

IN THE SUPREME COURT OF OHIO

Melisa Arbino

Petitioner

vs

Johnson & Johnson, et al

Respondents

*
*
*
*
*
*
*
*
*

Case No. 2006-1212

On Certification From the United States
District Court for the Northern District of
Ohio

BRIEF OF DONNA ULLIMAN, AMICUS CURAIE ON BEHALF OF PETITIONER

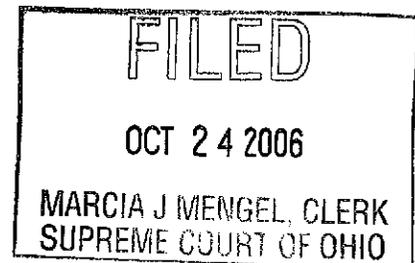
Kenneth R. Sheets (0024049)
46 S. Detroit St.
Xenia, Ohio 45385
Tel. 937-376-3548
Fax: 937-372-8287
krslegal@gmail.com

COUNSEL FOR DONNA ULLIMAN, AMICUS CURAIE

Janet G. Abaray (0002943) (COUNSEL OF RECORD)
Calvin S. Tregre (0073454)
Melanie S. Bailey (0075821)
312 Walnut St.
Suite 2090
Cincinnati, Ohio 45202
Tel. 513-852-5600

Robert S. Peck
Stephen Pershing
Center for Constitutional Litigation
1050 31st St. NW
Washington, DC 20007-4409

COUNSEL FOR PETITIONER



Julie Callsen (62287) (COUNSEL OF RECORD)
Benjamin Sasse (72856)
1150 Huntington Bldg
925 Euclid Ave
Cleveland, Ohio 44115.
Tel. 216-696-2286

COUNSEL FOR RESPONDENTS
JOHNSON & JOHNSON AND
ORTHO-McNEIL PHARMACEUTICAL

Stephen Carney (63460)(COUNSEL OF RECORD)
Douglas Cole (70665)
Holly Hunt (55051)
Sharon Jennings (55501)
James Petro (22096)
Frank Strigari (78377)
30 East Broad St., 17th Floor
Columbus, Ohio 43215
Tel. 614-466-8980

COUNSEL FOR RESPONDENT STATE OF OHIO

TABLE OF CONTENTS

| | Page |
|---|------|
| TABLE OF AUTHORITIES | 3 |
| STATEMENT OF FACTS | 4 |
| ARGUMENT | 6 |
| Proposition of Law No. 1: | |
| The State Farm case does not require the states to cap punitive damages using single digit multipliers. | 6 |
| Proposition of Law No. 2: | |
| Imposition of caps on punitive damages violates the equal protection rights of plaintiffs whose economic damages are slight. Such caps serve only to protect the wealthiest of defendants against the most egregious types of conduct. | 7 |
| CONCLUSION | 9 |
| PROOF OF SERVICE | 10 |

TABLE OF AUTHORITIES

Case Law

Page

State Farm Mut. Auto Insurance Co. v. Campbell, 538 U.S. 408; 123 S. Ct. 1513; 155 L. Ed. 2D 585 (2003)

5

Statutes

ORC 2315.21

7

STATEMENT OF FACTS

Donna Ulliman is the Plaintiff in a case currently pending in the Common Pleas Court for Greene County Ohio, styled Ulliman v. CVS Store #3404, et al, No. 2005CV0660. The acts that give rise to Ms. Ulliman's case arose in August, 2005, approximately four months after the effective date of Senate Bill 80, which imposes caps on punitive damages for tort claims in Ohio. The facts of her case are as follows¹:

For many years, CVS Corporation, a pharmacy chain based in Woonsocket, Rhode Island, engaged in practices and procedures that made it more likely that pharmacists in their chain would dispense the incorrect medication to their customers. Among these practices and policies were (1) the use of a software feature known as AutoComplete, which automatically fills in the drug name based upon entry of only the first few letters of the name; (2) restricting the flow of information within the company in a manner designed to prevent errors of this type from being discovered; (3) intentionally failing to capture information related to errors, which information would have made it easier to discern and correct patterns; and (4) issuing press statements which may have the effect of lulling their customers and potential customers into a false sense of security regarding the safety of using CVS pharmacies. These practices were designed and implemented by CVS Corporation in Rhode Island and were effective in every CVS pharmacy, nationwide, including those operated in Ohio. These actions were taken despite it being known throughout the pharmacy industry that they contributed to medication errors and despite other pharmacy companies taking corrective measures and publishing the results of those measures.

In June, 2005, Ms. Ulliman presented to the CVS pharmacy in Xenia, Ohio, a prescription for

¹ CVS disputes the facts as stated herein and, ultimately, the facts will be resolved by the trier of fact in the Common Pleas Court. This recitation exists merely so that the Court can understand why a decision in the instant case impacts Ms. Ulliman's rights.

the drug Methimazole, as she had done regularly for almost a year². This time, instead of Methimazole, the pharmacist dispensed the drug Metolazone. Metolazone is a powerful diuretic. Ms. Ulliman didn't notice the error and took the dispensed medication for a period of approximately 73 days, causing her potassium and electrolytes to drop to dangerously low levels. The effect of low potassium and electrolytes led her to experience heart problems. The medication error was discovered at an emergency visit to her physician.

Although Ms. Ulliman did not die as a result of the error, it was a very close thing. Ms. Ulliman did miss work, thereby suffering economic damages, however the total sum of these damages are low. Even considering the medical expenses directly related to the error, her total economic damages are less than \$50,000.00.

CVS Corporation earns over \$40 billion dollars each year. CVS Corporation is defending Ms. Ulliman's claim for punitive damages by asserting that such damages are capped by the terms of ORC 2315.21 at two times the compensatory – in this case a mere \$100,000.00.

Ms. Ulliman realizes that the parties to the instant litigation will brief the issues of the constitutionality of Senate Bill 80, but files this brief for two reasons. First, an issue was raised by the Attorney General in filings with the Northern District that may not be adequately addressed by the parties and this brief will focus only on that issue. Second, Ms. Ulliman wishes the Court to consider the effect that a potential ruling in favor of the constitutionality of the punitive damages caps would have on other plaintiffs asserting claims for particularly egregious conduct against extremely wealthy defendants yet whose economic damages are small. In such cases, the caps on punitive damages prevent juries from fulfilling their mandate in assessing such damages – to punish the defendant for egregious conduct in such a manner that the conduct is less likely to be repeated in the future.

This brief will focus on the issue of whether the case of *State Farm Mut. Auto Insurance Co. v.*

² Methimazole is used for the treatment of thyroid conditions.

Campbell, 538 U.S. 408; 123 S. Ct. 1513; 155 L. Ed. 2D 585 (2003) requires the imposition of caps on punitive damages.

ARGUMENT

Proposition of Law No. 1:

The State Farm case does not require the states to cap punitive damages using single digit multipliers.

In briefs filed in the Northern District of Ohio, the Attorney General took the position that the *State Farm* case, *supra*, mandated the imposition of single digit multipliers for punitive damages. A reading of the *State Farm* case reveals this not to be the case. In fact, the Court in *State Farm* specifically held to the contrary:

[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. *Gore*, *supra*, at 582 ("We have 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"); *TXO*, *supra*, at 458. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed.

State Farm, *supra*, at 424. The Court further observed:

[B]ecause there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages." *Ibid.*; see also *ibid.* (positing that a higher ratio might be necessary where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine"). The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.

State Farm, *supra*, at 425.

Far from being a requirement that single-digit multipliers are *required*, *State Farm* stands

squarely for the proposition that each case must be evaluated on its own merits when reviewing awards of punitive damages³. It certainly has no bearing on the issue before this Court on certification, which is merely whether the provisions of Senate Bill 80, with its statutory caps on punitive damages, is constitutional under the Ohio Constitution.

Proposition of Law No. 2:

Imposition of caps on punitive damages violates the equal protection rights of plaintiffs whose economic damages are slight. Such caps serve only to protect the wealthiest of defendants against the most egregious types of conduct.

Should this Court sustain the caps on punitive damages imposed by Senate Bill 80, the result is to say that we value the due process rights of corporate defendants more than we value the rights of the individual plaintiffs. This is obvious when you consider the true effect of low single-digit multiplier caps such as those imposed by ORC 2315.21.

Using Ms. Ulliman as an example, there we have a plaintiff whose lost wages and medical expenses are low. One reason for this is that Ms. Ulliman is employed at a low hourly wage⁴. Her medical expenses directly attributable to the medication error amount to somewhat less than \$30,000.00, while her lost income is only a little more than \$10,000.00⁵. If the caps are upheld, the most that CVS Corporation could be punished, via punitive damages, is approximately \$100,000.00.

Would \$100,000.00 be sufficient to achieve the intended result of assessments of punitive damages? To decide that issue, we must look to the wealth of the defendant. CVS Corporation earns approximately \$40 billion per year. The most recently released figures indicate that CVS's revenue for the second quarter of 2006 was \$10.6 billion, or \$3.53 billion per month. This further translates to

³ That precise issue is now before the U.S. Supreme Court in the case of Philip Morris USA v. Williams, 05-1256.

⁴ She typically works in retail sales.

⁵ Made up mostly of her ceasing to work two jobs and losing overtime on her remaining job.

\$117,777,778.00 per day, assuming an average month of 30 days. If each store is open an average of 12 hours per day, CVS is earning \$9,814,815.00 per hour. If CVS is earning only 10% interest on deposits of this revenue in accounts, they are earning nearly \$1,000,000.00 **per hour** simply in interest on earnings.

Can a corporation that earns that much money every single hour of operation be punished by imposition of damages of \$100,000.00? To think so would be incredulous. CVS could absorb any number of punitive damages awards of that magnitude without having any incentive to change their policies, especially since those policies contribute to their bottom line profitability.

But the question remains, does the arbitrary imposition of low single-digit multiplier caps violate Ms. Ulliman's equal protection rights. It would seem that it does when you consider that, had the exact same error occurred to someone who was forced to quit their employment at which they earned \$100,000.00 per year and suffered exactly the same amount of medical expenses, that plaintiff would be entitled to \$250,000.00 in punitive damages. Under the statutory scheme put in place in Senate Bill 80, the more money you make, the more you are entitled to have a defendant punished⁶. This is the essence of an equal protection violation.

The only manner in which the equal protection rights of all plaintiffs can be preserved is to simply abolish the caps and permit juries to do their job – weigh the actions of the defendant and assess appropriate punitive damages. Courts of appeal exist as a safeguard of the defendants due process rights by simple reversing the occasional verdict of a runaway jury. If this Court permits anything else it is simply saying that we, as a society, now value the due process rights of multi-billion dollar corporations over the rights of individual wage earners.

⁶ The provisions of ORC 2315.21 that remove the caps for certain types of physical injuries do not eliminate this inequity. If two plaintiffs suffer identical injuries, the result will still be that the plaintiff who earns the most money from employment will be entitled to have their defendant punished more severely than the plaintiff earning less. This is certainly not a rational distinction that can survive an equal protection analysis.

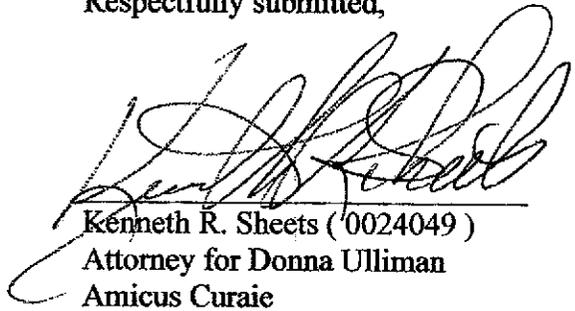
CONCLUSION

There is no requirement under the United States Constitution that *mandates* that the states impose single digit multiplier caps upon punitive damages. This Court is free to determine the precise issue currently certified by the Northern District, which is whether the provisions of Senate Bill 80, among which are single digit multiplier caps, are constitutional under the Ohio Constitution. This Court has previously addressed this issue and has determined that caps are unconstitutional.

The proponents of caps assert, among other things, that they are required in order to protect the due process rights of defendants. The defendants they are speaking of are generally multi-billion dollar corporations. It can be clearly demonstrated that caps violate the equal protection rights of certain plaintiffs. This Court should not go on record as favoring the due process rights of large corporations over the equal protection rights of individual plaintiffs.

The middle ground is preferred – hold that the statutory caps are unconstitutional, consistent with the holdings each time this issue has been before this Court, then leave it to the trial courts, guided by the Courts of Appeal, to safeguard the due process rights of defendants.

Respectfully submitted,



Kenneth R. Sheets (0024049)

Attorney for Donna Ulliman

Amicus Curaie

46 S. Detroit St.

Xenia, Ohio 45385

Tel.: 937-376-3548

Fax: 937-372-8687

krslegal@gmail.com

CERTIFICATE OF SERVICE

This certifies that a true copy of the foregoing was served upon:

Janet G. Abaray (0002943) (COUNSEL OF RECORD)
Calvin S. Tregre (0073454)
Melanie S. Bailey (0075821)
312 Walnut St.
Suite 2090
Cincinnati, Ohio 45202
Tel. 513-852-5600

Robert S. Peck
Stephen Pershing
Center for Constitutional Litigation
1050 31st St. NW
Washington, DC 20007-4409

COUNSEL FOR PETITIONER

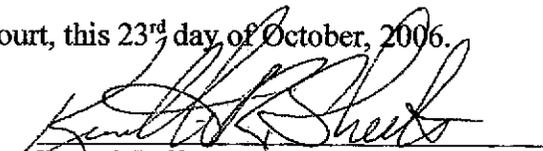
Julie Callsen (62287) (COUNSEL OF RECORD)
Benjamin Sasse (72856)
1150 Huntington Bldg
925 Euclid Ave
Cleveland, Ohio 44115.
Tel. 216-696-2286

COUNSEL FOR RESPONDENTS
JOHNSON & JOHNSON AND
ORTHO-McNEIL PHARMACEUTICAL

Stephen Carney (63460)(COUNSEL OF RECORD)
Douglas Cole (70665)
Holly Hunt (55051)
Sharon Jennings (55501)
James Petro (22096)
Frank Strigari (78377)
30 East Broad St., 17th Floor
Columbus, Ohio 43215
Tel. 614-466-8980

COUNSEL FOR RESPONDENT STATE OF OHIO

by mailing same to their addresses of record with this Court, this 23rd day of October, 2006.


Kenneth R. Sheets