

DOCKET NO. 32552

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN RE: TOBACCO LITIGATION  
(INDIVIDUAL PERSONAL INJURY CASES)

CONSOLIDATED PERSONAL INJURY  
PLAINTIFFS,

Petitioners,

v.

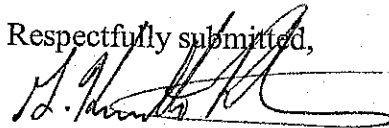
UPON CERTIFIED QUESTION  
FROM THE CIRCUIT COURT  
OF OHIO COUNTY

BROWN & WILLIAMSON TOBACCO  
CORPORATION, individually and as successor  
by merger to THE AMERICAN TOBACCO  
COMPANY; LORILLARD TOBACCO  
COMPANY; PHILLIP MORRIS USA INC.,  
R.J. REYNOLDS TOBACCO COMPANY;  
B.A.T. INDUSTRIES P.L.C.; BRITISH  
AMERICAN TOBACCO (INVESTMENTS)  
LIMITED f/k/a BRITISH AMERICAN  
TOBACCO COMPANY LIMITED; and HILL  
AND KNOWLTON, INC.

Respondents.

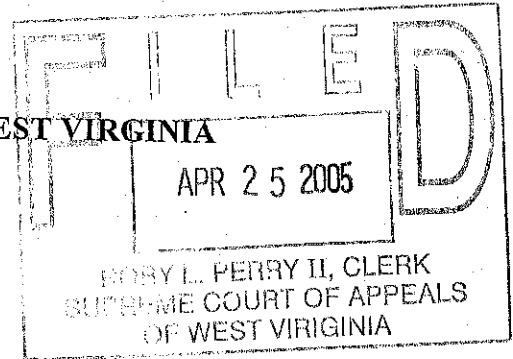
BRIEF OF AMICI CURIAE DEFENDANTS IN SUPPORT OF THE  
RESPONSE TO THE CERTIFIED QUESTION

Respectfully submitted,



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BRIEF OF AMICI CURIAE DEFENDANTS IN SUPPORT OF THE  
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I. INTEREST OF THE AMICI CURIAE

The amici curiae consist of Certain Asbestos Defendants,<sup>1</sup> who like the Respondents, are facing the possibility of a mass trial where protection of the amici curiae's constitutional rights will

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<sup>1</sup>The Defendants joining in this filing are Mobil Corporation, New Leednorth Company, Pharmacia Corporation f/k/a Monsanto Company, CertainTeed Corporation, UB West Virginia, Inc. f/k/a Union Boiler Company, Flowserve Corporation f/k/a Durametallic Corporation, J.H. France Refractories and Dana Corporation.

be sacrificed on the altar of efficiency. Like the Respondents, the claims against the amici curiae have been consolidated by the West Virginia Mass Litigation Panel ("MLP"), pursuant to West Virginia Trial Court Rule 26.01, despite the fact that the cases brought against the amici curiae have virtually nothing in common. The Defendants in the consolidated asbestos litigation consist of companies that allegedly manufactured asbestos, companies that allegedly used asbestos in their products, companies and persons that allegedly maintained asbestos on their premises, and companies and persons that allegedly exposed their employees to asbestos.

These Defendants are facing hundred of cases brought by Plaintiffs who have few, if any, connections to one another. The Plaintiffs, who have worked at hundreds of locations across the country, in different types of jobs, at different time periods spanning six decades, with different degrees of exposure and different individual health backgrounds, and who have been exposed to hundreds of different allegedly asbestos-containing products with different applications, instructions, and warning labels, are all asserting unique theories of recovery for individualized injuries.

Despite the lack of commonality between these cases, a minority of the Plaintiffs, represented by attorney James F. Humphreys, recently requested that the MLP abandon its current Case Management Order, providing for periodic all-issue "small group trials" comprised of around twenty Plaintiffs, in favor of a mass trial identical in format to that proposed by the Petitioners in this case - one in which punitive damages are determined before a jury even determines whether a Plaintiff has been injured, or who is to blame for that injury, if any exists. Thus, while the amici curiae have no position regarding the factual allegations contained within the Respondents' pleadings, they share Respondents' conviction that a mass trial, which fails to allow the jury to assess the unique injury suffered by each plaintiff prior to determining the appropriate measure of punitive damages, is

inherently and unquestionably unconstitutional.

## II. ARGUMENT

It is well established that “[w]hile states possess discretion over the imposition of punitive damages, . . . there are procedural and substantive constitutional limitations on these awards.” See State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408, 416 (2003); see also Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001); Honda Motor Co. v. Oberg, 512 U.S. 415, 420 (1994); TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 454-55 (1993). Specifically, “[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.” State Farm, 538 U.S. at 416.

The trial plan advocated by Petitioners is clearly prohibited by the Due Process Clause of the Fourteenth Amendment because it requires the jury to arbitrarily assess a punitive damages multiplier before determining what injuries a Plaintiff has suffered or whether punitive damages are appropriate in light of those injuries. Accordingly, this Court should answer the certified question in the affirmative and find that the mass trial plan proposed by the Petitioners is unconstitutional.<sup>2</sup>

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<sup>2</sup>While the issue before this Court focuses on the question of how punitive damages are assessed under the postulated mass trial format, Certain Asbestos Defendants submit that even without this glaring constitutional defect, the decisions of the United States Supreme Court of Appeals in Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) and Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999), as well as legions of other cases decided in the last decade, condemn the en masse or aggregated resolution of unrelated cases based on some tortured interpretation of the term “commonality,” as a blatant violation of the fundamental due process and equal protection rights of defendants.

**A. The Trial Plan Advocated by the Petitioners Violates the Recent United States Supreme Court Opinion in State Farm v. Campbell.**

The United States Supreme Court's most recent directives pertaining to punitive damages are found in the case of State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S. 408 (2003) where the United States Supreme Court repeatedly emphasized that, in order to be constitutional, a punitive damages award must be based on, and directly linked to, *the harm suffered by the individual plaintiff*. Id.

In State Farm, the United States Supreme Court was confronted with a punitive damages award that had virtually no connection to the actual injuries suffered by the plaintiffs. State Farm, 538 U.S. at 417. In reversing the award, the Court 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, 538 U.S. at 422-23. The Court emphasized that “[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.” Id. The Court also reiterated its holding in BMW of North America, Inc. v. Gore, 517 U.S. 559, 575 (1996), where it found that courts reviewing punitive damages awards must consider “the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award.” State Farm, 538 U.S. at 418; see also, Cooper Indus. Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 429-32 (2001) (finding that due process requires that procedures to assess punitive damages provide a meaningful individualized assessment of the appropriateness of punitive damages in each case); Syl. pt. 1, Boyd v. Goffoli, \_\_\_ W. Va. \_\_\_, 608 S.E.2d 169 (2004) (stating that punitive damages should bear a reasonable relationship to the harm that has occurred as a result of a defendant’s conduct).

The mass trial plan at issue in this case clearly violates the guidelines set forth in State Farm because it fails to afford the jury the opportunity to weigh its punitive damages award against the unique injury suffered by each Plaintiff. Specifically, the plan makes it impossible to ensure that the punitive damages (if any) awarded to a particular plaintiff are imposed only for “conduct that harmed [that] plaintiff.” State Farm, 538 U.S. at 423. Instead, Plaintiffs’ plan requires the jury to determine a punitive damages multiplier that will apply to hundreds of defendants, before hearing one word from any Plaintiff or about any Plaintiffs’ injuries. This virtually guarantees that in some, if not all cases, punitive damages awards will be based (at least in part) on conduct “independent from the acts” that actually harmed any given plaintiff. Id. at 422.

Plaintiffs’ mass trial plan also prevents jurors from assessing the reasonableness of the ratio between compensatory and punitive damages, because jurors (plainly) will not know the amount of compensatory damages to be awarded to any Plaintiff at the time they determine a multiplier. This procedure is flatly inconsistent with the notion endorsed by the State Farm Court, that a punitive damages award should bear a reasonable relation with compensatory damages, and with the idea that a jury may need to adjust the multiplier making it higher if an “egregious act has resulted in only a small amount of economic damages,” and lower if “compensatory damages are substantial.” State Farm, 538 U.S. at 425. Under Plaintiffs’ proposed plan, this kind of analysis and adjustment will be impossible. Instead, the trial court will determine by fiat that a single multiplier is appropriate for all plaintiffs, and jurors will be required to set that multiplier without reference to any actual compensatory damage award. Plaintiffs’ mass trial plan thus directly conflicts with the requirements of State Farm, and violates the constitutional prohibition against arbitrary punishments.

Petitioners try to obscure the clear constitutional ramifications of the State Farm decision on this case by arguing that a nexus between a plaintiff's actual injury and any punitive damages award is not required if the jury bases its punitive damages award on the reprehensibility of a defendant's conduct. Petitioners base this argument on their belief that a nexus is not required in the context of reprehensibility because reprehensibility may only be determined by looking at how a defendant's conduct may have also harmed others.

State Farm, however, confronts this very issue, and holds that "[t]his argument misses the mark." State Farm, 538 U.S. at 422. It notes that conduct directed toward others may be probative when it demonstrates the deliberateness and culpability of a defendant's actions, "but that conduct must have a nexus to the specific harm suffered by the plaintiff." Id. The Court goes on to hold that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of a reprehensibility analysis." Id. at 423. Moreover, Plaintiffs' "reprehensibility" argument does nothing to address the fact that under Plaintiffs' proposed mass trial plan, jurors will be precluded from considering the ratio between punitive and compensatory damages, and from adjusting the multiplier based on the facts specific to different Plaintiffs. Instead, as noted above, jurors will be forced to guess at a single multiplier without ever having made a single compensatory damages award. Clearly, despite the petitioner's flawed attempts to convince this Court otherwise, State Farm directly contravenes the trial format at issue because the proposed plan denies the jury the opportunity to assess each Plaintiff's injury and each Defendant's culpability before making any determination regarding punitive damages.

**B. The Majority of Other States that Have Examined Similar Mass Trial Plans Have Determined that They Are Unconstitutional.**

While State Farm does not directly address whether punitive damages can ever be properly assessed in the context of a mass trial plan (certainly, it directly condemns the trial plan postulated by the Petitioners here), the majority of courts across the country addressing this issue have held that it is always unconstitutional to assess punitive damages in a mass trial format because punitive damages must be based on the unique facts surrounding each plaintiff's injuries. See Corley v. Entergy Corp., 222 F.R.D. 316 (E.D. Tx. 2004)(holding that, in the context of mass litigation, courts cannot calculate punitive damages on a class-wide basis because each plaintiff's entitlement to punitive damages depends on "the subjective and intangible differences of each class member's individual circumstances"); In re Baycol Products Litigation, 218 F.R.D. 197 (D. Minn. 2003)(finding a mass trial on the issue of punitive damages was inappropriate because punitive damages must be based on the harm suffered by each particular plaintiff); In re Copley Pharmaceutical, Inc., 161 F.R.D. 456 (D. Wyo. 1995)(noting that punitive damages are inappropriate in a mass trial format because punitive damages "depend on an individual's injury and compensable damages"); Liggett Group, Inc. v. Engel, 853 So.2d 434 (Fla. 2003)(holding that punitive damages cannot be determined through a mass trial because punitive damages require "individualized proof"); accord Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998)(finding that, "because punitive damages must be reasonably related to the reprehensibility of the defendant's conduct and to the compensatory damages awarded to the plaintiffs, recovery of punitive damages must necessarily turn on the recovery of compensatory damages. Thus punitive damages must be determined after proof of liability to individual plaintiffs.")(internal citations omitted).

One particularly instructive case is the recent Florida decision Liggett Group Inc. v. Engle, 853 So.2d 434 (Fla. 2003), in which the District Court of Appeal of Florida was confronted with a punitive damages issue nearly identical to the issue facing this Court.<sup>3</sup> In Liggett, the plaintiffs were seeking to try nearly 700,000 cases alleging injury due to cigarette smoking, *en masse*. 853 So.2d at 440-42. In February of 1998, the Liggett trial court issued its first trial plan calling for a mass trial consisting of three phases. Id. at 441. Phase I was to consist of a trial on the purportedly common issues of liability. Id. Phase II was to determine the appropriate amount of punitive damages, and Phase III was to determine individual liability and compensatory damages. Id. at 441-42.

The Liggett trial court had actually completed the first two phases of this trial plan by the time the United States Supreme Court rendered its ruling in State Farm, but the court was forced to re-evaluate its trial plan in light of the holding in State Farm and other recent cases. Liggett, 853 So.2d at 442-57. In re-evaluating the Liggett trial court's plan the District Court of Appeal noted that the Liggett trial court had put "[t]he [c]art [b]efore the [h]orse." Id. at 450. It noted that due process requires that compensatory damages be assessed prior to any assessment of punitive damages because, "[w]ithout this prior assessment it is impossible to determine whether punitive damages bear a 'reasonable' relationship to the actual harm inflicted on the plaintiff as required by . . . federal law." Id. at 451.

The Liggett court went on to conclude that in addition to being procedurally incorrect, the Liggett trial court's trial plan was fundamentally flawed because it failed to allow for an individual assessment of punitive damages. Liggett, 853 So.2d at 451-55. The Liggett court held that all

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<sup>3</sup>While this case is governed by West Virginia Trial Court Rule 26.01, Liggett was governed by Florida Rule of Civil Procedure 1.220(d)(1). See Liggett, 853 So.2d at 442.

defendants, regardless of whether their cases have been consolidated for trial, “are entitled to a jury determination, on an individualized basis,” as to whether and to what extent punitive damages are appropriate. Id. at 453-54. “A claim for punitive damages is not a separate and distinct cause of action,” the Liggett court noted relying on State Farm. Id. at 456. “[R]ather it is auxiliary to, and dependant upon the underlying claim,” and cannot be entered unless it is individually determined and “proportionate to the amount of harm to the plaintiff.” Id. (quoting State Farm, 538 U.S. at 411). Thus, the Liggett court determined, the mass trial plan proposed by the trial court, which was nearly identical to the mass trial plan this Court is confronted with, was unconstitutional and required a new trial that calculated any possible punitive damages on an individualized basis. Id.

The response of courts to State Farm is clear. Mass trials that allow punitive damages to be calculated on anything other than an individualized basis are being struck down across the country as violative of the Due Process protections contained within the Fourteenth Amendment of the United States Constitution. Courts nationwide are concluding that the mass trial format is simply incompatible with the individualized assessment of punitive damages required by State Farm. This incompatibility exists whether the cases are consolidated pursuant to West Virginia Trial Court Rule 26.01, Florida Rule of Civil Procedure 1.220(d)(1), Federal Rule of Civil Procedure 23, Rule of Civil Procedure 42, or some other procedural mechanism.

This incompatibility arises whenever juries are deprived of the opportunity to look at the facts and circumstances of each case and determine what measure of punitive damages are appropriate for each unique plaintiff. The mass trial plan advocated by Petitioners unconstitutionally deprives juries of the ability to evaluate each of the Petitioner’s cases on an individual basis. Thus, it should be struck down and the certified question must be answered in the affirmative because any other answer

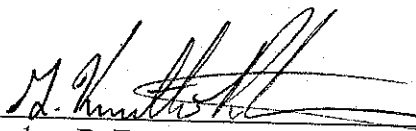
would deny the Respondents, and ultimately, Certain Asbestos Defendants, their constitutional right to be free from arbitrary punishments. Judge Recht recognized this and made a well-reasoned and thoughtful ruling which should not be disturbed by the Court.

### III. CONCLUSION

For the above reasons, *amici curiae* Certain Asbestos Defendants request that the certified question pending before the Court be answered in the affirmative.

**CERTAIN ASBESTOS DEFENDANTS,**

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CERTIFICATE OF SERVICE


I, G. Kenneth Robertson, do hereby certify that I have served the foregoing "Amici Curiae Brief in Support of the Response to the Certified Question" upon all counsel of record as reflected in the certificate of service by depositing true copies thereof in the United States mail, postage prepaid, this 25<sup>th</sup> day of April, 2005, addressed as follows:

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