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Casenote

Who's on First?: Why *Philip Morris USA v. Williams* Left Juries Confused About Whose Injuries Can Be Considered When Determining Punitive Damages

I. INTRODUCTION

For the third time in eleven years, the United States Supreme Court imposed constitutional limits on punitive damage awards. In *Philip Morris USA v. Williams*,¹ the Court, in a 5-4 decision, held that punitive damages cannot be used to punish a defendant for injuries that the defendant inflicted upon nonparties to the case.² However, the Court also held that injuries to nonparties can be considered when determining the reprehensibility of the defendant's conduct under the "Gore guideposts."³ Nevertheless, this decision is important for trial lawyers for what the Court did not hold. Once again, the Court passed on the

1. 127 S. Ct. 1057 (2007).

2. *Id.* at 1063.

3. *Id.* at 1063-64. The Court created the *Gore* guideposts in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-75 (1996). These guideposts are discussed in detail in Section III of this Casenote. See *infra* text accompanying notes 73-93.

opportunity to decide how much was too much when determining the size of punitive damage awards.⁴

II. FACTUAL BACKGROUND

Throughout his entire life, Jesse Williams heavily smoked Philip Morris USA brand cigarettes, of which Marlboros were his favorite. After Jesse died in 1997 from a form of lung cancer traditionally caused by cigarette smoking, Jesse's widow filed a lawsuit on behalf of his estate against Philip Morris for negligence and deceit.⁵ At trial a jury found for the plaintiff on both claims. The jury concluded that Jesse's cancer was caused by smoking Philip Morris cigarettes and that Jesse primarily smoked these cigarettes because he relied on the company's deceitful and negligent claims that smoking was safe.⁶ Jesse's false belief regarding the safety of smoking was influenced by a public relations campaign that Philip Morris and other tobacco companies implemented to create the public perception that scientists genuinely disagreed about smoking's carcinogenic effects. To create this misconception, the cigarette companies performed joint scientific studies that avoided researching the biological effects of smoking cigarettes.⁷ Additionally, although Philip Morris knew that correlations existed between smoking and cancer, throughout the 1950s and 1960s Philip Morris proclaimed that it "would 'stop business tomorrow' if it believed that its products were harmful."⁸ In an internal memo, a Philip Morris corporate officer stated that the goal of these studies and statements "was to give smokers a psychological crutch" to encourage them to continue smoking.⁹

At trial, the estate's attorney asked the jury, when determining punitive damages, to consider not only how Philip Morris's misleading statements harmed Jesse, but also how many other Oregonians were misled and harmed by Philip Morris's statements and studies.¹⁰ In response, Philip Morris proposed a jury instruction that punitive damages could be used to punish Philip Morris only for its misconduct toward Jesse and not for its misconduct toward other Oregon residents

4. *Philip Morris USA*, 127 S. Ct. at 1065.

5. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1065 (2007); *Williams v. Philip Morris Inc.* ("*Williams I*"), 48 P.3d 824, 829 (Or. Ct. App. 2002).

6. *Philip Morris USA*, 127 S. Ct. at 1060-61.

7. *Williams v. Philip Morris Inc.* ("*Williams III*"), 92 P.3d 126, 128-29 (Or. Ct. App. 2004).

8. *Id.* at 129.

9. *Id.*

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

who were not parties to the case. The trial judge rejected this instruction, and the jury found for the estate, awarding \$821,000 in compensatory damages and \$79.5 million in punitive damages.¹¹ However, the trial judge ruled that the award was excessive and violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution;¹² therefore, the judge reduced the punitive damages award to \$32 million.¹³

On appeal to the Oregon Court of Appeals, Philip Morris argued that the trial judge's rejection of its jury instruction and the size of the punitive damages award violated the Due Process Clause.¹⁴ The court of appeals rejected the first argument and cited *Parrott v. Carr Chevrolet, Inc.*¹⁵ In *Parrott* the Oregon Supreme Court held that juries, when determining the amount of punitive damages, can consider the potential injuries that the defendant caused to past, present, and future consumers who are not parties to the case.¹⁶ The court of appeals also rejected the second argument regarding the size of the award, holding that "no simple mathematical formula controls our review of the ratio of punitive damages" and that the 97-1 ratio was not excessive under the Due Process Clause.¹⁷ The court of appeals then reinstated the original \$79.5 million punitive damages award against Philip Morris.¹⁸

After the Oregon Supreme Court declined to review the case, the United States Supreme Court granted certiorari and, without oral arguments, remanded the case back to the Oregon Court of Appeals for reconsideration in light of the decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*.¹⁹ On remand, the court of appeals re-adopted its original decision and held that Philip Morris could be punished for its conduct towards nonparties because there was evidence that other Oregon residents were harmed and misled by the same public

11. *Id.* Punitive damages were only awarded on the fraud claim. Because the jury found Jesse to be fifty percent negligent for his own death, the jury declined to award punitive damages on the negligence claim. *Williams I*, 48 P.3d at 828.

12. U.S. CONST. amend. XIV, § 1.

13. *Philip Morris USA*, 127 S. Ct. at 1061.

14. *Williams I*, 48 P.3d at 837.

15. 17 P.3d 473 (Or. 2001).

16. *Williams I*, 48 P.3d at 837 (citing *Parrott*, 17 P.3d at 489).

17. *Id.* at 840-41 (quoting *Parrott*, 17 P.3d at 489).

18. *Id.* at 843. The Oregon Court of Appeals granted Philip Morris's petition for reconsideration of *Williams I* to consider questions not relevant to the issue of punitive damages. However, the court of appeals adhered to its original decision. See generally *Williams v. Philip Morris Inc.* ("Williams II"), 51 P.3d 670 (Or. Ct. App. 2002).

19. 538 U.S. 408 (2003); *Philip Morris USA*, 127 S. Ct. at 1061. In *Campbell* the Court reexamined each of the three *Gore* guideposts in detail. 538 U.S. at 419-28. This case is further discussed in Section III of this Casenote. See *infra* text accompanying notes 96-107.

relations campaign that misled Jesse.²⁰ When considering the size of the punitive damages award, the court of appeals recognized there is a presumption of constitutional invalidity.²¹ However, using the *Gore* guideposts as applied in *Campbell*, the court of appeals concluded that Philip Morris's conduct endangered the health of the Oregon public and that this conduct was reprehensible enough to warrant the \$79.5 million in punitive damages.²² The Oregon Supreme Court affirmed the judgment of the court of appeals.²³ On appeal for a second time, the United States Supreme Court granted certiorari and held that punishing a defendant with punitive damages for harming nonparties to the case violated the defendant's due process rights.²⁴

III. LEGAL BACKGROUND

A. *Early History of Punitive Damages*

Since its inception, the United States Supreme Court has struggled to determine whether there should be limitations on the size of punitive damage awards and, if so, how courts should regulate this area of law that is traditionally controlled by the jury. Punitive damages first appeared in the common law more than two centuries ago.²⁵ *Huckle v. Money*²⁶ is commonly cited as the first recorded case to recognize the existence of punitive damages in the English common law.²⁷ In *Huckle* the English court held that juries, when awarding tort damages, could consider the "state, degree, quality, trade or profession of the party injured, as well as of the person who did the injury."²⁸ In *Wilkes v. Wood*,²⁹ the English court added that juries could punish the guilty and deter similar conduct by awarding damages in excess of the plaintiff's actual harm.³⁰ American courts quickly absorbed this doctrine, which made one of its earliest reported appearances in South Carolina in 1784.³¹ In *Genay v. Norris*,³² a plaintiff was awarded punitive damag-

20. *Williams III*, 92 P.3d at 127-28, 141-42.

21. *Id.* at 144.

22. *Id.* at 145.

23. See generally *Williams v. Philip Morris Inc.*, 127 P.3d 1165 (Or. 2006).

24. *Philip Morris USA*, 127 S. Ct. at 1060.

25. David Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1263 n.19 (1976).

26. (1763) 95 Eng. Rep. 768 (K.B.).

27. Owen, *supra* note 25, at 1263 n.19.

28. 95 Eng. Rep. at 768.

29. (1763) 98 Eng. Rep. 489 (K.B.).

30. *Id.* at 498-99.

31. Owen, *supra* note 25, at 1263 n.20.

es after the defendant slipped a poison into the plaintiff's wine, causing the plaintiff to become ill.³³

Under the common law system, juries were given full discretion to award punitive damages and to determine the amount of damages to be assessed upon the defendant.³⁴ American courts treat punitive damages as a form of "private fines" that serve as retribution and deterrence for a defendant's wrongdoing.³⁵ However, unlike criminal fines, punitive damages are given to the injured rather than to the state.³⁶ Scholars have also claimed that punitive damage awards allow society to express its "social outrage" at the defendant's reprehensible conduct.³⁷ The United States Supreme Court reaffirmed many of these common law principles in *Day v. Woodworth*³⁸ by giving juries unbridled discretion to decide when and how much punitive damages should be awarded.³⁹

On July 28, 1868, the Fourteenth Amendment was added to the United States Constitution.⁴⁰ Thus, in addition to adhering to the common law traditions, punitive damages now had to satisfy the requirements of the Due Process Clause.⁴¹ However, the Supreme Court continued to give juries the same deference they possessed before the enactment of the Fourteenth Amendment. For instance, in *Missouri Pacific Railway Co. v. Humes*,⁴² the Court held that no definite rules control the jury's discretion.⁴³ The Court later held, in *Minneapolis & Saint Louis Railway Co. v. Beckwith*,⁴⁴ that the application of punitive damages does not violate the Due Process Clause because punitive damages have been recognized as proper and legal for more than a century.⁴⁵

32. 1 S.C.L. (1 Bay) 6 (1784).

33. *Id.*

34. *Day v. Woodworth*, 54 U.S. 363, 371 (1851).

35. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (internal quotation marks omitted) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)); *see also Day*, 54 U.S. at 371.

36. *Day*, 54 U.S. at 371.

37. Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2075 (1998).

38. 54 U.S. 363 (1851).

39. *Id.* at 371.

40. 15 Stat. 708, 711 (1868).

41. U.S. CONST. amend. XIV, § 1.

42. 115 U.S. 512 (1885).

43. *Id.* at 521.

44. 129 U.S. 26 (1889).

45. *Id.* at 36; *see also Barry v. Edmunds*, 116 U.S. 550, 565 (1886) ("[N]othing is better settled than . . . the peculiar function of the jury to determine the amount by their

B. The Court Hints at Due Process Protections and Begins to Rein in the Jury's Authority

As the United States Supreme Court entered the *Lochner* era,⁴⁶ the justices began hinting that the Due Process Clause has substantive limits "beyond which penalties may not go."⁴⁷ The cases from this period primarily focused on the application of statutory as opposed to common law punitive damages.⁴⁸ In *Waters-Pierce Oil Co. v. Texas*,⁴⁹ the Court held that by imposing penalties that were "grossly excessive," a state was depriving defendants of their property without due process of law.⁵⁰ In *Missouri Pacific Railway Co. v. Tucker*,⁵¹ the Court set aside a \$500 penalty, which was to be paid to the plaintiff, and concluded that the penalty was unreasonable and "repugnant to the due process . . . clause[] of the 14th Amendment."⁵² While many of the precedents from the *Lochner* era were discredited, the Court treats the punitive damages cases differently because the dissenting justices in *Lochner* joined in the majorities of the punitive damages cases.⁵³

After limiting the size of statutory punitive damages, the Supreme Court began entertaining the idea that the Due Process Clause might also limit the jury's unbridled authority to administer common law punitive damages. For instance, the Court in *Aetna Life Insurance Co. v. Lavoie*,⁵⁴ referred to the appellant's Due Process argument as "rais[ing] important issues which, in an appropriate setting, must be

verdict."); *Mo. Pac. Ry. Co.*, 115 U.S. at 521 ("[T]he wisdom of allowing such additional damages to be given is attested by the long continuance of the practice.").

46. The *Lochner* era, which is named for the case *Lochner v. New York*, 198 U.S. 45 (1905), refers to a period in the Supreme Court's history that lasted from 1897 until 1937. During this era, the Court held that laws regulating an employee's working hours, wages, and conditions violated the Due Process Clause of the Fourteenth Amendment. See generally David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469 (2005). Today, many of the precedents from this era are discredited, and *Lochner* is considered one of the most reviled cases in American history. *Id.*

47. *Seaboard Air Line Ry. v. Seegers*, 207 U.S. 73, 78 (1907).

48. See *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919) (authorizing passengers who were overcharged by railways to collect between \$50 and \$300 in penalties in a civil action); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 100 (1909) (awarding plaintiffs "not less than \$200 nor more than \$5,000" for each day that the defendant violated the state's antitrust law); *Seaboard Air Line Ry.*, 207 U.S. at 75-76 (awarding \$50 per day to the aggravated party if the carrier failed to follow the statute).

49. 212 U.S. 86 (1909).

50. *Id.* at 111.

51. 230 U.S. 340 (1913).

52. *Id.* at 346-47.

53. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 455 (1993).

54. 475 U.S. 813 (1986).

resolved.”⁵⁵ The Court, however, did not reach the issue of whether excessive punitive damages violated the Due Process Clause. The Court also refused to create due process limitations in *Bankers Life & Casualty Co. v. Crenshaw*.⁵⁶ However, Justice O'Connor, when referring to the jury's discretion to award common law punitive damages, stated in her concurrence that “[t]his grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process.”⁵⁷ A year later in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,⁵⁸ the Court concluded that “we have never addressed . . . whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit. That inquiry must await another day.”⁵⁹ In light of the *Lochner* era cases that limited the size of statutory punitive damages, the Court unanimously agreed that the issue of due process limitations on common law punitive damages should be addressed.⁶⁰

After dodging the issue in several cases, the Supreme Court could not avoid addressing the due process argument in *Pacific Mutual Life Insurance Co. v. Haslip*.⁶¹ In *Haslip* the Court held that the common law procedure of giving juries unbridled discretion may “invite extreme results that jar one's constitutional sensibilities.”⁶² The Court then placed a check on the jury's discretion by endorsing the Alabama Supreme Court's posttrial procedures for reviewing a jury's punitive damages award.⁶³ During the posttrial procedures, Alabama courts considered several factors when determining if a jury's punitive damages award bore a reasonable relationship to the defendant's present and future harm.⁶⁴ Aside from discussing the procedures, the United States

55. *Id.* at 828-29.

56. 486 U.S. 71 (1988).

57. *Id.* at 88 (O'Connor, J., concurring).

58. 492 U.S. 257 (1989).

59. *Id.* at 276-77 (citations omitted).

60. *See id.*; *id.* at 280 (Brennan, J., concurring) (“I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages. . . .”); *id.* at 283 (O'Connor, J., concurring in part and dissenting in part) (“[N]othing in the Court's opinion forecloses a due process challenge to awards of punitive damages. . . .”).

61. 499 U.S. 1 (1991).

62. *Id.* at 18.

63. *Id.* at 22.

64. *Id.* at 21-22. The Alabama Supreme Court held that a jury could consider, among other things: (1) the relationship between the punitive damages and the harm that the defendant caused and will cause; (2) the degree of reprehensibility of the defendant's conduct; (3) the defendant's profits during the wrongful act; (4) the current financial position of the defendant; (5) the cost of the litigation; and (6) the criminal and civil

Supreme Court declined to draw a mathematical bright-line ratio to determine when a punitive damages award was excessive under the Due Process Clause.⁶⁵ However, the Court held that a 4-1 ratio of punitive to compensatory damages "may be close to the line."⁶⁶ The refusal to establish a bright-line ratio was affirmed two years later in *TXO Production Corp. v. Alliance Resources Corp.*⁶⁷ There, the Court affirmed a punitive damages judgment with a 526-1 ratio.⁶⁸

The procedures used to limit the jury's unfettered discretion were further developed in *Honda Motor Co. v. Oberg*.⁶⁹ In *Oberg* the Supreme Court held that a punitive damages award violated the Due Process Clause because Oregon law did not provide for judicial review of the size of punitive damages awards.⁷⁰ The Court determined that judicial review was one of the few procedural safeguards from excessive punitive damages.⁷¹ While the Court did not decide whether the punitive damages award was excessive, *Oberg* marked the first time that the Court set aside a jury's common law punitive damages award on due process grounds.⁷²

C. *How Much is too Much?*

The United States Supreme Court in *BMW of North America, Inc. v. Gore*⁷³ finally provided some guidance on how to determine when a punitive damages award was excessive, and for the first time, the Court struck down a common law punitive damages award as being excessive.⁷⁴ The plaintiff in *Gore* purchased an imported car from the defendant in Alabama. After nine months, the plaintiff learned that the car had been damaged during its transport across the Atlantic Ocean and was repainted upon arriving in the United States.⁷⁵ At the time of the incident, BMW had a nationwide policy of selling cars without notifying the buyers that the car was damaged during manufacturing or

punishments already inflicted against the defendant. *Id.* (citing *Cent. Ala. Elec. Coop. v. Tapley*, 546 So. 2d 371, 377 (Ala. 1989)).

65. *Id.* at 18.

66. *Id.* at 23.

67. 509 U.S. 443, 458 (1993).

68. *Id.* at 453.

69. 512 U.S. 415 (1994).

70. *Id.* at 432.

71. *Id.*

72. *See id.*

73. 517 U.S. 559 (1996).

74. *Id.* at 585-86.

75. *Id.* at 563 & n.1.

transport.⁷⁶ While BMW's policy violated Alabama law, it was consistent with the laws of twenty-five other states.⁷⁷ As a result of the policy, the plaintiff alleged that the defendant fraudulently sold him a car that had lost ten percent of its value because it had been repainted.⁷⁸

The Court addressed two issues in *Gore*. First, the Court held that juries could not punish a national corporation for out-of-state conduct that was legal in the state where the conduct occurred.⁷⁹ The Court reasoned that the purpose of punitive damages was to support the state's interest in protecting its consumers and its economy.⁸⁰ That purpose was not furthered by punishing a defendant for conduct that both occurred outside of the state and did not affect the state or its citizens.⁸¹ The Court also held that the principles of state sovereignty prevented a state from using punitive damages to influence a defendant's conduct in another state.⁸²

In addressing the second issue, the Court created three guideposts to aid lower courts in determining when a punitive damages award was excessive.⁸³ This test ensured that the defendant would receive fair notice that its conduct would be subjected to a severe punishment.⁸⁴ The first guidepost analyzed the reprehensibility of the defendant's conduct.⁸⁵ This guidepost was the most important indication of excessiveness and reflected the principle that some wrongs are worse than others.⁸⁶ In *Gore* this guidepost suggested awarding smaller punitive damages because BMW's conduct caused purely economic harm and did not place anyone in physical danger.⁸⁷ The second guidepost called for the courts to review the ratio of punitive damages to compensatory damages to ensure that the two awards bore a reasonable relationship.⁸⁸ While the Court refused to set a bright-line rule, it reaffirmed that the 4-1 ratio from *Haslip* was close to the line but also

76. *Id.* at 563-64.

77. *Id.* at 565.

78. *Id.* at 564.

79. *Id.* at 572-73.

80. *Id.* at 572.

81. *See id.*

82. *Id.* at 571-72. After the jury awarded the punitive damages, BMW immediately changed its nationwide policy to notify all potential buyers of all repairs, no matter how minor. *Id.* at 565-66.

83. *Id.* at 574-75.

84. *Id.*

85. *Id.* at 575.

86. *Id.*

87. *Id.* at 576.

88. *Id.* at 580.

recognized that it had allowed a 526-1 ratio in *TXO Production Corp.*⁸⁹ The ratio in *Gore* was a “breathtaking 500 to 1.”⁹⁰ The third guidepost asked the courts to compare the punitive damages award to similar criminal or civil statutory penalties.⁹¹ Even though BMW could have received a \$2000 fine in a criminal proceeding, it was ordered to pay \$2 million in common law punitive damages.⁹² Using the guideposts, the Court was “fully convinced that the grossly excessive award imposed in this case transcend[ed] the constitutional limit.”⁹³

After determining in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*⁹⁴ that the *Gore* guideposts were to be reviewed de novo,⁹⁵ the Court in *State Farm Mutual Automobile Insurance Co. v. Campbell*⁹⁶ sought to clarify the *Gore* guideposts. In *Campbell* the Court again struck down a punitive damages award as being excessive under the Due Process Clause.⁹⁷ The plaintiff in *Campbell*, who had caused a car accident, alleged that his insurance company fraudulently told him that it would pay any judgment if the plaintiff went to trial to defend the claims from the accident victims. Relying on this advice, the plaintiff went to trial and lost, and the insurance company refused to pay the judgment.⁹⁸ At the trial against the insurance company, the plaintiff provided evidence that his encounter with the insurance company was one of many frauds it had committed across the nation to meet its corporate fiscal goals.⁹⁹

Applying the first *Gore* guidepost (reprehensibility), the Court expanded its ruling in *Gore* and held that a defendant cannot be punished for *any* conduct that occurred outside the state’s jurisdiction.¹⁰⁰ The Court then added to this rule, holding that a jury may not use punitive damages to punish a defendant for injuring nonparties unless the injuries to the nonparties and the plaintiff were similar.¹⁰¹ This holding reflected the notion that the United States Constitution

89. *Id.* at 581.

90. *Id.* at 583.

91. *Id.*

92. *Id.* at 584.

93. *Id.* at 585-86.

94. 532 U.S. 424 (2001).

95. *Id.* at 431.

96. 538 U.S. 408 (2003).

97. *Id.* at 412.

98. *Id.* at 412-13.

99. *Id.* at 415.

100. *Id.* at 421 (“Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction.”).

101. *Id.* at 422-23.

does not allow courts to “adjudicate . . . hypothetical claims against a defendant under the guise of the reprehensibility analysis.”¹⁰² The Court concluded that the defendant should not have been punished for its out-of-state conduct and that the plaintiff’s injuries were not similar to the injuries suffered by other victims of State Farm’s nationwide policy.¹⁰³

Under the second *Gore* guidepost (ratio), the Court refused to endorse a bright-line rule but concluded that the 145-1 ratio in *Campbell* raised a presumption of constitutional invalidity.¹⁰⁴ The Court held that “few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process.”¹⁰⁵ Using the third *Gore* guidepost (existence of statutory penalties), the Court concluded that the insurance company’s \$145 million judgment far exceeded the \$10,000 fine it could have received.¹⁰⁶ Weighing all the guideposts, the Court in *Campbell* held that the jury’s punitive damages award was excessive.¹⁰⁷ Four years later, the Court in *Philip Morris USA v. Williams*¹⁰⁸ attempted to refine the Court’s application in *Campbell* of the *Gore* guideposts.

IV. COURT’S RATIONALE

A. *The Majority Opinion*

Justice Breyer’s majority opinion in *Philip Morris USA v. Williams*¹⁰⁹ resumed the discussion from *State Farm Mutual Automobile Insurance Co. v. Campbell*¹¹⁰ and *BMW of North America, Inc. v. Gore*¹¹¹ by holding that the Due Process Clause¹¹² monitors two aspects of punitive damages awards.¹¹³ First, the Court held the Due Process Clause controls the jury’s discretion by imposing limitations on the procedures for awarding punitive damages.¹¹⁴ Second, the Court

102. *Id.* at 423.

103. *Id.* at 423-24.

104. *Id.* at 424-26.

105. *Id.* at 425.

106. *Id.* at 428.

107. *Id.* at 429.

108. 127 S. Ct. 1057 (2007).

109. 127 S. Ct. 1057 (2007).

110. 538 U.S. 408 (2003).

111. 517 U.S. 559 (1996).

112. U.S. CONST. amend. XIV, § 1.

113. *Philip Morris USA*, 127 S. Ct. at 1062.

114. *Id.*

held the Due Process Clause prohibits excessive punitive damages.¹¹⁵ The Court started its analysis by discussing the procedures used by the Oregon courts.¹¹⁶ Summing up the cases from the last twenty years, the Court held that the state had to "cabin the jury's discretionary authority" or risk depriving a defendant of fair notice while administering arbitrary punishments and imposing one state's policies on its neighbors.¹¹⁷ In this case, the Court held that the Due Process Clause required that the Oregon trial court instruct the jury to not punish the defendant for injuries it inflicted on nonparties to the litigation.¹¹⁸

The Court provided two reasons for its holding. First, according to the Court, the Due Process Clause allowed the defendant "an opportunity to present every available defense."¹¹⁹ If the jury, when determining punitive damages, considered injuries of nonparties, the defendant could not defend itself against the accusations of harm toward these hypothetical victims.¹²⁰ For example, when the plaintiff in *Philip Morris USA* asked the jury to "think about how many other Jesse Williams[es] . . . in the State of Oregon there have been,"¹²¹ Philip Morris would have been unable to prove that these other Jesse Williamses were not harmed by Philip Morris's fraudulent statements.¹²² Justice Breyer noted that it was possible that these other Jesse Williamses already knew smoking was dangerous and did not rely on Philip Morris's fraudulent statements or studies.¹²³ Because Philip Morris could not defend against these hypothetical claims, it could be subjected to punishment for deceiving people it may not have deceived.¹²⁴

Second, the Court held that allowing juries to punish defendants for causing injuries to nonparties would create a "near standardless dimension to the punitive damages equation."¹²⁵ When thinking about the other Jesse Williamses, the jury would have to consider things such as the similarity of the victims, the seriousness of each nonparty's injuries, and the manner in which each nonparty was injured.¹²⁶ Since these nonparties were not before the court, the jury would have been left

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 1063.

119. *Id.* (quoting *Lindsey v. Norment*, 405 U.S. 56, 66 (1972)).

120. *Id.*

121. *Id.* at 1061 (internal quotation marks omitted).

122. *Id.* at 1063.

123. *Id.*

124. *See id.*

125. *Id.*

126. *Id.*

to speculate.¹²⁷ This speculation, the Court concluded, would lead to arbitrary punitive damages awards and lack of proper notice for defendants.¹²⁸ The Court recognized that it had never explicitly held that juries could not punish defendants for causing harm to nonparties.¹²⁹ However, as Justice Breyer proclaimed, “we do so hold now.”¹³⁰

Three paragraphs after the Court created this new rule, the Court held that, when considering the reprehensibility of the defendant’s conduct under the *Gore* guideposts, juries *can* take into consideration injuries to nonparties.¹³¹ Thus, a jury must be instructed that it may consider injuries to nonparties when determining the reprehensibility of the defendant’s conduct, but the jury may not go further and consider injuries to nonparties when determining the actual size of the punitive damages award, even though reprehensibility is the most important guidepost when determining the size of a punitive damages award.¹³² When writing about this fine distinction of when juries can and cannot consider nonparty injuries, Justice Stevens, in his dissent, stated that “[t]his nuance eludes me.”¹³³ He concluded that the majority’s holding was confusing because any time a jury determines the reprehensibility of the defendant’s conduct, “the jury is by definition punishing the defendant—directly—for third-party harm.”¹³⁴ Furthermore, the Oregon Supreme Court held that this holding would make it “unclear . . . how a jury could consider harm to others, yet withhold that consideration from the punishment calculus.”¹³⁵ When addressing the concerns of Justice Stevens and the Oregon Supreme Court, the majority held that this was a “practical problem” and left it to the states to provide “some form of protection” to prevent juries from being confused.¹³⁶

Applying this holding to the facts, the Court held that the Oregon courts “applied the wrong constitutional standard” by allowing the jury,

127. *Id.*

128. *Id.*

129. *Id.* at 1065.

130. *Id.*

131. *Id.* at 1063-64.

132. *Id.* at 1064; *Gore*, 517 U.S. at 575 (“Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.”).

133. *Id.* at 1067 (Stevens, J., dissenting).

134. *Id.*

135. *Id.* at 1065 (majority opinion) (internal quotation marks omitted) (quoting *Williams v. Philip Morris, Inc.*, 127 P.3d 1165, 1175 n.3 (Or. 2006)).

136. *Id.*

when deciding the size of the punitive damages award, to consider the harm to other Oregonians who were not parties to the case.¹³⁷ Thus, the Court vacated the Oregon Supreme Court's ruling and remanded the case.¹³⁸ While the Court vacated the judgment on procedural grounds, it never addressed whether the punitive damages award, which had a ratio of 100-1, was grossly excessive. The Court held it was unnecessary to reach that question because the award was already set aside on procedural grounds and a new trial or reduction of the punitive damages award would be required.¹³⁹ As a result, *Philip Morris USA* joined the long list of cases where the Court refused to discuss due process limitations on excessive punitive damages awards.

B. *The Dissenting Opinions*

Chief Justice Roberts and Justices Kennedy, Souter, and Alito joined Justice Breyer's majority opinion. Justices Stevens, Thomas, and Ginsburg filed separate dissenting opinions, and Justice Scalia joined Justice Ginsburg's dissent. In his dissent, Justice Stevens disagreed with the Court's holding that juries could not consider the harm to nonparties when punishing the defendant's conduct.¹⁴⁰ Justice Stevens wrote that "punitive damages are a sanction for the public harm the defendant's conduct has caused or threatened."¹⁴¹ As an example, Justice Stevens considered that a man who throws a bomb into a crowd and kills only one person, but injures twelve, should be punished more severely than the same man who kills that same person, but harms no one else.¹⁴² Since the first man harmed more people than the second, a jury will demand more retribution and will require that the first man pay more punitive damages than the second.¹⁴³ Additionally, Justice Stevens accused the Court of lacking judicial restraint.¹⁴⁴ He stated that the Court must exercise the "utmost care" when it breaks new ground in an area of law.¹⁴⁵ Also, he reiterated that "the Court should be 'reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.'"¹⁴⁶

137. *Id.*

138. *Id.*

139. *Id.*

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

141. *Id.*

142. *Id.* at 1067.

143. *See id.*

144. *Id.*

145. *Id.* (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)).

146. *Id.* (quoting *Collins*, 503 U.S. at 125).

Justice Thomas's dissent not only criticized the Court's holding, but also reaffirmed his dissent from *Campbell* where he held that "the Constitution does not constrain the size of punitive damage awards."¹⁴⁷ Considering that punitive damages were established before the ratification of the Fourteenth Amendment, Justice Thomas wrote that the Due Process Clause does not limit the jury's discretion to award punitive damages.¹⁴⁸

The last dissent came from Justice Ginsburg who was joined by Justices Scalia and Thomas. In her dissent, Justice Ginsburg concluded that the Oregon Supreme Court had already done exactly what the Court was now telling them to do.¹⁴⁹ Justice Ginsburg noted that both the Oregon Supreme Court and the majority held that a jury could consider injuries to nonparties only when assessing the reprehensibility of Philip Morris's actions.¹⁵⁰ Because the majority failed to identify any portion of the Oregon Supreme Court's opinion that contradicted the majority's opinion, Justice Ginsburg concluded that the decision should not have been vacated.¹⁵¹ In response to Justice Ginsburg's dissent, the majority acknowledged that "one might read some portions of the Oregon Supreme Court's opinion as focusing only upon reprehensibility."¹⁵² However, the majority concluded that the opinion as a whole made clear that the Oregon Supreme Court was also allowing juries to consider a nonparty's injuries when punishing the defendant.¹⁵³

Lastly, Justice Ginsburg criticized the majority for "reach[ing] outside the bounds of the case" to come to its conclusion.¹⁵⁴ She pointed out that the only argument Philip Morris preserved for appeal was the trial judge's refusal to accept its jury instruction.¹⁵⁵ According to Justice Ginsburg, the majority never addressed the propriety of the instruction.¹⁵⁶ After reviewing it herself, Justice Ginsburg concluded that the

147. *Id.* (Thomas, J., dissenting) (quoting *Campbell*, 538 U.S. at 429 (Thomas, J., dissenting)).

148. *Id.* at 1067-68 (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 26-27 (1991) (Scalia, J., concurring in judgment)).

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

150. *Id.* Compare *Williams*, 127 P.3d at 1177 ("[A]s we have explained, the jury, in assessing the *reprehensibility* of Philip Morris's actions, could consider evidence of similar harm to other Oregonians caused (or threatened) by the same conduct." (emphasis added)), with *Philip Morris USA*, 127 S. Ct. at 1064 ("[A] plaintiff may show harm to others in order to demonstrate *reprehensibility*." (emphasis added)).

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

152. *Id.* at 1064 (majority opinion).

153. *Id.*

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

155. *Id.* at 1068.

156. *Id.* at 1069.

jury instruction would confuse rather than enlighten a jury.¹⁵⁷ She ended her dissent by stating that the majority should have given more respect to the “proceedings and dispositions of the state courts that sought diligently to adhere to our changing, less than crystalline precedent.”¹⁵⁸

V. IMPLICATIONS

The opinion in *Philip Morris USA v. Williams*¹⁵⁹ seems to create more confusion than clarity. First, the decision did nothing to clarify when punitive damages awards are excessive. Because the Court did not address the use of a bright-line ratio, Chief Justice Roberts’s and Justice Alito’s individual opinions on the subject are still unknown. If the other members of the majority in *Philip Morris USA* try to create a bright-line ratio in future cases, these two Justices may join Justices Scalia and Thomas and refuse to create such a ratio.¹⁶⁰ It is also interesting to note that Justice Stevens, who authored the opinion in *BMW of North America, Inc. v. Gore*¹⁶¹ and was in the majority in *State Farm Mutual Automobile Insurance Co. v. Campbell*,¹⁶² dissented in *Philip Morris USA*. The implications of his dissent are not great. In his dissent, Justice Stevens reaffirmed his support for *Gore* and *Campbell*, but he disagreed with the majority on the role that injuries to nonparties should play in determining the size of punitive damages awards.¹⁶³

While Justices Scalia and Thomas reaffirmed their dissents from *Gore* and *Campbell*, Justice Scalia did not use his typical arguments against the Court’s new rule. Justice Thomas was the only Justice to reaffirm his view that the Due Process Clause does not limit the size of punitive damages awards. In the past, Justice Scalia has previously refused to give stare decisis effect to *Gore*, and he has written that the Constitution does not protect defendants from excessive punitive damages.¹⁶⁴ Even

157. *Id.*

158. *Id.*

159. 127 S. Ct. 1057 (2007).

160. Marcia Coyle, *Prevailing Winds: In the First Full Term with Alito, Court Took Marked Conservative Turn*, NAT’L L.J., Aug. 1, 2007, available in Westlaw, 8/1/2007 Nat’l L.J. 1.

161. 517 U.S. 559 (1996).

162. 538 U.S. 408 (2003).

163. *Philip Morris USA*, 127 S. Ct. at 1066 (Stevens, J., dissenting) (“I remain firmly convinced that the cases announcing those constraints were correctly decided.”).

164. *Campbell*, 538 U.S. at 429 (Scalia, J., dissenting) (“[T]he Due Process Clause provides no substantive protections against ‘excessive’ or ‘unreasonable’ awards of punitive damages. . . . I do not feel justified in giving [*Gore*] stare decisis effect.” (internal quotation marks omitted)).

though these views mirror the arguments made in Justice Thomas's dissent in *Philip Morris USA*, Justice Scalia did not sign onto Justice Thomas's dissent. Instead he joined Justice Ginsburg who did not even address whether the Constitution limits the jury's discretion to award punitive damages. Justice Scalia's shift from Justice Thomas's to Justice Ginsburg's dissent might suggest that he is backing down from his previous dissents in *Gore* and *Campbell*, and that he may accept some limitations on punitive damages in future cases.¹⁶⁵

One legal implication of *Philip Morris USA* is that juries now have one more constraint placed upon them when considering punitive damages. However, the new limitation on when a jury can consider injuries to nonparties may not be much of a limitation because the ruling will be difficult to enforce and will likely create confusion among courts.¹⁶⁶ While lawyers and judges may understand the subtle difference between considering a nonparty's injuries when determining reprehensibility and punishing the defendant, a jury of laymen might not. As the Court held, it is up to the state courts to figure out how to make the distinction clear.¹⁶⁷ This mandate will require states to craft rules concerning when to exclude evidence of injuries to nonparties. If the evidence of injuries to nonparties would go toward reprehensibility, the states will have to craft cautionary jury instructions to limit how the jury uses this evidence.¹⁶⁸ Also, while the Court charged states to create protections for defendants, the Court may have placed the burden on defendants to request those protections.¹⁶⁹ When punitive damages are awarded, defendants must be sure to request due process protections through jury instructions and special verdict forms, and defendants must also preserve error if those requests are denied.¹⁷⁰ In the end, this case creates more questions than answers, and the confusion will probably result in the Court having to decide another punitive damages case in the next couple of terms.

STEVEN MOULDS

165. Jeff Bleich et al., *Smoke Signals: Philip Morris Provides Yet Another Chapter in the Ongoing Saga of Punitive Damages in the U.S. Supreme Court*, OR. ST. B. BULL., June 2007, at 28, available in Westlaw, 67-JUN ORSBB 24.

166. *Id.* at 29.

167. *Philip Morris USA*, 127 S. Ct. at 1065.

168. J. David Prince & Paula Duggan Vraa, *Focusing the Penalty: New Limits on Punitive Damages*, BENCH & B. MINN., April 2007, at 28, available in Westlaw, 64-APR BBMN 24.

169. *Id.*; *Philip Morris USA*, 127 S. Ct. at 1065 (“[W]e believe that where the risk of that misunderstanding is a significant one . . . a court, upon request, must protect against that risk” (emphasis added)).

170. Prince & Vraa, *supra* note 166, at 28.
