

S 179122
Case No. _____

**In The Supreme Court
of the State of California**

D.J. NELSON, TRUSTEE FOR THE D.J. NELSON TRUST, dba
FRUITRIDGE VISTA WATER COMPANY
Plaintiff and Appellant

v.

EXXON MOBIL CORPORATION
Defendant and Petitioner.

**SUPREME COURT
FILED**

DEC 30 2009

Frederick K. Ohlrich Clerk

COOK ENDEAVORS,
Petitioner,

v.

THE SUPERIOR COURT OF SACRAMENTO COUNTY,
Respondent;

EXXON MOBIL CORPORATION
Real Party in Interest [and Petitioner herein].

Deputy

After Decision by the Court Of Appeal
Third Appellate District, Civil No. and C059615 and C060271
Sacramento Superior Court Case No. 02AS00535
The Honorable Michael G. Virga

PETITION FOR REVIEW

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
JEFFREY J. PARKER, Cal. Bar No. 155377
jparker@sheppardmullin.com
KARIN DOUGAN VOGEL, Cal. Bar No. 131768
kvogel@sheppardmullin.com
WHITNEY JONES ROY, Cal. Bar No. 211541
wroy@sheppardmullin.com
333 South Hope Street, 48th Floor
Los Angeles, California 90071
Telephone: (213) 617-5586

MORGAN LEWIS & BOCKIUS
DAVID L. SCHRADER, Cal. Bar No. 149638
dschrader@morganlewis.com
300 South Grand Ave., 22nd Fl.
Los Angeles, CA 90071
Telephone: (213) 612-2500

Attorneys for Petitioner herein and Defendant EXXON MOBIL CORPORATION

Case No. _____

In The Supreme Court of the State of California

D.J. NELSON, TRUSTEE FOR THE D.J. NELSON TRUST, dba
FRUITRIDGE VISTA WATER COMPANY
Plaintiff and Appellant

v.

EXXON MOBIL CORPORATION
Defendant and Petitioner.

COOK ENDEAVORS,
Petitioner,

v.

THE SUPERIOR COURT OF SACRAMENTO COUNTY,
Respondent;

EXXON MOBIL CORPORATION
Real Party in Interest [and Petitioner herein].

After Decision by the Court Of Appeal
Third Appellate District, Civil No. and C059615 and C060271
Sacramento Superior Court Case No. 02AS00535
The Honorable Michael G. Virga

PETITION FOR REVIEW

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

JEFFREY J. PARKER, Cal. Bar No. 155377

jparker@sheppardmullin.com

KARIN DOUGAN VOGEL, Cal. Bar No. 131768

kvogel@sheppardmullin.com

WHITNEY JONES ROY, Cal. Bar No. 211541

wroy@sheppardmullin.com

333 South Hope Street, 48th Floor

Los Angeles, California 90071

Telephone: (213) 617-5586

MORGAN LEWIS & BOCKIUS

DAVID L. SCHRADER, Cal. Bar No. 149638

dschrader@morganlewis.com

300 South Grand Ave., 22nd Fl.

Los Angeles, CA 90071

Telephone: (213) 612-2500

Attorneys for Petitioner herein and Defendant EXXON MOBIL CORPORATION

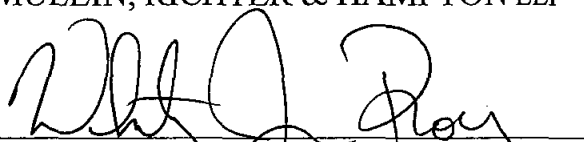
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

No person owns more than a 10 percent interest in Exxon Mobil Corporation, the party filing this Certificate. (Cal. Rules of Court, Rule 8.208(e)(1).)

DATED: December 30, 2009

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By



JEFFREY J. PARKER
KARIN DOUGAN VOGEL
WHITNEY JONES ROY

Attorneys for Petitioner and Defendant
EXXON MOBIL CORPORATION

TABLE OF CONTENTS

	<u>Page</u>
I. QUESTIONS PRESENTED FOR REVIEW	1
II. WHY THIS COURT SHOULD GRANT REVIEW.....	1
III. BACKGROUND	5
A. D.J. Nelson Trust’s Original Allegations	5
B. D.J. Nelson Trust’s Assignment of Assets to Cook Endeavors	6
C. ExxonMobil’s Motion to Substitute Cook Endeavors As Plaintiff.....	8
D. ExxonMobil At All Times Disclosed Its Intent To Seek To Dispose Of Punitive Damages	9
E. Cook Endeavors’ Sixth Amended Complaint & ExxonMobil’s Motion For Summary Adjudication Re Punitive Damages	10
IV. REVIEW IS NECESSARY to secure uniformity of decision and TO settle an important question of law.....	11
A. The Court of Appeal’s Opinion Creates Incongruity in the Law on the Issue of Whether a Claim for Punitive Damages Can Be Assigned	11
B. The Court of Appeal Also Erred in Relying Solely on an Indiana Appellate Court Decision to Find Cook Endeavors Stood In the Shoes of D.J. Nelson Trust for Purposes of Claiming Punitive Damages	20
V. CONCLUSION	23

TABLE OF AUTHORITIES

Cases

<i>Archdale v. American International Specialty Lines Ins. Co.</i> (2007) 154 Cal. App. 4th 499, 460 fn.	14, 16
<i>Dugar v. Happy Tiger Records, Inc.</i> , (1974) 41 Cal. App. 3d 811	15
<i>Essex Ins. Co. v. Five Star Dye House, Inc.</i> (2006) 38 Cal. 4th 1252.....	1, 12, 14, 16
<i>Federal Deposit Insurance Corp. v. W.R. Grace & Co.</i> , (N.D.Ill. 1988) 691 F.Supp. 87	2, 18, 19
<i>French v. Orange County Inv. Corp.</i> (1932) 125 Cal. App. 587.....	1, 3, 10, 13, 15, 17, 18
<i>Gawara v. United States Brass Corp.</i> (1998) 63 Cal. App. 4th 1341.....	3
<i>Gold v. Los Angeles Democratic League</i> (1975) 49 Cal. App. 3d 365.....	12
<i>Hilliard v. A.H. Robins Co.</i> (1983) 148 Cal. App. 3d 374.....	12
<i>Jackson v. Rogers & Wells</i> (1989) 210 Cal. App. 3d 336.....	18
<i>Kleinwort Benson North America, Inc. v. Quantum Financial Services, Inc.</i> (Ill. 1998) 692 N.E.2d 269.....	2, 3, 19, 20
<i>Murphy v. Allstate Ins. Co.</i> (1976) 17 Cal. 3d 937.....	13, 14, 15, 17, 18
<i>Nelson v. Exxon Mobil Corp.</i> (2009) 179 Cal. App. 4th 633, 2009 WL 3965417.....	1, 3, 9, 11, 15, 17, 20, 22
<i>People v. Jayhill Corp.</i> (1973) 9 Cal.3d 283.....	13, 15, 17, 18
<i>Schlauch v. Hartford Accident and Indemnity Co.</i> (1983) 146 Cal. App. 3d 926, 931	14, 16
<i>Summit Account and Computer Services, Inc. v. RJH of Florida, Inc.</i> , (Ind. App. 1998) 690 N.E.2d at p. 728.....	20, 22
<i>Sumpter v. Matteson</i> (2008) 158 Cal. App. 4th 928.....	16

Statutes

Cal. Civ. Code § 3294 16
Cal. Civ. Proc. Code § 368.5 9
Cal. Corp. Code §§ 1150-1160..... 21

I. QUESTIONS PRESENTED FOR REVIEW

A. May a party assign a claim for punitive damages?

B. If not, can an assignee avoid the rule of non-assignability by posturing itself as merely being a continuation of the assignor, in different legal form?

II. WHY THIS COURT SHOULD GRANT REVIEW

The answer to the first question in California has always been “no,” until now. In its published decision, the Court of Appeal restated the issue slightly as “whether a punitive damages claim incident to an otherwise assignable cause of action could itself be assigned.” Then, the Court erroneously declared the issue has not yet been addressed by a California appellate decision. (*Nelson v. Exxon Mobil Corp.* (2009) 179 Cal.App.4th 633, 2009 WL 3965417 at *9 [*Nelson*]; but see, e.g., *French v. Orange County Inv. Corp.* (1932) 125 Cal.App. 587 (holding that punitive damages may be sought only by the injured party and not an assignee) [*French*] and *Essex Ins. Co. v. Five Star Dye House, Inc.* (2006) 38 Cal.4th 1252 (holding that emotional distress and punitive damages incident to a bad faith breach of insurance contract cause of action are not assignable) [*Essex*].) Writing on a self-proclaimed clean slate, the Court of Appeal then answered the question “yes,” holding a claim for punitive damages can

be assigned if incident to an otherwise assignable cause of action. The Court erred in doing so.

Rather than following the holding and analysis of the California cases cited by defendant and petitioner Exxon Mobil Corporation (ExxonMobil), the Court of Appeal instead based much of its analysis on a federal trial court decision from the Northern District of Illinois interpreting Illinois statutory law (*Federal Deposit Insurance Corp. v. W.R. Grace & Co.* (N.D.Ill. 1988) 691 F.Supp. 87 [*Grace*]), and a decision from the Supreme Court of Illinois applying public policy principles based on the Illinois constitution, statutes, and case law (*Kleinwort Benson North America, Inc. v. Quantum Financial Services, Inc.* (Ill. 1998) 692 N.E.2d 269 [*Kleinwort*].) As a result of the Court of Appeal's decision based on these obscure out-of-state authorities, the law in California on the assignability of punitive damages is no longer uniform. The issue is solely one of law and is important, warranting review by the Supreme Court.

The facts of this case aptly posit the issues raised in this petition for review. Through a series of steps, the causes of action alleged by D.J. Nelson, Trustee for D.J. Nelson Trust (D.J. Nelson Trust) against ExxonMobil in this lawsuit were assigned to the corporation Cook Endeavors. Those assigned causes of action, for negligence and strict

liability, allege economic loss to the assignor, D.J. Nelson Trust, who held a usufructory right to extract and sell water that allegedly was contaminated by ExxonMobil. On motion for summary adjudication, ExxonMobil raised the issue: “As an assignee, may Cook Endeavors pursue punitive damages against ExxonMobil?”¹ The trial court found, based on California case law, that it could not.

The Court of Appeal granted Cook Endeavors’ petition for review. In reversing the trial court’s decision, the Court of Appeal concluded:

In the present matter, as in *Kleinwort and Grace*, the claims assigned to Cook Endeavors involve assignable injuries to property rather than nonassignable personal injuries. Under these circumstances, the rule stated in *French* is inapplicable. As long as the causes of action themselves are assignable, which the parties do not dispute, any punitive damages claims associated with those causes of action are also assignable.

(*Nelson*, 2009 WL 3965417 at *10.)

¹ The predicate question of whether D.J. Nelson Trust, because it sought to recover only for economic loss, even had a right to seek punitive damages to transfer to Cook Endeavors (see *Gawara v. United States Brass Corp.* (1998) 63 Cal.App.4th 1341, 1361-1362 (in a products liability case where, like here, the plaintiff suffers no personal injury, it cannot pursue punitive damages)) was not raised. In response to the Court of Appeal’s

By failing to adequately distinguish California case authority and instead relying on Illinois case law, the Court of Appeal underscored the conflict in the law created by its decision. For the first time, a California appellate court held that punitive damages can be assigned. The result is an exception to California's absolute rule that punitive damages cannot be assigned, and the beginning of the slow erosion of that absolute rule. No policy considerations in California justify such a change in the law, nor did the Court of Appeal provide any.

At the least, the Court of Appeal's decision raises an important question of law that should be settled, not by relying on the public policies implicated by the Illinois constitution, statutes, and case law, or on a federal district court's interpretation and application of an Illinois statute, but rather by relying on a broad-based, in-depth discussion of California public policy raised by the California constitution, statutes, and case law. If the law in California is going to now allow parties to assign claims for punitive damages any time the underlying cause of action to which the punitive damages attach is assignable, the issue deserves the

question regarding the nature of punitive damages, this authority was raised.

studied analysis of the California Supreme Court before the law changes course and moves in that direction.

Petitioner ExxonMobil respectfully requests that the Court grant this petition for review to address the issue of whether, under any circumstance, a claim for punitive damages can be assigned. In addition, the Court should grant review of the related issue of whether a party can avoid the rule against assignment of a claim for punitive damages by claiming the assignee is merely a continuation of the assignor.

III. BACKGROUND

A. D.J. Nelson Trust's Original Allegations

On May 8, 2001, D.J. Nelson, trustee for the D.J. Nelson Trust, filed this lawsuit against ExxonMobil and other defendants. (Vol. III of Cook Endeavor's Exhibits at 741 (hereinafter "[vol.] CEE [page]).) After a series of demurrers, amended complaints, and motions, D.J. Nelson Trust's only remaining causes of action were strict liability and negligence, seeking to recover only for economic loss, not personal injury. (I CEE 64-69, 73, 131-142, 143-154.) D.J. Nelson Trust sought punitive damages as part of its strict liability cause of action. (*Id.* at 66-67, 73, 142.)

B. D.J. Nelson Trust's Assignment of Assets to Cook Endeavors

On June 5, 2007, through a series of transactions, the D.J. Nelson Trust transferred and assigned all of its assets and liabilities, including its causes of action against ExxonMobil, to a corporation named Cook Endeavors. (I CEE 20-26 (Undisputed Material Fact [UMF] Nos. 7-11, 13-14, 16).) Specifically, in the first transaction on June 5, 2007, Robert Cook, Jr., the beneficiary of the D.J. Nelson Trust, executed a document entitled "Exercise of Power to Require Trustee to Distribute Trust Assets," in which he directed the trustee as follows:

The undersigned, . . . hereby requests that JANE A. COOK, as Trustee of the Trust, transfers and assigns all of the assets of the Trust's to (1) ROBERT COOK, JR., a married man, as his sole and separate property and (2) ROBERT C. COOK, JR., a married man, as his sole and separate property, subject to a legal life estate for JANE A. COOK, a married woman, as her sole and separate property, each to receive a one-half interest.

(I CEE 21 (UMF No. 8), 76 (emphasis added).)

In response, the trustee of the D.J. Nelson Trust transferred and assigned all of the assets of the D.J. Nelson Trust, 50% to Robert Cook, Jr., as his sole and separate property and 50% to Robert Cook, Jr., subject to a life estate to Jane Cook (hereinafter, "First Assignment"). (I CEE 21-22 (UMF No. 9), 76-100.) The First Assignment states:

The undersigned currently owns a 100% interest in that operating business known as FRUITRIDGE VISTA WATER COMPANY ("Fruitridge Vista").

FOR VALUE RECEIVED, the undersigned ("Assignor") hereby transfers and assigns its entire 100% interest in Fruitridge Vista in the following manner:

(1) A 50% interest in Fruitridge Vista to ROBERT C. COOK, a married man, as his sole and separate property; and

(2) A 50% interest in Fruitridge Vista to ROBERT C. COOK, a married man, as his sole and separate property, subject to a legal life estate for Jane A. Cook, a married woman, as her sole and separate property."

(I CEE 22 (UMF No. 10), 80 (emphasis added).)

The D.J. Nelson Trust did not reserve the right to pursue its causes of action against ExxonMobil. (I CEE 22-23 (UMF No. 11); 80-84.) Accordingly, because the causes of action alleged by D.J. Nelson Trust in the Fifth Amended Complaint were assets of the D.J. Nelson Trust, they transferred at the time the First Assignment was executed even though the D.J. Nelson Trust continued to exist after the assignment. (See I CEE 23 (UMF No. 12), 189.)

After receiving all of the D.J. Nelson Trust's assets, Robert Cook, Jr., and Jane Cook each transferred their respective interests to the corporation Cook Endeavors in a second transaction (hereinafter, "Second Assignment"). (I CEE 23-24 (UMF Nos. 13), 102, 145-153.) The instrument documenting the Second Assignment states:

We, (i) Robert C. Cook, Jr., individually and (ii) Robert C. Cook, Jr., subject to the legal life estate for Jane A. Cook and Jane A. Cook, life tenant (“Contributors”), do hereby contribute, assign, transfer and deliver to the capital of Cook Endeavors, a California corporation (the “Corporation”), all of the Contributors’ respective right, title and interest in and to the business assets formerly used in the business known as Fruitridge Vista Water Company (including real property), both tangible and intangible, together with the liabilities of said former business.

(I CEE 24 (UMF Nos. 14), 102 (emphasis added).)

At the time the Second Assignment was made, neither Robert Cook, Jr., nor Jane Cook reserved any right to pursue the causes of action against ExxonMobil. (I CEE 25 (UMF No. 16), 102.) Accordingly, the causes of action alleged by D.J. Nelson Trust in the Fifth Amended Complaint transferred to the corporation Cook Endeavors at the time of the Second Assignment.

C. ExxonMobil’s Motion to Substitute Cook Endeavors As Plaintiff

Although the assignment occurred in June 2007, D.J. Nelson Trust did not disclose the assignment to ExxonMobil or the trial court. Rather, ExxonMobil discovered documents mentioning “Cook Endeavors” (but not any assignment) in mid-March 2008 and, upon further investigation, confirmed on March 17, 2008 that D.J. Nelson Trust had assigned all of its assets to Cook Endeavors nine months earlier. (ExxonMobil Exhibits [EME] 26 (Roy Declaration in Support of Motion to

Substitute, Exh. 22).) Because Plaintiff's counsel refused to substitute the correct plaintiff, ExxonMobil filed a Motion to Substitute Cook Endeavors as Plaintiff pursuant to Code of Civil Procedure § 368.5 ("Motion to Substitute") on April 4, 2008. (*Id.* at 1-13.)

After extensive briefing and oral argument, the trial court granted ExxonMobil's Motion to Substitute and replaced the D.J. Nelson Trust with Cook Endeavors as plaintiff. (I CEE 233-234.) In its ruling, the court found that "D.J. Nelson, trustee of the D.J. Nelson Trust, transferred and assigned all assets and liabilities of the D.J. Nelson Trust to a California corporation known as Cook Endeavors." (I CEE 212, 234.) Based on this finding, the trial court properly concluded that D.J. Nelson Trust lacks standing and denied the oral motion to amend. (*Id.* at 218, 234.) D. J. Nelson Trust appealed both decisions, and the Court of Appeal affirmed both. (See *Nelson*, 2009 WL 3965417 at *11.)

D. ExxonMobil At All Times Disclosed Its Intent To Seek To Dispose Of Punitive Damages

From the moment ExxonMobil learned that D.J. Nelson Trust assigned its assets to Cook Endeavors, ExxonMobil made it clear to the trial court, D. J. Nelson Trust, and Cook Endeavors that once the proper plaintiff was substituted in the case and limited discovery was conducted regarding the assignment, ExxonMobil intended to file a motion disposing

of punitive damages. (See, e.g., EME 34:6-11 (ExxonMobil sought order postponing trial date to conduct discovery and file a motion disposing of the punitive damages claim).) Additionally, the parties engaged in multiple lengthy discussions with the trial court about the appropriate procedural mechanism to resolve the issue of whether Cook Endeavors is entitled to pursue punitive damages and, collectively, agreed that a motion for summary adjudication was the proper method. (See, e.g., I CEE 202-203.)

E. Cook Endeavors' Sixth Amended Complaint & ExxonMobil's Motion For Summary Adjudication Re Punitive Damages

As a result of the substitution, on June 23, 2008, Cook Endeavors filed a Sixth Amended Complaint asserting the exact same causes of action alleged by D.J. Nelson Trust. (I CEE 249-260.) Cook Endeavors does not allege any claims against ExxonMobil independent of the causes of actions it received via the assignment from D.J. Nelson Trust. (*Id.*) Accordingly, ExxonMobil filed its motion for summary adjudication, which the trial court granted. The court's ruling set forth the following basis for its decision:

“Exemplary damages are allowed only to the immediate person receiving the injury, either in a suit prosecuted for himself or by someone for his use.” (French v. Orange County Inv. Corp. (1932) 125 Cal.App. 587, 591.) There is no authority cited to the Court upon which it may find an exception to application of this general rule to the particular facts of the transfers and ownership statuses presented in this action. . . . Thus, the essential question presented to the Court upon this motion is whether Cook

Endeavors is the immediate person receiving the injury alleged in the action, or is prosecuting the action for the use of the immediate person receiving the injury. General principles of California law, applied to the undisputed facts presented, dictate a finding that Cook Endeavors is neither the immediate person receiving the injury alleged in the action, nor is it prosecuting the action for the use of the immediate person receiving the injury. . . . Consequently, Cook Endeavors may not pray or obtain exemplary damages in the current action, and Defendant's motion for summary adjudication as to the punitive damage prayer is granted.

(VII CEE 1388-1389.)

Cook Endeavors filed a petition for writ of mandate in the Court of Appeal, and the Court granted review, reversing the trial court's decision in a published decision. (*Nelson, supra*, 2009 WL 3965417.)

IV. REVIEW IS NECESSARY TO SECURE UNIFORMITY OF DECISION AND TO SETTLE AN IMPORTANT QUESTION OF LAW

A. The Court of Appeal's Opinion Creates Incongruity in the Law on the Issue of Whether a Claim for Punitive Damages Can Be Assigned

Perhaps to downplay the change in course in the law resulting from its holding, in its opinion the Court of Appeal first discusses at length legal propositions that are not disputed. For example, it is not disputed that legal causes of action can be freely assigned, so long as they are not "founded upon wrongs of a purely personal nature, such as slander, assault and battery, negligent personal injuries, criminal conversation, seduction, breach of marriage promise, malicious prosecution, and others of like

nature.” (E.g., *Essex*, *supra*, 38 Cal.4th at p. 1260.) It is based on this principle of law that D.J. Nelson Trust assigned its causes of action for negligence and strict liability, ultimately to Cook Endeavors.

The Court of Appeal also discussed the undisputed and well-established legal principle that a claim for punitive damages is not a cause of action or even the basis for a cause of action. (E.g., *Gold v. Los Angeles Democratic League* (1975) 49 Cal.App.3d 365, 373, fn. 3 (punitive damages cannot constitute the basis for a cause of action; actual damages are required); see also *Hilliard v. A.H. Robins Co.* (1983) 148 Cal.App.3d 374, 391 (there is no cause of action for punitive damages; whereas both an actionable wrong and damages are necessary elements for a cause of action, punitive damages are not).) Here, D.J. Nelson Trust alleged entitlement to punitive damages incident to its strict liability cause of action.

These legal principles, as to which there is no dispute, nonetheless do not directly answer the question of whether a party’s potential entitlement to punitive damages can be assigned. A claim for punitive damages is not a cause of action, and so is not controlled by the law allowing for free assignability of causes of action, or by the exception to free assignability for wrongs of purely a personal nature. Indeed, until this case, there was no dispute in the law in California that claims for

punitive damages are not assignable, and no California case until this one has held punitive damages can be assigned.

For example, in *French v. Orange County Investment Corp.* (1932) 125 Cal.App. 587, 591, involving an assignee's prosecution of a claim for unlawful conversion of a deed to real property, the court held "[e]xemplary damages are allowed only to the immediate person receiving the injury, . . ." In *People v. Jayhill Corp.* (1973) 9 Cal.3d 283 [*Jayhill*], involving a civil action brought by the Attorney General against door-to-door encyclopedia salesmen for false and misleading advertising and unfair competition, the court would not allow the Attorney General to recover exemplary damages, stating: "It is the general rule, however, that in the absence of statute, exemplary damages are allowed only to the immediate person injured." (*Id.* at p. 287.)

The law prohibiting assignment of claims for exemplary damages is well-established in the context of an insured's causes of action against the insurer for breach of the duty to settle and breach of the covenant of good faith and fair dealing. In *Murphy v. Allstate Ins. Co.* (1976) 17 Cal.3d 937, 942 [*Murphy*], the Court concluded that although the insured may assign his *cause of action* for breach of the duty to settle, any

claims for emotional distress damages or punitive damages *incident to that cause of action* were not assignable.² In *Essex, supra*, 38 Cal.4th at p. 1263, the Court confirmed that “[a]lthough some damages potentially recoverable in a bad faith action , including damages for emotional distress and punitive damages, are not assignable . . . , the cause of action itself remains freely assignable as to all other damages.” (Internal citations omitted.) (See also *Archdale v. American International Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 460 fn. 10 (any claim for emotional distress or punitive damages that might have arisen from breach of the implied covenant cause of action was not, and as a matter of law could not have been, assigned) [*Archdale*]; *Schlauch v. Hartford Accident and Indemnity Co.* (1983) 146 Cal.App.3d 926, 931 (damages for emotional distress and punitive damages could not have been predicated upon an assignment by the insured of a bad faith cause of action) [*Schlauch*].)

The Court of Appeal made two errors in reasoning that caused it to diverge from this body of established California law. First, the Court incorrectly reasoned that it is the nature of the “underlying cause of

² The Court in *Murphy* suggested strategies for how an assignment might be used to nonetheless protect the interests of both the insured and the claimant, while protecting the insured’s right to nonassignable claims

action” that prohibits a claim for punitive damages from being assigned. (See *Nelson*, 2009 WL 3965417 at *6.) Second, the Court of Appeal interpreted a statement in *French* to mean that where the cause of action underlying the punitive damages claim is incident to the transfer of a property interest, the punitive damages claim is excepted from the non-assignability rule, which the Court declared “is the situation presented here.” (*Id.* at *9.)

Contrary to the Court of Appeal’s reasoning, it is the nature of punitive damages themselves, not the nature of the underlying cause of action, that prohibits a claim for punitive damages from being assigned. As shown above, California courts have held punitive damages are not assignable in a variety of contexts, involving an array of underlying causes of action. (See, e.g., *French, supra*, 125 Cal.App. at p. 591 (underlying cause of action was for unlawful conversion of a deed to real property); *Jayhill, supra*, 9 Cal.3d at p. 286 (underlying cause of action was for false and misleading advertising and unfair competition); *Dugar v. Happy Tiger Records, Inc.* (1974) 41 Cal.App.3d 811 (underlying cause of action for fraudulent misrepresentation); and *Murphy, supra*, 17 Cal.3d at p. 942;

for punitive, emotional and personal injury damage. (See *Murphy*, 17 Cal.3d at pp. 946-947.)

Essex, supra, 38 Cal.4th at p. 1263; *Archdale, supra*, 154 Cal.App.4th at p. 460; *Schlauch, supra*, 146 Cal.App.3d at p. 931 (underlying causes of action were for breach of the duty to settle and/or breach of the covenant of good faith and fair dealing).)

Despite the variety of causes of action at issue in all of these contexts, the standard for proving entitlement to punitive damages is the same – the plaintiff must show the defendant “has been guilty of oppression, fraud, or malice.” (See Civil Code § 3294.) Because oppression, fraud and malice are generally associated with underlying wrongs of a personal nature, punitive damages as a matter of both law and public policy are aligned with personal torts that cannot be assigned. It is not, however, the nature of the underlying cause of action to which the punitive damages are incidental that makes punitive damages non-assignable, but rather the personal nature of a punitive damage award itself.³

³ Punitive damages are only incidental to a cause of action because even in the clearest cases of malice, fraud or oppression, California courts have concluded that a plaintiff does not have an absolute right to recover punitive damages. (See, e.g., *Sumpter v. Matteson* (2008) 158 Cal.App.4th 928, 936 (“[A] plaintiff is never entitled as a matter of right to exemplary damages. A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where

This leads directly to the Court of Appeal's second area of failed reasoning. The court in *French* found that its ruling that punitive damages cannot be assigned was "harmonious in principle" with the rule that a transfer of a bare right to file a bill in equity for fraud is against public policy. (*French*, 125 Cal.App. at p. 591.) In other words, just as an assignment of a bare right to sue for fraud is against public policy in California, so also an assignment of a claim for punitive damages is against public policy in California. The Court of Appeal read much more into the *French* court's simple analogy, though, and "[assumed the court in *French*] was incorporating the exception for claims incident to the transfer of a property interest." (*Nelson*, 2009 WL 3965417 at *9.) Then, the Court of Appeal concluded, without analysis, that D.J. Nelson Trust "transferred its real property to Cook Endeavors, with the right to seek redress being incident to that property interest." (*Id.*) That the holding in *French* should not be read so narrowly is confirmed by the Supreme Court's later reliance on *French* in *Jayhill*, *supra*, 9 Cal.3d at p. 287 (holding that "in the absence of statute, exemplary damages are allowed only to the immediate person injured"), and *Murphy*, *supra*, 17 Cal.3d at p. 942 (holding that a claim for

punitive damages are permissible, he is never entitled to them." [Internal citations and punctuation omitted.]

punitive damage is not assignable in California). (See also *Jackson v. Rogers & Wells* (1989) 210 Cal.App.3d 336, 349 (after finding fraud claim was actually a legal malpractice claim and not assignable, court also concluded the assignability of the punitive damages claim did not need to be addressed further “since the Supreme Court has adopted without limitation the rule stated in *French* . . . that punitive damages claims, because personal to the one injured, are not assignable. . . . [citing *Jayhill* and *Murphy*].”).)

To fill the void in its reasoning, the Court of Appeal looked first to the *Grace* decision out of the federal District Court for the Northern District of Illinois. In Illinois, apparently a claim is assignable only if it would survive the death of the injured party. (See *Grace, supra*, 691 F.Supp. at p. 92.) Because actions for fraud or deceit survive by statute (see Ill. Rev. Stat., ch. 110 ½, § 27-6), in Illinois a cause of action for fraud or deceit is assignable. (See *Grace*, 691 F.Supp. at p. 92.) Further, under Illinois law, punitive damages “are a type of relief which is part and parcel of the underlying cause of action.” (See *id.*) Thus, the court in *Grace* held that under Illinois law, a punitive damages claim based on fraud could be assigned from the lender to the Federal Deposit Insurance Corporation.

(*Id.*)

The follies of relying on the *Grace* decision as the basis for changing the law in California to find punitive damages can be assigned, are many. *Grace* is not a California appellate court decision construing California state law, but rather a federal trial court decision construing Illinois law. *Grace* was not constrained by California principles of law that control when a cause of action is assignable, but rather its holding was determined by Illinois case law and statutes.

The other case relied on by the Court of Appeal here in holding that punitive damages can be assigned is the *Kleinwort* decision by the Illinois Supreme Court. (*Kleinwort, supra*, 692 N.E.2d 269.) In *Kleinwort*, the issue was whether punitive damages can be recovered by assignees based on a fraud claim that was brought by a corporation and assigned to its former shareholders when all of the corporation's outstanding stock was sold. (*Id.* at p. 270.) Contrary to the decision in *Grace*, which *Kleinwort* discussed, in *Kleinwort* the Illinois Supreme Court gave up on the survival analogy to determine whether punitive damages may be recovered following an assignment, concluding Illinois courts had reached opposition conclusions on the issue. (*Id.* at pp. 263-274.) Instead, the Illinois Supreme Court decided the case on whether the assignment of punitive damages would violate the public policy of Illinois, as found in its

constitution, its statutes, and the decisions of its courts. (*Id.* at pp. 274-275.)

In addition to erring by relying on the *Grace* decision, the Court of Appeal here also erred in using the decision in *Kleinwort* to form the basis for California law on the assignability of punitive damages.

Kleinwort was decided on public policy grounds—*Illinois'* public policy.

The Court made no effort to compare the public policy of Illinois, as found in its constitution, statutes, and decisional law, with the public policy of California, as found in its own constitution, statutes, and decisional law.

Without such a comparison, the Court of Appeal erred in simply adopting the law of Illinois as California's own.

B. The Court of Appeal Also Erred in Relying Solely on an Indiana Appellate Court Decision to Find Cook Endeavors Stood In the Shoes of D.J. Nelson Trust for Purposes of Claiming Punitive Damages

To hold Cook Endeavors is able to pursue D.J. Nelson Trust's claim for punitive damages against ExxonMobil, the Court of Appeal again relied only on out-of-state authorities to find Cook Endeavors stood in D.J. Nelson Trust's shoes as "a direct continuation of the Trust." (See *Nelson*, 2009 WL 3965417 at *11, relying on *Kleinwort* and *Summit Account and Computer Service, Inc. v. RJF of Florida, Inc.* (Ind. App. 1998) 690 N.E.2d 723 [*RJH of Florida*].) The Court of Appeal made no effort to consider or

apply California law in reaching its conclusion, and also ignored the factual issues raised by the record on this point.

In fact, there is not a single California case that stands for the proposition that where one entity (i.e., a trust) transfers its assets to a different—and different type of—entity (i.e., a corporation), the new entity is legally entitled to pursue punitive damages based on a cause of action previously held by the original entity. More generally, there simply is no legal authority supporting the argument that where individual owners or beneficiaries of an entity elect to transfer the assets of that entity to a newly-created, separate entity, the two entities should be treated as if they are the same. Indeed, the California Corporations Code provides specific steps that must be taken when an entity elects to change its corporate form in order for the newly-formed entity to retain the legal rights of the original entity (see, e.g., Cal. Corp. Code §§ 1150-1160), but nothing in the record suggests that D.J. Nelson Trust or Cook Endeavors followed the procedural guidelines for such conversion. To be sure, such facts do not exist because the D.J. Nelson Trust continued to exist after the June 5, 2007 assignments took place. Accordingly, the idea that June 5, 2007 transaction could have somehow empowered Cook Endeavors to pursue punitive damages is not recognized under California law.

The Court of Appeal erred in relying on *RJH of Florida, supra*, for the proposition that the rule against assignment of punitive damages is inapplicable when the assignment amounts to a direct continuation of the assignor's business. (*Nelson*, 2009 WL 3965417 at *10-11.) The *RJH of Florida* decision was based on Indiana law, not California law. (*RJH of Florida*, 690 N.E.2d at p. 728.) No California case until this one has relied upon *RJH of Florida* and reached the same conclusion. Nor does it appear that any court in any other state has adopted the exception created by the Indiana appellate court. An isolated out-of-state intermediate appellate court decision should not determine California law.

Furthermore, *RJH of Florida* involved two corporations (the second one a "direct continuation" of the first with the same rights and liabilities) that were subject to the same governing laws, corporate laws principles, and benefits (e.g., tax laws; succession of rights, obligations, and liabilities; access to financing; transactional ability; etc.). The corporation Cook Endeavors, on the other hand, cannot be a "direct continuation" of D.J. Nelson Trust (which still exists) nor of the individual Robert Cook, Jr. Each has distinctly different rights and liabilities.

V. CONCLUSION

The Court of Appeal's decision in this case charts a new course for the law in California on the issue of whether a claim for punitive damages can be assigned. Not only does the Court's opinion erase almost a century of settled jurisprudence, but it does so based on a federal district court decision and a later Illinois Supreme Court decision that expressly applied Illinois law and policies – not California law and policies – while making no attempt to compare the laws and policies of the two states to justify its analysis. The result for California parties contemplating the transfer of causes of action to which claims for punitive damages are incidental is that there no longer is a clear rule of law to direct their actions. Courts later analyzing the appropriateness of the putative transfers also lack guidance for their review.

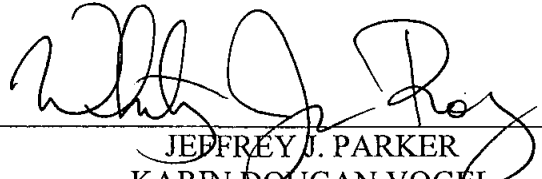
Considering the vacuum of authority supporting the change in the law stemming from the Court's opinion, review should be granted to give due consideration to the weighty issue of whether punitive damages claims can be assigned. At the same time, the Court should also consider whether a party can avoid the issue of non-assignability by posturing itself as only a continuation of the assignor, in different legal form.

For these reasons, petitioner respectfully urges the Court to grant this petition and resolve the important questions of law it presents.

DATED: December 30, 2009

SHEPPARD MULLIN RICHTER & HAMPTON LLP

By



JEFFREY J. PARKER
KARIN DOUGAN VOGEL
WHITNEY JONES ROY
Attorneys for Petitioner and Defendant
EXXON MOBIL CORPORATION

CERTIFICATE OF WORD COUNT

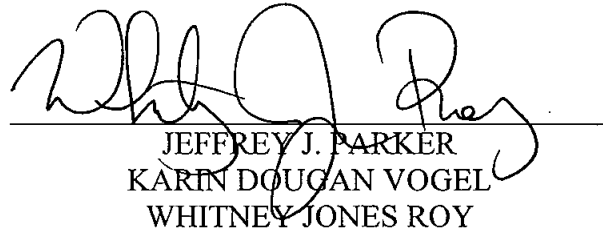
(Cal. Rules of Court, Rule 8.504 (1)(d))

The text of this petition consists of 5,037 words, including all footnotes, as counted by the computer program used to generate this petition.

DATED: December 30, 2009

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By



JEFFREY J. PARKER
KARIN DOUGAN VOGEL
WHITNEY JONES ROY

Attorneys for Petitioner and Defendant
EXXON MOBIL CORPORATION

D.J. NELSON v. EXXON MOBIL CORPORATION

2009 WL 3965417 (Cal.App. 3 Dist.)

--- Cal.Rptr.3d ----, 179 Cal.App.4th 633, 2009 WL 3965417 (Cal.App. 3 Dist.), 09 Cal. Daily Op. Serv. 14,056,
2009 Daily Journal D.A.R. 16,382
(Cite as: 2009 WL 3965417 (Cal.App. 3 Dist.))

H

Court of Appeal, Third District, California.
D.J. NELSON, as Trustee, etc., Plaintiff and Appel-
lant,
v.
EXXON MOBIL CORPORATION, Defendant and
Respondent.
Cook Endeavors, Petitioner,
v.
The Superior Court of Sacramento County, Re-
spondent;
Exxon Mobil Corporation, Real Party in Interest.
Nos. C059615, C060271.

Nov. 20, 2009.
As Modified Nov. 30, 2009.

Background: Trust brought action against oil company and others who allegedly contaminated water supply of trust's real property, for strict liability, negligence, trespass, and nuisance, seeking punitive damages. After trust transferred all its assets to a corporation owned by trust beneficiaries, oil company moved to substitute corporation as plaintiff, and moved for summary adjudication on punitive damages claims. The Superior Court, Sacramento County, No. 02AS00535, Michael J. Virga, J., granted both motions. Trust appealed and corporation filed petition for writ of mandate.

Holdings: The Court of Appeal, Cantil-Sakauye, J., held that:

- (1) order substituting corporation for trust as plaintiff was appealable by trust;
- (2) trust validly transferred its right to seek punitive damages to corporation; and
- (3) corporation was properly substituted as plaintiff.

Judgment affirmed, and writ granted.

West Headnotes

[1] Appeal and Error 30 ↪79(1)

30 Appeal and Error

30III Decisions Reviewable

30III(D) Finality of Determination

30k75 Final Judgments or Decrees

30k79 Finality as to All Parties

30k79(1) k. In general. Most Cited

Cases

Trial court's order substituting corporation for trust as plaintiff in action alleging that oil company contaminated water supply of real property, after trust transferred all its assets including the real property to corporation, was a final judgment as to the trust's rights in the action and therefore was appealable by the trust.

[2] Appeal and Error 30 ↪79(1)

30 Appeal and Error

30III Decisions Reviewable

30III(D) Finality of Determination

30k75 Final Judgments or Decrees

30k79 Finality as to All Parties

30k79(1) k. In general. Most Cited

Cases

Although interlocutory orders are generally not appealable, the rule requiring dismissal of interlocutory orders does not apply when the case involves multiple parties and a judgment is entered which leaves no issue to be determined as to one party.

[3] Mandamus 250 ↪172

250 Mandamus

250III Jurisdiction, Proceedings, and Relief

250k172 k. Scope of inquiry and powers of court. Most Cited Cases

The issue of whether transferor had a right to seek punitive damages for contamination of real property was not before the Court of Appeal on transferee's petition for writ of mandate seeking review of trial court's summary adjudication of transferee's punitive damages claim on the basis that the claim could not validly be transferred, even though de-

--- Cal.Rptr.3d ---, 179 Cal.App.4th 633, 2009 WL 3965417 (Cal.App. 3 Dist.), 09 Cal. Daily Op. Serv. 14,056,
2009 Daily Journal D.A.R. 16,382
(Cite as: 2009 WL 3965417 (Cal.App. 3 Dist.))

defendant argued to the Court of Appeal that transferor had no valid punitive damages claim to pass on, where defendant had made no such argument to the trial court.

[4] Damages 115 ↪87(1)

115 Damages

115V Exemplary Damages

115k87 Nature and Theory of Damages Additional to Compensation

115k87(1) k. In general. Most Cited Cases
The right to punitive damages is merely a remedy that may attach to a particular cause of action.

[5] Assignments 38 ↪22

38 Assignments

38I Property, Estates, and Rights Assignable

38k21 Rights of Action

38k22 k. In general. Most Cited Cases
In cases involving the assignment of choses in action, California generally follows a policy of free transferability.

[6] Property 315 ↪11

315 Property

315k11 k. Right of alienation. Most Cited Cases
One of the chief incidents of ownership in property is the right to transfer it.

[7] Assignments 38 ↪22

38 Assignments

38I Property, Estates, and Rights Assignable

38k21 Rights of Action

38k22 k. In general. Most Cited Cases

Property 315 ↪11

315 Property

315k11 k. Right of alienation. Most Cited Cases
The right to transfer property applies equally to tangible and intangible forms of property, including causes of action.

[8] Action 13 ↪1

13 Action

13I Grounds and Conditions Precedent

13k1 k. Nature and elements of cause of action and suspension of remedies. Most Cited Cases
It is the very essence of a cause of action that it gives rise to a right in the injured party to recover some type of relief.

[9] Insurance 217 ↪3419

217 Insurance

217XXVIII Miscellaneous Duties and Liabilities

217k3416 Of Insurers

217k3419 k. Bad faith in general. Most Cited Cases

A claim for bad faith breach of an insurance policy consists of both a contract and a tort claim.

[10] Assignments 38 ↪22

38 Assignments

38I Property, Estates, and Rights Assignable

38k21 Rights of Action

38k22 k. In general. Most Cited Cases
Because emotional distress and punitive damages flow from the personal tort aspect of an insurance bad faith claim, they may not be assigned.

[11] Assignments 38 ↪24(3)

38 Assignments

38I Property, Estates, and Rights Assignable

38k21 Rights of Action

38k24 For Tort

38k24(3) k. Fraud. Most Cited Cases
A defrauded party is prohibited from assigning its right to assert such fraud in a legal proceeding except where such assignment is incident to the transfer of some real or personal property interest.

[12] Trusts 390 ↪208

390 Trusts

390IV Management and Disposal of Trust Property

390k208 k. Assignment and transfer of rights of action. Most Cited Cases

--- Cal.Rptr.3d ----, 179 Cal.App.4th 633, 2009 WL 3965417 (Cal.App. 3 Dist.), 09 Cal. Daily Op. Serv. 14,056, 2009 Daily Journal D.A.R. 16,382
 (Cite as: 2009 WL 3965417 (Cal.App. 3 Dist.))

Trust validly transferred its right to seek punitive damages against oil company for contamination of water supply of trust's real property when it transferred all its assets including the real property to a corporation owned by trust beneficiaries, since the right to seek redress for the alleged contamination was incident to the property interest transferred, and the alleged contamination was an assignable injury to property.

See *Cal. Jur. 3d, Assignments, § 5; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, §§ 732, 734; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2009) ¶ 2:16 (CACIVP Ch. 2-A).*

[13] Assignments 38 ↪ 1

38 Assignments

38I Property, Estates, and Rights Assignable

38k1 k. Nature of right to assign. Most Cited Cases

Where the policy reasons underlying a rule against assignment of claims are inapplicable, the rule should not be followed.

[14] Parties 287 ↪ 59(2)

287 Parties

287IV New Parties and Change of Parties

287k57 Substitution

287k59 Persons Entitled to Be Substituted and Grounds Therefor

287k59(2) k. Assignees, purchasers, and other successors in interest. Most Cited Cases

Parties 287 ↪ 65(1)

287 Parties

287IV New Parties and Change of Parties

287k65 Striking Out Parties

287k65(1) k. In general. Most Cited Cases
 After trust transferred all its assets to a corporation owned by trust beneficiaries, corporation was properly substituted as plaintiff in lawsuit against oil company alleging contamination of real property formerly held by trust; the trust no longer had any beneficial interest in the litigation and therefore

was properly dismissed from the action.

Baron & Budd, Beverly Hills, Scott Summy, Celeste A. Evangelisti, John L. Yates, Encino, Carla M. Burke; Stevens, O'Connell & Jacobs, Charles J. Stevens, David A. Cheit, Bradley A. Benbrook, Sacramento; Sher & Leff, Victor M. Sher, San Francisco, Richard M. Franco, for Plaintiff and Appellant and for Petitioner.

Sheppard, Mullin, Richter & Hampton, Jeffrey J. Parker, Whitney Jones Roy, Karin Dougan Vogel, San Diego; Morgan Lewis & Brockius, David L. Schrader, Los Angeles, for Defendant and Respondent and for Real Party in Interest.

No appearance for Respondent Superior Court of Sacramento County.

CANTIL-SAKAUYE, J.

*1 In this consolidated proceeding, plaintiff and petitioner Cook Endeavors and its predecessor in interest, D.J. Nelson, as trustee for the D.J. Nelson Trust (the Trust), seek review of two orders of respondent superior court: one granting the motion of defendant and real party in interest Exxon Mobil Corporation (Exxon) to substitute Cook Endeavors for the Trust as plaintiff in the underlying action; the other granting Exxon's motion for summary adjudication on Cook Endeavors's punitive damages claim.^{FN1} The evidence presented to the superior court established that, during the pendency of this action, the Trust transferred all of its assets, including its interest in this lawsuit, to the Trust beneficiaries, who in turn transferred those assets to Cook Endeavors, a newly-formed corporation of which the Trust beneficiaries are the sole shareholders. The superior court concluded the transfer of all assets to Cook Endeavors divested the Trust of standing to pursue this action. However, the court further concluded the Trust's punitive damages claim could not lawfully have been assigned to the corporation, Cook Endeavors.

Cook Endeavors and the Trust (hereafter plaintiffs)

--- Cal.Rptr.3d ---, 179 Cal.App.4th 633, 2009 WL 3965417 (Cal.App. 3 Dist.), 09 Cal. Daily Op. Serv. 14,056, 2009 Daily Journal D.A.R. 16,382
(Cite as: 2009 WL 3965417 (Cal.App. 3 Dist.))

contend the superior court erred in one or the other of these rulings. Plaintiffs argue the court erred in concluding the punitive damages claim could not be transferred to Cook Endeavors, inasmuch as there was in fact no transfer of assets but merely a change in legal form of the single entity from a trust to a corporation. In the alternative, plaintiffs argue that if the punitive damages claim could not be transferred to Cook Endeavors, then such claim was retained by the Trust, in which case the Trust should not have been substituted out of the action.

We conclude the punitive damages claim was properly transferred to Cook Endeavors under the circumstances and, therefore, the trial court erred in granting Exxon's motion for summary adjudication. Whether viewed as a transfer of assets or simply a change in the legal form of a single entity, any preexisting punitive damages claim held by the Trust was transferred, along with all other assets, to Cook Endeavors. We further conclude the Trust no longer has any interest in the action and the trial court properly granted Exxon's motion for substitution. We therefore affirm the judgment (order) substituting Cook Endeavors for the Trust but grant the petition for writ of mandate on the order granting summary adjudication of the punitive damages claim.

FACTS AND PROCEEDINGS

There is essentially no dispute over the facts of this matter. The dispute is over the legal impact of those facts.

In 1973, the Trust was created with Robert C. Cook as the settlor and his wife, Jane A. Cook, a.k.a. D.J. Nelson (Nelson), as the trustee. The beneficiaries under the Trust were Nelson and the settlor's son, Robert C. Cook, Jr. (Cook), with Nelson receiving a life estate in the income from one-half the Trust assets and Cook receiving everything else. The Trust also provided for its termination and distribution of the Trust assets at the discretion of Cook, subject to continuation of the life estate in Nelson

over one-half of the Trust assets.

*2 The only asset of the Trust was a parcel of real property designated in the Trust agreement as Parcel B. The Trust expressly prohibited the addition of other property to the Trust corpus. At the time the lawsuit was commenced in this matter, the Trust, doing business as Fruitridge Vista Water Company, was operating a business that supplied water to 4,800 homes in the Sacramento area utilizing the water underlying the Trust's real property.

In May 2001, the Trust initiated this action in the superior court against Exxon and others alleging contamination of its water supply with methyl tertiary butyl ether (MTBE) and tertiary butyl alcohol (TBA). The fifth amended complaint contained four causes of action: strict liability, negligence, trespass, and nuisance. In each cause of action, the Trust sought an award of punitive damages.

Cook Endeavors was incorporated on May 9, 2007. On June 5, 2007, Cook exercised his right to order distribution of the Trust assets to the beneficiaries. Nelson, as trustee, transferred one-half of the Trust assets to Cook and the other half to Cook subject to a life estate in Nelson. The same day, Cook and Nelson transferred their interests in the Trust assets to Cook Endeavors, as part of the capitalization of that corporation. In exchange, Cook received 50 shares of stock in the corporation and another 50 shares subject to a life estate in Nelson.

On April 4, 2008, Exxon filed a motion to substitute Cook Endeavors for the Trust as plaintiff. Exxon asserted that by assigning all of its assets to Cook Endeavors, including its interest in this lawsuit, the Trust no longer has standing. In response, the Trust moved to amend the complaint to add Cook Endeavors as an additional plaintiff and to further clarify its strict liability claim. The Trust also submitted a proposed sixth amended complaint. At the hearing on the motions, the Trust informed the court that Exxon contends assignment of the Trust's interest in the lawsuit to Cook Endeavors eliminated punitive damages from the case

--- Cal.Rptr.3d ---, 179 Cal.App.4th 633, 2009 WL 3965417 (Cal.App. 3 Dist.), 09 Cal. Daily Op. Serv. 14,056, 2009 Daily Journal D.A.R. 16,382
 (Cite as: 2009 WL 3965417 (Cal.App. 3 Dist.))

because such claim cannot be assigned. The Trust argued that, to the extent this is true, it should be retained as a plaintiff to pursue the punitive damages claim itself. The trial court granted Exxon's motion to substitute and denied that portion of the Trust's motion to amend that sought to add Cook Endeavors as an additional plaintiff. The Trust appeals.

On June 24, 2008, Cook Endeavors, as the sole plaintiff, filed a sixth amended complaint, this time against Exxon alone and containing only two causes of action, strict liability and negligence. The sixth amended complaint seeks punitive damages on each cause of action.

Exxon filed a motion for summary adjudication of the punitive damages claims. The trial court issued a tentative ruling, concluding Cook Endeavors cannot seek punitive damages in this action because this aspect of the Trust's claims against Exxon could not be assigned. On September 12, the court affirmed its tentative ruling. On October 30, 2008, Cook Endeavors filed a petition for writ of mandate in this court challenging this ruling.

*3 We issued an alternative writ and consolidated the appeal and writ proceeding for purposes of argument and disposition. We also stayed all further proceedings in the superior court.

DISCUSSION

I.

Motion to Dismiss Appeal

[1] Exxon moves to dismiss the Trust's appeal, arguing the order substituting Cook Endeavors for the Trust is interlocutory in nature and, therefore, any appeal of that order must await final judgment in the action. The Trust responds that the order granting Exxon's motion to substitute constitutes a final judgment as to the Trust's rights in the action and

therefore is appealable by the Trust. The Trust has the better argument.

[2] Although interlocutory orders are generally not appealable, "[i]t is settled that the rule requiring dismissal does not apply when the case involves multiple parties and a judgment is entered which leaves no issue to be determined as to one party." (*Justus v. Atchison* (1977) 19 Cal.3d 564, 568, 139 Cal.Rptr. 97, 565 P.2d 122, disapproved on another point in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171, 216 Cal.Rptr. 661, 703 P.2d 1.) This exception to the general rule "better serves the interests of justice to afford prompt appellate review to a party whose rights or liabilities have been definitively adjudicated than to require him to await the final outcome of trial proceedings which are of no further concern to him." (*Ibid.*)

Exxon cites two California Supreme Court decisions for the proposition that a substitution order is not appealable. However, those cases are inapposite. In *Welsh v. Allen* (1880) 54 Cal. 211, Levy was substituted as plaintiff for Welsh and Welsh appealed. On the defendant's motion to dismiss the appeal, Welsh argued the order was final as between him and the defendant. The court concluded otherwise. (*Id.* at p. 212.) In other words, the court did not conclude the order was not appealable despite the fact it was a final adjudication as to Welsh. Instead, the court concluded the order was not in fact a final adjudication as to Welsh.

In *Grant v. Los Angeles etc. Ry. Co.* (1897) 116 Cal. 71, 47 P. 872, Grant appealed from an order substituting him into the action as the plaintiff. The court concluded the order granting substitution is subject to review only upon final judgment of the action. (*Id.* at p. 72, 47 P. 872.) However, in *Grant*, it was the party substituted *into* the action that was appealing, not the party substituted out. Obviously an order substituting a party into an action is not final as to that party.

Upon substitution of Cook Endeavors for the Trust as the plaintiff in this action, all rights of the Trust

--- Cal.Rptr.3d ---, 179 Cal.App.4th 633, 2009 WL 3965417 (Cal.App. 3 Dist.), 09 Cal. Daily Op. Serv. 14,056, 2009 Daily Journal D.A.R. 16,382
(Cite as: 2009 WL 3965417 (Cal.App. 3 Dist.))

in the action were finally adjudicated. It would be contrary to the interests of justice to require the Trust to await the outcome of the litigation between Cook Endeavors and Exxon before appealing this ruling. We therefore deny Exxon's motion to dismiss the appeal.

II.

Preliminary Matters

In ruling for Exxon on both the motion to substitute and the motion for summary adjudication, the trial court concluded the assignment of assets from the Trust to Cook Endeavors was actually two separate assignments, one from the Trust to the Trust beneficiaries and the other from the Trust beneficiaries to Cook Endeavors. The court concluded the punitive damages claim had been assigned to the Trust beneficiaries in the first step but had not been assigned to Cook Endeavors in the second. Hence, while the Trust was divested of all assets, the right to seek punitive damages did not reach the corporation, Cook Endeavors.

*4 Plaintiffs contend there was only one assignment, from the Trust to Cook Endeavors. Hence, either the right to seek punitive damages was assigned to Cook Endeavors or it remained with the Trust. Plaintiffs further contend that, in reality, there was no assignment at all but a change in legal form of a single entity from a trust to a corporation. However, as will become clear in the next section, it does not matter if we view this transaction as a single or a bifurcated assignment. Nor does it matter if we view the transaction as a transfer of assets or a reorganization of the Trust into a corporation. Under any of these scenarios, any preexisting punitive damages claim held by the Trust was assumed by the corporation.

[3] Before addressing the issue presented in this proceeding, it is helpful to note what is not at issue. We are not asked to decide whether the Trust ever

had a valid punitive damages claim against Exxon. Cook Endeavors asserts a right to punitive damages in both its strict liability and negligence claims. In its motion for summary adjudication, Exxon argued that, under California law, a right to punitive damages cannot be assigned. Exxon did not argue there was no valid punitive damages claim to begin with. Thus, although Exxon now argues, in its return to the writ petition, that the Trust could not have assigned its right to seek punitive damages because it had no such right to pass on, that issue was not raised below and is not properly before us. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 407, p. 466; *Planned Protective Services, Inc. v. Gorton* (1988) 200 Cal.App.3d 1, 12-13, 245 Cal.Rptr. 790, disapproved on another point in *Martin v. Szeto* (2004) 32 Cal.4th 445, 451, fn. 7, 9 Cal.Rptr.3d 687, 84 P.3d 374.)

We requested that the parties brief the additional issue of whether a punitive damages claim from an injury to water is in the nature of an assignable injury to real property or an unassignable personal injury. In response, the parties agree we are dealing here with an assignable injury to real property, disagreeing only on whether any punitive damages claim associated with that injury is also assignable. Therefore, we need not further consider the issue of the nature of the injury.

[4] Finally, throughout this opinion, when we refer to the Trust's claim for punitive damages, we do not mean to suggest the Trust had a separate cause of action for punitive damages. As Exxon correctly points out, the right to punitive damages is merely a remedy that may attach to a particular cause of action. (See *Hilliard v. A.H. Robins Co.* (1983) 148 Cal.App.3d 374, 391, 196 Cal.Rptr. 117.) Our discussion of the plaintiffs' punitive damages claim is merely a shorthand reference to their right to seek punitive damages on one or more of the causes of action in the complaint.

III.

--- Cal.Rptr.3d ---, 179 Cal.App.4th 633, 2009 WL 3965417 (Cal.App. 3 Dist.), 09 Cal. Daily Op. Serv. 14,056, 2009 Daily Journal D.A.R. 16,382
 (Cite as: 2009 WL 3965417 (Cal.App. 3 Dist.))

Assignment of the Punitive Damages Claim

Turning to the merits of the case, Exxon contends California law, *without exception*, prohibits the assignment of claims for punitive damages. However, as we shall explain, the cases on which Exxon relies do not support such a blanket rule.

*5 [5][6][7] In cases involving the assignment of choses in action, California generally follows a policy of free transferability. (*Essex Ins. Co. v. Five Star Dye House, Inc.* (2006) 38 Cal.4th 1252, 1259, 45 Cal.Rptr.3d 362, 137 P.3d 192.) “ [I]t is a fundamental principle of law that one of the chief incidents of ownership in property is the right to transfer it.’ [Citation.] [¶] This ‘chief incident of ownership’ applies equally to tangible and intangible forms of property, including causes of action.” (*Ibid.*)

“ [I]t is pretty generally held in America that the only causes or rights of action which are not transferable or assignable in any sense are those which are founded upon wrongs of a purely personal nature, such as slander, assault and battery, negligent personal injuries, criminal conversation, seduction, breach of marriage promise, malicious prosecution, and others of like nature. All other demands, claims and rights of action whatever are generally held to be transferable. In conformity with the principle just stated the following demands, claims, and rights of action have been held to be assignable: causes of action arising from the breach of a contract of any kind (except the breach of a promise to marry); causes of action arising from torts which affect the estate rather than the person of the individual who is injured. Under the latter head are claims arising from the carrying away or conversion, of personal property, from the fraudulent misapplication of funds by the officer of a bank, from negligent or intentional injury done to personal property or upon real estate. In view of the general tendency to recognize the transferability of rights of action growing out of injuries done in respect of one's property or estate, it is somewhat

curious to note that it is commonly held that the right of action for fraud and deceit is not assignable. But where property is obtained by deceit or fraudulent device of any sort, the cause of action is assignable, for here the injury is done in respect of the particular property which is wrongfully acquired.’ ” (*Wikstrom v. Yolo Fliers Club* (1929) 206 Cal. 461, 463, 274 P. 959; see also *Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 834, 69 Cal.Rptr. 321, 442 P.2d 377; *Jackson v. Deauville Holding Co.* (1933) 219 Cal. 498, 502-503, 27 P.2d 643.)

Of course, the present matter does not involve the question whether a particular cause of action may be assigned. It is undisputed the Trust's causes of action against Exxon for negligence and strict liability were assigned to Cook Endeavors. The question is whether, in connection with the assignment of those causes of action, any associated right to seek punitive damages was assigned as well.

[8] In answering this question, it is well to remember that the right to punitive damages is not a cause of action in and of itself but an incident of a cause of action. (*Gold v. Los Angeles Democratic League* (1975) 49 Cal.App.3d 365, 373, fn. 3, 122 Cal.Rptr. 732.) It is the very essence of a cause of action that it gives rise to a right in the injured party to recover some type of relief.

*6 We next review the cases relied upon by Exxon in support of its argument that the right to seek punitive damages is not assignable. One of the cases cited by Exxon in support of a blanket prohibition against the assignment of a right to seek punitive damages, notwithstanding the assignability of the underlying claim, is *Essex Ins. Co. v. Five Star Dye House, Inc.*, *supra*, 38 Cal.4th 1252, 45 Cal.Rptr.3d 362, 137 P.3d 192 (*Essex*). In *Essex*, the Supreme Court concluded that while claims for bad faith breach of an insurance contract are generally assignable, emotional distress and punitive damages associated with such claims are not. (*Id.* at p. 1263, 45 Cal.Rptr.3d 362, 137 P.3d 192.) The court cited as support its earlier decision in *Murphy v. Allstate*

--- Cal.Rptr.3d ---, 179 Cal.App.4th 633, 2009 WL 3965417 (Cal.App. 3 Dist.), 09 Cal. Daily Op. Serv. 14,056, 2009 Daily Journal D.A.R. 16,382

(Cite as: 2009 WL 3965417 (Cal.App. 3 Dist.))

Ins. Co. (1976) 17 Cal.3d 937, 132 Cal.Rptr. 424, 553 P.2d 584 (*Murphy*), which concluded that while an insured may assign a cause of action against an insurer for breach of the duty to settle, those damages arising from the personal tort aspect of the cause of action, i.e., emotional distress and punitive damages, may not be assigned. (*Id.* at p. 942, 132 Cal.Rptr. 424, 553 P.2d 584.)

[9] Although the high court in both *Essex* and *Murphy* discussed the assignability of the right to seek particular types of damages, the issue presented was in reality one of the assignability of a particular type of claim. As recognized by the courts, a claim for bad faith breach of an insurance policy consists of both a contract and a tort claim. (See *Archdale v. American Internat. Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 467, fn. 19, 64 Cal.Rptr.3d 632.) As we explained in *Schlauch v. Hartford Accident & Indemnity Co.* (1983) 146 Cal.App.3d 926, at page 931, 194 Cal.Rptr. 658, an insured may assign the breach of contract aspect of the bad faith claim but not the tort aspect. Citing *Murphy*, *supra*, 17 Cal.3d 937, 132 Cal.Rptr. 424, 553 P.2d 584 we stated: “ ‘Case law has established the proposition that an insured who has suffered damages in excess of an insurance policy as a consequence of an insurer’s bad faith failure to settle a claim may sue the insurer for breach of contract.’ [Citation.] Under settled principles, however, the insurer’s duty to settle runs to the insured and not to the injured claimant. Consequently Hartford owed no common law duty to plaintiff. [Citation.] Although the insured may assign his cause of action against the insurer for its breach of the duty to settle [citation], he cannot assign the personal tort aspect of that bad faith cause of action because that aspect is not assignable in California. [Citation.] Consequently, to the extent that plaintiff seeks damages against Hartford for emotional distress and punitive damage those damages could not have been predicated upon an assignment by the insureds.” (*Schlauch v. Hartford Accident & Indemnity Co.*, *supra*, at p. 931, 194 Cal.Rptr. 658.)

[10] In other words, it is not the nature of the relief that prohibits a claim for emotional distress or punitive damages from being assigned. It is the nature of the underlying cause of action giving rise to that relief. Because emotional distress and punitive damages flow from the personal tort aspect of an insurance bad faith claim, they may not be assigned.

*7 Another case on which Exxon relies for a blanket rule against assignment of punitive damages claims is *French v. Orange County Inv. Corp.* (1932) 125 Cal.App. 587, 13 P.2d 1046 (*French*). In *French*, the owner of real property was defrauded out of that property by the defendants and assigned its claim against the defendants to French. French filed suit and the jury awarded compensatory damages of \$2,142.27. (*French*, *supra*, at pp. 589-590, 13 P.2d 1046.) On appeal, French claimed a right to punitive damages as well. The Court of Appeal rejected the claim, explaining that punitive damages may be sought only by the injured party, not an assignee. (*Id.* at p. 591, 13 P.2d 1046.)

In *People v. Superior Court (Jayhill Corp.)* (1973) 9 Cal.3d 283, 107 Cal.Rptr. 192, 507 P.2d 1400 (*Jayhill*), the California Supreme Court relied on *French* in rejecting an attempt by the Attorney General to seek punitive damages on behalf of all those in the state who were defrauded by various door-to-door sellers of encyclopedias and similar publications. (*Id.* at p. 286, 107 Cal.Rptr. 192, 507 P.2d 1400.) The court stated that, “in the absence of statute, exemplary damages are allowed only to the immediate person injured.” (*Id.* at p. 287, 107 Cal.Rptr. 192, 507 P.2d 1400.)

Although *French* and *Jayhill* use broad language suggesting that all punitive damages claims are personal in nature and, hence, not assignable, the cases on which they relied suggest a narrower principle. The court in *French* indicated its ruling “appears to be harmonious in principle with the rule that ‘a bare right to file a bill in equity for fraud committed upon the assignor will be denied because the transfer of such right is against public policy.’ ” (

--- Cal.Rptr.3d ---, 179 Cal.App.4th 633, 2009 WL 3965417 (Cal.App. 3 Dist.), 09 Cal. Daily Op. Serv. 14,056,
2009 Daily Journal D.A.R. 16,382
(Cite as: 2009 WL 3965417 (Cal.App. 3 Dist.))

French, supra, 125 Cal.App. at p. 591, 13 P.2d 1046, quoting from *Swallow v. Tungsten Products Co.* (1928) 205 Cal. 207, 270 P. 366 (*Swallow*).) However, in *Swallow*, the high court drew a clear distinction between the transfer of a “bare right” to assert a claim for fraud and the transfer of a real or personal property interest coupled with the assignment of a claim for fraud associated with that property. (*Swallow, supra*, at p. 217, 270 P. 366.)

The following cases illustrate this distinction. In *People v. Mullan* (1884) 65 Cal. 396, 4 P. 348 (*Mullan*), a judgment had been entered against Mullan which affected title to certain real property and Mullan later conveyed the property to The Cucamonga Company. The Cucamonga Company moved to set aside the judgment for lack of proper service of the summons on Mullan. The high court concluded the corporation was in legal effect the assignee and legal representative of Mullan and had standing to pursue the motion under these circumstances. (*Id.* at p. 397, 4 P. 348.)

In *Whitney v. Kelley* (1892) 94 Cal. 146, 29 P. 624 (*Whitney*), a prior judgment among claimants to real property found the plaintiffs in that prior action to be the rightful owners. The defendants in that action thereafter assigned any rights they might have in the property to Whitney, who brought a new action to set aside the prior judgment on the basis of fraud. The trial court dismissed the action after sustaining the defendants' demurrers to the complaint, and Whitney appealed. (*Id.* at p. 147, 29 P. 624.)

*8 The Supreme Court affirmed. Quoting from Story on Equity Jurisprudence, the court stated the following general rule: “ ‘So an assignment of a bare right to file a bill in equity for a fraud committed upon the assignor will be held void as contrary to public policy, and as savoring of the character of maintenance.... Indeed, it has been laid down as a general rule that where an equitable interest is assigned in order to give the assignee a *locus standi in judicio* in a court of equity, the party assigning such right must have some substantial possession and some capability of personal judgment, and not

a mere naked right to overset a legal instrument or to maintain a suit.’ ” (*Whitney, supra*, 94 Cal. at p. 148, 29 P. 624.)

In *Whitney*, unlike *Mullan* where the property at issue was conveyed to the assignee, the defendants in the prior action had no interest in the property at issue at the time of the assignment to Whitney. All the assignors in *Whitney* had was a bare right to try and set aside the judgment that had found others to be the rightful owners. The high court in *Whitney* explained: “If plaintiff's grantors had nothing but a mere naked right to file a bill to set aside this judgment, then this plaintiff, their grantee, can have no title. It is essential that a party complaining in equity should have some present substantial interest in the subject-matter of the suit. He must have a direct interest in the result of the litigation, and his complaint must clearly indicate that fact. The plaintiff here has no interest in this land, for his grantors had no interest when they transferred to him.” (*Whitney, supra*, 94 Cal. at p. 151, 29 P. 624.)

In *Swallow*, it was asserted that, on June 19, 1922, Vaughn filed suit against Pine Creek Tungsten Company, the holder of certain mining rights. On July 17, 1922, Vaughn obtained a default judgment and, on March 29, 1923, purchased the mining rights pursuant to a writ of execution. Vaughn quitclaimed the mining rights to Swallow. In the meantime, on December 12, 1922, Pine Creek assigned its interest in the mining rights to Natural Soda Products Company, who in turn assigned its rights to Tungsten Products Company on March 14, 1923. (*Swallow, supra*, 205 Cal. at pp. 210-211, 270 P. 366.)

In a quiet title action brought by Swallow against Tungsten Products Company, Tungsten asserted Vaughn committed fraud in obtaining the earlier default judgment. The trial court granted judgment to Swallow and Tungsten appealed. (*Swallow, supra*, 205 Cal. at p. 211, 270 P. 366.) On appeal, Swallow argued Tungsten could not claim fraud in connection with the earlier default judgment be-

--- Cal.Rptr.3d ----, 179 Cal.App.4th 633, 2009 WL 3965417 (Cal.App. 3 Dist.), 09 Cal. Daily Op. Serv. 14,056, 2009 Daily Journal D.A.R. 16,382
 (Cite as: 2009 WL 3965417 (Cal.App. 3 Dist.))

cause Tungsten was not a party to the action at the time of the alleged fraud. (*Id.* at p. 214, 270 P. 366.) The Supreme Court reversed. The high court rejected Swallow's argument that Tungsten had no standing to claim fraud in connection with the prior judgment as a mere assignee, distinguishing the matter from *Whitney*. According to the court, despite the existence of a judgment which created an apparent lien on the property, Pine Creek was the owner and in possession of the property at the time it was transferred to Natural Soda and Natural Soda was the owner and in possession when the property was transferred to Tungsten. Thus, Tungsten obtained a right to challenge the prior judgment as an incident to that property ownership. (*Id.* at pp. 218-219, 29 P. 624.)

*9 [11] The foregoing cases stand for the proposition that a defrauded party is prohibited from assigning its right to assert such fraud in a legal proceeding except where such assignment is incident to the transfer of some real or personal property interest. This is consistent with long-standing policies against allowing the assignment of legal claims standing alone, while recognizing the free transferability of property interests, including associated legal claims.

[12] Thus, when the Court of Appeal in *French* indicated its determination that punitive damages may not be sought by an assignee appears to be harmonious with the rule stated in *Swallow*, it is reasonable to assume it was incorporating the exception for claims incident to the transfer of a property interest. That is the situation presented here. The Trust did not merely transfer to Cook Endeavors its right to seek redress from Exxon for contamination of its water supply. The Trust transferred its real property to Cook Endeavors, with the right to seek redress being incident to that property interest.

Nevertheless, the parties cite no California appellate decision where, as here, the court considered whether a punitive damages claim incident to an otherwise assignable cause of action could itself be assigned. Although *French* itself involved the as-

signment of a fraud claim, and the court ruled punitive damages could not be recovered notwithstanding the recovery of compensatory damages by the assignee, the issue of whether the underlying fraud claim was assignable was not considered by the court. Cases are not authority for propositions not considered therein. (*McKeon v. Mercy Healthcare Sacramento* (1998) 19 Cal.4th 321, 328, 79 Cal.Rptr.2d 319, 965 P.2d 1189.)

Other states, however, have addressed this issue. In *Federal Deposit Insurance Corp. v. W.R. Grace & Co.* (N.D.Ill.1988) 691 F.Supp. 87, affirmed in part and reversed in part on other grounds, (7th Cir.1989) 877 F.2d 614 (*Grace*), a bank assigned its fraud cause of action to the Federal Deposit Insurance Corporation and the federal district court held the fraud cause of action could be assigned in its entirety, including a claim for punitive damages. Applying Illinois law, the court distinguished prior cases finding no assignability where the claim involved personal injury rather than property damage. According to the court, Illinois, like California, generally distinguishes between nonassignable torts to the person and assignable torts to property. (691 F.Supp. at p. 92.) The court further concluded punitive damages "are a type of relief which is part and parcel of the underlying cause of action and do not constitute an independent basis of recovery." (*Ibid.*) Thus, when the fraud cause of action was assigned, the corresponding punitive damages claim went with it.

In *Kleinwort Benson North America, Inc. v. Quantum Financial Services, Inc.* (1998) 181 Ill.2d 214, 229 Ill.Dec. 496, 692 N.E.2d 269 (*Kleinwort*), Kleinwort sued Quantum and Quantum filed a counterclaim asserting fraud and seeking punitive damages in connection with the sale of a brokerage firm. During the pendency of the litigation, Quantum assigned its interest in the lawsuit to its two shareholders. Kleinwort argued the shareholders had no standing to pursue the punitive damages claim. (*Id.* at pp. 270-271.) The Illinois Supreme Court disagreed. Relying in part on *Grace*, the

--- Cal.Rptr.3d ---, 179 Cal.App.4th 633, 2009 WL 3965417 (Cal.App. 3 Dist.), 09 Cal. Daily Op. Serv. 14,056, 2009 Daily Journal D.A.R. 16,382
 (Cite as: 2009 WL 3965417 (Cal.App. 3 Dist.))

court indicated “punitive damages are a component of the relief available in an action and are therefore deemed a part of the underlying action. Punitive damages are a type of relief, not an independent cause of action.” (*Id.* at p. 274.)

*10 In the present matter, as in *Kleinwort* and *Grace*, the claims assigned to Cook Endeavors involve assignable injuries to property rather than nonassignable personal injuries. Under these circumstances, the rule stated in *French* is inapplicable. As long as the causes of action themselves are assignable, which the parties do not dispute, any punitive damages claims associated with those causes of action are also assignable.

We reach this same conclusion for another reason as well. *French* and its progeny state that a claim for punitive damages may only be asserted by the person who received the injury. In this instance, the complaint alleges damage to real property. At the time the complaint was filed, title to that real property was held by the Trust on behalf of the Trust beneficiaries. As it stands now, title to the real property is held by Cook Endeavors on behalf of its shareholders, the very same Trust beneficiaries. Hence, although the form has changed, the identity of the parties allegedly injured by Exxon's actions has remained the same.

In *Kleinwort*, *supra*, 181 Ill.2d 214, 229 Ill.Dec. 496, 692 N.E.2d 269, the Illinois Supreme Court examined the public policies underlying the rule prohibiting assignment of punitive damage claims. The plaintiff had argued the assignment violated public policy because it “would allow a litigious person to harass and annoy others by purchasing and pursuing such claims.” According to the plaintiff, a claim for punitive damages “would become a ‘commodity in trade’ in Illinois” and “would encourage private wars between strangers for the purpose of obtaining the windfall of punitive damage awards.” (*Id.* at p. 274.) The Illinois high court disagreed, explaining: “Based on the facts and circumstances of the instant case, allowing the assignees to seek punitive damages does not violate

any public policy. The assignees, Rosenthal and Collins, were Quantum's shareholders at the time of the alleged fraud. Rosenthal was intimately involved in the negotiations for the purchase of VTC, which serves as the basis for the alleged fraud. Contrary to Kleinwort's arguments, Rosenthal and Collins did not shop around for the fraud claim. They were involved in the litigation long before Quantum's claims were assigned to them.” (*Id.* at p. 275.)

In *Summit Account and Computer Service, Inc. v. RJH of Florida, Inc.* (Ind.App.1998) 690 N.E.2d 723 (*RJH of Florida*), Kimco Leasing entered into an agreement with GCI and GCI's attorney owner, Webster, whereby the latter would perform collection services on behalf of Kimco. Later, a dispute arose over the collection services and payment by Kimco. (*Id.* at pp. 724-725.) The matter was tried, and a net judgment was entered in favor of Kimco's successor in interest, RJH of Florida. (*Id.* at pp. 725-726.) On appeal, GCI and Webster argued, among other things, that RJH of Florida could not be awarded punitive damages in the action because, under Indiana law, claims for legal malpractice and claims seeking punitive damages are not assignable. (*Id.* at p. 728.)

*11 The Court of Appeal rejected the argument. The evidence presented at trial showed that Kimco sold all of its assets, including the claim against GCI and Webster, to Hoffman, Inc. and Hoffman, Inc. in turn sold all of the assets to RJH of Florida. However, Richard J. Hoffman was the sole shareholder of all three corporations and all three conducted the same business from the same location. (*RJH of Florida, supra*, 690 N.E.2d at p. 728.) The Indiana appellate court concluded RJH of Florida was a direct continuation of Kimco and could stand in its shoes for purposes of Kimco's claims against GCI and Webster. (*Ibid.*)

[13] Likewise, in the present matter, Cook Endeavors is a direct continuation of the Trust, albeit in a different form, and can stand in its shoes for purposes of pursuing a claim for injuries to the

--- Cal.Rptr.3d ----, 179 Cal.App.4th 633, 2009 WL 3965417 (Cal.App. 3 Dist.), 09 Cal. Daily Op. Serv. 14,056, 2009 Daily Journal D.A.R. 16,382
 (Cite as: 2009 WL 3965417 (Cal.App. 3 Dist.))

property formerly owned by the Trust. As in *Kleinwort*, Cook and Nelson were the beneficiaries of the Trust at the time of the injuries and thereafter became the sole shareholders of Cook Endeavors. Neither Cook Endeavors nor Cook and Nelson shopped around for the claims asserted in this matter. Cook and Nelson have been involved all along. Allowing Cook Endeavors to pursue any punitive damages claim the Trust may have had will not unfairly prejudice Exxon and will not render such claims a commodity in trade. Where, as here, the policy reasons underlying a rule against assignment of claims are inapplicable, the rule should not be followed. (See *Musser v. Provencher* (2002) 28 Cal.4th 274, 285-287, 121 Cal.Rptr.2d 373, 48 P.3d 408.)

[14] In light of the fact the causes of action asserted in this matter involve injury to property rather than personal injury, the assignment of the punitive damages claim is incident to the transfer of real property from the Trust to Cook Endeavors, and Cook Endeavors is merely a continuation of the Trust in another form, we conclude Cook Endeavors is entitled to pursue whatever punitive damages claim may exist by virtue of the matters alleged in the complaint. The trial court erred in concluding otherwise.

Having so concluded, we necessarily find, as did the trial court, that the Trust no longer has any beneficial interest in this litigation and therefore was properly dismissed from the action.

DISPOSITION

In the appeal in case No. C059615, the judgment (order) substituting Cook Endeavors for the Trust as plaintiff in this action is affirmed. In case No. C060271, the alternative writ, having fulfilled its purpose, is hereby dissolved. The stay issued by this court on December 4, 2008, shall be dissolved upon this opinion becoming final. A peremptory writ of mandate shall issue directing the superior court to vacate its order granting Exxon's motion

for summary adjudication on Cook Endeavors' punitive damages claim and to enter a new order denying the motion. Cook Endeavors shall receive its costs on appeal (Cal. Rules of Court, rule 8.278(a)(1)), and in the writ proceeding (Cal. Rules of Court, rule 8.493(a)(1)(A)).

We concur: SIMS, Acting P.J., and NICHOLSON, J.

FNI. Code of Civil Procedure section 437c, subdivision (f)(1) provides as pertinent: "A party may move for summary adjudication as to ... one or more claims for damages...." As used here, "claims for damages" means punitive damages. (*DeCastro West Chodorow & Burns, Inc. v. Superior Court* (1996) 47 Cal.App.4th 410, 421, 54 Cal.Rptr.2d 792.)

Cal.App. 3 Dist., 2009.

Nelson v. Exxon Mobil Corp.

--- Cal.Rptr.3d ----, 179 Cal.App.4th 633, 2009 WL 3965417 (Cal.App. 3 Dist.), 09 Cal. Daily Op. Serv. 14,056, 2009 Daily Journal D.A.R. 16,382

END OF DOCUMENT

ORDER MODIFYING OPINION

Filed 11/30/09

CERTIFIED FOR PUBLICATION

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

D.J. NELSON, as Trustee, etc.,
Plaintiff and Appellant,

v.

EXXON MOBIL CORPORATION,
Defendant and Respondent.

C059615

(Super. Ct. No. 02AS00535)

COOK ENDEAVORS,
Petitioner,

v.

THE SUPERIOR COURT OF SACRAMENTO
COUNTY,

Respondent;

EXXON MOBIL CORPORATION,
Real Party in Interest.

C060271

(Super. Ct. No. 02AS00535)

ORDER MODIFYING OPINION
[No change in judgment]

APPEAL from a judgment of the Superior Court of Sacramento County, Michael J. Virga, Judge. Affirmed.

ORIGINAL PROCEEDINGS: Petition for writ of mandate and request for stay. Michael J. Virga, Judge. Alternative writ dissolved, stay vacated, and peremptory writ issued.

Baron & Budd, Scott Summy, Celeste A. Evangelisti, John L. Yates, Carla M. Burke; Stevens, O'Connell & Jacobs, Charles J. Stevens; David A. Cheit, Bradley A. Benbrook; Sher & Leff, Victor M. Sher, Richard M. Franco for Plaintiff and Appellant and for Petitioner.

Sheppard, Mullin, Richter & Hampton, Jeffrey J. Parker, Whitney Jones Roy, Karin Dougan Vogel; Morgan Lewis & Brockius, David L. Schrader for Defendant and Respondent and for Real Party in Interest.

No appearance for Respondent Superior Court of Sacramento County.

BY THE COURT:

It is hereby ordered that the opinion filed herein on November 20, 2009, be modified as follows:

On page 26, under the heading "DISPOSITION", delete the following language of the second sentence in that paragraph ", and the stay issued by this court on December 4, 2008, is hereby vacated." and replace it with ". The stay issued by this court on December 4, 2008, shall be dissolved upon this opinion becoming final."

The corrected sentence should now read: "In case No. C060271, the alternative writ, having fulfilled its purpose, is hereby dissolved. The stay issued by this court on December 4, 2008, shall be dissolved upon this opinion becoming final."

This modification does not effect a change in the judgment.

BY THE COURT:

 SIMS , Acting P. J.

 NICHOLSON , J.

 CANTIL-SAKAUYE , J.

PROOF OF SERVICE

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

I am employed in the County of Los Angeles; I am over the age of eighteen years and not a party to the within entitled action; my business address is 333 South Hope Street, 48th Floor, Los Angeles, California 90071-1448.

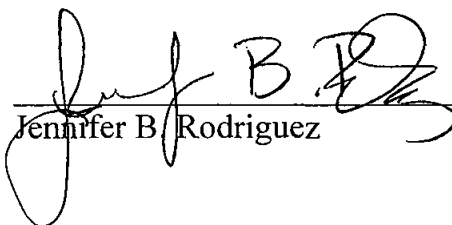
PETITION FOR REVIEW

on the interested party(ies) in this action by placing true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

See Attached Service List

- BY OVERNIGHT DELIVERY:** I served such envelope or package to be delivered on the same day to an authorized courier or driver authorized by the overnight service carrier to receive documents, in an envelope or package designated by the overnight service carrier.
- BY HAND DELIVERY:** I caused such envelope(s) to be delivered by hand to the office of the addressee(s).
- STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 30, 2009, at Los Angeles, California.



Jennifer B. Rodriguez

SERVICE LIST

California Court of Appeal
Third Appellate District
Clerk of the Court
900 N. Street, #400
Sacramento, CA 95814

Superior Court of California
County of Sacramento
Clerk of the Court
720 Ninth Street
Sacramento, CA 95814

Victor M. Sher, SBN 96197
Sher & Leff, LLP
450 Mission Street, Suite 400
San Francisco, CA 94105
Telephone (415) 348-8300
Facsimile (415) 348-8333

Scott Summy, Admitted in Texas
Celeste A. Evangelisti, SBN 225232
John L. Yates, Admitted in Texas
Carla M. Burke, Admitted in Texas
Baron & Budd, P.C.
3102 Oak Lawn Avenue, Ste 1100
Dallas, Texas 75219-4281
Telephone (214) 521-3605
Facsimile (214) 520-1181

*Counsel for Cook Endeavors and D.J.
Nelson, Trustee for the D.J. Nelson Trust*

*Counsel for Cook Endeavors and D.J.
Nelson, Trustee for the D.J. Nelson Trust*

Charles J. Stevens, SBN 106981
David A. Cheit, SBN 121379
Bradley A. Benbrook, SBN 177786
Stevens, O'Connell & Jacobs LLP
400 Capitol Mall, Suite 1400
Sacramento, California 95814-4498
Telephone (916) 329-9111
Facsimile (916) 329-9110

David L. Schrader, SBN 149638
Morgan Lewis & Bockius
300 South Grand Avenue, 22nd Floor
Los Angeles, California 90071
Telephone (213) 612-2500
Facsimile (213) 612-2501

*Counsel for Cook Endeavors and D.J.
Nelson, Trustee for the D.J. Nelson Trust*

Counsel for Exxon Mobil Corporation