

IN THE COURT OF APPEALS OF THE STATE OF OREGON

**PAUL SCOTT SCHWARZ, Personal
Representative of the Estate Of
Michelle Schwarz,**

Plaintiff-Respondent,

vs.

**PHILIP MORRIS USA INC., a foreign
corporation,**

Defendant-Appellant

and

**ROTHS I.G.A. FOOD LINER,
INCORPORATED,**

Defendant.

Multnomah County Circuit Court
Case No. 0002-01376
CA A152354

**DEFENDANT-APPELLANT PHILIP
MORRIS USA INC.'S OPENING
BRIEF AND EXCERPT OF
RECORD**

Circuit Court for Multnomah County
The Honorable, Judge Henry Kantor

William F. Gary, OSB #770325
william.f.gary@harrang.com
Sharon A. Rudnick, OSB #830835
sharon.rudnick@harrang.com
J. Aaron Landau, OSB #094135
aaron.landau@harrang.com
HARRANG LONG GARY RUDNICK P.C.
360 East 10th Avenue, Suite 300
Eugene, OR 97401-3273
(541) 485.0220

James Dumas, OSB #771671
jdumas@lindsayhart.com
LINDSAY HART NEIL & WEIGLER
LLP
1300 SW 5th Avenue, Suite 3400
Portland, OR 97201
(503) 548-6135

Frank Kelly, III, *Pro Hac Vice*
fkelly@shb.com
SHOOK, HARDY & BACON LLP
1 Montgomery Street, Suite 2700
San Francisco, CA 94104-4505
(415) 544-1948

Robert A. McCarter, III, *Pro Hac Vice*
rmccarter@shb.com
SHOOK, HARDY & BACON L.L.P.
1155 F Street NW, Suite 200
Washington, D.C. 20004-1305
(202) 639-5638

Lauren R. Goldman, *Pro Hac Vice*
lrgoldman@mayerbrown.com
Scott A. Chesin, *Pro Hac Vice*
sachsin@mayerbrown.com
Michael Rayfield
mrayfield@mayerbrown.com
MAYER BROWN LLP
1675 Broadway
New York, NY 10019
(212) 506-2647

Of Attorneys for Defendant-Appellant

Charles S. Tauman, OSB #773710
ctauman@aol.com
CHARLES S. TAUMAN PC
PO Box 19631
Portland, OR 97280
(503) 849-9281

D. Lawrence Wobbrock, OSB #773917
lwobbrock@wobbrock.com
LAWRENCE WOB BROCK P.C.
2151 Crest Drive
Lake Oswego, OR 97034
(503) 349-4141

James Coon, OSB #771450
jcoon@stc-law.com
SWANSON THOMAS & COON
820 SW Second Ave., Suite 200
Portland, OR 97204
(503) 228-5222

Richard A. Lane, OSB #862271
rlane@richardlanelaw.com
RICHARD A. LANE ATTORNEY AT LAW
707 SW Washington St Ste 600
Portland, OR 97205
(503) 228-6600

Of Attorneys for Plaintiff-Respondent

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
I. STATEMENT OF THE CASE	2
A. Nature Of The Action And Relief Sought	2
B. Nature Of The Judgment.....	2
C. Basis Of Appellate Jurisdiction.....	2
D. Effective Date For Appellate Purposes.....	2
E. Questions Presented On Appeal.....	3
F. Summary Of Argument.....	3
II. STATEMENT OF FACTS.....	7
A. Plaintiff’s Complaint.....	7
B. The First Trial.....	7
C. The First Appeal.....	8
D. The Retrial.....	9
III. FIRST ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED IN REFUSING TO REDUCE THE PUNITIVE DAMAGES AWARD PURSUANT TO ORS 31.730(2) AND (3) BECAUSE THE AWARD IS ARBITRARY AND EXCESSIVE, IN VIOLATION OF OREGON LAW AND FEDERAL DUE PROCESS.....	13
A. Preservation Of Error	13
B. Standard Of Review	13
C. Argument.....	14
1. The Record In This Case Cannot Support More Than A Nominal Award.....	16

2.	The Punitive Award Is Grossly And Unconstitutionally Excessive.....	22
3.	This Court Should Order An Unconditional Reduction Of The Punitive Award Under ORS 31.730(2) and (3).....	32
IV.	SECOND ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED IN FAILING TO GIVE PM USA’S REQUESTED INSTRUCTION THAT THE AMOUNT OF PUNITIVE DAMAGES HAD TO BE REASONABLY RELATED TO PLAINTIFF’S HARM.....	33
A.	Preservation of Error	33
B.	Standard of Review	34
V.	THIRD ASSIGNMENT OF ERROR: THE INSTRUCTIONS AS GIVEN WERE ERRONEOUS BECAUSE THEY DID NOT INFORM THE JURY THAT ITS AWARD OF PUNITIVE DAMAGES HAD TO BE REASONABLY RELATED TO PLAINTIFF’S HARM.....	35
A.	Preservation Of Error	35
B.	Standard Of Review	36
C.	Combined Argument On Instructional Error (Assignments 2 and 3).....	36
1.	The Proposed Instruction Correctly Stated The Law And The Failure To Give It Substantially Affected PM USA’s Rights.	36
2.	The Instructions As Given Were Misleading.	38
VI.	FOURTH ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED IN DENYING PM USA’S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL, BECAUSE PLAINTIFF FAILED TO ESTABLISH THE PREREQUISITES TO PUNITIVE LIABILITY UNDER ORS 31.730(1).	40
A.	Preservation Of Error	40

B.	Standard Of Review	40
C.	Argument.....	41
VII.	CONCLUSION	43

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Bains LLC v. Arco Prods. Co.</i> , 405 F3d 764 (9th Cir 2005)	24
<i>BMW of N. Am., Inc. v. Gore</i> , 517 US 559, 116 S Ct 1589, 134 L Ed 2d 809 (1996)	23, 36
<i>Boerner v. Brown & Williamson Tobacco Co.</i> , 394 F3d 594 (8th Cir 2005)	23, 25
<i>Boise Cascade Corp. v. State ex rel. Bd. of Forestry</i> , 216 Or App 338, 174 P3d 587 (2007)	43
<i>Bolt v. Influence</i> , 333 Or 572, 43 P3d 425 (2002) (en banc)	21, 25
<i>Brown v. J.C. Penney Co., Inc.</i> , 297 Or 695, 688 P2d 811 (1984)	40
<i>Exxon Shipping Co. v. Baker</i> , 554 US 471, 128 S Ct 2605, 171 L Ed 2d 570 (2008)	25
<i>Fayerweather v. Ritch</i> , 195 US 276, 25 S Ct 58, 49 L Ed 193 (1904)	42
<i>Goddard v. Farmers Ins. Co. of Or.</i> , 344 Or 232, 179 P3d 645 (2008)	16, 23, 25
<i>Hamlin v. Hampton Lumber Mills, Inc.</i> , 349 OR, 246 P3d 1121 (2011).....	24
<i>Hughes v. PeaceHealth</i> , 344 Or 142, 178 P3d 225 (2008)	33
<i>Levinson v. Prentice-Hall, Inc.</i> , 868 F2d 558, 564 (3d Cir. 1989)	37
<i>Motor Co. v. Oberg</i> , 512 US 415, 114 S Ct 2331, 129 L Ed 2d 336 (1994)	16, 38

<i>Ondrisek v. Hoffman</i> , 698 F3d 1020 (8th Cir 2012)	23
<i>Parrott v. Carr Chevrolet, Inc.</i> , 331 Or 537, 17 P3d 473 (2001)	14, 23, 30, 33
<i>Philip Morris USA v. Williams</i> , 549 US 346 (2007).....	16, 37, 38
<i>Roth v. Farner-Bocken Co.</i> , 667 NW2d 651 (SD 2003).....	24
<i>Schwarz v. Philip Morris Inc.</i> , 206 Or App 20, 135 P3d 409 (2006) (en banc)	8
<i>Schwarz v. Philip Morris Inc.</i> , 348 Or 442, 235 P3d 668 (2010)	8
<i>Schwarz v. Philip Morris Inc.</i> , 349 Or 521, 246 P3d 479 (2010)	9, 42
<i>Simon v. San Paolo US Holding Co., Inc.</i> , 113 P3d 63 (Cal. 2005).....	32
<i>State Farm Mut. Auto. Ins. Co. v. Campbell</i> , 538 US 408, 423, 123 S Ct 1513, 155 L Ed 2d 585 (2003)	16, 19, 22, 23, 24, 30, 37, 42
<i>State v. Barnes</i> , 329 Or 327, 986 P2d 1160 (1999)	34, 38
<i>State v. Walker</i> , 223 Or App 554, 196 P3d 562 (2008)	41
<i>Vasquez-Lopez v. Beneficial Or., Inc.</i> , 210 Or App 553, 152 P3d 940 (2007)	14
<i>Waddill v. Anchor Hocking, Inc.</i> , 190 Or App 172, 78 P3d 570 (2003)	23
<i>Wallach v. Allstate Ins. Co.</i> , 344 Or 314, 180 P3d 19 (2008)	36, 38
<i>Waterway Terminals v. P.S. Lord</i> , 256 Or 361, 474 P2d 309 (1970)	35

<i>Westwood Constr. Co. v. Hallmark Inns & Resorts, Inc.</i> , 182 Or App 624, 50 P3d 238 (2002)	42
<i>Williams v. Philip Morris Inc.</i> , 340 Or 35, 127 P3d 1165 (2006)	25
<i>Williams v. Philip Morris Inc.</i> , 344 Or 45, 176 P3d 1255 (2008)	16, 17

Statutes

ORS 19.205	2
ORS 30.925(2)	1, 5, 17
ORS 30.925(2)(a)-(b).....	19
ORS 30.925(2)(c).....	20
ORS 30.925(2)(d)	20
ORS 30.925(f).....	19
ORS 31.730.....	33
ORS 31.730(1)	3, 6, 40, 41
ORS 31.730(2)	13, 32, 42
ORS 31.730(2) and (3).....	6, 13, 32
ORS 31.730(3)	13, 32

Other Authorities

Del. Pattern Jury Instr. § 22.15 (2000);	37
Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009)	29, 31
N.J. Model Civil Jury Charges 8.46 (2010);.....	37
ORCP 63	6, 40
ORCP 63C and 64B(5)	40
Oregon Constitution, Article I, section 17.....	33

INTRODUCTION

In the first trial of this case, the jury awarded plaintiff \$168,515 in compensatory damages and \$150 million in punitive damages. The compensatory award was affirmed on appeal, but the punitive award was vacated and the case remanded for a new trial limited to amount of punitive damages. On remand, plaintiff sought punitive damages on a single claim: the allegation that PM USA had misrepresented the relative health risks associated with “low-tar” cigarettes. But plaintiff then made a startling and unexplained tactical decision: it introduced no evidence regarding that conduct during its case-in-chief, limiting its presentation to the first jury’s bare verdict of fraud; evidence of defendant Philip Morris USA Inc.’s (“PM USA”) finances; and evidence of the period during which PM USA sold Merit cigarettes, the brand decedent smoked. The retrial jury awarded \$25 million in punitive damages—148 times the compensatory award.

Under these unique circumstances, the punitive award cannot stand. The second jury had no evidence from which it could evaluate the character of defendant’s conduct or apply the criteria set forth in ORS 30.925(2). The award is both wholly arbitrary and unconstitutionally excessive: the record cannot support *any* substantial award of punitive damages, and certainly cannot support an award of \$25 million.

I. STATEMENT OF THE CASE

A. Nature Of The Action And Relief Sought

The Estate of Michelle Schwarz brought this action against PM USA seeking compensatory and punitive damages for Mrs. Schwarz's death from lung cancer. The jury returned a verdict for plaintiff and awarded compensatory and punitive damages.

On appeal, this court and the Supreme Court affirmed the compensatory damages portion of the judgment, vacated the punitive damages, and remanded for a partial new trial limited to the amount of punitive damages. After plaintiff abandoned its claim for punitive damages based on negligence and strict liability, the retrial jury awarded punitive damages of \$25 million on plaintiff's remaining fraud count.

B. Nature Of The Judgment

The trial court entered a general judgment and money awards for compensatory damages based upon the jury's verdict in the first trial and for punitive damages in the amount determined by the retrial jury.

C. Basis Of Appellate Jurisdiction

Appellate jurisdiction is based on ORS 19.205.

D. Effective Date For Appellate Purposes

Judgment was entered on August 27, 2012. The Notice of Appeal was served and filed on September 4, 2012.

E. Questions Presented On Appeal

1. Whether, as a matter of Oregon law and federal due process, a punitive award of \$25 million is adequately supported by a record that contains little more than another jury's verdict of fraud, evidence of the defendant's finances, and the defendant's mitigating evidence; or whether the award must be reduced on the ground that it is arbitrary and/or excessive.

2. Whether, under Oregon law and federal due process, the jury should have been instructed upon defendant's request that the amount of punitive damages awarded had to be reasonably related to the harm suffered by plaintiff.

3. Whether, under Oregon law and federal due process, the instructions as given were erroneous because they did not state that the amount of punitive damages awarded had to be reasonably related to the harm suffered by plaintiff.

4. Whether punitive damages may be awarded absent a showing that any factfinder has ever determined that the conduct in question satisfies the elements of punitive liability under ORS 31.730(1).

F. Summary Of Argument

Before the retrial, plaintiff made a tactical decision to introduce virtually no evidence of the alleged low-tar fraud that was the sole remaining basis for punitive liability, and instead to seek an inflated punitive award based

principally on allegations and evidence that had nothing to do with the amount of punitive damages necessary to punish and deter the conduct that harmed Michelle Schwarz. Plaintiff's strategy had three parts.

First, plaintiff decided not to pursue punitive damages based on its strict-liability and negligence claims, leaving only the allegation that PM USA made misrepresentations about low-tar cigarettes.

Second, plaintiff put on what it called a "streamlined case." The jury heard no evidence of what PM USA's alleged misrepresentations about low-tar cigarettes actually were, how they were made, whom they affected, how often they were made, or for how long they were made. Plaintiff's case-in-chief comprised only three elements: the first jury's fraud verdict; purported evidence of PM USA's finances; and evidence of the period during which PM USA sold Merit cigarettes, the low-tar brand Mrs. Schwarz smoked.

Third, on cross-examination of the defense witnesses, plaintiff elicited little evidence having anything to do with PM USA's marketing of low-tar cigarettes. Instead, plaintiff focused almost exclusively on allegations that PM USA had misrepresented the health hazards associated with smoking generally and the addictive properties of nicotine—conduct for which the first jury had expressly found PM USA *not* liable. Plaintiff then presented a rebuttal case limited to short excerpts from four documents, none of which could have assisted the jury's evaluation of the alleged low-tar fraud.

Plaintiff's strategy succeeded. The jury awarded \$25 million in punitive damages—148 times the compensatory award. But that award is legally defective under both Oregon law and federal due process and must be set aside.

1. The punitive award is wholly arbitrary. Plaintiff adduced no evidence from which the retrial jury could rationally have determined an appropriate amount of punitive damages to punish and deter PM USA's alleged low-tar fraud. Such evidence was required by ORS 30.925(2), which sets forth criteria that a jury must consider in setting punitive damages, and by federal due process, which prohibits the imposition of arbitrary punishments and punishment for conduct that did not harm the plaintiff. The record cannot support more than a nominal award of punitive damages. *See* Part III.C.1.

Plaintiff's evidentiary failures aside, the award cannot stand for another reason: it is grossly excessive and far exceeds the amount necessary today to punish and deter the past conduct that harmed Mrs. Schwarz. A ratio of punitive to compensatory damages greater than 9:1—and surely the 148:1 ratio in this case—is presumptively unconstitutional under well-established U.S. and Oregon Supreme Court precedent. In 2006, the Oregon Supreme Court found a limited exception to this rule in “extreme and outrageous” cases where the plaintiff demonstrates that the defendant's conduct is “extraordinarily reprehensible,” but plaintiff did not even attempt to meet that burden here. *See* Part III.C.2.

ORS 31.730(2) and (3) instruct a court to “reduce” a punitive damages award if it is not within the range “that a rational juror would be entitled to award based on the record as a whole.” Such action, rather than a remittitur, would not implicate any constitutional jury trial right because this is a wrongful death case. *See* Part III.C.3.

2. The court refused to give PM USA’s requested instruction that the amount of punitive damages must be reasonably related to the harm suffered by Mrs. Schwarz. PM USA’s proposed instruction correctly stated the law and was essential to effective enforcement of the due process principle that punishment must be limited to the harm done to the plaintiff. Both the refusal to give PM USA’s requested instruction, *see* Part IV, and the instructions ultimately given, *see* Part V, constituted prejudicial error.

3. PM USA is entitled to JNOV, or, in the alternative, a new trial, pursuant to ORCP 63. Under ORS 31.730(1), punitive damages cannot be awarded absent a predicate finding that the defendant’s conduct was undertaken with “reckless and outrageous indifference to a highly unreasonable risk of harm and * * * with a conscious indifference to the health, safety and welfare of others.” There can be no assurance that the first jury made such a finding with respect to low-tar fraud specifically, nor was the retrial jury asked to do so. *See* Part VI.

II. STATEMENT OF FACTS

A. Plaintiff's Complaint

Plaintiff sued PM USA in February 2000, alleging that Mrs. Schwarz had contracted lung cancer and died as a result of smoking cigarettes manufactured by PM USA. Plaintiff asserted claims of strict product liability, negligence, and fraud, and sought compensatory and punitive damages. ER-1-7. The complaint asserted four separate theories of fraud: that PM USA (1) made false representations about the link between smoking and disease; (2) made false representations about the addictiveness of cigarettes; (3) made false representations that “low-tar” cigarettes,¹ including the Merit cigarettes that Mrs. Schwarz smoked, were safer than regular cigarettes and presented an alternative to quitting; and (4) voluntarily assumed, and breached, a duty to disclose all research regarding smoking and health to consumers. ER-5 at ¶¶ 14-16.

B. The First Trial

The case initially went to trial (“*Schwarz I*”) in February 2002. The jury returned a verdict for plaintiff on all three of its claims. Answering special interrogatories, the jury specifically found that PM USA was *not* liable on two of plaintiff’s theories of fraud: the disease-causation and addiction theories.

¹ As of June 22, 2010, the Family Smoking Prevention and Tobacco Control Act prohibits the use of “light,” “mild,” “low,” or similar descriptors, and PM USA no longer uses them. All references to products with such descriptors are for historical purposes only.

The jury did find PM USA liable on the low-tar and assumed-duty theories. ER-11. It awarded plaintiff \$118,514 in economic damages, \$50,000 in non-economic damages, and separate punitive awards on each of plaintiff's claims totaling \$150 million. ER-9-10, 12. The verdict form did not specify whether the punitive damages award for fraud was based on the low-tar theory, the assumed-duty theory, or both. *See* ER-11-12.

The trial court entered judgment for the full amount of compensatory damages but reduced the punitive award to \$100 million “for all of plaintiff’s claims.” *Schwarz I* Money Judgment (May 10, 2002), at 6.

C. The First Appeal

Both parties appealed. *See Schwarz v. Philip Morris Inc.*, 206 Or App 20, 23, 135 P3d 409 (2006) (en banc) (“*Schwarz II*”). This court affirmed the compensatory award but vacated the punitive damages. *Id.* It determined that the “assumed duty” theory of fraud should not have been submitted to the jury and that the trial court had erred by refusing several of PM USA’s proposed instructions on punitive damages. *See id.* at 41, 57. The court “remand[ed] for a new trial on the amount of punitive damages,” mooted plaintiff’s cross-appeal. *Id.* at 57-58, 67.

The Supreme Court granted plaintiff’s petition for review, affirmed the decision to vacate the punitive award, and remanded “for a new trial limited to the question of punitive damages.” *Schwarz v. Philip Morris Inc.*, 348 Or 442,

460, 235 P3d 668 (2010) (“*Schwarz III*”). On reconsideration, the court “clarif[ied] that the issue on remand [wa]s not whether defendant [wa]s liable for punitive damages, but rather * * * the correct amount of those damages”; the court reasoned that “[b]y awarding punitive damages in any amount, the jury necessarily found that * * * defendant was liable for punitive damages.”

Schwarz v. Philip Morris Inc., 349 Or 521, 523, 246 P3d 479 (2010) (“*Schwarz IV*”).

D. The Retrial

On remand, plaintiff announced that it would pursue a “streamlined case.” ER-17-19. Plaintiff voluntarily dismissed its claim for punitive damages based on negligence and strict liability, leaving only the low-tar fraud theory as a potential basis for punitive damages. ER-24-25 at ¶ 17; Tr. 453. Plaintiff further announced that it intended to present little or no evidence regarding the alleged low-tar fraud, *see* ER-18, and sought to preclude PM USA from adducing its own proof regarding the nature of that conduct, *see* Pl. Mots. *in Limine* (Dec. 23, 2011) at 3-5.

The trial court warned plaintiff that the first jury’s verdict of fraud, standing alone, was insufficient to allow the retrial jury to carry out its task. Tr. 446. In that verdict, the jury had answered “Yes” to the question:

Did Philip Morris make false representations that “low tar” cigarettes delivered less tar and nicotine to the smoker and were therefore safer and healthier than regular cigarettes and an alternative to quitting

smoking upon which Michelle Schwarz reasonably relied, and if so, were such false representations and reliance a cause of Michelle Schwarz' death?

ER-11. The court told plaintiff that, in addition to this finding, the retrial jury needed to be given "context" and "information" about the conduct at issue. Tr. 935-36. In an effort to provide that context, the court permitted PM USA to defend itself by showing that the public health community had encouraged the development of low-tar cigarettes. *Id.* 1128.

Despite that warning, plaintiff's case-in-chief included none of the evidence about the alleged low-tar fraud that the first jury had seen. Plaintiff introduced only the first jury's low-tar fraud verdict, evidence of PM USA's purported financial resources, and evidence of the length of time during which PM USA sold Merit cigarettes. When PM USA moved for directed verdict, plaintiff argued that "the first jury's verdict," standing alone, "would allow the jury to determine the amount of punitive damages." Pl. Resp. to Def. Mot. For Directed Verdict (Feb. 9, 2012) at 5.

Virtually all of the evidence at trial regarding PM USA's development and marketing of low-tar cigarettes was introduced by the defense. PM USA's medical historian, Dr. Peter English, testified without contradiction that articles published as early as the 1950s disclosed that lower levels of tar should reduce health risks, but that smokers might not receive the benefits of low-tar cigarettes if they "compensated" for the lower delivery by smoking more cigarettes or by

changing their smoking behavior (*e.g.*, by taking more puffs or inhaling more deeply). *See, e.g.*, Tr. 3080-86, 3092-93. He testified that PM USA developed low-tar cigarettes because “public health organizations asked” it to do so in an effort to mitigate the health risks of smoking. *Id.* 3445. Dr. English explained that the Federal Trade Commission (“FTC”) developed a method for measuring the amount of tar and nicotine in a cigarette, using a machine that would “smoke” a cigarette in a standardized fashion. *Id.* 3144-45. He testified that PM USA and other tobacco companies warned the FTC that its method failed to properly account for the manner in which human smokers actually ingest smoke from a cigarette. *Id.* 3146-48. The FTC decided to use the method anyway. *Id.* 3149.

On cross-examination of Dr. English, plaintiff introduced a number of decades-old industry statements on the general link between smoking and health. *See, e.g., id.* 3451-56. These statements formed only “a small part” of “the vast amount of material in the media deal[ing] with the problems of smoking and disease,” *id.* 3461-62, and had nothing to do with the development and marketing of low-tar cigarettes. Plaintiff also attempted to impeach Dr. English’s testimony by asking him whether he had considered certain internal PM USA documents discussing compensation and the FTC method, topics he had discussed at length on direct examination. *See, e.g., id.* 3480-87, 3493-3500.

Richard Jupe, PM USA's Director of Product Development, then testified that PM USA developed low-tar cigarettes to mitigate the health risks of smoking. *See, e.g., id.* 3811. He described numerous studies conducted by PM USA in the 1970s and 1980s showing that low-tar cigarettes delivered less overall tar and nicotine to smokers, and that compensation did not necessarily eliminate this benefit. *See id.* 3845-50, 3864-68. He recounted the ways in which PM USA voluntarily disseminated public messages about low-tar cigarettes and the risk of compensation. *See id.* 3869-81. And he described the federal government's pervasive regulation of the tobacco industry today. *See id.* 3881-96, 4644-48.

Plaintiff attempted to impeach Mr. Jupe using a handful of industry statements about the general link between smoking and health. *See, e.g., id.* 4071-73. Plaintiff also asked Mr. Jupe a few questions about the warnings that PM USA placed on packages of low-tar cigarettes in 2002, *see id.* 4063-66, and about the FTC method of measuring tar and nicotine yields, *see, e.g., id.* 4146-50.

Plaintiff called no witnesses in its rebuttal case. It introduced short excerpts from four documents and then rested. *See id.* 4385-87.

The jury awarded punitive damages of \$25 million. PM USA's post-trial motions were denied.

III. FIRST ASSIGNMENT OF ERROR: The trial court erred in refusing to reduce the punitive damages award pursuant to ORS 31.730(2) and (3) because the award is arbitrary and excessive, in violation of Oregon law and federal due process.

A. Preservation Of Error

PM USA argued below that “plaintiff failed to adduce evidence from which the jury could have determined, in a rational and non-arbitrary manner as required by due process, the amount of punitive damages necessary to punish and deter the conduct that harmed Mrs. Schwarz,” and that “[a]ny award above a nominal amount is arbitrary and violates due process.” ER-40, 42.

PM USA also argued, alternatively: “The Court should at the very least reduce, or, in the alternative, remit the jury’s \$25 million award pursuant to ORS 31.730(2) because it is grossly and unconstitutionally excessive. The maximum constitutionally-permissible award in this case can be no more than nine times the amount of compensatory damages, or \$1,516,626.” ER-41.

The trial court rejected these requests. ER-44 (“Defendant’s motion to reduce the jury’s punitive damages award under ORS 31.730(2) and the Due Process Clause of the United States Constitution is denied * * *”).

B. Standard Of Review

ORS 31.730(2) requires a trial court to “review [a punitive damages] award to determine whether the award is within the range of damages that a rational juror would be entitled to award based on the record as a whole.” If not, the trial court has the authority to “reduce” it. ORS 31.730(3).

The court “must resolve all disputes regarding facts and factual inferences in favor of the jury’s verdict and then determine, on the facts as the jury was entitled to find them, whether the award violates the legal standard of gross excessiveness.” *Parrott v. Carr Chevrolet, Inc.*, 331 Or 537, 556-57, 17 P3d 473 (2001). Excessiveness is a legal issue reviewed for error of law. *Vasquez-Lopez v. Beneficial Or., Inc.*, 210 Or App 553, 582, 152 P3d 940 (2007). “The reviewing court’s examination * * * is limited to the evidence that was before the jury.” *Parrott*, 331 Or at 557.

C. Argument

Ordinarily, a jury assessing punitive damages against a defendant has an extensive understanding of the conduct underlying the plaintiff’s claims because that *same* jury will have already determined that the conduct was tortious; that it caused the plaintiff’s injury; the extent of that injury; and that the defendant acted with a punishable state of mind under Oregon law.

In the context of a partial retrial like this one, the situation is fundamentally different. The jury has no prior knowledge of the conduct that is being punished, the harm that it caused, or the degree of the defendant’s culpability. It must instead glean from the evidence it hears and the court’s instructions the information needed to set an appropriate punishment for the harms suffered by the plaintiff.

It is not enough to tell the retrial jury about another jury's finding that the defendant's conduct was tortious and was undertaken with reckless indifference to the consequences.² These bare findings would be a minimum precondition to *any* award of punitive damages, and by themselves cannot help the retrial jury determine *how much* punishment is appropriate in the particular case at hand. Thus, the trial court in this case warned plaintiff that it bore the burden of presenting "information to help the[jury] determine how reprehensible, how bad, how much punishment is necessary." *Id.* 936.

Plaintiff ignored that warning and introduced no evidence that would enable the jury to do its job. As a result, the retrial jury lacked the information it needed to make a rational decision. The record cannot support more than a nominal award—and it certainly cannot support an award of \$25 million.

//

//

² The trial court instructed the retrial jury that the first jury had found, *inter alia*, that PM USA knew its representations were false or had recklessly disregarded their falsity; that Ms. Schwarz had reasonably relied on the misrepresentations; and that she had "suffered injury and death as a direct result" of that reliance. Tr. 4393-94.

Over PM USA's objection, the trial court told the retrial jury that the first jury found that "Philip Morris' conduct demonstrated a reckless and outrageous indifference to a highly unreasonable risk of harm and that Philip Morris acted with a conscious indifference to the health, safety and welfare of others." *Id.* 4394. As we discuss in Part VI, however, there is no assurance that the first jury did in fact find that the low-tar fraud was committed with that state of mind.

1. **The Record In This Case Cannot Support More Than A Nominal Award.**
 - a. **Both Oregon Law And Federal Due Process Protect Against Arbitrary Awards Of Punitive Damages.**

It is a bedrock principle of both Oregon law and federal due process that “[a] defendant should be punished for the *conduct that harmed the plaintiff*, not for being an unsavory individual or business.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 US 408, 423, 123 S Ct 1513, 155 L Ed 2d 585 (2003) (emphasis added); *see also id.* at 422 (conduct “independent from the acts upon which liability was premised[] may not serve as the basis for punitive damages.”); *Goddard v. Farmers Ins. Co. of Or.*, 344 Or 232, 254, 179 P3d 645 (2008) (same). If a jury does not know basic facts about the conduct that harmed the plaintiff, its award necessarily will be arbitrary.

The “risk[] of arbitrariness” is one of “the fundamental due process concerns” animating the U.S. Supreme Court’s punitive damages jurisprudence; the court has repeatedly “emphasized the need to avoid an arbitrary determination of an award’s amount.” *Philip Morris USA v. Williams*, 549 US 346, 352, 354, 127 S Ct 157, 166 L Ed 2d 940 (2007) (“*Williams II*”); *see also State Farm*, 538 US at 416; *Honda Motor Co. v. Oberg*, 512 US 415, 429, 114 S Ct 2331, 129 L Ed 2d 336 (1994); *Williams v. Philip Morris Inc.*, 344 Or 45, 49, 176 P3d 1255 (2008) (“*Williams III*”) (“[T]he amount of punitive damages that a jury awards cannot be arbitrary * * *.”).

Oregon's statutory scheme is designed to reduce the risk of arbitrary awards. ORS 30.925(2) sets forth seven criteria on the basis of which "[p]unitive damages, if any, *shall* be determined and awarded" (emphasis added). These criteria are:

- (a) The likelihood at the time that serious harm would arise from the defendant's misconduct;
- (b) The degree of the defendant's awareness of that likelihood;
- (c) The profitability of the defendant's misconduct;
- (d) The duration of the misconduct and any concealment of it;
- (e) The attitude and conduct of the defendant upon discovery of the misconduct;
- (f) The financial condition of the defendant; and
- (g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct * * *.

ORS 30.925(2). The plaintiff bears the burden of establishing the appropriate amount of punitive damages through proof of these factors, in the aggregate.

See id.; Williams III, 344 Or at 59 (factors are "mandatory").

The retrial jury was therefore instructed to "determine the appropriate amount of punitive damages that is necessary to punish Philip Morris' fraudulent acts as found by the first jury[,] to deter Philip Morris from committing these and similar fraudulent acts in the future[,] and to deter others similarly situated from like conduct in the future." Tr. 4394. The "fraudulent acts" at issue were defined as the conduct forming the basis of plaintiff's low-tar fraud claim. *Id.* 4392-93. The jury was also instructed to consider six of the seven factors set forth in ORS 30.925(2). Tr. 4398. As demonstrated

below, plaintiff's evidence was insufficient to allow the jury to follow these instructions.

b. Any Award Above A Nominal Amount Would Be Arbitrary Because Plaintiff Provided The Jury With No Meaningful Information About The Alleged Low-Tar Fraud.

Because plaintiff decided to present a "streamlined case" limited to the first jury's verdict on low-tar fraud, PM USA's finances, and the length of time PM USA sold Merit cigarettes, the retrial jury heard almost nothing about what the alleged low-tar fraud actually was, and certainly nothing from which it could have deduced the amount necessary to punish PM USA for the harm inflicted on the plaintiff and to further the State's goals of punishment and deterrence.

During its case-in-chief, plaintiff called no witnesses to testify about low-tar fraud and introduced no documents about that conduct. Plaintiff offered no evidence of what, specifically, PM USA's low-tar misrepresentations were; no evidence of how they were made; no evidence of how often they were made; no evidence of their duration; and no evidence of the size of the audience to which they were directed or the effectiveness of any scheme of deception. Nor did plaintiff put on evidence that would have shown what PM USA knew, at what times, about the purportedly false nature of its statements, or to what extent any concealed or misrepresented facts were unknown to the public health community. The jury was thus unable to assess either "[t]he likelihood at the

time that serious harm would arise from the defendant's conduct" or "[t]he degree of the defendant's awareness of that likelihood." ORS 30.925(2)(a)-(b).

Plaintiff did present extensive evidence of PM USA's purported financial condition. Plaintiff's expert, Robert Johnson, testified that PM USA had a net worth of "somewhere around 50 billion dollars," Tr. 2623, and that the company had approximately \$2.6 billion in cash available, *id.* 2616. He pegged PM USA's market capitalization—which had nothing to do with its ability to pay a punitive award (*see id.* 2723)—at \$57.97 billion. *See id.* 2622. And he attempted to "conceptualize" "how big a billion dollars is" by describing a hypothetical scenario in which someone put a billion dollars in the bank on "the day Christ was born" and took out \$1,000 each day until now. *Id.* 2628.

This evidence certainly helps to explain why the jury awarded \$25 million in punitive damages on such a thin evidentiary record: its frame of reference was skewed by a stream of enormous and largely irrelevant figures. But Mr. Johnson's testimony could not help the jury assess the reprehensibility of the low-tar fraud or the need for punitive damages. While this evidence bore on the "financial condition of the defendant," ORS 30.925(f), it had no bearing on PM USA's state of mind and "had little to do with the actual harm sustained by" the plaintiff. *State Farm*, 538 US at 427. The evidence did nothing more than increase the risk that PM USA would be punished for its size.

Although Mr. Johnson testified about the revenues (not profits) generated by all of PM USA's sales of low-tar products (not just Merits), Tr. 2608, 2630-31, 2634, that evidence did not establish the "profitability of the defendant's *misconduct*," ORS 30.925(2)(c) (emphasis added), because plaintiff introduced no evidence regarding the extent of PM USA's allegedly *tortious* conduct. It did not show, for example, the proportion of Merit smokers who (1) smoked Merits in reasonable reliance on PM USA's alleged misrepresentations instead of quitting and (2) unknowingly compensated and thus failed to receive low-tar benefits—let alone the profits derived from sales to those smokers.

For similar reasons, the jury's task was not assisted by plaintiff's evidence on the period of time during which PM USA sold Merit cigarettes. This evidence certainly did not show the "duration of the *misconduct*," ORS 30.925(2)(d) (emphasis added)—that is, the duration of time in which PM USA (1) made intentional misrepresentations about Merit cigarettes that were (2) reasonably relied upon by smokers who (3) unknowingly compensated and thus failed to obtain less tar and nicotine.

Plaintiff did not cure its failure of proof during cross-examination or in its rebuttal case. Plaintiff's cross-examination of PM USA's witnesses was largely focused on allegations that PM USA had concealed the general link between smoking and health—conduct that the first jury *rejected* as a basis for liability in this case. *See, e.g.*, Tr. 3451-55, 4071-72. As explained in Part

III.C.2.c., the handful of documents plaintiff introduced during cross-examination and in rebuttal, none of which was the subject of any material testimony, did not provide the jury with meaningful information about the conduct being punished, and did not come close to curing the deficiencies in plaintiff's case.

The trial court recognized “the lack of evidence that the plaintiff may have offered” in support of its claim for punitive damages, but believed that because PM USA “ha[d] the ability to present *its* evidence,” there was “no due process violation.” Tr. 4201 (emphasis added). That reasoning misses the point. The problem here is not procedural, but a substantive failure by plaintiff to produce any evidence that could satisfy its burden of proof. *See Bolt v. Influence*, 333 Or 572, 579, 43 P3d 425 (2002) (en banc) (plaintiff bears burden of proving amount of punitive damages). PM USA's substantial *mitigating* evidence—which it had no obligation to produce—could not remedy the deficiency in plaintiff's proof.

* * *

The trial court's jury instructions, well-established Oregon law, and federal due process all required the jury to make a rational, non-arbitrary determination of the amount of damages, if any, necessary to deter and punish the conduct that harmed Mrs. Schwarz. As a direct result of plaintiff's tactical

decisions, the jury had no way of conducting such an analysis. The record in this case therefore cannot support anything more than a nominal award.

2. The Punitive Award Is Grossly And Unconstitutionally Excessive.

Even if the jury could properly have awarded *some* non-negligible amount of punitive damages, the amount it *did* award was unconstitutionally excessive. The jury's \$25 million award is a product of the large and irrelevant numbers with which the jury was bombarded, especially the evidence of PM USA's financial resources and the \$300 million sought in the complaint. It bears no relation to the amount necessary, on this record, to punish and deter the conduct that harmed Mrs. Schwarz. Any award more than nine times the amount of compensatory damages (\$1,516,626) would be unconstitutionally excessive.

Courts must consider three primary guideposts to determine whether a punitive damages award is unconstitutionally excessive:

(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.³

³ The third guidepost (the statutory and administrative penalties imposed for comparable conduct) is irrelevant here, as it often is. *See, e.g., State Farm, 538 US at 428.*

State Farm, 538 US at 418; *see also BMW of N. Am., Inc. v. Gore*, 517 US 559, 574-85, 116 S Ct 1589, 134 L Ed 2d 809 (1996); *Goddard*, 344 Or at 256-61.

More generally, a punitive award must be “rational in light of [its] purpose to punish what has occurred and to deter its repetition.” *Parrott*, 331 Or at 550 n.9. That requirement is not satisfied here.

a. The 148-to-1 Ratio Of Punitive To Compensatory Damages Is Presumptively Unconstitutional.

Under *State Farm* and its progeny, the jury’s \$25 million award—148 times the compensatory damages—is presumptively unconstitutional and must be reduced. “[F]ew awards exceeding a *single-digit* ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” *State Farm*, 538 US at 425 (emphasis added); *see also Goddard*, 344 Or at 259 (“[D]ue process normally will not permit a punitive damages award in excess of a single-digit ratio to the compensatory damages award.”); *Waddill v. Anchor Hocking, Inc.*, 190 Or App 172, 175, 78 P3d 570 (2003) (reducing ratio from just under 10:1 to 4:1 where compensatory damages were \$100,854).

This limitation applies even in cases involving highly reprehensible misconduct resulting in physical injuries. *See, e.g., Boerner v. Brown & Williamson Tobacco Co.*, 394 F3d 594, 602-03 (8th Cir 2005) (finding cigarette manufacturer’s conduct to be highly reprehensible, but holding that an award yielding no more than “a ratio of approximately 1:1 would comport with the requirements of due process”); *Ondrisek v. Hoffman*, 698 F3d 1020, 1029-

30 (8th Cir 2012) (10:1 ratio was unconstitutional in personal-injury case involving “exceptionally reprehensible” conduct).

b. The *State Farm* Exceptions Are Inapplicable.

State Farm specifically held that a higher ratio between compensatory and punitive damages “may comport with due process” in only three circumstances: (i) “a particularly egregious act has resulted in only a small amount of economic damages”; (ii) “the injury is hard to detect”; or (iii) “the monetary value of noneconomic harm might have been difficult to determine.” 538 US at 425.

None of those exceptions is satisfied here. An award of \$168,514 in compensatory damages is not “small,” such that there might be little incentive for a plaintiff to file suit. *See Bains LLC v. Arco Prods. Co.*, 405 F3d 764, 776 (9th Cir 2005) (“[t]his is not a ‘small amount’ case because the economic damages were substantial—\$50,000”); *Roth v. Farner-Bocken Co.*, 667 NW2d 651, 669-70 (SD 2003) (\$25,000 compensatory award was “substantial” and thus a lower ratio was warranted); *cf. Hamlin v. Hampton Lumber Mills, Inc.*, 349 Or 526, 537, 246 P3d 1121 (2011) (noting that the Oregon Supreme Court had “characterized an award of compensatory damages of less than \$25,000 as ‘relatively small’ and ‘low’”). And the injury here is no more difficult to detect or quantify than it would be in any other wrongful death case. *See, e.g.*,

Boerner, 394 F3d at 603 (injury not “hard to detect” or quantify in wrongful death action against a tobacco company).

c. The *Williams* Exception Is Inapplicable.

In *Williams v. Philip Morris Inc.*, 340 Or 35, 127 P3d 1165 (2006) (“*Williams I*”), the Oregon Supreme Court recognized that “the single-digit ratio (9:1) * * * ordinarily will apply in the usual case,” but held that a ratio above 9:1 may comport with due process in “extreme and outrageous circumstances” where the defendant’s conduct is “*extraordinarily reprehensible*.” *Id.* at 62-63 (emphasis added); *see also* *Goddard*, 344 Or at 258. The record in this case does not support such a finding.⁴

The plaintiff bears the burden of triggering the *Williams I* exception. *See Bolt*, 333 Or at 579. As discussed above, plaintiff did not even attempt to prove that the low-tar fraud was extraordinarily reprehensible. The mere fact that *Williams I* found extraordinary reprehensibility in a *different* case involving *different* conduct does not, of course, mean that it is present here. The punitive damages awarded in *Williams I* were predicated on the jury’s finding that PM

⁴ We respectfully submit that *Williams I* is erroneous and inconsistent with subsequent U.S. Supreme Court case law, which explains that the ratio guidepost is a “central feature in [the] due process analysis” mandated by the Constitution. *Exxon Shipping Co. v. Baker*, 554 US 471, 507, 128 S Ct 2605, 171 L Ed 2d 570 (2008). The ratio guidepost addresses critical concerns that are not protected by the other *State Farm/BMW* guideposts—most importantly, in the wake of *Williams II*, to ensure that the jury’s award is properly linked to the plaintiff’s harm and does not punish the defendant for harm to non-parties.

USA had made misrepresentations about the causal link between smoking and cancer. Here, the first jury found that Mrs. Schwarz was *not* harmed by any such conduct. *See Schwarz I* Verdict at 4. And the meager evidence of low-tar fraud presented to the retrial jury in this case is nothing at all like the evidence of fraud reviewed in *Williams I*. Plaintiff recognizes as much. *See* Tr. 108-10 (plaintiff’s counsel explaining that there was a “substantial difference” between the evidence and allegations in *Williams I* and this case).

Plaintiff certainly did not prove “extraordinary reprehensibility” in its case-in-chief (*see* pp. 18-21, *supra*), and the unexplained snippets from the handful of documents related to low-tar cigarettes that plaintiff relied upon later in the retrial do not come close to establishing extraordinary reprehensibility.

- **1961 PM USA Memorandum.** During closing arguments, plaintiff read from a 1961 PM USA memorandum—introduced by PM USA during *its* case—observing that when a smoker switches to a “high filtration cigarette,” he often “winds up smoking more units in order to provide himself with the same delivery which he had before.” Tr. 4404. Plaintiff neither offered nor elicited testimony about this document. PM USA, however, introduced undisputed evidence that the risk that a smoker may smoke more cigarettes to compensate for the lower delivery per cigarette (one form of compensation) was common knowledge by the time Merits were introduced fifteen years after the memorandum. Compensation was

reported by a prominent scientist in 1957 (*see id.* 3091, 3323); was the subject of widely disseminated government health advisories by the early 1970s (*see id.* 3269-71, 3139); was a central consideration of a 1981 report by the U.S. Surgeon General on the subject of low-tar cigarettes (*see id.* 3322-24); and would likely have been obvious to the smoker herself (who presumably would notice that she was “smoking more units” and paying more money for cigarettes). That a PM USA employee *also* stated that smokers may choose to smoke more cigarettes does not show anything deceitful about PM USA’s development and marketing of low-tar cigarettes.

- **1966 PM USA Memorandum.** Plaintiff introduced a 1966 PM USA internal marketing document that stated: “The illusion of filtration is as important as the fact of filtration.” *Id.* 4418. Plaintiff offered no testimony or other explanation about this document, either before or after it was admitted. PM USA, however, put the document in its proper context: the point of the “illusion of filtration” comment was that it was not enough for the manufacturer to design and manufacture a cigarette that *was* lower in tar; the product also had to have a visible filter so it would *appear* to be lower in tar. *See, e.g., id.* 3142-43, 4517-19. And that appearance was *not* in fact an “illusion,” because it is undisputed that

- filters “reduce[] the risk of lung cancer compared with smoking unfiltered high tar cigarettes.” *Id.* 3341.
- **1974 PM USA Memorandum.** Plaintiff introduced a 1974 PM USA document stating that “the FTC standardized test [for measuring tar levels] should be retained because it gives low numbers.” *Id.* 4419. Plaintiff omitted the fact that PM USA *affirmatively advised* the FTC of the flaws in its method, including that the machine did “not measure the volume of smoke or the particulate matter * * * that any human being will draw from smoking any particular cigarettes” and could not “measure the[] variations in human smoking habits.” *Id.* 3417-48.
 - **Report On Merit Cigarettes.** Plaintiff introduced evidence of the amount PM USA spent to promote Merit cigarettes in 1976, the year that they were introduced. *See id.* 4386. Plaintiff did not explain how PM USA’s marketing budget would help the jury determine the proper amount of punitive damages.
 - **Monograph 7.** On cross-examination, plaintiff asked Dr. English whether he had shown the jury an excerpt from “Monograph 7,” a paper published by the National Cancer Institute in 1996, which reported that the tobacco industry’s marketing of low-tar cigarettes “suggest[ed] an attempt to increase market share” by “alleviat[ing] smokers’ health concerns,” and that poll respondents believed that low-tar cigarettes were

safer and healthier. *Id.* 3678-80. None of the study's findings is tied to PM USA even in general, much less to the company's marketing of Merit cigarettes in particular. And its findings were in any event fully consistent with the public health community's objective of persuading smokers to switch to low-tar cigarettes if they could not or would not quit, as well as with the results of PM USA's own research. *See id.* 3077, 3082-83, 3138-39, 3154-60, 3165-67. Indeed, Monograph 7 reiterated that wider use of low-tar cigarettes would reduce the overall rate of smoking-related disease. *See id.* 3354-55.

- ***Post-FSPTCA Changes.*** Finally, plaintiff presented a document explaining some of the changes that would result from enactment of the Family Smoking Prevention and Tobacco Control Act ("FSPTCA"), Pub. L. No. 111-31, 123 Stat. 1776 (2009), including that what had previously been called "Merit Lights" would in the future be called "Merit Golds." Tr. 4387. Plaintiff elicited no testimony regarding this document, presumably because all it shows is PM USA's compliance with the statute—legislation that it alone among the major tobacco companies supported. *See id.* 4044-48.

Taken individually or together, these excerpts plainly do not satisfy plaintiff's burden to establish that this is an "extreme and outrageous" case and

that the alleged low-tar fraud was “extraordinarily reprehensible.” This record forecloses application of the *Williams I* exception to the ratio guidepost.⁵

d. The \$25 Million Award Is Not Necessary For Punishment Or Deterrence.

Even where a defendant’s conduct is highly reprehensible (and there has been no such showing here), the amount of a punitive award must be “rational in light of [its] purpose to punish what has occurred and to deter its repetition.” *Parrott*, 331 Or at 550 n.9; *see also State Farm*, 538 US at 419-20 (reversing a punitive damages award because “a more modest punishment for [the defendant’s] reprehensible conduct could have satisfied the State’s legitimate objectives, and the Utah courts should have gone no further”). PM USA now operates under a wholly different set of internal policies and external restraints that eliminate the need for additional deterrence in the form of punitive damages.

First, PM USA now openly and voluntarily acknowledges (and has for more than a decade expressly stated on its website and elsewhere) that:

⁵ Although plaintiff had the burden of triggering the *Williams I* exception, PM USA showed without contradiction that its actions in developing and marketing low-tar cigarettes, and representing them as such, were in line with the goals of the medical and scientific community between the 1960s and the 1990s. *See* Tr. 3082-83, 3138-39, 3324, 3333-42, 3346-48, 3353-55, 3360-62. PM USA also introduced undisputed evidence that, like the public health community, PM USA genuinely *believed* that low-tar cigarettes were safer despite the risk that some smokers would compensate. *See id.* 3845-50.

“[t]here is no such thing as a safe cigarette” and “[l]ow-tar * * * cigarettes are no exception” (Tr. 3875-76);

“smokers should not assume that lower yield brands are safe or safer than full flavor brands” (*id.* 3875);

“[t]he amount of tar and nicotine you inhale will vary depending on how you smoke the cigarette” (*id.* 3874);

“tar and nicotine numbers are not meant to communicate the amount of tar and nicotine actually inhaled by any smoker as individuals do not smoke like the machine used in the government test method” (*id.* 3879); and

“[t]he amount of tar and nicotine you inhale will be higher than the tar and nicotine yield numbers if, for example, you block ventilation holes, inhale more deeply, take more puffs or smoke more cigarettes” (*id.*).

PM USA also voluntarily stopped advertising its cigarettes in magazines in 2005. *Id.* 3886-87, 3889, 4109.

Second, the FSPTCA—which PM USA supported, *see id.* 4044-47—gave the FDA broad new regulatory authority over every aspect of the tobacco companies’ business. *See id.* 3889-95. The Act flatly prohibits the use of descriptors such as “low-tar” and “lights,” and forbids the use of tar measurements in advertisements. *See id.* 3890-91. The FDA is authorized to enforce its regulations through fines and other sanctions. *See id.* 3895.

Third, all major U.S. cigarette manufacturers have been bound since 1998 by the “Master Settlement Agreement” (“MSA”) that they entered into

with 46 States, including Oregon. *See id.* 3884-85. Under the MSA, they agreed to refrain from advertising on billboards, buses, or at sporting events; from sponsoring events like concerts; and from distributing merchandise with logos. *Id.* 3886. They must also make publicly available documents and research regarding the health effects of smoking. *Id.* 4059-60.

It is evident that PM USA has neither the inclination nor the ability to repeat the misconduct that gave rise to this case. A massive punitive award cannot be necessary to deter future commission of low-tar fraud.

3. This Court Should Order An Unconditional Reduction Of The Punitive Award Under ORS 31.730(2) and (3).

ORS 31.730(2) requires a trial court to “review [a punitive damages] award to determine whether the award is within the range of damages that a rational juror would be entitled to award based on the record as a whole.” ORS 31.730(3) then provides that a “*reduction*” in the punitive award “may be made under subsection (2).” (Emphasis added.) The statute does not provide that the plaintiff is to be given the option of electing a new trial.⁶

Plaintiff may assert that under *Parrott*, if the court determines that the verdict is unconstitutional, it must grant a remittitur rather than an outright reduction. Such an argument would lack merit. True, in *Parrott* the Supreme

⁶ That is no surprise, because “[o]nce a maximum constitutional award has been determined, * * * a new trial on punitive damages [is] futile.” *Simon v. San Paolo US Holding Co., Inc.*, 113 P3d 63, 81 (Cal. 2005).

Court concluded that “the parties’ right, under Article I, section 17, of the Oregon Constitution, to a trial by jury regarding a claim for punitive damages,” required a remittitur rather than an unconditional reduction upon a finding that a punitive award was unconstitutionally excessive. 331 Or at 557-58. But the Oregon Constitution does not guarantee a right to trial by jury in wrongful death actions like this one. *See Hughes v. PeaceHealth*, 344 Or 142, 152-53, 178 P3d 225 (2008). Thus, unlike in *Parrott*, there is no impediment to the outright judicial “reduction” of punitive damages authorized by ORS 31.730.

If the court nevertheless concludes that *Parrott* prevents it from ordering an outright reduction, it should order a remittitur.

IV. SECOND ASSIGNMENT OF ERROR: The trial court erred in failing to give PM USA’s requested instruction that the amount of punitive damages had to be reasonably related to plaintiff’s harm.

A. Preservation of Error

Before trial, PM USA requested that the following instruction be given as part of the criteria governing the jury’s determination of the proper amount of punitive damages: “Is there a reasonable relationship between the amount of punitive damages and plaintiff’s harm?” Tr. 777-78. PM USA filed the same request several days later. ER-28. The court instructed on some of the criteria governing the jury’s determination of the proper amount of punitive damages, Tr. 4397, but refused to instruct the jury to consider whether there was a reasonable relationship between the amount of punitive damages and plaintiff’s harm. *Id.* 778. The court explained that, in its view, “it’s a determination for

the Court to make[,] not the jury.” *Id.* 764; *see also* ER-16 (“The reasonable relationship instruction is not a correct statement of law, in that it seeks to impose a particular burden on the jury.”).

At a subsequent pretrial hearing, PM USA said, “We renew all of the objections that we have previously made orally and in writing * * * to the court’s refusal to give PM USA’s proposed instructions. * * * Has the court ruled on our objections?” Tr. 2367-68. The court answered, “Yes. My ruling is still the same.” *Id.* 2368.

Immediately after the jury was instructed, PM USA identified to the trial court the error in refusing to give the instruction and made a notation of exception, both orally, Tr. 4437 (“[W]e renew our objections to the * * * Court’s refusal to give our proposed instructions”) and in writing, ER-35 (“PM USA objects to the court’s denial of its proposed instruction.”); *see also* ER-30-35 (explaining reasoning). The court overruled those objections. Tr. 4438.

B. Standard of Review

“Generally, parties are entitled to have a proffered instruction given based on their theory of the case if the instruction correctly states the law.” *State v. Barnes*, 329 Or 327, 334, 986 P2d 1160 (1999). If a trial court fails to give an instruction that correctly states the law, this error requires reversal “if the instructions that were given cause prejudice by substantially affecting the rights of the party requesting the refused instruction.” *Id.* at 334. A party is

prejudiced if the failure to instruct “probably created an erroneous impression of the law in the minds of the jurymen which affected the outcome of the case.”

Waterway Terminals v. P.S. Lord, 256 Or 361, 370, 474 P2d 309 (1970).

V. THIRD ASSIGNMENT OF ERROR: The instructions as given were erroneous because they did not inform the jury that its award of punitive damages had to be reasonably related to plaintiff’s harm.

A. Preservation Of Error

After the court refused to give PM USA’s requested instruction on the reasonable-relationship requirement, the court proceeded to instruct the jury. *See* Tr. 4387-4402. PM USA then objected orally: “At this time, we renew our objections to the jury instructions as given and to the court’s refusal to give our proposed instructions.” *Id.* 4437. PM USA also objected in writing to the instructions as given, stating: “PM USA objects to the court’s refusal to instruct the jury that its award must bear a reasonable relationship to the compensatory damages or to the plaintiff’s harm.” ER-37. PM USA argued that its requested instruction was “of particularly critical importance because the court has elected to tell the jury that the maximum amount it can award is the \$300 million requested in the complaint, and that “the absence of a reasonable relationship instruction exacerbates the prejudicial anchoring effect of the plaintiff’s arbitrary and excessive prayer.” ER-38. PM USA asked: “does the Court continue to overrule our objections?” Tr. 4438. The court responded: “Yes.” *Id.*

B. Standard Of Review

When a party claims error in the trial court's jury instructions, this court determines whether the instruction was an incorrect statement of the law and whether it substantially affected the rights of the objecting party. *Wallach v. Allstate Ins. Co.*, 344 Or 314, 319-22, 180 P3d 19 (2008). If the "incorrect instruction permits the jury to reach a legally erroneous result, a party has established that the instructional error substantially affected its rights." *Id.* at 329.

C. Combined Argument On Instructional Error (Assignments 2 and 3)

1. The Proposed Instruction Correctly Stated The Law And The Failure To Give It Substantially Affected PM USA's Rights.

The trial court concluded that PM USA's proposed "reasonable relationship instruction is not a correct statement of law" because "[t]he reasonable relationship analysis is to be performed by the court, not the jury." ER-16; Tr. 764-78. We respectfully disagree. The proposed instruction was a correct statement of law and should have been given under *Barnes*.

Due process requires that an award of punitive damages bear a reasonable relationship to the plaintiff's harm, typically measured by the compensatory damages. *See, e.g., BMW*, 517 US at 580 ("exemplary damages must bear a 'reasonable relationship' to compensatory damages"). The Supreme Court has consistently held that a jury must be instructed on the constitutional restrictions

on its ability to award punitive damages. *See, e.g., State Farm*, 538 US at 422 (“A jury must be instructed * * * that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.”); *id.* at 418 (expressing constitutional “concerns” about “[v]ague instructions” that do not inform the jury of the limitations on a punitive award); *Williams II*, 549 US at 357 (holding that “a court, upon request, must protect” a defendant from an “unreasonable and unnecessary risk” that a jury will impose punitive damages on an improper basis).

The fact that the relationship between punitive and compensatory damages is also a consideration in post-verdict excessiveness review is no reason not to instruct the jury on this principle. Courts reviewing a punitive award for excessiveness are required, for example, to consider the degree of reprehensibility of the defendant’s conduct, yet no one would suggest that is a reason to refuse to instruct the jury to consider that factor.

Accordingly, courts typically give “reasonable relationship” instructions similar to those PM USA requested in this case. *See, e.g., Wash. Pattern Jury Instr.* 348.02 (6th ed. 2009) (“The amount of any punitive damages should [] bear a reasonable relationship to any injury or harm actually or potentially suffered by (name of plaintiff).”); *Del. Pattern Jury Instr.* § 22.15 (2000); *N.J. Model Civil Jury Charges* 8.46 (2010); *Levinson v. Prentice-Hall, Inc.*, 868 F2d

558, 564 (3d Cir. 1989) (reversing for failure to give reasonable relationship instruction).

Because PM USA’s proposed reasonable relationship instruction was a correct (and crucial) statement of federal constitutional law, Oregon law required that it be given. *See Barnes*, 329 Or at 334. The failure to give it substantially affected PM USA’s rights by “permit[ting] the jury to reach a legally erroneous result,” *Wallach*, 344 Or at 329—*i.e.*, to award punitive damages that (as discussed in Part III.C.2) bore no reasonable relationship to plaintiff’s alleged harm.

2. The Instructions As Given Were Misleading.

Even if a reasonable-relationship instruction is not required by Oregon law or due process in *every* punitive damages case, it was required here.

As discussed above, plaintiff introduced extensive evidence of (1) PM USA’s financial condition and (2) conduct that the first jury rejected as a basis for liability—creating a serious risk that the jury would punish PM USA on an improper basis, and obligating the trial court to protect PM USA against that risk by giving adequate jury instructions. *See Williams II*, 549 US at 355-57; *see also Oberg*, 512 US at 432 (“Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant’s net worth creates the potential that juries will use their verdicts to

express biases against big businesses, particularly those without strong local presences.”).

The instructions as given were especially misleading, in violation of Oregon law and due process, because the trial court instructed the jury (over PM USA’s objection, *see* Def. Obj. to Final Jury Instructions at 9) that it could award up to \$300 million, the amount of damages plaintiff requested in its prayer for relief. *See* Tr. 4397-98 (instructing that “plaintiff has requested \$300 million in punitive damages” and that “[t]he amount of punitive damages does fix the maximum amount you can award”). The maximum constitutionally-permissible punitive award in this case was *not* \$300 million (nearly 1,800 times the compensatory award); it was an amount reasonably related to plaintiff’s harm. And as PM USA showed the trial court, extensive legal and social science research demonstrates that juries exposed to high numerical “anchors” return much higher awards—even if those anchors are self-evidently arbitrary, and even if they are presented to jurors as “limits.” *See* Def. Mot. to Strike Prayer for Punitive Damages (Jan. 10, 2012), at 10-14.

The denial of a reasonable-relationship instruction—combined with the absence of any evidence that would allow the jury to set a rational punishment; the evidence of PM USA’s finances and conduct that did not harm the plaintiff; and the trial court’s statement that the jury could award up to \$300 million—

created a serious risk of improper punishment and substantially affected PM USA's rights. The court should order a new trial.

VI. FOURTH ASSIGNMENT OF ERROR: The trial court erred in denying PM USA's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, because Plaintiff failed to establish the prerequisites to punitive liability under ORS 31.730(1).

A. Preservation Of Error

PM USA "move[d] pursuant to ORCP 63 for an order granting judgment notwithstanding the verdict on plaintiff's punitive damages claim," on the ground that "plaintiff failed to satisfy its burden of proving punitive damages liability as required by ORS 31.730(1)." ER-40. PM USA "move[d] in the alternative for a new trial that at minimum encompasses punitive liability as well as the amount of punitive damages," on the ground that "there is no assurance that *any* jury has found that the 'low-tar' fraud at issue in this case satisfied Oregon's 'outrageous indifference' punitive liability standard." *Id.* The trial court denied both of these motions. ER-44 ("Defendant's motions for judgment notwithstanding the verdict under ORCP 63 are denied. * * * Defendant's motions for new trial under ORCP 63C and 64B(5) are denied.").

B. Standard Of Review

In reviewing the denial of a motion for JNOV, this court "consider[s] the evidence, including inferences, in the light most favorable to plaintiff," and asks whether "there is no evidence from which the jury could have found the facts necessary to establish the elements of plaintiff's cause of action." *Brown v. J.C.*

Penney Co., Inc., 297 Or 695, 705, 688 P2d 811 (1984). “When the trial court’s ruling on a motion for a new trial is based on an interpretation of law, [this court] review[s] for errors of law.” *State v. Walker*, 223 Or App 554, 561, 196 P3d 562 (2008).

C. Argument

PM USA was entitled to JNOV or, alternatively, a new trial, because plaintiff offered no evidence establishing the statutory prerequisites to punitive liability.

ORS 31.730(1) provides:

Punitive damages are not recoverable in a civil action unless it is proven by clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety, and welfare of others.

There can be no assurance that any jury made a finding that PM USA committed the alleged *low-tar* fraud with “reckless and outrageous indifference.” As discussed above, the *Schwarz I* jury found that PM USA committed two distinct species of fraud: *low-tar* fraud and assumed-duty fraud. ER-11. The jury instructions and verdict form allowed the first jury to find punitive liability in connection with *either* theory, without requiring that the jury specify which fraud was committed with the requisite state of mind. *See id.* Nor did the retrial jury make the necessary finding of outrageousness with

respect to low-tar fraud; the trial court rejected PM USA's argument that such a finding was required before the jury could award punitive damages. *See* Tr. 536, 538, 940.

It would violate both Oregon law and federal due process to permit plaintiff to use the first jury's finding to establish liability for punitive damages. Both state and federal law on punitive damages require findings of punitive liability and punitive amount to be based on the same conduct. *See* ORS 31.730(2) (a jury is "entitled to award" punitive damages "based on the record as a whole, viewing the statutory and common-law factors that allow an award of punitive damages *for the specific type of claim at issue in the proceeding*" (emphasis added)); *State Farm*, 538 US at 422 (conduct "independent from the acts upon which liability was premised[] may not serve as the basis for punitive damages"). And both state and federal preclusion law prohibit the court from ascribing to the first jury a finding that it may not have made. *See Westwood Constr. Co. v. Hallmark Inns & Resorts, Inc.*, 182 Or App 624, 634-36, 50 P3d 238 (2002); *Fayerweather v. Ritch*, 195 US 276, 307, 25 S Ct 58, 49 L Ed 193 (1904).

The Supreme Court's order limiting the retrial to "the correct amount of [punitive] damages," *Schwarz IV*, 349 Or at 523, is not to the contrary. That directive was rendered at a time when the finding of punitive liability rested not just on the ambiguous fraud verdict but also unambiguously on plaintiff's strict

liability and negligence claims. When plaintiff abandoned its claim for punitive damages based on strict liability and negligence, it fundamentally altered the circumstances on which the Supreme Court's ruling was based, rendering the law-of-the-case doctrine inapplicable. *See Boise Cascade Corp. v. State ex rel. Bd. of Forestry*, 216 Or App 338, 351-52, 174 P3d 587 (2007).

VII. CONCLUSION

For the foregoing reasons, the judgment should be reversed.

Respectfully submitted this 13th day of September, 2013.

HARRANG LONG GARY RUDNICK P.C.

By: s/William F. Gary
William F. Gary, OSB #770325
william.f.gary@harrang.com
Sharon A. Rudnick, OSB #830835
sharon.rudnick@harrang.com
J. Aaron Landau, OSB #094135
aaron.landau@harrang.com

Of Attorneys for Defendant-
Appellant PHILIP MORRIS USA
INC., a foreign corporation

INDEX FOR EXCERPT OF RECORD

ER Page #	Record Material	Court Record #
ER-1-ER-7	Plaintiff's Third Amended Complaint (Mar. 14, 2002)	223
ER-8-ER12	First Jury's Verdict Form (Mar. 22, 2002)	N/A
ER-13-ER-16	Judge Kantor's Order on Scope of Trial, Burden, and Jury Instructions (Sept. 30, 2011)	408
ER-17-ER-19	Plaintiff's Letter re "Streamlined" Case Strategy (Nov. 22, 2011)	N/A
ER-20-ER-25	Plaintiff's Fourth Amended Complaint (December 16, 2011).	442
ER-26-ER-28	Defendant's Proposed Supplemental Alternative Jury Instructions, including Proposed Instruction No. 31A (January 27, 2012)	488
ER-29-ER-35	Defendant's Objections to the Court's Refusal to Give Defendant's Proposed Jury Instructions and Verdict Form – As Filed After Final Jury Instructions (Feb. 13, 2012) (pp. 1, 29-34)	498
ER-36-ER-38	Defendant's Objections to Final Jury Instructions and Verdict Form - As Filed After Final Jury Instructions (Feb. 13, 2012) (pp.1, 8-9)	499
ER-39-ER-42	Defendant's Post-Trial Motions (pp. i, 1-2, 20) (March 16, 2012)	539
ER-43-ER-44	Judge Kantor's Order on Defendant's Post-Trial Motions (May 29, 2012)	548

ER-45-ER-48	General Judgment (Aug. 8, 2012)	563
-------------	---------------------------------	-----

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

THE ESTATE OF MICHELLE
SCHWARZ, deceased, by and through
her Personal Representative,
RICHARD SCHWARZ,

Plaintiff,

v.

PHILIP MORRIS INCORPORATED,
a foreign corporation,

Defendant.

Case No. 0002-01376

THIRD AMENDED COMPLAINT
(Product Liability,
Negligence and Fraud)

**NOT SUBJECT TO MANDATORY
ARBITRATION**

JURY TRIAL REQUESTED

Plaintiff alleges:

GENERAL ALLEGATIONS AND REMEDIES SOUGHT

1.

Richard Schwarz is the duly appointed Personal Representative of the Estate of Michelle Schwarz who died July 13, 1999 at age 53.

2.

Michelle Schwarz died from lung cancer which was caused by tobacco smoke from Merit brand cigarettes to which she was addicted from approximately 1976 to 1999.

///

LAWRENCE WOBROCK
Trial Lawyer, P.C.
Jackson Tower
10th Floor
806 SW Broadway
Portland, Oregon 97205
Telephone: (503) 228-6600

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

3.

Michelle Schwarz married Richard Schwarz on November 13, 1965 and worked in his medical office until his retirement in 1995 and then as a travel agent.

4.

As a result of the conduct of defendant which caused the wrongful death of Michelle Schwarz, she and her estate have incurred economic damages for medical expenses in the amount of \$118,514.22.

5.

As a result of the conduct of defendant which caused the wrongful death of Michelle Schwarz, her beneficiaries have been deprived of the companionship, society, support, love, affection and guidance of Michelle Schwarz for the remainder of their lives. The Estate of Michelle Schwarz has suffered additional damages for physical pain and suffering of Michelle Schwarz from the onset of the symptoms of her lung cancer in or about February, 1998 until her death on July 13, 1999. Therefore, the Estate and Michelle Schwarz' beneficiaries are entitled to recover reasonable compensation for non-economic damages in the amount of \$5,000,000.

FIRST CLAIM FOR RELIEF - PRODUCTS LIABILITY

6.

Plaintiff incorporates the allegations of paragraphs 1 through 5 above.

7.

At all material times, defendant Philip Morris Incorporated was a foreign corporation that designed, distributed, marketed, advertised, supplied and sold the Merit brand cigarettes which caused Michelle Schwarz' disease and death.

8.

At all material times, the cigarettes sold by defendant were defective and unreasonably dangerous in one or more of the following respects:

- a. The cigarettes contained added ammonia to increase the effects of nicotine;

LAWRENCE WOBROCK
Trial Lawyer, P.C.
Jackson Tower
10th Floor
806 SW Broadway
Portland, Oregon 97205
Telephone: (503) 228-6600

1 b. The cigarettes or their smoke contained altered pH so as to increase the effects of
2 nicotine;

3 c. At the time defendant's light cigarettes were sold, the product was dangerous and
4 in a condition not contemplated by the ultimate consumer in that it was
5 manufactured, marketed, and sold as a less harmful alternative to ordinary
6 cigarettes.

7 **SECOND CLAIM FOR RELIEF - NEGLIGENCE**

8 9.

9 Plaintiff incorporates the allegations of paragraphs 1 through 8 above.

10 10.

11 The conduct of defendant Philip Morris Incorporated in designing, testing, controlling,
12 processing, manufacturing, assembling, distributing, and supplying the Merit brand of cigarettes,
13 was negligent in one or more of the following ways:

14 a. In avoiding testing of tobacco, tobacco smoke, and cigarettes in a way that would
15 be likely to show the relationship between human disease to smoking in order to
16 allow defendant Philip Morris Incorporated to claim ignorance of the relationship
17 between human disease and smoking;

18 b. In processing, controlling and manipulating the contents and proportions of
19 various substances in cigarettes in such a way as to
20 continue and/or enhance the habit-forming and/or addictive effects of those
21 products on users, specifically by:

- 22 (1) adding ammonia to increase the effects of nicotine;
- 23 (2) altering the pH of cigarettes or cigarette smoke so as to increase the effects
24 of nicotine; and

25 ///

26 ///

LAWRENCE WOBROCK
Trial Lawyer, P.C.
Jackson Tower
10th Floor
806 SW Broadway
Portland, Oregon 97205
Telephone: (503) 228-6600

1 (3) controlling and manipulating the amount of nicotine in its cigarettes in
 2 such a way as to maintain the physical dependence of Michelle Schwarz
 3 and other smokers on its cigarettes.

4 c. In selling and distributing cigarettes which it knew or should have known
 5 contained poisonous and carcinogenic substances capable of causing and likely to
 6 cause numerous serious and fatal injuries and diseases, including but not limited
 7 to cancer of the lungs;

8 d. In selling and distributing products which it knew or should have known
 9 contained habit-forming and addictive substances capable of and likely to induce
 10 irresistible habits and/or physical and psychological dependence and addiction
 11 when used in a foreseeable manner;

12 e. In failing to manufacture and sell cigarettes without the characteristics described
 13 above although it was capable of doing so, thus depriving Michelle Schwarz of
 14 the opportunity to smoke a safer cigarette; and

15 f. In selling so-called low tar cigarettes as a safer cigarette and as an alternative to
 16 cessation.

17 11.

18 Defendant voluntarily assumed a duty to disclose research, cooperate closely with public
 19 health authorities and hold people's health paramount to all other business considerations.

20 **THIRD CLAIM FOR RELIEF - FRAUD**

21 12.

22 Plaintiff incorporates the allegations of paragraphs 1 through 11 above.

23 13.

24 Defendant Philip Morris Incorporated recklessly and/or intentionally made fraudulent
 25 misrepresentations about its tobacco products, including misrepresentations about adverse health
 26 effects, the addictive nature of its tobacco products, and their contents.

LAWRENCE WOBROCK
 Trial Lawyer, P.C.
 Jackson Tower
 10th Floor
 806 SW Broadway
 Portland, Oregon 97205
 Telephone: (503) 228-6600

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

14.

Defendant Philip Morris Incorporated engaged in an ongoing public relations effort beginning in the early 1950s, designed to manipulate public opinion by creating doubt about the adverse health effects of smoking and to provide rationalizations to help smokers keep smoking in spite of the adverse health effects. Defendant Philip Morris Incorporated made statements which were intended to and did cause cigarette smokers such as Michelle Schwarz to continue smoking cigarettes in spite of their adverse health effects. Defendant voluntarily assumed a duty to disclose all research.

15.

Michelle Schwarz did not know defendant Philip Morris Incorporated's representations were false and reasonably relied on, and suffered and died as a result of defendant Philip Morris Incorporated's misrepresentations.

16.

Defendant Philip Morris Incorporated's misrepresentations included the following and similar misrepresentations:

- a. That the causal link between cigarette smoking and human disease was in doubt or "had not been proven" in repeated statements during the past 50 years;
- b. That cigarettes are not addictive; and
- c. That "low tar" cigarettes delivered less tar and nicotine to the smoker and were therefore safer and healthier than regular cigarettes as an alternative to quitting smoking.

PUNITIVE DAMAGES

17.

Defendant Philip Morris Incorporated has shown a reckless and outrageous indifference to a highly unreasonable risk of harm, and has acted with a conscious indifference to the health, safety and welfare of others in the following particulars:

LAWRENCE WOBBCROCK
Trial Lawyer, P.C.
Jackson Tower
10th Floor
806 SW Broadway
Portland, Oregon 97205
Telephone: (503) 228-6600

- 1 a. By exploiting the inability of smokers to stop smoking;
- 2 b. By manipulating nicotine to keep smokers smoking;
- 3 c. By exploiting the psychological needs of the young and relying on them as
- 4 replacement smokers for those who die because of the adverse health effects of its
- 5 cigarettes; and
- 6 d. By selling low tar cigarettes as safer and as an alternative to quitting smoking with
- 7 the knowledge that they in fact were not safe and not a safe alternative to quitting
- 8 smoking.

9 The effects of defendant Philip Morris Incorporated's products are widespread and deadly
10 and defendant Philip Morris Incorporated has known this for many years but defendant Philip
11 Morris Incorporated has deceived the public concerning the health dangers of cigarettes, the
12 addictive properties of nicotine and the safety of light cigarettes to maintain and increase the
13 enormous profits to defendant Philip Morris Incorporated from the sales of cigarettes. Defendant
14 Philip Morris Incorporated should be assessed the amount of \$300,000,000 for punitive damages.

15 WHEREFORE, plaintiff prays for judgment in favor of the Estate of Michelle Schwarz
16 against defendants, as follows:

- 17 1. Economic damages in the amount of \$118,514.22;
- 18 2. Non-economic damages in the amount of \$5,000,000;
- 19 3. Punitive damages in the amount of \$300,000,000;

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

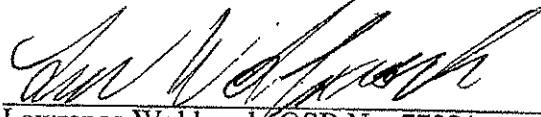
26 ///

LAWRENCE WOBROCK
Trial Lawyer, P.C.
Jackson Tower
10th Floor
806 SW Broadway
Portland, Oregon 97205
Telephone: (503) 228-6600

- 1 4. Costs and disbursements incurred herein; and
- 2 5. Such further relief this court deems just.

3 Dated this 14 day of March, 2002.

4 LAWRENCE WOBROCK TRIAL LAWYER, P.C.

5 

6
 7 Lawrence Wobrock, OSB No. 77391
 8 Charles Tauman, OSB No. 77371
 9 Richard A. Lane, OSB No. 86227
 Of Attorneys for Plaintiffs

10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25
 26

LAWRENCE WOBROCK
 Trial Lawyer, P.C.
 Jackson Tower
 10th Floor
 806 SW Broadway
 Portland, Oregon 97205
 Telephone: (503) 228-6600

MAR. 22. 2002 5:19PM PHILIP MORRIS

NO. 002 P. 1

5/22/02
1:50 PST

60%

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

THE ESTATE OF MICHELLE
SCHWARZ, deceased, by and through
her Personal Representative,
RICHARD SCHWARZ,

Plaintiff,

v.

PHILIP MORRIS INCORPORATED
a foreign corporation,

Defendant.

Case No. 0002-01376

VERDICT

NEGLIGENCE

We, the jury find.

1. Was defendant Philip Morris negligent with respect to Ment brand cigarettes in one or more of the ways alleged in the complaint, and, if so, was such negligence a cause of Michelle Schwarz' death?

ANSWER: Yes (Yes or No)

If your answer to question 1 is "yes," proceed to question 2. If your answer to question 1 is "no" proceed to question 5.

2. Was Michelle Schwarz negligent in one or more of the ways alleged in Philip Morris' answer, and, if so, was such negligence a cause of Michelle Schwarz' death?

ANSWER: Yes (Yes or No)

PAGE 1 - VERDICT

MAR. 22. 2002 5:19PM PHILIP MORRIS

NO. 002 P. 2

1 At least nine of you who answered "yes" to question 1 must also agree on the answer to question
2 2. If your answer to question 2 is "no," proceed to question 4. Do not answer question 3. If your
3 answer to question 2 is "yes," proceed to question 3.

4 3. What is the percentage of each of the parties' negligence which caused Michelle
5 Schwarz' death?

6 ANSWER: Philip Morris 51 %
7 Michelle Schwarz 49 %

8 (The percentages must total 100%)

9 At least nine of you who agreed on the answers to questions 1 and 2 must also agree on the
10 answer to question 3.

11 If Michelle Schwarz' percentage is greater than 50%, your verdict is for the defendant on
12 plaintiff's negligence claim. Proceed to question 5. If the plaintiff's percentage is 50% or less,
13 proceed to question 4.

14 4. What are the plaintiffs' damages?

15 ANSWER: Economic Damages \$ 118,514 ²²
16 Noneconomic Damages \$ 50,000
17 Punitive Damages \$ 25M

18 At least nine of you who agreed on the answers to questions 1, 2, and 3, if 3 was answered, must
19 agree on the answer to question 4.

20 Do not reduce the damages by Michelle Schwarz' negligence, if any, because the court will do
21 this when entering judgment.

22 STRICT LIABILITY

23 5. Was defendant Philip Morris' Marit brand cigarette defective and unreasonably
24 dangerous to Michelle Schwarz when sold and was the defect a cause of Michelle Schwarz'
25 death?

26 ANSWER: Yes (Yes or No)

PAGE 2 - VERDICT

RECEIVED TIME MAR. 18. 7:00PM

RECEIVED TIME MAR. 18. 7:10PM

MAR. 22. 2002 5:20PM PHILIP MORRIS

NO. 082 P. 3

1 If your answer to question 5 is "yes," proceed to question 6. If your answer to question 5 is "no,"
 2 proceed to question 9.

3 6. Was Michelle Schwarz' fault as alleged in Philip Morris' answer a cause of Michelle
 4 Schwarz' death?

5 ANSWER: Yes (Yes or No)

6 At least nine of you who answered "yes" to question 5 must also agree on the answer to
 7 question 6. If your answer to question 6 is "no," proceed to question 8. Do not answer question

8 7. If your answer to question 6 is "yes," proceed to question 7.

9 7. What is the percentage of each of the parties' fault in connection with plaintiff's strict
 10 liability claim?

11 ANSWER: Philip Morris 51 %
 12 Michelle Schwarz 49 %

13 (The percentages must total 100%)

14 At least nine of you who agreed on the answers to questions 5 and 6 must also agree on
 15 your answer to question 7.

16 If Michelle Schwarz' percentage is greater than 50%, your verdict is for the defendant on
 17 plaintiff's strict liability claim. Proceed to question 9. If the plaintiff's percentage is 50% or
 18 less, proceed to question 8.

19 8. What are the plaintiff's damages?

20 ANSWER: Economic Damages \$ 118,514.23
 21 Noneconomic Damages \$ 50,000
 22 Punitive Damages \$ 10,000,000

23 At least nine of you who agreed on the answers to question 5, 6, and 7 must also agree on the
 24 answer to question 8.

25 Do not reduce the damages by the plaintiff's percentage, if any, because the court will do
 26 this when entering judgment. If you awarded economic and noneconomic damages in response

PAGE 3 - VERDICT

RECEIVED TIME MAR. 18. 7:05PM

PRINT TIME MAR. 18. 7:10PM

MAR.22.2002 5:28PM PHILIP MORRIS

NO.002 P.4

1 to question 4, the economic and non-economic damages, if any, awarded in response to question 6
 2 must be the same. The punitive damages awarded, if any, need not be the same.

3 FRAUD

4 9. Did Philip Morris voluntarily assume a duty to disclose all research regarding smoking
 5 and health to Michelle Schwarz?

6 ANSWER: Yes (Yes or No).

7 If your answer to question 9 is "yes," proceed to question 10. If your answer to question
 8 9, is "no," proceed to question 11.

9 10. Did Philip Morris fail to perform its assumed duty by concealing research, did
 10 Michelle Schwarz reasonably rely upon defendant's performance of its duty, and was such failure
 11 to perform and reliance a cause of Michelle Schwarz' death.

12 ANSWER: Yes (Yes or No).

13 11. Did Philip Morris make false representations concerning the causal link between
 14 cigarette smoking and human disease upon which Michelle Schwarz reasonably relied, and if so,
 15 were such false representations and reliance a cause of Michelle Schwarz' death?

16 ANSWER: NO (Yes or No)

17 12. Did Philip Morris make false representations that cigarettes are not addictive upon
 18 which Michelle Schwarz reasonably relied, and if so, were such false representations and reliance
 19 a cause of Michelle Schwarz' death?

20 ANSWER: NO (Yes or No)

21 13. Did Philip Morris make false representations that "low tar" cigarettes delivered less
 22 tar and nicotine to the smoker and were therefore safer and healthier than regular cigarettes and
 23 an alternative to quitting smoking upon which Michelle Schwarz reasonably relied, and if so,
 24 were such false representations and reliance a cause of Michelle Schwarz' death?

25 ANSWER: Yes (Yes or No)

26 ///

PAGE 4 - VERDICT

RECEIVED TIME MAR. 19. 7:55P

PRINT TIME MAR. 19. 7:10PM

MAR. 22. 2002 5:28PM PHILIP MORRIS

NO. 002 P. 5

1 If your answer to question 10, 11, 12, or 13 is "yes," proceed to question 14. If your
2 answer to question 10, 11, 12 and 13 is "no," do not answer any further questions. Your
3 presiding juror should sign this verdict form.

4 14. What are plaintiff's damages?

5 ANSWER: Economic Damages \$ 18,514.27
6 Noneconomic Damages \$ 50,000
7 Punitive Damages \$ 115M

8 At least nine of you who answered "yes" to question 10, 11, 12, or 13 must also agree on
9 the answer to question 14. If you awarded economic and noneconomic damages in response to
10 question 4 or 8, the economic and noneconomic damages, if any, awarded in response to question
11 14 should be the same. If punitive damages were awarded in response to question 4 or 8, and if
12 punitive damages are awarded in response to question 14, the amount awarded need not be the
13 same.

14 DATED: _____, 2002

15
16 19/ Al Vickor
17 PRESIDING JUROR
18
19
20
21
22
23
24
25
26

PAGE 5 - VERDICT

RECEIVED TIME MAR. 18. 7:23PM

PRINT TIME MAR. 18. 7:18PM

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

ESTATE OF MICHELLE SCHWARZ,)	
)	
Plaintiff,)	Case No. 0002-01376
)	
v.)	
)	ORDER
PHILIP MORRIS INCORPORATED, et al.,)	
)	
Defendants.)	

The court held a pretrial hearing on various evidence and jury instructions issued over September 7-8, 2011. Plaintiff was represented by Charles S. Tauman, D. Lawrence Wobbrock, Richard A. Lane and James S. Coon of its attorneys. Defendant was represented by Frank P. Kelly, William F. Gary, Robert A. McCarter and Scott A. Chesin of its attorneys. Supplemental briefing was received on September 23, 2011.

The parties' submissions cover different subjects in different orders. This order will make rulings by subject matter. It is contemplated that counsel will apply the rulings to the various matters in dispute and then let the court know what else must be decided, as discussed during the hearing and set out in the court's latest scheduling order.

1. Scope of Trial and Amount of Punitive Damages

The context for the hearing and this order was established by the Supreme Court's decision to remand this case "for a new trial limited to the *amount* of punitive damages." *Estate of Schwarz v. Philip Morris Incorporated*, 349 Or 521, 524 (2010) (emphasis in original), *on reconsideration from* 348 Or 442 (2010). While the court was careful in its decision on reconsideration to clarify that the new trial would not concern any issue other than "the correct amount" of punitive damages, specifically excluding from trial the question of whether "punitive damages should be awarded," the court did not further define what it meant by the word "amount," including whether "amount" could include an award of zero or no punitive damages.

However, the context of the Supreme Court's opinion on reconsideration does provide significant guidance. Prior to its holding as to exactly what it was clarifying on reconsideration, it said that "[t]he logic of our earlier opinion made it plain that the trial court's instructional error had incorrectly stated the law that governed the jury's determination of the amount of punitive damages, not the jury's decision that punitive damages should be awarded." *Id.* To this court, that statement plainly provides that the second jury must be told that the first jury's decision that punitive damages should be awarded was affirmed and may not be modified by

the second jury, which in turn must be instructed that "punitive damages should be awarded." It is not possible that "punitive damages should be awarded" can mean that "no punitive damages should be awarded" or that "no punitive damages may be awarded." Therefore, the second jury must be instructed that it must award some punitive damages, more than zero, and that it will determine the correct amount of the punitive damages which it must award.

This court agrees with the defendant's general proposition that the second jury should be told only truths from the first trial. But telling the second jury that we don't know exactly which claims for relief or allegations of negligence, product liability or fraud supported the decision of at least nine members of the first jury to award punitive damages does not mean that the second jury is permitted to do something outside the scope of remand. So, the jury will be told about our lack of knowledge and further will be told that, nonetheless, they must award some punitive damages based on the evidence presented which persuaded the first jury to decide that punitive damages should be awarded. They will be told to follow the court's instructions, even if they don't agree with them. This court is confident that the second jury will be able to do just that.

In so holding, this court respectfully rejects defendant's arguments regarding issue preclusion and due process. Essentially, those doctrines do not fit the unique circumstances of this case in its unique new trial within the scope of remand situation.

2. Burden of Proof

Plaintiff asserts that it has no burden of proof as to the amount of punitive damages the jury must award, arguing that the jury simply is to apply the correct legal factors and come up with a number. Defendant asserts that plaintiff had the burden of proof in the first trial and that there is nothing about a new trial on remand which changes that. The court concludes that plaintiff retains the burden of proof as to the factors which the jury must consider and therefore also has the burden of coming forward with the evidence as to those factors. OEC 305 and 307. Although the matter was not briefed by the parties, this court is assuming that it will instruct the second jury that plaintiff has the burden of proof by clear and convincing evidence, as apparently instructed by Judge Robinson in the first trial.

Therefore, to address a hypothetical discussed during oral argument, this court holds that, if plaintiff were to present no evidence and just rest on the instructions (an absurdity of course), a motion for directed verdict would be granted on the ground that plaintiff failed to satisfy its burden of proof. This court further opines (always subject to actual briefing) that presentation in the second trial of the evidence which was presented during the first trial and which is admissible in the second trial will be sufficient evidence to overcome the directed verdict standard and get the question to the jury, as that evidence was sufficient to do so in the first trial and Judge Robinson's decision in that regard was not disturbed on appeal.

3. Evidence at Trial

Relevant evidence will be admissible, subject to the other rules of evidence. Irrelevant evidence will be inadmissible.

Evidence of the "broad fraudulent scheme to defraud the public" will be admissible to prove reprehensibility regardless of the basis of the first jury's decision about that scheme not harming plaintiff. "Defendant's behavior with respect to the development and marketing of low-tar cigarettes was but one iteration of a larger pattern of deceiving smokers and the rest of the public about the dangers of smoking." *Estate of Schwarz v. Philip Morris Incorporation*, 348 Or 442, 446 (2010). Judge Robinson's specific decision to allow this evidence as to punitive damages generally, which included the reprehensibility factor, and to instruct the jury about it was not disturbed on appeal, as compared to his instructions regarding harm. And this evidence is relevant to the determination of reprehensibility under *Philip Morris USA v. Williams*, 549 US 346, 355 (2007).

Evidence of defendant's wealth at the times of both the first trial and the second trial is admissible. Evidence of defendant's profits from sales other than to plaintiff's decedent is admissible.

Evidence of defendant's relevant efforts to mitigate harm to the public is generally admissible. However, such evidence may not contradict the findings of the first jury, so that evidence that low-tar cigarettes deliver less tar and nicotine to smokers than regular cigarettes is not admissible. This court finds that allowing such evidence would improperly and unfairly confuse the jury as to its task in the second trial and would unnecessarily prejudice plaintiff, who would then have the opportunity to refute the evidence, which in turn would unreasonably prolong the second trial and distract the jury from its task.

4. Jury Instructions

The second jury will be told how much plaintiff asked for in compensatory damages and how much compensatory damages the first jury awarded in the first trial, including the allocation of fault, and that the allocation of fault by the first jury is not material to the second jury's task except to inform the second jury of the amount of compensatory damages plaintiff will receive.

The second jury will be told how much punitive damages plaintiff asked for in the first trial, that the same amount is being sought in the second trial and that this amount represents the maximum award the jury could make (along with the minimum being more than zero).

The second jury will be told that the first jury awarded some punitive damages, that this award was erased because of some legal rulings and that they need not concern themselves with what happened or why.

The second jury will not be told how much punitive damages the first jury awarded, that Judge Robinson reduced that award or any of the circumstances of how the award was dealt with on appeal.

The second jury will not be instructed as to what the first jury was instructed. In other words, the instructions read to the first jury will not be read to the second jury. The second jury will be newly instructed as to the information it needs to know to make the determination it is being told to make and the law which governs that determination.

The reasonable relationship instruction is not a correct statement of law, in that it seeks to impose a particular burden on the jury. The reasonable relationship analysis is to be performed by the court, not the jury. In this regard, the court concludes that the Oregon Supreme Court would agree with *White v. Ford Motor Co.*, 500 F3rd 963, 973-74 (9th Cir 2007).

5. Judge Robinson's Evidentiary Rulings

All rulings overruling authenticity or foundation objections are continued as this court's rulings. A party may challenge a ruling sustaining an authenticity or foundation objection only with new information or arguments not presented to Judge Robinson; otherwise such rulings are continued as this court's rulings.

All rulings regarding hearsay and the use of testimony from other proceedings will be deemed presumptively valid and continued as this court's rulings but may be challenged by the losing party, who will have the burden to persuade this court why the ruling should be different in the second trial.

All rulings on objections to live trial questions as leading or otherwise improper or to arguments as improper will be considered but not automatically continued as this court's rulings.

DATED: September 30, 2011.


Henry Kantor
Circuit Court Judge

CHERYL F. COON*
 JAMES S. COON
 CHRIS D. FROST
 CHARLEY B. GEE
 CYNTHIA F. NEWTON†
 RAYMOND F. THOMAS

† ADMITTED IN OREGON AND CALIFORNIA
 * ADMITTED IN OREGON, PA., D.C., U.S.V.I

FOUNDING PARTNERS

MICHAEL D. ROYCE
 (1980 - 1994)

DOUGLAS A. SWANSON
 (1980 - 2004)

SWANSON, THOMAS & COON
ATTORNEYS AT LAW

THE THOMAS MANN BUILDING
 SUITE 200
 820 S.W. SECOND AVENUE
 PORTLAND, OREGON 97204
 FAX (503) 273-9175

TELEPHONE (503) 228-5222
 WWW.STC-LAW.COM

STAFF:
 STEPHANIE BALES
 NORA COON
 HANNAH GREGG
 KRISTIN L. KIDD
 KAYLA KINSLOW
 TANYA KNIGHT
 AARON MCCURRIE
 LYNNE MCHARRY
 HILARY M. MOORE
 ELISABETH RENNICK
 AKEMI STRICKLAND
 CHRISTOPHER THOMAS
 AMANDA R. ULRICH

November 22, 2011

Honorable Henry Kantor
 Multnomah County Courthouse
 1021 SW Fourth Avenue, Courtroom 544
 Portland, OR 97204

Re: ***The Estate of Michelle Schwarz, et. al. v. Philip Morris & Roth's IGA***
 Multnomah County Circuit Court No. 0002-01376
TRIAL SCHEDULE AND PROOF
Request for Status Conference

Dear Judge Kantor:

During the process of making and responding to evidentiary objections, plaintiff has been considering the best way to present this case to the jury and has concluded that it makes the most sense to present the jury with a streamlined case based primarily on the first jury's fraud verdict, which is binding in the upcoming trial. We believe that, aside from taking less court time and simplifying the evidentiary issues, this will make it easier to get a pool of jurors who will be able to attend a shorter trial. We write to apprise the court and Philip Morris of this so as to facilitate the scheduling of witnesses for trial and to narrow the universe of evidentiary objections on which the court must rule. Plaintiff believes it will be efficient and constructive to discuss any legal issues that may arise concerning this streamlined case now rather than waiting for trial.

As plaintiff suggested in its objections to Philip Morris's designated exhibits and in previous briefing on evidentiary issues, we believe the burden of proof the court has ruled plaintiff bears – to prove the punitive damages criteria under ORS 30.925(2) – can be carried by submitting:

Honorable Henry Kantor
November 21, 2011
Page 2 of 3

- (1) a jury instruction as to the first jury's finding that Philip Morris intentionally misled Michelle Schwarz that "low-tar" cigarettes delivered less tar and nicotine and were therefore safer and an alternative to quitting;
- (2) evidence as to defendant's financial condition and its profits;
- (3) evidence of the duration of Philip Morris's low-tar cigarettes marketing campaign; and
- (4) a jury instruction that the first jury found (as it necessarily did under Judge Robinson's instruction) that Philip Morris showed a reckless and outrageous indifference to a highly unreasonable risk of harm and acted with a conscious indifference to the health, safety and welfare of others.

Plaintiff would thus have offered evidence as to five of the seven possible criteria listed in ORS 30.925(2):

- (a) The likelihood at the time that serious harm would arise from the defendant's misconduct;
- (b) The degree of the defendant's awareness of that likelihood;
- (c) The profitability of the defendant's misconduct;
- (d) The duration of the misconduct and any concealment of it;
- (e) The attitude and conduct of the defendant upon discovery of the misconduct;
- (f) The financial condition of the defendant; and
- (g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which Philip Morris has been or may be subjected.

Plaintiff's evidence described above addresses criteria (2)(a) - (d) and (2)(f). Because there is no requirement that plaintiff address *all* of the criteria, and indeed no plaintiff, as far as we know, has ever introduced evidence as to (2)(g) (other penalties imposed), plaintiff believes this streamlined case should suffice legally to get the case to the jury. Philip Morris will doubtless offer evidence as to the sole remaining criterion, its attitude and conduct on discovery of its misconduct.

Other evidence may be reserved for cross examination or brief rebuttal, but the above is plaintiff's case in chief. Plaintiff expects to take about one trial day to present its case in chief to the jury. Trying the case in this way will allow plaintiff to withdraw its current designation of exhibits and former testimony, and plaintiff believes it will also serve to reduce the scope of Philip Morris's proof, for many of the reasons argued by Philip Morris in its objections to plaintiff's designated exhibits.

Honorable Henry Kantor
November 21, 2011
Page 3 of 3

Plaintiff may also withdraw its claims for punitive damages on the negligence and product liability claims, depending on the outcome of the process requested below.

Request for Status Conference

Philip Morris has requested, and plaintiff has agreed, to extend the due date for both parties' responses to evidentiary objections from November 23 to November 30, 2011. In the interim, plaintiff asks that the court set a status conference, on a Saturday if necessary, to discuss with the parties whether plaintiff's case in chief, as described above, will meet the burden of proof set out by the court in its September 30, 2011 Order. We would appreciate it if the court's staff could let us know whether that will be possible.

Respectfully submitted,



James S. Coon
Swanson, Thomas & Coon

/au

cc: D. Lawrence Wobbrock
Richard A. Lane
Charles S. Tauman
William F. Gary & Sharon A. Rudnick
Frank P. Kelly, III & Robert A. McCarter, III
James Dumas
Lauren R. Goldman & Scott A. Chesin

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

THE ESTATE OF MICHELLE
SCHWARZ, deceased, by and through
her Personal Representative,
RICHARD SCHWARZ,

Plaintiff,

v.

PHILIP MORRIS INCORPORATED,
a foreign corporation,

Defendant.

Case No. 0002-01376

FOURTH AMENDED COMPLAINT
(Product Liability,
Negligence and Fraud)

NOT SUBJECT TO MANDATORY
ARBITRATION

JURY TRIAL REQUESTED

Plaintiff alleges:

GENERAL ALLEGATIONS AND REMEDIES SOUGHT

1.

Richard Schwarz is the duly appointed Personal Representative of the Estate of Michelle Schwarz who died July 13, 1999 at age 53.

2.

Michelle Schwarz died from lung cancer which was caused by tobacco smoke from Merit brand cigarettes to which she was addicted from approximately 1976 to 1999.

///

WOBBROCK & LANE
Trial Lawyers, P.C.
Jackson Tower
10th Floor
806 SW Broadway
Portland, Oregon 97205
Telephone: (503) 228-6600

1 3.

2 Michelle Schwarz married Richard Schwarz on November 13, 1965 and worked in his
3 medical office until his retirement in 1995 and then as a travel agent.

4 4.

5 As a result of the conduct of defendant which caused the wrongful death of Michelle
6 Schwarz, she and her estate have incurred economic damages for medical expenses in the amount
7 of \$118,514.22.

8 5.

9 As a result of the conduct of defendant which caused the wrongful death of Michelle
10 Schwarz, her beneficiaries have been deprived of the companionship, society, support, love,
11 affection and guidance of Michelle Schwarz for the remainder of their lives. The Estate of
12 Michelle Schwarz has suffered additional damages for physical pain and suffering of Michelle
13 Schwarz from the onset of the symptoms of her lung cancer in or about February, 1998 until her
14 death on July 13, 1999. Therefore, the Estate and Michelle Schwarz' beneficiaries are entitled to
15 recover reasonable compensation for non-economic damages in the amount of \$5,000,000.

16 **FIRST CLAIM FOR RELIEF - PRODUCTS LIABILITY**

17 6.

18 Plaintiff incorporates the allegations of paragraphs 1 through 5 above.

19 7.

20 At all material times, defendant Philip Morris Incorporated was a foreign corporation that
21 designed, distributed, marketed, advertised, supplied and sold the Merit brand cigarettes which
22 caused Michelle Schwarz' disease and death.

23 8.

24 At all material times, the cigarettes sold by defendant were defective and unreasonably
25 dangerous in one or more of the following respects:

- 26 a. The cigarettes contained added ammonia to increase the effects of nicotine;

WOBBROCK & LANE
Trial Lawyers, P.C.
Jackson Tower
10th Floor
806 SW Broadway
Portland, Oregon 97205
Telephone: (503) 228-6600

- 1 b. The cigarettes or their smoke contained altered pH so as to increase the effects of
2 nicotine;
- 3 c. At the time defendant's light cigarettes were sold, the product was dangerous and
4 in a condition not contemplated by the ultimate consumer in that it was
5 manufactured, marketed, and sold as a less harmful alternative to ordinary
6 cigarettes.

7 **SECOND CLAIM FOR RELIEF - NEGLIGENCE**

8 9.

9 Plaintiff incorporates the allegations of paragraphs 1 through 8 above.

10 10.

11 The conduct of defendant Philip Morris Incorporated in designing, testing, controlling,
12 processing, manufacturing, assembling, distributing, and supplying the Merit brand of cigarettes,
13 was negligent in one or more of the following ways:

- 14 a. In avoiding testing of tobacco, tobacco smoke, and cigarettes in a way that would
15 be likely to show the relationship between human disease to smoking in order to
16 allow defendant Philip Morris Incorporated to claim ignorance of the relationship
17 between human disease and smoking;
- 18 b. In processing, controlling and manipulating the contents and proportions of
19 various substances in cigarettes in such a way as to
20 continue and/or enhance the habit-forming and/or addictive effects of those
21 products on users, specifically by:
- 22 (1) adding ammonia to increase the effects of nicotine;
- 23 (2) altering the pH of cigarettes or cigarette smoke so as to increase the effects
24 of nicotine; and

25 ///

26 ///

WOBROCK & LANE
Trial Lawyers, P.C.
Jackson Tower
10th Floor
806 SW Broadway
Portland, Oregon 97205
Telephone: (503) 228-6600

1 (3) controlling and manipulating the amount of nicotine in its cigarettes in
2 such a way as to maintain the physical dependence of Michelle Schwarz
3 and other smokers on its cigarettes.

4 c. In selling and distributing cigarettes which it knew or should have known
5 contained poisonous and carcinogenic substances capable of causing and likely to
6 cause numerous serious and fatal injuries and diseases, including but not limited
7 to cancer of the lungs;

8 d. In selling and distributing products which it knew or should have known
9 contained habit-forming and addictive substances capable of and likely to induce
10 irresistible habits and/or physical and psychological dependence and addiction
11 when used in a foreseeable manner;

12 e. In failing to manufacture and sell cigarettes without the characteristics described
13 above although it was capable of doing so, thus depriving Michelle Schwarz of
14 the opportunity to smoke a safer cigarette; and

15 f. In selling so-called low tar cigarettes as a safer cigarette and as an alternative to
16 cessation.

17 11.

18 Defendant voluntarily assumed a duty to disclose research, cooperate closely with public
19 health authorities and hold people's health paramount to all other business considerations.

20 **THIRD CLAIM FOR RELIEF - FRAUD**

21 12.

22 Plaintiff incorporates the allegations of paragraphs 1 through 11 above.

23 13.

24 Defendant Philip Morris Incorporated recklessly and/or intentionally made fraudulent
25 misrepresentations about its tobacco products, including misrepresentations about adverse health
26 effects, the addictive nature of its tobacco products, and their contents.

WOBBROCK & LANE
Trial Lawyers, P.C.
Jackson Tower
10th Floor
806 SW Broadway
Portland, Oregon 97205
Telephone: (503) 228-6600

1 14.

2 Defendant Philip Morris Incorporated engaged in an ongoing public relations effort
3 beginning in the early 1950s, designed to manipulate public opinion by creating doubt about the
4 adverse health effects of smoking and to provide rationalizations to help smokers keep smoking
5 in spite of the adverse health effects. Defendant Philip Morris Incorporated made statements
6 which were intended to and did cause cigarette smokers such as Michelle Schwarz to continue
7 smoking cigarettes in spite of their adverse health effects. Defendant voluntarily assumed a duty
8 to disclose all research.

9 15.

10 Michelle Schwarz did not know defendant Philip Morris Incorporated's representations
11 were false and reasonably relied on, and suffered and died as a result of defendant Philip Morris
12 Incorporated's misrepresentations.

13 16.

14 Defendant Philip Morris Incorporated's misrepresentations included the following and
15 similar misrepresentations:

- 16 a. That the causal link between cigarette smoking and human disease was in doubt
17 or "had not been proven" in repeated statements during the past 50 years;
18 b. That cigarettes are not addictive; and
19 c. That "low tar" cigarettes delivered less tar and nicotine to the smoker and were
20 therefore safer and healthier than regular cigarettes as an alternative to quitting
21 smoking.

22 **PUNITIVE DAMAGES**

23 17.

24 Defendant Philip Morris Incorporated has shown a reckless and outrageous indifference
25 to a highly unreasonable risk of harm, and has acted with a conscious indifference to the health,
26 safety and welfare of others by making misrepresentations that low tar cigarettes delivered less

WOBBROCK & LANE
Trial Lawyers, P.C.
Jackson Tower
10th Floor
806 SW Broadway
Portland, Oregon 97205
Telephone: (503) 228-6600

1 tar and nicotine to the smoker and were therefore safer and healthier than regular cigarettes and
2 an alternative to quitting smoking. Defendant Philip Morris Incorporated has misrepresented the
3 health dangers and the safety of low tar cigarettes to maintain and increase the enormous profits
4 to defendant Philip Morris Incorporated from the sales of low tar cigarettes. Defendant Philip
5 Morris Incorporated should be assessed the amount of \$300,000,000 for punitive damages.

6 WHEREFORE, plaintiff prays for judgment in favor of the Estate of Michelle Schwarz
7 against defendants, as follows:

- 8 1. Economic damages in the amount of \$118,514.22;
- 9 2. Non-economic damages in the amount of \$5,000,000;
- 10 3. Punitive damages in the amount of \$300,000,000;
- 11 4. Costs and disbursements incurred herein; and
- 12 5. Such further relief this court deems just.

13
14 Dated this 16th day of December, 2011.

15
16 CHARLES S. TAUMAN, P.C.

17 

18 Charles S. Tauman, OSB #77371
19 Email: ctauman@aol.com

20 WOBBROCK & LANE, P.C.
21 D. Lawrence Wobbrock, OSB #773917
22 Email: lwobbrock@wobbrock.com
23 Richard A. Lane, OSB #862271

24 SWANSON, THOMAS & COON
25 James C. Coon, OSB #771450
26 Email: jcoon@stc-law.com

WOBBROCK & LANE
Trial Lawyers, P.C.
Jackson Tower
10th Floor
806 SW Broadway
Portland, Oregon 97205
Telephone: (503) 228-6600

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

**THE ESTATE OF MICHELLE
SCHWARZ, Deceased, by and through
her Personal Representative, PAUL
SCOTT SCHWARZ,**

Plaintiff,

v.

**PHILIP MORRIS USA INC., a foreign
corporation,**

Defendant.

Case No. 0002-01376

**DEFENDANT'S PROPOSED
SUPPLEMENTAL
ALTERNATIVE JURY
INSTRUCTIONS**

Subject to the reservations and objections set forth in previous filings, Defendant Philip Morris USA Inc. ("PM USA") submits herewith a supplemental set of proposed jury instructions for use in this case.

All of these instructions except for Proposed Instruction No. 57 were offered in the alternative, in light of the Court's rulings rejecting the corresponding instructions from Defendant's Proposed Jury Instructions (Set C), filed January 4, 2012. The offering of these alternative instructions does not waive PM USA's objection to the Court's denial of the corresponding instructions in Defendant's Proposed Jury Instructions (Set C), filed January 4, 2012. These instructions supplement, but do not supersede, Set C. By submitting these instructions, PM USA does not waive, and hereby preserves, its objections to the Court's refusal to give each of the proposed instructions in Set C.

///

///

Page 1 – **DEFENDANT'S PROPOSED SUPPLEMENTAL ALTERNATIVE
JURY INSTRUCTIONS**

1 The Court has to date rejected all of the alternative instructions in this filing
2 *except* Proposed Instruction No. 36A and Proposed Instruction No. 58. We are filing
3 these instructions at the Court's suggestion, simply to complete the written record.

4 DATED this 27th day of January, 2012.

5 HARRANG LONG GARY RUDNICK P.C.

6
7 By: 

8 William F. Gary, OSB #770325

9 william.f.gary@harrang.com

10 Sharon A. Rudnick, OSB #830835

11 sharon.rudnick@harrang.com

12 Telephone: (541) 485-0220

13 Facsimile: (541) 686-6564

14 Of Attorneys for Defendant

15 PHILIP MORRIS INCORPORATED, a

16 foreign corporation, nka Philip Morris USA

17 Inc.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 31A

(Reasonable Relationship – Requested Upon The Court's Denial of Defendant's Proposed Instruction No. 31, Filed January 4, 2012)

(b) Is there a reasonable relationship between the amount of punitive damages and [plaintiff]'s harm?

Authority:

UCJI 75.02.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 31A

1
2
3
4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF MULTNOMAH
6

7 **THE ESTATE OF MICHELLE**
8 **SCHWARZ, Deceased, by and through**
9 **her Personal Representative, PAUL**
10 **SCOTT SCHWARZ,**

11 Plaintiff,

12 v.

13 **PHILIP MORRIS USA INC., a foreign**
14 **corporation,**

15 Defendant.

Case No. 0002-01376

DEFENDANT'S OBJECTIONS
TO THE COURT'S REFUSAL TO
GIVE DEFENDANT'S
PROPOSED JURY
INSTRUCTIONS AND VERDICT
FORM – AS FILED AFTER
FINAL JURY INSTRUCTIONS

16 Defendant Philip Morris USA Inc. ("PM USA") respectfully submits its
17 objections to the court's refusal to give its proposed jury instructions and verdict form.

18 As the court is aware, PM USA submitted five sets of jury instructions in the
19 several months before trial began. One of these sets ("Set B") has been superseded by a
20 subsequent filing, and it no longer represents PM USA's active request for jury
21 instructions. The other four filings (which the parties have referred to as (1) "Set A," (2)
22 "Set C," (3) PM USA's "Supplemental Alternative" instructions, and (4) PM USA's
23 "Second Supplemental" instructions) are discussed here. PM USA has also proposed
24 several verdict forms. PM USA first proposed a verdict form in its "Set A" jury
25 instructions, which the court rejected. PM USA later proposed an alternative verdict
26 form consistent with its "Set C" jury instructions, while maintaining that the court erred
in rejected its verdict from (Set A).

[DENIED]

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 31.

(Reasonable Relationship)

(b) Is there a reasonable relationship between the amount of punitive damages you are considering and the compensatory damages awarded by the first jury?

Objections:

PM USA proposed this instruction in Defendant's Proposed Jury Instructions (Set C), filed January 4, 2012. The court denied this instruction during the charge conference on January 19, 2012. *See* Jan. 19, 2012 Tr. at 68; Jan. 24, 2012 at 210. PM USA objects to the court's denial of its proposed instruction. Oregon law requires that a proposed instruction be given to the jury if it correctly states the law and engages the pleadings and evidence. *See Denton v. Arnstein*, 197 Or 28, 46-47, 250 P2d 407 (1952). This instruction is necessary because it is pertinent to the pleadings and evidence. It is also a correct statement of law.

The proposed instruction is based on UCJI 75.02, which includes a reasonable relationship instruction but states in the comment section that "the law is not clear on whether the reasonable relationship element is a question for the jury, or for the court on postverdict review." The comment is incorrect; the law is clear that both juries and reviewing courts should consider the relationship between compensatory and punitive damages.

Due process requires that punitive awards bear a reasonable relationship to the plaintiff's damages. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 US 559, 566-67, 116 S Ct 1589, 134 L Ed 2d 809 (1996) ("exemplary damages must bear a 'reasonable relationship' to compensatory damages . . ."); *State Farm Mut. Auto. Ins. Co. v.*

1 *Campbell*, 538 US 408, 417-18, 123 S Ct 1513, 155 L Ed 2d 585 (2003) (“When
2 compensatory damages are substantial, then a lesser ratio, perhaps only equal to
3 compensatory damages, can reach the outermost limit of the due process guarantee”; for
4 purposes of ratio, only harm to plaintiff that gives rise to the punitive damages award can
5 be considered). Oregon law requires that a proposed instruction be given to the jury if it
6 correctly states the law and engages the pleadings and evidence. *See Denton v. Arnstein*,
7 197 Or 28, 46-47, 250 P2d 407 (1952). An instruction that punitive damages must be
8 reasonably related to the plaintiff’s harm is undoubtedly a correct statement of the law,
9 and in a case seeking punitive damages such an instruction directly engages the pleadings
10 and evidence. Numerous courts throughout the country have held that reasonable-
11 relationship instructions must be given. *See, e.g., Levinson v. Prentice-Hall, Inc.*, 868
12 F2d 558, 564 (3d Cir 1989) (applying New Jersey law, granting new trial on amount of
13 punitive damages because “[t]here is no doubt that the requested charge [on
14 proportionality] should have been given”); *Gagnon v. Cont’l Cas. Co.*, 211 Cal App 3d
15 1598, 1602, 260 Cal Rptr 305 (1989) (“The proper proportion punitive damages should
16 bear to the injury suffered is also a question for the jury to determine, and as a result, the
17 defendant is entitled to an appropriate instruction.”) (citation omitted); *Roth v. Farner-*
18 *Bocken Co.*, 667 NW2d 651, 671 (SD 2003) (similar); *Garnes v. Fleming Landfill, Inc.*,
19 413 SE2d 897, 899 (W Va 1991) (similar). Numerous additional courts have upheld trial
20 courts’ decisions to instruct on reasonable relationship. *See, e.g., Rusak v. Ryan*
21 *Automotive*, 12 A.3d 239 (N.J. App. Div. 2011); *Blust v. Lamar Advertising*, 917 N.E.2d
22 373 (Ohio App. 2009); *Lopez v. Aramark Uniform*, 426 F Supp 2d 914 (N.D. Iowa 2006);
23 *Baker v. John Morrell*, 255 F Supp 2d 909 (N.D. Iowa 2003). Various states’ pattern
24 instructions also include reasonable relationship instructions. *See, e.g., New Mexico Sup*
25 *Ct R Ann, Uniform Jury Instructions, Civil No. 13-1827 (1990)* (“The amount [of
26 punitive damages] awarded, if any, must be reasonably related to the injury and to any

1 damages given as compensation and not disproportionate to the circumstances.”); NY
2 Pattern Jury Instruction Civil 2:278 (Thompson/West 2005) (“The amount of punitive
3 damages that you award must be both reasonable and proportionate to the actual and
4 potential harm suffered by [plaintiff], and to the compensatory damages you awarded
5 [plaintiff]”); Delaware Pattern Jury Instructions Civil § 22.27 (2000) (“Any award of
6 punitive damages must bear a reasonable relationship to [plaintiff’s name]’s
7 compensatory damages”); New Jersey Model Civil Jury Charges § 8.62 (1997) (“Finally
8 you should make sure that there is a reasonable relationship between the actual injury and
9 the punitive damages”); Judicial Council of California Civil Jury Instruction 3945 (2011)
10 (“Is there a reasonable relationship between the amount of punitive damages and [name
11 of plaintiff]’s harm [or between the amount of punitive damages and potential harm to
12 [name of plaintiff] that the defendant knew was likely to occur because of [his/her/its]
13 conduct]?”); Anderson, South Carolina Requests to Charge Civil § 13-21 (2d ed 2009)
14 (“[W]hether the award is reasonably related to the harm likely to result from such
15 conduct”); Manual of Model Civil Jury Instructions for the District Courts of the Eighth
16 Circuit § 4.50C (2011) (“The amount of any punitive damages award should bear a
17 reasonable relationship to the harm caused to the plaintiff.”).

18 Because the plaintiff’s harm has been quantified by the first jury, PM USA’s
19 proposed instruction altered the pattern language to take into account the jury’s verdict.
20 Under Oregon and federal law, the first jury’s compensatory award is the proper measure
21 of the “plaintiff’s harm” for purposes of determining a reasonable relationship between
22 compensatory and punitive damages. *See* PM USA’s Opening Brief on Evidentiary
23 Issues and Initial Evidentiary Motions (June 20, 2011), at 13-16. Under Oregon law, “the
24 actual and potential harm suffered by a plaintiff is a fact to be decided by the jury.”
25 *Goddard v. Farmers Ins. Co. of Oregon*, 344 Or 232, 268-69, 179 P3d 645 (2008). In
26 *Goddard*, the Oregon Supreme Court noted that the jury’s award of compensatory

1 damages, reduced by the plaintiff's percentage of fault, constituted the jury's factual
2 determination of the plaintiff's actual and potential harm. *Id.* Here, the first jury has
3 already determined the amount of the actual harm suffered by Ms. Schwarz, reflected in
4 its \$168,514.22 compensatory damages award (compared to the \$5,118,514.22 in
5 compensatory damages prayed for), reduced by Ms. Schwarz's comparative fault on the
6 negligence and strict liability claims. Given the limited scope of the Supreme Court's
7 remand, those findings are binding on the parties and the jury on retrial.

8 To the extent plaintiff has suggested that the first jury's compensatory award
9 understates Ms. Schwarz's harm because it does not account for "potential harm," it is
10 mistaken. There is no question of potential harm in this case. The United States
11 Supreme Court first addressed the concept of potential harm in *TXO Prod. Corp. v.*
12 *Alliance Resources Corp.*, 509 US 443, 113 S Ct 2711, 125 L Ed 2d 366 (1993). That
13 case involved a claim that the defendant had unsuccessfully attempted to force plaintiff to
14 renegotiate an oil and gas royalty agreement by filing a quiet title action based upon a
15 quitclaim deed that it knew to be worthless. The Supreme Court noted that "the shocking
16 disparity between the punitive award and the compensatory award . . . dissipates when
17 one considers the potential loss to respondents . . . had petitioner succeeded in its illicit
18 scheme." 509 US at 462.

19 Here, unlike in *TXO*, there is no scheme that was interrupted or thwarted. Nor is
20 there any harm that could have befallen Ms. Schwarz that was avoided. Her injury from
21 defendant's misconduct was complete. As the Oregon Supreme Court held in *Goddard*,
22 the concept of potential harm "has nothing to do with the amount that a jury *could*
23 conceivably have awarded to plaintiff." 344 Or at 268 (emphasis in original). Thus, on
24 retrial, the first jury's compensatory damages award quantifies the entirety of the harm
25 suffered by Ms. Schwarz.

26

1 This instruction is of particularly critical importance because the Court has
2 elected to tell the jury that the maximum amount it can award is the \$300 million
3 requested in the complaint; the absence of a reasonable relationship instruction
4 exacerbates the prejudicial anchoring effect of the plaintiff's arbitrary and excessive
5 prayer.

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

[DENIED]

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 31A

(Reasonable Relationship – Requested Upon The Court's Denial of Defendant's Proposed Instruction No. 31)

- (b) Is there a reasonable relationship between the amount of punitive damages and plaintiff's harm?

Objections:

PM USA proposed this instruction during the January 19, 2012 charge conference (see Jan.19, 2012 Tr. at 69-70) and in its Proposed Supplemental Alternative Jury Instructions (filed Jan. 27, 2012). The court denied this instruction during the charge conference. See Jan. 19, 2012 Tr. at 70 (denying instruction and giving defense counsel permission to file it in writing afterward). PM USA objects to the court's denial of its proposed instruction. Oregon law requires that a proposed instruction be given to the jury if it correctly states the law and engages the pleadings and evidence. See *Denton v. Arnstein*, 197 Or 28, 46-47, 250 P2d 407 (1952). This instruction is necessary because it is pertinent to the pleadings and evidence. It is also a correct statement of law. See UCJI 75.02. See also pp. 27-31 *supra*.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1

2

3

4

IN THE CIRCUIT COURT OF THE STATE OF OREGON

5

FOR THE COUNTY OF MULTNOMAH

6

**THE ESTATE OF MICHELLE
SCHWARZ, Deceased, by and through
her Personal Representative, PAUL
SCOTT SCHWARZ,**

Case No. 0002-01376

8

**DEFENDANT'S OBJECTIONS
TO FINAL JURY
INSTRUCTIONS AND VERDICT
FORM – AS FILED AFTER
FINAL JURY INSTRUCTIONS**

9

Plaintiff,

10

v.

11

**PHILIP MORRIS USA INC., a foreign
corporation,**

12

13

Defendant.

14

Defendant Philip Morris USA Inc. (“PM USA”) submits the following objections to the court’s final Jury Instructions (the “Final Instructions”) and Verdict Form. PM USA reserves the right to supplement or amend these objections at a later date. On February 9, 2012, at a hearing on jury instructions, defense counsel requested that the court reconsider its pretrial rulings concerning the instructions to be given to the jury. The court declined, and stood on its earlier rulings and reasoning. Feb. 9, 2012 Tr.

20

As a general matter, PM USA objects to the Final Instructions and Verdict Form to the extent they differ in any material respect from PM USA’s Preliminary Proposed Jury Instructions and Verdict Form (Set A) (filed August 5, 2011), or in the alternative, PM USA’s Proposed Jury Instructions (Set C) (filed January 4, 2012) and Defendant’s Proposed Verdict Form (Set C) (filed January 18, 2012).¹ PM USA incorporates by

25

26

¹ As the court is aware, PM USA originally requested that the court give its requested jury instructions and verdict form Set A, which anticipated a plenary retrial in Page 1 – **DEFENDANT’S OBJECTIONS TO FINAL JURY INSTRUCTIONS AND VERDICT FORM –AS FILED AFTER FINAL JURY INSTRUCTIONS**

1 **Maximum award of \$300 million.** PM USA further objects to the court's
2 decision to instruct the jury that the maximum punitive damages award in this case is
3 \$300 million, the amount requested in plaintiff's complaint. That instruction infringes on
4 PM USA's due process rights under *Williams*, and it is both misleading and highly
5 prejudicial. *See* 549 US 346. First of all, the maximum constitutionally permissible
6 punitive award in this case is far lower than \$300 million. *See State Farm*, 538 US at
7 424-45. *See* Defendant's Motion to Strike the Prayer for Punitive Damages in the Fourth
8 Amended Complaint and for Procedures to Protect Against an Arbitrary Award of
9 Punitive Damages (filed Jan. 10, 2012), incorporated herein by reference. Second, if the
10 jury is told of the amount that plaintiff has requested, that figure will "anchor" its
11 deliberations, creating a serious risk that PM USA will be subjected to an arbitrary and
12 excessive amount of punitive damages. *Id.* at 10-14. The court should refrain from
13 giving this instruction. *See Williams*, 549 U.S. at 355-57 (holding that "a court, upon
14 request, must protect" a defendant from an "unreasonable and unnecessary risk" that a
15 jury will impose punitive damages on an improper basis).

16 PM USA's Proposed Instruction No. 33 does not waive PM USA's objection to
17 this instruction being given to the jury in any form whatsoever. PM USA proposed this
18 instruction only in the alternative, after the court rejected PM USA's argument that it is
19 impermissible as a matter of both Oregon and federal constitutional law to instruct the
20 jury as to the amount of punitive damages claimed in the complaint. Jan. 24, 2012 Tr. at
21 136-63, 188. The court's decision to give PM USA's Proposed Instruction No. 33 does
22 not negate PM USA's objection to including any charge in the Final Instructions
23 whatsoever with respect to the amount of punitive damages requested by plaintiff.

24 **Reasonable Relationship.** PM USA objects to the court's refusal to instruct the
25 jury that its award must bear a reasonable relationship to the compensatory damages or to
26 the plaintiff's harm. The pattern instruction includes a reasonable relationship instruction

1 but states in the comment section that “the law is not clear on whether the reasonable
2 relationship element is a question for the jury, or for the court on postverdict review.”
3 See UCJI 75.02 (comment). Due process requires that punitive awards bear a reasonable
4 relationship to the plaintiff’s damages. See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 US
5 559, 566-67, 116 S Ct 1589, 134 L Ed 2d 809 (1996); *State Farm*, 538 US at 417-18.
6 And Oregon law requires that a proposed instruction be given to the jury if it correctly
7 states the law and engages the pleadings and evidence. See *Denton v. Arnstein*, 197 Or
8 28, 46-47, 250 P2d 407 (1952). An instruction that punitive damages must be reasonably
9 related to the plaintiff’s harm is undoubtedly a correct statement of the law, and in a case
10 seeking punitive damages such an instruction directly engages the pleadings and
11 evidence. This instruction is of particularly critical importance because the court has
12 elected to tell the jury that the maximum amount it can award is the \$300 million
13 requested in the complaint; the absence of a reasonable relationship instruction
14 exacerbates the prejudicial anchoring effect of the plaintiff’s arbitrary and excessive
15 prayer.

16 *Punish for Harm to Plaintiff Only.* The U.S. Supreme Court held in *State Farm*
17 that “a defendant should be punished for the conduct that harmed the plaintiff, not for
18 being an unsavory individual or business.” 539 US at 423. A defendant’s “dissimilar
19 acts,” the Court held, “may not serve as the basis for punitive damages.” *Id.* at 422. The
20 jury may consider evidence of similar conduct – acts that “have a nexus to the specific
21 harm suffered by the plaintiff,” or that “replicate[] the prior transgressions,” *id.*, – but only
22 to the extent that such evidence legitimately bears on the reprehensibility of the conduct
23 that harmed the plaintiff, *id.* at 423. Nothing in *State Farm* or any other Supreme Court
24 decision suggests that a jury may punish a defendant for “similar” or “related” conduct.
25 To the contrary, the Court was clear that the defendant may “only [be] punished for its
26 actions toward the” plaintiff. *Id.* In this case, therefore, it is necessary to inform the jury

Page 9 – **DEFENDANT’S OBJECTIONS TO FINAL JURY INSTRUCTIONS
AND VERDICT FORM –AS FILED AFTER FINAL JURY
INSTRUCTIONS**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

THE ESTATE OF MICHELLE
SCHWARZ, Deceased, by and through
her Personal Representative, PAUL
SCOTT SCHWARZ,

Plaintiff,

v.

PHILIP MORRIS USA INC., a foreign
corporation,

Defendant.

Case No. 0002-01376

POST-TRIAL MOTIONS:

**MOTION 1 FOR JUDGMENT
NOTWITHSTANDING THE
VERDICT (ORCP 63);**

**MOTION 2 FOR NEW TRIAL
(ORCP 63 C and 64 B(5));**

**MOTION 3 FOR REDUCTION
OF PUNITIVE AWARD (ORS
31.730(2));**

**MOTION 4 FOR REDUCTION
OF PUNITIVE AWARD (ORS
31.730(3)).**

**(ORAL ARGUMENT
REQUESTED)**

1 Philip Morris USA Inc. ("PM USA") respectfully submits the following post-trial
2 motions. PM USA requests oral argument and estimates that two hours is required for
3 oral argument on all of the motions. Court reporting services are requested.

4 **MOTION 1:** PM USA moves pursuant to ORCP 63 for an order granting
5 judgment notwithstanding the verdict on plaintiff's punitive damages claim. This motion
6 is made on each of three independently sufficient grounds: (1) plaintiff failed to satisfy
7 its burden of proving punitive damages liability as required by ORS 31.730(1); (2)
8 plaintiff failed to adduce evidence from which the jury could have determined, in a
9 rational and non-arbitrary manner as required by due process, the amount of punitive
10 damages necessary to punish and deter the conduct that harmed Mrs. Schwarz; and (3)
11 plaintiff failed to satisfy its burden of proof under ORS 30.925(2).

12 **MOTION 2:** In the alternative, PM USA moves for a new trial pursuant to
13 ORCP 63 C and 64 B(5).

14 PM USA moves in the first instance for a plenary retrial of all issues, including
15 compensatory liability and compensatory damages as well as punitive liability and
16 punitive amount. Oregon law and federal due process prohibit a limited retrial where—as
17 here—such a procedure would (a) result in separate juries making independent findings
18 about fundamentally inseparable issues or (b) there is a serious risk that the retrial jury
19 might impose punitive damages based on conduct different from the conduct that formed
20 the basis for the first jury's finding of compensatory and punitive liability.

21 If the court refuses to grant a plenary trial as to all issues, PM USA moves in the
22 alternative for a new trial that at minimum encompasses punitive liability as well as the
23 amount of punitive damages. Such a retrial is necessary both for the reasons described
24 above and because there is no assurance that *any* jury has found that the "low-tar" fraud
25 at issue in this case satisfied Oregon's "outrageous indifference" punitive liability
26 standard. Imposing punitive damages when the prerequisite finding of punitive liability

1 is neither expressly nor necessarily impliedly made violates both Oregon law and federal
2 due process.

3 **MOTION 3:** The Court should at the very least reduce, or, in the alternative,
4 remit the jury's \$25 million award pursuant to ORS 31.730(2) because it is grossly and
5 unconstitutionally excessive. The maximum constitutionally-permissible award in this
6 case can be no more than nine times the amount of compensatory damages, or
7 \$1,516,626.

8 **MOTION 4:** Finally, if PM USA is not granted judgment, then, without regard
9 to any reduction or remittitur that might be made on the ground of unconstitutional
10 excessiveness, PM USA moves for a reduction of the punitive award pursuant to ORS
11 31.730(3) on the ground that it has taken reasonable remedial measures to prevent any
12 reoccurrence of the conduct that gave rise to plaintiff's claim for punitive damages.

13 In support of these motions, PM USA relies upon the trial court file, the record of
14 proceedings on remand, and the Points and Authorities set forth below.

15 POINTS AND AUTHORITIES

16 BACKGROUND

17 Plaintiff elected to present to the retrial jury a "streamlined" case limited to a
18 single claim: that PM USA should be subjected to punitive damages based on the prior
19 jury's finding that PM USA made false representations concerning "low tar"¹ cigarettes
20 upon which Mrs. Schwarz reasonably relied. *See* Fourth Am. Compl. ¶ 17; Hr'g Tr. 16.,
21 Dec. 19, 2011. At trial, plaintiff introduced almost no evidence in support of that claim.
22 Its case-in-chief comprised only three elements: the first jury's findings; purported
23 evidence of PM USA's financial condition and income; and evidence of the period in
24 which PM USA sold low-tar cigarettes. And during cross-examination of PM USA's
25

26 ¹ As of June 22, 2010, the Family Smoking Prevention and Tobacco Control Act prohibits the use of "light," "mild," "low," or similar descriptors. All references to products with such descriptors are for historical purposes only.

1 trier of fact can evaluate the quality of the defendant's conduct—regardless of whether
2 the *defendant* is given the opportunity to present evidence. A party that is accused of
3 wrongdoing and faces the prospect of punishment is not required to produce any evidence
4 in defense; the burden rests with those who would impose the punishment. The United
5 States Supreme Court has held that as a matter of due process, courts “cannot authorize
6 procedures that create an unreasonable and unnecessary risk” of an arbitrary punitive
7 damages award, and must take affirmative steps to protect against such a risk. *Williams*,
8 549 US at 353, 357. The procedure that this court authorized in this case—excusing the
9 plaintiff from its evidentiary burden in the hope that the defendant would fill the void—
10 falls well short of the basic procedural protections that due process requires. Even if the
11 court were correct that evidence presented by the defendant *could* fill the void left by
12 plaintiff's complete failure to carry its burden of proof, moreover, the fact is that
13 defendant's evidence in this case *did not* do so. None of the evidence presented by PM
14 USA gave the jury any basis to conclude that an award of punitive damages—let alone an
15 award of \$25 million—was warranted in this case.⁷

16 Where, as in this case, the plaintiff makes a conscious, tactical choice to withhold
17 the information that the jury needs to do its job, the defendant is entitled to judgment as a
18 matter of law. To the extent that the court believes that—notwithstanding plaintiff's
19 tactical decision to ignore its burden of proof and the court's warnings—the court is
20 constrained by the Oregon Supreme Court's statement that the first jury found that
21 “punitive damages should be awarded,” we submit that the court should enter judgment
22 in favor of plaintiff in a nominal amount, such as \$1. Any award above a nominal
23 amount is arbitrary and violates due process.

24 //

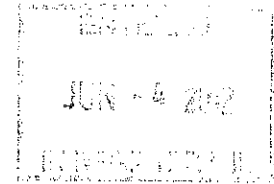
25 _____
26 ⁷ To the contrary, that evidence tended to show that PM USA's marketing of Merit
cigarettes was *not* reprehensible and that it took steps to ensure that consumers would *not*
be misled about low tar cigarettes. *See pp. 10-17 supra.*

ORIGINAL

FILED

12 MAY 30 AM 10:15

CIRCUIT COURT
FOR MULTNOMAH COUNTY.



IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

THE ESTATE OF MICHELLE
SCHWARZ, Deceased, by and through
her Personal Representative, PAUL
SCOTT SCHWARZ,

Plaintiff,

v.

PHILIP MORRIS, INCORPORATED., a
foreign corporation,

Defendant,

and

ROTH'S I.G.A. FOODLINER,
INCORPORATED, an Oregon
corporation,

Defendant.

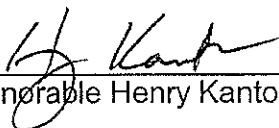
Case No.: 0002-01376

ORDER ON DEFENDANT'S
POST-TRIAL MOTIONS

The Court has considered the defendant's motions for judgment notwithstanding the verdict, for a new trial, for reduction of the jury's verdict under ORS 31.730(2) and the Due Process Clause of the United States Constitution and for reduction of the jury's verdict under ORS 31.730(3). The court has reviewed the parties' briefing and heard oral argument on May 17, 2012, and hereby ORDERS as follows:

- 1 1. Defendant's motions for judgment notwithstanding the verdict under ORCP
- 2 63 are denied;
- 3 2. Defendant's motions for new trial under ORCP 63C and 64B(5) are
- 4 denied;
- 5 3. Defendant's motion to reduce the jury's punitive damages award under
- 6 ORS 31.730(2) and the Due Process Clause of the United States
- 7 Constitution is denied; and
- 8 4. The Court exercises its discretion to deny defendant's motion to reduce the
- 9 jury's punitive damages award under ORS 31.730(3).

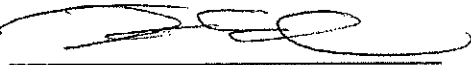
DATED this 29th day of May 2012.



Honorable Henry Kantor, Circuit Court Judge

Submitted by:

SWANSON, THOMAS, COON & NEWTON



James S. Coon, OSB 771450
820 SW Second Ave., Suite 200
Portland, OR 97204
Email: jcoon@stc-law.com
Of Attorneys for Plaintiffs

1 IN THE CIRCUIT COURT OF THE STATE OF OREGON
 2 FOR THE COUNTY OF MULTNOMAH

3 THE ESTATE OF MICHELLE
 4 SCHWARZ, Deceased, by and through
 5 her Personal Representative, PAUL
 SCOTT SCHWARZ,

Case No.: 0002-01376

GENERAL JUDGMENT

6 Plaintiff,

7 v.

8 PHILIP MORRIS, INCORPORATED.,

9 Defendant.

10
 11 Plaintiff brought this action for fraud, negligence and strict product liability, and it
 12 was tried to a jury from February 5 to March 22, 2002. The jury rendered a verdict on
 13 March 22, 2002 finding defendant liable on all claims and awarding economic damages
 14 of \$118,514.22 and noneconomic damages of \$50,000. The jury found plaintiff's
 15 decedent 49% comparatively negligent as to the negligence and strict liability claims.
 16 The jury awarded punitive damages of \$115,000,000 on the fraud claim, \$25,000,000 on
 17 the negligence claim and \$10,000,000 on the strict liability claim. On post-trial motions
 18 of the defendant, the court reduced the total punitive damages award to \$100,000,000.
 19 A general judgment was entered on the verdict as modified with an award of costs to
 20 plaintiff in the amount of \$6,342.00. Defendant appealed on various grounds, and the
 21 court of appeals and supreme court affirmed the judgment in all respects except for the
 22 amount of punitive damages and remanded to this court for a new trial limited to the
 23 amount of punitive damages. Defendant was awarded costs on appeal of \$367,700.92,
 24 plus \$638 per day from July 1, 2010, until release of its letter of credit or issuance of the

1 appellate judgment, whichever would occur first. The letter of credit was released by
2 stipulated order dated January 7, 2011, and the amount of the judgment for appellate
3 costs is \$488,920.92, which the court held would begin bearing statutory interest on the
4 date of entry of this judgment on remand.

5 The case was tried on remand to a jury from February 2 - February 16, 2012.
6 Plaintiff limited his claim for punitive damages to the fraud claim, and on February 16,
7 2012, the jury rendered its verdict awarding plaintiff punitive damages in the amount of
8 \$25,000,000 for fraud. Defendant moved for a new trial and for judgment
9 notwithstanding the verdict and to reduce that amount under ORS 31.730(2) and (3) and
10 the Due Process Clause of the United States Constitution, and those motions were
11 denied by order entered on June 4, 2012.

12 Pursuant to ORS 31.735, the Department of Justice of the State of Oregon is a
13 judgment creditor as to the punitive damages portion of the award to which the Criminal
14 Injuries Compensation Account is entitled pursuant to ORS 31.735(1)(b).

15 NOW, THEREFORE IT IS HEREBY ADJUDGED that plaintiff shall have
16 judgment against defendant for economic damages of \$118,514.22 and for
17 noneconomic damages of \$50,000, with simple interest at 9% from May 10, 2002.

18 IT IS FURTHER ADJUDGED that the plaintiff, shall have judgment against
19 defendant for punitive damages of \$10,000,000, with simple interest at 9% from
20 February 16, 2012.

21 IT IS FURTHER ADJUDGED that the State of Oregon, by and through the
22 Criminal Injuries Compensation Account of the Department of Justice Crime Victims'
23 Assistance Section shall have judgment against defendant for punitive damages of
24 \$15,000,000, with simple interest at 9% from February 16, 2012.

1 IT IS FURTHER ADJUDGED that plaintiff shall have judgment against defendant
 2 for his costs in the amount of \$6,342 with simple interest at 9% from May 10, 2002.

3 IT IS FURTHER ADJUDGED that defendant shall have judgment against plaintiff
 4 for \$488,920.92 for appellate costs, with simple interest at 9% from the date of entry of
 5 this judgment.

6 IT IS FURTHER ADJUDGED that all claims against Roth's IGA Foodliner Inc. are
 7 dismissed with prejudice.

8 MONEY AWARD

9	1. Name of Judgment Creditors:	A. Paul Schwarz, as Personal Representative of the Estate of Michelle Schwarz, for \$10,000,000.00
10		
11		B. The Oregon Department of Justice Criminal Injuries Compensation Account for \$15,000,000.00
12		
13		
14	2. A. Attorney for Judgment Creditor:	Lawrence Wobbrock 2151 Crest Drive Lake Oswego, OR 97034
15		
16	B. Attorney for Statutory Judgment Creditor:	Atty General Ellen Rosenblum Oregon Department of Justice 1162 Court Street Salem, Oregon 97301 (503) 378-6002
17		
18		
19	3. Name of Judgment Debtor:	Phillip Morris USA, Inc.
20	4. Attorney for Judgment Debtor:	William F. Gary Harrang, Long, Gary, Rudnick, PC 360 E. 10 th Ave, Suite 300 Eugene, Oregon 97401 (541) 485-0220
21		
22		
23	5. Amount of Judgment (principal):	\$25,168,514.22


24 ///

1 6. Costs

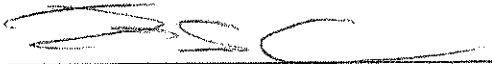
2 a. Payable to Judgment Creditor: \$6,342

3 b. Payable to Judgment Debtors: \$488,920.92

4 7. Interest:

5 Nine percent (9%) simple interest
6 is payable to the following parties
7 from the following dates:8 A. To Plaintiff/Judgment Creditor,
9 on \$168,514.22 compensatory
10 damages and \$6,342 costs from
11 May 10, 2002 and on \$10,000,000
12 punitive damages from February
13 16, 2012.14 B. To Oregon Department of
15 Justice/Statutory Judgment
16 Creditor on \$15,000,000 from
17 February 16, 2012.18 To Judgment Debtors, on
19 \$488,920.92 appellate costs from
20 the date of entry of this judgment.21 DATED this 8th day of August 2012.22 
23 Honorable Henry Kantor, Circuit Court Judge

24 Submitted by:

25 **SWANSON, THOMAS, COON & NEWTON**26 
27 James S. Coon, OSB # 77145028 Email: jcoon@stc-law.com29 **CHARLES S. TAUMAN**, OSB# 77371030 Email: ctauman@aol.com31 **D. Lawrence Wobbrock**, OSB# 77391732 Email: lwobbs@gmail.com33 **Richard A. Lane**, OSB#86227134 Email: rlane@richardlanelaw.com

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b), and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 9,986 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

HARRANG LONG GARY RUDNICK P.C.

By: S/ William F. Gary
William F. Gary, OSB #770325
william.f.gary@harrang.com
Sharon A. Rudnick, OSB #830835
sharon.rudnick@harrang.com
J. Aaron Landau, OSB #094135
aaron.landau@harrang.com

Of Attorneys for Defendant-
Appellant PHILIP MORRIS USA
INC., a foreign corporation

CERTIFICATE OF FILING AND SERVICE

I certify that on September 13, 2013, I filed the foregoing **OPENING BRIEF AND EXCERPT OF RECORD** with the Appellate Court Administrator by using the eFiling system.

Participants in this case who are registered eFilers will be served via the electronic mail function of the eFiling system.

Charles S. Tauman, OSB #773710
ctauman@aol.com
CHARLES S. TAUMAN PC
PO Box 19631
Portland, OR 97280
(503) 849-9281

D. Lawrence Wobbrock, OSB #773917
lwobbrock@wobbrock.com
LAWRENCE WOB BROCK P.C.
2151 Crest Drive
Lake Oswego, OR 97034
(503) 349-4141

James Coon, OSB #771450
jcoon@stc-law.com
SWANSON THOMAS & COON
820 SW Second Ave., Suite 200
Portland, OR 97204
(503) 228-5222

Of Attorneys for Plaintiff-Respondent

I further certify that on said date I served two true and correct copies of said document on the party or parties listed below, via first class mail, postage prepaid, and addressed as follows:

Richard A. Lane, OSB #862271
rlane@richardlanelaw.com
RICHARD A. LANE ATTORNEY AT LAW
707 SW Washington St Ste 600
Portland, OR 97205
(503) 228-6600
Of Attorney for Plaintiff-Respondent

Frank Kelly, III, *Pro Hac Vice*
fkelly@shb.com
SHOOK, HARDY & BACON LLP
1 Montgomery Street, Suite 2700
San Francisco, CA 94104-4505
(415) 544-1948

Robert A. McCarter, III, *Pro Hac Vice*
rmccarter@shb.com
SHOOK, HARDY & BACON L.L.P.
1155 F Street NW, Suite 200
Washington, D.C. 20004-1305
(202) 639-5638

Lauren R. Goldman, *Pro Hac Vice*
lrgoldman@mayerbrown.com
Scott A. Chesin, *Pro Hac Vice*
sachsin@mayerbrown.com
Michael Rayfield
mrayfield@mayerbrown.com
MAYER BROWN LLP
1675 Broadway
New York, NY 10019
(212) 506-2647

James Dumas, OSB #771671
jdumas@lindsayhart.com
LINDSAY HART NEIL & WEIGLER LLP
1300 SW 5th Avenue, Suite 3400
Portland, OR 97201
(503) 548-6135

Of Attorneys for Defendant-Appellant

HARRANG LONG GARY RUDNICK P.C.

By: s/William F. Gary
William F. Gary, OSB #770325
william.f.gary@harrang.com
Sharon A. Rudnick, OSB #830835
sharon.rudnick@harrang.com
J. Aaron Landau, OSB #094135
aaron.landau@harrang.com

Of Attorneys for Defendant-
Appellant PHILIP MORRIS USA
INC., a foreign corporation