

IN THE SUPREME COURT OF TEXAS

No. 96-0287

OWENS-CORNING FIBERGLAS CORPORATION, PETITIONER

v.

ROY MALONE ET AL., RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

- consolidated for oral argument with -

No. 96-0512

OWENS-CORNING FIBERGLAS CORPORATION, PETITIONER

v.

BARBARA WASIAK ET AL., RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

Argued November 21, 1996

CHIEF JUSTICE PHILLIPS, joined by JUSTICE ENOCH, concurring.

I concur in the Court's judgment and join in its opinion except for the discussion regarding the admissibility of prior, unpaid punitive damage awards. For the reasons explained by the Court, I agree that such awards should *generally* not be admissible when offered by a defendant to mitigate punitive damage liability. Because such awards are often reduced after trial or on appeal, admitting

them into evidence would often cause unfair prejudice and confusion.

There may be rare instances, however, where this rationale does not apply. If a defendant has engaged in a course of conduct resulting in repetitive punitive damage awards against it, and the defendant can demonstrate that such punitive awards *have been* regularly upheld on appeal, then those awards, even if unpaid at time of the current trial, should be admissible as mitigating evidence. The risk of prejudice from admitting the awards is no longer present in this situation. To the contrary, the defendant is at risk of unfair prejudice if the punitive awards are not admitted.

Therefore, rather than setting forth a hard-and-fast rule, as the Court has done, I would leave room for the admissibility of unpaid punitive awards in exceptional cases.

Thomas R. Phillips
Chief Justice

Opinion Delivered: June 5, 1998