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CASE NOTE

TORTS—Damage Control? Unraveling the New Due Process Standard Prohibiting the Use of Nonparty Harm to Calculate Punitive Damages, *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007).

Maren P. Schroeder*

INTRODUCTION

Jesse Williams, a long-time smoker, preferred Marlboro cigarettes, manufactured by Philip Morris.¹ Upon his death, caused by smoking, his widow brought a lawsuit against Philip Morris for negligence and deceit.² At trial, the jury found her husband smoked, in part, because Philip Morris knowingly and falsely led him to believe smoking was safe.³ The jury also found both Williams and Philip Morris equally negligent, and further determined Philip Morris engaged in deceit.⁴ The jury awarded \$821,000 in compensatory damages and \$79.5 million in punitive damages for the deceit claim.⁵ The trial judge found the punitive damages award excessive and reduced the award to \$32 million.⁶

Both Philip Morris and Williams appealed the district court's ruling.⁷ Upon appeal, the Oregon Court of Appeals restored the \$79.5 million jury award.⁸ The Oregon Supreme Court then denied review.⁹ Following this denial, Philip Morris appealed to the United States Supreme Court.¹⁰ The Supreme Court granted

* Candidate for J.D., University of Wyoming, 2009. I want to recognize the following people who made this note possible. First, I would like to thank Professor John M. Burman for his guidance and insight. Additionally, I would like to thank the members of the Wyoming Law Review editorial board for their time and encouragement. Any errors belong solely to me. I further express my gratitude to Edward T. Schroeder for his always timely and ever sage advice. I also thank Turner W. Branch for giving me such a wonderful introduction to the field. Finally, I want thank my family, including my parents Greg and Mary Ann Foster for their support and encouragement. And I dedicate this case note to my husband, Derek, thank you for your valuable insight and patience. Thank you all, I am forever in your debt.

¹ *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1060-61 (2007).

² *Id.* at 1060.

³ *Id.* at 1061.

⁴ *Id.*; *Williams v. Philip Morris*, 48 P.3d 824, 828 (Or. Ct. App. 2002). The jury found Williams fifty percent negligent, and therefore, did not award punitive damages on the negligence claim. *Id.*

⁵ *Philip Morris*, 127 S. Ct. at 1061. The jury awarded compensatory damages of \$21,000 for economic harm and \$800,000 for noneconomic harm. *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Philip Morris*, 127 S. Ct. at 1061.

certiorari, vacated the judgment, and remanded the case back to the Oregon Court of Appeals.¹¹ Upon remand, the Oregon Court of Appeals refused to reduce the award.¹² Philip Morris, once again, appealed to the Oregon Supreme Court.¹³

The Oregon Supreme Court granted review and rejected Philip Morris's argument that the Constitution prohibits punishing a defendant with punitive damages based on nonparty harm.¹⁴ The court, considering Philip Morris's reprehensible conduct, did not find the award grossly excessive.¹⁵ Following this ruling, Philip Morris, once again, sought certiorari in the United States Supreme Court claiming Oregon courts violated the Constitution by allowing punishment for harm suffered by nonparty victims.¹⁶ The United States Supreme Court granted certiorari to decide "whether the Constitution's Due Process Clause permits a jury to base [an] award in part upon its desire to punish the defendant for harming person's who are not before the court (e.g., victims whom the parties do not represent)."¹⁷

In a five-to-four decision, the United States Supreme Court held the Constitution's Due Process Clause prohibits a jury from using an award to punish the defendant for harming persons not before the court.¹⁸ According to the Court, using an award to punish a defendant for such harm constitutes a taking of "property" without due process of law.¹⁹

This case note provides a case-law background regarding punitive damages, which provides a framework for understanding the Court's reasoning and the multiple *Philip Morris* dissents.²⁰ The note argues the Court draws a confusing line between using nonparty harm to make reprehensibility determinations and to punish defendants directly.²¹ Despite this confusing new standard, this case

¹¹ *Id.*; *Philip Morris USA Inc. v. Williams*, 540 U.S. 801 (2003) (remanding in light of *State Farm Mutual Automobile Insurance, Co. v. Campbell*); see *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (holding there is no mathematical formula for punitive awards, but few awards with larger than a single-digit ratio between the compensatory and punitive awards will satisfy due process).

¹² *Philip Morris*, 127 S. Ct. at 1061.

¹³ *Id.*

¹⁴ *Id.* at 1061-62; *Williams v. Philip Morris, Inc.*, 127 P.3d 1165, 1175 (Or. 2006).

¹⁵ *Philip Morris*, 127 S. Ct. at 1062; *Williams*, 127 P.3d at 1181-82 (stating Philip Morris continually schemed to defraud the smoking public, concealing known health risks of smoking, which ultimately killed a number of smokers in Oregon).

¹⁶ *Philip Morris*, 127 S. Ct. at 1062.

¹⁷ *Id.* at 1060.

¹⁸ *Id.* at 1060, 1062.

¹⁹ *Id.* at 1062.

²⁰ See *infra* notes 23-115 and accompanying text.

²¹ See *infra* notes 119-149 and accompanying text.

note guides both courts and practitioners in avoiding Due Process Clause violations in punitive damages cases.²²

BACKGROUND

“Punitive damages have long been a part of traditional state tort law.”²³ They serve the purposes of retribution and deterrence.²⁴ Punitive damages are generally awarded for a defendant’s outrageous conduct, based on the defendant’s evil motive or reckless indifference.²⁵ In this case note, nonparty harm refers to harm suffered by strangers to the litigation.²⁶ The following United States Supreme Court, federal, and Wyoming cases detail the long tradition of punitive damages.

Early case law indicates the foundation of punitive damages in the common law. In 1851 the United States Supreme Court observed that punitive damages were well-established in the common law.²⁷ The *Day v. Woodworth, et al.* Court stated a jury should measure punitive damages in relation to the magnitude of the offense, rather than in compensation to the plaintiff.²⁸ The Court found the “malice, wantonness, oppression or outrage of the defendant’s conduct” necessary for punitive damages.²⁹ It also described the punitive damage award as a punishment, which is made payable to the plaintiff.³⁰ The Supreme Court and most states consider the doctrine of punitive damages settled law.³¹

The Court Rejects Use of Mathematic Formula

More recently, the Court addressed whether punitive damages calculation requires the use of a mathematical formula.³² In *Pacific Mutual Life Insurance Co.*

²² See *infra* notes 150-168 and accompanying text.

²³ *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984).

²⁴ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

²⁵ See RESTATEMENT (SECOND) OF TORTS § 908(2) (1979).

²⁶ *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007).

²⁷ *Day v. Woodworth et al.*, 54 U.S. (13 How.) 363, 371 (1851) (noting “repeated judicial decisions for more than a century” are evidence of well-established nature of exemplary or punitive damages). *Day* involved a claim of a downstream milldam owner whose dam had been taken down by an upstream mill owner. *Id.* at 363-64.

²⁸ *Id.* at 371.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Smith v. Wade*, 461 U.S. 30, 35 (1983).

³² *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991). *Haslip* involved a fraud claim against an insurer and agent for the misappropriation of health insurance premium payments, which resulted in a canceled policy without notice to four insureds. *Id.* at 4-5, 18.

v. Haslip the Court declined to institute a mathematical line separating acceptable and unacceptable punitive damage awards, under the Due Process Clause.³³ The Court stated the Constitution requires inquiry into the reasonableness and adequacy of jury guidance.³⁴ The Court conceded, however, that unlimited jury discretion in awarding punitive damages leads to extreme and unconstitutional results.³⁵

Ultimately, the Court concluded the lower court's criteria for determining punitive damage awards were reasonably related to the State's deterrence and retribution goals, and sufficiently constrained the trial court's damage award.³⁶ The seven criteria used to assess the excessiveness or inadequate nature of an award included 1) whether a reasonable relationship exists between the punitive damages award and actual harm or potential harm resulting from the defendant's conduct, 2) the reprehensibility and length of the defendant's conduct, the defendant's knowledge, any concealment, and the *existence and frequency of similar past conduct*, 3) the defendant's profitability resulting from his conduct, and whether profit should be removed to give the defendant a loss, 4) the defendant's wealth, 5) all costs of litigation, 6) mitigation by any criminal sanctions imposed, and 7) mitigation by other civil awards against the defendant for the same conduct.³⁷ Ultimately, the Court upheld a punitive damages award more than four times the compensatory damage amount, and two-hundred times more than the plaintiff's out-of-pocket expenses.³⁸

Two years later in *TXO Production Corp. v. Alliance Resources Corp.*, the Court again declined to use a mathematical formula to uphold a large punitive damages award despite small compensatory damages.³⁹ In refusing to issue a mathematical test, the Court stated: "It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim . . . as well as the possible harm to other victims that might have resulted if similar

³³ *Id.* at 18.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 21-22.

³⁷ *Haslip*, 499 U.S. at 21-22 (citing *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 223-24 (Ala. 1989)) (emphasis added). *But see* *State Farm Mut. Auto. Ins. Co. v. Campbell* 538 U.S. 408, 423 ("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.") (emphasis added).

³⁸ *Haslip*, 499 U.S. at 24. The jury rendered a general verdict in favor of *Haslip* in the amount of \$1,040,000—it is believed that \$200,000 of the award was compensatory (including \$4,000 of plaintiff's out of pocket expenses), and that at least \$840,000 was punitive. *Id.* at 6 n.2.

³⁹ *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 446-47 (1993) (concerning slander of title of oil and gas rights). In this case, a jury awarded \$19,000 in compensatory damages and \$10 million in punitive damages. *Id.* at 451.

future behavior was not deterred.”⁴⁰ The Court did not find the dramatic difference between the compensatory damages and punitive damages controlling.⁴¹ Instead, the Court considered the potential amount of money involved, the defendant’s bad faith, the defendant’s greater pattern of fraud, and the defendant’s wealth.⁴² The Court concluded the factor of “alleged wrongdoing in other parts of the country” was an appropriate factor in determining punitive damages.⁴³

Judicial Review Required by the Due Process Clause

After rejecting a bright line rule for calculating punitive damages in relation to compensatory damages, the Court specifically held the absence of judicial review of punitive damage awards violates the Due Process Clause of the Fourteenth Amendment.⁴⁴ The Court noted judicial review has historically safeguarded against excessive punitive damage awards.⁴⁵ The Court held punishment, with exemplary damages, is an act of state power that must comply with the Fourteenth Amendment Due Process Clause.⁴⁶

Notice Requirements Satisfying the Due Process Clause

The Court next required a defendant be given notice of the conduct that will lead to punitive damages and the potential severity of the award.⁴⁷ In *BMW of North America, Inc. v. Gore*, Gore unknowingly purchased a repainted car, after the vehicle sustained damage prior to its delivery to the dealership.⁴⁸ The jury awarded \$4,000 in compensatory damages and \$4 million in punitive damages at trial.⁴⁹ The Alabama Supreme Court reduced the award to \$2 million, after

⁴⁰ *Id.* at 460.

⁴¹ *Id.* at 462.

⁴² *Id.*

⁴³ *Id.* at 462 n.28.

⁴⁴ *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994). The Oregon Constitutional amendment prohibited judicial review of a punitive damages award, unless no evidence existed to support the verdict. *Id.* at 418; OR. CONST. ART. VII, § 3. In *Oberg*, a product liability case, the plaintiff suffered permanent injuries when he overturned an all-terrain vehicle manufactured and sold by Honda Motor Co.. *Oberg*, 512 U.S. at 418. The Court held the Oregon Constitutional amendment denying judicial review violated the Fourteenth Amendment Due Process Clause, and arbitrarily deprived the defendant of its property without due process of law. *Id.* at 430, 432, 435. The Court reversed and remanded the case. *Id.* at 435.

⁴⁵ *Oberg*, 512 U.S. at 421 (stating judicial review of punitive damage awards has been a “safeguard against excessive verdicts as long as punitive damages have been awarded”).

⁴⁶ *Id.* at 434-35.

⁴⁷ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996).

⁴⁸ *Id.* at 563.

⁴⁹ *Id.* at 565.

determining the jury inappropriately multiplied the compensatory award by the number of similar sales outside of the state.⁵⁰

In *Gore*, the Court noted that laws and policies protecting citizens from deceptive trade practices vary widely among states.⁵¹ As a result, the *Gore* Court held no state could impose its own policy on the entire nation or neighboring states.⁵² Specifically, a state could not punish a company for its lawful conduct in other states.⁵³ Nevertheless, the Court allowed the use of the defendant's out-of-state conduct to determine the reprehensibility of the defendant's conduct.⁵⁴

The *Gore* Court also held that under the Due Process Clause of the Fourteenth Amendment a person must have notice of both the type of conduct that is punishable and the potential severity of that punishment.⁵⁵ In determining that BMW had not received the requisite notice, the Court used three guideposts: 1) reprehensibility of conduct; 2) disparity between harm (or potential harm) suffered and the punitive damages award; and 3) the difference between the punitive damage award and other civil penalties imposed or awarded in similar cases.⁵⁶

In assessing reprehensibility, the *Gore* Court found the plaintiff suffered only economic harm, and that the defendant did not show indifference or reckless disregard for the health and safety of others.⁵⁷ The Court concluded BMW's conduct, while sufficient to warrant tort liability and modest punitive damages, did not warrant a \$2 million punitive award.⁵⁸ The Court held Alabama could not justify its sanction imposed on BMW without considering whether a less drastic remedy would achieve its goal.⁵⁹

Deprivation of Property

The Court upheld the *Gore* guideposts and asserted that high punitive damage ratios may not comport with the Due Process Clause in *State Farm Mutual Auto Insurance Co. v. Campbell*.⁶⁰ In *Campbell*, the Court found a \$145 million

⁵⁰ *Id.* at 567.

⁵¹ *Id.* at 569-70.

⁵² *Gore*, 517 U.S. at 571.

⁵³ *Id.* at 572.

⁵⁴ *Id.* at 574 n.21.

⁵⁵ *Id.* at 574.

⁵⁶ *Id.* at 574-75.

⁵⁷ *Gore*, 517 U.S. at 576.

⁵⁸ *Id.* at 580.

⁵⁹ *Id.* at 584.

⁶⁰ *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003).

punitive damages award an irrational and arbitrary deprivation of property since the compensatory damage totaled only \$1 million.⁶¹

In *Campbell*, the United States Supreme Court held the punitive damages award served no legitimate purpose, was grossly excessive, and constituted an arbitrary deprivation of property.⁶² Addressing the use of alleged nonparty harm, the Court stated a jury may not base punitive damages on a defendant's dissimilar and unrelated acts.⁶³ The Court found the Utah Supreme Court violated the Fourteenth Amendment Due Process Clause when it adjudicated nonparties' hypothetical claims in its reprehensibility analysis.⁶⁴ Because the judgment does not bind nonparties, the Court warned that such punitive damage calculations could lead to multiple awards against a defendant for a single course of conduct.⁶⁵

Discussing the excessive nature of awards, the *Campbell* Court also asserted a single-digit ratio between the compensatory and punitive damages awards would usually comport with Due Process requirements.⁶⁶ Nevertheless, it refused to institute a maximum bright-line ratio for punitive damages.⁶⁷

⁶¹ *Id.* at 412, 429. The Campbells filed suit against State Farm because the company failed to settle an automobile liability suit when a considerable likelihood of an excess verdict existed. *Id.* at 413. The Campbells asserted claims of bad faith, fraud, and intentional infliction of emotional distress. *Id.* at 414. At trial, the Campbells introduced evidence of the defendant's unrelated nationwide business practices, indicating alleged harm to nonparties. *Id.* at 415. The jury awarded \$2.6 million in compensatory damages and \$145 million in punitive damages. *Id.* The trial court judge reduced these to \$1 million in compensatory damages and \$25 million in punitive damages. *Id.* The trial court based its award reduction on the large ratio between compensatory and punitive damages. *Id.* Applying the Supreme Court's decision in *Gore*, the Utah Supreme Court reinstated the \$145 million punitive damage award. *Id.*; *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134 (Utah 2001). The United States Supreme Court granted review to reverse the reinstatement of the \$145 million punitive award by applying the *Gore* guideposts. *Campbell*, 538 U.S. at 418.

⁶² *Campbell*, 538 U.S. at 417.

⁶³ *Id.* at 423.

⁶⁴ *Id.* The Utah Supreme Court supported its improper holding stating, "[e]ven if the harm to the Campbells can be appropriately characterized as minimal, the trial court's assessment of the situation is on target: 'The harm is minor to the individual but massive in the aggregate.'" *Id.*; *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1149 (Utah 1991).

⁶⁵ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003).

⁶⁶ *Id.* at 425. The following is an example of a single-digit ratio: a \$1 million compensatory damage award and a \$9 million punitive damages award, arrived at by using a single-digit multiplier of nine.

⁶⁷ *Id.* "We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.*

Federal and Wyoming case law involving punitive damages also provide a helpful framework for examining and understanding *Phillip Morris*. Under this case law, the United States Court of Appeals for the Seventh Circuit used nonparty harm to justify a large punitive damage award in a case with low compensatory damages.⁶⁸ Writing for the court, Judge Posner, in *Mathias v. Accor Economy Lodging, Inc.* relied on nonparty harm, in part, to uphold the punitive damages despite the large ratio between the compensatory and punitive damages award.⁶⁹ Additionally, the court held that punitive damages in the case served to remove the defendant's potential profits it derived from escaping detection.⁷⁰

Punitive Damages in Wyoming

Several Wyoming cases have established standards for punitive damages. The Wyoming Supreme Court has stated a jury may use a defendant's wealth, the injury's nature and extent, the injurious act's character, and aggravation in determining punitive damages.⁷¹ Additionally, the Wyoming Supreme Court has stated three factors juries should consider in punitive damage awards: nature of the tort, actual damages, and the defendant's wealth.⁷²

⁶⁸ *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003). In *Mathias*, the court upheld a punitive damages award of \$186,000 in a negligence action brought by two motel guests for bedbug bites when the compensatory damages awarded in the case only totaled \$5,000. *Id.* at 673-74.

⁶⁹ *Id.* at 678. Judge Posner stated, "[T]his is just the beginning. Other guests of the hotel were endangered besides these two plaintiffs." *Id.* The court emphasized the defendant's outrageous conduct including offering refunds only upon request, failing to fumigate, and deceiving ignorant customers by alleging the bugs were ticks. *Id.* at 677.

⁷⁰ *Mathias*, 347 F.3d at 677. ("The award of punitive damages in this case thus serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and (private) prosecution. If a tortfeasor is 'caught' only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the time he gets away."). The profit loss argument necessarily involves consideration of harm to nonparties. *See id.*

⁷¹ *Hall Oil Co. v. Barquin*, 237 P. 255, 278 (Wyo. 1925). In this trespass case involving entry and drilling upon the plaintiff's land, the court found the defendant acted with a "reckless disregard for, or a willful indifference to, the rights of the plaintiffs." *Id.* at 271. The plaintiff requested punitive damages in this trespass action. *Id.* at 257, 269.

⁷² *Sears v. Summit*, 616 P.2d 765, 772 (Wyo. 1980). *Sears* involved an incident of trespass of a landowner upon trespassing party using heavy construction equipment. *Id.* at 766-69. The landowner suffered damage from the trespass of the heavy equipment on his property. *Id.* at 768-69. The landowner required the trespassing crew to leave their equipment on the property, while being ushered off the property at gunpoint. *Id.* The court explained the defendant's wealth was a proper factor in calculating punitive damage awards, but required evidence in the record to support an instruction based on this factor. *Id.* at 772. The court reversed and remanded on the issue of punitive damages claims made by each party. *Id.* at 773-74.

The Wyoming Supreme Court has more recently articulated an objective standard it found comported with *Gore*, in *Farmers Insurance Exchange v. Shirley*.⁷³ The court held juries must be given the seven criteria for determining punitive damages: reasonable relationship between defendant's conduct and the likely and actual harm, degree of reprehensibility, removal of defendant's profit, defendant's wealth, costs of litigation, and mitigation for criminal and civil sanctions already imposed.⁷⁴

The previous United States Supreme Court, federal and Wyoming cases provided the framework for a new limitation on punitive damages.⁷⁵ While courts discussed nonparty harm in earlier cases, the United States Supreme Court directly addressed use of such harm when it set a new due process standard in *Philip Morris USA v. Williams* for punitive damage awards.⁷⁶

⁷³ *Farmers Ins. Exch. v. Shirley*, 958 P.2d 1040, 1043-44 (Wyo. 1998). In *Shirley*, an insurance company appealed a jury verdict finding for the plaintiff motorist in a claim involving breach of the duty of good faith and fair dealing in collecting underinsured motorist benefits. *Id.* at 1042, 1045. The court reversed and remanded the case, ordering a new trial. *Id.* at 1053.

⁷⁴ *Shirley*, 958 P.2d at 1044 (citing *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 223-24 (Ala. 1989)). The U.S. Supreme Court listed the factors:

- (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.
- (2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.
- (3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.
- (4) The financial position of the defendant would be relevant.
- (5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.
- (6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages.
- (7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in the mitigation of punitive damages awards.

Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21-22 (1991). In *Shirley*, the Wyoming Supreme Court not only acknowledged the guidelines endorsed by United States Supreme Court in *Haslip*, but it mandated the guidelines be given to juries determining punitive damages in the form of jury instructions. *Shirley*, 958 P.2d at 1053.

⁷⁵ See *supra* notes 23-74 and accompanying text.

⁷⁶ *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1065 (2007).

PRINCIPAL CASE

Philip Morris USA v. Williams, the United States Supreme Court's most recent case involving punitive damages, evaluated the constitutionality of using alleged nonparty harm in punitive damages calculations.⁷⁷ Justice Breyer authored the majority opinion, joined by Chief Justice Roberts, Justices Kennedy, Souter, and Alito.⁷⁸ Justices Stevens, Thomas, and Ginsburg each wrote separate dissenting opinions.⁷⁹ Justice Thomas and Justice Scalia, however, each joined Justice Ginsburg's dissenting opinion as well.⁸⁰

The Majority Opinion

In *Philip Morris*, the United States Supreme Court stated the purpose of punitive damages is to punish unlawful conduct and deter future unlawful conduct.⁸¹ However, the Court held states engaged in such punishment and deterrence must provide defendants with fair notice of a penalty's potential severity.⁸² Likewise, the Court advised that without proper safeguards, a state, in its punitive damage awards, could impose its policy choice on other states, which may have different policies.⁸³ Furthermore, the Court held the Fourteenth Amendment Due Process Clause prohibits a state from using a punitive damage award to punish a defendant for nonparty injuries.⁸⁴ The Court based its holding on the view that the Due Process Clause does not allow a state to punish a defendant without offering that defendant the opportunity to present every defense possible.⁸⁵ The Court reasoned if a state allowed juries to consider nonparty harm in the damage calculation, the state would effectively sanction the defendant for this alleged harm without providing the defendant with the opportunity to defend such allegations.⁸⁶ Therefore, the Court held that juries may only use potential harm *to the plaintiff*, not nonparties, in determining punitive damages.⁸⁷

⁷⁷ *Id.* at 1060.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 1062.

⁸¹ *Philip Morris*, 127 S. Ct. at 1062.

⁸² *Id.*

⁸³ *Id.* A state imposes its policy preference on other states, if it punishes a defendant for harm to alleged nonparty victims residing in other states. *See id.* (“[W]here the [punitive damages] amounts are sufficiently large, it may impose one state’s (or one jury’s) ‘policy choice,’ say as to the conditions under which (or even whether) certain products can be sold, upon ‘neighboring States’ with different public policies.”). *Id.*

⁸⁴ *Id.* at 1063.

⁸⁵ *Id.*

⁸⁶ *Philip Morris*, 127 S. Ct. at 1063.

⁸⁷ *Id.* The term “potential harm” reflects harm that *could have been* suffered by the plaintiff. *Id.*

The Court, however, stated that juries may use potential harm to nonparties to show the defendant's reprehensible conduct, which posed a risk to the general public.⁸⁸ The Court considered conduct risking harm to a large number of people more reprehensible than conduct risking harm to only a small number of people.⁸⁹ The Court drew an analogy between recidivism statutes and reprehensibility determinations, stating that such statutes do not punish a criminal defendant for additional past crimes, but make the penalty harsher for the current crime based on the repetitive conduct.⁹⁰ Juries, similarly, can consider nonparty harm in punitive damages cases, not to punish the defendant for past or future harm, but to determine the reprehensibility of his or her conduct with respect to the plaintiff bringing the claim.⁹¹

The Oregon Supreme Court found the task of deciding whether a jury used the reprehensibility determination to directly punish defendants for nonparty injuries unworkable.⁹² The *Phillip Morris* Court responded by holding state courts may not allow procedures that risk such confusion.⁹³ The Court found a high risk for confusion, and instructed courts to guard against misunderstanding in the evidence presented and arguments made to the jury.⁹⁴ The Court clarified that while states have some flexibility in deciding the procedures they will institute, they must offer some protection against confusion under this federal constitutional standard.⁹⁵ The Court remanded the case to the Oregon Supreme Court.⁹⁶ Because the case could face a new trial, the United States Supreme Court declined to decide whether the award was grossly excessive.⁹⁷

The Dissenting Opinions

In his dissent, Justice Stevens asserted that no identifiable reason existed why nonparty harm cannot be considered in determining the appropriate punishment

⁸⁸ *Id.* at 1064.

⁸⁹ *Id.* at 1065.

⁹⁰ *Id.*

⁹¹ *Philip Morris*, 127 S. Ct. at 1064.

⁹² *Id.*

⁹³ *Id.* at 1065 ("State courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring.").

⁹⁴ *Id.* at 1064. Courts may prohibit counsel from making arguments suggesting harm to parties may be multiplied by a number of known nonparties. *Id.* Courts may also allow evidence of nonparty harm only for reprehensibility analysis. *Id.* at 1065. Courts may also choose to use explicit jury instruction language that prohibits use of nonparty harm in the calculation of a punitive damages award. *Id.*

⁹⁵ *Id.* at 1065. The upcoming analysis section provides suggestions for such procedures for practitioners and judges. *See supra* notes 150-168 and accompanying text.

⁹⁶ *Philip Morris*, 127 S. Ct. at 1065.

⁹⁷ *Id.*

for reprehensible conduct.⁹⁸ He identified the differences between punitive and compensatory damages: punitive damages are a punishment for public harm the defendant threatened or caused, and compensatory damages assess the harm the defendant's conduct caused the plaintiff.⁹⁹

Looking at punitive damages from the perspective of a sanction for public harm, Justice Stevens claimed little difference exists between the rationale for a criminal sanction and a punitive damages award, and that both were historically available in cases involving a private citizen.¹⁰⁰ Unlike compensatory damages, he asserted both punitive damages and criminal sanctions serve retribution and deterrence purposes.¹⁰¹ Justice Stevens found no reason to exclude nonparty harm, as a factor, in the punitive damage assessment for reprehensible conduct.¹⁰² He endorsed a jury increasing a punitive damages award based on nonparty harm to *directly* punish the defendant for that additional harm.¹⁰³ He concluded the plaintiff properly presented the jury with the evidence of possible harm to other Oregon citizens.¹⁰⁴

Justice Thomas's brief dissenting opinion asserted the "Constitution does not constrain the size of punitive damage awards."¹⁰⁵ He characterized the Court's holding as a confusing substantive, rather than procedural, change in due process law.¹⁰⁶ Justice Thomas further noted that no specific procedures were needed at common law to constrain the jury's power to award punitive damages.¹⁰⁷

⁹⁸ *Id.* at 1066 (Stevens, J., dissenting).

⁹⁹ *Id.* (Stevens, J., dissenting).

¹⁰⁰ *Id.* (Stevens, J., dissenting); *See Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 127-28 (1998) (Stevens, J., concurring).

¹⁰¹ *Philip Morris*, 127 S. Ct. at 1066 (Stevens, J., dissenting) (citing *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003)).

¹⁰² *Id.* (Stevens, J., dissenting).

¹⁰³ *Id.* at 1067 (Stevens, J., dissenting) ("When a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant's conduct, the jury is by definition punishing the defendant-directly-for third-party harm."); Justice Stevens did not find use of criminal recidivism statutes helpful, "[b]ut if enhancing a penalty for a present crime because of prior conduct that has already been punished is permissible, it is certainly proper to enhance a penalty because the conduct before the court, which has never been punished, injured multiple victims." *Id.* n.2 (Stevens, J., dissenting).

¹⁰⁴ *See id.* at 1066 (Stevens, J., dissenting).

¹⁰⁵ *Id.* at 1067 (Thomas, J., dissenting) (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429-30 (2003)).

¹⁰⁶ *Philip Morris*, 127 S. Ct. at 1067 (Thomas, J., dissenting).

¹⁰⁷ *Id.* (Thomas, J., dissenting). Justice Thomas cited Justice Scalia's concurring opinion in *Haslip*: "In . . . 1868 punitive damages were undoubtedly an established part of the American common law torts. It is . . . clear that no particular procedures were deemed necessary to circumscribe a jury's discretion regarding the award of such damages, or their amount." *Id.* at 1067-68 (Thomas, J., dissenting) (citing *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 26-27 (1991) (Scalia, J., concurring)).

Justice Ginsburg authored the final dissenting opinion, joined by Justices Scalia and Thomas.¹⁰⁸ Justice Ginsburg's dissent reiterated the purpose of punitive damages: to punish and not to compensate.¹⁰⁹ The dissent asserted the Oregon courts correctly applied the Court's accepted reprehensibility inquiry under *Gore* and *Campbell*.¹¹⁰

Justice Ginsburg's dissent also asserted that Philip Morris only objected to the trial court's failure to present the defendant's requested jury instruction, charge number thirty-four, and that the Court did not address the trial court's denial of this instruction.¹¹¹ The proposed instruction required the punitive damages award exhibit a reasonable relationship to the plaintiff's harm.¹¹² The instruction would have theoretically allowed the jury to use nonparty harm to determine reprehensibility, but prohibited similar consideration in assessing the award amount.¹¹³ Justice Ginsburg asserted a trial court judge would not give such a confusing instruction.¹¹⁴ By going beyond Philip Morris's only preserved objection, this dissent asserted the Court was overreaching in this case.¹¹⁵

¹⁰⁸ *Id.* at 1068 (Ginsburg, J., dissenting).

¹⁰⁹ *Id.* (Ginsburg, J., dissenting).

¹¹⁰ *Id.* (Ginsburg, J., dissenting) (supporting the Court's definition of reprehensibility, "the harm that Philip Morris was prepared to inflict on the smoking public at large"); *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 429-50 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 599 (1996).

¹¹¹ *Philip Morris*, 127 S. Ct. at 1068-69 (Ginsburg, J., dissenting).

¹¹² *Id.* (Ginsburg, J., dissenting).

¹¹³ *Id.* at 1068-69 (2007) (Ginsburg, J., dissenting). The requested charge thirty-four read:

If you determine that some amount of punitive damages should be imposed on the defendant, it will then be your task to set the amount that is appropriate. This should be such amount as you believe is necessary to achieve the objectives of deterrence and punishment. While there is not a set formula to be applied in reaching an appropriate amount, I will now advise you of some of the factors that you may wish to consider in this connection:

(1) The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, 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 and award punitive damages for those harms, as such other juries see fit. . . .

(2) The size of the punishment may appropriately reflect the degree of reprehensibility of the defendant's conduct—that is, how far the defendant has departed from accepted societal norms of conduct.

Id. (Ginsburg, J., dissenting). The charge indicates there are factors a jury *may* consider, but it prohibits direct punishment based on nonparty harm when (and if) the jury considers the reasonable relationship. *Id.* (Ginsburg, J., dissenting).

¹¹⁴ *Id.* at 1069 (Ginsburg, J., dissenting).

¹¹⁵ *Id.* (Ginsburg, J., dissenting).

ANALYSIS

This section discusses the mistake the Court made in creating a new due process standard in light of the purposes of punitive damages.¹¹⁶ It further examines the difficulty in using nonparty injuries solely to inform the reprehensibility determination.¹¹⁷ This note subsequently provides practical guidance to courts and practitioners to avoid due process violations under the new standard.¹¹⁸

The New and Confusing Due Process Standard

The Court made a grave mistake in attempting to fashion a compromise that allows juries to use nonparty harm for limited purposes in cases involving punitive damages.¹¹⁹ The objective of punitive damages is to punish, not to compensate.¹²⁰ The *Restatement (Second) of Torts* states, that “[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others.”¹²¹ As Justice Stevens wrote in his dissent, “punitive damages are a sanction for the public harm the defendant’s conduct has caused or threatened.”¹²² Justice Stevens compared such damages to criminal sanctions, which historically have considered nonparty harm.¹²³ The Court’s decision allows juries to look at nonparty harm to determine if the defendant’s conduct posed a significant risk to the general public in a reprehensibility determination.¹²⁴ Nevertheless, the information used in this reprehensibility determination, may not be used in the punitive damages calculation to directly punish the defendant.¹²⁵

The United States Supreme Court previously held that a defendant’s *similar* past conduct informs the reprehensibility evaluation.¹²⁶ *Gore* gave three guideposts for evaluating excessiveness of an award, the first of which deter-

¹¹⁶ See *infra* notes 119-130 and accompanying text.

¹¹⁷ See *infra* notes 131-149 and accompanying text.

¹¹⁸ See *infra* notes 150-168 and accompanying text.

¹¹⁹ Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007); See Erwin Chemerinsky, *More Questions about Punitive Damages*, *Supreme Court Review*, 43 TRIAL 72, 74 (May 2007) (“[O]ne thing that is absolutely clear is that the ruling will engender enormous confusion in the lower courts . . .”).

¹²⁰ *Philip Morris*, 127 S. Ct. at 1068 (Ginsburg, J., dissenting).

¹²¹ RESTATEMENT (SECOND) OF TORTS, § 908(2) (1979).

¹²² *Philip Morris*, 127 S. Ct. at 1066 (Stevens, J., dissenting).

¹²³ *Id.* (Stevens, J., dissenting).

¹²⁴ *Id.* at 1064.

¹²⁵ *Id.*; Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual Private Wrongs*, 87 MINN. L. REV. 583, 675 (2003).

¹²⁶ *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991).

mines reprehensibility of the defendant's conduct.¹²⁷ *Gore* asserted that evidence of a defendant's out-of-state conduct could be used in the reprehensibility assessment.¹²⁸ Because an evil motive or *recklessness toward others* is the basis for punitive damages, the jury is well informed if it is presented with evidence of recklessness toward nonparties.¹²⁹ Nonetheless, juries can no longer use this harm to punish the defendant directly.¹³⁰

Difficulty inheres in asking a jury to use nonparty harm to assess reprehensibility, only to discard that determination in deciding the proper punishment.¹³¹ The Court commanded that a trial court must provide assurances that a jury will "ask the right question, not the wrong one."¹³² It charged trial courts with guarding against confusion from evidence and arguments presented at trial.¹³³ However, the Court appeared to soften this new standard when it asserted that state courts will have flexibility in implementing this protection.¹³⁴ Nevertheless, such flexibility may result in an increased threat of appellate review rather than a clear due process standard.¹³⁵ The important flexibility touted by the Court fails to clarify how a jury can disregard nonparty harm when it calculates punitive damages after using such harm in its reprehensibility determination.¹³⁶

¹²⁷ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-75 (1996).

¹²⁸ *Id.* at 574 n.21.

¹²⁹ See *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1067 (2007) (Stevens, J., dissenting) ("[T]here is no reason why the measure of the appropriate punishment for engaging in a campaign of deceit in distributing a poisonous and addictive substance to thousands cigarette smokers statewide should not include consideration of the harm to those 'bystanders' as well as harm to the individual plaintiff.>").

¹³⁰ *Id.* at 1064.

¹³¹ Daniel Susler Agle, *Working the Unworkable Rule Established in Philip Morris: Acknowledging the Difference Between Actual and Potential Injury to Nonparties*, 2007 *BYU L. REV.* 1317, 1355 (2007) ("If jurors consider injury to nonparties when determining reprehensibility, and if, at the same time, they consider reprehensibility to determine the amount of punitive damages to assess, naturally jurors ultimately will consider injury to nonparties when determining the total punitive damages.>").

¹³² *Philip Morris*, 127 S. Ct. at 1064.

¹³³ *Id.* at 1065.

¹³⁴ *Id.* at 1065.

¹³⁵ *Id.* at 1068 (Thomas, J., dissenting) (arguing the Court's decision is evidence that the "Court's punitive damages jurisprudence is 'insusceptible of principled application'") (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 563 (1996) (Scalia, J., dissenting)); see *Farmers Ins. Exch. v. Shirley*, 958 P.2d 1040, 1045 (Wyo. 1998). The Wyoming Supreme Court reasoned that without objective standards for calculating punitive damages "we hazard litigants in our courts to future reversal by the Supreme Court of the United States because of the denial of due process of law resulting from the application of our current process." *Id.* at 1045. See also Michael I. Krauss, *Punitive Damages and the Supreme Court: A Tragedy in Five Acts*, 2007 *CATO SUP. CT. REV.* 315, 334 (2007) ("We can look forward to years of litigation and circuit splits trying to sort out what the Court hath wrought.>").

¹³⁶ See Agle, *supra* note 131, at 1355.

In spite of the Court's ruling, juries may use nonparty harm from the reprehensibility analysis in calculating punitive damage awards.¹³⁷ Also, the new prohibition in calculation may lead juries to obscure the reasoning behind award calculation.¹³⁸ If juries act accordingly, the awards generally may decrease or even increase.¹³⁹

The jury in one United States Court of Appeals case, without guidance, multiplied the plaintiff's harm by the number of alleged nonparties injured to reach a punitive award.¹⁴⁰ Despite insignificant compensatory harm suffered by the plaintiff, the court upheld the punitive damage award based on significant nonparty harm.¹⁴¹ The *Philip Morris* Court rejected the Seventh Circuit's reasoning stating, "it is appropriate to consider the reasonableness of a punitive damages award in light of *potential* harm the defendant's conduct could have caused. But we have made clear that the potential harm at issue was harm potentially caused the *plaintiff*."¹⁴² When a jury now engages in punitive damages calculation, it may not use alleged numbers of potentially affected nonparties in any way.¹⁴³ Juries may still be inclined to use numbers of nonparty harm in punitive damage calculations, even though counsel or courts attempt to comply with the new due process standard.¹⁴⁴ Additionally, without the restraint of a number, such as alleged nonparty injuries, juries may award even higher, more arbitrary awards.¹⁴⁵ Or, juries may also use nonparty harm in calculations, but hide this fact from courts and parties.¹⁴⁶ In *Mathias*, Judge Posner explained that because no punitive

¹³⁷ See Jeff Bleich, Michelle Friedland, Dan Powell, & Aimee Feinberg, *Smoke Signals*, 67-Jun. OR. ST. B. BULL. 24, 29 (June 2007) ("[W]hile juries cannot directly count harm to non-litigants, they could continue to impose, under the *mantle of reprehensibility*, hefty damages judgments on defendants whose conduct affects many people.") (emphasis added).

¹³⁸ *Id.*

¹³⁹ See Ben Figa, Note, *The New Due Process Limitation in Philip Morris: A Critique and an Alternative Rule Based on Prior Adjudication*, 85 DENV. U. L. REV. 179, 190 (2007) ("[J]ury instructions that are in accordance with *Philip Morris* may confuse the jury and lead to erroneous verdicts.").

¹⁴⁰ *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003). In *Mathias*, there were no damage guidelines, but nonetheless, the jury awarded a punitive damages award that, combined with the compensatory award, neatly equaled a \$1,000 penalty for each hotel room. *Id.* at 678.

¹⁴¹ *Id.* at 677.

¹⁴² *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007).

¹⁴³ *Id.* at 1065. See *supra* note 131 and accompanying text for a discussion of the difficulty juries will face with limiting instructions.

¹⁴⁴ See Chemerinsky, *supra* note 119, at 74 (noting the distinction between reprehensibility determination and punishment may be clear to the Court, but it may be too confusing for juries to understand and administer). The number the jury may have used in *Mathias* is the number of rooms in the hotel, arguably a proxy number of third party victims. See, e.g., *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003); see *supra* note 140 for a facts of *Mathias*.

¹⁴⁵ *Mathias*, 347 F.3d at 678; Chemerinsky, *supra* note 119, at 74.

¹⁴⁶ See, e.g., *Mathias*, 347 F.3d at 678.

damages guidelines exist, similar to criminal federal and state sentencing guidelines, the amounts of punitive damage awards will be arbitrary.¹⁴⁷

Commentators suggest the Court is now moving beyond just limiting punitive damage awards, and moving toward questioning the purpose of punitive damage awards generally.¹⁴⁸ However, the Court only took a step in that direction in *Philip Morris* when it set a new standard that courts of all states, including Wyoming, must implement.¹⁴⁹

Application to Wyoming

While Wyoming is not bound by statutory limits governing punitive damages, Wyoming, like all states, must now provide assurances that juries do not violate the Due Process Clause by punishing defendants for nonparty harm.¹⁵⁰ The Wyoming Supreme Court required courts to deliver objective jury instruction standards in *Shirley*.¹⁵¹ Adhering to *Gore*, the Wyoming court sought to give juries more specific factors when awarding punitive damages.¹⁵² The jury instruction proposed below alters the instructions given by the Wyoming Supreme Court in *Shirley* in light of *Philip Morris*.¹⁵³

In Wyoming, mandatory bifurcation of the determination of whether punitive damages should be awarded from the punitive damage calculation occurs at trial.¹⁵⁴ This mandatory bifurcation may help Wyoming juries to draw the confusing, yet required, line between the reprehensibility analysis and the damage award calculation.¹⁵⁵ Bifurcating the trial for punitive damages mandates that juries assess punitive damages in two parts, first assessment of liability and whether the plaintiff is entitled to punitive damages and second, calculation of

¹⁴⁷ *Id.* (“[I]t is inevitable that the specific amount of punitive damages awarded whether by judge or jury will be arbitrary.”).

¹⁴⁸ Bleich, Friedland, Powell, & Feinberg, *supra* note 137, at 24.

¹⁴⁹ *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1064 (2007).

¹⁵⁰ *Id.*

¹⁵¹ *Farmers Ins. Exch. v. Shirley*, 958 P.2d 1040, 1043-44 (Wyo. 1998);

¹⁵² *Id.* at 1052. The Court adopted the factors from *Green Oil*, approved in *Haslip*. See also *supra* notes 37 and 74 and accompanying text for an examination of the factors.

¹⁵³ See *infra* note 160 and accompanying text for the proposed jury instruction.

¹⁵⁴ *Campen v. Stone*, 635 P.2d 1121, 1132 (Wyo. 1981).

¹⁵⁵ *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1064 (2007). See Wyoming Civil Pattern Jury Instructions 4.06, Exemplary or Punitive Damages—Phase I of Bifurcated Trial, and 4.06A, Exemplary or Punitive Damages—Phase II of Bifurcated Trial (2003) (showing bifurcated trial procedure currently used to determine liability for punitive damages before the award calculation). But see Elizabeth A. Davis, *Providing Greater Integrity for Punitive Awards*, 2 OHIO TORT L. J. 91, 91 (2007) (“[B]ecause the guideposts [for determining reprehensibility and punitive damages calculations] are interrelated and require balancing, it is difficult to see how a court could separate the presentation of evidence so that a jury could determine each post.”).

the punitive award.¹⁵⁶ Courts must take steps, as required by *Philip Morris*, to guard against due process violation.¹⁵⁷

Guidance for Courts

Trial courts now have an obligation to bar jury instructions that allow consideration of nonparty harm in punitive damages calculation.¹⁵⁸ This obligation extends to preventing counsel from presenting opening statements, closing arguments, or evidence that will allow jurors to use nonparty harm for more than reprehensibility determinations.¹⁵⁹ In light of *Philip Morris*, a suggested jury instruction for the calculation of punitive damages is provided below:

In calculating the punitive damage award you should consider the following:

- 1) The award should bear a reasonable relationship to the potential or actual harm suffered by the plaintiff.
- 2) Reprehensibility of the defendant's conduct—You may consider harm to nonparties in *determining the reprehensibility* of the defendant's conduct, but you *may not use this harm to punish the defendant directly*. You may not multiply the defendant's harm by the number of other alleged victims not party to this lawsuit who may bring suits of their own and receive their own punitive damage awards.
- 3) If the wrongful conduct was profitable for the defendant, the damages should remove only the profit derived from the individual plaintiff's harm.
- 4) You may consider the financial position of the defendant.
- 5) The costs of litigation should be considered to encourage the plaintiffs to litigate such cases.
- 6) If criminal sanctions have been imposed, the award should be reduced to take into account such sanctions.¹⁶⁰

¹⁵⁶ *Campen*, 635 P.2d at 1132; Davis, *supra* note 155, at 91.

¹⁵⁷ *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1064 (2007).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1065; J. David Prince & Paula Duggan Vraa, *Focusing the Penalty: New Limits on Punitive Damages*, 64-APR BENCH & B. MINN. 24, 28 (2007).

¹⁶⁰ *Philip Morris*, 127 S. Ct. at 1064. The instructions were adapted from the Wyoming Civil Pattern Jury Instructions 4.06A (2003). Section seven of the pattern instruction is now obsolete,

In guarding against now-prohibited arguments and evidence presented by counsel, such a jury instruction will enable the State to provide due process assurances to defendants facing punitive damages.¹⁶¹ Additionally, the new due process standard prohibits juries from removing profits gained by the defendant for any conduct beyond that which directly harmed the plaintiffs in punitive damage calculation.¹⁶² Therefore, the proposed instruction only modifies the previous standards set by the Wyoming Supreme Court in *Shirley*.¹⁶³

Guidance for Practitioners

While the line between using nonparty harm in determining reprehensibility and punishing directly may not be clear, practitioners must attempt to make this distinction.¹⁶⁴ The Due Process Clause prohibits a state from using punitive damages to punish a defendant without giving that defendant the opportunity to raise every possible defense.¹⁶⁵ Counsel must be aware of this danger when presenting reprehensibility arguments and evidence.¹⁶⁶ Counsel may need to

because in the absence of other pending civil actions against the defendant, consideration of nonparty harm is still a due process violation according to *Philip Morris*. This instruction comports with *Farmers Ins. Exch. v. Shirley*, 958 P.2d 1040, 1043-44 (Wyo. 1998).

¹⁶¹ *Philip Morris*, 127 S. Ct. at 1064-65; see Colby, *supra* note 125, at 674-75 (arguing that such a change comporting with due process requires recognition that the purpose of punitive damages is not punishment for a public wrong, but punishment for a private wrong, the injury to the plaintiff); see also Prince & Vraa, *supra* note 159, at 28 (“[T]he protections . . . may include . . . strongly worded jury instructions, more explicit special verdict forms, or even special admonitions to the jury.”).

¹⁶² See Colby, *supra* note 125, at 675-76. Colby argues that courts should not instruct juries to take away the defendant’s profits for an “entire course” of conduct, only the profit earned associated with the parties injured. *Id.*

¹⁶³ *Farmers Ins. Exch. v. Shirley*, 958 P.2d 1040, 1043-44 (Wyo. 1998).

¹⁶⁴ *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1065 (2007). See Chemerinsky, *supra* note 119, at 74 (“[The jury] can be told that it can consider harm to nonparties in assessing the reprehensibility of a defendant’s conduct and that reprehensibility is the most important factor in determining the size of the punitive damages award. But the jury also must be told that it cannot punish the defendant for harm to nonparties.”); Colby, *supra* note 125, at 675-76 (The jury should be instructed that it may consider the harm to other victims only for the purpose of ascertaining the degree of reprehensibility of the wrong to the plaintiff, but it may not punish the defendant for the wrong done, or the harm caused, to persons not before the court; nor should it endeavor to remove the profits illicitly gained at the expense of victims not before the court.); Agle, *supra* note 131, at 1319; Prince & Vraa, *supra* note 159, at 28 (noting *Philip Morris* may place most of the burden on the defendant to request appropriate protections).

¹⁶⁵ *Philip Morris*, 127 S. Ct. at 1063 (holding defendant should be allowed to defend claims of alleged nonparty harms, either by joining nonparties or excluding such allegations from consideration in punitive damage calculation). Colby, *supra* note 125, at 675.

¹⁶⁶ See *Philip Morris*, 127 S. Ct. at 1065; (holding a court, upon request, must protect against the introduction of certain evidence and the presentation of arguments that risk due process violation); see Colby, *supra* note 125, at 675.

request that a limiting jury instruction accompany evidence of nonparty harm, prohibiting its use in punitive damages calculation.¹⁶⁷ The line between assessing reprehensibility and directly punishing is a line practitioners must attempt to draw to avoid constitutional due process violations.¹⁶⁸

CONCLUSION

The *Philip Morris* Court's distinction between using nonparty harm to punish directly and to assess reprehensibility sets a confusing and difficult standard for states to implement; a mistake by the *Philip Morris* Court. However, practitioners and courts must try to identify the distinction to avoid violating the Fourteenth Amendment Due Process Clause. In Wyoming, juries should receive specific jury instructions similar to the proposal set forth in this case note. Courts must also guard against statements made by counsel and evidence introduced, and if needed, qualify its purpose solely for reprehensibility analysis. Practitioners also must heed the new standard in presenting arguments, introducing evidence, requesting limiting instructions, and proposing jury instructions.

¹⁶⁷ Colby, *supra* note 125, at 675; Prince & Vraa, *supra* note 159, at 28 (“[W]hile the decision charges the state courts to ensure appropriate protections are used, it also appears to put most of the burden on the defendant to request such appropriate protections.”); Philip Morris, 127 S. Ct. at 1065 (holding that when confusion between the use of nonparty harm for reprehensibility and damage calculation of the award is great, “a court, *upon request*, must protect against that risk.”) (emphasis added).

¹⁶⁸ Philip Morris, 127 S. Ct. at 1064 (holding risk of failure to make a distinction between using nonparty harm for reprehensibility determination and punishing directly must be guarded against in plaintiff's arguments and evidence presented at trial); see Colby, *supra* note 125, at 675-76 (asserting juries should be instructed to base punitive awards solely based on harm suffered by plaintiffs).