

NO. 05-15655

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

GINNY V. WHITE and JIMMIE D. WHITE,

Plaintiffs-Appellees,

v.

FORD MOTOR COMPANY, a Delaware Corporation.

Defendant-Appellant.

**Appeal from the United States District Court
for the District of Nevada**

**SUPPLEMENTAL REPLY BRIEF
OF DEFENDANT-APPELLANT
FORD MOTOR COMPANY**

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Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007), confirms that the judgment in this case is unsustainable. Plaintiffs' arguments to the contrary are unconvincing.

A. The Harm-to-Non-Parties Instructions

1. Ford's proposed instructions were neither confusing nor legally incorrect.

a. The proposed instructions were not confusing.

Plaintiffs note that the first, second, and fourth sentences of Ford's proposed Jury Instruction No. 10 and Ford's proposed amendment to the court's Jury Instruction No. 18 say that the jury could punish Ford only for the conduct that injured Plaintiffs and could not punish Ford for conduct involving vehicles other than the one involved in the accident. Plaintiffs assert that these statements were confusing because the case involved a single course of conduct, and no conduct was specifically directed toward them. Accordingly, they contend, Ford's proposed instructions did not present the harm-to-non-parties concept with sufficient clarity, and, therefore, the district court did not err in refusing to give either of the proposed instructions.

Plaintiffs grudgingly admit that the third sentence of Ford's proposed Jury Instruction No. 10 "comes closest to presaging the Court's holding in *Williams*," though they claim (without explanation) that it still is not close enough. (Pl. Supp. Br. 7-8.) That sentence reads: "Likewise, you may not base the amount of any

punitive damages award on any past, present, or future harm to anyone other than the plaintiffs in this case.” It thus clearly states the *Williams* limitation and therefore eliminates any perceived ambiguity about the meaning of the other sentences in the instruction. Read as a whole, the four sentences would have told the jury to punish for what happened to Plaintiffs and not for what happened or might happen to anyone else. It is unrealistic to have expected Ford to “presag[e]” *Williams* any better than that.

Plaintiffs’ criticism of Ford’s proposed addition of the words “for the wrongful conduct that harmed the plaintiffs in this case” to the court’s Jury Instruction No. 18 is equally misplaced. This addition would have focused the jury on the harm *to Plaintiffs*, while underscoring the principle that punitive damages are intended to punish the defendant’s *conduct*, not to compensate for the plaintiff’s *harm*.

Furthermore, there was no possibility that either the district court or Plaintiffs were confused about the meaning of the proposed instructions. Ford’s counsel made clear that the purpose was to ensure that the jury would not punish Ford for harm to non-parties, explaining that in *State Farm*

[t]he Court was concerned that in a given case—let’s take this one—that the jury, whether it’s in-state conduct or out-of-state conduct that harms other people, that this jury will punish this defendant in this case not just for the harm to these plaintiffs, but for harm to other plaintiffs, whether in state or out of state.

That is the principal concern the Court was expressing, and the reprehensibility issue is a separate consideration, your Honor.

The Court did say, and quite clearly, that the consideration of other actions can be taken into account in terms of determining reprehensibility, but in terms of what you are punishing . . . that has to be punishing for the harm to this plaintiff.

(ER524-525.) Thus, even if the district court had qualms about the references to “conduct” in the proposed instructions—and it did not express any—it could not have failed to understand the principle that Ford was advocating, which turned out to be *precisely* what the Supreme Court held in *Williams*.

Moreover, in their principal brief in this Court, the Whites did *not* argue that Ford’s proposed harm-to-non-parties instructions were confusing, although this argument would have been just as relevant before *Williams* as it is now. Rather, their previous argument to this Court assumed that the jury would have understood Ford’s point perfectly well, but that the instruction was wrong under *State Farm*. (See Pl. Br. 45 (criticizing Ford’s proposed instructions on the ground that “*State Farm* plainly does not prohibit a jury from considering the harm or potential harm to others likely to result from the *same* course of conduct that harmed the plaintiff in a given case. Indeed, *State Farm* expressly reaffirms the deterrent purpose of punitive damages.”).) They also argued that Ford’s proposed harm-to-non-parties

instructions would have rendered the extraterritoriality instruction superfluous. (*Id.* at 46.)

Because the Whites could have made the “confusion” argument in their opening brief, the argument should be deemed waived. *See Barroso v. Gonzales*, 429 F.3d 1195, 1203 (9th Cir. 2005) (“As a general matter, an issue is ‘deemed waived if it is raised for the first time in a supplemental brief.’”) (quoting *Devereaux v. Abbey*, 263 F.3d 1070, 1079 (9th Cir. 2001)). Even if the argument were not waived, the fact that neither the district court nor Plaintiffs made it before now confirms that the instructions adequately conveyed the prohibition against punishing Ford for the effects of its conduct on non-parties.

b. The proposed instructions did not misstate the law.

Plaintiffs argue that Ford’s proposed Jury Instruction No. 10 misstated the law by failing to inform the jury that, in assessing reprehensibility, it could consider both extraterritorial conduct and harm suffered by in-state and out-of-state non-parties. (Pl. Supp. Br. 6.) Plaintiffs contrast Ford’s proposed instructions in this respect to the proffered instruction in *Williams*, which explained that the jury could consider harm to non-parties “in determining what [the] reasonable

relationship is.” *Id.* at 7 (quoting *Williams*, 127 S. Ct. at 1064 (in turn quoting defendant’s proposed instruction)).¹

This argument ignores that Ford was proposing *limiting* instructions in “prohibitory” form. *See generally* 21A WRIGHT & GRAHAM, FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 5066, at 350-352 (2006) (discussing “prohibitory” instructions). Ford’s proposed harm-to-non-parties instruction set forth a limited restriction—the prohibition against punishing Ford for conduct harming non-parties—which left the jury free to rely on the evidence of conduct affecting third parties for other purposes, including the determination of reprehensibility.

Instructions phrased in a “prohibitory” form—*i.e.*, instructions advising the jury of restrictions on the use of evidence—are perfectly appropriate. *See, e.g.*, *Borunda v. Richmond*, 885 F.2d 1384, 1388 (9th Cir. 1988) (“Rule 105 . . . entitles the opponent to an instruction cautioning the jury to the possibility of forbidden use and admonishing them not to use it for that purpose.”); 21A WRIGHT & GRAHAM, *supra*, § 5066, at 351. Thus, Ford was not under any obligation to qualify its harm-to-non-parties instruction by stating that evidence of conduct toward, and harm to, non-parties may be considered in assessing reprehensibility.

¹ Plaintiffs’ reliance on this aspect of the proposed *Williams* instruction is ironic in the extreme, given that they successfully opposed Ford’s reasonable-relationship instruction.

If Plaintiffs wanted to include such an “affirmative” (21A WRIGHT & GRAHAM, *supra*, § 5066, at 350) statement in the instructions, *they* should have requested it.

Plaintiffs also argue that Ford’s proposed Jury Instruction No. 10 is “very misleading” because “*Williams* does permit the jury to ‘punish’ Ford for conduct directed to persons other than the Whites to the extent that it may increase its punitive damages award based on a determination that such conduct evidences a higher degree of reprehensibility.” (Pl. Supp. Br. 7.) The scare quotes around the word “punish” speak volumes, reflecting the Whites’ awareness that their argument is inconsistent with *Williams*’ distinction between directly punishing for conduct and considering that conduct in the reprehensibility calculus.² Thus, what is misleading and incorrect under *Williams* is not Ford’s proposed instruction, but, rather, Plaintiffs’ criticisms of it.

2. The failure to give the proposed instructions was erroneous and harmful.

Plaintiffs also argue that the district court’s refusal to give a harm-to-non-parties instruction either was not erroneous or was harmless error because the district court did give an extraterritoriality instruction, and “all of the harm to non-

² Justice Stevens made precisely the same argument as Plaintiffs in his dissent. *See* 127 S. Ct. 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 harms.”). The majority necessarily rejected that argument.

parties occurred in states other than Nevada.” (Pl. Supp. Br. 8.) Thus, according to Plaintiffs, there was no “‘unreasonable and unnecessary risk’ that a jury, ‘in taking account of harm caused others under the rubric of reprehensibility, also seeks to punish the defendant for having caused injury to others.’” (*Id.* at 9 (quoting *Williams*, 127 S. Ct. at 1065).) This is revisionist history.

Plaintiffs concede that they relied on a 1999 document detailing 54 injuries that “did not specify the states where the accidents occurred.” (*Id.* at 10 n.3.) Thus, based on this document alone, there was an “unreasonable and unnecessary risk” that the jury thought that there were injured Nevadans and that it could punish for them. Moreover, Plaintiffs’ counsel repeatedly speculated about possible injuries in addition to the ones that were in evidence. During closing argument, for example, he stated:

And we know that as of January of ’99 there were
1149 rollaways and 54 injuries.

* * * *

How many people were really injured across this
country and really killed, and how many have been
injured since January of ’99? Five years have interceded
since.

We never got those figures, did we?

(AER 2; *see also id.* (“How many people got injured along the way there?”); *id.* at AER 9-10 (“They know there are not less than 54 people as of January of ’99 who

were injured from a rollaway. They know that Walter White was killed from that. God knows how many others there are that they haven't owned up to.”.)

As with the evidence of the 54 injured people, the argument that there likely were many more people who were injured since 1999 was rife with risk that jurors would assume that other Nevadans had been injured and that Ford could and should be punished for the state-wide effects of the conduct. The extraterritoriality instruction did not protect against that risk. Accordingly, the district court's refusal to give a harm-to-non-parties instruction was error, and the error was not harmless.

B. The Reasonable-Relationship Instruction

In response to our contention that a reasonable-relationship instruction would have reinforced the prohibition against punishing for non-party harms recognized in *Williams*, Plaintiffs again deny that there was any evidence of harm to other Nevadans. (Pl. Supp. Br. 14.) We already have addressed the flaws in this argument (*see* pages 6-8, *supra*) and will not repeat ourselves here.

In response to our contention that a reasonable-relationship instruction is necessary to fulfill the broader mandate of *Williams* to provide juries with “proper legal guidance” (127 S. Ct. at 1064), Plaintiffs argue that “the Court's concern with evidence of harm to non-parties is to ensure that evidence relevant for one purpose—reprehensibility—not be considered for another—determining the harm

to be punished. A reasonable relationship instruction serves no such purpose.” (Pl. Supp. Br. 15.) That argument completely misses our point, which is that *Williams* bolsters the statements made in *State Farm* about the need to provide juries with clearer guidance on all aspects of their punishment-setting tasks (*see* Ford Br. 38-39 (discussing *State Farm*)).

Furthermore, Plaintiffs’ argument is wrong even on its own terms. Ford’s proposed reasonable-relationship instruction stated that any punitive award “must bear a reasonable relationship to the harm that the defendant’s wrongful conduct caused the plaintiffs in this case.” (ER 356.) By limiting the relevant relationship to that between the punitive award and the harm to the plaintiffs, Ford’s proposed instruction would have focused the jury on the harm that properly could be punished, thereby underscoring the principle that “evidence relevant for one purpose—reprehensibility—not be considered for another—determining the harm to be punished.”

Plaintiffs also argue that *Williams* affords states “‘flexibility’ to determine the ‘*kind* of procedures they will implement’ to ensure that punitive awards comport with due process,” and suggest that it therefore is perfectly acceptable for courts to continue to keep juries in the dark about the reasonable-relationship

requirement. (Pl. Supp. Br. 14 (quoting *Williams*, 127 S. Ct. at 1065).)³ But the Supreme Court modified “flexibility” with “some,” which plainly does not authorize courts to do *nothing*. Moreover, what the Court likely had in mind was a choice between excluding evidence entirely and allowing it subject to a limiting instruction. It surely did not intend to allow courts to continue providing inadequate guidance as part of the “flexibility” it reposed in the states. In any event, this is a federal case governed by federal law, and the course Plaintiffs propose is an undesirable one that should not be endorsed by this Court.

C. The Refusal to Allow the Jury to Know the Amount of Compensatory Damages Awarded in the First Trial

We argued in our supplemental brief (at 10) that *Williams* supports reversal because the district court’s refusal to allow the jury to know the amount of compensatory damages “add[ed] a near standardless dimension to the punitive damages equation.” *Williams*, 127 S. Ct. at 1063. Plaintiffs offer nothing more than *ipse dixit* in response. But even without *Williams*, the district court’s inexplicable decision to keep the jury in the dark about the amount of the compensatory damages is the most glaring error in the case.

³ In so arguing, Plaintiffs again invoke *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996). But they fail to respond to our argument (Ford’s Supp. Br. 9 n.2) that, insofar as *BMW* and *State Farm* did not already undermine *Hilao*, *Williams*’s declaration that “it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance” (127 S. Ct. at 1064) surely does.

D. Excessiveness

Plaintiffs respond to our argument that *Williams* undermines their reliance on the ratios in *Williams* and *Bullock v. Philip Morris USA, Inc.*, 42 Cal. Rptr. 3d 140 (Cal. Ct. App. 2006), by saying that nobody knows what will happen to the award in *Williams* on remand or what the California Supreme Court will do in *Bullock*. (Pl. Supp. Br. 18.) This uncertainty does not help Plaintiffs. They, not Ford, were relying on those cases.

Plaintiffs also argue that *Williams* “offers no additional guidance” on the excessiveness inquiry in this case because “there was neither evidence nor argument concerning intrastate harm.” (Pl. Supp. Br. 16; *see also id.* at 18 (“To the extent that either [the *Williams* or *Bullock*] court reduces an award based on a concern that the jury punished for harm to non-parties, there is no such concern in this case for the reasons explained above.”).) As discussed above (at 6-8), the premise of this argument is false.

In response to our contention that the sheer size of the award in this case implicates the Supreme Court’s concern about the imposition of a single state’s (or jury’s) policies upon other states (Ford’s Supp. Br. 11-12), Plaintiffs argue that there is no reasonable prospect that Ford could be subject to a \$52 million punitive award in each of the 50 states. (Pl. Supp. Br. 17.) This argument misses the point.

Our argument is a variant of the “internal consistency” test used by the Supreme Court to determine whether state taxes violate the Commerce Clause. The test *hypothesizes* that each state will replicate the tax; it does not *require* that each state actually do so.⁴ The question is whether the tax’s “identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax.” *Oklahoma Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995).

Our point is much the same here. If every state (or even the substantial majority of states that do not prohibit or cap punitive damages) were to replicate the \$52,000,000 punitive award in this case, the ensuing aggregate punishment would greatly exceed what any reasonable person would consider necessary to punish and deter on a national basis. It follows that \$52,000,000 is excessive for one plaintiff, and necessarily implicates the Supreme Court’s concern about awards being “sufficiently large” as to “impose one State’s (or one jury’s) ‘policy choice’”

⁴ For this reason, Plaintiffs’ argument that Ford has failed to show that there is any risk of other punitive awards (Pl. Supp. Br. 17-18) is not only wrong but also beside the point.

“upon ‘neighboring States’ with different policy choices.” *Williams*, 127 S. Ct. at 1062.

Finally, Plaintiffs refer to three cases that allegedly support the entire punitive award in this case. (Pl. Supp. Br. 18-20.) It is unclear what bearing these cases have on the issue that this Court has asked the parties to brief, but in any event they do not help Plaintiffs here.

Seltzer v. Morton, ___ P.3d ___, 2007 WL 735692 (Mont. Mar. 12, 2007), is a malicious prosecution case involving far lower punitive damages (\$9,900,000 reduced from \$20,000,000) and a lower ratio (9:1) than here. Moreover, according to the Montana Supreme Court, the defendants’ conduct in *Seltzer* was “uniquely egregious.” *Seltzer*, 2007 WL 735692, at *44. The *Seltzer* defendants knowingly filed a groundless lawsuit against an art authenticator in an effort to coerce him to “lie” about the authenticity of a painting so that it could be sold “as an authentic Russell to an unsuspecting buyer.” *Id.* at *14, *15. The court found that “the manifest and acknowledged objective of the lawsuit was not to obtain an adjudication of the merits . . . but rather to threaten Seltzer and force a negotiated retraction and disavowal of his opinion.” *Id.* at *43. The court also found that the defendants engaged in discovery abuses to undermine Seltzer’s ability to defend himself and “literally demanded that Seltzer lie, under oath, about his true

conviction” about the authenticity of the painting. *Id.* In short, the defendants in Seltzer acted with the *specific intent to injure* the plaintiff.

The same is true of *L-3 Communications Corp. v. OSI Systems, Inc.*, 2007 WL 576124 (S.D.N.Y. Feb. 23, 2007). In that case, which has yet to undergo appellate review, there was clear and convincing evidence “that L-3 had engaged in fiduciary fraud with malice, oppression, and intentional fraud. . . . L-3 placed itself in a superior position and placed OSI in a vulnerable or inferior position. Thereafter, L-3 abused its position by withholding information, changing the presentation of significant financial data, trying to sell to third parties what OSI was to receive, and other similar conduct.” *Id.* at *9. Moreover, the key actor for L-3 “apparently detested” the CEO of OSI; his actions were motivated by his personal animosity toward OSI. *Id.* at *3. Hence, here again, the tort was attended by a specific intent to injure born out of actual malice.

In contrast, the conduct for which Ford is being punished—a delay in warning about and remedying a phenomenon (“spontaneous disengagement”) the very existence of which was the subject of serious debate in the engineering community (*see* Ford Br. 8-9)—did not involve any intent to injure. Although the first jury found that the delay resulted in a tragic death, that fact alone cannot make Ford’s conduct especially egregious; if it could, every product-liability case resulting in a death or serious injury could be said to rise so high on the

reprehensibility spectrum as to warrant a double-digit ratio of punitive to compensatory damages. What matters most in gauging reprehensibility is state of mind, and a specific intent to cause harm surely is more culpable than Ford's non-iniquitous failure to warn about and expeditiously remedy a defect, especially when, as here, the remedy for the defect would eliminate the component's safety benefits (*see White v. Ford Motor Co.*, 312 F.3d 998, 1003 (9th Cir. 2002), *amended by* 335 F.3d 833 (9th Cir. 2003)).

Finally, *Buell-Wilson v. Ford Motor Co.*, 141 Cal. App. 4th 525 (2006), *petition for cert. filed*, 75 U.S.L.W. 3409 (U.S. Jan. 30, 2007) (No. 06-1068), does not help Plaintiffs because the ratio of punitive to compensatory damages there is slightly more than 2:1. Moreover, because even that ratio is excessive under the circumstances of the case—including the facts that (i) Ford had prevailed in eleven prior cases involving the same alleged defect, (ii) the design comported with federal safety standards, and (iii) at the time of the design decision, there was a genuine dispute among experts about the relative merits of the design in question vis-à-vis its alternatives—Ford has filed a petition for *certiorari*. One of the issues raised in that petition is the failure of the district court to give a harm-to-non-parties instruction. Accordingly, *Buell-Wilson* is hardly solid support for the punitive award here.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

Supplemental Brief:

By order dated February 26, 2007, the Court ordered that Defendant-Appellant Ford Motor Company may file a supplemental reply brief of no more than 3,500 words.

The brief is

Proportionally spaced, has a type face of 14 points or more and contains 3,499 words

or is

Monospaced, has 10.5 or few characters per inch and

Contains _____ words or _____ lines of text.

Dated: April 11, 2007

Adam C. Sloane

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on 11th day of April, 2007, I served 2 copies of the attached Supplemental Reply Brief of Defendant-Appellant Ford Motor Company, by express courier addressed to counsel as follows:

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