

**Rose v Brown & Williamson Tobacco Corporation**

2005 NY Slip Op 30187(U)

December 2, 2005

Supreme Court, New York County

Docket Number: 0101996/2002

Judge: Karen Smith

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KAREN SMITH

PART 44

Index Number : 101996/2002

ROSE, NORMA

vs  
AMERICAN TOBACCO

Sequence Number : 028

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
_____
_____
_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *to set aside the verdict*

*Decided in accordance with the attached memorandum decision.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**  
DEC - 8 2005  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 12-2-05

K.S.S.  
**KAREN SMITH** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK - LAS PART 44

-----X  
NORMA ROSE and LEONARD ROSE,

Plaintiffs,

Index No. 101996/2002

-against-

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~~BROWN-&WILLIAMSON TOBACCO CORPORATION,~~  
as successor in interest to AMERICAN TOBACCO,  
PHILIP MORRIS, USA, INC. and  
R. J. REYNOLDS TOBACCO COMPANY,

**DECISION AND ORDER**

Defendants.

-----X  
**HON. KAREN S. SMITH**

From February 7, 2005 through March 28, 2005, this court tried the sole remaining cause of action (negligent product design) in the instant case before a jury in three phases. The first phase of the trial was to determine liability for damages suffered by the plaintiffs as a result of plaintiff Norma Rose having smoked cigarettes manufactured by defendants over a 46 year period. The second phase of the trial was to determine if there was sufficient evidence to impose punitive damages on the defendants who were found liable in phase one of the trial. The third phase of the trial was to determine what amount, if any, should be imposed as punitive damages on the defendant who was found liable in phase two of the trial.

On March 18, 2005, the jury rendered a verdict on compensatory damages in favor defendant R.J. Reynolds Tobacco Company against plaintiffs, and in favor of plaintiffs against defendant Brown & Williamson, as successor in interest to American Tobacco (hereinafter "American Tobacco"), and in favor of plaintiffs against defendant Philip Morris, USA, Inc. (hereinafter Philip Morris). The jury apportioned liability equally (50 % each) against defendants American Tobacco and Philip Morris for the following compensatory damages: (1) two million dollars (\$2,000,000) for Mrs. Rose for past pain and suffering, (2) one million dollars (\$1,000,000) for Mrs. Rose for future pain and suffering, (3) three hundred thousand (\$300,000) for Mr. Rose for past loss of consortium, and (4) one hundred twenty thousand dollars (\$120,000) for Mr. Rose for future loss of consortium.

On March 24, 2005 the jury rendered a verdict on liability for punitive damages in favor of defendant American Tobacco against plaintiffs, and in favor of plaintiffs against defendant Philip Morris.

On March 28, 2005, the jury rendered a verdict on punitive damages in favor of plaintiffs against defendant Philip Morris in the amount of seventeen million one hundred thousand dollars (\$17,100,000).

Defendants American Tobacco and Philip Morris now move for a directed verdict pursuant to CPLR § 4401<sup>1</sup>, and for judgment notwithstanding the verdict, or, in the alternative, for a new trial on liability for compensatory damages pursuant to CPLR § 4404 (a). Philip Morris also moves for judgment notwithstanding the verdict or a new trial on punitive damages pursuant to CPLR § 4404 (a). Oral argument was held on October 7, 2005. For the reasons stated below, the court denies all these motions in their entirety.

The court finds that the plaintiffs made a *prima facie* showing of liability for negligent product design by the close of their case having submitted sufficient facts demonstrating that (1) at the time they manufactured the cigarettes that Mrs Rose smoked, defendants knew that tar in cigarettes causes lung cancer and nicotine causes addiction (a fact defendants admitted at trial), (2) at that time they manufactured their products defendants had the knowledge and the technological feasibility to manufacture a safer product, (3) defendants chose instead to continue manufacturing the defectively designed product, and (4) the defectively designed product was a substantial factor in causing Mrs. Rose's injuries. Thus, as plaintiffs made a *prima facie* showing of all of the essential elements of their case, defense motions for a directed verdict are denied.

As for American Tobacco's and Philip Morris's motion on liability and compensatory damages seeking a judgment notwithstanding the verdict or, in the alternative, a new trial, and Philip Morris's motion on the jury's award on punitive damages seeking the same relief, the court finds that the moving defendants have failed to sustain their burden of proving either that there is no valid line of reasoning or permissible inferences which could possibly lead rational

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<sup>1</sup> All defendants moved for a directed verdict at the close of plaintiffs' case. The court reserved on the motion and gave permission to the defendants to include full argument on their motion for a directed verdict in their post verdict motion papers.

persons to the conclusion reached by the jury, or that there is no fair interpretation of the credible evidence that will support the jury's verdict. Nor does the court find that its rulings during either the compensatory or the two punitive damage phases of the trial deprived the moving defendants of a fair trial.

The following are the specific grounds cited by the moving defendants as a basis for their motion in relation to the compensatory damage phase of the trial: (1) plaintiffs' negligent product design claim is preempted by the doctrine of conflict preemption, (i.e. Congress's regulation of cigarette smoking so dominates the field that any laws or regulations which appear to conflict with Congress's intent, are preempted), (2) plaintiffs failed to prove that the products were defectively designed, (3) plaintiffs failed to establish, and the court erred in its charges and evidentiary rulings with respect to, the requisite elements of proximate cause (i.e. Mrs. Rose failed to prove, and the court erroneously ruled that plaintiffs were not required to prove, that Mrs. Rose would have used the low tar/low nicotine cigarettes and would thereby have avoided her injuries), (4) the court erred in excluding evidence of consumer acceptability and by failing to instruct the jury that a safer alternative design must be commercially viable, (5) the court erred in failing to admit evidence and charge the jury as to consumer awareness and expectations, (6) the court erroneously excluded evidence and failed to charge the jury regarding informed choice, (7) the court failed to properly instruct the jury that they must consider the utility of cigarettes, (8) the court erred by not instructing the jury on industry custom and practice, (9) the court erroneously admitted incompetent and irrelevant testimony by plaintiffs' experts, Drs. Wigand and Grunberg, and (10) the court erred in dismissing the defenses of express and primary assumption of risk.

The specific grounds cited by Philip Morris as a basis for its motion on the punitive damages phases of the trial are that: (1) the claim for punitive damages in a negligent product design case, involving the manufacture and sale of cigarettes, is barred by the doctrine of conflict preemption, (2) defendant Philip Morris is entitled to a new trial based on specific enumerated errors made by the court during the punitive damage phases of the trial, including, but not limited to, alleged prejudicial comments made by the court to defendant Philip Morris's attorney and the court's substitution of an alternate juror in the damages phase of the trial, and (3) the jury's ward

of \$17,100,000 in punitive damages is grossly and unconstitutionally excessive.

The vast majority of defendants' arguments in their post trial motions reargue the same arguments they made at trial. The court finds no valid line of reasoning to change its *limine* decisions post trial and stands on the record as to those matters. The court thus incorporates and refers the parties to its September 29, 2005 decision (*Rose v. Brown & Williamson Tobacco Corp., et al*, NYLJ, October 26, 2005 at 22, col 3; 2005 NY Slip Op 25459, 2005 NY Misc LEXIS 2392) for the decisions on the following issues: (1) whether the cause of action for negligent product design is barred by conflict preemption, (2) whether evidence of the public's awareness or common knowledge of the dangers of cigarette smoking is properly excluded in a case in which liability is premised on the manufacturer's conduct, (3) whether the affirmative defenses of primary and express assumption of risk are properly excluded, (4) whether it is proper to exclude evidence of commercial viability as an element in the determination of whether the safer alternative design is feasible, (5) whether the burden of proof for punitive damages in a negligent design case is based on a "preponderance of the evidence" standard, and (6) whether evidence of Philip Morris's profits and financial status must be excluded in the punitive damages phase of the trial.

The following are the remaining issues raised in these motions, which require decisions: (1) whether the court's refusal to allow post 1993 scientific evidence on the safety, or lack of safety, of low tar/low nicotine cigarettes so prejudiced the defendants that a new trial is required, (2) whether this court's comments to defendant Philip Morris's counsel during phase two of the trial were so prejudicial as to require a new trial, (3) whether the substitution of one of the alternate jurors in phase two of the trial so deprived the defendants of a fair trial, that a new trial is necessary and (4) whether the \$17,100,000 punitive damage award was grossly and unconstitutionally excessive.

### **The Exclusion of the Post 1993 Scientific Evidence That Low Yield Cigarettes Were Not A Safe Alternative**

Defendants claim that the court erroneously precluded the introduction of evidence that post 1993, (after Mrs. Rose ceased smoking), the scientific community, including the United

States Surgeon General, voiced doubts that low tar/low nicotine (“low yield”) cigarettes were a “safe” alternative to high tar/high nicotine (“high yield”) cigarettes (page 22, lines 5-11 of the October 7, 2005 transcript of the oral argument on these motions). According to defendants, had such evidence been admitted for the jury to consider, the jury could have concluded that low yield cigarettes were not a “safe” alternative and as such defendants could not be liable for negligently designing their products. In addition, defendants maintain, absent a showing that there was a “safe” alternative design, there can be no showing that defendants’ products were a substantial factor in causing Ms. Rose’s injuries.

Contrary to defendants’ assertions, to sustain a cause of action for negligent product design the plaintiff must prove only that there is a “safer” alternative design, not a “safe” alternative design (*Voss v. Black & Decker*, 59 NY2d 102 [1983]). In addition, defendants’ argument ignores the fact that, under New York law, evidence of the “state of the art”<sup>2</sup> which was not known until after the date of the manufacture of the alleged defective product, is inadmissible in determining whether the manufacturer of the product was negligent (see, *Bolm v. Triumph Corp.*, 71 AD2d 429, 436- 438 [4<sup>th</sup> Dept 1979]; *Frank v. Volkswagenwerk*, 105 Misc. 2d 760 [Sup Ct NY County 1980].) While such evidence has been held to be admissible “with appropriate limiting instructions, if the defendant contests the issue of feasibility” of the alleged safer alternative design, it is plaintiff who is permitted to introduce evidence that the defendant made changes in the product after the accident, which made it safer, and that the changes were available to the defendant manufacturer before the accident in question (*Bolm v. Triumph Corp*, *id* at 437; *Frank v. Volkswagenwerk*, *id* at 762). Such evidence is only admissible, however, for the limited purpose of showing the “feasibility” of the alternative design, not to show that the alternative design is safer, i.e. that it reduces the risk of injury. In this case defendants are seeking to offer post manufacture state-of-the-art evidence to challenge plaintiffs’ claims as to the safety of the low yield cigarettes to demonstrate that defendants cannot be held liable for negligent design. As stated above, the law does not permit the introduction of such evidence for the

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<sup>2</sup> “State of the art” evidence has been defined as “the safety, technical, mechanical and scientific knowledge in existence and reasonably feasible for use at the time of manufacture.” (*Bolm v. Triumph Corp.*, 71 AD2d at 438.)

purposes of proving liability under a theory of negligence.

While such evidence, may be admissible on the issue of proximate cause, the trial transcript shows that this evidence was admitted at trial through the testimony of defendants' expert, Dr. Sharon Blackie (Tr. p.3068, line 6 - p. 3071, line 21, p. 3158, lines 22-25, p. 3159, lines 1-12, p. 3245, line 23-24, p. 3246-3248, p. 3250-3253). According to Dr. Blackie, commencing in 1981 and culminating in the 1989 Surgeon General's Report, the scientific community began to express doubts that low yield cigarettes were safer than the high yield cigarettes, finding that smokers who smoked low yield cigarettes over-compensated for the loss of taste (caused by the decrease in tar) and the loss of the buzz (caused by the decrease in the nicotine) by holding the smoke in longer or by smoking more cigarettes.<sup>3</sup> Defendants' expert Dr. Richard Carchman also testified concerning research by scientists which suggested that low yield cigarettes were not safe (Tr. p. 2388, lines 1-26, p. 2389, lines 1-5, p. 2392, lines 2-11, p. 2393, lines 1-10). While the substance of his testimony was no different than Dr. Blackie's on this point, the court struck his testimony (Tr. p. 2390, lines 14-21) because he referred to studies which were done post 1993, after the acts complained of in the lawsuit.

As Dr. Carchman's testimony would have been cumulative on this point, the court finds that defendants were not prejudiced by the court's ruling striking such testimony.

### **Court's Comments to Philip Morris's Attorney**

According to Philip Morris, this court's comments during the punitive damages phase of the trial that, in essence, their attorney would probably be appealing the case and, in the appeal, would attack the rulings of the court, as had been his practice throughout the trial, was so prejudicial as to require a new trial. The court notes that it immediately gave a curative instruction to the jury to disregard the comments. The court also notes that it is common sense

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<sup>3</sup>According to plaintiffs' expert witness, Dr. Jeffrey Wigand, it was not until 2002 with the release of The National Cancer Institute's Monograph # 13, that some scientists began to opine about the health risks of low yield cigarettes. (Tr. page 1019, line 22 - page1021, line 24).

that in a case such as this, where the stakes are high, the losing party will probably appeal. The comments by the court about Philip Morris's attorney, while regrettable, were no more than a recognition of his behavior towards the court throughout the trial, as born out by the trial transcript, which was apparent to the jury.

The court regrets the comments and leaves it to the appellate court to determine, based on the full record of the eight week trial, whether this one comment, with the corrective instruction provided to the jury, constitutes reversible error.

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### **The Substitution of One of the Alternate Jurors in Phase Two of the Trial**

In phase two of the eight week trial, one of the jurors who had been part of the deliberations in phase one, had to leave the jury at the conclusion of phase one, as she was moving out of town and her employer required her to work a certain amount of time in order to continue to receive her medical benefits. The alternate jurors sat throughout the trial and were included during all of the read backs and responses to the jury's questions.

The court finds unavailing Philip Morris's argument that a substitution under such circumstances, where new evidence is being offered as to liability for punitive damages in a separate phase of the trial, was so prejudicial to defendants as to require the setting aside of the punitive damages portion of the verdict and to hold a new trial on those issues. The constraints of CPLR § 4106, which permits the court to substitute an alternate juror without consent of the parties only before the final submission of the case to the jury, does not apply here. That constraint only applies to a trial where issues of liability and damages are tried together in one phase.

The only case which was provided to the court directly on point, is the case *U.S. v. Webster* (162 F2d 308 [5<sup>th</sup> Cir 1998]) in which the court held, in a situation similar to the instant case, that a criminal defendant suffered no prejudice when the trial court excused a sitting juror after the first phase of a trial and elevated an alternate juror before the jury retired for its deliberations at the penalty phase of a bifurcated trial. The court reasoned that there was no prejudice to the defendant since the alternate juror had sat through both phases of the trial.

The court thus denies that portion of defendants Philip Morris's motion seeking to set aside the verdict for substitution of an alternate juror in the damages phase of the trial.

### **The \$17,100,000 Punitive Damages Verdict**

Philip Morris argues that the court must set aside the \$17,100,000 punitive damage award as it is grossly and unconstitutionally excessive. Philip Morris maintains that as it was found to be only 50% liable for the \$3,420,000 compensatory damage awarded to plaintiffs, (or \$1,710,000), the \$17,100,000 punitive damage award, which is ten times greater than Philip Morris's portion of the compensatory damages, is grossly excessive and arbitrary, and thus violates defendant's due process rights under the United States Constitution.

Contrary to Philip Morris's argument, the United States Supreme Court did not set up, either in *State Farm Mutual Automobile Insurance Co. v. Campbell*, (538 US 408 [2003]) or in *BMW of North America, Inc. v. Gore* (517 US 559 [1996]), a "bright line" single digit ratio between compensatory damages and punitive damages which cannot, under any circumstances, be exceeded. (*BMW*, *id* at 582; *Planned Parenthood v. American Coalition of Life Activists, et al.*, 422 F3d 949, 954 [9<sup>th</sup> Cir 2005].) In *State Farm*, the Supreme Court (citing its decision in *BMW*) articulated three guideposts courts should consider to determine whether an award violates due process:

(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.<sup>4</sup>

(*State Farm*, *id* at 418, citing *BMW*, 517 US at 575.)

Defendant relies solely on the language in *State Farm* where the Court states that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages,

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<sup>4</sup> Philip Morris did not refer to the third guidepost either in their papers or in oral argument.

to a significant degree, will satisfy due process” (*Id.* at 425) and the language that “a 4 to 1 ratio, based on a long history of sanctions, might be close to the constitutional line”, to support their argument that the 10 to 1 ratio awarded by the jury in the instant case, is constitutionally excessive. The Supreme Court has never held that an award of punitive damages which exceeds a single digit ratio is *per se* unconstitutional. Defendant’s argument places too much weight on the second guidepost which merely considers the pure mathematic ratio between the compensatory and the punitive damage awards to determine if the punitive damages award passes constitutional muster. In fact, of the three guideposts, the Supreme Court has emphasized that “perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct” (*BMW, id.*). The degree of reprehensibility not only determines if punitive damages should be awarded (“punitive damages should only be awarded if the defendant’s culpability...is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence” [*State Farm, id.* at 419]), but is the key determining factor in considering whether the ratio, referred to in the second guidepost, is excessive.

In evaluating the reprehensibility of the conduct, there are certain factors the courts weigh. The courts place greater weight on physical injury and an indifference to safety and health than on economic injury. Trickery or deceit is afforded greater weight than mere accident or negligence. The courts also consider whether deliberate false statements or acts of affirmative misconduct are involved (*State Farm, id.* at 419; *Planned Parenthood v. American Coalition of Life Activists, et al.*, 422 F3d at 954).

In the instant case, sufficient evidence was submitted at trial for the jury to conclude that Philip Morris’s continued manufacture and sale of the defectively designed product (high yield cigarettes) at a time they were capable of manufacturing a product which reduced the risk of injury (low yield cigarettes), demonstrated a reckless disregard for safety and health. This conclusion was further supported by evidence presented at trial, albeit contested by defendants’ witnesses, that defendants (including Philip Morris), added chemicals to cigarettes to speed up the delivery of nicotine to the brain which increased the deleterious impact of the nicotine on the brain, and that defendants (including Philip Morris), hid this from the public. In addition, documents were submitted at the trial, many of which were authored by defendant Philip

Morris's executive officers, which tended to show that defendant's executives were fully aware of the dangers of addiction and of lung cancer but attempted to obfuscate and conceal the dangers from the public. Although the claims at trial did not involve any claims for failure to warn or misrepresentation, evidence of the behavior was admissible in the punitive damages phase of the trial for the purposes of determining whether each defendant's conduct was reprehensible and thus what amount of punitive damages should be awarded.

Based on all of the evidence in the case, the jury imposed punitive damages against defendant Philip Morris in an amount which represents a 10 to 1 ratio of punitive damages in relation to defendant Philip Morris's proportional share of the compensatory damages awarded by the jury.<sup>5</sup> In *Planned Parenthood v. American Coalition of Life Activists, et al.*, (*id.*), the 9<sup>th</sup> Circuit Court of Appeals found that a 9 to 1 ratio did not offend constitutional sensibilities where there were sufficient facts to show that the plaintiff doctors, who performed abortions, had cause to fear physical harm or worse, from the indirect physical threats made by defendants (*Id.* at 963). In the *Planned Parenthood* case, however, the plaintiffs did not suffer any physical harm as a result of the defendants' conduct. In the instant case, the defendant's conduct did result in physical harm to the plaintiff Norma Rose. Moreover, unlike the defendants in *Planned Parenthood*, the evidence presented at trial showed that defendant Philip Morris's conduct was motivated solely by pecuniary gain.

Based on the evidence presented at trial, the court finds that a ratio of 10 to 1, is not excessive and thus does not violate Philip Morris's rights under the Due Process Clause of the United States Constitution. The court thus denies the portion of Philip Morris's motion to set aside the punitive damages award.

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<sup>5</sup> Contrary to both defendants' and plaintiffs' assertions, the court does not find the *Planned Parenthood* case to be applicable to the instant case on the issue as to whether the court should consider the entire compensatory award as against defendant Philip Morris in setting the appropriate ratio or only defendant Philip Morris's proportionate share of the compensatory damages. In *Planned Parenthood*, there were multiple defendants held liable for the punitive damages. In the instant case, only defendant Philip Morris was held liable for punitive damages. In addition, the court reads *Planned Parenthood* as holding that the court should first set the constitutionally permissible ratio based on the factors cited above, and then calculate each defendant's liability based on their proportionate share of the punitive damages, as assigned to them by the jury.

For the reasons stated above and in the court's September 29, 2005 decision on defendants' motion in *limine*, defendants' motions are denied in their entirety.

This constitutes the decision and order of the court.

Dated: December 2, 2005  
New York, New York

  
KAREN S. SMITH, J.S.C.

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