

Filed: December 2, 2011

IN THE SUPREME COURT OF THE STATE OF OREGON

MAYOLA WILLIAMS,
Personal Representative of the
Estate of Jesse D. Williams, Deceased,

Plaintiff-Appellant,
and

STATE OF OREGON,
acting by and through the Department of Justice,

Cross-Appellant
Cross-Respondent,

v.

RJ REYNOLDS TOBACCO COMPANY;
FRED MEYER, INCORPORATED;
and PHILIP MORRIS COMPANIES, INC.,

Defendants,

and

PHILIP MORRIS, INC.,
nka Philip Morris USA, Inc.,

Defendant-Respondent
Cross-Respondent.

(CC 970503957; SC S059014 (Control))

STATE OF OREGON,

Plaintiff-Appellant,

v.

AMERICAN TOBACCO COMPANY, INC., et al.,

Defendants,

and

PHILIP MORRIS, INC.,

Defendant-Respondent.

(CC 970604457; SC S059248)

On appeal certified from the Court of Appeals on appeal from a judgment of the Multnomah County Circuit Court.

Janice R. Wilson, Judge.

Argued and submitted September 19, 2011.

James S. Coon, Swanson Thomas & Coon, Portland, argued the cause for appellant, Mayola Williams, and Stephanie Striffer, Senior Assistant Attorney General, Salem, argued the cause for cross-appellant-cross-respondent State of Oregon. James S. Coon filed the briefs for Appellant. With Stephanie Striffer on the briefs for cross-appellant-cross-respondent were John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

William F. Gary, Harrang Long Gary Rudnick PC, Eugene, argued the cause for respondent-cross-respondent Philip Morris United States of America Incorporated. With him on the answering brief was Sharon A. Rudnick.

Lisa T. Hunt, Portland, filed a brief on behalf of *amici curiae* American Lung Association of the Mountain Pacific, American Cancer Society, Campaign for Tobacco Free Kids, Upstream Public Health and the Tobacco-Free Coalition.

Janie Robben, Oregon Crime Victims Law Center, Portland, filed a brief on behalf of *amicus curiae* Oregon Crime Victims Law Center.

Margaret Garvin, Executive Director, National Crime Victim Law Institute, at Lewis & Clark Law School, Portland, filed a brief on behalf of *amicus curiae* National Crime Victim Law Institute.

Before De Muniz, Chief Justice, and Durham, Kistler, Walters, and Linder,

Justices.*

DE MUNIZ, C. J.

The judgment of the circuit court in *Williams v. Philip Morris* (CC970503957) is reversed, and the case is remanded for entry of a judgment consistent with this opinion. The post-judgment order in *State v. American Tobacco Co.* (CC 970604457) is reversed.

*Balmer and Landau, JJ., did not participate in the consideration or decision of this case.

1 DE MUNIZ, C. J.

2 This is a certified appeal from the Court of Appeals. *See* ORS 19.405
3 (describing process for certification of appeal to this court). The dispute arises out of the
4 case of *Williams v. Philip Morris, Inc.*, in which, in 1999, a jury awarded the Estate of
5 Jesse Williams (the Williams estate) compensatory damages and \$79.5 million in
6 punitive damages for Philip Morris, Inc.'s (Philip Morris) fraud and negligence leading to
7 the smoking-related lung cancer death of Jesse Williams. After over a decade of appeals,
8 during which the case has been before this court multiple times, the punitive damages
9 award now has been affirmed.¹ Philip Morris has paid the compensatory damages and
10 part of the punitive damages to the Williams estate, but has refused to pay the 60 percent
11 of the jury's punitive damages award that is allocated to the state under Oregon's split
12 recovery statute, ORS 31.735.² The state and the Williams estate have sought to force
13 Philip Morris to pay that 60 percent share, either to the state, as the statute directs, or,
14 alternatively, to the Williams estate. The trial court ruled that the state had released its

¹ *Williams v. Philip Morris Inc.*, 335 Or 142, 61 P3d 938 (2002), *rev'd and rem'd*, 540 US 801, 124 S Ct 56, 157 L Ed 2d 12 (2003), *on remand*, 340 Or 35, 127 P3d 1165 (2006), *rev'd and rem'd*, 549 US 346, 127 S Ct 1057, 166 L Ed 2d 940 (2007), *on remand*, 344 Or 45, 176 P3d 1255 (2008), *cert dismissed as improvidently granted*, 556 US 178, 129 S Ct 1436, 173 L Ed 2d 346 (2009).

² At the time that the complaint in *Williams v. Philip Morris, Inc.* was filed, Oregon's split recovery statute was numbered as ORS 18.540. In 2003, it was renumbered as ORS 31.735. For convenience, we refer to that statute at all times in this opinion as it is currently codified. We set out the text of ORS 31.735 later in this opinion.

1 claim to those punitive damages in a settlement agreement in another action, and that the
2 Williams estate also has no right to the portion of the punitive damages award allocated
3 to the state under ORS 31.735. The state and the Williams estate appealed that ruling to
4 the Court of Appeals, which certified the appeal to this court. We now hold that the
5 state's statutory right to a share of punitive damages is not a "released claim," as that term
6 is defined in the settlement agreement in the other action, and therefore, the state did not
7 release its right to pursue payment of its statutory interest in 60 percent of the *Williams*
8 punitive damages award when it settled that other action. We therefore reverse the
9 judgment of the trial court.

10 The following facts are undisputed. For decades, Jesse Williams smoked
11 cigarettes manufactured and marketed by Philip Morris. In March 1997, Williams died
12 of lung cancer, and later that year, his estate filed a complaint against Philip Morris,
13 alleging that the company's fraud and negligence caused his death. In November 1998,
14 the Williams estate moved to amend the complaint to add a claim for punitive damages.
15 Philip Morris opposed that motion, but the trial court granted the estate leave to file the
16 amended complaint in December 1998. In March 1999, a jury returned a verdict in favor
17 of the Williams estate, awarding the estate economic and noneconomic damages on the
18 negligence and fraud claims, and awarding \$79.5 million in punitive damages on the
19 fraud claim. As noted, the case, and particularly the punitive damages award, has been
20 the subject of protracted appeals in this court and in the United States Supreme Court.
21 This court ultimately affirmed the punitive damages award, *Williams v. Philip Morris*
22 *Inc.*, 344 Or 45, 176 P3d 1255 (2008), *cert dismissed as improvidently granted*, 556 US

1 178, 129 S Ct 1436, 173 L Ed 2d 346 (2009), and the appellate judgment issued in 2009.

2 Also in 1997, the State of Oregon filed an action against Philip Morris and
3 other major domestic cigarette manufacturers and distributors of tobacco products,
4 alleging unfair trade practices, ORICO violations, and other claims. In *State v. American*
5 *Tobacco Co., Inc., et al. (State v. Philip Morris)*,³ the state alleged that it had incurred
6 hundreds of millions of dollars in increased Medicaid expenses for medical care for low-
7 income Oregon residents and increased health insurance premiums for public employees
8 as a result of the tobacco companies' unlawful conduct. In 1998, Oregon settled its
9 claims against the tobacco companies when its attorney general, and the attorneys general
10 of 45 other states, entered into a "Master Settlement Agreement" (MSA), a global
11 settlement agreement with Philip Morris and the other tobacco companies. As part of the
12 MSA, the tobacco companies agreed, among other things, to make annual payments to
13 the settling states to compensate the states for past and future health care expenses. They
14 also agreed to adhere to restrictions on their advertising and marketing. In return, the
15 settling states agreed to release the tobacco companies from past and future claims
16 relating to the manufacturing of, sale of, and exposure to tobacco products, as well as
17 claims relating to research, statements, or warnings regarding tobacco products.⁴ Oregon

³ Although the case is denominated *State v. American Tobacco Co., Inc., et al.*, in the trial court register and throughout the appellate process, the parties have always referred to the case as *State v. Philip Morris*. For convenience, we do the same in this opinion.

⁴ The terms of the MSA release provisions are set out later in this opinion.

1 Attorney General Hardy Myers signed the MSA in November 1998, and the trial court
2 entered a consent decree based on that agreement in December 1998.

3 In April 1999, after the jury returned the verdict in *Williams v. Philip*
4 *Morris*, Philip Morris sent the Oregon Attorney General a letter asserting that the MSA
5 released Philip Morris from its obligation under ORS 31.735 to pay the state its 60
6 percent share of the punitive damages award.⁵ The state then moved in *State v. Philip*
7 *Morris* for declaratory relief concerning its entitlement to part of the punitive damages

⁵ ORS 31.735 provides, in part:

"(1) Upon the entry of a verdict including an award of punitive damages, the Department of Justice shall become a judgment creditor as to the punitive damages portion of the award to which the Criminal Injuries Compensation Account is entitled pursuant to paragraph (b) of this subsection, and the punitive damage portion of an award shall be allocated as follows:

"(a) Forty percent shall be paid to the prevailing party. * * *

"(b) Sixty percent shall be paid to the Criminal Injuries Compensation Account of the Department of Justice Crime Victims' Assistance Section to be used for the purposes set forth in ORS chapter 147. * * *

"* * * * *

"(3) Upon the entry of a verdict including an award of punitive damages, the prevailing party shall provide notice of the verdict to the Department of Justice. In addition, upon entry of a judgment based on a verdict that includes an award of punitive damages, the prevailing party shall provide notice of the judgment to the Department of Justice. The notices required under this subsection must be in writing and must be delivered to the Department of Justice Crime Victims' Assistance Section in Salem, Oregon within five days after the entry of the verdict or judgment."

1 awarded in *Williams*. The trial court stayed the proceedings pending the outcome of the
2 *Williams* appeals.

3 After the *Williams* punitive damages award was affirmed on appeal in
4 2009, Philip Morris paid the Williams estate over \$61 million in full satisfaction of the
5 award of economic and noneconomic damages, and in full satisfaction of the estate's
6 interest in 40 percent of the punitive damages award allocated to the Williams estate
7 under ORS 31.735, plus costs and interest on those awards. The Williams estate
8 executed a partial satisfaction of money judgment, but asserted that, if the state had
9 released its share of the punitive damages award, then the estate was entitled to recover
10 that share.⁶

11 The trial court then lifted the stay in *State v. Philip Morris* and
12 recommenced the proceedings on the state's action to construe the terms of the MSA.
13 The court consolidated *Williams v. Philip Morris* and *State v. Philip Morris* to decide the
14 legal questions surrounding entitlement to the punitive damages award: *viz.*, whether by
15 signing the MSA, the state released its allocated share in the *Williams* punitive damages
16 award and, if so, what should happen to that money.

17 In briefs and in arguments in the consolidated cases, the state and the

⁶ By our calculations, today (12 years after the entry of the judgment in the *Williams* case), the remaining 60 percent of the punitive damages award, plus accrued simple interest at nine percent per annum, amounts to over \$99 million. ORS 82.010(2)(b) (providing for simple interest on judgments at rate of nine percent per annum).

1 Williams estate contended that the state's statutory allocation of 60 percent of any
2 eventual punitive damages award was not a "Claim" or a "Released Claim" under the
3 MSA, because the state was entitled to a share of the punitive damages award by
4 operation of law, or alternatively that the MSA was at least ambiguous as to whether the
5 state had released its right to recover 60 percent of the punitive damages award.⁷ In that
6 latter regard, the Williams estate also argued that the MSA contained conflicting
7 provisions, one appearing to provide that the state released claims for punitive damages,
8 and another appearing to provide that such claims are not part of the settlement.

9 In addition, both the state and the Williams estate argued that extrinsic
10 evidence supported their position that the state had not released its right to the 60 percent
11 allocation of the punitive damages award under ORS 31.735. In particular, they asserted

⁷ In 2004, the state and the Williams estate entered into an agreement to cooperate in an effort to ensure that Philip Morris is required to pay the entire amount of the punitive damages awarded in *Williams*, and to share those funds if successful. In part the agreement provides:

"8. Any amount recovered by the State of Oregon or by the Williams Estate or both in *State of Oregon v. Philip Morris*, whether by litigation to final judgment, by settlement, or by any other means, shall be paid 55% to the State of Oregon and 45% to the Williams Estate and its attorneys. In the event that Philip Morris pays 100% of the final appellate judgment in *Williams v. Philip Morris* with or without litigating *State of Oregon v. Philip Morris*, the State of Oregon would receive 33.33% of the total punitive damages recovered, and the Williams Estate and its attorneys would receive 66.67% of the total punitive damages recovered."

Under that agreement, the state and the Williams estate each argued at the trial court level and in this court that the state had not released its statutory share of the punitive damages award when it entered into the MSA, and, if it had, then the estate was entitled to recover that part of the award.

1 that, when the Oregon Attorney General signed the MSA, he was aware of the *Williams*
2 case and the fact that the Williams estate claimed punitive damages, and that, by the end
3 of December 1998, only a few weeks after signing the MSA, the Attorney General wrote
4 at least two official letters assuring the recipients of those letters that the settlement
5 would not affect any interest of the state's other than those the state asserted in *State v.*
6 *Philip Morris*. In addition, the state and the Williams estate argued that Philip Morris
7 appeared to share that belief, pointing to evidence that, on December 22, 1998, counsel
8 for the tobacco companies (including Philip Morris) sent a notice to the attorneys general,
9 as required by the MSA, listing "potential released claims" under the MSA. The tobacco
10 companies described the list as "substantially over inclusive" in an "exercise of caution"
11 to include every known case in which there was a "colorable possibility" of a released
12 claim. Although the *Williams* case was pending at that time, it was not included in the
13 tobacco companies' list.

14 In response, Philip Morris argued that the wording of the MSA release
15 provisions is extraordinarily broad and encompasses the state's interest in its statutory
16 share of the punitive damages award. Philip Morris contended that, properly understood,
17 the MSA does not contain any provision that contradicts that broad release provision.
18 Urging that the MSA is not ambiguous, Philip Morris moved to strike the extrinsic
19 evidence of the parties' intent in entering into the MSA not to release the state's share of
20 any punitive damages award in *Williams*. Finally, Philip Morris argued that the Williams
21 estate was not entitled to the state's share of the punitive damages award because, under
22 the split recovery statute, plaintiffs acquire no right, entitlement, property interest, or

1 even expectation interest in the state's statutory allocation of a punitive damages award.

2 The trial court ultimately ruled in Philip Morris's favor on all points. The
3 court concluded that (1) the state had released its right to a share of the *Williams* punitive
4 damages award by entering into the MSA; (2) the MSA was not ambiguous, and,
5 therefore, there was no need for extrinsic evidence of the parties' intent,⁸ and (3) the
6 Williams estate was not entitled to the unpaid 60 percent of the jury's punitive damages
7 verdict. As to the MSA's release provisions, the trial court stated:

8 "The State's claim for money from Philip Morris pursuant to the
9 judgment in the *Williams* case arises, at least indirectly, from and is
10 certainly 'in any way related' to conduct arising out of and related to the
11 use, sale, distribution, advertising, marketing or health effects of tobacco.
12 The State's right to the money at issue arose precisely because the jury
13 imposed punitive damages against Philip Morris in its verdict for the type
14 of conduct described in the MSA. There simply would have been no
15 verdict for punitive damages and no judgment as to which the State is a
16 creditor but for the described conduct."

17 In concluding that the MSA is not ambiguous, the trial court stated:

18 "I find nothing contradictory about those two provisions [one
19 releasing claims for punitive, among other things, punitive damages, and
20 another stating that no part of any payment under the MSA is for, among
21 other things, punitive damages]. It is more common than not in settlement
22 agreements for the releasing language to be as broad as the defendant can
23 make it and the plaintiff will allow, while there is often some limiting
24 characterization of the payment made. Often the characterization is made

8 In addition to concluding that the MSA was not ambiguous, the trial court
concluded that the Attorney General's opinion about the meaning of the agreement,
disclosed to nonparties after the agreement was signed, was not probative, and that the
letter from the tobacco companies listing all the released claims was not probative
because it was generated in fulfillment of a notice obligation under the MSA and was not
produced as part of some due diligence before the settlement itself was reached.

1 for tax reasons -- sometimes for the plaintiff's benefit, sometimes for the
2 defendant's.

3 "Following the Williams Estate's argument, any time the language in
4 a settlement agreement characterizing a settlement payment is not identical
5 to the language characterizing the claims released, the settlement agreement
6 would be ambiguous, and that is not sound reasoning factually or legally."

7 Finally, with respect to the Williams estate's right to the state's allocation of the punitive
8 damages award, the court stated:

9 "I conclude that the state became a judgment creditor [under ORS
10 31.735, when the jury returned the verdict awarding punitive damages], but
11 had released its right to collect. The Williams estate never had an interest
12 in the portion of the punitive damages award allocated by statute to the
13 State, and the State's release through the MSA did not create such an
14 interest in the Williams estate. So I conclude that the estate is not entitled
15 to the remaining portion of the punitive damages award in that verdict."

16 The state and the Williams estate each filed notices of appeal in the Court of Appeals.

17 The Court of Appeals, noting (1) that this court already has reviewed much of the record
18 of the case in deciding *Williams v. Philip Morris* and is familiar with the facts and issues
19 surrounding the award of punitive damages, and (2) that review in this court appeared to
20 be inevitable because of the amount of money at stake and because of the important
21 issues to be resolved, unanimously decided to certify the appeals to this court. This court
22 accepted certification.

23 Our analysis of the legal issues presented in this case requires that we
24 interpret the MSA. To begin that analysis, we set out the operative terms of the
25 agreement, starting with the release itself.

26 The MSA includes the following provision, in a section entitled
27 "SETTLING STATES' RELEASE, DISCHARGE AND COVENANT," under the

1 heading "Release":

2 "(1) Upon the occurrence of State-Specific Finality in a Settling
3 State, such Settling State shall absolutely and unconditionally release and
4 forever discharge all Released Parties from all Released Claims that the
5 Releasing Parties directly, indirectly, derivatively or in any other capacity
6 ever had, now have, or hereafter can, shall or may have.

7 "** * * * *

8 "(3) Each Settling State (for itself and for the Releasing Parties)
9 further covenants and agrees that it (and the Releasing Parties) shall not
10 after the occurrence of State Specific Finality sue or seek to establish civil
11 liability against any Released Party based, in whole or in part, upon any of
12 the Released Claims, and further agrees that such covenant and agreement
13 shall be a complete defense to any such civil action or proceeding."

14 Oregon, as one of the 46 signatories to the MSA, is a "Settling State." Additionally, it is
15 undisputed that, under the MSA, the state is a "Releasing Party" and that Philip Morris is
16 a "Released Party."⁹ Accordingly, under the "Release," the state "absolutely and

⁹ "Releasing Party" is defined as follows:

"Releasing Parties" means each Settling State and any of its past, present and future agents, officials acting in their official capacities, legal representatives, agencies, departments, commissions and divisions; and also means, to the full extent of the power of the signatories hereto to release past, present and future claims, the following: (1) any Settling State's subdivisions * * *, public entities, public instrumentalities and public educational institutions; and (2) persons or entities acting in a parens patriae, sovereign, quasi-sovereign, private attorney general, qui tam, taxpayer, or any other capacity, whether or not any of them participate in this settlement, (A) to the extent that any such person or entity is seeking relief on behalf of or generally applicable to the general public in such Settling State or the people of the State, as opposed solely to private or individual relief for separate and distinct injuries, or (B) to the extent that any such entity (as opposed to an individual) is seeking recovery of health-care expenses * * * paid or reimbursed, directly or indirectly, by a Settling State."

1 unconditionally release[d] and forever discharge[d]" Philip Morris from all "Released
2 Claims" that it then had or ever would have.

3 "Released Claims" are defined, in pertinent part, as

4 "(1) for past conduct, acts or omissions (including any damages
5 incurred in the future arising from such past conduct, acts or omissions),
6 those Claims directly or indirectly based on, arising out of or in any way
7 related, in whole or in part, to (A) the use, sale, distribution, manufacture,
8 development, advertising, marketing or health effects of, (B) the exposure
9 to, or (C) research, statement or warnings regarding Tobacco Products
10 * * *."

11 "Claims," in turn, are defined as

12 "any and all manner of civil (i.e., non-criminal): claims, demands, actions,
13 suits, causes of action, damages (whenever incurred), liabilities of any
14 nature including civil penalties and punitive damages, as well as costs,
15 expenses and attorneys' fees * * *, known or unknown, suspected or
16 unsuspected, accrued or unaccrued, whether legal, equitable, or statutory."

17 To resolve a dispute over the meaning of a contractual provision, this court
18 first considers the text of the disputed provision in the context of the contract as a whole
19 to determine whether the disputed provision is ambiguous. *Yogman v. Parrott*, 325 Or
20 358, 361-63, 937 P2d 1019 (1997). A contractual provision is ambiguous if its wording
21 can, in context, reasonably be given more than one plausible interpretation. *Pacific First*

"Released Party" is defined as follows:

 '"Released Parties' means all Participating Manufacturers, their past,
 present and future Affiliates, and the respective divisions, officers,
 directors, employees, representatives, insurers, underwriters, Tobacco-
 Related Organizations, trade associations, suppliers, agents, auditors,
 advertising agencies, public relations entities, attorneys, retailers and
 distributors of any Participating Manufacturer or of any such Affiliate
 * * *."

1 1 *Bank v. New Morgan Park Corp.*, 319 Or 342, 348, 876 P2d 761 (1994). Whether a
2 2 provision is ambiguous is a question of law, as is the meaning of an unambiguous
3 3 provision. *State v. Heisser*, 350 Or 12, 25-26, 249 P3d 113 (2011). The court must, if
4 4 possible, construe the contract so as to give effect to all of its provisions. *Johnson v.*
5 5 *School District No. 12*, 210 Or 585, 592, 312 P2d 591 (1957); *see* ORS 42.230 (in
6 6 construing a document, court is "to ascertain and declare what is, in terms or in
7 7 substance, contained therein, not to insert what has been omitted, or to omit what has
8 8 been inserted; and where there are several provisions or particulars, such construction is,
9 9 if possible, to be adopted as will give effect to all"). If the meaning of the provision is
10 10 clear from the text and context, then the analysis ends. *Yogman*, 325 Or at 361. If the
11 11 provision is ambiguous, the court moves to the second step of the analysis, which is to
12 12 consider other evidence of the parties' intent. *Id.* at 363.

13 With that interpretive paradigm in mind, we turn to the principal question
14 14 before us: whether the MSA's definitions of "Claims" or "Released Claims" encompass
15 15 the state's interest in an allocation of the *Williams* punitive damages award. Before we
16 16 determine whether those terms apply to the state's allocation, however, we think it is
17 17 helpful first to examine the nature of the state's interest.

18 The state was not a party in *Williams*: it did not directly bring a claim,
19 19 make a demand, file an action or suit, assert a cause of action, allege damages, or assert a
20 20 liability based on the smoking and health-related conduct described in the MSA's
21 21 definition of "Released Claims." In other words, the state's interest does not arise out of
22 22 any direct participation in the *Williams* case. Rather, the state's interest arose by

1 operation of Oregon's split recovery statute, ORS 31.735. For convenience, we set out
2 the pertinent parts of ORS 31.735 again here:

3 "(1) Upon the entry of a verdict including an award of punitive
4 damages, the Department of Justice shall become a judgment creditor as to
5 the punitive damages portion of the award to which the Criminal Injuries
6 Compensation Account is entitled pursuant to paragraph (b) of this
7 subsection, and the punitive damage portion of an award shall be allocated
8 as follows:

9 "(a) Forty percent shall be paid to the prevailing party. * * *

10 "(b) Sixty percent shall be paid to the Criminal Injuries
11 Compensation Account of the Department of Justice Crime Victims'
12 Assistance Section to be used for the purposes set forth in ORS chapter
13 147. * * *

14 "* * * * *

15 "(3) Upon the entry of a verdict including an award of punitive
16 damages, the prevailing party shall provide notice of the verdict to the
17 Department of Justice. In addition, upon entry of a judgment based on a
18 verdict that includes an award of punitive damages, the prevailing party
19 shall provide notice of the judgment to the Department of Justice. The
20 notices required under this subsection must be in writing and must be
21 delivered to the Department of Justice Crime Victims' Assistance Section in
22 Salem, Oregon within five days after the entry of the verdict or judgment."

23 As the terms of ORS 31.735 provide, the statute applies without regard to
24 the subject matter or nature of any claims made in a civil action in which punitive
25 damages are awarded. If a jury awards punitive damages, the state becomes a judgment
26 creditor on entry of the verdict as to the "portion of the [punitive damages] award to
27 which the Criminal Injuries Compensation Account is entitled" under the statute. The
28 judgment of the court must allocate shares of any punitive damage award according to the
29 percentages set out in ORS 31.735(1)(a) and (b), regardless of the conduct that triggered
30 the award. In other words, the statute is blind to the nature of the underlying action and

1 the conduct that gave rise to it.

2 It is true that subsection (1) makes the state a "judgment creditor" on entry
3 of a verdict that includes an award of punitive damages, but the statute does not require
4 the state to take any particular action to assert its right to the 60 percent allocation of a
5 punitive damages award as set out in paragraph (1)(b). Rather, as this court explained in
6 *Patton v. Target Corp.*, 349 Or 230, 235-43, 242 P3d 611 (2010), the state's status as a
7 judgment creditor serves another purpose, which a brief description of the history of the
8 statute helps to elucidate. When Oregon's split recovery statute first was enacted, it
9 mandated how punitive damages awards were to be distributed; it did not make the state a
10 judgment creditor. Over time, the legislature became aware that, on occasion, the parties
11 to litigation in which punitive damages were awarded agreed before judgment to settle
12 their cases to avoid paying the state a share of the punitive damages award. To prevent
13 that type of agreement, the legislature ultimately amended the statute to make the state a
14 judgment creditor on entry of a verdict. In *Patton*, this court held that the state's status as
15 a judgment creditor on entry of a verdict that includes an award of punitive damages
16 confers no specific rights or obligations on the state before the judgment is entered. 349
17 Or at 243.¹⁰ The parties remain free to settle the case as they see fit. The state's consent

¹⁰ In *Patton*, a former employee of Target successfully sued the company for wrongful discharge, and a jury awarded the employee a substantial sum in punitive damages. After the verdict, but before the trial court entered judgment, the employee and Target entered into a settlement agreement that eliminated the state's share of the punitive damages award under ORS 31.735, and jointly moved the court to approve a stipulated judgment dismissing the case. The state filed a complaint in intervention in the case,

1 to the settlement is not required even if the settlement reduces or eliminates the punitive
2 damages award that would be allocated to the state under ORS 31.735. However, once a
3 court has entered judgment awarding punitive damages, and only then, does the state
4 have the right of a judgment creditor to enforce the statutory allocation of part of the
5 punitive damages award to the crime victims' fund.

6 Under ORS 31.735, the state's statutory interest in 60 percent of a punitive
7 damages award arises by operation of law. Moreover, the statutory designation of the
8 state as a judgment creditor is a mechanism that allows the state to enforce compliance
9 with ORS 31.735; it does not change the nature of the state's interest. We have already
10 noted that the state does not and never did have any *direct* claim, demand, action, suit,
11 cause of action, damages, or liability for any tobacco related conduct in *Williams*. It was
12 not a party to that case. The question, then, is whether the state's statutory interest, or its
13 effort to enforce payment of that statutory interest, nonetheless is a "Claim" or a
14 "Released Claim" under the definition of those terms in the MSA.

15 Under the MSA, "Claims" means:

16 "any and all manner of civil (i.e., non-criminal): claims, demands, actions,
17 suits, causes of action, damages (whenever incurred), liabilities of any

arguing that it had a vested interest in 60 percent of the punitive damages award and that the parties, therefore, were precluded from settling the case without its consent. This court held that, at the time of entry of a verdict awarding punitive damages, the state had, "at most, an economic expectancy of 60 percent of whatever portion of punitive damages, if any, eventually is memorialized in a judgment." 349 Or at 239. However, the state did not have the right to block a settlement; its consent was not a prerequisite to any post-verdict settlement between the parties. *Id.* at 343-44.

1 nature including civil penalties and punitive damages, as well as costs,
2 expenses and attorney's fees * * *."

3 We agree that, by covering "any and all manner" of various types of claims, the definition
4 of "Claims" is very broad and could be seen to cover the state's action to collect under
5 ORS 31.735. However, even assuming, for purposes of argument here, that the state's
6 action is a "Claim" as that term is defined in the MSA, we have no trouble concluding
7 that it is not a "Released Claim."

8 Under the MSA's release provision, the state released "all Released Parties
9 from all Released Claims that the Releasing Parties directly, indirectly, derivatively or in
10 any other capacity ever had, now have, or hereafter can, shall or may have." The
11 definition of "Released Claims" is bifurcated into separate definitions for past and future
12 conduct, acts, or omissions. As relevant here, "Released Claims * * * for past conduct,
13 acts or omissions" are

14 "those Claims directly or indirectly based on, arising out of or in any way
15 related, in whole or in part, to (A) the use, sale, distribution, manufacture,
16 development, advertising, marketing or health effects of, (B) the exposure
17 to, or (C) research, statement or warnings regarding Tobacco Products
18 * * *."

19 In other words, the state released only those "Claims" that are "directly or indirectly
20 based on, arising out of or in any way related" to the described tobacco-related conduct.
21 As we already have explained, the state's interest in the 60 percent share arises by
22 operation of law. If Philip Morris continues to refuse to pay the 60 percent it owes the
23 crime victims' fund under ORS 31.735, the state may have to take steps to execute on the
24 judgment to force Philip Morris to pay it, but that claim will be to enforce the statute, not

1 to recover damages for Philip Morris's tobacco-related conduct. And while it could be
2 said that the state's *interest* in a share of the *Williams* punitive damages award is
3 indirectly related in some way to the *Williams* case, its effort to secure payment under the
4 statute is not related in any way to that case.

5 Philip Morris counters that

6 "[t]he State's claim under ORS 31.735 in this case only exists because the
7 Williams Estate sued and recovered based on the same past conduct that
8 formed the basis of the State's claims against [Philip Morris] and which
9 expressly defines the scope of release. Therefore, even if the State's claim
10 under ORS 31.735 for 60% of the *Williams* punitive damages award could
11 properly be classified as one 'for a statutory allocation' rather than one 'for
12 conduct,' it would *still* be a claim 'indirectly based on, arising out of or in
13 any way related, in whole or in part, to' the conduct that formed the basis of
14 the claims in *Williams*."

15 (Emphasis in original.) It is true that the state's statutory entitlement to a share of the
16 punitive damages award in *Williams* "only exists" because the Williams estate sued Philip
17 Morris for tobacco-related conduct. However, the fact that there is a but-for causal
18 connection between the *Williams* case (and Philip Morris's tobacco-related conduct that
19 triggered the punitive damages award in that case) and the state's entitlement to part of
20 the punitive damages award does not change the legal nature of the state's interest in its
21 share of that award.¹¹ The state's interest in the punitive damages award arises out of a

¹¹ We also reject Philip Morris's assertion that the Williams estate sued and recovered based on "the same past conduct that formed the basis of the State's claims" against Philip Morris. The state sued Philip Morris and other tobacco companies to recover for the state's own increased health care costs arising out of the tobacco companies' tobacco-related conduct. The Williams estate, by contrast, sued and recovered based on misconduct directed at Jesse Williams, not at the people of the State

1 statute that is indifferent to the factual basis of the underlying litigation. The state's
2 entitlement to the statutory share is not, even indirectly, related to or dependent on the
3 tobacco-related conduct that is described in the MSA.

4 Philip Morris also argues that, by seeking a post-judgment declaration in
5 the trial court as to the correctness of Philip Morris's interpretation of the MSA, the state
6 has sought to establish liability for the statutory share of the punitive damages award in
7 *Williams*, which itself constitutes a "Released Claim" under the MSA. In support of that
8 position, Philip Morris contends that, under this court's decision in *DeMendoza v.*
9 *Huffman*, 334 Or 425, 449, 51 P3d 1232 (2002), it is *only* the state that has ever had an
10 interest in the punitive damages awarded in *Williams*.

11 We disagree. First, in *DeMendoza*, this court did *not* hold that only the
12 state ever has an interest in the part of the punitive damages award allocated to the state
13 under ORS 31.735, or that plaintiffs never have any interest in the entirety of a punitive
14 damages award. Rather, the court ruled only that a plaintiff does not have a
15 *constitutionally vested* pre-judgment property right in punitive damages, which, under
16 Article I, section 18, of the Oregon Constitution, could not be taken for public use
17 without just compensation. 344 Or at 449. More importantly, *DeMendoza* says nothing

of Oregon. As Philip Morris itself has argued so strenuously in this court in earlier cases, and as the United States Supreme Court affirmed, punitive damages may not be awarded to punish a defendant for harms to persons who were not parties to the litigation. *Philip Morris USA v. Williams*, 549 US 346, 353, 127 S Ct 1057, 166 L Ed 2d 940 (2007); *Williams v. Philip Morris Inc.*, 344 Or 45, 48-55, 176 1255 (2008) (discussing history of the case).

1 about whether the state has a claim for punitive damages under ORS 31.735. It also is
2 noteworthy that, in *Patton*, this court held that, up until entry of the judgment awarding
3 punitive damages, the plaintiff controls the claim for punitive damages: the plaintiff can
4 expand the claim or drop it, and, even after a jury renders a verdict awarding punitive
5 damages, the plaintiff can settle away a punitive damages award. *See Patton*, 349 Or at
6 243-44. The state is powerless to stop a plaintiff from depriving the state of its share of a
7 punitive damages award up to that point. *Id.* Second, as we already have discussed, the
8 state's entitlement to a share of a punitive damages award in *Williams* is not even
9 indirectly related to the tobacco-related conduct identified in the MSA. Rather, that
10 entitlement arose by operation of law. In other words, the state's effort to obtain its
11 statutory share was based on Philip Morris's refusal to pay the allocation as required by
12 the statute, not on Philip Morris's tobacco-related conduct. The state's pursuit of a trial
13 court declaration that Philip Morris's interpretation of the MSA was incorrect is not a
14 "Released Claim."

15 Based on the foregoing, we hold that the state's interest in a share of the
16 *Williams* punitive damages award was not a "Released Claim" under the MSA. The state
17 did not release any claim to that money.

18 Alternatively, Philip Morris argues that the state, in executing the MSA,
19 promised that Philip Morris and the other tobacco companies would have no further
20 liability, not just to the state, but also to *third parties* acting on the public's behalf with
21 respect to smoking and health related claims. To that end, the definitions of "Released
22 Claim" and "Releasing Parties" explicitly contemplate that the release will apply to

1 claims brought by persons other than the state for the benefit of the public. And, under
2 those definitions, Philip Morris argues, the Williams estate is a "Releasing Party" and its
3 claim for punitive damages, at least to the extent that those damages are allocated to the
4 state's crime victim's fund, is a "Released Claim."

5 The MSA defines "Releasing Party" to include:

6 "persons or entities acting in a parens patriae, sovereign, quasi-sovereign,
7 private attorney general, qui tam, taxpayer, or other capacity, whether or
8 not any of them participate in this settlement, (A) to the extent that any
9 such person or entity is seeking relief on behalf of or generally applicable
10 to the general public in such Settling State or the people of the State, as
11 opposed solely to private or individual relief for separate and distinct
12 injuries."

13 Philip Morris argues that the obvious purpose of that provision is to prevent persons other
14 than the state from recovering on the *public's* behalf from Philip Morris for the same
15 alleged misconduct, and it would vitiate the provision if the public could recover from
16 Philip Morris again for the same misconduct simply because the action was not brought
17 by the state but by some third party also acting on behalf of the public. In this case,
18 according to Philip Morris, the Williams estate was suing, in part, for the public's 60
19 percent share, a share that, it contends, under this court's decision in *DeMendoza*, the
20 Williams estate never had an interest in. Thus, Philip Morris concludes, even if the claim
21 to the state's 60 percent share of the *Williams* punitive damages award actually is a claim
22 by the Williams estate, it would still be a "Released Claim" under the MSA because the
23 Williams estate was seeking relief that, under ORS 31.735, could inure only to the benefit
24 of the public.

25 The short answer to Philip Morris's argument lies in the wording of the

1 MSA's definition of "Releasing Party": the definition applies to third parties only "to the
2 extent that any such person or entity is seeking relief on behalf of or generally applicable
3 to the general public * * *, as opposed solely to private or individual relief for separate
4 and distinct injuries." By the plain terms of that definition, the Williams estate is not a
5 "Releasing Party." When the estate sued Philip Morris, the estate did not "seek[] relief on
6 behalf of or generally applicable to the general public." Nor could it. As noted above,
7 the United States Supreme Court has held that punitive damages may not be awarded to
8 punish a defendant for harms to persons who were not parties to the litigation. ____ Or at
9 ____ n 11 (slip op at 17 n 11). Rather, in its effort to recover damages for injuries suffered
10 by Jesse Williams, the estate was seeking "private or individual relief" for the death of
11 Jesse Williams, a "separate and distinct injur[y]."

12 Moreover, as we pointed out earlier in this opinion, Philip Morris's
13 contention that this court, in *DeMendoza*, held that a plaintiff never has an interest in the
14 60 percent of a punitive damages award that is allocated to the state under ORS 31.735 is
15 simply incorrect. The court held in *DeMendoza* that a plaintiff does not have a
16 constitutionally vested right to punitive damages before judgment, because the jury
17 ultimately has discretion not to award punitive damages. 334 Or at 449. However, the
18 fact that a plaintiff does not have a constitutionally guaranteed expectation of punitive
19 damages does not mean that a plaintiff never has any interest in the entirety of a punitive
20 damages award. As we discuss above, the estate had a significant interest in that award.
21 As this court explained in *Patton*, before a judgment is entered awarding punitive
22 damages, a plaintiff has the right to control the punitive damages claim, including the

1 right to settle away the state's 60 percent statutory share. 349 Or at 243-44. Thus, we
2 cannot conclude that the Williams estate sued Philip Morris on behalf of the public for
3 the share of the punitive damages award that would inure to the public's benefit after
4 entry of the judgment.¹² The Williams estate is not a "Releasing Party" under the MSA.

5 Finally, Philip Morris argues that, if this court concludes that the state did
6 not release its statutory interest in the *Williams* punitive damages award when it executed
7 the MSA, then the court must conclude that the MSA is ambiguous, because Philip
8 Morris's construction of the MSA's release terms to cover the state's entitlement to part of
9 the punitive damages award is plausible. Therefore, according to Philip Morris, this court
10 should remand the case for factfinding to resolve the ambiguity. *See Pacific First Bank*,
11 319 Or at 348 (a contract is ambiguous if it can reasonably be construed to have more
12 than one meaning).

13 We disagree that the MSA contains an ambiguity that must be resolved.
14 Our conclusion that the state's interest in its statutory share of the punitive damages
15 award is not covered under the MSA is not based on our construction of any ambiguous
16 terms of the MSA, but on our interpretation of the statute that confers the state's share.
17 That is, we have examined the nature of the state's interest under ORS 31.735, and we
18 conclude, as a matter of law, that that interest is *not* directly or indirectly based on,

¹² The Williams estate also points out that it sued Philip Morris in 1997, five years before this court resolved the constitutional challenges to ORS 31.735 in *DeMendoza*, and it consistently argued to the trial court that ORS 31.735 was unconstitutional and that it was entitled to the entire punitive damages award.

1 arising out of, or related in any way to the conduct that formed the basis for the estate's
2 claims in *Williams*. Rather, as discussed at length above, the state's interest arises by
3 operation of law in any case in which punitive damages are awarded, without regard to
4 the nature of the underlying litigation. We understand Philip Morris's construction of the
5 term "Released Claims" to include any entitlement to payment that is "'indirectly based
6 on, arising out of or in any way related, in whole or in part, to' the conduct that that
7 formed the basis of the claims in *Williams*." Accepting that construction as correct for
8 purposes of analysis here, we nevertheless conclude that the state's interest in 60 percent
9 of the punitive damages award in *Williams* is not a "Released Claim" for tobacco-related
10 conduct under the MSA, and that the state did not release its right to that share of the
11 punitive damages award in that case when it executed the MSA.

12 The judgment of the circuit court in *Williams v. Philip Morris*
13 (CC970503957) is reversed, and the case is remanded for entry of a judgment consistent
14 with this opinion. The post-judgment order in *State v. American Tobacco Co.*
15 (CC 970604457) is reversed.