

S162639

**IN THE
SUPREME COURT OF CALIFORNIA**

GARRY N. HOLDGRAFER, et al.,
Plaintiffs, Respondents and Cross-Appellants,

vs.

UNOCAL CORP., et al.,
Defendants, Appellants and Cross-Respondents.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT,
DIVISION SIX, CASE NO. B175953

ANSWER TO PETITION FOR REVIEW

HORVITZ & LEVY LLP

ELLIS J. HORVITZ (BAR NO. 22682)
DAVID M. AXELRAD (BAR NO. 75731)
JEREMY B. ROSEN (BAR NO. 192473)
15760 VENTURA BOULEVARD, 18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
(818) 995-0800 • FAX: (818) 995-3157
ehorvitz@horvitzlevy.com
daxelrad@horvitzlevy.com
jrosen@horvitzlevy.com

ANDRE, MORRIS & BUTTERY

JAMES C. BUTTERY (BAR NO. 56665)
1102 LAUREL LANE, P.O. Box 730
SAN LUIS OBISPO, CALIFORNIA 93406-0730
(805) 543-4171 • FAX: (805) 543-0752
jbuttery@amblaw.com

ROGERS JOSEPH O'DONNELL

ROBERT C. GOODMAN (BAR NO. 111554)
311 CALIFORNIA ST., 10TH FLOOR
SAN FRANCISCO, CALIFORNIA 94104
(415) 956-2828 • Fax (415) 956-6457
rgoodman@rcg-law.com

ATTORNEYS FOR DEFENDANTS, APPELLANTS AND CROSS-RESPONDENTS
**UNOCAL CORPORATION, UNION OIL COMPANY OF CALIFORNIA,
UNOCAL CALIFORNIA PIPELINE COMPANY, UNOCAL PIPELINE
COMPANY, AND 76 PRODUCTS COMPANY**

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ANSWER TO PETITION FOR REVIEW

INTRODUCTION

The Court of Appeal’s opinion applies the directives from two United States Supreme Court opinions, *State Farm Mut. Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408 [123 S.Ct. 1513, 155 L.Ed.2d 585] (*Campbell*) and *Philip Morris v. Williams* (2007) ___ U.S. ___ [127 S.Ct. 1057, 166 L.Ed.2d 940] (*Williams*), to hold that (1) the trial court erred in admitting evidence of Unocal’s prior dissimilar conduct to support the Holdgrafers’ claim for punitive damages (see typed opn. 20-27) and (2) the trial court erred by failing to instruct the jury, as defendant properly requested, that evidence of prior similar conduct could not be used to punish Unocal (see typed opn. 27-30). These holdings are

entirely consistent with other decisions construing the same Supreme Court opinions. Accordingly, review is not warranted here.

LEGAL ARGUMENT

- A. The Court of Appeal properly applied a de novo standard of review in holding that the jury's consideration of Unocal's dissimilar conduct at Avila and Guadalupe violated Unocal's due process rights. The opinion in *Buell-Wilson v. Ford Motor Co.* presents no conflict.**

After analyzing the record in this case, the Court of Appeal concluded that the trial court violated Unocal's due process rights by allowing the jury to impose punitive damages based on Unocal's "radically different" conduct towards non-parties: "we agree with Unocal that the Guadalupe and Avila Beach evidence should have been excluded from trial because it involves deplorable conduct that had nothing to do with the conduct that harmed Plaintiffs. Through that evidence, the jury heard that Unocal had concealed other spills and leaks from the public and government, and had also denied responsibility for contamination and misrepresented the magnitude of damage to the environment. This conduct is radically different from the conduct at issue in this case. Unocal reported the Tank Farm Road spill to the state and all of the affected property owners. The

contamination was contained and was thereafter continuously monitored by public and private entities, including Plaintiffs, to whom Unocal made full and continuing disclosure. The harm involved the subterranean infiltration of oil onto Plaintiffs' property, for which they rightfully sought compensation to protect their investment. Settlement negotiations continued for over a decade. During this period Unocal not only sought to prevent a recurrence, but guaranteed loans, and otherwise assisted in protecting Plaintiffs from a negative financial impact on their investment." (Typed opn. 21.)

The Holdgrafers, relying on *Buell-Wilson v. Ford Motor Co.* (2008) 160 Cal.App.4th 1107 (*Buell-Wilson*) and *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388 (*Hasson*), contend that the Court of Appeal erred in applying a de novo, rather than an abuse of discretion standard, to determine that Unocal's due process rights were violated. (PFR 25-32.)^{1/} The Holdgrafers are wrong. *Buell-Wilson* and *Hasson* apply an abuse of discretion standard to review ordinary evidentiary rulings, not to determine whether a defendant's due process rights have been violated. (See *Buell-Wilson*, at p. 1131; *Hasson*, at pp. 404-405.) As we now explain, United States Supreme Court precedent makes clear that due process review requires de novo review.

^{1/} The Holdgrafers' first issue in their petition asks "whether a trial court's determination to admit evidence of a defendant's misconduct towards third parties because it is similar to its conduct towards the plaintiffs is reviewed *de novo* by the appellate court . . . or for abuse of discretion . . ." (PFR 1.)

The United States Supreme Court has held that “[a] defendant’s dissimilar acts, independent from the acts upon which liability was premised, *may not serve as the basis for punitive damages.*” (*State Farm, supra*, 538 U.S. at p. 422, emphasis added.) Indeed, “courts must ensure the conduct in question replicates the prior transgressions.” (*Id.* at p. 423.) In its earlier opinion in *Cooper Industries v. Leatherman Tool* (2001) 532 U.S. 424 [121 S.Ct. 1678, 149 L.Ed.2d 674] (*Cooper*) the Supreme Court explained why it is appropriate for courts rather than juries to treat such constitutional considerations underlying punitive damage awards as matters of law. The Court noted that these constitutional considerations—like the “similarity” test articulated in *State Farm*—consist of “fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed.” (*Id.* at p. 436.) As a result, “[r]equiring the application of law, rather than a decisionmaker’s caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself.” (*Ibid.*) Thus, “courts of appeals should apply a *de novo* standard of review when passing on district courts’ determinations of the constitutionality of punitive damages awards.” (*Ibid.*)

The court in *State Farm* itself treated the question of whether evidence of prior acts toward non-parties were similar or dissimilar to the conduct toward plaintiff as one of law for the court, finding that the evidence of acts directed toward nonparties admitted in that case

was too dissimilar to support the punitive award. (See *Campbell, supra*, 538 U.S. at pp. 415 [finding “most of [defendant’s] practices bore no relation to third-party automobile insurance claims, the type of claim underlying the Campbells’ complaint against the company”], 423-424 [finding lower court erred “because evidence pertaining to claims that had nothing to do with a third-party lawsuit was introduced at length”], 424 [finding that “the Campbells have shown no conduct by State Farm similar to that which harmed them”].)

In sum, there is no existing conflict in the caselaw regarding appellate review of the *constitutionality* of a punitive damage award.

B. As an alternative ground for reversal, the Court of Appeal properly found that due process required the trial court to instruct the jury pursuant to *Philip Morris v. Williams*. The proposed instruction in *Buell-Wilson v. Ford Motor Co.* was materially different from Unocal’s proposed instruction.

The Court of Appeal’s reversal of the judgment was based not only on the jury’s constitutionally impermissible consideration of Unocal’s dissimilar conduct towards non-parties, but also on the trial court’s failure to instruct the jury that Unocal could not be punished for harm it may have caused to non-parties as required by *Williams*. The Holdgrafers contend that this alternative holding is erroneous and conflicts with the recent opinion in *Buell-Wilson*. Specifically, the

Holdgrafers contend that Unocal's proposed instruction incorrectly stated the law and that Unocal waived its right to a proper instruction under *Williams* by proposing an instruction that did not inform the jury they could consider harm to non-parties in assessing reprehensibility. (PFR 32-37.)^{2/} Neither contention is correct.

Unocal requested an instruction that "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." (4 AA 951; see 28 RT 3357-3358.) This proposed instruction would have correctly informed the jury, as required by *Williams*, 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." (*Williams, supra*, 127 S.Ct. at p. 1063.) In three recent cases, appellate courts have found that trial courts should have given similar instructions pursuant to *Williams*. (See *Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 693-696; *Merrick v. Paul Revere Life Ins. Co.* (9th Cir. 2007) 500 F.3d 1007, 1016-1018; *White v. Ford Motor Co.* (9th Cir. 2007) 500 F.3d 963, 971-974.)

In contrast, the proposed instruction at issue in *Buell-Wilson*

^{2/} The Holdgrafers' second issue in their petition asks "whether the federal due process requirement that, 'upon request,' juries must be instructed that punitive damage awards may not be used to directly punish harm to third parties (though that harm may be considered in determining the reprehensibility of the defendant's conduct), requires reversal where the defendant's proposed instruction is inaccurate and incomplete?" (PFR 1.)

affirmatively “told the jury it could not consider third party harm for *any purpose*, including in assessing the reprehensibility of Ford’s conduct.” (*Buell-Wilson, supra*, 160 Cal.App.4th at p. 1167.) Thus, while Unocal’s proposed instruction properly explained the rule that juries may not impose punishment based on evidence of harm to non-parties and was silent as to other potential appropriate uses for such evidence, the proposed instruction in *Buell-Wilson* broadly prohibited consideration of prior conduct for *any purpose*. As a result, the question presented in *Buell-Wilson*, i.e., whether an erroneous instruction is sufficient to trigger a duty to instruct, is not presented in this case because Unocal’s proposed instruction correctly stated the law.^{3/}

To the extent the Holdgrafers wanted an additional instruction that evidence of similar conduct toward non-parties could be used in assessing reprehensibility, they could have proposed such an instruction. Unocal was not obligated to propose language on *plaintiffs’* theory to protect its own due process rights. (*Bullock v. Philip Morris USA, Inc., supra*, 159 Cal.App.4th at pp. 693-695; *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 949-951, disapproved on another ground in *White*

^{3/} Even if a proposed instruction is flawed, a trial court is required to give a proper instruction that captures the substance of the law where the subject matter of the proposed instruction is material and “vital” to the case. (See *Orient Handel v. United States Fid. & Guar. Co.* (1987) 192 Cal.App.3d 684, 698; *Wank v. Richman & Garrett* (1985) 165 Cal.App.3d 1103, 1113.)

v. Ultramar, Inc. (1999) 21 Cal.4th 563, 574, fn. 4; *Menchaca v. Helms Bakeries, Inc.* (1968) 68 Cal.2d 535, 543.) Certainly, Unocal's proposal of an instruction that did not cover plaintiff's theory did not relieve the trial court of its obligation to "provide assurance that juries are 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.)

In any event, if the court grants review in *Buell-Wilson* and *Bullock* to address the scope of the trial courts' duty to insure due process protection against punitive damage awards that punish for harm to non-parties, the court should not grant review in this case, not even on a grant and hold basis. Any holding by this Court on the *Williams* issue will have no practical effect in this case because the *Williams* instructional error was a secondary reason for reversing the judgment. The primary basis for reversal was the *Campbell* error involving the jury's consideration of *defendant's dissimilar conduct*. Accordingly, if this Court is concerned about leaving the *Williams* discussion in the *Holdgrafer* opinion on the books while the Court considers the *Williams* issue in *Buell-Wilson* and/or *Bullock*, depublication of the *Holdgrafer* opinion would be appropriate.

CONCLUSION

For the above reasons, and for those set forth in the Court of Appeal's opinion, the Holdgrafers' Petition for Review should be denied.

Dated: April 30, 2008

HORVITZ & LEVY LLP
ELLIS J. HORVITZ
DAVID M. AXELRAD
JEREMY B. ROSEN

ANDREW, MORRIS & BUTTERY
JAMES C. BUTTERY

ROGERS JOSEPH O'DONNELL
ROBERT C. GOODMAN

By: _____

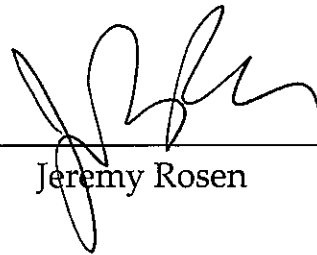

Jeremy B. Rosen

Attorneys for Defendants, Appellants
and Cross-Respondents UNOCAL
CORPORATION, UNION OIL
COMPANY OF CALIFORNIA,
UNOCAL CALIFORNIA PIPELINE
COMPANY, and 76 PRODUCTS
COMPANY

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this brief consists of 1796 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

Dated: April 30, 2008



Jeremy Rosen

PROOF OF SERVICE [C.C.P. § 1013a]

I, **Jeralyn Odom**, declare as follows:

I am employed in the County of Los Angeles, State of California and over the age of eighteen years. I am not a party to the within action. I am employed by Horvitz & Levy LLP, and my business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436. I am readily familiar with the practice of Horvitz & Levy LLP for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing. On **April 30, 2008**, I served the within document entitled:

ANSWER TO PETITION FOR REVIEW

on the parties in the action by placing a true copy thereof in an envelope addressed as follows:

Parties Served:

Ilan Funke-Bilu, Esq.
1008 Walnut Street
San Luis Obispo, CA 93401

Attorneys for Plaintiffs and Respondents Gary N. Holdgrafer, Evelyn L. Holdgrafer, Garry N. Holdgrafer, II, Cindy Okerson, Holdgrafer and Associates, and Holdgrafer & Okerson

Richard M. Pearl, Esq.
1816 Fifth Street
Berkeley, CA 94710

Attorneys for Plaintiffs and Respondents Gary N. Holdgrafer, Evelyn L. Holdgrafer, Garry N. Holdgrafer, II, Cindy Okerson, Holdgrafer and Associates, and Holdgrafer & Okerson

Robert C. Goodman
Rogers Joseph O'Donnell
311 California St., 10th Floor
San Francisco, CA 94104

Co-Counsel: Defendants, Appellants and Cross-Respondents Unocal Corporation, Union Oil Company of California, Unocal California Pipeline Company, Unocal Pipeline Company, and 76 Products Company

James C. BATTERY
Mary E. McAlister, Esq.
Andre, Morris & BATTERY
P.O. Box 730
San Luis Obispo, CA 93406-0730

Co-Counsel: Defendants, Appellants and Cross-
Respondents Unocal Corporation, Union Oil
Company of California, Unocal California
Pipeline Company, Unocal Pipeline Company,
and 76 Products Company

Martin J. Tangeman, Judge
Superior Court of California
County of San Luis Obispo
1035 Palm Street, #385
San Luis Obispo, CA 93408

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Office of the Clerk
California Supreme Court
350 McAllister Street, Room 1295
San Francisco, CA 94102-3600

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and, following ordinary business practices of Horvitz & Levy LLP, by sealing said envelope and depositing the envelope for collection and mailing on the aforesaid date by placement for deposit on the same day in the United States Postal Service at 15760 Ventura Boulevard, Encino, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **April 30, 2008**, at Encino, California.

Jeralyn Odom