SUPREME COURT OF LOUISIANA

2014-C-0256

JOHN OLESZKOWICZ

versus

EXXON MOBIL CORPORATION, et al.

On application for writ of certiorari or review
to the Court of Appeal, Fifth Circuit, Parish of Jefferson

Application of Exxon Mobil Corporation, Defendant and Applicant, for Writ of Certiorari or Review

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SUPREME COURT OF LOUISIANA
WRIT APPLICATION FILING SHEET

NO._____

TO BE COMPLETED BY COUNSEL or PRO SE LITIGANT FILING APPLICATION

TITLE

John Oleszkowicz

VS.

Exxon Mobil Corporation et al.

Applicant: Exxon Mobil Corporation
Have there been any other filings in this Court in this matter? ☐ Yes ☑ No

Are you seeking a Stay Order? No
Priority Treatment? No
If so you MUST complete & attach a Priority Form

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Pleading being filed: ☐ In proper person, ☐ In Forma Pauperis

Attach a list of additional counsel/pro se litigants, their addresses, phone numbers and the parties they represent.

TYPE OF PLEADING

☑ Civil, ☐ Criminal, ☐ R.S. 46:1844 protection, ☐ Bar, ☐ Civil Juvenile, ☐ Criminal Juvenile, ☐ Other
☐ CINC, ☐ Termination, ☐ Surrender, ☐ Adoption, ☐ Child Custody

ADMINISTRATIVE OR MUNICIPAL COURT INFORMATION

Tribunal/Court: n/a Docket No._____
Judge/Commissioner/Hearing Officer:_____ Ruling Date:_____

DISTRICT COURT INFORMATION

Parish and Judicial District Court: Jefferson Parish, 24th Judicial District Court Docket Number: 695,645
Judge and Section: Robert A. Pitre, Jr., Judge Date of Ruling/Judgment: 19 March 2012

APPELLATE COURT INFORMATION

Circuit: Fifth Docket No. 12-CA-623 Action: Affirmed in part, amended in part, reversed in part
Applicant in Appellate Court: Exxon Mobil Corporation, appellant Filing Date: 8 May 2012
Ruling Date: 19 Dec. 2013 Panel of Judges: Susan Chehardy; Marc Johnson; Hans Liljeberg En Banc: ☐

REHEARING INFORMATION

Applicant: Exxon Mobil Corporation Date Filed: 2 Jan. 2014 Action on Rehearing: Denied
Ruling Date: 7 Jan. 2014 Panel of Judges: Susan Chehardy; Marc Johnson; Hans Liljeberg En Banc: ☐

PRESENT STATUS

☐ Pre-Trial, Hearing/Trial Scheduled date:_____, ☐ Trial in Progress, ☑ Post Trial

Is there a stay now in effect? No Has this pleading been filed simultaneously in any other court? No

If so, explain briefly_____

_____.

VERIFICATION

I certify that the above information and all of the information contained in this application is true and correct to the best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are attached to this filing. I further certify that a copy of this application has been mailed or delivered to the appropriate court of appeal (if required), to the respondent judge in the case of a remedial writ, and to all other counsel and unrepresented parties.

5 Feb. 2014
DATE

s/ Martin A. Stern
SIGNATURE

Addendum to Writ Application Filing Sheet

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Statement of Writ Grant Considerations

This case is writ-worthy for the following reasons:

1. La. Code Civ. P. art. 1795. It is mandatory under article 1795 that when the jury sends a request to the trial judge during deliberations, the court shall conduct the jury into the courtroom, notify the parties to solicit their input as to how to respond, and then do so on the record. Indeed, trial judges routinely do this. . But here, when the jury made such a request, the court did none of these. The court of appeal agreed that the trial court violated the law, but finding no prejudice, it did nothing. It reached this conclusion only by refusing to consider the jurors' affidavits, thereby compounding the trial court's legal error with its own.

As this Court has held, although juror affidavits are not permissible to impeach the jurors' internal deliberations, they are permissible to establish improper interaction between trial court and jury. Here, because the trial court failed to notify the parties and then responded to the jury's request off the record, juror affidavits were the *only* way to establish the violation of art. 1795. Moreover, these affidavits established prejudice because they reflect that the jury was not provided the evidence it requested—scientific evidence demonstrating that plaintiff's prostate cancer was not caused by the alleged toxic exposure.

If the lower courts' misapplication of art. 1795 is allowed to stand, art. 1795 will become a dead letter. Its violation will never be capable of being demonstrated. Because this goes to the very heart of how trials are conducted, writs should be granted to address this issue. *See* Rule X, §1(a)(4) and (5).

2. Res judicata. This is the second time that the *same* plaintiff has sued the *same* defendant on the *same* punitive-damage claim. Indeed, in the first case, plaintiff's punitive-damage claim was vigorously prosecuted by the same lawyers. After a full trial, the jury found no reckless conduct, the court of appeal affirmed, and this Court denied writs. Under La. R.S. 13:4231(3), *res judicata* precluded retrial.

The trial court, however, denied partial summary judgment and the court of appeal affirmed. The court of appeal actually agreed that *res judicata* applied, but made a *de novo* finding that unidentified "convoluted circumstances" constituted "exceptional circumstances" under La. R.S. 13:4232(A)(1), sufficient to disregard *res*

judicata. On this basis, it went on to award over $2 million in punitive damages. This decision was wrong for three reasons: First, this exception has never been applied where, as here, the party had a chance to fully litigate the claim at issue. Second, this approach is directly contrary to the mandatory nature of *res judicata*, which serves to fulfill the strong public policy favoring the finality of judgments. Finally, this approach is unfair to the defendant who, having defeated plaintiff's punitive-damages claim in the first jury trial, is forced to try it again. And because fairness goes to the heart of due process, which is implicated by any punitive-damage claim, the court of appeal's approach violates not only Louisiana law, but also federal and state due process. *See* Rule X, §1(a)(1), (4), and (5).

3. Disregard of controlling U.S. Supreme Court decision. On the defendant's request, a trial court *must* instruct the jury not to punish the defendant for harm to non-parties. *Philip Morris USA v. Williams*, 549 U.S. 346, 354–55 (2007). Here, defendant asked for this instruction, but the trial court refused to give it. As numerous courts have held, this is a clear violation of due process that must be corrected on appeal. Here, however, the court of appeal failed to do so. This Court should grant writs on all issues presented, but if nothing else, defendant respectfully suggests that the Court should grant summary reversal to correct this open-and-shut due-process violation. *See* Rule X, §1(a)(1), (4), and (5).

4. Excessive punitive-damage award. The court of appeal entered a punitive-damage award of $2,370,370, more than three times the net award for compensatory damages. Because the compensatory-damage award was itself so high, the U.S. Supreme Court instructs that punitive damages should be no higher. Moreover, the defendant here has already paid over $112 million in punitive damages—one of the highest awards on record—for exactly the same conduct. To punish defendant again for the same conduct serves no purpose and is patently unjust. The court of appeal not only failed to give any of these arguments the *de novo* review required by due process, but ignored them altogether. If any punitive damages can stand, they must be significantly reduced. *See* Rule X, §1(a)(4) and (5).

Any of these grounds presents a strong basis to grant review. The trial court, without notice to the parties, deprived the jury of the evidence compelling a defense

verdict. Then, it allowed plaintiff to prosecute a punitive-damage claim that he had already lost and, in the process, deprived the defendant of the most basic due process protections, refusing even to give a limiting jury charge specifically required by the U.S. Supreme Court. Finally, the court of appeal not only failed to correct these errors, but compounded them, and then ignored altogether the arguments requiring a reduction of the punitive-damage award. Taking these grounds together, the need for review here is unusually compelling.

Memorandum

Statement of the Case

1. Procedural history.

This case is John Oleszkowicz's second lawsuit against Exxon Mobil Corporation for alleged exposure to naturally occurring radioactive material (NORM). In his first, a jury awarded him compensatory damages for increased risk of cancer, but denied his claim for punitive damages, finding that Exxon had not engaged in wanton or reckless conduct. The court of appeal affirmed that judgment, and this Court denied writs. *Lester v. Exxon Mobil Corp.*, 10-743 (La. App. 5 Cir. 5/31/12), 102 So. 3d 148, *writ denied*, 2012-2202 (La. 4/19/13), 111 So. 3d 1028.

Soon after winning damages for increased risk of cancer in his first suit, Oleszkowicz actually contracted prostate cancer and, at age 69, he filed this second suit, claiming that it was caused by the same exposure.[1] Rejecting Exxon's plea of *res judicata*, the trial court allowed him to retry his claim for punitive damages. And in this trial, unlike his first trial, his counsel was allowed to offer evidence of harm to non-parties—including inflammatory and unproven allegations of contamination of the community's food supply—and to argue for imposition of punitive damages based on that harm.

The jury responded by awarding $10 million in punitive damages, a figure nearly 12 times greater than the $850,000 award for compensatory damages. The jury assessed 20% fault to Oleszkowicz, probably because of his history of cigarette smoking. The trial court rendered judgment on the verdict, reducing the compensatory and punitive awards by 20%. Exxon appealed, and Oleszkowicz answered the appeal. The court of appeal reduced punitive damages from $10

[1] As Exxon showed at trial, every man who lives long enough will eventually contract prostate cancer. Moreover, Exxon introduced scientific evidence demonstrating that every preeminent international and national scientific body agrees that radiation does not cause prostate cancer. These include the National Research Council of the National Academies of Sciences ("There is no convincing epidemiologic evidence that prostate cancer is a radiogenic disease. . . ."); the American Cancer Society ("Exposure to radiation … may cause DNA mutations in many organs of the body, but these factors have not been proven to be important causes of mutations in prostate cells. . . ."); and the United Nations Scientific Committee on the Effects of Atomic Radiation (UNSCEAR) ("studies of people who received radiotherapy provide little indication that external or internal radiation exposure increases prostate cancer risks."). Exxon assigned as error on appeal the failure to prove causation, but mindful of this Court's unique role as set forth in Rule X, Exxon does not do so here.

million to $2,370,370, but reversing the trial court, held that the punitive-damage award should not be reduced for Oleszkowicz's comparative fault. Otherwise, the court of appeal affirmed the trial court's judgment.

Exxon now seeks this Court's review of the court of appeal's judgment.

2. Facts.

In April 1986, Chevron discovered radium in oifield equipment at a well site in Mississippi, in the scale built up on the interior of some oil-production tubulars. This material is referred to as "NORM," for naturally occurring radioactive material. *See* La. Admin Code Title 33, Part XV, Chapter 14. In May 1986, after learning of Chevron's discovery, Exxon tested its own Mississippi well sites and found NORM accumulation in some equipment.

For years before this discovery, these used oilfield tubulars were sent to various pipeyards for removal of the scale so that they could be re-used. Intracoastal Tubular Services, Inc. (ITCO) operated one of these pipeyards in Harvey, Louisiana. John Oleszkowicz worked there from 1979 until April 1986, about a month before Exxon discovered NORM in its Mississippi facilities.

3. Oleszkowicz's first lawsuit.

In December 2002, a lawsuit alleging NORM exposure was filed in Civil District Court, Orleans Parish, styled *Lester v. Exxon Mobil Corp. et al.*, cumulating actions by hundreds of plaintiffs, including Oleszkowicz. Among the numerous defendants were Exxon and ITCO. Plaintiffs sought compensatory damages and punitive damages under former La. Civ. Code art. 2315.3. Former art. 2315.3, effective September 3, 1984, allowed punitive damages in tort cases "if it is proved that plaintiff's injuries were caused by the defendant's wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances."[2]

[2] *See* Acts 1984, No. 335 (enacting former art. 2315.1, renumbered 2315.3 by the Louisiana State Law Institute. Former art. 2315.3 was repealed effective April 16, 1996. *See* Acts 1996, 1st Ex. Sess., No. 2.

As a result of pre-trial motion practice, a flight of 26 plaintiffs, including Oleszkowicz, was severed and transferred to the 24th Judicial District Court, Jefferson Parish. Trial of this flight began in January 2010, at which point the only remaining defendants were ITCO and Exxon. By the end of the six-week trial, only 16 plaintiffs were left, including Oleszkowicz. None of these plaintiffs had cancer, but they nevertheless sought compensatory damages for increased risk of cancer. They also sought punitive damages under former art. 2315.3.

The jury found Exxon 100% negligent and awarded Oleszkowicz $115,000 for increased risk of cancer. But the jury rejected the claims of Oleszkowicz and his co-plaintiffs for punitive damages, expressly finding Exxon not guilty of any wanton or reckless conduct. The court of appeal affirmed judgment on the verdict, and this Court denied writs. *Lester v. Exxon Mobil Corp.*, 10-743 (La. App. 5 Cir. 5/31/12), 102 So. 3d 148, *writ denied*, 2012-2202 (La. 4/19/13), 111 So. 3d 1028.

4. Oleszkowicz's second lawsuit.

After Oleszkowicz's first trial, he filed a second lawsuit, alleging that he had been diagnosed with and treated for prostate cancer caused by the same NORM exposure. Indeed, Oleszkowicz specifically alleged in his petition that this lawsuit arose from the same facts as his first lawsuit. He sought compensatory damages and renewed his claim for punitive damages under former art. 2315.3.

In pre-trial proceedings, Exxon filed a motion for partial summary judgment to dismiss Oleszkowicz's claim for punitive damages. The basis for this motion was *res judicata* under La. R.S. 13:4231(3), specifically based on the *Lester* jury's denial of punitive damages and finding of no wanton or reckless conduct. But the trial court denied Exxon's motion without any discussion of La. R.S. 13:4231(3).

A jury trial of Oleszkowicz's second lawsuit began in March 2012. At this trial, Oleszkowicz was allowed to offer argument and evidence of alleged harm to persons other than himself. This included evidence about Exxon's permitted discharge of produced water (i.e. water that comes up with crude oil through production tubulars), even though Oleszkowicz did not claim, let alone prove, any exposure to produced water. Similarly, Oleszkowicz alleged dangerous conditions at

ITCO years after he left, this at a point when it could not have conceivably affected him. Exxon repeatedly objected to this evidence, but the trial court overruled Exxon's objections. Exxon also asked for a jury instruction, as the U.S. Supreme Court held was its right in *Philip Morris USA v. Williams*, 549 U.S. 346, 354 (2007), that it could not be punished for harm to non-parties. The trial court refused Exxon's request.

In its defense, Exxon introduced into evidence several studies from unimpeachable scientific authorities showing that radiation does not cause prostate cancer.[3] Later, during its deliberations, the jury asked to see this evidence. Juror Kenya M. Jackson testified in his hand-written affidavit that the jury made a list of requested exhibits, and that list included "a study that will help us to understand a study of radiation that's inside the body." Juror David S. Stanford confirmed Jackson's account, testifying in his hand-written affidavit:

> We asked the jury foreman to write down the materials that we wanted to review. We called the bailiff in and gave the note to him to deliver to the judge.

Under La. Code Civ. P. art. 1795, the trial court was required to notify the parties of the jury's request, conduct the jury to the courtroom, and respond to the request on the record in open court. None of this happened. The written list described in Jackson's and Stanford's affidavits was never filed into the record. In fact, Exxon did not learn of the request until after trial, when its counsel interviewed some of the jurors.

During the hearing of the parties' post-trial motions, the trial judge's law clerk said (not under oath) that the jury "got all the exhibits." But the trial judge himself admitted having "no idea" which exhibits were provided to the jury because "I didn't select them." Contrary to the law clerk's unsworn statement, Jackson's affidavit stated that the jury was not provided with the requested "study of radiation that's inside the body." Stanford's affidavit said that, in responding to the jury's request, the trial court's personnel failed to provide the exhibits demonstrating that radiation does not cause prostate cancer:

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[3] *See* n. 1, *supra*.

> When the secretary returned with the material, she told us that she could not get all of the material that we requested. As we looked through the material that she brought in, we noticed that there was very little material that we requested on Exxon's evidence. Without the pamphlets or brochures that Exxon used during the trial, I feel as though I could not make an honest decision that would be fair to both parties.

Without the exhibits supporting Exxon's causation defense, the jury rendered a verdict fixing Oleszkowicz's compensatory damages at $850,000, assessing 80% negligence to Exxon and 20% to Oleszkowicz. As set forth in the special verdict form, the jury found Exxon negligent for "**failing to know** between 1979 and 1986 [the years Oleszkowicz worked at ITCO] that its used pipes contained radioactive waste and negligently failed to prevent exposure to John Olezkowicz." (emphasis added). But despite its finding that Exxon did not know of the NORM hazard while Oleszkowicz worked at ITCO, the jury nevertheless awarded him $10 million in punitive damages. The trial court signed a judgment on the verdict for the amounts awarded by the jury, with both compensatory and punitive damages reduced 20% for Oleszkowicz's comparative fault.

Exxon appealed, and Oleszkowicz answered Exxon's appeal. The court of appeal affirmed in part, amended in part, and reversed in part. For purposes of this writ application, the following rulings are pertinent:

1) The court of appeal rejected Exxon's argument that the verdict should be set aside because of the trial court's violation of La. Code Civ. P. art. 1795. The court of appeal found that Exxon failed to prove that it was prejudiced by the trial court's violation, and in the same stroke, refused to consider the juror affidavits establishing that prejudice. *See* pp. A15–A18 below.

2) The court of appeal rejected Exxon's argument that the jury's verdict of no reckless conduct in Oleszkowicz's first trial precluded relitigation of this same issue in his second trial. The court of appeal did not disagree that his punitive-damages claim was fully and fairly litigated in his first suit and that all elements of *res judicata* were met. But it held that "the complexity of and convoluted circumstances" of this case constituted "exceptional circumstances" relieving Oleszkowicz of the preclusive effect of the final judgment in his first suit. *See* pp. A23–A25 below.

3) The court of appeal rejected Exxon's argument that the trial court committed reversible error in failing to instruct the jury not to punish Exxon for harm to non-parties, an instruction required by *Williams*, *supra*, as a matter of due process. *See* pp. A27–A30 below.

4) The court of appeal disregarded Exxon's argument that the amount of punitive damages violates due process, reasoning that because it had, on other grounds, reduced the award to $2,370,370, Exxon's due-process argument was somehow moot.

Assignment of Errors

1. The trial court deprived Exxon of a fair trial by failing to notify the parties of the jury's request to see exhibits and by failing to respond to the request on the record. In affirming, the court of appeal compounded the error by refusing to consider juror affidavits establishing both the violation and the resulting harm.

2. The jury in Oleszkowicz's first trial found Exxon not guilty of any wanton or reckless conduct. The trial court and court of appeal erred by failing to accord this verdict preclusive effect in Oleszkowicz's second trial and, on this basis, allowing him to relitigate the issue of reckless conduct.

3. The trial court violated due process by failing to instruct the jury against punishing Exxon for harm to non-parties. The court of appeal likewise erred by excusing the trial court's failure.

4. The court of appeal further violated Exxon's right to due process by imposing successive punitive damages for the same conduct and for assessing punitive damages nearly 3.5 times greater than Oleszkowicz's net award of compensatory damages.

Summary of the Argument

1. Violation of La. Code Civ. P. art. 1795. When the jury, during deliberations, sends a note with a question to the trial judge, the court routinely calls the parties into court and responds on the record. This is mandatory under La. Code Civ. P. art. 1795. But here, when the jury sent a note to the trial judge asking to

see certain exhibits, the trial court neither notified the parties nor responded on the record.

After learning of this after trial, Exxon raised this on a motion for new trial, at which point the trial court admitted having "no idea" which exhibits were actually given to the jury in response to its request. Juror affidavits reflect that exhibits favorable to Exxon were withheld. Yet the trial court failed to grant Exxon's motion for new trial. In affirming this trial-court error, the court of appeal refused even to consider the juror affidavits. And without the juror affidavits, the court of appeal determined that Exxon failed to prove any harm caused by the trial court's violation of art. 1795.

The court of appeal's approach is, with respect, nonsensical. It was precisely because the trial court failed to notify counsel of the jury's inquiry, or even put the jury's request or the court's response on the record, that there was no way for counsel to demonstrate the trial court's violation of art. 1795 except through juror affidavits. Under this Court's decision in *State v. Marchand*, 362 So. 2d 1090 (La. 1978), juror affidavits are, in fact, admissible for the limited purpose of establishing that the trial court's interaction with the jury violated the law. Were this not so, there would be no remedy at all for a trial court's violation of art. 1795.

2. Failure to give preclusive effect to first jury's verdict. *Res judicata* is not a discretionary doctrine; it is mandatory. Under the issue-preclusion aspect of *res judicata* contained in La. R.S. 13:4231(3), a valid and final judgment in a prior lawsuit between the same parties is conclusive in any subsequent action between them, with respect to any issue actually litigated if its determination was essential to that judgment. Here, Oleszkowicz's first lawsuit against Exxon for fear of cancer resulted in a valid, final judgment rejecting his claim for punitive damages. In that first lawsuit, the parties fully litigated the issue of Exxon's alleged reckless conduct and, indeed, the jury's determination that there was no reckless conduct was essential to its denial of punitive damages. That final judgment, affirmed on appeal, should have been preclusive here, and should have prevented relitigation of the same claim.

The trial court, however, erroneously denied Exxon's motion for partial summary judgment. And the court of appeal erroneously affirmed, making the *de novo* finding that "exceptional circumstances" allowed it to disregard La. R.S. 13:4231(3). In making this finding, the court of appeal committed legal error. The "exceptional circumstances" exception has never been applied to a claim that was actually litigated by the parties to final judgment in an earlier lawsuit. The court of appeal's unjustified application of this exception opens the door for any court to disregard *res judicata*. Left uncorrected, this decision will reduce *res judicata* to, at most, a mere discretionary doctrine, directly contrary to the strong public policy favoring the conclusiveness of final judgments. Moreover, where *res judicata* is being brushed off to allow the *same* plaintiff to sue the *same* defendant on the *same* claim for punitive damages, this rises to the level of a due-process violation.

3. Failure to instruct the jury against punishing Exxon for harm to non-parties. Due process forbids a jury from imposing punitive damages to punish the defendant for harm to non-parties. When the evidence and arguments presented at trial create a substantial risk that the jury will punish the defendant for harm to non-parties, the trial court, on request, *must* instruct the jury against doing so.

That is the holding of *Philip Morris USA v. Williams*, 549 U.S. 346 (2007). The rule it announced is not discretionary; it is mandatory. Here, Oleszkowicz's arguments and evidence created a substantial risk that the jury would punish Exxon for harm to non-parties. Exxon therefore requested an instruction, as is its due-process right under *Williams*, that the jury be specifically told not to punish Exxon for harm to non-parties. The trial court refused Exxon's request, and the court of appeal compounded the error. Because the jury was not instructed as required by due process, the resulting punitive-damages award must be vacated.

4. Excessive punishment. In view of the above arguments, no punitive-damage award should stand here. Alternatively, basic notions of fairness and due process militate against punishing a defendant multiple times for the same conduct. In *Grefer v. Alpha Technical*, 2002-1237 (La. App. 4 Cir. 8/8/07), 965 So. 2d 511, Exxon paid over $112 million in punitive damages—one of the highest punitive damage awards in the history of the State, if not the nation—for exactly the same

conduct alleged here. Any further punishment violates due process by punishing Exxon multiple times for the same conduct. If any punitive-damage award can comply with due process in these circumstances, it must be drastically reduced, and can be no higher than an amount equal to compensatory damages.

Argument

1. The trial court's violation of La. Code Civ. P. art. 1795 deprived Exxon of a fair trial.

1.A. The trial court failed to notify the parties of the jury's request to see exhibits and failed to respond to the request on the record.

According to the affidavits of two jurors, the jury asked during deliberations to see exhibits concerning causation of prostate cancer, including studies on the effect "of radiation inside the body." The parties were never notified of the jury's request, and therefore had no opportunity to be heard on the appropriate response. Worse, the affidavits reflect that the jury was denied evidence supporting Exxon's causation defense.

The trial court's failure to notify the parties of the jury's request was a plain violation of black-letter law. Code of Civil Procedure art. 1795 dictates that when the jury, after retiring, requests review of certain evidence, it must be conducted to the courtroom, and the trial court may respond only after notifying the parties:

> A. If the jury, after retiring for deliberation, requests a review of certain testimony or other evidence, they **shall be** conducted to the courtroom.
>
> B. After giving notice to the parties, the court may have the requested testimony read to the jury and may permit the jury to examine the requested materials admitted into evidence.

La. Code Civ. P. art. 1795 (emphasis added). A trial court commits error by failing to notify the parties of the jury's request to examine evidence. *Lavergne v. Family Dollar Stores*, 97-1005 (La. App. 3 Cir. 2/4/98), 706 So. 2d 1088, 1090. Failure to notify the parties before responding to a jury's request during deliberations can be reversible error. *U.S. v. Ronder*, 639 F.2d 931, 934 (2d Cir. 1981).

Exxon discovered the trial court's violation of art. 1795 in conducting post-trial interviews of the jurors, and it raised the issue in post-trial motions. During the

hearing of these motions, the trial court admitted that the jury had asked to see the exhibits. The trial judge said he had "no idea" which exhibits were actually presented to the jury because "I didn't pick them."

Had the trial court complied with art. 1795, the parties would have been notified of the jury's request during deliberations, they would have had the opportunity to be heard on the appropriate response, and the record would reflect exactly which exhibits were or were not provided to the jury. Instead, because the trial court failed to comply with art. 1795, we have only the two jurors' affidavits stating that the trial court's staff withheld exhibits favorable to Exxon.

This error so taints the jury's deliberations that the resulting verdict cannot stand. The manifest-error standard of review is based on the assumption that the underlying proceedings are untainted by prejudicial error and are fair to both sides. Because art. 1795 was not followed, that assumption cannot be made here.

1.B. The court of appeal erroneously refused to consider juror affidavits showing that the trial court's staff withheld exhibits favorable to Exxon.

In rejecting Exxon's argument on this error, the court of appeal refused to consider the jurors' affidavits. *See* p. A18 below. And with neither the affidavits nor a proper record reflecting which exhibits were furnished to the jury, the court of appeal determined that Exxon failed to show any harm caused by the trial court's violation of art. 1795. *See* p. A16 below. In so doing, the court of appeal not only penalized Exxon for the trial court's unilateral failure to follow the law, but also made it impossible to establish the very prejudice that the court of appeal required.

The court of appeal's decision to disregard the jurors' affidavits was based on a misinterpretation of La. Code Evid. art. 606(B). This article codifies prior Louisiana caselaw on jurors' post-verdict testimony. While a juror cannot testify about the jury's internal deliberations or the juror's own mental processes, a juror may testify about "outside influence … improperly brought to bear upon any juror …." La. Code Evid. art. 606(B).

This distinction was recognized by this Court in *State v. Marchand*, 362 So. 2d 1090 (La. 1978). Under *Marchand*, "jurors are competent to establish an overt act

independent of the jury's deliberations, if this overt act is in violation of law or of the statutory formalities designed to assure the impartiality of the jury finding and the jury's freedom from influences extraneous of the evidence presented to it for consideration." *Id.* at 1094. Indeed, as the *Marchand* court recognized, to prohibit juror testimony about improper communications with non-jurors would "prevent[ ] proof of it through the only means possible, the testimony of the jurors who received and transmitted the unauthorized communication." *Id.*

Marchand, like the present case, involved the jury's request to see certain evidence and the response of the trial court's personnel to the request. The *Marchand* court held that the jurors' testimony about their communications with trial court personnel was admissible because it dealt, not with the jury's private internal deliberations, but with improper actions by non-jurors. "The testimony admitted did not relate to alleged juror misconduct, as to which their testimony is incompetent …. Instead, it dealt with the overt act of a third person which caused extraneous prejudicial information to be considered by the jury in reaching its verdict." *Id.* at 1093. For exactly the same reasons, the juror affidavits should have been considered here.

Indeed, Louisiana courts applying art. 606(B) have reached the same conclusion as *Marchand*: while juror testimony about the jury's private deliberations is inadmissible, juror testimony about improper interactions with trial-court personnel is admissible to show that impropriety by a non-juror may have tainted the verdict. *See State v. Videau*, 04-923 p. 12 (La. App. 5 Cir. 3/1/05), 900 So. 2d 855, 863; *State v. Rodriguez*, 97-501 p. 6 (La. App. 5 Cir. 11/25/97), 703 So. 2d 803, 806.

Unlike *Marchand*, the cases cited by the court of appeal in support of its decision (p. A17 below) did not involve communications between the jury and the trial court's personnel. In *LeBlanc v. Western Heritage Insurance Co.*, 02-788 (La. App. 5 Cir. 12/30/02), 837 So. 2d 81, the appellant attempted to impeach the verdict itself by showing that the jury's answers to special interrogatories did not reflect its intended verdict. The other case, *Washington v. Lake City Beverage, Inc.*, 352 So. 2d 717 (La. App. 3 Cir. 1977), acknowledged the distinction between "matters of

impeachment extrinsic to the verdict," which may be shown by juror testimony, and matters that "inhere in the verdict itself," which may not. *Id.* at 720.

Here, Exxon has not attempted to pry into the jury's internal, private deliberations. Rather, Exxon's argument is based on the jury's request to see certain evidence and the trial court's response. Under art. 1795, this should have occurred in open court, on the record, after notice to the parties, and with their participation. The fact that the trial court violated this law cannot in and of itself serve to insulate its violation from review; if it did, then any violation of art. 1795 would be rendered automatically harmless and art. 1795 itself, therefore, would become meaningless.

The only other reason offered by the court of appeal for ignoring the trial court's violation of art. 1795 was that "[s]ubsection B of Article 1795 allows the trial court discretion in allowing review of the requested evidence." *See* p. A16 below. This reasoning is erroneous for three reasons: First, it is contrary to the text of art. 1795(B) itself, which permits the trial court to exercise this discretion only "[a]fter giving notice to the parties …." While the response may be discretionary, prior notice to the parties—not given here—is mandatory. Second, it is precisely because the trial court typically has discretion in how to respond that the parties must be notified, and heard, before the trial court decides how to exercise its discretion. Here, that could not and did not happen. Finally, the particular request here—for Exxon's evidence—involved no discretion. The trial judge was required to provide the scientific evidence requested. Instead, he admitted having "no idea" which exhibits went to the jury because "I didn't select them."

At bottom, it is undisputed that the trial court violated art. 1795 in failing to notify the parties of the jurors' request for evidence and in failing to put its response on the record. Juror affidavits, wrongly ignored by the court of appeal, reflect that that the trial court deprived the jurors of the scientific evidence they specifically requested—evidence conclusively demonstrating that although radiation can cause some types of cancer, it does not cause prostate cancer. If a violation of art. 1795 is to have any meaning, art. 1795 must be enforced here.

2. The final judgment on punitive damages in Oleszkowicz's first suit was improperly denied *res judicata* effect.

2.A. The trial court erred in failing to recognize the preclusive effect of the jury's verdict in Oleszkowicz's first lawsuit.

The *Lester* jury denied Oleszkowicz's claim for punitive damages. Essential to that aspect of its verdict was its finding that Exxon had not engaged in wanton or reckless conduct. That finding should have been preclusive here. Instead, the trial court erroneously allowed Oleszkowicz to relitigate the issue of reckless conduct, thus forcing Exxon to defend a claim already decided in its favor.

In 1990, Louisiana's law on *res judicata* was substantially broadened. Among the 1990 changes in the law was Louisiana's adoption of issue preclusion, a principle that "serves the interests of judicial economy by preventing relitigation of the same issue between the same parties." La. R.S. 13:4231, Comments—1990, comment (b). This principle is embodied in La. R.S. 13:4231(3):

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> …
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

Under issue preclusion, once a court decides an issue of fact or law that is necessary to its judgment, that decision precludes relitigation of the same issue in a different cause of action between the same parties. *Smith v. Parish of Jefferson*, 04-860 pp. 6–7 (La. App. 5 Cir. 12/28/04), 889 So. 2d 1284, 1288; *Lewis v. Hill*, 03-623 p. 4 (La. App. 5 Cir. 10/28/03), 860 So. 2d 156, 159.

The application of issue preclusion in a latent-disease case is aptly illustrated by *Adams v. Johns-Manville Sales Corp.*, 727 F.2d 533 (5th Cir. 1984). The *Adams* plaintiff alleged exposure to asbestos. Like Oleszkowicz in the *Lester* case, he did not have cancer but sought to recover for increased risk of cancer. The district court excluded evidence of increased risk of cancer, and the Fifth Circuit affirmed. The Fifth Circuit reasoned that, if and when the plaintiff actually contracted cancer, he

would "have a new cause of action, with new damages …." *Id.* at 538. But in any such subsequent action, the resolution of any issues decided in the first suit would be binding in the second. "In the second suit on a different cause of action, the parties will be 'estopped from relitigating only those issues actually and necessarily decided in the first suit.'" *Id.*, quoting *Dore v. Kleppe*, 522 F.2d 1369, 1374 (5th Cir. 1975).

Here, not only issue preclusion, but even claim preclusion, applies. The *same* plaintiff is bringing the *same* punitive-damage claim based on the *same* exposure and the *same* conduct. The only thing that has changed is that whereas he earlier claimed increased risk of cancer, he now claims that he actually has cancer. But it is beyond dispute that issue preclusion applies. Essential to the judgment in *Lester* was the jury's finding that Exxon had not committed reckless conduct. The resolution of that issue, affirmed on appeal, is conclusive in any subsequent action between the same parties, including this one. Exxon's motion for partial summary judgment should have been granted, and this issue never should have gone to another jury.

In denying Exxon's motion for partial summary judgment, the trial court reasoned that Oleszkowicz's current suit is "a separate claim, it's not the same claim as was litigated in the first trial, even though you have the same parties …." This reasoning, unsupported by any legal authority, is difficult to fathom. While the predicate claim may be different, the punitive-damage claim is exactly the same. But even if this were a basis to reject claim preclusion, it is not a basis to reject issue preclusion. By definition, issue preclusion will always apply to a "separate claim," or, as Oleszkowicz has repeatedly argued in the courts below, a "new suit."

The question for issue preclusion is not whether the claim is the same or whether the plaintiff has the right to file a "new suit" on a new claim. The question is whether an issue in the "new suit" has already been decided in a prior suit. Here, Oleszkowicz admitted in his petition that the conduct sued upon here is identical to the conduct sued upon in *Lester*. The *Lester* jury found that this same conduct was not reckless, and this finding was essential to the *Lester* jury's judgment denying punitive damages. All elements of issue preclusion are met here. The trial court plainly erred in failing to recognize these undeniable facts.

2.B. The court of appeal misapplied the law in making its *de novo* finding of "exceptional circumstances" to deny Exxon the benefit of the first jury's verdict.

This Court has held that the doctrine of *res judicata* is mandatory, not discretionary. *Avenue Plaza, L.L.C. v. Falgoust*, 96-0173 p. 7 (La. 7/2/96), 676 So. 2d 1077, 1080. But here, the court of appeal effectively reduced *res judicata* to a merely discretionary doctrine. Unable to deny the existence of all elements of issue preclusion, the court of appeal nevertheless declined to apply it. To reach this result, the court of appeal resorted to the "exceptional circumstances" exception to *res judicata* found in La. R.S. 13:4232(A)(1). The court of appeal made the *de novo* finding that "the complexity of and convoluted circumstances involved in the instant case" constituted exceptional circumstances sufficient to dispense with *res judicata*. *See* p. A25 below. In so reasoning, the court of appeal committed legal error.

The exceptions to *res judicata* in R.S. 13:4232(A) apply only to claim preclusion, not issue preclusion. This conclusion necessarily follows from the text of R.S. 13:4231(3) and 4232(A). The purpose of the exceptions in R.S. 13:4232(A) is to allow the plaintiff, in certain limited circumstances, to bring "another action" that otherwise might be barred by *res judicata*. These exceptions cannot possibly apply to issue preclusion, because issue preclusion assumes "a subsequent action" between the same parties. *See* La. R.S. 13:4231(3). Since issue preclusion allows "a subsequent action" to go forward, the exceptions in R.S. 13:4232(A) allowing "another action" cannot apply to issue preclusion.

More fundamentally, the court of appeal's application of the "exceptional circumstances" exception is contrary to every reported Louisiana decision that has ever considered the exception. Contrary to the court of appeal's decision, the "exceptional circumstances" exception is not generally applied to "convoluted factual or legal scenarios." *See* p. A25 below. Rather, it has been applied to complex procedural situations "in which litigants are deprived of any opportunity to present their claims because of some quirk in the system which could not have been anticipated." *Chaisson v. Oceanside Seafood*, 97-2756 p. 6 (La. App. 1 Cir. 6/29/98), 713 So. 2d 1286, 1289. The test for "exceptional circumstances" is not the complexity of the proceedings, but whether the litigant was deprived of the

opportunity to litigate the claim in question. *See*, *e.g.*, *Labiche v. La. Patients' Compensation Fund Oversight Bd.*, 98-2880 pp. 8–9 (La. App. 1 Cir. 2/18/00), 753 So. 2d 376, 382 (collecting cases).

A survey of Louisiana cases shows that, before the court of appeal's decision here, Louisiana courts have consistently refused to apply the "exceptional circumstances" exception when the plaintiff had the opportunity to litigate the precluded claim in the first suit. *See*, *e.g.*, *Benard v. Eagle, Inc.*, 2008-0262 p. 9 (La. App. 4 Cir. 12/3/08), 1 So. 3d 588, 594 (all of plaintiffs' claims against defendants were previously litigated); *Mandalay Oil & Gas, L.L.C. v. Energy Dev. Corp.*, 2001-0993 p. 22 (La. App. 1 Cir. 8/4/04), 880 So. 2d 129, 144 (party put on identical case in first suit); *Labiche*, *supra*, pp. 9–10, 753 So. 2d at 382 (issue of custodial-care costs was contested issue in prior settlement negotiations); *Arwood v. J.P. & Sons, Inc.*, 99-1146 p. 5 (La. App. 5 Cir. 2/29/00), 759 So. 2d 848, 850 (forfeiture of worker's compensation benefits was addressed by the trial judge in plaintiff's first suit); *Spear v. Prudential Prop. & Cas. Ins. Co.*, 98-1663 p. 6 (La. App. 4 Cir. 1/13/99), 727 So. 2d 640, 643 (defendant did nothing to prevent plaintiff from asserting claims for penalties and attorney fees in her first suit).

Here, Oleszkowicz fully litigated his punitive-damages claim in his first suit. There were no "exceptional circumstances" that prevented him from presenting this claim to the jury in his first suit. Nor were the proceedings in his first suit even "convoluted"; he was in no way tricked into failing to assert his claim, but rather he vigorously prosecuted it, through a full-blown jury trial, then through appeal, and finally on a writ application. *Lester v. Exxon Mobil Corp.*, 10-743 (La. App. 5 Cir. 5/31/12), 102 So. 3d 148, *writ denied*, 2012-2202 (La. 4/19/13), 111 So. 3d 1028.

The purpose of the "exceptional circumstances" exception is to give the plaintiff a chance to assert a claim when, through technicalities, he might otherwise never get that chance. Here, Oleszkowicz had ample opportunity to—and, in fact, did—fully litigate his punitive-damage claim in his first suit. To apply the "exceptional circumstances" exception here is to rob *res judicata* of its fundamental, mandatory character, contrary to this Court's teaching in *Avenue Plaza*.

There is nothing unfair in holding Oleszkowicz to the jury verdict in his first suit. On the other hand, denial of issue preclusion would be patently unfair to Exxon. It would subject Exxon to repeated claims for punitive damages by the same plaintiff based on the same alleged conduct. The concept of basic fairness is at the heart of due process, and as the U.S. Supreme Court has repeatedly explained, punitive damages are constrained by due process. To impose a $2.37 million punitive-damage award, where that claim has already been dismissed, violates not only R.S. 13:4231, but also federal and state due process.

3. The trial court violated due process by failing to instruct the jury against punishing Exxon for harm to non-parties.

3.A. When there is a significant risk that the jury may punish the defendant for harm to non-parties, the trial court must explicitly instruct the jury not to do so.

The Due Process Clause of the United States Constitution forbids a jury from imposing punitive damages on a defendant to punish the defendant for harm to non-parties. *Philip Morris USA v. Williams*, 549 U.S. 346, 356–57 (2007) ("We did not previously hold explicitly that a jury may not punish for the harm caused others. But we do so hold now."). When the evidence introduced at trial or the arguments made by plaintiff create the risk of the jury's punishing the defendant for harm to non-parties, the trial court, upon request, must protect against that risk. *Id.* at 357. This means that, when the defendant in such a case requests a jury instruction not to base the amount of punitive damages on harm to non-parties, the trial court must give that instruction. *See White v. Ford Motor Co.*, 500 F.3d 963, 972 (9th Cir. 2007); *Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007, 1017 (9th Cir. 2007). [4]

White is particularly instructive. There, the trial was before the Supreme Court's ruling in *Williams*. Nevertheless, on appeal, the Ninth Circuit vacated the punitive-damage award based on the intervening Supreme Court opinion, explaining: "Given *Williams'* guidance, we must conclude that the court's failure to

[4] *See also* La. Code Evid. art. 105 (when evidence is admissible for one purpose but inadmissible for another, the trial court, on request, must restrict the evidence to its proper scope and instruct the jury accordingly).

give a harm to nonparties instruction violated due process." 500 F.3d at 972. Numerous other courts have reached exactly the same result.[5]

Here, having been specifically told of *Williams,* the trial court still declined to give the required instruction. In particular, Exxon specifically requested that the jury be told that "in determining the amount [of punitive damages] … you may only consider the harm to the plaintiff in this lawsuit …. You may not consider conduct that may have harmed persons who are not a plaintiff in this suit." Furthermore, when the trial court failed to give such an instruction, Exxon specifically objected, explaining that *Williams* categorically required that the instruction be given. Still, the trial court declined to give the required instruction. This error violated Exxon's right to due process. As shown below, the plaintiff's evidence and argument created the substantial risk that the jury would punish Exxon for harm to non-parties. And as the verdict itself reflects, the jury did just that.

3.B. Oleszkowicz's argument and evidence created a significant risk that the jury would punish Exxon for harm to non-parties.

Over Exxon's repeated objections, the trial court allowed a flood of argument and evidence about alleged harm to non-parties.

Produced water. One example is evidence concerning produced water—water that comes up with crude oil through production tubulars. This water, like the scale that precipitates from it, sometimes contains trace amounts of radium. Oleszkowicz neither alleged nor proved that he was exposed to produced water. But that did not stop his counsel from making produced water a theme of their case.

The campaign began with plaintiff's opening statement. They told the jury about "radioactive waste in the waste water that they were discharging into the Louisiana environment," containing "ten times the level of radiation that is allowed by law," discharged through "700 produced water discharge points in Louisiana." To

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[5] *See, e.g., Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007, 1018 (9th Cir. 2007); *Moody v. Ford Motor Co.*, 506 F. Supp. 2d 823, 850 (N.D. Okla. 2007); *Bullock v. Philip Morris USA, Inc.*, 159 Cal. App. 4th 655, 696 (2008); *Holdgrafer v. Unocal Corp.*, 160 Cal. App. 4th 907, 933-34, 73 (2008); *Highlands Hosp. Corp. v. Castle*, No. 2007-CA-002432-MR, 2010 WL 2787906 (Ky. Ct. App. July 16, 2010); *Frankson v. Brown & Williamson Tobacco Corp.*, 67 A.D.3d 213, 221-22 (N.Y. App. Div. 2009); *Estate of Schwarz ex rel. Schwarz v. Philip Morris Inc.*, 348 Or. 442, 460, 235 P.3d 668, 678 (Or. 2010).

make sure that the jury did not miss the point, a few minutes later they returned to this theme, again referring to "700 different places where Exxon was discharging the waste water into the Louisiana environment."

Over Exxon's objection, Oleszkowicz's counsel used a video deposition of former Exxon employee John Rullman to introduce testimony concerning the discharge of produced water into brackish marshes. Later, during the testimony of plaintiff's expert in dose reconstruction, Phillip Plato, they had Plato recount Rullman's testimony, even though it had nothing to do with Plato's calculations. During the cross-examination of defense medical expert Dr. Rubin, Oleszkowicz's counsel alluded to studies (never offered into evidence) of "bioaccumulation" of radium in oysters and shrimp. They returned to the theme during the cross-examination of defense expert Dr. Hoel, suggesting (but offering no proof) that Louisiana citizens were being exposed to radiation by eating oysters and shrimp.

In closing arguments, Oleszkowicz's counsel accused Exxon of a "trespass" against the "environment." They reminded the jury of Rullman's testimony concerning the 700 discharge points. They explicitly asked the jury to punish Exxon for this unproven environmental harm:

> Should a corporation or other corporations who have the environment, the air, the water, ability to throw toxins into it, should they be allowed to recklessly and wantonly put profits over safety, to be allowed to pollute [our] environment and not be pressured? That's what that question is. Or do we as a jury in Jefferson Parish have the ability to say no, we're not going to put up with it.

Conduct occurring after Oleszkowicz left ITCO. Oleszkowicz alleges that the entirety of his exposure to NORM occurred when he worked at ITCO from 1979 until April 1986. This means that nothing Exxon did after April 1986 caused him to experience any additional exposure to NORM, and evidence of conduct after April 1986 was wholly irrelevant. But this did not prevent Oleszkowicz from offering—or the trial court from admitting—evidence of numerous things occurring after Oleszkowicz left ITCO in April 1986. These included the following:

The Stein memo. In 1987, the year after Oleszkowicz left ITCO, an Exxon industrial hygienist visited the ITCO yard on three occasions to conduct air-

sampling tests, to aid Exxon in ongoing negotiations with ITCO over a new contract for services. In July 1988, more than two years after Oleszkowicz left ITCO, an in-house lawyer for Exxon, Rosemary Stein, wrote a confidential memo to Exxon employee John Guidry about the results. Over Exxon's objection of attorney-client privilege, Oleszkowicz put this memo in evidence, mischaracterizing it so as to argue to the jury that Exxon was trying to "[s]ubvert the information."

Phasing out ITCO. In April 1989, three years after Oleszkowicz left ITCO, Rullman wrote a memo discussing liability issues related to NORM and suggesting that Exxon switch from ITCO to another cleaning contractor. Over Exxon's objection, the trial court allowed Oleszkowicz to put this memo into evidence. His counsel brought this memo up in the examination of expert witness Plato, even though it had nothing to do with Plato's dose-reconstruction calculations. In closing arguments, they used the memo to suggest that Exxon left ITCO holding the bag.

These were not the only instances where, over Exxon's objections, Oleszkowicz argued and offered evidence of alleged harm to non-parties. Since all of these arguments were based on things that occurred after Oleszkowicz left ITCO in April 1986, not a single one of them affected him. Yet these were the focus of Oleszkowicz's case for punitive damages against Exxon.

These litigation tactics created a substantial risk that the jury would impose punitive damages for perceived harm to non-parties. Under these circumstances, the trial court was required to grant Exxon's request that the jury be instructed not to punish Exxon for harm to non-parties. The trial court's failure to give this instruction violated Exxon's right to due process.

3.C. Contrary to the court of appeal's opinion, the jury instructions actually given by the trial court were constitutionally inadequate.

In failing to reverse on this basis, the court of appeal misinterpreted *Williams*. Under that decision, due process forbids a jury from punishing a defendant for harm caused to non-parties. 549 U.S. at 356–57. This means that the jury must not consider harm to non-parties in assessing the amount of punitive damages. *See White*, 500 F.3d at 972. It is not enough to instruct the jury that *liability* for punitive

damages must be based on harm to the plaintiff. Due process requires that the jury be instructed not to consider harm to non-parties in setting the *amount* of punitive damages. *See Merrick*, 500 F.3d at 1017 (jury instructions addressing only liability for punitive damages, not the amount, insufficient under *Williams*).

On pages 21–22 of its opinion (pp. A28–A29 below), the court of appeal quoted some of the trial court's jury instructions on punitive damages. Nothing in the quoted instructions instructs the jury not to consider harm to non-parties in assessing the amount of punitive damages. Indeed, the court of appeal's own analysis of the trial court's instructions confirms that the instructions addressed only liability for punitive damages, not quantum. "We find the jury instructions adequately instructed the jury to consider only the harm cause [*sic*] to Plaintiff in determining whether to award punitive damages . . . ." Page A29 below. Similarly, the court of appeal accurately observed, "The only reference the trial court made to harm or potential risk of harm to nonparties was its explanation that punitive damages may be recovered where a defendant's conduct shows wanton and reckless disregard for public safety." Page A29 below. The court of appeal's own analysis proves Exxon's point: In violation of *Williams*, the trial court failed to instruct the jury against punishing Exxon for harm to non-parties.

The only instruction the trial court gave for setting the amount of punitive damages provided the jury with no guidance at all regarding harm to non-parties:

> The law recognizes that punitive damages are not the only way to punish and deter conduct. Rather any payments that a defendant must make because of its action, such as damages that you may award to the plaintiff will have a deterrent effect for the future and should be considered in determining whether additional liability in the form of punitive damages is necessary and, if so, how much.
>
> The amount to be awarded, if any, is solely in your discretion, and the law only requires that in fixing any such future [sic] damages you arrive at a figure which takes into consideration all of the known circumstances of the case and the uncertainties of life, and that which seems just as to both plaintiff and defendant.

This instruction, a confusing conflation of punitive damages and future damages, failed to give the jury any guidance at all, much less the guidance required by *Williams*. On this basis, reversal is required.

4. Despite reduction by the court of appeal, the punitive-damages award violates due process.

The jury, left without any guidance in assessing the amount of punitive damages, awarded $10 million, nearly 12 times the amount of compensatory damages. On appeal, after making the above arguments for reversal of the punitive-damage award, Exxon alternatively argued that, given the excessive award and in view of its having already paid over $112 million in punitive damages for the same conduct,[6] due process requires that the award be stricken or at least drastically reduced to no more than the amount of compensatory damages.

The court of appeal refused to consider these arguments. *See* p. A30 below. Instead, on its own motion, the court of appeal determined that former art. 2315.3 was in effect for only 1.6 of the 6.75 years that Oleszkowicz worked at ITCO. On this basis, the court of appeal reduced punitive damages to $2,370,370, a figure nearly 3.5 times Oleszkowicz's net award for compensatory damages.[7] *See* p. A27 below. Having reduced the award somewhat on this basis, the court of appeal deemed Exxon's due-process arguments to be moot. *See* p. A30 below.

In refusing even to consider Exxon's due-process argument, the court of appeal failed to fulfill its duty under *Cooper Industries v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). *Cooper Industries* requires appellate courts to apply *de novo* review when reviewing the constitutionality of a punitive-damages award. *Id.* at 436. Here, the court of appeal not only failed to review the constitutionality of the punitive award *de novo*; it failed to conduct any constitutional review at all.

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[6] *See Grefer v. Alpha Technical*, 2002-1237 (La. App. 4 Cir. 8/8/07), 965 So. 2d 511 (awarding $112,290,000 in punitive damages based on conduct at the ITCO pipeyard).

[7] The net award for compensatory damages is $680,000. The jury fixed total compensatory damages at $850,000 but assigned 20% fault to Oleszkowicz. If one compares the court of appeal's punitive-damages award to the $850,000 before reduction for comparative fault, the ratio of punitive damages to compensatory damages would still be too high at nearly 2.8 to 1.

The Supreme Court has warned against "multiple punitive damages awards for the same conduct." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003). Numerous courts agree.[8] In *Grefer v. Alpha Technical*, 2002-1237 pp. 20–21 (La. App. 4 Cir. 8/8/07), 965 So. 2d 511, 525, Exxon paid over $112 million in punitive damages for the conduct complained of here by Oleszkowicz. Any further punishment for the same conduct would be patently unfair and, therefore, violate Exxon's right to due process. For this reason, the court of appeal's punitive-damages award should be stricken entirely.

If the award is not stricken entirely, it must be substantially reduced. The Supreme Court has set forth guideposts to review the amount of punitive damages, one of which is the disparity between the harm suffered by the plaintiff and the punitive-damages award. *BMW of N. Am. v. Gore*, 517 U.S. 559, 575 (1996). Although the Court has not established a bright-line limit, in practice few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. *State Farm*, 538 U.S. at 425. A large ratio may be justified when particularly egregious conduct has caused only a small amount of economic damages. But the converse is also true: when compensatory damages are substantial, a lesser ratio, one equal to compensatory damages, can reach the limit of due process. *Id.*

Here, compensatory damages are substantial: $850,000 reduced by Oleszkowicz's 20% comparative fault to $680,000. The court of appeal's $2,370,370 award for punitive damages is nearly nearly 3.5 times higher than $680,000. Because compensatory damages are so substantial, any award for punitive damages should not exceed compensatory damages.

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[8] *See*, *e.g.*, *Ex parte Holland*, 692 So. 2d 811, 820 (Ala. 1997) ("[I]t is no longer subject to doubt that there is a constitutional limit on the amount of punitive damages that may be awarded against a defendant for a tortious course of conduct affecting multiple claimants."); *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 865 (Iowa 1994) ("We do not disagree that the problem of successive punitive damages awards in mass tort cases arising from the same conduct is a serious one."); *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1064 (D.N.J. 1989), *vacated*, 718 F. Supp. 1233, 1234 (D.N.J. 1989) ("repetitive awards of punitive damages for the same conduct violate a defendant's due process rights").

Conclusion

The court of appeal's opinion threatens the fairness of jury trials by rendering La. Code Civ. P. art. 1795 a dead letter. By declaring juror testimony inadmissible to prove a violation of this law, the court of appeal has made the violation and resulting prejudice impossible to prove. This issue merits the granting of a writ of review.

Equally writ-worthy is the lower courts' failure to apply *res judicata*, thus allowing the same plaintiff to relitigate the same punitive damage claim against the same defendant. The "exceptional circumstances" exception should be reserved for cases where failure to apply it would result in an injustice. No such injustice has been demonstrated here. Applying this exception as the court of appeal has done transforms *res judicata* from being mandatory to being merely discretionary. Besides being contrary to this Court's holding in *Avenue Plaza*, this is contrary to the strong public interest in the finality of judgments.

Also writ-worthy is the court of appeal's failure to follow *Williams*. The plaintiff's evidence and arguments created a significant risk that Exxon would be punished for harm to non-parties. Under these circumstances, *Williams* makes clear that due process entitled Exxon to a jury instruction against such punishment. The trial court failed to give the instruction, and the court of appeal blessed the trial court's failure. Even if writs were otherwise denied, Exxon respectfully submits that, on this basis, due process requires a summary reversal.

Finally, the amount of punitive damages is constitutionally excessive. This would be true based only on the substantial compensatory damages. But when one considers that Exxon has already been punished for the same conduct in an amount of over $112 million, repetitive punishment for the same conduct can serve no valid purpose consistent with due process.

For all these reasons, Exxon Mobil Corporation respectfully prays that this Court grant a writ of certiorari or review.

Respectfully submitted,

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