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No. D045154

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE**

BENETTA BUELL-WILSON and BARRY S. WILSON,

Plaintiffs, Respondents, and Cross-Appellants,

v.

FORD MOTOR COMPANY and DREW FORD

Defendants, Appellants, and Cross-Respondents.

Appeal from the San Diego County Superior Court
The Honorable Kevin A. Enright
No. GIC800836

**APPLICATION OF LEAVE TO FILE *AMICUS CURIAE* BRIEF;
BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA IN SUPPORT OF
APPELLANTS**

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to California Rule of Court 29.1, subdivision (f), the Chamber of Commerce of the United States of America respectfully applies for leave to file the attached *amicus curiae* brief in support of appellants in this case.

The Chamber is the world's largest business federation, with an underlying membership of more than 3,000,000 business and professional organizations of every size, in every sector of business, and in every region of the country. The Chamber has thousands of members in California and thousands more conduct substantial business in the State. For that reason, the Chamber and its members have a significant interest in the administration of civil justice in the California courts. One of the Chamber's most important functions is to represent its members' interests by filing *amicus curiae* briefs in cases involving issues of concern to American business. In fulfilling that role, the Chamber has appeared many times before the California appellate courts.

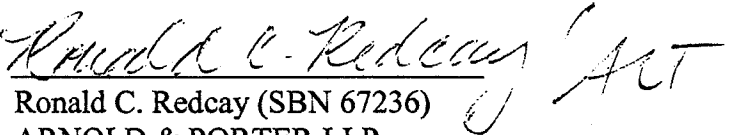
There are few issues of greater concern to American business than arbitrary punitive damages awards. For that reason, over the past 18 years, the Chamber has filed a brief in every punitive damages case before the U.S. Supreme Court. In *Philip Morris USA v. Williams* (2007) 127 S.Ct. 1057, the Supreme Court recognized that allowing juries to impose punitive damages to punish a defendant for allegedly causing harm to non-parties violates due process. Furthermore, the Court recognized, that, where procedures create a *risk* of jury confusion -- "because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury -- a court, upon request, *must* protect against that risk." (*Id.* at p. 1065, italics added.) The fundamental purpose of such

protection is to guard against “risks of arbitrariness, uncertainty, and lack of notice.” (*Id.* at p. 1063.) The Chamber respectfully submits this brief urging this Court to safeguard these rights.¹

Dated: September 28, 2007

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¹ The Chamber of Commerce has previously filed an amicus curiae brief in this case arguing that the trial court erred by allowing the jury to award punitive damages in a case in which Ford complied with all relevant government and industry safety standards. (See Brief of Amicus Curiae Curiae the Chamber of Commerce of the United States of America in Support of Appellants (Jan. 3, 2006)). The Chamber continues to adhere to this argument but focuses here on the implications of the Supreme Court’s decision in *Williams* on a defendant’s rights to protection against the risk of unconstitutional punishment.

INTRODUCTION AND SUMMARY OF ARGUMENT

This action presents the textbook case for the application of *Williams*. *First*, plaintiffs made the deliberate tactical decision to try their case by relying heavily on evidence and argument that the conduct of Ford Motor Company (“Ford”) caused severe harm to countless, unidentified Californians. Plaintiffs submitted no individualized evidence that any of these non-parties had actionable claims against Ford. Rather, plaintiffs relied on statistics and argument that deprived Ford of any meaningful opportunity to show that the injured non-parties did not have valid claims. The nature of plaintiffs’ claims, their evidence, and their argument created a significant risk that the jury would be confused about whether it was permitted to punish Ford for these harms to non-parties. *Second*, Ford responded to plaintiffs’ evidence and argument by seeking protection from the trial court against the risk that the jury would improperly rely on harm to others as a basis for punishing Ford. Thus, Ford moved *in limine* to exclude evidence of harm to others and, when the trial court denied that motion, requested a jury instruction, which was also denied.

Under *Williams*, once Ford made its requests for protection, the trial court was affirmatively obligated to offer “*some* form of protection” against the risk of unconstitutional punishment. (*Philip Morris USA v. Williams* (2007) 127 S.Ct. 1057, 1065.) The trial court’s failure to do so tainted the entire punitive damages verdict. (See *Merrick v. Paul Revere Life Ins. Co.* (9th Cir. Aug. 31, 2007) No. 05-16380, 2007 WL 2458503, at pp. *7-8; *White v. Ford Motor Co.* (9th Cir. Aug. 30, 2007) No. 05-15655, 2007 WL 2445952, at pp. *6-7.)

Plaintiffs ask this Court to erect a series of roadblocks to the ability of any defendant to invoke the due process rights recognized in *Williams*. These roadblocks, if recognized, would all but nullify the important protection *Williams* provides. As an initial matter, plaintiffs argue that the their evidence and argument relating to non-party harms was relevant to reprehensibility and thus properly considered by the jury. Even if true, that argument is entirely beside the point. Plaintiffs cannot reasonably dispute that their evidence and argument relating to non-parties created a significant risk that the jury would be confused about its ability to punish Ford for causing harm to non-parties. The due process right recognized in *Williams* is a right to protection against the *risk of jury confusion*.

In addition, plaintiffs argue that Ford cannot show that it is “reasonably probable” that it was prejudiced by the due process violation, citing *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 581 fn.11. But the impossibility of determining the extent of jury confusion after a jury returns a verdict is precisely why the Supreme Court in *Williams* required a pre-verdict remedy in the form of procedures to avoid jury confusion in the first place. Indeed, the Supreme Court asked the very question raised by plaintiffs here: “How can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to punish the defendant for having caused injury to others?” (*Williams, supra*, 127 S.Ct. at p. 1065.) The Court’s answer was to hold that state courts must impose *pre-verdict* procedures such as jury instructions protecting against the risk of jury confusion. (*Ibid.*) The failure to provide such instructions is per se prejudicial. In any event, prejudice is clear here.

Finally, plaintiffs nitpick Ford’s instructions to argue that it was not perfectly proper and thus properly denied. Ford submitted its instruction,

however, before *Williams* was ever decided. If it is not perfect, surely some leeway must be given for Ford's less than perfect prescience. That Ford's request for protection was in the form of a supposedly incomplete instruction does not obviate the fact that the request was made. The failure of the Court, upon request, to provide some form of protection violated due process. Under *Williams*, the form of the proposed instruction cannot be used to deprive Ford of the constitutional protection that it unequivocally requested.

ARGUMENT

I. THE TRIAL COURT DEPRIVED FORD OF DUE PROCESS BY FAILING TO PROTECT AGAINST THE RISK OF PUNISHMENT FOR NONPARTY HARMS

In *Philip Morris USA v. Williams* (2007) 127 S.Ct. 1057, the Supreme Court did not merely hold that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties." (*Id.* at p. 1063.) Rather, the Supreme Court went one step further to hold that, where procedures create a *risk* of jury confusion -- "because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury -- a court, upon request, *must* protect against that risk." (*Id.* at p. 1065, italics added.) "Although the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases." (*Ibid.*, italics in original).

The *Williams* Court provided several reasons for its holding. The Court explained that due process bars a state from punishing a defendant without first providing the "individual with 'an opportunity to present every

available defense.” (Ibid.) The Court found that, by allowing the jury to punish for harm to nonparties, the trial court would deprive a defendant of this due process right by allowing the jury to impose punishment without giving it any opportunity to show that defendant’s conduct as to nonparties was not wrongful or did not cause the injuries to nonparties. (Ibid.)

The Court also explained that “to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation.” (Ibid.) The Court found that a jury that is permitted to punish a defendant for nonparty harms could only speculate about the number of victims, the extent to which each was injured, and the circumstances under which his or her injuries occurred. (Ibid.) Such speculation magnifies “the fundamental due process concerns to which our punitive damages cases refer -- risks of arbitrariness, uncertainty and lack of notice.” (Ibid.)

The *Williams* holding is fully applicable here. As an initial matter, it simply cannot be reasonably denied that the nature of plaintiffs’ claims -- as well as their evidence and argument -- created a significant risk that the jury would be confused about whether it was permitted to punish defendant for harm to nonparties. After all, this case involved a single accident in a single Ford Explorer. However, plaintiffs’ evidence and argument went far beyond this single accident. For example, plaintiffs submitted massive evidence about other accidents involving Explorers. (See Ford’s Opening Brief on Remand at pp. 14-15). But, more than that, plaintiffs emphasized accidents involving not only non-parties but also *a different make of car entirely* -- the Bronco II. As Ford recounts in detail in its opening brief on remand, plaintiffs introduced testimony and documents about the Bronco II’s fatal rollover rate, its design flaw, and its avoidability. (Id. at 12-14).

Nor was such evidence merely incidental; rather, it was an essential component of plaintiffs' case. Thus, plaintiffs argued at length that the jury should impose punitive damages based on injuries to non-parties caused by other accidents:

[T]housands of these vehicles were manufactured and sold in their defective condition and they are on our highways in California. And every time we look at one of those vehicles, we hope and pray there is no avoidance maneuver necessary They knew that people like Benetta, lives and families would be devastated by death and paralysis, but they chose to accept that risk.

* * *

Willful disregard of the health and safety of Benetta and those like her. Was this a single isolated incident? No. You have heard of others in California. Just a few we were allowed to present.

(RT 8508-09).

None of these other injuries was ever identified with specificity. Ford was never given the chance to defend itself against these other injuries by showing, for example, that these other accidents were the result of other causes or had nothing to do with the defect alleged here. Instead, based on this generalized evidence, the jury was invited to speculate about the number of victims who might have a valid claim against Ford, the extent to which those victims were injured, and the circumstances under which their injuries occurred. The result was an improper punitive damage award based on speculation, passion and prejudice, and arbitrary decision-making.

At trial, Ford did precisely what *Williams* required: it requested protection against the serious risk that the jury would punish it for harm to nonparties. Ford moved *in limine* to exclude evidence of harm to others, explaining that plaintiffs should not be permitted to urge the jury "to punish

Ford for any conduct that goes beyond the specific alleged harm to the plaintiffs in this case.”² Ford also proposed a jury instruction that said, among other things, that “[i]n determining the appropriate amount of punitive damages . . . you may consider only the harm to the plaintiffs. . . . Therefore, if you decide to award any punitive damages, your award must be limited to redressing the injuries incurred only by the plaintiffs in this lawsuit.” (See 2 AA 358). Both requests were denied.

Under *Williams*, Ford was required to do no more. Once Ford requested protection against the risk of unconstitutional punishment, the trial court was obligated to give the proposed instruction or take other action to protect against that risk, such as the exclusion of evidence. (*Williams*, *supra*, 127 S. Ct. at p. 1065). The trial court’s failure to give the instruction or otherwise protect against the risk tainted the entire punitive damages verdict, which must now be reversed and the case remanded for a new trial. Any other result would render the Supreme Court’s opinion in *Williams* a nullity.

II. PLAINTIFFS’ JUSTIFICATION FOR EVIDENCE AND ARGUMENT RELATING TO HARM TO OTHERS IS IRRELEVANT

In response to *Williams*, plaintiffs argue at length that the evidence and argument of harms to non-parties related to the jury’s assessment of reprehensibility. (Respondents’ Reply Brief on Remand (“Pls. Reply Br.”) at pp. 2-3, 8-9, 25). To be sure, the Supreme Court in *Williams* recognized that the jury could consider harm to others for the limited purpose of

² See Appellant’s Supplemental Appendix on Remand (“App.’s Supp. Br.”) at pp. 8-9, quoting *State Farm Mut. Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408, 423.

assessing reprehensibility. (*Williams, supra*, 127 S.Ct. at p. 1064). At the same time, however, the Court was unequivocal in drawing a line that must not be crossed: “a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.” (*Ibid.*)

Plaintiffs’ argument justifying allowance of the evidence and argument relating to harm to non-parties misconceives the fundamental teaching of *Williams*. For purposes of argument, we assume that plaintiffs are correct to this limited extent: that their evidence and argument of non-party harms was properly allowed as relevant to reprehensibility. This assumption, however, makes absolutely no difference. The issue is not one of admissibility, but whether there was a *risk* that the jury may have used such evidence and argument in assessing punitive damages for the purposes of *punishing* Ford. As long as there was such a risk, the trial court was obligated “to provide assurance that [the jury was] not asking the wrong question, i.e., seeking not simply to determine reprehensibility, but also to punish for harm caused strangers.” (*Ibid.*) Plaintiffs’ evidence relating to the Bronco II and “thousands” of other defective Explorers on the road certainly created such a risk.

Although the trial court could have protected Ford by excluding such evidence and limiting argument, there were other ways as well, such as providing a jury instruction telling the jury that punitive damages could not be imposed to punish Ford for harm to non-parties. Nothing in the trial court’s instructions told the jury that it could not impose punitive damages for this purpose.

III. THE FAILURE TO PROTECT AGAINST THE RISK OF UNCONSTITUTIONAL PUNISHMENT REQUIRES A NEW TRIAL

Plaintiffs further argue that Ford has not shown the requisite prejudice from this constitutional violation and therefore is not entitled to relief. (See Pls. Reply Br. at pp. 27-30). According to plaintiffs, Ford must somehow show that it is “probable” that the jury relied on evidence of harm to others to punish Ford, instead of properly considering such evidence for the limited purpose of assessing reprehensibility.

The short answer to this is that the Supreme Court has already acknowledged the difficulty of unscrambling the eggs after verdict -- that is, to determine after verdict the extent to which a punitive damage award is improperly attributable to punishment for causing harm to non-parties. Because of the difficulty in making this determination *post-verdict*, the Supreme Court held that the only way a defendant’s rights would be adequately protected is by using *pre-judgment* remedies -- such as proper jury instructions. Thus, the Supreme Court specifically held that, as a matter of due process, state courts, “upon request, must” protect a defendant from even the *risk* that the jury might punish it for harm to nonparties:

How can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to *punish* the defendant for having caused injury to others? Our answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary *risk* of any such confusion occurring. In particular, we believe that *where the risk of that misunderstanding is a significant one* -- because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury -- *a court, upon request, must protect against that risk.*

(*Williams, supra*, 127 S.Ct. at p. 1065, italics added.) Notably, in remanding the case back to state court for further proceedings, the court said nothing about any additional determination of “prejudice.” Under *Williams*, failure to protect against the significant risk of unconstitutional punishment is itself prejudice which requires retrial. It is the very impossibility of determining prejudice after the constitutional violation that caused the Supreme Court to impose a prophylactic obligation on trial court to protect against a due process deprivation.

Nor do plaintiffs’ arguments have any merit to the extent they suggest that the jury instructions that were actually given somehow protected against the risk of unconstitutional punishment. (See *Merrick v. Paul Revere Life Ins. Co.* (9th Cir. Aug. 31, 2007) No. 05-16380, 2007 WL 2458503, at *6 (rejecting a similar argument that the instructions taken as a whole protected against punishment for third-party harm). Plaintiffs argue that the instructions actually given directed the jury to assess punitive damages based on plaintiff’s harm and focused the jury on such harm when it defined “oppression” and “fraud.” But while the instructions actually given in this case may have been correct as far as they went, they in no way performed the essential *limiting* function due process requires: they did not tell the jury that it could not impose punishment for harm to nonparties. (See *Williams, supra*, 127 S.Ct. at p. 1064). Merely telling the jury that it may impose punitive damages to punish for plaintiffs’ harm hardly tells the jury that it *may not* impose punitive damages to punish for harm to others.

Further, the fact that the jury imposed a 2:1 ratio hardly rebuts the presumption of prejudice created by *Williams*, as plaintiffs also suggest. (See Pls. Reply Br. at p. 29). Given the overwhelming evidence of harm to others, the ratio may well have been far less -- and possibly the jury may

not have awarded punitive damages at all -- had the jury been properly instructed that it could not punish Ford for allegedly causing harm to others. Indeed, the jury's original \$246 million punitive damages verdict was twice as large as plaintiffs' counsel requested. (RT 8510-8511). It is to avoid this very speculation that the Supreme Court in *Williams* held that the existence of a significant risk of jury confusion was sufficient to trigger a defendant's due process rights. For a court to hold that, even after a clear violation of *Williams*, a defendant is entitled to relief only if it can show prejudice by a "reasonable probability" (as plaintiffs argue), would effectively nullify the very prophylactic protection that the Supreme Court imposed as a matter of constitutional law.

Finally, even under the standard test of prejudice for instructional error, Ford is entitled to a new trial. As plaintiffs point out, under *Soule* (1994) 8 Cal.4th 848, instructional error requires a new trial where it is "reasonably probable" that, but for the instructional error, the party would have obtained a more favorable result. (*Soule, supra*, 8 Cal.4th at p. 581 fn.11). However, at the same time, in reviewing whether instructional error was prejudicial, the Court "must assume that the jury, had it been given proper instructions, might have drawn different inferences more favorable to the losing [party] and rendered a verdict in [that party's] favor on those issues as to which it was misdirected." (*Logacz v. Limansky* (1999) 71 Cal.App.4th 1149, 1156; see also *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 674 [court should assume jury believed evidence on which proffered instructions were predicated].) Here, in assessing prejudice, the Court may infer that the jury considered evidence of harm to others in assessing whether to punish Ford -- and if so in what amount. Given the predominant role evidence of harm to others played at trial, it is clearly

“reasonably probable” that the jury’s decision to punish Ford was influenced by such evidence. That is sufficient to entitle Ford to relief.

IV. THE WILLIAMS ISSUE IS PROPERLY PRESERVED FOR THIS COURT’S REVIEW

Plaintiffs also argue that Ford cannot complain about the trial court’s failure to properly instruct the jury because Ford’s own instruction misstated the law. (See Pls. Reply Br. at pp. 15-17).

It is important to put plaintiffs’ arguments in context. For purposes of this argument, it must be assumed that there was a significant risk of unconstitutional punishment. Furthermore, plaintiffs do not deny that Ford filed both *in limine* motions and proposed instructions in an effort to bar the jury from punishing it for allegedly causing harm to third parties. Instead, plaintiffs argue that Ford nonetheless is not entitled to relief because its instructions -- submitted before *Williams* -- did not perfectly anticipate *Williams*. Plaintiffs cavalier attitude about depriving Ford of its due process rights is not shared by the Supreme Court or by California courts.

In *Williams*, the Supreme Court held that, “a court, *upon request*, must protect against” the risk that the jury will seek to punish the defendant for the effect of its conduct on other persons. (*Williams, supra*, 127 S.Ct. at p. 1065, italics added.) Here, by proposing its instruction, Ford made the request that *Williams* requires. Ford’s request, therefore, required the trial court to take affirmative action to ensure that the jury did not impose punitive damages based on alleged harms to others.

Any doubt about this was recently put to rest in the Ninth Circuit’s recent decision in *Merrick v. Paul Revere Life Ins. Co.* (9th Cir. Aug. 31, 2007) No. 05-16380, 2007 WL 2458503. There, the defendant submitted a

virtually identical jury instruction to the instruction that Ford proposed here. The defendant there requested that the jury be instructed that:

In deciding whether or in what amount to award in punitive damages, you may consider only the specific conduct by Defendants that injured Plaintiff. You may not punish Defendants for conduct or practices that did not affect Plaintiff, even if you believe that such conduct or practices were wrongful or deserving of punishment. The law provides other means to punish wrongdoing unrelated to Plaintiff.

(*Id.* at p. *6.) Thus, this instruction, like the one here, would have told the jury that the only conduct that it could consider in addressing punitive damages was the conduct that injured the plaintiff and thus would have precluded the jury from considering harm to nonparties in assessing the reprehensibility of the defendant's conduct. (*Ibid.*) The plaintiff in *Merrick* -- as do the plaintiffs here -- argued that the court should reject the defendant's due process challenge because the defendant's proposed instruction was incomplete "because it fail[ed] to indicate that the jury may consider harm to others as part of its reprehensibility analysis." (*Id.* at p. *8.) The Ninth Circuit, however, rejected this argument. Even though it agreed that the proposed instruction was incorrect, the court held that a new trial was required because, where "a proposed instruction is supported by law and *not* adequately covered by other instructions, the court should give a non-misleading instruction that captures the substance of the proposed instruction." (*Ibid.*, italics in original.) The Ninth Circuit concluded that "the district court erred in failing to instruct the jury that it could not punish the defendant for conduct that harmed only nonparties[,]. . . vacate[d] the punitive damages verdict and remand[ed] the case for a new trial on punitive damages." (*Ibid.*)

Another recent Ninth Circuit panel decision further supports Ford's arguments here. In *White v. Ford Motor Co.* (9th Cir. Aug. 30, 2007) No. 05-15655, 2007 WL 2445952, Ford "requested an instruction that would prevent the jury from punishing '[Ford] in this case not just for the harm to these plaintiffs, but for harm to other plaintiffs.'" (*Id.* at p. *6.) The trial court refused the instruction and Ford appealed. On appeal, the plaintiff argued that Ford's proposed instruction was properly refused because it "did not explain that the jury was permitted to consider harm to non-parties in assessing reprehensibility." (Supplemental Brief of Plaintiffs-Appellees, *White v. Ford Motor Co.* (9th Cir. Apr. 4, 2007) No. 05-15655, 2007 WL 1406020, at p. *6.) The Ninth Circuit rejected this argument (which tracks plaintiffs' argument in this case), holding that, "[g]iven *Williams*' guidance, we must conclude that the [district] court's failure to give a harm to nonparties instruction violated due process" and required a new trial. (*White, supra*, 2007 WL 2445952, at *6.)

If any doubt could possibly remain, it must be deemed put to rest by the recent decision of the Judicial Council of California to accept the recommendation of its Advisory Committee to accept model instructions substantially the same as the instruction Ford proposed. (See Judicial Council of California Civil Jury Instructions (*CACI07-02*) No. 3940, 3942, 3943, 3945, 3947, 3949.) The Advisory Committee, after "consider[ing] this idea at some length," determined that the model instruction should *not* inform the jury that it could consider evidence of harm to others in assessing reprehensibility "because the United States Supreme Court did

not approve or suggest any particular language for this purpose”³ and that “*Williams* requires that the jury be instructed on when harm to others cannot be considered, but not necessarily on when it can.” (*Id.* at p. 9.) Thus, plaintiffs’ assertion that “[t]he Committee, in short never denied the need to instruct a jury that it may consider harm to third parties in assessing reprehensibility” (Plaintiffs’ Sept. 24, 2007 Letter to the Court at p. 2) is contradicted by both the model instruction itself and the Advisory Committee’s Report. Because, as the Advisory Committee recognized, *Williams* does not affirmatively require a “reprehensibility” instruction relating to harm to non-parties, Ford was not required to propose one.

Indeed, the Advisory Committee also concluded that an additional instruction that the jury could take harm to others into account in assessing reprehensibility was unnecessary because California’s current standard instruction on punitive damages “leaves sufficient room for the plaintiff to present harm to others for the limited purpose of proving reprehensibility.” (Advisory Comm. Report at p. 3.) Here, the trial court recognized the same thing. The trial court made very clear that plaintiffs’ counsel was free to argue that the conduct was reprehensible because of the risk it posed to others. (RT 8499.) For this reason as well, an additional instruction on reprehensibility was not necessary.⁴

³ See Report from Advisory Committee on Civil Jury Instruction to Members of the Judicial Council (July 24, 2007) at p. 3, available at <<http://www.courtinfo.ca.gov/jc/documents/reports/083107item2.pdf>> (hereinafter “Advisory Comm. Report”).

⁴ Plaintiffs also argue that Ford’s proposed instruction was incorrect because it stated that, “if you decide to award any punitive damages, your award must be limited to redressing the injuries incurred only by the plaintiffs in this lawsuit.” (Plaintiffs’ Sept. 24, 2007 Letter to the Court at

Plaintiffs argue that Ford has waived its rights under *Williams* by failing to comply with state procedural rules governing requests for instructions -- specifically, California's requirement of a proper proposed instruction. (See Pls. Reply Br. at pp. 15-17). However, the right at issue in *Williams* is not simply a right to a proper jury instruction. Rather, it is a broader right to "some form of protection" -- not limited to jury instructions -- against the risk of unconstitutional punishment. As the Supreme Court stated:

[S]tate courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. In particular, we believe that where the risk of that misunderstanding is a significant one -- because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument that plaintiff made to the jury -- a court, upon request must protect against that risk. Although the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases.

(*Williams, supra*, 127 S.Ct. at p. 1065, italics in original.) That Ford's request for protection was in the form of a supposedly inaccurate instruction does not obviate the fact that the request was made. If, because of state procedural rules governing instructions, the precise instruction proposed by Ford was properly refused, all that would establish is that the trial court properly declined one of several particular *solutions* that Ford suggested to the problem. But, Ford repeatedly asked for protection against

p. 4.) Plaintiffs assert without citation that the use of the word "redressing" rendered the proposed instruction erroneous because it suggested that the purpose of punitive damages was compensatory. This is nonsense. Taken as a whole, the instruction reflected the holding of *Williams* that punitive damages may be imposed only for the plaintiffs' injuries and not for harm of non-parties.

the risk of unconstitutional punishment, both by proposing an instruction and by asking the trial court to bar or limit evidence relating to harm to others. Given that Ford expressly raised the *problem* for the court, due process required the court to provide some form of protection. The court failed to do so, and so the verdict cannot stand.

California Supreme Court authority confirms that important rights, such as the constitutional due process rights at issue here, are not readily lost. In *People v. Taylor* (1982) 31 Cal.3d 488, the defendant failed to comply with an administrative rule allowing a criminal defendant to wear street clothes during his trial. Notwithstanding the failure to comply with the rule, the defendant requested that he be allowed to wear street clothes at trial. The trial court denied the request because defendant failed to comply with the rule. The California Supreme Court reversed. First, the Court found that the right to wear street clothes was a “constitutional right valuable to a fair trial.” (*Id.* at p. 495.) Second, the Court found that this constitutional right could not be waived absent “an intentional relinquishment or abandonment of a known right or privilege.” (*Id.* at p. 497, quoting *Johnson v. Zerbst* (1938) 304 U.S. 458, 464.) The Court concluded that the defendant clearly did not intentionally relinquish a known right. Finally, the Court recognized that the failure to comply with the court’s procedure in certain cases may constitute a “waiver,” but that this principle was subject to limitation. “[W]hen a local procedural rule is invoked to prevent the defendant from exercising his right to a fair trial, and alternatives are readily available, inflexible adherence to the rule cannot be tolerated.” (*Taylor, supra*, 31 Cal.3d at p. 496.) The Court determined that application of the rule regarding the procedure for submitting street clothing for inspection would violate due process and that instead “the trial

judge should take all reasonable measures to assure that a defendant who so desires may stand trial in civilian clothes.” (*Id.* at p. 496.)

The same result should obtain here. First, as in *Taylor*, the due process right here -- the right to be protected from the risk of punishment for harm to nonparties -- is clearly designed to safeguard the right to a fair trial. As the Supreme Court recognized, its purpose is to protect against “risks of arbitrariness, uncertainty, and lack of notice.” (*Williams, supra*, 127 S.Ct. at p. 1063.) Second, as in *Taylor*, the question of waiver is a federal question controlled by federal law. (See, e.g., *Brookhart v. Janis* (1966) 384 U.S. 1, 4; *People v. Howard* (1994) 1 Cal.4th 1132, 1175.) Where, as here (and in *Taylor*), the due process right at issue is designed to safeguard a fair trial, federal law provides heightened protection against waiver and specifically requires “an intentional relinquishment or abandonment of a known right or privilege.” (*Brookhart, supra*, 384 U.S. at p. 4, quotations omitted.) This heightened standard applies to both criminal and civil cases.⁵ At trial, far from “intentionally relinquishing” its due process right to be protected against the risk of punishment for causing harm to others, Ford affirmatively asserted its right both by asking for a jury instruction and by asking the trial court to bar or limit evidence of harm to others.

Third, as in *Taylor*, some leeway should be afforded in the application of state court procedural rules (here, requiring “a specific, proper proposed instruction”) to safeguard the right to a fair trial. Ford

⁵ See *Lake James Community Volunteer Fire Dep’t Inc. v. Burke County* (4th Cir. 1998) 149 F.3d 277, 280; *Gete v. INS* (9th Cir. 1997) 121 F.3d 1285, 1293; *W.B. v. Matula* (3d Cir. 1995) 67 F.3d 484, 497.

unequivocally invoked its rights by proposing a specific instruction that anticipated the precise federal due process protection articulated by the Supreme Court in *Williams*. Given that Ford clearly requested protection here, “inflexible adherence to the rule cannot be tolerated.” (*Taylor, supra*, 31 Cal.3d at p. 496.) Having provided no other form of protection, the trial court below was obligated to provide Ford’s proposed instruction or an alternative instruction that would have assured against punishment for causing harm to nonparties.

This case stands in sharp contrast to *Grefer v. Alpha Technical* (La. Ct. App. Aug. 8, 2007) __ So. 2d __, 2007 WL 2473250, cited by plaintiffs in their September 24, 2007 letter to the Court. There, the defendant did not offer a proposed instruction or move *in limine* -- or anything else -- to request protection against the risk that the jury may impose punitive damages to punish for harm to others. Given the defendant’s *complete* failure to request protection, the appellate court was required under *Williams* only to ensure that it did not take into account harm to others in remitting the award because of excessiveness. (See *id.* at pp. *4-5). *Grefer*, if anything, supports retrial here, where Ford repeatedly made the requests for protection that *Williams* contemplates.

Finally, under California law, the trial court also had an obligation *sua sponte* to instruct the jury that it could not impose punitive damages to punish Ford for allegedly causing harm to others. Under California law, the “general rule is that it is the responsibility of the trial court to instruct the jury on the controlling legal principles applicable to a case.” (*Orient Handel v. United States Fid. & Guar. Co.* (1987) 192 Cal.App.3d 684, 698; *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 951 [“there ordinarily is no duty to instruct in the absence of a specific request by a party; the exception is a

complete failure to instruct on material issues and controlling legal principles which may amount to reversible error.”].) This rule applies even though faulty or inadequate instructions were submitted by the parties or instructions were not submitted by the parties on the controlling legal principles at all. (*Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 157-58 [“the court [is] not relieved of [its] responsibility [to provide the jury with a complete understanding of the law applicable to the facts] even though faulty or inadequate instructions were submitted by the parties or instructions were not submitted by the parties on the vital issues at all.”].)

For an issue to constitute a “controlling legal principle,” it must be “material” or “vital” to the result reached in the case. (*Orient Handel, supra*, 192 Cal.App.3d at p. 698; *Agarwal v. Johnson, supra*, 25 Cal.3d at p. 951.) It is well established that the duty to instruct on controlling legal principles encompasses the duty to instruct the jury on the proper measure of damages. (See *Blake v. Thompson Petroleum Repair Co.* (1985) 170 Cal.App.3d 823, 834; *Thomas v. Buttress & McClellan, Inc.* (1956) 141 Cal.App.2d 812, 819-20.) In *Blake*, for example, the trial court failed to instruct “the jury that any award of damages for lost profits should be limited to the period of time ‘reasonably necessary to repair or replace the damaged property.’” (*Blake, supra*, 170 Cal.App.3d at p. 834.) The Court of Appeal held that this limitation on lost-profit damages was a controlling legal principle and that the trial court, therefore, erred in not instructing on the issue.

The *Williams* right to be protected against punishment for harm to others is a “controlling legal principle” because the right is part of the fundamental due process right to be free from “risks of arbitrariness, uncertainty, and lack of notice.” (*Williams, supra*, 127 S.Ct. at p. 1063.)

Here, the instructions contained a gaping omission: they imposed no restraint on the jury's ability to punish Ford for causing harm to others. (See App.'s Supp. Br. at pp. 5-6.) As in *Blake*, the limitation was a controlling legal principle, and, therefore, the trial court erred in not instructing on the issue.

Accordingly, the trial court violated its duties under California law and federal constitutional law by failing "to provide assurance that [the jury was] not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." (*Williams*, *supra*, 127 S.Ct. at p. 1064.)

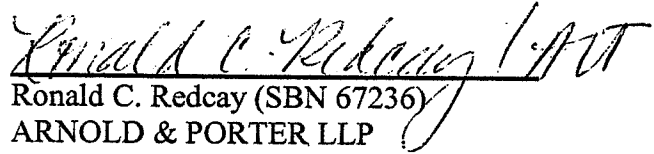
CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below and order a new trial.

Dated: September 28, 2007

Respectfully submitted,

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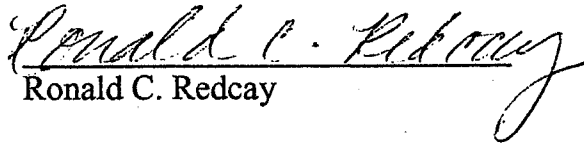

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CERTIFICATION OF WORD COUNT

Pursuant to Rule 14(c)(1) of the California Rules of Court, the undersigned hereby certifies that the foregoing Brief of *Amicus Curiae* The Chamber of Commerce of the United States of America contains 6,222 words, according to the word count generated by the computer program used to produce this brief.

Dated: September 28, 2007


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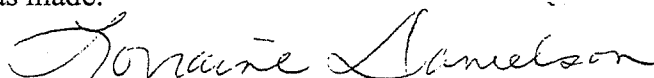
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