

PUNITIVE DAMAGES – A PLAINTIFF’S PERSPECTIVE

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I. Introduction.

There is perhaps no greater challenge to a trial lawyer today than convincing a jury to punish a defendant by awarding punitive damages in a case. The issue of punitive damages has been raging in our state for years now and will most likely remain in the political spotlight for years to come. Tort reformers have turned the phrase “trial lawyer” into a word with a negative connotation. Thus, lawyers who represent consumers are now faced with new jury dynamics. It has become apparent that potential jurors are increasingly suspicious of lawyers who ask for punitive damages. Jurors start and, too frequently, finish the trial process thinking they will not be the ones to allow the injured plaintiff to “win the lottery.” The mindset of an average person summoned to jury duty was best described as follows:

The average person arrives at the courtroom on the morning of the first day of trial in less than open-minded state. He or she has been summoned from home, work, or play, has had to make arrangements to cover for his or her absence, and is looking forward to forced participation in a process not understood and not trusted. Parking is expensive and sparse, directions to the courtroom are, at best, misleading, and the potential juror has just been forced to listen to monotonic court employee utter convoluted intonations about a system of justice, which has no relevance to real life. Potential jurors are then herded into a wooden corral, the prospect of release from which is unpromising. They are faced with a god-like figure wearing a black robe and a bevy of lawyers about whom they have misgivings at the best and dislike for at worst. They know not when or if they will be allowed to go to the bathroom. They do know they are about to be asked personal and perhaps embarrassing questions. They have been told by their neighbors and even their personal lawyers what to say to extricate themselves from jury duty. They feel trapped, uncomfortable, and intimidated. To add to their feeling of

dismay, the judge proceeds to tell them whatever the lawyers say is not evidence. In other words, do not believe what the sharks are about to tell you. Now we have the McDonalds, BMW, and similar verdicts, all spun out of context and vilified by tort reform addicts. Jurors have been convinced the entire system is skewed.¹

The tort reform propaganda has created the widespread belief that we live in a “sue ‘em” society where frivolous lawsuits are commonplace and plaintiff’s lawyers are no more than hired gunfighters. Many jurors have bought into the belief by the tort reform movement that they will personally be harmed financially by a large plaintiff’s verdict. They have been conditioned to believe that such a verdict will affect the affordability and even the availability of health insurance, automobiles and other products. Trial lawyers today face a very real and daunting challenge. However, take heart, this challenge can be met and overcome with the right approach, including proper preparation for trial and conditioning of your jury. The challenge for plaintiffs is to convince the jury that your cause is their cause and it is a just cause that will ultimately protect them and their children in the future.

II. Debunking The Myth Of Out-Of-Control Punitive Damages Verdicts.

Although the tort reform movement has been successful in selling its propaganda to the average person, the reality is that there is not epidemic of punitive damages awards. In fact, only a very small percentage of cases end with an award of punitive damages.

Contrary to popular myth, juries rarely award punitive damages. In the most recent year (2001) studied by the U.S. Department of Justice on punitive damages awards, it was determined that winning plaintiffs only are awarded punitive damages 5.6% of the time, as compared to 6.1% in 1992. Punitive damages were only awarded

2% of time in product liability cases and only 4.9% of medical malpractice cases. Interestingly, in tort trials, juries awarded punitive damages in 4.5% of the cases as compared to judges in bench trials who awarded punitive damages in 10.5% of the cases. In other words, juries and judges use similar reasoning in punitive damages decisions, and award similar amounts when accounting for differences in case types.²

The likelihood of an award of punitive damages is inflated by certain elements of the media. The reality is that the verdicts the media promote in its degradation of trial lawyers and punitive damages awards in Alabama are exceptions to the rule. Certain cases have been pushed to the forefront by the media when discussing the so-called “downward spiral” of justice in Alabama’s courts (i.e., BMW v. Gore, Exxon Mobile, etc.). However, if you take a closer look at the facts of these cases, the actual computation of the verdicts and the actions of the courts after the announced verdict, you would see a different story altogether. For example, in the BMW case, cited so many times in the headlines, the \$4 million punitive damages portion of the verdict was later reduced based on the fact that the jurors made a computation error.

The jury originally based the “formula” of computing sufficient punitive damages on the amount of compensatory damages awarded in the case (\$4,000) multiplied by the similar sales in the country, instead of in the state only. Therefore, the \$4 million verdict was reduced to \$2 million. This was still held to be “grossly excessive” by the U.S. Supreme Court and remanded back to the Alabama Supreme Court. Having only heard the “huge” verdict of \$4 million to a “wealthy” doctor, the public is of course outraged over a “simple” paint job non-disclosure. However, if the average reasonable person were to see the rest of the story, they would see that our current system of

justice worked. The punishment was reduced by the Court to “fit the crime,” yet, at the same time, a jury was allowed to have a voice in the process and was allowed to send a very clear message to corporate America that deceit and fraud will not and should not be tolerated in our society.

The notion that “doing away with” the current system of punitive damages available would benefit the society as a whole is preposterous. In states where juries are not allowed to assess traditional punitive damages, studies show that they inflate the amount of compensatory damages or award “exemplary” damages to counteract the lack of punitive damages. Unlike compensatory damages, punitive damages are to deter the future behavior of a defendant. The punitive damages awarded to a plaintiff are not just for that plaintiff in most cases. In cases like products liability and fraud, the punitive award, although given to the plaintiff in the case at hand, is a representation of the amount required to right a wrong done to all who have experienced the same problem. It is an attempt to punish and deter the same or similar acts by a defendant.

A juror is more sensible than the average corporation seems to think. Jurors are not going to award punitive damages when they believe that the corporation is doing all that it can to be responsible. The odds that a juror will find for a corporation are much greater than the odds they will find that the corporation is in need of being punished. In fact, in many products liability cases, the jury finds for the corporation.

It is also interesting to note that product liability and medical malpractice lawsuits represent only a small portion of tort suits filed. Most lawsuits involve individuals suing one another – not individuals suing businesses. There are also a significant number of lawsuits -- including cases with some of the largest punitive damages ever awarded --

where a corporation sues another corporation. To get more information on the true and accurate statistics regarding lawsuits and punitive damages, go to Public Citizen's website at www.citizen.org.

In my opinion, the attacks on the judicial system are unwarranted. Reality is that a very small percentage of cases result in punitive damages. Those that do must pass through a thorough review at the post-verdict hearing stage and then later on appeal. No case with weak facts has survived the system in Alabama. Very few cases have come out of the Alabama Supreme Court without large reductions of punitive damages, even when the wrongdoing was great and aggravated.

III. Overview of the Current State of the Law of Punitive Damages.

As mentioned earlier, the purpose of punitive damages is to punish the wrongdoer and to deter the wrongdoer and others in the same situation from such wrongdoing in the future. Thus, punitive damages are imposed not simply for punishment and deterrence related to conduct regarding the plaintiff, but also on a "theory of punishment for the general benefit of society and as a restraint on the transgressor."³ Alabama Pattern Jury Instruction 11.03 states that "the purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiff by way of punishment to the defendant, and for the added purpose of protecting the public by deterring the defendant and others from doing such wrong in the future." "Since punitive damages are not to compensate a victim for loss, but to punish and deter, the state alone is considered the true party plaintiff, and in seeking punitive damages, a plaintiff is an agent of the state."⁴ Thus, the jury acts as the "conscious of the community" when determining an award of punitive damages.⁵

These rather simple principles of punitive damages have been greatly complicated from a practitioner's standpoint by the recent United States Supreme Court decision in Philip Morris USA v. Williams.⁶ More about that opinion later, but first a brief history of the Supreme Court opinions affecting punitive damages.

The U.S. Supreme Court has long made clear that "punitive damages may properly be imposed to further a state's legitimate interest in punishing unlawful conduct and deterring its repetition."⁷ However, the Court has also firmly stated that a jury's unfettered discretion in awarding punitive damages cannot go unchecked. The Due Process Clause of the Fourteenth Amendment imposes substantive limits beyond which penalties may not go.⁸ The Constitution imposes certain limits on punitive damages, in respect both to the procedure for awarding punitive damages and to amounts forbidden as "grossly excessive."⁹ As to the procedures for awarding punitive damages, the U.S. Supreme Court has required judicial review of the size of punitive damages and that the review must be *de novo*.¹⁰

As to determining whether the amounts are "grossly excessive," in BMW v. Gore, the Supreme Court enumerated three "guideposts" for the courts to follow to make its determination. They were (1) the reprehensibility of the defendant's conduct, (2) whether the award bears a reasonable relationship to the actual and potential harm caused by the defendant to the plaintiff, and (3) the difference between the award and sanctions authorized or imposed in comparable cases.¹¹ In 2003, the Supreme Court issued State Farm v. Campbell.¹² In Campbell, the plaintiff sued State Farm for bad faith, fraud, and intentional infliction of emotional distress. The jury awarded the plaintiffs \$2.6 million in compensatory damages and \$145 million in punitive damages.

The trial court reduced the award to \$1 million and \$25 million respectively. However, on appeal, the Utah Supreme Court reinstated the \$145 million punitive damages award relying in large part on extensive evidence about State Farm's conduct nationwide. The Supreme Court reversed the judgment of the Utah Supreme Court and remanded the matter.¹³

The Campbell opinion has been cited for the premise that "a defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages."¹⁴ The Supreme Court explained:

Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff. A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.

* * *

The courts awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm. 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. Due 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 the reprehensibility analysis, but we have not doubt the Utah Supreme Court did that here.¹⁵

The Campbell court also stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."¹⁶

While the lower courts and attorneys were still struggling to determine the ramifications and applicability of Campbell, the U.S. Supreme Court issued its most recent decision -- Philip Morris v. Williams, supra. In Williams, the widow of Jessie

Williams, a heavy cigarette smoker, filed suit against Philip Morris, the manufacturer of Marlboro cigarettes, for negligence and deceit out of the death of her husband from smoking. A jury found that Williams' death was caused by smoking; that Williams smoked in significant part because he thought it was safe to do so; and that Philip Morris knowingly and falsely led him to believe that this was so. The jury awarded Ms. Williams compensatory damages of approximately \$821,000 and punitive damages in the amount of \$79.5 million. The trial judge subsequently reduced the punitive damages award to \$32 million by applying the "guideposts" cited in BMW v. Gore. However, on appeal, the appellate court restored the \$79.5 million jury award and Philip Morris sought review by the United States Supreme Court.¹⁷

Justice Breyer, delivering the opinion of the Court, framed the punitive damages issue before it as follows:

The question we addressed today concerns a large state-court punitive damages award. We are asked whether the Constitution's Due Process Clause permits a jury to base that award in part upon its desire to *punish* the defendant for harming persons who are not before the court (*e.g.*, victims whom the parties do not represent). We hold that such an award would amount to a taking of 'property' from the defendant without due process.¹⁸

The Supreme Court determined 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 or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation."¹⁹

However, in making this holding, the Supreme Court also recognized that "conduct that risks harm to many is likely more reprehensible than conduct that risks

harm to only a few. And a jury consequently may take this fact into account in determining reprehensibility.”²⁰

Respondents argue that she is free to show harm to other victims because it is relevant to a different part of the punitive damages constitutional equation, namely, reprehensibility. That is to say, harm to others show more reprehensibility conduct. Philip Morris, in turn, does not deny that a plaintiff may show harm to others in order to demonstrate reprehensibility. Nor do we. Evidence of actual harm to non-parties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible – although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of its harms is alleged to have visited on non-parties.²¹

This holding presents quite a quagmire for trial lawyers and courts. How does one properly instruct a jury that, on the one hand tells them that they can consider evidence of harm to others as evidence of the reprehensibility of the defendant’s conduct but, yet, it cannot award punitive damages on the basis of the harm caused to others by the defendant. The Supreme Court provided little to no instruction on how courts are to accomplish this feat.

How can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to *punish* the defendant for having caused injuries to others? Our answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. In particular, we believe that where the risk of that misunderstanding is a significant one – because, for instance, of the sort of evidence that was introduced at trial or the kind of argument that the plaintiff made to the jury – a court, upon request, must protect against that risk. Although the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases.²²

The dissenting justices pointed out that, in its application, a jury instruction of this type would clearly confuse a jury.

While apparently recognizing the novelty of its holding, . . . the majority relies on a distinction between taking third-party harm into account in order to assess the reprehensibility of the defendant's which is permitted – from doing so in order to punish the defendant “directly” – which is forbidden . . . this nuance eludes me. When a jury increases a punitive damages award because injuries to third parties enhance the reprehensibility of the defendant's conduct, the jury is by definition punishing the defendant – directly for third-party harm.²³

* * *

The Court's Order vacating the Oregon Supreme Court's judgment is all the more inexplicable considering that Philip Morris did not preserve any objection to the charges in fact delivered to the jury, to the evidence introduced at trial, or to opposing counsel's argument. The sole objection Philip Morris preserved was to the trial court's refusal to give defendants' requested charge number 34. . . . Under that charge, just what use could the jury properly make of 'the extent of harm suffered by others'? The answer slips from my grasp. A judge seeking to enlighten rather than confuse surely would resist delivering the requested charge.^{24 25}

III. Trial: Conditioning Your Jury to Award Punitive Damages.

It is against this legal backdrop that trial lawyers now pursue their punitive damages claim. How does a trial lawyer convince a jury to award punitive damages? How does a lawyer overcome the biases that the average person may have against punitive damages due to the tort reform movement? How does a lawyer now tiptoe through the mine field that is Philip Morris? The next section will approach not only how to get punitive damages at trial, but also how to aggressively defend the jury's award of punitive damages in the post-trial hearings.

The manner in which a case is presented to the jury generally determines whether or not the jurors will meet or exceed your expectations. In every case where punitive damages are sought, all jurors must have been properly motivated toward such damages. Large verdicts don't just happen. How do you condition a jury to respond as you would have them respond? There is obviously no textbook answer to this query. However, to achieve a substantial punitive damages award, your focus from the start of

trial to the end should be on the bad conduct of the defendant. Develop a trial theme that effectively creates a powerful bond between your client and the jurors. One such theme that has been effective is the “need for protection.” All people need and want to be protected, including jurors. We all feel a strong need to protect our loved ones. If this is your theme, any argument should stress that the plaintiff deserved protection, wasn’t provided that protection by the defendant and, as a result, was harmed. Jurors need to see that by protecting your clients, they are protecting themselves. In other words, you are making your cause – the jury’s cause – and that cause is a just cause because it will protect everyone from the defendant’s wrongdoing. This type of conditioning process, i.e., the theme of your case, should start with your very first contact with the prospective jurors.

A. Voir Dire.

It is essential to use the voir dire examination of jurors effectively. The goal for the trial lawyer is to not only eliminate jurors whom you believe to be unfavorable, but to wind up with jurors who will respond in a proper fashion if you do your job. Through voir dire, the lawyer develops an early rapport with the jurors. The lawyer will be able to get persons who will ultimately decide your client's case.

When voir dire examination of the jury panel is completed, each juror should have a general idea of what the case is all about. They should actually know what the theme of the Plaintiff's case is at that stage. They should certainly know from the Plaintiff's side that the case is a good one and something that will be interesting to hear as the case unfolds. If your case involves tragic circumstances and the need for a substantial verdict, the jury panel must know that before a jury is actually seated for the

trial. They must be given a general idea of the nature and seriousness of the injuries involved and why the Defendant is responsible and why the conduct was so reprehensible that it warrants punitive damages. You must let the prospective jurors know this early-on and eliminate those who do not favor punitive damages. Cases that involve punitive damages must be handled differently from those dealing solely with compensatory damages. Some jurors have fixed opinions against the awarding of punitive damages in any amount. This is the first and most important opportunity that a trial lawyer can use to implement his theme, whether it is the need for protection or other theme. The conditioning process begins with voir dire and the jurors need to know that a punitive damages award must be substantial enough to deter further wrongdoing by the defendant.

B. Opening Statements.

The opening statement is a most important part of trying a lawsuit. Many lawyers do not treat the opening statement with the importance it deserves. Many opening statements are not well prepared which is inexcusable. Jurors generally have a very superficial knowledge of what your case involves even after experiencing voir dire examination. This is especially true where the trial judge conducts the examination. The jurors know nothing about the facts except what little they remember from voir dire. The lawyer for the Plaintiff has the responsibility of educating the jurors who know nothing about the facts and who also may have a distorted view of the law applicable to the case. In the post-tort reform atmosphere, the trial lawyer must deal with a great deal of adverse and oftentimes false information put out to the general public concerning lawsuits in general. It is extremely important to let the jury know what your case is all

about in simple, understandable terms. Most jurors really want to know what the case is about and why the Plaintiff is bringing this suit. They are disappointed and probably greatly surprised if they do not find out at the outset from the Plaintiff's lawyer that they are sitting on an important case and one that has its own unique and interesting set of facts.

I, like many others, believe that jurors tend to make up their minds to a large degree during the opening statements. This is probably why most defense lawyers ask the jury not to make up their minds until the defense has had their say. Of course, jurors can change their minds, especially if you have misled them or have done something that they will later consider to be unfair. If you say you will prove a key element of your case, you had best do so later. You may not win in the opening statement, but you can certainly lose at that stage. First impressions generally last and do not change. If you do badly at the outset, you will have a hard row to hoe during the rest of the trial. It makes good sense to develop the theme of your case early in your opening statement.

This theme should have become a part of your case preparation long before you get to the courthouse. You are conveying the central message of your case to the jury and making them anticipate and then relate the trial evidence they will hear and see to your theme. If your case is based upon an insurance company's taking advantage of the elderly with fraudulent Medicaid supplemental policies, let the jury know this. If it is based upon a total disregard for safety in design by an automobile manufacturer, the jury must know and appreciate this from the outset. If a front end lift device makes a farm tractor a highly dangerous machine, certainly your case must be built around that theme.

Punitive damages must be woven into your opening statement. There is no hard fast rule as to when you first mention punitive damages. Sometimes I start with the shocking conduct by the Defendant and then add punitive damages at the appropriate time. You should let the jury know what your damages are in sufficient detail so they will be looking for the various elements during your evidence. They can then key in on testimony as it develops. If you don't do a good job on damages, your verdict will reflect this in most every case.

A good opening statement will set the tone for your case. If you do poorly in the opening statement it is possible to overcome it, but it will be much more difficult. On the other hand, a good, strong opening statement will set the tone for your case and generally will give you an advantage over the Defendant which you should keep throughout the trial.

**C. Presentation of Evidence Justifying Punitive Damages:
Keeping the Focus on the Defendant's Wrongdoing.**

As we are all well aware of, in order to recover punitive damages, the plaintiff must prove by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff.²⁶ In personal injury cases, plaintiffs, more often than not, seek to prove wantonness in order to obtain punitive damages. Wantonness means conduct which is carried on with a reckless or conscious disregard of the rights or safety of others.²⁷

Alabama has historically treated actions resulting in death different from actions causing physical injuries. Alabama's Wrongful Death Statute provides only for the recovery of only punitive damages.²⁸ Alabama law has noted that "the enormity of the

wrong” in causing someone’s death justifies the difference in treatment. “The legislature has authorized the jury to ascertain an amount of damages appropriate to the goal sought to be achieved – preservation of life because of the enormity of the wrong, the uniqueness of the injury, and the finality of death.”²⁹

The jury’s consideration of the ‘enormity of the wrong’ includes accessing the finality of death, the propriety of punishing the wrongdoing and wrongdoers, whether the death could have been prevented and, if so, the lack of difficulty that would have been involved in preventing the death, as well of the public’s interest in deterring others from committing the same or similar wrongful conduct.³⁰

Thus, no matter whether you have a personal injury or a wrongful death case, in order to get punitive damages, the law requires that the focus must be on the defendant’s conduct, i.e., the enormity of the defendant’s wrongdoing, the reckless or conscious disregard of the rights and safety of others, and deterrence to ensure it doesn’t happen to anyone else. With this background in mind, there are key types of evidence to present at trial that greatly increases the trial lawyer’s chance of convincing a jury to award punitive damages.

1. Other similar incidents.

One of the most crucial and effective types of evidence a plaintiff can present in a case is evidence of other incidents involving the same or similar conduct or product. Evidence of other similar incidents or similar accidents is admissible if the condition of the place or thing at such other times was substantially similar to condition existing at the time of the accident. Now what is or is not a substantially similar accident or incident is a much debated topic. The point of this paper is not to educate you on what is or is not “substantially similar” – the point is that if you can overcome the evidentiary

hurdles and get this type of evidence before a jury, it is very powerful and adds strength to your pursuit of punitive damages.

For example, in fraud cases, use of pattern and practice witnesses that prove that others have been similarly defrauded by the same sales person is powerful evidence of the scope of the defendant's wrongdoing. In fraud cases, one of the most common defenses is that the agent for the insurance company or lender was just a renegade agent. In other words, the defendant argues that while it tries to police the people working for it, it is an imperfect world and sometimes mistakes are made in monitoring its agents. Similar occurrence evidence serves to combat the one bad apple defense and also shows the defendant's knowledge and approval of the misconduct. If a defendant knew there was a problem and closed its eyes to the problem in order to make money, then a strong punitive damages argument can be made.

The importance of pattern and practice evidence in obtaining a substantial punitive damages award was demonstrated in Life Ins. Co. of Georgia v. Johnson.³¹ A jury awarded \$250,000 in compensatory damages and \$15 million in punitive damages to an elderly woman who was sold a worthless Medicaid policy by the defendant. Plaintiff presented three live pattern and practice witnesses of other elderly, uneducated women who were sold the same worthless policies. The evidence demonstrated that the defendant's conduct was not an isolated event and that the defendant knew of the problem, but did nothing to correct it.³²

Similarly, in product liability actions, evidence of complaints to the manufacturer of the product alleging the same defect is strong evidence supportive of punitive damages. Where a manufacturer has received information about safety-related

malfunctions of its vehicles which are being used by the public, an inadequate response or no response at all may demonstrate sufficient disregard for safety to others to justify punitive damages.

In General Motors v. Johnston, the plaintiff admitted 251 internal reports of stalling problems in vehicles with identical engines as the one in the plaintiff's pickup truck. In that case, the plaintiff's truck stalled as it went through an intersection and was struck by a tractor/trailer truck, killing a seven-year-old passenger. The jury awarded \$15 million.³³ In Hobart Corporation v. Scroggins, a jury awarded \$10 million in punitive damages as a result of the plaintiff losing a portion of his right index finger in an accident at work using a meat saw. The plaintiff introduced evidence of injury sustained by other meat cutters on the same meat saw. There was also testimony presented regarding a list that purported to contain 97 complaints of injuries since the specific product was placed on the market.³⁴ In Mikolajczyk v. Ford,³⁵ the court allowed evidence of prior accidents involving the same alleged defect in the seatback of the Ford vehicle. The jury returned a \$25 million verdict.

Other similar incident evidence gives a jury a strong foundation to award a substantial punitive damages verdict. Many lawyers fail to develop the OSIs adequately and that really hurts in a good case.

2. Beware of Philip Morris v. Williams.

As a practicing trial lawyer, the question posed now is how do you aggressively pursue claims of punitive damages through the use of other incidents or pattern and practice evidence, while at the same time comply with the due process implications of Philip Morris. The simple answer is, no one knows – not lawyers and not the Courts. I

certainly would not shy away from using this type of evidence. The Supreme Court clearly said that the door was open for evidence and argument about harm to others as a result of the defendant's conduct. However, it also made clear that punitive damages cannot be awarded for harm caused to "strangers to the litigation."

One of the most obvious results will be new and creative jury instructions. The Supreme Court, through Philip Morris, requires the trial court to give a jury guidance on how it is to consider evidence regarding harm to others. The Supreme Court hinted that a proper instruction should tell the jury that it "may consider the extent of harm suffered by others in determining what the reasonable relationship is between [the defendant's] punishable misconduct and harm caused [the plaintiff], but you are not to punish the defendant for the impact of its alleged misconduct on other persons"36

The other cautionary note to trial lawyers who assert punitive damages on the basis of other incidents or harm to others should be that counsel for plaintiffs need to pay close attention to the actual wording they use in their closing arguments and throughout the trial. In Snyder v. Phelps,³⁷ the court was asked to determine whether in light of Philip Morris, the punitive damages award of \$8 million was grossly excessive. The court there held that the Philip Morris decision was not applicable.

The Philip Morris USA decision is inapplicable. In that case plaintiff's counsel argued to the jury in the punitive damages portion of the underlying trial to "think about how many other –cigarette smokers] in the last 40 years in the State of Oregon there have been In Oregon, how many people do we see outside, driving home . . . smoking cigarettes? [C]igarettes . . . are going to kill ten [of every hundred]. [And] the market share of Marlboros [*i.e.*, Philip Morris] is one-third [*i.e.*, one of every three killed]." In light of this argument, the Supreme Court was concerned about the reference to past harm to third parties. In this case, plaintiff's counsel did not refer to any other prior injuries inflicted by defendants. Instead, plaintiff's counsel argued for a punitive award that is

proportionate [to the harm] and appropriate that says don't do this in Maryland again. Do not bring your circus of hate to Maryland again. That no son or daughter of Maryland shall have [his or her] funeral defiled by the malicious tactics of the [D]efendants again and that no future father or mother suffers this.

Plaintiff's counsel did not mention *past* harm to third parties, only *future* harm to third parties. The reference to future harm is necessary in addressing the deterrent value of the punitive award, especially where, as here, the reference is only to future conduct within the state.³⁸

The lesson gleaned from this case is that trial counsel may want to focus their arguments on future harm to third parties as part of the deterrent value of punitive damages and not the past harm to third parties.

3. Trickery and deceit by a corporation.

If there is clear evidence of deceit, trickery or deliberate false statements by a defendant, the plaintiff should tenaciously pursue punitive damage. "Although the Supreme Court did not provide any particular yardstick by which to measure reprehensibility, it did acknowledge that trickery and deceit are more reprehensible than negligence, and that acts of affirmative misconduct, such as making deliberate false statements, are more reprehensible than making innocent representations."³⁹ The Supreme Court also recognized that economic damage inflicted upon a financially vulnerable plaintiff might well support a large punitive-damages award.⁴⁰ The Life of Georgia v. Johnston case demonstrates the effect of how taking advantage of a financially vulnerable person might well lead to a substantial punitive damages award. Another case which shows how juries react to blatantly deceitful conduct by a defendant is Orkin v. Jeter.⁴¹

In Orkin, an elderly homeowner, who was both poor and in poor health, sued the defendant for fraud in connection with treatment of termite infestation in her home. The record was replete with evidence that Orkin knew of serious termite damage to Ms. Jeters' home as early as 1984 and that it engaged in a policy of fraudulently concealing that damage. The defendant deceived the plaintiff into believing that she needed additional services to preserve her home, when in fact her home had already been badly damaged by termites. The Court noted that Orkin's conduct was "highly reprehensible." In fact, it was so reprehensible and so outrageous to a jury that despite only awarding \$400,000 in compensatory damages, the jury awarded \$80 million in punitive damages.⁴²

4. Corporate knowledge of its own testing.

In product liability cases, pre-injury knowledge by the defendant concerning potential injuries or death may not always come in the form of prior complaints. One of the most common sources of evidence in establishing a reckless disregard for safety can be found in the crash testing performed by the manufacturers. The manufacturer's knowledge of a potential injury can be found in the results of crash tests conducted by the manufacturers. Manufacturers are required to extensively test their vehicles to determine their crashworthiness by simulating collision impact courses. These tests tell the manufacturers how a vehicle's various systems would perform in a collision and may also reveal safety deficiencies that should be remedied but which the defendant often times ignored.

In Grimshaw v. Ford Motor Co.,⁴³ an accident involving an individual who was burned when the Ford Pinto in which he was a passenger burst into flames when struck

from behind. The jury awarded \$2,576,000 in compensatory damages, but \$125 million in punitive damages (which was remitted to \$3.5 million in the trial court.) The critical evidence came from the results of crash tests conducted by Ford showing Ford knew that the Pinto's fuel tank and rear structure would expose consumers to serious injury or death in a 20-30 mph collision.

5. Profit motive or cost savings.

Obviously, one sure fire way of making a jury mad is to present evidence that a defendant made a conscious decision not to implement a safety design because of a profit motive. In GM v. Jernigan,⁴⁴ our firm obtained a \$100 million punitive damages award after presenting evidence that GM instituted a cost reduction program wherein it sought to save \$2,500 per vehicle by making changes to its cars that significantly weakened the car's structure and degraded the car's ability to withstand the forces of real-world collisions. The motive for GM's decision was to maximize profits at the expense of safety. In Grimshaw, supra, Ford's internal documents showed that the placement of the gas tank of the Pinto over the axle surrounded with a protected barrier would have cost \$9.95 per car and that equipping the car with a reinforced rear structure, smooth axle, improved bumper and additional crush space would have cost only \$15.30 per car. Despite this information, management decided to defer these "fixes" based on cost savings. The appellate court noted:

There is evidence that Ford could have corrected the hazardous design defects at minimal cost but decided to defer correction of the shortcomings by engaging in a cost benefit analysis balancing human lives and limbs against corporate profits. Ford's institutional mentality was shown to be one of callous indifference to public safety. There was substantial evidence that Ford's conduct constituted a conscious disregard of the probability of injury to the members of the consuming public.⁴⁵

D. Closing Argument.

By this stage of the case, you should have fully convinced the jury that your client's cause is a just one. If you have done your job properly, and the facts and law of the case justify it, each juror should now be ready and willing to make a decision that will fully and adequately punish the defendant and deter future wrongdoing. The conduct of the defendant, combined with the plaintiff's injuries and damages, should justify a substantial verdict. The likelihood of obtaining that verdict will be much greater if the jurors now expect and want you to ask for a substantial award. I try to remind the jury that I told them in the very beginning that this was an important case and that I would be asking them to respond by awarding a substantial verdict to my client. Remember, no lawyer will ever participate in a "big verdict" case if he or she is timid about asking for a large sum of money. You certainly can't duck your head and whisper the amount to the jury and expect much in return.

By conditioning your jury at the outset and throughout the trial to focus on the enormity of the wrong, chances are you have greatly improved the likelihood of a large punitive damages verdict in your case.

V. Understanding and Preparing for the Post-Trial BMW/Hammond/Green Oil Hearing.

If you are fortunate enough to obtain a substantial punitive damages award, you must then prepare to defend the award at the post-trial hearings. Although some attorneys choose to simply respond to whatever the defendant raises in his JNOV motion, I recommend taking a much more aggressive and pro-active approach to defending the award. The BMW/Hammond/Green Oil post-trial procedure provides a new opportunity for further discovery against the defendant on its finances. What can

be learned in post-trial discovery may go a long way in justifying the substantial punitive award you just received.

A. Overview of the due process requirements for upholding a punitive damages award.

As you know, both the Alabama Supreme Court and the United States Supreme Court requires that the court must review the size of a jury's award of punitive damages to ensure that the award was not "grossly excessive" and was in compliance with the Constitution's Due Process Clause.⁴⁶ The court's review is *de novo*.⁴⁷

The Court in considering the questions of adequate or excessiveness of an award must consider the "guideposts" established by the United States Supreme Court in BMW of North America, Inc. v. Gore,⁴⁸ and the factors set forth in Hammond v. City of Gadsden,⁴⁹ and Green Oil Co. v. Hornsby⁵⁰. According to BMW, the Court must consider the following: (1) the reprehensibility of the defendant's conduct; (2) the ratio of the punitive-damages award to the compensatory-damages award; and (3) a comparison of the award of punitive damages to the civil or criminal penalties that could be imposed for comparable misconduct.

The first and most important factor to be considered is the degree of reprehensibility of the conduct of the defendant.⁵¹ Considering this factor helps ensure that the punitive damages award is not "grossly out of proportion to the severity of the offense."⁵² The second factor to be considered is the ratio of the punitive damages award to the harm inflicted.⁵³ In setting out this factor, the Supreme Court was quick to state that it has "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award."⁵⁴ However, the Court recently stated that "[s]ingle-digit

multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution. . . ."⁵⁵ A third critical factor to be considered with regard to the question of excessiveness is the potential imposition of criminal or civil penalties for comparable misconduct.⁵⁶

Besides the BMW "guideposts," Alabama sets forth additional factors a court should consider when reviewing a punitive damages award. They are: (1) The punitive damages should bear a reasonable relationship to the harm that is likely to occur from the Defendant's conduct as well as the harm that actually occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater; (2) The degree of reprehensibility of the Defendant's conduct should be considered; (3) If the wrongful conduct was profitable to the Defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the Defendant recognizes a loss; (4) The financial position of the Defendant is relevant and should be considered; (5) All of the costs of litigation should be included, so as to encourage Plaintiffs to bring the wrongdoers to trial; (6) If criminal sanctions have been imposed on the Defendant for his conduct, this should be taken into account in mitigation of the punitive damages award; and (7) If there have been other civil actions against this same Defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.⁵⁷

B. Aggressively defending your jury award.

So you just obtained the biggest punitive damages verdict of your legal career -- What are you going to do now? Well, don't go to Disneyworld just yet. You now need to immediately begin your defense of the award. As I stated earlier, this defense should

be very proactive and aggressive. The court will look at all the evidence under a *de novo* standard, not an abuse of discretion standard. That is critical because, in a certain sense, you are retrying the case all over again but this time only in front of the judge at the post-trial hearing. However, because of this post-trial procedure, the door is now open to pursue discovery that might have been prevented in the trial stage and which most corporate defendants jealously guard and vehemently oppose. Here are a few steps I recommend in preparing for a post-trial BMW/Hammond/Green Oil hearing.

- 1. Thoroughly detail for the trial court every aspect of the evidence presented at trial which supported punitive damages.**

Obviously because the review is *de novo*, you must thoroughly detail the evidence you presented at trial for the court at this stage. If the transcript of the trial is completed, then pour over every detail of the transcript pulling out all the testimony, documents, and other evidence supportive of the verdict. However, if the transcript of the trial will not be ready before the hearing and you did not get daily copy of your trial, then immediately after trial, while fresh on your mind, write down everything you remember presenting at trial. Memories fade quickly. That is why it is important to keep detailed notes of what was presented throughout the trial. If you know that the case has a potential for a large punitive damage award, then I suggest that you designate a member of your trial team to take detailed notes throughout the trial of the evidence, documents, and testimony presented. Don't rely solely upon your memory.

- 2. Pursue financial discovery.**

Two of the key factors a court looks at in determining if the punitive damages award was excessive is the financial position of the defendant and whether the wrongful

conduct of the defendant was profitable. In fact, Green Oil states that the punitive damages award should remove the profit or should be in excess of the profit if such wrongful conduct was profitable. These factors thus open the door for the plaintiff to pursue further discovery on the defendant's financial status – discovery that might not have been allowed prior to trial. In light of this, you should draft specific discovery pertaining to the net worth of the defendant, the cash it has on hand, the revenues it generated in a given year, how much profit it made off the sale of its product, and compensation paid to its most highly paid employees. Seek to obtain copies of insurance policies, financial statements, budgets and tax returns. Attached to this paper are some interrogatories our firm prepared after obtaining the \$100 million punitive damages award in Jernigan. Hopefully, they will give you an idea of the type of discovery that you can pursue in your own situation.

Another factor under Green Oil is whether there have been other lawsuits against the defendant. Again, this opens up an avenue of discovery that may have not been allowed in your case prior to trial. If not allowed discovery at trial, be sure to now seek all lawsuits or complaints against the defendant involving the product or similar claims. Pursue an itemization of the costs the defendant incurred in defending the case. Even ask about settlements and the amounts paid out by the defendant in those settlements. Corporations hate this and will fight to keep the financial records secret. However, a strong argument can be made that all of this information is discoverable under Green Oil.

You may want to consider taking a 30(b)(6) corporate representative deposition. This corporate representative should be the person most familiar with the financial

position of the defendant, cost of litigation of this case to the defendant, whether there were similar civil cases to which the defendant has been a party and whether there are any policies of insurance. Enclosed is a copy of a notice of deposition for such a witness that might be helpful to you.

Once you have gathered this information, you may even consider hiring an accounting expert. This obviously will be dependant upon the amount of the award, the size of the defendant, and the complexity of its corporate structure.

Conclusion

As this paper details, it is not easy under the law to obtain a punitive damages verdict. However, with proper preparation, a proper trial strategy, and thorough knowledge of the law, you can achieve it. The real fun begins in defending the award. By aggressively pursuing post-trial discovery, you can keep the pressure on the defendant and enjoy watching them squirm as they have to reveal some of the most secretive aspects of their corporation.

¹ "Recognizing and Dealing with Jury Bias in Voir Dire," ITLA, 33rd Annual Institute, Indianapolis, IA.

² "Mythbuster – Punitive Damages: Rare, Reasonable, and Effective," Center for Justice and Democracy (January 2007).

³ Bowles v. Lowery, 5 Ala.App. 555, 59 So. 696 (1912). See also, C. Gamble and J. Marsh, Alabama Law of Damages, § 4:1 (5th Ed. 2004).

⁴ Maryland Casualty Co. v. Tiffan, 537 So.2d 469 (Ala. 1988).

⁵ Bozeman v. Busby, 639 So.2d 501, 503 (Ala. 1994) (citing Henderson v. Alabama Power Co., 627 So.2d 878, 893 (Ala. 1993) (*abrogated on other grounds*)).

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- ⁶ Philip Morris USA v. Williams, _ U.S. _, 127 S.Ct. 1057 (2007).
- ⁷ Pacific Mutual Life v. Haslip, 499 U.S. 1, 22, 111 S.Ct. 1032 (1991). See also BMW v. Gore, 517 U.S. 559, 568, 116 S.Ct. 1589 (1996).
- ⁸ TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 453-54, 113 S.Ct. 2711 (1993).
- ⁹ Philip Morris USA v. Williams, *supra*.
- ¹⁰ Honda Motor Co. v. Oberg, 512 U.S. 415, 432, 114 S.Ct. 2331 (1994); Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 443, 121 S.Ct. 1678 (2001).
- ¹¹ BMW, *supra*, at 574-585, 116 S.Ct. 1589.
- ¹² State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513 (2003).
- ¹³ State Farm, *supra*, at 412-416, 123 S.Ct. at 1517-1519.
- ¹⁴ Id. at 422; 123 S.Ct. at 1523.
- ¹⁵ Id. at 422-23; 1522-23 (citations omitted).
- ¹⁶ Id. at 425; 122 S.Ct. at 1524.
- ¹⁷ Philip Morris, *supra*, at 1060-1062.
- ¹⁸ Philip Morris at 1060 (emphasis in the original).
- ¹⁹ Id. at 1063.
- ²⁰ Id. at 1065.
- ²¹ Id. at 1063-64 (emphasis added).
- ²² Id. at 1065 (emphasis in the original).
- ²³ Id. at 1066-67 (J. Stevens dissenting).
- ²⁴ Id. at 1068 (J. Ginsberg dissenting).
- ²⁵ For an excellent analysis of Philip Morris USA v. Williams, see “Tiptoeing Through Punitive Damages: a Discussion of Philip Morris USA v. Williams” -- Lee King Forstman, Alabama Association for Justice Summer Seminar (August 9-11, 2007).
- ²⁶ A.P.J.I. §11.03.
- ²⁷ Id.
- ²⁸ Ala.Code §6-5-410.
- ²⁹ Tillis Trucking Co., Inc. v. Moses, 748 So.2d 847, 889 (Ala. 1999) (quoting Campbell v. Williams, 638 So.2d 804, 810-11 (Ala.1994)).
- ³⁰ Tillis Trucking, *supra*, at 889.
- ³¹ Life Ins. Co. of Georgia v. Johnson, 684 So.2d 685 (Ala. 1996) (opinion vacated by 519 U.S. 923, 117 S.Ct. 288 (1996) and remanded for further consideration in light of BMW v. Gore, *supra*).
- ³² The punitive damages award was ultimately remitted to \$3 million by the Court. See Life Ins. Co. of Georgia v. Johnson, 701 So.2d 524 (Ala. 1997).
- ³³ General Motors v. Johnston, 592 So.2d 1054 (Ala. 1992) (The award was ultimately remitted to \$7.5 million.).
- ³⁴ Hobart Corp. v. Scoggins, 776 So.2d 56 (Ala. 2000) (On appeal, the Court reversed the punitive damages award holding that plaintiff had not presented clear and convincing evidence of wantonness to justify an award of punitive damages.).
- ³⁵ Mikolajcvyk v. Ford, 870 N.E. 2d 885 (Ill.App. 1 Dist. 2007).
- ³⁶ Philip Morris, *supra*, at 1064.

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- ³⁷ Snyder v. Phelps, 2008 WL 294671 (D.Maryland, Feb. 4, 2008).
- ³⁸ Snyder, slip. op. at *23 (emphasis in the original) (citations omitted).
- ³⁹ Orkin Exterminating Co., Inc. v. Jeter, 832 So.2d 25, 39 (Ala. 2001) (citing BMW, 517 U.S. at 575-76, 116 S.Ct. 1589.).
- ⁴⁰ Id.
- ⁴¹ Orkin v. Jeter, 832 So.2d 25 (Ala. 2001).
- ⁴² The Court ultimately reduced the punitive damages award to \$2 million.
- ⁴³ Grimshaw v. Ford Motor Co., 119 Cal.App. 3d 757, 174 Cal.Rptr. 348 (1981).
- ⁴⁴ GM v. Jernigan, 883 So.2d 646 (Ala. 2003).
- ⁴⁵ Grimshaw, 119 Cal.App. 3d at 813.
- ⁴⁶ Honda Motor Co. v. Oberg, 512 U.S. 415, 432, 114 S.Ct. 2331 (1994). See also Hammond v. City of Gadsden, 493 So.2d 1374 (Ala. 1986), and Green Oil Co. v. Hornsby, 539 So.2d 218 (Ala. 1989).
- ⁴⁷ Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 443, 121 S.Ct. 1678 (2001).
- ⁴⁸ BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589 (1996).
- ⁴⁹ Hammond v. City of Gadsden, 493 So.2d 1374 (Ala.1986).
- ⁵⁰ Green Oil Co. v. Hornsby, 539 So.2d 218 (Ala.1989).
- ⁵¹ BMW of North America, Inc. v. Gore, 517 U.S. 599, 576, 116 S.Ct. 1589, 1599 (1996); AutoZone, Inc. v. Leonard, 812 So.2d 1179, 1187 (Ala.2001).
- ⁵² American Pioneer Life Ins. Co. v. Williamson, 704 So.2d 1361, 1362 (Ala. 1997) (quoting BMW of North America, Inc. v. Gore, 517 U.S. at 576, 116 S.Ct. at 1599.).
- ⁵³ BMW, 517 U.S. at 580, 116 S.Ct. at 1601.
- ⁵⁴ American Pioneer Life Ins. Co. v. Williamson, 704 So.2d 1361, 1362, (Ala. 1997) (citing BMW, 517 U.S. at 582, 116 S.Ct. at 1602).
- ⁵⁵ Philip Morris, supra., at 425, 123 S.Ct. at 1524 (2003).
- ⁵⁶ BMW, 517 U.S. at 583, 116 S.Ct. at 1603; American Pioneer Life Ins. Co. v. Williamson, 704 So.2d 1361, 1362 (Ala. 1997).
- ⁵⁷ Green Oil v. Hornsby, 539 So.2d 218 (Ala. 1989).

**IN THE CIRCUIT COURT
FOR BULLOCK COUNTY, ALABAMA**

WILBERT JERNIGAN as Father and Next)
Friend of JEFFREY JERNIGAN, a minor)
child, and, WILBERT JERNIGAN,)
individually,)

Plaintiffs,)

vs.)

GENERAL MOTORS CORPORATION;)
BILL JACKSON CHEVROLET – OLDS -)
CADILLAC, INC.; CAPTIOL CHEVROLET)
AND IMPORTS, INC.; VALERIA)
CRITTENDEN; et al.,)

Defendants.)

CIVIL ACTION NO. CV-2000-104

**PLAINTIFF'S FIRST POST TRIAL INTERROGATORIES
AND REQUEST FOR PRODUCTION TO DEFENDANT
GENERAL MOTORS CORPORATION**

Plaintiff pursuant to A.R.Civ.P. 34, *Hammon v. City of Gaston*, 493 So.2d 1374, (Ala. 1986), and *Green Oil Co. v. Hornsby*, 539 So.2d 219 (Ala. 1989), propound the following interrogatories and request for production to Defendant General Motors Corporation ("GM") to be responded to within the time and in the manner required by law.

INTERROGATORIES

1. State the gross profit GM recognized from the sale of "H" cars for each year they were sold.
2. State the gross profit GM recognized from the sale of the "H" cars for the entire country for each year they were sold.

3. State the net worth of this Defendant as of the date of its response. Produce and the new worth of this Defendant at the end of each year the H car was sold . Produce all documents evidencing this information.

4. State the cash on hand for this Defendant on the date of its response and the cash on hand for each year the H car was sold. Produce all documents evidencing this information.

5. State the total compensation (including salary, bonus, stock options, deferred compensation, or compensation of any type) of the most highly paid employee of this Defendant for the past five (5) years.

6. State this Defendant's gross revenues for the past five (5) years.

7. State this Defendant's gross profits for the past five (5) years.

8. State this Defendant's net income for the past five (5) years.

9. Please provide the name, address and phone number of each witness you intend to call at the post trial stage in this matter, provide a brief summary of their testimony and produce any documents you plan to offer.

10. Please provide the name of the parties, the civil action number, the style of the case, and the lawyers involved in any case which you contend the Trial Court should use as a comparison in connection with the evidence you plan to produce at the post trial stage of this matter.

11. Please identify by carrier and policy number any insurance coverage of any type, including the policy limits, which arguably would provide coverage for any verdict in this case. Include any carrier to whom notice of this

lawsuit has been given. Please produce a complete copy of each such insurance contract or policy including the declaration pages.

12. Please describe any change in policy, procedure, or practice of any type in which the Defendant contends was an attempt to remedy or correct the conduct which is the subject of this lawsuit.

13. Please describe any proposed policy change relative to cost reduction programs as a result of this case.

14. State the net worth of GM as of the date of this response. Produce all documents evidencing this information.

15. State the name, address and subject matter of any expert witness that you intend to call in the post trial stage of this case and include in your answer the summary of expected opinions.

16. State the total number of "H" cars manufactured by GM for the following year models: 1986, 1987, 1988, 1990, 1991, 1992, 1993, 1994, and 1995.

17. With respect to each of those vehicle models, state the per vehicle cost of the front door guard beam.

18. For the vehicles that incorporated the bentler beams, state the amount of cost reduction obtained from going to the bentler beam design for the front doors of the "H" car.

19. State the total amount per vehicle cost reduction by changing the front upper rails from high strength steel to mild steel in the "H" car design.

20. State the total amount per vehicle cost reduction by changing the front fenders from metal to plastic fenders in the “H” car design.

21. State the total amount per vehicle cost reduction by changing shortening and narrowing the lower rail of the “H” cars.

22. With respect to the number of “H” cars sold by GM from 1986 to 1995 state how many of those vehicles were sold in the State of Alabama.

23. State whether or not any similar lawsuit similar to the Jernigan case was filed against GM.

24. State the total number of dollars GM has paid in cases involving the second generation “H” car involved in a similar type crash to the Jernigan v. GM case.

25. State in precise detail how you contend that the verdict for compensatory damages for Jeffrey Jernigan is excessive.

26. State precisely what evidence GM produced at trial that would indicate that Jeffrey Jernigan’s compensatory damages awarded by this jury are excessive.

27. State what evidence GM offered to counter the life care plan of Jeffrey Jernigan.

28. State what evidence GM has to indicate that the jury’s award of three times the punitive damages is excessive.

29. State what evidence GM has to indicate that the jury acted out of bias, passion or corruption.

30. State what evidence GM has or produced at trial to indicate that Jeffrey Jernigan would ever improve from his current condition.

31. State the total amount of money that GM offered prior to trial or during trial to settle the case.

32. State the amount of money defense counsel suggested that the jury should award to Jeffrey Jernigan in this case.

33. State whether or not GM admits that Jeffrey Jernigan will never be employable.

34. State whether or not GM admits that Jeffrey Jernigan will ever be able to marry.

35. State what evidence GM has that Jeffrey Jernigan will ever lead a normal life.

REQUEST FOR PRODUCTION

1. Produce any and all documents which support your answer to interrogatories.

2. Balance sheet for this Defendant for each fiscal or calendar year for the past five (5) years.

3. Income statement for this Defendant for each fiscal or calendar year for the past five (5) years and for 1993, 1994 and 1995.

4. Consolidated financial statements (including balance sheets and income statements) for any entity into which the operations of this Defendant are consolidated for the past five (5) years.

5. Form 10K filed with the Securities and Exchange Commission for any business entity into which the operations of this Defendant are consolidated for the past five (5) years.

6. A copy of this Defendant's Federal Income Tax Returns for 1993, 1994 and 1995.

7. Annual reports to shareholders for this Defendant for each of the last five (5) years.

8. The annual report for 1994.

9. Please produce for 1992, 1993 and 1994 the following:

(a) Balance sheet for this Defendant;

(b) Balance sheet for any parent and/or holding company of this Defendant;

(c) Balance sheet of any subsidiary and/or affiliated company of this Defendant. Please list separately:

(d) Income statement for this Defendant;

(e) Income statement for any parent and/or holding company of this Defendant;

(f) Income statement for each of the subsidiaries and/or affiliated companies of this Defendant;

(g) Consolidated financial statements (including balance sheets and income statements) for any entity into which the operations of either this Defendant or any of its parent and/or holding companies, and/or subsidiary companies and/or affiliated companies, are consolidated;

(h) Form 10-K filed with the Securities and Exchange Commission for any business entity in which the operations of this Defendant, its holding company, parent company, subsidiary, or affiliates, are consolidated;

(i) Any documents evidencing intercompany accounts and transactions with any business entity into which the operations of this Defendant, its parent, holding company, subsidiary, or affiliates, are consolidated;

(j) Any and all documents related to financial statements of any entity into which the operations of this Defendant are consolidated;

10. Please identify by parties, case number, court, state, county, division of any county, all lawsuits pending against this Defendant that this Defendant contends “pertains to the same alleged conduct.”

11. Please produce all annual reports to shareholders for 1992, 1993 and 1994.

J. GREG ALLEN (ALL021)
Attorney for Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify that I have filed the original of the foregoing document in this Court with copies to be served upon all Defendants of record as listed below by placing a copy of same in the United States Mail, first class, postage prepaid on this the _____ day of _____, 2002.

OF COUNSEL

**ATTORNEYS FOR GENERAL MOTORS
AND CAPITOL CHEVROLET
AND IMPORTS, INC.**

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Eufaula, AL 36072

Chilton Davis Varner
Robert D. Hays
L. Frank Coan, Jr.
Jameson B. Carroll
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W. Ray Persons
King & Spalding
191 Peachtree Street
Atlanta, GA 30303-1763

**IN THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA**

GREGORY E. PALMER,)
as Administrator of the Estate of)
Dolly Palmer, Deceased,)
)
Plaintiff,)

vs.)

CIVIL ACTION NO.: CV-00-2775

SOUTH ALABAMA NURSING)
HOME, INC. d/b/a BEVERLY)
HEALTHCARE – MOBILE,)
(formerly BAY MANOR HEALTH CARE);)
LINDA POSEY COOK, EXECUTIVE)
DIRECTOR, NURSING HOME)
ADMINISTRATOR; et al.,)
Defendants.)

**AMENDED NOTICE TO TAKE DEPOSITION OF DEFENDANT’S CORPORATE
REPRESENTATIVE PURSUANT TO RULE 30(b)(6) A.R.CIV.P.**

Please take notice that Plaintiff will take the deposition of Defendant’s corporate representative on **a date and time to be decided between the parties** at the offices of Carr, Alford, Clausen, & McDonald, LLC, located at One St. Louis Centre, Suite 5000, Mobile, Alabama, upon oral examination before a court reporting service how is authorized to administer oaths under the laws of the State of Alabama.

Pursuant to Rule 30(b)(6), Plaintiff requests that the corporate representative(s) should be the person or persons most familiar with the financial position of Defendant; cost of litigation of this case to Defendant; similar civil cases to which this Defendant has been a party; and any and all policies of insurance providing coverage for this verdict rendered in this case, and any other

matters related to the financial position of this Defendant. Pursuant to Rule 30(b)(6), Plaintiff also requests that the deponent provide the below listed information at the deposition:

1. A list of the name, address and telephone number of each witness you intend to call at the Hammond/Green Oil hearing, including a brief summary of the testimony of each, and a copy of any documents you plan to introduce into evidence through said witness(es).

2. Provide documents that show the following:

- (a) The net worth of Beverly Healthcare – Mobile as of the date of this response;
- (b) The net worth of Beverly Healthcare – Mobile on the date the jury verdict was returned;
- (c) The cash on hand at Beverly Healthcare – Mobile on the date of this response;
- (d) The cash on hand at Beverly Healthcare – Mobile on the date the verdict was returned;
- (e) The revenues of Beverly Healthcare – Mobile for its most recent fiscal year;
- (f) The profits of Beverly Healthcare – Mobile for its most recent fiscal year;
- (g) The total compensation (including salary, bonus, stock options, deferred compensation, or compensation of any type) of the five most highly paid officers and employees of Beverly Healthcare – Mobile for the most recent fiscal year;
- (h) The total compensation (including, salary, bonus, stock options, deferred compensation, or compensation of any type) of the five most highly paid officers of this defendant for the most recent fiscal year;
- (i) The total compensation (including, salary, stock options, deferred compensation, or compensation of any type) of the five most highly paid employees of this defendant for the most recent fiscal year;
- (j) The total compensation (including, salary, stock options, deferred

compensation, or compensation of any type) of the five most highly paid directors of this defendant for the most recent fiscal year;

- (k) The total compensation (including, salary, bonus, stock options, deferred compensation, or compensation of any type) of the five most highly paid consultants of this defendant for the most recent fiscal year;
- (l) The total compensation (including, salary, bonus, stock options, deferred compensation, or compensation of any type) of the five most highly paid expert witnesses who have provided testimony in any manner for this defendant for the most recent fiscal year.

3. A complete copy of this Defendant's most recent financial statement.

4. A copy of any and all policies of insurance including the declaration page that might provide coverage for the verdict in this case.

5. A copy of any and all financial statements prepared by this Defendant for the years 1998, 1999, and 2000.

6. A copy of Defendant's tax returns for the years 1998, 1999, and 2000.

7. A copy of Defendant's budget for the years 1998, 1999, 2000, and 2001.

8. A copy of Defendant's profit/loss statements for the years 1998, 1999, and 2000.

9. A copy of Defendant's budget summaries or other financial documents provided to parent company (Beverly Health and Rehabilitation Services, Inc.) for the years 1998, 1999, and 2000.

10. A copy of any reservation of rights letters that Defendant has received from any of its insurance companies.

11. A copy of any document in which the Defendant bases its net worth at \$2.5 million at the time this incident occurred (August 1998).

ROBERT L. PITTMAN (PIT024)
GERALD B. TAYLOR JR.(TAY026)
KAREN MASTIN (MAS027)
Attorneys for Plaintiff

OF COUNSEL:

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(334) 269-2343

R. Edward Massey, Jr.
CLAY, MASSEY & ASSOCIATES
509 Church Street
Mobile, AL 36602

CERTIFICATE OF SERVICE

I hereby certify that I have filed the original of the foregoing document with the Court and served a copy of same upon all counsel of record as listed below by United States Mail, first class, postage prepaid on this the _____ day of February 2002.

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