STATE OF WISCONSIN
IN SUPREME COURT

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased,

Plaintiffs-Intervenors-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant,

NEIL F. LAMPSON, INC.,

Defendant-Respondent,

LAMPSON INTERNATIONAL LTD., FEDERAL INSURANCE COMPANY, and THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendants.

Case No. 01-0724
(consolidated with Case Nos. 01-1031 and 01-2486)

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I, DATED SEPTEMBER 30, 2003

BRIEF OF PATRICIA WISCHER, MARJORIE DeGRAVE AND RAMONA DULDE-STARR

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased;

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-
Cross-Appellant,

Case No. 01-1031
(consolidated with
Case Nos. 01-0724
and 01-2486)

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-Petitioner,

NEIL F. LAMPSON, INC., and LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY,

Defendant-Co-Appellant,

THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendant.

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased;

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-
Cross-Appellant,

Case No. 01-2486
(consolidated with
Case Nos. 01-0724
and 01-1031)

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-
Cross-Respondent,

NEIL F. LAMPSON, INC., and LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY, and THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendants-Respondents-
Cross-Appellants.

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STATEMENT OF ISSUE PRESENTED

What proof is required for a plaintiff to recover punitive damages under the phrase "in an intentional disregard of the rights of the plaintiff" as provided in Wis. Stat. §895.85(3)?

In a 2-to-1 decision (Schudson, J., dissenting), the court of appeals interpreted the phrase "to require either an intent by a defendant to cause injury to the plaintiffs or knowledge that the defendant's conduct was practically certain to cause the accident or injury to the plaintiffs." *Wischer v. Mitsubishi Heavy Industries America, Inc.*, 2003 WI App 202, ¶5, 267 Wis.2d 638, 673 N.W.2d 303.

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

This case stems from the deaths of three ironworkers who were killed on July 14, 1999, when a crane, which was under the exclusive control of Mitsubishi Heavy Industries America, Inc. (MHIA), collapsed while lifting an enormous roof piece for the Miller Park stadium and struck another crane holding the men.

II. PROCEDURAL HISTORY OF THE CASE.

The procedural history leading up to the court of appeals' opinion is discussed in detail in that opinion and will not be repeated in full here.

A. Proceedings in the Circuit Court.

This case was tried to a jury in the fall of 2000. The circuit court determined there was sufficient evidence to submit the issue of punitive damages to the jury. (App.66-69, 71-72)[1] The punitive damages instruction given to the jury was consistent with Wis JI-Civil 1707.1, which instructs a jury that "[a] person acts in an intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the plaintiff's rights, or is aware that his or her acts are practically certain to result in the plaintiff's rights being disregarded." (App.77-81) The jury unanimously found that MHIA "act[ed]

[1] Citations will take the following form: "App.50" refers to page 50 of the appendix to this brief. The index to that appendix contains the record document numbers for documents included therein.

in an intentional disregard of the rights of the decedents" and awarded $94 million in punitive damages. (App.75-76)

B. The Court of Appeals' Decision.

Patricia Wischer, Marjorie DeGrave and Ramona Dulde-Starr (hereinafter collectively "Wischer") argued in the court of appeals that Wis. Stat. §895.85(3) does not require a showing of an intent to cause injury. MHIA conceded that if Wischer's interpretation of the statute were correct, then it was appropriate for the circuit court to allow the jury to consider the punitive damages issue. (MHIA appeal brief, p. 25; App.123)

The court of appeals concluded that §895.85(3) "is not ambiguous." *Wischer*, 2003 WI App 202, ¶32. The court interpreted the phrase "intentional disregard of the rights of the plaintiff" so as "to require either an intent by a defendant to cause injury to the plaintiffs or knowledge that the defendant's conduct was practically certain to cause the accident or injury to the plaintiffs." *Id.* at ¶5.[2] Because the evidence did not show that MHIA intended to cause injury to the decedents or knew its conduct was practically certain to cause injury, the court reversed the punitive damages award. *Id.* at ¶¶5, 45, 46.

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[2] Later in its decision, the court expressed its interpretation of the statute differently, stating that the phrase means "either that the actor intended to cause the accident or injury ***or*** the actor was practically certain that his conduct could result in accident or injury." (emphasis in the original) *Wischer*, at ¶44.

III. STATEMENT OF FACTS.

A. Introduction.

The court of appeals' factual summary is, as the dissent points out, an "incomplete account of the evidence the jury ... found so compelling." *Wischer* (Schudson, J., dissenting), at ¶64 n. 2. The majority did not present the facts in a light most favorable to Wischer, but rather most favorably to MHIA, omitting crucial evidence of the course of MHIA's conduct for months before and culminating in the fatal Miller Park disaster.

Significantly, if Wischer is correct that §895.85(3) does not require intent to cause injury, there is no issue of sufficiency of evidence, because MHIA has admitted that if her interpretation is correct, then the jury had the right to consider punitive damages. (App.123)

B. Summary of MHIA's Conduct.

The evidence showed that the deaths at Miller Park stemmed, not from an isolated event, but from a course of conduct on the part of MHIA's top managers, Victor Grotlisch and Wayne Noel, intentionally disregarding worker safety for months during the construction. This course of conduct culminated with the choice to risk the lives of the workers on July 14, 1999, by directing the heavy lift operation in winds which Grotlisch and Noel knew were highly dangerous and in excess of the crane's limits. Not only were they repeat offenders before the fatal day, but the character of their conduct was exacerbated by post-

accident acts to try to cover up what happened and to continue similar dangerous acts at the work site and by their untruthfulness at trial.

C. The Hazardous Workplace.

Erecting the new stadium's roof, MHIA used a huge crane leased from Lampson International Ltd., but under MHIA's exclusive control. (App.126, 377, 391-426) Lampson provided a load chart with the crane, which placed limits on the crane's use. It prohibited using the crane where winds exceeded 20 mph and cautioned that the crane's capacity did not consider the wind's effect on the load suspended from the crane. (App.127-33, 430-33)

Wischer's expert Howard Shapiro, recognized by all as one of the world's foremost crane experts (App.379-80, 384-85), testified that industry custom and practice called for engineering calculations of the wind-exposed area of the lifted piece as well as the wind-exposed area of the crane. One would then adjust the 20 mph limit downward to arrive at a recommended safe wind speed. (App.313-25, 327-28)

Abundant evidence showed that MHIA was responsible for wind calculations and Grotlisch, the MHIA site manager (App.251), was in charge of lift operations. (App.134-35, 147, 197, 199, 218-19, 299-304, 307, 386) Grotlisch monitored wind conditions by a computer in the MHIA trailer. (App.221-22) Only he or Noel could order a roof lift to be aborted. (App.157, 161-62, 166, 263, 305-06)

It was undisputed that no one did the necessary wind

calculations for the lift of July 14, 1999, or for any of the prior nine heavy roof lifts at Miller Park. Grotlisch knew MHIA had not done them. (App.210, 252, 261) Although Grotlisch claimed that he assumed Lampson was doing them, he admitted that he never asked for nor saw them, and no Lampson employees ever told him they were doing them. (App.210-11) Grotlisch shrugged off his failure to assure that wind calculations were done by saying "I dropped the ball" (App.214), but the jury was entitled to infer that he knew full well that calculations were never done and he just did not care. Lampson employees testified that before the Miller Park construction ever started, they told Grotlisch and MHIA representatives that Lampson was not going to do the calculations and that MHIA needed to do them. (App.141-44, 343-45)

MHIA's indifference to the right to a safe workplace was further revealed by Grotlisch's conduct before July 14, 1999. He stated that he hired workers "from the neck down" (App.290, 348-49, 375) and he believed workers' complaints about safety concerns were not legitimate. (App.243) He told his safety supervisor Noel to stay in the trailer so he could look the other way as Grotlisch transported workers with iron parts in a man basket, knowingly violating MHIA's own safety rules. (App.215-17) Grotlisch also coerced Lampson to remove the Lampson employee on loan to MHIA to direct the crane, because this employee complained too often about safety problems. (App.137-40, 429)

Additionally, evidence showed intentional disregard of worker safety by Grotlisch in roof lifts prior to July 14, 1999 - insufficient manpower (App.149-53); excessively windy conditions (App.148-49); in snow and cold, late at night, to impress the media and the Stadium Board (App.154-55); unsafe operations to impress Brewer fans. (App.306-6B)

D. Admissions By Grotlisch and Noel Demonstrated Their Knowledge of the Dangers of Wind Effects on Cranes.

Named 4R3, the roof piece lifted on July 14, 1999, weighed 913,000 pounds, had a surface area of a billboard, 120 ft. x 76 ft., equal to the surface area of 3-1/2 Boeing 747 aircraft wings. (App.309-10, 326, 328, 427-28)

Grotlisch and Noel admitted that they knew the dangerous effects of wind on the crane and a load the size of 4R3, that it was unsafe to lift in wind speeds of that day or even less, and that it was so dangerous to do so without wind calculations, that the crane could tip over and kill people such as the decedents, and Grotlisch agreed that he was "reasonably certain ... prior to July 14, 1999 that if these wind load calculations were not being done with a piece the size of 4R3, not only was it a dangerous practice, but there was a probability that a tragedy could occur." (App.176-77, 178-80, 204-10, 212-14, 368-70, 434)

E. July 14, 1999 - The Day of the Tragedy.

Shapiro testified without contradiction that proper calculations demonstrated that the lift should never have been undertaken in winds greater than 11.5 mph. (App.324-5)

Grotlisch assured those involved with the lift that day that he would use the computer in the MHIA trailer to monitor the weather. (App.156, 171, 198, 221-22)

Grotlisch claimed the winds prior to and at the time of the lift were "minimal and were decreasing in the afternoon and were below 15-16 mph at the time the crane went down." (App.225-29) However, the evidence to the contrary was overwhelming.

WTMJ-TV meteorologist John Malan testified that winds were 20-25 mph with gusts over 35 mph in the afternoon and that at the time of the lift, winds were sustained at 21 mph with gusts of 26 mph. (App.283-84, 289) Ironworkers and operating engineers testified that they observed winds in the 20-32 mph range throughout the afternoon with gusts as high as 30-35 mph. (App.110-11, 158-59, 164-65, 168-69, 262) Video evidence showed high wind conditions before and after the disaster. (App.275-88, 346-47, 436-40; Trial Exhibits (contained in Record 699) 658, 1848, 1858, 1864)

Substantial evidence showed that MHIA was aware of hazardous winds. An OSHA investigator told Noel that day that a man was blown off a scaffold by the wind. (App.267) The lift had been suspended earlier due to the wind, a fact that Grotlisch and Noel denied or did not recall. (App.195-96, 267-68, 336, 356-64, 389-90) MHIA's Dennis Frazer, Grotlisch's assistant (App.150), testified that at 3:30 pm, it was "too windy to do the lift." (App.293-97) Overheard radio transmissions between MHIA employees and

Lampson employees included the crane's operator giving a wind speed of 29-32 mph at 4-5:00 pm. (App.265-66)

Noel testified that he told Grotlisch twice that he was concerned about the wind. (App.184-89) Despite Grotlisch's denial (App.224), Noel's statement was corroborated by evidence that Noel was seen using a hand-held wind speed measuring device (App.291-92) and he was overheard reporting winds speeds of 32 mph at 3:30 pm. (App.270-72) and 26-28 mph at 4:00 pm, an hour before the crane went down. (App.273-74)

Shapiro calculated the wind speed at the time of the crash to be 27-29 mph. (App.328-30, 331) Experts on all sides agreed the tragedy would have been averted if the lift had been performed in winds of 11.5 mph. (App.324-25, 381-82, 388)

In the face of these risks, Grotlisch insisted that the lift proceed. He had his reasons. MHIA was over budget and behind schedule and would have suffered a financial penalty if the lift had been aborted. (App.217-217C) Also, due to a rumor that the media thought the ironworkers were on strike, Grotlisch told a worker he was going to "fly the piece" to show the media. (App.269-70)

F. How This Conduct Was Described By Admissions of MHIA Employees and Experts.

Grotlisch testified that if he had observed wind speeds in excess of 20 mph with gusts to 26 mph or if Noel had observed such speeds (speeds that Noel was overheard

describing on the radio) and failed to tell him, proceeding with the lift would be a conscious disregard of the safety of workers. (App.230-31) Grotlisch denied that Noel told him about the winds he was measuring at 3-5 pm. (App.224)

Noel agreed that it would be a conscious disregard of worker safety if he had failed to report such wind speeds to Grotlisch. (App.365-67) Noel testified that if Grotlisch failed to act on his reports of wind speeds of 26-28 mph with gusts of 32 mph, then Grotlisch would be guilty of conscious disregard of the workers' safety. (App.366-67)

Crane expert Shapiro said that MHIA's behavior was unconscionable, he did not understand how Grotlisch permitted the lift in the face of the winds, and that in all his experience dealing with crane safety, this was the most callous and outrageous disregard of worker safety he had ever experienced. (App.332-33) Shapiro further characterized Grotlisch's conduct as "playing Russian Roulette" with other people's lives. (App.335)

G. Post-Tragedy Conduct.

MHIA's chief engineer testified that right after the crane crash, Grotlisch told him that they needed to check the wind speeds on the computer and they went to MHIA's trailer. (App.337-41, 351-54) Grotlisch said he did not recall this. (App.236-38) The wind speeds at the time of the crash could have been checked and the data saved. (App.239-42, 372-73) MHIA employees, including Grotlisch,

stayed in the trailer from after the accident until about 10:00 pm. (App.236, 244-45, 373-74) At about 8:30 pm that night, the computer was mysteriously unplugged, destroying data of the wind speeds that existed at the time of the crash. (App.240-42, 246) The jury was entitled to believe that Grotlisch or other MHIA employees destroyed this evidence -- the wind speeds their own computer showed.

Wischer also introduced evidence, which Grotlisch denied, that even after the tragedy, Grotlisch was pushing the operators of Big Blue's replacement crane to exceed the allowable wind speeds to get the roof built sooner, but was rebuffed. (App.220, 256-60) After all this, at the time of trial, MHIA still employed Grotlisch as Miller Park site manager and he sat at counsel table as MHIA's representative. (App.174-75)

STANDARD OF REVIEW

The interpretation of a statute and application of a statute to a given set of facts are questions of law that the Supreme Court decides independently, while benefiting from the analyses of the courts below. *Ahrens v. Town of Fulton*, 2002 WI 29, ¶15, 251 Wis.2d 135, 641 N.W.2d 423.

SUMMARY OF ARGUMENT

Wis. Stat. §895.85(3) reaffirmed Wisconsin's public policy that conduct in "disregard" of the plaintiff's "rights" is deserving of civil punishment by punitive damages. Codifying and tightening the standard of conduct for punitive damages, the legislature specified that the

"disregard of rights" must be "intentional" and abandoned other less stringent common law descriptors, *i.e.*, "reckless," without requiring that injury be intended.

By retaining a "disregard of rights" as the standard, §895.85(3) reaffirmed that punitive damages are a remedy, not a cause of action, based on an analysis of the aggravating circumstances of the wrongdoer's conduct. This analysis is separate from an analysis of the nature of the underlying tort and is not governed by the probability or certainty that injury will occur, as in determining whether the injury is negligently or intentionally inflicted. Intent to injure or practical certainty of injury is neither a necessary nor sufficient basis for punitive damages. Yet, the court of appeals has collapsed the analysis of the aggravating circumstances into the analysis of the type of tort involved, without any statutory basis.

Ignoring principles of statutory construction, the court of appeals failed to strictly construe §895.85(3), which nowhere mentions "injury" or "practical certainty." Though finding the statute unambiguous, the court found it necessary to add words to reach its result.

Wischer believes the statute unambiguously requires no intent to cause injury. This interpretation is supported by the statutory language itself, the rules of statutory construction, the common law meaning of the terms used in the statute, as well as an examination of other factors. After all, by the statute's own language, what is it that

must be "intentional"? -- a "disregard of rights," not an "injury." Any other interpretation is the product of unacceptable judicial activism in statutory interpretation.

It is difficult to imagine a course of conduct that better demonstrates an intentional disregard of a person's rights than that of the MHIA managers, whose deliberate decisions placed the Miller Park workers at such a high risk of injury on July 14, 1999. This is just the type of conduct which the remedy of punitive damages was intended to punish and deter and for which the legislature intended to provide that remedy in §895.85(3).

ARGUMENT

I. WIS. STAT. §895.85(3) PERMITS THE IMPOSITION OF PUNITIVE DAMAGES BASED UPON CONDUCT THAT IS AN "INTENTIONAL DISREGARD OF THE RIGHTS OF THE PLAINTIFF," AND DOES NOT REQUIRE AN INTENT TO CAUSE INJURY TO THE PLAINTIFF.

Wis. Stat. §895.85 was created by 1995 Wis. Act 17, effective on May 17, 1995. Subsection (3) of the statute codifies the standard of conduct for punitive damages:

> (3) STANDARD OF CONDUCT. The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

The issue before the court concerns the legislature's intent in permitting the recovery of punitive damages when the defendant acted "in an intentional disregard of the rights of the plaintiff."

A. Under the Rules of Statutory Interpretation, Wis. Stat. §895.85(3) Must Be Strictly Construed and Words Must Not Be Added to Its Language.

The goal of statutory interpretation is to discern the intent of the legislature. *Highland Manor Associates v. Bast*, 2003 WI 152, ¶9, 268 Wis.2d 1, 672 N.W.2d 709.

The manner in which statutory interpretation is approached implicates separation of powers concerns. As this court has stated repeatedly, and recently, "[o]ur duty to fulfill legislative intent ensures that we uphold the separation of powers by not substituting judicial policy views for the views of the legislature." *State ex rel. Hensley v. Endicott*, 2001 WI 105, ¶7, 245 Wis.2d 607, 629 N.W.2d 686, quoting *State ex rel. Cramer v. Court of Appeals*, 2000 WI 86, ¶17, 236 Wis.2d 473, 613 N.W.2d 591. "In adhering to our adjudicative role, we employ our established analytical framework on a point of statutory construction, which avoids invading the province of the legislature." *Id.* at ¶8. *See also*: *State v. Sample*, 215 Wis.2d 487, 495, 573 N.W.2d 187 (1998).

Although it is important for the court not to invade the province of the legislature, the rules of statutory construction recognize that the court should preserve the common law if the legislature does not express an intent to change that law. *Fuchsgruber v. Custom Accessories, Inc.*, 2001 WI 81, ¶25, 244 Wis.2d 758, 628 N.W.2d 833. This principle is embodied in the rule that statutes in derogation of the common law are to be strictly construed.

Id. Wis. Stat. §895.85(3) is, without dispute, a statute in derogation of the common law, which recognized that punitive damages should be an available remedy where the defendant's conduct was malicious or was undertaken in "wanton, willful or reckless" disregard of others' rights. As such, the statute must be strictly construed.

Recent opinions of this court have offered differing approaches to the determination of the plain meaning of a statute, the concept of ambiguity in statutory construction, and the proper role of extrinsic sources in this process. *See, e.g., State v. Byers*, 2003 WI 86, 263 Wis.2d 113, 665 N.W.2d 729; *State v. Peters*, 2003 WI 88, ¶¶13, 14, 263 Wis.2d 475, 665 N.W.2d 171; *Conway v. Board of Police and Fire Commissioners*, 2003 WI 53, 262 Wis.2d 1, 662 N.W.2d 335; *State v. Hamilton*, 2003 WI 50, ¶¶9-13, 261 Wis.2d 458, 661 N.W.2d 823; *Randy A.J. v. Norma I.J.*, 2004 WI 41, ¶22, ___ Wis.2d ___, 677 N.W.2d 630. *See also*: *Resp. Use of Rural & Agric. Land v. Public Service Commission*, 2000 WI 129, ¶41, 239 Wis.2d 660, 619 N.W.2d 888; *Columbus Park Housing Corp. v. Kenosha*, 2003 WI 143, ¶36, 267 Wis.2d 59, 671 N.W.2d 633.

Whichever approach is taken, all seem to agree that an interpretation that adds words to a statute is not a "plain meaning" interpretation. *Bruno v. Milwaukee County*, 2003 WI 28, ¶23, ¶34, 260 Wis.2d 633, 660 N.W.2d 656. Here, the court of appeals' interpretation of Wis. Stat. §895.85(3) adds the word "injury" to the statute in order to restrict

the phrase "intentional disregard of rights." Thus, the court's decision cannot be sustained under the "plain meaning" approach it purports to employ.

Regardless of whether one believes that statutory interpretation should be confined to an examination of the statutory language alone or believes that extrinsic sources or other relevant evidence may be considered in determining legislative intent, either approach leads to the same conclusion: the legislature did not intend that an "intentional disregard of the rights of the plaintiff" requires an "intent to cause injury to the plaintiff," as the court of appeals ruled. Rather, the legislature reaffirmed the common law principle that punitive damages can be premised on conduct that is a "disregard of rights," and used "intentional" to describe the state of mind of the defendant who disregards rights, instead of the common law's description of "wanton, willful or reckless."

B. Prior to the Enactment of §895.85(3), the Common Law Permitted the Imposition of Punitive Damages Based Upon a Defendant's Aggravated Conduct that Constituted a Wanton, Willful or Reckless Disregard of the Plaintiff's Rights.

Prior to the enactment of Wis. Stat. §895.85(3), the common law established the standard of conduct governing the imposition of punitive damages. The statute, in now codifying the standard of conduct, uses words from the common law to describe the conduct, particularly the words "disregard of rights." Therefore, the common law provides

a basis for determining the statute's meaning.

Punitive damages are allowed for purposes of public policy to punish the wrongdoer's conduct and deter the wrongdoer and others from similar conduct. *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 278, 294 N.W.2d 437 (1980); *Fahrenberg v. Tengel*, 96 Wis.2d 211, 234, 291 N.W.2d 516 (1980). They are not intended to compensate the plaintiff for the loss sustained. *Id.* "[P]unishment and deterrence are important considerations in the law of torts in Wisconsin," *Wangen*, 97 Wis.2d at 280, and, because punitive damages serve those purposes, the principle of punitive damages has been deemed "a valuable and effective tool in the control of human conduct." *Id.* at 280-81.

The foundation for punitive damages is the wrongdoer's aggravated conduct. Therefore, common law principles governing the propriety of a punitive damage award focused on conduct: (1) conduct that constituted a wanton, willful or reckless disregard of the plaintiff's rights was a sufficient basis for punitive damages; and (2) sufficiently aggravated conduct could warrant punitive damages regardless of the tort theory underlying the compensatory damages claim. These principles are discussed below.

1. The common law permitted the imposition of punitive damages based upon two categories of conduct, one of which involved the defendant's "disregard of rights" of the plaintiff, but no intent to cause injury.

The common law permitted the imposition of punitive

damages based upon two categories of conduct. Punitive damages could be awarded if the defendant acted (1) maliciously, or (2) in wanton, willful or reckless disregard of the plaintiff's rights. *Sharp v. Case Corp.*, 227 Wis.2d 1, 21, 595 N.W.2d 380 (1999); *Wangen v. Ford Motor Co.*, 97 Wis.2d at 275; *Kink v. Combs*, 28 Wis.2d 65, 79, 135 N.W.2d 789 (1965).

The first category of conduct included conduct that was intended to cause injury. Malicious conduct was defined as follows: Acts are malicious "'when they are the result of hatred, ill will, a desire for revenge, or inflicted under circumstances where insult or injury is intended.'" *Ervin v. City of Kenosha*, 159 Wis.2d 464, 483, 464 N.W.2d 654 (1991), quoting Wis JI-Civil 1707.

However, a plaintiff who sought to prove that a defendant's conduct fell into the second category of conduct was not required to prove that the defendant intended to injure the plaintiff. *Wangen*, 97 Wis.2d at 266-68. In *Fahrenberg*, 96 Wis.2d at 221, the court stated: "To sustain an award for punitive damages, the law does not require a specific finding of an intentional and ruthless desire to injure, vex or annoy. The injured party need only show a wanton, willful or reckless disregard of the rights of others on the part of the wrongdoer." In *Sharp*, 227 Wis.2d at 21, the court stated: "A person's conduct is wanton, willful and in reckless disregard of the plaintiff's rights when it demonstrates an indifference on the

person's part to the consequences of his or her actions, even though he or she may not intend insult or injury."

As *Sharp* illustrates, the term "disregard of rights" was used to describe a type of conduct. In *Brown v. Maxey*, 124 Wis.2d 426, 433, 369 N.W.2d 677 (1985), the court stated that punitive damages may be awarded if "the defendant's ***conduct*** was willful or wanton, in a reckless disregard of rights or interests." (emphasis added)

The word "rights" was used to mean exactly that -- the rights of the plaintiff or others, whether the right was, as in a personal injury case, the right to be safe from physical injury,[3] or whether the right involved property interests[4] or financial integrity.[5]

The term "disregard of rights" describes a type of conduct that involves an indifference on the defendant's part to the consequences of his or her actions. *Sharp*, 227 Wis.2d at 21. The adjectives "wanton, willful or reckless" were used to describe the wrongdoer's state of mind in disregarding those rights. In *Sharp*, 227 Wis.2d at 22, a products liability case, the court noted that "the frame of mind" of the wrongdoer is a necessary consideration in determining whether punitive damages may be imposed under

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[3] *E.g.*, *Sharp*, 227 Wis.2d at 21, a products liability case, where the court referred to the "manufacturer's reckless disregard for the safety of product users, consumers or others who might be harmed by the product."

[4] *E.g.*, *Fahrenberg v. Tengel*, 96 Wis.2d 211.

[5] *E.g.*, *Jeffers v. Nysse*, 98 Wis.2d 543, 297 N.W.2d 495 (1980).

the "disregard of rights" standard. "Some type of knowledge is a necessary component" to the imposition of punitive damages "because an alleged wrongdoer who is unaware of a product's defect cannot be recklessly disregarding the rights of another person." *Sharp*, 227 Wis.2d at 22-23.

The cases in which the courts applied the "wanton, willful or reckless disregard of rights" standard indicate that the courts essentially believed that a defendant disregarded the rights of the plaintiff or others when the defendant had knowledge of a risk of injury or loss posed by his or her conduct, but proceeded to act or failed to act in disregard of the consequences. *E.g.*, *Sharp*; *Brown*. The determination of whether the defendant's conduct was sufficiently aggravated to meet the common law standard and warrant punitive damages was a fact-driven analysis.

A good example is *Brown v. Maxey*, where the owner of a low-income apartment complex knew of security problems at the complex that were resulting in arson fires and knew that those problems were allowing vandals to damage the buildings' fire alarm system. He failed to correct the problems, however, and, as a result of those conditions, a fire severely injured the plaintiff. Given the defendant's knowledge of the problems and his "conscious refusal" to reduce the risk of fires, the court held the jury could find that "Maxey's conduct evidences a reckless disregard of the rights and safety of Mr. Brown." *Brown v. Maxey*,

124 Wis.2d at 437. Upholding a punitive damage award, the court stated: "Based upon the evidence concerning Maxey's failure to take action, it is reasonable to conclude that Maxey proceeded with a reckless and conscious disregard of the grave consequences involved with such conduct." *Id.*

No case states that a "disregard of rights" is equivalent to an "injury" or encompasses an intent to cause injury or that a "disregard of rights" that is "willful" or "conscious" or "intentional" is equivalent to an intent to cause injury. In fact, in *Brown*, where the court ruled that Maxey's conduct was a "conscious disregard" of rights, the court did not require an intent to injure. 124 Wis.2d at 434, 437. In *Majorowicz v. Allied Mutual Ins. Co.*, 212 Wis.2d 513, 533, 569 N.W.2d 472 (Ct.App. 1997), a bad faith case, there was no evidence that the insurer intended to cause injury to the plaintiff, but the court ruled that the insurer's conduct could lead the jury to find an "intentional disregard" of the plaintiff's rights.

2. Under the common law, a showing of aggravated conduct by the wrongdoer was a prerequisite to a punitive damage award; the mere breach of the duty giving rise to the tort underlying the compensatory damages claim was not sufficient.

Because the court of appeals interpreted §895.85(3) to require proof of an intent to cause injury and to allow punitive damages if such proof were shown, it is important to explain that under the common law, an intent to injure was not sufficient, in itself, to warrant punitive damages.

Under the common law, a plaintiff seeking punitive damages had to show that the defendant engaged in aggravated conduct.[6] The availability of punitive damages was not dependent upon the classification of the underlying tort justifying compensatory damages, but on the nature of the wrongdoer's conduct. *Brown*, 124 Wis.2d at 431; *Wangen*, 97 Wis.2d at 266. Accordingly, the wrongdoer's mere breach of the duty that gave rise to the underlying tort was not sufficient, in itself, to support an award of punitive damages. As the court stated in *Wangen*, 97 Wis.2d at 269, "the award of punitive damages depends on the character of the particular conduct in question, not on the mere fact that the defendant's conduct constituted a tort or a crime." On the other hand, if the plaintiff could prove the necessary aggravated conduct, punitive damages were available regardless of the nature of the underlying tort. As stated in *Wangen*: "[A] claim for punitive damages may be supported by proof of aggravating circumstances beyond those supporting compensatory damages." 97 Wis.2d at 267.

Consistent with these principles, the court ruled that the mere fact that the defendant's conduct may constitute an intentional tort, or even a crime, was not sufficient, in and of itself, to authorize the recovery of punitive

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[6] "Punitive damages rest on allegations which, if proved, demonstrate a particular kind of conduct on the part of the wrongdoer, which has variously been characterized in our cases as malicious conduct or willful or wanton conduct in reckless disregard of rights or interests." *Wangen*, 97 Wis.2d at 267.

damages. *Wangen*, 97 Wis.2d at 267-69; *Fahrenberg*, 96 Wis.2d at 222. There is a "distinction between the intent necessary to maintain an action for an intentional tort and the frame of mind of the wrongdoer necessary to recover punitive damages." *Wangen*, 97 Wis.2d at 268. Accordingly, "proof of an intentional tort in an action for compensatory damages does not necessarily mean that an award of punitive damages is appropriate." *Wangen*, 97 Wis.2d at 269.

Because of the distinction between conduct that will support the recovery of compensatory damages for an intentional tort and conduct that will support the imposition of punitive damages, the court upheld a denial of punitive damages in cases based on an intentional tort theory where there was insufficient evidence of aggravated conduct, even though there was intentional conduct. *Mid-Continent Refrigerator Co. v. Straka*, 47 Wis.2d 739, 178 N.W.2d 28 (1970) (fraudulent misrepresentation; punitive damages not submitted to jury because no evidence of malice, vindictiveness or wanton deliberate disregard of duty); *Bank of Sun Prairie v. Esser*, 155 Wis.2d 724, 456 N.W.2d 585 (1990) (intentional misrepresentation; punitive damages not submitted to jury because of insufficient evidence of malice or willful or reckless disregard of plaintiff's rights).

On the other hand, the court has permitted the imposition of punitive damages where the defendant engaged in aggravated conduct, even though the defendant did not commit an intentional tort.

Thus, in *Wangen*, 97 Wis.2d at 265-71, the court ruled that punitive damages were available in a product liability action predicated on negligence or strict liability if there were proof of aggravated conduct by the wrongdoer that justified the imposition of punitive damages, and rejected the manufacturer's argument that punitive damages were only recoverable in actions based on intentional, personal torts.

Reaffirming this principle in *Brown*, the court held that punitive damages were available in a negligence action. The court ruled that "if the plaintiff proves ***only*** those elements constituting the [negligence] cause of action, punitive damages are not available." (emphasis added) 124 Wis.2d at 432. "However, the mere fact that the cause of action is based upon negligent conduct does not preclude a punitive damage award if the plaintiff proves the necessary aggravating circumstances beyond ordinary negligence. In such cases, punitive damages are appropriate to punish and deter the wrongdoer." *Id.*

Consistent with the rulings in *Wangen* and *Brown*, the court allowed the recovery of punitive damages in cases based upon a negligence theory where sufficiently aggravated conduct was shown. *E.g.*, *Sharp v. Case Corp.* (products liability); *Miller v. Wal-Mart Stores, Inc.*, 219 Wis.2d 250, 580 N.W.2d 233 (1998) (negligent hiring, training or supervision of employee); *Brown v. Maxey* (premises liability); *Wussow v. Commercial Mechanisms,*

Inc., 97 Wis.2d 136, 293 N.W.2d 897 (1980) (products liability); *Franz v. Brennan*, 146 Wis.2d 541, 431 N.W.2d 711 (Ct.App. 1988), *affirmed*, 150 Wis.2d 1, 440 N.W.2d 562 (1989) (motorist's excessive speeding).

C. The Plain and Unambiguous Language of Wis. Stat. §895.85(3) Refers to an "Intentional Disregard of Rights," Not an Intent to Cause Injury.

Wis. Stat. §895.85(3) now defines the standard of conduct for punitive damages. It permits the recovery of punitive damages if the evidence shows that "the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff." This language is unambiguous. A number of points are noteworthy about the statute and the legislature's choice of words.

First, the legislature reaffirmed the public policy underlying punitive damages.

Second, as evidenced by use of the word "acted," the legislature reaffirmed the principle that punitive damages are imposed on the basis of the defendant's conduct.

Third, the legislature retained two categories of conduct that will give rise to punitive damages, one based upon "malicious" conduct, the other based on conduct involving a "disregard of rights." The court of appeals acknowledged this fact. *Wischer*, at ¶33. The legislature thus reaffirmed that punitive damages may be imposed for conduct that "disregards rights."

Fourth, the legislature used the word "intentional" as the adjective to describe the "disregard of rights," and

eliminated the adjectives of "wanton, willful or reckless" that were most often used in the common law as describing the disregard of rights.

Fifth, the legislature did not use the words "injury," "harm," "accident," or "intent to injure or harm" or "intent to cause injury or harm" in the statute.

When one examines the plain language of §895.85(3), one must conclude that the legislature did not intend to require a showing of an intent to cause injury to the plaintiff as a prerequisite for punitive damages.[7] Rather, the legislature simply intended to require a showing that the defendant engaged in conduct that constituted a "disregard of rights" that was "intentional."

1. The statute does not refer to an "injury."

When interpreting a statute, the court first looks at its plain language. *Schaefer v. Riegelman*, 2002 WI 18, ¶16, 250 Wis.2d 494, 639 N.W.2d 715. Examining the plain language of §895.85(3), one must conclude that the phrase "intentional disregard of the rights of the plaintiff" does not mean "an intent to cause injury to the plaintiff" for the simple reason that the statute does not use the word

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[7] For the sake of brevity, Wischer will discuss the fact that the statutory phrase "intentional disregard of the rights of the plaintiff" does not require an intent to cause injury, as the court of appeals ruled. However, her argument also applies to the rest of the court of appeals' definition of that phrase as meaning "knowledge that the defendant's conduct was practically certain to cause the accident or injury to the plaintiffs." *Wischer*, at ¶5.

"injury." It does not use the phrase "intent to injure" or "intent to cause injury."[8] When interpreting a statute, the court will not read extra words into a statute to achieve a specific result. *Responsible Use of Rural and Agri. Land v. Public Service Comm.*, 2000 WI 129, ¶37. Therefore, the court cannot insert the words "injury" or "injure" or "cause injury" into the statute.

The court presumes that the legislature chose its words carefully when drafting a statute. *State v. Chrysler Outboard Corp.*, 219 Wis.2d 130, 163, 580 N.W.2d 203 (1998). If the legislature had intended to require a showing of an intent by the defendant to cause injury to the plaintiff, it could have easily done so; it could have used the word "injury." It did not.

Rather than using the words "intent to cause injury," the legislature used the words "intentional disregard of the rights." The court must attempt to give effect to every word and clause in a statute, *Blazekovic v. Milwaukee*, 2000 WI 41, ¶30, 234 Wis.2d 587, 610 N.W.2d 467, and presumes that the legislature does not add extraneous language to a statute. *Stephenson v. Universal Metrics, Inc.*, 2002 WI 30, ¶32, 251 Wis.2d 171, 641 N.W.2d 158. A statute is not to be interpreted as rendering any portion thereof superfluous. *Landis v. Physicians Ins. Co.*, 2001 WI 86, ¶16, 245 Wis.2d 1, 628 N.W.2d 893.

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[8] Also, the statute does not contain the word "accident," which is another word the court of appeals included in its alternative definitions. *Wischer*, ¶¶5, 44.

If the court were to interpret §895.85(3) as requiring an intent to cause injury, this would render the words "disregard" and "rights" superfluous. In fact, such an interpretation would render the entire phrase containing those words superfluous.

Sec. 895.85(3) sets forth two categories of conduct that may warrant punitive damages. The first category, set forth in the first phrase of the statute, is malicious conduct. This court has already interpreted "malicious" acts to include those that are the result of hatred, ill will, or a desire for revenge or "inflicted under circumstances where insult or injury is intended." *Ervin*, 159 Wis.2d at 483. *See also*: *Moua v. Northern States Power Co.*, 157 Wis.2d 177, 189-90, 458 N.W.2d 836 (Ct.App. 1990), quoting *Webster's Third New International Dictionary* (1976) which defines "malice" as "'intention or desire to harm another.'" Because "malicious" conduct includes conduct that is intended to cause injury, this means that if the court were to interpret the second phrase of §895.85(3) as requiring an intent to cause injury, the statute would essentially state that the plaintiff may receive punitive damages if "the defendant acted with hatred, ill will, or a desire for revenge, or with an intent to injure the plaintiff, or with an intent to cause injury to the plaintiff." If the legislature had intended to limit the availability of punitive damages to situations where there was an evil intent or an intent to cause

injury, then the legislature would not have included the second phrase in the statute. The legislature, however, did include the second phrase and used the words "disregard" and "rights." Since a statute is not to be interpreted as rendering any portion thereof superfluous, the court must interpret the words "disregard" and "rights" to mean something.

2. The statute refers to an "intentional disregard of rights" and the words "intentional" and "disregard of rights" have plain meanings.

Rather than attempting to look for words that do not appear in §895.85(3), the court must look at the words the legislature chose to use in drafting the statute and determine what those words mean. At the time the statute was enacted, a well-developed body of common law governed the imposition of punitive damages. Therefore, the rules of statutory construction require that the court interpret those words in light of that common law.

The court presumes that the legislature acted with full knowledge of the existing case law when it enacted a statute. *Czapinski v. St. Francis Hospital*, 2000 WI 80, ¶22, 236 Wis.2d 316, 613 N.W.2d 120. A statute must be interpreted in light of the common law and the scheme of jurisprudence existing at the time of its enactment. *State v. Hansen*, 2001 WI 53, ¶19, 243 Wis.2d 328, 627 N.W.2d 195. A word or phrase that has a peculiar meaning in the law must be construed according to that meaning. Wis. Stat.

§990.01(1); *State v. Martin*, 162 Wis.2d 883, 904, 470 N.W.2d 900 (1991).

A statute in derogation of the common law must be strictly construed. *Fuchsgruber v. Custom Accessories*, Inc., 2001 WI 81, ¶25. "A statute does not change the common law unless the legislative purpose to do so is clearly expressed in the language of the statute." *Id.* "To accomplish a change in the common law, the language of the statute must be clear, unambiguous and peremptory." *Id.*

When the legislature drafted Wis. Stat. §895.85(3), it chose words that are strikingly similar to the words that the courts used in the common law to describe the type of conduct that would warrant the imposition of punitive damages. For instance, in *Wangen*, 97 Wis.2d at 298-99, the court explained that, to award punitive damages, the jury must find, upon clear, satisfactory and convincing evidence, that "the defendant acted maliciously or in a willful or reckless disregard of the plaintiff's rights." *See*: Wis JI-Civil 1707. In drafting §895.85(3), the legislature used these words: "The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff."

Because the legislature is presumed to act with full knowledge of the common law, and because of similarities between the words used to describe the common law standard for punitive damages and the words used in the statute, one

must conclude that the legislature intended to retain some aspects of the common law. The legislature retained two categories of conduct as the bases for the imposition of punitive damages: conduct that is "malicious" and conduct that constitutes a "disregard of rights." The legislature used the same nouns as the common law to describe the second category of conduct -- "disregard of rights." Since the legislature did so, one must conclude that the legislature intended the term "disregard of rights" to have the same meaning as it had under the common law, and thus intended to allow the imposition of punitive damages under circumstances where the defendant disregarded the plaintiff's rights, even though injury was not intended. There is no clear expression that the legislature intended the term "disregard of rights" to have a meaning different than that used in the common law.

The legislature did make one change to the law. It used the word "intentional" as the adjective to modify the term "disregard of rights." It used that word in place of the varied and multiple modifiers of "willful, wanton or reckless" that had been used in the common law. By doing so, the legislature eliminated those types of "disregard of rights" as a basis for punitive damages, particularly, a "reckless" disregard of rights, and thus required an increased level of consciousness and deliberateness at which the defendant must disregard the plaintiff's rights in order to be subject to punitive damages.

Nothing in the statute, however, indicates that by using the word "intentional" to modify "disregard of rights," the legislature intended to change the common law meaning of "disregard of rights." Certainly, no language indicates that the legislature intended to transform a "disregard of rights" into an "injury" so that an "intentional disregard of rights" would mean "an intent to cause injury," as the court of appeals ruled.[9] Because there is no "clearly expressed" legislative purpose to change the meaning of "disregard of rights," the court cannot conclude such a change occurred. *Fuchsgruber*, ¶25.

In fact, the legislature used language in the statute that indicates no such change was intended.

Under the common law, the term "disregard of rights" meant a type of conduct. The legislature intended the term to continue to have that meaning in the statute. This is evident when one considers the entire subsection of the statute. A court must not look at a single, isolated portion of a sentence, but at the role of the relevant

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[9] Even if this court were to simply examine dictionary definitions of the words "intentional," "disregard" and "rights," the court could not conclude that those words mean an intent to cause injury. *Webster's Third New International Dictionary* (1976) defines the word "intentional" to mean "done by intention or design." It defines the word "disregard" as "to treat without fitting respect or attention," "to treat as unworthy of regard or notice," "to give no thought to: pay no attention to," "the act of disregarding or the state of being disregarded; ...: intentional slight or neglect." None of the definitions of "right" mentions an injury. *Id.*

language in the statute. *Landis*, 2001 WI 86, ¶16. The phrase "intentional disregard of the rights of the plaintiff" does not stand alone in §895.85(3). That phrase describes how a "defendant acted." The statute requires a showing that "the defendant acted ... in an intentional disregard of the rights of the plaintiff." Therefore, a "disregard of rights" means a type of conduct.

There is no indication in the statutory language that by using the term "intentional" to modify the "disregard of rights," the legislature thereby intended to change the focus of punitive damages from the nature of the wrongdoer's conduct to the likelihood of an injury and require a certain probability of injury -- either an intent to cause injury or a practical certainty of injury, as the court of appeals ruled. Since the statute must be strictly construed, the court cannot imply such an intent.

In sum, in using the word "intentional" to modify the term "disregard of rights," the legislature intended to retain a "disregard of rights" as a type of conduct that will give rise to punitive damages and to simply require that the "disregard of rights" be "intentional."

This conclusion is supported by an application of the common meaning of the term "intentional."

Restatement (Second) of Torts §8A states that the word "intent" denotes "that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it."

In *Shepard v. Outagamie County Circuit Court*, 189 Wis.2d 279, 286-87, 525 N.W.2d 764 (Ct.App. 1994) (emphasis deleted), the court defined "intentional" as follows:

> The legal definition of "intentional" is essentially the same, whether found in tort law or in criminal law, ... A person may be said to have intentionally caused the result where the result is substantially certain to occur from the actor's conduct. (citation omitted) The definition of "intentionally" in the criminal code, §939.23(3), STATS., is similar: "Intentionally" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result.

Under these definitions, a result or consequence is intentional if the person has an intent to cause the result or consequence or if the result or consequence is practically certain to occur from the person's conduct. The statutory phrase "intentional disregard of rights" requires the "disregard of rights" to be "intentional." Thus, the result or consequence to which the statute refers is the "disregard of rights." Therefore, when applying the definition of "intentional," one must substitute the words "disregard of rights" for the word "result" or "consequence" in the definition. Applying that definition, one must conclude that §895.85(3)'s requirement that the defendant act "in an intentional disregard of the rights of the plaintiff" requires that the defendant act with a purpose to cause a disregard of rights of the plaintiff or is aware that his or her conduct is practically certain to

cause a disregard of the rights of the plaintiff.

This analysis is confirmed by Wis JI-Civil 1707.1. Recognizing the common law meaning of "disregard of rights" and utilizing the common definition of "intent," the Wisconsin Civil Jury Instructions Committee (hereinafter "JI Committee") drafted the standard instruction to give the following meaning to the statutory phrase:

> A person acts in an intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the plaintiff's rights, or is aware that his or her acts are practically certain to result in the plaintiff's rights being disregarded.

The jury instruction explains how a person "intentionally" disregards rights. In response to this court's question, Wischer submits that, as proof which a court must consider in determining whether to submit the punitive damages issue to the jury, a plaintiff must show proof of an act or course of conduct that (1) is indifferent to a right of the plaintiff, whether it be a right to safety, health or life, a property right, the right to financial integrity, or some other right; (2) the conduct must demonstrate an appreciation of an attendant risk and intent to proceed with the conduct in the face of such risk; (3) the disregard of the risk and right must be deliberate and intentional; and (4) the character of the conduct must be sufficiently aggravated to cause the judicial observer to believe that punishment by punitive damages is warranted, without the necessity of having to

prove intent, subjective or objective, to cause the consequences that ensue from the disregard of rights.

This is consistent with Wis JI-Civil 1707.1, and is merely an explanation of what proof is needed under §895.85(3), consistent with the instruction's definition of "intentional disregard of rights." Wischer's proof withstands this analysis.

3. An interpretation of §895.85(3), in accordance with its plain language, as not requiring an intent to cause injury, is consistent with appellate opinions decided subsequent to the enactment of the statute.

Earlier cases in which Wisconsin appellate courts reviewed a submission of the punitive damages issue to the jury under the standard of §895.85(3) are helpful in determining the meaning of "intentional disregard of rights." *Trinity Ev. Lutheran Church v. Tower Ins. Co.*, 2002 WI App 46, 251 Wis.2d 212, 641 N.W.2d 504, *affirmed in part, reversed in part*, 2003 WI 46, 261 Wis.2d 333, 661 N.W.2d 789; *Allied Processors, Inc. v. Western National Mut. Ins. Co.*, 2001 WI App 129, 246 Wis.2d 579, 629 N.W.2d 329. Those cases did not squarely raise the issue of the meaning of an "intentional disregard of the rights of the plaintiff," as here, but they illustrate that the courts' view of that language is consistent with the interpretation advocated by Wischer. In each case, the courts applied the statute without difficulty in accordance with its plain language. The courts simply noted that the question for

the jury was whether the defendant had intentionally disregarded the plaintiff's rights, without any indication that there was a requirement to show that the defendant intended to injure the plaintiff or knew that injury was practically certain to occur.

In *Trinity Ev. Lutheran Church v. Tower Ins. Co.*, a bad faith case, the jury "determined that Tower had acted 'in an intentional disregard of the rights of the plaintiff'" and awarded $3.5 million in punitive damages. 2002 WI App 46, ¶15. The court of appeals ruled that the trial court committed no error in submitting the punitive damages question to the jury. Quoting the language of §895.85(3) and emphasizing the words "or in an intentional disregard" of the rights of the plaintiff, the court ruled that "Trinity supplied credible evidence to show that Tower acted in an intentional disregard of Trinity's rights; this showing is enough to support the submission of punitive damages to the jury." 2002 WI App 46, ¶30.

This court affirmed that part of the court of appeals' decision that upheld the punitive damage award, 2003 WI 46, and discussed the evidence that supported the award. That evidence would never have supported a finding that Tower intended to cause injury to Trinity or knew its conduct was practically certain to cause injury to Trinity; Trinity was never at risk since either the insurance agent's errors and omissions insurer or Tower would have provided coverage to Trinity. Therefore, one can infer that the court did not

believe that the jury was required to determine whether Tower had any intent to cause injury, when it noted that the jury instruction that mirrored the language in Wis JI-Civil 1707.1 "adequately covered the factors that the jury should have considered." 2003 WI 46, ¶45 n. 5.

In *Allied Processors, Inc.*, the plaintiff alleged the insurer failed to settle a claim in bad faith. The evidence supporting the finding of bad faith showed that the insurer breached its duties to its insured and the breach was a "substantial disregard" of the insured's "interests." 2001 WI App 129, ¶35. There was no showing that the insurer intended that its insured be subjected to an excess verdict or that an excess verdict was practically certain. The court of appeals upheld the punitive damages award, noting that the jury was properly instructed based upon Wis JI-Civil 1707.1, and ruling that there was sufficient evidence for them to find the insurer "intentionally disregarded API's rights" and that the insurer "was aware" that its conduct was "practically certain to result in the disregard of API's right to be protected from an excess verdict." *Id.* at ¶37.

See also: *Dorr v. Sacred Heart Hospital*, 228 Wis.2d 425, 597 N.W.2d 462 (Ct.App. 1999).

D. Besides the Plain Language of Wis. Stat. §895.85(3), Other Factors Support Wischer's Interpretation of the Statute.

Besides the words of §895.85(3) and their common meaning, other factors support Wischer's interpretation:

(1) the title of the statute, and (2) the effect on punitive damages law of an interpretation of "intentional disregard of rights" as meaning an intent to cause injury.

1. The title of Wis. Stat. §895.85(3) shows that the legislature intended the imposition of punitive damages to be based on "conduct," not the certainty of an injury.

The title of Wis. Stat. §895.85(3) is "STANDARD OF CONDUCT." Although a title to a subsection is not part of the statute, Wis. Stat. §990.001(6), it is persuasive evidence of a statutory interpretation. *Mireles v. Labor & Industry Review Comm.*, 2000 WI 96, ¶60, n. 13, 237 N.W.2d 69, 613 N.W.2d 875. The title indicates that the legislature intended that the availability of punitive damages was dependent on proof of particular types of conduct, not upon proof of the certainty of an injury.

2. An interpretation of the phrase "intentional disregard of the rights of the plaintiff" to mean an intent to cause injury would result in a dramatic change in punitive damages law not supported by the statutory language.

A statute may not be construed as changing the common law unless the purpose to effect such a change is clearly expressed therein. *Fuchsgruber*, 2001 WI 81, ¶25. An interpretation of the phrase "intentional disregard of the rights of the plaintiff" as meaning an intent to cause injury to the plaintiff would result in a dramatic change in the law of punitive damages that is not evidenced, nor supported, by the statutory language.

a. Such an interpretation would change the character of punitive damages from being a remedy for wrongful conduct.

Punitive damages are a remedy for wrongful conduct, not a cause of action. *Brown*, 124 Wis.2d at 431; *Wussow*, 97 Wis.2d at 149. Under the common law, to recover punitive damages, a plaintiff was not required to show that the defendant's conduct posed a threshold probability of injury -- that the defendant intended his or her conduct to cause injury or that the conduct was practically certain to cause an injury. A showing that the defendant's conduct was committed under sufficiently aggravated circumstances, that at least rose to the level of a reckless disregard of rights, was sufficient.[10] Before the issue of punitive damages could be submitted to the jury, the court had to determine whether the evidence was sufficient to support an award of punitive damages. *Sharp*, 227 Wis.2d at 20-21. If the issue were submitted to the jury, the jury had the discretion to decide whether punitive damages were warranted. *Wangen*, 97 Wis.2d at 301. Two questions were submitted to the jury; one asked the jury to decide, upon an instruction requiring clear, satisfactory and convincing

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[10] The law of punitive damages does have some regard for the injury or harm resulting from a defendant's conduct, since the law does not allow punitive damages to be awarded in the absence of an award of actual damages. *Tucker v. Marcus*, 142 Wis.2d 425, 418 N.W.2d 818 (1988). *But see, Jacque v. Steenberg Homes, Inc.*, 209 Wis.2d 605, 563 N.W.2d 154 (1997) (where the tort is an intentional trespass to land, nominal actual damages will suffice as support for a punitive damage award).

proof, whether the defendant's conduct met the standard for the imposition of punitive damages, and the other asked the jury to assess the appropriate sum, if any, against the defendant for punitive damages that would serve the purposes of punishment and deterrence. Wis. JI-Civil 1707. In assessing an amount for punitive damages, the jury was permitted to consider, among other factors, "the potential damage which might have been done by such acts as well as the actual damage." *Wangen*, 97 Wis.2d at 302; Wis. JI-Civil 1707. Thus, under the common law, the potential damage that the defendant's conduct might have caused, or the likelihood thereof, was not a prerequisite to an award of punitive damages, but merely one factor the jury could consider in assessing the amount of punitive damages.

If the phrase "intentional disregard of rights" were interpreted to require an intent to cause injury, this would change the character of punitive damages. Under such an interpretation, the potential damage would no longer be simply one factor in the jury's punitive damage assessment; it would be a prerequisite to the submission of the punitive damage issue to the jury in the first instance.

b. Such an interpretation would eliminate punitive damages in any tort case other than where there is an intent to cause injury.

The foundation of punitive damages has always been the wrongdoer's conduct. *Wangen*, 97 Wis.2d at 267, 275. Punitive damages serve society because they punish and

deter wrongful conduct. *Id.* at 280-81. If the court were to interpret "intentional disregard of rights" as meaning an intent to cause injury, this would alter the entire focus of punitive damages and deny the societal benefits of punitive damages in many cases. Under that interpretation, a plaintiff would be precluded from recovering punitive damages -- regardless of how aggravated the defendant's conduct was -- if the plaintiff could not show that the defendant intended, either subjectively or objectively, to injure the plaintiff.

Many tort theories do not require an intent to cause injury as an element of the tort, including negligence and strict products liability.[11] This court has acknowledged that "there are several documented instances of manufacturers who knowingly or recklessly breached the tort rules of product safety," and, consequently, "punitive damages may play a vital role in product liability cases." *Wangen*, 97 Wis.2d at 282, 298. "[T]he need for punitive damage may be particularly appropriate in a product liability case because mere compensatory damages might be insufficient to deter the defendant from further wrongdoing." *Id.* at 285. Despite the important role of punitive damages in products

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[11] Negligence is conduct that poses an unreasonable risk of injury to others. *Alvarado v. Sersch*, 2003 WI 55, ¶¶14, 19, 262 Wis.2d 74, 662 N.W.2d 350. Strict products liability is based upon the seller's placement of a defective and unreasonably dangerous product into the stream of commerce. *Dippel v. Sciano*, 37 Wis.2d 443, 155 N.W.2d 55 (1967).

liability cases, the court of appeals' interpretation of §895.85(3) may eliminate punitive damages in product liability cases and in other negligence cases, regardless of the aggravated nature of the defendant's conduct, since it is unlikely, except in an extreme case, that the plaintiff would be able to show the defendant intended to cause injury or was aware that his or her conduct was practically certain to cause injury. Under that interpretation, even if the defendant's conduct were highly aggravated, the conduct would go unpunished and undeterred.

II. THE COURT OF APPEALS' REASONING IS INCONSISTENT WITH THE COMMON LAW AND RULES OF STATUTORY CONSTRUCTION.

The court of appeals majority concluded at the outset that the legislature intended to "heighten" the standard for the recovery of punitive damages. *Wischer*, at ¶39. Wischer does not disagree with that premise. She disagrees with the court's assessment of the level to which the legislature heightened the standard and the reasoning process by which the court reached its conclusion that the legislature heightened the standard to such an extent as to require an intent to cause injury. The court erroneously added words to the statute, it misapplied the definition of "intentional," and it substituted its policy views for the intent of the legislature.

A. The Court of Appeals' Interpretation Is Contrary to the Plain Language of the Statute.

Although the court of appeals stated that it only

needed to apply the statutory text to determine the statute's meaning, *Wischer*, at ¶32, the court did not apply that text. The statute does not contain the word "injury" or the words "cause injury;" yet, the court interpreted the statute to contain those words. The court thus acted as legislator by inserting words into the statute.

The statute uses the words "disregard of rights." The court failed to consider the common law meaning of "disregard of rights" and rendered the words "disregard" and "rights" meaningless.

B. The Court of Appeals Misused Sources Defining "Intentional."

The court of appeals attempted to find a meaning for the word "intentional" that would enable it to interpret an "intentional disregard of rights" as an "intent to cause injury." The sources on which it relied, however, do not support its interpretation.

1. The court of appeals misinterpreted the comment to Wis JI-Civil 1707.1 and failed to consider the language of the instruction.

The first source the court of appeals examined is the JI Committee's comment to Wis JI-Civil 1707.1. *Wischer*, at ¶39. That comment quotes the definition of "intentional" in Wis. Stat. §939.23(3) which states: "'Intentionally' means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." That

definition, however, does not convert an "intentional disregard of rights" into an "intent to cause injury."

The definition in §939.23(3) refers to the "result" of the actor's conduct. Since Wis. Stat. §895.85(3) requires the "disregard of rights" to be "intentional," the "result" of the defendant's conduct to which §895.85(3) refers is the "disregard of rights."[12] The court failed to realize this.[13] Under the definition in §939.23(3), "intentional disregard of rights" means that "the actor either has a purpose to disregard rights or cause a disregard of rights, or is aware that his or her conduct is practically certain to cause a disregard of rights." In fact, this is essentially how the jury instruction itself defines an "intentional disregard of rights." Wis JI-Civil 1707.1.

Ironically, although the court of appeals considered the JI Committee's comment to Wis JI-Civil 1707.1, it ignored the actual language of the instruction, which does not support the court's interpretation. When the JI

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[12] In *Allied Processors,* 2001 WI App 129, ¶37, in ruling that the insurer intentionally disregarded the plaintiff's right, the court stated that the insurer was aware that its conduct "was practically certain to ***result*** in the disregard of [plaintiff's] right ..." (emphasis added)

[13] In a tort action, the ultimate result of the tortfeasor's conduct is an injury or damage. That has to be the ultimate result since a tort is not actionable unless the defendant's tortious conduct causes an injury or damage. However, that result is not the result to which §895.85(3) refers and which the statute requires to be "intentional." The statute requires the "disregard of rights" to be "intentional."

Committee adapted §939.23(3)'s definition of "intentional" into the jury instruction, the Committee viewed the "result" to be the "disregard of rights," not an "injury." The court of appeals' interpretation cannot be reconciled with the language of the instruction.

Not only did the court ignore the language of Wis JI-Civil 1707.1, but it ignored the fact that the instruction was expressly approved in *Allied Processors* and implicitly approved in *Trinity Ev. Lutheran Church*.

2. The court of appeals misapplied Wis JI - Civil 2001.

The court of appeals relied on the language of Wis JI-Civil 2001. *Wischer*, at ¶39. However, the court misunderstood the instruction's purpose. As the first sentence of that instruction notes, the instruction is to be used when there is a dispute as to whether a defendant's conduct was intentional or negligent.[14] That this is the instruction's purpose is the reason it states that "intent" requires an intent to cause injury.

The language of the instruction that the court of appeals quoted at ¶39 of its decision was based upon language in *Gouger v. Hardtke*, 167 Wis.2d 504, 482 N.W.2d 84 (1992). There, the defendant struck the plaintiff in the eye with a piece of soapstone, the plaintiff sued for

[14] The comment to Wis JI - Civil 2001 states that the instruction "needs to be preceded or followed by the negligence instruction" set forth in Wis JI - Civil 1005.

negligence, and, because the statute of limitations for intentional torts had expired, the defendant argued that he was not negligent but that he had intended to injure the plaintiff. The court's statement that became the basis for Wis JI-Civil 2001 was addressed to that dispute.

A cause of action for negligence requires a showing that the defendant's conduct posed an unreasonable risk of harm or injury, and that the conduct caused an injury. *Alvarado v. Sersch*, 2003 WI 55, ¶¶14, 19, 262 Wis.2d 74, 662 N.W.2d 350. Since an injury is a required element of a negligence action, this necessarily means that when there is a dispute as to whether a defendant's conduct was intentional or negligent, the dispute centers around the question of whether the conduct posed an unreasonable risk of injury or whether the defendant intended to cause injury. That is why the court in *Gouger*, 167 Wis.2d at 512, stated that "[i]ntent requires both an intent to do an act and an intent to cause injury by that act." The court, however, could not possibly have intended to supply a definition of "intent" for all cases in which the meaning of "intentional" is in issue, and could not possibly have meant that the words "intent" or "intentional" are synonymous with "intent to cause injury" in all cases. The court's statement certainly is not determinative of the meaning of an "intentional disregard of rights" in §895.85(3), which makes no reference to an "injury" and was enacted three years after the *Gouger* decision.

C. The Court of Appeals Erroneously Believed the Only Way to Heighten the Standard for Punitive Damages Was to Interpret "Intentional Disregard of Rights" As an "Intent to Cause Injury."

The court of appeals concluded that the legislature intended to heighten the standard for the recovery of punitive damages because the legislature used the word "intentional" to describe the disregard of rights, rather that the common law's "reckless." *Wischer*, at ¶¶38, 39. The court erroneously believed that the only way in which the standard could be heightened was to interpret Wis. Stat. §895.85(3) so as to eliminate the availability of punitive damages in "unintentional tort cases." *Id.* at ¶41.

In attempting to eliminate punitive damages for conduct that is a "reckless" disregard of rights, the court eliminated punitive damages in cases where there is an intentional disregard of rights, but not an intent to cause injury. There is no indication in the statute, however, that the legislature wanted to eliminate punitive damages in "unintentional tort cases," *Wischer*, at ¶41, and intended such a drastic change in the law. The court failed to consider that the statute can be interpreted in a manner that would result in heightening the standard and, yet, would be consistent with the statute's language, consistent the principles of statutory construction, and respectful of the common law: One can conclude that the legislature intended to preserve the common law meaning of "disregard of rights" but, by using the word "intentional,"

intended to require the defendant's conduct in disregarding rights to be more deliberate than the common law required.

The court of appeals was concerned that if an "intentional disregard of rights" were interpreted to mean a "disregard of rights" that is "intentional," this would expand the right to recover punitive damages because any volitional act that results in an injury, even a negligent act, could be viewed as an "intentional disregard of rights" and would thus support the imposition of punitive damages. *Wischer*, at ¶¶40, 41, 43. The court was concerned that such an interpretation would permit punitive damages in "practically any ordinary negligence case." *Wischer*, at ¶43. The court's concern was unfounded.

All parties agreed that the "intentional disregard of rights" standard is a stricter standard than the common law standard, so the court's concern that an interpretation other than its own would increase the number of cases in which punitive damages are warranted is inexplicable.

Even under the common law standard, punitive damages were not available in all cases involving negligence. *Brown*, 124 Wis.2d at 432 ("[T]he vast majority of negligence cases do not give rise to the remedy of punitive damages."). *See, e.g., Maskrey v. Volkswagenwerk A.G.*, 125 Wis.2d 145, 161-62, 370 N.W.2d 815 (Ct.App. 1985) (no punitive damages warranted in products liability case where there was no evidence of conduct that amounted to maliciousness or willful or reckless disregard of plaintiffs'

rights). Under the common law, punitive damages were available in a negligence action only "if the plaintiff prove[d] the necessary aggravating circumstances beyond ordinary negligence." *Brown*, 124 Wis.2d at 432. The same would be true under Wischer's interpretation of §895.85(3).

Under her interpretation, not every volitional act that disregard rights, in a literal sense, would support the imposition of punitive damages. Punitive damages would be available in any tort action, including a negligence action, only when the conduct is so aggravated that it meets the standard of being an "intentional disregard of rights." Her interpretation is based on the plain language of the statute, is consistent with the principles of statutory construction, is respectful of the common law, and is also consistent with the legislature's intent to heighten the standard for the recovery of punitive damages.

CONCLUSION

The language of Wis. Stat. §895.85(3) is plain and unambiguous. The phrase "disregard of rights," which is the threshold consideration in the qualitative analysis of a wrongdoer's conduct to determine if it warrants the remedy of punitive damages, was lifted intact from the common law by the legislative drafters. By substituting the descriptor "intentional" before "disregard of rights," the drafters discarded "reckless" as a descriptor, thus raising the bar to the entrance to the evaluation process that must be undertaken to determine if punitive damages

are justified. Thus, now, the disregard of rights must be deliberate, conscious and, accordingly, intentional. The evaluation of conduct, however, has not been eliminated. All tortious conduct can qualify for the evaluation, but now some torts will fall short because the conduct was not deliberate enough in the face of the risks involved.

With the stroke of a pen, the drafters had the power to limit punitive damages to those cases involving malicious conduct or intentional torts, or, for that matter, to eliminate punitive damages entirely. By the language they chose, they clearly did not do so.

When considering the impact of the court of appeals' interpretation of §895.85(3), one has to ask: Is the type of conduct displayed in this case, where MHIA intentionally disregarded workers' safety and three deaths resulted, the kind of conduct that the public policy underlying punitive damages was intended to address? Yes, it was.

Respectfully, Wischer requests this court to reverse the decision of the court of appeals.

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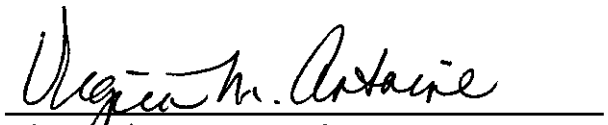
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced with a monospaced font. The length of this brief is 50 pages.



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I hereby certify that on May 24, 2004, I served copies of the Brief of Patricia Wischer, Marjorie DeGrave and Ramona Dulde-Starr and Appendix of Patricia Wischer, Marjorie DeGrave and Ramona Dulde-Starr upon counsel for the parties in the manner designated below, at the addresses indicated below:

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STATE OF WISCONSIN
IN SUPREME COURT

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased,

Plaintiffs-Intervenors-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant,

NEIL F. LAMPSON, INC.,

Defendant-Respondent,

LAMPSON INTERNATIONAL LTD., FEDERAL INSURANCE COMPANY, and THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendants.

Case No. 01-0724
(consolidated with Case Nos. 01-1031 and 01-2486)

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I, DATED SEPTEMBER 30, 2003

APPENDIX OF PATRICIA WISCHER, MARJORIE DeGRAVE AND RAMONA DULDE-STARR, VOLUME I

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased;

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-
Cross-Appellant,

Case No. 01-1031
(consolidated with
Case Nos. 01-0724
and 01-2486)

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-Petitioner,

NEIL F. LAMPSON, INC., and LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY,

Defendant-Co-Appellant,

THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendant.

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased;

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-
Cross-Appellant,

Case No. 01-2486
(consolidated with
Case Nos. 01-0724
and 01-1031)

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-
Cross-Respondent,

NEIL F. LAMPSON, INC., and LAMPSON INTERNATIONAL LTD.,

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FEDERAL INSURANCE COMPANY, and THE TOKIO MARINE & FIRE INSURANCE COMPANY,

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COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 01-0724
01-1031
01-2486

Cir. Ct. No. 99 CV 6553

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

NO. 01-0724

PATRICIA WISCHER, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JEFFREY A. WISCHER, DECEASED, MARJORIE DEGRAVE, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF WILLIAM R. DEGRAVE, DECEASED, AND RAMONA DULDE-STARR, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JEROME W. STARR, DECEASED,

PLAINTIFFS-INTERVENORS-RESPONDENTS,

V.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

DEFENDANT-APPELLANT,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

DEFENDANT,

NEIL F. LAMPSON, INC.,

DEFENDANT-RESPONDENT,

LAMPSON INTERNATIONAL LTD., FEDERAL INSURANCE COMPANY, AND THE TOKIO MARINE & FIRE INSURANCE COMPANY,

DEFENDANTS.

NO. 01-1031

PATRICIA WISCHER, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JEFFREY A. WISCHER, DECEASED, MARJORIE DEGRAVE, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF WILLIAM R. DEGRAVE, DECEASED, AND RAMONA DULDE-STARR, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JEROME W. STARR, DECEASED,

PLAINTIFFS-RESPONDENTS-
CROSS-RESPONDENTS,

V.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

DEFENDANT-RESPONDENT-
CROSS-APPELLANT,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

DEFENDANT-APPELLANT-PETITIONER,

NEIL F. LAMPSON, INC. AND
LAMPSON INTERNATIONAL LTD.,

DEFENDANTS,

FEDERAL INSURANCE COMPANY,

DEFENDANT-CO-APPELLANT,

THE TOKIO MARINE & FIRE INSURANCE COMPANY,

DEFENDANT.

NO. 01-2486

PATRICIA WISCHER, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JEFFREY A. WISCHER, DECEASED, MARJORIE DEGRAVE, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF WILLIAM R. DEGRAVE, DECEASED, AND RAMONA DULDE-STARR, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JEROME W. STARR, DECEASED,

PLAINTIFFS-RESPONDENTS-
CROSS-RESPONDENTS,

V.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

DEFENDANT-RESPONDENT-
CROSS-APPELLANT,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

DEFENDANT-APPELLANT-
CROSS-RESPONDENT,

NEIL F. LAMPSON, INC. AND
LAMPSON INTERNATIONAL LTD.,

DEFENDANTS,

FEDERAL INSURANCE COMPANY AND
THE TOKIO MARINE & FIRE INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS-
CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from judgments and orders of the circuit court for Milwaukee County: DOMINIC S. AMATO, Judge. *Affirmed in part; reversed in part.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 WEDEMEYER, P.J. This case involves three consolidated cases in the so-called "Miller Park" appeals.[1] Although the cases underlying this consolidated appeal present many issues of varying complexity, there is one dispositive issue: whether, based on the facts as conceded by the plaintiffs, the $94,000,000 punitive-damage award is contrary to the calls of WIS. STAT. § 895.85(3) (1999-2000).[2] We hold that it is. Accordingly, we reverse the punitive-damage award, and consequently do not address the other issues. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed). The judgment relative to the compensatory damage award is affirmed.

I. PROCEDURAL BACKGROUND

¶2 In appeal number 01-0724, Mitsubishi Heavy Industries America, Inc., appeals from a judgment dismissing Neil F. Lampson, Inc. (the designer and

[1] On February 21, 2002, this court ordered case numbers 01-1031 and 01-2486 consolidated for the purposes of briefing and disposition. On this court's own motion, we now order that case number 01-0724 be consolidated with the aforereferenced appeals for dispositional purposes.

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

manufacturer of the crane involved), following the trial court's decision directing a verdict in Neil F.'s favor. Patricia Wischer, Marjorie DeGrave and Ramona Dulde-Starr (the plaintiffs) filed a motion to intervene in this appeal, which was granted.[3]

¶3 In the other consolidated cases, The Travelers Indemnity Company of Illinois and Federal Insurance Company appeal from judgments entered against them and in favor of the plaintiffs and in favor of Mitsubishi, its insured. Mitsubishi filed a cross-appeal challenging the judgment rendered in favor of the plaintiffs following a seven-week jury trial. In addition, Travelers appeals from the trial court's judgment ordering it to pay the entire jury verdict as a consequence of its failure to plead and prove its policy limits during the trial. Federal and The Tokio Marine & Fire Insurance Company cross-appeal from the judgments rendered against them and in favor of the plaintiffs and Travelers, ordering the insurers to pay their policy limits of $50,000,000 and $2,000,000, respectively. In this case, Mitsubishi also maintains a cross-appeal against the plaintiffs.[4]

---

[3] Mitsubishi claims the trial court erred when it: (1) directed a verdict in favor of defendant Neil F.; (2) erroneously precluded expert testimony from Mitsubishi's expert, which would have bolstered Mitsubishi's negligence case against Neil F.; and (3) declared that Neil F.'s potential liability was moot.

[4] Travelers presents seven claims: (1) the $94,000,000 punitive damage award is unconstitutional; (2) the trial court's post-verdict decision on punitive damages deprived the defendants of statutory due process; (3) WIS. STAT. § 895.85(3) was erroneously interpreted by the trial court, leading to erroneous instructions to the jury, and an improper award of punitive damages; (4) the trial court erred in ruling that Travelers is responsible for the entire amount of the verdict despite its $25,000,000 policy limit; (5) exclusions in the policy preclude coverage for the judgment against Mitsubishi; (6) the trial court erroneously ignored the Department of Workforce Development's preliminary determination that the three decedents involved were loaned employees to Mitsubishi; and (7) the mid-trial settlement agreement limits the recovery amount.

(continued)

¶4 The dispositive issue in this appeal is governed by WIS. STAT. § 895.85(3), enacted by our legislature in 1995, which provides: "The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff."

¶5 Based upon our analysis of the statute, we hold that the phrase "intentional disregard of the rights of the plaintiff" in WIS. STAT. § 895.85(3) can only be reasonably interpreted to require either an intent by a defendant to cause injury to the plaintiffs or knowledge that the defendant's conduct was practically certain to cause the accident or injury to the plaintiffs. Based on this conclusion, together with the concession by both the plaintiffs and the trial court that there is no evidence demonstrating that Mitsubishi intended to cause injury or knew that its conduct was practically certain to cause injury, we reverse the award of punitive damages.[5]

Federal and Tokio Marine claim: (1) Wisconsin's direct action statutes do not permit a claim solely based on punitive damages; (2) the insurance policies do not provide coverage for the damages; (3) the judgment directly against the insurers here is unconstitutional and violates public policy; (4) the settlement agreement caps liability and therefore no post-judgment interest may be awarded; and (5) the trial court erred in ruling that Travelers has a valid claim to equitable subrogation against Federal and Tokio Marine.

Mitsubishi makes four arguments in support of its claim that the trial court erred: (1) the trial court erroneously refused to include the decedents' employer on the verdict; (2) the trial court misinterpreted the new punitive damage statute, which led to an improper punitive damage award; (3) the trial court erroneously excluded evidence of Mitsubishi's wealth; and (4) the punitive damage award is excessive.

[5] The court acknowledges, with gratitude, the amicus curiae briefs filed by the Wisconsin Academy of Trial Lawyers, the Wisconsin Insurance Alliance and the Wisconsin Manufacturers and Commerce.

¶6 Because we have reached this conclusion, it is not necessary for us to address any of the other issues raised in this appeal. All of the remaining issues are moot.

II. FACTUAL BACKGROUND

¶7 July 14, 1999, was to be an exciting day in the construction of Miller Park stadium, the home of the Milwaukee Brewers major league professional baseball team. On that day, a crane known as "Big Blue" was to lift a large piece of the retractable roof of the stadium so workers could bolt it into place. Unfortunately, the lift did not go as planned. The crane broke and its boom struck the crane holding three ironworkers who were to secure the roof. All three workers fell to their instant death.

¶8 In order to understand the events of July 14, 1999, it is important to know who the relevant parties and non-parties are and how they came to work together that fateful day.

The Parties

¶9 The construction of Miller Park stadium was a joint effort involving many individuals and business organizations. The general contractor for the construction project was a joint venture of three companies: Hunzinger Construction Company, Clark Construction Builders, Inc., and Huber, Hunt & Nichols, Inc. ("general-contractor joint venture"). The general-contractor joint venture hired eighty contractors and those contractors hired approximately two hundred subcontractors.

¶10 One of the contractors hired by the general-contractor joint venture was Mitsubishi Heavy Industries America, Inc. Mitsubishi was hired to build the stadium roof according to an architectural design, to erect the roof, and to design, build, and install the drive system that moved the roof panels. Victor Grotlisch was Mitsubishi's site manager, and Wayne Noel was Mitsubishi's safety superintendent.

¶11 Mitsubishi hired Lampson International Ltd., an industry leader in performing heavy lifts, to help install the roof of the stadium. Lampson International leased a crane known as "Big Blue" to Mitsubishi. On April 22, 1998, Mitsubishi and Lampson International entered into an agreement for the lease of a crane to assist in the lift of the Miller Park roof. The lease agreement stated that Lampson International would provide a TransiLift 1200 Series IIA crane; however, Lampson International actually provided a TransiLift 1500 Series IIIA crane.

¶12 A transi-lift crane is a crane that is not stationary; it can pick up and transport extremely heavy loads. Big Blue is a TransiLift crane that stands forty-five stories high and rests on a base only ten yards wide. The crane sits on two crawlers, the means by which it moves. A car body sits on each crawler, and on each body are a table and a plastic bearing. The boom is the long lattice arm extending from the plastic bearing. At the end of the boom is a joint, and extending beyond the joint is a shorter lattice called the jib. Any load carried by the crane hangs from the jib.

¶13 Lampson International also supplied a crew to assemble Big Blue on site, and provided a crew to operate the crane. Fred Flowers was the crane operator; Alan Watts was the flagger and supervisor for the Lampson crew.

¶14 Neil F. Lampson was the principal designer and manufacturer of the TransiLift crane known as Big Blue. As designer, Neil F. made changes to the design of Big Blue and a last minute addition to the assembly of the crane. Both changes and the possibility of a negligent design of the crane were raised as issues in this case.

¶15 Danny's Construction Company, Inc. (DCCI) was hired to bolt the stadium roof into place. The deceased ironworkers employed by DCCI included Jeffrey Wischer, William DeGrave and Jerome Starr. Red Lewis was DCCI's superintendent and Joe Edwards was the operator of the crane that lifted the ironworkers.

Insurance

¶16 The stadium's owner, Southeast Wisconsin Professional Baseball Park District, purchased an Owners Controlled Insurance Program (OCIP) to provide commercial general liability insurance coverage for the Miller Park construction project. The coverage was "layered" in that each insurer's coverage attached when the underlying policy was exhausted. Thus, one insurer provided coverage up to a certain amount and, when that amount was exhausted, another insurer provided coverage up to a certain amount, and so on. The priority for coverage under the OCIP was as follows:

The Travelers Indemnity Company of Illinois	$2,000,000
Royal Insurance Company of America	$5,000,000
Indemnity Insurance Company of North America	$20,000,000
Federal Insurance Company	$50,000,000
The Travelers Indemnity Company of Illinois	$25,000,000
The Tokio Marine & Fire Insurance Company	$2,000,000 in separate coverage for MHIA, attaches at $75,000,000.

¶17 The parties entered into three settlement agreements. The first two were entered into before trial and involved the payment of $2,000,000 (Travelers) and $5,000,000 (Royal) to the plaintiffs. The third settlement is known as the IINA agreement, which was entered into during trial on November 7, 2000. Under the IINA settlement, the plaintiffs entered into an agreement with Mitsubishi, its parent company, Mitsubishi Heavy Industries LTD, and Indemnity Insurance Company of North America (IINA). The agreement provided for an immediate payment of $12,375,000, which would be credited against any compensatory damages awarded by the jury. The IINA agreement then capped punitive damages at $84,626,000 if it was later determined that Mitsubishi had insurance coverage, and $10,000,000 if Mitsubishi did not have insurance coverage.

¶18 The IINA agreement was not disclosed to the trial court or any other party until one month after the jury reached its verdict. The jury returned a compensatory damage verdict of $5,250,000 and a punitive damage award of $94,000,000 against Mitsubishi.

The Day of the Lift

¶19 At 7:30 a.m. on July 14, 1999, several people participated in a pre-lift meeting at Miller Park. At that meeting, Victor Grotlisch, Mitsubishi's site manager, discussed the weather report, Allen Watts, the Lampson supervisor, discussed how the lift would occur, and Wayne Noel, Mitsubishi's safety supervisor, discussed safety issues involved in the lift, including rescue, radio communication, and responsibilities. At this meeting, Noel told the workers that anyone could stop the lift for any reason at any time if it was unsafe to continue.

¶20 While Mitsubishi stresses the importance of this statement because the lift requires people at different locations watching the lift from different angles, the plaintiffs claim that the workers are in no position to tell supervisors to stop a lift because the workers, having families to support, do not want to risk their jobs.

¶21 At about 10 a.m., Big Blue picked the roof piece off of the ground and crews checked the load stabilization and center of gravity. By 11:00 or 11:30 a.m., Grotlisch, Watts, and a DCCI representative agreed that the lift could proceed. Watts, Lampson's supervisor, was then in charge of the lift.

¶22 Later in the afternoon, Grotlisch checked the wind speeds and was informed by Watts that the lift was going fine. Wischer, DeGrave and Starr entered the man basket and were lifted so that they could bolt the roof into place. As the roof was being lifted, there was a squeal of brakes and a loud snap. Big Blue toppled and struck the boom of the crane holding the ironworkers. Wischer, DeGrave and Starr fell to an instant death.[6]

---

[6] The parties disagree in many respects as to the cause of the crane collapse. The plaintiffs claim that the crane collapsed because it was misused by Mitsubishi in excessive winds, that Mitsubishi never performed wind load calculations, and that the wind conditions that day far exceeded the load chart limitations. Mitsubishi, however, claims that Lampson International never told Mitsubishi that wind sail calculations had to be done or that Lampson International did not do the calculations.

The parties also contest wind speeds that day. Mitsubishi site manager Victor Grotlisch claims he checked the weather forecast and that winds were between 15-17 mph. Because the load chart limited Big Blue to winds less than 20 mph, Grotlisch and Noel claim they continued with the lift within appropriate wind speeds. Lampson International claims that the wind speeds that day were between 20-25 mph, with gusts between 25 and 35 mph. Plaintiffs agree with those figures, adding that at 5:00 p.m., just minutes before the collapse, the wind speeds at Mitchell Field were 21 mph, with gusts of 26 mph. Mitchell Field is 9.6 miles from Miller Park.

Procedural History

¶23 On August 12, 1999, plaintiffs, the wives of the decedents, filed a lawsuit charging the general-contractor joint venture, Mitsubishi, Lampson International, and Neil F. Lampson with negligence, seeking compensatory and punitive damages. On September 15, 2000, based on a settlement, the court dismissed the general-contractor joint venture from the lawsuit. On October 16, 2000, the case went to trial. During trial, the parties disagreed on the interpretation of Wisconsin's punitive damages statute, WIS. STAT. § 895.85(3). As noted, the statute states:

> The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

WIS. STAT. § 895.85(3).

¶24 During the trial, the court directed a verdict in favor of Neil F., leaving Mitsubishi and Lampson as the only defendants in the lawsuit. On November 7, 2000, the IINA agreement was executed, limiting Mitsubishi's liability, and on December 1, 2000, the jury returned a verdict attributing 97% liability to Mitsubishi and 3% liability to Lampson International. As noted, the jury awarded $5,250,000 million in compensatory damages and $94,000,000 in punitive damages against Mitsubishi. Mitsubishi filed several post-verdict motions, all of which were denied by the trial court.

¶25 After the jury verdict was returned, the plaintiffs amended their complaint to seek recovery of punitive damages from Federal Insurance Company, claiming that Federal was liable to the plaintiffs for the damages. The plaintiffs

also amended the complaint to seek recovery of punitive damages from Tokio Marine, seeking a declaratory judgment that its policy provided coverage for punitive damages. After motions and hearings, the trial court entered summary judgment against Federal and Tokio Marine in their direct actions.

¶26 Separate from Federal and Tokio Marine's liability to the plaintiffs is their liability to Travelers. The trial court entered judgment against Travelers Insurance Company for $84,625,000 for Travelers's failure to plead and prove its policy limits as part of the OCIP. As a result, Travelers filed cross-claims against Federal and Tokio Marine for equitable subrogation, equitable contribution, and unjust enrichment. The trial court concluded that Travelers was entitled to judgment against Federal and Tokio Marine on a theory of equitable subrogation. The trial court concluded that the $77,000,000 judgment against Mitsubishi was payable as follows:

> With respect to the plaintiffs' judgment against [Mitsubishi], the remaining amount of which is $77 million plus taxable costs and interest, the first $50 million plus corresponding taxable costs and interest is insured by Federal ... the next $25 million plus corresponding taxable costs and interest is insured by Travelers ... and the last $2 million plus corresponding taxable costs and interest is insured by Tokio Marine .... For the benefit of [Mitsubishi] only, the entire $77 million plus corresponding taxable costs and interest, as previously adjudged, is insured by Travelers ....

¶27 Based on the above judgments, Mitsubishi appeals the punitive damage award as excessive and not warranted by the evidence contending that there is no evidence of either intent to injure the decedents or knowledge that such injury was practically certain to occur. Mitsubishi also appeals the trial court order dismissing Neil F. from the action, the trial court's refusal to include DCCI

on the verdict, and the trial court's refusal to admit evidence of Mitsubishi's wealth. The plaintiffs intervened in this appeal because they believed resolution of this matter might affect the punitive damage judgment.

¶28 Travelers Insurance appeals the $77,000,000 judgment against it for failing to plead and prove its policy limits in the trial court. Travelers argues that its policy limit was $25,000,000, and its policy attaches at the $27,000,000 mark; therefore, it should not be liable for $77,000,000 because Travelers cannot be liable for more than its policy limits. Travelers also argues that if the judgment against it is affirmed, the cross-claims against Federal and Tokio Marine should also be affirmed because the judgments do "no more than enforce those two insurance contracts, preventing both an injustice to Travelers and an outrageous windfall for Federal and Tokio."

¶29 Federal Insurance appeals the direct action judgment against it in favor of the plaintiffs and the judgment against it in favor of Travelers on the cross-claim. Federal claims that the Wisconsin direct action statute does not provide the plaintiffs with a cause of action against it and, even if the statute does, the insurance policy does not cover punitive damages because such an award is against public policy and in excess of Mitsubishi's liability under the IINA agreement.

¶30 Tokio Marine appeals the direct action judgment against it in favor of the plaintiffs and the portion of the judgment against it in favor of Travelers on its cross-claim. Tokio Marine claims that Travelers must be liable for the amount of damages because it failed to prove its policy limits. In addition, Tokio Marine claims that its policy does not cover punitive damages because such an award is in excess of Mitsubishi's liability under the IINA agreement.

III. DISCUSSION

¶31 Indeed, there is no dispute that this case involved a horrible tragedy. The three men who died gave their lives in the process of erecting a state-of-the-art structure. The wives and families of the decedents suffered an immeasurable loss. In compensation for the loss, the three plaintiffs have received a total of $27,000,000. Regardless of our decision on this appeal, that compensation stands.[7]

¶32 The dispositive issue in this case involves the interpretation of a statute. Accordingly, our review is independent from that of the trial court. ***Stephenson v. Universal Metrics, Inc.***, 2002 WI 30, ¶26, 251 Wis. 2d 171, 641 N.W.2d 158. As a part of our interpretation, we strive to ascertain and enforce the intent of the legislature; our first consideration is the plain language of the statute. ***Id.***, ¶27. The language of the statute provides: "The plaintiff may receive punitive damage if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff." WIS. STAT. § 895.85(3). We conclude that the statute is not ambiguous. *See* ***State v. Peters***, 2003 WI 88, ¶14, ___ Wis. 2d ___, 665 N.W.2d 171. When the language of a statute is clear, we need only apply "the statutory text to determine the statute's meaning." ***Id.*** (citation omitted). If the language of the statute "unambiguously expresses the intent of the legislature, we apply that meaning without resorting to extrinsic sources of legislative intent." ***Id.*** (citation

[7] Before trial, Travelers paid $2,000,000 and Royal paid $5,000,000. Pursuant to the mid-trial settlement, IINA paid $12,375,000 and, after the verdict, IINA paid $7,625,000. It is undisputed that this appeal will not in any way affect the $27,000,000 already paid to the plaintiffs.

omitted). "Statutory language is given its common, ordinary and accepted meaning." ***Id.*** (citation omitted). "Rules of statutory construction are inapplicable if the language of the statute has a plain and reasonable meaning on its face." ***Id.*** (citation omitted). Moreover, "[w]hether there is sufficient evidence to submit the question of punitive damages to the jury is a question of law which this court independently reviews." ***Loveridge v. Chartier***, 161 Wis. 2d 150, 187-88, 468 N.W.2d 146 (1990).

¶33 Here, the plain language of the statute sets forth two standards under which punitive damages may be appropriate. The first category indicates punitive damages may be appropriate if the conduct is *malicious*. The second category allows a punitive damage award when there is *an intentional disregard of the rights of the plaintiff*.

¶34 All parties concede that the record here is devoid of malicious conduct. Plaintiffs' lead counsel, Robert L. Habush, stated:

> We concede that there was no malicious act here, we concede it is not necessary for them to intend to have harmed these people.... [T]he hazard, the wind, and doing a lift in the face of this wind without any engineering calculations whatsoever, once that's known, they affirmatively decided to go ahead with this lift, and that is the intentional disregard.

The dispute then specifically entails the interpretation of the phrase "intentional disregard of the rights of the plaintiff." The plaintiffs argue that this standard simply requires evidence demonstrating that Mitsubishi acted volitionally to do something that resulted in the rights of the decedents to a safe work environment being disregarded, and that this part of the statute does not require that any of Mitsubishi's employees either intended that harm result or have either subjective

or objective knowledge that such harm was practically certain to occur. They contend that Grotlisch's decision to proceed with the lift on such a windy day under hazardous conditions demonstrated his disregard for the rights of the plaintiffs, thus satisfying the statutory standard and justifying the jury's punitive damage award.[8] The plaintiffs thus argue that punitive damages are appropriate when the defendant intentionally disregards the injured party's right to safety, but that intent to injure is not required. In his closing argument, plaintiffs' counsel stated:

> I believe the evidence has shown to you that there was intentional disregard of the rights of the three deceased ironworkers. The intentional part is easy. They intended to do the lift. They made the decision to do the lift. It was an intentional decision. They didn't stumble into it. It was an intentional decision in the face of hazards and obvious wind conditions, and in doing so, they ignored, they disregarded the rights of those three men.
>
> And what were those rights? The right to a safe workplace. The right to life. And in so doing, they intentionally disregarded those rights of the three deceased ironworkers.
>
> We don't have to prove that Victor Grotlisch intended to kill these guys. This is not a criminal case. We don't have to prove that they knew for sure that crane was going to go down.
>
> Let me give you an example. A person decides to run the stop sign, I'm going to run that stop sign, and in running that stop sign crashes into a crossing vehicle, killing the occupants. Would we hear that driver be able to say, I didn't intend to kill those occupants, I didn't know Sally, I didn't know Bill, I didn't intend to kill them?

[8] Specifically, the plaintiffs claimed that no one did the necessary wind calculations for the roof piece involved, that Grotlisch knew it was unsafe to proceed with the lift without the calculations, and that Grotlisch knew the crane's performance could be impeded if exposed to winds in excess of 20 m.p.h.

> But that person intended to run that stop sign and, in so doing, must bear the consequences of an intentional disregard of the rights of any other vehicle or pedestrian that might have come into harm's way by that intentional act.
>
> ....
>
> There can't be any question, members of the jury, that this was an intentional decision on the part of Grotlisch, concurred in by Noel, that the hazards were obvious and ignored, that the rights of these three men, the right to life, the right to limb, the right to a safe workplace, were ignored and disregarded, as the law calls.

¶35 On the other hand, the defendants argue that punitive damages would be appropriate only if Mitsubishi either: (1) intended to cause the accident or injury; or (2) was aware that its conduct was practically certain to cause the accident or injury. Based on this standard, Mitsubishi claims that this case is not appropriate for a punitive damages award because, as the plaintiffs concede, Mitsubishi did not intend to cause injury or believe with substantial certainty that injury would occur. In their brief in opposition to Federal's summary judgment motion, the plaintiffs concede the following:

> The fact that Grotlisch was in the zone of danger indicates that he could not have believed that there was a substantial certainty that injury would occur.
>
> ....
>
> [T]here is no evidence to permit a reasonable jury to conclude that the [Mitsubishi] employees intended to cause bodily injury to the decedents or that they knew or should have known that bodily injury was substantially certain to follow from their acts.

Mitsubishi argues that because the defendants did not act with malice, and because the plaintiffs concede that the defendants did not intend to injure the plaintiffs, there was no punitive damages issue for the jury.[9]

¶36 Mitsubishi contends that its interpretation of the new statutory standard is supported by the legislature's intent to narrow the types of cases in which a punitive damage award would be appropriate. Mitsubishi points to the guidance offered by the jury instruction committee in interpreting the new statute and suggests that the proper interpretation of the statutory standard requires either intent to cause the accident or injury *or* knowledge that its conduct was practically certain to cause the accident or injury.

¶37 When faced with this disputed issue during the trial, the trial court agreed with the statutory interpretation proffered by the plaintiffs. Adopting the

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[9] The conflict in interpretation of the statute was clear even before the trial began. The plaintiffs stated:

> If the legislature had intended to wipe out punitive damages, they [sic] could have. If the legislature had intended to limit the malicious acts, they [sic] could have. All they changed was the word reckless disregard into intentional disregard. And concede, Your Honor, that that did make it tougher, and that with respect to some other cases, acts of omission would not meet that burden, 'cause that would be reckless, it's a negligence connotation, but when they intended to go forward in the face of known hazards, that intentional disregard, and that's all the law requires us to meet.

Defendants responded:

> [W]e have an entirely different view of the law. We think [plaintiffs' counsel is] using old recklessness standard, but we'll deal with that at the time of the trial.

plaintiffs' interpretation, the trial court determined that there was sufficient evidence to submit the issue of punitive damages to the jury. The court ruled:

> There is absolutely no evidence in this record to show that it was the intent of anyone, let alone Mitsubishi, there was never any evidence to indicate that Mitsubishi or anyone intended to cause an injury. There was a finding by the jury on the punitive damage questions that there was an intentional disregard of the rights of the plaintiffs and others.
>
> ....
>
> People may do things in a negligent way, they may intend to do a certain act without intending to actually injure or hurt someone, and that's the standard of negligence, care without intending to do harm, does something or fails to do something that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.
>
> That is the negligence the jury found in this case, and the jury also found that there was just an intentional disregard with regard to the rights of the plaintiff and others to have a safe environment to work in. It's just that simple.

¶38 We conclude that the trial court's interpretation of the statute was erroneous. We reach the opposite conclusion based on the reasoning that follows. Before the enactment of WIS. STAT. § 895.85(3), punitive damages were governed by the common law. There was a variety of terms used to describe circumstances under which punitive damages were appropriate: acting maliciously or in wanton, willful, or reckless disregard of the plaintiff's rights. *See* WIS JI—CIVIL 1707; ***Wangen v. Ford Motor Co.***, 97 Wis. 2d 260, 267, 294 N.W.2d 437 (1980) (Punitive damages may be awarded if the party seeking those damages demonstrates by the middle burden of proof that there was "a reckless indifference to or disregard of the rights of others and conscious action in deliberate disregard of them."). The legislature, intending to limit circumstances where juries could

award punitive damages, enacted § 895.85(3) which, as we have seen, now requires that there be an intentional disregard of the rights of the plaintiff, not merely "reckless indifference" to those rights.

¶39 Clearly, by using the word *intentional*, the legislature intended to heighten the standard for the recovery of punitive damages. Although the legislature did not supply a definition of the new phrase "intentional disregard of the rights of the plaintiff," Note 2 accompanying WIS JI—CIVIL 1707.1, offers some guidance:

> The [second] basis for punitive damages is if the "defendant acted ... in an intentional disregard of the rights of the plaintiff." This part of the standard was clearly intended to be more narrow than the case law standard which allowed punitive damages for conduct which "shows a reckless indifference to or disregard of the rights of others on the part of the wrongdoer." ... The legislative history reveals only that "intentional disregard" was ultimately favored over earlier drafts and bills which provided recovery for "wilful disregard" of the rights of the plaintiff. See LRB-1744 drafted 12/3/94, 1993 S.B. 152, 1991 S.B. 138, 1989 S.B. 153 (which provided "wilful or conscious" disregard).
>
> There is, of course, no case law which defines "intentional disregard of the plaintiff's rights." The Committee finds the statutory formulation of criminal intent in WIS. STAT. § 939.23, to be helpful. "'Intentionally' means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." The Committee's reference to the Criminal Code's formulation of the definition of "intentionally" is well supported by the court of appeals decision in ***Shepard v. Outagamie County***, 189 Wis. 2d 279, 286-87, 525 N.W.2d 764 (1994). In ***Shepard***, the court of appeals found that: "The legal definition of 'intentional' is essentially the same, whether found in tort law or criminal law, and we see no reason to use a separate definition when interpreting the same word...." ***Id.*** ... Accordingly, the Committee largely adapted the definition of "intentionally" as set forth in section 939.23.

WISCONSIN STAT. § 939.23(3) defines intent under criminal law: "'Intentionally' means that the actor either has a purpose to do the thing or cause the result specified, *or* is aware that his or her conduct is practically certain to cause that result." (Emphasis supplied.) This conclusion is further supported by WIS JI—CIVIL 2001, which provides a definition of "intent":

> Intent requires both an intent to do an act and an intent to cause injury by that act. An intent to cause injury exists where the actor actually means to cause injury by his or her conduct or where injury is almost certain to occur from the actor's conduct.
>
> ....
>
> If ... the conduct of (defendant) merely created a risk of some harm to someone, which may or may not have resulted, then (defendant)'s conduct was negligent as opposed to intentional.

¶40 Based on this analysis offered by the jury instruction and the Jury Instruction Committee, which our supreme court acknowledges can offer "insightful and persuasive" assistance in interpreting legislative enactments, *see* ***Nommensen v. American Cont'l Ins. Co.***, 2001 WI 112, ¶47, 246 Wis. 2d 132, 629 N.W.2d 301, we are convinced that there is only one reasonable interpretation of WIS. STAT. § 895.85(3). The more demanding statute requires both a general intent to perform an act *and a specific intent to cause injury by that act or knowledge that the act is practically certain to result in injury*, and not, as the plaintiffs would have it, a volitional act that results in unintended and unforeseen injuries.

¶41 To conclude otherwise would lead to unreasonable results and *expand*, rather than narrow, the scope of cases where punitive damages may be awarded. To affirm the trial court's interpretation of the statute would permit the

request for punitive damages in almost any negligence case, contrary to the intent of the legislative enactment. For example, in a vehicle collision caused because the tortfeasor was talking on a cellular telephone, punitive damages could be sought and awarded. Under the trial court's standard, the victim could argue that the tortfeasor intentionally disregarded his or her rights by deliberately choosing to talk on the phone while driving. We hold that the intent of the legislature with respect to the new punitive damages statute was to "make it more difficult for a plaintiff to recover punitive damages." *See* ***Unified Catholic Sch. v. Universal Credit Card Servs. Corp.***, 34 F. Supp. 2d 714, 718 (E.D. Wis. 1999); *see also* ***Boomsma v. Star Transp., Inc.***, 202 F. Supp. 2d 869, 880 (E.D. Wis. 2002). As aptly observed by Marc Galanter in his treatise on punitive damages:

> [T]he heartland of punitive damages awards is in *intentional* torts and in cases involving financial rather than physical harm. Such cases produce punitive damages awards in larger numbers and at a higher rate than do cases involving other types of harm. In particular, the rates in personal injury cases are far lower ....

Marc Galanter, *Shadow Play: The Fabled Menace of Punitive Damages*, 1998 WIS. L. REV. 1, 2 (1998) (emphasis added). In recent years, punitive damage awards have become commonplace in unintentional tort cases; however, with the passage of WIS. STAT. § 895.85(3), our legislature, as a matter of public policy, has decided to return punitive awards to its place of origin.[10]

[10] As one treatise notes, by enacting the new statute, our legislature places Wisconsin "among the states having the most stringent punitive damage conduct requirements." RICHARD L. BLATT, ET AL., PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE § 8.59, at 546 (2003).

¶42 During oral argument in this case, plaintiffs' counsel admitted that his interpretation of the statute would expand rather than narrow the number of cases under which punitive damages could be awarded. A member of our panel asked plaintiffs' counsel what he saw as the result under his interpretation of WIS. STAT. § 895.85(3) and ***Loveridge***, 161 Wis. 2d 150, 468 N.W.2d 146 (1990), where the supreme court overturned an award of punitive damages to a woman whom the defendant infected with genital herpes. ***Loveridge*** noted that under the common law, punitive damages, as material here, could only be recovered if

> the defendant knows, or should have reason to know, not only that his conduct creates an unreasonable risk of harm, but also that there is a strong probability, although not a substantial certainty, that the harm will result but, nevertheless, he proceeds with his conduct in reckless or conscious disregard of the consequences.

Id. at 188 (citation omitted). The supreme court held that punitive damages could not be recovered because there was

> no credible evidence in the record to support the conclusion that Chartier subjectively intended to injure or harm Loveridge. [The ***Loveridge*** court] also held that a reasonable person in Chartier's position would not believe that his sexual contact with Loveridge was substantially certain to result in injury or harm to Loveridge.

Id. at 189. Moreover, there was no evidence that the "defendant knew or should have known that his or her conduct created an unreasonable and strong probability of harm." ***Id.*** at 191 (citation omitted). Thus, although the defendant in ***Loveridge*** volitionally did something that caused the plaintiff to get herpes from him, the supreme court held that punitive damages could not be recovered. In the instant appeal, plaintiffs' counsel indicated that in his view of § 895.85(3), punitive damages under the ***Loveridge*** scenario *could be recovered*:

> [PANEL MEMBER]: Would you say in ***Loveridge***, the young man disregarded the rights of the young woman?
>
> [PLAINTIFFS' COUNSEL]: Yes.
>
> [PANEL MEMBER]: So under ***Loveridge***, under the new statute, there would be punitive damage coverage?
>
> [PLAINTIFFS' COUNSEL]: Yes. You can have punitive -- You obviously --
>
> [PANEL MEMBER]: But there wasn't punitive damage coverage under the old law. So you're saying that there's more coverage under the new law than the old law?
>
> [PLAINTIFFS' COUNSEL]: No, I'm not. I'm saying under the new law, there is no requirement that you have to show that the actor intended bodily harm in a bodily injury case or property right harm in a property injury case because that makes the second clause a nullity and superfluous, and the cases have not said that.
>
> [PANEL MEMBER]: No. I think you just put your finger on the crux, because under your reading of 895.85, there would be punitive damages under ***Loveridge***, but under the common law, there is no punitive damages under ***Loveridge***. Therefore, an expansion of the scope of punitive damages rather than a restriction of the scope of punitive damages.

Although plaintiffs' counsel attempted to deny the effects of his interpretation, he was unsuccessful. His interpretation of the statute, both under the facts of ***Loveridge*** and under the facts here, would expand the scope of punitive damages awards in clear contravention to the intent of the legislature when it enacted § 895.85(3). If punitive damages would be awarded under his interpretation of the statute in a case where punitive damages were not appropriate under the common law, then his interpretation would not "heighten the standard for recovery of punitive damages." ***Boomsma***, 202 F. Supp. 2d at 880. Rather, it would lower the standard.

¶43 The dissent's analysis of the statute is unreasonable and would lead to absurd results. After conceding that the legislature intended to heighten the standard for punitive damages, it disregards the consequences of that action. Based on that disregard, the dissent goes on to explain why there is no need to bring an intent to harm element into the statute. If the dissent's interpretation is correct, instead of narrowing the scope of punitive damages with the enactment of WIS. STAT. § 895.85(3), the legislature has not only opened the door wider, but knocked down the entire wall. If we apply the dissent's interpretation, practically any ordinary negligence case will permit an award of punitive damages. Under the dissent's interpretation, anyone who is negligent could be considered to be intentionally disregarding the rights of someone. Examples are numerous: someone who is drinking a cup of coffee while driving, or eating while driving, or adjusting the radio while driving, or even driving over the speed limit. In each of these examples, an injured plaintiff could argue that the tortfeasor driver intentionally disregarded the rights of the other drivers on the road, and thus justify a punitive damage award. Such an interpretation is simply illogical. The only reasonable interpretation of § 895.85(3) is to apply the definition of "intentional" used within the statute as the legislature instructed. Thus, the statute requires both an intent to do an act *and* an intent that harm will result or knowledge that harm is practically certain to result. We are not adding words to the language of the statute; we are simply applying it as the legislature intended.[11]

[11] We also comment briefly on the dissent's criticism regarding ascertaining the meaning of legislative intent in the face of an unambiguous statute. The law clearly states that in construing a statute, our role is to determine the intent of the legislature. This occurs regardless of whether the statute is ambiguous or not. In reviewing a statute, our goal is to "take a comprehensive view toward discerning legislative intent." ***State v. Peters***, 2003 WI 88, ¶34, ___
(continued)

¶44 Based on the foregoing, we hold that the trial court's interpretation of the statute was erroneous. The correct interpretation demands that the phrase "intentional disregard of the rights of the plaintiff" be defined to mean either that the actor intended to cause the accident or injury *or* the actor was practically certain that his conduct could result in accident or injury.

¶45 Having reached this conclusion, we must also conclude that the trial court erred in submitting the punitive damages issue to the jury. The trial court specifically ruled, and the plaintiffs agreed, that there was no evidence that the defendants intended to harm the decedents or that the defendant knew their conduct was practically certain to result in injury. The plaintiffs, through counsel, conceded that the evidence does not rise to the level of intent to harm. Specifically, in his brief to this court, plaintiffs' counsel admits: "[T]here is no evidence to permit a conclusion that the [Mitsubishi] employees intended to cause bodily injury to the decedents or that they knew or should have known that bodily injury to the decedents was substantially certain to follow."

¶46 Accordingly, because it is undisputed that the record does not contain any evidence to support a specific intent to harm or knowledge that Mitsubishi's conduct was practically certain to result in harm, we must reverse the judgment pertaining to punitive damages. The issue should not have been

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Wis. 2d ___, 664 N.W.2d 171 (Abrahamson, C.J., concurring). The Chief Justice of our supreme court has repeatedly called our attention to this rule in recent opinions from that court. *See, e.g., id.*, ***State v. Byers***, 2003 WI 86, ¶50, ___ Wis. 2d ___, 665 N.W.2d 729 (Abrahamson, C.J., concurring); *see also* ***Bruno v. Milwaukee County***, 2003 WI 28, ¶18, 260 Wis. 2d 633, 660 N.W.2d 656 (disagreement as to the plain meaning of a statute does not make it ambiguous).

submitted to the jury because there was insufficient evidence to send a punitive damages question to the fact-finder. Accordingly, the punitive damages award of $94,000,000 is hereby vacated.

¶47 Based on our disposition, it is not necessary for us to decide any of the other issues raised. The plaintiffs retain the $27,000,000, which has already been paid. The case does not need to be retried because the evidentiary and insurance issues are now moot. Therefore, we decline to address the merits of any of the other issues raised in this appeal.

By the Court.—Judgments and orders affirmed in part; reversed in part.

Recommended for publication in the official reports.

¶48 FINE, J. (*concurring*). I fully join in Judge Wedemeyer's opinion. I wish to add a few words, however, about what I believe has been a general transformation of punitive damages from a useful social tool into something filled with the seeds of dangerous, albeit unintended, consequences. None of my comments has influenced my decision in this matter; as the Majority opinion explains, the recovery of punitive damages in these cases is barred by WIS. STAT. § 895.85, and as judges on an intermediate appellate court we are bound by the law given to us by the Wisconsin Supreme Court, the legislature, and, on matters of federal-constitutional interpretation, the United States Supreme Court.

¶49 Punitive damages, as the term denotes, are designed to punish and deter egregious anti-social conduct. Indeed, under the Wisconsin Supreme Court's most recent analysis, punishment and deterrence are the *only* purposes for which punitive damages may be awarded in this state. ***Trinity Evangelical Lutheran Church v. Tower Ins. Co.***, 2003 WI 46, ¶50, 261 Wis. 2d 333, 355, 661 N.W.2d 789, 799 ("[T]he purpose of punitive damages is to punish the wrongdoer, and to deter the wrongdoer and others from similar conduct, rather than to compensate the plaintiff for any loss.").

¶50 Until the Wisconsin legislature enacted WIS. STAT. § 895.85, the right to recover punitive damages was created and shaped wholly by judges in this state, and not by the legislature. Punitive damages were designed to be a "quasi-criminal" way to punish conduct that would otherwise go unpunished. ***Kink v. Combs***, 28 Wis. 2d 65, 80, 135 N.W.2d 789, 798 (1965).

> Suffice it to say that whatever shortcomings the award of punitive damages may have, nevertheless, it must be remembered that it has the effect of bringing to punishment types of conduct that though oppressive and hurtful to the individual almost invariably go unpunished by the public prosecutor.

Ibid. Thus, punitive damages are similar to and supplement the criminal law. ***State Farm Mut. Auto. Ins. Co. v. Campbell***, 538 U.S. ___, 123 S. Ct. 1513, 1520 (2003) (punitive-damage "awards serve the same purposes as criminal penalties"). To be effective, however, they must, as one case colorfully noted, be sufficiently painful to "sting." ***Gianoli v. Pfleiderer***, 209 Wis. 2d 509, 531, 563 N.W.2d 562, 570 (Ct. App. 1997). In the early days, if "A" hurt "B" by conduct that was sufficiently egregious to warrant an award of punitive damages, assessment of punitive damages against "A" would not only punish "A" but would also deter "A" and others like "A" from doing it again.

¶51 Circumstances have changed, however, from an "A" versus "B" situation to one where the harm sought to be punished by punitive damages may have been caused by an employee or employees of large corporations. At first blush, it may seem that "large corporations" are fair game. First, many persons have a "prejudice against large corporations," especially if they are from out of town. ***TXO Prod. Corp. v. Alliance Res. Corp.***, 509 U.S. 443, 464 (1993) (Stevens, J., for a plurality of the Court and announcing its judgment). Second, large corporations are seen as golden-eggs-laden geese from which there is an endless supply of "free money." This is a dangerous myth unsupported by economic realities; just as there is no "free lunch," there is no "free money"—the money has to come from someone, and, in the case of large corporations, it comes from employees, shareholders, and customers.

¶52 Unlike small, closely held corporations, sole proprietorships, or small partnerships, large corporations are generally far-flung businesses employing thousands or tens of thousands employees. These businesses, so vital to our economy, are owned not by the managers who control what the corporations do, but by stockholders who, with rare exceptions, have *no* control over either those managers or corporate policy. And these corporations are not living creatures that can be punished like a person can be punished; they cannot be sent to prison. Subjecting corporations to draconian criminal or criminal-like penalties, hurts *only* their employees, shareholders, and customers. Thus, by one estimate, the criminal prosecution of the large public-accounting firm Arthur Andersen cost 80,000 employees their jobs, all but a few of whom were not guilty of anything related to the firm's prosecution.[1] Imposition of punitive damages can have similar life-derailing consequences for those innocent of *any* wrongdoing, because, to repeat, when corporations are forced to pay punitive damages most of the pain falls on employees, shareholders, and customers. Indeed, often the culpable employee escapes any punishment.

¶53 I recognize that the Wisconsin Supreme Court has said that all of this is OK by ruling, without supporting economic data or analysis, that it is unlikely for a corporation to be able to pass to consumers punitive-damages-related increased costs, and, also, that it is not unfair to force shareholders to pay penalties flowing from punitive-damages awards. ***Wangen v. Ford Motor Co.***, 97 Wis. 2d 260, 287–288, 291, 294 N.W.2d 437, 452, 453 (1980) ("But the loss of

[1] Interview with Samuel A. DiPiazza, Global Chief Executive Officer, PricewaterhouseCoopers, *at* http://www.pwcglobal.com/ru/eng/ins-sol/issues/03-07-08_sd_ve.html (last visited Aug. 26, 2003).

investment and the decline in value of investments are risks which investors knowingly undertake, and investors should not enjoy ill-gotten gains."). I respectfully disagree. Although ***Wangen***'s assessment of the equities is logical in the abstract, consequences of punitive-damage awards can be malignant in practice. Oliver Wendell Holmes, Jr., once presciently observed: "The life of the law has not been logic: it has been experience." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881). Experience tells us that something is terribly wrong when the sting of "quasi-criminal" punitive damages falls on innocent employees, stockholders, customers, and, in some cases, taxpayers. ***Wangen***, 97 Wis. 2d at 327, 294 N.W.2d at 470–471 (Coffey, J., dissenting).[2]

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[2]

> There are two categories of persons who will automatically bear the costs of the majority decision, depending on the strength and market position of the manufacturer: (1) the employees and stockholders; or (2) the consumer-taxpayer. If the manufacturer is not in a strong financial position so as to be able to bear these added costs, he will be faced with the threat of being forced out of business or into bankruptcy, thus resulting in a loss of jobs (unemployment) and the curtailment of competition, to the detriment of the consumer. If bankruptcy or the loss of business and jobs is to be avoided, it is the consumer who will ultimately bear the burden of punitive damage awards through the payment of higher prices for the goods in the market place. As the cost of such damages is passed on through higher product prices, the consumer will foot the bill for a penalty imposed for its very own protection. If the consumer does not pay higher prices, as a taxpayer, he will pay for the hidden costs of government with higher taxes for increased welfare, retraining and unemployment programs occasioned by business failures. Moreover, imposition of multiple punitive damage awards could have an adverse impact not only on the manufacturer, Ford, but also those commercial businesses that supply materials for use in construction of cars, such as the producers of automobile locks, tires,

(continued)

¶54 But punitive-damage awards are loved by personal-injury lawyers, and judges are thus reluctant to staunch their flow. Indeed, ***Wangen*** conceded that punitive-damage awards (ostensibly designed to punish only) are also a back-door way to pay lawyers: "[P]ayment of punitive damages to the injured party is justifiable as a practical matter, because such damages do serve to compensate the injured party for uncompensated expenses, *e.g.*, attorneys' fees and litigation expenses, and that the [punitive-damages] windfall motivates reluctant plaintiffs to go forward with their claims." ***Id.***, 97 Wis. 2d at 292, 294 N.W.2d at 454.[3]

¶55 There is also a roll-of-the-dice aspect to punitive damages; very few persons who are harmed by conduct warranting imposition of punitive damages *ever* get to recover from those who caused the harm even compensatory damages, no less punitive damages. The plaintiffs in this case suffered grievous losses, but, sadly, their pain is not unique to them. Last year in Wisconsin, for example, 164 persons were homicide victims.[4] Nation-wide, the toll was more than 16,100, or,

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> catalytic converters, etc. Are we going to further intimidate Wisconsin manufacturers with the threat of high punitive damage awards? The recovery of punitive damages against American businesses resulting in higher product costs obviously magnifies their disadvantage in competition with foreign manufacturers.

Wangen v. Ford Motor Co., 97 Wis. 2d 260, 327, 294 N.W.2d 437, 470–471 (1980) (Coffey, J., dissenting).

[3] Similarly, "compensatory" but noneconomic damages work "essentially as a pool from which the attorney's fees of personal-injury plaintiffs" are paid. ***Guzman v. St. Francis Hosp., Inc.***, 2001 WI App 21, ¶5, 240 Wis. 2d 559, 571, 623 N.W.2d 776, 782 (Ct. App. 2000) (upholding statutory cap on noneconomic damages in medical-malpractice cases).

[4] Tom Rybarczyk & Kelly Wells, *Homicides Reported in State at 14-year Low*, MILWAUKEE J.S., July 1, 2003, *available at* http://www.jsonline.com/news/state/june03/151979.asp (June 30, 2003).

on the average, forty-four *per day*.[5] My guess is that few if any of the families of these victims will receive *anything* from those who killed their loved ones. And then, of course, there are the countless other victims of crime who suffer horrendous injuries short of death. They, too, rarely, if *ever*, receive *any* payment from those who raped or maimed them. These victims, to borrow Horace's poignant words, suffer "unwept, unknown, because they lack a sacred poet." HORACE, 4 Odes ix 1. 25. Our current system of punitive damages is of no help to them.

¶56 Courts have recognized the out-of-balance unfairness of huge punitive-damage awards, and have gradually attempted to trim some of the rougher edges. *See* ***Campbell***, 123 S. Ct. at 1527 (Ginsburg, J., dissenting) (collecting cases). This is not enough; tinkering with the engine is useless when that engine is, as I believe it is, in need of an overhaul. As noted, our task as judges on an intermediate appellate court is to apply the law as it is given to us by the legislature and the Wisconsin Supreme Court. Both the Wisconsin Supreme Court, which can only act in the context of cases brought to it by lawyers, and the Wisconsin legislature, which has broad plenary power to make law, should set things right. As Justice Antonin Scalia has observed: "State legislatures and courts have the power to restrict or abolish the common-law practice of punitive damages, and in recent years have increasingly done so." ***Pacific Mut. Life Ins. Co. v. Haslip***, 499 U.S. 1, 39 (1991) (Scalia, J., concurring); *see also* ***BMW of N.***

[5] Callie Marie Rennison, Ph.D. & Michael R. Rand, U.S. Department of Justice Office of Justice Programs Bureau of Justice Statistics Criminal Victimization, 2002, Aug. 2003, NCJ 199994, *available at* http://www.ojp.usdoj.gov/bjs/pub/ascii/cv02.txt (August 13, 2003).

Am., Inc. v. Gore, 517 U.S. 559, 614–619 (1996) (Ginsburg, J., dissenting) (table of "State Legislative Activity Regarding Punitive Damages").

¶57 We should have a system that punishes the guilty, not the innocent, and, further, punitive damages should not be lottery-like windfalls for a tiny percentage of those who suffer pain inflicted by others.[6]

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[6] One approach to solving the windfall part of the problem was tried by ***Dardinger v. Anthem Blue Cross & Blue Shield***, 781 N.E.2d 121 (Ohio 2002), when it directed that a significant portion of the punitive damages awarded be distributed to a cancer hospital and research institute at Ohio State University, even though no statute authorized such a distribution. ***Id.***, 781 N.E.2d at 146. ***Dardinger*** noted, however, that its approach was similar to that authorized by statute in some other states: "Numerous states have formalized through legislation a mechanical means to divide a punitive damages award between the plaintiff and the state. In some states, the state's portion goes to a special fund, in others, to the general fund. Annotation (1993), 16 A.L.R. 5th 129." ***Id.***, 781 N.E.2d at 145. I offer no opinion as to whether such an approach or one similar to it should be adopted in Wisconsin; that is an issue for either the legislature following extensive inquiry, or the Wisconsin Supreme Court after briefing and argument.

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¶58 SCHUDSON, J. (*dissenting*). These appeals present numerous issues and, on the basis of one or more of them, it is possible that the punitive damages award will fall.[1] It also is possible that the Wisconsin Supreme Court, weaving policy considerations into the legal analysis, will interpret WIS. STAT. § 895.85(3) in a manner that precludes or reduces the punitive damages awarded in this case. If it does so, however, it should not embrace the majority's analysis lest it upend fundamental, well-settled principles underlying the essential difference between compensatory and punitive damages.

¶59 I write separately, therefore, to explain that WIS. STAT. § 895.85(3): (1) if deemed *unambiguous*, cannot mean what the majority claims; and (2) if deemed *ambiguous*, could mean what the majority claims but, consistent with the logic underlying the difference between compensatory and punitive damages, probably does not. Further, in light of Judge Fine's concurring opinion, I shall comment briefly on the importance of prosecuting corporate officers who try to hide their crimes behind corporate veils.

I. WISCONSIN STAT. § 895.85(3)

[1] I mention this, at the outset, not to signal my opinion on any issue we have not yet addressed, but rather, to acknowledge that many substantial issues remain. I would hope, therefore, that if the supreme court embraces my understanding of WIS. STAT. § 895.85(3), it will also address the constitutional challenge to the punitive damages award.

¶60 Quite properly, the majority focuses on the words of WIS. STAT. § 895.85(3): "The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff *or in an intentional disregard of the rights of the plaintiff*." (Emphasis added.) Quite curiously, however, the majority, despite concluding "that the statute is not ambiguous," majority at ¶32, embarks on the kind of long, interpretive cruise generally reserved for judicial travelers viewing *ambiguous* statutes.

¶61 So, although portions of its analysis are helpful, the majority's statutory discussion, as a whole, is internally inconsistent, confusing and, ultimately, incorrect. Accordingly, if only to advance the discussion of what, no doubt, will call for supreme court review, let me try to re-align the analysis.

A. WISCONSIN STAT. § 895.85(3) — Unambiguous?

¶62 The majority says WIS. STAT. § 895.85(3) is unambiguous. But, in the midst of so much uncertainty in these appeals, perhaps the only certainty is this: if WIS. STAT. § 895.85(3) is *unambiguous*, it supports the plaintiffs. The analysis is simple and clear.

¶63 The statutory words at issue are: "or in an intentional disregard of the rights of the plaintiff." The statute says nothing about "harm" or "injury," intentional or otherwise. And WIS JI—CRIMINAL 1701.1 doesn't either; it elaborates: "A person acts in an intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the plaintiff's rights, or is aware that his or her acts are practically certain to result in the plaintiff's rights being disregarded" (footnote omitted). In this case, the plaintiffs accept the unadorned statutory language; the defendants, and now the majority, do not.

¶64 The plaintiffs' premise is, in part, that "rights" under WIS. STAT. § 895.85(3) includes the right to a safe workplace. That part of their premise is unremarkable; the defendants do not dispute it. The plaintiffs' premise, however, also includes the understanding that, under the statute, their right to a safe workplace may be intentionally disregarded, such that punitive damages may be warranted, *regardless of the defendants' intent to cause harm or injury*. They explain:

> Intent to cause physical injury is not necessary to intentionally disregard rights. This case is a perfect example, *where there was a pattern of exposing workers to great risk by knowingly operating in unsafe conditions.* Each time, workers' rights were disregarded, even if no injury occurred. When the decedents were killed, [Mitsubishi's] conduct exposed it to punitive damages under § 895.85(3). There is no basis to say that in a personal injury case, the statute requires an intent to cause physical injury when the statute contains no such distinction, and such intent has not been required in the cases previously decided under § 895.85(3), regardless of the liability theory.

(Emphasis added.)[2] The defendants disagree; they contend that for the right to a safe workplace to be disregarded, harm or injury must be intended.

¶65 Clearly, *if* the statute is *unambiguous*, the defendants are wrong. Their position would require the addition of essential words: "with intent to cause harm or injury." The majority simply does not explain where it has located those

[2] I add emphasis to "where there was a pattern of exposing workers to great risk by knowingly operating in unsafe conditions" because the majority, in its factual summary, fails to acknowledge that this *pattern* was critical to the plaintiffs' proof. *See* majority at ¶34. Instead, the majority concentrates on the factual allegations relating to Mitsubishi's conduct on the fateful day. *See id.* The particulars of that day, however, comprised only the last chapter of the tragedy. Standing alone, the events of that final day constitute an incomplete account of the evidence the jury apparently found so compelling.

missing words or how it can graft them to the statute. Thus, if the majority is correct in concluding that WIS. STAT. § 895.85(3) is *unambiguous*, the plaintiffs' statutory argument prevails.

B. WISCONSIN STAT. § 895.85(3) — Ambiguous?

¶66 If, as the defendants contend, "with intent to cause harm or injury" must be grafted to the statute, it could only be because "rights" is ambiguous and courts, interpreting far beyond the face of the statute, say it must be so. So let us consider that and, in doing so, let me try to locate the best theory I can to support the majority's view. And then let us see if the theory holds.

¶67 The majority relies on jury instructions and a note to one of them. Here, the majority finds some support (but not quite where the majority leans).

¶68 First, the majority points out that Note 2 to WIS JI—CIVIL 1707.1 declares that the statute "was clearly intended to be more narrow than the case law standard." But that does not advance the analysis of the parties' dispute. After all, no one is contending that the statute fails to do that. All agree that the statute has tightened the standard for establishing "intentional disregard." *The issue, however, is whether, somehow, the intentional disregarding of "rights" necessarily includes the intent to cause harm or injury.*

¶69 Second, and far more helpfully, the majority notes that WIS JI—CIVIL 2001 defines "intent" in a way that carves away negligence by explaining that if a defendant's conduct "merely created a risk of some harm to someone, which may or may not have resulted, then (defendant)'s conduct was negligent as opposed to intentional." That, then, may set the foundation for the syllogism essential to the defendants' position: (1) WIS. STAT. § 895.85(3) requires an

"intentional" act; (2) WIS JI—CIVIL 2001 provides that creating "risk," without intending "harm," is negligent, not intentional; and, therefore (3) the intentional disregarding of rights, under § 895.85(3), necessarily includes intending "harm."

¶70 So what's the problem? Well, in the first place, this is the only authority the majority can locate for its grafting. This single, tangentially-related jury instruction is, I think, a terribly thin thread from which to hang the full, framed portrait of punitive damages. And, in the second place, the majority's theory—interpretively adding "with intent to cause harm or injury" to the statute—makes little sense. To add these words is to obliterate the most fundamental difference between compensatory and punitive damages. Let's examine that.

¶71 The majority maintains that the evolution from the common law to the 1995 statute supports the defendants' position. But that begs the obvious question: If the legislature, in addition to tightening the standard, also wanted to require intended "harm" or "injury," why didn't it say so? Why didn't the legislature add the simple words, "with intent to cause harm or injury"? As the parties explained to this court, the legislative history does not answer. It seems, however, that law and logic do.

¶72 Law, addressing "harm" or "injury," enters the realm of *compensatory* damages, and does so regardless of intent. But law, addressing the "intentional disregarding of rights," *see* WIS. STAT. § 895.85(3), points directly at a defendant's *conduct*. And where Wisconsin law provides the statutory potential for punitive damages to deter dangerous conduct, it does so with *some* regard for intent and the extent of the resulting harm or injury, *but it also preserves the*

potential for punitive damages even in the absence of all but nominal harm or injury.[3]

¶73 Any possible doubt about that was recently erased in ***Trinity Evangelical Lutheran Church v. Tower Insurance Co.***, 2003 WI 46, 261 Wis. 2d 333, 661 N.W.2d 789. In ***Trinity***, the supreme court reiterated:

> The factors necessary for an award of punitive damages[] require a showing of: (1) evil intent deserving of punishment or of something in the nature of special ill-will; or (2) wanton disregard of duty; or (3) gross or outrageous conduct.
>
> Punitive damages may properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition.

Id., ¶¶45-46 (citations omitted). *The supreme court did not add any "with-intent-to-cause-harm-or-injury" element.* The state's "legitimate interests in punishing unlawful conduct and deterring its repetition," ***id.***, ¶46, remain solidly in place *regardless* of whether a defendant intends harm or injury to result from the disregarding of rights.

¶74 Were this not enough, the supreme court, in ***Trinity***, quoted, with approval, a punitive damages jury instruction that explicitly provides, "Punitive damages may be awarded, if you find that the defendant acted in an intentional disregard of the rights of the plaintiff." ***Id.***, ¶45 n.5. It made no mention of intending harm or injury. The instruction then goes on to explain that "[p]unitive

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[3] *See* ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 393, 541 N.W.2d 753 (1995) ("Wisconsin does not allow punitive damages to be awarded in the absence of an award of actual damages."); ***Jacque v. Steenberg Homes, Inc.***, 209 Wis. 2d 605, 626, 563 N.W.2d 154 (1997) (nominal damages will suffice if a legal right has been violated).

damages *are not awarded to compensate the plaintiff for any loss he or she has sustained.*" ***Id.*** (emphasis added). Then, most definitively, the instruction absolutely separates the jury's determination of *whether* punitive damages should be awarded (regardless of intended harm of injury), from *how much* should be awarded (taking harm or injury—actual *and potential*—into consideration):

> *If* you determine that punitive damages should be awarded, you may then award such sum as will accomplish the purpose of punishing or deterring wrongful conduct.
>
> Factors you should consider in answering this question include:
>
> 1. The grievousness of the defendant's acts,
>
> 2. *The potential damage which might have been done by such acts as well as the actual damage*, and
>
> 3. The defendant's ability to pay....

Id. (emphases added).

¶75 The message could not be more clear: (1) Punitive damages are intended to punish unlawful conduct and deter its repetition. ***Id.***, ¶46. (2) Punitive damages serve those purposes regardless of intended harm or injury. ***Id.***, ¶¶45-46. (3) Punitive damages may be awarded in recognition of "the *potential damage* which *might* have been done by such acts." ***Id.***, ¶45 n.5 (emphasis added). (4) The amount of punitive damages may increase if "actual damage" has resulted. ***Id.***[4]

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[4] Other recent Wisconsin decisions support the same proposition. *See, e.g.*, ***Dorr v. Sacred Heart Hosp.***, 228 Wis. 2d 425, 454-55, 597 N.W.2d 462 (Ct. App. 1999) (*without any reference to harm or injury*, concludes that, under WIS. STAT. § 895.85(3), for purposes of summary judgment analysis, intentional disregard of plaintiffs' right to be free from hospital's improper lien can establish the basis for punitive damages claim); ***Allied Processors, Inc. v. Western Nat'l Mut. Ins. Co.***, 2001 WI App 129, ¶38, 246 Wis. 2d 579, 629 N.W.2d 329 (*without* (continued)

¶76 And indeed, how could it be otherwise? The separation between compensatory and punitive damages, and the potential for punitive damages even in the absence of intended harm or injury, are at the foundation of our common law. In 1763, in one of the seminal cases allowing punitive damages, Lord Chief Justice Sir Charles Pratt declared that juries have the "power to give *damages for more than the injury received* ... as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury *to the action itself*." ***Wilkes v. Wood***, 98 Eng. Rep. 489, 498-99 (C.P. 1763) (emphases added).

¶77 Early American courts soon echoed the ***Wilkes*** principles. The New Jersey Supreme Court, for example, in 1791, approved a jury instruction that emphasized that, in determining punitive damages, the jury was "*not to estimate the damages by any particular proof of suffering or actual loss*; but to give damages for *example's* sake, to prevent such offenses in [the] future." ***Coryell v. Colbaugh***, 1 N.J.L. 77, 77 (1791) (first emphasis added). The ***Wilkes*** principles remain solid. Lest any doubt linger, the United States Supreme Court recently reiterated that while compensatory damages flow from a jury's factual determinations of actual loss, punitive damages are "an expression of [the jury's] moral condemnation." ***Cooper Indus., Inc. v. Leatherman Tool Group, Inc.***, 532 U.S. 424, 432 (2001).

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any reference to harm or injury, concludes that, under WIS. STAT. § 895.85(3), for purposes of measuring the sufficiency of evidence to support a jury's punitive damages verdict, intentional disregard of plaintiff's rights to disclosure of accurate insurance coverage information, proper evaluation of punitive damages claim, and proper claim settlement in order to prevent an excess verdict, can establish the basis for punitive damages award).

¶78 Thus, I conclude, the majority's attempt to graft a "with-intent-to-cause-harm-or-injury" element to WIS. STAT. § 895.85(3) violates the traditional distinction between compensatory and punitive damages—a distinction that removes "harm" or "injury" from a jury's initial determination of *whether* punitive damages are warranted and, under Wisconsin law, relegates the intent and extent of any harm or injury to the criteria affecting a jury's subsequent determination of *how much* should be awarded. *See* ***Trinity***, 261 Wis. 2d 333, ¶45. From ***Wilkes*** to ***Trinity***, from 1761 to 2003, the separation is certain; the grafting cannot hold.

C. The Bottom Line — WIS. STAT. § 895.85(3) — Unambiguous or Ambiguous

¶79 In short, whether simply following the course of what appears to be an unambiguous statute, or interpretively traveling through WIS. STAT. § 895.85(3), we arrive at the same destination. The legislature did indeed tighten the standard for punitive damages; at the same time, however, the legislature maintained the critical distinction between compensatory and punitive damages. Thus, consistent with that distinction and the traditional, sound public policy it embodies, the statute preserves the *potential* for punitive damages in a case where a defendant intentionally disregards rights by creating an unsafe workplace, regardless of whether the defendant intended any harm or injury to result.

II. Corporate Responsibility

¶80 Judge Fine's concurring opinion could call for extensive, additional discussion. Here, however, I offer only a few thoughts.

¶81 Most helpfully, Judge Fine's comments can help courts shed the polemics often included in arguments about corporate responsibility. It is safe to say, I think, that corporations are neither as demonic nor angelic as their critics

and apologists claim. And corporations, I think, do not fall neatly into any political category. After all, we all have seen corporate conduct liberals applaud as well as corporate misconduct conservatives condemn.

¶82 Corporations, I suspect, often are as good or bad, constructive or destructive, as the individuals directing their affairs. Some corporate leaders reach the right balance. Carefully attending to both community responsibility and shareholder return, they recognize that healthy communities are good for business, and good businesses help make healthy communities. Other corporate leaders, however, lose their way. They cut corners, carelessly cut jobs, give-in to greed, and break laws.

¶83 When that occurs, as Judge Fine points out, firing a shotgun at "the corporation" may wound the innocent. Thus, carefully aimed criminal prosecution of individual corporate officers becomes all the more important. Thorough investigation and tenacious prosecution can help protect our communities from criminals who would try to hide behind their corporate veils.[5]

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[5] For a discussion of the importance of criminal prosecution of individual, corporate officers, *see* Charles B. Schudson, et al., *Nailing An Omelet to the Wall: Prosecuting Nursing Home Homicide*, in CORPORATIONS AS CRIMINALS—PERSPECTIVES IN CRIMINAL JUSTICE 6, 131, 134-36 (Ellen Hochstedler, ed., 1984).

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

PATRICIA WISCHER, et al.,

Plaintiffs,

vs.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., et al.,

Defendants.

FILED
CIVIL DIVISION
FEB 23 11

Case No. 99-CV-006553

Personal Injury, Other: 30107
Wrongful Death: 30105

ORDER FOR INTERLOCUTORY JUDGMENT FOR PUNITIVE DAMAGES AGAINST MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.

Upon motion of the plaintiffs, and based on the entire record and file herein,

IT IS HEREBY ORDERED:

Plaintiffs Patricia Wischer, as Special Administrator of the Estate of Jeffrey A. Wischer, deceased; Marjorie DeGrave, as Special Administrator of the Estate of William R. DeGrave, deceased; and Ramona Dulde-Starr, as Special Administrator of the Estate of Jerome W. Starr, deceased, shall have and recover against defendant Mitsubishi Heavy Industries America, Inc., an interlocutory judgment in the amount of Eighty-Four Million Six Hundred Twenty-Five Thousand and no/100 Dollars ($84,625,000.00), plus taxable costs.

IT IS FURTHER ORDERED:

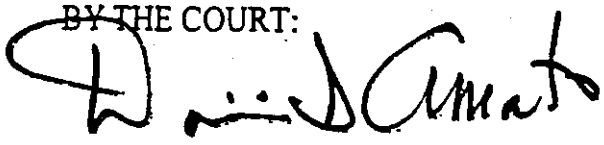
Upon stipulation of the plaintiffs and by virtue of the judgment being interlocutory in nature, execution of the judgment entered upon this order is stayed pending further order of this

court.

Dated at Milwaukee, Wisconsin this 23rd day of February, 2001.

CASE# 99-CV-006553

BY THE COURT:



HONORABLE DOMINIC S. AMATO
Circuit Court Judge

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

PATRICIA WISCHER, et al.,

Plaintiffs,

vs.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., et al.,

Defendants.

FEB 26 2001

$5.00 JUDGMENT FEE PAID

Case No. 99-CV-006553

Personal Injury, Other: 30107
Wrongful Death: 30105

INTERLOCUTORY JUDGMENT FOR PUNITIVE DAMAGES AGAINST MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.

Upon the Order for Interlocutory Judgment for Punitive Damages, dated the 23rd day of February, 2001,

IT IS HEREBY ADJUDGED AND DECREED that:

Plaintiffs Patricia Wischer, as Special Administrator of the Estate of Jeffrey A. Wischer, deceased; Marjorie DeGrave, as Special Administrator of the Estate of William R. DeGrave, deceased; and Ramona Dulde-Starr, as Special Administrator of the Estate of Jerome W. Starr, deceased, have and recover from defendant Mitsubishi Heavy Industries America, Inc., the sum of Eighty-Four Million Six Hundred Twenty-Five Thousand and no/100 Dollars ($84,625,000.00), plus taxable costs and interest.

In accordance with the provisions of Wis. Stat. § 806.01(1). the places of residence of the parties are as follows:

1. Plaintiff Patricia Wischer, Special Administrator of the Estate of Jeffrey A. Wischer. deceased, resides at 543 West Wisconsin Avenue, Pewaukee, Wisconsin 53072;

2. Plaintiff Marjorie DeGrave, Special Administrator of the Estate of William R. DeGrave. deceased, resides at 140 Darboy Road, Kimberly, Wisconsin 54136;

3. Plaintiff Ramona Dulde-Starr, Special Administrator of the Estate of Jerome W. Starr, deceased, resides at 920 East Mason Street, Milwaukee, WI 53202; and

4. Defendant Mitsubishi Heavy Industries America, Inc., is a foreign corporation with its principal offices at 520 Madison Avenue, New York, New York 10167.

Costs and interest are hereby allowed and taxed in favor of the plaintiffs and against defendant Mitsubishi Heavy Industries America, Inc., in the amount of to be determined by the Court.

Entered at Milwaukee, Wisconsin this 22nd day of February, 2001.

BY THE COURT:

HONORABLE DOMINIC S. AMATO
Circuit Court Judge

Judgment Entered: 2-26-01 and Docketed: 02-26-01.

BY THE COURT
JOHN BARRETT
CLERK OF CIRCUIT COURT
BY _____
JUDGMENT CLERK

FILED
0 FEB 26 2001 0
JOHN BARRETT
Clerk of Circuit Court

COSTS TO BE TAXED WITHIN
30 DAYS OR FORFEITED
WIS. STATUTE 806.06(4)

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

PATRICIA WISCHER. et al.,

Plaintiffs,

vs.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., et al.,

Defendants.

FEB 26 2001

$5.00 JUDGMENT FEE PAID

FILED CIVIL DIVISION

Case No. 99-CV-006553

Personal Injury, Other: 30107
Wrongful Death: 30105

FINAL JUDGMENT AGAINST THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS

Upon the Order for Final Judgment Against The Travelers Indemnity Company of Illinois, dated the 23rd day of February, 2001,

IT IS HEREBY ADJUDGED AND DECREED that:

1. Plaintiffs Patricia Wischer, as Special Administrator of the Estate of Jeffrey A. Wischer, deceased; Marjorie DeGrave, as Special Administrator of the Estate of William R. DeGrave, deceased; and Ramona Dulde-Starr, as Special Administrator of the Estate of Jerome W. Starr, deceased, have and recover from defendant The Travelers Indemnity Company of Illinois (Travelers) the sum of Two Million and no/100 Dollars ($2,000,000.00). This amount represents the first two million dollars ($2,000,000) of liability coverage provided by Travelers under the Owner Controlled Insurance Program (OCIP).

2. Plaintiffs Patricia Wischer, as Special Administrator of the Estate of Jeffrey A. Wischer, deceased; Marjorie DeGrave, as Special Administrator of the Estate of William R. DeGrave, deceased; and Ramona Dulde-Starr, as Special Administrator of the Estate of Jerome W. Starr, deceased, have and recover from defendant The Travelers Indemnity Company of Illinois the sum of Twenty-Five Million and no/100 Dollars ($25,000,000.00), plus taxable costs

and interest. The amount of twenty-five million dollars ($25,000,000) represents the twenty-five million dollars ($25,000,000) of excess liability coverage provided by Travelers, which is the layer between $77,000,000 and $102,000,000 of liability coverage under the OCIP. The twenty-five million dollars ($25,000,000), when paid, will represent and satisfy that layer of outstanding liability of MHIA between $57,625,000 and $82,625,000.

In accordance with the provisions of Wis. Stat. §806.01(1), the places of residence of the parties are as follows:

1. Plaintiff Patricia Wischer resides at 543 West Wisconsin Avenue, Pewaukee, Wisconsin 53072.

2. Plaintiff Marjorie DeGrave resides at 140 Darboy Road, Kimberly, Wisconsin 54136.

3. Plaintiff Ramona Dulde-Starr resides at 920 East Mason Street, Milwaukee, Wisconsin 53202.

4. Defendant The Travelers Indemnity Company of Illinois is a foreign corporation with its principal offices at 2500 Cabot Drive, Lisle, IL 60563.

Costs and interest are hereby allowed and taxed in favor of the plaintiffs and against defendant The Travelers Indemnity Company of Illinois in the amount of to be determined by Court

Dated at Milwaukee, Wisconsin this 23rd day of February, 2001.

FILED
FEB 23 2001
JOHN BARRETT
Clerk of Circuit Court

BY THE COURT:

HONORABLE DOMINIC S. AMATO
Circuit Court Judge

Judgment Entered: 2-26-01 and Docketed: 2-26-01.

BY THE COURT
JOHN BARRETT
CLERK OF CIRCUIT COURT
BY _____
JUDGMENT CLERK

COSTS TO BE TAXED WITHIN
30 DAYS OR FORFEITED
WIS. STATUTE 806.06(4)

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

PATRICIA WISCHER, et al.,

Plaintiffs,

vs.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., et al.,

Defendants.

Case No. 99-CV-006553

Personal Injury, Other: 30107
Wrongful Death: 30105

ORDER FOR FINAL JUDGMENT AGAINST THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS

It appearing from the entire file herein, that:

1. The Travelers Indemnity Company of Illinois (Travelers) provided commercial general liability insurance coverage to Mitsubishi Heavy Industries America, Inc. (MHIA);

2. In a settlement agreement filed with and approved by the court, it was agreed by the parties that two insurance policies issued by Travelers provided the following layers of commercial general liability coverage under an Owner Controlled Insurance Program (OCIP):

a. The first two million dollars ($2,000,000) of liability, and

b. Twenty five million dollars ($25,000,000) between seventy-seven million dollars ($77,000,000) and one hundred and two million dollars ($102,000,000) of liability;

3. As part of a settlement, Travelers has paid the limits of the policy for the first $2,000,000 of liability and other insurers in the next layers of insurance have paid $17,375,000, such that the Travelers policy providing $25,000,000 in coverage is now in place to cover the

layer between $57,625,000 and $82,625,000 of any remaining liability;

4. As result of a jury verdict rendered on December 1, 2000, and after having denied all motions after verdict, the court has ruled that MHIA is liable to the plaintiffs for the sum of $84,625,000;

Now, upon motion of the plaintiffs, and based on the court's oral bench decision issued on February 22, 2001, and on the entire record and file herein,

IT IS HEREBY ORDERED:

Plaintiffs Patricia Wischer, as Special Administrator of the Estate of Jeffrey A. Wischer, deceased; Marjorie DeGrave, as Special Administrator of the Estate of William R. DeGrave, deceased; and Ramona Dulde-Starr, as Special Administrator of the Estate of Jerome W. Starr, deceased, shall have and recover against defendant The Travelers Indemnity Company of Illinois judgment in the amount of $27,000,000.00 (twenty-seven million and no/100 dollars), plus taxable costs. This amount represents the first two million dollars ($2,000,000) of liability coverage provided by Travelers under the OCIP, plus the twenty-five million dollars ($25,000,000) of excess liability coverage provided by Travelers, which is the layer between $77,000,000 and $102,000,000 of liability coverage under the OCIP. The twenty-five million dollars ($25,000,000), when paid, will represent and satisfy that layer of outstanding liability of MHIA between $57,625,000 and $82,625,000.

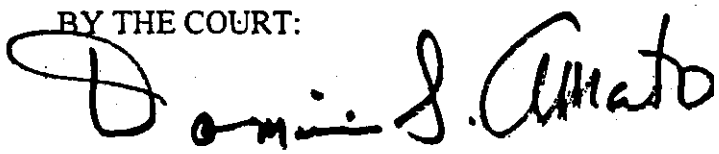
IT IS FURTHER ORDERED:

In acknowledgement of the payment by Travelers of two million dollars under the aforesaid settlement agreement, plaintiffs Patricia Wischer, as Special Administrator of the Estate of Jeffrey A. Wischer, deceased; Marjorie DeGrave, as Special Administrator of the Estate of William R. DeGrave, deceased; and Ramona Dulde-Starr, as Special Administrator of the

Estate of Jerome W. Starr, deceased, shall execute a Partial Satisfaction of Judgment in favor of Travelers in satisfaction of the first two million dollars ($2,000,000) of the judgment to be entered upon this order. This amount of two million dollars represents the first two million dollars of Travelers' liability coverage under the OCIP, as referenced in paragraph 2a.

Dated at Milwaukee, Wisconsin this 23rd day of February, 2001.

BY THE COURT:



HONORABLE DOMINIC S. AMATO
Circuit Court Judge

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

PATRICIA WISCHER, et al.,

Plaintiffs,

vs.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., et al.,

Defendants.

FILED
CIVIL DIVISION
MAY 11 2001
HON. DOMINIC S. AMATO PRESIDING
JOHN BARRETT-CLERK OF COURTS

Case No. 99-CV-006553

Personal Injury, Other: 30107
Wrongful Death: 30105

ORDER FROM HEARING ON MAY 3, 2001

For reasons set forth on the record at the May 3, 2001 hearing held in this matter,

IT IS HEREBY ORDERED AS FOLLOWS:

1. The following judgments and orders are to be considered final judgments and orders of the court:

   a. Interlocutory Judgment for Punitive Damages Against Mitsubishi Heavy Industries America, Inc., signed and filed on February 23, 2001, docketed on February 26, 2001 and perfected on March 23, 2001;

   b. Final Judgment Against The Travelers Indemnity Company of Illinois, signed and filed on February 23, 2001, entered and docketed on February 26, 2001 and perfected on March 23, 2001;

   c. Order for Interlocutory Judgment in Favor of Mitsubishi Heavy Industries America, Inc. And Against The Travelers Indemnity Company of Illinois;

   d. Order Denying The Travelers Indemnity Company of Illinois' Motion to Re-open the Evidence and Vacate the Judgment, signed and filed April 6, 2001; and

   c. The court's orders dated January 30, 2001 and April 3, 2001 dismissing Neil F. Lampson.

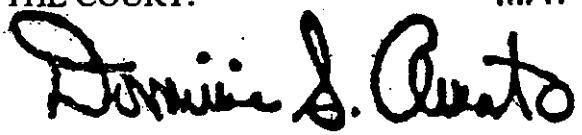
2. The claims of the plaintiffs and Mitsubishi Heavy Industries America, Inc. to determine insurance coverage against the defendants, Federal Insurance Company and the Tokyo Marine & Fire Insurance Company are hereby severed and separated from any other claims in the action and shall be proceeded with separately and will continue in the trial court, including through trial, while any appeals from judgments as to other claims are pursued.

3. The motion of Travelers Indemnity Company of Illinois to stay all trial court proceedings is hereby denied.

4. The amended crossclaim filed by Lampson International, Ltd. against Mitsubishi Heavy Industries America, Inc., shall be stayed pending the outcome of the appeal.

Dated at Milwaukee, Wisconsin, this ____ day of _____, 2001.

BY THE COURT: MAY 11 2001



Honorable Dominic S. Amato
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

PATRICIA WISCHER, et al.,

Plaintiffs,

vs.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., et al.,

Defendants.

CIVIL DIVISION
AUG 23 2001

Case No. 99-CV-006553

Personal Injury, Other: 30107
Wrongful Death: 30105

FINAL JUDGMENT AGAINST FEDERAL INSURANCE COMPANY AND THE TOKIO MARINE AND FIRE INSURANCE COMPANY

Upon the Order dated the 23rd day of August, 2001,

IT IS HEREBY DECLARED that:

1. The insurance policy issued by defendant Federal Insurance Company as part of the Owner Controlled Insurance Program, policy number (00) 7974-01-75, provides coverage to defendant Mitsubishi Heavy Industries America, Inc. ("MHIA") for the damages that the jury awarded in the plaintiffs' favor against MHIA.

2. The insurance policy issued by defendant The Tokio Marine and Fire Insurance Company to MHIA, policy number CLL424075600, provides coverage to MHIA for the damages that the jury awarded in the plaintiffs' favor against MHIA.

3. If defendant The Travelers Indemnity Company of Illinois makes a payment in excess of $25 million plus such corresponding taxable costs and interest for which MHIA is responsible in satisfaction or on account of the judgment in favor of MHIA against Travelers, Travelers shall be entitled to immediate equitable subrogation and payment, dollar for dollar, from Federal and Tokio Marine, in accordance with the layers of insurance coverage that Federal

and Tokio Marine provide to MHIA. Travelers shall not be required to pay its $25 million policy limit toward the amount of money for which MHIA is liable to the plaintiffs more than once, and neither the plaintiffs nor MHIA will be entitled to a double recovery.

IT IS HEREBY ADJUDGED AND DECREED that:

1. Plaintiffs Patricia Wischer, as Special Administrator of the Estate of Jeffrey A. Wischer, deceased; Marjorie DeGrave, as Special Administrator of the Estate of William R. DeGrave, deceased; and Ramona Dulde-Starr, as Special Administrator of the Estate of Jerome W. Starr, deceased, have and recover from defendant Federal Insurance Company the sum of Fifty Million and no/100 Dollars ($50,000,000.00), plus such corresponding taxable costs and interest for which MHIA is responsible. The amount of fifty million dollars ($50,000,000) represents the fifty million dollars ($50,000,000) of excess liability insurance coverage provided by Federal Insurance Company, which is the layer between $27,000,000 and $77,000,000 of liability coverage under the Owner Controlled Insurance Program. When paid, the fifty million dollars ($50,000,000), plus such corresponding taxable costs and interest for which MHIA is responsible, will represent and satisfy that layer of outstanding liability of MHIA to the plaintiffs between $1 and $50,000,000 plus such corresponding taxable costs and interest for which MHIA is responsible.

2. Plaintiffs Patricia Wischer, as Special Administrator of the Estate of Jeffrey A. Wischer, deceased; Marjorie DeGrave, as Special Administrator of the Estate of William R. DeGrave, deceased; and Ramona Dulde-Starr, as Special Administrator of the Estate of Jerome W. Starr, deceased, have and recover from defendant The Tokio Marine and Fire Insurance Company the sum of Two Million and no/100 Dollars ($2,000,000.00), plus such corresponding taxable costs and interest for which MHIA is responsible. The amount of two million dollars ($2,000,000) represents the two million dollars ($2,000,000) of excess liability insurance coverage provided by The Tokio Marine and Fire Insurance Company, which is the layer above

all of the layers of liability coverage under the Owner Controlled Insurance Program. When paid, the two million dollars ($2,000,000), plus such corresponding taxable costs and interest for which MHIA is responsible, will represent and satisfy that layer of outstanding liability of MHIA to the plaintiffs between $75,000,000 and $77,000,000 plus such corresponding taxable costs and interest for which MHIA is responsible.

In accordance with the provisions of Wis. Stat. §806.01(1), the places of residence of the parties are as follows:

1. Plaintiff Patricia Wischer resides at 543 West Wisconsin Avenue, Pewaukee, Wisconsin 53072.

2. Plaintiff Marjorie DeGrave resides at 140 Darboy Road, Kimberly, Wisconsin 54136.

3. Plaintiff Ramona Dulde-Starr resides at 920 East Mason Street, Milwaukee, Wisconsin 53202.

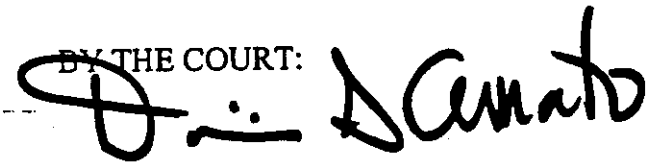
4. Defendant Federal Insurance Company is a foreign corporation with its principal offices at 15 Mountain View Road, Warren, New Jersey 07061.

5. Defendant The Tokio Marine and Fire Insurance Company is a foreign corporation with its principal offices at 101 Park Avenue, New York, New York 10178.

6. Defendant The Travelers Indemnity Company of Illinois is a foreign corporation with its principal offices at 2500 Cabot Drive, Lisle, Illinois 60563.

Dated at Milwaukee, Wisconsin this 23rd day of August, 2001.

BY THE COURT:



HONORABLE DOMINIC S. AMATO
Circuit Court Judge

1 IN THE CIRCUIT COURT OF MILWAUKEE COUNTY

2 STATE OF WISCONSIN

3

4 PATRICIA WISCHER, individually,
and as Special Administrator of the
5 ESTATE OF JEFFREY A. WISCHER, deceased;
MARJORIE DeGRAVE, individually,
6 and as Special Administrator of the.
ESTATE OF WILLIAM R. DeGRAVE, deceased;
7 and RAMONA DULDE-STARR, individually,
and as Special Administrator of the
8 ESTATE OF JEROME STARR, deceased,

9 Plaintiffs,

10

-vs- Case No. 99-CV-006553

11

12 MITSUBISHI HEAVY INDUSTRIES
AMERICA, INC., TRAVELERS
13 PROPERTY CASUALTY INSURANCE
COMPANY, THE TRAVELERS INDEMNITY
14 COMPANY OF ILLINOIS, NEIL F. LAMPSON,
INC., HCH MILLER PARK JOINT VENTURE,
15 HUNZINGER CONSTRUCTION COMPANY,
CLARK CONSTRUCTION BUILDERS, INC.,
16 and HUBER, HUNT & NICHOLS, INC.,

17 Defendants.

18

19 October 30, 2000

20 Volume XI

21 TRANSCRIPT OF JURY TRIAL

22 Before:
23 HONORABLE DOMINIC S. AMATO
Circuit Court Judge Presiding

24 Court Reporters: Debra A. Wisniewski, CRR/RMR
25 Constance L. Bauer, CRR/RMR
Julie K. Lyle, RMR/RPR

1 A P P E A R A N C E S:

2 HABUSH, HABUSH, DAVIS & ROTTIER, S.C., by
Mr. Robert L. Habush
3 Mr. Mark S. Young
777 East Wisconsin Avenue
4 Milwaukee, Wisconsin 53202
Appeared on behalf of Plaintiffs Patricia Wischer,
5 individually and as Special Administrator of the
Estate of Jeffrey A. Wischer, deceased; Marjorie
6 DeGrave, individually and as Special Administrator of
the Estate of William R. DeGrave, deceased.
7
JACQUART & LOWE, by
8 Mr. David P. Lowe
One Plaza East, Suite 745
9 330 East Kilbourn Avenue
Milwaukee, Wisconsin 53202
10 Appeared on behalf of Plaintiff Ramona Dulde-Starr,
individually and as Special Administrator of the
11 Estate of Jerome W. Starr, deceased.

12 CRIVELLO, CARLSON, MENTKOWSKI & STEEVES, S.C., by
Mr. Donald H. Carlson
13 Mr. Timothy F. Mentkowski
Mr. Jeffrey T. Nichols
14 Mr. William W. Ehrke
710 North Plankinton Avenue, Suite 500
15 Milwaukee, Wisconsin 53203
Appeared on behalf of Defendant Neil F. Lampson, Inc.
16
JOHNSON & BELL, LTD., by
17 Mr. John Bell
Mr. Kevin Owens
18 222 North LaSalle Street, Suite 2200
Chicago, Illinois 60601
19 Appeared on behalf of Defendant Mitsubishi
Heavy Industries America, Inc.
20
REINHART, BOERNER, VAN DEUREN, NORRIS &
21 RIESELBACH, S.C., by
Mr. Ralph A. Weber
22 1000 North Water Street
Milwaukee, Wisconsin 53203
23 Appeared on behalf of Defendant Mitsubishi
Heavy Industries America, Inc.
24
25

1 Daylight Savings Time, so it's probably dark or
2 getting close to it, so I'm going to send you home
3 now. There are some issues that the lawyers and I
4 have to take up that have nothing to do with anything
5 that you have to bother to hear about. So I'm going
6 to send you home. All those admonishments continue,
7 please, I know you are, just be aware of it. We'll
8 see you. Be back up there at 9:00 tomorrow morning.
9 We'll see you at nine o'clock bright and early.
10 I again want to thank the gentleman
11 from Interstate Brands and Interstate Brands is
12 bringing the treats. We don't have the resources to
13 bring them, and I hope they're just good. We'll see
14 you tomorrow, everybody. Please rise.
15 (The jury was excused.)
16 THE COURT: The jury is out. You may be
17 seated. Mr. Habush?
18 MR. HABUSH: Yes, Your Honor, I'd like the
19 court to rule as a matter of law that we established
20 a prima facie case to go to the jury with on punitive
21 damages. I not only believe we went through the
22 threshold, but we're in the house and went out the
23 back door. So I think the evidence that we have
24 established shows compliance with the statute of
25 intentional disregard by the testimony, expert

1 testimony, by their conduct, and if the court would
2 like, I can go to specific references, but I think we
3 all remember it pretty clearly. It's only been a
4 couple of weeks. So that's my request, Your Honor.
5 THE COURT: I'll address the insurance
6 coverage issue real quickly.
7 MR. HABUSH: Excuse me, sir?
8 THE COURT: Punitive damages on the
9 insurance. You asked for the insurance policies too.
10 MR. HABUSH: Yes. If the court rules
11 affirmatively, then I would like the financials kept
12 under seal turned over to us so I can have them
13 examined this evening by an accountant, at which time
14 I will decide whether to request the asset -- the
15 insurance policies be put into evidence as well as
16 one of the assets. I may decide not to use the
17 insurance policy or the financials, I may decide to
18 use one or the other, but I'd like to have that
19 option.
20 THE COURT: You want the option?
21 MR. HABUSH: The option, yes.
22 THE COURT: Mr. Carlson, do you want to be
23 heard on this?
24 MR. CARLSON: I have no interest in that
25 particular issue.

1 THE COURT: Mr. Bell, Mr. Weber, Mr. Owens?
2 MR. WEBER: The question, Your Honor, is
3 one of law for the court, and this would be the
4 appropriate time to move pursuant to 805.14 as well
5 or --
6 THE COURT: Why don't you do that when
7 Mr. Habush rests his case. Subject to housekeeping
8 on exhibits, both Mitsubishi's and Lampson's rights
9 will automatically be preserved to bring a motion at
10 the close of the testimony, and we'll defer that the
11 next time the jury is out. So you're all safe on
12 that. I just want to address the issues raised by
13 plaintiffs on punitive damages.
14 MR. WEBER: Right. Your Honor, first, the
15 standard is clear and convincing evidence. Second,
16 as noted in the comments of the jury instruction,
17 that this law was changed after 1995, so we're
18 talking about a different standard, a different
19 approach from a law that previously existed. In
20 particular, Your Honor, there has to be a showing
21 that the individuals, the individual employees of
22 Mitsubishi, particularly Wayne Noel and Victor
23 Grotlisch, were practically certain on July 14 that
24 Big Blue was certain to fall, tip over, and cause the
25 death of these individuals.

1 The evidence brought forth to this
2 date is exactly to the opposite. In fact, Wayne Noel
3 himself was in the zone of danger at the time of the
4 accident and had to run for his life. Victor
5 Grotlisch was about to go up on the track beam and,
6 likewise, was in the zone of danger as defined by
7 plaintiffs' own witness. So what we have is evidence
8 of alleged reckless conduct, conduct that no longer
9 meets the standard for punitives under Wisconsin law.
10 There is no evidence that anyone told Victor
11 Grotlisch to stop this lift. To the contrary, once
12 the -- once the pick was off the ground in the late
13 morning hours, it proceeded under the control of
14 Allen Watts and Fred Flowers.
15 Very interesting testimony today.
16 Amazing admission by Mr. Flowers that contrary to
17 everything that's been said over the last two weeks,
18 he had not in mind a 20 mile an hour speed limit but
19 rather a 25 to 27 before he was even going to say
20 anything to Allen Watts.
21 This -- there's no evidence any of
22 that information was shared with anyone at
23 Mitsubishi, and so there is a break in any alleged
24 causal chain before it ever gets to Mitsubishi. So
25 for those reasons, Your Honor, and the other reasons

1 set forth with more specificity in our brief --
2 THE COURT: In your brief?
3 MR. WEBER: Yes -- we oppose the motion.
4 THE COURT: Those you don't have to -- I
5 pulled all those documents out and read them --
6 MR. WEBER: Right.
7 THE COURT: -- just recently.
8 MR. WEBER: Yeah, as to the insurance
9 issue -- and, likewise, Judge, that's been briefed.
10 We don't oppose Mr. Habush having a copy of it, but
11 it's quite a different issue, a substantial issue of
12 Wisconsin public policy whether that would be
13 allowed.
14 THE COURT: Thank you. I reread everything
15 again. A part of your argument, Mr. Weber, setting
16 aside what's contained in your briefs and your
17 motions in limine, but part of the argument that you
18 just made now is really arguing the merits of the
19 case and the weight of the testimony and balancing
20 out, and those issues are for the jury to ultimately
21 decide the weight and the credibility they put on
22 witnesses and who they believe and who they don't
23 believe in searching for the truth to do justice.
24 Section 895.85 on punitive damages,
25 subsection 3, standard of conduct, says, "The

1 plaintiff may receive punitive damages if evidence is
2 submitted showing that the defendant acted
3 maliciously towards the plaintiff or in an
4 intentional disregard of the rights of the
5 plaintiff."
6 The procedure under sub. 4 is that if
7 the plaintiff establishes a prima facie case for the
8 allowance of punitive damages, A, the plaintiff may
9 introduce evidence of the wealth of the defendant."
10 All the plaintiff has to do at this
11 stage of the proceedings is show a prima facia case.
12 He doesn't have to do anything other than present
13 competent evidence that would support a prima facie
14 case under the appropriate burden of proof. The
15 testimony on this subject could only be invaded, as
16 argued by Mr. Weber, if it was inherently incredible
17 or inherently implausible, and the testimony offered
18 to support a prima facie case for punitive damages
19 does not rise to testimony that would be inherently
20 incredible or inherently implausible.
21 Setting aside the testimony of the
22 experts on this subject and the references that some
23 of experts testified, such as Mr. Shapiro, just
24 setting that aside, the evidence offered by the
25 people there working at Miller Park, along with the

1 admissions by Mr. Grotlisch, Mr. Noel, that in and of
2 itself rises to the level of the plaintiff
3 establishing a prima facie case for the allowance of
4 punitive damages. I don't have to reach the
5 testimony of the experts. I don't want to get
6 involved in their descriptive phraseology of what is
7 or what is not. I know there was testimony by some
8 of the experts as to a conscious disregard. The
9 court doesn't have to reach that because there's
10 enough evidence in the record to show not only a
11 conscious disregard but an intentional disregard of
12 the rights of the plaintiffs in this case.
13 The evidence has been established to
14 support a prima facie case that those acting on
15 behalf of Mitsubishi, their employees, Mr. Grotlisch
16 and Mr. Noel, that the acts, actions and inactions,
17 the verbal dialog, the non-verbal dialog, the
18 communication, course of conduct and the way the
19 testimony shows how the people interacted, along with
20 the responsibility and decision-making -- ultimate
21 decision-making, that Mitsubishi, through its agents
22 and employees, put these people, in addition to other
23 people, in harm's way where there was a high
24 probability of physical injury and/or death. And
25 under those circumstances, the court is satisfied

1 that the plaintiffs in this case can seek and argue
2 punitive damages to the jury.
3 It's ultimately up to the jury to
4 decide who they believe or they do not believe and
5 the jury to decide what, if any, punitive damages are
6 appropriate. They also have to decide, the jury,
7 whether or not the actions of Mitsubishi are
8 intentional disregard for plaintiffs' rights. So
9 those are issues of fact for the jury to ultimately
10 make. All I'm deciding today is based upon the
11 evidence proffered and tendered and garnered through
12 the exhibits and witnesses on the witness stand as to
13 whether or not a prima facie case has been made. And
14 it clearly has been made.
15 With regard -- and in such cases of
16 punitive damage, the plaintiffs at that point in time
17 have the opportunity to offer evidence because
18 punitive damages are there to punish the wrongdoer.
19 And when you deal with the issue of punitive damages,
20 you deal with the economic wealth of the party who
21 punitive damages are being sought against.
22 The insurance issue, insurance
23 coverage, is inadmissible upon the issue of whether
24 or not someone is negligent or someone is at fault
25 and caused the -- carelessness caused the injury.

1 IN THE CIRCUIT COURT OF MILWAUKEE COUNTY
STATE OF WISCONSIN

2

3 PATRICIA WISCHER, individually,
and as Special Administrator of the
4 ESTATE OF JEFFREY A. WISCHER, deceased;
MARJORIE DeGRAVE, individually,
5 and as Special Administrator of the.
ESTATE OF WILLIAM R. DeGRAVE, deceased;
6 and RAMONA DULDE-STARR, individually,
and as Special Administrator of the
7 ESTATE OF JEROME STARR, deceased,

8 Plaintiffs,

9
-vs- Case No. 99-CV-006553
10

11 MITSUBISHI HEAVY INDUSTRIES
AMERICA, INC., TRAVELERS
12 PROPERTY CASUALTY INSURANCE
COMPANY, THE TRAVELERS INDEMNITY
13 COMPANY OF ILLINOIS, NEIL F. LAMPSON,
INC., HCH MILLER PARK JOINT VENTURE,
14 HUNZINGER CONSTRUCTION COMPANY,
CLARK CONSTRUCTION BUILDERS, INC.,
15 and HUBER, HUNT & NICHOLS, INC.,

16 Defendants.

17

18

19 November 27, 2000

20 VOLUME XXIX

21 TRANSCRIPT OF JURY TRIAL

22 Before:
HONORABLE DOMINIC S. AMATO
23 Circuit Court Judge Presiding

24 Court Reporters: Debra A. Wisniewski, CRR/RMR
Constance L. Bauer, CRR/RMR
25 Julie A. Poenitsch, CRR/RMR

1 stipulation on that. Let's go down to MHIA's
2 motions. I don't -- Mr. Weber.
3 MR. WEBER: Yes. Pursuant to 805.14(4),
4 motion at the close of all the evidence, we want to
5 renew the motions that we made at the close of
6 plaintiffs' case with respect to the no affirmative
7 act and failure to have sufficient evidence to
8 support a punitive damages claim. No additional
9 evidence came in in support of either claim, so
10 we've renewed those motions.
11 In addition, we -- well, why don't we --
12 did you want something from Mr. Carlson?
13 THE COURT: Again, so there's no
14 confusion, you're asking me, Mr. Weber and Mr. Bell
15 and Mr. Owens, to look at the evidence in the most
16 favorable light, and I did that, and I was told I
17 prejudged the case because I agreed with Shapiro,
18 which I didn't, but as I ruled in the past in the
19 beginning and as I ruled at the close of the
20 plaintiffs' case and as I rule now, there is
21 overwhelming evidence to show not only affirmative
22 acts, but looking at the evidence in the best light
23 of the plaintiffs, the Court cannot rule as a matter
24 of law that MHIA is entitled to relief.
25 The jury could easily come back, if they

1 accepted the testimony of the plaintiffs, that MHIA
2 was negligent, and if they accepted the testimony
3 and the evidence offered by the plaintiffs along
4 with the expert opinion, they could come back and
5 find that there was a conscious disregard of the
6 plaintiffs' rights by MHIA, and therefore those
7 motions are denied. There is sufficient evidence in
8 the record to support a jury's verdict on both of
9 those subjects.
10 And I'm going to dispense with the
11 argument of Mr. Habush and Mr. Carlson because
12 they're just going to get up and tell me the same
13 thing they told me before, and they might be a
14 little more expressive this time around; unless you
15 want to build a record, Mr. Habush?
16 MR. HABUSH: I'm saving my voice.
17 THE COURT: Mr. Carlson?
18 MR. CARLSON: Same.
19 THE COURT: Okay. And again, I'm not
20 prejudging the case. This is how I have to rule on
21 these things. I have to look at it and accept it as
22 they are -- for purposes of dismissing or granting
23 the motion. Anything else?
24 MR. WEBER: No. With respect to
25 Lampson's motion, I understand the Court has already

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

PATRICIA WISCHER, individually,
and as Special Administrator of the
ESTATE OF JEFFREY A. WISCHER, deceased,
MARJORIE DeGRAVE, individually,
and as Special Administrator of the
ESTATE OF WILLIAM R. DeGRAVE, deceased,
and RAMONA DULDE-STARR, individually,
and as Special Administrator of the
ESTATE OF JEROME W. STARR, deceased,

Plaintiffs,

vs.

MITSUBISHI HEAVY INDUSTRIES AMERICA,
INC. and LAMPSON INTERNATIONAL, LTD.,

Defendants.

FILED
CIVIL DIVISION
11 NOV 28 2000 11
HON. DOMINIC S. AMATO PRESIDING
JOHN BARRETT-CLERK OF COURTS

Case No. 99-CV-6553

Case Code:
Personal Injury, Other: 30107
Wrongful Death: 30105

SPECIAL VERDICT REGARDING TORT ISSUES

1. Without considering the conduct of Allen Watts, Fred Flowers and Steven Aldrich, was defendant Mitsubishi Heavy Industries America, Inc. negligent?

Yes
YES or NO

2. If you answered "yes" to Question No. 1, then answer this question: Was such negligence of defendant Mitsubishi Heavy Industries America, Inc., a cause of the plaintiffs' damages?

FILED
CIVIL DIVISION
11 DEC - 1 2000 11
HON. DOMINIC S. AMATO PRESIDING
JOHN BARRETT-CLERK OF COURTS

Yes
YES or NO

3. Without considering the conduct of Allen Watts, Fred Flowers and Steven Aldrich, was defendant Lampson International Ltd. negligent?

Yes
YES or NO

4. If you answered "yes" to Question No. 3, then answer this question: Was such negligence of defendant Lampson International Ltd. a cause of the plaintiffs' damages?

YES
YES or NO

5. Were Allen Watts, Fred Flowers or Steven Aldrich negligent?

NO
YES or NO

6. If you answered "yes" to Question No. 5, then answer this question: Was such negligence of Allen Watts, Fred Flowers or Steven Aldrich a cause of the plaintiffs' damages?

_____
YES or NO

7. If you answered "yes" to two or more of Question Nos. 2, 4, or 6, then answer this question: Assuming the total negligence that caused the plaintiffs' damages to be 100%, what percentage of the negligence do you attribute to:

A.	Mitsubishi Heavy Industries America, Inc. (without considering the conduct of Allen Watts, Fred Flowers and Steven Aldrich)	97 %
B.	Lampson International Ltd. (without considering the conduct of Allen Watts, Fred Flowers and Steven Aldrich)	3 %
C.	Allen Watts, Fred Flowers or Steven Aldrich	0 %
		100 %

8. On July 14, 1999, were Allen Watts, Fred Flowers and Steven Aldrich loaned employees of defendant Mitsubishi Heavy Industries America, Inc.?

YES
YES or NO

REGARDLESS OF HOW YOU HAVE ANSWERED THE PREVIOUS QUESTIONS, YOU MUST ANSWER QUESTIONS 9 and 10:

9. What sum of money will fairly and reasonably compensate the Estate of Jeffrey A. Wischer, the Estate of William R. DeGrave, and the Estate of Jerome W. Starr for the pain, suffering, mental anguish and distress experienced by:

A. Jeffrey A. Wischer $ 1,400,000.

B. William R. DeGrave $ 1,400,000.

C. Jerome W. Starr $ 1,400,000.

10. What sum of money will fairly and reasonably compensate each of the following plaintiffs for the loss of the society and companionship of their respective husbands:

A. Patricia Wischer: $ 350,000

B. Marjorie DeGrave: $ 350,000

C. Ramona Dulde-Starr: $ 350,000

11. If you answered "yes" to Question No. 2 and awarded a sum of money in answer to Question No. 9, then answer this question: Did defendant Mitsubishi Heavy Industries America, Inc. act in an intentional disregard of the rights of the decedents?

YES
YES or NO

12. If you answered "yes" to Question No. 11, then answer this question: What sum, if any, do you assess against defendant Mitsubishi Heavy Industries America, Inc. as punitive damages?

$ 94,000,000.

Dated at Milwaukee, Wisconsin this 1 day of DECEMBER, 2000.

a. Wonser

Foreperson

Dissenting Jurors:

_____

_____

_____

1707.1

Punitive damages may be awarded, in addition to compensatory damages, if you find that defendant Mitsubishi Heavy Industries America, Inc. acted in an intentional disregard of the rights of the decedents.

A person acts in an intentional disregard of the rights of another if the person acts with a purpose to disregard the other's rights, or is aware that his or her acts are practically certain to result in the other's rights being disregarded.

The purpose of punitive damages is to punish a wrongdoer or deter the wrongdoer and others from engaging in similar conduct in the future. Punitive damages are not awarded to compensate a party for any loss he or she has sustained. A party is not entitled to punitive damages as a matter of right. Even if you find that defendant Mitsubishi Heavy Industries America, Inc. acted in an intentional disregard of the decedents' rights, you do not have to award punitive damages. Such damages may be awarded or withheld at your discretion. You may not, however, award punitive damages unless you have awarded compensatory damages.

If you determine that punitive damages should be awarded, you may then award such sum as will accomplish the purpose of punishing or deterring wrongful conduct.

Factors you should consider in answering this question include:

1. the grievousness of the defendant's acts,
2. the degree of intentional disregard involved, and
3. the potential damage which might have been done by such acts as well as the actual damage.

1 IN THE CIRCUIT COURT OF MILWAUKEE COUNTY

2 STATE OF WISCONSIN

3

4 PATRICIA WISCHER, individually,
and as Special Administrator of the
5 ESTATE OF JEFFREY A. WISCHER, deceased;
MARJORIE DeGRAVE, individually,
6 and as Special Administrator of the.
ESTATE OF WILLIAM R. DeGRAVE, deceased;
7 and RAMONA DULDE-STARR, individually,
and as Special Administrator of the
8 ESTATE OF JEROME STARR, deceased,

9 Plaintiffs,

10

-vs- Case No. 99-CV-006553

11

12 MITSUBISHI HEAVY INDUSTRIES,
AMERICA, INC., TRAVELERS
13 PROPERTY CASUALTY INSURANCE
COMPANY, THE TRAVELERS INDEMNITY
14 COMPANY OF ILLINOIS, NEIL F. LAMPSON,
INC., HCH MILLER PARK JOINT VENTURE,
15 HUNZINGER CONSTRUCTION COMPANY,
CLARK CONSTRUCTION BUILDERS, INC.,
16 and HUBER, HUNT & NICHOLS, INC.,

17 Defendants.

18

19 November 28th, 2000

20 VOLUME XXX

21 TRANSCRIPT OF JURY TRIAL

22 Before:
HONORABLE DOMINIC S. AMATO
23 Circuit Court Judge Presiding

24 Court Reporters: Constance L. Bauer, CRR/RMR
Debra A. Wisniewski, CRR/RMR
25 Julie A. Poenitsch, CRR/RMR

1 If the -- excuse me. The amount to be
2 inserted by you in answer to each damage question is
3 for you, the jury, to determine from the evidence.
4 What counsels, what the lawyers ask for in their
5 closing arguments is no criterion or measure of
6 damages sustained. The opinions and conclusions of
7 the lawyers, the counsels, as to what damages should
8 be awarded should not influence you unless it is
9 sustained by the evidence. Examine the evidence
10 carefully and dispassionately and determine your
11 answers from the evidence in this case.
12 Remember we talked about the middle
13 burden? This is a civil case. In criminal court,
14 the standard is beyond a reasonable doubt. Civil,
15 it's preponderance. When you get to the punitive
16 damage question, it's the middle burden, clear and
17 convincing, okay?
18 (Jurors nod heads.)
19 THE COURT: Punitive damages may be
20 awarded, in addition to compensatory damages, if you
21 find that the Defendant Mitsubishi Heavy Industries
22 America, Inc. acted in an intentional disregard of
23 the rights of the decedents.
24 A person acts in an intentional disregard
25 of the rights of another if the person acts with a

1 purpose to disregard the other's rights or is aware
2 that his or her acts are practically certain to
3 result in the other's rights being disregarded.
4 The purpose of punitive damages is to
5 punish a wrongdoer or to deter the wrongdoer or
6 others from engaging in similar conduct in the
7 future. Punitive damages are not awarded to
8 compensate a party for any loss that he or she has
9 sustained. A party is not entitled to punitive
10 damages as a matter of right.
11 Even if you find that the Defendant
12 Mitsubishi Heavy Industries America, Inc. acted in
13 an intentional disregard of the decedents' rights,
14 you, the jury, do not have to award punitive
15 damages. Such damages may be awarded or withheld at
16 the discretion of the jury. The jury, however --
17 you may not, however, award punitive damages unless
18 you have awarded compensatory damages.
19 If you determine that punitive damages
20 should be awarded, you may then award such sum as
21 will accomplish the purpose of punishing or
22 deterring the wrongful conduct.
23 Factors you should consider in answering
24 this question include:
25 One, the grievousness of the defendant's

1 act;

2 Two, the degree of intentional disregard

3 involved;

4 And, three, the potential damage which

5 might have been done by such acts as well as the

6 actual damage.

7 In determining the amount of compensatory

8 damages for personal injuries, you must not include

9 in the award or add to it any sum to compensate the

10 plaintiff for state or federal income taxes since

11 compensatory damages received as an award for

12 personal injuries are not subject to income tax.

13 You will not, of course, subtract from or exclude

14 from your award of compensatory damages any amount

15 because the plaintiffs are not required to pay

16 income taxes.

17 The law provides that the estate of the

18 deceased person is entitled to be compensated fairly

19 and reasonably for pain and suffering, mental

20 anguish, and distress endured by the deceased person

21 from the time of the accident up to the time of

22 death.

23 Pain and suffering includes all physical

24 pain and discomfort, worry, and mental distress.

25 In determining the amount of damages for

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased, MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased, and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE OF JEROME STARR, deceased,

COPY

Plaintiffs,

-vs- Case No. 99CV006553

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., and LAMPSON INTERNATIONAL, LTD.,

Defendants.

JANUARY 30, 2001 PROCEEDINGS HELD BEFORE THE

HONORABLE DOMINIC S. AMATO,

CIRCUIT JUDGE, BR. 11, PRESIDING

Robert H. Dettmann, RMR
Official Reporter

TRANSCRIPT OF PROCEEDINGS

A P P E A R A N C E S:

Robert L. Habush, Esq., Daniel Rottier, Esq., Mark Young, Esq., & Virginia Antoine, Esq., Attorneys at Law, Appearing for Plaintiffs Wischer & DeGrave.

1
David Lowe, Esq.,
2 Attorney at Law,
Appearing for Plaintiff Starr.
3
Ralph Weber, Esq., John Bell, Esq.,
4 Kevin Owens, Esq. & Dean Laing, Esq.,
Attorneys at Law,
5 Appearing for Mitsubishi.

6 Donald Carlson, Esq. & Jeffrey Nichols, Esq.,
Attorneys at Law,
7 Appearing for Lampson.

8 Mark Rattan, Esq.,
Attorney at Law,
9 Appearing for Travelers.

10 Frank Scherkenbach, Esq.,
Attorney at Law,
11 Appearing for Tokio Marine.

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1 I would note for the record, and I'm referring to the
2 plaintiff's brief and as documented by very clear
3 Wisconsin case law -- I'm going to mispronounce the name
4 -- it's J-a-c-q-u-e, 209 Wis. 2d at page 626. And that
5 case dealt with trespass to land. The compensatory
6 damages were really one dollar nominal damages, and the
7 jury awarded a hundred thousand dollars punitive damages,
8 and Wisconsin law made it clear that you do not apply a
9 multiplier. You do a qualitative analysis, not a
10 quantitative or a numerical analysis when addressing the
11 issues of punitive damages.
12 I'm supposed to look at the evidence in favor of
13 supporting the jury's verdict, and in looking at the
14 evidence in favor of supporting the jury's verdict there
15 is more than sufficient evidence to support the jury's
16 verdict that MHIA's conduct was reprehensible and
17 grievous. There is substantial evidence in the record to
18 support the jury's verdict that there was an intentional
19 disregard of the rights of others, not just the
20 plaintiffs.
21 I'll have to get to this later, but I will note for
22 the record that Mr. Habush in closing arguments discussed
23 the jury -- to the jury the cost of MHIA in putting on the
24 roof. He said forty-seven million dollars.
25 Well, you were all here, though I'm not going to

1 bring the jury testimony into this case, but you did have
2 the benefit of hearing the media and the press talk to the
3 jury. They did very clearly say that they reached the
4 ninety-four million dollars by doubling the forty-seven.
5 They also discussed the punitive damage verdict.
6 Strike that. They also discussed the compensatory damage
7 verdict. And I'm not relying on what the jury said or
8 didn't say, but I think the record should indicate that
9 we've all had the benefit of hearing the jury express some
10 of their thoughts at the request of the media, since this
11 is a public trial. And the jury in this case themselves
12 chose to proceed with that inquiry, based upon that
13 format, because they did not want to discuss the case
14 again with anyone and they wanted to be left alone. And
15 that's basically the reason why the court entered the
16 orders dealing with any of the parties having any contact
17 with the jury.
18 Now, in the case of United States v. Lane, 474 U.S.
19 438, a 1986 case, at page 11, the court talks about
20 evidence and the harmless error rule. The court stated at
21 page 450 of that decision, page 11 of the computer Lexis
22 printout: "In the face of overwhelming evidence of guilt
23 shown here, we are satisfied that the claimed error was
24 harmless. When evidence on misjoined count 1 was
25 introduced, the District Court provided a proper limiting

1 instruction, and in the final charge repeated that
2 instruction and admonished the jury to consider each count
3 and defendant separately. Moreover, the same evidence on
4 count 1 would likely have been admissible on joint retrial
5 of counts 2 through 6 to show James Lane's intent under
6 the Federal Rules of Evidence. Any error therefore failed
7 to have any substantial influence on the verdict."
8 In the footnote, goes on, says: "We can agree with
9 Justice Stevens' partial dissent that the harmless error
10 inquiry is entirely distinct from a sufficiency of the
11 evidence inquiry. Our reliance on the Kotteakos test
12 makes this clear. But that does not in any sense mean
13 overwhelming evidence of guilt is irrelevant; the
14 threshold of overwhelming evidence is far higher than mere
15 sufficiency to uphold conviction."
16 The point that's being made is that when I apply the
17 standards on 805.18 for motions after verdict and for
18 judgment entering the jury's verdict, and whether or not
19 someone has erred, and whether their error is harmless, in
20 addition to the standards of Wisconsin v. Jones previously
21 enunciated, the court, in measuring whether or not error
22 is harmless or not harmless, can gauge that by the
23 evidence proferred during the course of trial. And the
24 evidence of responsibility as it relates to Mitsubishi in
25 this case is overwhelming. There is more than sufficient

1 evidence to support the jury's verdict.

2 The following undisputed facts appear in the record.

3 Victor Grotlisch for Mitsubishi testified

4 unequivocally that he dropped the ball.

5 Mr. Bell, in his opening statement to the jury on

6 behalf of Mitsubishi, indicated that the wind was a

7 significant contributing factor.

8 Vice-president of Mitsubishi testified that the lift

9 was suspended that day, based upon a conversation he had

10 with one of his colleagues.

11 Mr. Bell, in his opening statement, at page 40 of the

12 trial transcript on October 18th of 2000 said in part, on

13 lines 13 through 17: "I would suggest to you that this is

14 the most compelling piece of evidence that you will see in

15 this case, and that videotape runs for many, many minutes

16 during the course of the last half hour or so, 40 minutes

17 to an hour before the accident."

18 Mr. Bell, in his opening statement to the jury on

19 behalf of his client at page 84, starting at line 4, said

20 in part: "And this is what I believe the evidence is

21 going to show, ladies and gentlemen, is that the wind

22 alone, given a level surface, there was not enough wind to

23 cause this catastrophic failure. Ground settlement alone,

24 there was not enough ground settlement alone to cause this

25 catastrophic failure. Endo correction, if it wasn't done

1 properly, alone was not enough to cause this catastrophic
2 failure."
3 And at page 85 in his opening statement, Mr. Bell
4 argues or states at line 19: "And I believe the evidence
5 will show, ladies and gentlemen, that all of these factors
6 came into play like a domino effect and brought this crane
7 down."
8 And at page 96 of his opening statement at line 4, he
9 states in part: "When all of the elements that I've spent
10 some time going through with you came together to fail
11 that crane and to cause this accident."
12 Set out in the plaintiffs' briefs are statements
13 taken from portions of the testimony that the wind was
14 there. It's undisputed that there was a major problem and
15 a concern about it being too windy that day. All the
16 experts talked about it being windy that day. It was just
17 a question of how fast the wind was blowing and what the
18 gusts were. There is no question that it was absolutely
19 windy.
20 And there is no question, as documented at the
21 November 6, 2000 transcript at page 97, when Mr. Bell was
22 examining his client, the vice-president, Mr. Saito of
23 Mitsubishi, at page 97, line 16:
24 "Q. Now, calling your attention, we have heard that
25 at a meeting on July 14, 1999 someone from Mitsubishi

1 made a representation at the meeting that the lift
2 had been temporarily suspended because of wind?
3 A. Yes.
4 Q. Were you at that meeting?
5 A. Yes.
6 Q. Can you tell the ladies and gentlemen of the jury
7 what your role was in that statement?
8 A. What role my statement? I actually made the
9 statement."
10 And it goes on through -- up through page 111, and
11 there's dialog 'cause he talked to Mr. Hashimoto, and on
12 page 111, the question was asked:
13 "Q. Okay. And that says 'Block 3 pick has been
14 temporarily suspended because of wind.'"
15 This is line 8 on page 111. Goes on says:
16 "'The block will be picked up once the wind dies
17 down. MHIA indicated later in the meeting that they
18 had commenced the lift.' Did I read that correctly?
19 A. Yes."
20 Line 18:
21 "Q. Now it wasn't only the information that you got
22 from Mr. Hashimoto that led you to believe that the
23 lift had been suspended due to the wind; is that
24 correct?
25 A. Correct.

1 Q. In fact, from your vantage point in the office,
2 you were able to see out the window and see the flag?
3 A. Yes."
4 During the course of the trial there was a lot of
5 argument as to whether anyone could stop the lift, and it
6 turned out that anyone could stop it temporarily, but it's
7 different from suspending it, and it's different from
8 aborting the lift. And there is undisputed evidence in
9 the record that Mitsubishi had control of the lift
10 operations. And the jury verdict is supported by that
11 evidence.
12 The jury verdict -- there is also evidence to support
13 the jury verdict that the OSHA inspectors on site that day
14 thought that the lift was cancelled because of the wind.
15 And again, all the appropriate experts indicated it was
16 windy that day. It was not in dispute that it was windy,
17 but rather how windy.
18 And the only other dispute that was tried before this
19 jury is who was supposed to do the wind sail calculations
20 in order to pick up the roof pieces. The jury came back
21 and found factually that it was Mitsubishi's
22 responsibility.
23 And the ground expert, though they argued that the
24 ground may have been a factor, the ground expert they had
25 before the accident, they kept that same expert with

1 regard to the ground after the accident.

2 In closing arguments Mr. Bell, though they were

3 trying to shift responsibility over to Lampson, Mr. Bell

4 indicated that the jury should find and give the

5 plaintiffs three hundred fifty thousand dollars for loss

6 of companionship. And Mr. Bell, in his closing statement,

7 also talked about pain and suffering, and he indicated

8 that the jury should also award the deceaseds' family

9 members for the pain and suffering of Wischer, DeGrave and

10 Starr, another three hundred fifty thousand dollars.

11 On page 165 of the November 28, 2000 transcript, Mr.

12 Bell stated in part, at line 14:

13 "With respect to the damages, Mr. Habush has told

14 you that loss of society under Wisconsin law has a

15 cap of $350,000. These families are entitled to that

16 money. Each family. They are making no claim for

17 future lost earnings. That is not before you. The

18 only claim they are making is for conscious pain and

19 suffering in the 14 seconds prior to death, and I

20 suggest -- and it's a suggestion that is going to

21 help -- going to be your decision, ladies and

22 gentlemen."

23 I read that wrong. I'll read it again. I'm sorry.

24 "The only claim they are making is for the

25 conscious pain and the suffering in the 14 seconds

1 prior to death, and I suggest -- and it's a
2 suggestion that is going to be your decision, ladies
3 and gentlemen."
4 We had the benefit of the jury's dialog in this case,
5 and they awarded, out of the 14 second fall, which was not
6 in dispute, when the three gentlemen knew they were going
7 to die, and based upon the testimony of Levy, the jury
8 came back with a hundred thousand dollars a second, one
9 point four million. And the jurors even suggested that
10 they were trying to make it a point, just like the
11 punitive damage award. But that's just for basis --
12 purposes of protecting the record.
13 Page 166, Mr. Bell for his client says, line 5:
14 "I suggest a reasonable number for that 14 seconds
15 is another $350,000 per family. That is tax-free,
16 both of those numbers."
17 Line 9:
18 "I suggest with respect to punitive damages, ladies
19 and gentlemen, this was an accident. There was no
20 intent to operate unsafely out there. To the exact
21 opposite, we were attempting to operate safely. We
22 hired what we thought was a reputable company. We
23 hired their people to operate their equipment. We
24 hired their engineers to make sure it was done right.
25 We hired other consultants to work with them. Yes,

1 we thought we were operating safely."

2 Reality is the jury came back and found as a factual

3 matter that there was an intentional disregard by

4 Mitsubishi of the plaintiffs' and other parties' rights

5 and not operating safely out there. In fact, there was

6 testimony that there was up to 20 people under some of

7 those lifts that were holding pieces in the air.

8 Now, the previous order that the court entered on

9 November 30th of 2000, which dealt with the motions made

10 by the Mitsubishi lawyers for a mistrial, or that this

11 judge was prejudiced, that decision stands. I had

12 portions of the record taken out and attached to that

13 order, and the court's previous rulings on this subject

14 continue to stand.

15 I have not favored anyone. I have tried to be fair

16 and impartial. I've tried to prevent the parties from

17 litigating this case or controlling the litigation where

18 they would prevent one of the other sides prejudicially

19 from having a fair and impartial trial, and my rulings on

20 this subject continue to stand.

21 In State ex rel Dressler v. Mitchell, Baxter &

22 Zieger, 163 Wis. 2d 622, pages 9 and 10 of the Lexis read-

23 out, the court discusses the standard for a judge or party

24 asking that the judge disqualify himself or remove himself

25 from the case, and it discusses the case law that's been

1 asserted by all the parties on this subject.

2 This court has consistently ruled that -- and this

3 judge has consistently ruled that it can be fair and

4 impartial, and it has been fair and impartial.

5 The court notes at page 10 in dealing with Judge

6 Dressler: "We note that not all comments made by a judge

7 during the course of the proceedings are grounds for

8 disqualification. A trial judge may express his or her

9 opinion about counsel's motions without being subject to

10 recusal. Judge's opinion that the jury would find the

11 defendant guilty when read in context shows there was no

12 partiality."

13 In that case the lawyers were taking statements of

14 the judge out of context, which is also the case here.

15 In Western Bank of Scotland v. Tallman, 15 Wis. 2d --

16 excuse me -- 15 Wis. 101, dealt with the issue of forming

17 an opinion on a legal question by the judge is not a basis

18 for prejudice.

19 Goes on to state in that decision: "Under section

20 757.19 (2) (g), the reason for a judge's disqualification

21 is subjective. This subjective standard requires us to

22 analyze the judge's comments. When viewed out of context,

23 the trial judge's remarks could be interpreted as a

24 refusal to exercise discretion in order to avoid angering

25 the Racine County Board of Supervisors and the county's

1 taxpayers. The trial court's refusal to exercise
2 discretion could be an abuse of discretion. The decision
3 of whether or not to provide funding for an expert witness
4 for a defendant must, of course, be grounded on the
5 factors we have previously discussed and not on the
6 ramifications of a decision that a political body's
7 treasury should be liable for the expense.
8 "However, when the trial judge's remarks are
9 considered in toto, and in the context of the March 7,
10 1991 motion hearing, we see an appropriate exercise of
11 discretion."
12 It goes on and says the court commenting is not
13 grounds to disqualify.
14 A lot of the reasons expressed in the plaintiffs'
15 brief on a new trial, on the issue of Mitsubishi's motion
16 for a new trial in the interest of justice, and on the
17 alleged prejudice, and a lot of issues discussed by the
18 plaintiffs' brief opposing that, and discussed by Lampson
19 opposing that, I adopt into this court's decision.
20 I'm not going to go back and reargue and rediscuss
21 everything that's occurred. The record's basically clear,
22 if you look at it, without question. There hasn't been
23 any favoritism, there hasn't been any prejudgment.
24 When I'm asked to rule on certain motions, I'm asked
25 to look at them in the best light of the other parties,

1 and that's all this court has done. This court continues
2 to be fair and impartial. And if there has ever been an
3 attempt to prejudice any of the parties, it's been more
4 the position taken by the Mitsubishi lawyers as it relates
5 against Lampson and the plaintiffs in this case.
6 The record should note that when I smile, I'm not
7 serious as a judge; when I'm serious, and have a smirk on
8 my face, I'm picking on the Mitsubishi lawyers, and I'm
9 prejudiced. The record will show that no matter what this
10 trial judge does, or what this court does, the position as
11 interpreted by the Mitsubishi lawyers has been to give a
12 jaundiced impression that the court is showing favoritism
13 towards the other parties and not Mitsubishi Heavy
14 Industries of America, Inc., and that's just not true.
15 This is not desperate lawyers doing desperate things.
16 The record will show that I have very intelligent, sharp,
17 skilled lawyers, who purposely have basically objected to
18 everything they could object, have taken every position
19 that they could have taken, and whether it's a motion that
20 has a basis in fact, or whether it's baseless, or whether
21 it's been previously decided, or whether it's frivolous,
22 it has been renewed with the effort to cause the court to
23 react in a way that the lawyers can suggest that the judge
24 is somehow prejudiced. And I'm just not prejudiced, guys,
25 I'm sorry.

1 The record should also reflect on a lot of these
2 motions that the court's already dealt with, and I'm not
3 going to reiterate my prior rulings. With regards to
4 Mitsubishi Heavy Industries of America, Inc., that I had
5 given Mr. Weber and Mr. Bell, and particularly Mr. Weber,
6 an opportunity to have input as to what the jury verdict
7 should read, with regard to a position that was asserted
8 by Mitsubishi against Lampson. And when I would ask that
9 a position be taken, one would not be taken, and there'd
10 be silence. So the trial was not about what was
11 appropriate, the trial turned out to be what they could
12 object to. And when you object to absolutely everything
13 in the record, you can easily say that judge is not ruling
14 in my favor and he must be prejudiced against my client,
15 and that's just not true.
16 Enough said.
17 The jury came back on a special verdict and found
18 that Watts, Fred Flowers and Steve Aldrich was not
19 negligent. They found that Mitsubishi Heavy Industries of
20 America was negligent. And they found this was a cause of
21 the plaintiffs' damages.
22 And in the special verdicts they found that
23 Mitsubishi Heavy Industries of America entered into an
24 agreement with Lampson International to rent a Transi-lift
25 crane, and they found that the agreement between Lampson

1 International and Mitsubishi Heavy Industries of America,
2 Inc. was a bare lease, and they found that paragraph 16 of
3 the agreement was entered into. And those findings of
4 fact are supported by overwhelming evidence in the record.
5 And the questions of the verdict on tort liability
6 with regard to 1 through 7, sub parts A, B and C,
7 paragraph 8 -- question 8, questions 9 and 10, with their
8 A, B, C sub parts, and questions 11 and 12 are also
9 substantially supported by the record. The evidence is
10 overwhelming. And the jury instructions given by the
11 court to the jury on this subject were appropriate.
12 And the bottom line is they believed and they found
13 that it was Mitsubishi's responsibility to do the wind
14 sail calculations for the lift. And that the agreements
15 that were entered into by Lampson were the appropriate
16 agreements as argued by Lampson on their cross claims,
17 that it was a bare lease, that they were loaned employes,
18 and paragraph 16 of the indemnification agreement applied.
19 And jurors can believe parts of a witness's
20 testimony, or all of a witness's testimony, or one
21 witness's testimony, or none of it. And they can do that
22 with experts.
23 And in viewing the evidence in the light of the
24 standards adopted, though there could be no trial that's
25 perfect, there's always error, this court finds that there

1 was no prejudicial error committed towards Mitsubishi
2 Heavy Industries of America, Inc., and that the jury
3 verdict is supported by overwhelming evidence, and I
4 affirm the jury's verdict.
5 This court, based upon the arguments and the
6 presentation of the positions by the parties, and the
7 evidence provided, and the law as provided, this court
8 believes an interlocutory judgment is the appropriate
9 disposition in this case, until the other issues can be
10 resolved as argued by the parties here today.
11 This court enters interlocutory judgment in favor of
12 Lampson, and against Mitsubishi Heavy Industries of
13 America, Inc. as prayed for in that defendant's motions
14 after verdict, interlocutory in nature.
15 This court enters an interlocutory judgment in favor
16 of the plaintiffs and against the defendant Mitsubishi
17 Heavy Industries, Inc. of America as prayed for by the
18 plaintiffs in their moving papers.
19 The only remaining question is the request by Lampson
20 to be found as a matter of law not negligent on the 3%.
21 In looking at the jury's verdict, the jury could have
22 taken the testimony of Mr. Bozung, the arguments made by
23 the Mitsubishi lawyers as to what inferences that could be
24 drawn as to Bozung's conduct as to whether he was a loaned
25 employe or not a loaned employe, and we started out that

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

CIVIL DIVISION
JAN 22 2008
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JOHN BARRETT-CLERK OF COURTS

PATRICIA WISCHER, et al.,

Plaintiffs,

vs.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., et al.,

Defendants.

Case No. 99-CV-006553

Personal Injury, Other: 30107
Wrongful Death: 30105

PLAINTIFFS' BRIEF IN OPPOSITION TO MHIA'S POST-VERDICT MOTION DIRECTING A VERDICT AGAINST PLAINTIFFS' PUNITIVE DAMAGES CLAIM OR GRANTING MHIA A NEW TRIAL ON THE ISSUE OF PUNITIVE DAMAGES

INTRODUCTION

MHIA's motions regarding the punitive damages verdict should be denied because (1)there is sufficient evidence to support the jury's unanimous finding that MHIA acted in intentional disregard of the decedents' rights, and (2) they are based upon MHIA's unsupported contention that the plaintiffs were required to prove that MHIA intended to cause injury to the decedents

ARGUMENT

The granting of a new trial on the ground that the verdict is contrary to law or the weight of the evidence is within the discretion of the trial court, and the trial court cannot substitute its judgment for that of the jury. Burrows v. Follett & Leach, Inc., 115 Wis.2d 272, 286, 340 N.W.2d 485 (1983); Markey v. Hauck, 73 Wis.2d 165, 172, 242 N.W.2d 914 (1976);

As to changing an answer in the verdict on the ground of insufficiency of the evidence, Wis. Stat. §805.14(1) sets forth the test:

> No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.

The trial court must view the credible evidence and reasonable inferences therefrom in the

light most favorable to the verdict, and if there is such credible evidence, or favorable reasonable inferences therefrom, the trial court may not change the jury's answer. Kovalic v. DEC International, Inc., 161 Wis.2d 863, 878, 469 N.W.2d 224 (Ct.App. 1991).

I. SUFFICIENT EVIDENCE SUPPORTS THE JURY'S FINDING THAT MHIA ACTED IN AN INTENTIONAL DISREGARD OF THE DECEDENTS' RIGHTS.

Under Wis. Stat. §895.85(3), a plaintiff may recover punitive damages "if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff."[1] Here, the court instructed the jury:

> Punitive damages may be awarded, in addition to compensatory damages, if you find that the Defendant Mitsubishi Heavy Industries America, Inc. acted in an intentional disregard of the rights of the decedents.
> A person acts in an intentional disregard of the rights of another if the person acts with a purpose to disregard the other's rights or is aware that his or her acts are practically certain to result in the other's rights being disregarded. (11/28/00 T.Tr. 48-49)

MHIA does not dispute the jury's finding of causal negligence on the part of MHIA. MHIA's motion is based only on a claimed absence of evidence that any MHIA employee was aware that his acts were practically certain to result in the decedents' rights being disregarded. Plaintiffs submit that there is sufficient evidence to support the jury's finding that MHIA acted in an intentional disregard of the decedents' rights.

Victor Grotlisch knew before July 14, 1999 that making the lift without wind load calculations was a dangerous practice which could cause the crane to fall over and kill people, such as the decedents. (10/23/00 Tr. 47-8) Grotlisch admitted he was "reasonably certain" that if wind load calculations were not done for 4R3, "not only was it a dangerous practice, but there was a probability that a tragedy could occur." (*Id.* 48-49) Grotlisch said he knew that if winds reached 20 MPH with gusts up to 26 MPH, any attempt to lift 4R3 would be unsafe. (*Id.* 40-41) Grotlisch knew that the 20 MPH limit on the load chart did not take into consideration the effect of wind on

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[1]An extensive discussion regarding the interpretation of this statute is set forth in Plaintiffs' Brief in Opposition to Mitsubishi Heavy Industries America, Inc.'s Motion for Summary Judgment on Punitive Damages Claims, dated September 21, 2000, and will not be repeated here. The plaintiffs incorporate those arguments into this brief.

the load and thus he knew that winds as low as 15 MPH could be unsafe. (*Id.* 42)

There was ample evidence from which the jury could have concluded that Grotlisch had actual knowledge that no wind calculations had been done. He knew no one from MHIA had done them. (*Id.* at 43-44) Though he claimed he thought Lampson personnel were performing wind calculations, the jury was entitled to conclude that this was untrue and he actually knew Lampson was not doing them. He admitted that he never saw any calculations from Lampson and no MHIA engineer ever told him Lampson was doing them. (*Id.* at 43-44) Moreover, at the meeting in 1998, attended by Grotlisch, Lampson representatives told MHIA representatives to be cognizant of wind speeds due to large sail areas, and MHIA responded that the issue would be studied. (10/31 Tr. 58-62). Werner Gros testified that he had made it clear to Grotlisch that Lampson would not be doing any wind calculations. (10/19 Tr. 53-56)

Grotlisch said that if he had observed wind speeds in excess of 20 MPH, with gusts to 26 MPH, or if Wayne Noel had observed such wind speeds and failed to bring it to Grotlisch's attention, it would be a conscious disregard of the safety of the workers. (10/23 Tr. 94-95) Noel agreed that if he observed such winds and failed to report it to Grotlisch, Noel would have been acting in conscious disregard of the safety of the workers. (11/6 Tr. 217-218) Noel said that he spoke to Grotlisch twice between 4:00 and 5:00 p.m. and told him he had observed 32 MPH wind gusts and that he was concerned. (10/20 Tr. 74-75). Noel said that if Grotlisch did nothing about such information, this would be a conscious disregard of the rights of the workers. (11/6 Tr. 216-18) Grotlisch denied the conversation, and claimed that the last time he checked the weather computer was around 3:00 to 3:30 p.m. (10/23 Tr. 86-88, 91-92)

The jury was entitled to believe Kirt Upton's testimony that Noel was using a hand-held anemometer (10/24 Tr. 209-10), and those who overheard Noel reporting wind speeds of 32 MPH and sustained winds of 26-28 MPH between 3:30 and 4:00 p.m. (*Id.* 72-73, 81, 93-94) The jury could have believed that Noel relayed these wind speeds to Grotlisch between 4:00 and 5:00 p.m., when, as Noel said, he spoke with Grotlisch about his concerns with the winds. (10/20 Tr. 74-75).

There was other overwhelming evidence that Grotlisch knew the winds on July 14, 1999 were excessive. Many witnesses who, like Grotlisch, were at Miller Park that day testified to the high winds. (See attached summary) Dennis Frazer, Grotlisch's assistant who had been in charge of prior lifts, testified that up to about 3:30 p.m., when he left for the airport, it was too windy to go ahead with the lift. (10/24 Tr. 280-86) The jury had the right to believe that it was so windy during the day that the lift was "suspended" as testified to by Kano Saito (11/6 Tr.98-118) and was to be canceled and put over to another day, as Noel told Mr. Ostrenga of OSHA. (10/24 Tr. 49-50) Grotlisch also testified he had checked the DTN weather computer (10/23 Tr. 91), which reports information from the National Weather Service (11/10 Tr. 73), and John Malan testified that Milwaukee Mitchell Field is a local source for National Weather Service data. (10/24 Tr. 156-58, 169-70) The data from Mitchell Field (Ex. 1866; 11/9 Tr. 182-83) show that over the course of the afternoon the mean wind speeds were around 20 MPH with gusts in the high 20's. Given all the testimony about the wind conditions that day, a reasonable inference could be made that when Grotlisch looked at the weather computer he saw wind speeds over 20 MPH with gusts in the high 20's. The facts that Grotlisch was aware of excessive winds and that the DTN computer displayed excessive wind speeds are also supported by Moto Baba's testimony that immediately after the accident Grotlisch asked him to go with him to check the wind speeds, but that when Baba could not operate the computer in the trailer, Grotlisch did not try to assist him (10/30 Tr. 235-36), and later the computer was found unplugged. (10/23 Tr. 108) The jury had a reasonable basis to conclude that Grotlisch was an untrustworthy witness and was lying when he said he saw lower wind speeds, or when he said he didn't remember going to the trailer with Baba (*id.* at 101-05), from which the jury could further infer that what he saw on the computer that day were excessive wind speeds. Moreover, the jury could have concluded that it was Grotlisch who unplugged the computer because it showed the high wind speeds of which he was aware prior to ordering the lift to proceed.

Noel and Grotlisch knew that the three decedents were positioned in harm's way. Grotlisch delivered Wischer to the man basket to be lifted by Edwards' crane. (10/19 Tr. 153) Grotlisch was

positioned in the outfield below the track beam where he would have had a clear view of the roof piece and the three decedents' location, as observed and photographed by Hans Zeitler. (10/20 Tr. 217-37; 10/23 Tr. 110-11) The winds were causing the manbaskets to swing and spin, as described by Zeitler, Kazinski, and Edwards. (10/19 Tr. 160-61, 222; 10/23/00 Tr. 22, 25-27) Noel testified he could see the decedents in the man basket (10/20 Tr. 61, 109), and Grotlisch would have had a clear view.The jury could have concluded that Grotlisch and Noel saw the decedents being blown in the winds and in close vicinity to the lifted roof piece, such that they knew that in ordering the lift to proceed under these conditions, they were disregarding the rights of these particular men.

The intentional nature of MHIA's conduct can be further inferred from the extensive evidence of the pattern of intentional unsafe practices on the part of MHIA employees prior to July 14, 1999, as well as Grotlisch's intimidation of workers. This included the fact that no wind calculations were ever done for any of the numerous prior roof picks (10/23 Tr. 171), thus knowingly repeating this dangerous practice; Grotlisch's response to Bengtson's concern over the safety of the lift of 4L1, that "when [Frazer] says to pick it, you will pick it"(10/19 Tr. 96-98); 4L1 being unsafely suspended in the air for 11 days, because Grotlisch failed to make sure enough workers were available and went to the Denver Broncos football game (*id.* 98-100); Grotlisch deliberately allowing men and material in man baskets in violation of OSHA rules and telling Noel not to look (10/23 Tr. 53-55); MHIA insisting on the use of nylon straps for picking (10/19 Tr. 92-94); Grotlisch forcing men to rig a piece in snowy, cold and unlit conditions to look good for the media (*id.* 101-02); Grotlisch forcing the lift of 4L2 in winds of 24-28 MPH over Bengtson's objection (10/19 Tr. 94-96); Grotlisch's attitude toward the workers in telling them that he only had hired them "from the neck down" (10/24 Tr. 207; 10/31 Tr. 246-47; 11/8 Tr. 185); that Grotlisch removed Bengtson from the site because Bengtson complained about unsafe practices. (10/19 Tr. 15-16, 91-92); Allen Watts' testimony that because of prior experiences with Grotlisch he felt intimidated so as not to object more strongly to the lift on July 14, 1999 (10/25 Tr. 97); that despite his knowledge of the hazards that day, Grotlisch wanted to go forward with the lift so he could "show [the media]" that

Local 8 was still working, as Michael Ellison testified. (10/24 Tr. 71-72)

The jury had every reason to conclude that MHIA witnesses had lied to the jury in an orchestrated attempt to avoid responsibility and blame others. Noel gave absurd testimony that he thought he was the object of an assassination threat by Milo Bengtson (11/6 Tr. 198-200); Grotlisch claimed the winds were "minimal," and the record contains any number of contradictions and "I don't recall" answers by MHIA witnesses, which the jury could have concluded were falsehoods. Combined with the overwhelming evidence that Grotlisch and Noel were aware of the dangers of picking a load like 4R3 in high winds, the jury was free to infer that they intentionally chose to disregard the decedents' rights to safety, knowing that it was a practical certainty, not just a possibility, that those rights would be disregarded.

II. MHIA'S ARGUMENTS ARE BASED ON AN INCORRECT STANDARD.

MHIA's motions are based entirely upon a distortion of the law and a lack of understanding of the plaintiffs' burden of proof.

A. Wis. Stat. §895.85(3) Does Not Require the Plaintiffs To Prove that the MHIA Employees Intended to Harm or Injure the Decedents.

MHIA attempts to raise plaintiffs' burden by arguing that plaintiffs must prove that the MHIA employees knew that their acts were practically certain to result in the decedents being injured or killed. For instance, MHIA claims that "no evidence produced before or during trial demonstrates that anyone at MHIA either intended to cause the accident and accompanying deaths or was subjectively aware that the accident and accompanying deaths were practically certain to occur on July 14, 1999." (MHIA's brief, p. 1) These statements and others like it stem from MHIA's misapplication of the definition of "intent."

As explained in plaintiffs' brief on MHIA's summary judgment motion, since the plaintiffs attempted to show that the conduct of the MHIA employees fell within the second category of conduct set forth in §895.85(3), the plaintiffs did not have to show that the MHIA employees intended to injure the decedents, but only needed to show that the MHIA employees acted in an intentional disregard of the decedents' rights. Under the jury instruction's definition of "intent," the

plaintiffs could meet that burden by showing that the MHIA employees were aware that their acts were practically certain to result in the decedents' rights being disregarded.

MHIA's view of the standard stems from its erroneous reliance on the definition of "intent" in Pachucki v. Republic Ins. Co., 89 Wis.2d 703, 278 N.W.2d 898 (1979), and its failure to understand the "consequences" that are required to be intended. The court in Pachucki, 89 Wis.2d at 710, quoting the definition of "intent" set forth in sec. 8A of theRestatement (Second) of Torts, stated that "to constitute an intentional tort, ..., the actor must intend the consequences of his acts, or believe that they are substantially certain to follow." In relying on this definition, MHIA apparently believes that the "consequence" that is important to the punitive damages issue is the injury to the decedents. Therefore, MHIA contends that in order to meet their burden of proof, the plaintiffs must show that the MHIA employees were aware that injury to the decedents was substantially certain to result from their acts. However, that is not so. The "consequence" of the MHIA employees' acts that is important in determining whether MHIA can be held liable for punitive damages is the disregard of the decedents' rights. This is all that §895.85(3) requires. It does not say the defendant must intend to injure, and it does not say that the defendant must intend to injure a particular individual.

MHIA's erroneously relies on non-Wisconsin cases, none involving punitive damages, in which the plaintiff was required to show an intent to injure. (MHIA's brief, p. 4-7) They are worker's compensation cases in which, under the worker's compensation laws of those jurisdictions, the plaintiff could not sue unless he established that the employer or co-employee intended to injure him, and it was in that context that the courts attempted to define an intent to injure. None involved an intent to disregard rights, the issue here. Those courts' definitions of "intent" to injure are obviously inapplicable here.

B. Wis. Stat. §895.85(3) Does Not Require the Plaintiffs To Prove Actual, Subjective Intent of the MHIA Employees; Their Intent May Be Inferred From the Nature of Their Acts.

MHIA also contends that the plaintiffs cannot recover punitive damages because they did not

prove that the MHIA employees had actual, subjective awareness that their acts were practically certain to result in the decedents' rights being disregarded. First, there was overwhelming evidence that Grotlisch and Noel had such subjective awareness and they knew, and therefore intended, that decedents' right to a safe workplace would be disregarded.

However, subjective intent is not required. MHIA overlooks the principle that intent may be inferred from the nature of a person's acts. In Pachucki, 89 Wis.2d at 711, the court explained the meaning of the word "intent" by quoting from Prosser, Law of Torts (4th ed. 1971), as follows:

> "Intent, however, is broader than a desire to bring about physical results. It must extend not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what he does. ... The man who fires a bullet into a dense crowd may fervently pray that he will hit no one, but since he must believe and know that he cannot avoid doing so, he intends it. The practical application of this principle has meant that where a reasonable man in the defendant's position would believe that a particular result was substantially certain to follow, he will be dealt with by the jury, or even by the court, as though he had intended it."

Applying this principle, the court in Pachucki held that a person's intent need not be actual and can be inferred from the nature of the person's intentional acts. Similarly, in Loveridge v. Chartier, 161 Wis.2d 150, 168, 468 N.W.2d 146 (1991), the court stated that "intent may be actual (a subjective standard) or inferred by the nature of the insured's intentional act (an objective standard)."

This means that the requirement of the jury instruction, that it be shown that the defendant "is aware that his or her acts are practically certain to result in the other's rights being disregarded," is an objective standard. It may be proven by showing that the defendant had actual knowledge of a hazard presented by his acts and that a reasonable person in his position would believe that a disregard of the other's rights was substantially certain to follow from his acts.

The evidence showed that the MHIA employees had subjective knowledge of the hazard of proceeding with the roof lift in excessive winds and without wind load calculations. This, along with evidence of their deliberate decision to proceed with the lift in the face of those hazards, was sufficient to establish their intentional disregard of the decedents' rights.

In support of its argument that the plaintiffs were required to present direct evidence of

subjective intent, MHIA relies on the definition of criminal "intent" in Wis. Stat. §939.23 and the case of State v. Chapman, 175 Wis.2d 231, 499 N.W.2d 222 (Ct.App. 1993). These authorities are not controlling in this civil case. In Chapman, a parent was alleged to have buried his child alive, but he claimed that the child was already dead when buried. The case involved an issue of whether second-degree reckless homicide was a lesser-included offense to first-degree intentional homicide, which has nothing to do with the issue here. Wis. Stat. §939.23(3) defines "intentionally" as:

> "Intentionally" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition, except as provided in sub. (6) [which refers to the lack of necessity to prove the age of a minor even when age is an element of the crime], the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth [in the criminal statutes in chapters 939 to 951] after the word "intentionally."

The concepts in the first sentence were used as the basis for the definition of "intentional" in Wis JI-Civil 1707.1. However, the requirement in the last sentence -- requiring proof of actual knowledge -- was not incorporated into the jury instruction and is not part of a plaintiffs' burden of proof in a civil case.

C. The Plaintiffs Do Not Have To Prove that the Conduct of the MHIA Employees Was Specifically Directed at the Decedents.

MHIA also argues that the plaintiffs were required to prove that the conduct of the MHIA employees was directed specifically at the decedents. As the plaintiffs explained in their brief on MHIA's summary judgment motion, that the portion of Wis. Stat. §895.85(3) requiring a showing of an intentional disregard of rights does not require proof that the defendant's conduct was directed at a particular person. In any event, plaintiffs proved that Grotlisch and Noel knew that, because of the lift that day, they placed these particular decedents in harm's way and thus, the rights of these particular decedents, as well as others, were being disregarded.

MHIA cites two Walworth County Circuit Court cases (MHIA brief p. 7-8), but these are, of course, not binding precedent for this court, and they are in conflict with the decision in Hensler v. Ford Motor Co., Case No. 98-CV-218 (Jeff. Co. Cir. Ct., May 4, 2000) (transcript attached) where the trial judge concluded that it is too narrow a reading of the punitive damage statute to require that

the acts disregarding the rights be directed at a particular individual.

D. Punitive Damages May Be Awarded When The Right to Safety is Disregarded.

In Sharp v. Case Corp., 227 Wis.2d 1, 21, 595 N.W.2d 380 (1999), the Wisconsin Supreme Court specifically pointed out that a person's right to safety is one of the rights which, if disregarded, will allow punitive damages:

> The allegation in the present case is that Case Corporation acted with reckless disregard of rights of others. Punitive damages may be awarded in product liability suits if the plaintiff proves by clear and convincing evidence that the harm suffered was the result of the manufacturer's reckless disregard for the **safety** of product users, consumers or others who might be harmed by the product.

(emphasis added). Although Sharp was dealing with a "reckless," rather than "intentional," disregard of rights of others, both standards deal with the "disregard of rights of others."

CONCLUSION

There is sufficient evidence to support the jury's finding that the MHIA employees acted in an intentional disregard of the decedents' rights. The plaintiffs respectfully request the court to deny MHIA's motions on the punitive damages claims.

Dated at Milwaukee, Wisconsin this 22nd day of January, 2001.

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WIND SPEED TESTIMONY BY TIME ON JULY 14, 1999

Time	Witness	Wind Speed	Volume: Page	Wind Speeds Increasing/Decreasing
9:15 a.m.	Hashimoto	8 meters/sec. (17.9 mph)	10/31:29	
10:00 a.m.	Edwards	20-25 mph minimum	10/19:146-7	winds picked up, 10/19:162
Before 12:00 p.m. noon	Christie	gusts 20-30 mph	10/20:173-174	In afternoon, decreased for a short period, then increased again, 10/20:174-175
12:00 p.m. noon	Grotlisch	17-18 mph per Doppler	10/23:85	decreasing in p.m., 10/23:92
"Noon until wreck"	Flowers	between 17-20 mph	10/31:265	
12:30 - 1:00 p.m.	Edwards	25-30 mph	10/19:149-50	
afternoon, around 12:45 p.m.	Sidabras overhears Flowers on radio	winds of 26 mph with gusts at 30-32 mph	10/24:129-130	windier in p.m. than 8:00 a.m.
1:00 - 2:00 p.m.	Hashimoto	22.4 mph gusts	10/31:26	
1:00 - 2:00 p.m.	Thraen overhears Flowers on radio	17-19 with gusts of 25-26 mph 30 mph gust at 1:00 p.m.	10/24:32 10/24:43	
Afternoon generally	Malan	20-25 mph with gusts over 35 mph	10/24:181	
2:00 p.m.	Kazinski	25-30 mph	10/19:215	1:00 p.m. winds were picking up, 10/19:211
3:00 p.m.	Isoda	"wind is strong"	10/3:48-51	
3:00 - 3:30 p.m. (as of time he left	Frazer	"too windy to do the lift"	10/24:284-6	

Time	Witness	Wind Speed	Volume: Page	Wind Speeds Increasing/Decreasing
3:30 p.m.	Ellison hears Noel on radio	"I have wind speeds of 32 mph"	10/24:72-73, 81	
3:30-4:00 p.m.	Malan	25-32 mph peak gusts	10/24:177-9	
3:00-5:00 p.m.	Becker	20-25 mph	10/24:96	winds increased 10/24:96
4:00 p.m.	Becker hears Noel on radio	"I have sustained winds of 26-28 mph"	10/24:93-4	
4:00 - 5:00 p.m.	Thraen overhears Flowers on radio	19-20 with gusts of 30-32	10/24:33	
4:00 p.m.	Christie	over 20 mph	10/20:175	
4:45 p.m.	Christie	25 mph	10/20:176	
	Urick	25-30 mph	10/23:217	
5:00 p.m.	Malan	21 mph gusting to 26 mph	10/24:169-170	
	Kazinski	35 mph	10/19:214-15	winds stronger than earlier, 10/19:225

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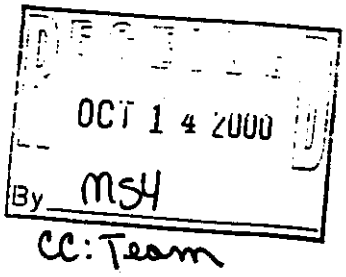

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October 13, 2000

Ms. Wendy Warnes
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Re: *Hensler, et. al. v. Ford Motor Co., et. al.*
Jefferson County Case No. 98-CV-218

Dear Wendy:

Pursuant to your request, enclosed please find a copy of the trial transcript where the judge rules on the admission of punitive damages in the above-referenced case.

Should you have any questions regarding this matter, please feel free to contact me.

Very truly yours,

SLATTERY & HAUSMAN, LTD.

Lori L. Eigner
Paralegal

Enclosure

1 Q (BY MR. SLATTERY) What are they going to see?
2 A This is a sled test, that is, rather than hitting
3 the back of the Saab with the seat in it, basically
4 what's happening here is you mount a seat on a sled,
5 which is like a platform, it can be wheels or
6 whatever, and then in this case they have what they
7 call a HYGE accelerator, which pushes this thing in
8 this direction, simulating an accident condition is
9 basically what they're trying to do here.
10 Q There's nothing wrong with doing that?
11 A Not at all. In fact, it's obviously a lot less
12 expensive way to develop a seat rather than crashing
13 vehicles every time you want to see it happen, but
14 what I wanted -- and I think this is the 25 mile an
15 hour Delta V or close to it, but what is -- I really
16 want you to observe is the lack of relative motion
17 between the head, the neck, and the thorax. The
18 idea is if you have no motion, you have no loads,
19 okay? And so that's basically what we're looking at
20 here. And so what I want to show is just keep an
21 eye on how this is controlled in the process of
22 this, okay? Obviously we have some restrictions.
23 The other side is better.
24 Q Is that seat yielding?
25 A Yes.

1 Q Is it absorbing energy?
2 A Yes.
3 Q Is that a controlled yielding?
4 A Yes.
5 Q Is that good?
6 A That's very good here.
7 Q Is that seat releasing the occupant?
8 A No, it is not. In fact, part of the design here is
9 one of compliance where you have compliance between
10 the occupant and the seat; and when you do that, you
11 increase the friction between the seat and the
12 occupant and you up the chance for ejection of the
13 occupant. I think it will be more clearer when we
14 see the camera from this side because you don't have
15 the obstruction from the simulated B pillar. Here
16 we go. Everything stays nice and low with regard to
17 the head, neck, and thorax.
18 Q Okay. Mr. Shaw, I'd like to talk to you about
19 occupants who are out of position --
20 A Yes.
21 Q -- who are leaning over the side or their head is
22 way up in front near the dashboard. Is it possible
23 for somebody to be rear-ended when they're in
24 positions where they're not going to engage the
25 seat?

1 A Sure.
2 Q Are those people more likely to be hurt than people
3 who are in position and afforded the potential full
4 body resistance of the seat?
5 A Yes.
6 Q Are they more likely to be injured if they're out of
7 position in a strong seat as well as a weak seat?
8 A Yes.
9 Q All right. Is the same thing true in a frontal
10 collision of air bags and seat belts?
11 A Absolutely.
12 Q Would you explain that, please?
13 A Yes. And we've probably seen on T.V. for the last
14 two or three years about the problems with air bags
15 and children or air bags with typically smaller
16 women out of position too close to the air bag. If
17 you're up against the dash where the air bag is, an
18 air bag goes off, we get fatal injuries from that
19 because we're out of position, and the restraint --
20 when it goes off, we're not in a position to be
21 properly restrained, and so where you're out of
22 position in a frontal, where you're out of position
23 in a rear and I suppose to some degree in some of
24 the other areas, primarily those two directions, if
25 you're out of position, you have the opportunity of

1 having enhanced injuries over not being out of
2 position.
3 Q Is the reality that somebody might be out of
4 position a legitimate reason in your judgment, is it
5 reasonable to allow seats to collapse in foreseeable
6 accidents and send people into the rear with the
7 potential you've already described for injuring
8 themselves, their children, or whoever else may be
9 in the rear and for that vehicle to go out of
10 control?
11 A Absolutely not.
12 Q May -- I'd like to ask you this question, Mr. Shaw.
13 In terms of the potential of the seat to do what
14 I've just described, has Ford's conduct been
15 accidental or has it been intentional?
16 A In my opinion, intentional.
17 Q And Ford has in fact said that, that they design
18 seats to yield just as the Aerostar does?
19 A That's what they've said.
20 MR. SLATTERY: May I approach, Your
21 Honor?
22 THE COURT: Sure.
23 (Whereupon, a conference was held at
24 sidebar off the record.)
25 THE COURT: We're going to take our mid-

1 afternoon break now and we'll reconvene at about 3
2 p.m. Deputy Riedel.
3 (Jury excused.)
4 THE COURT: Let me report two sidebars
5 and then we'll see what we're going to do about the
6 motion. Let's see. In the last one we had no
7 discussion.
8 In the first one, the court objected to
9 having Mr. Shaw giving biomedical opinions because
10 it was not of -- as he was previously offered as a
11 witness. The court allowed the plaintiff to put in
12 that testimony through Shaw or somebody else but not
13 multiply.
14 Our second sidebar was regarding the
15 summaries of learned treatises offered as abstracts
16 by Shaw, it wasn't part of the stipulation according
17 to Ford, and the court ruled that plaintiff could
18 use recorded remarks within that exhibit but not
19 summaries and that order was on the record.
20 Okay. You have a motion then,
21 Mr. Slattery?
22 MR. SLATTERY: I've indicated to the
23 Court in the last sidebar that I believe I've met
24 the threshold of intentional disregard of known
25 dangers, the ones that were delineated in the

1 testimony of Mr. Shaw, and that those were
2 intentional and not accidental.
3 THE COURT: Do you want to recount for me
4 how that came in?
5 MR. SLATTERY: It came in directly. We
6 talked about the known dangers through their
7 demonstration in Ford's tests, in literature
8 published pre-1994. I then took it up to
9 information that's been known in the industry and
10 continued up into the '70s and '80s and '90s.
11 THE COURT: Who's going to argue for
12 Ford?
13 MR. PARLEE: Your Honor, as I heard the
14 testimony, all he said was Ford had decided
15 intentionally to make a yielding seat. That was an
16 intentional decision and it's uncontroverted.
17 THE COURT: And so the argument is that
18 that in combination with results of studies from
19 other experts and Ford's tests that we've seen today
20 meet the threshold of intentional disregard --
21 MR. SLATTERY: Exactly.
22 THE COURT: -- of known injuries?
23 MR. PARLEE: I don't see how it's
24 possible. Every other manufacturer at the time made
25 the same kind of seat.

1 MR. SLATTERY: That's not an excuse where
2 the conduct is intentional disregard of a known risk
3 of serious injury or death.
4 MR. PARLEE: Again, Your Honor, it's not
5 a disregard. They knew about it and made a decision
6 to make a yielding seat and they had a reasonable
7 basis to do so.
8 MR. SLATTERY: The disregard is of the
9 risk. Certainly they knew about it. If they didn't
10 know about it, they couldn't intentionally disregard
11 it. That's the whole point.
12 THE COURT: I think that's the crux and
13 so maybe I'd ask you both to address that for a
14 minute. I guess it's what "disregard" means here.
15 Mr. Slattery's argument is that it's unreasonable to
16 disregard that information in terms of making
17 changes. It's Mr. Parlee's argument that it's not
18 a -- it's a rejection of the information, it's not a
19 disregard. The information is processed and
20 rejected in favor of a different decision.
21 MR. SLATTERY: Then it ought to at least
22 be warned about.
23 MR. PARLEE: The presumption is that you
24 can make a perfect seat. Alternative designs were
25 proposed, information was available to indicate that

1 in certain circumstances that design might be safer,
2 but they consciously considered another design,
3 consciously considered risks associated with that
4 alternative design, and simply made a reasonable
5 decision between alternatives.
6 MR. SLATTERY: That alternative design
7 does not address the known risk of seat collapse and
8 torso inertial loading of the neck which Ford knew
9 about. There's additional admissions coming once we
10 get to the read-ins, Judge.
11 THE COURT: Do either of you have any
12 good authority on this "disregard" language?
13 MR. SLATTERY: The language I'm quoting
14 is from the instruction which is derived from the
15 current statute. It's the punitive damage statute
16 on product liability.
17 THE COURT: Is there any --
18 MR. SLATTERY: It's in our requested
19 instructions.
20 THE COURT: Is there any good case law
21 that tells us what "disregard" means?
22 MR. SLATTERY: There has been no case law
23 since the statute was amended in 1995. That very
24 topic is addressed by the instruction committee.
25 I've reviewed it carefully and followed it in the

1 phraseology of my questions.
2 THE COURT: What's the number and what's
3 the note?
4 MR. SLATTERY: I think I left the number
5 back at the hotel. I didn't expect to get into that
6 today.
7 MR. LEE: Seventeen 0 something.
8 MR. SLATTERY: Seventeen -- if I could
9 approach the right side of the bench, I could
10 probably find it for you real quick.
11 MR. PARLEE: 1707.1 or 2.
12 MR. SLATTERY: All right. 1707.1 or 2,
13 but please let me find the right section because
14 there's a right one and a wrong one. If you go to
15 our requested instructions filed with the court
16 under the subject of punitive damages, you will find
17 exactly that instruction. In fact, we produced the
18 commentary that addresses the subject the court
19 inquired about. Intentional disregard is the
20 language.
21 THE COURT: You're talking about this
22 comment in 1707(2)?
23 MR. SLATTERY: I'd have to look at it to
24 tell you.
25 MR. LEE: I probably have an extra copy

1 of the jury instructions. Would you like them?
2 MR. PARLEE: Yeah, I'd like it.
3 MR. SLATTERY: There's one for nonproduct
4 cases, there's one for product cases. There's some
5 language in the instruction that I took out because
6 I don't feel that it applies.
7 THE COURT: I remember reading this
8 language and thinking it was -- this note from the
9 committee and thinking how unhelpful it was.
10 MR. PARLEE: Judge, is the punitive
11 damage statute cited in there, the number of the
12 statute?
13 MR. SLATTERY: The language is taken from
14 the language of the statute.
15 THE COURT: The comment is in 1707(1).
16 MR. SLATTERY: We're not contending that
17 "acted maliciously toward the plaintiff." We're
18 contending the second one, "or in an intentional
19 disregard of the rights of the plaintiff."
20 THE COURT: So the question is is there
21 enough evidence in -- there's really nothing in
22 evidence about any choice that Ford's made. The
23 evidence that's in is that -- reasonably construed,
24 is that Ford had notice of these articles that were
25 in the public domain and Ford did its own testing.

1 MR. SLATTERY: That demonstrated that
2 seats collapsed and the people moved rearward in
3 real world accidents, the jury has already heard
4 about one of them, and that they had notice of that
5 before the occurrence of the Hensler accident.
6 THE COURT: That's a pretty high
7 threshold. So we know about Newman. We don't know
8 about -- we know about the Newman allegation. We
9 don't anything else about it.
10 MR. SLATTERY: We know the seat
11 collapsed, we know the result was serious injury.
12 We know that Ford's tests in the '60s and '70s
13 produced collapsing seats which in dummy simulations
14 indicated the likelihood of head hits. We know that
15 Ford ran 301 tests throughout the '70s -- late '70s
16 and '80s with dummies that produced rearward
17 collapsing of the seats, produced head hits. Ford
18 has conducted a test virtually identical to that.
19 They conducted a 30-mile-an-hour barrier test.
20 While the dummy produced extension moments in
21 addition to a head hit, it clearly produced what the
22 witness has described as something that is
23 inescapably indicative of the potential of serious
24 injury that occurred if in no other case than
25 Newman, and we know it occurred in other cases

1 before the occurrence in the Hensler accident and we
2 know Ford never warned about it.
3 MR. PARLEE: Your Honor -- Are you done,
4 Bob?
5 MR. SLATTERY: Yeah.
6 MR. PARLEE: Okay. Judge, the question
7 is what rises to the level of intention. You look
8 at these tests. You can design any test or you can
9 look at any specific accident with any given seat
10 that's going to result in injury. These are very
11 high speed accidents. This is not a situation where
12 there's a fender bender and the seat goes down.
13 Mr. Slattery can choose the most extreme
14 situations he wants, paint the picture that people
15 were injured under this scenario and say, Ford, your
16 conduct was -- your conduct intentionally
17 disregarded the rights of the plaintiff because you
18 didn't do anything about that, but the whole point
19 of the case is that these types of high speed
20 accidents when these seats are going down are rare.
21 They're very unusual. They are not frequent
22 occurrences.
23 Furthermore, his own expert has indicated
24 that with a less yielding seat there is a risk of
25 injury in other accident scenarios where the

1 headrest is too low or the person in the seat is in
2 – or, I should say, out of position, so there is a
3 reasonable alternative design striking a different
4 balance. Maybe with a different seat design you're
5 not going to protect against high speed injuries,
6 but you will protect against a larger number of
7 smaller speed injuries. The alternative design that
8 he discussed with the more rigid seat, he admitted,
9 as I recall his testimony, that other types of
10 injuries can result from that.
11 How do you get the intentional disregard
12 of the rights of the plaintiff in a situation where
13 the manufacturer has to balance all these factors
14 and then comes up with a decision that admittedly
15 isn't perfect but hardly consciously disregards
16 intentionally the rights of the plaintiff?
17 All that expert said was that Ford
18 intentionally chose the yielding seat design. To
19 me, that reflects favorably on the company, that
20 they actually consciously considered these different
21 alternatives but simply made a production decision
22 based on all of these factors, safety, admittedly
23 cost, marketing, et cetera, and resolved that
24 balance in favor of the yielding seat.
25 How do you get from that, how do you get

1 from an accident – how do you get from the
2 situation with an automobile and a driver and a
3 situation where a million variables come into play,
4 the size of the driver, the size of the automobiles
5 involved in the accident, the position of the person
6 in the vehicle, the type of seat? You've got a
7 million different variables. The company has to
8 juggle those and come up with a reasonable design
9 and this is simply the choice that they made. I
10 hardly see as that rises to the level of punishable
11 conduct that intentionally disregards the rights of
12 the plaintiff. Arguably, if it disregards the
13 rights of any plaintiff, it disregards the rights of
14 the thousands of additional people that would get
15 injured under another alternative design.
16 MR. SLATTERY: The tradeoff argument has
17 been met, Your Honor. There is no tradeoff
18 necessary between high speed and low speed
19 occurrences. You can protect in both. If you
20 choose intentionally not to and choose to ignore the
21 high end accidents and say we're going to go in a
22 different direction. We saw Ford looked at and
23 considered design guidelines. The court knows they
24 considered and looked at design guidelines back in
25 1969. That's why those safety position papers that

1 are going to come in but I chose not to bring in
2 through this witness were consciously made. It
3 isn't that they didn't look at them. They made a
4 conscious decision never to design a seat to crash
5 criteria. The court has all these snippets from the
6 read-ins, but the court has it in certain terms in
7 the exhibit I just introduced, in 1992 Ford Motor
8 Company has no crash criteria for seats. None.
9 THE COURT: Mr. Meeker, did you want to
10 argue?
11 MR. MEEKER: Yes. Judge, what Mr. Parlee
12 has offered is a closing argument on the subject of
13 punitive damages and not an argument that the
14 threshold hasn't been met.
15 THE COURT: My problem really – and this
16 is what I'm going to go back to on, Mr. Parlee – is
17 I have to look at the state of evidence today and
18 you are telling me what you're going to show in your
19 case, so let me interrupt Mr. Meeker and put that
20 question to you. At this moment the evidence is
21 this. Ford made a conscious design decision and
22 Ford made that decision knowing of its own tests,
23 knowing at least of some of the literature. I guess
24 all I know is that they knew about "60 Minutes". I
25 guess there's no other evidence about what else Ford

1 knew.
2 MR. SLATTERY: Ford knew what was
3 published in the '60s.
4 THE COURT: There is no evidence of what
5 Ford knew about that.
6 MR. SLATTERY: There's a Ford
7 publication, Judge, from the '60s that I introduced
8 today from a Ford engineer.
9 THE COURT: That's what I say, they know
10 of their own test results, they know what was in the
11 "60 Minutes" program as it's been summarized to us,
12 and they made a conscious design choice. That's
13 what's in evidence today at this moment. Is that
14 enough to meet the threshold?
15 MR. PARLEE: No.
16 THE COURT: Why not?
17 MR. PARLEE: Because for several reasons,
18 the first of all being he's talking about accidents
19 under an extreme circumstance, violent accidents at
20 55 miles an hour in which you raise a serious issue
21 as to whether any seat design, especially back at
22 that time in 1987, could have been cost effective or
23 was feasible from an engineering standpoint.
24 MR. SLATTERY: Ford wrote in 1968 that it
25 was feasible –

1 THE COURT: Let Mr. Parlee finish,
2 please.
3 MR. SLATTERY: -- at 55 --
4 THE COURT: Let Mr. Parlee finish,
5 please.
6 MR. SLATTERY: Oh, I'm sorry.
7 MR. PARLEE: The other thing is, Your
8 Honor, we're taking this recitation of the evidence
9 from the plaintiffs' expert unexamined, no cross-
10 examination, and procedurally I question whether
11 that is what the statute contemplates. Does that
12 mean under the statute that the plaintiff can put a
13 single, obviously biased witness on the stand, a guy
14 who -- Mr. Slattery said you're my good friend in
15 the beginning of the testimony, I've worked with you
16 for many, many years. He established himself as a
17 very effective "yes man" during his questioning. I
18 think he said the word "right" somewhere between 25
19 and 30 times in response to Mr. Slattery's
20 questions. So are we to believe that the statute
21 contemplates having an extremely biased witness
22 coming up there untested by cross-examination
23 spewing forth all the possible evidence with
24 negative slants and the court bases its decision
25 based on that? I don't think so.

1 MR. MEEKER: Judge, can I respond,
2 because this is all a parentheses in my argument?
3 THE COURT: Sure. And I wonder if you're
4 done, Mr. Parlee, because it was an important
5 question.
6 MR. PARLEE: Yeah, on that. Go ahead.
7 MR. MEEKER: I just wanted to address
8 that point, Judge. That's what prima facie means.
9 MR. PARLEE: Well -- I'm sorry.
10 MR. MEEKER: It doesn't mean that you're
11 balancing all of the competing evidence. It means
12 has -- have the basic elements that are required by
13 the statute been put forward. Mr. Slattery has
14 recited those. I mean, it -- what Mr. Parlee is
15 suggesting is that we can't make a decision about
16 the admissibility of punitive damages evidence until
17 both cases in chief are in and that's clearly not
18 what's contemplated here.
19 MR. PARLEE: No, I'm not saying that.
20 MR. SLATTERY: The court has to make that
21 threshold decision at some juncture in the case, and
22 I think there can be no doubt based on the evidence
23 presented at this point from Ford documents and Ford
24 published articles that that conscious decision was
25 made and the further conscious decision was made not

1 to warn, to give the people the choice as to whether
2 they want to buy a vehicle with a seat that can
3 potentially collapse and cause broken necks and
4 deaths.
5 THE COURT: There's no evidence to that
6 effect.
7 MR. SLATTERY: Warning is part of --
8 THE COURT: There's no evidence that
9 there was a conscious decision not to warn, is
10 there?
11 MR. SLATTERY: They didn't warn. They
12 knew of the danger and they didn't warn.
13 THE COURT: So the answer to the question
14 is?
15 MR. SLATTERY: You've either got to
16 decide to correct it or you have to tell people.
17 THE COURT: Is there evidence that Ford
18 made a conscious decision not to warn?
19 MR. SLATTERY: They don't have to make a
20 conscious decision not to warn. Somebody doesn't
21 have to sit down and deliberate it.
22 MR. PARLEE: Well, you're talking about
23 intentional disregard of the rights of the
24 plaintiff. I suggest that there does have to be a
25 deliberative process. You cannot reach this

1 standard of conduct simply by implication.
2 THE COURT: I think this is the issue.
3 The issue is whether there's an intentional design
4 decision. There clearly has been. The other
5 question is if that intentional design decision with
6 the knowledge that Ford had becomes an intentional
7 disregard of known dangers --
8 MR. PARLEE: Exactly.
9 THE COURT: -- and I asked you both for
10 some authority or some comparing and contrasting on
11 those things and I haven't heard any of it. That's
12 what I need to decide.
13 MR. SLATTERY: Judge, we have it in the
14 statute, I can't help that, and it's a unique
15 statute as far as I know --
16 MR. PARLEE: It is unique.
17 MR. SLATTERY: -- on that topic. The
18 instruction committee has attempted to interpret it.
19 THE COURT: They've said what -- what
20 they've said is we don't know.
21 MR. PARLEE: Your Honor, I think that the
22 more important or just as important question is one
23 of procedure. It seriously concerns me that
24 procedurally the standard could be reached on that
25 slim a basis. I believe the term prima facie case

1 refers to the credible evidence. It's not a
2 standard similar to summary judgment where the court
3 simply assumes that everything the witness says is
4 true untested by cross examination. I can't believe
5 -- if that were the standard, it would be
6 extraordinarily easy for plaintiffs to meet that in
7 the modern context of litigation where you have paid
8 experts who will say virtually anything --
9 MR. SLATTERY: Judge --
10 MR. PARLEE: -- for the right price.
11 MR. SLATTERY: Part of the read-ins is of
12 Agnes Kim and Priya Prasad, biomechanisists at Ford,
13 who say we know about torso inertial loading of the
14 seats.
15 THE COURT: I don't have that evidence
16 yet. You're asking me to find him at the threshold
17 on what I do have.
18 MR. SLATTERY: I have.
19 THE COURT: Are you going to -- is my
20 ruling -- is what you do with Shaw now dependent on
21 my ruling or are you done with him no matter what?
22 MR. SLATTERY: No, I want to ask the
23 pivotal questions, I want to ask the -- beyond the
24 expectations of the ordinary consumer that's
25 required for product liability.

1 THE COURT: Okay. Well, my -- my
2 reaction is, part of what Mr. Parlee has said, it
3 doesn't feel under the old statute what we think
4 about as punitive damages. This doesn't feel like
5 enough because that's a high threshold.
6 MR. PARLEE: The statute is a higher
7 threshold than the previous common law.
8 MR. SLATTERY: The statute is exactly the
9 threshold that the legislature enacted. They took
10 out the question of outrageousness. We spent years
11 developing outrageousness.
12 MR. PARLEE: Yeah.
13 MR. SLATTERY: Now whatever the statute
14 did or whatever its intent was I don't know, but the
15 language of the statute is precisely what I got Ford
16 witnesses to admit and precisely what I elicited
17 from this witness.
18 THE COURT: Well -- and that's exactly
19 what I was saying about Mr. Parlee's comment, the
20 statutory language sounds like a lower burden than
21 we had been using under the old statute.
22 MR. SLATTERY: I can't help that, Your
23 Honor. It's the one -- we're not free to rephrase
24 that here today.
25 THE COURT: Mr. Parlee, I'll give you one

1 last kick at it.
2 MR. PARLEE: Well, I understand the
3 argument or the issues that I've seen come up in the
4 trial courts about the statute is whether it now so
5 restricts the application of punitive damages that
6 there must be a specific disregard of that specific
7 plaintiff's rights. For example, it's not a
8 situation where under the outrageousness standard
9 you look upon the conduct in and of itself and
10 determine almost, say, objectively whether that
11 rises to the level of an intentional disregard.
12 There has to be a person with a person's -- with
13 another person in mind and a disregard of that
14 specific person's rights, intentional disregard of
15 the plaintiff's rights, and that's the level at
16 which that discussion is at.
17 MR. SLATTERY: Judge, let me ask this
18 question. How can Ford with any measure of
19 consciousness allow thousands and thousands and
20 millions and millions of potentially collapsing
21 seats out there and at the same time tell parents to
22 put their kids in the back seat of those cars?
23 THE COURT: Well, they're going to tell
24 me in their case in chief.
25 MR. PARLEE: Exactly.

1 THE COURT: But the question is, what do
2 we do with the state of the evidence today and this
3 new statute, and the crux of it is the interpreta-
4 tion of -- just as I indicated earlier, we're
5 talking about an intentional design decision with
6 the knowledge that we have attributed to Ford in the
7 case, if that becomes intentional disregard. Let me
8 tell the jury to take another ten minutes and let us
9 do that and come back then.
10 (Short recess taken.)
11 THE COURT: Well, I thought this issue
12 was going to come up after the other accident
13 evidence came in, but as I think about it, the real
14 state of the evidence would really be the same. The
15 question is whether plaintiff has established prima
16 facie evidence thathat Ford intentionally disregarded
17 her rights. Because Mr. Parlee raised the issue of
18 the plaintiff's rights, which I think is really a
19 side issue, let me take that up first.
20 Plaintiff's rights under that statute
21 must include this plaintiff's rights once the
22 plaintiff is put into context. I think any reading
23 that that must be disregarded for any single
24 litigant is much too narrow a reading. The real
25 issue is what this new statute intends.

1 This is the evidence. With the knowledge
2 that yielding seats produced serious injury in rear
3 impacts, defendant designed and manufactured that
4 seat, and that's enough. Mr. Parlee makes an
5 argument that it comes too easy and, really, that is
6 something that is bothersome to the court, too, but
7 the knowledge coupled with the continued manufacture
8 and the obvious design decision to continue it is
9 enough to meet that statute. The threshold is met.
10 MR. LEE: Your Honor, before you call the
11 jury back, I don't mean to interrupt you --
12 THE COURT: I'm done.
13 MR. SLATTERY: I've been trying to get
14 together with Ford on a couple of read-ins and I
15 haven't gotten the cooperation I've been looking for
16 from them and we're looking for a specific ruling on
17 Mendelsohn. We proposed reading in the whole
18 transcript --
19 THE COURT: Wait a minute. Don't we have
20 hours to go here?
21 MR. LEE: We're planning in advance, Your
22 Honor.
23 MR. SLATTERY: We don't want to run out
24 of witnesses, Your Honor.
25 THE COURT: Then we'll talk about it

1 BY MR. SLATTERY:
2 Q Just the legalese questions, Mr. Shaw. Do you have
3 an opinion to a reasonable degree of expertise in
4 your area of expertise as to whether or not the
5 conduct of Ford in designing the Aerostar seat failed
6 to meet standards of ordinary care?
7 A I think they failed to meet that ordinary care.
8 Q And that is to a reasonable degree of certainty?
9 A Yes.
10 Q And for all the reasons that you expressed?
11 A Yes.
12 Q Secondly, do you have an opinion as to whether or not
13 the Aerostar seat, as designed for the Hensler van,
14 was unreasonably dangerous and defective in terms of
15 being beyond the expectations of the ordinary
16 consumer or hidden in nature?
17 A Yes. I doubt that anybody driving an Aerostar van
18 would have expected the seat to collapse in this
19 manner.
20 Q Thirdly, do you have an opinion as to whether or not
21 the collapse of that seat in the manner described was
22 a substantial factor in producing the cord injury
23 that Sandy Hensler sustained?
24 A My opinion, there's no question about it.
25 Q Did Sandy Hensler, as you understand this case,

1 later. I've had the jury sitting out for 45 minutes.
2 MR. SLATTERY: Very good.
3 (End of take.)
4 (Jury returned.)
5 THE COURT: Be seated, please. Did you all
6 see a videotape before you started your service? Did
7 they show you a videotape when you were in the
8 assembly room?
9 JURY: (Nods heads.)
10 THE COURT: Did I do it?
11 JURY: (Nods heads.)
12 THE COURT: Probably the only thing about
13 it is that I was ten years younger. But I think I
14 remember that I spoke, among other things, about
15 breaks in the trial. In case I didn't, I'll tell you
16 now that they happen, as you've experienced today and
17 yesterday. And one of the reasons that that happens,
18 there are many, but one of the them is that the
19 lawyers and I have legal issues to attend to. So we
20 try very hard to keep those as short and efficient as
21 possible, but it's important that we do things right
22 too. So let me apologize once for that
23 inconvenience, and this won't be the last time it
24 happens.
25 All right. Mr. Slattery.

1 sustain any injury other than that single injury
2 fracturing her cervical vertebrae and the resulting
3 cord injury?
4 A I'm not aware of any, no.
5 Q Had that seat not collapsed, would she have walked
6 away free of the cord injury?
7 A Most probably.
8 Q Lastly, do you have an opinion to a reasonable degree
9 of certainty as to whether that was outrageous
10 conduct to allow a seat to be out there with no
11 warning about the dangers where the dangers are of
12 serious injury or death to the driver occupying the
13 seat, serious injury or death to the occupants in the
14 rear seat behind, and loss of control of the vehicle
15 potentiating injury to people outside the vehicle,
16 either in other cars or pedestrians or people in
17 school yards or their own backyard or whatever, is
18 that in your judgment outrageous?
19 A It is outrageous to me.
20 Q Particularly where the public is not told about it?
21 A That is correct.
22 MR. SLATTERY: Thank you, sir.
23 Oh, just one more thing.
24 Q We started out with Exhibit 1343 talking about
25 controlled yielding of seats and Exhibit 1344 talking

1 about the Aerostar seat?
2 A Yes.
3 Q Have your opinions essentially embraced in these two
4 exhibits with all of the rest been supported?
5 A Yes.
6 MR. SLATTERY: Thank you.
7 THE COURT: Mr. Meeker?
8 MR. MEEKER: No questions, Judge. Thank
9 you.
10 THE COURT: And Mrs. Clark.
11 MS. CLARK: Yes. Thank you, Your Honor.
12 Q Good afternoon, Mr. Shaw.
13 A Good afternoon.
14 Q We met by telephone two or tree times during the
15 course of discovery in this case and out in the
16 hallway right before?
17 A Right.
18 Q Mr. Shaw, I've had a little laryngitis. I think it's
19 mostly back, but if you don't understand me, my
20 question, will you let me know if you're not
21 following me?
22 A I think I have the same problem.
23 Q Thank you. Now, Mr. Shaw, you began litigation
24 consulting in 1981 as a full-time profession; is that
25 right, sir?

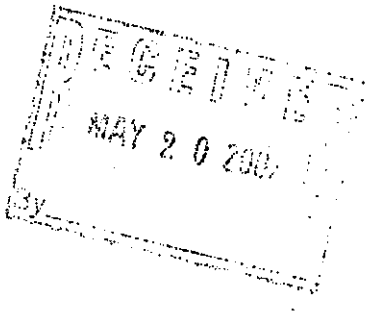
1 A That's correct.
2 Q And that's about the same time that you began working
3 with Mr. Slattery, the plaintiffs' lawyer?
4 A Yes. Actually one of the first cases that I had was
5 Mr. Slattery. There were three similar cases
6 throughout the country with regard to front-end crash
7 worthiness. He happened to have one, and that's the
8 first case I had with him.
9 Q And over the years, Mr. Slattery has retained you on
10 several different cases against other automotive
11 manufacturers, such as Porsche?
12 A Yes.
13 Q Volkswagen?
14 A Yes.
15 Q General Motors?
16 A Yes.
17 Q And you have -- you have become good friends with
18 him, you told us earlier?
19 A No question about it.
20 Q Yes, sir. Now, your work in terms of the work that
21 you do as a litigation consultant is primarily 80 or
22 90 percent on behalf of the plaintiff?
23 A That's the way it's turned out.
24 Q For attorneys such as Mr. Slattery?
25 A I'm sorry?

1 Q For attorneys who are representing plaintiffs, such
2 as Mr. Slattery, if not Mr. Slattery himself,
3 correct?
4 A That's correct, primarily the plaintiff.
5 Q And most of that concerns where you're suing an auto
6 manufacturer claiming that the automobile is
7 defective or some other product that the claim is its
8 defective, sir?
9 A Well, not always. It depends on the case. Some of
10 them are just reconstructions on what happened. And
11 some of them have to do with even defense in terms of
12 what happened and whether or not somebody is liable.
13 Q But the majority of your cases are cases where you're
14 working for a plaintiff's attorney who is alleging
15 that an automobile or another product is defective;
16 is that correct, sir?
17 A Usually that's the case, yes.
18 Q And you don't do it for free?
19 A No.
20 Q And what do you charge, sir?
21 A 235 an hour.
22 Q And as you've done this over the years, your rates
23 have gone up?
24 A Of course, just like yours.
25 Q And you have been testifying in cases on behalf of

1 plaintiffs' attorneys in seat back cases since around
2 1981 or 1982?
3 A Well, you know, I don't remember all of them, to be
4 quite honest with you. I'm sorry. I don't remember
5 all my cases that well.
6 Q Well, it's -- it's at least a few -- we know the
7 Neilson case was 12 or 13 years ago, correct?
8 A Right. I think the first case that I had with seat
9 back probably involved a Nissan, and that was
10 probably in the very early '80s. And then I think
11 Guhrke, who was a Ford case in Detroit, occurred
12 probably '83, '84 time period. I'm not absolutely
13 sure of that, but that would be the time period we're
14 talking about.
15 Q Working on behalf of plaintiffs' attorneys you've
16 criticized the seats of Nissan, Ford, Porsche,
17 General Motors, other manufacturers, sir?
18 A That's quite possible.
19 Q I think you told me in deposition that -- when I took
20 your deposition that in 1987 when the Aerostar was on
21 the market and when this Aerostar was built, you
22 didn't know of any seat that you considered
23 reasonably safe; isn't that so, sir?
24 A Well, to do that, I would have had to test them. I
25 think there were seats that had the potential for

COURT OF APPEALS OF WISCONSIN
DISTRICT I

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased,



Plaintiffs-Respondents-Cross-Respondents,

vs.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-Cross-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant,

NEIL F. LAMPSON, INC.,

Defendant,

LAMPSON INTERNATIONAL, LTD.,

Defendant-Cross Respondent,

FEDERAL INSURANCE COMPANY,

Defendants-Co-Appellant,

THE TOKIO MARINE AND FIRE INSURANCE COMPANY,

Defendant.

Appeal No. 01-1031
(Consolidated with Appeal No. 01-2486)

Trial Court Case No. 99-CV-006553

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.'S INITIAL BRIEF

APPEAL FROM FINAL ORDERS AND JUDGMENTS ENTERED BY THE HONORABLE DOMINIC S. AMATO, IN MILWAUKEE COUNTY CIRCUIT COURT CASE NO. 99-CV-006553

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased,

Plaintiffs- Respondents-
Cross-Respondents,

Appeal No. 01-2486
(Consolidated with Appeal No. 01-1031)

vs.

Trial Court Case No. 99-CV-006553

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-
Cross-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-
Cross-Respondent,

NEIL F. LAMPSON, INC. and LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY and THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendants-Respondents-
Cross-Appellants.

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no fact issue for the jury to decide. Thus, the Court of Appeals' task here is simple—it must interpret section 895.85(3). If the trial court's and the plaintiffs' rendition of the statute is accurate, then it was appropriate to allow the jury to consider punitive damages. If MHIA's interpretation of the statute is correct, then the Court of Appeals must vacate the punitive damages award.

B. In Wisconsin, Punitive Damages Are Warranted Only if the Defendant Intends the Consequences of his Misconduct, or Is Aware that His Conduct Is Practically Certain to Cause an Accident or Injury.

When the legislature passed section 895.85(3), it placed Wisconsin "among the states having the most stringent punitive damage conduct requirements." Richard L. Blatt, *et al.*, *Punitive Damages: A State by State Guide to Law and Practice* 253 (2000 Supp.) To appreciate why the statute is so strict, the Court must consider how it is different from its predecessor (the common law standard for punitive damages), how Wisconsin's jury instruction committee has interpreted the standard, and how Wisconsin courts have applied it.

1. The Common Law Standard Authorized Punitive Damages for Reckless Disregard of the Plaintiffs' Rights.

Under common law, a jury could award punitive damages if: (1) the defendant's conduct was willful or wanton so that he desired to cause the harm sustained by the plaintiff or he believed the harm would be substantially certain to follow his conduct; or (2) the

(E.D. Wis. 1999) (noting that the intent of the new legislation was to make it more difficult to recover punitive damages.)

The statute does not define the term "intentional disregard," but Wisconsin's model jury instructions shed some light on the issue:

> A ***person acts in intentional disregard*** of the rights of the plaintiff if the person acts with a ***purpose*** to disregard the plaintiff's rights, or is ***aware*** that his or her acts are ***practically certain*** to result in the plaintiff's rights being disregarded.

Wis. JI-Civil 1701.1. (Emphasis supplied).

Meanwhile, the jury instruction notes bring the meaning of "intentional disregard" more clearly into focus:

> 1. 1995 Wisconsin Act 17, Section 3 creates a new statute, Wis. Stat. § 895.85, which revises the standard and procedures for awarding punitive damages.
>
> * * *
>
> The [second] basis for punitive damages is if the "defendant acted . . . in an intentional disregard of the rights of the plaintiff." ***This part of the standard was clearly intended to be more narrow than the case law standard which allowed punitive damages for conduct which "shows a reckless indifference to or disregard of the rights of others on the part of the wrongdoer." (citations omitted).*** . . . The legislative history reveals only that "intentional disregard" was ultimately favored over earlier drafts and bills which provided recovery for "willful disregard" of the rights of the plaintiff. *See* LRB-1744 drafted 12/3/94, 1993 S.B. 152, 1991 S.B. 138, 1989 S.B. 153 (which provided "willful or conscious" disregard).
>
> There is, of course, no case law which defines "intentional disregard of the plaintiff's rights." The Committee finds the statutory formulation of ***criminal***

1 IN THE CIRCUIT COURT OF MILWAUKEE COUNTY

2 STATE OF WISCONSIN

3

4 PATRICIA WISCHER, individually,
and as Special Administrator of the
5 ESTATE OF JEFFREY A. WISCHER, deceased;
MARJORIE DeGRAVE, individually,
6 and as Special Administrator of the
ESTATE OF WILLIAM R. DeGRAVE, deceased;
7 and RAMONA DULDE-STARR, individually,
and as Special Administrator of the
8 ESTATE OF JEROME STARR, deceased,

9 Plaintiffs,

10 -vs- Case No. 99-CV-006553

11

12 MITSUBISHI HEAVY INDUSTRIES
AMERICA, INC., TRAVELERS
13 PROPERTY CASUALTY INSURANCE
COMPANY, THE TRAVELERS INDEMNITY
14 COMPANY OF ILLINOIS, NEIL F. LAMPSON,
INC., HCH MILLER PARK JOINT VENTURE,
15 HUNZINGER CONSTRUCTION COMPANY,
CLARK CONSTRUCTION BUILDERS, INC.,
16 and HUBER, HUNT & NICHOLS, INC.,

17 Defendants.

18

October 18, 2000
19 9:12 a.m.

20 Volume III

21 TRANSCRIPT OF JURY TRIAL

22 Before:
HONORABLE DOMINIC S. AMATO
23 Circuit Court Judge Presiding

24 Court Reporters: Debra A. Wisniewski, CRR/RMR
Julie A. Poenitsch, CRR/RMR
25 Constance L. Bauer, CRR/RMR

1 MR. CARLSON: No objection.
2 THE COURT: Received.
3 MR. HABUSH: The next is Plaintiff's
4 Exhibit 92, which is the lift plan.
5 THE COURT: Any objection?
6 MR. BELL: No objection.
7 MR. CARLSON: No objection.
8 THE COURT: Received.
9 MR. HABUSH: Next is Plaintiff's Exhibit
10 1157, which is the lease between Lampson and
11 Mitsubishi.
12 MR. BELL: No objection.
13 MR. CARLSON: No objection.
14 THE COURT: Received.
15 MR. HABUSH: The next is -- exhibit is
16 Plaintiff's Exhibit 1765, which is a letter from
17 Mr. Grotlisch to Mr. Gros dated May 7th, 1999.
18 MR. BELL: No objection.
19 MR. CARLSON: No objection.
20 THE COURT: Received.
21 MR. HABUSH: The next exhibit is
22 Plaintiff's Exhibit 1773, which is the load chart.
23 MR. BELL: No objection.
24 MR. CARLSON: No objection.
25 THE COURT: Received.

1 I'll see what you said, I'll see what Mr. Carlson
2 said, I'll see what Mr. Habush said and I'll rule.
3 MR. BELL: It wasn't the subject of a
4 motion, Your Honor.
5 THE COURT: You should have said it
6 earlier then. Next question.
7 MR. HABUSH: Kenny, let's put up the load
8 chart. I think it's 1773, TRI00320.
9 THE COURT: I want you to disregard the
10 dialogue, okay? It's not important, okay? They're
11 doing their job and I'm making -- Okay. Thank you.
12 MR. HABUSH: Okay. I'm putting one up on
13 the board so most of you can see this a little
14 better. Can you see it?
15 THE WITNESS: I need a hard copy. This
16 is really a fuzzy screen here.
17 THE COURT: Let me ask you something.
18 They gave me a monitor. Tell me if this is any
19 better. I'm not used to all this equipment. Is
20 that any better to read? And I'll just switch it
21 over.
22 THE WITNESS: Yeah. Maybe.
23 THE COURT: Can you just hold on a second
24 and I'll switch this over here?
25 (Short pause.)

1 THE COURT: All right. Go ahead.
2 THE WITNESS: Thank you.
3 THE COURT: Sure.
4 BY MR. HABUSH:
5 Q Now, this is what is known as a load chart, correct?
6 A Yes.
7 Q And on its top --
8 MR. HABUSH: You can move up a little
9 bit, Kenny. Move it down so we can see the top,
10 LTL. No, above that. Above that. Keep moving down
11 so we can see the top. I want to see the LTL-1500
12 Series. That's it. There we go. Okay. Thank you.
13 Q That describes the Big Blue that was involved in the
14 incident at Miller Park?
15 A Yes.
16 Q And it describes, does it not, it had a 200-foot
17 jib, 110-foot jib strut; is that correct?
18 A Yes.
19 Q 330 -- 340-foot main boom, correct?
20 A Yes.
21 Q What is that, 190?
22 A 190-foot mast.
23 Q A 100-foot stinger. I think we explained to the
24 jury what the stinger was.
25 A Yes.

1 Q So this was made specifically, was it not, for not
2 only this particular crane, but if you look at the
3 date, June 8th of '99 over on the right corner, that
4 this was a load chart that was applicable to the
5 particular lift in question on July 14th; am I
6 right?
7 A Yes.
8 MR. HABUSH: Now, if you could go down
9 and enlarge, Ken, please, the part below the
10 LTL-1500 for me. No, up. Higher. There. That's
11 it, those guys right there. All right. Can you
12 enlarge it, please.
13 Q Now, you see there, it says 20-mile-an-hour wind; is
14 that correct?
15 A Yes.
16 Q Now, was that a specification that you, the
17 manufacturer, placed on this crane?
18 A Yes.
19 Q That was at your manufacturer's discretion?
20 A Yes.
21 Q And you felt, did you not, that for this particular
22 crane -- And this is without anything on the hook,
23 correct?
24 A Yes.
25 Q Nothing on, no load, right?

1 A Yes.
2 Q -- that you didn't want this crane operated in winds
3 over 20 miles an hour; is that correct?
4 A Yes.
5 Q Now, is there some place on this load chart where
6 you tell the user about the load itself?
7 A Well, Item No. 10.
8 MR. HABUSH: Could you get 10 enlarged
9 for me, please, Ken, Condition 10.
10 Q Now, this is under a heading called "Applicable
11 Conditions"; is that correct?
12 A Yes.
13 Q And do you expect the users of your crane to read
14 these load charts?
15 A Yes, of course.
16 Q They're in English, correct?
17 A Yes.
18 Q Have you ever heard anything from Mitsubishi they
19 didn't understand your load chart?
20 A No, not until litigation started.
21 Q Not until after the accident, right?
22 A Yes.
23 Q Now, that says, chart capacities do not consider
24 effect of wind on the suspended load. Chart
25 capacities do not consider the effect of wind on the

1 suspended load. Now, is that difficult to
2 understand, Mr. Lampson?
3 MR. BELL: Objection.
4 MR. HABUSH: Strike that. Withdrawn.
5 THE COURT: All right. Next question.
6 BY MR. HABUSH:
7 Q What do you understand that to be?
8 A Well, what it's trying to explain is that the
9 20-mile-per-hour wind limitation has to do with the
10 effect of wind on the crane structure itself, the
11 boom and the mast and all the structure of the crane
12 that protrudes up into the air.
13 The reason that it can't address the
14 load itself is because you never know, as a
15 manufacturer, would never know what load might be
16 hanging on the hook. You don't know what the sail
17 area of that particular load might be. Today it
18 might be a cylindrical piece; tomorrow it might be a
19 sail like the Miller Park lift. You never know.
20 The wind limitation is intended to address the
21 structure of the crane that's in the sail area.
22 Does that --
23 Q Yeah. Now, we look at that crane, and it looks like
24 it's got a lot of space in it, you know, between the
25 steel.

1 A Um-hum.
2 Q And it's hard for perhaps a person like myself to
3 understand what is the wind going to blow at. So is
4 there ways to calculate the amount of width and
5 space on a crane that the wind is going to affect?
6 A Yes. You have to take into consideration all the
7 structural members, the size, the shapes, the
8 angles, and if you're doing it right, even the nuts
9 and bolts that protrude into the air. And you
10 calculate based on that given area and its exposure
11 to the -- to a wind from the worst direction, the
12 direction that creates the most amount of drag on
13 that particular piece, and that's how you calculate
14 the area in general terms.
15 Q Now, we look at that 4R3, that big roof piece that
16 we had up on the board. And I'm putting it up on
17 the board again for the jury to look at. That,
18 again, looks like a lot of holes in there and a lot
19 of space between the metal. Is there ways to
20 calculate the actual surface area that's affected by
21 the wind on that piece as well?
22 A Do you want me to go up there?
23 Q Yeah. Just take a look at it, please.
24 A Well, yeah, it's a lot of what we refer to as a
25 latticework piece, if you will, much like the crane

1 boom is a latticework, has all these lacings in it
2 is the reference to lattice. But if you add them
3 all up, it gets to be almost like a solid sheet, and
4 there is a way to calculate it, but, again, you have
5 to have the size and shape of each one of these,
6 each of the big members, horizontal members, each of
7 the diagonal members, and all the connecting
8 hardware that goes in all these points, and it takes
9 some time and some energy, but given all that
10 information, you can -- you can make the
11 calculation.
12 Q Now, who had the information on the various sizes of
13 each of the pieces that made up 4R3?
14 A Only Mitsubishi, to the best of my knowledge.
15 Q Did they ever ask you to do the wind calculations?
16 A No, sir.
17 Q Did you ever tell them that you were going to do the
18 wind calculations?
19 A No.
20 Q Did you expect them to do the wind calculations?
21 A I would have thought so, yes.
22 MR. HABUSH: You can take your seat.
23 Thank you, Mr. Lampson. Ken, can you do Paragraph
24 11? See if we can see that. Did we lose it? It's
25 on the same -- on the load chart. It's just the

1 conditions, Paragraph 11.
2 MR. JARVIS: What number was that,
3 please?
4 MR. HABUSH: 1774. All right. You
5 got it?
6 Q Let's use this. Paragraph 11 says, in addition, the
7 person in charge of lift operations shall carefully
8 review all site-specific operating conditions.
9 MR. HABUSH: Okay. There it is. It's
10 up there. Could you enlarge number Paragraph 11.
11 Q In addition, the person in charge of lift operations
12 shall carefully review all site-specific operating
13 conditions before putting the crane into operation;
14 e.g., wind gusting, inclement weather, visibility,
15 and dynamic effects due to -- is that to hoisting,
16 lowering, swinging, and travel, correct?
17 A Yes, that's what it says.
18 Q From your understanding of what was going on at
19 Miller Park, was it Victor Grotlisch in charge of
20 the entire lift operations?
21 A Yes, he was directing all the metal.
22 Q Was it Victor Grotlisch who made the decisions of
23 when to go and when not to go?
24 A You mean the day of the lift?
25 Q Yes.

1 A Yes.
2 Q Was it Victor Grotlisch who made the decision
3 whether it was too windy or not to go on a specific
4 day?
5 A I assume so, yes.
6 Q Were you ever told --
7 MR. BELL: Objection, Your Honor.
8 THE COURT: I don't want you to guess
9 or speculate. You can say if you don't know. If
10 you know, you can testify from your personal
11 knowledge.
12 THE WITNESS: Okay. Based on my
13 knowledge, he was the person in charge of all the
14 other activities, so I said assume so. I guess one
15 can deduce that he was in charge of that decision,
16 as well as all the other decisions.
17 MR. BELL: Same objection, Your Honor.
18 THE COURT: Motion to strike is --
19 Objection is granted. The testimony that he assumed
20 Mr. Grotlisch, that part's stricken. The jury is to
21 disregard it. The balance of the testimony can
22 stand, including his deductions. Let's proceed.
23 MR. HABUSH: You can take that down
24 now, Ken.
25 Q Have you ever seen the OSHA tape?

1 IN THE CIRCUIT COURT OF MILWAUKEE COUNTY

2 STATE OF WISCONSIN

3

4 PATRICIA WISCHER, individually,
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5 ESTATE OF JEFFREY A. WISCHER, deceased;
MARJORIE DeGRAVE, individually,
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ESTATE OF WILLIAM R. DeGRAVE, deceased;
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INC., HCH MILLER PARK JOINT VENTURE,
15 HUNZINGER CONSTRUCTION COMPANY,
CLARK CONSTRUCTION BUILDERS, INC.,
16 and HUBER, HUNT & NICHOLS, INC.,

17 Defendants.

18

19 October 19, 2000

20 VOLUME IV

21 TRANSCRIPT OF JURY TRIAL

22 Before:
HONORABLE DOMINIC S. AMATO
23 Circuit Court Judge Presiding

24 Court Reporters: Debra A. Wisniewski, CRR/RMR
Constance L. Bauer, CRR/RMR
25 Julie A. Poenitsch, CRR/RMR

1 site basically.
2 Q Did Mr. Grotlisch indicate to you that there had
3 been some quarrels between him and Milo over safety
4 of some of the lifts, some of the other activities
5 that Mr. Grotlisch had engaged in?
6 A Yes. I can't remember specifically how the
7 conversation went in May. Everything had been
8 rehashed many, many times earlier on, and it just
9 got to the point where Victor said he's got to go.
10 Q And Victor sent you a letter, did he not? Actually,
11 it was sent to Mr. Gros, Exhibit No. 327. It was
12 dated May 7th of 1999. Actually, it's Exhibit 1766.
13 THE COURT: Could you use the screen,
14 sir, to --
15 MR. HABUSH:
16 Q This was addressed to Mr. Gros but you saw it, did
17 you not, Mr. Lampson?
18 A Yeah. Let me -- the screen's not very good.
19 THE COURT: There we go.
20 THE WITNESS: Oh, there we go.
21 THE COURT: When you have that
22 problem, don't be afraid to tell me.
23 THE WITNESS: Okay.
24 THE COURT: Any witness, okay, because
25 this is not something that I've normally done

1 myself. That's why I don't have one up here for
2 myself.
3 THE WITNESS: Okay.
4 MR. HABUSH:
5 Q Do you recognize that letter?
6 A Yes, I do.
7 Q It says, "Confirming my numerous telephone
8 conversations, MHIA demands that Milo Bengtson be
9 immediately removed from the Miller Park project.
10 Attached is a list of invoices on my desk waiting
11 approval. These invoices will be immediately
12 handled after the above issue is resolved to MHIA's
13 satisfaction." That was a not too subtle suggestion
14 they weren't going to pay your bills until you bent
15 to their will; isn't that true?
16 A That's the message.
17 Q Did you subsequently call Milo in or indicate to
18 Milo that he had to leave that project?
19 A Yeah, I handled it by phone actually. I was in
20 Kennewick, Washington and he was at the job site, so
21 I handled it by phone.
22 Q Did he have occasion to tell you of the various
23 problems he had with Victor Grotlisch over safety?
24 A Yes, we discussed those issues, and although the
25 gist of what I gleaned out of the conversation was

1 it was more other issues, I'll call them personality
2 conflicts, but there was a disagreement on the way
3 things should be done and the parties weren't seeing
4 eye-to-eye.
5 Q You told me, did you not, in your deposition that
6 you didn't believe what Mitsubishi had said about
7 Milo operating in an unsafe manner; you didn't
8 believe that, did you?
9 A No, I did not believe that.
10 Q You don't believe it to today, do you?
11 A No, I do not believe that today.
12 Q Do you feel bad about having to bring him off the
13 site?
14 A Yes.
15 Q How did he feel about it?
16 A He was not happy about it, but I tried my best to
17 explain the situation. It was a matter of trying to
18 keep peace on the site and that we had a good
19 customer in Mitsubishi and we had to do the best to
20 get along with them and do our best to get along
21 with them, and it didn't appear to me at the time it
22 was worth the fight to continue to keep him on the
23 job site, and Mitsubishi had requested that he be
24 fired from the job site.
25 Q Did you subsequently confirm with Randy Meise, who

1 was his crawler operator -- no, he was actually the
2 crane operator, wasn't he?
3 A Randy Meise was the hoist operator.
4 Q And he left with Milo because they're kind of a
5 team; right?
6 A Yes, they work together.
7 Q And did you confirm with Randy by talking to him
8 that Milo's complaint against Victor war accurate?
9 A Yes.
10 MR. BELL: Objection, hearsay.
11 THE COURT: Will that witness be
12 testifying?
13 MR. HABUSH: By deposition.
14 THE COURT: Overruled.
15 THE WITNESS: I spoke to Randy Meise
16 when I was back there in January directly. I spent
17 time with him actually in the hoist cab and talked
18 to him privately about the issue, and he confirmed
19 Milo's side of the story.
20 MR. HABUSH:
21 Q Milo still working for you?
22 A Yes, he is.
23 Q Is he working on a job right now?
24 A He's presently assigned to a Transi-lift job we're
25 doing in New Jersey for Sunco Oil. Actually, that's

1 at a walk -- what they would need for assembly,
2 pardon me, look at a walk path, a walkway to get
3 inside the stadium, so they could hire a geotech
4 person to quantify the ground where the crawler
5 would be walking.
6 Milo could basically say, here's the
7 area we're going to need to walk from where you put
8 it together to how you get in the stadium so they
9 could do their proper ground inspections and do
10 their geotech surveys.
11 Q Did you make it clear to Victor and Moto that
12 Lampson was not going to be doing the wind
13 calculations?
14 A We basically told them that the only help we would
15 give them would be the rigging -- rigging studies,
16 as far as the amounts and lengths of rigging. The
17 size of rigging, once they get their center of
18 gravity, and the size of their picks, that would be
19 the service that John Bozung would provide, and
20 that's all that we had offered.
21 We had offered, as well, to assign
22 John on a more permanent basis, Bozung, to the
23 project, and they felt that was not necessary. They
24 felt he could make a site visit as necessary and
25 communicate with Moto and Victor and Dennis on what

1 communication information he might need and get the
2 information forwarded to them.
3 Q At the time of your deposition that I took on
4 August 23rd, 2000 -- Do you remember when I took a
5 deposition of you?
6 A Yes, sir.
7 Q And on page 32, I asked you this question:
8 "Who did you make that clear to at
9 Mitsubishi that you would not be doing any wind sail
10 calculations on the load?
11 "Answer. Victor and Moto were both in
12 the meetings.
13 "Question. And did they indicate by
14 either vocal response or nodding of the head that
15 they understood that?
16 "Answer. They understood very clearly
17 that we were not doing anything but helping with
18 rigging and capacities of the machine.
19 "Question. Did they say okay, nod
20 their heads, did they indicate assent?
21 "Answer. Yes. There was always a lot
22 of head noddings in this case."
23 Do you remember those questions and
24 answers?
25 A Yes, sir.

1 Q Do you stick by those?
2 A Yes, sir.
3 Q And on page 31 of the same deposition, this question
4 and these answers were given to you:
5 "Question. Was there any discussion
6 between you and Victor as to how he might ensure
7 that wind would not be a problem on specific loads?
8 "Answer. He needed to take into
9 effect, once the pieces were decided, how big they
10 were going to pick, and where they were going to be
11 picked, take into account all the ramifications,
12 taking a pick of this size and how the wind would
13 affect it.
14 "Question. Did you say to him in
15 these meetings that that's going to require some
16 engineering considerations and calculations for you
17 to have to do in order to make sure it would be a
18 safe pick?
19 "Answer. I told Victor that whatever
20 forces it took, his engineering, Moto, whoever he
21 had on-site, all these factors had to be considered
22 before the lift was made in any kind of wind."
23 Do you remember that?
24 A Yes, sir.
25 Q Do you stand by that?

1 A Yes, sir.
2 Q Now, at some point the negotiations got down to hard
3 numbers and hard information, correct?
4 A Yes, sir.
5 Q And eventually what was decided on was what is known
6 in the trade as a bare lease?
7 A Bare lease, yes, sir.
8 Q And that's a lease in which the equipment is leased
9 in a contract to the user, correct?
10 A Yes, sir.
11 Q That can be with or without crew.
12 A Yes, sir.
13 Q In this instance it was decided in negotiations to
14 send along a crew.
15 A Yes, sir.
16 Q And that required a crane operator.
17 A Yes, sir.
18 Q A mechanic, who turned out also to be the rear
19 crawler operator.
20 A Yes, sir.
21 Q Mr. Aldrich. The crane operator at that time, the
22 first one who went over there, was what, Randy
23 Meise?
24 A Randy Meise, yes, sir.
25 Q And you guys picked Milo Bengtson to be the crane

1 that they didn't have anyone there that knew how to
2 do the math?
3 A I didn't know that.
4 Q Do you know that Mr. Baba, the chief engineer for
5 Mitsubishi, told us in depositions, I don't know how
6 to do that?
7 MR. BELL: Objection, Your Honor.
8 MR. HABUSH: What's the objection?
9 Excuse me.
10 THE COURT: Overruled.
11 BY MR. HABUSH:
12 Q Did you know that?
13 A No.
14 Q Do you know that Mitsubishi has told us that they
15 had no engineer on-site at Miller Park who was
16 capable of calculating the wind loads on that piece?
17 MR. BELL: Objection.
18 THE COURT: Just a second.
19 MR. BELL: That's not his testimony,
20 Your Honor. This is a mischaracterization of his
21 testimony. He testified he didn't know the effect
22 on Big Blue.
23 MR. HABUSH: He testified, Your Honor,
24 he didn't know how to do the calculations.
25 MR. BELL: As relates to Big Blue.

1 THE COURT: You're going to have the
2 people here that you took the depositions of?
3 MR. HABUSH: Yes.
4 THE COURT: Okay. Objection
5 overruled. Let's proceed.
6 BY MR. HABUSH:
7 Q Did they ever tell you in any of the negotiation
8 conferences, Mr. Gros, that they did not know how to
9 do wind load calculations on a load?
10 A No.
11 Q When you discussed the wind and the soil with them,
12 did they ever say to you, boy, would you do that for
13 us because we don't know how to do it?
14 A No.
15 Q If they had, what would you have said?
16 A I simply would have said the people that have
17 designed the building and designed this roof to the
18 wind loads obviously knew how to guide off, keep it
19 from blowing away on their wheels and their trucks
20 and all that stuff, so those same people should
21 certainly be able to do the wind calculations when
22 the piece is suspended.
23 Q If you knew ahead of time that Mitsubishi was
24 incapable of bringing in engineers from Japan from
25 their crane operation or anywhere else in the world

1 you would be loaned to Mitsubishi as their
2 employees?
3 A Yes.
4 Q And that you would be taking directions and orders
5 from Mitsubishi?
6 A Yes.
7 Q Did you come there with the intention that you would
8 comply with those instructions?
9 A Yes.
10 Q Had you lifted or been involved in Transi-lift lifts
11 prior to Miller Park that involved loads as big as
12 the loads being lifted at Miller Park?
13 A Yes.
14 Q Where?
15 A Australia, Texas. That would probably be it.
16 Q Were you familiar with what effect wind can have on
17 the crane and loads before you got to Miller Park?
18 A Yes.
19 Q And were you familiar with the fact that excessive
20 winds can affect the stability of even a crane as
21 big as Big Blue?
22 A Yes.
23 Q And that wind can affect the crane and the load
24 both?
25 A Yes.

1 A Yes.
2 Q That was sometime in March?
3 A Yes.
4 Q And do you remember what number of piece that was?
5 A I believe it was 4L2.
6 Q That would be on the left field side?
7 A Yes.
8 Q Do you remember what the winds were that day?
9 A 24 to 28.
10 Q And when you expressed your concern it was too
11 windy, what did Grotlisch say?
12 A He asked me if I was refusing to make the lift.
13 Q As a matter of fact, this was -- he took you out of
14 the prelift meeting, correct?
15 A Yes.
16 Q He and Frazer took you out in the hall?
17 A We were outside.
18 Q And what did he say to you?
19 A He asked me if I was refusing to make the lift.
20 Q Okay. And what did you say?
21 A I explained to him that I wouldn't refuse to make
22 the lift. I felt that I could get the piece in
23 place. Once it was there, he would not be able to
24 handle it in the windy conditions.
25 Q So you told him that although you might be able to

1 get it up, once you got it in place, you wouldn't be
2 able to get it set because it was too windy?
3 A Yes.
4 Q He insisted that you go forward, did he not?
5 A Yes.
6 Q You went forward, did you not?
7 A Yes.
8 Q And when you got the piece up, you couldn't set it,
9 could you?
10 A No.
11 Q Because of the wind?
12 A Yes.
13 Q And you had to take it down again?
14 A Yes.
15 Q So you were right and he was wrong?
16 A Yes.
17 Q Was there an occasion where you had a piece, a roof
18 piece that you were getting ready for a lift and you
19 were told to do things and you didn't have the men
20 to do it?
21 A Yes.
22 Q What was that situation?
23 A That would be the very first lift.
24 Q Go ahead. Tell us about it.
25 A We came to work that morning, it was real cold, I

1 can't really remember the temperature, the wind
2 chill, probably 40 below, but we were trying to find
3 the CG. All of the support crews had gone home and
4 I was standing out there under the hook. My men
5 were manning the crane and there was no one else on
6 the job site but myself, and Dennis Frazer was just
7 screaming that I pick this piece.
8 Q What did you say to him?
9 A I told him I didn't have any help, I couldn't pick
10 it. It was very difficult to set these things back
11 down on the towers and it was -- the first pick we
12 were ever attempting to make, no one really knew how
13 bad it would be and he didn't care. He just went
14 into one of his fits, started screaming to pick it.
15 Q Mr. Frazer was Mr. Grotlisch's assistant?
16 A Yes. Site superintendent.
17 Q Yes. So who were you missing that would have been
18 essential to make that lift?
19 A It would take ten people, you know, a couple of
20 forklifts to secure, to hold it once it was
21 floating. Then as it came down onto the towers, the
22 false work towers, there would be people stationed
23 at all of these towers to make sure that the shims
24 and everything were in place. It took a lot of eyes
25 to see all this. There was no possible way you

1 could do it by yourself.
2 Q What did you do?
3 A Dennis went and got Victor and Victor came out and
4 he told me that when Dennis said to pick one of
5 these I would pick it.
6 Q When Dennis says to pick it, you will pick it?
7 A You will pick it.
8 Q Did you tell Victor you didn't have any people to do
9 it?
10 A I sat there and tried to explain it to him and they
11 just insisted that I pick it up. At that point I
12 have no choice but to walk off.
13 Q And did you?
14 A Yes.
15 Q That must have made him very happy?
16 A No.
17 Q Was there an occasion where you had a roof pick that
18 was scheduled and you had some discussion about
19 whether it could be completed and you got it up in
20 the air and there it sat, do you remember that
21 instance, the one where it sat up in the air for 11
22 days?
23 A Yes.
24 Q Tell us about that.
25 A That was the very first lift. In the prelift

1 meeting, I was concerned that we would not be able
2 to get this piece tied down, secured. It was the
3 first one; no one really knew what they had to do.
4 So I went to Victor and asked him if he would
5 guarantee me three days, that he would keep the men
6 on site for three days and work steady to secure the
7 piece. He said it was only going to take eight
8 hours. I said, "Well, if we get it done in eight
9 hours, that's fine, but we should plan on three
10 days." It was real cold, it was dangerous, hard to
11 work in the air, but if he guaranteed me that the
12 people would stay that I would make the lift, and he
13 guaranteed me they would stay to get the piece
14 secured.
15 Q And what happened?
16 A It went up about, it was approximately noon, got it
17 into position, it took about an hour, 1 o'clock.
18 I'm not sure what time Victor left, maybe within a
19 half hour, he got on a plane and went to Denver to a
20 football game. Dennis Frazer was left in charge.
21 They stayed approximately two more hours. It was
22 not secured at all. We had one guy line on one end
23 that required shores. There were no bolts in the
24 truss columns. I wanted the skid plate to be
25 welded, secure before we left it in case the wind

1 would come up. They would put on a couple little
2 tacks that amounted to nothing, and everyone left
3 the site and didn't come back for three days.
4 Q Now, as I understand it, he ordered you to do this
5 lift and then he took off and went to Denver to
6 watch a football game?
7 A Yes.
8 Q And how long did that piece hang in the air?
9 A By the time it was secured good enough to where we
10 could cut the crane loose, I believe it was 11 days.
11 Q Eleven days. Did that present any potential danger
12 to the workers at that worksite?
13 A Yes. If -- once the guy lines were on, it was
14 welded and secure, it could possibly stay there.
15 The way it was left for the first three days, if we
16 would have had any kind of a windstorm, we would
17 have probably lost everything, the shoring towers,
18 truss columns, who knows what all.
19 Q When Mr. Grotlisch got back from his football game,
20 did you talk to him about this?
21 A Yes.
22 Q What did he say?
23 A He said nothing happened, I guess I was right.
24 Q This was the first lift did you say?
25 A Yes.

1 Q That one had been postponed a number of times due to
2 weather, was it not, the first one?
3 A Postponed due to weather?
4 Q And other things?
5 A It was -- it wasn't ready to go. It was never
6 postponed due to weather.
7 Q Okay. Mr. Bengtson, were there other run-ins you
8 had with Mr. Grotlisch over matters of safety?
9 A Yes.
10 Q What were they?
11 A Well, we had one one night, I can't remember the
12 piece, he wanted the crane attached so that it would
13 look good for the media, stadium board, whoever.
14 There was no possible way we could set the lift.
15 They were taking iron off of it as we were hooking
16 the rigging on. It was going to take us all night
17 to get this hooked up, and it did take all night,
18 until 3 o'clock in the morning. It was snowing,
19 cold, no lights, and no reason to do it. Dangerous
20 to work, you know. And I had quite a confrontation
21 with him, why we had to stay all night, we could
22 just as well come back in the morning and hook the
23 crane up, and he wanted it to look ready, he wanted
24 to tell everyone that the weather would be a delay
25 and he'd have something to blame, you know, besides

1 the fact that he was not ready to set the piece, so
2 we worked all night for no reason. The piece wasn't
3 set for three to four days.
4 Q Based upon your experience of many years, did
5 Mr. Grotlisch seem to you like he knew anything
6 about proper lift safety operations?
7 A Pardon me? I couldn't hear you.
8 Q Based on your experience, did it appear to you that
9 Mr. Grotlisch didn't have much of an idea of how to
10 conduct safe operations with a lift of this size?
11 A No. I -- he had no common sense whatsoever.
12 Q Did your tension with him and your debates with him
13 continue to increase in intensity and frequency?
14 A Yes. I don't know about intensity. They were
15 pretty intense right from the start.
16 Q Now you're aware that he requested that you be
17 removed from the site?
18 A Yes.
19 Q And your boss went along with him?
20 A Yes.
21 Q You must have felt pretty lousy about that?
22 A Yes.
23 Q But you're still working for the company?
24 A Yes.
25 Q Have you ever, ever, in your entire career, been

1 A Yes.
2 Q And did you get there right on time or were you --
3 A No, I was about ten mines late. I went to a wrong
4 trailer. We didn't know exactly which one it was,
5 Larry Baumgartner and I.
6 Q Now, when you were at the prelift meeting, who was
7 running the meeting?
8 A Now when I walked in, it was already -- it was
9 packed, and I -- Victor was just saying that,
10 discussing the pick and that there's a weather
11 system or a weather system here this morning, it had
12 been drizzling, you know, and that it's being
13 monitored, the weather, and they're going to --
14 supposed to be moving out mid morning.
15 Q Who said they were going to monitor the weather?
16 A Victor.
17 Q In this meeting were you assigned to monitor the
18 weather at all?
19 A No.
20 Q As far as you recall, did any -- was anybody other
21 than Victor indicated to be the person who was going
22 to monitor the weather?
23 A Not to my knowledge.
24 Q At the meeting did you hear it said that anybody can
25 stop the pick or words to that effect?

1 A Yes.
2 Q And do you recall who said that?
3 A Wayne Noel said that..
4 Q And what did you understand that to mean?
5 A Well, that was always said at every prelift meeting,
6 and just from the past meetings it -- my
7 interpretation was, like, if somebody sees something
8 that's not right with the rigging or something's not
9 right and you need to change something to make it
10 right or rectify it, you can stop the pick, we'll
11 correct whatever's wrong and rectify it and proceed.
12 Q Did you understand from that statement which you had
13 heard before at other meetings that, for example,
14 you would be able to call off the pick for the day?
15 A No.
16 Q What was your understanding as to who had the power
17 to be able to cancel the pick so everybody would go
18 home for the day?
19 A I would say Mitsubishi supervision.
20 Q At the prelift meeting did you hear about, anything
21 said about how much this roof piece that was going
22 to be moved, what that represented in terms of the
23 percent capacity of the crane?
24 A Yes. I heard that it was going to be at 98 or 99
25 percent capacity at that radius.

1 too.
2 Q Mr. Edwards, on this enlargement of the picture we
3 have up there, I've got a little sticker that says
4 Edwards.
5 A Yeah.
6 Q Can you put that sticker on here so that later in
7 this trial we'll know where you said your crane was?
8 A Yeah. About this right there -- (witness
9 indicates).
10 Q Okay. So you have put the sticker that says Edwards
11 a little bit below and a little bit over your crane?
12 A Yeah.
13 Q And that's on Exhibit 1831H. Now, Mr. Edwards, at
14 the time you and your crew in the morning decided to
15 knock it off because it was too windy to control
16 these pieces, what's your estimate of the wind
17 speeds you were dealing with?
18 MR. OWENS: Objection, Judge.
19 Foundation.
20 THE COURT: You can ask him --
21 everyone can testify to sensory impressions. It's
22 allowed by the instructions.
23 MR. YOUNG:
24 Q And you were out there, you observed it, you felt
25 it, you saw the flags. What's your estimate of the

1 speed?
2 A Twenty to twenty-five minimum.
3 Q After you knocked off with that work in the morning,
4 at about I think you said 10:00, what did you do
5 next?
6 A That's when we started the project with Jeff
7 Kazinski and the cable, trying to prep for the
8 cable, post tension cables.
9 Q Okay.
10 A I can't remember if we started right before lunch or
11 right after lunch, but it was right in that time
12 area.
13 Q And tell -- explain what you were doing.
14 A Well, they have to hang knuckles and saddles and
15 they have to put saddles, like, if I remember right,
16 seven, seven spots so those cables can rest in these
17 saddles, because you just couldn't have a 500 foot
18 cable, 25 ton, drop to the floor. So it goes
19 through saddles of, like, an -- it was four holes
20 through it where each cable, you know, four cables
21 go through and make one, you know, they tighten it
22 up and it makes a truss. And we were just putting
23 the platforms up and trying to get everything up and
24 ready so we, you know, once we got that, what I call
25 Block 3, in we could start running the cables.

1 A Yeah.
2 Q Is this it here?
3 A Yeah.
4 Q And is this 1779B a close-up of the man-basket?
5 A Yes.
6 MR. YOUNG: Okay. I have no further
7 questions, Mr. Edwards. Thanks.
8 THE COURT: Cross.
9 CROSS-EXAMINATION
10 BY MR. OWEN:
11 Q Good afternoon, Mr. Edwards. I have just a few
12 questions for you, sir. Mr. Young asked you about
13 the line down rate as expressed in the manual for
14 the project. What would be the fastest line down
15 rate you could accomplish, regardless of what the
16 manual says?
17 A From 220 feet, I'd say, if you just wanted to cut
18 them loose, probably four and a half seconds, five
19 seconds.
20 Q So in an emergency situation, that could be
21 accomplished.
22 A (Witness nods head.)
23 Q I'm sorry. You have to answer out loud.
24 A Yes.
25 Q Thank you. Now, you described for Mr. Young how

1 the percent capacity this roof piece was going to
2 place on the crane?
3 A I heard it was going to be at 93 percent of the
4 crane's capacity.
5 Q Did you hear anybody at the meeting say that anyone
6 can stop the lift?
7 A Yes, I did.
8 Q Do you recall who said that?
9 A I believe it was Wayne Noel.
10 Q Had you heard that before at prelift meetings?
11 A Yes, I had.
12 Q What did you understand that to mean?
13 A If somebody had -- If you're up in the air or on
14 the ground and you see something that's not right,
15 something's in the way, maybe something had worked
16 loose, that you could stop it momentarily to take
17 care of the problem.
18 Q And then after the problem was taken care of?
19 A Continue on with the lift.
20 Q Did you understand that to -- at any time to mean
21 that you, Jeff Kazinski, a connector on the job,
22 could call off the lift for the day completely?
23 A No. No, I never took that.
24 Q As far as you understood, who had the ability to
25 call off the lift completely?

1 A Victor or Wayne.
2 Q After the meeting, did you get direction from your
3 supervisors about what to do?
4 A Yes, I did.
5 Q And who was that?
6 A Dan Garnhardt.
7 Q He was a supervisor for Danny's?
8 A For Danny's, yes.
9 Q And what did he tell you to do?
10 A Go about our normal job for the morning.
11 Q And what would -- what was your normal job for the
12 morning?
13 A I was a foreman of the cable crew installing the
14 suspension cables in there, inside the bowl of the
15 stadium.
16 Q Okay. Now, we have Exhibit 1831H, which Mr. Edwards
17 used to tell us where he was, where his crane was.
18 And does this photograph shows where you went to
19 after the prelift meeting?
20 A Yes, it does.
21 Q Okay. Maybe you could just use your finger and
22 point where that would have been.
23 THE COURT: Here, use my pen.
24 THE WITNESS: Where we were working?
25

1 Q Okay. Who was up in the basket?
2 A Cal and Al.
3 Q All right. And at that time did you observe the
4 basket going around?
5 A Yes, I did.
6 Q Can you describe that for the jury, please?
7 A It was bouncing around. The saddles that hang off
8 the bottom part of the truss, that was already in
9 the air, and there's a work platform underneath that
10 saddle, and my guys were running a man-basket up to
11 that platform to do the work they needed to do, and
12 they were drifting back and forth anywhere from 4 to
13 8 feet, they were bouncing back and forth along the
14 side of that platform.
15 Q What was causing them to bounce back and forth that
16 far?
17 A The wind.
18 Q And at that time of day, how did the winds compare
19 to earlier?
20 A They were picking up.
21 Q And what direction were the winds coming from?
22 A South/southwest.
23 Q And ultimately did you stop that operation?
24 A Yes, I did.
25 Q And why did you stop it?

1 corner there. We -- we actually put that crane --
2 we put that flag on the corner of the building
3 there. That faces the VA Center and the -- the
4 Veterans, they can see it from the hospital there,
5 so they brought the flag down and they asked if we
6 would put that on the top of the building for them
7 so they could see the flag from the hospital, so
8 we're actually the ones that put it up there.
9 Q And were you able to observe that flag on July 14,
10 1999 around this time of -- around the time of 1:30,
11 2 o'clock, is that about when you were to go home,
12 you thought you were going to go home?
13 A Yes.
14 Q Around that time, were you able to see that flag?
15 A Yes.
16 Q Do you remember how large that flag was?
17 A Maybe 3 x 5.
18 Q And you -- with regard to this information about the
19 wind speed indicator, did you also over the months,
20 were you able to compare that to how man-baskets
21 moved in the wind?
22 A Yes.
23 Q And around 2 o'clock when, as you said, that you
24 were thinking of going home for the day, do you have
25 an estimate of what the wind speeds were?

1 A I'd estimate 25 to 30.
2 Q Exhibit 563-A --
3 MR. YOUNG: I'm not sure this is in
4 evidence. Is this Tocci? We do believe this is all
5 in, and it's TRI9047.
6 Q And, Mr. Kazinski, do you see this picture?
7 A Yeah.
8 Q Do you recognize the place?
9 A Yes, I do.
10 Q Okay. So you're oriented. Does this show the
11 American flag that you had put up on the building?
12 A Yes, it does.
13 Q Okay. Can you point it out with the pointer?
14 A (Witness complies.)
15 Q Okay. And then can you see the screen up there?
16 A Yes.
17 Q Okay. And is that the flag?
18 A Yes, it is.
19 Q Right in the center?
20 A Yes.
21 Q And how does the way it looks there compare to the
22 way it was looking to you around 2 o'clock?
23 THE COURT: Do you want to look at this,
24 sir?
25 MR. YOUNG: You can also look there.

1 think my job would be on the line, whether it be
2 fired or being removed from being a foreman.
3 Q What do you mean your job would be on the line?
4 A Well, we're telling you to do this and you're saying
5 you're not going to do it, that's insubordination.
6 Q Did you feel that you had the authority to call off
7 the whole lift and tell everybody on site that we're
8 not going to have a pick today?
9 A No.
10 Q As far as you knew, who had authority for that?
11 A Victor Grotlisch or Wayne Noel.
12 Q Did you know Mr. DeGrave and Mr. Wischer and
13 Mr. Starr?
14 A Yes, I did.
15 Q And how long did you know Mr. Wischer?
16 A I knew Jeff as long as I've been in the trade.
17 Q What kind of a worker was he?
18 A Real good worker. I -- his brother is in the trade;
19 I knew his dad was in the trade. I knew the whole
20 family. And he was -- I worked with Jeff on a
21 day-to-day basis, we needed the same equipment, we
22 needed the same cranes. He was a real, real good
23 guy. A real good guy. Real good -- on the site, we
24 were real good friends. We had a lot of -- you
25 know, both our names were Jeff, we did a lot of

1 to be a real -- a real headache for us to get that
2 in there, so my whole crew was going to be involved
3 with that, too.
4 Q What was the first thing that you and your crew did
5 then for this roof pick?
6 A Two of the guys went around the outside of the
7 building, they were going to take -- Rick said there
8 was another crane out there, they were going to take
9 the elevator up or something to get them out on the
10 back side, and then I was going to take myself, Cal,
11 Rick, and Mike were going to be up in that corner
12 there, so I took -- you're only allowed three men in
13 a man-basket at a time, so I took Rick and Cal up to
14 the ring beam.
15 Q That's Cal Lanser and Rick Devine?
16 A Correct.
17 Q Okay. And when you went up in the man-basket with
18 them, did you have any radio contact? Who were you
19 connected with by radio?
20 A I had one -- one radio for the crane I was in, one
21 radio tied me directly to Ray, and the other radio I
22 had, was for the lift itself, was going to be on
23 Channel 2, that was going to be just specifically
24 for the lift.
25 Q When you say the lift itself, who's on that channel?

1 of a rocking motion, like that.
2 Q You had seen other lifts before, correct?
3 A Correct.
4 Q And was it moving like you had seen in other lifts?
5 A I haven't seen another lift move like that.
6 Q In your judgment, based on your observations that
7 day, was the movement that you saw due to the crane
8 moving?
9 A No. No, it wasn't.
10 Q And based on your observations that day, what did
11 you believe the movement was due to?
12 A The wind.
13 Q At this time how did the wind feel compared to
14 earlier in the day?
15 A Stronger.
16 Q And were you able to see the American flag?
17 A Yes.
18 Q And did it look extended, like we saw in that
19 earlier picture?
20 A Yeah. Yeah. It was straight out.
21 Q Were you able to observe the Miller Park flag
22 from -- as you got up in your basket?
23 A Yes.
24 Q And how did it look to you?
25 A Fairly well straight out.

1 we were -- we were swinging quite a bit. I mean, we
2 were -- I don't want to say out of control, but
3 there's just no way to stop yourself. You're out
4 there like a weight just swinging in the breeze, and
5 I don't want to damage any equipment or hurt
6 anybody, so I just made sure we were high enough to
7 clear everything.
8 Q When you got -- when you were boomed up above the
9 ring beam and above the structure, how did the wind
10 feel up there?
11 A It was -- it was nasty. It was bad. Just -- just
12 -- when the wind is that bad, it hits your hard hat
13 and rings in your ear. It's very uncomfortable.
14 Very nasty wind.
15 Q What would you estimate the wind speed was up there?
16 A Thirty, 35. It wasn't -- it wasn't really even --
17 it wasn't -- I can't even say it was gusting. It
18 was a steady, just a steady, just a driving wind.
19 Q Now when you got up there and you were coming in to
20 land, did somebody help you?
21 A Yes.
22 Q And who was that?
23 A Some of the engineers from Mitsubishi were up there,
24 I assume they were up there monitoring the lift, and
25 there was maybe six of them up there, and I just --

1 A Yes.
2 Q Okay. And you were going to go back down again?
3 A That's correct.
4 Q And what was that for?
5 A Go back down and pick up Mike Woods and some tools.
6 Q And did you give instructions to your crane
7 operator?
8 A Yes, I did.
9 Q And what did you tell him?
10 A I just -- I told him to get me up fast. Once he had
11 tension on the basket, I told him to get me up fast.
12 The quicker you go up, the less possibility of
13 slamming into something.
14 Q Okay. And did you -- did you -- before the -- you
15 learned that there was this event going to occur,
16 this is around the time when it started for you,
17 right?
18 A Correct.
19 Q Before that happened, did he actually get you lifted
20 up off the ring beam?
21 A Yes, he did.
22 Q And what was the first thing you heard that alerted
23 you to something wasn't right?
24 A A real loud bang.
25 Q Were you able to see the piece before the bang?

1 A No, I didn't. I just seen the piece moving.
2 Q And you had indicated that if the boom was moving,
3 that could be a problem.
4 A Right.
5 Q But that wasn't the case that we had on July 14th,
6 to your observations, true?
7 A True.
8 Q In the July 14th prelift meeting, there was a
9 discussion regarding who was going to monitor the
10 weather. Do you recall that testimony?
11 A Yes.
12 Q And that discussion was handled by Victor Grotlisch
13 and Wayne Noel?
14 A Yes.
15 Q Mr. Grotlisch told everybody in that room that he
16 was going to monitor the weather.
17 A Yes.
18 Q Were you aware at that time that Mr. Grotlisch had
19 available to him the Doppler radar system?
20 A Yes.
21 Q That was something that was common knowledge in the
22 room, to your knowledge?
23 A I don't know if it was common knowledge. It was
24 just one of the superintendents I work for told me
25 that they were -- I believe they were on the

1 IN THE CIRCUIT COURT OF MILWAUKEE COUNTY

2 STATE OF WISCONSIN

3

4 PATRICIA WISCHER, individually,
and as Special Administrator of the
5 ESTATE OF JEFFREY A. WISCHER, deceased;
MARJORIE DeGRAVE, individually,
6 and as Special Administrator of the.
ESTATE OF WILLIAM R. DeGRAVE, deceased;
7 and RAMONA DULDE-STARR, individually,
and as Special Administrator of the
8 ESTATE OF JEROME STARR, deceased,

9 Plaintiffs,

10
-vs- Case No. 99-CV-006553
11

12 MITSUBISHI HEAVY INDUSTRIES
AMERICA, INC., TRAVELERS
13 PROPERTY CASUALTY INSURANCE
COMPANY, THE TRAVELERS INDEMNITY
14 COMPANY OF ILLINOIS, NEIL F. LAMPSON,
INC., HCH MILLER PARK JOINT VENTURE,
15 HUNZINGER CONSTRUCTION COMPANY,
CLARK CONSTRUCTION BUILDERS, INC.,
16 and HUBER, HUNT & NICHOLS, INC.,

17 Defendants.

18

19 October 20, 2000

20 Volume V

21 TRANSCRIPT OF JURY TRIAL

22 Before:
HONORABLE DOMINIC S. AMATO
23 Circuit Court Judge Presiding

24 Court Reporters: Debra A. Wisniewski, CRR/RMR
Julie A. Poenitsch, CRR/RMR
25 Constance L. Bauer, CRR/RMR

1 the winds were, steady winds, and what the gusty
2 winds were; isn't that true?
3 A Yes, sir.
4 Q Now on the Miller Park site, you got weather and
5 wind information from a number of sources, didn't
6 you?
7 A Yes.
8 Q One of the sources was calling up Weather 6-1212,
9 calling up the weather on the phone, right?
10 A Yes.
11 Q Another source would be talking to Mr. Grotlisch or
12 anyone who was at the Doppler computer in your
13 trailer which would give you weather information. Is
14 that another source?
15 A Yes.
16 Q Another source would be the wind speed indicator
17 that was located on the crane?
18 A Mr. Watts, yes.
19 Q And were there any handheld anemometers on the
20 worksite at Miller Park on July 14th?
21 A I did not have one, sir.
22 Q I don't think that was my question. My question
23 was, were there any handheld anemometers on the
24 worksite on July 14th?
25 A Not to my knowledge.

1 Q So you would not have advised Mr. Grotlisch of your
2 concern over the winds at any time?
3 A I would need a clearer statement because I was
4 talking about one thing and you added something
5 else. Could you please repeat that?
6 Q Would you have talked to Mr. Grotlisch before you
7 made a decision whether or not you thought the lift
8 could be cancelled? That's the question. Simple.
9 A No, it's not simple, sir.
10 THE COURT: Just a second. Just a
11 second, sir.
12 THE WITNESS: Could you clarify it?
13 THE COURT: Sir, you're entitled to give
14 a responsive answer to the question. You're not
15 limited by yes or no. That means you can give a
16 responsive answer, but you can't start giving
17 explanations. Your lawyers for Mitsubishi will
18 present the case and they'll have a chance to
19 clarify, and if they choose, they can have anybody
20 testify. Just give a responsive answer. No
21 explanations, please. All right.
22 MR. HABUSH: Let me withdraw the question
23 and ask the question again.
24 Q Mr. Grotlisch was site superintendent, was he not?
25 A Yes, sir, he was.

1 Q Mr. Grotlisch --
2 A Still is.
3 Q Still is?
4 A Yes, sir.
5 Q And does Mr. Grotlisch make the decisions on when
6 the lifts were going to go?
7 A Yes.
8 Q Did Mr. Grotlisch make the decision on what piece
9 was going to go in what order?
10 A Yes. It's got to go in a certain order, yes, sir.
11 Q Did Mr. Grotlisch have the responsibility to check
12 the weather reports in the Doppler system?
13 A Yes. He would check the reports on the Doppler
14 system, sir.
15 Q And did Mr. Grotlisch at prelift meetings advise the
16 people in attendance on July 14th that he was going
17 to be monitoring the weather?
18 A Yes, he did say that.
19 Q Did Mr. Grotlisch have authority to shut down the
20 lift if he felt it was unsafe to go?
21 A Yes, he was one of the ones that could have, yes,
22 sir.
23 Q And were you also one of them?
24 A Yes, sir.
25 Q Could you do that without consulting with Victor

1 THE WITNESS: Yes, I would.
2 MR. HABUSH:
3 Q Because if manufacturer's limitations and
4 specifications are exceeded, there could be a
5 serious accident that can occur; is that true?
6 A It's a possibility, yes.
7 Q And it's part of your overall responsibility to
8 prevent that from happening?
9 A I'm one of the people, yes, sir.
10 Q So you don't want anyone, including Mitsubishi
11 people, from misusing heavy equipment on your job
12 site, am I correct?
13 A Yes. I would agree with you there, sir.
14 Q Now out of your subcontractor's accident prevention
15 manual, I refer to Exhibit 1796 --
16 MR. HABUSH: We offer that into evidence.
17 MR. BELL: No objection.
18 MR. CARLSON: No objection.
19 THE COURT: Received.
20 MR. HABUSH:
21 Q And could you take a look at this and tell me if
22 that's an enlarged copy from your accident
23 prevention manual?
24 MR. BELL: Mr. Habush, can we have the
25 page in the manual that this document is from so

1 that we can look at the manual and read along with
2 you?
3 MR. HABUSH: Excuse me. It's one of your
4 documents, Mr. Bell. 7771-7775.
5 Q I think the question was, do you recognize this as
6 being an enlarged copy?
7 A Yes, I recognize it.
8 Q And the title is "Subcontractor Accident Prevention
9 Manual," paragraph 8.23, "Cranes and Hoisting,"
10 under MHIA Guide to Loss Control, and on that page
11 there's a paragraph which is entitled "Load Chart,"
12 and going down to paragraph 3, it says, "Remember if
13 you are at the maximum or close to it, a gust of
14 wind can cause the load to go outside the radius and
15 cause a tipover or structural failure." Did I read
16 that correctly?
17 A I wasn't reading it, but it sounds good.
18 Q Go ahead.
19 A Yes, sir.
20 Q Had you read that provision before July 14th?
21 A Yes, sir.
22 Q Can we assume you understood it?
23 A I don't assume anything or try not to. I believe
24 that's correct, sir.
25 Q No, I'm asking you whether we all could assume you

1 believe that that was probably what he used.
2 Q Mr. Noel, did I ask you whether you made this?
3 A I didn't make it, no.
4 Q But I didn't ask you if you did, did I?
5 A No, but in the question that I heard -- I don't know
6 if this is what Allen used, okay, or Lampson used.
7 Q So are you telling us that this exhibit, the load
8 chart, I've just handed you the small version, which
9 is Exhibit 1773, are you telling us today that you
10 don't know that this was the load chart that was
11 used on July 14th in connection with the lift of
12 4R3?
13 A I can tell you, jury, that the 20-mile-an-hour wind
14 speed is what we use there.
15 Q Did I ask you that question?
16 THE COURT: Hold on, please. Answer the
17 question.
18 MR. HABUSH: Read the question back.
19 THE COURT: Don't give an explanation.
20 Just answer the question responsively, sir.
21 MR. HABUSH: Read the question to the
22 witness, please.
23 (Pending question read by reporter.)
24 THE WITNESS: I would say that this is
25 the load chart that we -- that Lampson used. It's a

1 copy that I've seen before.
2 MR. HABUSH:
3 Q Thank you. Now on that load chart, if you look at
4 the bottom of the chart, it has various capacities,
5 does it not, at different radiuses or angles that
6 the boom is with the ground, talks about the
7 counterweight, and basically gives you information
8 of what is the capacity that you could lift with
9 that crane at various configurations or angles,
10 isn't that an accurate summary?
11 A Yes.
12 Q Okay. And then the title on top --
13 MR. HABUSH: Can you block that, please?
14 (Mr. Jarvis complies.)
15 MR. HABUSH:
16 Q -- that refers to the LTL-1500 Series, which is the
17 reference to the Transi-lift crane that was used on
18 July 14th; isn't that true?
19 A I believe it is, yes.
20 Q And on there it lists certain conditions -- strike
21 that, certain figures which describe how long the
22 jib is and how long the jib strut is and how long
23 the boom is, et cetera, am I correct?
24 A Yes, sir, that's what's here.
25 Q And then on there, it has at the bottom line, in

1 that opening paragraph we'll call it, it says,
2 "20-mile-per-hour wind." Do you see that?
3 A Yes, sir.
4 Q Did you understand that the 20-mile-an-hour wind was
5 put on there by Lampson?
6 A Yes, sir.
7 Q Mitsubishi didn't put that on, correct?
8 A No, sir.
9 Q And when you read this, did you understand that the
10 20-mile-per-hour wind was a manufacturer's statement
11 to the user that for this particular crane with this
12 particular configuration, this particular length of
13 the boom and jib strut, that they did not want this
14 crane to be operated in winds that were in excess of
15 20 miles per hour, did you understand that?
16 A Twenty miles an hour, yes, sir.
17 Q Now right under there is a series of applicable
18 conditions, correct?
19 A Yes, sir, that's what it says.
20 Q Now can I assume that when you read that and it said
21 applicable conditions, you knew what that meant?
22 A I believe I did, yes.
23 Q That means that they're listing a series of
24 conditions that happened to be applicable to this
25 particular crane with this particular length of boom

1 being lifted that day; isn't that true?
2 A No, sir. The 20 miles an hour is what we use. This
3 is what we use here is the 20 miles an hour. That's
4 what we were told. That is what was said in the
5 prelift meeting, sir.
6 Q Yes. Mr. Noel, I'm referring to Paragraph 10. Will
7 you stick with me on Paragraph 10? Did you
8 understand Paragraph 10 when you read it?
9 A Yes.
10 Q And its plain language, does it not, says that the
11 chart capacities do not consider the effect of wind
12 on the suspended load. Now, do you have any trouble
13 understanding that?
14 A Mr. Habush, I understand it.
15 MR. BELL: Let me interject. He's
16 arguing with the witness now.
17 THE COURT: Now we're starting
18 argument. Another question.
19 BY MR. HABUSH:
20 Q Now, when the manufacturer puts on these specs, the
21 manufacturer who sends the crane to the user doesn't
22 know, do they, what size load is going to be lifted
23 on any particular day.
24 A Are you referring to total weight, sir?
25 Q Yes.

1 using to locate people. It's an aerial view after
2 the accident, so try to take a look at it like
3 you're looking down onto the stadium.
4 A Um-hum.
5 Q And could you locate yourself for me, where you
6 were.
7 A I can locate where I was all day -- At a particular
8 time you're looking for?
9 Q You know, the general area.
10 A During most of the time, there's a stairway right
11 here. I would be from this area here, what we call
12 the pivot, from this point here to this point,
13 somewhere right about in here.
14 MR. HABUSH: Okay. Do we have a black
15 marker we can have Mr. Noel mark?
16 MR. BELL: Mr. Habush, what's the
17 exhibit number of that photograph?
18 MR. HABUSH: 1831-H. Thank you.
19 Q Okay. Why don't you do this for me. Why don't you
20 first tell me by using this marker, and we'll put
21 your name on it and a line to it, where you were
22 standing, say, within the last half hour before the
23 crane went down.
24 A Can I -- can I make a horizontal line, or do you
25 want just a dot, sir? I don't want to do it wrong.

1 Q I promise I won't punish you.
2 A Okay.
3 Q Just mark an X, okay, an X where you were within a
4 half an hour before the accident.
5 A (Witness complies.)
6 Q All right. Let the record show you've marked on
7 this Exhibit 1831 an X where you were within a half
8 an hour.
9 Now, why don't you just take that same
10 marker, Mr. Noel, and just with a bracket, show us
11 the area with small, little X's where you were
12 moving during the course of from 11:30 until a half
13 an hour before.
14 MR. BELL: Mr. Habush, could we have
15 him demonstrate on the --
16 MR. HABUSH: I'm having him mark,
17 Mr. Bell, and then if you want him to repeat it --
18 MR. BELL: Just so the jury can see
19 what he's doing.
20 MR. HABUSH: The jury will see it in
21 due course.
22 THE COURT: You can lean it up --
23 Here, here, this might be easier. You might want to
24 put it on --
25 MR. HABUSH: Lay it on this table

1 A No.
2 Q This was an attempt to put some balance into it in
3 the configuration that they wanted, rather than
4 taking it back down and doing another rerigging
5 operation; were you aware of that?
6 A When I saw the piece in the air, I assumed -- or,
7 excuse me -- I believe there was a problem, and they
8 needed to put something on to make it at a
9 particular angle, yes.
10 Q In your entire construction life, have you ever seen
11 anyone attempt to rerig a piece being lifted by
12 putting a deadman hanging on it?
13 A Yes, I've seen it done before.
14 Q And you consider that a safe practice? Yes --
15 A I consider --
16 Q Yes or no.
17 A I consider it a safe practice if it's done properly,
18 yes, sir.
19 Q Now, during the course of the time you were up on
20 that terrace level, you reported to Victor Grotlisch
21 about your observations, did you not?
22 A What observations, sir?
23 Q Observations about the weather.
24 A I called him, I believe, twice in the afternoon.
25 Could you be a little more specific, sir?

1 Q Sure. Turn to page 157 of your 1999 deposition.
2 A Page 57?
3 Q 157, line 24. Are you there?
4 A "Did you relate your observations." Yes, sir, I'm
5 there.
6 Q It says there, does it not, "Did you relate your
7 observations about the wind to Victor?" Go over to
8 page 158. Answer: "Yes, sir."
9 A Yes, sir.
10 Q Does that refresh your recollection?
11 A Yes, sir.
12 Q And if you just stay right there on page 158, you
13 also conveyed your observations to Allen Watts, did
14 you not? See line 6?
15 A Yes, sir. I did earlier in the day, yes, sir.
16 Q Let's talk about the period of time after four
17 o'clock, about an hour and 15 minutes before the
18 crane tipped over, okay? I want you to just focus
19 in on that period of time, all right?
20 A Okay.
21 Q There were wind reports, were there not, after four
22 o'clock to Victor by telephone?
23 A There were wind reports -- questions as far as what
24 the winds were to Victor on the Doppler, what the
25 weather was with my walkie-talkie portion of my

1 Nexel phone, yes.
2 Q Now, you apparently called something called GADO for
3 weather reports?
4 A I -- I asked for information from GADO or the DTN
5 about weather reports, yes.
6 Q Do you know what GADO stands for?
7 A GADO is General Aviation District Offices.
8 Q Look at page 163 of the October 21st deposition,
9 please.
10 A Page 163?
11 Q 163, yes, sir.
12 A Yes, sir.
13 Q Now, after four o'clock, Victor gave you reports on
14 the wind situation, did he not? Look at line 20.
15 Is that correct?
16 A Victor gave me weather information, yes, sir.
17 Q And that was by telephone, was it not?
18 A It was via my walkie-talkie portion of my Nexel
19 telephone, yes, sir.
20 MR. HABUSH: Show us line 22, please.
21 THE WITNESS: It's a telephone/
22 walkie-talkie all in one, sir. I'm sorry, that's
23 what it is.
24 BY MR. HABUSH:
25 Q And you called him to check and see what the winds

1 were?
2 A I called him to check and see what the weather was,
3 yes, sir.
4 Q And the reason you called him is because you wanted
5 to see if everything was still good to go; is that
6 correct?
7 A Yes, sir.
8 Q By that, whether the lift was going to proceed,
9 correct?
10 A No, sir. The lift was already proceeding at four
11 o'clock.
12 Q If the lift was going to continue to completion;
13 isn't that correct?
14 A No, sir, that's not correct. I wanted to know what
15 the weather was.
16 MR. HABUSH: Let's go back up to
17 question, line 22, Mr. Jarvis. Enlarge that last
18 section, please.
19 Q Line 22 says, "And this was by telephone?
20 "Answer. Yes. I called him to check
21 and see what the winds, if the winds and everything
22 were still good to go."
23 Did I read that correctly?
24 A Yes, sir, that's correct.
25 Q And the expression "everything was still good to go"

1 was whether or not the winds would have required the
2 lift to be aborted; isn't that a fact?
3 A It could be interpreted that way, yes, sir.
4 Q Yes, it could. Next question was, "Where was
5 Victor?"
6 MR. HABUSH: And if you show that,
7 Mr. Jarvis, please.
8 Q It's on page 164, line 1. "He said he was going
9 back down by the trailer. I didn't ask him exactly
10 where he was at that time. I got him on my comlink.
11 I did that a couple of times later on in the pick in
12 regards to the winds.
13 "Question. I'm talking about between
14 four and five o'clock, how many times did you talk
15 to Victor about the wind?
16 "Answer. Twice.
17 "Question. Twice. Were you concerned
18 about it?
19 "Answer. I wanted to know what it
20 was.
21 "Question. Were you concerned about
22 it?
23 "Answer. If I called Victor, I was
24 concerned.
25 "Question. Why were you so concerned?

1 The wind was dropping?
2 "Answer. It was.
3 "Question. Why were you concerned?
4 "Answer. Because I'd get a momentary
5 gust occasionally. That's what I was concerned
6 about."
7 Did I read that correctly?
8 A Yes, sir.
9 Q Now, do you know that Mr. Grotlisch denies talking
10 to you after four o'clock in his sworn deposition,
11 do you know that?
12 A No, sir, but I talked to him, I guarantee you.
13 Q Aren't you aware from discussions with him and the
14 lawyers that Victor Grotlisch denied ever talking to
15 you after four o'clock?
16 A No, sir.
17 Q This is the first you've heard of it, right now?
18 A Right now from you, sir.
19 Q How much time did you spend preparing for your
20 testimony?
21 A Today?
22 Q With the lawyers. No, before today.
23 A I met with them last night, sir.
24 Q For how long?
25 A From five o'clock until about 7:30, 8:00, 8:30. I'm

1 from this July 14th incident that you did not know
2 before?
3 "Answer. More anemometers, possibly,
4 other than having just one or two. Having more at
5 height would have been beneficial, I think."
6 Did I read that correctly?
7 A Yes, sir, that's correct. That's correct.
8 Q Are you aware of whether or not there were any
9 hand-held anemometers on the Miller Park site on
10 July 14th?
11 A Where I was at, or can you be more specific, sir?
12 Q Are you aware of anyone that had hand-held
13 anemometers on that job site on July 14th?
14 A That takes in a lot of people. Where I was at, I
15 didn't see any, no.
16 Q Are you aware of anyone else having a hand-held
17 anemometer on the job site on July 14th?
18 A No, sir.
19 Q You are familiar with hand-held anemometers, are you
20 not?
21 A I know what they are, yes, sir.
22 Q As a matter of fact, you told the OSHA investigators
23 that you were familiar with a Wiley-type hand-held
24 anemometer, didn't you?
25 A No, that's not correct. It's not a Wiley, sir.

1 Q Did you tell them that you were familiar with any
2 type of hand-held anemometer?
3 A I believe I did.
4 Q Was it a Dwyer --
5 A It was a Dwyer.
6 Q Okay. I misspoke. It was a Dwyer, correct?
7 A That's correct.
8 Q Did you own a Dwyer?
9 A Have I ever owned one?
10 Q No, sir. Did on July 14th --
11 A No, sir.
12 Q -- did you own a Dwyer?
13 A No, sir.
14 Q Have you ever owned a Dwyer?
15 A Yes, sir. I did when I was skydiving.
16 Q Now, in the statement to OSHA that you gave -- And,
17 by the way, that statement you gave to OSHA was
18 under oath, was it not?
19 A To my knowledge, yes.
20 Q Did you have a lawyer present with you?
21 A Yes, I did.
22 Q Did you tell OSHA in that course of that statement
23 that you had checked with the Doppler about the wind
24 gusts because you didn't have any means of
25 physically measuring the wind gusts up where you

1 were; do you remember making that statement to them?
2 A Yes, sir, that's correct.
3 Q What, in effect, you were telling them is you didn't
4 have a hand-held anemometer with you to have made
5 these kind of accurate assessments of the wind that
6 you were reporting; am I correct?
7 A That's correct.
8 Q And that's when you in the discussion of the
9 administrative statement told OSHA that you knew
10 about this Dwyer hand-held anemometer, correct?
11 A I know about Dwyer hand-held anemometers, yes, sir.
12 Q Yes. But you advised the OSHA investigator about it
13 as well, didn't you?
14 A I believe -- Do we need to go here? To my
15 knowledge, yeah, I talked to him about the
16 anemometer, yeah.
17 Q If you remember it, we don't need to go there.
18 A Yeah, I remember talking to him, sir.
19 Q Did you also tell him at the time of that statement
20 that you had never seen a hand-held Dwyer anemometer
21 used to determine the winds on a construction site,
22 did you not?
23 A That one we'll have to check, sir, because that
24 takes quite a few years. I can't --
25 Q Well, actually, it wasn't quite a few years ago, it

1 was -- What's the date today, the 20th? What is it
2 today? It was one year ago today. Well, you've got
3 the administrative statement.
4 A That I saw a Dwyer --
5 Q No, no, that the statement was made to OSHA.
6 A Oh.
7 Q So will you look at the administrative statement
8 that I have in front of you. And will you please
9 turn to page 102. I'm starting out at line 2. Do
10 you see that?
11 "Question. Have you ever seen a
12 hand-held Dwyer or anemometer used to determine the
13 wind on a construction site?
14 "Answer. No."
15 Did I read that correctly?
16 A That's pretty much correct.
17 Q Does that refresh your recollection?
18 A Yes, sir.
19 Q Did your lawyers advise you that Mr. Kurt Upton has
20 given a deposition in this case?
21 A Do I know what the content of his deposition is?
22 No, sir.
23 Q Have you read his deposition?
24 A No, I haven't.
25 Q Have your lawyers told you that Mr. Upton has

1 testified under oath that he saw you up on the
2 terrace level just before the crane went down
3 holding a hand-held anemometer; have you been told
4 that?
5 A Yes.
6 Q And when Mr. Upton was asked by counsel what did it
7 look like, he said it was red. Do you remember --
8 Were you told that?
9 A By counsel?
10 Q Yes.
11 A Yes.
12 Q Exhibit 1704, this happens to be a Dwyer hand-held
13 anemometer, which is red. Let me show this to you.
14 A It's a nice one, sir.
15 Q I'm sure it is.
16 A Yep.
17 Q Now, Mr. Noel, on July 14th, 1999, did you hold that
18 red hand-held anemometer in your hand, yes or no?
19 A No.
20 Q Do you have any explanation why Mr. Kurt Upton, who
21 just arrived at the site, who never knew you, never
22 had a run-in with you, would have so testified? Do
23 you have any explanation?
24 A He had to be mistaken, sir.
25 MR. HABUSH: We offer Exhibit 1704

1 A No, sir. I've never seen it, sir.
2 Q Well, I'm going to show them to you.
3 A Good.
4 THE COURT: Let's -- let's just answer
5 the question and not give any additional responses,
6 please.
7 THE WITNESS: Okay.
8 BY MR. HABUSH:
9 Q Let me show you Exhibit 169, which is a portion of
10 minutes that occurred on July 14th, 1999, and
11 present from MHIA was Masa Takahashi, Moto Baba,
12 Victor Grotlisch, Kano Saito, Heki Kasugai, Kaz
13 Hayashi, and Paul Deasy. Is that correct? Have I
14 read that correctly?
15 A To my knowledge, yes, sir.
16 (End of take.)
17
18
19
20
21
22
23
24
25

1 Q Why don't you read to the jury what it says there in
2 yellow, paragraph 4.
3 A Yes, sir, I will. Just a second. I want to look at
4 it just for a minute.
5 Q Please do.
6 A It says, ladies and gentlemen, "Panel 4R, pick 4R3
7 today. Block 3 pick has been temporarily suspended
8 because of wind. The block will be picked up once
9 the wind dies down. MHI indicated later in the
10 meeting that they had commenced the lift."
11 Q So this is the first time you've read this?
12 A Yes, sir. Yes, sir, it is.
13 Q Were you told by your lawyers that Mr. Moto Baba,
14 the head engineer for Mitsubishi, had testified at a
15 deposition that he heard that statement made at that
16 particular meeting, that the lift had been suspended
17 due to the winds?
18 A No, sir, I didn't hear that.
19 Q Did you hear the testimony of Mr. Saito who made the
20 statement to the group there that the lift had been
21 suspended due to the wind?
22 A No, sir.
23 Q First time you've ever heard that --
24 MR. BELL: Your Honor, let me object
25 to arguing with the witness. The witness is

1 I was also up there to make sure that
2 nobody would go in this area or underneath the
3 block. We red flagged five levels, checked all of
4 the rooms to make sure that nobody was in there, and
5 that was my purpose of being there, sir.
6 Q What time of day did you get notification that you
7 should begin to clear the area?
8 A I got notification at 11:40 a.m.
9 Q And who did you get notification from?
10 A I got notification from Victor Grotlisch.
11 Q And did you remain at that level for the rest of the
12 day?
13 A Yes, sir. I remained at that level or the level
14 right directly below it the rest of the day.
15 Q With respect to the raising of the man-basket with
16 Mr. Wischer and Mr. DeGrave and Mr. Starr, who gave
17 the order for that man-basket to go up?
18 A Allen Watts would call for them. He would need the
19 men in the man-basket to sight over the top of the
20 roof or the structure.
21 Q How long did it take you to clear that section of
22 the stadium?
23 (End of take.)
24
25

1 this crane pick for any reason at any time if it's
2 unsafe to continue, ironworkers, crawler operators,
3 ground people, HCH personnel," what is that, is that
4 an exclamation mark there? Is that what that is,
5 that big black thing?
6 A Yes, sir.
7 Q And you had to write that exclamation mark on your
8 notes to remind you to be emphatic about that, yes?
9 A Yes, sir.
10 Q And do you ordinarily, when you make notes or
11 outlines about what you want to say to people, sign
12 it like you're signing a letter to somebody?
13 A Yes, sir. I sign it -- when I sign my notes, I sign
14 things because that's me, yes, sir. Not all, but
15 some.
16 Q Well, you did on this one for sure, right?
17 A Yes, sir, I did.
18 Q Now is it -- was it your testimony, and I may have
19 misunderstood you, that the monitoring of the
20 Doppler radar, that is, the monitoring of the
21 weather using the Doppler, was that not expressed at
22 the meeting quite clearly by Victor Grotlisch that
23 he was going to be doing that?
24 A Yes, sir.
25 Q Do you remember when I was questioning you this

1 charge?
2 A Not that I remember.
3 Q Okay. It's in your deposition, but I'll let it go.
4 A Okay.
5 Q I'd like to take a look at the load chart that
6 Mr. Noel had up on the board before. I believe
7 that's Exhibit 1774. Okay. Technical difficulty
8 here. It was up on the board and there was a phrase
9 there, paragraph 11, that talked about "the person
10 in charge of lift operations." Based upon your work
11 out at the job site, who on the date of the accident
12 was the person in charge of lift operations?
13 A Victor Grotlisch.
14 MR. OWENS: Objection. Objection, Your
15 Honor.
16 THE COURT: Overruled.
17 MR. OWENS: Foundation.
18 THE COURT: You can testify as to who you
19 understand and I'll allow it.
20 THE WITNESS: I understood that Victor
21 Grotlisch was in charge of the lift operations.
22 MR. MENTKOWSKI:
23 Q There was some talk about stopping the lift.
24 Mr. Noel had his notes up there that he signed and
25 explained to us that anybody could stop the lift.

1 IN THE CIRCUIT COURT OF MILWAUKEE COUNTY

2 STATE OF WISCONSIN

3

4 PATRICIA WISCHER, individually,
and as Special Administrator of the
5 ESTATE OF JEFFREY A. WISCHER, deceased;
MARJORIE DeGRAVE, individually,
6 and as Special Administrator of the.
ESTATE OF WILLIAM R. DeGRAVE, deceased;
7 and RAMONA DULDE-STARR, individually,
and as Special Administrator of the
8 ESTATE OF JEROME STARR, deceased,

9 Plaintiffs,

10 -vs- Case No. 99-CV-006553

11

12 MITSUBISHI HEAVY INDUSTRIES,
AMERICA INC., TRAVELERS
13 PROPERTY CASUALTY INSURANCE
COMPANY, THE TRAVELERS INDEMNITY
14 COMPANY OF ILLINOIS, NEIL F. LAMPSON,
INC., HCH MILLER PARK JOINT VENTURE,
15 HUNZINGER CONSTRUCTION COMPANY,
CLARK CONSTRUCTION BUILDERS, INC.,
16 and HUBER, HUNT & NICHOLS, INC.,

17 Defendants.

18

19 October 23, 2000

20 VOLUME VI

21 TRANSCRIPT OF JURY TRIAL

22 Before:
HONORABLE DOMINIC S. AMATO
23 Circuit Court Judge Presiding

24 Court Reporters: Debra A. Wisniewski, CRR/RMR
Constance L. Bauer, CRR/RMR
25 Julie A. Poenitsch, CRR/RMR

1 Q That was your experience you had observed in
2 previous roof picks, that the crane actually, I
3 think they say, walked the piece to its position?
4 A I don't ever recall them walking a piece into
5 position. I saw them swinging the pieces in
6 position.
7 Q Very good. And that's what you saw on July 14;
8 right?
9 A That's correct.
10 MR. OWENS: Okay. Next series,
11 please, Ken.
12 Q Tell us what we're looking at here, please, and give
13 us the times you took the photos.
14 A 5:07, and the other picture was taken at the same
15 time.
16 Q Okay. Again, continuing to track the progress of
17 the piece toward its set spot?
18 A Correct.
19 MR. OWENS: Next series, please.
20 Q Okay. Tell us what's in the top photo first --
21 whoops. There we go.
22 A It was taken at 5:07.
23 Q Okay. More of the same, tracking the progress of
24 the piece?
25 A That's right.

1 Q Tracking the progress of the piece as it moved
2 along?
3 A I'm taking pictures as the piece moves along, yes.
4 MR. OWENS: Okay. Let's go to the
5 last -- the next one, the next bottom picture,
6 please.
7 Q Okay. We talked a bit about this on Friday. Tell
8 us, please --
9 MR. OWENS: And now, Judge, with your
10 permission, I have a blowup that I'll show the jury
11 as well.
12 Q Tell us what it is we're looking at in this photo,
13 sir.
14 A Two man-baskets.
15 Q Okay. And the one in the foreground we heard on
16 Friday and in previous testimony as being the one
17 that had Mr. Kazinski and his colleagues; correct?
18 A That's correct.
19 Q Now, would you put this in the category of some of
20 the people pictures that you took out on this job
21 site?
22 A Yes.
23 Q Okay. And to your knowledge, were these fellows
24 previously aware that you were someone who liked to
25 take a lot of pictures out on site?

1 A I'm sorry, who was aware?
2 Q Mr. Kazinski and the other men in the basket, you
3 had seen them on the site before?
4 A I don't really recall.
5 Q Okay. Either looking at your monitor or on the
6 blowup that I have here, I wonder if you could
7 describe for me the demeanor of the gentlemen. For
8 example, the first fellow on the left, do we see his
9 arm resting on the railing of the basket?
10 MR. YOUNG: Your Honor, I object. The
11 picture speaks for itself.
12 THE COURT: Overruled.
13 MR. OWENS: Thank you.
14 THE WITNESS: Their demeanor?
15 MR. OWENS:
16 Q Yes.
17 A I have no idea. That is --
18 Q Well, for example, the first gentleman in the
19 foreground on the left, is that his arm resting on
20 the railing of the basket?
21 A Yes.
22 Q Okay. And the gentleman at the far right, he
23 appears to be kind of leaning up against the back of
24 the basket?
25 A I -- it doesn't look to me like he's leaning against

1 documents and ask you whether or not you agree with
2 them and see whether or not we need to go to the
3 depositions to throw them up on the screen; okay?
4 A Okay.
5 Q Now, before you got to Miller Park you were aware of
6 efforts to calculate the effect of wind on loads
7 being lifted by cranes; isn't that true?
8 A Yes.
9 Q And you had worked for a company that had done wind
10 load calculations. They had also done rigging; is
11 that correct?
12 A Yes.
13 Q And you told me that you had critiqued hundreds of
14 lift plans?
15 A I think that's correct.
16 Q You also told me that you had been in 50 prior lifts
17 where wind calculations had been done?
18 A Correct.
19 Q You also told me that you were familiar with the
20 influences that wind could have on a crane?
21 A Correct.
22 Q And you told me that you were familiar with Big
23 Blue?
24 A I don't think that's correct. Not familiar with Big
25 Blue prior to Miller Park.

1 Q Oh, I mean after --
2 A Aware of Big Blue.
3 Q Right. I mean after you got to Miller Park, you
4 became familiar generally with Big Blue?
5 A That's correct.
6 Q Did you also tell me that Miller Park, the loads
7 that were being lifted were the biggest loads that
8 you, in your job experience, had been part of?
9 A That is correct.
10 Q Did you also tell me that you were familiar with,
11 before July 14th, with the restrictions on the use
12 of man-baskets in certain weather and wind
13 conditions?
14 A Yes.
15 Q You told me, did you not, that you knew by July of
16 1999 that a 20 mile an hour wind would likely have a
17 negative affect on Big Blue?
18 A A negative -- a negative affect? What do you mean
19 by that?
20 Q Well, negative isn't good.
21 A I don't understand your question.
22 Q Let's refer to your October '99 deposition in front
23 of you. Go to page 81.
24 A October the 20th?
25 Q October 20th, 1999 deposition, page 81.

1 A Page 81?

2 Q Right. Line 10:

3 "Q Did you have in your mind before

4 July of 1999 what wind velocity would likely have a

5 negative impact on Big Blue?

6 A Yes.

7 Q What?

8 A What velocity?

9 Q Yes.

10 A Twenty miles an hour."

11 Does that refresh your recollection?

12 A That's what the deposition says, correct.

13 Q So apparently you didn't have any difficulty with

14 the word negative at the time I asked that question

15 at the deposition?

16 MR. BELL: Your Honor, for rules of

17 completeness, I ask that the next few questions and

18 answers be read.

19 THE COURT: Proceed.

20 MR. HABUSH:

21 "So in your mind as long as "-- line

22 18 -- "as long as the wind velocity was 20 miles per

23 hour or under 20 miles per hour? Which.

24 A twenty.

25 Q Twenty or under? You think that

1 the stability of the crane was sufficient that it
2 would not be affected by the wind, the crane itself?
3 Is that a correct statement?
4 A I felt 20 miles an hour was also
5 the input from the people that were responsible for
6 the operation of the crane. The operator always has
7 the call on the crane."
8 Did I read those correctly?
9 A I believe you did.
10 Q So anyways, getting back to what I said, you
11 understood when I asked about negative affect at the
12 time of the deposition, did you not?
13 A Yes, sir.
14 Q Did you also tell me at that deposition that if the
15 crane is exposed to winds in excess of 20 miles an
16 hour, it could impede its performance and its
17 ability to stand upright?
18 A Yes, I believe we discussed that.
19 Q You also told me at that deposition, Mr. Grotlisch,
20 that wind gusts do have an adverse affect on cranes?
21 A I believe we discussed that.
22 Q As well as on loads?
23 A Yes.
24 Q You also told me at the deposition that sailing of a
25 load is a bad thing?

1 A I believe we discussed that.
2 Q You also told me, Mr. Grotlisch, that if wind speeds
3 reached 20 miles per hour with gusts up to 26 miles
4 per hour, any attempt to lift 4R3 would be unsafe?
5 A I believe we discussed that.
6 Q I know we discussed it, but I want you to, if you
7 could, sir, tell me whether or not you remember it
8 or you agree that that's what you told me.
9 A I believe I told you that and agreed to that.
10 Q Thank you, sir. Did you also say that you knew from
11 experience that winds greater than 20 miles an hour
12 would have a negative impact on the crane before the
13 accident?
14 A Could you repeat that question again, please?
15 Q Yes. That you knew from your experience that winds
16 greater than 20 miles an hour would have a negative
17 impact on the crane and you knew this before July
18 14th?
19 A Correct.
20 Q And you also told me in that deposition that you
21 knew that any wind in excess of 20 miles an hour
22 might adversely affect the crane's ability to
23 withstand side pressures or side loads?
24 A Correct.
25 Q Let's talk for a moment about load charts. You know

1 what a load chart is?
2 A Yes.
3 Q You told me that load charts were created by the
4 manufacturer and it had in them operating and
5 operating capacities for the piece of equipment?
6 A Correct.
7 Q And that you were familiar with load charts prior to
8 the time you got to Miller Park?
9 A Yes.
10 Q And you knew before July 14th, sir, that load chart
11 capacity, when it listed 20 miles per hour, did not
12 take into consideration the effect that wind would
13 have on the load?
14 A Correct.
15 Q And you knew that the 20 miles an hour on the load
16 chart meant maximum?
17 A Correct.
18 Q You also told me, didn't you, Mr. Grotlisch, that
19 the winds could have been 15 miles an hour but
20 because of the size and the shape of the load, that
21 could have made 20 miles an hour inoperative or
22 unsafe under certain conditions?
23 A Correct.
24 Q You also told me that it would have been helpful to
25 know on July 14th if a 15 mile an hour wind on 4R3

1 due to the size and shape of that roof truss would
2 have made 20 miles an hour unusable or inoperative
3 as a standard?
4 A Correct.
5 Q Let's talk about wind load calculations now. You
6 told me, did you not, sir, that no MHIA employee was
7 doing wind load calculations on the effect of wind
8 on the load prior to July 14th --
9 A Correct.
10 Q -- did you not? Correct?
11 THE COURT: I'm sorry, I didn't hear
12 your answer.
13 THE WITNESS: I said correct.
14 MR. HABUSH:
15 Q You told me that you just assumed they were being
16 done?
17 A I believe they were being done --
18 Q And you told --
19 A -- yes.
20 Q You assumed they were done but you never saw them?
21 A Correct.
22 Q You assumed that Lampson was doing them?
23 A That's correct.
24 Q But no MHIA engineer ever told you that Lampson was
25 doing those calculations?

1 A That is correct.
2 Q Lampson never told you that they were doing the
3 calculations?
4 A Correct.
5 Q You don't know if MHIA engineers were even qualified
6 to do those calculations?
7 A Correct.
8 Q Are you aware that Mr. Baba has testified in this
9 case that he is not qualified to do these
10 calculations? That's what he said. Are you aware
11 of that?
12 A I don't recall that.
13 Q Have you read Mr. Baba's deposition?
14 A No, sir.
15 Q At page 63 -- well, back to 64 of his deposition
16 taken on October 26th --
17 MR. BELL: Your Honor, I'm going to
18 object to reading from another person's deposition.
19 That person will be here and answer questions.
20 Mr. Grotlisch has not read his deposition.
21 THE COURT: Sustained.
22 MR. HABUSH:
23 Q Do you know of any engineer that was on site at
24 Miller Park that had the capacity or capability to
25 do wind calculations prior to July 14th?

1 Q Was Mr. -- wasn't Mr. Baba involved in the
2 negotiations that took place over this contract?
3 A With?
4 Q With Lampson.
5 A Negotiations with who?
6 Q Lampson.
7 A Yes, he was involved.
8 Q As you were?
9 A Yes, sir.
10 Q What was his title?
11 A I believe structural engineer. Project structural
12 engineer.
13 Q Continuing on with the calculations, you told me,
14 did you not, that it was necessary to do
15 calculations on the effect of wind on the load due
16 to the size of the roof piece at Miller Park?
17 A Correct.
18 Q You also told me, did you not, Mr. Grotlisch, that
19 if you had known that the calculations were not
20 being done, you'd have done something about it?
21 A Yes.
22 Q You also told me, did you not, Mr. Grotlisch, that
23 when you proceed with a lift at Miller Park, due to
24 variable winds, the topography, the size of 4R3, the
25 size of the crane, without doing calculations of the

1 effect of wind on the load, that this could be a
2 dangerous practice?
3 A That is correct, you asked me that question.
4 Q Yes. And that was your answer, was it not?
5 A That was my response to your request.
6 Q And you knew that before July 14th, 1999, didn't
7 you?
8 A Yes.
9 Q And by a dangerous practice, a practice that could
10 lead to the crane being affected, its stability
11 being affected; isn't that right?
12 A That is correct.
13 Q It could lead to the crane tipping over; isn't that
14 an effect?
15 A That's an effect.
16 Q And it could also be a dangerous practice because it
17 could fall over and kill people; isn't that also
18 true?
19 A Correct.
20 Q People such as the plaintiffs?
21 A That is correct.
22 Q You were reasonably certain, were you not, prior to
23 July 14th, 1999 that if these wind load calculations
24 were not being done with a piece the size of 4R3,
25 that not only was it a dangerous practice, but there

1 was a probability that a tragedy could occur?
2 A That is correct.
3 Q Now, you told me, Mr. Grotlisch, in that connection
4 that it was your responsibility that if you knew no
5 one at Mitsubishi was doing these calculations, you
6 were unsure if Lampson was doing them, that it was
7 your responsibility to ask Did you do them?
8 A I believe that was a question of yours, yes.
9 Q And you answered that it was your responsibility to
10 have inquired from Lampson Are you doing them?
11 A Yes.
12 Q You didn't, did you?
13 A No, I did not.
14 Q You dropped the ball, didn't you?
15 THE COURT: Answer the question.
16 THE WITNESS: Correct.
17 MR. HABUSH:
18 Q So on the 14th of July when 4R3 was being lifted,
19 you had no idea what effect wind might have on that
20 load or as to how it might affect the crane; is that
21 correct?
22 A Can you repeat that question?
23 Q Sure, I'll be happy to. You told me, did you not,
24 in your January deposition that on the 14th, when
25 4R3 was being lifted, you had no idea what effect

1 Q What was his title?
2 A What was his title?
3 Q Yes, sir.
4 A Superintendent. Field superintendent.
5 Q And he worked for Mitsubishi?
6 A Yes, sir. When we say Mitsubishi, it's Mitsubishi
7 Heavy Industries America, Inc., so.
8 Q Thank you for reminding me. That's the only one
9 that's being sued in this case.
10 A I don't know, sir.
11 THE COURT: Let's proceed.
12 MR. HABUSH:
13 Q Let's talk about you. Now before -- when you
14 arrived at the job, you knew, did you not, that
15 there were certain restrictions about what kind of
16 materials can go into a man-basket when there's men
17 in there?
18 A Yes.
19 Q And you admitted to me, did you not, that you
20 authorized men to go in the man-baskets with iron
21 and metal parts at the same time and you knew that
22 this was a safety violation?
23 A Yes, that was a violation of our on-site safety
24 program.
25 Q You were the site superintendent?

1 A No, sir.
2 Q What was your title on this job?
3 A I'm site manager. I'm not one of the
4 superintendents.
5 Q Do you think the site manager should try to set the
6 example for other employees as to what is proper
7 safety procedure?
8 A Yes, sir.
9 Q Do you think you were setting a proper example for
10 other workers on the site by allowing them with your
11 knowledge to commit a safety violation?
12 A Your question again, please.
13 MR. HABUSH: Please read the question to
14 the witness.
15 (Pending question read by reporter.)
16 THE WITNESS: No, sir.
17 MR. HABUSH:
18 Q You also told me, did you not, that you made a phone
19 call to Mr. Wayne Noel, who was the safety
20 supervisor?
21 A That is correct.
22 Q Who was in the Mitsubishi trailer?
23 A I believe so.
24 Q And you told him something to the effect of do not
25 look, correct?

1 A No, sir. I believe I told him to stay in the
2 trailer or something to that effect.
3 Q Excuse me, sir?
4 A I believe I told him to stay in the trailer, not to
5 not look.
6 Q Oh. Was the purpose of telling him to stay in the
7 trailer so he couldn't see you committing a safety
8 violation?
9 A Correct.
10 Q Don't you think that rules that you violated and
11 instructed your safety supervisor not to observe are
12 made to keep men from being put at risk?
13 A Yes.
14 Q Prevent them from being injured or killed?
15 A Yes.
16 Q What you did there showed some disrespect for those
17 rules, did it not?
18 A I don't believe it did, sir.
19 Q On July 14th of 1999, were you behind schedule on
20 getting the roof pieces in place?
21 A Yes.
22 Q As a matter of fact, when the schedule was first
23 prepared, it was hoped that the entire roof would be
24 set and in place by July of 1999; isn't that true?
25 A I think that's one of the schedules.

1 Q You also told me, did you not, that in addition to
2 being behind schedule that the company was over
3 budget?
4 A That is correct.
5 Q And being over budget was due to change orders?
6 A Pending change orders.
7 Q That we're talking like something on the order of
8 $40 million?
9 A I believe that's what we discussed.
10 Q And the original bid by Mitsubishi was around $40
11 million, wasn't it?
12 A Forty-seven. Yes, sir.
13 Q Well, they were almost 100 percent over budget on
14 July 14th, were they not?
15 A There was almost 100 percent of change orders that
16 were in presentation, not over budget.
17 Q Now you don't believe that these change orders were
18 justified, correct?
19 A Could I have that question again?
20 Q Yes. I assume you don't believe that these change
21 orders were justified?
22 A That's not what I stated.
23 Q Were they justified?
24 A I believe they are.
25 Q You don't believe it was any of Mitsubishi's

1 A Yes, sir. It's highlighted here.
2 Q Yes. Now you were at that meeting, right?
3 A I believe I was.
4 MR. HABUSH: Thank you, Ken.
5 Q You knew, did you not, Mr. Grotlisch, and you told
6 me at your deposition, that there was going to be
7 serious financial consequences to HCH if the piece
8 was not picked on July 14th?
9 A No, sir.
10 Q You didn't tell me that?
11 A Serious consequences to HCH?
12 Q Yes.
13 A I don't know what arrangement HCH has with the
14 District.
15 Q Turn to page -- in your '99 dep, page 194.
16 A Page 194?
17 Q I believe so, yes. Line 23. Are you there? Okay?
18 A Line 23, page 194?
19 Q Yes, sir.
20 A Yes, sir.
21 Q "Q Were you aware that there was going
22 to be some serious financial consequences to HCH if
23 that piece had not been put in place on July 14th?"
24 Go to the next page, line 1:
25 "A Yes."

1 Next question:
2 "Q Are you aware that Mitsubishi was
3 going to be held accountable for that?
4 "A That was always the case, yes.
5 "Q And did you know that before July
6 14th?
7 "A Yes."
8 Did I read those correctly?
9 A Yes, you did.
10 Q Does that refresh your recollection?
11 A Yes, sir.
12 Q I want Mr. Jarvis to put up some minutes from a
13 meeting of May 19th, 1999, and I'm going to ask you
14 some questions about it. First of all, let's see
15 who's there from Mitsubishi. Mr. Saito,
16 Mr. Takahashi, Mr. Baba, you, and Kasugai. We're
17 missing an A after MHI there. Oh, thank you, David.
18 Is he from Japan?
19 A I believe he is.
20 Q The parent company?
21 A I don't know the chain of the organization, sir.
22 Q But it's not MHIA?
23 A That is correct.
24 MR. HABUSH: Now if we go to the
25 paragraph, Ken, please that I want to discuss.

1 that were utilized before this incident were
2 utilized after this incident by Mr. Wagner?
3 A I believe he followed the same engineering approach.
4 You'd have to talk to Mr. Wagner on the safety
5 factors.
6 Q Did you tell OSHA after this incident that you knew
7 of no ground settlement or ground cracking that
8 caused this accident?
9 A That caused this accident, correct.
10 Q Next section. Decisions. You told me, did you not,
11 in January that you had the ultimate responsibility
12 of lift operations?
13 A I believe that's the question that was asked and I
14 answered, yes.
15 Q You told me that you had the authority to stop any
16 lift?
17 A As well as everybody else, that's correct.
18 MR. HABUSH: Strike the portion that's
19 not responsive.
20 THE COURT: The answer can stand. You
21 can ask him some more questions.
22 MR. HABUSH:
23 Q I didn't ask you whether anybody else could, did I,
24 Mr. Grotlisch? I asked you whether you could. Did
25 you understand the question?

1 A That is correct.
2 Q Did you also tell me that you could have aborted
3 this lift any time on July 14th up to 5 o'clock in
4 the afternoon?
5 A Yes.
6 Q Do you remember a lift that occurred on January 8th,
7 423-ton roof piece was lifted?
8 A Would that be 4L1?
9 Q That would have been your first one.
10 A First pick.
11 Q Yes?
12 A Yes.
13 Q Do you remember that it was very cold and snowy?
14 A In the morning for a portion of the day.
15 Q Do you remember standing outside and talking to
16 somebody and saying that you decided to proceed
17 despite the cold and snow because the wind was
18 virtually calm?
19 A I believe that has been quoted.
20 Q Yes?
21 A Yes.
22 Q That's true, isn't it, that statement is true?
23 A I believe that is true.
24 Q Do you remember pointing to a flag on top of the
25 stadium superstructure and noting that it was

1 A That is not correct.
2 Q And that they are picking pieces that are much
3 smaller than the pieces that were being picked prior
4 to July 14th; isn't that correct?
5 A The pieces have been sized for their crane.
6 Q And the pieces are smaller; am I correct? Are they
7 smaller?
8 A They're lighter in tonnage and somewhat smaller in
9 size.
10 Q They have less surface area than the roof pieces
11 that were picked prior to July 14th?
12 A Some are. Some are exactly the same.
13 Q Did you go to Mr. Sterk and complain that they
14 should raise the wind limits on how lifts should be
15 picked?
16 A Yes.
17 Q Didn't you say to Mr. Sterk with respect to trying
18 to raise the wind limits that they wanted to lift
19 these various pieces that, quote, "with these kind
20 of wind speeds, we'll never get the stadium
21 finished," end quote?
22 A That is correct.
23 Q Let's talk about the prelift meeting. You attended
24 it?
25 A Yes.

1 Just answer the question responsively, sir.
2 THE WITNESS: I don't know who all was
3 monitoring it in the trailer because it was
4 available to everybody, but I used it to monitor.
5 BY MR. HABUSH:
6 Q Will you turn to page -- in your January deposition,
7 page 310.
8 A January 19th?
9 Q Yes, sir. Line 16.
10 "Question. Now during the course of
11 the day, were you the only one who made reference to
12 the Doppler system to monitor the weather?
13 "Answer. I believe I was."
14 Does that refresh your recollection?
15 A Yes, sir, that's what I stated.
16 Q My question was, does that refresh your
17 recollection? Does that not say that you were the
18 only one? "Now during the course of the day, were
19 you the only one;" do you see that? Do you agree
20 with that?
21 MR. HABUSH: Put it up there again,
22 please, Ken.
23 Q Do you agree with that?
24 THE COURT: There's two questions
25 pending, sir. Did you say that, that's the first

1 question. The second question is do you agree with
2 it. Did you say it?
3 THE WITNESS: Yes, I said that.
4 THE COURT: Okay. Thank you.
5 BY MR. HABUSH:
6 Q Do you wish to change that?
7 A No.
8 Q You told me, did you not, that in addition to the
9 Doppler radar system in the trailer to monitor the
10 weather, you -- you used, also, the Internet,
11 Weather Channel, things like that?
12 A Yes, sir.
13 Q And this is located, this Doppler radar program, was
14 located in your trailer?
15 A Correct.
16 Q Did you tell me it had no printing capacity?
17 A No. I said the unit that we had did not have a
18 printer.
19 Q Did you have other computers in the trailer?
20 A Yes, sir.
21 Q Did they have printers on them?
22 A Yes, sir.
23 Q Do you know whether or not those printers could be
24 attached to the computer that was operating the
25 weather system?

1 3:00 p.m. of wind in excess of 15 to 17 miles an
2 hour or gusts in excess of 15 to 17 miles an hour.
3 Did you tell me that?
4 A That is correct, that I received.
5 Q Yes, that you received.
6 A That is correct.
7 Q Or that you -- or that you observed.
8 A That is correct.
9 Q You told me that you saw winds or you saw winds on
10 your Doppler at 17, 18 miles an hour around
11 lunchtime and that the highest wind gust was in
12 midmorning. Do you remember saying that?
13 A Yes, sir.
14 Q And do you remember telling me that around three
15 o'clock that there were lower winds to the south?
16 A Yes.
17 Q Now, Mr. Noel has been in court in front of this
18 jury and the Court, and he told us that he reported
19 information about the wind to you the afternoon of
20 the 14th. Do you know that?
21 A Yes, I've heard that.
22 Q You've denied that, haven't you?
23 A That's correct.
24 Q You told me that Mr. Noel never reported wind speeds
25 in the afternoon of the 14th to you.

1 A That is correct.
2 Q You also told me that you don't recall any
3 communication from any of the MHIA group between
4 three and five o'clock discussing winds; am I
5 correct?
6 A That is correct.
7 Q And you told me that Noel never discussed wind with
8 you.
9 A Correct.
10 Q Mr. Noel told the Court and jury that in the
11 afternoon he was concerned with wind gusts and that
12 he related this observation to you about his concern
13 about wind gusts. Do you deny that?
14 A Yes, sir.
15 Q Mr. Noel said to this Court and jury that you
16 were -- you were giving him -- you, Mr. Grotlisch,
17 was giving Mr. Noel weather reports after four
18 o'clock in the afternoon. Do you agree with that?
19 A I do not agree with that.
20 Q And that you were going back to the trailer when you
21 gave him those reports. Do you agree with that?
22 A I don't agree with giving him reports.
23 Q Mr. Noel told this Court and jury that he talked to
24 you twice between four and five o'clock in the
25 afternoon. Do you deny that?

1 "Question. You deny what I just
2 quoted you?
3 "Answer. Yes."
4 Did I read that correctly?
5 A I believe you did.
6 Q Now, you testified, did you not, Mr. Grotlisch, that
7 at the time of the accident, which was around 5:14,
8 that the winds were very minimal. Do you recall
9 that?
10 A I don't recall those exact words but --
11 Q All right. Pull out your administrative statement,
12 page 149.
13 A That's the 10/19?
14 Q Yes, October 19th, 1999, page 149.
15 A Okay.
16 Q I'll start at line 4.
17 "Question. Do you believe that wind
18 played a role in the crane collapse on July 14th of
19 Big Blue?
20 "Answer. I do not.
21 "Question. Why do you not believe
22 that wind played a role in the collapse?
23 "Answer. From the conditions on site.
24 "Question. What conditions are those?
25 "Answer. The winds were very minimal

1 at the time of the accident."
2 Does that refresh your recollection?
3 A Yes, sir.
4 Q And by minimal, are you talking what, 10 miles an
5 hour?
6 MR. BELL: Well, in the rule of
7 completeness, Your Honor --
8 MR. HABUSH: I'm going to read those
9 next, Mr. Bell. Just be patient. Be patient.
10 THE COURT: All of you be patient with
11 each other. Let's proceed.
12 MR. HABUSH: Be patient.
13 Q Now, my question to you is what do you call minimal?
14 Ten miles an hour?
15 A I don't have a wind speed for minimal, Mr. Habush.
16 Q You don't know what minimal means?
17 A Maybe it was a poor choice of words.
18 Q I didn't use them; you did.
19 A I understand that.
20 Q So you can't tell this jury what your thoughts of
21 what minimal wind speeds are?
22 MR. BELL: Your Honor, my objection
23 was that he continue reading the document for
24 completeness.
25 MR. HABUSH: Your Honor, please. This

1 is not proper. I'm conducting my examination as
2 best I can, and I will get to that next section, I
3 assure the Court. I'm entitled to ask him in the
4 order that I'm asking him.
5 THE COURT: A few more questions,
6 Mr. Habush, and then under the rule of completeness,
7 I'd like it read.
8 MR. HABUSH: Okay.
9 Q Are you able to tell this Court and jury at all what
10 you call minimal?
11 A No. I think it was a poor choice of words, sir.
12 Q All right. Now, let's read on. Line 13. Line 13.
13 "What were they at the time of the
14 accident, do you recall?
15 "Answer. I had looked at the Doppler,
16 and it was -- I think somewhere around 3:30, 3:00 to
17 3:30, somewhere in that window, and the Doppler was
18 showing in our area of 15 to 17 mile an hour with
19 winds dropping off. Around five o'clock, the
20 accident was, I believe, 5:14, the winds weren't
21 such. They had been dropping off all day."
22 Now, I'd like to question you about
23 that.
24 MR. HABUSH: And start with the word,
25 Ken, "around five o'clock." Go up to the -- There.

1 Start there.
2 Q You made this statement in a sworn statement in the
3 administrative statement before OSHA, and you told
4 them, "Around five o'clock, the accident was, I
5 believe, at 5:14, the winds weren't such."
6 Now, would you agree that if one is
7 reading that, what you're saying is the winds
8 weren't even 15 to 17 miles an hour?
9 A And your question?
10 THE COURT: That is the question.
11 BY MR. HABUSH:
12 Q That is my question.
13 A That was my opinion.
14 Q So the winds, in your opinion, weren't even 15 to 17
15 miles an hour at the time of the accident.
16 A That was my opinion, sir.
17 Q Now, at the time of the accident, you were on the
18 ground, weren't you?
19 A That is correct.
20 Q And you, at least according to the testimony we read
21 so far, the last time you had looked at the Doppler
22 was around 3:00 to 3:30; is that correct?
23 A That is correct.
24 Q And between, say, 3:30 and five o'clock, you had not
25 gone back to that DTN; is that correct?

1 A That is correct.
2 Q Did you have a hand-held anemometer with you?
3 A No, sir.
4 Q Did anyone else on site have a hand-held anemometer,
5 if you know?
6 A Not to my knowledge.
7 Q Between 3:30 and five o'clock, had anyone provided
8 you with any more accurate wind information?
9 A No, sir.
10 Q So you had no idea, Mr. Grotlisch, am I correct,
11 what the wind was at 5:14?
12 A I believe I told you that was my opinion.
13 Q The answer is -- My question is you had no specific
14 knowledge of what the wind was at 5:14; am I
15 correct?
16 A That is correct.
17 Q Now, did I read correctly in that -- in that
18 statement that it's your testimony from your
19 observations that the wind was decreasing all day,
20 even up to the time of the tipover; is that what you
21 have us believe?
22 A I felt they were decreasing in the afternoon.
23 Q Have you had a chance, Mr. Grotlisch, in preparation
24 for this case, to look at the Mitchell Field speed
25 reports at five o'clock?

1 BY MR. HABUSH:
2 Q Let me start over. Are you aware, Mr. Grotlisch,
3 that the weather report at Mitchell Field at five
4 minutes to five -- and that's taken at 33 feet --
5 had steady winds of 20.7 miles per hour and wind
6 gusts of 26 and a half miles per hour?
7 A No, sir.
8 Q Are you aware that John Malan, Channel 4
9 meteorologist, reported 27-mile-per-hour wind gusts
10 at Mitchell about that time, 29-mile-per-hour wind
11 gusts at Timmerman, and at WTMJ 32 miles per hour;
12 are you aware of that?
13 A I believe I've heard of that in some newspaper
14 articles.
15 Q And you still maintain your opinion that the wind
16 speeds at 5:13 in the afternoon were below 15 to 17
17 miles an hour?
18 A Yes, sir, I do.
19 Q Now, if Mr. Noel had observed winds in excess of 20
20 miles per hour, with wind gusts at 26 miles per
21 hour, would you have expected him to bring this to
22 anyone's attention?
23 A Yes, sir.
24 Q And would you have expected him to bring that to
25 your attention?

1 A Yes, sir.
2 Q And if he failed to do so; that is, contact you,
3 this would be a conscious disregard of the safety of
4 workers, would it not?
5 A Yes, sir.
6 Q And if you had observed wind speeds at those levels,
7 that would be a conscious disregard of the safety of
8 workers by you, as well, would it not?
9 A Yes, sir.
10 MR. HABUSH: Ken, could I have the
11 minutes of the Plaintiff's Exhibit 127 of July 14th.
12 Q Mr. Grotlisch, there was a meeting held on the day
13 of the incident that you attended; am I correct?
14 A That is correct.
15 Q It has your name on the top that we just flashed on
16 the screen, correct?
17 A I can't read this screen, but I take your word for
18 it.
19 THE COURT: You can go ahead and turn
20 around and look. And there's a pointer,
21 Mr. Grotlisch -- Sir, there's a pointer right
22 there. If you have to point, it'll extend out.
23 Sure. All right.
24 BY MR. HABUSH:
25 Q You're the one, two, three, four, fifth name down on

1 "Answer. Pulled out at one point.
2 "Question. Who pulled you out?
3 "Answer. Bob Decker.
4 "How long were you gone during that
5 period.
6 "Answer. Ten to fifteen minutes.
7 "Question. Apart from that period of
8 time you were at the meeting?
9 "Right, and then I asked to be excused
10 to go back down to the site while the lift was going
11 on.
12 "Answer -- Question. How long all
13 together were you at that meeting?
14 "Answer. A range of two to three
15 hours, to my recollection."
16 Did I read that correctly?
17 A Yes.
18 Q Now, is it your testimony that that was never said
19 at the meeting, or you didn't hear it said?
20 A It wasn't said in my presence.
21 Q Now, did anyone at that meeting tell you that they
22 had heard that said?
23 A What -- what do you mean --
24 Q That the lift had been suspended due to the wind.
25 A On the day of the 14th?

1 Q Yes, sir.
2 A No.
3 Q Now, Mr. Baba has testified that he heard that
4 statement being made by Mr. Saito. Are you aware of
5 that?
6 A Yes, I'm aware of that.
7 Q And Mr. Saito has told us in his deposition that he
8 did make that statement. Are you aware of that?
9 A Yes, I am aware of that.
10 Q Now, Mr. Noel, before this Court and jury, said that
11 he didn't know that the lift was suspended. Are you
12 aware of that?
13 A Yes, sir.
14 Q Are you telling us you didn't know the lift was
15 suspended because of the wind?
16 A That is correct.
17 Q Are you aware that Mr. Ostrenga from OSHA has
18 testified in the deposition and will testify in this
19 courtroom that Mr. Noel did tell him around 2:00 or
20 2:30 that the lift had been postponed and possibly
21 could go over to another day because of the wind;
22 are you aware of that?
23 A I'm aware of that.
24 Q Another subject. You had nothing to do with the
25 functions or the operators of the three men in the

1 man-basket; am I correct?
2 A I don't believe they were operators in the
3 man-basket; they were ironworkers in the man-basket,
4 sir.
5 Q Let me rephrase the question. You had nothing to do
6 with the functions or operations of Mr. Wischer,
7 Mr. DeGrave, or Mr. Starr in that man-basket that
8 day; am I correct?
9 A That is correct.
10 Q With respect to the man-basket operation lift, that
11 was handled by the ironworkers and the crane
12 operators.
13 A That is correct.
14 Q And that with respect to Mr. Wischer and Mr. DeGrave
15 and Mr. Starr, who were employees of DCCI, their
16 supervisors supervised them.
17 A That is correct.
18 Q And not you.
19 A That is correct.
20 Q And that's true on July 14th and in the weeks
21 preceding July 14th.
22 A That is correct.
23 Q You knew that there were OSHA inspectors on the site
24 on July 14th?
25 A Yes, sir.

1 Q Now, you didn't relinquish any of your safety
2 responsibilities just because OSHA was there that
3 day, did you?
4 A No, sir.
5 Q You made no decisions and you did not fail to make
6 decisions that were influenced by the fact that
7 there were OSHA people on site; am I correct?
8 A That is correct.
9 Q Any decisions you made with respect to the lift were
10 not influenced by the fact that OSHA was on site; is
11 that correct?
12 A That is correct.
13 Q Did you also tell me in your deposition in January
14 that in your view, HCH, the general contractor, the
15 construction manager, did nothing wrong that day?
16 A That is correct.
17 Q You also told us that the three deceased ironworkers
18 did nothing wrong that day.
19 A That is correct.
20 Q You also told us, did you not, that Danny's, their
21 employer, did nothing wrong that day.
22 A That is correct.
23 Q Let's talk about the events after the crane went
24 down. Immediately after the crane went down, you
25 and Mr. Baba went to your trailer, did you not?

1 immediately after the collapse of the crane, did it
2 not?
3 "Answer. No.
4 "Question. So immediately after the
5 collapse of the crane you were not concerned with
6 weather conditions that might have existed at the
7 time of the collapse which may have caused or
8 contributed to the collapse?
9 "Answer. That's correct.
10 "Question. Immediately after the
11 crane collapsed, did you not proceed to the trailer
12 with Mr. Moto Baba?
13 "Answer. Yes. We proceeded to the
14 trailer."
15 Did I read that correctly?
16 A Yes, you did.
17 Q Then I went on to ask you, "What was the purpose of
18 the trip?"
19 You said, "Well, to go back to the
20 command post and try to start obtaining a head
21 count, finding out where all the people were."
22 Then going over to page 298.
23 "Question. Did you at that time make
24 any observations of the DTN equipment or the Doppler
25 radar equipment when you went back to the trailer?

1 "I don't recall.
2 "Question. Mr. Baba recalls that's
3 exactly what you did when you went back to the
4 trailer.
5 "I don't recall.
6 "Question. Do you agree or disagree
7 with that?
8 "Answer. I do not recall that.
9 "Question. You just forgot that?
10 "I do not recall that."
11 Did I read that correctly?
12 A Yes, sir, you have.
13 Q And then if you jump down to page 299, line 14.
14 "Question. Do you have any
15 explanation why Mr. Baba would have remembered that
16 and you don't?
17 "Answer. No."
18 Did I read that correctly?
19 A Yes, you did.
20 Q Now, Mr. Baba says that you asked him to check the
21 wind speed. Do you deny that?
22 A I don't recall that, sir.
23 Q Mr. Baba says the Doppler was working. Do you
24 remember that it was working when you went back to
25 the trailer?

1 A I believe it was on. We left it on all the time.
2 Q Mr. Baba says that when you got back to the trailer,
3 the first thing is we checked the wind speed at that
4 time. Do you remember doing that?
5 A No, sir.
6 Q Now, of course, Mr. Baba also says he doesn't
7 remember what he saw on the screen. Do you know
8 that?
9 A I have heard that.
10 Q Now, Mr. Grotlisch, you were monitoring the wind and
11 the weather all day, including the afternoon of the
12 14th, were you not?
13 A Not all day. I had monitor -- monitored the weather
14 the day of the 14th.
15 Q I didn't mean to imply, sir, that you did it
16 continuously, but you did it from time to time?
17 A That's how it came across so --
18 Q Sorry. Is that true, from time to time?
19 A From time to time, correct.
20 Q You were interested in seeing what the weather was
21 doing, were you not?
22 A That is correct.
23 Q And, in particular, you were interested in seeing
24 what the wind was doing, true?
25 A One of the conditions, yes, sir.

1 A I knew that we had an injury in the infield.
2 Q You didn't know who?
3 A No, sir.
4 Q You didn't ask anybody?
5 A I was told to get out of the infield.
6 Q Now, when you went back to the trailer, knowing that
7 someone had been injured or killed, and you had been
8 watching the wind, weren't you a little bit curious
9 when you got back to your trailer to take a little
10 peek at that computer to see what the wind speeds
11 were when you went back there?
12 A No, sir, that wasn't my concern.
13 Q You had no curiosity of that at all?
14 A No, sir.
15 Q And you deny telling Mr. Baba, one of your
16 colleagues, to do so; is that correct?
17 A I don't recall saying that, sir.
18 Q If you had looked at the Doppler and if it had
19 recorded wind speeds which were consistent with your
20 opinion, would you have been able to save that
21 information on the screen?
22 A From the system that we had?
23 Q Yeah.
24 A I believe you -- you probably could have saved it to
25 a file. It has the capability to -- to download to

1 a file.
2 Q Was any information retained about what that Doppler
3 showed on July 14th?
4 A Yes, sir.
5 Q Have you seen that?
6 A I saw it on the 15th.
7 Q And has that been produced in this lawsuit?
8 A I don't -- There's 30,000 documents. I don't know
9 what's been produced, sir.
10 Q The Doppler was -- Or the computer was unplugged,
11 was it not?
12 A Yes, it was.
13 Q Did you unplug it?
14 A No, sir, I did not.
15 Q Do you know who unplugged it?
16 A No, sir, I do not.
17 Q Do you know when it was unplugged?
18 A The -- I have -- There's a time on the Doppler
19 when it was plugged back in, and it -- I believe it
20 showed 8:00 or 8:30.
21 Q It showed 8:30 p.m. on July 14th when it got
22 replugged in the next day?
23 A On the 15th I was instructed to plug it back in.
24 Q And up popped 8:30 p.m., correct?
25 A I believe it may have been 8:00 or 8:30.

1 Q So if you had gotten back to the trailer on the 14th
2 around 5:30 p.m. and if you had looked at the screen
3 and pulled up the wind information at about 5:30
4 p.m. and then unplugged it at 5:30 p.m., then the
5 first screen that would have shown when it was
6 replugged would have been July 14th, 5:30, correct?
7 A That is correct.
8 Q So if there had been something on that screen which
9 supported your opinion what the winds were at about
10 5:00 or 5:30 p.m. that you wanted to show people,
11 all you had to do was unplug it and then replug it
12 when someone wanted to look at it, correct?
13 A No, sir.
14 Q No? Let's assume, Mr. Grotlisch, that the wind
15 speed that showed up on that Doppler at 5:30 p.m.
16 was winds in excess of 20 miles an hour with wind
17 gusts close to 30 miles an hour and that was on the
18 wind screen that Mr. Baba saw when he went back to
19 the trailer that day with you after you asked him,
20 according to him, to do so. Let's assume that just
21 for the purpose of my question, all right? Now, if
22 you wanted to preserve that on the screen, you could
23 have just walked away from the screen and left it on
24 the screen, correct?
25 A That is correct.

1 Q Or if someone had unplugged it at that point in
2 time, the next time it got plugged back in, it would
3 have that same information show up, right?
4 A If it was unplugged at 5:30, it would show the --
5 Q Right, right.
6 A -- the 5:30 conditions, not the 8:30 conditions.
7 Q But you don't have any idea why someone unplugged it
8 at 8:30.
9 A I didn't hear your question. Excuse me.
10 Q You don't have any idea why somebody chose to unplug
11 that system at 8:30.
12 A No, I -- I don't know anything -- how it happened or
13 who did it or -- or what happened.
14 Q Did you ever observe any man-baskets that afternoon
15 before the crane went over that were in use while
16 you were at the -- on the site?
17 A I don't recall, Mr. Habush.
18 Q Just before the crane went down, you were where on
19 that picture right behind you?
20 (End of take.)
21
22
23
24
25

1 A There's an elevator that's on the track beam, girder
2 system. That's somewhere in here, this area,
3 outside the structure. I was about 100 feet away
4 walking towards the elevator to go up to the track
5 beam on the ground.
6 Q Mr. Drew Edwards has testified before this court and
7 jury that you drove Mr. Wischer over to the
8 man-basket before he went up; is that correct?
9 A I believe that to be correct.
10 Q And did you hear any comment that Mr. Edwards made
11 to you?
12 A No, sir, I did not.
13 Q You've told me, have you not, at your deposition,
14 that often times workers would make safety
15 complaints that you didn't think were legitimate?
16 A Yes, sir.
17 Q Often times workers would express concern for safety
18 and you didn't think that was a legitimate excuse;
19 is that correct?
20 A That was a question in my deposition.
21 Q And sometimes you told me that you thought the
22 ironworkers made up bogus excuses for going home by
23 calling it safety concerns; is that correct?
24 A That was a question, yes, sir.
25 Q Would it be fair for me to characterize that you

1 Mr. Bell? Do you need that model anymore with this
2 testimony?
3 MR. BELL: I think that -- I think that
4 covers it.
5 MR. HABUSH: Thank you.
6 MR. BELL:
7 Q Mr. Grotlisch, could you tell the ladies and
8 gentlemen of the jury what was going on in the
9 trailer that you went to following the accident that
10 evening?
11 A Starting at what time, Mr. Bell?
12 Q Well, you know -- basically, give us an idea what
13 was happening that evening in that trailer.
14 A That evening the site was closed down. It was put
15 underneath the police and sheriff care, control, and
16 custody. There was a head count taking place to
17 find out how many fatalities we had.
18 Q Were you involved --
19 A Our trailer --
20 Q Were you involved in that process?
21 A I was sequestered to our trailer. I say
22 sequestered. The sheriff's department came in, the
23 police department came in, OSHA came in.
24 Q Were they physically in your trailer?
25 A Physically in our trailer, coming and going, and I

1 was requested to stay in the trailer until written
2 statements had been taken and also recorded. I had
3 to give recorded testimony as well as written
4 statements that were taken by the officers.
5 Q Was it -- where was this occurring?
6 A In Mitsubishi's trailer.
7 Q How long did that last?
8 A Lasted up till about 10 or 10:30 that night, and
9 then we were released from the trailer, and it
10 stayed in the custody of, I believe, the sheriff's
11 department.
12 Q And the next morning, tell us what you did.
13 A The next morning we were requested to come back to
14 the trailer; waited for proper entry into the
15 trailer. We were -- the trailer was still locked up
16 and under their custody. And then started pulling
17 documents together for the -- for the different
18 people requesting documents.
19 Q Was there a request the next morning for you to show
20 any of the authorities the Doppler monitor?
21 A Yes, there was. The night before, everybody was
22 looking for the black box that was on the
23 Transi-lift, they thought it was like a 747, and
24 they were looking for a recording device, and
25 finally they determined we did not have a black box

1 on the Transi-lift.
2 They were aware that we had a Doppler
3 weather station in the trailer, so the station was
4 not on, and Mr. Mackey, I believe with the sheriff's
5 department, asked me to show them and show him, I
6 believe that it was both the sheriff's department
7 and OSHA, I could be mistaken, they wanted to see
8 the Doppler and see how it operates, so they --
9 sometime in the night, it was between 8 or 8:30,
10 this Doppler was unplugged, and so they asked me to
11 plug it in and show them, and I proceeded with
12 plugging the Doppler in, and the Doppler fired up
13 and showed the data that was still sitting on -- or
14 still retained in its files as of 8 or 8:30, it
15 shows the time and it also showed the wind chart
16 that was on and it showed the mile per hour in some
17 50-mile radius of Miller Park, and it retained that
18 for a couple minutes until it finally uplinked with
19 the satellite and brought it up to current date,
20 current time.
21 Q And do you recall the data that came up when you
22 turned the machine on?
23 A Yes, sir, I do.
24 Q And what did it show?
25 A In the Miller Park area, it was 11-, 12-,

1 adjust the block to the real world. You work with
2 an estimated point where you think the CG is going
3 to be, and then through adjustments to the cable and
4 in this particular piece we added weight to it, that
5 gives you the angle that you have to fly. The block
6 has to be adjusted north to south and east to west
7 so that you have the proper flight angle to land it
8 on the structure.
9 Q Now, who does the estimation of the CG?
10 A Mitsubishi did the estimation of the CG.
11 Q And how did they do that? Is that mathematical?
12 A Through drawings, computer drawings --
13 Q But do they make --
14 A -- and mathematical calculations.
15 Q And then what is done in the field with the
16 mathematical calculations?
17 A The mathematical calculation was then given to
18 Lampson to develop the rigging drawings, the
19 engineered rigging plan.
20 Q And then --
21 A And then the rigging plan is sent back to the field
22 so that the workers attach all the necessary
23 components and cables to allow this block to fly in
24 that configuration.
25 Q You were asked about Van Seumeren?

1 THE COURT: You don't have to
2 apologize. Let's proceed.
3 MR. BELL:
4 Q Mr. Grotlisch, I'll try to stand back. Maybe that
5 will cause you to project your voice a little bit.
6 I was asking you about this document. Does that
7 relate to the subject we're talking about with
8 respect to Van Seumeren concerning wind speed?
9 A Yes, it does.
10 Q And could you explain to the ladies and gentlemen
11 what the document relates to in terms of the subject
12 that Mr. Habush brought up about this conversation
13 with Van Seumeren concerning wind speeds?
14 A This document is requesting Van Seumeren's home
15 office engineer, who produced the original wind
16 speeds, allowable wind speeds for the lift, to
17 review the wind speeds again to give us a different
18 wind speed for when we're attaching the rigging to
19 the block, versus just a blanket this is the lift
20 speed which you cannot do anything to the piece. So
21 we were asking for a separate tabulation of winds to
22 allow us to do the rigging to the block versus the
23 flight of the block; when the block is on the
24 ground, not when it's 250 feet in the air.
25 THE COURT: You're giving a narrative

1 now. Just please answer the question. Thank you.
2 MR. BELL:
3 Q And was that accomplished with Van Seumeren?
4 A Yes, it was accomplished.
5 Q Did they give you a different wind speed for when
6 you're working out near the ground as opposed to
7 flying the block in the air?
8 A Yes, sir, they did.
9 Q Can you tell the ladies and gentlemen of the jury
10 how the load chart was used on the Big Blue crane,
11 how it was used by Mitsubishi Heavy Industries of
12 America for the work they were doing on erecting
13 this roof?
14 A The load chart --
15 MR. CARLSON: Your Honor.
16 THE WITNESS: -- used by --
17 THE COURT: Were you going to tell me
18 something?
19 MR. CARLSON: They -- I was just going
20 to ask to have them take it off the board when they
21 aren't talking about it.
22 THE COURT: All right. They've done
23 it.
24 THE WITNESS: More water, please.
25 THE COURT: Sure. Bob, get a cup of

1 water. Proceed.

2 MR. BELL:

3 Q Mr. Grotlisch, I had asked you the question can you

4 tell the ladies and gentlemen of the jury how

5 Mitsubishi used their load chart that was supplied

6 by Lampson for the Big Blue crane.

7 A The load chart was used for the configuration of the

8 block, for sizing the block, determining the largest

9 piece that the blocks could be built in. So the

10 blocks were built to the capacity of the crane. Our

11 erection procedure was to build the blocks as big as

12 possible on the ground, doing it on the ground

13 versus building the blocks in the air, so the

14 capacity of the crane became an important piece of

15 information. The radius that, that capacity, how

16 the blocks could be built, how they could be

17 engineered and separated.

18 Q Let me put the load chart up on the board, up on the

19 screen.

20 MR. OWENS: Exhibit 2168, Mr. Jarvis,

21 if you could just focus on the numbers on the

22 bottom. Yeah.

23 Q Mr. Grotlisch, what do we see there on the load

24 chart?

25 A The load chart has a column on the left-hand side

1 but I want to really focus this, so I'm sustaining
2 the objection at this time.
3 MR. BELL:
4 Q Mr. Grotlisch, you were asked what your title is on
5 the job, and I believe you indicated you're the site
6 manager?
7 A That is correct.
8 Q Does that mean you're the site manager for all
9 contractors on the job site?
10 A No, sir.
11 Q Can you explain what your role is on this project
12 and what contractors that you would be the site
13 manager with or for? I'm not sure the ladies and
14 gentlemen understand the size of this project and
15 the role that you played in it.
16 MR. HABUSH: Your Honor, is that a
17 question?
18 MR. BELL: It's an explanation, your
19 Honor.
20 MR. HABUSH: Not a question.
21 THE COURT: It can stand. Let's
22 proceed.
23 THE WITNESS: The overall project has
24 a construction manager on it, which we call HCH.
25 Underneath the construction manager, who is the

1 block. Instead of the block flying south, around
2 and then over the structure and going down, it
3 required the block to swing around to the right,
4 over to north, over the structure and down. So we
5 had to change the flight pattern of the block and
6 then back the piece of equipment and get back on the
7 engineered runway that was used in two previous
8 picks.
9 Q And when did that conversation take place?
10 A In the morning, I'd say sometime around 10:00,
11 11:00.
12 Q And did you agree with his proposal?
13 A Yes, I did.
14 Q Did the ironworkers -- who was, who was responsible
15 for the ironworkers on this?
16 A Yes, they -- there wasn't a problem with it.
17 Q You had authority to stop this lift?
18 A Yes, sir.
19 Q If you had known that wind effect calculations had
20 not been done, what would you have done regarding
21 this lift?
22 A Not proceeded.
23 Q Would that have been true on the previous nine
24 lifts?
25 A Yes, sir.

1 you're assuming, are you not, that the lift wasn't
2 called off because of the wind, as reported in those
3 minutes; am I correct?
4 A I don't understand your question.
5 Q The minutes that we showed to the Court and jury
6 show that the lift had been called off by MHIA due
7 to the wind. Do you remember we talked about that,
8 you and I?
9 A Correct.
10 Q And you say that didn't happen, right?
11 A That is correct.
12 Q But if it did happen, the notes also say that it was
13 MHIA that then resumed the lift. Do you remember
14 that?
15 A Yes, sir.
16 Q Not Bill DeGrave, not Allen Watts, but MHIA. Do you
17 remember those minutes?
18 A Correct.
19 MR. HABUSH: Ken, can you put up Sterk
20 Exhibit 5 -- 652C. That's the first page. Could
21 you show the jury what that -- what that is, what it
22 says there, please.
23 Q Little difficult to see, but it says on the third
24 line, Attention Victor Grotlisch and Moto Baba.
25 It's a memo from Wessel Helmens. Do you know who he

1 is?
2 A Yes.
3 Q He's the engineer for Van Seumeren, is he not?
4 A No, sir.
5 Q Is he one of the employees of Van Seumeren?
6 A He's the head of their engineering department in
7 Holland.
8 Q Didn't I say he was an engineer? Did I misspeak?
9 A I don't know.
10 Q Okay. No problem. Anyways, the subject is
11 allowable wind speeds; is that correct?
12 A Correct.
13 MR. HABUSH: And could you turn to the
14 second page, please, Kenneth. Now, if you could,
15 just for the sake of comparison, focus on the 4R's
16 and enlarge that for us, please. Maybe you better
17 start -- go up to the top and show what the top
18 labels are, particularly the one that is the maximum
19 allowed wind speeds, the third from the right, so
20 they can see that. There. They can see that now, I
21 think.
22 Q Okay. Have you seen this before?
23 A Yes, sir.
24 MR. HABUSH: Now, we go down to the 4R
25 numbers, please. Down to the 4R's. That's line 15,

1 16, 17, 18, and 19. Thank you. Could you enlarge
2 that? Is that as large as you can get it?
3 MR. JARVIS: That is.
4 MR. HABUSH: That is?
5 Q Under the maximum allowed wind speed for the 4R
6 pieces, which, of course, the 4R1 and 4R2 were
7 destroyed in the accident, correct, and 4R3 is what
8 was being lifted, so they had to start over again.
9 A Correct.
10 Q And it shows on the -- on this chart, it shows that
11 the, oh, the maximum wind surface on those pieces,
12 and they are all less than what they would have been
13 had the accident not happened; isn't that true?
14 A That is correct.
15 Q And if you look at the drawings there, they have
16 with louvers the wind speeds, and what they did for
17 us people who can't transmit easily the wind speed
18 per second or meters per second, over on the right
19 it says 14.6 miles per hour, 15.5 miles per hour,
20 15.2, 15.2, 15.2 and then down there where it says
21 without louvers, 14.8, 15.7, 15.5, 15.5, and 15.7, I
22 believe.
23 MR. HABUSH: Yeah, the exhibit number
24 is -- What is the trial exhibit number, Ken?
25 MR. JARVIS: 652-C.

1 MR. HABUSH: We offer that in
2 evidence, Your Honor.
3 MR. BELL: No objection.
4 MR. CARLSON: No objection.
5 THE COURT: Received.
6 BY MR. HABUSH:
7 Q Now, with respect to Mr. Sterk again --
8 MR. HABUSH: Can you take that off,
9 please, Ken.
10 Q At his deposition -- and I want to ask you about
11 this -- he said, "And Victor asked you whether or
12 not that number could be increased, correct?
13 "He would like to go up a little bit
14 higher, yeah.
15 "On what?
16 "On wind speed.
17 "Why?
18 "Answer. If you can lift with more
19 wind speed, then maybe you lose less days -- or you
20 lose days in the contract.
21 "Question. Victor said that to you?
22 "Well, no, he did not say that, but
23 that's what I think.
24 "Question. What did he say? Tell me
25 what he said.

1 "He said to me, with this kind of wind
2 speeds, we'll never get the stadium finished.
3 "Okay. What did you say?
4 "Answer. That is not my problem.
5 "Question. What he did he say?
6 "Answer. Nothing.
7 "Question. Nothing.
8 "Answer. I said, that is Mitsubishi's
9 problem, not mine.
10 "What did he say?
11 "Answer. Nothing. Then he asked me
12 again to check if we can go up with more wind.
13 "Did he say how much more wind?
14 "Answer. No.
15 "Question. What is the maximum, if
16 you recall, from all your schedules that you've made
17 on this job since you've been at Miller Park, what
18 is the maximum allowable wind speeds that you have
19 set forth in your charts?
20 "Answer. Not higher than what the
21 papers say.
22 "Question. Well, what is that?
23 "Answer. Every piece is a little bit
24 different.
25 "Question. What is the highest that

1 you recall?

2 "Answer. I think it was -- the

3 highest one is -- I have to see by the engineer how

4 much it is. It goes from -- between 14 miles per

5 hour and 15.5 or something, but I'm not quite sure.

6 I have to ask my engineers."

7 Then going over to page 30. I'll

8 continue.

9 "I have some charts I will show you in

10 just a few minutes, but your best recollection it

11 goes between 14 and 15.5. Do you recall any larger

12 pieces --

13 MR. BELL: Your Honor, let me just

14 object. Mr. Sterk will be testifying here. He's

15 not a party. I don't know what Mr. Habush is doing

16 with this.

17 MR. HABUSH: That's not an objection,

18 Your Honor. I'm going to read this and ask a

19 question about this.

20 MR. BELL: The witness (sic) will be

21 calling the witness. He's not a party to the case.

22 THE COURT: The objection is

23 overruled.

24 BY MR. HABUSH:

25 Q "Question. I have some charts I will

1 show you in just a few minutes, but your best
2 recollection it goes between 14 and 15.5. Do you
3 recall any larger pieces where the allowable wind
4 speed is as low as 10 or 11 miles per hour?
5 "Answer. There are pieces between 8
6 or 10 miles per hour. I have to see the list, what
7 our company made.
8 "Question. But do you recall there
9 are some picks that are only 8 to 10 miles per hour?
10 "Answer. I have to look in the paper.
11 I cannot remember exactly any -- anymore how much --
12 how much it is for each piece.
13 "How many times did Victor discuss
14 with you his desire to increase the wind speed --
15 allowable wind speeds that Van Seumeren had
16 calculated to be safe?
17 "Answer. Only once.
18 "And did you at that occasion tell him
19 that if he continued to force this issue, that you
20 would not remain in Milwaukee as the supervisor?
21 "Answer. Right.
22 "Question. Were you angry?
23 "Answer. No. I just told him the
24 truth.
25 "Question. You told him what?

1 "I told him the truth. We go by our
2 list that our company made up and no higher wind
3 speed."
4 Now, do you deny that you had that
5 conversation with Mr. Sterk?
6 A No, I don't deny the conversations.
7 Q Now, you had told us this morning at great length
8 how important it was to do wind sail calculations on
9 the kinds of pieces that were going to be lifted at
10 Miller Park. Do you remember that?
11 A Yes, sir.
12 Q And you knew that from your experience before you
13 sat down to negotiate with these guys at Lampson; am
14 I correct?
15 A Correct.
16 Q It would be something that would be very important
17 to understand before you started work here as to
18 whether you or Lampson was going to do those,
19 correct?
20 A That is correct.
21 Q Now, you've told us this morning that Lampson never
22 told you they were going to do them, correct? You
23 told me that this morning.
24 A Correct.
25 Q And you also told me this morning that you had no

1 A Approximately 30, I believe.
2 Q And when did they do the last pick?
3 A Last Monday, I believe.
4 Q And Lampson did nine picks prior to July 14 of 1999?
5 A Prior to July 14th, yes, nine.
6 Q Did Mr. Watts or Mr. Bengtson ever ask you or
7 Mitsubishi for information about wind sail
8 calculations on any of these picks?
9 A No, sir.
10 Q Tell me how many times you've worked with Big Blue
11 prior to this project.
12 MR. HABUSH: I believe this is outside
13 my recross.
14 THE COURT: Pardon me?
15 MR. HABUSH: I believe this is outside
16 my re-examination area.
17 MR. BELL: It's a familiar area with
18 the crane, Your Honor. It's what the whole
19 examination is about.
20 THE COURT: I'll allow it. Just a few
21 questions, then let's get back on track.
22 THE WITNESS: None.
23 BY MR. BELL:
24 Q As between you and Lampson's engineers and their --
25 their lift supervisors, who was more knowledgeable

1 Q And from that point forward, did you stay generally
2 in the west yard area?
3 A Yes, sir.
4 Q Okay. So about what time was that? I'm sorry,
5 maybe I didn't catch it. What time did you wind up
6 in the west yard?
7 A About quarter to five.
8 Q Now in the -- around the last half hour before the
9 crane catastrophe, what would you estimate the wind
10 speeds were, including gusts?
11 A I know sand was blowing in my face, so I would
12 estimate it at anywhere from 25 to 30.
13 Q Over the course of the day up to the time of the
14 crane collapse, tell us whether or not the winds
15 increased, decreased, stayed the same.
16 A They would go down a little bit but not very much.
17 They stayed pretty much the same.
18 Q Did you have occasion to speak to Dennis Frazer, who
19 worked for Mitsubishi, about the wind?
20 A No.
21 MR. WEBER: Vague. Object, vague as to
22 time, Your Honor.
23 THE COURT: Can you rephrase it?
24 MR. YOUNG: Sure.
25 THE COURT: Any time that day?

1 of Wayne Noel; is that right?
2 A Yes, sir.
3 Q Do you recall Mr. Noel testifying that anyone could
4 stop this lift?
5 A Yes, sir.
6 Q Is that true?
7 A No, sir.
8 Q What's your understanding as to who could stop this
9 lift?
10 A My understanding was that you could -- they could
11 not stop -- not just anybody could stop the pick.
12 It had to come from Victor was my understanding.
13 Q Victor Grotlisch, to your understanding, was the
14 only person that could stop the lift on July 14th,
15 1999?
16 A Yes, sir.
17 Q Could you stop the lift if you wanted to?
18 A No, sir.
19 Q Do you know what would have happened had you tried
20 to stop the lift?
21 MR. WEBER: Object. Calls for
22 speculation.
23 THE COURT: Overruled. You may answer
24 if you know.
25 THE WITNESS: No, sir.

STATE OF WISCONSIN
IN SUPREME COURT

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER,deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased,

Plaintiffs-Intervenors-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant,

NEIL F. LAMPSON, INC.,

Defendant-Respondent,

LAMPSON INTERNATIONAL LTD., FEDERAL INSURANCE COMPANY, and THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendants.

Case No. 01-0724
(consolidated with Case Nos. 01-1031 and 01-2486)

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I, DATED SEPTEMBER 30, 2003

APPENDIX OF PATRICIA WISCHER, MARJORIE DeGRAVE AND RAMONA DULDE-STARR, VOLUME II

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased;

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-
Cross-Appellant,

Case No. 01-1031
(consolidated with
Case Nos. 01-0724
and 01-2486)

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-Petitioner,

NEIL F. LAMPSON, INC., and LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY,

Defendant-Co-Appellant,

THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendant.

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased;

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-
Cross-Appellant,

Case No. 01-2486
(consolidated with
Case Nos. 01-0724
and 01-1031)

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-
Cross-Respondent,

NEIL F. LAMPSON, INC., and LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY, and THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendants-Respondents-
Cross-Appellants.

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1 IN THE CIRCUIT COURT OF MILWAUKEE COUNTY

2 STATE OF WISCONSIN

3

4 PATRICIA WISCHER, individually,
and as Special Administrator of the
5 ESTATE OF JEFFREY A. WISCHER, deceased;
MARJORIE DeGRAVE, individually,
6 and as Special Administrator of the.
ESTATE OF WILLIAM R. DeGRAVE, deceased;
7 and RAMONA DULDE-STARR, individually,
and as Special Administrator of the
8 ESTATE OF JEROME STARR, deceased,

9 Plaintiffs,

10
-vs- Case No. 99-CV-006553
11

12 MITSUBISHI HEAVY INDUSTRIES
AMERICA, INC., TRAVELERS
13 PROPERTY CASUALTY INSURANCE
COMPANY, THE TRAVELERS INDEMNITY
14 COMPANY OF ILLINOIS, NEIL F. LAMPSON,
INC., HCH MILLER PARK JOINT VENTURE,
15 HUNZINGER CONSTRUCTION COMPANY,
CLARK CONSTRUCTION BUILDERS, INC.,
16 and HUBER, HUNT & NICHOLS, INC.,

17 Defendants.

18

19 October 24, 2000

20 Volume VII - P.M. SESSION

21 TRANSCRIPT OF JURY TRIAL

22 Before:
HONORABLE DOMINIC S. AMATO
23 Circuit Court Judge Presiding

24 Court Reporters: Debra A. Wisniewski, CRR/RMR
Constance L. Bauer, CRR/RMR
25 Julie A. Poenitsch, CRR/RMR

1 the ground where they wanted the crane to end up at,
2 and Allen was cautioning the crawler track
3 operators, Danny and Steve, "You've got to handle
4 these controls with the most delicate touch you have
5 ever done. We have this thing in the worst possible
6 situation for this type of a crane," and when I
7 heard that, I went, what's going on here, and I got
8 my binoculars out and tried to see what was
9 different about the situation there that I hadn't
10 seen before.
11 The only thing I could tell from my
12 vantage point was that the crane was going to be
13 making a dog tracking move, both crawler tracks
14 moving south into the wind, and I think that's what
15 the thing was that Allen was really cautioning his
16 operators to be very, very careful about.
17 Q And then around 5 -- between 4 and 5 o'clock, what
18 wind speeds did you hear reported?
19 A Nineteen, 20 miles an hour.
20 Q And what gusts did you hear?
21 A They were -- they were some of the higher ones, 29-,
22 30-, 31-mile-per-hour gusts.
23 Q And what was the highest you recall hearing?
24 A At one point, maybe about an hour or so before the
25 accident, there was a gust reported at 32 miles an

1 hour.
2 Q And when you heard Fred Flowers report these gusts
3 in the very high end, did you detect any tone in his
4 voice?
5 A Yes. There was one point there when he was
6 reporting one of these higher gusts of 30 or 31 or
7 32, whichever one it was, that when a person is
8 really frightened, their lower lip -- or their chin
9 starts shaking, and I could tell in his voice he was
10 quivering, he was frightened, he was frightened with
11 that wind gust he was reporting.
12 Q Did you hear over the radio -- Strike that.
13 MR. YOUNG: I have no further questions,
14 Your Honor. Thank you, Mr. Thraen.
15 THE COURT: Cross.
16 MR. OWENS: Thank you, Judge.
17 CROSS EXAMINATION
18 BY MR. OWENS:
19 Q Hi, Mr. Thraen. I'm Kevin Owens, I represent
20 Mitsubishi. You may remember we met in your
21 deposition sometime back. I have just a few
22 questions for you today, sir. You've made quite a
23 hobby out of this project from what I understand.
24 A Yeah.
25 Q Even to the point of factoring watching this

1 Q Were you on site at Miller Park on July 14th, 1999?
2 A Yes, I was.
3 Q And while you were on site on July 14th, 1999, did
4 you have occasion to talk to one Wayne Noel about
5 whether you saw a man blown off a scaffold due to
6 the wind?
7 MR. BELL: Objection, Your Honor.
8 THE COURT: For the previous reasons,
9 overruled.
10 MR. HABUSH:
11 Q Do you have the question? It was interrupted.
12 A Yes, I do.
13 Q And what is your answer, sir?
14 A Yes, I did.
15 Q What did you say to Mr. Noel about the man being
16 blown off the scaffold due to the wind?
17 A I walked up to Mr. Noel on the roof section and
18 asked him what was going to be going on for the rest
19 of the day. I then told him what we had seen to the
20 east of where he was standing and told him that he
21 should also make sure that nobody is underneath the
22 load.
23 Q What time about was this, sir?
24 A Between 1 -- 1:45 and 2:45 or 3 o'clock, somewhere
25 in that realm.

1 Q At or about the same time did you have a
2 conversation with Mr. Wayne Noel, safety supervisor
3 for Mitsubishi, in which he told you that the lift
4 that day was probably going to be cancelled and put
5 over to another day because of the wind?
6 A Yes.
7 Q Tell us about that.
8 A When I walked up to him and asked him as to what the
9 progress was of the job to find out what we were --
10 my people were going to be doing later that day, he
11 informed me that the lift was probably going to be
12 postponed due to the wind.
13 MR. HABUSH: That's all I have.
14 THE COURT: Cross.
15 MR. BELL: Yes, Your Honor.
16 CROSS EXAMINATION
17 BY MR. BELL:
18 Q Mr. Ostrenga, you were aware that the lift was going
19 on that day when you arrived at the job site?
20 A I could see that the load was in the air, yes.
21 Q And you assisted Mr. Wayne Noel in clearing the
22 first base side, the right field side of the stadium
23 after you arrived at the job site?
24 MR. HABUSH: Your Honor -- excuse me.
25 MR. KOPLIN: Objection.

1 flapping, was it one of those little louvers or
2 what?
3 A No, sir. It was the entire panel.
4 Q And where was it loose?
5 A At the bottom.
6 Q And what was causing it to flap, in your
7 observation?
8 A It would have to be the wind.
9 Q And did you see that then fastened?
10 A No, I did not observe that.
11 Q Did you at approximately 1:30 p.m. have occasion to
12 speak to Victor Grotlisch?
13 A He approached me and spoke.
14 Q And where were you when this occurred?
15 A I was approximately a hundred feet west of the clock
16 tower setting -- resting on a gang box, tool box.
17 Q Is -- is the area that you're referring to shown on
18 one of these aerial shots in general that you could
19 point out this area of the clock tower and where you
20 were sitting?
21 A Yeah.
22 Q Okay. We've got 1775-F on the screen or on the
23 board here.
24 A Approximately in this area here.
25 Q Okay. And you said you were sitting on a gang box?

1 A Yes, sir.
2 Q What's that?
3 A A tool box.
4 Q Okay. And would you please tell us your best
5 recollection of what Victor Grotlisch said to you,
6 what you said to him.
7 A He said, God damn it. I can't even go down to
8 Kelly's and eat lunch. The media's down there, and
9 they think Local 8's on strike. And I looked at him
10 and I said, so you need us to fly this piece to show
11 them we're still working. And he said, that's
12 exactly right.
13 Q Mr. Ellison, at approximately 3:30 p.m., did you
14 also hear Wayne Noel make a statement on the radios?
15 A Yes, sir, I did.
16 Q And would you please tell the jury what you heard
17 from Wayne Noel over the radio at that time?
18 A He said, gentlemen, I would like for you to know
19 that I have reports of wind speeds of 32 miles per
20 hour.
21 Q Where were you located at the time the crane tipped
22 over?
23 A Approximately 50 yards north of the counterweights.
24 Q I apologize. I don't think I have a sticker with
25 your name on it to put on the exhibit, but maybe you

1 can point out on Exhibit 1831-H the general area
2 where you were depicted.
3 A Right here in front of this truss.
4 Q Okay. And what were you doing at that time?
5 A Waiting to go up in a man-basket and man my point.
6 Q And how did you realize that this disaster was going
7 to occur?
8 A The loud bangs.
9 Q And what did you do?
10 A The first one I didn't realize what was going on. I
11 just kind of looked around. The second one I looked
12 up at the tip of the boom because I knew I'd see
13 movement there first, and I watched it fall over.
14 MR. YOUNG: I have no further
15 questions. Thank you, Mr. Ellison.
16 THE COURT: Cross.
17 CROSS-EXAMINATION
18 BY MR. WEBER:
19 Q Mr. Ellison?
20 A Yes, sir.
21 Q How certain are you of the times that you're giving
22 us today?
23 A I'm certain.
24 Q Okay. So you're certain that you spoke with
25 Mr. Grotlisch at 1:30?

1 BY MR. YOUNG:
2 Q Now, Mr. Ellison, this statement, when abouts did
3 you provide it and to whom?
4 A I provided this statement to the business agent of
5 Local 8, and he forwarded it to OSHA.
6 Q All right. And we have highlighted on the screen --
7 Is this in your handwriting?
8 A Yes, sir, it is.
9 Q And did you write, "Wayne Noel came on the radio
10 twice stating `I just want you to know the wind
11 reports are gusts of 32 miles per hour;'" is that
12 correct?
13 A Yes, sir.
14 Q Okay. Now, you indicated you were on the lift
15 channel?
16 A Yes, sir.
17 Q Okay. And the lift channel was the channel that all
18 the ironworkers had access to?
19 A All the ironworkers involved with the lift, yes.
20 Q And was that also sometimes known as Channel 2?
21 A Yes, sir.
22 Q Now, the -- you knew that Mr. DeGrave had access to
23 the lift channel.
24 A Oh, yeah.
25 Q He's one of the ironworkers. And did you also know

1 Q Now, on July 14, 1999, about one hour before the
2 crane collapse, where was the piece?
3 A It was approximately -- could you repeat that again,
4 please?
5 Q Yeah. I'm going to ask you about a -- did you hear
6 a communication made by Wayne Noel over the radio?
7 A Yes, I did.
8 Q And when was that?
9 A Approximately an hour before the collapse.
10 Q Okay. And at that time where was the crane and the
11 roof piece?
12 A It was approximately 20 feet from the target area.
13 Q And had you, on prior occasions and on that day,
14 heard Wayne Noel's voice over the radio?
15 A Yes, I had.
16 Q And were you able to recognize his voice?
17 A Yes, I had.
18 Q What did you hear from Mr. Noel over the radio at
19 that time?
20 MR. OWENS: Objection, hearsay.
21 THE COURT: Overruled. You can
22 answer.
23 THE WITNESS: He stated that we had
24 sustained winds at 26 to 28 miles an hour.
25 MR. YOUNG: Now, make sure you use

1 that microphone. Was the jury able to hear?
2 THE JURORS: Yes.
3 MR. YOUNG:
4 Q Mr. -- did Mr. Noel announce himself when you heard
5 this statement?
6 A Yes.
7 Q And would you tell us, as best you recall, exactly
8 word for word in terms of the announcement and the
9 whole statement? And use the microphone please,
10 sir.
11 A He stated that it was Safety 1, and that's what he
12 called himself. His handle was Safety 1 on the
13 radio, so.
14 Q And what did he say then?
15 A That we had sustained winds of 26 to 28 miles an
16 hour.
17 Q And did this come over the same channel that you
18 were on with Mr. DeGrave?
19 A Yes.
20 Q And I guess we didn't go over that, but you were on
21 a channel -- well, tell us what channel were you on,
22 with whom, in order to do your work?
23 A I was on a radio channel with Bill Deck -- Bill
24 DeGrave.
25 THE COURT: Before you ask the next

1 in evidence to the extent they show video at Miller
2 Park. And we're going to lead in with some excerpts
3 which defense counsel has seen.
4 MR. WEBER: Two things, your Honor.
5 Object as to audio selections, which I think has
6 been resolved.
7 MR. YOUNG: That's stipulated to.
8 MR. WEBER: And as to offering the
9 whole tape in evidence, we object since only
10 portions of it, I think, are going to be used.
11 MR. CARLSON: Same objection. Same
12 stipulation.
13 THE COURT: I don't know if only
14 portions are going to be used until Mr. Young
15 finishes his direct and Mr. Weber and Mr. Bell
16 finish their cross and Mr. Carlson and Mr. Ehrke
17 finish their cross and redirect and recross and
18 recross.
19 So knowing that I can't read minds, I
20 think the fairest procedure is since there's no
21 specific objection to content per se, we'll conduct
22 the entire examination and then I'll entertain
23 motions to excise out those portions of the video
24 that are irrelevant, immaterial, or upon motion of
25 any of the parties that they not be used.

1 MR. YOUNG: Thank you.
2 THE COURT: But I'm not -- I'm not
3 going to just open the door and just leave two hours
4 of video sitting in the record. I agree with
5 Mr. Weber on that, so somehow you good lawyers with
6 all these, all these resources have to come up with
7 a way to edit out this material that's not relevant.
8 Did you understand all that?
9 THE WITNESS: I certainly did,
10 especially in television.
11 MR. YOUNG:
12 Q Mr. Malan, do you recall whether or not you gave a
13 weather report just prior to the station going to
14 breaking news with the incident at Miller Park?
15 A Actually, I had just finished. I believe there was
16 a commercial break before we were informed of the
17 accident.
18 Q And once the breaking news occurred and up until --
19 how late did you stay at the station?
20 A For the remainder of the night. Until about 11:00.
21 Q And can you tell us whether or not up until 7:00
22 then the station continued to broadcast about the
23 Miller Park incident?
24 A Exactly. They were on the air talking about Miller
25 Park. As soon as -- as soon as they heard or it

1 happened, then we were -- there was no interruption
2 in news.
3 Q And from that point on were -- was the broadcast
4 substantially live video taken from Chopper 4 at
5 Miller Park?
6 A Yes, it was.
7 Q And did the video over that time period show the
8 conditions at Miller Park?
9 A Yes.
10 Q Live?
11 A Live, yes.
12 MR. YOUNG: At this time, your Honor,
13 I would propose to play some excerpts from those,
14 the tape, and defense counsel has seen them.
15 MR. WEBER: Is this 1848 or 58?
16 MR. YOUNG: I've got it on an
17 separate -- 1548 is the 5:00 to 5:30, and then there
18 are, I believe, two excerpts that are -- one's at
19 approximately 5:40 and the other one is at 6:00, at
20 6:30 that we talked about.
21 THE COURT: Is everyone on the same
22 plateau with the excerpts?
23 MR. WEBER: It sounds like there's a
24 separate tape that the excerpts are going to be
25 shown, and maybe we can mark that for the record.

1 MR. YOUNG: Actually, I'm going to
2 play -- because one of the tapes is, for some reason
3 is not here in the courtroom. The first one we have
4 the excerpts on one tape, which I can mark if you
5 wish, but then the 1858 is here and that last
6 portion which I talked to you about we'll play off
7 of there because the quality is much better.
8 MR. WEBER: Okay. We'll work it out,
9 Judge.
10 THE COURT: All right. Let's proceed.
11 Mr. Young, do you need the back lights flipped
12 again?
13 MR. YOUNG: Yeah, I think it might be
14 good if we --
15 Q Mr. Malan, would you mind coming down here, and the
16 excerpts go fairly quickly so you can stand, and as
17 we play them, I'll ask you to point out some things
18 that you might see.
19 MR. YOUNG: Here's the stop, Ken.
20 Q Is that the banner for the 5:00 report?
21 A Yes.
22 Q Okay. And now the next item that -- do you recall,
23 Mr. Malan, that prior to the station learning of the
24 accident, your anchor, is that Mike Gousha, the
25 newsman Mike Gousha?

1 A Right.
2 Q Went to a live shot from your camera at Miller Park
3 of the lift?
4 A Yes, he did sometime earlier in the 5:00 news, yes.
5 Q Okay. And that's the next excerpt we have here,
6 which is at approximately 5:09.
7 MR. YOUNG: And the audio is down,
8 Mr. Jarvis?
9 MR. JARVIS: Yes.
10 MR. YOUNG:
11 Q Okay, so let's show that shot. What we're seeing
12 now is a -- why don't you explain what that is,is,
13 Mr. Malan.
14 A That's our station, what we call the Miller Park
15 cam -- I should address the jury -- Miller Park
16 camera, which is just looking at -- it's a
17 stationary camera looking at this crane lift, and
18 essentially the camera is mounted so it is a
19 stationary picture. So what you're just looking at
20 is live video at that time of Miller Park and the
21 crane, Big Blue, lifting the roof.
22 MR. YOUNG: Okay. Now, could you
23 replay that? I wanted to point out a couple of
24 things on there. Just that portion.
25 THE COURT: Nobody can read sign or

1 lips, can they? Anybody?
2 THE JURORS: No.
3 THE COURT: Okay, thank you. Please
4 don't try to.
5 MR. YOUNG:
6 Q Okay. Mr. Malan, when we --
7 MR. YOUNG: Oh, you've gone past it
8 already. Stop. Could you go back to the -- okay.
9 Not all the way.
10 Q Now, Mr. Malan, in the lower right-hand corner we
11 see the flagpoles. Are those -- where are those?
12 What is that?
13 A You mean the light poles?
14 Q The light poles, I'm sorry.
15 A The light poles, yes.
16 Q Is that -- those are the poles at County Stadium?
17 A At County Stadium, right, and they seem to be moving
18 in the wind.
19 MR. YOUNG: Okay. Now, the next --
20 can you just keep playing this?
21 Q Just in order to show the time, after this excerpt
22 do you remember, Mr. Malan, that you came on and
23 gave the temperatures and the time of day was shown
24 on the video?
25 A I remember doing the first forecast. I couldn't.

1 tell you exactly --
2 Q Okay. Well, watch the video.
3 A It'll be there? Okay.
4 Q This is the -- and this states the time --
5 A Right.
6 Q -- of day of the -- up until then?
7 A Right.
8 Q Now the next excerpt is your first forecast.
9 MR. YOUNG: And can you pause it right
10 there, Mr. Jarvis?
11 (Mr. Jarvis complies.)
12 MR. YOUNG:
13 Q You testified you gave a broadcast of the weather
14 prior to the station becoming aware of the Miller
15 Park incident?
16 A Exactly.
17 MR YOUNG: And for the record -- and,
18 Counsel, we can work out the exact details -- by our
19 estimation, this is approximately 5:18 on the tape.
20 And would you then proceed and -- Mr. Jarvis, and
21 I'll tell you when to pause it again?
22 (Mr. Jarvis complies.)
23 MR. YOUNG:
24 Q This is giving the temperatures at the time?
25 A Yes.

1 MR. YOUNG: And can you stop? Does it
2 always jump down like that?
3 MR. JARVIS: Yeah.
4 MR. YOUNG:
5 Q What I have here, Exhibit 1859, Mr. Malan, is that a
6 still photo of the screen image we're seeing right
7 now, which has what you reported for winds at
8 approximately 5:18 in the afternoon?
9 A Yes, it is.
10 MR. YOUNG: Okay. I move Exhibit 1859
11 into evidence.
12 THE COURT: Can he come back on the
13 witness stand?
14 MR. YOUNG: There's some more video
15 coming up.
16 THE COURT: Well, let's try to have him
17 look at the screen.
18 MR. YOUNG: Oh, that will be fine.
19 MR. WEBER: I'm sorry, the time you're
20 saying the wind is?
21 MR. YOUNG: Approximately -- well, he's
22 going to testify where he got it from, but this
23 broadcast is about 5:18 on the tape.
24 THE COURT: Is there any objection to
25 that exhibit?

1 MR. WEBER: No, Your Honor.
2 MR. CARLSON: No, Your Honor.
3 MR. YOUNG: You were -- Mr. Jarvis tells
4 me the video does not come through at that screen,
5 but we'll work it out.
6 THE COURT: It was earlier.
7 MR. YOUNG: The videotape can't. The CD
8 videotape can. Can you put that on?
9 THE WITNESS: I can probably --
10 THE COURT: You tell me where you're more
11 comfortable. Is it good just to get -- back off a
12 little bit and then watch it?
13 THE WITNESS: I'll probably be okay here,
14 Your Honor.
15 THE COURT: Okay. You do it at a level
16 that you feel comfortable with, okay?
17 THE WITNESS: Okay.
18 MR. YOUNG:
19 Q Okay. So we have 1859 on the screen, and this is
20 prior to the station going to your Miller Park
21 report; and, Mr. Malan, what did you tell everybody
22 about the winds?
23 A I was telling folks that Mitchell International
24 Airport reported southwest winds at 21 miles per
25 hour steady gusting to 26, and these come right from

1 the 5 o'clock hourlies provided by the National
2 Weather Service out of Mitchell International.
3 Q Okay. Now can we go back to the videotape?
4 According to our estimations of the tape, it's
5 around 5:23 or so, 5:20-ish, a little after that
6 that we get the breaking news. And we have it on
7 the screen here, Mr. Malan. Can you see it there?
8 A I have it here, yes.
9 Q Okay. Would you tell us what you see in the far
10 right with regard to the light poles at Miller Park?
11 A They're swaying in the wind.
12 Q Those are the County Stadium lines?
13 A County Stadium, right in the foreground.
14 Q And then down in the lower portion of the video we
15 see some bushes. What do you see there with regard
16 to wind?
17 A There are bushes or treetops blowing in the wind.
18 There's also a tarpaulin it looks like blowing in
19 the wind. There's a tarpaulin hanging off Miller
20 Park blowing in the wind.
21 Q Okay.
22 A But there's a lot of evidence here of wind.
23 Q All right. Now this goes on for a few more minutes.
24 In this -- do you recall at this point in the
25 broadcast and several times during the night you

1 folks going back to some film shot earlier in the
2 day? In fact, here it is. Do you see that?
3 A Yes.
4 Q And what -- what do you observe there with regard to
5 the light poles?
6 A Oh, again, they're swaying in the wind, the ones in
7 the foreground especially, the ones blocking the
8 view of the lift itself.
9 Q And in the upper left-hand corner just above the
10 black stripe that comes on, do you see the flag on
11 the crane?
12 A Yes.
13 MR. YOUNG: Okay. That was a stop
14 segment there. Mr. Jarvis, could you back up?
15 (Mr. Jarvis complies.)
16 MR. YOUNG: Go back farther, please, to
17 the beginning of this segment. Okay. Stop. Okay.
18 Now go forward.
19 (Mr. Jarvis complies.)
20 MR. YOUNG:
21 Q Okay. Now we can see the Miller Park flag on the
22 mast of Big Blue in the upper left?
23 A Yes, I can.
24 MR. YOUNG: All right. Now at this point
25 I want to switch to the other tape I believe.

1 Let's -- well, now this is -- I'm sorry. I forgot
2 about this portion.
3 Q This is Chopper 4 live?
4 A Right.
5 Q And as Chopper 4 gets up over the stadium, I'd like
6 you to point out any observations you see. Maybe
7 you see some now of wind on the top portion of
8 Miller Park.
9 A Well, there were some flags I had seen earlier, yes,
10 right on the top -- Do you want me to use this
11 pointer?
12 Q There you go.
13 A -- right there, blowing stiff in the wind, pretty
14 much straight out.
15 Q Okay. And then, Mr. Malan, can you -- do you see
16 this area here?
17 A Yes.
18 Q There's some tarpaulins there?
19 A It's kind of hard to make out.
20 Q It comes up later when they get more overhead. Now
21 do we see that --
22 A Yes.
23 Q -- blowing?
24 A That is blowing in the wind, yes.
25 Q Okay. And that would be -- would that -- how would

1 that be representative of wind conditions?
2 A Well, the tarpaulin versus the flag, you're getting
3 more of a gust effect of -- what you're looking at
4 right now, so you see more of a flapping turbulence
5 whereas where a flagpole has a flag straight out
6 above a prominent, you know, an obstruction, what we
7 call diffuse eddies or curls in the wind caused by
8 disruptions, the flag will fly straight out and give
9 you a more true perspective of actual wind speed.
10 This gives you more gusting.
11 Q That's where the portion gets kind of dark. This is
12 a better quality. And do you recall a segment which
13 was at approximately 6:28 or so with Mr. Jim Angeli,
14 a photo journalist?
15 A I believe so. Yes, he was part of the broadcast. I
16 believe he may have been up in the chopper at the
17 time.
18 Q And there's a closeup of the flag that you pointed
19 out. Do you recall that?
20 A Yes.
21 Q Okay. I believe we're going to show that now. And
22 we see the American flag on a ring beam blowing in
23 the wind there, sir?
24 A Blowing stiff in the wind, yes, straight out,
25 indicating very steady, strong winds.

1 Q We also see in the foreground the blowing of the
2 trees?
3 A Uh-huh. Yes, sir.
4 MR. YOUNG: Okay. That's it. Thank you,
5 Mr. Jarvis.
6 Q Now, during the broadcast, did you have occasion to,
7 at approximately I think it's about 8 -- or 5:40,
8 right in the initial sequence after the accident, go
9 on the air with Mr. Gousha and tell about the
10 information you had about wind over the course of
11 the afternoon?
12 A Yes, we did. I don't know the exact time. I'm sure
13 you have it off the tape, but yes, we did have a --
14 I was notified by our administration that we were
15 going to do, you know, full coverage of the
16 accident, and my job was to give weather conditions
17 at the time or shortly after, what were the wind
18 speeds, what were the peak gusts, things like that.
19 Q Okay. And did you -- at your deposition we gave you
20 a transcript that you looked at?
21 A Yes.
22 Q And do you recall at the deposition that you tracked
23 it with the video and it was accurate?
24 A Right, it was.
25 Q Let me show you a copy of Exhibit 372. Is that that

1 35, 36, or 37 miles per hour as far as peak winds
2 gusts.
3 Q And then on Exhibit 372, we have pretty much your
4 wrap-up statement at the end, and could you tell the
5 jury, based on all the information that you had
6 available to you that afternoon, in general, what
7 were the wind conditions over the southeastern
8 Wisconsin area that included Miller Park?
9 A Twenty to 25 miles per hour steady and wind gusts to
10 over 35.
11 Q The -- this may be a multiple question because
12 you've got a lot of data points there, but can you
13 give us an idea in general or specific about the
14 height at which those wind speeds that you've talked
15 about are being measured?
16 A They all vary. The station -- our station
17 anemometer is about 75 feet off the ground on a
18 tower.
19 Q And how high is it above any obstructions?
20 A Forty feet.
21 Q Okay.
22 A Thirty to 40 feet. Thirty to 40 feet. The instant
23 weather network that we get 35-, 36-, 37-mile-per-
24 hour gusts from are located at schools around
25 southeastern Wisconsin. Some of those are on

1 BY MR. HABUSH:
2 Q And when you expressed your concerns to
3 Mr. Grotlisch, what would he tell you with respect
4 to what part of your body he hired you for?
5 MR. WEBER: Same objection.
6 THE COURT: Overruled.
7 THE WITNESS: There were statements
8 made that we were hired from the neck down, and that
9 was what we were basically hired, as a labor force,
10 and they would do the thinking, and we would do the
11 labor.
12 BY MR. HABUSH:
13 Q Did he say that to anyone else in your presence
14 other than saying it to yourself?
15 A Yes, sir.
16 Q Who else did he make that comment to that you
17 witnessed?
18 A Mr. Garnhardt.
19 Q And who is Mr. Garnhardt?
20 A Mr. Garnhardt was also an on-site superintendent for
21 DCCI.
22 Q Now, Mr. Upton, you were on site on the day of the
23 incident on July 14th?
24 A Yes, sir.
25 Q And tell us whether you had occasion that day to see

1 standing there.
2 Q Where was Mr. Noel standing?
3 A Mr. Noel was in this area right in here.
4 Q And did you indicate on that picture Wayne, pointing
5 to that spot, and you, Kirt, pointing to where you
6 were when you first came up?
7 A That's correct, sir.
8 Q When you went up on the terrace -- leave that
9 picture up, please -- what direction were you coming
10 from to walk over to see Mr. Noel?
11 A I would have been to the east of Mr. Noel.
12 Q Mr. Noel had testified in this trial that you were
13 on the terrace level walking across an area at the
14 time that you were on the south side walking from
15 south to north to get to him. Is that the truth or
16 not?
17 A No, sir, that's incorrect.
18 Q Tell us what is correct.
19 A There's a ramp right here going up through the
20 building. I had access to the building on this
21 side, came across the terrace floor, and then came
22 up the stairwell right here, as I said.
23 Q What did you observe about Mr. Noel when you saw
24 him?
25 A Mr. Noel was looking over the edge of the building.

1 Q And did you see him doing anything when he was
2 looking over the edge of the building?
3 A Yes, sir, I did.
4 Q Tell us what you saw.
5 A I saw Mr. Noel with his arm extended over the edge
6 of the building taking a wind reading.
7 Q With what?
8 A With a hand-held anemometer.
9 Q Prior to that time, did you know what a hand-held
10 anemometer looked like?
11 A Yes, sir.
12 Q Had you used them yourself in the trade?
13 A Yes, sir.
14 Q Have you used them since July 14th, 1999, in the
15 trade?
16 A Yes, sir.
17 Q And did you describe at the time of your deposition
18 what color that hand-held anemometer was?
19 A Yes, sir.
20 Q What did you describe?
21 A I said I believed that it was red.
22 Q And at the time you said that in your deposition
23 that we took, which was taken on September 15th, had
24 you been shown any hand-held anemometers by us?
25 A No, sir.

1 lunch.

2 "Q Did you ever leave the job site

3 on the 14th?

4 "A Yes, I did.

5 "Q What time?

6 "A I don't recall the exact time.

7 "Q I didn't ask you the exact time.

8 Give me an approximate.

9 "A Approximate, somewhere between

10 3:00, 3:30.

11 "Q And where did you go?

12 "A I went home, packed and went to

13 the airport.

14 "Q What time were you at the

15 airport?

16 "A 4:30, somewhere in there."

17 MR. YOUNG: Page 42, line 5:

18 "Q Now, let's proceed. What did you

19 observe about the weather, and let's talk about the

20 morning of the 14th."

21 MR. YOUNG: Mr. Owens?

22 MR. OWENS: "Other than what he's

23 already told you?" It's an objection, Judge,

24 repetitive.

25 THE COURT: Overruled.

1 "Q Answer the question.
2 "A As I stated, it was a sunny day
3 and it was a little windy.
4 "Q Was it sunny at 8:00 in the
5 morning?
6 "A To the best of my recollection,
7 yeah.
8 "Q Was it a little windy in the
9 morning?
10 "A Yes.
11 "Q Was it a little windy in the
12 afternoon?
13 "A At times.
14 "Q What is your definition of a
15 little windy?
16 "A I could just see the leaves on
17 the trees.
18 "Q You saw the leaves on the trees
19 doing what -- do what?
20 "A Blowing in the wind.
21 "Q Are you able to define for me in
22 terms of miles per hour what a little windy means to
23 you?
24 "A No.
25 "Q You can't tell me who whether a

1 little windy is 5 miles per hour or 10 miles per
2 hour or 15 miles per hour?
3 "A I don't know what speed of wind
4 it takes to move the leaves on the trees."
5 MR. YOUNG: Page 64, line 7:
6 "Q Would you agree with this
7 statement, Mr. Frazer, that if you were aware of
8 winds at 20 miles per hour gusting to 25 miles per
9 hour, that that would cause you some concern with
10 respect to a lift of a roof piece the size of 4R3?
11 "A Please repeat that?
12 "Q Yes. I'm asking you, do you
13 agree that if the winds were 20 miles per hour
14 steady, gusting to 25 miles per hour, would that
15 have caused you some concern of continuing the lift
16 of 4R3?
17 "A Yes.
18 "Q Right?
19 "A Yes.
20 "Q Why?
21 "A Well, you're always concerned
22 about the wind when you make the lifts.
23 "Q Why?
24
25

1 "A We can't operate the crane in windy
2 conditions. It's unsafe.
3 "Q Why?
4 "A Due to the loading of the lift.
5 "Q Why?
6 "A High winds create extra load. Pushes
7 the load outside the center of the boom.
8 "Q Have you ever heard the term 'sail
9 effect'?
10 "A Yes.
11 "Q Is that what you're talking about?
12 "A Yes."
13 MR. YOUNG: Page 96, line 1:
14 "Q When you got to that -- to the
15 airport that afternoon, what time was it on the
16 14th?
17 "A I don't recall the exact time. It
18 was approximately 4, 4:30.
19 "Q Did you notice whether it was very
20 windy when you got to the airport?
21 "A To tell you the truth, I wasn't even
22 paying attention.
23 "Q So you didn't notice?
24 "A No.
25 "Q Did it occur to you at all during the

1 day, including up to the time you were at the
2 airport, that it was too windy to do the lift that
3 day?
4 "A At the time that I was on site, it
5 appeared to be too windy. I'm not certain. I
6 didn't go check.
7 "Q Who did you tell that you thought it
8 was too windy?
9 "A Nobody.
10 "Q Why not?
11 "A I wasn't associated with that work.
12 That was not my duties that day.
13 "Q I see. So if you had been associated
14 with the lift, then you would have expressed
15 yourself, but since you weren't, you didn't?
16 "A Sir, I didn't know the -- I didn't
17 know what the wind was like when they made the pick.
18 "Q But you knew it was too windy?
19 "A I know what the conditions were when
20 I was on site, yes.
21 "Q It was too windy?
22 "A When I was on site, yes.
23 "Q Did that cause you any concern for
24 the safety of your brethren who worked for
25 Mitsubishi or any other employees?

1 "A I had no idea what they were planning
2 to do.
3 "Q You knew they were going to go ahead
4 with the lift you thought?
5 "A I don't recall saying that.
6 "Q Didn't you think they were going to
7 go ahead with the lift?
8 "A I had no idea.
9 "Q So why did you keep it to yourself?
10 "A Keep what to myself?
11 "Q Your opinion that it was too windy to
12 do the lift.
13 "A I stated that if the lift was going
14 to take place when I was on site, it would have been
15 too windy to make the pick.
16 "Q But why didn't you tell anyone that,
17 Mr. Frazer?
18 "A They weren't making the pick.
19 "Q How do you know that?
20 "A I could see it on the ground.
21 MR. YOUNG: Page 100, line 3:
22 "Q Let's back up, Mr. Frazer. We sure
23 don't want to have any misunderstanding.
24 "A Okay.
25 "Q In your observations that day when

1 you were on the job site, you didn't think or you
2 didn't know the lift was going to go forward, am I
3 correct?
4 "A Correct.
5 "Q Is that what you've testified to?
6 "A Correct.
7 "Q And you testified that you thought it
8 was very windy when you were on the job site. Did
9 you testify to that a few minutes ago?
10 "A No.
11 "Q You deny you said that?
12 "A I deny I said very windy.
13 "Q Do you deny that you said it was too
14 windy to go ahead with the lift?
15 "A At the time I was there, it appeared
16 to me, yes, it could have been.
17 "Q Too windy to go ahead with the lift?
18 "A Yes.
19 "Q Now assuming that you felt that way,
20 that it was too windy to go ahead with the lift, and
21 you were part of the lift, okay?
22 "A Okay.
23 "Q Would you have recommended aborting
24 the lift?
25 MR. OWENS: Object to the form of the

1 IN THE CIRCUIT COURT OF MILWAUKEE COUNTY

2 STATE OF WISCONSIN

3

4 PATRICIA WISCHER, individually,
and as Special Administrator of the
5 ESTATE OF JEFFREY A. WISCHER, deceased;
MARJORIE DeGRAVE, individually,
6 and as Special Administrator of the.
ESTATE OF WILLIAM R. DeGRAVE, deceased;
7 and RAMONA DULDE-STARR, individually,
and as Special Administrator of the
8 ESTATE OF JEROME STARR, deceased,

9 Plaintiffs,

10
-vs- Case No. 99-CV-006553
11

12 MITSUBISHI HEAVY INDUSTRIES,
AMERICA INC., TRAVELERS
13 PROPERTY CASUALTY INSURANCE
COMPANY, THE TRAVELERS INDEMNITY
14 COMPANY OF ILLINOIS, NEIL F. LAMPSON,
INC., HCH MILLER PARK JOINT VENTURE,
15 HUNZINGER CONSTRUCTION COMPANY,
CLARK CONSTRUCTION BUILDERS, INC.,
16 and HUBER, HUNT & NICHOLS, INC.,

17 Defendants.

18

19 October 25th, 2000

20 VOLUME VIII

21 TRANSCRIPT OF JURY TRIAL

22 Before:
HONORABLE DOMINIC S. AMATO
23 Circuit Court Judge Presiding

24 Court Reporters: Debra A. Wisniewski, CRR/RMR
Constance L. Bauer, CRR/RMR
25 Julie A. Poenitsch, CRR/RMR

1 that the load was going to be 97 percent of the
2 capacity of the crane; isn't that correct?
3 A Yes, sir.
4 Q That's getting kind of close, isn't it?
5 A Yes, sir.
6 Q Were you concerned about that?
7 A Yes, sir.
8 Q Did you express your concern to Victor Grotlisch?
9 A Yes, sir.
10 Q Victor Grotlisch made the decision to lift 4R3, did
11 he not?
12 A Yes, sir.
13 Q He made the decision as to when it was going to be
14 lifted; correct?
15 A Yes.
16 Q He made the decision on what the weather was going
17 to be like or should be like to lift the piece, did
18 he not?
19 A He made the decision to make the lift that day.
20 Q And he made the decision to go that day, did he not?
21 A Yes.
22 Q And it was within his power, his discretion, and his
23 judgment on whether to stop it; isn't that true?
24 A Yes, sir.
25 Q And his decision was, for you, as far as you know,

1 now going to need that space for the other reporter.
2 MR. HABUSH: I'm moving it.
3 THE COURT: Thank you. Okay. You can
4 answer the question, if you have it in mind.
5 MR. HABUSH:
6 Q Do you understand what I'm saying?
7 A Yes, sir.
8 Q When you go from a shorter boom and a shorter jib to
9 a longer boom and a longer jib, what affect does it
10 have on operation?
11 A You have to watch everything just that much more
12 closely.
13 Q Does it create potential hazards that don't exist on
14 the shorter length?
15 A Well, your capacity goes down, your loading on the
16 front crawler would go up. Yes, there's a lot of
17 things it would entail.
18 Q You didn't need to have a crane with that length of
19 boom and jib in order to conduct the operations on
20 July 14th, did you?
21 A No.
22 Q You could have used a shorter boom and a shorter
23 jib; correct?
24 A Yes, sir.
25 Q And it was Victor Grotlisch's request that that

1 length of boom was made and the length of the jib
2 was made. Are you aware of that?
3 A Yes.
4 Q And do you know why he made that request?
5 A No.
6 Q On that same point, originally on the lift plan the
7 roof piece was going to be lifted and it was going
8 to be swung, if you can visualize this as a clock,
9 in a counterclockwise rotation over the V.A.;
10 correct?
11 A Yes.
12 Q And that would have resulted in the piece being
13 lifted at a lower altitude than what ultimately was
14 done; correct?
15 A Yes.
16 (End of take.)
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1 Q And when you left the prelift meeting that day,
2 everyone was on the assumption that it was going to
3 be done that way that I've just described, correct?
4 A Yes.
5 Q And those plans were changed on the -- sort of on
6 the spot after you got to the field, correct?
7 A After we lifted it up?
8 Q Yes.
9 A Yes.
10 Q And the decision to go the other way around, which
11 required this roof piece to be lifted at a higher
12 altitude over the -- what would be the north part of
13 the erected stadium, was that something that Victor
14 Grotlisch understood and knew?
15 A I told Victor that we were either going to have to
16 set the load down and relevel the front crawler, or
17 the only way out of the position that we were in was
18 to back up, and, therefore, it would have had to
19 change the direction of the swing.
20 Q He didn't want to do that?
21 A No.
22 Q Why not?
23 A Because we wouldn't -- most likely would not have
24 been able to make the lift that day.
25 Q But that would have been a safer plan, wouldn't it?

1 A Yes.
2 Q Because when this piece had to be lifted the way it
3 ended up being lifted, going clockwise, being lifted
4 over the north part of the erected stadium, and had
5 to go higher, it would be exposed to more variable
6 and higher winds, would it not?
7 A I don't know about higher winds, but it would have
8 been exposure time higher, yes.
9 Q What about the movement of the crane itself? By
10 going in this -- this on-the-spot devised plan,
11 would it require the crane to make a longer trip
12 down the runway than had otherwise been considered?
13 A Not really, sir. The front crawler had to always
14 move the same distance.
15 Q So the amount of distance from north to south, would
16 that have been the same under either plan?
17 A Yes. The load just would not have been over the
18 structure except for a small period of time.
19 MR. HABUSH: If you could put that up
20 again, please, Ken.
21 Q Were there -- Was there stuff or items left off
22 this -- Strike that. Where did you get the weights
23 from? Who gave the numbers of the weights that are
24 on that lift plan?
25 A Most of them came from Lampson's engineer from the

1 A We just didn't have very much information, no.
2 Q You didn't get very much information from
3 Mr. Grotlisch.
4 A Not very much.
5 Q Did they seem to really know what they were doing,
6 Mr. Watts?
7 MR. BELL: Objection.
8 THE COURT: Just give me grounds.
9 MR. BELL: Foundation.
10 THE COURT: Sustained. Reask the
11 question.
12 BY MR. HABUSH:
13 Q How many lifts and experience had you been involved
14 in before you got to Miller Park?
15 A Thousands.
16 Q Had you ever seen a sloppier operation as that
17 conducted by Victor Grotlisch before you got to
18 Miller Park?
19 MR. BELL: Objection.
20 THE COURT: Overruled. You can
21 answer.
22 THE WITNESS: No.
23 BY MR. HABUSH:
24 Q You signed this lift plan, correct?
25 A Unfortunately.

1 Q How long did he address that group? Minutes?
2 A Off and on for five minutes, ten minutes.
3 Q Did you see him reading from a script?
4 A He had a note pad that he was looking at.
5 Q And when he said or someone said, now anyone can
6 stop this lift, how many times have you heard that?
7 A Quite a few.
8 Q That's said at every lift meeting, wasn't it?
9 A Yes.
10 Q And everyone knew what they were talking about when
11 he said it.
12 MR. BELL: Objection, Your Honor.
13 MR. HABUSH: I'll withdraw the
14 question. Poorly phrased question.
15 THE COURT: Go ahead.
16 BY MR. HABUSH:
17 Q You knew, did you not, Mr. Watts, when he was
18 talking about that, what they meant is that should
19 there be a temporary emergency situation, something
20 breaks, something goes wrong, someone puts
21 themselves in harm's way and someone sees it, they
22 can say stop, correct?
23 A Yes.
24 Q But there wasn't one soul on that job site, other
25 than Victor Grotlisch and Wayne Noel, based upon

1 practice and -- custom and practice that had
2 preceded July 14th, that you knew could say everyone
3 go home, the lift is off, we're going to do it
4 tomorrow; isn't that true?
5 A True.
6 Q As a matter of fact, you learned, did you not, early
7 on, when you got to the job site and had once voiced
8 an objection to Victor Grotlisch -- Remember --
9 remember that?
10 A Yes, sir.
11 Q That was lift what?
12 A One -- It would have been designated 4R1.
13 Q And you voiced some concerns to Mr. Grotlisch about
14 doing the lift?
15 A Yes.
16 Q Tell the jury and the Court what Mr. Grotlisch said
17 to you then.
18 A It was on a Sunday afternoon. It had taken us quite
19 a while to rig to this piece, and it was roughly the
20 same size and dimension and weight of 4R3. And like
21 I say, it was late in the afternoon by the time we
22 got it done, it was on a Sunday, we had already
23 worked approximately 10 hours, and I thought it
24 would be best, and so did some of the other people
25 around there, most of the other people, that we

1 would wait until the next morning.
2 And that was brought up to Victor, and
3 he said, no, we're going with it now. And I believe
4 one of his answers to me was that there was a
5 baseball game going on, and he wanted it in the air
6 so people could see it.
7 Q So people could see it. What were the winds that
8 day?
9 A Ten, twelve, fourteen.
10 Q How late did you have to work, you and the other
11 ironworkers?
12 A The ironworkers worked up until about 9:00 or 9:30,
13 and it got dark, and there was not very much
14 lighting there, so they went home. We stayed all
15 night.
16 Q All night.
17 A Yes, sir, in -- I take that back. There was four
18 of us, and I split the crew up so we could get like
19 three or four hours sleep each. Two guys stayed on
20 the crane, and then the other two guys would come
21 out and spell them.
22 Q It could have been done the next day, right?
23 A What's that, sir?
24 Q What you did could have waited until the morning,
25 couldn't it?

1 A Yes, sir.
2 Q Isn't it more dangerous to work at night than the
3 daylight hours, everything else being equal?
4 A Most definitely.
5 Q And so you were rebuffed by Mr. Grotlisch, were you
6 not?
7 A Yes, sir.
8 Q Mr. Watts, you knew why Milo Bengtson was sent away
9 from that job, did you not?
10 A Basically.
11 Q You knew it was because he had been arguing with
12 Victor Grotlisch over certain matters?
13 A Matters, yes.
14 Q When you got to the job site, did -- maybe within
15 the first day or so, did Mr. Grotlisch have a
16 discussion with you as to just what your place was
17 there?
18 A Yes, sir.
19 Q Tell the Court and jury what he said to you.
20 A He told me my job was to guide the crane, make sure
21 the rigging was on the crane, and not to get into
22 any of the political trappings on the job, not get
23 chummy with the subcontractors, to do what he told
24 me to do, and I worked for him.
25 Q And before you went there, your instructions from

1 your responsibility in the field and Mr. Grotlisch,
2 because you've been given a title, superintendent,
3 have you not?
4 A Yes.
5 Q In that position in the field within the industry,
6 what do you do?
7 A In the industry or on this job?
8 Q On this job.
9 A On this job I flagged the crane and worked with the
10 supervision of Dumas and Danny's to try to
11 accomplish our job.
12 Q And what was Mr. -- As you worked with him, what
13 was Mr. Grotlisch's responsibility?
14 A Seemed like he was directing everything.
15 Q Was he directing you?
16 A Yes.
17 Q Did you take your orders from him?
18 A Yes.
19 Q Did you try to follow his orders?
20 A To the best of my ability.
21 Q Now, in the movement of the crane from the initial
22 pick to its final resting spot, Mr. Habush asked you
23 about having some marks that were made on the ground
24 or on the gravel. Do you recall that as a subject
25 matter?

1 IN THE CIRCUIT COURT OF MILWAUKEE COUNTY
STATE OF WISCONSIN

2

3 PATRICIA WISCHER, individually,
and as Special Administrator of the
4 ESTATE OF JEFFREY A. WISCHER, deceased;
MARJORIE DeGRAVE, individually,
5 and as Special Administrator of the.
ESTATE OF WILLIAM R. DeGRAVE, deceased;
6 and RAMONA DULDE-STARR, individually,
and as Special Administrator of the
7 ESTATE OF JEROME STARR, deceased,

8 Plaintiffs,

9 -vs- Case No. 99-CV-006553

10

11 MITSUBISHI HEAVY INDUSTRIES
AMERICA, INC., TRAVELERS
12 PROPERTY CASUALTY INSURANCE
COMPANY, THE TRAVELERS INDEMNITY
13 COMPANY OF ILLINOIS, NEIL F. LAMPSON,
INC., HCH MILLER PARK JOINT VENTURE,
14 HUNZINGER CONSTRUCTION COMPANY,
CLARK CONSTRUCTION BUILDERS, INC.,
15 and HUBER, HUNT & NICHOLS, INC.,

16 Defendants.

17

18

19 October 26, 2000

20 VOLUME IX

21 TRANSCRIPT OF JURY TRIAL

22 Before:
HONORABLE DOMINIC S. AMATO
23 Circuit Court Judge Presiding

24 Court Reporters: Debra A. Wisniewski, CRR/RMR
Constance L. Bauer, CRR/RMR
25 Julie A. Poenitsch, CRR/RMR

1 THE COURT: Do you want the lights
2 back?
3 MR. HABUSH: Please. Thank you.
4 Q Have I asked you some way that we can demonstrate to
5 the Court and jury the amount of surface space that
6 that roof piece represented?
7 A Surface area, yes.
8 Q Yes.
9 A Yes.
10 Q Let me show you what has been marked as Exhibit
11 1711.
12 MR. HABUSH: We offer this into
13 evidence.
14 MR. WEBER: No objection.
15 MR. CARLSON: No objection.
16 THE COURT: Received.
17 BY MR. HABUSH:
18 Q What does that represent, Mr. Keefe?
19 A If you look at the 4R3 roof section, there are --
20 it's made up of a number of individual elements.
21 Each has exposed area.
22 And Mr. Shapiro went through and
23 calculated all the affected areas that are exposed
24 to the wind and affected by the wind with different
25 factors involved, and he came up with an area of

1 about 9100 square feet of area that's affected by
2 the wind to -- to catch the wind and apply force to
3 the crane.
4 And looking for something to equate
5 that to, it's about the same as three and a half --
6 the area of three and a half wings of a Boeing 747.
7 So that's a simple graphic to illustrate that.
8 Q Okay. Then I asked you if you could come up with
9 something graphic to show how heavy this piece was
10 that would represent something we could all identify
11 with, correct?
12 A Correct.
13 MR. HABUSH: Exhibit 1713 offered into
14 evidence.
15 MR. WEBER: No objection.
16 MR. CARLSON: No objection.
17 THE COURT: Received.
18 BY MR. HABUSH:
19 Q What did you come up with -- What did we come up
20 with on that?
21 A We equated it to a common car that everyone has
22 seen, a Ford Taurus, which weighs about 3200 pounds,
23 and 285 Ford Tauruses is about the same weight as
24 4R3.
25 Q Did I ask you -- That's fine, Ken. Did I ask you,

1 IN THE CIRCUIT COURT OF MILWAUKEE COUNTY
STATE OF WISCONSIN

2

3 PATRICIA WISCHER, individually,
and as Special Administrator of the
4 ESTATE OF JEFFREY A. WISCHER, deceased;
MARJORIE DeGRAVE, individually,
5 and as Special Administrator of the.
ESTATE OF WILLIAM R. DeGRAVE, deceased;
6 and RAMONA DULDE-STARR, individually,
and as Special Administrator of the
7 ESTATE OF JEROME STARR, deceased,

8 Plaintiffs,

9
-vs- Case No. 99-CV-006553
10

11 MITSUBISHI HEAVY INDUSTRIES
AMERICA, INC., TRAVELERS
12 PROPERTY CASUALTY INSURANCE
COMPANY, THE TRAVELERS INDEMNITY
13 COMPANY OF ILLINOIS, NEIL F. LAMPSON,
INC., HCH MILLER PARK JOINT VENTURE,
14 HUNZINGER CONSTRUCTION COMPANY,
CLARK CONSTRUCTION BUILDERS, INC.,
15 and HUBER, HUNT & NICHOLS, INC.,

16 Defendants.

17

18

19 October 27, 2000

20 VOLUME X

21 TRANSCRIPT OF JURY TRIAL

22 Before:
HONORABLE DOMINIC S. AMATO
23 Circuit Court Judge Presiding

24 Court Reporters: Debra A. Wisniewski, CRR/RMR
Constance L. Bauer, CRR/RMR
25 Julie A. Poenitsch, CRR/RMR

1 Q And how long did you do that?
2 A I think the first meeting was in 1973.
3 Q And have there been a series of meetings since that
4 time?
5 A Every year.
6 Q And every year are you the American representative?
7 A I'm one of them, although I've missed a few years.
8 Q And have you been chairman of the Technical Advisory
9 Group or Subcommittee on crane design?
10 A Yes, sir.
11 Q And who is that for?
12 A That's an SAE subcommittee that advises the American
13 delegates to the ISO --
14 Q I see.
15 A -- committee.
16 (End of take.)
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1 direction created by the weight of the crane itself
2 and the load.
3 Q We've heard a lot about load charts, the jury and
4 the Court and us. We think we know what they are by
5 now. But based upon your -- your lifetime
6 experience and your -- your teachings, just how
7 important is it to follow the load chart?
8 A The load chart is really the main communication
9 between the manufacturer of the crane and the users
10 of the crane. It tells you what the crane is
11 capable of doing, and it sets up the limitations on
12 the use of the crane. And those are just the
13 necessary things that you have to deal with to use a
14 crane safely.
15 Q The load chart, in addition to giving information
16 about what weights can be lifted at various boom
17 lengths and at various angles, gives information
18 about what is a safe wind to operate the crane; is
19 that correct?
20 A They often do, yes.
21 Q And you saw the load chart for this case?
22 A Yes, sir, I did.
23 Q And did that indicate a wind of 20 miles per hour?
24 A It did.
25 Q What is the manufacturer telling the user when they

1 put that 20-mile-an-hour limitation on it?
2 A They're saying that no matter what you're doing with
3 this crane, if you're going to be lifting loads, 20
4 miles an hour is the maximum wind speed that you can
5 permit during that operation or that you can conduct
6 that operation in.
7 Q What is the fact that when they're saying that, that
8 they're only talking about the crane itself without
9 any load on it?
10 A Well, in this case, that was specified in the -- in
11 a note to the rating chart that the 20 miles an hour
12 applied to the crane itself and that wind effects on
13 the load had to be considered as well.
14 Q What -- what is the fact as to whether any user
15 reading that load chart, that Paragraph 10 which
16 says that the specifications do not anticipate or
17 take into consideration the wind on the load, what
18 does that tell the user as to whether they can be
19 comfortable, happy, with winds 20 miles an hour?
20 A It would depend on the wind exposure area of the
21 load. If it had any kind of material wind exposure
22 area, the 20 miles per hour is no longer permitted.
23 Q So what you're saying is that you have to take it on
24 a case-by-case basis?
25 A Yes, sir.

1 Q Or put it differently, a lift-by-lift basis --
2 A That's correct.
3 Q -- correct? There are some objects that, say, Big
4 Blue could lift that were of sufficient
5 insignificant size that the 20 miles an hour would
6 be okay?
7 MR. BELL: Your Honor, let me just
8 object to Mr. Habush testifying. This is direct
9 examination, and I believe he should be not entitled
10 to lead his own witness.
11 MR. HABUSH: I believe the objection
12 is leading, and I think that's all that's necessary.
13 THE COURT: Rephrase the question.
14 MR. HABUSH: Sure, I'll be glad to,
15 Your Honor.
16 THE COURT: Sure.
17 BY MR. HABUSH:
18 Q Tell us, Mr. Shapiro, when the 20-mile-an-hour
19 limitation on the load chart with Big Blue would be
20 an okay speed with a certain specific kind of load.
21 A It would be a situation, and as a common situation,
22 where you're lifting a very small, but heavy object,
23 which may not be near the capacity of the crane, but
24 has a smaller wind exposure area, and then the 20
25 miles an hour would be okay.

1 Q I'm going to be asking you some opinions from time
2 to time, and I'd like you to assume that whenever
3 you express your opinion, it's to a reasonable
4 degree of scientific probability within the area of
5 your expertise, okay?
6 A Yes, sir.
7 Q So I don't have to keep repeating myself, all right?
8 A Yes.
9 Q What is your opinion as to whether it was reasonable
10 for Mitsubishi at Miller Park on the 14th to
11 consider when lifting a piece the size of 4R3 that
12 20 miles an hour would be a reasonable speed to lift
13 in?
14 A That wasn't the reasonable decision.
15 Q Nineteen miles an hour?
16 A You can't pick numbers out of the air. It's
17 necessary to do a calculation to determine what's a
18 safe wind speed.
19 Q We'll get to that in a moment. Let's talk about
20 lift plans, okay?
21 A Yes, sir.
22 Q You've had lots of experience looking at lift plans?
23 A And making them, yes.
24 Q You've actually made lift plans?
25 A Yes, sir.

1 Q That is, authored them yourself?
2 A Yes, sir.
3 Q You looked at the lift plan that was involved in the
4 particular lift on the 14th?
5 A I never saw anything that I would characterize as a
6 lift plan for the work on the 14th.
7 Q Well, they called it a lift plan.
8 A Yes.
9 Q Tell us how you would characterize its adequacy.
10 A Well, I saw one piece of paper I think was titled
11 "Lift Plan" that was filled out by Allen Watts at
12 5:30 in the morning on the 14th, and all that was
13 was a recitation of the length of the boom and jib
14 and the weight of the load and the weight of the
15 rigging and odds and ends. It wasn't a lift plan.
16 Q Mr. Watts testified that he got that form from
17 Mitsubishi and -- and -- and then after certain
18 information he put in there, certain information he
19 got from Mitsubishi, and then he signed it. In your
20 opinion, do you have an opinion as to whether the
21 lift plan that has been called a lift plan was,
22 based on your experience, sufficient, adequate,
23 appropriate?
24 A It was inappropriate.
25 Q Why?

1 A I don't characterize it as a lift plan. It's just a
2 recitation of some information concerning the lift,
3 but there's not a plan there.
4 Q Tell me -- tell us what a lift plan really is or
5 should be.
6 A Well, of course, it varies with the circumstances of
7 the lift, but it has to address such things as not
8 only the weight of the load to be lifted and the
9 rated capacity at the operating conditions, which
10 was on this form, it has to show the position that
11 the crane starts out with and the load starts out
12 with and the steps that have to be taken to get the
13 load and the crane from the initial position to the
14 final position.
15 It's got to include whatever
16 limitations there are on the operation, which may
17 include the levelness of their travel surface, wind
18 limitations. It should address such risks as may
19 come up during various parts of the operation and
20 what measures ought to be taken either to eliminate
21 or ameliorate those risks.
22 Sometimes a lift plan may include
23 checking and measuring activities to make sure that
24 everything is functioning properly along the way.
25 Q Is that usually a multipage document?

1 A It often is, and it usually contains one or more
2 drawings and may include one or more pages of text
3 as well.
4 Q Now, Mitsubishi has characterized the lift that
5 occurred on the 14th of July as an engineered lift.
6 A Yes, sir.
7 Q What is your understanding of when someone calls a
8 lift an engineered lift, what do you understand that
9 to mean?
10 A That would be a lift that -- I call that a
11 subcategory of a critical lift, and a critical lift
12 is one where the conditions are such that you're
13 nearing capacity or there are other situations that
14 raise the level of risk, and an engineered lift is
15 the subset of that where engineering input is needed
16 to satisfy some of the problems involved in the
17 lift.
18 Q Now, we saw earlier that the critical lift was
19 defined as -- as where the capacity -- where the
20 load that is being lifted is 80 percent or more of
21 capacity. That's their definition of a critical
22 lift.
23 A That's one definition that's used.
24 Q And, of course, the load that day was in 80 percent
25 or greater of capacity of this crane, was it not?

1 A It was about 97 percent, yes.
2 Q When someone says, someone who is in charge of -- of
3 the lifting operation, that we are -- this -- this
4 lift has been engineered, what type of engineering
5 calculations is that supposed to include?
6 A Well, in a general sense, it would include any
7 engineering calculations that are necessary to
8 successfully carry out the lift. It could be
9 different areas where you would have engineering
10 calculations made.
11 Q Well, for instance, it would include locating the
12 center of gravity, would it not?
13 A Determining the weight, locating the center of
14 gravity.
15 Q What else?
16 A Dealing with the support of the crane as it travels,
17 making sure the support is adequate over the travel
18 area and where the lift is being done and, when
19 appropriate, determining what a limiting wind would
20 be for the lift.
21 Q Lifting a piece that has a large sail area, a
22 potential, if you will, for catching the wind, would
23 an engineered lift plan supposed to include
24 engineering calculations as to how that -- how
25 potential wind might affect that load?

1 A Yes, sir.
2 Q And when that -- those are done, would you expect on
3 a proper lift plan that that would be on the lift
4 plan itself, those cal -- or the result of those
5 calculations?
6 A The result of the calculations would be on there in
7 the form of some sort of instructions on how to
8 handle wind.
9 Q And so it would say to the operators that if the
10 wind exceeds X miles per hour, that's impermissible.
11 A Yes, sir, that would be one way.
12 Q Like a -- a no-go type of thing.
13 A Yes.
14 Q Let's talk now about the calculations that are
15 necessary to determine the effects of wind on a
16 various load, okay?
17 A Yes, sir.
18 Q What's the starting point?
19 A The starting point would be drawings defining the
20 load and the dimensions, dimensions of each piece of
21 it.
22 Q Now, this particular roof piece had how many pieces?
23 A Approximately 500.
24 Q So what would be necessary in order to do the
25 calculations with respect to measuring the surface

1 areas of each of those pieces?
2 A You need to determine the dimensions of the piece.
3 The shape of the piece defines the wind resistance
4 blowing against it, and those are handbook values.
5 You look up those values in a handbook, and you
6 determine the wind resistance of each piece, and
7 then you add them all together.
8 Q How long have engineers been doing that kind of
9 calculation with respect to crane lifts?
10 A I can only testify to how long I've been doing it.
11 Q Well, go ahead.
12 A More than 20 years.
13 Q Twenty?
14 A More than 20 years.
15 Q Now, before that, what was it? Seat of the pants?
16 A Probably so, yes.
17 Q Okay. And for the last 20 years --
18 A Not -- not the seat of my pants. I've always done
19 the calculation.
20 Q Seat of someone else's pants?
21 A Yes.
22 Q During the last 20 years, has this been a deep, dark
23 secret that this formula is only possessed by a few
24 people on the planet, or is it published somewhere
25 that anyone can see it?

1 A Well, I had that information in the edition to my
2 book that was published in 1980, and I didn't invent
3 that information. I got it from elsewhere.
4 Q But if someone didn't want to spend the outrageous
5 cost of your book, is there another place they could
6 find it?
7 A In the library. It's also, you'll find it, in
8 certain ISO standards.
9 Q Yes. The ISO that you were talking about this
10 morning --
11 A Yes, sir.
12 Q -- publishes that formula?
13 A Yes.
14 Q It's about three or four lines or something like
15 that?
16 A The formulas are pretty straightforward. They're
17 not complicated.
18 Q Probably the hardest part of it is getting together
19 all the -- the numbers of the surface areas,
20 correct?
21 A Yes, sir, that's right.
22 Q And I assume that can be put into a computer, and
23 the formula can be put into a computer, and press a
24 couple buttons?
25 A I find it easier to do it by hand.

1 Q You know, when you look at that 4R3, it looks like
2 some of the pieces are shielding some of the other
3 pieces.
4 A Yes.
5 MR. BELL: Objection. Leading, Your
6 Honor.
7 THE COURT: Overruled.
8 MR. HABUSH: I'll rephrase the
9 question.
10 THE COURT: Overruled. Finish the
11 question. He was leading into a question to ask the
12 expert, and under the rules, experts can just get up
13 here and read their reports and say what they
14 basically want. So let's proceed, gentlemen.
15 BY MR. HABUSH:
16 Q What do you have to do to calculate the effect of
17 one piece of iron kind of shielding another piece of
18 iron?
19 A That's covered in the handbooks, also, and in the
20 ISO document on that. It's a standard procedure.
21 Q At my request, you did a calculation on 4R3, did you
22 not?
23 A Yes, sir.
24 Q And what did you determine, for the size of that
25 crane and the size of piece being lifted, what, if

1 any, safe wind speed not to exceed with 4R3?
2 A Eleven-and-a-half miles an hour.
3 Q And so if this operation had taken place on a calm
4 day with winds not in excess of eleven-and-a-half
5 or, say, 12 miles an hour, this accident never would
6 have happened.
7 A That's correct, yes, sir.
8 Q Are you aware that Mitsubishi -- Strike that. Are
9 you aware that nobody had done wind sail
10 calculations not only on -- on July 14th, but
11 apparently they had not been done for the previous
12 nine lifts? Are you aware of that?
13 A Yes.
14 Q In your opinion, was the failure to do wind sail
15 calculations on July 14th a violation of industry
16 standards?
17 A Industry practices, yes.
18 Q And violation of OSHA requirements?
19 A Yes.
20 Q And a violation of the load chart?
21 A Well, it was a violation of OSHA because it violated
22 the provisions of the load chart.
23 Q Are you familiar with -- Did you have a chance to
24 look at Mitsubishi's own safety manual under load
25 charts? Do you remember that?

1 Q And are you able to give us an example of -- The
2 jury saw yesterday that -- with Bill Keefe that it
3 represented three-and-a-half 747 wings, the surface
4 area. Would you agree with that?
5 A Yes.
6 Q Is there another frame of reference that you've
7 used?
8 A I've likened it to a billboard 120 feet wide and 76
9 feet high.
10 Q Would it be -- State what the fact to be as to
11 whether or not it would be fair to characterize it
12 as having the appearance of a real wind catcher.
13 A Yes, I would say.
14 Q State your opinion as to whether that would be open
15 and obvious to anyone looking at it.
16 A It should have been.
17 Q I asked you to help me on this case, did I not?
18 A Yes, sir.
19 Q Early on?
20 A Yes.
21 Q Early on none of us knew what happened or why it
22 happened, correct?
23 A That's correct.
24 Q And your charge was to tell me what happened.
25 A Exactly.

1 kingpin, the split ring retainer exerts pressure
2 against the washer and against the brass thrust
3 bearing that is above it. The split ring retainer,
4 because of the way it was designed, tends to twist
5 and puts greater pressure closer into the kingpin
6 than it does further away. That's why the washer
7 was misshaped and squeezed thinner on its inside
8 diameter.
9 And as that pressure built up, the
10 washer was the weakest point, and the pressure had
11 to build up within it until it was able to overcome
12 the friction that was created by the parts being
13 pressed together, and then it failed by virtually
14 exploding outward.
15 Q What was causing all this pressure to begin with?
16 A The wind.
17 Q The wind?
18 A Yes, sir.
19 Q On the load and on the crane both?
20 A On the load and on the crane. The wind on the load
21 was about twice the effect as the wind on the crane.
22 Q Can you say that again?
23 A The effect of the wind on the load was about twice
24 that of the wind on the crane.
25 Q Why?

1 A The load is somewhat of a concentrated area. You
2 have -- it's, like, 120 feet wide by 76 feet high,
3 but that entire force is transmitted to the very top
4 of the crane and creates a much greater prying
5 action on the kingpin than the wind forces
6 distributed over the whole height of the crane, and
7 that ratio is about two to one.
8 Q So you're saying that when the wind hits 4R3, it has
9 a greater impact than when the wind hits the crane,
10 everything else being equal?
11 A About twice the impact.
12 Q Because it's so concentrated?
13 A And because it, in effect, acts at the very top of
14 the crane --
15 Q And that --
16 A -- and creates a greater prying action because
17 it's --
18 Q That's what I was looking for. A prying action
19 like, like a lever?
20 A Like a lever.
21 Q In any event, after you got this additional
22 information and redid your calculations, what did
23 you determine in your opinion was the wind speed
24 that would be required to have fractured the
25 apparatus around the kingpin and the kingpin, as the

1 jury has seen on pictures?
2 A I narrowed it down to 27 to 29 miles per hour.
3 Q You just narrowed your box?
4 A Yes, sir.
5 Q Now, you've had a chance, in the course of looking
6 at everything that you've observed or read, the
7 various observations of wind made by ironworkers,
8 operating engineers, others on site?
9 A Yes, sir, I have.
10 Q You've also had a chance to read and observe various
11 reports of wind speed that were overheard by
12 ironworkers on the scene and sidewalk
13 superintendents, that is estimates of wind speed
14 that were reported from the anemometer by
15 Mr. Flowers and from Mr. Wayne Noel who was on the
16 terrace level?
17 A Yes, I have.
18 Q Those reports of wind speed by these observers were
19 anywhere from 20 miles an hour to 25 miles an hour,
20 26 to 28 sustained, 32 miles an hour wind gusts,
21 high 20s. Do you remember reading that?
22 A Yes.
23 Q Okay. And would you say that your scientific
24 calculations, that you find these estimates by these
25 gentlemen and I believe lady are entirely credible

1 and consistent?
2 A Well, the crane failed and the wind was there to do
3 it.
4 Q My question is based upon your experience and in
5 your opinion, were these estimates on the mark?
6 A They were consistent with my -- what my calculations
7 showed, yes.
8 Q Were you in court when I asked Mr. Keefe yesterday
9 that in order -- on this case, with all the
10 eyewitnesses we have to wind and all the
11 observations and the weather reports that we have,
12 that you don't need to be a wind engineer to come up
13 with an estimate at what the wind was that day?
14 A No, sir, you don't.
15 Q Pardon me?
16 A You don't have to be, no.
17 Q Tell us what you believe you observed on the OSHA
18 tape, observed and heard.
19 A Well, what I observed was a few seconds after the
20 tape started, you were able to discern the roof
21 section, the 4R3 roof section, start to move towards
22 the north and it continued moving towards the north
23 sometimes with the speed of movement changing,
24 slowing down and picking up again, which seemed to
25 be more or less consistent with the change in

1 negligent design.
2 Q Could you tell us whether or not you have any
3 evidence of it being assembled improperly or
4 negligently?
5 A Well, of course there was a washer on there that was
6 not shown on the drawings, but I don't think I would
7 call that negligent assembly.
8 Q Is there anything about the design or the
9 construction or the manufacture of the crain -- have
10 it in mind that the crane was being used outside the
11 manufacturer's specifications of use -- that you
12 believe was a substantial factor in causing this
13 tip-over?
14 A Can I have that once more, please?
15 Q Have it in mind that the crane was being operated in
16 winds beyond the manufacturer's specification, that
17 wind load calculations had not been done, have it in
18 mind that the wind expressed -- to have been
19 expressed from a range, as you expressed it, from 24
20 to 31 and probably around 28 or 29 miles an hour at
21 the time of the incident. Was there anything about
22 the crane design or manufacture which caused this
23 collapse?
24 A None.
25 Q Could you express to us, if you can, Mr. Shapiro,

1 happened on the 14th rather than on other days.
2 Q Okay.
3 A Although I did read testimony that indicated that he
4 played a little fast and loose in safety.
5 MR. BELL: Objection.
6 THE COURT: Grounds?
7 MR. BELL: Foundation.
8 THE COURT: Overruled. The answer can
9 stand.
10 MR. HABUSH:
11 Q Let's talk about the 14th. Tell the court and jury
12 how you feel about that.
13 A The behavior on the 14th I feel was unconscionable.
14 I don't really understand how Mr. Grotlisch could
15 have permitted that operation to go forward in the
16 face of those winds.
17 Q In your over thirty years of experience and as a
18 recognized expert on cranes and crane safety, can
19 you tell the court and jury whether or not in your
20 experience this is the most callous and outrageous
21 disregard of workers' safety that you've ever
22 experienced --
23 MR. BELL: Objection.
24 THE COURT: Overruled. You can answer.
25 MR. HABUSH:

1 Q -- where someone has been injured or killed?
2 A I would have to say yes.
3 MR. HABUSH: I have no further questions.
4 THE COURT: Do you want a quick break or
5 do you want to keep going, ladies and gentlemen of
6 the jury? Do you want to stretch? I know someone
7 asked for a two-hour lunch break and I didn't hear
8 you, and if I did, you wouldn't have got it. Do you
9 want to take a real quick break?
10 THE JUROR: Sure.
11 THE COURT: All right. We'll do that.
12 Be back, ready to go at 2:25. You have 15 minutes.
13 Same admonishments apply. See you at twenty-five
14 after. Everybody please rise.
15 (Jury excused).
16 THE COURT: All right. We're in recess.
17 Be ready to go at 2:25.
18 (Short recess taken.)
19 THE COURT: Welcome back. Please have a
20 seat. We asked for some more water containers up
21 there and I did get the one on, so -- and I told my
22 reporter Bob to turn up the heat. He did turn up
23 the heat again some more, so we're trying to get to
24 a comfort level on a Friday afternoon. All right.
25 Cross-examination.

1 IN THE CIRCUIT COURT OF MILWAUKEE COUNTY

2 STATE OF WISCONSIN

3

4 PATRICIA WISCHER, individually,
and as Special Administrator of the
5 ESTATE OF JEFFREY A. WISCHER, deceased;
MARJORIE DeGRAVE, individually,
6 and as Special Administrator of the.
ESTATE OF WILLIAM R. DeGRAVE, deceased;
7 and RAMONA DULDE-STARR, individually,
and as Special Administrator of the
8 ESTATE OF JEROME STARR, deceased,

9 Plaintiffs,

10 Case No. 99-CV-006553
-vs-
11

12 MITSUBISHI HEAVY INDUSTRIES
AMERICA, INC., TRAVELERS
13 PROPERTY CASUALTY INSURANCE
COMPANY, THE TRAVELERS INDEMNITY
14 COMPANY OF ILLINOIS, NEIL F. LAMPSON,
INC., HCH MILLER PARK JOINT VENTURE,
15 HUNZINGER CONSTRUCTION COMPANY,
CLARK CONSTRUCTION BUILDERS, INC.,
16 and HUBER, HUNT & NICHOLS, INC.,

17 Defendants.

18

19 October 30, 2000

20 Volume XI

21 TRANSCRIPT OF JURY TRIAL

22 Before:
HONORABLE DOMINIC S. AMATO
23 Circuit Court Judge Presiding

24 Court Reporters: Debra A. Wisniewski, CRR/RMR
Constance L. Bauer, CRR/RMR
25 Julie Lyle, RMR/RPR

1 of the load chart could cause the crane to tip over,
2 with an admission that there was a probability that
3 a tragedy could occur by doing the lift of 4R3
4 without wind load calculations, in the face of the
5 evidence by weather reports, by observation on the
6 site, by reported wind speeds overheard of those
7 reading anemometers, what is going on that afternoon
8 before 5 o'clock in your opinion due to all the
9 evidence available to you?
10 MR. BELL: Objection, Your Honor.
11 THE COURT: You can testify to, quote,
12 what's going on, unquote, with regard to your
13 professional discipline.
14 MR. HABUSH:
15 Q Based upon your experience and expertise to
16 characterize what was going on with respect to the
17 conduct of Mitsubishi.
18 A In my opinion, Victor Grotlisch was playing Russian
19 Roulette, but not with his own life.
20 MR. BELL: Objection, Your Honor, move to
21 strike.
22 THE COURT: I'm going to let it stand,
23 but I didn't hear the last part of the answer. What
24 is the last part of the answer, Madam Reporter?
25 (Pending answer read by reporter.)

1 the same transcript:
2 "Q Mr. Baba?
3 "A Yes.
4 "Q Did Mr. Saito say that the lift
5 had been suspended because of the wind? Yes or no?"
6 MR. OWENS: Objection, asked and
7 answered.
8 THE COURT: Overruled. He can answer.
9 It's cross.
10 MR. LOWE: "Q Yes or no?
11 "A To the best of my memory, yes.
12 "Q Thank you. Were you in the
13 meeting when the lift was resumed?
14 "A Yes, I was still in the
15 conference room.
16 "Q And who made the announcement
17 that the lift had been resumed?
18 "A Mr. Kano Saito.
19 "Q Approximately how much time went
20 by between the time it was suspended and the time it
21 was resumed?
22 "A I don't remember exactly.
23 "Q Five minutes? One hour?
24 "A I guess 30 minutes to 1 hour."
25 MR. LOWE: February 7, 2000, Volume

1 to the infield?
2 "A Yes. By myself.
3 "Q How long did it take you to get
4 down to the infield?
5 "A Five to ten minutes.
6 "Q Did you see Big Blue hit the
7 crane that was carrying the three men?
8 "A I don't remember seeing it.
9 "Q Did you see their basket fall to
10 the ground?
11 "A No.
12 "Q Did you go over to where they
13 were lying after the fall?
14 "A I didn't go very close to them.
15 "Q And how long did you remain in
16 the infield?
17 "A Ten to twenty minutes, I think.
18 "Q And then where did you go?
19 "A The sheriffs told us to get out
20 of the infield, so I moved to the east of the
21 concrete beam -- the concrete beam.
22 "Q How long did you stay there?
23 "A Five to ten minutes, I think.
24 "Q Then where did you go?
25 "A I went to Mitsubishi trailer.

1 "Q Is that when Mr. Grotlisch asked
2 you to go to the trailer with him?
3 "A Yes.
4 "Q And that's when he told you he
5 wanted to go to the trailer to check the wind
6 speeds?
7 "A Yes."
8 MR. LOWE: February 7, 2000, page 15,
9 line 24:
10 "Q Did anyone ask you about the wind
11 that night?
12 "A Yes.
13 "Q Who?
14 "A As far as I remember, Victor
15 Grotlisch talked about the wind.
16 "Q What did Victor Grotlisch say
17 about the wind?
18 "A I think he told me to check the
19 weather computer.
20 "Q Anyone else?
21 "A No, not anybody else.
22 "Q And when Victor Grotlisch asked
23 you to check the computer, did you?
24 "A I tried to work the computer.
25 "Q Had you done that before?

1 "A No.
2 "Q Was Victor with you when he asked
3 you?
4 "A Yes.
5 "Q How long after the crane
6 collapsed did this take place?
7 "A I think it was about 30 minutes
8 later, but I can't -- I'm not sure.
9 "Q Do you remember what time the
10 crane collapsed on July 14?
11 "A I think it was between 5 and 5:30
12 in the evening.
13 "Q Was anyone else in the trailer
14 with you and Victor at the time he asked you to
15 check the weather computer?
16 "A No. I don't think so."
17 MR. LOWE: February 7, Volume II,
18 page 20, line 8:
19 "Q In your last deposition, dated
20 October 26 of 1999, when you were asked, `What did
21 you do when you got to the trailer,' you said, on
22 page 114, line 1, `We checked the wind speed at that
23 time.' That's what you testified under oath before.
24 Does that refresh your recollection?
25 "A Yes, I remember.

1 "Q And when you were using the word
2 we, you were talking about you and Victor, weren't
3 you?
4 "A Yes."
5 LOWE MR.: Page 21, line 5:
6 "Q When you and Victor left the
7 scene of the accident, you were traveling in some
8 sort of vehicle, were you not?
9 "A Do you mean that I used a vehicle
10 to go from the site to the trailer?
11 "Q Yes.
12 "A No. I walked -- We walked.
13 "Q Really? You walked?
14 "A Yes, I did.
15 "Q Was that when Victor told you
16 that we need to go back to the trailer to check the
17 wind speed?
18 "A That is what I remember.
19 "Q Did you ask him why do we need to
20 do that?"
21 MR. YOUNG: We've gone too far.
22 MR. OWENS: That portion was not
23 designated.
24 MR. YOUNG: That's right.
25 MR. LOWE: I'm sorry.

THE COURT: That answer is stricken. The jury will disregard it. Let's go.

MR. LOWE: Page 24 -- February 7 of 2000, beginning on page 24, line 15:

"Q How long did you wait -- How long did you wait after you figured out that you couldn't get the wind speed up to tell Victor you couldn't do it? How long did you wait?

"A About five minutes after I started trying to operate the computer.

"Q That's what I thought. Where was he when you told him that?

"A He came to my room from the room he was sitting next to.

"Q And did he volunteer to show you how?

"A. No, he didn't try to assist me."

MR. LOWE: February 7, Volume II, page 107, line 12:

"Q Had you been in the trailer when other people used the Doppler to be able to see what the weather was like west of Milwaukee?

"A Generally speaking.

"Q And were you in there when other people were able to observe on the screen what the

1 IN THE CIRCUIT COURT OF MILWAUKEE COUNTY

2 STATE OF WISCONSIN

3

4 PATRICIA WISCHER, individually,
and as Special Administrator of the
5 ESTATE OF JEFFREY A. WISCHER, deceased;
MARJORIE DeGRAVE, individually,
6 and as Special Administrator of the.
ESTATE OF WILLIAM R. DeGRAVE, deceased;
7 and RAMONA DULDE-STARR, individually,
and as Special Administrator of the
8 ESTATE OF JEROME STARR, deceased,

9 Plaintiffs,

10 -vs- Case No. 99-CV-006553

11

12 MITSUBISHI HEAVY INDUSTRIES
AMERICA, INC., TRAVELERS
13 PROPERTY CASUALTY INSURANCE
COMPANY, THE TRAVELERS INDEMNITY
14 COMPANY OF ILLINOIS, NEIL F. LAMPSON,
INC., HCH MILLER PARK JOINT VENTURE,
15 HUNZINGER CONSTRUCTION COMPANY,
CLARK CONSTRUCTION BUILDERS, INC.,
16 and HUBER, HUNT & NICHOLS, INC.,

17 Defendants.

18

19 October 31st, 2000

20 Volume XII

21 TRANSCRIPT OF JURY TRIAL

22 Before:
HONORABLE DOMINIC S. AMATO
23 Circuit Court Judge Presiding

24 Court Reporters: Debra A. Wisniewski, CRR/RMR
Constance L. Bauer, CRR/RMR
25 Julie K. Lyle, RMR/RPR

1 "A There was some questions on nil
2 ductility.
3 "Q What does nil ductility mean?
4 "A performance of various components
5 at very low temperatures.
6 "Q So the climate conditions that
7 were discussed regarding Milwaukee revolved around
8 the fact that Milwaukee can become cold during the
9 wintertime?
10 "A We also discussed winds.
11 "Q Okay. So you discussed nil
12 ductility, which is related to --
13 "A Temperature.
14 "Q -- temperature; correct?
15 "A Yes.
16 "Q And you also discussed the wind?
17 "A Correct.
18 "Q What was discussed with respect
19 to the wind?
20 "A Generally that we had a very
21 large sail area, and as such, we would have to be
22 cognizant of the allowable wind speeds.
23 "Q So you, as a representative of
24 Lampson, told Mitsubishi that there was a need to be
25 cognizant of wind speeds due to the large sail

1 areas?

2 "A Correct.

3 "Q And what was the response to

4 that?"

5 MR. OWENS: Object to that, Your

6 Honor, because there's been no identification of who

7 from Mitsubishi was present at the meeting.

8 THE COURT: Overruled. He can answer.

9 "A In each issue the response was,

10 you know, the issue would be studied.

11 "Q With respect to the wind issue,

12 was there any indication made to you as to what type

13 of study would be performed?

14 "A No."

15 "Q You said that wind was discussed

16 at the meeting. Specifically what was discussed

17 with respect to the wind?

18 "A Specifically we were talking

19 about just prevailing breezes coming off the lake;

20 and because we have a large sail area, we would have

21 to be very cognizant what would be the maximum wind

22 speed that would be allowed.

23 "Q Did you tell Mitsubishi how to

24 perform an analysis like this?

25 "A I, you know, Mitsubishi is a

1 bunch of pros. I would not presume to tell them how
2 to do an analysis.
3 "Q So you did not tell them how to
4 calculate what the maximum wind speed is for a load?
5 "A I would not presume to do that."
6 "Q You answered some questions about
7 this meeting in April of 1998 by saying that one of
8 the things you told the MHIA representatives at the
9 meeting was that they needed to be cognizant of wind
10 speeds because of the large sail areas of the pieces
11 that were going to be picked?
12 "A That's correct.
13 "Q And the MHIA representatives at
14 the meeting included several Japanese engineers?
15 "A My understanding they were
16 engineers.
17 "Q And Victor Grotlisch was present?
18 "A Yes, sir.
19 "Q And the response you got from,
20 among that group of MHIA representatives, was that
21 the issue will be studied concerning wind?
22 "A That's correct."
23 "Q Did you have any assumption about
24 the ability of the Mitsubishi people to do as they
25 said, a study of the issue?"

1 agree. That's received.

2 MR. YOUNG: Your Honor, we also then

3 have Exhibits 1848 and 1858, which are the WTMJ

4 broadcasts from 5:00 to 5:30, that's 1848, and 5:30

5 to 7:00, 1858, which by in large includes the

6 Chopper 4 viewing of the area and has many

7 observations of wind conditions, et cetera.

8 THE COURT: With your basic objections

9 that existed before, those are preserved on the

10 record. Do you have a -- accept them with that

11 understanding?

12 MR. WEBER: Right. Again, it's the

13 sound. These tapes, I think, have sound on them

14 that was not allowed to be played, and so we

15 continue our objections in that regard and -- but

16 the counsel, I think, has provided another tape with

17 the excerpts without sound; is that right? Is that

18 what you have there?

19 MR. YOUNG: No.

20 THE COURT: No. I'll receive into

21 evidence the tape without sound. That I'll receive.

22 I'm not going to receive into evidence the tape with

23 sound because it wasn't played with sound.

24 MR. YOUNG: All right. Well, these --

25 the copies here have sound. We can delete that

1 and --

2 THE COURT: Just make you sure you

3 delete it. Whether it goes to the jury is a whole

4 nother issue.

5 MR. YOUNG: Right. Then Exhibit 1864,

6 which is a new one, and I gave copies to defense

7 counsel today, which are the excerpts from the WTMJ

8 broadcasts that were played during the testimony of

9 Mr. Malan.

10 MR. WEBER: No objection.

11 THE COURT: Reserving the same

12 objections you had then, outside of this, nothing

13 new, it's received.

14 MR. CARLSON: That's fine.

15 THE COURT: And the plaintiff rests

16 subject to rebuttal. What else?

17 MR. YOUNG: Exhibit 1702 is the

18 American flag taken from the southwest corner of the

19 stadium, which is seen on many of the videos and

20 photographs.

21 THE COURT: Received. No objection.

22 MR. WEBER: If I could just note, Your

23 Honor, it hasn't been used with any witness, and so

24 we object.

25 THE COURT: It was shown to the jury.

1 A Could you say that again, please?
2 Q Sure. You just told Mr. Bell that you believe that
3 you did your job the best you could with the
4 information you had at the time. What I need to find
5 out is what other information, in retrospect, should
6 you have had?
7 A Well, like I said in prior discussions, I've never
8 been privy to any of the meetings, any of the
9 paperwork, any of the inventory, any of the weights,
10 any of the wind sail calculations. I was not privy
11 to anything on that job.
12 Q So if there was a wind speed limitation on the piece,
13 nobody shared that with you?
14 A That's correct.
15 Q If there had been a wind speed limitation on the
16 piece less than 20 miles an hour, based on your
17 experience, would you have expected that to be shared
18 with you?
19 A It would have had to have been.
20 Q Did you ever have any discussions with Victor with
21 regards to what he expected of you or what part of
22 the body he wanted from you?
23 A Yes.
24 Q What did he tell you?
25 A When I got on site, he told me my job was to guide

1 the crane, not get involved with the politics, to
2 make sure the rigging was right, and that was it.
3 Basically from the neck down.
4 Q Mr. Bell asked you about tag lines and also
5 interjected the concept of tugs. Are tag lines and
6 the tuggers that were on the crane the same thing?
7 A Not what I was expressing to them.
8 Q Just if there had been tag lines on 4R3, can you just
9 explain to the jury how they could have been tied off
10 using normal industry practice?
11 A They could have been hooked to possibly a deadman on
12 the infield, the ring beam, and possibly 4R1 or 4R2.
13 Q And if you found yourself in a position where there
14 were winds that were unacceptable, would tag lines
15 prevent the piece from being blown so far over that
16 it drags the crane over on its side?
17 A It definitely would have helped, yes.
18 Q By the way, Mr. Bozung doesn't do the -- the charts
19 for the crane, does he?
20 A I don't believe so, no.
21 Q Mr. Stemp is back here. Do you know him?
22 A Yes, sir.
23 Q Does he do charts for cranes?
24 A Yes, sir.
25 MR. CARLSON: That's all. Thank you very

1 IN THE CIRCUIT COURT OF MILWAUKEE COUNTY

2 STATE OF WISCONSIN

3

4 PATRICIA WISCHER, individually,
and as Special Administrator of the
5 ESTATE OF JEFFREY A. WISCHER, deceased;
MARJORIE DeGRAVE, individually,
6 and as Special Administrator of the.
ESTATE OF WILLIAM R. DeGRAVE, deceased;
7 and RAMONA DULDE-STARR, individually,
and as Special Administrator of the
8 ESTATE OF JEROME STARR, deceased,

9 Plaintiffs,

10 -vs- Case No. 99-CV-006553

11

12 MITSUBISHI HEAVY INDUSTRIES
AMERICA, INC., TRAVELERS
13 PROPERTY CASUALTY INSURANCE
COMPANY, THE TRAVELERS INDEMNITY
14 COMPANY OF ILLINOIS, NEIL F. LAMPSON,
INC., HCH MILLER PARK JOINT VENTURE,
15 HUNZINGER CONSTRUCTION COMPANY,
CLARK CONSTRUCTION BUILDERS, INC.,
16 and HUBER, HUNT & NICHOLS, INC.,

17 Defendants.

18

19 November 3, 2000

20 Volume XV

21 TRANSCRIPT OF JURY TRIAL

22 Before:
HONORABLE DOMINIC S. AMATO
23 Circuit Court Judge Presiding

24 Court Reporters: Debra A. Wisniewski, CRR/RMR
Julie Poenitsch, CRR/RMR
25 Rosanne E. Pezze, CRR/RPR

1 A Restart, yes.
2 Q Restart.
3 A Yes.
4 Q Now, the jury has heard some testimony, sir, about
5 after the accident that you went with Victor
6 Grotlisch to the trailer to -- Victor Grotlisch told
7 you -- we read your deposition -- told you that we
8 need to go look at the wind on the computer. Do you
9 remember that?
10 A Yes, it was my -- it was my recollection.
11 Q And do you remember that that happened within about
12 a half an hour after this tragedy, this accident?
13 A Yes, it's my recollection.
14 Q And when you were in the trailer looking at the
15 weather computer, you told us in your deposition
16 that we, you and Victor, checked the weather. Do
17 you remember that?
18 A Yes. Actually, just me, just I checked the -- the
19 Doppler radar system.
20 Q Okay. Let me ask you to take a look at -- on
21 page -- of your second deposition, page 20.
22 A Yes.
23 Q We're waiting for it to be up on the screen. And
24 it's on your monitor there. And this was when
25 Mr. Habush was questioning you on page 20 of

1 February 7 at line 8.
2 "Question. In your last deposition,
3 dated October 26 of 1999, when you were asked, "What
4 did you do when you got to the trailer," you said,
5 on page 114, line 1, "We checked the wind speed at
6 that time." That's what you testified under oath
7 before. Does that refresh your recollection?
8 "Answer. Yes, I remember.
9 "Question. And when you were using
10 the word "we," you were talking about you and
11 Victor, weren't you?
12 "Answer. Yes."
13 MR. BELL: Under the rule of
14 completeness, I'd like the next questions and
15 answers read in.
16 THE COURT: Sure.
17 BY MR. YOUNG:
18 Q "And what did you see when you checked
19 the wind speed with Victor that night?
20 "Answer. By changing the screen, I
21 tried to go to the screen where wind speed is shown,
22 but I couldn't.
23 "Question. Did Victor?
24 "Answer. I don't think Victor touched
25 the weather computer, as far as I remember."

1 MR. BELL: On page 18, Your Honor,
2 same line of questioning.
3 MR. YOUNG: Which line?
4 MR. BELL: Line 4, going down to line
5 8 -- line 20.
6 MR. YOUNG: "Question. Now, what did
7 you try to do after Victor asked you to get the
8 weather -- the wind information off the computer?
9 What did you do?
10 "Answer. I changed the screen. I
11 tried to find the screen where you can get the wind
12 speed information.
13 "Question. Well, what did you tell
14 Victor you didn't know how to do it?" Or sorry, I
15 read that wrong. "Well, did you tell Victor you
16 didn't know how to do it?
17 "Answer. No, I didn't. I told him
18 that I'd try.
19 "Question. And how many times did you
20 try before you decided that you couldn't do it?
21 "Answer. I think I tried the
22 computer -- tried on the computer about five
23 minutes.
24 "Question. Was Victor standing there
25 with you?

1 "Answer. No. At that time Victor was
2 not by me.
3 "Question. Where was he?
4 "Answer. I remember entering the
5 trailer with him. After that, I don't remember if
6 he got out of the trailer or if he went to the
7 desk."
8 Q Now, Mr. Baba, you are not changing your testimony,
9 are you, that after the accident and about 30
10 minutes later, Victor Grotlisch wanted you to go
11 back to the trailer to look at the weather; is that
12 true?
13 A Yes, that's my recollection.
14 Q That's what he asked you to do with him.
15 A That's my recollection, yes.
16 Q And you also advised us in your deposition that you
17 really don't remember what you saw on the screen.
18 A No.
19 Q Correct?
20 A That's correct.
21 MR. YOUNG: Thank you, Mr. Baba. I
22 have no further questions.
23 THE COURT: Are you going to do it,
24 Don, or Mr. Nichols?
25 MR. CARLSON: I will.

1 IN THE CIRCUIT COURT OF MILWAUKEE COUNTY

2 STATE OF WISCONSIN

3

4 PATRICIA WISCHER, individually,
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5 ESTATE OF JEFFREY A. WISCHER, deceased;
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12 MITSUBISHI HEAVY INDUSTRIES
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15 HUNZINGER CONSTRUCTION COMPANY,
CLARK CONSTRUCTION BUILDERS, INC.,
16 and HUBER, HUNT & NICHOLS, INC.,

17 Defendants.

18

19 November 6, 2000

20 Volume XVI

21 TRANSCRIPT OF JURY TRIAL

22 Before:
HONORABLE DOMINIC S. AMATO
23 Circuit Court Judge Presiding

24 Court Reporters: Debra A. Wisniewski, CRR/RMR
Rosanne E. Pezze, CRR/RPR
25 Julie A. Poenitsch, CRR/RMR

1 MR. YOUNG: Thank you, Your Honor.
2 Q Mr. Saito, I have a few more questions about the
3 meeting on July 14, but before I get to those -- Can
4 you hear me?
5 A Yeah.
6 Q You testified that MHIA was formed, did you say in
7 1970 something?
8 A '79, I believe.
9 Q And was it formed by MHI, Ltd. in Japan to perform
10 construction work in the United States?
11 A Yeah. The construction work in the United States is
12 a rather new area for MHIA. As far as I know, this
13 retractable roof is the second construction job.
14 Q And was MHIA, that being the American company, was
15 it formed by MHI of Japan?
16 A MHIA is a subsidiary company of MHI.
17 Q And by subsidiary, do you know, is it a wholly owned
18 subsidiary?
19 A Yes.
20 Q And that means that all of the stock of MHIA is
21 owned by MHI, Ltd. in Japan?
22 A I believe so.
23 Q Now going back to the July 14 meeting, let's -- this
24 is already in evidence, these are the minutes on the
25 screen, Exhibit 169, and of course you were at this

1 meeting, and Mr. Jarvis will put on the screen
2 the --
3 A Who?
4 Q Mr. Jarvis will put on the screen the particular
5 paragraph that we've been talking about in these
6 minutes. Do you see that?
7 A Yes.
8 Q Okay. And that says, "Block 3 pick has been
9 temporarily suspended because of wind. The block
10 will be picked up once the wind dies down. MHIA
11 indicated later in the meeting that they had
12 commenced the lift." Did I read that correctly?
13 A Yes.
14 Q And, of course, that's the paragraph that you
15 acknowledge is in the minutes because of the
16 statements you made at the meeting, correct?
17 A Yes.
18 Q Now it wasn't only the information that you got from
19 Mr. Hashimoto that led you to believe that the lift
20 had been suspended due to the wind; is that correct?
21 A Correct.
22 Q In fact, from your vantage point in the office, you
23 were able to see out the window and see a flag?
24 A Yes.
25 Q And that was a flag that was on County Stadium, the

1 old baseball stadium?
2 A No, I could see only a small flag on top of the
3 sausage house.
4 Q Right. You referred to it in your deposition as the
5 Brewer sausage house --
6 A I --
7 Q -- or something like that?
8 A I -- yes. I don't know whether it was managed or
9 ran by Brewers, but they -- I called it Brewers
10 sausage house.
11 Q Okay. And is that -- is the location of the flag
12 that you saw on your board there?
13 A Around here -- in the parking lot -- There is a
14 parking lot, I believe around here.
15 Q Okay. So it's off the top of your model?
16 A Right.
17 Q All right. From where you were sitting at the
18 table, you could see out the window and you could
19 see this flag blowing in the wind?
20 A From 1:30 to 2:30, it was wavy.
21 Q And is it true that Mr. Grotlisch was sitting next
22 to you and he could see out the same window?
23 A I can't remember -- I cannot remember him sitting
24 next to me or very -- or -- he was sitting very
25 close to me, but I don't know whether he saw the

1 flag or not.
2 Q Okay. But he was sitting on the same side of the
3 table as you were?
4 A Yes.
5 Q And from that vantage point, he could look out that
6 window, too; is that right?
7 A Possibly, yes.
8 Q Okay. Well, in your deposition, do you remember
9 telling us, "I think so, he could look out that
10 window"?
11 A I don't remember I said so, but possibly, yes.
12 Q So from being able to see the flag, you could tell
13 that it was windy?
14 A I cannot tell whether it was windy or not, but there
15 was a wind until 2:30 or so.
16 Q Okay. Let's go to your transcript there. This is
17 on page --
18 A Which one?
19 Q The February 9, 2000.
20 A Okay.
21 Q The earliest one. On page 47.
22 A Forty-seven. Okay.
23 Q Okay. Well, actually, to shorten it up, on page 48.
24 A Forty-eight. Which line?
25 Q Page 48 -- actually, it's the last line of 47 --

1 well, actually, let's go to line 13 on 47.
2 A Okay.
3 Q First of all, do you recall --
4 A Excuse me.
5 Q I'm sorry. Are you ready?
6 A Okay.
7 Q Do you recall pointing out the flag to the other
8 people?
9 A Yes, I believe so.
10 Q Okay. And at line 13, it says:
11 "Q Did you point out that flag that you
12 were observing to anyone else?
13 "A Yes.
14 "Q Who?
15 "A They were sitting in front of me.
16 They were both from district boards. These two
17 people, William Day, Mr. William Day and Ann
18 Woodhull, Miss. After Mr. Grotlisch went out of the
19 room around 3, the flag was calming down -- was
20 going down. I talked to these people, William Day
21 and Ann Woodhull, 'Look at the flag, it is calming
22 down. Maybe that is why the lift has been
23 resumed.'"
24 Then:
25 "Q Oh. Now when you saw it before, when

1 it wasn't calming down"--
2 A Just a moment. Okay.
3 Q Okay?
4 THE COURT: He said okay.
5 MR. YOUNG:
6 Q Are you caught up with us, are you okay?
7 A Yes.
8 Q "Q -- when it wasn't calming down, did
9 you form any impression about how fast or -- how
10 fast the wind was blowing at that time?
11 "A I can't judge the wind speed by
12 looking at the flag.
13 "Q But you did know from looking at the
14 flag that it was very windy?
15 "A I don't know if it was very or not,
16 but I recognized that it was windy.
17 "Q Was it --
18 "A Or there was a wind. Wind."
19 Do you remember giving that testimony?
20 A Yes.
21 Q And you stand by that testimony today, correct?
22 A Yes.
23 Q Now you've testified, I think, that Mr. Hashimoto
24 was a very good engineer?
25 A Yeah.

1 Q And whether he could speak English or understand
2 English, maybe from the other members of the crew,
3 wouldn't you agree that given your observations and
4 what he said about the wind that it just plain was
5 logical that the lift wasn't -- when the lift was
6 not proceeding, it wasn't because -- it was because
7 of the wind, you could see the wind, he thought the
8 wind was over 20 miles an hour, and so that all made
9 sense, didn't it?
10 A Yes.
11 Q And, in fact, it made so much sense that that's why
12 you told the people at the meeting?
13 A Yeah. So -- until 2:30 or something like that that
14 it was -- there was a wind.
15 Q But from your observation, it looked to be windy
16 enough that that could be an explanation for
17 stopping the lift, correct?
18 A I cannot tell that.
19 Q Now you told the people in the meeting more than
20 once about the -- the lift being stopped because of
21 the wind, correct?
22 A Yes, I did.
23 Q In fact, you told them three or four times?
24 A Yeah. Yes.
25 Q And you also then, as it was stated in the minutes,

1 you also said that the block would be picked up when
2 the wind dies down, do you remember that?
3 A Yes.
4 Q And when you said that to the people in the meeting,
5 who could also look out the window or had come in
6 from the outside, there was no comment in reply --
7 A No.
8 Q -- correct? Am I right?
9 A Yes. Everybody was in the meeting room so they
10 didn't feel the wind.
11 Q Okay. But they came from outdoors into the meeting,
12 didn't they?
13 A Pardon?
14 Q They came from the outdoors into the meeting room?
15 A Yes, around 1:30.
16 Q So when all of these people in the room heard you
17 say it's too windy, they've stopped the lift, nobody
18 protested or said well, it's not too windy or
19 anything, there was no comment, everybody
20 understood, correct?
21 A I cannot speculate what they were thinking.
22 Q But, in any event, nobody objected or made any
23 comment about the wind in reply to your statement?
24 A Nobody.
25 Q Nobody. And then, as I understand it, when you said

1 that the lift had been resumed, that maybe the wind
2 had died down, then Mr. Grotlisch left the meeting?
3 A Yes.
4 MR. YOUNG: Okay. Thank you, Mr. Saito.
5 THE COURT: Mr. Carlson.
6 MR. CARLSON: Thank you, Your Honor.
7 CROSS-EXAMINATION
8 BY MR. CARLSON:
9 Q Good afternoon, sir.
10 A Good afternoon.
11 Q To what degree did you participate in reviewing the
12 contract with us before it was signed by Mitsubishi?
13 A I can't understand your question. Can you specify?
14 Q Sure. Did you, prior to your company signing the
15 contract with us, did you review the terms and
16 conditions of the agreement?
17 A No.
18 Q Now Mr. Baba has explained to us that he had come
19 out to Washington and met with Lampson people. Do
20 you recall that testimony?
21 A Yes.
22 Q And do you recall that there was a meeting here in
23 Wisconsin in December of '97?
24 A Uh-huh.
25 Q Correct?

1 he did?
2 A I do not recall him calling me, sir, no.
3 Q This is another "I don't recall"?
4 MR. OWENS: Objection.
5 THE COURT: Sustained.
6 MR. HABUSH:
7 Q Is that your answer, I don't recall?
8 MR. OWENS: Objection. Asked and
9 answered.
10 THE COURT: That's appropriate. You can
11 answer that. Overruled.
12 THE WITNESS: I don't recall.
13 MR. HABUSH:
14 Q Mr. Grotlisch denies that you called him twice
15 between 4 and 5 o'clock on July 14th. Are you aware
16 of that?
17 A I didn't know those were the exact times, but I knew
18 he says I did not call him in regards to the
19 weather, yes.
20 Q Now let's assume just for the sake of argument that
21 Mr. Grotlisch is being truthful about that and let's
22 assume that during that period you observed wind
23 gusts of 32 miles an hour and that you were
24 concerned over wind gusts as you've testified to and
25 that you overheard reporting sustained wind speeds

1 of 26 to 28 miles per hour. Let's just assume that
2 really happened. All right?
3 A (Witness nods head.)
4 Q Now if you in fact had observed winds of 26 to 28
5 miles an hour sustained and if you had observed wind
6 gusts of 32 miles an hour and if you had not
7 reported that to Mr. Grotlisch, would you agree that
8 you were not performing your job as safety
9 supervisor?
10 MR. OWENS: Object to the form.
11 THE COURT: Overruled.
12 THE WITNESS: This is a hypothetical
13 situation that you're telling me about?
14 MR. HABUSH:
15 Q Well --
16 THE COURT: Yes, it is.
17 THE WITNESS: Yes, I would say that
18 Mr. Grotlisch would have a concern and he should
19 reprimand me, yes, sir.
20 MR. HABUSH:
21 Q As a matter of fact, Mr. Grotlisch told us in his
22 testimony if you had observed those things and
23 hadn't reported it to him that you were acting in
24 conscious disregard of the safety of workers on that
25 job site, are you aware of that?

1 A No, sir.
2 Q Would you agree?
3 A If I did what you said I did, yes, I would agree
4 with you, sir.
5 Q On the other hand, if what you are saying is true
6 and what Mr. Grotlisch says is untrue, that in fact
7 you did report to Mr. Grotlisch that you were
8 concerned about wind gusts and you had reported to
9 him the wind speeds that you were observing and he
10 did nothing about it, would you agree that his was a
11 safety violation?
12 MR. OWENS: Object to the form.
13 THE COURT: Overruled.
14 THE WITNESS: Yes, sir.
15 MR. HABUSH:
16 Q And would you agree that his was a conscious
17 disregard of the rights of the workers at that job
18 site?
19 A This is a hypothetical situation? Yes.
20 MR. OWENS: Objection, calls for a legal
21 conclusion.
22 THE COURT: Overruled. You can answer
23 that. The answer stands.
24 MR. HABUSH:
25 Q Now let's assume on the day of the incident, as

1 THE WITNESS: If I had a hand-held
2 anemometer and I read those wind speeds and I did
3 not report that to the authorities, that would be in
4 violation, that would be bad, yes.
5 BY MR. HABUSH:
6 Q You agree, do you not, it's dangerous not to do wind
7 calculations on the effect of wind on a load?
8 A That is correct.
9 Q You also agree that if you had known that
10 calculations hadn't been done on July 14th, that you
11 would have stopped the lift?
12 A That's correct.
13 Q Now, you told the OSHA investigators when you gave
14 your statement that one of your responsibilities was
15 to review all lifting plans and critical lifts. Do
16 you recall that?
17 A I don't recall that statement, but it is possible,
18 yes.
19 Q Well, actually, it was Mr. Koplin from OSHA, and he
20 was reading from some submission that you had given
21 him where it says, "Mr. Noel was responsible for
22 inspections, all preliminary erection procedures,
23 sequences, all lifting plans and critical lifts,
24 chaired all safety plans, action meetings,
25 debriefings, was responsible for safety coordination

1 with all trades on the site." Does that sound like
2 something you would have said you were -- was part
3 of your job responsibilities?
4 A Yes, that's a portion of my jobs.
5 Q Can we assume then that on the nine prior lifts
6 prior to July 14th that you would have had occasion
7 to look at the lift plan?
8 A I would have had a chance to look at the paperwork
9 that I was given that I had in my critical lift book
10 and anything else that was given to me, yes.
11 Q Would that include the lift plan?
12 A That would include any paperwork that I had in my
13 critical lift book, sir.
14 Q Sir, I'm asking you a simple question. Would it
15 have included the lift plan?
16 A It would have included my copy, my template of my
17 lift plan, yes, sir.
18 Q And would your copy of your lift plan be the
19 official lift plan that was utilized with those
20 lifts?
21 A To my knowledge, yes.
22 Q Could you tell the Court and jury whether you ever
23 saw on any of the nine prior lifts on the lift plan
24 a restriction which indicated at what speed that
25 particular piece should not be lifted at?

1 A On the safe plan of action, no, sir.
2 Q Did you ever see that on the lift plan anywhere, a
3 no or no-go wind speed that you could not lift that
4 particular load at a particular speed?
5 A I could not lift that load if there was suspended --
6 if there was winds in excess of 20 miles an hour,
7 sir.
8 Q I'm not now talking about the load chart, Mr. Noel.
9 I'm talking about the lift plan. And my question to
10 you is whether you ever saw on any lift plan prior
11 to July 14th any number which says if the wind gets
12 to be X, you've got to stop the lift.
13 A No, sir.
14 Q And you didn't see that on the lift plan of
15 July 14th either, did you?
16 A No, sir.
17 Q Now, you told us that it's important to do wind load
18 calculations on the piece, right, and it was
19 dangerous not to do so, right?
20 A That's correct, sir.
21 Q And you told us, did you not, that when -- if you
22 had known that they weren't done at any time, you
23 wouldn't have allowed a lift to go forward, correct?
24 MR. OWENS: Objection. Asked and
25 answered.

1 IN THE CIRCUIT COURT OF MILWAUKEE COUNTY
STATE OF WISCONSIN

2

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4 ESTATE OF JEFFREY A. WISCHER, deceased;
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17

18

19 November 8, 2000

20 VOLUME XVIII

21 TRANSCRIPT OF JURY TRIAL

22 Before:
HONORABLE DOMINIC S. AMATO
23 Circuit Court Judge Presiding

24 Court Reporters: Debra A. Wisniewski, CRR/RMR
Julie A. Poenitsch, CRR/RMR
25 Rosanne E. Pezze, CRR/RPR

1 A I don't recall seeing Mr. Baba looking at the
2 computer, sir.
3 Q Why would he make that up, Mr. Grotlisch?
4 MR. WEBER: Object to form.
5 THE WITNESS: I don't know.
6 THE COURT: Grounds? I didn't hear your
7 grounds.
8 MR. WEBER: Object to the form,
9 argumentative.
10 THE COURT: Sustained. The question is
11 stricken. The jury to disregard. Rephrase the
12 question.
13 MR. HABUSH:
14 Q You had the capacity, did you not, Mr. Grotlisch,
15 after the accident to see what the wind speeds were
16 prior to 5 o'clock?
17 A (No response.)
18 Q Would you like me to repeat the question?
19 A Yeah.
20 Q Do you have it on the screen there?
21 A It's not clear as to what you're asking.
22 Q Well, let me --
23 A After and before?
24 Q After the accident, did you have the capacity to see
25 what the wind speeds had been prior to 5 o'clock?

1 A Yes, sir. I think the -- the DTN will show you
2 information.
3 Q Does the DTN retain information on it for about
4 what, three hours before it changes?
5 A I'm not an expert on it, sir.
6 Q Although you had the capacity to do so, is it your
7 testimony you didn't do so?
8 MR. WEBER: Object to form. Foundation.
9 Assumes facts not in evidence.
10 THE COURT: Overruled. He can answer.
11 THE WITNESS: Didn't do what, sir?
12 MR. HABUSH:
13 Q Check to see what the wind speeds were before 5
14 o'clock.
15 A No, sir, I didn't look at it.
16 Q You told Mr. Bell, I believe, that you folks were
17 required to stay in the trailer till about 10:30 at
18 night by the authorities?
19 A Yes, sir, I think it was approximately 10:30.
20 Q Who else was in the trailer with you folks from the
21 time the authorities first came in there till about
22 10:30?
23 A A number of people, sir.
24 Q Well, there were people there from OSHA, right?
25 A Yes, sir.

1 Q People from the Sheriff's Department?
2 A Sheriff's Department.
3 Q Milwaukee Police Department?
4 A Yes, sir.
5 Q And who from Mitsubishi?
6 A Mike Forsythe, Moto Baba, Wayne Noel, myself,
7 several Danny's people, DCCI, several Price people.
8 They were coming and going.
9 Q Now you told me, did you not, that you had the
10 ability to download the information on that DTN and
11 store it?
12 A I told you I found out afterwards I had that
13 ability.
14 Q Now when the machine was unplugged, do you know
15 whether you were in the trailer?
16 A I don't know when the machine was unplugged.
17 Q Couldn't we tell by on the 15th, when it was
18 replugged in at the request of the authorities, it
19 popped up at 8:30 p.m., did it not?
20 A I think somewhere between 8 and 8:30, that's
21 correct.
22 Q Didn't that give you a clue as to what time it was
23 unplugged?
24 A Yes, sir, but I don't know if I was in the trailer
25 or outside or -- I mean --

1 Q There's been some testimony that this Court and jury
2 has heard that when suggestions or concerns were
3 expressed to you by workers on that job site, you
4 said, "We hire you from the neck down." Did you
5 ever say --
6 A You made that statement earlier.
7 Q Have you ever said that?
8 A I don't recall that, sir, but --
9 Q That sounds like something you'd say?
10 A Could be, yes, sir.
11 Q That's kind of insulting, isn't it?
12 A You'd have to know the rest of the story. I
13 don't -- I don't know what the rest of the story
14 was.
15 Q Well, when you tell a worker, who may be very
16 experienced, who comes to you as a site
17 superintendent and expresses concerns over safety
18 matters, and you brush him off with a statement,
19 "Listen, fella, we only hire you from the neck
20 down," would you call that disrespectful?
21 A In that hypothetical situation, regarding a safety
22 issue, yes, sir.
23 Q You're telling them you're not hiring them for their
24 brains, you're telling them you only want their
25 bodies, right, if that's true?

1 IN THE CIRCUIT COURT OF MILWAUKEE COUNTY

2 STATE OF WISCONSIN

3

4 PATRICIA WISCHER, individually,
and as Special Administrator of the
5 ESTATE OF JEFFREY A. WISCHER, deceased;
MARJORIE DeGRAVE, individually,
6 and as Special Administrator of the.
ESTATE OF WILLIAM R. DeGRAVE, deceased;
7 and RAMONA DULDE-STARR, individually,
and as Special Administrator of the
8 ESTATE OF JEROME STARR, deceased,

9 Plaintiffs,

10 -vs- Case No. 99-CV-006553

11

12 MITSUBISHI HEAVY INDUSTRIES,
AMERICA INC., TRAVELERS
13 PROPERTY CASUALTY INSURANCE
COMPANY, THE TRAVELERS INDEMNITY
14 COMPANY OF ILLINOIS, NEIL F. LAMPSON,
INC., HCH MILLER PARK JOINT VENTURE,
15 HUNZINGER CONSTRUCTION COMPANY,
CLARK CONSTRUCTION BUILDERS, INC.,
16 and HUBER, HUNT & NICHOLS, INC.,

17 Defendants.

18

19 November 9, 2000

20 VOLUME XIX

21 TRANSCRIPT OF JURY TRIAL

22 Before:
HONORABLE DOMINIC S. AMATO
23 Circuit Court Judge Presiding

24 Court Reporters: Constance L. Bauer, CRR/RMR
Julie A. Poenitsch, CRR/RMR
25 Julie K. Lyle, RMR/RPR

1 MR. CARLSON: The original should be there.
2 It's been used, Your Honor.
3 THE COURT: Come on up and help him out.
4 I'd appreciate it, Mr. Carlson.
5 BY MR. CARLSON:
6 Q Just two more questions. Okay.
7 Question: "And pursuant to the lease,
8 because the crane is in Mitsubishi's control,
9 Mitsubishi is responsible pursuant to the lease for
10 any damages done to that crane while its at Miller
11 Park, true?"
12 Answer: "I believe that's what the
13 lease states."
14 Question: "And Mitsubishi is
15 responsible for damages to that crane whether
16 Mitsubishi caused that damage or some other
17 contractor caused that damage, true?"
18 Answer: "I believe that's what the
19 lease states."
20 Did I correctly read that, sir?
21 A Yes, sir, you did.
22 Q Okay, thanks. All right. Anemometer, the anemometer
23 was on the top of the mast of the Transi-lift?
24 A Your question is?
25 Q Yeah. Was the anemometer, the descending unit for

1 IN THE CIRCUIT COURT OF MILWAUKEE COUNTY

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11

12 MITSUBISHI HEAVY INDUSTRIES
AMERICA, INC., TRAVELERS
13 PROPERTY CASUALTY INSURANCE
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INC., HCH MILLER PARK JOINT VENTURE,
15 HUNZINGER CONSTRUCTION COMPANY,
CLARK CONSTRUCTION BUILDERS, INC.,
16 and HUBER, HUNT & NICHOLS, INC.,

17 Defendants.

18

19 November 14, 2000

20 Volume XXII

21 TRANSCRIPT OF JURY TRIAL

22 Before:
HONORABLE DOMINIC S. AMATO
23 Circuit Court Judge Presiding

24 Court Reporters: Debra A. Wisniewski, CRR/RMR
Constance L. Bauer, CRR/RMR
25 Julie A. Poenitsch, CRR/RMR

1 with clients over whether or not and how wind would
2 affect cranes on a job site. Are you aware of that?
3 A Yes.
4 Q He's had over 30 years of experience in which he
5 advises his clients how wind would affect the safety
6 of using one crane versus another. Are you aware of
7 that?
8 A I'm aware he's done that from time to time.
9 Q He's had 30 years in which he had to assess the
10 suitability of the ground that the crane or other
11 machines would be sitting on. Are you aware of
12 that?
13 A Yes.
14 Q Are you aware that this is his life's work, this is
15 not litigation experience?
16 A I understand that his career is working with cranes,
17 that's correct.
18 Q Yes. And he's written a definitive text that I have
19 sitting on my desk?
20 A He has written that textbook, that's correct.
21 Q Third edition?
22 A I don't remember the edition.
23 Q Have you read it?
24 A Read parts of it.
25 Q Parts that pertain to this case?

1 A Yes.
2 Q Do you have it in your library?
3 A Yes.
4 Q Are you aware that he was chairman, chairperson of a
5 number of committees for the American Society of
6 Mechanical Engineers, the Society of Automotive
7 Engineers, was a delegate of -- for the United
8 States to the ISO, and it was all related to his
9 specialty of cranes and derricks. Are you aware of
10 that?
11 A I am aware of that.
12 Q Now, you have not served on committees like that,
13 have you?
14 A Not for cranes and derricks, no.
15 Q You have not written any textbooks about cranes and
16 derricks either, have you?
17 A That is correct. I have written one paper dealing
18 with the failure analysis of a crane.
19 Q You have never worked for a crane manufacturer?
20 A Only as a consultant.
21 Q You've never designed a crane?
22 A I've done design analysis for clients who are crane
23 manufacturers, but I haven't personally stamped the
24 drawings for the crane.
25 Q Now, what Mr. Shapiro brought to this court, to this

1 Q And you said it may be true in parts, didn't you?
2 A Yes.
3 Q Now remember when I started your cross-examination,
4 I asked you about an ounce of prevention is better
5 than a pound of cure?
6 A I remember that.
7 Q I'd like to finish with that same theme, and I'd
8 like to remind you of testimony that I got from you
9 which I've taken the time to put on this board, and
10 I'm going to ask Ken to put up on the screen so it
11 might be easier for the jury to read. This is from
12 your deposition of June 26th-27th, 2000, page 271,
13 line 1 to 8. It will be up there, too. I asked
14 you:
15 "Q But, in any event, going back and
16 asking you to assume that people did not have the
17 benefit of your post-accident analysis, had they
18 read the load chart and understood the load chart,
19 you agree under those circumstances the accident
20 would not have happened?
21 "A Yes. If all of the precautions
22 provided on that chart were followed, I agree with
23 that."
24 Do you stand by that?
25 A Yes, I do.

1 Q Then on page 49 of that same deposition, line 14 to
2 19, I asked you:
3 "Q I want you to assume exactly the same
4 facts as you understand happened on this particular
5 day. I want you to assume now a wind speed of 11
6 miles per hour. Is it your testimony that the crane
7 would have still tipped over?
8 "A Other things being equal, probably
9 not."
10 A That's probably true.
11 Q So if people on site had followed that load chart,
12 people who understood what it meant and had done
13 their homework and determined, as Mr. Shapiro
14 determined, that it was safe to lift at 11 1/2 miles
15 an hour or thereabouts, you wouldn't be here
16 discussing failure analysis with me here today,
17 correct?
18 A With all of the other factors in play, that's true.
19 Q And these three widows would have their husbands
20 back, true, wouldn't they?
21 A I would hope so.
22 Q And their children would have a father back, too,
23 wouldn't they?
24 A Yes, sir, that's true.
25 MR. HABUSH: That's all.

1 IN THE CIRCUIT COURT OF MILWAUKEE COUNTY

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MARJORIE DeGRAVE, individually,
6 and as Special Administrator of the.
ESTATE OF WILLIAM R. DeGRAVE, deceased;
7 and RAMONA DULDE-STARR, individually,
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9 Plaintiffs,

10 -vs- Case No. 99-CV-006553

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AMERICA INC., TRAVELERS
13 PROPERTY CASUALTY INSURANCE
COMPANY, THE TRAVELERS INDEMNITY
14 COMPANY OF ILLINOIS, NEIL F. LAMPSON,
INC., HCH MILLER PARK JOINT VENTURE,
15 HUNZINGER CONSTRUCTION COMPANY,
CLARK CONSTRUCTION BUILDERS, INC.,
16 and HUBER, HUNT & NICHOLS, INC.,

17 Defendants.

18

19 November 21st, 2000

20 VOLUME XXVII

21 TRANSCRIPT OF JURY TRIAL

22 Before:
HONORABLE DOMINIC S. AMATO
23 Circuit Court Judge Presiding

24 Court Reporters: Constance L. Bauer, CRR/RMR
Debra A. Wisniewski, CRR/RMR
25 Julie A. Poenitsch, CRR/RMR

1 calculations were made, doesn't it?
2 A Yes, it does,
3 MR. WEBER: Object.
4 MR. HABUSH:
5 Q Mr. Weber talked to you a bit about Mr. Shapiro.
6 You weren't here when he testified, were you?
7 A Just caught the last few minutes.
8 Q Do you know Mr. Shapiro is the expert that we have
9 hired?
10 A Yes, I do.
11 Q And Mr. Shapiro told this jury and this Court that
12 when I retained him, I asked him to call it as he
13 sees it. I represented the widows. Tell me what
14 happens, spare me nothing. I want to know the whole
15 truth.
16 A Yes, sir.
17 Q Do you know that Howard Shapiro is one of the most
18 recognized crane experts in the world?
19 A Yes, sir. He's a big dog in the crane world.
20 Q And if anybody on this planet would know whether or
21 not this crane was defective, it would be Howard
22 Shapiro, would you agree?
23 MR. WEBER: Object, foundation.
24 THE COURT: Overruled.
25 THE WITNESS: I think he could make a

1 pretty good evaluation of it, yes.
2 MR. HABUSH:
3 Q Now Mr. Weber, he told you about he criticized the
4 Rolli-Flex and he criticized paragraph 10, but did
5 Mr. Weber advise you that when Mr. Shapiro testified
6 and he was asked, "In this case, you have
7 familiarity with crane designs of lots of different
8 manufacturers and it is your opinion to a reasonable
9 degree of engineering probability that Transi-lift
10 was not defective on the day of the accident?
11 "Answer: That's my opinion, yes."
12 From the mouth of Howard Shapiro. Do
13 you understand that?
14 A Yes, I do.
15 MR. HABUSH: That's all I have. Thank
16 you.
17 THE COURT: Mr. Carlson, any redirect?
18 Taking into consideration what we discussed from
19 yesterday and this morning.
20 MR. CARLSON: Yes.
21 THE COURT: Okay.
22 REDIRECT EXAMINATION
23 BY MR. CARLSON:
24 Q The importance of the load chart in the industry is
25 known far and wide?

1 paragraph 11 that paragraph 11 does not, I repeat,
2 does not refer to the lift supervisor, does it?
3 A No, sir.
4 Q Tell the jury, for what I hope to be the last time,
5 what paragraph 11 refers to.
6 A It says, "In addition, the person in charge of lift
7 operations shall carefully review all site-specific
8 operating conditions before the crane is put into
9 operation, including, example, wind gusting,
10 inclement weather, visibility, and the dynamic
11 effects due to hoisting, lowering, swinging, and
12 travel."
13 Q And for what I am certain will not be the last time
14 the jury hears this, who was in charge of lift
15 operations?
16 A Victor Grotlisch of Mitsubishi.
17 MR. HABUSH: Thank you.
18 THE COURT: Is the thank you, thank you,
19 like I'm completed, or were you just pausing and
20 hesitating or -- I don't know. Can you help me a
21 little bit?
22 MR. HABUSH: All done.
23 THE COURT: Thank you. And thank you.
24 Whatever is marked as an exhibit, please leave.
25 THE WITNESS: Thank you.

1 IN THE CIRCUIT COURT OF MILWAUKEE COUNTY

2 STATE OF WISCONSIN

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-vs-
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15 HUNZINGER CONSTRUCTION COMPANY,
CLARK CONSTRUCTION BUILDERS, INC.,
16 and HUBER, HUNT & NICHOLS, INC.,

17 Defendants.

18

19 November 22, 2000

20 Volume XXVIII

21 TRANSCRIPT OF JURY TRIAL

22 Before:
HONORABLE DOMINIC S. AMATO
23 Circuit Court Judge Presiding

24 Court Reporters: Debra A. Wisniewski, CRR/RMR
Constance L. Bauer, CRR/RMR
25 Julie A. Poenitsch, CRR/RMR

Reporting Ltd. (414) 272-7878

1 lift off. Are you aware of that?
2 A I remember that very specific language.
3 Q And Mr. Watts told us, again repeating what he had
4 told us at his deposition, that what prevented him
5 going to Victor Grotlisch that day and saying to
6 Victor let's cut this out, let's quit this lift, was
7 not only influenced by the orders he had gotten from
8 his bosses but a prior experience he had had with
9 Mr. Grotlisch where he had recommended that be done
10 and was rebuffed. Are you aware of that?
11 A Yes.
12 Q Do you agree with Mr. Morin, who was Mitsubishi's
13 expert, that if Mitsubishi had followed the load
14 chart that day, this tragedy would never have
15 occurred?
16 A That is true.
17 Q And do you agree with Mr. Morin if the lift had been
18 conducted in winds around 11 miles per hour, this
19 tragedy would never have occurred?
20 A I agree.
21 Q I want you to assume, Dr. Ross, that between 12:30
22 and 1:00 an experienced crane operator, Mr. Edwards,
23 observed the wind to be 25 to 30 miles an hour. I
24 want you to assume that a citizen who was around the
25 area that day estimated winds of 26 miles per hour

Huber, Hunt & Nichols, Inc.
A Subsidiary of The Hunt Corporation

CLARK CONSTRUCTION

The Clark Construction Group, Inc.

Hunzinger Construction Company

HCH/MHIA/SEWPBPD
Meeting Minutes
July 14, 1999

Attendees:

Bob Decker	HCH
Rick DeJean	HCH
Mark Flandermeyer	HCH
Rebecca Griffin	HCH
Tom Leslie	HCH
Peter Tocci	HCH
Chris Raykowski	SEWPBPD
Mike Duckett	SEWPBPD
William Day	SEWPBPD
Ann Woodhull	SEWPBPD
Masa Takahashi	MHIA
Moto Baba	MHIA
Victor Grotlisch	MHIA
Kano Saito	MHIA
Heki Kasugai	MHIA
Kaz Hayashi	MHIA
Paul Deasy	MHIA
Bob Grothman	GAS
Jeffrey Rosner	GAS
John Hutchings	HKS
Surinder Mann	OAP
John Roberts	OAP

Exhibit 169

Grotlisch
EXHIBIT 169
10-20-99 JD
BROWN & JONES

Discussion:

1. Peer Review Involvement Presentation

MHIA provided the attached handout outlining the extent of Peer Review they had done. This listing includes field visits which have occurred approximately once per week.

GAS noted that they had reviewed the original erection procedure. Once the erection procedure was changes to the current scheme, they reviewed a preliminary, a secondary and a final version. At that time, a report was issued.

HCH noted that based on the handout, it appears that there has been more peer review involvement than we have seen previous indication of. HCH noted that perhaps the comfort level would increase if copies of all correspondence were forwarded. MHIA will provide this.

HCH MILLER PARK
Joint Venture

162 North 44th Street
Milwaukee, WI 53208
Phone: (414) 771-7264
Fax: (414) 771-7365

FILE

HKS noted that 2L erection is in the near future. MHIA needs to provide necessary information as soon as possible to prevent a similar situation of MHIA waiting on information by others.

2. Panel 4L Drain Piping
4L Home plate end – MHIA anticipated punching thru tomorrow or Friday, 7/16. Crew will then go to the outfield. The outfield will be done in 1 wk of 1 ½ wk.

3. Panel 3L Jacking &
Replacement of damaged brace
See that discussed in above Item #1.

OAP has taken jack info from MHIA and run their model. Revised gap dimensions have been provided. OAP noted the need to know if forces required to bend/flex hangers is larger than that defined by them. It was pointed out that MHIA is not set up to record forces as the flexing occurs with come alongs. Operation to restart tomorrow, 7/15. MHIA anticipates getting 3 done tomorrow. MHIA noted a scheduling issue with the M2250 because it is unable to reach the outfield members.

OAP has no technical comment to the preflexing procedure at this point. It was confirmed that OAP has no comment regarding the order in which MHIA intends to flex the hangers. OAP noted that the proposed sequence is fine. OAP's concurrence is necessary for procedure. OAP's John Roberts will make comment yet today.

4. Panel 4R (pick 4R3 today)
Block 3 pick has been temporarily suspended because of wind. The block will be picked up once the wind dies down. MHIA indicated later in the meeting that they had commenced the lift.

Decking
Material is here. Installation will occur after 4R3 is connected. MHIA noted that there are lifting devices on blocks 2 & 1, and that Purlins and red iron will have to be installed on 4R3. MHIA noted that lifting devices are still on because they have been concentrating on other things.

MHIA noted that bracing between blocks 2 and 3 may start Monday.

PVC
MHIA anticipates an August 2nd start date for PVC.

Drain Piping
MHIA noted that fabrication has not yet started. This will start next week once a PO has been written. HCH noted the desire of having an 8/15 dry-

Gros
EXHIBIT 1157
8-23-00 SK
BROWN & JONES

LAMPSON INTERNATIONAL LTD.

Standard Equipment Lease Agreement

THIS AGREEMENT is executed on _____ DATE

by LAMPSON INTERNATIONAL LTD. (LESSOR) MITSUBISHI HEAVY INDUSTRIES AMERICA (LESSEE)

THE PARTIES for the consideration hereinafter stated agree as follows

Lessee hereby leases from Lessor the equipment described below and/or on Exhibit "A" without extra cable sheaves cords small parts piping hose fuel lubricants supplies or crew at the agreed value and at rental rates stated below

THE GENERAL CONDITIONS ON THE REVERSE SIDE ARE INCORPORATED HEREIN BY REFERENCE AND MADE PART OF THIS AGREEMENT

Equipment Identification

1. EQUIPMENT DESCRIPTION:	Company No	S/N	Agreed Equipment Value
LAMPSON TRAVEL LIFT [illegible]	TBA	TBA	
SERVICE LIFT EQUIPPED WITH [illegible]			
DE BRAY [illegible] OF THE [illegible]			
ELECTRIC WIRE ROPE AND SWIVEL			
COUNTERWEIGHT BLOCKS			

2. RENTAL RATES AND USE: X Bare ___ Fully Operated

	Single Shift Rate	2nd Shift Rate
Rate per Hour	$	$
Rate per 8 Hour Day	$	$
Rate per 40 Hour Week	$	$
Rate per 176 Hour Month	$	$

Hours in excess of the above shall be charged for on a direct pro rata basis of the respective shift rate

3. RENTAL PERIOD: Minimum Term [illegible] MONTHS Agreed minimum revenue amount $ ____

Commencing [illegible]

4. PROJECT NAME AND LOCATION: [illegible] MILWAUKEE, WISCONSIN

BILLING ADDRESS [illegible] JOBSITE PHONE TBA

TYPE OF WORK X Lift crane work only Other _____

5. DELIVERY AND RETURN CHARGES

Equipment unloading and assembly at jobsite paid by	X Lessee $	Lessor
Equipment dismantle and load out at jobsite paid by	X Lessee $	Lessor
Transportation to jobsite paid by	X Lessee $	Lessor
Transportation from jobsite paid by	X Lessee $	Lessor

Lessee assumes charges for field representatives to assist Lessee with equipment on site assembly operation disassembly and onsite. Lessee agrees to pay Lessor the following charges for each representative or service mechanic furnished while working traveling or for other compensable time. Section 16 applicable

X Labor Rates $/hr $ ____ Overtime $ ____ Double time $ N/A

X Subsistence $ ____ X Lessee at actual cost

X Service vehicle at $ ____ X Airfare $ car rental at actual cost

X Other [illegible] STATE PERMITS AND SPECIALIZED EQUIPMENT [illegible] DEPARTMENT REPRESENTATIVE ENGINEERING.

6. INSURANCE CERTIFICATES.

Prior to use of equipment Lessee shall furnish certificates of insurance evidencing coverage for Lessor for general liability and all risk physical damage. The insurance shall be in a coverage amount not less than $1,000,000 Combined Single Limit and shall include Lessee as an additional insured.

X Lessee to furnish insurance for Lessor with proper endorsements and be responsible for physical damage

X Lessee to furnish insurance for Lessor with proper endorsements and be responsible for general liability

X Lessee to include Lessor as insured on any project insurance available to Lessee

IN WITNESS WHEREOF, Lessor and Lessee have executed this Agreement the day and year first above written

CRC15985

Name and address of Lessor	Name and address of Lessee
LAMPSON INTERNATIONAL LTD.	MITSUBISHI HEAVY INDUSTRIES AMERICA
4335 E. 60TH AVENUE	162 NORTH 44TH STREET
COMMERCE CITY, CO 80022	MILWAUKEE, WI 53208
Phone No 303 286-1000 Fax 303 286-1099	Phone No 414 607-0837 Fax 414 607-0839
By [signature]	By [signature]
The VICE PRESIDENT Date 7-14-96	The [illegible] Date [illegible]

RECEIVED

Ex 1157

[redacted]

LAMP 002499

CONFIDENTIAL

ENERAL CONDITIONS OF LEA

[illegible]

7. RENTAL PERIOD. [illegible]

8. RENTAL CHARGES. [illegible]

9. PAYMENT. [illegible]

10. TRANSPORTATION. [illegible]

11. RETURN OF EQUIPMENT. [illegible]

12. USE OF EQUIPMENT. [illegible]

13. REPAIRS AND OPERATION COSTS. [illegible]

14. SUPPLYING OPERATORS. [illegible]

15. DAMAGE TO EQUIPMENT AND/OR INJURY TO PERSONS. [illegible]

16. INDEMNIFICATION. [illegible]

17. INSURANCE. [illegible]

18. TERMINATION OF AGREEMENT. [illegible]

19. WARRANTIES. [illegible]

20. LIMITS OF LIABILITY. [illegible]

21. TITLE. [illegible]

22. TAXES. [illegible]

23. ASSIGNMENT - TRANSFER - SUBLETTING. [illegible]

24. SUCCESSORS AND ASSIGNS. [illegible]

25. APPLICABLE LAW. [illegible]

26. FORM OF AGREEMENT. [illegible]

LAMP 002500

CONFIDENTIAL

TR215986

GENERAL CONDITIONS OF LEASE

The conditions of lease here below stated together with the Agreement set forth on the reverse side of this sheet. constitute between the parties therein named a contract which is hereafter referred to as this Agreement.

7. RENTAL PERIOD: The Rental Period includes all time in transporting the equipment and shall begin when the equipment is loaded out and ready for shipment and shall end when the equipment is returned to Lessor's point of origin or equivalent Lessor's designated receiving point. Should Lessee retain the equipment beyond the minimum term, the term shall be extended at the respective pro rata rates provided notice of a minimum of ten (10) days prior to expiration of the minimum term is provided to the Lessor. After expiration of minimum term. Lessee will provide a minimum of ten (10) days written notification of intent to return machine to Lessor.

8. RENTAL CHARGES: The Lessee shall pay all rentals incurred for the Rental Period on each article of equipment leased at the rate stipulated without deduction for equipment downtime. or for surrender of the equipment prior to the expiration of the minimum term. or for any other reason. except as authorized by Lessor in writing. Further. Lessor shall not be responsible for any charges or costs incurred by Lessee resulting from equipment downtime. Rental rates established on the face of this Agreement are minimums for established periods based on eight (8) hours per day five (5) days per week and twenty-two (22) days per month. Any hours in excess of these established periods will be charged for at the respective pro rata rate. Lessee will submit equipment utilization logs each month to Lessor. based on operator hours.

9. PAYMENT: Lessee shall pay all rentals or other charges to Lessor at the address designated herein or at such other place as Lessor may designate in writing. Payment shall be in U.S. funds unless the parties agree otherwise in writing. Rental payments and other charges invoiced as a consequence of this lease agreement are due within ten (10) days of invoice date. Past due amounts plus any unpaid interest shall bear interest 1.5% per month or maximum provided by law. Payment of this interest shall not waive the Lessor's right to terminate this Agreement.

10. TRANSPORTATION: Lessee agrees to be responsible for all transportation costs. including but not limited to. loading and unloading costs. storage. carriage. towage. salvage and demurrage costs. Lessee accepts responsibility for all damage or loss. direct or indirect and consequential. however caused. while in transit and during the entire period of the lease. Lessee shall furnish timely instructions for shipment to the place of use specified herein and provide free and clear unimpeded access over all haul routes and to and from all work areas. Lessor shall not be held responsible for any costs or delays resulting from Lessor's failure to timely deliver equipment due to reasons beyond Lessor's control.

11. RETURN OF EQUIPMENT: Lessee agrees to return the equipment to Lessor at Lessor's designated receiving point of origin unencumbered and in the same condition as when received by Lessee. excepting reasonable wear and tear resulting from normal and proper use. Excessively worn. non-functional or damaged parts such as cables. frictions. brakes. pumps. valves. batteries. glass. gauges. etc.. which require replacement are consumables and not considered normal wear and tear and will be replaced at Lessee's expense. On-hire and off-hire inspection shall be at Lessee's expense. The cost of any repairs necessary to restore the equipment to said condition. including cleaning equipment at

(11. RETURN OF EQUIPMENT CON'T.): completion of job. shall be paid by Lessee regardless of betterment. Any time beyond the minimum rental period required to make such repairs shall extend the rental period to include such reasonable additional repair time as is necessary under the circumstances. Lessor may require Lessee to ship the equipment to a point other than the point of origin or to accept return where located. In this case the Lessee shall pay the Lessor the equivalent of the rental period estimated to return the equipment to the point of origin and the freight. loading. insurance and other costs which would have been required to return to the point of origin.

12. USE OF EQUIPMENT: In absence of Lessor's written permission to do otherwise. Lessee shall use the equipment only in the conduct of its business and at the places of anticipated use specified in Paragraph four (4). At no time shall the equipment be subjected to improper. careless or needlessly adverse use or to any usage in violation of any statute. ordinance. rule. regulation or order of any government or other entity having jurisdiction over the place of use or while in transit. Lessee agrees: (a) to use the equipment in accordance with the manufacturer's instructions and within the rated load capacity for such or similar equipment: (b) equipment is not designed for. nor intended to be used as personnel hoists--any revisions required to meet state or federal regulations for such use will be for Lessee's expense: (c) no counterweight in excess of the manufacturer's specifications shall be used: (d) the equipment shall be protected from all hazards. including environmental exposure.

Factory checklists. assembly and rigging drawings and instruction folios must be followed precisely. No deviation from respective assembly and rigging drawings is permitted without written approval. and no substitution or non-standard components are permitted.

Lessee agrees not to alter or modify the equipment or to remove or alter any numbering. lettering or insignia placed upon the equipment without first obtaining Lessor's written consent. Lessee shall maintain accurate lubrication and repair records for the equipment. and record and submit to Lessor the actual hours and dates of operation in the form prescribed by Lessor (attached hereto) which the parties expressly agree shall be incorporated herein by the reference. Lessee shall keep Lessor informed of the location and of the condition of the equipment at all times and Lessor shall be given access to the equipment at all reasonable times to enter the premises occupied by the equipment and afforded necessary facilities for the purpose of inspection.

13. REPAIRS AND OPERATION COSTS: Lessee agrees to inspect the equipment upon taking delivery. Lessee's failure to notify Lessor in writing of any deficiencies in the equipment within twenty-four (24) hours after taking delivery or such other period of time as may be mutually agreed upon in writing is Lessee's acknowledgment that the equipment was. when delivered. in good. safe and serviceable condition and fit for its intended use. Lessee shall maintain the equipment and its attachments or devices in good. safe operating condition in accordance with manufacturer specifications and shall bear the cost thereof. including protection against freezing. corrosion or other abnormal exposure. This includes all safety related devices such as load indicating devices. anti-two block devices. electronic boom angle indicators. etc. Lessor does not warranty or guarantee the accuracy or reliability of these devices or that they will remain functional throughout the rental term. Lessee assumes all responsibility for use of such devices. Lessee shall not incur any liability or expend any money for Lessor's account. nor shall Lessor become liable to Lessee for any costs incurred by Lessee. Title to all parts. materials and supplies furnished to the equipment become the property of the Lessor.

All accessories or attachments not listed herein or necessarily includable as part of the equipment shall be furnished by Lessee at its own expense.

14. SUPPLYING OPERATORS: Unless otherwise mutually agreed in writing the Lessee shall supply and pay all operators for the leased equipment during the rental period and shall employ only competent. experienced. knowledgeable. and reliable personnel who will operate and maintain the equipment. Should the Lessor loan any operators or other workmen for the equipment. they shall be

(14. **SUPPLYING OPERATORS CON'T.**): employees of the Lessee under Lessee's exclusive jurisdiction, supervision, and control during the rental period, and the Lessee shall also pay them such traveling expenses, board and lodging as may be agreed between the Lessee and Lessor. The Lessee shall provide and pay for all wages, workmen's compensation insurance, fringe benefits, and pay all payroll taxes required by law applying to such operators and workmen. Lessee agrees to indemnify Lessor against and hold Lessor harmless from all liability for wages, taxes, insurance contributions, other such payments, benefits under any workmen's compensation or similar expenses, respecting Lessee's employment of such personnel. Lessor does not represent, warrant or guarantee to Lessee or anyone that Lessor supplied equipment operators have been properly trained or instructed to operate the leased equipment. Accordingly, all Lessor supplied equipment operators shall become Lessee's responsibility and shall be tested and pre-qualified by Lessee to determine their competency, experience and reliability to operate the leased equipment.

15. DAMAGE TO EQUIPMENT AND/OR INJURY TO PERSONS: Lessee shall pay Lessor for any loss or damage to the equipment howsoever caused during the rental period. If the equipment is damaged or made inoperable in any way other than as a result of normal operating wear or a personal injury is sustained, the Lessee shall notify Lessor within twenty-four (24) hours of its occurrence, specifying the extent and nature of the damage or injury . Repairs to structural or load carrying portions of the equipment, including, but not limited to, boom sections are not to be undertaken without first obtaining Lessor's written consent. The appraisal of any such loss or damage shall be based on the agreed equipment values specified in Paragraph One (1). Rentals shall continue to accrue at rates stipulated until repairs are complete and equipment is returned to Lessor at point of origin in same condition as when delivered.

16. INDEMNIFICATION: Lessee agrees that the equipment and all persons operating or supervising operation of such equipment, using, having access to whether authorized or unauthorized, including Lessor's and Lessee's employees, are under Lessee's exclusive jurisdiction, supervision, and control and agrees to defend, indemnify and hold harmless Lessor, its employees and agents from all claims, including but not limited to claims based on negligence, strict liability, product liability (whether arising out of alleged defects in design, defects in construction or inadequate warnings) or pollution, for death or injury to persons, including Lessor's and Lessee's employees, and from all loss, damage or injury to property, including the equipment, arising in any manner out of Lessee's operation or use of the equipment. Lessee's obligation hereunder shall not be limited by any industrial or workmen's compensation act. *This waiver is the result of direct negotiations between the parties.* If a state other than the State of Washington has at least a reasonable relation to or connection with the subject matter of this Agreement, and if that state's law allows indemnification for amounts attributable to the fault of the indemnitee or third parties, then that state's law shall apply to enforcement of this paragraph. Lessee's duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including but not limited to all court and or arbitration costs, filing fees, attorney fees and costs of settlement.

17. INSURANCE: Lessee shall provide and maintain Commercial General Liability insurance and other insurance necessary (including blanket contractual liability insurance) to protect the Lessor and it's affiliates continuously during the life of this Agreement from any and all claims for bodily injury, death or property damage (including loss of use thereof) made or arising out of the operation, handling or transportation of the equipment leased under this Agreement with limits of liability not less than $2,000,000.00 combined single limit per occurrence and general aggregate. The latter to be provided on a per location or per job site basis. Such insurance shall be endorsed to include the Lessor as an additional insured with a waiver of any right of subrogation against the Lessor.

(17. INSURANCE CON'T.): The Lessee shall provide and maintain during the life of this Agreement marine and/or inland marine replacement value insurance on an "all risk basis" including boom coverage with no overload exclusion on all equipment leased under this Agreement with limits of coverage equal to the agreed equipment values shown on the face of this Agreement. Such insurance shall name Lessor as insured/loss payee and shall not be canceled without first giving Lessor thirty (30) days prior written notice. Whenever Lessee is named as an additional insured on any builders risk and/or wrap-up policy (or is granted a waiver of subrogation) by either the owner, general contractor or subcontractor "project insurance." Lessor shall also be named and such benefits shall pass through to the Lessor.

The Lessee shall pay the deductible and or retention on all policies of insurance. Lessee shall furnish the certificates of the aforementioned insurance to the Lessor within ten (10) days from the date of Lessee's execution of the Agreement and before taking delivery of the equipment. All insurance policies provided by Lessee according to rental agreements entered into between the Lessee and Lessor shall always be primary irrespective of any coverages carried by the Lessor. Lessee's duty to provide insurance to Lessor is in addition to and is independent of Lessee's duty to indemnify Lessor and applies regardless of the latter's applicability or enforceability.

18. TERMINATION OF AGREEMENT: Should the Lessee become thirty (30) days delinquent in payment to Lessor or become bankrupt, or fail to maintain and operate or to return the equipment as provided by this Agreement, or violate any provision thereof, the Lessor may, after notice, terminate this Agreement, take possession of the equipment without becoming liable for trespass and recover all rental due, full damages for any injury to, and all expenses incurred in returning the equipment.

19. WARRANTIES: Lessor warrants that it has the right to lease the equipment and that Lessee shall have quiet possession of the equipment during the term. The equipment is leased where is, as is; Lessor makes no representation or warranty of any kind that the equipment or its attachments or devices is or shall be fit or suitable for any specific purpose or purposes of Lessee. Lessor makes no other express or implied warranties respecting the equipment nor shall this contract be varied, supplemented, qualified, or interpreted by any prior course of dealing between the parties or by any usage of trade. Lessee warrants that it is duly authorized to do business in the jurisdiction where the equipment is to be used and that the person signing this Agreement has the authority to bind Lessee.

20. LIMITS OF LIABILITY: In consideration for Lessor's agreement to enter into this lease agreement, Lessee agrees as a limitation of liability that Lessor, its employees and agents shall not be liable for direct, indirect or consequential loss, however caused, including but not limited to loss of use, loss of revenue and profit or added costs of construction resulting from Lessee's operation or use of the equipment. Lessor shall not be responsible for direct, indirect or consequential damages arising out of the operation of the equipment, delay or loss of use of the equipment for any reason, including but not limited to any act, failure to act or negligence of Lessor or any of its servants, agents or employees.

21. TITLE: Lessor retains title to the equipment. Lessee agrees to keep the equipment from all liens or other encumbrances. Lessee agrees to notify Lessor immediately after any lien or any attachment or other claim is filed against the equipment. Lessee agrees to protect Lessor's interest in equipment at all times during the term of the lease.

22. TAXES: All state or local taxes including, but not limited to sales, use and property taxes, whether taxable to Lessor or Lessee, incurred as a consequence of this agreement or arising out of Lessee's use, possession, or location of the equipment identified herein, including any interest and penalties assessed shall be paid for by Lessee. If Lessor is caused to advance payment, then Lessee shall reimburse Lessor for any costs, expenses or penalties resulting from Lessees failure to pay.

23. ASSIGNMENT - TRANSFER - SUBLETTING: Any attempt by Lessee to assign, sublet or otherwise transfer this lease or any interest herein in absence of Lessor's written consent, shall be void. Lessee shall not, in absence of Lessor's prior written consent, remove the equipment from its place of designated use nor shall Lessee relinquish possession, custody or control of the equipment to anyone other than those designated by Lessor in writing. If Lessor assigns this lease, such assignment shall be free of all claims or offsets in favor of Lessee. Upon assignment, the term "Lessor" shall include and refer to Lessor's assignee.

24. SUCCESSORS AND ASSIGNS: This lease shall be binding upon and shall inure to the benefit of the parties and their respective heirs, successors, administrators, executors, trustees and assigns, subject to the provisions of Paragraph twenty-three (23) hereon.

25. APPLICABLE LAW: The Lessee hereby submits to the jurisdiction of the State of Washington in any action concerning this agreement or its subject matter. Except as otherwise provided in this Agreement, the laws of the State of Washington shall govern such legal action. Venue shall be in Benton County, Washington. Lessor shall be entitled to reasonable attorney's fees and costs of litigation in any suit to enforce the terms of this Agreement.

26. FORM OF AGREEMENT: This document is a complete and exclusive statement of all the terms of this lease and includes all the representations of the parties. Lessee represents that it has not relied upon any previous representations by anyone as an inducement to enter into this lease. Lessor may withhold delivery of the equipment until this Agreement has been properly executed by all parties; however, acceptance of delivery of the equipment and its use by Lessee shall constitute acceptance of all of its terms and conditions. This agreement may only be modified in writing signed by the parties.

Meeting Minutes

A meeting was on held on December 3, 1997 at the Lampson International Ltd. headquarters in Pasco, Washington. The attendees are as follows:

Lampson		Mitsubishi Heavy Industries America (MHIA)	
Bill Lampson	President	Moto Baba	Structural Engineer
Bucky Gros	Vice President	Marion Kanki	Purchasing Manager
		Ed Macias	Consultant

The following were discussed during the meeting:

1.1 The 2000-ton crane that MHIA referred to in their agenda was clarified to be a Lampson Transi-Lift 1200 Series 2A.

1.2 A sidebar discussion resulted in renegotiating smaller service cranes as well as the possibility of utilizing a LTL 350 in lieu of a 600-ton D-Mag. We explained the importance of one of the 4100W's to be a Lampson crane to adapt to the LTL 350 attachment. Ballpark figures were discussed at $45,000.00 and today's quote reflects $40,000.00.

1.3 Tower Attachments were discussed for the 4100W's to be used for fill-in and light steel that will not exceed 28,000 lbs. Handouts were distributed for the 4100W Towers.

2.1 Bill Lampson explained an interest to renting an LTL to one entity throughout job, preferably MHIA. MHIA can supply and backcharge HCH for their use in the early stages as well as the period when HCH and MHIA will be using the machine.

2.2 We discussed that the transition will work when HCH rents the machines, erection and transfer to MHIA.

2.3 The rental period will begin approximately 6 weeks before the 1st lift is required by MHIA if HCH does not use the machine. The machine will ship in May June or depending on when the 1st lift is required in July. If HCH utilizes the transi-lift Lampson will start to mobilize in January February 1998.

2.4 We discussed the window from approximately December 15, 1998 – February 15, 1999 where the operators will not be required due to inclement weather and cold working conditions. From February 15, 1999, the machine will be operated through completion in July.

2.5 Operators were discussed: one flagmen (Superintendent) will be supplied since the majority of the crew are ironworkers. This person will most likely be an ironworker.

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2.5a A hoist operator is required. Our preference is to provide a mechanic who can also double as a crawler operator. If in fact the union wants to put local men on as crawler operators then it will be a good idea to keep our mechanic on-site as a spare mechanic or oiler if required.

2.7 We standardized the rates between HOTH and MHIA for Lampson employees. In one case we listed it at $7[illegible] per day while in the other it was $650.00 per day. One price did not include the service truck. It was finalized that $650.00 per day will be used throughout the project and this price includes the service truck.

2.7a Engineering, both on and off-site will be available at the above rate (paragraph 2.7).

2.8 We would allow the operator to be paid direct by the subcontractor as long as their benefits could be paid direct to the home local union or paid by Lampson and backcharged by Lampson. Our rates were based more on simplicity for budget figures, estimating and charging. This is not a very big cost item that we have to insist upon handling.

2.9 If DOBY is required by the local unions then the employees will be reimbursed for this cost. We hope the second crawler operator takes the place of an oiler.

3.1 It is MHIA understanding that OCIP exists. At this point they do not feel that there is an equipment floater. However, builders risk should be in place that all subcontractors and suppliers can be named on. Moto Baba is researching this.

3.2 Lampson will quote for the project the physical damage insurance under a separate cover. The 4000W's, 4100W's and Transi-Lift will be listed separately and will include what our rates would be if each piece of equipment is insured individually.

3.3 Moto Baba was more comfortable if we provided the insurance to guarantee that the equipment was insured according to Lampson's requirements.

3.4 Taxes were discussed. There was a question whether the project was exempt or the 5.6% applies and if any property tax applies to the equipment on-site. Moto Baba is researching this.

3.5 Subsistence was explained as the rental of hotel rooms at cost and a $25.00 daily meal allowance seven days per week.

3.6 Expenses are items as airline tickets, rental vehicles, and engineers' room rentals for site visits. These are all pass through expenses.

3.7 The Superintendent and the operator will drive the service trucks. The service truck rate is included in our daily technical assistance rate unless the labor is paid direct. Then the cost is $50.00 per day. The $1.10 per mile only applies to and from the project.

4.1 WBE/MBE participation is not available through the Lampson organization. We would entertain providing our services to MHIA subcontractors as long as all contractual agreements and standard terms and conditions are guaranteed by MHIA.

5.1 Lampson Terms and Conditions were reviewed and distributed. If there are any questions or problems, they can be discussed at the meeting next week.

6.1 Soil conditions were discussed. Bill Lampson explained that this is a requirement of the lessee and we will offer an engineer to meet with your civil contractor and/or geotech. subcontractor to explain or requirements and how they change with different loads at different radii.

6.2 Wooden mats are available from Lampson. The two mud boats are also available to use to cross piping, staging, etc.

7.1 The crane access to site is acceptable at this point. Hopefully at this time next year an off-ramp to the site will be completed to provide direct access.

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8.1 Moto Baba explained the budget restraints. Lampson agreed to review the pricing in the package as well as the price of the transi-lift. There is some room for negotiation, more so if we can combine HCH's utilization with MHIA's to increase the overall scope of the lifting requirements on the project.

These meeting minutes are represented from the writers interpretation of the meeting held on December 3, 1997. If there are any discrepancies, additions, or questions of these minutes, please contact Lampson.

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LAMPSON INTERNATIONAL LTD.

Jeff	
Bill	
File	

December 18, 1997

Mitsubishi Heavy Industries America, Inc.
162 North 44th Street
Milwaukee, WI 53208
Phone: (414) 607-0831
Fax: (414) 607-0839

Attention: Mr. Moto Baba
Reference: Miller Park Baseball Stadium

Gentlemen:

Happy Holidays to you and your staff. You should have received a package this morning from John Bozung depicting an upscale version of the LTL 350. This new version is the LTL 350 600.

As you can see, the size is beginning to approach the dimensions of the LTL 1200 Series 2A. However, this smaller version has less ground bearing pressure and rents for less than the LTL 1200 Series 2A. The LTL 350 600 is far more mobile than a large hydraulic truck crane.

Maybe our meeting will clarify why the LTL 1200 Series 2A will not be used for the panels "4L" and "4R." If you need two machines at the same time, then the superintendent technician can probably schedule his duties to service both pieces of equipment. We can also clarify which of the components can be interchanged between the LTL 350/600 and the LTL 1200 Series 2A depending on delivery schedules and HCH's needs and schedules.

A reduced price, as a part of the package, for the LTL 350 600 would be as follows:

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Freight Inbound	$ 75,000.00
Bare Monthly Rental	$ 75,000.00
Freight Outbound	$ 75,000.00

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4305 E. 60TH AVENUE • COMMERCE CITY, COLORADO 80022 • (303) 286-1000 • FAX (303) 286-1099

Please advise me as soon as possible if it is your intent to have a meeting early next week or between Christmas and the New Year. Flights are extremely full due to the holidays, however, I am sure I can fly to Chicago and drive to Milwaukee.

Please call me today if you have any questions.

Sincerely,

W. L. "Bucky" Gros
Vice President

WLG:jpm

cc: Bill Lampson
Jeff Abersfeller

LAMPSON INTERNATIONAL LTD.

January 14, 1998

Mitsubishi Heavy Industries America, Inc.
162 North 44th Street
Milwaukee, WI 53208
Phone: (414) 607-0837
Fax: (414) 607-0839

Attention: Mr. Vic Grotlisch Jr.
Reference: Miller Park Baseball Stadium

Gentlemen:

Thank you for the time you spent with me on Tuesday, January 13, 1998. I have enclosed the leases for the Lampson Transi-Lift and conventional cranes. You can execute these leases once you receive the final authorization.

If there are any questions, please feel free to call me. Again, thank you and good luck with your project.

Sincerely,

W. L. "Bucky" Gros
Vice President

WLG:jpm

cc: Bill Lampson
Jeff Abersfeller

Enclosure

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4305 E. 60TH AVENUE • COMMERCE CITY, COLORADO 80022 • (303) 286-1000 • FAX (303) 286-1099

Meeting Minutes from April 10, 1998 Meeting
With
Mitsubishi Heavy Industries

The following items were discussed at the meeting.

(1) The start date for the Transi-Lift needs to be July 1st to have the boom in the air by September 1st.

(2) If the Transi-Lift is kept beyond 14 months, then the two-week outbound transportation will be waived after the last truck leaves the gate. Rent will stop when the last truck leaves the gate.

(3) The first 4100 will ship around May 25th with the inbound transportation time not to exceed 5 days.

(4) All overtime on cranes (over 176 hours), per the operators payroll record, will be billed at the first shift rate. If the second shift rate is billed at the beginning of the month, it will be billed at 75%.

(5) The Transi-Lift overtime will be calculated on a forced account basis. If Mitsubishi is reimbursed on a forced account or additional work basis, then we will recover these costs.

(6) Invoicing will take place on the last week of the month prior to rent. That way, we can receive our payment no later than the second week of the month following the rental period.

(7) Mitsubishi will provide the physical damage insurance. Mitsubishi will review coverage to see if values need to be full replacement values to guarantee that full claims are paid. The replacement value for the 4100's is $1,250,000.00 and the towers is approximately $400,000.00.

(8) Lampson will be named under the owners control insurance program for all operators, mechanics, engineers, iron workers, and supervision while traveling to, from, and while on the job site.

(9) Lampson is not supplying liability insurance to this project for either craft personnel or engineering personnel. Lampson is only supplying technical assistance, and if "PE" stamps are required, then they will be done in Wisconsin.

(10) Lampson will be named additional insured with a waiver of subrogation on both Mitsubishi's and the minority labor subcontractor utilized on site. Mitsubishi will hire a minority labor subcontractor to handle the pay roll.

(11) During offload and assembly of the Transi-Lift, Lampson will require a hoist operator, a mechanic, and a superintendent.

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(12) Once the Transi-Lift is boomed up, work wise, and all parties are comfortable with the local craft crawler transporter operators, then the mechanic may depart or remain on site as mutually agreed upon.

(13) Pay for the superintendent will be $30.00 per hour, or $2.00 per hour more than the highest man paid in the crew. The hoist operator and master mechanic will receive $1.00 per hour more than the highest paid man in the crew or $30.00 per hour.

(14) Subsistence will either be $25.00 per day, 7 days per week, plus lodging at cost, or a lump sum of $2,250.00 living allowance.

(15) Lampson will bill the service trucks at $50.00 per day. One will be for the master mechanic while on site and one will be for the superintendent. The vehicle for the operator can be provided by Mitsubishi or paid with an allowance by the labor subcontractor.

(16) Travel to and from Milwaukee will be arranged in advance for Christmas if the machine is still in operation. The employee, unless the machine is idle, will pay for all other travel arrangements.

(17) New wooden mats will be supplied at an agreed upon rate.

(18) Mitsubishi or their subcontractor will supply plywood, bentenite, and other small consumables.

(19) The specialized rigging and gear van will only be used to offload, assemble, disassemble, and load out the Transi-Lift.

(20) Specialized rigging, spreader bars, and weldments will be leased at an agreed upon rate. Any items that Lampson needs to buy directly for the project will be purchased at Lampson's discount and bought back at the end of the project at a negotiated rate.

(21) The offsite engineering will be completed by July 1st. Any additional engineering and both off and on site visits will be billed at the agreed lease rates.

(22) Empty counterweight boxes will be supplied by Lampson and filled with structural fill by Mitsubishi.

These meeting minutes are written from the writers understanding of the meeting. If there are any discrepancies, omissions, or additions, please notify us immediately so we can make the appropriate changes. If you find these items acceptable, please sign below and attach copies to the executed lease agreements.

Bucky Gros, Vice President
Lampson International Ltd.

Masaki Takahashi, Project Manager
Mitsubishi Heavy Industries

TR116002
LAMP 002516
CONFIDENTIAL
App.408

Bill C.
FYI
Bucky

MITSUBISHI HEAVY INDUSTIRES AMERICA, INC.
MILLER PARK PROJECT OFFICE
162 N 44 TH STREET MILWAUKEE, WI 53208

Ref. : LT -154
Date : April 10, 1998

To: Mr. W.L. (Bucky) Gros
Lampson International Ltd.

Re: Letter of Intent for Package No 154

Dear Mr. Gros

This letter confirms the intent of Mitsubishi Heavy Industries America, Inc. (MHIA) to lease Lampson Cranes (One(1) Transi-Lift 1200-IIA, 2(two) 4100W Manitowoc Crawlers, one (1)tower attachment) for Miller Park Project in Milwaukee, Wisconsin.

The final contract rate and fee are based on the Lampson's "Standard Equipment Lease Agreement" dated January 14, 1998 and the minutes of meeting dated April 10, 1998 which is mutually agreeable.

If this letter accurately reflects mutual understanding, please execute this letter of intent in the space provided.

We look forward to your involvement in this project.

Best regards,

Mitsubishi Heavy Industries America, Inc.

By: Masaki Takahashi
Masaki Takahashi
Project Manager

Lampson International Ltd.

By:
W.L. (Bucky) Gros
Vice President

CC: MHI Kobe

TRI16003

LAMP 002517

CONFIDE

App.409

LAMPSON INTERNATIONAL LTD.

April 13, 1998

Mr. Victor W. Grotlisch, Jr.
Mitsubishi Heavy Industries America, Inc.
162 North 44th Street
Milwaukee, WI 53208
Phone: (414) 607-0837
Fax: (414) 607-0839

Reference: Miller Park Baseball Stadium

Gentlemen:

Please review the attached meeting minutes. If you find any discrepancies, omissions, or additions, please let me know so we can make the appropriate changes.

We are in the process of contacting our model builder to determine whether or not he can create the model that you have requested.

I have a call into Allen Watts to schedule a meeting at the Transi-Lift project in Quebec City, Quebec. I will let you know as soon as possible when it would be feasible to visit the project.

This afternoon we are discussing and compiling the necessary information needed for a complete bid package for the assembly and disassembly of the 4100's and the Transi-Lift. You will have this information prior to your prebid meeting on Monday, April 27th.

If you need any further assistance, please do not hesitate to call.

Sincerely,

W. L. "Bucky" Gros
Vice President

WLG:jpm

Enclosure

cc: Bill Lampson
Jeff Abersfeller

LAMP 002518

CONFIDENTIAL

4305 E. 60TH AVENUE • COMMERCE CITY, COLORADO 80022 • (303) 286-1000 • FAX (303) 286-1099

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.
MILLER PARK PROJECT OFFICE

Our. Ref. No.: MP-F-0140
Date: April 15, 1998

To: Mr. W.L. Bucky Gros
Lampson International Ltd.
Re: Miller Park Baseball Stadium

Dear Mr. Gros

Regarding the Minutes of Meeting dated April 10, 1998, MHIA would like Lampsom to revise as follows.

(2) If the Transi-Lift is kept beyond ~~14~~ 13 months, then the two-week outbound transportation will be waived after the last truck leaves the gate. Rent will stop when the last truck leaves the gate.

(8) Lampson Will be named under the owners control insurance program for all operators, mechanics, engineers, iron workers, and supervision ~~while traveling to, from, and~~ while on the job site.
(Because the owners control insurance program covers on the job site only.)

(15) Lampson will bill the service ~~trucks~~ truck at $50.00 per day. It will be used for the master mechanic and the superintandent. The vehicle for the operator can be provided by Mitsubishi or paid with and allowance by the labor.
(Please let them share one truck.)

(21) MHIA wants to discuss the offsite and onsite engineering rate, before we complete the lease agreements. Please submit Lampsom's proposal as soon as possible.

If you have any questions or comments, please let us know.

Best regards,

Harry Saeki
Project Administrator

162 North 44th Street Milwaukee, WI 53202
Tel: 414-607-0837 Fax: 414-607-0839

LAMP 002519

CONFIDENTIAL

file - LTL 1000

LAMPSON INTERNATIONAL LTD.

April 15, 1998

Mr. Harry Saeki
Mitsubishi Heavy Industries America, Inc.
162 North 44th Street
Milwaukee, WI 53208
Phone: (414) 607-0837
Fax: (414) 607-0839

Reference: Miller Park Baseball Stadium

Gentlemen:

Please find the enclosed meeting minutes from our April 10, 1998 meeting. I have made the changes you requested on items 2, 8, 15, and 21. The rate for off site and on site engineering is $75.00 per hour.

If you find these minutes acceptable, please sign page two and return a copy with the original executed lease agreements to my office.

If you have any questions, please feel free to call me.

Sincerely,

W. L. "Bucky" Gros
Vice President

WLG:jpm

Enclosure

cc: Bill Lampson
Jeff Abersfeller

TR11 6006

LAMP 002520

CONFIDENTIAL

4305 E. 60TH AVENUE • COMMERCE CITY, COLORADO 80022 • (303) 286-1000 • FAX (303) 286-1099

Meeting Minutes from April 10, 1998 Meeting
With
Mitsubishi Heavy Industries

The following items were discussed at the meeting.

(1) The start date for the Transi-Lift needs to be July 1st to have the boom in the air by September 1st.

(2) If the Transi-Lift is kept beyond 13 months, then the two-week outbound transportation will be waived after the last truck leaves the gate. Rent will stop when the last truck leaves the gate.

(3) The first 4100 will ship around May 25th with the inbound transportation time not to exceed 5 days.

(4) All overtime on cranes (over 176 hours), per the operators payroll record, will be billed at the first shift rate. If the second shift rate is billed at the beginning of the month, it will be billed at 75%.

(5) The Transi-Lift overtime will be calculated on a forced account basis. If Mitsubishi is reimbursed on a forced account or additional work basis, then we will recover these costs.

(6) Invoicing will take place on the last week of the month prior to rent. That way, we can receive our payment no later than the second week of the month following the rental period.

(7) Mitsubishi will provide the physical damage insurance. Mitsubishi will review coverage to see if values need to be full replacement values to guarantee that full claims are paid. The replacement value for the 4100's is $1,250,000.00 and the towers is approximately $400,000.00.

(8) Lampson will be named under the owners control insurance program for all operators, mechanics, engineers, iron workers, and supervision while on the job site.

(9) Lampson is not supplying liability insurance to this project for either craft personnel or engineering personnel. Lampson is only supplying technical assistance, and if "PE" stamps are required, then they will be done in Wisconsin.

(10) Lampson will be named additional insured with a waiver of subrogation on both Mitsubishi's and the minority labor subcontractor utilized on site. Mitsubishi will hire a minority labor subcontractor to handle the pay roll.

(11) During offload and assembly of the Transi-Lift, Lampson will require a hoist operator, a mechanic, and a superintendent.

(12) Once the Transi-Lift is boomed up, work wise, and all parties are comfortable with the local craft crawler transporter operators, then the mechanic may depart or remain on site as mutually agreed upon.

CONFIDENTIAL

(13) Pay for the superintendent will be $30.00 per hour, or $2.00 per hour more than the highest man paid in the crew. The hoist operator and master mechanic will receive $1.00 per hour more than the highest paid man in the crew or $30.00 per hour.

(14) Subsistence will either be $25.00 per day, 7 days per week, plus lodging at cost, or a lump sum of $2,250.00 living allowance.

(15) Lampson will bill the service truck at $50.00 per day. One will be for the master mechanic while on site and one will be for the superintendent. The vehicle for the operator can be provided by Mitsubishi or paid with an allowance by the labor subcontractor.

(16) Travel to and from Milwaukee will be arranged in advance for Christmas if the machine is still in operation. The employee, unless the machine is idle, will pay for all other travel arrangements.

(17) New wooden mats will be supplied at an agreed upon rate.

(18) Mitsubishi or their subcontractor will supply plywood, bentenite, and other small consumables.

(19) The specialized rigging and gear van will only be used to offload, assemble, disassemble, and load out the Transi-Lift.

(20) Specialized rigging, spreader bars, and weldments will be leased at an agreed upon rate. Any items that Lampson needs to buy directly for the project will be purchased at Lampson's discount and bought back at the end of the project at a negotiated rate.

(21) The offsite engineering will be completed by July 1st. Any additional engineering and both off and on site visits will be billed at $75.00 per hour. This rate includes prints, materials, and computers.

(22) Empty counterweight boxes will be supplied by Lampson and filled with structural fill by Mitsubishi.

These meeting minutes are written from the writers understanding of the meeting. If there are any discrepancies, omissions, or additions, please notify us immediately so we can make the appropriate changes. If you find these items acceptable, please sign below and attach copies to the executed lease agreements.

W. L. Bucky Gros, Vice President
Lampson International Ltd.

Masaki Takahashi, Project Manager
Mitsubishi Heavy Industries

TRI16008

CONFIDENTIAL

LAMP 002522

CONTRACT OF PURCHASE

PROJECT NAME : MILLER PARK RETRACTABLE ROOF PROJECT

PURCHASE NO. : MPP-141(C)

DATE : April 22, 1998

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC. AS BUYER CONFIRMS THE PURCHASE FROM THE BELOW NAME LESSOR OF THE FOLLOWING GOODS UNDER THE TERMS AND CONDITIONS GIVEN HEREIN, INCLUDING ALL THOSE ON THE SHEET(S) ATTACHED HERETO, WHICH ARE EXPRESSLY AGREED TO, UNDERSTOOD AND NAME A PART OF THIS CONTRACT.

LESSOR'S NAME : LAMPSON INTERNATIONAL LTD.

ADDRESS : 4305 E. 60th Avenue Commerce City, CO 80022

1.	TERMS OF DELIVERY	: As per attached (1) "Meeting Minutes from April 10, 1998 Meeting With Mitsubishi Heavy Industries" which shall be superseded any other documents (2) Lessor's "Standard Equipment Lease Agreement" dated January 14, 1998. (3) Undertaking to Continue Performance Form needs to be included
2.	TIME OF DELIVERY	: As per attached agreements.
3.	PLACE OF SHIPMENT	: Miller Park Project Job Site in Milwaukee, Wisconsin
4.	DESTINATION	: Same as the above 3.
5.	INSURANCE	: The Lessor shall insure transportation to/from "Place of Shipment".
6.	PACKING	: N/A
7.	PAYMENT TERMS	: As per attached agreements.
8.	INSPECTION	: N/A

COMFIRMED AND ACCEPTED
(LESSOR: Crane Supplier)

BY: _____

W. L. (Bucky) GROS

DATE: April 22, 1998

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.
(BUYER: CONTRACTOR)

CONFIDENTIAL

BY: Masaki Takahashi

MASAKI TAKAHASHI

PROJECT MANAGER

MITSUBISHI HEAVY INDUSTIRES AMERICA, INC.
MILLER PARK PROJECT OFFICE
162 N. 44 TH STREET MILWAUKEE, WI 53208

Ref. : L/I -154
Date : April 10, 1998

To: Mr. W.L. (Bucky) Gros
Lampson International Ltd.

Re: Letter of Intent for Package No.154

Dear Mr. Gros

This letter confirms the intent of Mitsubishi Heavy Industries America, Inc. (MHIA) to lease Lampson Cranes (One(1) Transi-Lift 1200-IIA, 2(two) 4100W Manitowoc Crawlers, one (1)tower attachment) for Miller Park Project in Milwaukee, Wisconsin.

The final contract rate and fee are based on the Lampson's "Standard Equipment Lease Agreement" dated January 14, 1998 and the minutes of meeting dated April 10, 1998 which is mutually agreeable.

If this letter accurately reflects mutual understanding, please execute this letter of intent in the space provided.

We look forward to your involvement in this project.

Best regards,

Mitsubishi Heavy Industries America, Inc.

By: Masaki Takahashi
Masaki Takahashi
Project Manager

Lampson International Ltd.

By: _____
W.L. (Bucky) Gros
Vice President

CC: MHI Kobe

TR116010

LAMP 002524

CONFIDENTIAL

Meeting Minutes from April 10, 1998 Meeting
With
Mitsubishi Heavy Industries

The following items were discussed at the meeting.

(1) The start date for the Transi-Lift needs to be July 1st to have the boom in the air by September 1st.

(2) If the Transi-Lift is kept beyond 13 months, then the two-week outbound transportation will be waived after the last truck leaves the gate. Rent will stop when the last truck leaves the gate.

(3) The first 4100 will ship around May 25th with the inbound transportation time not to exceed 5 days.

(4) All overtime on cranes (over 176 hours), per the operators payroll record, will be billed at the first shift rate. If the second shift rate is billed at the beginning of the month, it will be billed at

(5) The Transi-Lift overtime will be calculated on a forced account basis. If Mitsubishi is reimbursed on a forced account or additional work basis, then we will recover these costs.

(6) Invoicing will take place on the last week of the month prior to rent. That way, we can receive our payment no later than the second week of the month following the rental period.

(7) Mitsubishi will provide the physical damage insurance. Mitsubishi will review coverage to see if values need to be full replacement values to guarantee that full claims are paid. The replacement value for the 4100's is and the towers is approximately

(8) Lampson will be named under the owners control insurance program for all operators, mechanics, engineers, iron workers, and supervision while on the job site.

(9) Lampson is not supplying liability insurance to this project for either craft personnel or engineering personnel. Lampson is only supplying technical assistance, and if "PE" stamps are required, then they will be done in Wisconsin.

(10) Lampson will be named additional insured with a waiver of subrogation on both Mitsubishi's and the minority labor subcontractor utilized on site. Mitsubishi will hire a minority labor subcontractor to handle the pay roll.

(11) During offload and assembly of the Transi-Lift, Lampson will require a hoist operator, a mechanic, and a superintendent.

(12) Once the Transi-Lift is boomed up, work wise, and all parties are comfortable with the local craft crawler transporter operators, then the mechanic may depart or remain on site as mutually agreed upon.

LAMP 002525

CONFIDENTIAL

App.417

(13) Pay for the superintendent will be per hour, or per hour more than the highest man paid in the crew. The hoist operator and master mechanic will receive $1.00 per hour more than the highest paid man in the crew or per hour.

(14) Subsistence will either be per day, 7 days per week, plus lodging at cost, or a lump sum of living allowance.

(15) Lampson will bill the service truck at: per day. One will be for the master mechanic while on site and one will be for the superintendent. The vehicle for the operator can be provided by Mitsubishi or paid with an allowance by the labor subcontractor. Max 2 vehicles ~~at~~ one time ~~at~~

(16) Travel to and from Milwaukee will be arranged in advance for Christmas if the machine is still in operation. The employee, unless the machine is idle, will pay for all other travel arrangements.

(17) New wooden mats will be supplied at an agreed upon rate.

(18) Mitsubishi or their subcontractor will supply plywood, bentenite, and other small consumables.

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(21) The offsite engineering will be completed by July 1st. Any additional engineering and both off and on site visits will be billed at per hour. This rate includes prints, materials, and computers.

(22) Empty counterweight boxes will be supplied by Lampson and filled with structural fill by Mitsubishi.

These meeting minutes are written from the writers understanding of the meeting. If there are any discrepancies, omissions, or additions, please notify us immediately so we can make the appropriate changes. If you find these items acceptable, please sign below and attach copies to the executed lease agreements.

W. L. Bucky Gros, Vice President
Lampson International Ltd.

Masaki Takahashi
Masaki Takahashi, Project Manager
Mitsubishi Heavy Industries

CONFIDENTIAL

Miller Park Meeting

April 22,1 998 – April 27, 1998

To: Bill Lampson, Jeff Abersfeller, Bob Jester, Bryan Pepin-Donat, John Bozung, Milo Bingston

From: Bucky Gros

A meeting will be held to discuss the following items:

(1) To familiarize all parties with the project areas for offloading and assembly.

(2) Work areas for erection both inside and outside the stadium will be discussed.

(3) Travel path from outside the stadium to inside the stadium will be discussed.

(4) Wind criteria for tie off and lay down area.

(5) Bob will basically review the overall project and line out areas of concern and areas to be tested by Geotech subcontractors.

(6) A meeting will be held with Hubert, Hunt, Nichols to answer any questions they might have.

(7) Milo and John need to stay and flag all layout and walk areas for the Geotech subcontractor. John needs to get a feel for what drawings and services will be required and get a feel for how much time will be required on site.

(8) Monday will be a pre-job walk with all the potential subcontractors for the offload, assembly, disassembly, and load out of the two 4100's and the Transi-Lift. Mitsubishi has asked that we help them prepare a bid package for these operations.

(9) Bryan, have we ever put a formal bid package together or just used your spreadsheets for this estimated work.

(10) This proposal can be finalized on Mitsubishi's paper either Friday or Saturday before the Monday meeting.

(11) I will be having a meeting with the operator BA and ironworker BA separately. Hopefully, Milo will get the opportunity to meet with the ironworker BA before he leaves. Potentially, a minority subcontractor will be awarded all the work for offload, assembly, disassembly, and load out. This could also be the same subcontractor that carries the whole payroll.

(12) The hotel that Miller Stadium has a discount is the Hilton downtown. The hotel is just 5 minutes from the project. This is a billable trip. We should try to minimize the number of rental cars we have.

CONFIDENTIAL

Miller Park Meeting

April 22,1 998 – April 27, 1998

To: Bill Lampson, Jeff Abersfeller, Bob Jester, Bryan Pepin-Donat, John Bozung, Milo Bingston

From: Bucky Gros

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(12) The hotel that Miller Stadium has a discount is the Hilton downtown. The hotel is just 5 minutes from the project. This is a billable trip. We should try to minimize the number of rental cars we have.

LAMPSON INTERNATIONAL LTD.

May 8, 1998

Mr. Vic Grotlisch Jr.
Mitsubishi Heavy Industries America, Inc.
162 North 44th Street
Milwaukee, WI 53208
Phone: (414) 607-0837
Fax: (414) 607-0839

Dear Vic:

Please find enclosed your "Undertaking to Continue Performance" document. Recognize that the terms and conditions of the Lampson International Ltd. lease agreement are the prevailing documents for all work that is completed.

If you have any questions, please do not hesitate to call me.

Sincerely,

W. L. "Bucky" Gros
Vice President

WLG:kls

cc: Bill Lampson
Jeff Abersfeller

CONFIDENTIAL

LAMP 002529

TR116015

4305 E. 60TH AVENUE • COMMERCE CITY, COLORADO 80022 • (303) 286-1000 • FAX (303) 286-1099

SF 19-1

UNDERTAKING TO CONTINUE PERFORMANCE

We, Lampson International Ltd., agree to continue
(Sub-subcontractor or Materialman)
performance of all contracts, agreements and Purchase Orders in force between Mitsubishi Heavy Industries America, Inc. (MHIA) and ourselves
(Subcontractor)
relative to construction at 162 North 44th Street, Milwaukee, WI; this project being constructed by HCH Miller Park Joint Venture commonly known as Miller Park.

We will continue such performance as specified in these Contracts, Agreements and Purchase Orders on behalf of HCH Miller Park Joint Venture without additional cost beyond that stated in these Subcontracts, Agreements and Purchase Orders, less all amounts previously paid. True and complete copies of all of these Contracts, Agreements and Purchase Orders have been, or may substantially be, annexed hereto.

We agree to undertake this performance on behalf of HCH Miller Park Joint Venture upon notice from HCH Miller Park Joint Venture of the occurrence of a default or dispute under any of the Contract Documents between MHIA
(Subcontractor)
and HCH Miller Park Joint Venture, without obligation on our part to make an independent inquiry as to the accuracy of the assertion of a default or dispute contained in such notice, or to receive proof of such default or dispute relied upon. We agree to perform and to continue to perform on behalf of HCH Miller Park Joint Venture, and it is understood and agreed that HCH Miller Park Joint Venture shall not become obligated to perform or discharge any obligation, duty or liability of MHIA
(Subcontractor)
_____ incurred prior to the date of the notice given to us by HCH Miller Park Joint Venture under any of these Contracts, Agreements and Purchase Orders, or under or by reason of the existence of this Undertaking to Continue Performance.

DATED: _____

MHIA	Lampson International Ltd.
Name of Subcontractor	Name of Sub-subcontractor
By: Masaki Takahashi	By:
Title: Project Manager	Title: Vice President
Date: April 27, 1998	Date: May 8, 1998

ATTEST:

_____

TR116016

LAMP 002530

CONFIDENTIAL

SF 19-1

CERTIFICATE

I, Werner L. "Bucky" Gros (Name of Approved Officer), certify that I am the Vice President (Title) of Lampson International Ltd (Name of Sub-subcontractor or Materialman) named as Sub-subcontractor or Materialman herein, that Werner L. "Bucky" Gros (Name of Signer) who signed above was then the Vice President (Title of Signer) of Lampson International Ltd. (Name of Sub-subcontractor or Materialman); that this Undertaking to Continue Performance was duly signed for and in behalf of Lampson International Ltd. (Name of Sub-subcontractor or Materialman) by authority of its governing body, and is within the scope of its Corporate Powers.

Dated: May 8, 1998

State of Colorado)
)
County of Adams)

Subscribed and sworn before me, a Notary Public in and for said County and State, this 8 day of May, 1998.

Notary Public
William F. Thurmond

My Commission Expires:
11/15/2001

County of Residence:
Jefferson

CONFIDENTIAL

TRI16017

LAMP 002531

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.
MILLER PARK PROJECT OFFICE
162 N. 44th Street Milwaukee, WI 53208
Tel: 414-607-0837 / Fax: 414-607-0839

FAX COVER SHEET

To: Mr. Ron Winklesky Lampson International Fax. No.: 509-582-6011	Date: June 17, 1998 From: Michiko Kohata
Subject: Tax Exemption	
Total 2 page(s) including this page.	

Dear Mr Ron Winklesky:

Attached is your Certificate of Exemption for Wisconsin Sales Tax.

Please call 414-607-0837 if you have any questions.

Best regards,

Michiko Kohata

TR116018

LAMP 002532

CONFIDENTIAL

CERTIFICATE OF EXEMPTION

Instructions: This certificate should be completed by the purchaser and given to the seller for retention as part of the seller's records.

☐ Single Purchase ☒ Continuous

The undersigned hereby claims exemption from Wisconsin sales or use tax on the purchase, lease or rental of tangible personal property or taxable services from

Lampson International Ltd.
(Name of Seller or Lessor)

based upon his or her proposed exempt use of the item purchased or the exempt status of the purchasing institution as shown below:

☐ 1. Containers and other packaging, packing and shipping materials used to transfer merchandise to customers of the purchaser.

☐ 2. Tangible personal property becoming an ingredient or component part of an article of tangible personal property in any form destined for sale.

☐ 3. Trailers, or accessories, attachments, parts, supplies, materials and service on motor trucks, tractors and trailers which are used exclusively in common or contract carriage under LC or IC No. _____. (Motor trucks or tractors may be purchased ex-tax by use of Form MV-1).

☐ 4. Items or services purchased directly by and used by a religious, charitable, educational, scientific or other organization holding a Certificate of Exempt Status. CES No. _____.

☐ 5. Tangible personal property to be resold by _____ on my behalf where _____ is registered to collect and remit sales tax to the Department of Revenue on such sales.

☐ 6. Tangible personal property or services purchased by a Native American with enrollment # _____, who is enrolled with and resides on the _____ Reservation, where buyer will take possession of such property or services.

☐ 7. Tangible personal property becoming a component of an industrial or municipal waste treatment facility, including replacement parts, and chemicals and supplies used or consumed in operating the facility.

☒ 8. Other purchases exempted by law. (State items and exempt use). Building materials, Supplies, and equipment to be used solely for or solely in the construction, renovation, or development of the new Brewer baseball stadium which is exempt under sec.77.54(41), stats.

If "continuous" exemption is checked above, this certificate shall continue in force until revoked and shall be considered as a part of each order given to the above named seller or lessor. A continuous exemption certificate can be voided for a particular transaction only if a separate letter explaining the inapplicability of the certificate accompanies the purchase order. Use of this certificate does not exempt sales of taxable items for uses other than certified above. Misuse of this certificate by the seller, lessor, buyer, lessee, or other representative may constitute a misdemeanor.

PURCHASER'S BUSINESS NAME	AUTHORIZED SIGNATURE	
Mitsubishi Heavy Industries America	Masaki Takahashi	
PURCHASER'S ADDRESS	TITLE	DATE
162 N. 44th St. Milwaukee, WI 53208	Project Manager	6 /17/ '98
PURCHASER'S OR LESSEE'S BUSINESS ACTIVITY (E.G. GROCER, UTILITY, TRUCKER, ETC.)		
Subcontractor of Miller Park Project (Retractable Roof Contractor)		

This form is not to be used by farmers, or manufacturers purchasing machinery and equipment; they should use the exemption forms designed for their use.

Questions: If either the purchaser or the seller has any questions regarding the completion or use of this exemption certificate, please call (608) 266-2776, or write the Wisconsin Department of Revenue, P.O. Box 8902, Madison, WI 53708-0902.

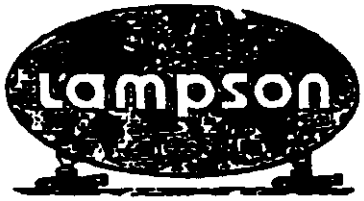
This Form May Be Reproduced
See Additional Instructions on Reverse Side

S-207 (R. 6-96) Wisconsin Department of Revenue

CONFIDENTIAL

TR216019

LAMP 002533



LAMPSON INTERNATIONAL LTD.

July 9, 1998

Mr. Victor W. Grotlisch, Jr.
Mitsubishi Heavy Industries America, Inc.
162 North 44th Street
Milwuakee, WI 53208
Phone: 414 607-0837
Fax: 414 607-0839

Dear Victor:

The Transi-Lift and the 4100W SII Manitowoc Crawler Crane assigned to the project at the Miller Park Project - Milwaukee, WI have the following serial and equipment numbers: Serial # 41585 and Equipment # 370 for the 4100W and Serial # 1500/034 with Equipment # 1300 for the Transi-Lift.

Please make necessary notations on your leases and notify your insurance company so a certificate reflecting the serial number can be issued, unless you have blanket coverage *on file* to cover all the equipment being used.

Thank you for your assistance in this matter and regret any inconvenience. Please call if you have any questions.

Sincerely,

Rosalea V. Schissler
Office Administrator

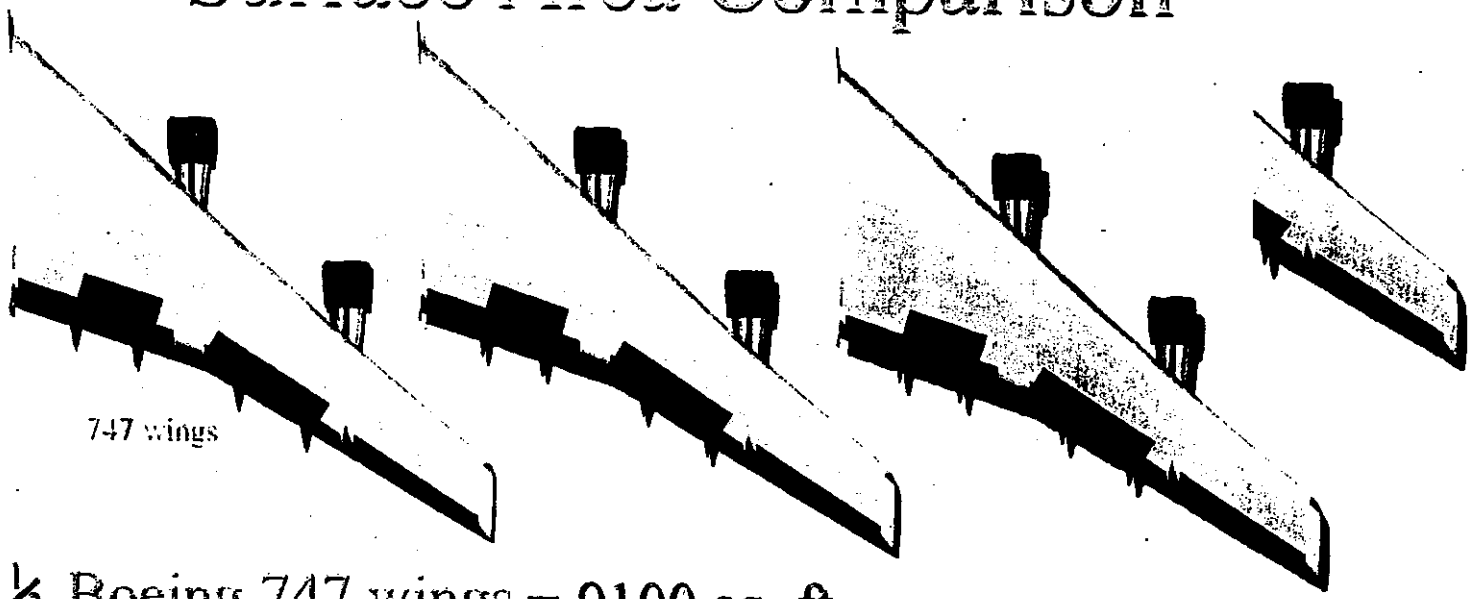
cc: Ron Winklesky

LAMP 002534

CONFIDENTIAL

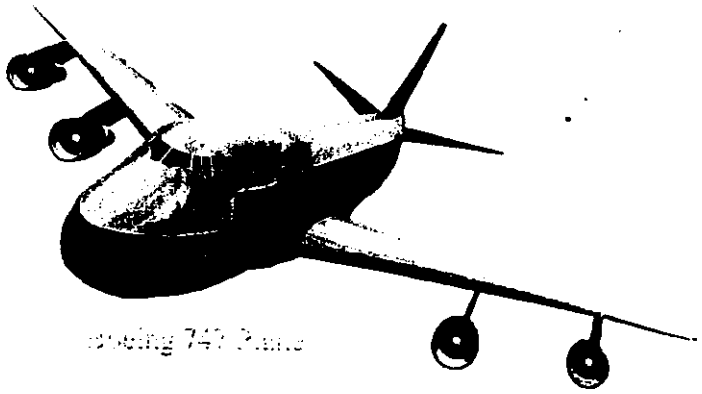
4305 E. 60TH AVENUE • COMMERCE CITY, COLORADO 80022 • (303) 286-1000 • FAX (303) 286-1099

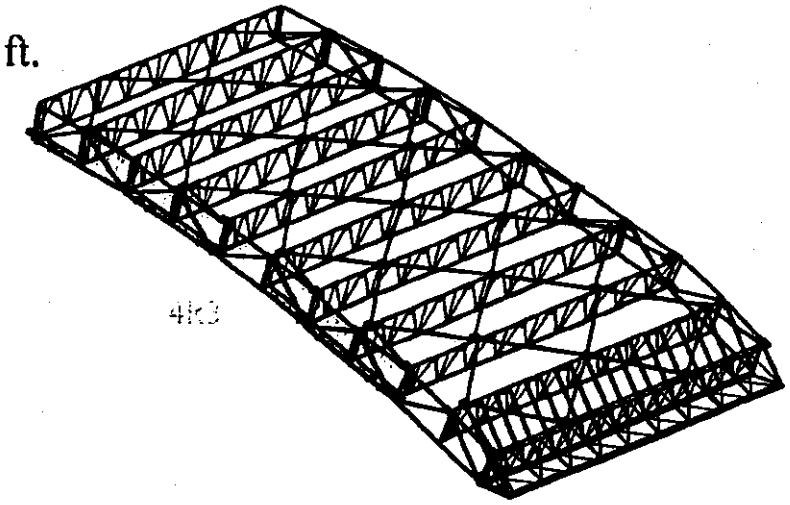
Surface Area Comparison



3⅓ Boeing 747 wings = 9100 sq. ft.

1 483 = 9100 sq. ft.



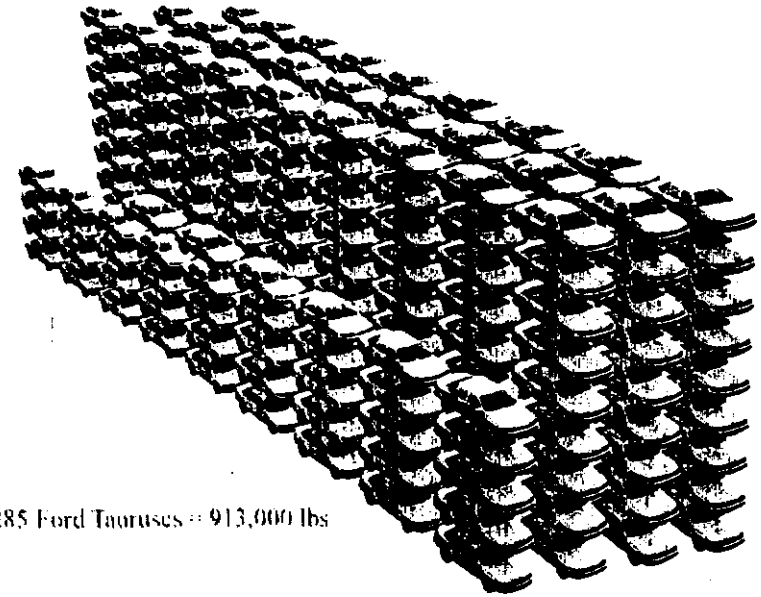


PLAINTIFF'S EXHIBIT 1710

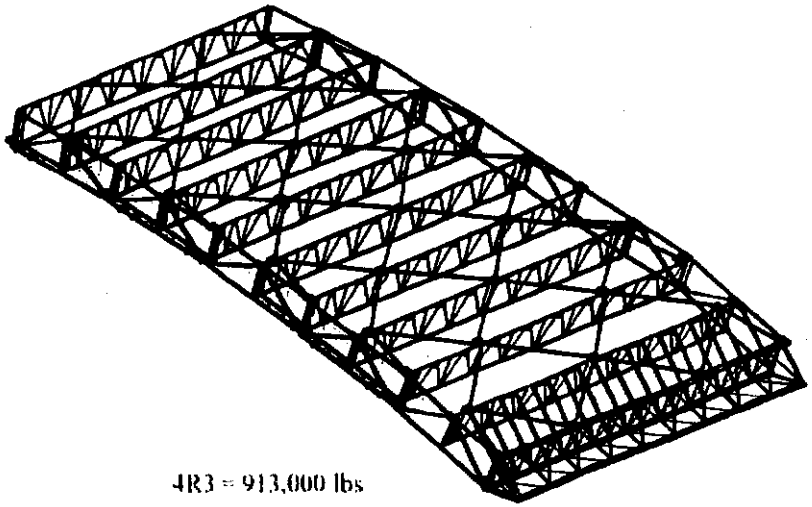
Exhibit 1711

TRI20769

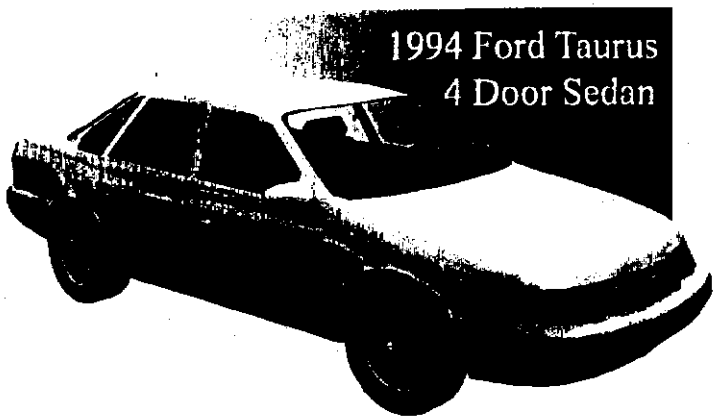
Weight Comparison



285 Ford Tauruses = 913,000 lbs



4R3 = 913,000 lbs



1 car = 3200 lbs

PLAINTIFF'S EXHIBIT 1713
Exhibit 1713
TR120768

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.
MILLER PARK PROJECT OFFICE
162 North 44th Street, Milwaukee, WI 53208
Phone: 414-933-1146 / Fax: 414-933-1334

Facsimile Transmittal

Attn : Mr. Bucky Gros

NEIL F. LAMPSON, Inc.

Fax: 1-303-286-1000

From : Victor W. Grotilsch, Jr.

SUBJECT: Supt. / Flagman Removal

Date : May 7, 1999

Number of pages including this page: one (1ea.)

Confirming my numerous telephone conversation, MHIA demands that Milo Bengtson be immediately removed from the Miller Park project.

Attached is a list of invoices on my desk awaiting approval. These invoices will be immediately handled after the above issue is resolved to MHIA's satisfaction.

MHIA awaits your response.

Gros
EXHIBIT 327
11-18-99
BROWN & JONES

MHIA0013

Ex 1765

* LTL-1500 SERIES III A TRANSI-LIFT

200 FT JIB 110 FT JIB-STRUT 10 DEG OFFSET
340 FT MAIN BOOM 190 FT MAST 100 FT STINGER
20 MPH Wind-#1500A BOOM-#1500 MAST-#1000 JIB & STRUT-REV 1 6/08/99

APPLICABLE CONDITIONS:

1.) Weight of Jibfalls, Jib block, Hook, Weightball, Slings, etc are part of the lifted load.
2.) Machine shall be level to within plus or minus 3/4 inch in 30'-0".
3.) Ground must be firm and able to support track pressures developed by the machine.
4.) Capacities are based on structural strength of machine components (LARGER & DARKER PRINT)or on 441 KIPS of EFFECTIVE MACHINE WT. plus AUXILIARY COUNTERWEIGHT located 100 feet behind the centerline of the front crawler and on 85 % of tipping. Capacities shown assume the front crawler is on firm level ground.
5.) Capacities shown do not consider strength of Jibfall cable or Ma. parts.
6.) Gravity center of suspended load shall be maintained coincident with the plane of boom and mast centerlines.
7.) Consult Operations Manual for procedures while traveling with the load.
8.) All weights shown are in units of 1000 pounds (ie KIPS).
9.) NOTE:**UPPER AND LOWER MAINLOAD BLOCKS NOT INSTALLED !**
10.) Chart Capacities do not consider effect of Wind on the suspended load.
11.) IN ADDITION, THE PERSON IN CHARGE OF LIFT OPERATIONS SHALL CAREFULLY REVIEW ALL SITE-SPECIFIC OPERATING CONDITIONS BEFORE PUTTING THE CRANE INTO OPERATION; e.g., WIND GUSTING, INCLEMENT WEATHER, VISIBILITY, AND DYNAMIC EFFECTS DUE TO HOISTING, LOWERING, SWINGING, AND TRAVEL.
* 12.) REFER TO BOOM ASSEMBLY DWG 10813-D AND MAST ASSEMBLY DWG 10815-D.
* 13.) REFER TO TOPPING ASSEMBLY DWG 12143-D AND STRUT ASSEMBLY DWG 11919-D
* 14.) REFER TO JIB ASSEMBLY DWG 12056-D.

JIB CAPACITY - KIPS.

LIFT RADIUS (FEET)	BOOM ANGLE (DEGREES)	EXTERNAL COUNTERWEIGHT REQUIRED (KIPS) 2600	2400	2200	2000	JIB TIP HEIGHT (FEET)
140	78.7	1040.0	1040.0	1040.0	1040.0	537.4
145	78.2	1040.0	1040.0	1040.0	1040.0	536.1
150	77.6	1040.0	1040.0	1040.0	1040.0	534.6
155	77.1	1040.0	1040.0	1040.0	1040.0	533.2
160	76.5	1040.0	1040.0	1040.0	1021.7	531.7
165	75.9	1040.0	1040.0	1040.0	978.4	530.1
170	75.4	1037.2	1037.2	1037.2	937.5	528.5
175	74.8	1029.6	1029.6	996.1	899.0	526.8
180	74.3	1022.2	1022.2	957.1	862.6	525.1
185	73.7	1015.0	1011.9	920.1	828.2	523.3
190	73.1	1007.9	974.5	885.0	795.5	521.4
195	72.6	1001.1	938.9	851.7	764.5	519.5
200	72.0	990.1	905.1	820.1	735.1	517.6
205	71.4	955.8	872.9	790.0	707.1	515.5

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ENGLISH

Flowers
EXHIBIT 72
10-18-99
BROWN & JONES

LAMP 000015

PLAINTIFF'S EXHIBIT 1773

CONFIDENTI

App.430

• LTL-1500 SERIES III A TRANSI-LIFT

200 FT JIB 110 FT JIB-STRUT 10 DEG OFFSET
340 FT MAIN BOOM 190 FT MAST 100 FT STINGER
20 MPH Wind-@1500A BOOM-@1500 MAST-@1000 JIB & STRUT-REV 1 6/08/99

JIB CAPACITY - KIPS.

LIFT RADIUS (FEET)	BOOM ANGLE (DEGREES)	EXTERNAL COUNTERWEIGHT REQUIRED (KIPS) 2600	2400	2200	2000	JIB TIP HEIGHT (FEET)
210	70.9	923.2	842.3	761.3	680.4	513.5
215	70.3	892.1	813.0	733.9	654.9	511.3
220	69.7	862.4	785.1	707.8	630.5	509.2
225	69.1	833.9	758.4	682.8	607.3	506.9
230	68.6	806.7	732.8	658.9	585.0	504.6
235	68.0	780.7	708.3	636.0	563.7	502.2
240	67.4	755.7	684.9	614.0	543.2	499.8
245	66.8	731.7	662.3	593.0	523.6	497.3
250	66.2	708.7	640.7	572.7	504.7	494.7
255	65.6	686.6	619.9	553.2	486.6	492.1
260	65.0	665.3	599.9	534.5	469.1	489.4
265	64.4	644.8	580.6	516.5	452.3	486.6
270	63.8	625.0	562.0	499.1	436.1	483.8
275	63.2	605.9	544.1	482.3	420.5	480.9
280	62.6	587.5	526.8	466.1	405.4	477.9
285	61.9	569.8	510.1	450.5	390.8	474.8
290	61.3	552.6	494.0	435.4	376.8	471.7
295	60.7	536.0	478.4	420.8	363.2	468.5
300	60.1	520.0	463.3	406.7	350.0	465.2
305	59.4	504.5	448.7	393.0	337.2	461.8
310	58.8	489.4	434.6	379.7	324.9	458.4
315	58.1	474.8	420.9	366.9	312.9	454.9
320	57.5	460.7	407.6	354.4	301.3	451.2
325	56.8	447.0	394.7	342.3	290.0	447.5
330	56.2	433.6	382.1	330.6	279.1	443.7
335	55.5	420.7	370.0	319.2	268.5	439.9
340	54.8	408.1	358.1	308.1	258.1	435.9
345	54.1	395.9	346.7	297.4	248.1	431.8

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ENGLISH

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CONFIDENT

App.431

* LTL-1500 SERIES III A TRANSI-LIFT

200 FT JIB 110 FT JIB-STRUT 10 DEG OFFSET
360 FT MAIN BOOM 190 FT MAST 100 FT STINGER
20 MPH Wind-@1500A BOOM-@1500 MAST-@1000 JIB & STRUT-REV 1 6/08/99

JIB CAPACITY - KIPS.

LIFT RADIUS (FEET)	BOOM ANGLE (DEGREES)	EXTERNAL COUNTERWEIGHT REQUIRED (KIPS) 2600	2400	2200	2000	JIB TIP HEIGHT (FEET)
350	53.4	384.0	335.5	286.9	238.3	427.6
355	52.7	372.5	324.6	276.7	228.8	423.3
360	52.0	361.2	314.0	266.8	219.6	418.9
365	51.3	350.3	303.7	257.1	210.5	414.4
370	50.6	339.6	293.7	247.7	201.8	409.8
375	49.9	329.2	283.9	238.5	193.2	405.1
380	49.1	319.0	274.3	229.6	184.8	400.2
385	48.4	309.1	265.0	220.8	176.7	395.2
390	47.6	299.5	255.9	212.3	168.7	390.1
395	46.9	290.0	247.0	204.0	160.9	384.9
400	46.1	280.8	238.3	195.8	153.3	379.5
405	45.3	271.8	229.8	187.9	145.9	373.9
410	44.5	263.0	221.5	180.1	138.6	368.2
415	43.7	254.4	213.4	172.5	131.5	362.4
420	42.9	246.0	205.5	165.0	124.5	356.3
425	42.0	237.7	197.7	157.7	117.7	350.1
430	41.2	229.7	190.1	150.6	111.1	343.7
435	40.3	221.7	182.7	143.6	104.5	337.0
440	39.4	214.0	175.4	136.7	98.1	330.2
445	38.5	206.4	168.2	130.0	91.8	323.1
450	37.5	198.9	161.2	123.4	85.6	315.8
455	36.6	191.6	154.3	116.9	79.5	308.2
460	35.6	184.4	147.5	110.5	73.6	300.3
465	34.6	177.4	140.8	104.2	67.7	292.1
470	33.5	170.4	134.3	98.1	61.9	283.6
475	32.4	163.6	127.8	92.0	56.2	274.7
480	31.3	156.9	121.4	86.0	50.6	265.3
485	30.2	150.2	115.2	80.1	45.1	255.6

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ENGLISH

• LTL-1500 SERIES III A TRANSI-LIFT

200 FT JIB 110 FT JIB-STRUT 10 DEG OFFSET
240 FT MAIN BOOM 120 FT MAST 100 FT STINGER
20 MPH Wind-#1500A BOOM-#1500 MAST-#1000 JIB & STRUT-REV 1 6/08/99

JIB CAPACITY - KIPS.

LIFT RADIUS (FEET)	BOOM ANGLE (DEGREES)	EXTERNAL COUNTERWEIGHT REQUIRED (KIPS) 2600	2400	2200	2000	JIB TIP HEIGHT (FEET)
490	28.9	143.7	109.0	74.3	39.6	245.2
495	27.7	137.2	102.9	68.5	34.2	234.3
500	26.3	130.8	96.8	62.8	28.8	222.7
505	24.9	124.5	90.8	57.2	23.5	210.3
510	23.4	118.2	84.9	51.5	18.2	197.0
515	21.8	112.0	78.9	45.9	12.9	182.4
520	20.0	105.7	73.0	40.3	7.6	166.2
525	18.0	99.4	67.0	34.6	2.2	148.0
530	15.7	92.9	60.8	28.8		126.6
535	12.8	86.2	54.4	22.6		99.7
540	8.4	78.5	47.0	15.5		58.4

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CONFIDE

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.
MILLER PARK PROJECT OFFICE

SUBCONTRACTOR
ACCIDENT PREVENTION MANUAL

162 North 44th Street Milwaukee WI 53208
Phone (414)607-0837 Fax (414)607-0839

8.23 CRANES AND HOISTING

INTRODUCTION

Accidents with cranes and lifting equipment can be costly. They are machines designed and operated to raise and lower loads efficiently and safely within their stated capacities. Accidents with cranes can only be caused by a person's actions or non-actions. Therefore, it is essential that all supervisors be familiar with the general characteristics and capabilities of cranes and that all operators and attendants be properly trained. Supervisors are held accountable for all loads until the operator makes a conscious effort to raise the load off the ground.

Ex 179

THE LOAD CHART

(1) The Load Chart is very different on every machine. No two 18-ton cranes have the same load chart, nor are they capable of the same loads at a given radius.
(2) Radius is measured from the center pin to the center of the load line.
(3) Remember if you are at the maximum or close to it, a gust of wind can cause the load to go outside of the radius, and cause a tip-over or structural failure.
(4) Hydraulic cranes cannot be relied upon to show tipping, they may fail or any other component when they reach the edge of the overloaded point!
(5) Each Supervisor must study the Load Charts IN PERSON so he can instruct his people to read Load Charts. Generally the required derating of a load chart is very complex. Boom angle indicators are subject to errors, soft ground under outriggers nullifies the charts, out of level derates capacity, etc.
(6) Common sense, conservatism and cool attitude of mind are essential to rating capacities

1 IN THE CIRCUIT COURT OF MILWAUKEE COUNTY

2 STATE OF WISCONSIN

3

4 PATRICIA WISCHER, individually,
and as Special Administrator of the
5 ESTATE OF JEFFREY A. WISCHER, deceased;
MARJORIE DeGRAVE, individually,
6 and as Special Administrator of the.
ESTATE OF WILLIAM R. DeGRAVE, deceased;
7 and RAMONA DULDE-STARR, individually,
and as Special Administrator of the
8 ESTATE OF JEROME STARR, deceased,

9 Plaintiffs,

10

-vs- Case No. 99-CV-006553

11

12 MITSUBISHI HEAVY INDUSTRIES
AMERICA, INC., TRAVELERS
13 PROPERTY CASUALTY INSURANCE
COMPANY, THE TRAVELERS INDEMNITY
14 COMPANY OF ILLINOIS, NEIL F. LAMPSON,
INC., HCH MILLER PARK JOINT VENTURE,
15 HUNZINGER CONSTRUCTION COMPANY,
CLARK CONSTRUCTION BUILDERS, INC.,
16 and HUBER, HUNT & NICHOLS, INC.,

17 Defendants.

18

19 October 24, 2000

20 Volume VII - P.M. SESSION

21 TRANSCRIPT OF JURY TRIAL

22 Before:
HONORABLE DOMINIC S. AMATO
23 Circuit Court Judge Presiding

24 Court Reporters: Debra A. Wisniewski, CRR/RMR
Constance L. Bauer, CRR/RMR
25 Julie A. Poenitsch, CRR/RMR

1 BY MR. LOWE:
2 Q Is the flag that's within that red circle the one
3 that's attached to the mast of the Big Blue crane?
4 A Right. The flag is hanging straight out.
5 Q Is that something that you saw throughout the
6 afternoon while you were there?
7 A More so in the afternoon than in the morning.
8 Q Now, if I could have Exhibit 1856-B. Do you
9 recognize this as another photograph that your
10 mother took that afternoon?
11 A Yes, I do.
12 Q Now, what's happening in this picture as compared to
13 the prior one?
14 A Well, the lift is up to a little higher position.
15 Q Okay.
16 A And the flag is still out taunt.
17 Q Can you see that through the lattice structure of
18 the piece itself?
19 A Right. Right where you've got it circled.
20 Q Now, you began to talk about wind. What was the
21 weather like that afternoon when you were there
22 beginning at one o'clock?
23 A It was very windy and gusty out.
24 Q Could you see the wind influencing things around
25 you?

1 A You could see it in the trees up at the VA Hospital
2 area. You could see it in regard to the lift itself
3 on the move. You could see it regarding the flag.
4 You could also see it with looking at the old
5 Milwaukee County Stadium light poles swaying.
6 Q That was visible to you from places where you were
7 standing that afternoon?
8 A Yes, it was.
9 Q Could you see any dust blowing?
10 A Also saw dust blowing in the west parking lot, where
11 they were reasphalting the area.
12 Q Now, did you hear any radio transmissions concerning
13 wind speeds as you were standing near people who had
14 the scanners?
15 A Yes, I did.
16 Q Who did you hear talking or reporting wind speeds?
17 A I believe it was Fred, the crane operator.
18 Q Do you remember what kind of wind speeds you heard
19 Fred Flowers, the operator, announcing over the
20 radio?
21 A Well, one that sticks out in my mind like glue is a
22 statement he had made where he said it was a
23 26-mile-an-hour wind gusting to 30 to 32 miles per
24 hour.
25 Q And during what time frame was that statement made?

1 A That was in the afternoon.
2 Q Do you have any doubt in your mind as to whether you
3 heard those wind speeds reported by Fred?
4 A I have no doubt whatsoever.
5 Q Now, the -- you took a videotape of some of the lift
6 activity going on outside in this area that this
7 photograph depicts?
8 A Yes, I did.
9 Q And it has an audio track, but we're going to play
10 it without the audio, and so while it's on, I'd like
11 you to point out some of the features that you were
12 videotaping, okay?
13 A Okay. I don't have that little red pointer that
14 you -- There we go.
15 MR. LOWE: Your Honor, with the
16 Court's permission, if he could come off the stand.
17 THE COURT: Sure.
18 MR. LOWE: And use this laser pointer.
19 THE COURT: You can step down.
20 MR. LOWE: And since your back's going
21 to be to the jury, please try to talk loudly. Your
22 Honor, could we dim the lights because it might come
23 out better if we do so.
24 Please let us know, ladies and
25 gentlemen back here, if you can't hear.

1 Q And speak up, Mr. Sidabras.
2 A Okay. This is taken on July 14th, 1999. This is
3 approximately between 12:30 and quarter to one, and
4 as we're noticing the live action of the tape, as
5 I'm panning across, you can see the piece actually
6 moving, and you can also see the flag blowing.
7 And I zoom in on my telephoto lens,
8 and that's what the -- what I call the
9 counterbalance weight looks like. At that
10 particular time, they just left one on. Earlier in
11 the morning, there was two -- three in total.
12 Q Is this showing the piece moving and swaying at this
13 time?
14 A Yes. If you look at the tape, if I were to hold a
15 point on one given spot, you can see that it's
16 continuously moving. Right now it's moving back to
17 the right.
18 This is looking out to the northwest
19 where they were working on the parking lot. You can
20 kind of see, as the front-end loader here turns, the
21 dust that's coming up into this general area here.
22 You can kind of see through here a little bit. I
23 don't know if you can pick up on the -- There's
24 some more dust and debris. I don't know if you can
25 pick up on the trees in the background there. There

1 your flag is still blowing. It's very taunt.
2 MR. BELL: Your Honor, can I just
3 object to the narrative. Can we have a question and
4 answer format?
5 THE COURT: Fair enough.
6 BY MR. LOWE:
7 Q Okay. Which direction are you looking in now?
8 A This would be facing to the north. As a matter of
9 fact, that was my --
10 MR. BELL: Same objection, Your Honor.
11 BY MR. LOWE:
12 Q And who are these people you're focusing in on here?
13 A That's my father and mother there.
14 Q Do you see any effect of the wind on your mother's
15 blouse?
16 A You can see her blouse moving and her hair.
17 MR. LOWE: Okay. Why don't we stop
18 the tape a second. Can you resume the stand for a
19 moment, Mr. Sidabras. Go back up there.
20 THE COURT: Back up here, sir, please.
21 BY MR. LOWE:
22 Q Now, what did you decide to do after filming this
23 sequence you just described?
24 A Okay. At that time it was approximately getting
25 very close to three o'clock in the afternoon, and

STATE OF WISCONSIN
IN THE
SUPREME COURT

Appeal No. 01-0724 (Consolidated by the Court of Appeals with Nos. 01-1031 and 01-2486)
Milwaukee County Circuit Court Case No. 99-CV-6553

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased, MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased, and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE OF JEROME W. STARR, deceased,

Plaintiffs-Intervenors-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant,

NEIL F. LAMPSON, INC.,

Defendant-Respondent,

LAMPSON INTERNATIONAL LTD., FEDERAL INSURANCE COMPANY, and THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendants.

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS' RESPONSIVE BRIEF

STATE OF WISCONSIN
IN THE
SUPREME COURT

Appeal No. 01-1031 (Consolidated by the Court of Appeals with Nos. 01-0724 and 01-2486)
Milwaukee County Circuit Court Case No. 99-CV-6553

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased, MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased, and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE OF JEROME W. STARR, deceased,

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-Cross-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-Petitioner,

NEIL F. LAMPSON, INC. and LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY,

Defendant-Co-Appellant,

THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendant.

STATE OF WISCONSIN
IN THE
SUPREME COURT

Appeal No. 01-2486 (Consolidated by the Court of Appeals with Nos. 01-0724 and 01-1031)
Milwaukee County Circuit Court Case No. 99-CV-6553

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased, MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased, and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE OF JEROME W. STARR, deceased,

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-Cross-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-Cross-Respondent,

NEIL F. LAMPSON, INC. and LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY, and THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendants-Respondents-Cross-Appellants.

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INTRODUCTION

Four years ago, a Milwaukee County jury awarded the plaintiffs $94 million in punitive damages for the deaths of three ironworkers in the Miller Park stadium tragedy. The trial court left the verdict undisturbed. The Court of Appeals did not. After the plaintiffs received $27 million, which they will keep, the Court of Appeals vacated the entire punitive award. The question of punitive damages should never have been submitted to the jury, the court concluded, because the plaintiffs repeatedly admitted that the tragedy was an accident.

No one intended to harm anyone at Miller Park on July 14, 1999. Neither was it practically certain that anyone would be hurt—even if the massive crane that buckled had been operating in unsafe conditions. On these stipulated facts, the state's new punitive damages statute, section 895.85(3), Stats., compelled the appellate court's decision. The plaintiffs had no evidence, in the statute's words, "that the defendant acted...in an intentional disregard of the rights of the plaintiff[s]." To the contrary, the plaintiffs repeatedly said the tragedy was the result of negligence.

They pled negligence; they proved negligence; and, only negligence gave them a claim against the four insurance companies eventually named as co-defendants.

This Court should affirm the 2-1 decision of the Court of Appeals. *Wischer v. Mitsubishi Heavy Industries America, Inc.*, 2003 WI App 202, 267 Wis. 2d 638, 673 N.W.2d 303; Travelers' Appendix ("App.") 1-45. The 1995 punitive damages statute, the first in the state's history, requires vacating the verdict. The language of the statute may not be as unambiguous, however, as Judge Wedemeyer found it in the majority opinion. At the very least, the phrase "rights of the plaintiff" is open to dispute.

Those four words could only be, for the jury here or for any jury, a mystery that the statute leaves unexplained and the pattern jury instructions leave unsolved. However, the language of the statute, its legislative history, and its constitutional context all lead to the same conclusion: no punitive damages verdict can stand in this case because no one intended harm.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The Travelers Indemnity Company of Illinois ("Travelers") and the other defendants presented the Court of Appeals with more than a dozen issues—common law, statutory and constitutional.[1] The Court of Appeals decided the case on only one issue—the same issue this Court agreed to consider when it granted the petition for review:

> What proof is required for a plaintiff to recover punitive damages under the phrase "in an intentional disregard of the rights of the plaintiff" as provided in Wis. Stat. § 893.85(3)?[2]

Order, April 22, 2004.

On May 12, 2004, this Court ordered that all of the other issues raised in the Court of Appeals remained for consideration, if necessary, in the event of a remand. The Court of Appeals catalogued the issues preserved for appeal. *Wischer*, 2003 WI App 202, ¶¶ 2-6 & nn.3-4, 27-30.

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[1] Travelers has changed its name to Travelers Property Casualty Company of America.

[2] The Court's order was presumably meant to specify section 895.85(3), the punitive damages statute.

STATUTE AT ISSUE

This is the relevant text of the statute on which this appeal turns:

> **895.85 Punitive damages.** (1) DEFINITIONS. In this section:
>
> ....
>
> (c) "Plaintiff" means the party seeking to recover punitive damages
>
> ....
>
> (3) STANDARD OF CONDUCT. The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

STATEMENT OF THE CASE

On July 14, 1999, three ironworkers fell to their death at the Miller Park construction site in Milwaukee. The jury found that negligence led to the catastrophe. Through a series of settlements, the decedents' families have already received $27 million. The only issue before this Court is the statutory propriety of the $94 million punitive damages award.

Factual Summary

The trial spanned six weeks in 2000—with more than 50 witnesses and nearly 500 exhibits—filling more than 26,000 transcript pages. Notwithstanding the massive record, the facts relevant to the issue presented for review are not

disputed. From the comprehensive factual summary in the Court of Appeals' opinion, 2003 WI App 202, ¶¶ 7-30, Travelers notes several facts in particular.

HCH Miller Park Joint Venture ("HCH"), the general contractor, built the baseball stadium. R.724, App.48. HCH hired Mitsubishi Heavy Industries America, Inc. ("MHIA") to construct the stadium's retractable roof; and Neil F. Lampson, Inc. designed and manufactured "Big Blue," the giant crane used to lift the roof into place. *Id.*, App.49. Lampson International leased the crane to MHIA with a crew trained to operate it. *Id.*

The Southeast Wisconsin Professional Baseball Park District, the stadium's owner, purchased an Owner Controlled Insurance Program ("OCIP"), providing commercial general liability coverage for the project. Travelers wrote the primary $2 million in OCIP coverage and, after the accident, promptly paid its primary limits.

Four insurers provided an additional $100 million in excess coverage, each layer triggered only when the underlying layers had been exhausted: Royal Insurance Company of North America ($5 million), Indemnity

Insurance Company of North America ($20 million), Federal Insurance Company ($50 million), and Travelers ($25 million). R.105, App.56. In addition to the OCIP coverage, Tokio Marine and Fire Insurance Company provided $2 million in coverage. R.953, App.62; *see Wischer*, 2003 WI App 202, ¶ 16.

While lifting the largest piece of the stadium's roof, Big Blue buckled and collapsed. Its boom struck another crane holding three workers, Jeffrey Wischer, William DeGrave, and Jerome Starr (in this brief, collectively with their estates and survivors, "Wischer"). At trial, the plaintiffs did not introduce any evidence of economic loss. To reach the $5.25 million awarded in actual damages, the jury gave each family the $350,000 statutory maximum for wrongful death, sec. 895.04(4), Stats., and $1.4 million for each worker's pain and suffering.

Procedural History

This personal injury case has been pending for five years with a complex procedural history in the trial court and in the Court of Appeals. These are the key events:

Procedural History	Date
Complaint	August 12, 1999
Trial	October-November, 2000
Jury Verdict	December 1, 2000
Judgment on the Verdict	February 23, 2001
Notices of Appeal	March-April, 2001
Court of Appeals: Order Staying Appeal Pending Resolution of Insurance Coverage Issues	July 17, 2001
Final Order on Insurance Coverage	August 23, 2001
Court of Appeals: Order Consolidating Appeals	February 21, 2002
Court of Appeals: Briefing complete	September 3, 2002
Court of Appeals: Order Holding Appeals in Abeyance Pending *Trinity*[3]	October 4, 2002
Supreme Court Decision in *Trinity*	May 23, 2003
Court of Appeals: Oral Argument	July 1, 2003
Court of Appeals: Decision	September 30, 2003
Supreme Court: Petition for Review	October 28, 2003
Supreme Court: Order Granting Petition for Review	April 22, 2004

The Plaintiffs' Stipulations

Through a series of tactical decisions, the Wischer plaintiffs conceded that MHIA did not intend to harm the decedents or anyone else. The plaintiffs focused their evidence on Victor Grotlisch, MHIA's site manager. Through his conduct, the plaintiffs sought to establish MHIA's recklessness. Yet, the plaintiffs themselves

[3] An insurance bad faith case, *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 2003 WI 46, 261 Wis. 2d 333, 661 N.W.2d 789, *cert. denied*, 124 S. Ct. 925 (2003), was neither discussed nor even cited by the *Wischer* majority.

conceded the dispositive facts on this appeal: MHIA did not intend to injure the decedents. MHIA did not know, nor should it have known, that injury was practically certain to follow the site manager's flawed decisions.

At trial, and on appeal, Wischer argued that the only evidence of intent necessary to award punitive damages was MHIA's intent to lift the roof piece in high winds:

> I believe the evidence has shown to you that there was intentional disregard of the rights of the three deceased ironworkers. *The intentional part is easy. They intended to do the lift.* They made the decision to do the lift.... *It was an intentional decision in the face of hazards and obvious wind conditions*, and in doing so, they ignored, they disregarded the rights of those three men.
>
> And what were those rights? The right to a safe workplace. The right to life....
>
> We don't have to prove that Victor Grotlisch intended to kill these guys. This is not a criminal case. We don't have to prove that they knew for sure that crane was going to go down.
>
> Let me give you an example. A person decides to run the stop sign, ...and in running that stop sign crashes into a crossing vehicle, killing the occupants. Would we hear that driver be able to say, I didn't intend to kill those occupants, ...?
>
> But that person intended to run that stop sign and, in so doing, must bear the consequences of an intentional disregard of the rights of any other vehicle or pedestrian that might have come into harm's way by that intentional act.

R.751, Tr., Plaintiffs' Closing Argument, Nov. 28, 2001, App.65-66 (emphasis added).

After the trial, Wischer's counsel again conceded that MHIA did not intend to cause an accident, let alone cause serious injury or death.

> Nowhere in the record is there any evidence that MHIA employees subjectively intended to cause bodily injury to the decedents....In addition to the fact that *there can be no showing of any such subjective intent on the part of any MHIA employee*, [there can be no] show[ing] that any injury to the decedents *was substantially certain to occur from the MHIA employees' acts.*
>
> [T]here is no evidence to permit a reasonable jury to conclude that the MHIA employees intended to cause bodily injury to the decedents *or that they knew or should have known that bodily injury was substantially certain to follow from their acts.*

R.886, App.72 (emphasis added). Nor was Victor Grotlisch practically certain that the tragedy would occur:

> None of [the lay and expert testimony]...is sufficient...to establish that MHIA's employees['] acts...were substantially certain to result in bodily injury. The testimony is not even sufficient to create an issue of fact on the matter.
>
> ....
>
> The fact that [MHIA's site manager] was [himself] in the zone of danger indicates that he could not have believed that there was a substantial certainty that injury would occur.

R.909, App.76-77.

The trial court endorsed the plaintiffs' concessions:

> There is no finding by this jury...that there was intentional conduct. There has never been anything in this record that the conduct on behalf of Mitsubishi or its employees, Mr. Grotlisch, or anyone else, was intentional. No one tried to intentionally hurt anyone.

R.985, Tr., Aug. 6, 2001, App.84-85.

The Court of Appeals' Decision

On September 30, 2003, the Court of Appeals, District I, vacated the $94 million punitive damages award in a 2-1 decision. Judge Fine concurred in a separate opinion, "fully" joining Judge Wedemeyer's majority opinion. 2003 WI App 202, ¶ 48.

Finding a single issue dispositive, the court concluded that under the "heightened" standard for punitive damages established by section 895.85(3), the circuit court erred in submitting punitive damages to the jury. *Id.*, ¶¶ 39, 45. In section 895.85(3), the Court of Appeals held, the phrase "intentional disregard of the rights of the plaintiff" can only be reasonably interpreted "to require either an intent...to cause injury to the plaintiffs or knowledge that the defendant's conduct was practically certain to cause the accident or injury to the plaintiffs." *Id.*, ¶ 5.

Dissenting, Judge Schudson agreed the statute "tighten[ed] the standard for punitive damages." *Id.*, ¶ 79. Nevertheless, he concluded, section 895.85(3) permits punitive damages for creating an unsafe workplace—whether

or not the statute is ambiguous and whether or not "the defendant intended any harm or injury to result" from its conduct. *Id.*

STANDARD OF REVIEW

Statutory interpretation is always subject to *de novo* appellate review. *See Finnegan v. Wisconsin Patients Compensation Fund*, 2003 WI 98, ¶ 15, 263 Wis. 2d 574, 666 N.W.2d 797. In addition, the U.S. Supreme Court has now mandated heightened judicial scrutiny of punitive damage awards. *See Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001).[4]

This Court has comprehensively analyzed and summarized the rules for statutory interpretation. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58. First, "statutory interpretation focus[es] primarily on the language of the statute." *Id.*, ¶ 44. "Context is important to meaning," however, helping the court "avoid absurd or unreasonable results." *Id.*, ¶ 46. Context always includes the structure of the statute and the language of surrounding or closely-related

[4] The judicial determination of whether there is sufficient evidence to submit a punitive damages question to a jury is also subject to *de novo* review. *City of West Allis v. Wisconsin Electric Power Co.*, 2001 WI App 226, ¶ 23, 248 Wis. 2d 10, 635 N.W.2d 873.

statutes. When this "intrinsic" analysis "yields a plain, clear statutory meaning, then there is no ambiguity...." *Id.* (citation omitted).

Second, a statute is ambiguous only when the language "reasonably gives rise to different meanings." *Id.*, ¶ 47 (citation omitted). When a statute is ambiguous, the courts turn to "extrinsic" sources or "interpretive resources outside the statutory text" to determine the statute's intent. *Id.*, ¶ 50. The most typical and reliable extrinsic aid, legislative history, generally "is not consulted except to resolve an ambiguity in the statutory language." *Id.*, ¶ 51. However, in an important exception, "legislative history is sometimes consulted to confirm or verify a plain-meaning interpretation." *Id.*; *see Panzer v. Doyle*, 2004 WI 52, ¶¶ 6-37 (relying on analysis by the Legislative Reference Bureau and bill drafter's notes).

ARGUMENT

The punitive damages statute "changed" 150 years of common law. *Jones v. Secura Ins. Co.*, 2002 WI 11, ¶ 14 n.6, 249 Wis. 2d 623, 638 N.W.2d 575. Had change not been the legislature's goal, there would have been no reason to enact the statute.

All three Court of Appeals judges agreed that the statute "heightened" the bar for punitive damages. So did the Civil Jury Instructions Committee and two federal judges. Even the Wischer plaintiffs concede that the standard has been heightened, *see* Pl. Br. at 42, 48, 49, though their application of the "stricter" statutory standard effectively makes punitive damages more, not less, available.

How high is this new statutory bar? For Wischer, the statute permits punitive damages any time any defendant intentionally disregards the "rights" of any plaintiff "whether it be a right to safety, health or life, a property right, the right to financial integrity, or some other right...." *Id.* at 34; *see id.* at 18, 25. For Wischer, a plaintiff need never "prove intent, subjective or objective, to cause the consequences that ensue from the disregard of rights." *Id.* at 35. Yet, whether the statute's language is "plain" or "ambiguous," that cannot be its meaning for it leads to an absurd result—a result diametrically opposed to the law's very enactment.

For the first time, section 895.85(3) made "intentional" conduct a prerequisite for punitive damages—not just an intentional act that creates the risk of harm by jeopardizing a

"right" but, rather, an act intended to do harm (including conduct from which harm will be the practically certain result). This Court should conclude that, in this state, by law, punitive damages are only available for intentional torts.

I. TO RECOVER PUNITIVE DAMAGES, SECTION 895.85(3) REQUIRES, AT A MINIMUM, CONDUCT INTENDED TO HARM OR PRACTICALLY CERTAIN TO HARM THE PLAINTIFF.

The dispositive terms in section 895.85(3) are "intentional" and "rights." The statute cannot be applied, either by this Court or by a jury, in this case or in any other, without defining their precise meaning.

Any statutory analysis begins with the words and their intrinsic context. That is the first step in this Court's new framework for statutory interpretation. *See Custodian of Records v. State*, 2004 WI 65, ¶ 12. The words cannot be isolated from each other or from related statutory provisions. *See Kalal*, 2004 WI 58, ¶ 49. To supplement this intrinsic analysis, extrinsic evidence plays an important role, either confirming the "plain meaning" or helping resolve ambiguity. *Id.*, ¶ 51. With or without a finding of ambiguity in

section 895.85, however, the outcome here will be the same: the statute limits punitive damages to intentional torts.

A. <u>The Statute Requires "Intentional" Conduct—Conduct Intended To Harm, Not Just General Indifference To Someone's "Rights."</u>

The statute's introduction of the term "intentional" significantly changed the common law of punitive damages. The Wischer plaintiffs themselves have emphasized just that: by using the word "intentional," the statute "eliminated the adjectives of 'wanton, willful or reckless' that were most often used in the common law as describing the disregard of rights." Pl. Br. at 24-25. The legislature "eliminated those types of 'disregard of rights' as a basis for punitive damages, particularly a 'reckless' disregard...." *Id.* at 30.

"Intentional": Plain Meaning

In tort law, "intentional" conduct has a plain intrinsic meaning, determined through the analytical framework established in the *Kalal* decision. "Intent requires both an intent to do an act and an intent to cause injury by that act." *Gouger v. Hardtke*, 167 Wis. 2d 504, 512, 482 N.W.2d 84 (1992). It is beyond mere negligence, surpassing even recklessness:

> Intent and negligence are entirely different concepts. Negligence entails unreasonably risky conduct....Even if the defendant recognizes the risk and deliberately decides to chance it without having purpose or certainty required for intent, he is not liable for an intentional tort, only for negligence.

Dan B. Dobbs, *The Law of Torts* § 26 (West Group 2000).

The meaning of intent—and the distinction between intent and mere negligence—is hornbook law:

> The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong.

W. Page Keeton, *Prosser and Keeton on Torts* § 8, at 36 (5th ed. 1984).

The word "intentional" in section 895.85(3) has an intrinsic context in state law as well that emphasizes its plain meaning. Part of that context is the simple fact that, by definition, punitive damages are meant to punish. They "serve the same purposes as criminal penalties." *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). "[T]he purpose of punitive damages is to punish the wrongdoer, and to deter the wrongdoer and others from similar conduct...." *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 2003 WI 46, ¶ 50.

Accordingly, the definition of "intentionally" in the criminal code provides intrinsic context for the meaning of "intentional" in section 895.85(3):

> "Intentionally" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result.

Sec. 939.23, Stats.[5] "The legal definition of 'intentional' is essentially the same," in other words, "whether found in tort law or in criminal law." *Shepard v. Outagamie County Circuit Court*, 189 Wis. 2d 279, 286-87, 525 N.W.2d 764 (Ct. App. 1994), quoted with approval, Pl. Br. at 33.

Section 939.23 is closely related to the punitive damages statute. *See Kalal*, 2004 WI 58, ¶ 46. Relying on that explicit definition of "intentional," the Court of Appeals concluded that "by using the word *intentional* [in section 895.85(3)], the legislature intended to heighten the standard for the recovery of punitive damages." *Wischer*, 2003 WI App 202, ¶¶ 39-40 (emphasis in original). For the

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[5] "An intent to take a risk, however, is far short of an intent to inflict an actual harm or *an invasion of the plaintiff's rights*, so intentional risk-taking is not itself the basis for finding an intentional tort." *Dobbs*, § 27 (emphasis added); *accord*, *Loveridge v. Chartier*, 161 Wis. 2d 150, 188-91, 468 N.W.2d 146 (1991).

Wischer plaintiffs, however, this heightened standard of intent becomes no obstacle at all.

The plaintiffs have adopted a boundless application of the term "rights" that overwhelms any punitive damages standard, regardless of its dimensions. The "result" that must be "intentional" for the Wischer plaintiffs' analysis is not harm but, instead, the undefined "disregard of rights."

> Therefore, when applying the definition of "intentional," one must substitute the words "disregard of rights" for the word "result" or "consequence" in the [statutory] definition [of "intentional"].

Pl. Br. at 33, quoting sec. 939.23.

"Rights": Plain Meaning

The application of a statute is not a word game. "Rights" may well be the most commonly used phrase in the law. It has a virtually limitless number of possible definitions. The standard legal dictionary alone notes at least 40 types of rights, *see Black's Law Dictionary* 1322-24 (7th ed. 1999), and these definitions are far too broad to provide a "common, ordinary, and accepted meaning" of the term "rights." *Kalal*, 2004 WI 58, ¶ 45.

The precise definition of "rights" ultimately depends on the context that frames the word. *Id.*, ¶ 49. The intrinsic

context of section 895.85 limits its application to harm—that is, injury either intentionally inflicted or practically certain to occur.

The Wischer plaintiffs urge this Court to interpret the statute "in light of [the] common law" and "with full knowledge of the existing case law...." Pl. Br. at 28. Whether appellate decisions themselves provide "intrinsic" or "extrinsic" context in applying the statute, *see Kalal*, 2004 WI 58, ¶ 42, this Court helped develop the common law by repeatedly using the phrase "disregard of rights" as a synonym for the harm sustained as a result of the defendant's conduct.[6]

More than 20 years ago, this Court summarized the common law proof required for punitive damages in *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437 (1980). Punitive damages were available "if the injured party shows a

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[6] *See, e.g.*, *Sharp v. Case Corp.*, 227 Wis. 2d 1, 21, 595 N.W.2d 380 (1999) ("Punitive damages may be awarded in product liability suits if the plaintiff proves...that the *harm suffered* was the result of the manufacturer's reckless disregard for the safety of product users...") (emphasis added); *Brown v. Maxey*, 124 Wis. 2d 426, 433, 369 N.W.2d 677 (1985) ("the conduct necessary to impose punitive damages" focuses on "'*the harm sustained by the plaintiff*'") (emphasis added) (quoted source omitted); *Walter v. Cessna Aircraft Co.*, 121 Wis. 2d 221, 227, 358 N.W.2d 816 (Ct. App. 1984) (defendant must have "specific knowledge of a product's defect and its potential for *harm*...") (emphasis added).

reckless indifference to or *disregard of the rights of others....*" *Id.* at 267 (emphasis added). While the wrongdoer's conduct is always a focal point, it cannot be divorced, in the award of punitive damages, from the plaintiff's injury caused by that aggravated conduct.

> A governing principle...in allowing punitive damages has been the presence of "circumstances of aggravation" in the tortious injury.

Id. at 268 (*quoting Mid-Continent Refrigerator Co. v. Straka*, 47 Wis. 2d 739, 746, 178 N.W.2d 28 (1970)).

At common law, a wrongdoer "disregarded rights," subjecting herself to punitive damages, only where the plaintiff's *injury* was inflicted through "aggravating" or "outrageous" conduct. In *Kehl v. Economy Fire & Cas. Co.*, 147 Wis. 2d 531, 534, 433 N.W.2d 279 (Ct. App. 1988), for example, the court denied punitive damages for even "despicable conduct" (leaving an accident scene) without proof that the plaintiff "has suffered some actual damage as a result of the conduct." Even within the common law context of punitive damages, therefore, "disregard of rights" had a "common, ordinary and accepted meaning"—the tortious injury that the wrongdoer inflicted upon the plaintiff.

"Rights": Scope, Intent and Purpose

The "scope, intent and purpose" of a statute directly shape its meaning and application. They are "perfectly relevant to a plain-meaning interpretation of [even] an unambiguous statute as long as [they are] ascertainable from the text and structure of the statute itself...." *Kalal*, 2004 WI 58, ¶ 48.

Section 895.85(3) is the state's "Punitive Damages" statute. While titled "Miscellaneous General Provisions," Chapter 895 resounds with the concept of damages. *See, e.g.*, secs. 895.02 (measure of damages), 895.03 (damages in wrongful death actions), 895.80 (property damage and loss). The chapter concludes with section 895.85 on punitive damages and that section, in turn, concludes with the admonition that the "rule of joint and several liability does not apply to punitive damages." Sec. 895.85(5), Stats.

Historically, the rule of joint and several liability had required multiple tortfeasors, acting in concert, to bear individual as well as collective responsibility "for all damages" resulting from their concerted action. *See* *Brandner v. Allstate Ins. Co.*, 181 Wis. 2d 1058, 1072, 512

N.W.2d 753 (1994). The new comparative negligence law, section 895.045, in contrast eliminates joint and several liability for defendants found less than 51 percent negligent.

Not only are the two statutes closely related, the new joint and several liability statute became the law of this state as part of the same legislative act, 1995 Wis. Act 17, that created section 895.85. The punitive damages and comparative negligence statutes must be consistently applied—with each other and within themselves. Adopted simultaneously, they refer to each other. Individually and collectively, they limit both liability *and* damages.

The law imposes no liability (whether joint or several) for disregarding rights. It does impose liability for causing harm. In the absence of a specific definition of "rights" in section 895.85, the statute's new and heightened standard for "intentional" conduct can only permit an award of punitive damages when the defendant has intentionally harmed the plaintiff or the defendant's conduct was practically certain to have that outcome.

In contrast, the Wischer plaintiffs' sweeping definition of "rights" is so broad that it consumes any definition of

"intentional." Any voluntary act that eventually leads to harm, by their unique definition, will have jeopardized "some right." Pl. Br. at 34. That definition ignores the context, scope and purpose of a statute that, all agree, "heightened" the punitive damages standard.

B. Punitive Damages Can Be Awarded For Intentional Conduct Practically Certain To Harm The Plaintiff.

The Court of Appeals' application of section 895.85(3) was anything but rigid. Punitive damages are available "either" when a defendant "intended to cause the accident or injury *or* the actor was practically certain that his conduct could result in accident or injury." *Wischer*, 2003 WI App 202, ¶ 44 (emphasis in original). (MHIA refers to "practical certainty" in its brief as the "general intent" to harm.)

The Wischer plaintiffs ignore the "practical certainty" component of the statute's application. *See* Pl. Br. at 25 n.7. However, the "practical certainty" standard permits the submission of punitive damages to the jury where the defendant may lack the literal and subjective intent to inflict

harm.[7] Reflecting the inherent difference between intentional conduct and negligence, a "person may be said to have intentionally caused the result where the result is substantially certain to occur from the actor's conduct." *Shepard v. Outagamie County Circuit Court*, 189 Wis. 2d at 287; *accord*, sec. 939.23(3), Stats. Just as criminal intent can be inferred, the intent to injure can be inferred—if the harm is not just probable or even just likely but, rather, a practical certainty.

Questions of intent are generally subjective and, as a result, generally questions of fact. Yet, this Court has concluded, the certainty of harm necessary to inferentially establish intentional conduct is a question of law subject to a demanding analysis. *See Gouger*, 167 Wis. 2d at 513.

The need to establish "practical certainty" to permit a punitive award protects both plaintiffs and defendants. It will prevent plaintiffs from recovering punitive damages for merely reckless conduct. At the same time, it will prevent defendants from attempting to avoid punitive damages

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[7] "If, for example, a motorist drives eighty miles per hour around the Capitol Square in Madison in the wrong direction, it seems clear that we will hold that he intends to hit any person or object that he in fact hits." Richard V. Campbell, *Wisconsin Law Governing Automobile Accidents – Part II*, 1962 Wis. L. Rev. 557, 576.

liability by creatively mischaracterizing a plaintiff's claims. *See Wangen*, 97 Wis. 2d at 266 ("This court has rested its analysis of punitive damages not on the classification of the underlying tort...but on the nature of the wrongdoer's conduct.")

The Wischer plaintiffs already have conceded that harm was not "practically certain" to result from MHIA's conduct here. While that might account for their disinterest in the standard, it is disingenuous for them to then predict the apocalyptic "elimination" of punitive damages, Pl. Br. at 42, in the wake of the Court of Appeals' decision. The "practical certainty" application of section 895.85(3) will be an indispensable part of the punitive damages calculus in many cases. This Court recognized just that on June 8, 2004 when it granted certification of a drunk driving punitive damages case, *Strenke v. Hogner*, 2004 WL 1097753, from the District III Court of Appeals.

The defendant, driving with a .269 per cent blood alcohol level and four prior OWI convictions, injured the plaintiff. The jury awarded $2,000 in compensatory damages and $225,000 in punitive damages. Unlike *Wischer*, the

Court of Appeals' certification noted, "the underlying circumstances involve a criminal act...[and] an act that under the common law 'outrageous' standard...could support a punitive damages award...." *Id.* at *2. Citing *Wischer* and a federal district court decision applying section 895.85(3), *Boomsma v. Star Transport, Inc.*, 202 F. Supp. 2d 869 (E.D.Wis. 2002), the certification asked this Court to decide a series of questions:

> If *Wischer*...is correct, are there sufficient facts from which a jury could conclude [that the defendant] was aware his acts were "practically certain" to cause injury?
>
> Must a defendant's conduct giving rise to punitive damages have been directed at the specific plaintiff seeking punitive damages?

Strenke, 2004 WL 1097753 at *1.

While "practical certainty" and the specific identity of "the plaintiff" are pivotal issues in *Strenke*, the Wischer plaintiffs have waived them. Intent to harm, for the Wischer plaintiffs, is not an issue at all once an intent to do any act—raising the roof beam in high wind, for example—has been established. "The legislature," they steadfastly maintain, "did not intend to require a showing of intent to cause injury to the plaintiff as a prerequisite for punitive damages." Pl. Br. at 25; *see id.* at 2, 11, 30. Nor, for the Wischer plaintiffs,

does the plaintiffs' status matter as long as any workers were "at risk." *Id.* at 3.

Punitive damages cannot be awarded without convincing evidence, in the words of section 895.85(3), that "the defendant" intentionally disregarded the rights of "the plaintiff," and the statute provides explicit definitions of those two common legal terms. Even if the defendants intentionally disregarded a right, however amorphous, they must have "acted" with intentional disregard for the rights of "the plaintiff." This statute gives "plaintiff" a specific meaning: "the party seeking to recover punitive damages." Sec. 895.85(1)(c), Stats.

The Wischer plaintiffs contend that the contractor generally disregarded the rights of construction workers and that it generally maintained unsafe working conditions. *See* Pl. Br. at 5, 6, 9. Yet, the plaintiffs never even address the contractor's intention with respect to the rights of the decedents individually.

The words "plaintiff" and "defendant," defined expressly in section 895.85, are rarely defined in the state's

statutes.[8] Why here? The only plausible explanation for the definitions is to reinforce the statute's intent to limit the availability of punitive damages—to specific plaintiffs whose rights are specifically disregarded by the defendants who harm them.[9]

In certifying *Strenke*, the Court of Appeals also asked hypothetically how the new punitive damages statute would be applied to products liability cases. The court described a manufacturer that distributes a drug "practically certain" to cause harm but then, when sued, argues "that it did not intend or know there was a practical certainty that *those particular plaintiffs* who are seeking to recover punitive damages would be harmed." *Strenke*, 2004 WL 1097753, at *3 (emphasis in original). Most products liability cases do involve harm to consumers—not directed, by definition, at specific individuals. While the Court *may* conclude that

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[8] The terms are defined in Chapter 801, of course, and the few other instances are insignificant. *See, e.g.*, secs. 804.05(3)(b)5. (discovery); 401.201(13) (commercial code); 811.001 (attachment); and, 812.01(1) (garnishment).

[9] The Legislative Reference Bureau's Wisconsin Bill Drafting Manual (2003-04), at § 2.01(1)(a), notes that definitions are inserted in legislation "when there is more than one meaning for a word...and the intended meaning is either not apparent from the context or more specific than the generally recognized meaning."

section 895.85(3) intended in effect to eliminate punitive damages for products liability cases, it need not do so.

Products liability always has occupied a unique place in the law of torts. Sellers should be responsible for products they place into the stream of commerce irrespective of their degree of care. *See Sharp v. Case Corp.*, 227 Wis. 2d at 19. In adopting the approach to products liability in the *Restatement (Second) of Torts*, this Court abandoned the common law requirement that a products liability claimant have a pre-existing contractual relationship with the defendant. *See Dippel v. Sciano*, 37 Wis. 2d 443, 449, 155 N.W.2d 55 (1967). "[I]t is not necessary that the ultimate user or consumer have acquired the product directly from the seller...." *Mulhern v. Outboard Marine Corp.*, 146 Wis. 2d 604, 612, 432 N.W.2d 130 (Ct. App. 1988). Accordingly, Wisconsin's products liability law requires that a defendant placing a defective product in the "stream of commerce" be liable for injuries the product causes. *Id.*, at 613.

This Court made punitive damages available in products liability actions, *see Wussow v. Commercial Mechanisms, Inc.*, 97 Wis. 2d 136, 293 N.W.2d 897 (1980),

15 years before the enactment of the punitive damages statute. The Court adapted the common law punitive damages standard to products liability cases to require "malice, vindictiveness, ill-will, or wanton, willful or reckless disregard of [a] plaintiff's rights." *Wangen v. Ford Motor Co.*, 97 Wis. 2d at 308.[10]

In short, the law of products liability is largely court-made, *id.*, at 283, yet neither this case nor *Strenke* presents product liability issues. Accordingly, this Court can leave the intersection between the common law of products liability and the new punitive damages statute for another day. Consistent with the law's evolution, *see State v. Esser*, 16 Wis. 2d 567, 584, 115 N.W.2d 505 (1962), moreover, the legislature itself can specifically provide for punitive damages in products liability cases using the standard of section 895.85(3) or another standard.[11]

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[10] In the state's history, only a handful of reported products liability cases have led to the award of punitive damages. *See, e.g.* (partial list), *Sharp*, 227 Wis. 2d 1; *Mulhern*, 146 Wis. 2d 604; *Wangen*, 97 Wis. 2d 260.

[11] *See, e.g.*, secs. 19.37(3) (punitive damages in public records *mandamus* actions); 106.50(6)(m) (equal rights and open housing violations); 706.06(4) (false authentication of title).

C. **The Statute's Limitation On Punitive Damages Is Consistent With Wisconsin Case Law.**

This case presents an issue of first impression: the definition of "intentional disregard of the rights of the plaintiff" in section 895.85(3). Yet, the statute's enactment in 1995 reflects a distinct pattern. Wisconsin courts have almost always limited punitive damages to intentional torts, the "heartland" of punitive damage awards. *Wischer*, 2003 WI App 202, ¶ 41, *quoting* Marc Galanter, *Shadow Play: The Fabled Menace of Punitive Damages*, 1998 Wis. L. Rev. 1, 2.

A review of 150 years of punitive damages case law defines the surprising boundaries of that heartland. Since the first reported case, *McWilliams v. Bragg*, 3 Wis. 424 (1854), Wisconsin appellate courts have decided more than 200 reported cases directly involving punitive damages. Of that total, fewer than 12 affirmed punitive damages for unintentional torts.[12] The overwhelming majority of punitive verdicts affirmed on appeal involved an intentional tort

[12] *See, e.g.* (partial list), *Miller v. Wal-Mart Stores, Inc.*, 219 Wis. 2d 250, 580 N.W.2d 233 (1998); *Brown*, 124 Wis. 2d 426; *Meibus v. Dodge*, 38 Wis. 300 (1875); *see also* collected cases, *supra* n.10.

(assault, battery, misrepresentation, fraud, trespass or insurance bad faith, for example).

While this necessarily imperfect analysis does not resolve the statutory interpretation question definitively, it demonstrates that the change in the law mandated by the statute is evolutionary. It is not, as the plaintiffs suggest, revolutionary. Indeed, since the statute's enactment, the punitive awards affirmed on appeal have reflected its purposeful limitation of punitive damages to intentional torts.

Most recently, in *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 2003 WI 46, this Court upheld the punitive damages award in a bad faith case where the insurance company had made a deliberate decision to deny coverage to a specific insured. There was no doubt that the specific insured's contractual rights had been violated, no doubt that, by deliberately denying coverage, the insurance company intentionally harmed a specific plaintiff. Bad faith is an intentional tort. *Id.*, ¶ 87 (Sykes, J., dissenting); *see Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 691, 271 N.W.2d 368 (1978). The punitive damages award in *Trinity* falls squarely

within the statute's limitation of punitive damages to intentional torts.[13]

Punitive damages have properly been awarded in intentional trespass cases as well. In *Jacque v. Steenberg Homes, Inc.*, 209 Wis. 2d 605, 563 N.W.2d 154 (1997), this Court affirmed a punitive damages award for an intentional trespass, even where the plaintiffs had only nominal damages—in part because the plaintiffs had denied the defendants permission to cross their land. *See also City of West Allis v. Wisconsin Electric Power Co.*, 2001 WI App 226 (evidence of trespass and environmental contamination sufficient to send punitive damages to the jury).

Since the enactment of section 895.85, at least one notable case involving an "unintentional tort" has reflected the statute's restriction on punitive damages: even the most outrageous negligence can no longer support a punitive award. In *Boomsma v. Star Transport, Inc.*, 202 F. Supp. 2d 869, cited in the Court of Appeals' certification of *Strenke v. Hogner*, the federal district court held that punitive damages

[13] In *Allied Processors, Inc. v. Western Nat'l Mut. Ins. Co.*, 2001 WI App 129, 246 Wis. 2d 579, 629 N.W.2d 329, another bad faith insurance case, the Court of Appeals also affirmed a punitive damages award.

were unavailable in a wrongful death case where five people died in a car-truck collision. Specifically applying section 895.85(3), the court held that the defendant's conduct "would amount at most to reckless[ness]," and that does not "constitute...intentional disregard for the plaintiffs' rights." *Id.* at 882.

Recklessness can never satisfy the standard in section 895.85(3). "Mere risk[,]...even a very high risk, is not enough to show [the] substantial certainty" required for punitive damages. *Dobbs*, § 24. Yet, the plaintiffs still argue that the "deliberate decisions [that] placed the Miller Park workers at such a high *risk* of injury" are "just the type of conduct" punitive damages are "intended to punish." Pl. Br. at 12. That might have satisfied the common law standard. However, under the statutory standard, only deliberate conduct designed to harm a plaintiff can justify a punitive award, and only intentional torts are designed to harm.

II. THE WISCHER PLAINTIFFS' "PLAIN LANGUAGE" STATUTORY INTERPRETATION LEADS TO AN ABSURD RESULT.

The Wischer plaintiffs summarized the appellate decision below: "The court of appeals majority concluded at

the outset that the legislature intended to 'heighten' the standard for the recovery of punitive damages." Pl. Br. at 42. While the plaintiffs also conceded in the next breath that they "do[] not disagree with that premise," *id.*, every argument they advance expands the availability of punitive damages—not only returning to the common law recklessness standard replaced by section 895.85 but lowering even that bar.

The Wischer plaintiffs maintain that the statute is "plain" and "unambiguous." Pl. Br. at 11, 24, 49. No statutory application, however, can lead to an absurd or unreasonable result. *Kalal*, 2004 WI 58, ¶ 46. The plaintiffs' "plain language" reading collides with this principle. They ask this Court to adopt a lower standard for punitive damages, interpreting the statute to do what no court can do: "make the economic, social and political decisions that fall within the province of the legislature." *Aicher v. Wisconsin Patients Compensation Fund*, 2000 WI 98, ¶ 20, 237 Wis. 2d 99, 613 N.W.2d 849.

A. Section 895.85(3) Limits Punitive Damages By Eliminating The Common Law "Reckless" And "Outrageous" Conduct Standards.

Until 1995, the state's appellate courts applied the punitive damages standard in a variety of ways. To sustain a punitive award, it was enough that conduct be "willful or wanton, in a reckless disregard of rights or interests," *Brown v. Maxey*, 124 Wis. 2d at 433, or involve harm "inflicted 'under circumstances of aggravation, insult or cruelty, with vindictiveness or malice,'" *Anderson v. Continental Ins. Co.*, 85 Wis. 2d at 697 (citation omitted). The common law did *not* require plaintiffs to prove intentional harm. *Id.* Rather, "outrageous" conduct set the standard. *Wangen v. Ford Motor Co.*, 97 Wis. 2d at 267-68 (citation omitted).

In 1995, the legislature replaced this "reckless disregard of rights" common law standard with the mandate of section 895.85(3). The statute was "clearly intended to be more narrow" than the common law that had allowed "punitive damages for conduct[] 'show[ing] a reckless indifference to or disregard of the rights of others on the part of the wrongdoer.'" Wis. J.I.—Civil 1707.1 (1998), note 2 (citations omitted). This new statutory standard for punitive

damages has been declared one of the nation's "most stringent." Richard L. Blatt et al., *Punitive Damages: A State-by-State Guide to Law and Practice* § 8.59, at 544 (2004 ed.). The statute is "narrower" and more "stringent" because it introduces to state law, for the first time, an express requirement of intent—not merely an intent to act, but an intent to inflict harm.

The plaintiffs themselves describe precisely what the legislature did in enacting section 895.85(3): the statute "abandoned" the "less stringent" common law standard. Pl. Br. at 11. According to the Wischer plaintiffs, the statute instead "used the word 'intentional' as the adjective to describe the 'disregard of rights,' and [thereby] eliminated the adjectives of 'wanton, willful or reckless'...most often used in the common law as describing the disregard of rights." *Id.* at 24, 25; *accord*, *id.* at 15, 30. To ensure no misunderstanding about the focus of that common law standard, they singled out a passage from *Sharp v. Case Corp.*, 227 Wis. 2d at 21, for emphasis: "A person's conduct is wanton, willful and in reckless disregard of the plaintiff's rights when it demonstrates an *indifference* on the person's

part to the consequences of his or her actions, *even though he or she may not intend insult or injury*." Pl. Br. at 17-18 (emphasis added).

That is the standard, they say, the statute replaced. Indeed, it did, but the plaintiffs refuse to accept the consequences of the legislature's decision. They not only ignore their own analysis of the statute's effect, they embrace the very common law standard that they (not to mention the Court of Appeals) stipulate has been replaced by the statute. The statute replaced the common law standard—wanton, willful and reckless conduct without regard to the intent to harm—with an intent to inflict harm standard that, the plaintiffs concede, cannot be met here.

B. The Plaintiffs Would Have This Court Expand the Jury's Ability to Award Punitive Damages.

The plaintiffs offer this Court a punitive damages test under section 895.85(3) that, at 152 words in a single sentence, is almost four times the statute's length. Pl. Br. at 34-35. They say a punitive damages award requires only proof of conduct that is merely "indifferent" to some right and an intent to proceed with that conduct "in the face of [an

attendant] risk" in a manner "sufficiently aggravated to cause the judicial observer to believe" punitive damages are warranted—all without the slightest need to prove intent to "cause the consequences that ensue from the disregard of rights." *Id.* Putting aside the complexity of the plaintiffs' "plain language" standard, it incorporates the very elements—indifference, risk, aggravation—that, even the plaintiffs concede, are no longer part of the punitive damages calculus.

The Wischer plaintiffs tailored their evidence to meet a common law standard that has not been the law since 1995. That anachronistic standard permeates the very facts that, they say, justify the $94 million punitive award. "MHIA[] [was] indifferen[t] to the right to a safe workplace." *Id.* at 5. "Substantial evidence showed that MHIA was aware of hazardous winds." *Id.* at 7. There was an "outrageous disregard of worker safety." *Id.* at 9. The defendants "intended to go forward in the face of known hazards...and that's all the law requires," the plaintiffs say, to qualify for punitive damages. *Wischer*, 2003 WI App 202, ¶ 35 n.9, quoting plaintiffs' counsel.

The plaintiffs conclude their brief with a statement as circular as it is remarkable:

> Under the common law, punitive damages were available in a negligence action only "if the plaintiff prove[d] the necessary aggravating circumstances beyond ordinary negligence." *Brown*, 124 Wis. 2d at 432. *The same would be true under Wischer's interpretation of § 895.85(3)....* Punitive damages would be available...only when the conduct is so aggravated that it meets the standard of being an "intentional disregard of rights."

Pl. Br. at 49 (emphasis added).[14] According to plaintiffs, a defendant's intentional disregard of rights permits the award of punitive damages—but only if the tortious conduct is aggravated, and the tortious conduct is aggravated only if it disregards plaintiff rights. That is no standard at all, let alone a "stricter" or "plain language" standard.

The Wischer plaintiffs ignore the common, ordinary and accepted meaning of the phrase intentional "disregard of rights" and, instead, hand craft their own limitless definition of "rights." It could not be broader in its sweep. Any right will do: "whether it be a right to safety, health or life, a property right, the right to financial integrity, *or some other*

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[14] Even "aggravated" negligence is surely not punishable with punitive damages under a statute requiring intentional conduct. "Any given act may be intentional or it may be negligent, but it cannot be both." *Dobbs*, § 26.

right." Pl. Br. at 34 (emphasis added). The common meaning of "disregard of rights," however, has never included abstract rights, nor any right, in the absence of an injury. *See supra* at I.A.

Under plaintiffs' application of the statute, the foundation of tort law—injury or harm—would become irrelevant. Punitive damages would be available in a far greater range of simple negligence cases than ever before, even at common law, the opportunities for punishment "expand[ed] rather than narrow[ed]." *Wischer*, 2003 WI App 202, ¶ 42. The "stricter" standard of the statute would become a license to punish and deter conduct that had, as its only known "consequence," the disregard of "a right to safety, health or life…or some other right...." Pl. Br. at 34.

Running a stop light, exceeding the speed limit, parking in a no-parking zone—all are commonplace "intentional" acts that can, in some circumstances, eventually lead to bodily harm or even loss of life. *See Wischer*, 2003 WI App 202, ¶ 43 (cataloguing examples). For the plaintiffs, they all would lead to punitive damages because they also disregard a "right."

A standard that potentially permits the award of punitive damages in such a wide range of negligence cases neither punishes nor deters. Instead, it "overextends" their availability "and dulls the potentially keen edge of the doctrine as an effective deterrent of truly reprehensible conduct." *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985) (restricting punitive damages to "malicious" conduct and disallowing them to punish a driver who ran a red light.)

As the Wischer plaintiffs *mis*apply the statute, few negligent decisions or acts would escape the submission of a punitive damages question to the jury. That could not have been the legislature's intent. Like the common law generally, the new statute limits the potential award of punitive damages to intentional torts: it requires clear and convincing evidence of the actor's intention to inflict harm.

III. BOTH THE STATUTE'S LEGISLATIVE HISTORY AND CONSTITUTIONAL CONTEXT UNEQUIVOCALLY ESTABLISH ITS INTENT: TO LIMIT PUNITIVE DAMAGES.

The Court of Appeals found the statute unambiguous, applied it and vacated the punitive damages verdict. For the Wischer plaintiffs, the statute is just as unambiguous, but

their "plain meaning" application reinstates the verdict. Travelers believes the limitless phrase "rights," undefined by the legislature or by the appellate courts in the punitive damages context, makes the statute ambiguous.[15] In any event, whether the statute is ambiguous or not, this Court should review the extrinsic evidence as well as the intrinsic evidence of statutory intent.

A. **The Legislature Repeatedly Expressed Its Intention To Narrow The Types of Cases That Would Support Punitive Damages.**

During the 1995-1996 session, the Wisconsin legislature passed a number of bills to limit civil liability. *See* Leg. Council Info. Memo. 96-25, *Legislation Relating To Liability and Insurance Enacted During the 1995-96 Legislative Session* (July 26, 1996), App.88-118.[16] Of the tort reform bills adopted that session, 1995 Wisconsin Act 17 ("the Act") was the most significant. It essentially abolished

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[15] "[T]he test for ambiguity examines the language of the statute to determine whether well-informed persons *should have* become confused, that is, whether the statutory language *reasonably* gives rise to different meanings." *Kalal*, 2004 WI 58, ¶ 47 (emphasis in original; citations and quotation marks omitted).

[16] This Court has repeatedly relied on Legislative Council materials. *See, e.g.*, *Wagner v. Milwaukee County Election Comm'n*, 2003 WI 103, ¶ 38, 263 Wis. 2d 709, 666 N.W.2d 816.

the doctrine of joint and several liability, replacing it with the modified comparative fault system now codified at section 895.045, Stats. *See supra* at I.A. In addition, of course, the Act replaced the common law punitive damages standard.

The Act marked the culmination of sustained efforts over at least ten years and seven consecutive legislative sessions to change the civil justice system.[17] That dissatisfaction had a variety of reported causes, including unpredictable and unjustified "windfalls" associated with increasingly large damage awards—especially punitive awards—and widespread publicity given seemingly frivolous cases. *See* Leg. Council Staff Memorandum to Sen. Huelsman (1/31/95) ("Huelsman Memo."), App.203-206.[18] Indeed, some argued that punitive damages should be eliminated altogether, leaving the role of punishment to the criminal courts. *See id.*; *see also* In re the

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[17] *See* David Callender, Thompson Defends Tax Cut for Rich, *The Capital Times*, May 17, 1995, at 3A ("The bill is the result of more than 20 years of liability reform sought by the state's top business groups...."), App.119-120.

[18] *See also* Daniel Ritsche, *Torts and Damages: The Civil Justice Reform Issues*, L.R.B. Brief 95-5 (1995), App.207-215; *Liability Reform Needs Reform*, Wis. State Journal, May 30, 1995, at 9A, App.216-217.

Matter of Joint Reform, Transcript of Assembly Floor Debate (April 6, 1995) ("Assembly Transcript"), p. 64 ("[T]here are other ways of punishing. It's called the criminal statutes...."), App.187.

Although the Act did not eliminate punitive damages, it did establish a new standard more stringent than previous proposals. For example, in prior sessions, some bills would have required plaintiffs only to show that the defendant acted "in a wilful or conscious disregard" of the plaintiff's rights. *See, e.g.*, 1989 AB 153; 1989 SB 251; 1991 AB 217; 1991 SB 458, App.218-262. Similar bills would have required plaintiffs to show the defendant acted "in a wilful disregard" of the plaintiff's rights, eliminating the word "conscious." *See, e.g.*, 1991 SB 138; 1991 AB 1022; 1993 SB 152, App.263-290.

Section 895.85's "intentional" requirement did not appear by happenstance. The bill initially required only a "showing that the defendant acted maliciously...or in a *wilful* disregard of the rights of the plaintiff" to justify punitive damages. *See* 1995 SB 11, § 3 (emphasis added), App.295. The Senate Judiciary Committee amended the bill, however,

substituting the word "intentional" for the more expansive word "wilful." Senate Substitute Amendment (SSA) 1 to 1995 SB 11, App.304. As a result, the bill reported by the committee required nothing less than a showing of an intentional disregard of rights to justify punitive damages.

The heightened standard withstood persistent efforts to dilute it. For example, Senator Lynn Adelman offered an amendment that would have made punitive damages available where defendants acted "maliciously...or in reckless disregard" of the plaintiff's rights. Senate Amendment 4 to SSA 1, 1995 SB 11, App.306-307. The Adelman amendment failed, however, and the bill passed the senate by a two-thirds margin. *See* App.291-292.[19]

For its part, the assembly also rejected an amendment to replace "intentional" with the less stringent common law standard. Specifically, the amendment would have made punitive damages available in cases where a defendant acted

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[19] In 1997, Lynn Adelman became a federal judge. Five years ago, in a diversity case, he reviewed the statute he voted against. Judge Adelman concluded that "the intent of the new legislation was to make it more difficult for a plaintiff to recover punitive damages." *Unified Catholic Schools of Beaver Dam Educ. Ass'n v. Universal Card Services Corp.*, 34 F. Supp. 2d 714, 718 (E.D. Wis. 1999). This Court has cited Judge Adelman's decision and the statute's enactment as a "change" in the common law. *Jones v. Secura Ins. Co.*, 2002 WI 11, ¶ 14.

"maliciously or in wanton, willful or reckless disregard of the plaintiff's rights." Assembly Amendment 5 to 1995 SB 11, App.308-310. This amendment also failed; and the stricter version of the bill passed the assembly by a two-thirds margin, just as it had in the senate. *See* App.291-292.

When it adopts a bill, the legislature presumably knows the state of the law and choses its words carefully. *See Village of Slinger v. City of Hartford*, 2002 WI App 187, 256 Wis. 2d 859, 650 N.W.2d 81, 65 (citations omitted). In this situation, the presumption is irrefutable. Legislators understood that changing the standard of conduct for punitive damages would have a significant impact on Wisconsin law. *See* Assembly Transcript at 51-52, App.174-175 ("So if...we're not quite sure what the impact of changing the language is, then we ought not to do it and we should be cautious....").

More importantly, the legislature was aware that the new "intentional disregard" standard would drastically limit the availability of punitive damages in Wisconsin, even in cases involving egregious conduct.

> I think that there's a tremendous change when you...chang[e] the standard to intentional, well, there are

> two standards in the bill: malicious or intentional. *Those are pretty – pretty tough standards to meet if you're the injured party.*

Id. at 55-56 (emphasis added), App.178-179.

Moreover, unless *intent to injure* the plaintiff could be proven, legislators believed that the "intentional disregard" standard would prohibit punitive damages even where a physician amputated the wrong limb, where a physician mistakenly terminated life support, or where a three-time drunk driver injured a child.[20]

---

[20] These examples punctuated the debate over the unsuccessful amendment that would have codified a "wanton, willful, or reckless disregard" standard:

> Well, this one is my favorite.... *[W]hat SB11 does is it changes the standard for punitive damages from malicious conduct and wanton or willful disregard to malicious or intentional acts....*
>
> Now, what we have under SB11 is that you have to find that the person acted intentionally, so those of you who have for instance kept up with the cases in that wonderful hospital in Florida, ..., where a wrong leg was amputated and in one case someone went in and turned off the life support system of the wrong person – oops – *we would now have to provide in order to get punitive damages that this was done intentionally.*
>
> There are other types of cases that this could happen. Let's imagine we have a drunk driver going down the road. A little girl runs out in front of him. He hits her. She's – she's horribly injured.... Now we want to go after some punitive damages. We say, well, we don't like this person who has three previous drunk drivings out on the road, doing it again. He says it was an accident. I didn't mean to hit her. No punitive damages.

See Assembly Transcript at 40-42, App.163-165 (emphasis added).

The "intentional disregard" standard was enacted after years of debate over tort reform and after repeated and unsuccessful attempts to replace it with a less demanding test. Through the Act, the legislature made a conscious choice to heighten the standard for punitive damages at precisely the time it made other conscious choices to limit civil liability generally. In the words of one of the statute's opponents, "[t]he clear message of this bill is to essentially eliminate punitive damages...." *Id.* at 42, App.165. It was, and it did—except for intentional torts.

B. The Evolution Of The Punitive Damages Pattern Jury Instruction Provides Extrinsic Evidence Of Statutory Meaning.

This Court did not accept this case to review the pattern jury instructions on punitive damages. Yet those instructions are directly relevant.[21] The instructions and the Jury Instructions Committee's complementary commentary are interpretive resources that provide compelling extrinsic evidence of the statute's meaning. *See Kalal*, 2004 WI 58,

[21] The U.S. Supreme Court has mandated *de novo* review of punitive damages jury instructions because of the constitutional implications. *See Leatherman*, 532 U.S. at 436; *see also infra* at III.C.

¶ 50. The jury instructions on punitive damages, on negligence, on intentional conduct, and their evolution, all support the statutory interpretation limiting punitive damages to intentional harm.

The first jury instruction on punitive damages, adopted in 1966, required that "the defendant act[] either maliciously or in a willful or reckless disregard of the plaintiff's rights." Wis. J.I.—Civil 1707 (1966); App. 329-330.[22] The subsequent development of the punitive damages jury instruction—from the common law to section 895.85(3)—reflect increasing limitations on punitive damages to cases of malice or intentional harm.

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[22] The alternative basis for punitive damages, "the defendant acted maliciously toward the plaintiff," is not at issue because the Wischer plaintiffs conceded that no defendant acted with malice. *Wischer*, 2003 WI App 202, ¶ 34. However, the plaintiffs argue that "malice" requires intent to injure and, therefore, that "intentional disregard" does not require intent to harm. Pl. Br. at 27-28. While that argument relies on one subsidiary dictionary definition of malice, this Court has readily acknowledged that "malice" is difficult to define. *See Ervin v. City of Kenosha*, 159 Wis. 2d 464, 483-85, 464 N.W.2d 654 (1991) (multiple definitions of malice); *Meshane v. Second Street Co.*, 197 Wis. 382, 387, 222 N.W. 320 (1928). In addition, when section 895.85(3) is read as a whole, one part of the statute ("malice toward the plaintiff") contains a particular term and part two ("intentional disregard") contains a much more general term. The former is "simply one specific example of the general category" that is the latter. *In re K.G.R. Partnership*, 187 Wis. 2d 376, 385, 523 N.W.2d 120 (Ct. App. 1994). This is the only statutory reading consistent with the statute's intent to restrict, not expand, punitive damages in Wisconsin.

Before section 895.85(3)'s enactment, the model instruction properly reflected the common law punitive damages standard, requiring "outrageous" conduct:

> A person's conduct is wanton, willful, and in reckless disregard of the plaintiff's rights when it demonstrates an indifference on his or her part to the consequences of his or her actions, even though he or she may not intend insult or injury.

Wis. J.I.—Civil 1707 (1996). After its enactment, the new instruction properly removed the terms "outrageous," "wanton," "willful," and "reckless." *See supra* at II.A. Of particular significance, the new instruction omitted the language "even though he or she may not intend insult or injury," demonstrating that the new statute and instruction *do* require an actor to intend injury.

The commentary to the instruction directly addresses the question of intent at the heart of this appeal. To create the new instruction, the Jury Instructions Committee expressly relied on section 939.23, Stats., defining criminal intent:

> (3) "Intentionally" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result....

See Wis. J.I.—Civil 1707.1 (1998), n.2 ("[t]he Committee finds the statutory formulation of criminal intent...helpful"). So did the Court of Appeals. *Wischer*, 2003 WI 202, ¶ 39.

Under the criminal intent statute, the foundation for the statutory concept of punitive damages, a defendant must act with a "purpose" to harm or virtually complete awareness that the specified conduct is practically certain to cause harm before the law can punish that conduct as intentional. Based on the criminal law, moreover, the standard is subjective—what the actor knew and intended—not objective. *See Pachucki v. Republic Ins. Co.*, 89 Wis. 2d 703, 710, 278 N.W.2d 898 (1979); *see Dobbs*, § 24.[23]

Other civil jury instructions highlight the deficiency in the plaintiffs' construction of intent. "Intent requires both an intent to do an act *and* an intent to cause injury by that act." Wis. J.I.—Civil 2001 (1995) (emphasis in original). By contrast, if the defendant's conduct "merely created a risk of some harm to someone, which may or may not have resulted,

[23] The "practical certainty" requirement of section 939.23, repeated in the jury instruction, provides an objective standard *See supra* at I.B.

then [the] conduct was negligent as opposed to intentional." *Id.*

Furthermore, even the pattern jury instruction defining "negligence" demonstrates that the Wischer plaintiffs' statutory interpretation of "intentional disregard of rights"—with no intent to harm required—is only a negligence concept.

> A person is negligent when (he) (she) fails to exercise ordinary care....A person is not using ordinary care and is negligent, if the person, *without intending to do harm*, does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.

Wis. J.I.—Civil 1005 (2004) (emphasis added).

The purpose of instructions at trial is to inform the jury, fully and fairly, of an applicable rule or principle of law, explaining what it "means to persons who usually do not possess law degrees." *See Nommensen v. American Continental Ins. Co.*, 2001 WI 112, ¶ 36, 246 Wis. 2d 132, 629 N.W.2d 301. Wisconsin's jury instruction on punitive damages leaves legislative judgments—regarding the conduct that might constitute an "intentional disregard" and which "rights" might be pertinent—to a jury without the benefit of definitions or an explanation. Left incomplete and

unexplained, the punitive damages jury instruction defines punishment-worthy conduct far too broadly. It invites arbitrary results. There is no better example of that than the $94 million punitive damages award in this case.

C. **The Statute Should Only Be Applied Consistently With The U.S. Supreme Court's Punitive Damages Decisions.**

While the constitutional issues that permeate this case are not now before this Court, the most recent punitive damages decisions of the U.S. Supreme Court themselves provide extrinsic evidence that should inform the application of section 895.85(3). *See Kalal*, 2004 WI 58, ¶ 69 (Abrahamson, C.J., concurring). The case law offers not only an explanatory framework but, for statutory interpretation, a cautionary one as well. It is, indeed, for the states to determine their own public policy on punitive damages—but not without regard for due process. The U.S. Supreme Court's opinions—like the statute's legislative history—can only lead to a restrictive application of section 895.85.

In the punitive damages calculus, the failure to define key terms can have devastating implications. Justice Breyer, concurring in *BMW of North America, Inc. v. Gore*, 517 U.S.

559 (1996), expressed concern that the fraud statute at issue made punitive damages too readily available. The state courts, he noted, had applied common law "factors" established to limit punitive damages in a way that "belie[d] that purpose." *Id.* at 589. Just last year in *State Farm*, 538 U.S. at 417, moreover, the U.S. Supreme Court re-emphasized the importance of clarity in the law of punitive damages, expressing its increasing "concerns over the imprecise manner in which punitive damage systems are administered."

In *State Farm*, the U.S. Supreme Court reiterated its mandate for heightened judicial scrutiny of punitive damage awards. *Id.* at 418. The Court for the first time also established a "single digit" rule for punitive damages and imposed substantive restrictions on the evidence that can support them. *Id.* at 425.[24] In light of the direct relationship between punitive damages and criminal proceedings, the Court held that state law at a minimum must provide both uniform treatment and notice of the conduct that might be

[24] Among other things, the *State Farm* decision limits the "course of conduct" and "potential harm" evidence so emphasized by the plaintiffs. Pl. Br. at 3, 12, 40.

subject to punishment. *Id.* at 417-18 (citation omitted). While the Wisconsin jury instruction incorporates the language of section 895.85(3) (and, therefore, is not a literal misstatement of law), it fails (like the statute itself) to define "rights of the plaintiff" in any way.

Section 895.85(3) cannot be interpreted in isolation from the constitutional limitations on punitive damage awards. Those limitations, imposed by the U.S. Supreme Court, provide their own context. Indeed, they are part of the extrinsic framework for interpreting and applying the standard for punitive damages under the statute.

The precedential pattern could not be clearer. The U.S. Supreme Court continues to heighten the due process standards for punitive damages, subjecting them to increasingly extensive judicial review. This Court's interpretation of the statute should parallel that standard. Punitive damages should remain available in this state, as they remain available under the Fourteenth Amendment, but only for conduct that, at a minimum, rises to the level of an intentional tort.

CONCLUSION

The $94 million punitive damage award here was based on a misinterpretation of section 895.85(3). As the Court of Appeals correctly concluded, the tragedy was an accident, not the "intentional disregard of the rights of the plaintiff[s]" required for punitive damages.

The Wischer plaintiffs have received $27 million. That is not, by itself, a reason to affirm the Court of Appeals. A decision to reinstate the punitive damages award will lead unavoidably to even more litigation—in the trial court, in the Court of Appeals and, almost certainly, again in this Court given the constitutional dimensions of the issues that lie in wait. Neither is that, by itself, a reason to affirm the Court of Appeals.

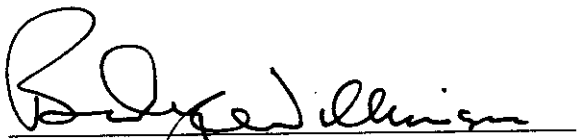
This Court's interpretation and application of section 895.85(3) to limit punitive damages to intentional torts will leave the plaintiffs well-compensated and end the litigation. More importantly, it will leave the state with a statute that means what it says.

For the reasons stated above, the Supreme Court should affirm the decision of the Court of Appeals vacating

the judgment for punitive damages entered by the Milwaukee County Circuit Court. If this Court cannot affirm that decision, it should remand the case for a new trial on punitive damages. In the alternative, the Supreme Court should remand the case to the Court of Appeals to address the litany of dispositive issues preserved on appeal.

Dated: June 14, 2004.

LA FOLLETTE GODFREY & KAHN

By: 

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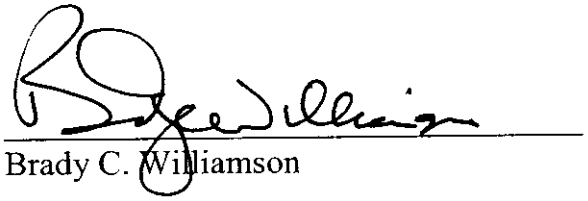
CERTIFICATION

I hereby certify that this brief conforms to the requirements of sections 809.19(8)(b) and (c), Stats., and this Court's April 22, 2004 Order for a brief produced with a proportional font. The length of this brief is 10,998 words.

Dated: June 14, 2004.



Brady C. Williamson

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STATE OF WISCONSIN
IN THE
SUPREME COURT

Appeal No. 01-0724 (Consolidated by the Court of Appeals with Nos. 01-1031 and 01-2486)
Milwaukee County Circuit Court Case No. 99-CV-6553

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased, MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased, and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE OF JEROME W. STARR, deceased,

Plaintiffs-Intervenors-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant,

NEIL F. LAMPSON, INC.,

Defendant-Respondent,

LAMPSON INTERNATIONAL LTD., FEDERAL INSURANCE COMPANY, and THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendants.

APPENDIX OF THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS

STATE OF WISCONSIN
IN THE
SUPREME COURT

Appeal No. 01-1031 (Consolidated by the Court of Appeals with Nos. 01-0724 and 01-2486)
Milwaukee County Circuit Court Case No. 99-CV-6553

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased, MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased, and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE OF JEROME W. STARR, deceased,

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-Cross-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-Petitioner,

NEIL F. LAMPSON, INC. and LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY,

Defendant-Co-Appellant,

THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendant.

STATE OF WISCONSIN
IN THE
SUPREME COURT

Appeal No. 01-2486 (Consolidated by the Court of Appeals with Nos. 01-0724 and 01-1031)
Milwaukee County Circuit Court Case No. 99-CV-6553

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased, MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased, and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE OF JEROME W. STARR, deceased,

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-Cross-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-Cross-Respondent,

NEIL F. LAMPSON, INC. and LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY, and THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendants-Respondents-Cross-Appellants.

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COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Cir. Ct. No. 99 CV 6553

Appeal Nos. 01-0724
01-1031
01-2486

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

NO. 01-0724

PATRICIA WISCHER, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JEFFREY A. WISCHER, DECEASED, MARJORIE DEGRAVE, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF WILLIAM R. DEGRAVE, DECEASED, AND RAMONA DULDE-STARR, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JEROME W. STARR, DECEASED,

PLAINTIFFS-INTERVENORS-RESPONDENTS,

V.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

DEFENDANT-APPELLANT,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

DEFENDANT,

NEIL F. LAMPSON, INC.,

DEFENDANT-RESPONDENT,

LAMPSON INTERNATIONAL LTD., FEDERAL INSURANCE COMPANY, AND THE TOKIO MARINE & FIRE INSURANCE COMPANY,

DEFENDANTS.

NO. 01-1031

PATRICIA WISCHER, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JEFFREY A. WISCHER, DECEASED, MARJORIE DEGRAVE, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF WILLIAM R. DEGRAVE, DECEASED, AND RAMONA DULDE-STARR, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JEROME W. STARR, DECEASED,

PLAINTIFFS-RESPONDENTS-
CROSS-RESPONDENTS,

V.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

DEFENDANT-RESPONDENT-
CROSS-APPELLANT,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

DEFENDANT-APPELLANT-PETITIONER,

NEIL F. LAMPSON, INC. AND
LAMPSON INTERNATIONAL LTD.,

DEFENDANTS,

FEDERAL INSURANCE COMPANY,

DEFENDANT-CO-APPELLANT,

THE TOKIO MARINE & FIRE INSURANCE COMPANY,

DEFENDANT.

NO. 01-2486

PATRICIA WISCHER, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JEFFREY A. WISCHER, DECEASED, MARJORIE DEGRAVE, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF WILLIAM R. DEGRAVE, DECEASED, AND RAMONA DULDE-STARR, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JEROME W. STARR, DECEASED,

PLAINTIFFS-RESPONDENTS-
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MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

DEFENDANT-RESPONDENT-
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THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

DEFENDANT-APPELLANT-
CROSS-RESPONDENT,

NEIL F. LAMPSON, INC. AND
LAMPSON INTERNATIONAL LTD.,

DEFENDANTS,

FEDERAL INSURANCE COMPANY AND
THE TOKIO MARINE & FIRE INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS-
CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from judgments and orders of the circuit court for Milwaukee County: DOMINIC S. AMATO, Judge. *Affirmed in part; reversed in part.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 WEDEMEYER, P.J. This case involves three consolidated cases in the so-called "Miller Park" appeals.[1] Although the cases underlying this consolidated appeal present many issues of varying complexity, there is one dispositive issue: whether, based on the facts as conceded by the plaintiffs, the $94,000,000 punitive-damage award is contrary to the calls of WIS. STAT. § 895.85(3) (1999-2000).[2] We hold that it is. Accordingly, we reverse the punitive-damage award, and consequently do not address the other issues. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed). The judgment relative to the compensatory damage award is affirmed.

I. PROCEDURAL BACKGROUND

¶2 In appeal number 01-0724, Mitsubishi Heavy Industries America, Inc., appeals from a judgment dismissing Neil F. Lampson, Inc. (the designer and

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[1] On February 21, 2002, this court ordered case numbers 01-1031 and 01-2486 consolidated for the purposes of briefing and disposition. On this court's own motion, we now order that case number 01-0724 be consolidated with the aforereferenced appeals for dispositional purposes.

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

manufacturer of the crane involved), following the trial court's decision directing a verdict in Neil F.'s favor. Patricia Wischer, Marjorie DeGrave and Ramona Dulde-Starr (the plaintiffs) filed a motion to intervene in this appeal, which was granted.[3]

¶3 In the other consolidated cases, The Travelers Indemnity Company of Illinois and Federal Insurance Company appeal from judgments entered against them and in favor of the plaintiffs and in favor of Mitsubishi, its insured. Mitsubishi filed a cross-appeal challenging the judgment rendered in favor of the plaintiffs following a seven-week jury trial. In addition, Travelers appeals from the trial court's judgment ordering it to pay the entire jury verdict as a consequence of its failure to plead and prove its policy limits during the trial. Federal and The Tokio Marine & Fire Insurance Company cross-appeal from the judgments rendered against them and in favor of the plaintiffs and Travelers, ordering the insurers to pay their policy limits of $50,000,000 and $2,000,000, respectively. In this case, Mitsubishi also maintains a cross-appeal against the plaintiffs.[4]

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[3] Mitsubishi claims the trial court erred when it: (1) directed a verdict in favor of defendant Neil F.; (2) erroneously precluded expert testimony from Mitsubishi's expert, which would have bolstered Mitsubishi's negligence case against Neil F.; and (3) declared that Neil F.'s potential liability was moot.

[4] Travelers presents seven claims: (1) the $94,000,000 punitive damage award is unconstitutional; (2) the trial court's post-verdict decision on punitive damages deprived the defendants of statutory due process; (3) WIS. STAT. § 895.85(3) was erroneously interpreted by the trial court, leading to erroneous instructions to the jury, and an improper award of punitive damages; (4) the trial court erred in ruling that Travelers is responsible for the entire amount of the verdict despite its $25,000,000 policy limit; (5) exclusions in the policy preclude coverage for the judgment against Mitsubishi; (6) the trial court erroneously ignored the Department of Workforce Development's preliminary determination that the three decedents involved were loaned employees to Mitsubishi; and (7) the mid-trial settlement agreement limits the recovery amount.

(continued)

¶4 The dispositive issue in this appeal is governed by WIS. STAT. § 895.85(3), enacted by our legislature in 1995, which provides: "The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff."

¶5 Based upon our analysis of the statute, we hold that the phrase "intentional disregard of the rights of the plaintiff" in WIS. STAT. § 895.85(3) can only be reasonably interpreted to require either an intent by a defendant to cause injury to the plaintiffs or knowledge that the defendant's conduct was practically certain to cause the accident or injury to the plaintiffs. Based on this conclusion, together with the concession by both the plaintiffs and the trial court that there is no evidence demonstrating that Mitsubishi intended to cause injury or knew that its conduct was practically certain to cause injury, we reverse the award of punitive damages.[5]

Federal and Tokio Marine claim: (1) Wisconsin's direct action statutes do not permit a claim solely based on punitive damages; (2) the insurance policies do not provide coverage for the damages; (3) the judgment directly against the insurers here is unconstitutional and violates public policy; (4) the settlement agreement caps liability and therefore no post-judgment interest may be awarded; and (5) the trial court erred in ruling that Travelers has a valid claim to equitable subrogation against Federal and Tokio Marine.

Mitsubishi makes four arguments in support of its claim that the trial court erred: (1) the trial court erroneously refused to include the decedents' employer on the verdict; (2) the trial court misinterpreted the new punitive damage statute, which led to an improper punitive damage award; (3) the trial court erroneously excluded evidence of Mitsubishi's wealth; and (4) the punitive damage award is excessive.

[5] The court acknowledges, with gratitude, the amicus curiae briefs filed by the Wisconsin Academy of Trial Lawyers, the Wisconsin Insurance Alliance and the Wisconsin Manufacturers and Commerce.

¶6 Because we have reached this conclusion, it is not necessary for us to address any of the other issues raised in this appeal. All of the remaining issues are moot.

II. FACTUAL BACKGROUND

¶7 July 14, 1999, was to be an exciting day in the construction of Miller Park stadium, the home of the Milwaukee Brewers major league professional baseball team. On that day, a crane known as "Big Blue" was to lift a large piece of the retractable roof of the stadium so workers could bolt it into place. Unfortunately, the lift did not go as planned. The crane broke and its boom struck the crane holding three ironworkers who were to secure the roof. All three workers fell to their instant death.

¶8 In order to understand the events of July 14, 1999, it is important to know who the relevant parties and non-parties are and how they came to work together that fateful day.

The Parties

¶9 The construction of Miller Park stadium was a joint effort involving many individuals and business organizations. The general contractor for the construction project was a joint venture of three companies: Hunzinger Construction Company, Clark Construction Builders, Inc., and Huber, Hunt & Nichols, Inc. ("general-contractor joint venture"). The general-contractor joint venture hired eighty contractors and those contractors hired approximately two hundred subcontractors.

¶10 One of the contractors hired by the general-contractor joint venture was Mitsubishi Heavy Industries America, Inc. Mitsubishi was hired to build the stadium roof according to an architectural design, to erect the roof, and to design, build, and install the drive system that moved the roof panels. Victor Grotlisch was Mitsubishi's site manager, and Wayne Noel was Mitsubishi's safety superintendent.

¶11 Mitsubishi hired Lampson International Ltd., an industry leader in performing heavy lifts, to help install the roof of the stadium. Lampson International leased a crane known as "Big Blue" to Mitsubishi. On April 22, 1998, Mitsubishi and Lampson International entered into an agreement for the lease of a crane to assist in the lift of the Miller Park roof. The lease agreement stated that Lampson International would provide a TransiLift 1200 Series IIA crane; however, Lampson International actually provided a TransiLift 1500 Series IIIA crane.

¶12 A transi-lift crane is a crane that is not stationary; it can pick up and transport extremely heavy loads. Big Blue is a TransiLift crane that stands forty-five stories high and rests on a base only ten yards wide. The crane sits on two crawlers, the means by which it moves. A car body sits on each crawler, and on each body are a table and a plastic bearing. The boom is the long lattice arm extending from the plastic bearing. At the end of the boom is a joint, and extending beyond the joint is a shorter lattice called the jib. Any load carried by the crane hangs from the jib.

¶13 Lampson International also supplied a crew to assemble Big Blue on site, and provided a crew to operate the crane. Fred Flowers was the crane operator; Alan Watts was the flagger and supervisor for the Lampson crew.

¶14 Neil F. Lampson was the principal designer and manufacturer of the TransiLift crane known as Big Blue. As designer, Neil F. made changes to the design of Big Blue and a last minute addition to the assembly of the crane. Both changes and the possibility of a negligent design of the crane were raised as issues in this case.

¶15 Danny's Construction Company, Inc. (DCCI) was hired to bolt the stadium roof into place. The deceased ironworkers employed by DCCI included Jeffrey Wischer, William DeGrave and Jerome Starr. Red Lewis was DCCI's superintendent and Joe Edwards was the operator of the crane that lifted the ironworkers.

Insurance

¶16 The stadium's owner, Southeast Wisconsin Professional Baseball Park District, purchased an Owners Controlled Insurance Program (OCIP) to provide commercial general liability insurance coverage for the Miller Park construction project. The coverage was "layered" in that each insurer's coverage attached when the underlying policy was exhausted. Thus, one insurer provided coverage up to a certain amount and, when that amount was exhausted, another insurer provided coverage up to a certain amount, and so on. The priority for coverage under the OCIP was as follows:

The Travelers Indemnity Company of Illinois	$2,000,000
Royal Insurance Company of America	$5,000,000
Indemnity Insurance Company of North America	$20,000,000
Federal Insurance Company	$50,000,000
The Travelers Indemnity Company of Illinois	$25,000,000
The Tokio Marine & Fire Insurance Company	$2,000,000 in separate coverage for MHIA, attaches at $75,000,000.

¶17 The parties entered into three settlement agreements. The first two were entered into before trial and involved the payment of $2,000,000 (Travelers) and $5,000,000 (Royal) to the plaintiffs. The third settlement is known as the IINA agreement, which was entered into during trial on November 7, 2000. Under the IINA settlement, the plaintiffs entered into an agreement with Mitsubishi, its parent company, Mitsubishi Heavy Industries LTD, and Indemnity Insurance Company of North America (IINA). The agreement provided for an immediate payment of $12,375,000, which would be credited against any compensatory damages awarded by the jury. The IINA agreement then capped punitive damages at $84,626,000 if it was later determined that Mitsubishi had insurance coverage, and $10,000,000 if Mitsubishi did not have insurance coverage.

¶18 The IINA agreement was not disclosed to the trial court or any other party until one month after the jury reached its verdict. The jury returned a compensatory damage verdict of $5,250,000 and a punitive damage award of $94,000,000 against Mitsubishi.

The Day of the Lift

¶19 At 7:30 a.m. on July 14, 1999, several people participated in a pre-lift meeting at Miller Park. At that meeting, Victor Grotlisch, Mitsubishi's site manager, discussed the weather report, Allen Watts, the Lampson supervisor, discussed how the lift would occur, and Wayne Noel, Mitsubishi's safety supervisor, discussed safety issues involved in the lift, including rescue, radio communication, and responsibilities. At this meeting, Noel told the workers that anyone could stop the lift for any reason at any time if it was unsafe to continue.

¶20 While Mitsubishi stresses the importance of this statement because the lift requires people at different locations watching the lift from different angles, the plaintiffs claim that the workers are in no position to tell supervisors to stop a lift because the workers, having families to support, do not want to risk their jobs.

¶21 At about 10 a.m., Big Blue picked the roof piece off of the ground and crews checked the load stabilization and center of gravity. By 11:00 or 11:30 a.m., Grotlisch, Watts, and a DCCI representative agreed that the lift could proceed. Watts, Lampson's supervisor, was then in charge of the lift.

¶22 Later in the afternoon, Grotlisch checked the wind speeds and was informed by Watts that the lift was going fine. Wischer, DeGrave and Starr entered the man basket and were lifted so that they could bolt the roof into place. As the roof was being lifted, there was a squeal of brakes and a loud snap. Big Blue toppled and struck the boom of the crane holding the ironworkers. Wischer, DeGrave and Starr fell to an instant death.[6]

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[6] The parties disagree in many respects as to the cause of the crane collapse. The plaintiffs claim that the crane collapsed because it was misused by Mitsubishi in excessive winds, that Mitsubishi never performed wind load calculations, and that the wind conditions that day far exceeded the load chart limitations. Mitsubishi, however, claims that Lampson International never told Mitsubishi that wind sail calculations had to be done or that Lampson International did not do the calculations.

The parties also contest wind speeds that day. Mitsubishi site manager Victor Grotlisch claims he checked the weather forecast and that winds were between 15-17 mph. Because the load chart limited Big Blue to winds less than 20 mph, Grotlisch and Noel claim they continued with the lift within appropriate wind speeds. Lampson International claims that the wind speeds that day were between 20-25 mph, with gusts between 25 and 35 mph. Plaintiffs agree with those figures, adding that at 5:00 p.m., just minutes before the collapse, the wind speeds at Mitchell Field were 21 mph, with gusts of 26 mph. Mitchell Field is 9.6 miles from Miller Park.

Procedural History

¶23 On August 12, 1999, plaintiffs, the wives of the decedents, filed a lawsuit charging the general-contractor joint venture, Mitsubishi, Lampson International, and Neil F. Lampson with negligence, seeking compensatory and punitive damages. On September 15, 2000, based on a settlement, the court dismissed the general-contractor joint venture from the lawsuit. On October 16, 2000, the case went to trial. During trial, the parties disagreed on the interpretation of Wisconsin's punitive damages statute, WIS. STAT. § 895.85(3). As noted, the statute states:

> The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

WIS. STAT. § 895.85(3).

¶24 During the trial, the court directed a verdict in favor of Neil F., leaving Mitsubishi and Lampson as the only defendants in the lawsuit. On November 7, 2000, the IINA agreement was executed, limiting Mitsubishi's liability, and on December 1, 2000, the jury returned a verdict attributing 97% liability to Mitsubishi and 3% liability to Lampson International. As noted, the jury awarded $5,250,000 million in compensatory damages and $94,000,000 in punitive damages against Mitsubishi. Mitsubishi filed several post-verdict motions, all of which were denied by the trial court.

¶25 After the jury verdict was returned, the plaintiffs amended their complaint to seek recovery of punitive damages from Federal Insurance Company, claiming that Federal was liable to the plaintiffs for the damages. The plaintiffs

also amended the complaint to seek recovery of punitive damages from Tokio Marine, seeking a declaratory judgment that its policy provided coverage for punitive damages. After motions and hearings, the trial court entered summary judgment against Federal and Tokio Marine in their direct actions.

¶26 Separate from Federal and Tokio Marine's liability to the plaintiffs is their liability to Travelers. The trial court entered judgment against Travelers Insurance Company for $84,625,000 for Travelers's failure to plead and prove its policy limits as part of the OCIP. As a result, Travelers filed cross-claims against Federal and Tokio Marine for equitable subrogation, equitable contribution, and unjust enrichment. The trial court concluded that Travelers was entitled to judgment against Federal and Tokio Marine on a theory of equitable subrogation. The trial court concluded that the $77,000,000 judgment against Mitsubishi was payable as follows:

> With respect to the plaintiffs' judgment against [Mitsubishi], the remaining amount of which is $77 million plus taxable costs and interest, the first $50 million plus corresponding taxable costs and interest is insured by Federal ... the next $25 million plus corresponding taxable costs and interest is insured by Travelers ... and the last $2 million plus corresponding taxable costs and interest is insured by Tokio Marine .... For the benefit of [Mitsubishi] only, the entire $77 million plus corresponding taxable costs and interest, as previously adjudged, is insured by Travelers ....

¶27 Based on the above judgments, Mitsubishi appeals the punitive damage award as excessive and not warranted by the evidence contending that there is no evidence of either intent to injure the decedents or knowledge that such injury was practically certain to occur. Mitsubishi also appeals the trial court order dismissing Neil F. from the action, the trial court's refusal to include DCCI

on the verdict, and the trial court's refusal to admit evidence of Mitsubishi's wealth. The plaintiffs intervened in this appeal because they believed resolution of this matter might affect the punitive damage judgment.

¶28 Travelers Insurance appeals the $77,000,000 judgment against it for failing to plead and prove its policy limits in the trial court. Travelers argues that its policy limit was $25,000,000, and its policy attaches at the $27,000,000 mark; therefore, it should not be liable for $77,000,000 because Travelers cannot be liable for more than its policy limits. Travelers also argues that if the judgment against it is affirmed, the cross-claims against Federal and Tokio Marine should also be affirmed because the judgments do "no more than enforce those two insurance contracts, preventing both an injustice to Travelers and an outrageous windfall for Federal and Tokio."

¶29 Federal Insurance appeals the direct action judgment against it in favor of the plaintiffs and the judgment against it in favor of Travelers on the cross-claim. Federal claims that the Wisconsin direct action statute does not provide the plaintiffs with a cause of action against it and, even if the statute does, the insurance policy does not cover punitive damages because such an award is against public policy and in excess of Mitsubishi's liability under the IINA agreement.

¶30 Tokio Marine appeals the direct action judgment against it in favor of the plaintiffs and the portion of the judgment against it in favor of Travelers on its cross-claim. Tokio Marine claims that Travelers must be liable for the amount of damages because it failed to prove its policy limits. In addition, Tokio Marine claims that its policy does not cover punitive damages because such an award is in excess of Mitsubishi's liability under the IINA agreement.

III. DISCUSSION

¶31 Indeed, there is no dispute that this case involved a horrible tragedy. The three men who died gave their lives in the process of erecting a state-of-the-art structure. The wives and families of the decedents suffered an immeasurable loss. In compensation for the loss, the three plaintiffs have received a total of $27,000,000. Regardless of our decision on this appeal, that compensation stands.[7]

¶32 The dispositive issue in this case involves the interpretation of a statute. Accordingly, our review is independent from that of the trial court. ***Stephenson v. Universal Metrics, Inc.***, 2002 WI 30, ¶26, 251 Wis. 2d 171, 641 N.W.2d 158. As a part of our interpretation, we strive to ascertain and enforce the intent of the legislature; our first consideration is the plain language of the statute. ***Id.***, ¶27. The language of the statute provides: "The plaintiff may receive punitive damage if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff." WIS. STAT. § 895.85(3). We conclude that the statute is not ambiguous. *See* ***State v. Peters***, 2003 WI 88, ¶14, ___ Wis. 2d ___, 665 N.W.2d 171. When the language of a statute is clear, we need only apply "the statutory text to determine the statute's meaning." ***Id.*** (citation omitted). If the language of the statute "unambiguously expresses the intent of the legislature, we apply that meaning without resorting to extrinsic sources of legislative intent." ***Id.*** (citation

[7] Before trial, Travelers paid $2,000,000 and Royal paid $5,000,000. Pursuant to the mid-trial settlement, HNA paid $12,375,000 and, after the verdict, HNA paid $7,625,000. It is undisputed that this appeal will not in any way affect the $27,000,000 already paid to the plaintiffs.

omitted). "Statutory language is given its common, ordinary and accepted meaning." ***Id.*** (citation omitted). "Rules of statutory construction are inapplicable if the language of the statute has a plain and reasonable meaning on its face." ***Id.*** (citation omitted). Moreover, "[w]hether there is sufficient evidence to submit the question of punitive damages to the jury is a question of law which this court independently reviews." ***Loveridge v. Chartier***, 161 Wis. 2d 150, 187-88, 468 N.W.2d 146 (1990).

¶33 Here, the plain language of the statute sets forth two standards under which punitive damages may be appropriate. The first category indicates punitive damages may be appropriate if the conduct is *malicious*. The second category allows a punitive damage award when there is *an intentional disregard of the rights of the plaintiff.*

¶34 All parties concede that the record here is devoid of malicious conduct. Plaintiffs' lead counsel, Robert L. Habush, stated:

> We concede that there was no malicious act here, we concede it is not necessary for them to intend to have harmed these people.... [T]he hazard, the wind, and doing a lift in the face of this wind without any engineering calculations whatsoever, once that's known, they affirmatively decided to go ahead with this lift, and that is the intentional disregard.

The dispute then specifically entails the interpretation of the phrase "intentional disregard of the rights of the plaintiff." The plaintiffs argue that this standard simply requires evidence demonstrating that Mitsubishi acted volitionally to do something that resulted in the rights of the decedents to a safe work environment being disregarded, and that this part of the statute does not require that any of Mitsubishi's employees either intended that harm result or have either subjective

or objective knowledge that such harm was practically certain to occur. They contend that Grotlisch's decision to proceed with the lift on such a windy day under hazardous conditions demonstrated his disregard for the rights of the plaintiffs, thus satisfying the statutory standard and justifying the jury's punitive damage award.[8] The plaintiffs thus argue that punitive damages are appropriate when the defendant intentionally disregards the injured party's right to safety, but that intent to injure is not required. In his closing argument, plaintiffs' counsel stated:

> I believe the evidence has shown to you that there was intentional disregard of the rights of the three deceased ironworkers. The intentional part is easy. They intended to do the lift. They made the decision to do the lift. It was an intentional decision. They didn't stumble into it. It was an intentional decision in the face of hazards and obvious wind conditions, and in doing so, they ignored, they disregarded the rights of those three men.
>
> And what were those rights? The right to a safe workplace. The right to life. And in so doing, they intentionally disregarded those rights of the three deceased ironworkers.
>
> We don't have to prove that Victor Grotlisch intended to kill these guys. This is not a criminal case. We don't have to prove that they knew for sure that crane was going to go down.
>
> Let me give you an example. A person decides to run the stop sign, I'm going to run that stop sign, and in running that stop sign crashes into a crossing vehicle, killing the occupants. Would we hear that driver be able to say, I didn't intend to kill those occupants, I didn't know Sally, I didn't know Bill, I didn't intend to kill them?

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[8] Specifically, the plaintiffs claimed that no one did the necessary wind calculations for the roof piece involved, that Grotlisch knew it was unsafe to proceed with the lift without the calculations, and that Grotlisch knew the crane's performance could be impeded if exposed to winds in excess of 20 m.p.h.

> But that person intended to run that stop sign and, in so doing, must bear the consequences of an intentional disregard of the rights of any other vehicle or pedestrian that might have come into harm's way by that intentional act.
>
> ....
>
> There can't be any question, members of the jury, that this was an intentional decision on the part of Grotlisch, concurred in by Noel, that the hazards were obvious and ignored, that the rights of these three men, the right to life, the right to limb, the right to a safe workplace, were ignored and disregarded, as the law calls.

¶35 On the other hand, the defendants argue that punitive damages would be appropriate only if Mitsubishi either: (1) intended to cause the accident or injury; or (2) was aware that its conduct was practically certain to cause the accident or injury. Based on this standard, Mitsubishi claims that this case is not appropriate for a punitive damages award because, as the plaintiffs concede, Mitsubishi did not intend to cause injury or believe with substantial certainty that injury would occur. In their brief in opposition to Federal's summary judgment motion, the plaintiffs concede the following:

> The fact that Grotlisch was in the zone of danger indicates that he could not have believed that there was a substantial certainty that injury would occur.
>
> ....
>
> [T]here is no evidence to permit a reasonable jury to conclude that the [Mitsubishi] employees intended to cause bodily injury to the decedents or that they knew or should have known that bodily injury was substantially certain to follow from their acts.

Mitsubishi argues that because the defendants did not act with malice, and because the plaintiffs concede that the defendants did not intend to injure the plaintiffs, there was no punitive damages issue for the jury.[9]

¶36 Mitsubishi contends that its interpretation of the new statutory standard is supported by the legislature's intent to narrow the types of cases in which a punitive damage award would be appropriate. Mitsubishi points to the guidance offered by the jury instruction committee in interpreting the new statute and suggests that the proper interpretation of the statutory standard requires either intent to cause the accident or injury *or* knowledge that its conduct was practically certain to cause the accident or injury.

¶37 When faced with this disputed issue during the trial, the trial court agreed with the statutory interpretation proffered by the plaintiffs. Adopting the

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[9] The conflict in interpretation of the statute was clear even before the trial began. The plaintiffs stated:

> If the legislature had intended to wipe out punitive damages, they [sic] could have. If the legislature had intended to limit the malicious acts, they [sic] could have. All they changed was the word reckless disregard into intentional disregard. And concede, Your Honor, that that did make it tougher, and that with respect to some other cases, acts of omission would not meet that burden, 'cause that would be reckless, it's a negligence connotation, but when they intended to go forward in the face of known hazards, that intentional disregard, and that's all the law requires us to meet.

Defendants responded:

> [W]e have an entirely different view of the law. We think [plaintiffs' counsel is] using old recklessness standard, but we'll deal with that at the time of the trial.

plaintiffs' interpretation, the trial court determined that there was sufficient evidence to submit the issue of punitive damages to the jury. The court ruled:

> There is absolutely no evidence in this record to show that it was the intent of anyone, let alone Mitsubishi, there was never any evidence to indicate that Mitsubishi or anyone intended to cause an injury. There was a finding by the jury on the punitive damage questions that there was an intentional disregard of the rights of the plaintiffs and others.
>
> ....
>
> People may do things in a negligent way, they may intend to do a certain act without intending to actually injure or hurt someone, and that's the standard of negligence, care without intending to do harm, does something or fails to do something that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.
>
> That is the negligence the jury found in this case, and the jury also found that there was just an intentional disregard with regard to the rights of the plaintiff and others to have a safe environment to work in. It's just that simple.

¶38 We conclude that the trial court's interpretation of the statute was erroneous. We reach the opposite conclusion based on the reasoning that follows. Before the enactment of WIS. STAT. § 895.85(3), punitive damages were governed by the common law. There was a variety of terms used to describe circumstances under which punitive damages were appropriate: acting maliciously or in wanton, willful, or reckless disregard of the plaintiff's rights. *See* WIS JI—CIVIL 1707; ***Wangen v. Ford Motor Co.***, 97 Wis. 2d 260, 267, 294 N.W.2d 437 (1980) (Punitive damages may be awarded if the party seeking those damages demonstrates by the middle burden of proof that there was "a reckless indifference to or disregard of the rights of others and conscious action in deliberate disregard of them."). The legislature, intending to limit circumstances where juries could

award punitive damages, enacted § 895.85(3) which, as we have seen, now requires that there be an intentional disregard of the rights of the plaintiff, not merely "reckless indifference" to those rights.

¶39 Clearly, by using the word *intentional*, the legislature intended to heighten the standard for the recovery of punitive damages. Although the legislature did not supply a definition of the new phrase "intentional disregard of the rights of the plaintiff," Note 2 accompanying WIS JI—CIVIL 1707.1, offers some guidance:

> The [second] basis for punitive damages is if the "defendant acted ... in an intentional disregard of the rights of the plaintiff." This part of the standard was clearly intended to be more narrow than the case law standard which allowed punitive damages for conduct which "shows a reckless indifference to or disregard of the rights of others on the part of the wrongdoer." ... The legislative history reveals only that "intentional disregard" was ultimately favored over earlier drafts and bills which provided recovery for "wilful disregard" of the rights of the plaintiff. See LRB-1744 drafted 12/3/94, 1993 S.B. 152, 1991 S.B. 138, 1989 S.B. 153 (which provided "wilful or conscious" disregard).
>
> There is, of course, no case law which defines "intentional disregard of the plaintiff's rights." The Committee finds the statutory formulation of criminal intent in WIS. STAT. § 939.23, to be helpful. "'Intentionally' means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." The Committee's reference to the Criminal Code's formulation of the definition of "intentionally" is well supported by the court of appeals decision in ***Shepard v. Outagamie County***, 189 Wis. 2d 279, 286-87, 525 N.W.2d 764 (1994). In ***Shepard***, the court of appeals found that: "The legal definition of 'intentional' is essentially the same, whether found in tort law or criminal law, and we see no reason to use a separate definition when interpreting the same word...." ***Id.*** ... Accordingly, the Committee largely adapted the definition of "intentionally" as set forth in section 939.23.

WISCONSIN STAT. § 939.23(3) defines intent under criminal law: "'Intentionally' means that the actor either has a purpose to do the thing or cause the result specified, *or* is aware that his or her conduct is practically certain to cause that result." (Emphasis supplied.) This conclusion is further supported by WIS JI—CIVIL 2001, which provides a definition of "intent":

> Intent requires both an intent to do an act and an intent to cause injury by that act. An intent to cause injury exists where the actor actually means to cause injury by his or her conduct or where injury is almost certain to occur from the actor's conduct.
>
> ....
>
> If ... the conduct of (defendant) merely created a risk of some harm to someone, which may or may not have resulted, then (defendant)'s conduct was negligent as opposed to intentional.

¶40 Based on this analysis offered by the jury instruction and the Jury Instruction Committee, which our supreme court acknowledges can offer "insightful and persuasive" assistance in interpreting legislative enactments, *see* ***Nommensen v. American Cont'l Ins. Co.***, 2001 WI 112, ¶47, 246 Wis. 2d 132, 629 N.W.2d 301, we are convinced that there is only one reasonable interpretation of WIS. STAT. § 895.85(3). The more demanding statute requires both a general intent to perform an act *and a specific intent to cause injury by that act or knowledge that the act is practically certain to result in injury*, and not, as the plaintiffs would have it, a volitional act that results in unintended and unforeseen injuries.

¶41 To conclude otherwise would lead to unreasonable results and *expand*, rather than narrow, the scope of cases where punitive damages may be awarded. To affirm the trial court's interpretation of the statute would permit the

request for punitive damages in almost any negligence case, contrary to the intent of the legislative enactment. For example, in a vehicle collision caused because the tortfeasor was talking on a cellular telephone, punitive damages could be sought and awarded. Under the trial court's standard, the victim could argue that the tortfeasor intentionally disregarded his or her rights by deliberately choosing to talk on the phone while driving. We hold that the intent of the legislature with respect to the new punitive damages statute was to "make it more difficult for a plaintiff to recover punitive damages." *See* ***Unified Catholic Sch. v. Universal Credit Card Servs. Corp.***, 34 F. Supp. 2d 714, 718 (E.D. Wis. 1999); *see also* ***Boomsma v. Star Transp., Inc.***, 202 F. Supp. 2d 869, 880 (E.D. Wis. 2002). As aptly observed by Marc Galanter in his treatise on punitive damages:

> [T]he heartland of punitive damages awards is in *intentional* torts and in cases involving financial rather than physical harm. Such cases produce punitive damages awards in larger numbers and at a higher rate than do cases involving other types of harm. In particular, the rates in personal injury cases are far lower ....

Marc Galanter, *Shadow Play: The Fabled Menace of Punitive Damages*, 1998 WIS. L. REV. 1, 2 (1998) (emphasis added). In recent years, punitive damage awards have become commonplace in unintentional tort cases; however, with the passage of WIS. STAT. § 895.85(3), our legislature, as a matter of public policy, has decided to return punitive awards to its place of origin.[10]

[10] As one treatise notes, by enacting the new statute, our legislature places Wisconsin "among the states having the most stringent punitive damage conduct requirements." RICHARD L. BLATT, ET AL., PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE § 8.59, at 546 (2003).

¶42 During oral argument in this case, plaintiffs' counsel admitted that his interpretation of the statute would expand rather than narrow the number of cases under which punitive damages could be awarded. A member of our panel asked plaintiffs' counsel what he saw as the result under his interpretation of WIS. STAT. § 895.85(3) and ***Loveridge***, 161 Wis. 2d 150, 468 N.W.2d 146 (1990), where the supreme court overturned an award of punitive damages to a woman whom the defendant infected with genital herpes. ***Loveridge*** noted that under the common law, punitive damages, as material here, could only be recovered if

> the defendant knows, or should have reason to know, not only that his conduct creates an unreasonable risk of harm, but also that there is a strong probability, although not a substantial certainty, that the harm will result but, nevertheless, he proceeds with his conduct in reckless or conscious disregard of the consequences.

Id. at 188 (citation omitted). The supreme court held that punitive damages could not be recovered because there was

> no credible evidence in the record to support the conclusion that Chartier subjectively intended to injure or harm Loveridge. [The ***Loveridge*** court] also held that a reasonable person in Chartier's position would not believe that his sexual contact with Loveridge was substantially certain to result in injury or harm to Loveridge.

Id. at 189. Moreover, there was no evidence that the "defendant knew or should have known that his or her conduct created an unreasonable and strong probability of harm." ***Id.*** at 191 (citation omitted). Thus, although the defendant in ***Loveridge*** volitionally did something that caused the plaintiff to get herpes from him, the supreme court held that punitive damages could not be recovered. In the instant appeal, plaintiffs' counsel indicated that in his view of § 895.85(3), punitive damages under the ***Loveridge*** scenario *could be recovered*:

> [PANEL MEMBER]: Would you say in ***Loveridge***, the young man disregarded the rights of the young woman?
>
> [PLAINTIFFS' COUNSEL]: Yes.
>
> [PANEL MEMBER]: So under ***Loveridge***, under the new statute, there would be punitive damage coverage?
>
> [PLAINTIFFS' COUNSEL]: Yes. You can have punitive -- You obviously --
>
> [PANEL MEMBER]: But there wasn't punitive damage coverage under the old law. So you're saying that there's more coverage under the new law than the old law?
>
> [PLAINTIFFS' COUNSEL]: No, I'm not. I'm saying under the new law, there is no requirement that you have to show that the actor intended bodily harm in a bodily injury case or property right harm in a property injury case because that makes the second clause a nullity and superfluous, and the cases have not said that.
>
> [PANEL MEMBER]: No. I think you just put your finger on the crux, because under your reading of 895.85, there would be punitive damages under ***Loveridge***, but under the common law, there is no punitive damages under ***Loveridge***. Therefore, an expansion of the scope of punitive damages rather than a restriction of the scope of punitive damages.

Although plaintiffs' counsel attempted to deny the effects of his interpretation, he was unsuccessful. His interpretation of the statute, both under the facts of ***Loveridge*** and under the facts here, would expand the scope of punitive damages awards in clear contravention to the intent of the legislature when it enacted § 895.85(3). If punitive damages would be awarded under his interpretation of the statute in a case where punitive damages were not appropriate under the common law, then his interpretation would not "heighten the standard for recovery of punitive damages." ***Boomsma***, 202 F. Supp. 2d at 880. Rather, it would lower the standard.

¶43 The dissent's analysis of the statute is unreasonable and would lead to absurd results. After conceding that the legislature intended to heighten the standard for punitive damages, it disregards the consequences of that action. Based on that disregard, the dissent goes on to explain why there is no need to bring an intent to harm element into the statute. If the dissent's interpretation is correct, instead of narrowing the scope of punitive damages with the enactment of WIS. STAT. § 895.85(3), the legislature has not only opened the door wider, but knocked down the entire wall. If we apply the dissent's interpretation, practically any ordinary negligence case will permit an award of punitive damages. Under the dissent's interpretation, anyone who is negligent could be considered to be intentionally disregarding the rights of someone. Examples are numerous: someone who is drinking a cup of coffee while driving, or eating while driving, or adjusting the radio while driving, or even driving over the speed limit. In each of these examples, an injured plaintiff could argue that the tortfeasor driver intentionally disregarded the rights of the other drivers on the road, and thus justify a punitive damage award. Such an interpretation is simply illogical. The only reasonable interpretation of § 895.85(3) is to apply the definition of "intentional" used within the statute as the legislature instructed. Thus, the statute requires both an intent to do an act *and* an intent that harm will result or knowledge that harm is practically certain to result. We are not adding words to the language of the statute; we are simply applying it as the legislature intended.[11]

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[11] We also comment briefly on the dissent's criticism regarding ascertaining the meaning of legislative intent in the face of an unambiguous statute. The law clearly states that in construing a statute, our role is to determine the intent of the legislature. This occurs regardless of whether the statute is ambiguous or not. In reviewing a statute, our goal is to "take a comprehensive view toward discerning legislative intent." ***State v. Peters***, 2003 WI 88, ¶34, ___
(continued)

¶44 Based on the foregoing, we hold that the trial court's interpretation of the statute was erroneous. The correct interpretation demands that the phrase "intentional disregard of the rights of the plaintiff" be defined to mean either that the actor intended to cause the accident or injury *or* the actor was practically certain that his conduct could result in accident or injury.

¶45 Having reached this conclusion, we must also conclude that the trial court erred in submitting the punitive damages issue to the jury. The trial court specifically ruled, and the plaintiffs agreed, that there was no evidence that the defendants intended to harm the decedents or that the defendant knew their conduct was practically certain to result in injury. The plaintiffs, through counsel, conceded that the evidence does not rise to the level of intent to harm. Specifically, in his brief to this court, plaintiffs' counsel admits: "[T]here is no evidence to permit a conclusion that the [Mitsubishi] employees intended to cause bodily injury to the decedents or that they knew or should have known that bodily injury to the decedents was substantially certain to follow."

¶46 Accordingly, because it is undisputed that the record does not contain any evidence to support a specific intent to harm or knowledge that Mitsubishi's conduct was practically certain to result in harm, we must reverse the judgment pertaining to punitive damages. The issue should not have been

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Wis. 2d ___, 664 N.W.2d 171 (Abrahamson, C.J., concurring). The Chief Justice of our supreme court has repeatedly called our attention to this rule in recent opinions from that court. *See, e.g.*, *id.*, ***State v. Byers***, 2003 WI 86, ¶50, ___ Wis. 2d ___, 665 N.W.2d 729 (Abrahamson, C.J., concurring); *see also* ***Bruno v. Milwaukee County***, 2003 WI 28, ¶18, 260 Wis. 2d 633, 660 N.W.2d 656 (disagreement as to the plain meaning of a statute does not make it ambiguous).

submitted to the jury because there was insufficient evidence to send a punitive damages question to the fact-finder. Accordingly, the punitive damages award of $94,000,000 is hereby vacated.

¶47 Based on our disposition, it is not necessary for us to decide any of the other issues raised. The plaintiffs retain the $27,000,000, which has already been paid. The case does not need to be retried because the evidentiary and insurance issues are now moot. Therefore, we decline to address the merits of any of the other issues raised in this appeal.

By the Court.—Judgments and orders affirmed in part; reversed in part.

Recommended for publication in the official reports.

¶48 FINE, J. (*concurring*). I fully join in Judge Wedemeyer's opinion. I wish to add a few words, however, about what I believe has been a general transformation of punitive damages from a useful social tool into something filled with the seeds of dangerous, albeit unintended, consequences. None of my comments has influenced my decision in this matter; as the Majority opinion explains, the recovery of punitive damages in these cases is barred by WIS. STAT. § 895.85, and as judges on an intermediate appellate court we are bound by the law given to us by the Wisconsin Supreme Court, the legislature, and, on matters of federal-constitutional interpretation, the United States Supreme Court.

¶49 Punitive damages, as the term denotes, are designed to punish and deter egregious anti-social conduct. Indeed, under the Wisconsin Supreme Court's most recent analysis, punishment and deterrence are the *only* purposes for which punitive damages may be awarded in this state. ***Trinity Evangelical Lutheran Church v. Tower Ins. Co.***, 2003 WI 46, ¶50, 261 Wis. 2d 333, 355, 661 N.W.2d 789, 799 ("[T]he purpose of punitive damages is to punish the wrongdoer, and to deter the wrongdoer and others from similar conduct, rather than to compensate the plaintiff for any loss.").

¶50 Until the Wisconsin legislature enacted WIS. STAT. § 895.85, the right to recover punitive damages was created and shaped wholly by judges in this state, and not by the legislature. Punitive damages were designed to be a "quasi-criminal" way to punish conduct that would otherwise go unpunished. ***Kink v. Combs***, 28 Wis. 2d 65, 80, 135 N.W.2d 789, 798 (1965).

> Suffice it to say that whatever shortcomings the award of punitive damages may have, nevertheless, it must be remembered that it has the effect of bringing to punishment types of conduct that though oppressive and hurtful to the individual almost invariably go unpunished by the public prosecutor.

Ibid. Thus, punitive damages are similar to and supplement the criminal law. ***State Farm Mut. Auto. Ins. Co. v. Campbell***, 538 U.S. ___, 123 S. Ct. 1513, 1520 (2003) (punitive-damage "awards serve the same purposes as criminal penalties"). To be effective, however, they must, as one case colorfully noted, be sufficiently painful to "sting." ***Gianoli v. Pfleiderer***, 209 Wis. 2d 509, 531, 563 N.W.2d 562, 570 (Ct. App. 1997). In the early days, if "A" hurt "B" by conduct that was sufficiently egregious to warrant an award of punitive damages, assessment of punitive damages against "A" would not only punish "A" but would also deter "A" and others like "A" from doing it again.

¶51 Circumstances have changed, however, from an "A" versus "B" situation to one where the harm sought to be punished by punitive damages may have been caused by an employee or employees of large corporations. At first blush, it may seem that "large corporations" are fair game. First, many persons have a "prejudice against large corporations," especially if they are from out of town. ***TXO Prod. Corp. v. Alliance Res. Corp.***, 509 U.S. 443, 464 (1993) (Stevens, J., for a plurality of the Court and announcing its judgment). Second, large corporations are seen as golden-eggs-laden geese from which there is an endless supply of "free money." This is a dangerous myth unsupported by economic realities; just as there is no "free lunch," there is no "free money"—the money has to come from someone, and, in the case of large corporations, it comes from employees, shareholders, and customers.

¶52 Unlike small, closely held corporations, sole proprietorships, or small partnerships, large corporations are generally far-flung businesses employing thousands or tens of thousands employees. These businesses, so vital to our economy, are owned not by the managers who control what the corporations do, but by stockholders who, with rare exceptions, have *no* control over either those managers or corporate policy. And these corporations are not living creatures that can be punished like a person can be punished; they cannot be sent to prison. Subjecting corporations to draconian criminal or criminal-like penalties, hurts *only* their employees, shareholders, and customers. Thus, by one estimate, the criminal prosecution of the large public-accounting firm Arthur Andersen cost 80,000 employees their jobs, all but a few of whom were not guilty of anything related to the firm's prosecution.[1] Imposition of punitive damages can have similar life-derailing consequences for those innocent of *any* wrongdoing, because, to repeat, when corporations are forced to pay punitive damages most of the pain falls on employees, shareholders, and customers. Indeed, often the culpable employee escapes any punishment.

¶53 I recognize that the Wisconsin Supreme Court has said that all of this is OK by ruling, without supporting economic data or analysis, that it is unlikely for a corporation to be able to pass to consumers punitive-damages-related increased costs, and, also, that it is not unfair to force shareholders to pay penalties flowing from punitive-damages awards. ***Wangen v. Ford Motor Co.***, 97 Wis. 2d 260, 287–288, 291, 294 N.W.2d 437, 452, 453 (1980) ("But the loss of

[1] Interview with Samuel A. DiPiazza, Global Chief Executive Officer, PricewaterhouseCoopers, *at* http://www.pwcglobal.com/ru/eng/ins-sol/issues/03-07-08_sd_ve.html (last visited Aug. 26, 2003).

investment and the decline in value of investments are risks which investors knowingly undertake, and investors should not enjoy ill-gotten gains."). I respectfully disagree. Although ***Wangen***'s assessment of the equities is logical in the abstract, consequences of punitive-damage awards can be malignant in practice. Oliver Wendell Holmes, Jr., once presciently observed: "The life of the law has not been logic: it has been experience." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881). Experience tells us that something is terribly wrong when the sting of "quasi-criminal" punitive damages falls on innocent employees, stockholders, customers, and, in some cases, taxpayers. ***Wangen***, 97 Wis. 2d at 327, 294 N.W.2d at 470–471 (Coffey, J., dissenting).[2]

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[2]

> There are two categories of persons who will automatically bear the costs of the majority decision, depending on the strength and market position of the manufacturer: (1) the employees and stockholders; or (2) the consumer-taxpayer. If the manufacturer is not in a strong financial position so as to be able to bear these added costs, he will be faced with the threat of being forced out of business or into bankruptcy, thus resulting in a loss of jobs (unemployment) and the curtailment of competition, to the detriment of the consumer. If bankruptcy or the loss of business and jobs is to be avoided, it is the consumer who will ultimately bear the burden of punitive damage awards through the payment of higher prices for the goods in the market place. As the cost of such damages is passed on through higher product prices, the consumer will foot the bill for a penalty imposed for its very own protection. If the consumer does not pay higher prices, as a taxpayer, he will pay for the hidden costs of government with higher taxes for increased welfare, retraining and unemployment programs occasioned by business failures. Moreover, imposition of multiple punitive damage awards could have an adverse impact not only on the manufacturer, Ford, but also those commercial businesses that supply materials for use in construction of cars, such as the producers of automobile locks, tires,

(continued)

¶54 But punitive-damage awards are loved by personal-injury lawyers, and judges are thus reluctant to staunch their flow. Indeed, ***Wangen*** conceded that punitive-damage awards (ostensibly designed to punish only) are also a back-door way to pay lawyers: "[P]ayment of punitive damages to the injured party is justifiable as a practical matter, because such damages do serve to compensate the injured party for uncompensated expenses, *e.g.*, attorneys' fees and litigation expenses, and that the [punitive-damages] windfall motivates reluctant plaintiffs to go forward with their claims." ***Id.***, 97 Wis. 2d at 292, 294 N.W.2d at 454.[3]

¶55 There is also a roll-of-the-dice aspect to punitive damages; very few persons who are harmed by conduct warranting imposition of punitive damages *ever* get to recover from those who caused the harm even compensatory damages, no less punitive damages. The plaintiffs in this case suffered grievous losses, but, sadly, their pain is not unique to them. Last year in Wisconsin, for example, 164 persons were homicide victims.[4] Nation-wide, the toll was more than 16,100, or,

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> catalytic converters, etc. Are we going to further intimidate Wisconsin manufacturers with the threat of high punitive damage awards? The recovery of punitive damages against American businesses resulting in higher product costs obviously magnifies their disadvantage in competition with foreign manufacturers.

Wangen v. Ford Motor Co., 97 Wis. 2d 260, 327, 294 N.W.2d 437, 470–471 (1980) (Coffey, J., dissenting).

[3] Similarly, "compensatory" but noneconomic damages work "essentially as a pool from which the attorney's fees of personal-injury plaintiffs" are paid. ***Guzman v. St. Francis Hosp., Inc.***, 2001 WI App 21, ¶5, 240 Wis. 2d 559, 571, 623 N.W.2d 776, 782 (Ct. App. 2000) (upholding statutory cap on noneconomic damages in medical-malpractice cases).

[4] Tom Rybarczyk & Kelly Wells, *Homicides Reported in State at 14-year Low*, MILWAUKEE J.S., July 1, 2003, *available at* http://www.jsonline.com/news/state/june03/151979.asp (June 30, 2003).

on the average, forty-four *per day*.[5] My guess is that few if any of the families of these victims will receive *anything* from those who killed their loved ones. And then, of course, there are the countless other victims of crime who suffer horrendous injuries short of death. They, too, rarely, if *ever*, receive *any* payment from those who raped or maimed them. These victims, to borrow Horace's poignant words, suffer "unwept, unknown, because they lack a sacred poet." HORACE, 4 Odes ix 1. 25. Our current system of punitive damages is of no help to them.

¶56 Courts have recognized the out-of-balance unfairness of huge punitive-damage awards, and have gradually attempted to trim some of the rougher edges. *See* ***Campbell***, 123 S. Ct. at 1527 (Ginsburg, J., dissenting) (collecting cases). This is not enough; tinkering with the engine is useless when that engine is, as I believe it is, in need of an overhaul. As noted, our task as judges on an intermediate appellate court is to apply the law as it is given to us by the legislature and the Wisconsin Supreme Court. Both the Wisconsin Supreme Court, which can only act in the context of cases brought to it by lawyers, and the Wisconsin legislature, which has broad plenary power to make law, should set things right. As Justice Antonin Scalia has observed: "State legislatures and courts have the power to restrict or abolish the common-law practice of punitive damages, and in recent years have increasingly done so." ***Pacific Mut. Life Ins. Co. v. Haslip***, 499 U.S. 1, 39 (1991) (Scalia, J., concurring); *see also* ***BMW of N.***

[5] Callie Marie Rennison, Ph.D. & Michael R. Rand, U.S. Department of Justice Office of Justice Programs Bureau of Justice Statistics Criminal Victimization, 2002, Aug. 2003, NCJ 199994, *available at* http://www.ojp.usdoj.gov/bjs/pub/ascii/cv02.txt (August 13, 2003).

Am., Inc. v. Gore, 517 U.S. 559, 614–619 (1996) (Ginsburg, J., dissenting) (table of "State Legislative Activity Regarding Punitive Damages").

¶57 We should have a system that punishes the guilty, not the innocent, and, further, punitive damages should not be lottery-like windfalls for a tiny percentage of those who suffer pain inflicted by others.[6]

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[6] One approach to solving the windfall part of the problem was tried by ***Dardinger v. Anthem Blue Cross & Blue Shield***, 781 N.E.2d 121 (Ohio 2002), when it directed that a significant portion of the punitive damages awarded be distributed to a cancer hospital and research institute at Ohio State University, even though no statute authorized such a distribution. ***Id.***, 781 N.E.2d at 146. ***Dardinger*** noted, however, that its approach was similar to that authorized by statute in some other states: "Numerous states have formalized through legislation a mechanical means to divide a punitive damages award between the plaintiff and the state. In some states, the state's portion goes to a special fund, in others, to the general fund. Annotation (1993), 16 A.L.R. 5th 129." ***Id.***, 781 N.E.2d at 145. I offer no opinion as to whether such an approach or one similar to it should be adopted in Wisconsin; that is an issue for either the legislature following extensive inquiry, or the Wisconsin Supreme Court after briefing and argument.

Nos. **01-0724(D)**
01-1031(D)
01-2486(D)

¶58 SCHUDSON, J. (*dissenting*). These appeals present numerous issues and, on the basis of one or more of them, it is possible that the punitive damages award will fall.[1] It also is possible that the Wisconsin Supreme Court, weaving policy considerations into the legal analysis, will interpret WIS. STAT. § 895.85(3) in a manner that precludes or reduces the punitive damages awarded in this case. If it does so, however, it should not embrace the majority's analysis lest it upend fundamental, well-settled principles underlying the essential difference between compensatory and punitive damages.

¶59 I write separately, therefore, to explain that WIS. STAT. § 895.85(3): (1) if deemed *unambiguous*, cannot mean what the majority claims; and (2) if deemed *ambiguous*, could mean what the majority claims but, consistent with the logic underlying the difference between compensatory and punitive damages, probably does not. Further, in light of Judge Fine's concurring opinion, I shall comment briefly on the importance of prosecuting corporate officers who try to hide their crimes behind corporate veils.

I. WISCONSIN STAT. § 895.85(3)

[1] I mention this, at the outset, not to signal my opinion on any issue we have not yet addressed, but rather, to acknowledge that many substantial issues remain. I would hope, therefore, that if the supreme court embraces my understanding of WIS. STAT. § 895.85(3), it will also address the constitutional challenge to the punitive damages award.

¶60 Quite properly, the majority focuses on the words of WIS. STAT. § 895.85(3): "The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff *or in an intentional disregard of the rights of the plaintiff.*" (Emphasis added.) Quite curiously, however, the majority, despite concluding "that the statute is not ambiguous," majority at ¶32, embarks on the kind of long, interpretive cruise generally reserved for judicial travelers viewing *ambiguous* statutes.

¶61 So, although portions of its analysis are helpful, the majority's statutory discussion, as a whole, is internally inconsistent, confusing and, ultimately, incorrect. Accordingly, if only to advance the discussion of what, no doubt, will call for supreme court review, let me try to re-align the analysis.

A. WISCONSIN STAT. § 895.85(3) — Unambiguous?

¶62 The majority says WIS. STAT. § 895.85(3) is unambiguous. But, in the midst of so much uncertainty in these appeals, perhaps the only certainty is this: if WIS. STAT. § 895.85(3) is *unambiguous*, it supports the plaintiffs. The analysis is simple and clear.

¶63 The statutory words at issue are: "or in an intentional disregard of the rights of the plaintiff." The statute says nothing about "harm" or "injury," intentional or otherwise. And WIS JI—CRIMINAL 1701.1 doesn't either; it elaborates: "A person acts in an intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the plaintiff's rights, or is aware that his or her acts are practically certain to result in the plaintiff's rights being disregarded" (footnote omitted). In this case, the plaintiffs accept the unadorned statutory language; the defendants, and now the majority, do not.

¶64 The plaintiffs' premise is, in part, that "rights" under WIS. STAT. § 895.85(3) includes the right to a safe workplace. That part of their premise is unremarkable; the defendants do not dispute it. The plaintiffs' premise, however, also includes the understanding that, under the statute, their right to a safe workplace may be intentionally disregarded, such that punitive damages may be warranted, *regardless of the defendants' intent to cause harm or injury.* They explain:

> Intent to cause physical injury is not necessary to intentionally disregard rights. This case is a perfect example, *where there was a pattern of exposing workers to great risk by knowingly operating in unsafe conditions.* Each time, workers' rights were disregarded, even if no injury occurred. When the decedents were killed, [Mitsubishi's] conduct exposed it to punitive damages under § 895.85(3). There is no basis to say that in a personal injury case, the statute requires an intent to cause physical injury when the statute contains no such distinction, and such intent has not been required in the cases previously decided under § 895.85(3), regardless of the liability theory.

(Emphasis added.)[2] The defendants disagree; they contend that for the right to a safe workplace to be disregarded, harm or injury must be intended.

¶65 Clearly, *if* the statute is *unambiguous*, the defendants are wrong. Their position would require the addition of essential words: "with intent to cause harm or injury." The majority simply does not explain where it has located those

[2] I add emphasis to "where there was a pattern of exposing workers to great risk by knowingly operating in unsafe conditions" because the majority, in its factual summary, fails to acknowledge that this *pattern* was critical to the plaintiffs' proof. *See* majority at ¶34. Instead, the majority concentrates on the factual allegations relating to Mitsubishi's conduct on the fateful day. *See id.* The particulars of that day, however, comprised only the last chapter of the tragedy. Standing alone, the events of that final day constitute an incomplete account of the evidence the jury apparently found so compelling.

missing words or how it can graft them to the statute. Thus, if the majority is correct in concluding that WIS. STAT. § 895.85(3) is *unambiguous*, the plaintiffs' statutory argument prevails.

B. WISCONSIN STAT. § 895.85(3) — Ambiguous?

¶66 If, as the defendants contend, "with intent to cause harm or injury" must be grafted to the statute, it could only be because "rights" is ambiguous and courts, interpreting far beyond the face of the statute, say it must be so. So let us consider that and, in doing so, let me try to locate the best theory I can to support the majority's view. And then let us see if the theory holds.

¶67 The majority relies on jury instructions and a note to one of them. Here, the majority finds some support (but not quite where the majority leans).

¶68 First, the majority points out that Note 2 to WIS JI—CIVIL 1707.1 declares that the statute "was clearly intended to be more narrow than the case law standard." But that does not advance the analysis of the parties' dispute. After all, no one is contending that the statute fails to do that. All agree that the statute has tightened the standard for establishing "intentional disregard." *The issue, however, is whether, somehow, the intentional disregarding of "rights" necessarily includes the intent to cause harm or injury.*

¶69 Second, and far more helpfully, the majority notes that WIS JI—CIVIL 2001 defines "intent" in a way that carves away negligence by explaining that if a defendant's conduct "merely created a risk of some harm to someone, which may or may not have resulted, then (defendant)'s conduct was negligent as opposed to intentional." That, then, may set the foundation for the syllogism essential to the defendants' position: (1) WIS. STAT. § 895.85(3) requires an

"intentional" act; (2) WIS JI—CIVIL 2001 provides that creating "risk," without intending "harm," is negligent, not intentional; and, therefore (3) the intentional disregarding of rights, under § 895.85(3), necessarily includes intending "harm."

¶70 So what's the problem? Well, in the first place, this is the only authority the majority can locate for its grafting. This single, tangentially-related jury instruction is, I think, a terribly thin thread from which to hang the full, framed portrait of punitive damages. And, in the second place, the majority's theory—interpretively adding "with intent to cause harm or injury" to the statute—makes little sense. To add these words is to obliterate the most fundamental difference between compensatory and punitive damages. Let's examine that.

¶71 The majority maintains that the evolution from the common law to the 1995 statute supports the defendants' position. But that begs the obvious question: If the legislature, in addition to tightening the standard, also wanted to require intended "harm" or "injury," why didn't it say so? Why didn't the legislature add the simple words, "with intent to cause harm or injury"? As the parties explained to this court, the legislative history does not answer. It seems, however, that law and logic do.

¶72 Law, addressing "harm" or "injury," enters the realm of *compensatory* damages, and does so regardless of intent. But law, addressing the "intentional disregarding of rights," *see* WIS. STAT. § 895.85(3), points directly at a defendant's *conduct*. And where Wisconsin law provides the statutory potential for punitive damages to deter dangerous conduct, it does so with *some* regard for intent and the extent of the resulting harm or injury, *but it also preserves the*

potential for punitive damages even in the absence of all but nominal harm or injury.[3]

¶73 Any possible doubt about that was recently erased in ***Trinity Evangelical Lutheran Church v. Tower Insurance Co.***, 2003 WI 46, 261 Wis. 2d 333, 661 N.W.2d 789. In ***Trinity***, the supreme court reiterated:

> The factors necessary for an award of punitive damages[] require a showing of: (1) evil intent deserving of punishment or of something in the nature of special ill-will; or (2) wanton disregard of duty; or (3) gross or outrageous conduct.
>
> Punitive damages may properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition.

Id., ¶¶45-46 (citations omitted). *The supreme court did not add any "with-intent-to-cause-harm-or-injury" element.* The state's "legitimate interests in punishing unlawful conduct and deterring its repetition," ***id.***, ¶46, remain solidly in place *regardless* of whether a defendant intends harm or injury to result from the disregarding of rights.

¶74 Were this not enough, the supreme court, in ***Trinity***, quoted, with approval, a punitive damages jury instruction that explicitly provides, "Punitive damages may be awarded, if you find that the defendant acted in an intentional disregard of the rights of the plaintiff." ***Id.***, ¶45 n.5. It made no mention of intending harm or injury. The instruction then goes on to explain that "[p]unitive

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[3] *See* ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 393, 541 N.W.2d 753 (1995) ("Wisconsin does not allow punitive damages to be awarded in the absence of an award of actual damages."); ***Jacque v. Steenberg Homes, Inc.***, 209 Wis. 2d 605, 626, 563 N.W.2d 154 (1997) (nominal damages will suffice if a legal right has been violated).

damages *are not awarded to compensate the plaintiff for any loss he or she has sustained.*" ***Id.*** (emphasis added). Then, most definitively, the instruction absolutely separates the jury's determination of *whether* punitive damages should be awarded (regardless of intended harm of injury), from *how much* should be awarded (taking harm or injury—actual *and potential*—into consideration):

> *If* you determine that punitive damages should be awarded, you may then award such sum as will accomplish the purpose of punishing or deterring wrongful conduct.
>
> Factors you should consider in answering this question include:
>
> 1. The grievousness of the defendant's acts,
>
> 2. *The potential damage which might have been done by such acts as well as the actual damage,* and
>
> 3. The defendant's ability to pay....

Id. (emphases added).

¶75 The message could not be more clear: (1) Punitive damages are intended to punish unlawful conduct and deter its repetition. ***Id.***, ¶46. (2) Punitive damages serve those purposes regardless of intended harm or injury. ***Id.***, ¶¶45-46. (3) Punitive damages may be awarded in recognition of "the *potential damage* which *might* have been done by such acts." ***Id.***, ¶45 n.5 (emphasis added). (4) The amount of punitive damages may increase if "actual damage" has resulted. ***Id.***[4]

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[4] Other recent Wisconsin decisions support the same proposition. *See, e.g.,* ***Dorr v. Sacred Heart Hosp.***, 228 Wis. 2d 425, 454-55, 597 N.W.2d 462 (Ct. App. 1999) (*without any reference to harm or injury,* concludes that, under WIS. STAT. § 895.85(3), for purposes of summary judgment analysis, intentional disregard of plaintiffs' right to be free from hospital's improper lien can establish the basis for punitive damages claim); ***Allied Processors, Inc. v. Western Nat'l Mut. Ins. Co.***, 2001 WI App 129, ¶38, 246 Wis. 2d 579, 629 N.W.2d 329 (*without*
(continued)

¶76 And indeed, how could it be otherwise? The separation between compensatory and punitive damages, and the potential for punitive damages even in the absence of intended harm or injury, are at the foundation of our common law. In 1763, in one of the seminal cases allowing punitive damages, Lord Chief Justice Sir Charles Pratt declared that juries have the "power to give *damages for more than the injury received* ... as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury *to the action itself*." ***Wilkes v. Wood***, 98 Eng. Rep. 489, 498-99 (C.P. 1763) (emphases added).

¶77 Early American courts soon echoed the ***Wilkes*** principles. The New Jersey Supreme Court, for example, in 1791, approved a jury instruction that emphasized that, in determining punitive damages, the jury was "*not to estimate the damages by any particular proof of suffering or actual loss*; but to give damages for *example's* sake, to prevent such offenses in [the] future." ***Coryell v. Colbaugh***, 1 N.J.L. 77, 77 (1791) (first emphasis added). The ***Wilkes*** principles remain solid. Lest any doubt linger, the United States Supreme Court recently reiterated that while compensatory damages flow from a jury's factual determinations of actual loss, punitive damages are "an expression of [the jury's] moral condemnation." ***Cooper Indus., Inc. v. Leatherman Tool Group, Inc.***, 532 U.S. 424, 432 (2001).

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any reference to harm or injury, concludes that, under WIS. STAT. § 895.85(3), for purposes of measuring the sufficiency of evidence to support a jury's punitive damages verdict, intentional disregard of plaintiff's rights to disclosure of accurate insurance coverage information, proper evaluation of punitive damages claim, and proper claim settlement in order to prevent an excess verdict, can establish the basis for punitive damages award).

¶78 Thus, I conclude, the majority's attempt to graft a "with-intent-to-cause-harm-or-injury" element to WIS. STAT. § 895.85(3) violates the traditional distinction between compensatory and punitive damages—a distinction that removes "harm" or "injury" from a jury's initial determination of *whether* punitive damages are warranted and, under Wisconsin law, relegates the intent and extent of any harm or injury to the criteria affecting a jury's subsequent determination of *how much* should be awarded. *See* ***Trinity***, 261 Wis. 2d 333, ¶45. From ***Wilkes*** to ***Trinity***, from 1761 to 2003, the separation is certain; the grafting cannot hold.

C. The Bottom Line — WIS. STAT. § 895.85(3) — Unambiguous or Ambiguous

¶79 In short, whether simply following the course of what appears to be an unambiguous statute, or interpretively traveling through WIS. STAT. § 895.85(3), we arrive at the same destination. The legislature did indeed tighten the standard for punitive damages; at the same time, however, the legislature maintained the critical distinction between compensatory and punitive damages. Thus, consistent with that distinction and the traditional, sound public policy it embodies, the statute preserves the *potential* for punitive damages in a case where a defendant intentionally disregards rights by creating an unsafe workplace, regardless of whether the defendant intended any harm or injury to result.

II. Corporate Responsibility

¶80 Judge Fine's concurring opinion could call for extensive, additional discussion. Here, however, I offer only a few thoughts.

¶81 Most helpfully, Judge Fine's comments can help courts shed the polemics often included in arguments about corporate responsibility. It is safe to say, I think, that corporations are neither as demonic nor angelic as their critics

and apologists claim. And corporations, I think, do not fall neatly into any political category. After all, we all have seen corporate conduct liberals applaud as well as corporate misconduct conservatives condemn.

¶82 Corporations, I suspect, often are as good or bad, constructive or destructive, as the individuals directing their affairs. Some corporate leaders reach the right balance. Carefully attending to both community responsibility and shareholder return, they recognize that healthy communities are good for business, and good businesses help make healthy communities. Other corporate leaders, however, lose their way. They cut corners, carelessly cut jobs, give-in to greed, and break laws.

¶83 When that occurs, as Judge Fine points out, firing a shotgun at "the corporation" may wound the innocent. Thus, carefully aimed criminal prosecution of individual corporate officers becomes all the more important. Thorough investigation and tenacious prosecution can help protect our communities from criminals who would try to hide behind their corporate veils.[5]

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[5] For a discussion of the importance of criminal prosecution of individual, corporate officers, *see* Charles B. Schudson, et al., *Nailing An Omelet to the Wall: Prosecuting Nursing Home Homicide*, in CORPORATIONS AS CRIMINALS—PERSPECTIVES IN CRIMINAL JUSTICE 6, 131, 134-36 (Ellen Hochstedler, ed., 1984).

1 IN THE CIRCUIT COURT OF MILWAUKEE COUNTY

2 STATE OF WISCONSIN

3

4 PATRICIA WISCHER, individually,
and as Special Administrator of the
5 ESTATE OF JEFFREY A. WISCHER, deceased;
MARJORIE DeGRAVE, individually,
6 and as Special Administrator of the
ESTATE OF WILLIAM R. DeGRAVE, deceased;
7 and RAMONA DULDE-STARR, individually,
and as Special Administrator of the
8 ESTATE OF JEROME STARR, deceased,

9 Plaintiffs,

10 Case No. 99-CV-006553
-vs-

11

12 MITSUBISHI HEAVY INDUSTRIES
AMERICA, INC., TRAVELERS
13 PROPERTY CASUALTY INSURANCE
COMPANY, THE TRAVELERS INDEMNITY
14 COMPANY OF ILLINOIS, NEIL F. LAMPSON,
INC., HCH MILLER PARK JOINT VENTURE,
15 HUNZINGER CONSTRUCTION COMPANY,
CLARK CONSTRUCTION BUILDERS, INC.,
16 and HUBER, HUNT & NICHOLS, INC.,

17 Defendants.

18 October 18, 2000
19 9:12 a.m.

20 Volume III

21 TRANSCRIPT OF JURY TRIAL

22 Before:
HONORABLE DOMINIC S. AMATO
23 Circuit Court Judge Presiding

24 Court Reporters: Debra A. Wisniewski, CRR/RMR
Julie A. Poenitsch, CRR/RMR
25 Constance L. Bauer, CRR/RMR

1 know-how and the knowledge that they advertised they
2 had when they got the job at Miller Park.
3 You will hear evidence that on July 14th,
4 1999, Mitsubishi was many months behind schedule.
5 As a matter of fact, the entire roof was supposed to
6 have been up by the summer of 1999 when this
7 accident happened. They were not only behind
8 schedule, members of the jury, they were over
9 budget. You will hear testimony they were almost 90
10 to 100 percent over budget and behind schedule and
11 they were being threatened by HCH, the construction
12 manager, with a severe financial penalty if this
13 piece wasn't lifted over the period of July 14th or
14 15th.
15 I'm going to talk for a few minutes about
16 something you're going to hear a lot about in this
17 trial. It's called the load chart. Simply put, the
18 low chart is a document which comes with the crane.
19 It's prepared by the manufacturer of the crane, in
20 this instance, Lampson. The load chart describes
21 what this Big Blue could lift in terms of its
22 capacity, in terms of various lengths of its boom,
23 in terms of the angle that it would be to the
24 ground, but this load chart had on it, right on top,
25 20 miles an hour limit on this crane, 20 miles an

1 hour, and then you look down at the bottom of the
2 load chart and there in what is called Paragraph 10,
3 and you will see a lot of this, it says the 20 miles
4 an hour on top, the limit set by the manufacturer,
5 does not apply to the effect of wind on loads.
6 And the custom and practice in the
7 industry you will hear, members of the jury, is that
8 when you're lifting a load or a piece that has a
9 large area that the wind can catch, a large sale
10 area, you're supposed to do math, calculations which
11 are published in engineering texts and in standards
12 to calculate what is the wind surface on that load
13 so you can then determine whether that 20 miles an
14 hour is too high, should it be lower.
15 In addition, that load chart says to the
16 user be aware of wind gusts on site. It's written.
17 It's paragraph 11, which you will see.
18 You will hear testimony that Lampson in
19 their negotiation period with this lease told
20 Mitsubishi you've got to take into consideration the
21 effect of wind on loads. You've got to do the
22 engineering. This testimony will come to us by a
23 number of witnesses, including one employee of
24 Mitsubishi.
25 Mr. Grotlisch in his deposition admitted

1 that it would be dangerous, dangerous to lift this
2 big piece that was lifted on July 14th without doing
3 these calculations, that it can be dangerous, but,
4 members of the jury, Mitsubishi never did any load
5 calculations on the piece. Not only did they not do
6 it on July 14th, they had never done them, any of
7 them, on all the lifts that occurred prior to this
8 time. Some of the lifts had pieces almost as large
9 as the one lifted on the 14th.
10 Lampson will tell you that its customary
11 for the user, Mitsubishi, they expected Mitsubishi
12 to do these load calculations, to determine what
13 would be a safe wind speed to fly this piece at.
14 Mr. Grotlisch will admit to you, if he
15 testifies as he did in his deposition, that he knew
16 that Mitsubishi didn't do any calculations. He
17 assumed Lampson was going to do them, but he never
18 asked them, they never told him that they were doing
19 them, he never inquired, he never saw any. And so
20 on the 14th, members of the jury, that piece was
21 lifted without anybody having done the math to see
22 what that wind speed should have been in order to
23 lift that piece that big.
24 And understand what the evidence will be,
25 that the roof piece being lifted, and you'll see

1 pictures of it, has surfaces that the wind acts on,
2 and it was so big that it almost doubled the surface
3 area of -- the crane and the load together were
4 almost equal in wind surfaces affecting it.
5 All the experts that have been retained
6 in this case, Mitsubishi's expert, Lampson's expert,
7 our crane expert, have all agreed if the load chart
8 had been followed on July 14th we wouldn't be he
9 today. There would have been no accident. There
10 would have been no deaths. They all agree.
11 Mr. Howard Shapiro, who you will hear
12 from and the evidence will show is one of the
13 foremost crane experts certainly in the United
14 States, maybe in the world, will tell you that he
15 did the study, he did the math, and he determined
16 that it wouldn't have been safe to fly this roof
17 piece at a speed greater than 12 miles an hour.
18 Twelve miles an hour.
19 You will hear evidence that with the new
20 operation, the Van Seumeren operation out at Mi
21 Park, wind load calculations are now done on eve
22 lift, and they're lifting pieces almost half the
23 size of the piece lifted on July 14th or smaller,
24 and that they've set a top limit of no more than --
25 on an average, no more than 15 miles an hour fo

1 struggling with since that accident is what caused
2 this chain of events? What happened? What came
3 together to produce this accident?
4 This was the tenth major lift of a
5 major roof panel. They'd all been proceeding very
6 similar. The left field side had been completed.
7 Those panels had been put in position. They were
8 going to come back and do some further work in the
9 future. They had moved over to the right field
10 side.
11 I mention the videotape because you're
12 going to hear conflict in the testimony of the
13 various witnesses, and you'll have to judge, as His
14 Honor told you, the credibility. There will be
15 disputes about observations, estimations,
16 recollections, and you would expect that in the
17 normal affairs of your life.
18 When you talk to many people about
19 what they saw, they all give a slightly different
20 version. They all give a slightly different
21 recollection. The one thing that is not subject to
22 interpretation and recollection is the actual
23 videotape that you will see, and you'll see it more
24 than once.
25 Now, what I'd like to do is begin at

1 the beginning and work our way through the evidence
2 that I think you're going to hear, and there's quite
3 a bit of it. There's quite a lot of people that
4 you're going to hear from. You're going to see a
5 lot of documents. Much of it is very technical.
6 You're going to hear from experts in various
7 disciplines, people from the National Atmospheric
8 Research Institute, people that are structural
9 engineers, mechanical engineers, metallurgical
10 engineers, geologists, geotechnical experts. You're
11 going to hear some very complicated mathematical
12 calculations to figure out some of these concepts of
13 wind effect, ground conditions. Use your common
14 sense. You judge the credibility, what makes sense
15 to you, what doesn't make sense to you.
16 Now, at the beginning, why was
17 Mitsubishi Heavy Industries of America involved in
18 this project? Mitsubishi in Japan has a reputation
19 of building retractible roof stadiums in Japan. It
20 had built a number of them. One was similar to this
21 design concept.
22 The design concept of Miller Park is
23 very unusual. Nothing exists like it in this
24 country. It's a fan-shape roof that opens like a --
25 like a fan and closes. Mitsubishi had built a

1 similar roof in Japan, and they were invited by the
2 park district to bid on this project. They were the
3 only company to bid for this project to do the roof
4 construction.
5 They did not do the design work,
6 however. The design work was done by a company
7 called Ovarup, which was retained by the Park
8 District to do the design work and the engineering
9 work for the stadium roof.
10 Mitsubishi was awarded the contract to
11 fabricate that roof to the design of the architect.
12 Mitsubishi was also responsible for erecting the
13 roof into the stadium. Mitsubishi was also
14 responsible for designing, building, and installing
15 the drive system that moves these panels in a fan
16 shape.
17 You will hear, as Mr. Habush told you,
18 of a company called HCH, which is a joint venture of
19 three large construction companies. They acted as
20 the general contractor for this project. There were
21 many, many subcontractors. You will hear the names
22 of the ironworker subcontractors, Dumas, Danny's,
23 also referred to as DCCI. You will hear about
24 Price, another ironworker subcontractor, many, many
25 other subcontractors.

1 When Mitsubishi was given the contract
2 to do this work, they -- they hired the ironworkers
3 to erect these panels, and one of the concepts was
4 to build as much of the iron on the ground as you
5 could. It's safer for ironworkers to work on the
6 ground than to make connections up in the air.
7 In Japan, the roofs, the retractable
8 roof stadiums that Mitsubishi had built, were not
9 built like Miller Park was built. They didn't use a
10 crane like Big Blue. They built them on shoring
11 towers, and you will hear that some shoring towers
12 were used at Miller Park, and what that is is steel
13 columns are built on -- on concrete platforms in the
14 ground, and then the roof panels are built at the
15 top of the shoring tower so that it's supported, and
16 there are numerous shoring towers, almost like a
17 forest of shoring towers, and the panels are built
18 on top of them and then connected in the air.
19 Mitsubishi looked at doing that type
20 of construction here at Miller Park, ran into a
21 problem with conflicts with the other trades. HCH
22 did not want the entire infield covered with shoring
23 towers that would have interfered with the work of
24 other trades doing other work on the stadium.
25 Mitsubishi then hired a consultant to

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1 find them companies that could supply heavy cranes
2 to make these lifts of panels so that the work could
3 go on on the interior of the stadium.
4 Candidates for this job were given to
5 Mitsubishi by this consultant, and you'll hear the
6 name Ed Maceus. He recommended a company called
7 Van Seumeren, which is a Dutch company, and he
8 recommended Lampson. Several other companies were
9 interviewed by Mitsubishi.
10 You will hear from Moto Baba, a
11 Japanese engineer that was involved in interviewing
12 these various crane -- heavy crane companies. He
13 interviewed the Van Seumeren Company, interviewed
14 the Lampson Company, several other companies, to
15 select a company that could provide the capabilities
16 of lifting panels to facilitate the construction of
17 the roof.
18 Eventually Lampson was selected.
19 Lampson has a worldwide reputation for a very unique
20 crane that they designed and manufacture. It's
21 patented. They're the only company in the world
22 that has it. It's called a Transi-lift. They build
23 it. And you will see their promotional information
24 as the world's strongest, largest crane that is
25 capable of picking up the heaviest loads and moving

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1 with those loads and placing them in position. That
2 is what we selected as a means of doing the
3 construction of the roof, rather than the shoring
4 towers, which had conflicts with the other -- other
5 work that would be going on.
6 At one point in time we were thinking
7 of bringing Big Blue into the interior of the
8 infield and building the roof from the infield.
9 That also created problems with HCH with regard to
10 other work that would be taking place in the
11 construction of the stadium. Mitsubishi was not
12 responsible for erecting the support for the roof,
13 just placing the roof on the steel that was being
14 positioned to support the roof, and that was under
15 HCH's responsibility as the general contractor.
16 Mr. Habush mentioned there was delays
17 in the scheduling. If any of you have had
18 experience in construction in your house or at work,
19 it's not unusual that construction is delayed.
20 There were delays. There were delays because you
21 cannot put a roof onto something that's not ready to
22 accept the roof.
23 And in this case you will hear
24 evidence that on July 12, two days before this
25 accident, HCH sent a letter to Mitsubishi indicating

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1 that the support columns to accept this panel were
2 ready to receive Panel 4R3.
3 You will hear that term, Panel 4R3.
4 That was a designation for this section of roof, and
5 it is on the right field side. That's why we get
6 the designation R, as opposed to L. There are L
7 panels, and there are R panels. So two days before
8 the accident, we were given the go-ahead to begin to
9 get ready to place Panel 4R3.
10 Some of the individuals that you will
11 hear mentioned, you've heard Victor Grotlisch. He
12 was the project manager for Mitsubishi Heavy
13 Industries of America. He was also given to --
14 Mr. Maceus -- recommended to Mr. Maceus by Mr. Bucky
15 Gros from Lampson, who had experience in this type
16 of project. His name was given to Mitsubishi by our
17 consultant, and we interviewed Mr. Grotlisch, and we
18 hired him to be the project manager.
19 Mr. Wayne Noel was hired to be the
20 safety -- responsible for safety on the project for
21 Mitsubishi. He prepared a safe -- safety plan for
22 the project for Mitsubishi and for the
23 subcontractors. He relied on the OSHA and ANSI
24 standards. He prepared booklets for each of the
25 subcontractors. He had meetings with the

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1 subcontractors on a regular basis.
2 One of the areas of his responsibility
3 was to conduct prelift meetings before any of these
4 major lifts. There would be a meeting of all of the
5 supervisors and the safety people involved with the
6 lift to go over what's going to be done to discuss
7 how they're going to do it, to make sure that
8 everybody is on the same page, make sure that safety
9 is going to be observed and how they're going to
10 observe it. There was such a meeting on the morning
11 of this accident, and I'll get into that in a
12 minute, but that was a part of his safety program.
13 And, yes, at that meeting and at every
14 meeting on a prelift, the people that were involved
15 on the lift, the supervisors, were given radios so
16 they could be in constant communication. And on
17 this lift, there was about 18 or 19 radios for 18 or
18 19 supervisors and safety personnel to monitor that
19 lift throughout the day, and that any one of them,
20 if they saw anything that they felt was unsafe, they
21 could call Alan, call Victor, and ask that the lift
22 be stopped. That procedure was in effect for every
23 one of the lifts.
24 And why is that? Because these men
25 are all in the zone of danger if there's something

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

PATRICIA WISCHER, individually and as Special Administrator of the Estate of Jeffrey A. Wischer, deceased,
MARJORIE DeGRAVE, individually and as Special Administrator of the Estate of William R. DeGrave, deceased,
RAMONA DULDE-STARR, individually and as Special Administrator of the Estate of Jerome W. Starr, deceased,

Plaintiffs

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.
MITSUBISHI HEAVY INDUSTRIES, LTD.
TRAVELERS PROPERTY CASUALTY INSURANCE COMPANY, THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS, NEIL F. LAMPSON, INC., LAMPSON INTERNATIONAL LTD., HCH MILLER PARK JOINT VENTURE, HUNZINGER CONSTRUCTION COMPANY, THE CLARK CONSTRUCTION GROUP, INC., HUBER, HUNT & NICHOLS, INC.,

Defendants

Case No. 99-CV-006553
Case Code:
Personal Injury, Other: 30107
Wrongful Death: 30105

FILED
CIVIL DIVISION
11 JAN 18 2000 11
HON. DOMINIC S. AMATO PRESIDING
JOHN BARRETT-CLERK OF COURTS

STIPULATION AND ORDER FOR APPROVAL OF THIRD-PARTY SETTLEMENT

RECITALS

1. Jeffrey A. Wischer, William R. DeGrave, and Jerome W. Starr died in an accident on July 14, 1999, while working in the course of their employment for Danny's Construction Company, Inc. ("DCCI"), at a baseball stadium construction site commonly known as Miller Park in Milwaukee County, Wisconsin. Defendant Travelers Indemnity Company of Illinois ("Travelers Indemnity") provided worker's compensation insurance for DCCI on the date of the accident.

2. As a result of the deaths of Jeffrey A. Wischer, William R. DeGrave, and Jerome W. Starr, Travelers Indemnity paid and will likely pay in the future worker's compensation benefits under Wis. Stats. Ch. 102 to the Estates of Jeffrey A. Wischer, William R. DeGrave, and Jerome W. Starr in the following totals:

To the Wischer Estate:	$186,388
To the DeGrave Estate:	$186,388
To the Starr Estate:	$184,326
TOTAL:	$557,102

3. Patricia Wischer, individually, and as Special Administrator of the Estate of Jeffrey A. Wischer, deceased; Marjorie DeGrave, individually, and as Special Administrator of the Estate of William R. DeGrave, deceased; and Ramona Dulde-Starr, individually, and as Special Administrator of the Estate of Jerome W. Starr, deceased, (all of whom are hereinafter referred to as the "Plaintiffs") have started the present action claiming that the Miller Park accident and the resulting injuries and damages were caused by the negligence of Defendants Mitsubishi Heavy Industries America, Inc., Mitsubishi Heavy Industries, Ltd., Neil F. Lampson, Inc., Lampson International, Ltd., HCH Miller Park Joint Venture, Hunzinger Construction Company, The Clark Construction Group, Inc., and Huber, Hunt & Nichols, Inc. Travelers Indemnity is a party pursuant to Wis. Stats. §102.29, as the workers compensation carrier for DCCI. Travelers Indemnity is also a proper party as one of the liability insurers of the defendants.

4. Travelers Indemnity has a claim under the provisions of Wis. Stats. §102.29 to receive reimbursement for amounts paid to or on behalf of the Wischer, DeGrave, and Starr Estates. Travelers Indemnity agrees to waive its statutory rights to share in the proceeds of this and certain future settlements, as more particularly described in the attached Partial Release.

5. The plaintiffs have now agreed to the settlement of certain claims. The plaintiffs have agreed to accept the sum of $2,000,000 and, in exchange, will release

certain, but not all, claims against Travelers Indemnity, HCH, Hunzinger Construction Company, The Clark Construction Group, Inc., and Huber, Hunt & Nichols, all pursuant to the terms of the attached Partial Release.

6. Habush, Habush, Davis & Rottier, counsel for the Wischer and DeGrave Estates, and Jacquart & Lowe, counsel for the Starr Estate, agree to defer their rights to payment of attorney fees out of the proceeds of this settlement and seek only payment of certain litigation expenses they have advanced in the prosecution of this lawsuit.

NOW, THEREFORE, THE PARTIES HERETO STIPULATE THAT:

1. The settlement proceeds of $2,000,000 will be divided as follows:

Total amount of partial settlement:	$2,000,000.00
Costs of collection (litigation expenses only)	275,913.14
Subtotal:	$1,724,086.86

Entire Balance to Plaintiffs, to be distributed as follows:

To Patricia Wischer, individually and as the Special Administrator of the Estate of Jeffrey A. Wischer:	$574,695.62
To Marjorie DeGrave, individually and as the Special Administrator of the Estate of William R. DeGrave:	$574,695.62
To Ramona Dulde-Starr, individually and as the Special Administrator of the Estate of Jerome W. Starr:	$574,695.62

2. For purposes of this settlement, plaintiffs agree to share equally in the remainder after payment of costs and will defer readjustments until future anticipated recoveries are made.

3. Travelers Indemnity waives its rights under Wis. Stats. 102.29 to share in the proceeds of this and certain future settlements, as more particularly described in the attached Partial Release.

4. Because decedents Jeffery Wischer and William DeGrave are survived by minor children, the settlements and intended distribution of the proceeds of the

settlements to plaintiffs Patricia Wischer and Marjorie DeGrave will be submitted to the court for its approval.

5. The Court may enter an order approving the foregoing settlement and distribution, as required by Wis. Stats. §102.29(1), without further notice to the parties.

Dated: 1/17/2000

HABUSH, HABUSH, DAVIS & ROTTIER, S.C.
Attorneys for Patricia Wischer, individually and as Special Administrator of the Estate of Jeffrey A. Wischer and Marjorie DeGrave, individually and as Special Administrator of the Estate of William R. DeGrave

BY: _____
ROBERT L. HABUSH
State Bar No. SB 1008419

Dated: 1/17/2000

JACQUART & LOWE, S.C.
Attorneys for Ramona Dulde-Starr, individually and as Special Administrator of the Estate of Jerome W. Starr

BY: _____
DAVID P. LOWE
State Bar No. SB 1018378

Dated: 1/17/2000

TRAVELERS INDEMNITY COMPANY OF ILLINOIS (as the liability insurer of HCH)

BY: _____
GREGORY BOE
State Bar No. 1020845

Dated: 1-17-00

NELSON, DRIES, CONNELL & KRAMER, S.C.
Attorneys for Travelers Property Casualty Insurance Company, HCH Miller Park Joint Venture, Hunzinger Construction Company, The Clark Construction Group, and Huber, Hunt & Nichols, Inc.

BY: _____
JAMES J. DRIES
State Bar No. 01016166

Dated: 1/17/2000

TRAVELERS INDEMNITY COMPANY OF ILLINOIS (as the workers compensation carrier for Danny's Construction Company, Inc.

BY: _____

ORDER FOR APPROVAL OF THIRD-PARTY SETTLEMENT

Based on the above Stipulation of the parties,

IT IS ORDERED that the foregoing settlement and agreement for distribution of proceeds of the settlement is approved pursuant to Wis. Stats. §102.29. The court will set a hearing on a date to be determined for the approval required by Wis. Stats. sec. 895.04 (2).

Dated at Milwaukee, Wisconsin, this 18 day of January, 2000.

BY THE COURT:

_____
HONORABLE DOMINIC S. AMATO
Circuit Court Judge

PARTIAL RELEASE AND COVENANTS

RECITALS

Jeffrey A. Wischer, William R. DeGrave, and Jerome W. Starr died in an accident on July 14, 1999, while working in the course of their employment at a baseball stadium construction site commonly known as Miller Park in Milwaukee County, Wisconsin.

Patricia Wischer is the widow of Jeffrey A. Wischer and is the lawfully appointed Special Administrator of the Estate of Jeffrey A. Wischer.

Marjorie DeGrave is the widow of William R. DeGrave and is the lawfully appointed Special Administrator of the Estate of William R. DeGrave.

Ramona Dulde-Starr is the widow of Jerome W. Starr and is the lawfully appointed Special Administrator of the Estate of Jerome W. Starr.

On or about August 12, 1999, Patricia Wischer, Marjorie DeGrave, and Ramona Dulde-Starr filed a lawsuit (the "Suit") in the Circuit Court of Milwaukee County, alleging that the deaths of their husbands in the Miller Park accident were caused by the wrongful conduct of Mitsubishi Heavy Industries America Inc., Neil F. Lampson, Inc., HCH Miller Park Joint Venture, Hunzinger Construction Company, Clark Construction Builders, Inc. (identified in the plaintiffs' Amended Complaint as The Clark Construction Group, Inc.), and Huber, Hunt & Nichols, Inc., the defendants named in the Suit; the plaintiffs in the Suit filed an Amended Complaint on December 1, 1999, naming as additional defendants Lampson International, Ltd., and Mitsubishi Heavy Industries, Ltd. In the balance of this release, Neil F. Lampson, Inc., and Lampson International, Ltd., are referred to individually and collectively as Lampson; Mitsubishi Heavy Industries America, Inc., and Mitsubishi Heavy Industries, Ltd., are referred to individually and collectively as Mitsubishi.

HCH Miller Park Joint Venture is a joint venture formed for the purpose of providing construction management services in connection with the construction of Miller Park. The members of the joint venture are Hunzinger Construction Company, The Clark Construction Group Inc., and Huber, Hunt & Nichols, Inc. In the balance of this Release, HCH Miller Park Joint Venture and its three constituent members are referred to individually and collectively as HCH.

The owner of Miller Park is the Southeast Wisconsin Professional Baseball Park District (the "District"). Before the start of the construction of Miller Park, the District purchased an Owner Controlled Insurance Program ("OCIP"), providing, among other insurance, commercial general liability coverage ("CGL"). The OCIP provided the following layers of CGL coverage, with the per occurrence and aggregate limits indicated:

Insurer	*Policy No.*	*Coverage*
Travelers Indemnity Company of Illinois	RTJ-GLSA-275T3079-TIL-99 (the "RTJ policy")	$2,000,000.
Royal Insurance Company of America ("Royal")	PHA 011211	$5,000,000
Indemnity Insurance Company of North America ("IIC")	XLX G18879621	$20,000,000
Federal Insurance Company ("Federal")	(00) 7974-01-75	$50,000,000
Travelers Indemnity Company of Illinois ("Travelers")	7FSJ-EX-271T241-7-TIL-96 (the "FSJ policy")	$25,000,000

Travelers, Royal, IIC, and Federal are referred to collectively as the "OCIP insurers."

HCH is insured under the OCIP.

HCH has filed an Answer in the Suit, denying any liability but desires to compromise certain claims arising out of the Miller Park accident and to do so in a way that will eliminate any uninsured exposure for HCH in the Suit, so that it can focus its attention on completing the construction of Miller Park.

To fulfill its insurance policy obligations, Travelers intends to provide the payment necessary to accomplish the compromise of certain claims of the plaintiffs under the RTJ policy.

The plaintiffs in the Suit desire to resolve their claims against Travelers under the RTJ policy, to resolve certain of their claims against HCH, and to receive partial payment toward their loss.

1. Description of Claims Released

Patricia Wischer, individually and as Special Administrator of the Estate of Jeffrey A. Wischer; Marjorie DeGrave, individually and as Special Administrator of the Estate of William R. DeGrave; and Ramona Dulde-Starr, individually and as Special Administrator of the Estate of Jerome W. Starr (all of whom are referred to collectively in the remainder of this Release as "Releasors") hereby release HCH from:

(a) the first two million dollars of liability for any and all claims, actions, demands, and causes of action (hereinafter collectively referred to as Claims) arising out of, or relating to, the Miller Park incident.

(b) any liability in excess of 102 million dollars for any and all Claims arising out of, or relating to, the Miller Park incident.

(c) any liability between two million and 102 million dollars for which HCH is not indemnified by valid and collectible insurance under the OCIP for any and all Claims arising out of, or relating to, the Miller Park incident.

Releasors hereby release Travelers from the first 2 million dollars of liability for any and all Claims arising out of, or relating to, the Miller Park incident under the RTJ policy. Releasors agree that Travelers provides 25 million dollars of liability coverage under the OCIP in excess of 77 million dollars, but provides no liability coverage under the OCIP between 2 million dollars and 77 million dollars. Accordingly, Releasors agree that, upon payment of the 2 million dollar limit of liability coverage under the RTJ policy, they will not seek recovery from Travelers of any additional amount until they have recovered 77 million dollars and will not seek recovery from Travelers of any amount in excess of 102 million dollars.

The liability released, as described above, relates to claims of every kind and nature now existing or which may hereafter arise, including any consequences thereof now existing or which may develop, whether or not such consequences are presently known or anticipated, whether based upon matters presently known as well as unknown, anticipated as well as unanticipated, whether directly or indirectly incurred, including any contingent or derivative claims as well as any claims arising by subrogation or contribution, and including claims actually asserted, or which could have been asserted, in the above-referenced lawsuit.

Releasors further release Lampson and Mitsubishi from those two million dollars of damages arising from the Miller Park incident, if any, imposed by verdict or judgment or agreed to be paid by settlement, which are greater than 100 million dollars and less than 102 million dollars, such amount between 100 million and 102 million being the first two million dollars of liability for Lampson and Mitsubishi beyond the remaining OCIP insurance protection after the two million dollar payment contemplated by this release.

Releasors acknowledge that the injuries and damages sustained are, or in some cases may be, progressive, and that the precise amount of damages is uncertain and indefinite. In making this release, it is understood and agreed that the Releasors rely upon their own judgment, belief and knowledge of the nature, extent, effect and duration of damages and liability therefore, and upon the advice of their selected advisors. This release is made without reliance upon any statement or representation of any released party, or its representatives.

2. Consideration

The consideration for this release is payment by Travelers on behalf of HCH of the total of Traveler's two million dollar limit of liability coverage under the RTJ policy in partial settlement of Releasors' claims, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged. Releasors agree that they will decide how the consideration paid for this release will be divided among themselves.

3. Reservation Of Claims

This Release does not relinquish any claims or release any party other than those claims and parties specifically identified. Releasors reserve the right to prosecute all other claims against any party who may be responsible for their damages, specifically including without limitation Lampson and Mitsubishi and the OCIP insurers, and also reserve their right to prosecute their claims against HCH, and the OCIP insurers in their status of insurers for HCH, for injuries and damages that may be found to exceed two million dollars, but not to exceed that

portion of the amount between two million and 102 million for which HCH has valid and collectible insurance under the OCIP.

As against all parties other than HCH and Travelers, Releasors reserve and do not release any part of any claim they have or may have against such parties, except for their release of the two million dollars in damages, if any, owed to Releasors from Lampson or Mitsubishi or their insurers, exceeding 100 million dollars and less than 102 million dollars, such amount being (after the payment herein of two million dollars on behalf of HCH) the first two million dollars of damages excess of the remaining OCIP insurance for those non-HCH parties.

Nothing contained in this Release will be deemed to operate as a waiver of any claims that HCH or Travelers may have against any party. HCH and Travelers reserve any claims that they may have against any other party arising out of the Miller Park incident.

4. Incident

The incident referred to in this Release is the collapse of a crane commonly known as Big Blue on July 14, 1999, at the Miller Park construction site.

5. Offset And Credit For Payment

Releasors agree to offset any claim they may have against HCH and the OCIP insurers on behalf of HCH up to two million dollars. Releasors further agree to credit two million dollars toward any future settlement with or verdict against HCH and any OCIP insurer that is required, by settlement or verdict, to make a payment on behalf of HCH. Releasors agree to credit the first two million dollars in excess of 100 million dollars toward any future settlement with or verdict or judgment against Lampson and Mitsubishi.

6. Offset And Credit - Claims Of Other Parties

Releasors agree to offset any amount that they recover by settlement, verdict or judgment from any other party to this action by the amount which the other party could enforce by way of contribution or indemnification claim against HCH, unless the amount which the other party could enforce against HCH is indemnified by valid and collectible insurance under the OCIP.

7. Indemnification

Releasors agree to indemnify and save harmless HCH from any and all claims of any party to this action for contribution or indemnification made by others adjudged jointly liable with HCH but only to the extent that the amount of available and collectible insurance afforded to HCH under the OCIP is insufficient to satisfy those claims.

8. Limits Of Coverage

In making the covenants set forth in this Release, Releasors acknowledge that the aggregate limits of insurance provided under the OCIP that remain after the settlement provided in this Release are one hundred million dollars and those limits may be further reduced by

coverage defenses, by the payment of claims asserted against others insured under the OCIP, specifically including MHIA and Lampson, or by insurer insolvency.

9. Subrogation

Except as otherwise provided in this paragraph, Releasors agree that, to the extent of the Released Amount, they will remain responsible to satisfy lien interests, if any, such as any lien arising from worker's compensation payments, subrogation for medical insurance payments and attorney's liens. Travelers waives any rights that it may have to recover workers compensation benefits that it has paid or will pay to or on behalf of Releasors out of the proceeds of a) this settlement and b) all future third-party payments unless the third-party on whose behalf the payment is made is not insured under the OCIP. To the extent of the Released Amount, Releasors agree to indemnify and hold harmless HCH and Travelers against claims made against them arising out of lien interests.

10. No Admission of Liability

Neither this release, nor any payment, concession or any other action by HCH or Travelers is to be construed as an admission of liability, liability being expressly denied. This release is a compromise partial settlement which is the result of settlement negotiations.

11. Persons Bound And Benefited

This release binds the Releasors, their heirs, executors, administrators, successors and assigns, and inures to the benefit of the named released parties and their officers, directors, agents, employees, successors and assigns.

12. Construction Of Ambiguities

This Release is the joint work product of the Releasors and the parties released and their respective counsel. Accordingly, the Releasors, Travelers and HCH agree that any rule of construction resolving ambiguities against the drafting party is inapplicable to the interpretation of this Release.

13. Entire Agreement

Releasors represent that no promise, inducement or agreement, not set forth herein, has been made. This release contains the entire agreement between the parties. Each numbered paragraph of this release is contractual and not a mere recital. Each person signing this Release acknowledges that she has read the Release, reviewed it with her attorneys, and understands it in its entirety.

14. Governing Law

This agreement shall be governed by Wisconsin law.

IN WITNESS WHEREOF, each of the undersigned has hereunto set her hand and seal this 17 day of Jan 2000.

Patricia Wischer, Individually and as Special Administrator of the Estate of Jeffrey A. Wischer

Marjorie DeGrave, Individually and as Special Administrator of the Estate of William R. DeGrave

Ramona Dulde-Starr, Individually and as Special Administrator of the Estate of Jerome W. Starr

CONSENT OF ATTORNEYS FOR PATRICIA WISCHER AND MARJORIE DEGRAVE

Pursuant to Wis. Stats. § 757.38, the undersigned attorneys for Patricia Wischer and Marjorie DeGrave hereby consent to and approve the settlement set forth in the above Release.

Dated at Milwaukee, Wisconsin, this 17 day of January 2000.

HABUSH, HABUSH, DAVIS & ROTTIER

By: _____
Robert L. Habush

CONSENT OF ATTORNEYS FOR RAMONA DULDE-STARR

Pursuant to Wis. Stats. § 757.38, the undersigned attorneys for Romana Dulde-Starr hereby consent to and approve the settlement set forth in the above Release.

Dated at Milwaukee, Wisconsin, this 17 day of Jan. 2000.

JACQUART & LOWE, S.C.

By: _____
David Lowe

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

PATRICIA WISCHER, et al.,

Plaintiffs,

vs.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., et al.,

Defendants.

AUG 23 2001

Case No. 99-CV-006553

Personal Injury, Other: 30107
Wrongful Death: 30105

FINAL JUDGMENT AGAINST FEDERAL INSURANCE COMPANY AND THE TOKIO MARINE AND FIRE INSURANCE COMPANY

Upon the Order dated the 23rd day of August, 2001,

IT IS HEREBY DECLARED that:

1. The insurance policy issued by defendant Federal Insurance Company as part of the Owner Controlled Insurance Program, policy number (00) 7974-01-75, provides coverage to defendant Mitsubishi Heavy Industries America, Inc. ("MHIA") for the damages that the jury awarded in the plaintiffs' favor against MHIA.

2. The insurance policy issued by defendant The Tokio Marine and Fire Insurance Company to MHIA, policy number CLL424075600, provides coverage to MHIA for the damages that the jury awarded in the plaintiffs' favor against MHIA.

3. If defendant The Travelers Indemnity Company of Illinois makes a payment in excess of $25 million plus such corresponding taxable costs and interest for which MHIA is responsible in satisfaction or on account of the judgment in favor of MHIA against Travelers, Travelers shall be entitled to immediate equitable subrogation and payment, dollar for dollar, from Federal and Tokio Marine, in accordance with the layers of insurance coverage that Federal

and Tokio Marine provide to MHIA. Travelers shall not be required to pay its $25 million policy limit toward the amount of money for which MHIA is liable to the plaintiffs more than once, and neither the plaintiffs nor MHIA will be entitled to a double recovery.

IT IS HEREBY ADJUDGED AND DECREED that:

1. Plaintiffs Patricia Wischer, as Special Administrator of the Estate of Jeffrey A. Wischer, deceased; Marjorie DeGrave, as Special Administrator of the Estate of William R. DeGrave, deceased; and Ramona Dulde-Starr, as Special Administrator of the Estate of Jerome W. Starr, deceased, have and recover from defendant Federal Insurance Company the sum of Fifty Million and no/100 Dollars ($50,000,000.00), plus such corresponding taxable costs and interest for which MHIA is responsible. The amount of fifty million dollars ($50,000,000) represents the fifty million dollars ($50,000,000) of excess liability insurance coverage provided by Federal Insurance Company, which is the layer between $27,000,000 and $77,000,000 of liability coverage under the Owner Controlled Insurance Program. When paid, the fifty million dollars ($50,000,000), plus such corresponding taxable costs and interest for which MHIA is responsible, will represent and satisfy that layer of outstanding liability of MHIA to the plaintiffs between $1 and $50,000,000 plus such corresponding taxable costs and interest for which MHIA is responsible.

2. Plaintiffs Patricia Wischer, as Special Administrator of the Estate of Jeffrey A. Wischer, deceased; Marjorie DeGrave, as Special Administrator of the Estate of William R. DeGrave, deceased; and Ramona Dulde-Starr, as Special Administrator of the Estate of Jerome W. Starr, deceased, have and recover from defendant The Tokio Marine and Fire Insurance Company the sum of Two Million and no/100 Dollars ($2,000,000.00), plus such corresponding taxable costs and interest for which MHIA is responsible. The amount of two million dollars ($2,000,000) represents the two million dollars ($2,000,000) of excess liability insurance coverage provided by The Tokio Marine and Fire Insurance Company, which is the layer above

all of the layers of liability coverage under the Owner Controlled Insurance Program. When paid, the two million dollars ($2,000,000), plus such corresponding taxable costs and interest for which MHIA is responsible, will represent and satisfy that layer of outstanding liability of MHIA to the plaintiffs between $75,000,000 and $77,000,000 plus such corresponding taxable costs and interest for which MHIA is responsible.

In accordance with the provisions of Wis. Stat. §806.01(1), the places of residence of the parties are as follows:

1. Plaintiff Patricia Wischer resides at 543 West Wisconsin Avenue, Pewaukee, Wisconsin 53072.

2. Plaintiff Marjorie DeGrave resides at 140 Darboy Road, Kimberly, Wisconsin 54136.

3. Plaintiff Ramona Dulde-Starr resides at 920 East Mason Street, Milwaukee, Wisconsin 53202.

4. Defendant Federal Insurance Company is a foreign corporation with its principal offices at 15 Mountain View Road, Warren, New Jersey 07061.

5. Defendant The Tokio Marine and Fire Insurance Company is a foreign corporation with its principal offices at 101 Park Avenue, New York, New York 10178.

6. Defendant The Travelers Indemnity Company of Illinois is a foreign corporation with its principal offices at 2500 Cabot Drive, Lisle, Illinois 60563.

Dated at Milwaukee, Wisconsin this 23rd day of August, 2001.

BY THE COURT:

HONORABLE DOMINIC S. AMATO
Circuit Court Judge

1 IN THE CIRCUIT COURT OF MILWAUKEE COUNTY

2 STATE OF WISCONSIN

3

4 PATRICIA WISCHER, individually,
and as Special Administrator of the
5 ESTATE OF JEFFREY A. WISCHER, deceased;
MARJORIE DeGRAVE, individually,
6 and as Special Administrator of the.
ESTATE OF WILLIAM R. DeGRAVE, deceased;
7 and RAMONA DULDE-STARR, individually,
and as Special Administrator of the
8 ESTATE OF JEROME STARR, deceased,

9 Plaintiffs,

10
-vs- Case No. 99-CV-006553
11

12 MITSUBISHI HEAVY INDUSTRIES,
AMERICA, INC., TRAVELERS
13 PROPERTY CASUALTY INSURANCE
COMPANY, THE TRAVELERS INDEMNITY
14 COMPANY OF ILLINOIS, NEIL F. LAMPSON,
INC., HCH MILLER PARK JOINT VENTURE,
15 HUNZINGER CONSTRUCTION COMPANY,
CLARK CONSTRUCTION BUILDERS, INC.,
16 and HUBER, HUNT & NICHOLS, INC.,

17 Defendants.

18

19 November 28th, 2000

20 VOLUME XXX

21 TRANSCRIPT OF JURY TRIAL

22 Before:
HONORABLE DOMINIC S. AMATO
23 Circuit Court Judge Presiding

24 Court Reporters: Constance L. Bauer, CRR/RMR
Debra A. Wisniewski, CRR/RMR
25 Julie A. Poenitsch, CRR/RMR

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1 for you, if you take an hour.
2 MR. HABUSH: I don't think I'll need
3 it, but we'll see.
4 THE COURT: Do you want me to indicate
5 a half hour?
6 MR. HABUSH: This won't go that long.
7 THE COURT: I just want to indicate to
8 the jury so they have a time frame. You're on the
9 record, though, for -- Mr. Habush, you're on the
10 record for reserving 45 minutes.
11 MR. HABUSH: That's probably right.
12 THE COURT: Everyone please rise for
13 the jury.
14 (Jury returned.)
15 THE COURT: Welcome back. Please be
16 seated. Plaintiffs go first in closing arguments.
17 They have the burden of proof, so the plaintiffs'
18 lawyers will have an opportunity to do a rebuttal at
19 the -- after the closing arguments of both Lampson
20 and Mitsubishi Heavy Industries of America, Inc.
21 Okay. Mr. Habush.
22 MR. HABUSH: Judge Amato, ladies and
23 gentlemen: It seems like we've been together for a
24 long time, and on behalf of the Wischer family, the
25 DeGrave family, and the Starr family, we want to

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1 thank you.
2 I know that the judge instructed you
3 you can't talk about this case, but that doesn't
4 mean that you went home every night and didn't think
5 about it, and I'm certain that it's weighed upon
6 your hearts and minds much in the same way it has
7 upon the families I represent and myself.
8 There was an empty chair at the
9 Thanksgiving table in the Wischer, DeGrave, and
10 Starr homes this Thanksgiving, and the usual joys of
11 Christmas and that the season brings will certainly
12 be dampened this year, as last year, by the loss of
13 their husbands and their fathers. But you, members
14 of the jury, have an opportunity in this case to
15 bring justice to their homes, and in the next few
16 minutes, I'm going to try to tell you how.
17 You, the jury, bring a sense of common
18 sense, a sense of community, a sense of experiences
19 of life that we can't get anywhere else. We don't
20 try these cases in front of crane manufacturers. We
21 don't try products liability cases in front of
22 engineers. We don't try medical malpractice cases
23 in front of doctors. We don't try professional
24 liability cases in juries of lawyers. We try it in
25 front of citizens like yourself.

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1 And you, as jurors, have the role of
2 defining the credibility of witnesses. You. If you
3 think a witness has been untruthful, has varied from
4 the facts, you can disregard their testimony. Even
5 if that witness is an expert, self-proclaimed or
6 otherwise, if you believe that witness has not been
7 frank and candid with you, you have the power to
8 disregard that testimony.
9 Civilization has never come up with a
10 better way to control human behavior than the
11 American jury. You're better than the Food and Drug
12 Administration. You're better than the Federal
13 Aviation Administration. You're better than the
14 Consumer Product Safety Commission. You're better
15 than any of the professional responsibility boards
16 and committees that govern the ethics of lawyers and
17 doctors. Because you folks can send a message. And
18 when you speak, people listen.
19 You will have a rare opportunity in
20 this case, one that is not often afforded to juries,
21 and that's because we believe that the tragedy that
22 occurred at Miller Park on July 14th, 1999, was due
23 to the intentional and outrageous decision by
24 Mitsubishi employee Victor Grotlisch to lift the
25 huge roof piece in the face of obvious danger and

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1 hazardous wind. This, members of the jury, is the
2 basis for our punitive damage claim against
3 Mitsubishi Heavy Industries of America.
4 And you heard the judge tell you a few
5 moments ago the objectives of punitive damages.
6 One, to punish. Two, to correct behavior so it
7 doesn't happen again, not only of the person that's
8 involved in the lawsuit, but others who may be
9 listening to what you're saying and observing what's
10 going on in this courtroom, to correct behavior of
11 Mitsubishi and others. And finally, to send a
12 message, a clear and unmistakable, unambiguous
13 message to people who come into our community, to
14 contractors who come into our community, that you
15 will not put our men and women in harm's way. And
16 that's the three goals of punitive damages.
17 I believe the evidence has shown to
18 you that there was intentional disregard of the
19 rights of the three deceased ironworkers. The
20 intentional part is easy. They intended to do the
21 lift. They made the decision to do the lift. It
22 was an intentional decision. They didn't stumble
23 into it. It was an intentional decision in the face
24 of hazards and obvious wind conditions, and in doing
25 so, they ignored, they disregarded the rights of

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1 those three men.
2 And what were those rights? The right
3 to a safe workplace. The right to life. And in so
4 doing, they intentionally disregarded those rights
5 of the three deceased ironworkers.
6 We don't have to prove that Victor
7 Grotlisch intended to kill these guys. This is not
8 a criminal case. We don't have to prove that they
9 knew for sure that crane was going to go down.
10 Let me give you an example. A person
11 decides to run the stop sign, I'm going to run that
12 stop sign, and in running that stop sign crashes
13 into a crossing vehicle, killing the occupants.
14 Would we hear that driver be able to say, I didn't
15 intend to kill those occupants, I didn't know Sally,
16 I didn't know Bill, I didn't intend to kill them?
17 But that person intended to run that
18 stop sign and, in so doing, must bear the
19 consequences of an intentional disregard of the
20 rights of any other vehicle or pedestrian that might
21 have come into harm's way by that intentional act.
22 After we view the evidence together,
23 you will see, and I hope you will believe, that the
24 only way to do justice to these three families and
25 the community is to punish Mitsubishi by awarding

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1 punitive damages.
2 Now, let's talk about the evidence.
3 See all this stuff here? If I spent my time holding
4 up posters and papers, we'd be here a week. I just
5 want to talk with you. I just want to talk with you
6 about the evidence, and let's think about it
7 together.
8 We're going to divide the conduct
9 into three parts, the conduct that occurred before
10 July 14th, 1999, the conduct that occurred on
11 July 14th, and the conduct that occurred after
12 July 14th.
13 Let's talk about first the conduct
14 before because it sets the scene for what happened
15 on July 14th. Victor Grotlisch takes a man-basket
16 up, in violation of safety regulations, with men and
17 steel. He does so knowingly, haughtily, and then he
18 tells his safety supervisor, Mr. Noel, to stay put
19 so he doesn't have to see it. He admits that this
20 is a safety violation.
21 What does that tell you about his
22 attitude? What does that tell you about setting an
23 example for the workers who witnessed all this?
24 Victor Grotlisch conducts lifts prior
25 to the 14th in unsafe wind conditions. When Milo

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1 Bengtson complained about it, he says, are you
2 telling me that you're not going to do this lift?
3 And, of course, he went along with it.
4 When Allen Watts got there and he
5 complained about doing a lift because of weather
6 conditions, they went ahead with it. When Milo
7 Bengtson told him he didn't have enough men to
8 finish the preparation for a lift, and Dennis Frazer
9 said, it's going up, Grotlisch comes by and says,
10 when Frazer tells you to lift, you lift.
11 Victor Grotlisch, when the workers
12 made safety complaints, what did he think about
13 those? Oh, they're just trying to dog it. They're
14 just making up these safety complaints because they
15 don't want to work. That shows his attitude about
16 people complaining about safety problems.
17 Oh, and this is the best one. Victor
18 Grotlisch: We hire you from the neck down. What
19 does that tell you about the man? Contempt,
20 disrespect, the men are nothing but beasts of
21 burden. I don't want to hear from your brains. I
22 don't want your suggestions. You do what I tell
23 you. And that was testified to by both Mr. Watts
24 and Mr. Upton.
25 Victor Grotlisch, who does lifts to

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1 impress the baseball fans in conditions that are
2 unsafe, who does a lift on the day of the accident
3 because the media thinks that the workers are on
4 strike, as well Mr. Ellison says, you mean you're
5 going to lift -- fly this piece just to show them?
6 Victor Grotlisch says, correct. What does that tell
7 you about the man?
8 Victor Grotlisch, who had to be shown
9 safety standards that were obtained by Milo Bengtson
10 so that he wouldn't have people under the loads.
11 Victor Grotlisch behind schedule, over budget. His
12 expertise and the expertise of Mitsubishi being
13 challenged by HCH with financial consequences he
14 knew existed if he didn't go ahead.
15 And Victor Grotlisch, who trumped up a
16 case against Milo Bengtson to get rid of a thorn in
17 his side. The only one who had the guts to stand up
18 to him and to argue with him, who had the courage.
19 So he threatened his bosses with withholding their
20 money, and he got his way. He got rid of that thorn
21 in his side. What does that tell you about the man?
22 And Victor Grotlisch, who promises
23 help during a lift, and the lift goes up, and it
24 can't be completed. So what does he do? He takes
25 off and goes to Denver to watch a football game

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

PATRICIA WISCHER, et al.,

Plaintiffs,

vs.

Case No. 99-CV-006553

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., et al.,

Personal Injury, Other: 30107
Wrongful Death: 30105

Defendants.

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AGAINST FEDERAL INSURANCE COMPANY

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1. Federal's claim that the bodily injuries were not caused by an "occurrence" has no reasonable basis. 6

2. The decedents' fatal bodily injuries were caused by an "occurrence." 6

IV. THE DAMAGES FOR WHICH MHIA IS LIABLE ARE NOT EXCLUDED FROM COVERAGE. 10

A. The Travelers and Federal Policies Do Not Contain a Punitive Damages Exclusion. 10

B. The "Expected or Intended Injury" Exclusion Does Not Apply. 14

1. Federal's reliance on the "expected or intended injury" exclusion has no reasonable basis. 14

2. The fact that Travelers and Federal use specific endorsements to exclude punitive damage indicates that the "expected or intended injury" exclusion was not intended to act as an exclusion for punitive damages. 14

3. As a matter of law, the fatal bodily injuries to the decedents were not expected or intended from the standpoint of MHIA.. . . . 15

a. In order for bodily injury to be "expected or intended" by an insured, the insured must have intended the act and intended to cause bodily injury. 15

b. The fact that the jury found in the plaintiffs' favor on the punitive damages questions does not establish that the MHIA employees intended to cause bodily injury to the decedents. 16

c. The record is devoid of any evidence that MHIA intended bodily injury to the decedents. 17

(1) The plaintiffs and MHIA both contended that there was no intent to cause bodily injury to anyone. . . 18

(2) There is no evidence that bodily injury to the decedents was intended by MHIA employees. . . . 20

C. The Decedents Were Not Employed by MHIA, So the "Employer's Liability" Exclusion Does Not Apply. 21

1. The court was correct in ruling that MHIA admitted that the decedents were employees of DCCI and was estopped from claiming otherwise. 23

a. MHIA admitted that the decedents were employees of DCCI. 24

b. MHIA never raised immunity as an affirmative defense in its answer. 24

c. There were other admissions by MHIA and other evidence showing that the decedents were employees of DCCI. 25

2. The record establishes as a matter of law that the decedents were employees of DCCI and were doing DCCI's work. 25

a. The plaintiffs submitted evidence prior to trial which showed the decedents were controlled by DCCI, and there was no issue of fact as to this matter. 26

b. The evidence at trial establishes, as a matter of law, that the decedents were not MHIA's employees, and there is no material issue of fact on this matter. 27

c. Defense counsel before, during, and after trial admitted, and even argued, that the evidence proved the decedents were not MHIA employees, but rather were employees of DCCI. 30

3. Federal is bound by the evidence, findings and judgments against MHIA with regard to the loaned employee issue. 31

D. The "Professional Services" Exclusion Does Not Apply. 36

1. Federal's reliance on the professional services exclusion has no reasonable basis. 37

2. The professional services exclusion does not apply here, because the "additional insured" endorsement excepts contractors, such as MHIA, from the application of the exclusion. 37

3. The professional services exclusion does not apply here, because the facts of this case do not fit within the exclusion. 40

a. The professional services exclusion only applies to engineers, architects and surveyors. 40

b. The bodily injury to the decedents did not arise out of the rendering of or failure to render "professional services.". 40

(1) Authorities interpreting professional services exclusions. 41

(2) The bodily injury to the decedents did not arise out of the rendering of or failure to render "professional services" by MHIA. 47

c. Even if it could be concluded that the bodily injuries to the decedents arose, in part, out of the rendering of or failure to render "professional services" by MHIA, coverage would not be precluded. 49

CONCLUSION 50

(Tr. 11/28/00, p. 65-66)

Counsel for MHIA argued in closing argument:

> I suggest with respect to punitive damages, ladies and gentlemen, this was an accident. There was no intent to operate unsafely out there. To the exact opposite, we were attempting to operate safely.

(Tr. 11/28/00, p. 166)

Finally, in motions after verdict, counsel for MHIA argued: "[T]he evidence does not show that MHIA was subjectively aware that Messrs. Wischer, DeGrave or Starr were practically certain to be injured by lifting 4R3 on July 14." (Exhibit 17)

Thus, throughout this litigation, both the plaintiffs and MHIA, based on the evidence, agreed that there was no evidence of intent to cause bodily injury to the decedents.

(2) There is no evidence that bodily injury to the decedents was intended by MHIA employees.

To support its contention that the "expected or intended injury" exclusion is applicable, Federal must prove that the MHIA employees intended to cause bodily injury to the decedents. Federal bears the middle burden of proof with respect this contention.

In Macherey v. Home Insurance Co., 184 Wis.2d 1, 15-17, 515 N.W.2d 434 (Ct.App. 1994), the court held that the trial court properly instructed the jury that the insurer bore the middle burden of proof with respect to its claim that the incident at issue fell within an intentional tort exclusion, because the claim involved proof of an act which would be considered criminal.

Wis. Stat. §940.01(1) provides that whoever causes the death of another human being with intent to kill that person is guilty of a Class A felony. Wis. Stat. §940.19(1) provides that whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without consent is guilty of a Class A misdemeanor. Thus, the conduct which Federal claims MHIA committed would be considered criminal. Accordingly, Federal must meet the middle burden of proof. In order for the "expected or intended injury" exclusion to be applicable, Federal must submit evidence that is clear, satisfactory and convincing that the MHIA employees intended to cause bodily injury to the decedents. Federal will be unable to meet this burden.

Nowhere in the record is there any evidence that the MHIA employees subjectively intended to cause bodily injury to the decedents. Therefore, Federal will be unable to put forward any evidence showing a subjective intent on the part of any MHIA employee to cause bodily injury to the decedents. In addition to the fact that there can be no showing of any such subjective intent on the part of any MHIA employee, Federal cannot show that any injury to the decedents was substantially certain to occur from the MHIA employees' acts. Therefore, Federal will be unable to establish, from an objective point of view, that any MHIA employee intended to cause bodily injury to the decedents. Under the facts of this case, there is really no distinction between a subjective analysis of intent and an objective analysis, because there is nothing about the subjective point of view as demonstrated in the record which is inconsistent with what a reasonable person might have anticipated would occur.

Although there was ample evidence to show that MHIA's acts in proceeding with the roof lift under hazardous conditions constituted an intentional disregard of the decedents' rights, as the jury found, there is no evidence to permit a reasonable jury to conclude that the MHIA employees intended to cause bodily injury to the decedents or that they knew or should have known that bodily injury to the decedents was substantially certain to follow from their acts. Because Federal will not be able to prove that the MHIA employees intended to cause bodily injury to the decedents, the court must hold as a matter of law that the "expected or intended injury" exclusion does not apply.

C. The Decedents Were Not Employed by MHIA, So the "Employer's Liability" Exclusion Does Not Apply.

Another exclusion appearing in the Travelers policy on which Federal attempts to rely is the "employer's liability" exclusion. Federal claims that the exclusion applies because the decedents were employees of MHIA at the time of the accident. That exclusion states in part:

> This insurance does not apply to:
>
> * * *
>
> e. Employer's Liability
>
> "Bodily injury" to:
>
> (1) An employee of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that "employee" as a consequence of (1) above.

This exclusion applies:

(1) Whether the insured may be liable as an employer or in any other capacity; and

(2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

The term "employee" is defined as follows:

> "Employee" includes a "leased worker." "Employee" does not include a "temporary worker."

The term "leased worker" is defined as follows:

> "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker."

The term "temporary worker" is defined as follows:

> "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

The decedents were not "leased workers" because the decedents were not "leased" to MHIA by a "labor leasing firm" under any type of agreement to perform duties related to MHIA's business. The decedents were employed by Danny's Construction Company, Inc. ("DCCI"), which is not a "labor leasing firm," and they were performing duties for DCCI.

The real issue is whether the decedents were "employees" of MHIA under the common meaning of that term. Federal cannot prove the decedents were MHIA employees, and the court must rule as a matter of law that the decedents were not MHIA employees, because (1) the court ruled before trial that MHIA admitted the decedents were employees of DCCI, not MHIA, and was estopped from claiming otherwise, (2) the record establishes as a matter of law that the decedents were not MHIA employees, and (3) Federal is bound by MHIA's admission and the court's ruling

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

PATRICIA WISCHER, et al.,

Plaintiffs,

vs.

Case No. 99-CV-006553

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., et al.,

Personal Injury, Other: 30107
Wrongful Death: 30105

Defendants.

PLAINTIFFS' BRIEF IN OPPOSITION TO FEDERAL INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

COPY

INTRODUCTION

Federal Insurance Company ("Federal") has moved for summary judgment on the ground that its policy does not cover the damages for which the jury found Mitsubishi Heavy Industries America, Inc. ("MHIA") liable to the plaintiffs. The plaintiffs request the court to deny Federal's motion and to grant the plaintiffs' motion for summary judgment against Federal.

ARGUMENT

I. THE "PROFESSIONAL SERVICES" EXCLUSION DOES NOT APPLY.

Federal contends that MHIA's liability was the result of its rendering of and/or failure to render "professional services" and, therefore, coverage is excluded by the "professional services" exclusion. Federal's arguments must be rejected.

Federal has failed to show how or why the "professional services" exclusion is applicable to a contractor such as MHIA. As explained on pages 37-40 of the plaintiffs' brief in support of their motion for summary judgment, Federal's policy contains an "additional insured" endorsement that clearly indicates that the policy was intended to provide coverage to contractors like MHIA and that only engineers, architects and surveyors were intended to be deprived of coverage for damages arising out of "professional services." Therefore, the professional services exclusion does not apply to MHIA.

C. An Intent to Cause Bodily Injury to the Decedents Cannot Be Inferred From the Facts As a Matter of Law.

Implicitly conceding that the jury's finding on the punitive damages question is not sufficient to show that the "expected or intended injury" exclusion applies, Federal requests the court to determine as a matter of law, based on some of the evidence presented at trial, that bodily injury was substantially certain to follow from MHIA's acts and, therefore, MHIA intended to cause bodily injury. An intent to cause bodily injury, however, cannot be inferred as a matter of law. In fact, as the plaintiffs argued in their motion for summary judgment, the evidence in the record is insufficient to even create an issue of fact as to intent, and the court should rule as a matter of law that MHIA did not intend to cause bodily injury, and grant summary judgment to the plaintiffs.

The "expected or intended injury" exclusion cannot apply unless the insured intended to cause bodily injury. An intent to cause bodily injury may be shown by evidence that the insured subjectively intended to cause bodily injury. In addition, in certain cases, the Wisconsin courts have held that an intent to injure may be inferred by the nature of the insured's acts, regardless of the insured's claimed intent. The first case in which a Wisconsin court inferred an intent to injure is K.A.G. v. Stanford, 148 Wis.2d 158, 434 N.W.2d 790 (Ct.App. 1988), which involved the insured's sexual molestation of a minor. There, the court of appeals held that an intent to cause injury may be inferred as a matter of law where the injury is substantially certain to result from an insured's intentional conduct:

> [F]or purposes of the intentional act exclusion, intent to injure may be inferred where injury is substantially certain to result from an insured's intentional conduct. However, the applicability of this rule is narrow. For it to apply, two requirements must be met. First, the conduct must be intentional. Second, the conduct must be substantially certain to cause injury. If these conditions are met, the rule will only be applied if the degree of certainty that the conduct will cause injury is sufficiently great to justify inferring intent to injure as a matter of law.

K.A.G., 148 Wis.2d at 163.

Federal does not cite any evidence showing that the MHIA employees had a subjective intent to cause bodily injury to the decedents. Federal thereby concedes that there was no subjective intent to cause bodily injury. Instead, Federal contends that an intent to cause bodily injury may be inferred by the nature of MHIA's acts. Federal, however, does not discuss the trial evidence in any detail and

does not explain how the MHIA employees' acts were of such a nature that bodily injury was substantially certain to result from those acts. Therefore, Federal has not established the foundation which would be necessary for the court to infer that the MHIA employees intended to cause bodily injury to the decedents.

"A court may infer intent to injure as a matter of law only in narrow circumstances." Loveridge v. Chartier, 161 Wis.2d 150, 170, 468 N.W.2d 146 (1991). The circumstances in which the courts have inferred an intent to injure are indeed narrow. E.g., N.N. v. Moraine Mutual Ins. Co., 153 Wis.2d 84, 450 N.W.2d 445 (1990) (insured sexually assaulted a 9-year old girl and pleaded guilty to first degree sexual assault); K.A.G. v. Stanford, supra (insured sexually molested a 6-year old girl); Raby v. Moe, supra (insured participated in an armed robbery); Smith v. Keller, 151 Wis.2d 264, 444 N.W.2d 396 (Ct.App. 1989) (insured hit another person in the face with a closed fist); Schwersenska v. American Fam. Mut. Ins. Co., 206 Wis.2d 549, 557 N.W.2d 469 (Ct.App. 1996) (insured conspired with a friend to scare their adversaries with a semi-automatic rifle). This case is not a case in which the facts would permit the court to infer that the insured intended to cause bodily injury. Attempting to liken MHIA's conduct to a sexual assault of a child or hitting someone in the face or using a weapon is preposterous.

In support of its contention that the court should infer that MHIA intended to cause bodily injury to the decedents, Federal relies on small portions of the testimony of three individuals. None of this testimony, however, is sufficient, by itself or in combination, to establish that the MHIA's employees acts on July 14, 1999 were substantially certain to result in bodily injury. The testimony is not even sufficient to create an issue of fact on the matter.

Federal relies on the testimony of Victor Grotlisch. In particular, Federal claims that Grotlisch testified that he was reasonably certain that if wind load calculations were not being done with respect to a roof piece the size of 4R3, "there was a probability that a tragedy would occur." (Emphasis supplied) (Federal's brief, p. 12) These were not Grotlisch's words, however. They were Robert Habush's words framed in a question to which Grotlisch agreed. Also, Federal has misstated the words. Federal uses the word "would" when the actual word was "could." (Tr. 10/23/00, p. 48-49) By finding it necessary to fabricate Grotlisch's testimony by changing a word, Federal has admitted

that the actual testimony is insufficient to support an inference of intent to cause bodily injury. Moreover, the mere statement of a "probability" that a tragedy could occur does not amount to a showing that there was a "substantial certainty" of bodily injury, because it does not state the degree of probability. Federal also relies on Grolisch's testimony that "if he observed winds" in excess of 20 miles per hour, it would be a conscious disregard of the safety of the workers to fail to bring this fact to someone's attention. (Federal's brief, p. 12) Again, these are not Grotlisch's words. Grotlisch was responding to Mr. Habush's question regarding Wayne Noel's observation of winds, not Grotlisch's observation. In any event, this testimony supports the jury's finding that MHIA acted in an intentional disregard of the decedents' rights, but it does not show that bodily injury to the decedents was substantially certain to result from MHIA's acts or omissions.

None of Grotlish's testimony on which Federal relies establishes that there was a substantial certainty that bodily injury would occur. Moreover, these few pieces of testimony cannot be viewed in isolation from the rest of Grotlisch's testimony. Other portions of his testimony must be considered. Grotlisch testified that at about 4:45 p.m. on July 14, 1999, he had a discussion with Allan Watts about the fact that there were no problems with the lift, and it was decided that Grotlisch would go up to the track beam girder where the roof piece would be set, and that at the time of the collapse, Grotlisch was close to the elevator getting ready to go up to the track beam. (Tr. 11/8/00, p. 65, 67-68, 71, 72) The fact that Grotlisch was in the zone of danger indicates that he could not have believed that there was a substantial certainty that injury would occur. Also, he acknowledged that because of the size and shape of the roof piece, a 15 mph wind might make the lift unsafe, but this did not cause him concern. (Tr. 11/8/00, p. 75-76)

In addition to Grotlisch's testimony, Federal attempts to rely on the testimony of Howard Shapiro, who testified that the conduct of MHIA was the most callous and outrageous disregard of workers' safety that he had ever experienced where someone was injured or killed, and he likened it to playing Russian Roulette with someone else's life. This testimony simply supports the jury's finding that MHIA acted in an intentional disregard of the decedents' rights, but it does not show that bodily injury to the decedents was substantially certain to result from MHIA's conduct. The expression

"playing Russian Roulette" is merely a figure of speech. It denotes the taking of a chance; it does not quantify the degree of certainty of injury. Thus, Mr. Shapiro's use of that expression in characterizing MHIA's conduct actually underscores the lack of certainty of bodily injury, not the opposite.

Finally, Federal relies on the following testimony of William Keefe:

> Q And is it -- In your opinion, sir, is it reasonably certain that on July 14th, 1999, in the face of the hazardous wind conditions, that intentionally preceding with that -- that lift on that day was reasonably certain to result in some injury or death to somebody?
>
> MR. WEBER: Object to form.
>
> THE COURT: Overruled. You can answer.
>
> THE WITNESS: Yes, I think making that lift in those winds, there was a good probability that there would be a serious incident in terms of a crane tip-over or controlling the load or injuring a worker, getting struck by the load, all sorts of possibility and probabilities of what could occur making a lift of this size in those winds.

(Tr. 10/26/00, p. 139)

This testimony does not assist Federal because (1) the testimony is not relevant to the question of whether MHIA's acts were of such a nature as to permit the court to infer that bodily injury was intended "from the standpoint of the insured," and (2) it is not sufficient to establish that bodily injury was "substantially certain" to occur. The testimony is not relevant for two reasons.

First, under the language of the "expected or intended injury" exclusion in Federal's policy, the question of whether bodily injury was intended is to be viewed "from the standpoint of the insured." Federal could have written the exclusion differently if it so chose. It did not. Since the exclusion is written in this manner, the question of whether bodily injury was intended must be viewed from the standpoint of the MHIA employees. Keefe's testimony does not address the probability of injury from the standpoint of those employees. Therefore, his testimony is not relevant to the issue of whether the MHIA employees intended to cause bodily injury.

Second, a court is permitted to infer an intent to injure where the facts are such that a reasonable person in the insured's position would believe that an injury was substantially certain to follow from the insured's acts. Pachucki, 89 Wis.2d at 710. In the testimony on which Federal attempts to rely,

Keefe did not state or address what a reasonable person in the position of the MHIA employees would know or believe. Keefe's testimony is expressed in terms of his own personal opinion. Therefore, it does not provide any assistance in the determination of whether intent to injure may be inferred and is, therefore, irrelevant.

Moreover, even if Keefe's testimony did address the issue of intent from the proper standpoint, the portion of Keefe's testimony on which Federal relies is simply not sufficient to permit the court to infer that the MHIA employees intended to cause bodily injury. A full reading of Keefe's testimony shows that he was merely stating that there was a possibility or a chance that someone might be injured. His use of the word "could" demonstrates that he was speculating. His testimony does not establish that there was a substantial certainty that a bodily injury would occur and thus does not support an inference that MHIA intended to cause bodily injury.

III. FEDERAL WAIVED ITS RIGHT TO CONTEND THAT THE BODILY INJURIES TO THE DECEDENTS WERE NOT CAUSED BY AN "OCCURRENCE."

In footnote 7 of its brief, Federal asserts that its policy does not cover the damages the jury awarded because the damages did not arise from an "occurrence." Federal then states:

> Wisconsin courts have treated both the expected or intended exclusion and the policy requirement that damages arise from an occurrence in the same vein. Therefore, in the interest of efficiency, the argument set forth in section III [the section addressing the expected or intended exclusion] applies equally to the "expected or intended" exclusion and the policy requirement that the damages arise from an "occurrence."

The first statement quoted above is not accurate. The courts have applied the same principles to the interpretation of the "expected or intended injury" exclusion and the interpretation of the "occurrence" requirement only when those provisions contain similar language. The definition of "occurrence" in the Federal policy does not contain the same language as the "expected or intended injury" exclusion in the Federal policy. Therefore, Federal's argument with respect to the "expected or intended injury" exclusion does not apply to its claim that the damages were not caused by an "occurrence."

The Federal policy states that the insurance applies to bodily injury only if the bodily injury is caused by an "occurrence." The policy defines "occurrence" as follows: "'Occurrence' means an

accident, including continuous or repeated exposure to substantially the same general harmful conditions." This definition does not require any consideration of whether the "accident" or "occurrence" was expected or intended from the standpoint of the insured. As explained on pages 6-8 of the plaintiffs' brief in support of their motion for summary judgment, when a policy merely requires that the injury or damage be caused by "accident," unqualified by any other requirement, the determination of whether an injury is "caused by accident" must be made from the standpoint of the injured person, rather than from that of the person causing the injury. Tomlin v. State Farm Mut. Auto. Liab. Ins. Co., 95 Wis.2d 215, 219, 290 N.W.2d 285 (1980). Since the definition of "occurrence" in Federal's policy uses the term "accident," the principle of Tomlin is controlling here. The question of whether the bodily injuries to the decedents were caused by an "accident" and thus an "occurrence" must be viewed from the standpoint of the decedents.

Because the Federal policy's definition of "occurrence" does not require consideration of whether bodily injury was expected or intended from the standpoint of the insured, it is different than the policy's "expected or intended injury" exclusion. That exclusion specifically requires consideration of the insured's state of mind. It states: "This insurance does not apply to ... '[b]odily injury' ... expected or intended from the standpoint of the insured." Because the definition of "occurrence" in the Federal policy does not contain the same language as the "expected or intended injury" exclusion in the Federal policy, Federal's argument with respect to the "expected or intended injury" exclusion does not apply to its claim that the injuries were not caused by an "occurrence." By failing to advance any argument as to why the "occurrence" requirement is not satisfied in this case, Federal has waived its right to rely on the "occurrence" provision as precluding coverage. Therefore, the court must rule in the plaintiffs' favor on this issue and hold that the "occurrence" requirement is satisfied.

IV. REQUIRING FEDERAL TO PAY PUNITIVE DAMAGES TO THE PLAINTIFFS WOULD NOT BE AGAINST PUBLIC POLICY.

On pages 14-16 of its brief, Federal attempts to rely on the language of the settlement agreement between the plaintiffs and Indemnity Insurance Company of North America ("IINA") as providing support for an argument that a finding of coverage under Federal's policy would be against

1 STATE OF WISCONSIN *CIRCUIT COURT* MILWAUKEE COUNTY

2 ----------

3 PATRICIA WISCHER, individually, and
as Special Administrator of the
4 ESTATE OF JEFFREY A. WISCHER, deceased,
MARJORIE DeGRAVE, individually, and as
5 Special Administrator of the ESTATE OF
WILLIAM R. DeGRAVE, deceased, and
6 RAMONA DULDE-STARR, individually, and as
Special Administrator of the ESTATE OF
7 JEROME STARR, deceased,

COPY

8 Plaintiffs,

-vs- Case No. 99CV006553

9

MITSUBISHI HEAVY INDUSTRIES OF AMERICA,
10 INC., and LAMPSON INTERNATIONAL, LTD.,

11 Defendants.

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12 August 6, 2001 PROCEEDINGS HELD BEFORE THE
HONORABLE DOMINIC S. AMATO,
13 CIRCUIT JUDGE, BR. 11, PRESIDING

14

Andrea M. Bell
15 Official Reporter

16

TRANSCRIPT OF PROCEEDINGS

17

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18

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10 Company.

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1 if the press gets access to hear what some of the
2 jurors have to say, everyone else in this
3 litigation should be treated fairly. And after
4 talking to all the jurors and they wanted their
5 privacy, they consented to be interviewed by the
6 press, but we did it in this courtroom with all the
7 litigants and their attorneys present. When I say
8 the litigants, those attorneys whose clients wished
9 to be present on that date. And that process did
10 take place. We did not make a record of those
11 proceedings, but everyone was present here to
12 listen to me.
13 And I believe this was somewhat addressed
14 in some of the Court's prior oral bench decisions.
15 But since we're particularly focusing on the
16 punitive damage issue, the media asked one of the
17 jurors, one of the presiding jurors or the juror
18 who was speaking, and the comment made by the
19 jurors were generally a juror was generally
20 representative of how the whole jury felt. They
21 talked about the fact that it was important to be
22 unanimous on everything. But there was a comment
23 on punitive damages. I don't remember who asked
24 the question. It could have been Mr. Lamke, it
25 could have been Bill Graffin. I'm just not sure.

1 But the response on the punitive damage question
2 was that it was approximately $47 million to bill
3 that, and they doubled that amount.
4 But the important comment was that the
5 jury said there was an expectation that when one's
6 husband or wife leaves home and goes to work, that
7 there is an expectation that they will go to work
8 and be reasonably safe in the environment, that
9 they work and come home. And it was deterrence.
10 That's what the jury talked about on the punitive
11 damage issue. They did not talk about, nor was
12 there any dialogue, but they focused on deterrence
13 as opposed to labeling someone as a wrongdoer, or
14 as opposed to labeling someone as a bad guy, or as
15 opposed to focusing in on anything else. I say
16 that because we're all bound by what the jury found
17 in this case. And if there is going to be issues
18 at the appellate level, the appellate court should
19 at least have the benefit of the jury giving
20 further expression on the subject that this was
21 done to deter and the basis for them reaching the
22 $94 million.
23 There is no finding by this jury,
24 contrary to what Mr. Rattan of Travelers argues,
25 that there was intentional conduct. There has

1 never been anything in this record that the conduct
2 on behalf of Mitsubishi or its employees,
3 Mr. Grotlisch, or anyone else, was intentional. No
4 one tried to intentionally hurt anyone.
5 I pulled some jury instructions I want to
6 read a little bit into the record, because it's
7 part of the analysis that the Court has considered
8 in reaching its decision today. Negligence
9 defined, 1005, under the Wisconsin Jury
10 Instructions states in part, "A person is not using
11 ordinary care and is negligent, if the person,
12 without intending to do harm, does something (or
13 fails to do something) that a reasonable person
14 would recognize as creating an unreasonable risk of
15 injury or damage to a person or property." All the
16 negligence instructions address those concepts.
17 In 2001, intentional versus intentional
18 conduct, it says in part, "Intent requires both an
19 intent to do an act and an intent to cause injury
20 by that act. An intent to cause injury exists
21 where the actor actually means to cause injury by
22 his or her conduct or where injury is almost
23 certain to occur from the actor's conduct."
24 There is absolutely no evidence in this
25 record to show that it was the intent of anyone,

1 let alone Mitsubishi, there was never any evidence
2 to indicate that Mitsubishi or anyone intended to
3 cause an injury. There was a finding by the jury
4 on the punitive damage questions that there was an
5 intentional disregard of the rights of the
6 plaintiffs and others.
7 There is a meaningful distinction with
8 the difference between disregarding the rights of
9 others, intentionally disregarding the rights of
10 others, such as, the safety of the workplace
11 vis-a-vis an intent to injure a particular person.
12 Someone may be approaching an intersection on a
13 busy day downtown Milwaukee on 6th and Wells
14 driving his or her vehicle and makes a purposeful
15 decision and intends to go through that
16 intersection feeling that he or she can get through
17 that intersection, even though the light is
18 changing from green to amber to red, and making
19 that choice decision that they were going to
20 proceed through that intersection without intending
21 to get into an accident or hurting anybody or
22 injuring anybody. Pure rules of the road, safety
23 standards, can be in negligent cases, not just
24 automobile accident cases, and just about any area
25 that tort negligence covers, from flying planes to

1 construction, the whole gamut.

2 People may do things in a negligent way,
3 they may intend to do a certain act without
4 intending to actually injure or hurt someone, and
5 that's the standard of negligence, care without
6 intending to do harm, does something or fails to do
7 something that a reasonable person would recognize
8 as creating an unreasonable risk of injury or
9 damage to a person or property.

10 That is the negligence the jury found in
11 this case, and the jury also found that there was
12 just an intentional disregard with regard to the
13 rights of the plaintiff and others to have a safe
14 environment to work in. It's just that simple.

15 Some of the rules of law, and many of
16 them have been cited most recently by the parties
17 in their briefs on summary judgment, and basically
18 everybody has moved for summary judgment or some
19 aspect of it, except Tokio Marine asking to be
20 treated fairly. Everybody has moved in that venue
21 and has talked about insurance, the laws of
22 insurance contracts and the applicable doctrines
23 that apply. An insurer must specifically exclude
24 punitive damages and may not rely on the intended
25 or expected exclusion in the definition of

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LEGISLATION RELATING TO LIABILITY AND INSURANCE ENACTED DURING THE 1995-96 LEGISLATIVE SESSION

Information Memorandum 96-25

Wisconsin Legislative Council Staff
st Main Street, Suite 401
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July 26, 1996

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Information Memorandum 96-25*

LEGISLATION RELATING TO LIABILITY AND INSURANCE ENACTED DURING THE 1995-96 LEGISLATIVE SESSION

INTRODUCTION

This Information Memorandum describes selected legislation enacted into law during the 1995-96 Legislative Session that relates to liability and insurance laws.

The Information Memorandum presents a detailed background and description of 1995 Wisconsin Act 10, relating to medical malpractice, Act 17, relating to comparative negligence and punitive damages, Act 21, relating to notification of the availability of underinsured motorist coverage, stacking of motor vehicle liability insurance coverage and drive-other-car exclusions under motor vehicle policies, and Act 295, relating to sale of burial agreements funded with life insurance policies.

The Information Memorandum also provides a summary of 1995 Wisconsin Acts 6, 13, 223, 256, 260, 441 and 447, relating to liability, and Acts 177, 259, 371, 453, 462 and 463, relating to insurance.

Copies of all Acts referred to in this Information Memorandum may be obtained from the Documents Room, Lower Level, One East Main Street, Madison, Wisconsin 53702; telephone: (608) 266-2400.

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* This Information Memorandum was prepared by Gordon A. Anderson, Senior Staff Attorney, Legislative Council Staff.

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I. LEGISLATION RELATING TO LIABILITY LAW

A. 1995 WISCONSIN ACT 10, RELATING TO MEDICAL MALPRACTICE

1. Background

a. Future Medical Expenses

In 1975, the Legislature enacted a medical malpractice reform law [Ch. 37, Laws of 1975] which contained provisions relating to future medical expenses. The law provided that if a settlement, panel award or court judgment was made under ch. 655, Stats., and provided for future medical expense payments in excess of $25,000, the portion of future medical expense payments in excess of $25,000 would be paid into the Patients Compensation Fund (the "Fund"). The Commissioner of Insurance would manage and disburse the money. The payments would be made until either the amount in the Fund for that patient was exhausted or the patient died. If the patient died before the amount was exhausted, the remaining amount would be retained by the Fund.

As part of the malpractice legislation enacted in 1986 (1985 Wisconsin Act 340), this provision was "sunsetted" effective on June 14, 1986.

b. Noneconomic Damages

1985 Wisconsin Act 340 created a limitation on noneconomic damages. The amount of noneconomic damages recoverable under ch. 655, Stats., for acts or omissions of a health care provider (physicians, nurses, anesthetists and hospitals) for any action ***filed*** on or after June 14, 1986 and before January 1, 1991 would be subject to a $1,000,000 limit. The limit was required to be adjusted each year by the Director of State Courts to reflect changes in the Consumer Price Index. The limit expired on January 1, 1991.

c. Periodic Payments of Large Claims

Under Ch. 37, Laws of 1975, if the Fund incurred liability exceeding $1,000,000 to any person under a single claim, the Fund would pay not more than $500,000 per year. The payments would be made until the claim is paid in full and any attorney fees in connection with the claim would be similarly prorated. No interest could be paid by the Fund on the unpaid portion of the claim. 1985 Wisconsin Act 340 made the periodic payment provision applicable only to settlements, panel awards and judgments entered into or rendered before June 14, 1986.

d. Wrongful Death

Under current law, if a wrongful death action is brought against anyone, the amount recoverable for the loss of "society and companionship" is limited to $150,000. [This amount was increased from $50,000 to $150,000 by 1991 Wisconsin Act 308, effective May 16, 1992.]

In *Rineck v. Johnson*, 155 Wis. 2d 659, 456 N.W.2d 336 (1990), *cert. denied*, 498 U.S. 1068 (1991), the Wisconsin Supreme Court ruled that the prior $50,000 limit under the wrongful death statute was inapplicable to actions involving medical malpractice because the $1,000,000 limit on noneconomic damages in medical malpractice actions created by the Legislature in 1986 had superseded the wrongful death limit.

Subsequently, in *Jelinek v. St. Paul Fire and Casualty Insurance Company*, 182 Wis. 2d 1, 512 N.W.2d 764 (1994), the Court ruled that after the limit on noneconomic damages expired on January 1, 1991, the right to recovery for loss of society and companionship in a medical malpractice action that involves death is ***unlimited***.

2. Description of Act 10

a. Future Medical Expenses

The Act provides that if a settlement or judgment under ch. 655, Stats., resulting from an act or omission that occurs on or after May 25, 1995, provides for future medical expense payments in excess of ***$100,000***, the portion in excess of $100,000, after deducting the "costs of collection that are attributable to" those future medical expenses, including "attorneys' fees reduced to present value" will be paid into the Fund and disbursed by the Commissioner under administrative rules promulgated by the Commissioner.

The periodic payment of future medical expenses will continue until the account is exhausted or the patient dies.

Act 10 creates an appropriation for the interest earned by the Fund that is attributable to amounts for future medical expense payments that are held by the Fund. Interest earnings will be credited to each individual's future medical expense payment account.

Also, Act 10 requires the Commissioner to include in the rule provisions for managing and disbursing future medical expense payments, a provision for the creation of separate accounts for each person and for crediting each person's account with a proportionate share of any interest earned by the Fund based on the account's proportionate share of the total Fund.

b. Noneconomic Damages

The Act creates a new limitation on noneconomic damages for actions against ***all*** health care providers that will apply to acts or omissions that ***occur*** on or after the effective date of the Bill. The new limit is ***$350,000***. The Act does not define "health care provider." Thus, the meaning of the term will be left for court interpretation.

c. Periodic Payments of Large Claims

The Act makes the periodic payment provision for Fund liability of $1,000,000 or more applicable to acts or omissions occurring on or after May 25, 1995. After deducting the costs of

collection, including "attorneys' fees reduced to present value," attributable to the "remaining liability" (the amount remaining after deducting future medical expenses), the Fund will pay the ***full amount*** of the medical expenses. Also, the Fund will make payments each year, in an amount determined by the Fund not to exceed $500,000, that will pay the remaining liability over the person's anticipated lifetime or until that remaining liability is paid in full.

The Act permits the Fund to pay the remaining liability in a single lump sum payment, rather than in periodic payments upon the death of an injured person if the person's death occurs before the full amount of remaining liability has been paid.

d. Wrongful Death

The Act provides that damages recoverable in wrongful death actions against health care providers, and employes of health care providers acting within the scope of their employment and providing health care services, are subject to the provisions of s. 895.04 (4), Stats., the $150,000 wrongful death limit for loss of society and companionship. It further provides that if damages in excess of the limit are found, the court will make any necessary reductions for contributory negligence and award the lesser of the reduced amount or the limit under s. 895.04 (4), Stats.

The Act provides that medical malpractice actions will continue to be subject to statutory rules on contributory negligence contained in s. 895.045, Stats.

e. Other Provisions

The Act requires the Commissioner to submit a report to the Legislature within two years after May 25, 1995 and an additional report within two years thereafter. The report will compare data for the year before the effective date of the Act with data for the years after the effective date, to evaluate the effects that the Act has on the number of health care providers practicing in Wisconsin, the fees that health care providers pay to the Fund and the premiums that health care providers pay for health care liability insurance.

The Act also allows evidence of compensation for a bodily injury of the plaintiff to be admitted in an action for medical malpractice. The compensation must have been from sources other than the defendant and be for the purpose of compensating the plaintiff for the injury which is the subject of the action. The provision states that it does not limit the rights of persons who have claims based upon subrogation.

The Act became effective on May 25, 1995.

B. 1995 WISCONSIN ACT 17, RELATING TO COMPARATIVE NEGLIGENCE AND PUNITIVE DAMAGES

1. Background

a. Comparative Negligence

In Wisconsin, the comparative negligence rule, as formulated prior to Act 17, was that if the contributory negligence of the claimant is "not greater" than the negligence of the party against whom recovery is sought, recovery is not barred; however, any damages allowed to the claimant are diminished in proportion to the amount of negligence attributable to the claimant [s. 895.045, Stats.]. Using the simple example of a case involving one plaintiff and one defendant, if the contributory negligence of the plaintiff was found to be ***greater*** than 50%, recovery was barred. If contributory negligence of the plaintiff was found to be 50% ***or less***, recovery was not barred, and any damages allowed were ***reduced*** by the percentage of ***the plaintiff's*** contributory negligence as determined by the finder of fact (a jury or judge).

Generally, the negligence of the parties was compared individually for purposes of determining whether liability exists [*Mariuzza v. Kenower*, 68 Wis. 2d 321, 228 N.W.2d 702 (1975)].

Under the comparative negligence law, as interpreted by the Wisconsin Supreme Court, the rule of joint and several liability applied whenever ***two or more persons*** have caused the plaintiff's injuries and the acts causing the injuries are ***not*** separate acts (i.e., the defendants are "joint tortfeasors"). Under the rule, each defendant ***who is liable*** is liable ***individually*** for the ***entire*** damage which the plaintiff is entitled to recover (although this does not entitle the plaintiff to double recovery).

An example of the operation of the joint and several liability rule follows. Assume that the plaintiff is 5% negligent, defendant "A" is 20% negligent and defendant "B" is 75% negligent. Under the comparative negligent statute, the plaintiff is entitled to 95% of any damages awarded and each defendant is liable, because each defendant's negligence is ***greater than*** the ***plaintiffs***. Under the rule of joint and several liability, both defendant "A" and defendant "B" are ***individually*** liable for the entire amount, or 95% of the damages. If defendant "B" is "judgment proof" (does not have the necessary available assets), defendant "A" pays the entire amount, or if defendant "A" is judgment proof, defendant "B" pays the entire amount. [Note that the defendants, under the theory of ***contribution***, may ultimately end up paying only that proportion of the plaintiff's damages corresponding to their respective negligence, if each has sufficient assets to do so.]

A variation of the operation of the rule of joint and several liability occurs when only one of two defendants is liable to the plaintiff for damages. Assume that the plaintiff is 30% negligent, defendant "A" is 45% negligent and defendant "B" is 25% negligent. In this factual setting, the plaintiff is entitled to 70% of the damages awarded (100% minus 30%); defendant "B" is not liable to the plaintiff for any damages because the plaintiff's negligence (30%) is

greater than defendant "B"'s (25%). The result is that defendant "A" is ***individually*** ("severally") liable for the entire amount of the damages to which the plaintiff is entitled.

b. Punitive Damages

Prior to Wisconsin Act 17, in Wisconsin, common law allowed punitive damages to be awarded if the defendant acted either ***maliciously or with a wanton, wilful or reckless disregard*** of the plaintiff's rights [*Kink v. Combs*, 28 Wis. 2d 65, 135 N.W.2d 789 (1965)]. The plaintiff must prove that the defendant so acted by presenting evidence that is "clear and convincing." The "clear and convincing" evidentiary standard (or "burden of proof") falls between the lower "preponderance of the evidence" standard applicable to ***civil*** actions and the higher "beyond-a-reasonable-doubt" standard required in ***criminal*** actions; *Wangen v. Ford Motor Company*, 97 Wis. 2d 260, 294 N.W.2d 437 (1980). Thus, to receive punitive damages, the plaintiff must both show that the defendant's conduct was beyond mere negligence and meet a higher standard of proof than is ordinarily required in civil actions.

In cases tried before a jury where punitive damages have been claimed, the jury: (1) determines whether punitive damages are to be awarded; and (2) assesses the amount of punitive damages to be awarded. However, punitive damages are not a matter of right; even if the plaintiff meets the burden of proof, the jury is not required to award punitive damages. The jury's verdict to award and assess punitive damages must be supported by 5/6ths of the jurors.

In assessing the amount of punitive damages to be awarded, the jury could consider the defendant's wealth, because punitive damages, to accomplish the damages' purpose, may be proportionate to the defendant's ability to pay [*Thomas v. Williams*, 139 Wis. 467, 121 N.W. 148 (1909)]. However, where there are two or more defendants, evidence of the wealth of the defendants is inadmissible, because of the possible prejudice to, and resultant high punitive damage award against, a defendant whose wealth is disproportionately low [*Ogodziski v. Gara*, 173 Wis. 380, 181 N.W. 231 (1921)]. Other appropriate factors for consideration in determining the amount of punitive damages to be awarded include: "...the grievousness of defendant's acts; the degree of malicious intention; [and] the potential damage which might have been done by such acts as well as the actual damage..." (citations omitted) [*Fahrenberg v. Tengel*, 96 Wis. 2d 211, 291 N.W.2d 516 (1980)].

A jury may not award punitive damages unless compensatory damages have been awarded. Further, a court may find an award of punitive damages excessive, if it finds that the award is more than necessary to serve its purposes (punishment and deterrence) or if the award inflicts a penalty or burden on a defendant which is disproportionate to the wrongdoing [*Fahrenberg*, at p. 234].

2. Description of Act 17

a. Comparative Negligence

Act 17 modifies the comparative negligence law as follows:

(1) The negligence of the plaintiff must be measured separately against the negligence of each party found to be causally negligent [s. 895.045 (1), Stats., as amended by the Act].

(2) The liability of each party found to be causally negligent whose percentage of causal negligence is ***less than 51%*** is limited to the percentage of the total causal negligence attributed to that party. A party found to be causally negligent whose percentage of causal negligence is ***51% or more*** will continue to be jointly and severally liable for the damages allowed [s. 895.045 (1), Stats., as amended by the Act].

(3) If two or more parties act in accordance with a common scheme or plan, those parties will remain jointly and severally liable for all damages resulting from that action, except as previously noted for punitive damages [s. 895.045 (2), Stats., as created by the Act].

The provisions are effective for actions commenced on or after May 17, 1995.

b. Punitive Damages

Act 17 makes the following changes in punitive damages:

(1) A plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted ***maliciously*** toward the plaintiff or ***in an intentional disregard*** of the rights of the plaintiff. [Previously, the defendant must have acted maliciously or with a wanton, a wilful or reckless disregard of the rights or interests of the plaintiff.]

(2) If the plaintiff has established a legally sufficient (a *prima facie*) case for the allowance of punitive damages:

(a) The plaintiff may introduce evidence of the wealth of the plaintiff; and

(b) The judge is required to submit to the jury a special verdict as to punitive damages or, if the case is tried to the court, the judge is required to issue a special verdict for punitive damages.

(3) The rule of joint and several liability (discussed in the previous section of this memorandum) does not apply to punitive damages.

(4) The new provisions on punitive damages does not apply to awards or double damages or triple damages, or to the award of exemplary damages under:

(a) Section 46.90 (6) (c), Stats., for violation of confidentiality of records relating to elder abuse.

(b) Section 51.30 (9), Stats., for violation of confidentiality of records relating to persons who are receiving or have received services for mental illness, developmental disabilities, alcoholism or drug dependency.

(c) Section 51.61 (7), Stats., for violations of patients' rights of persons receiving services for mental illness, developmental disabilities, alcoholism or drug dependency.

(d) Section 103.96 (2), Stats., for unlawful retaliation against migrant workers who exercise their rights under federal or state laws and regulations.

(e) Section 153.85, Stats., for violation of confidentiality of patient information obtained by the Office of Health Care Information.

(f) Section 252.14 (4), Stats., for discrimination against persons with Acquired Immunodeficiency Syndrome or positive tests for the presence of HIV (human immunodeficiency virus).

(g) Section 252.15 (8) (a), Stats., for violation of restrictions on use or reporting of a test for HIV.

(h) Section 943.245 (2) and (3), Stats., for civil actions for the issuance of worthless checks.

(i) Section 943.51 (2) and (3), Stats., for civil actions for retail theft.

These provisions also became effective for actions filed on or after May 17, 1995.

C. OTHER LIABILITY-RELATED LEGISLATION

1. ***1995 Wisconsin Act 6*** extends to volunteer fire companies organized under ch. 181, Stats. (nonstock, nonprofit corporations), the limits on liability currently provided to volunteer fire companies organized under ch. 213, Stats., and to political corporations, government subdivisions and agencies and the officers, officials, agents or employes of these entities. The amount recoverable may not exceed $25,000. The Act applies to actions commenced on or after May 6, 1995.

2. ***1995 Wisconsin Act 13*** extends the immunity for civil liability for regional emergency response teams and members of the team to a local agency that contracts with the State Emergency Response Board to provide for a regional emergency response team, the county, city, village or town that contracts to provide the emergency response team to the county and a local emergency planning committee that receives a grant under s. 166.21, Stats. The Act applies to acts or omissions occurring on or after May 31, 1995.

3. ***1995 Wisconsin Act 223*** codifies a decision by the Wisconsin Court of Appeals in *Moua v. Northern States Power Company*, 157 Wis. 2d 177 (1990), in which the Court of Appeals declared that the statute granting immunity to recreational property owners for injuries occurring on the property is ambiguous because it is unclear whether the statute includes death. The Court concluded that the term "death" was included an "injury." The Act codified the

decision in the case by granting the owner of recreational property immunity from liability for the death of the person if the death occurs while the person is engaged in a recreational activity on the property. The Act became effective on May 1, 1996.

4. ***1995 Wisconsin Act 256*** creates a civil liability exemption for equine activities. Under the Act, a person, including an equine activity sponsor or an equine professional, is immune from civil liability for acts or omissions relating to his or her participation in equine activities if the person participating in the equine activity is injured or killed as a result of an inherent risk of equine activities. Equine activities involve "donkeys, hinnies, horses, mules and ponies" and includes, for example, shows, fairs, competitions, performances or parades. The Act applies to activities occurring on or after May 4, 1996.

5. ***1995 Wisconsin Act 260***, relating to limiting the liability of trustees, directors' officers and volunteers of religious organizations, provides the following:

a. It protects directors and officers of religious organizations, as defined in the Act, from personal liability to the religious organization, its members or creditors, or any other person for breach of, or failure to perform, any duty resulting solely from his or her status as a director or officer, except in: (1) cases of wilful misconduct or knowing criminal conduct; and (2) cases where the director or officer derived an improper personal profit from the breach or failure.

b. It permits directors and officers of religious organizations, in discharging duties to the organization, to rely on information from specified sources when the director or officer believes in good faith that the source of the information is reliable.

c. It protects volunteers of religious organizations from personal liability arising from any act or omission as a volunteer, unless the act or omission constitutes knowing criminal misconduct or wilful misconduct. The immunity does not apply to various specified proceedings and claims.

The Act became effective for occurrences on or after May 7, 1996.

6. ***1995 Wisconsin Act 441*** creates a civil liability exemption for an employer who, in good faith, provides a reference concerning a current or former employe. Under the Act, an employer who, on the request of an employe or prospective employer of the employe provides a reference to that prospective employer is presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, is immune from all civil liability that may result from providing the reference. The presumption of good faith may be rebutted only by a showing by clear and convincing evidence, that the employer knowingly provided false information in the reference, that the employer made the reference maliciously or that the employer made the reference in violation of s. 111.322, Stats., relating to employment discrimination. The Act first applies to a reference to a prospective employer on or after July 9, 1996.

7. ***1995 Wisconsin Act 447*** specifies the liability of contact sport participants. It states that a participant in a recreational activity that involves physical contact between persons in a sport involving amateur teams, including teams in recreational, municipal, high school and college leagues may be liable for an injury inflicted on another participant during and as part of that sport in a tort action only if the participant who caused the injury acted recklessly or with intent to cause injury.

Furthermore, unless a professional league establishes in a clear policy a different standard, a participant in an athletic activity that involves physical contact between persons in a sport involving professional teams in a professional league may be liable for an injury inflicted on another participant during and as part of that sport in a tort action only if the participant who caused the injury acted recklessly or with intent to cause injury.

The Act first applies to injuries received on or after July 9, 1996.

II. INSURANCE LEGISLATION

A. 1995 WISCONSIN ACT 21, RELATING TO NOTIFICATION OF THE AVAILABILITY OF UNDERINSURED MOTORIST COVERAGE, STACKING OF MOTOR VEHICLE INSURANCE COVERAGE AND DRIVE-OTHER-CAR EXCLUSIONS UNDER MOTOR VEHICLE POLICIES

1. Background

Prior to Act 21, s. 632.32 (4), Stats., provided, in part:

> ...Every policy of insurance subject to this section that insures with respect to any motor vehicle registered or principally garaged in this state against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall contain therein or supplemental thereto provisions approved by the commissioner:
>
> (a) *Uninsured motorist.* 1. For the protection of persons injured who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death resulting therefrom, in limits of at least $25,000 per person and $50,000 per accident. The insurer may increase the coverage limits provided under this paragraph up to the bodily liability limits provided in the policy....

An uninsured motor vehicle includes: (a) an insured motor vehicle if before or after the accident the liability insurer of a motor vehicle is declared insolvent by a court of competent jurisdiction; and (b) an unidentified motor vehicle involved in a hit and run accident [s. 632.32 (4) (a) 2, Stats.].

Thus, under s. 632.32 (4), Stats., every motor vehicle policy that covers a motor vehicle registered or principally garaged in this state must contain ***uninsured motorist coverage***. Also, the policy may not provide more coverage for injuries caused by uninsured drivers who injure the driver or passengers in the insured motor vehicle than it provides in liability coverage for persons injured ***by*** the driver of the insured motor vehicle.

Underinsured motorist coverage applies to situations in which injury is caused by a vehicle which is insured. While uninsured motorist coverage requires that there can be ***no insurance*** that covers the party responsible for the accident, underinsured motorist coverage is applicable if the party causing injury has insurance, but the limits are below those provided by the underinsured motorist coverage. There is no requirement that underinsured motorist coverage be included in a motor vehicle policy.

a. Uninsured Motorist Coverage

In *Leatherman v. American Family Mutual Insurance Company*, 52 Wis. 2d 644, 190 N.W.2d 904 (1971), a passenger involved in a 1965 accident with an uninsured motorist recovered from the host driver's uninsured motorist coverage. He then attempted to recover from his own insurer under his uninsured motorist coverage. His coverage contained a "reducing clause" through which any recovery under the uninsured motorist coverage of his policy would be reduced by the amount of uninsured motorist coverage paid by the driver's policy. The Wisconsin Supreme Court upheld the reducing clause and stated that it was not contrary to public policy.

Chapter 486, Laws of 1965, effective for policies issued or renewed on or after January 1, 1966, required insurers to ***offer*** uninsured motorist coverage, but the insured had the right to reject the coverage. The same conclusion as in *Leatherman* was reached by the Supreme Court for an accident occurring after ch. 486 became effective [*Scheer v. Drobach*, 53 Wis. 2d 308, 193 N.W.2d 14 (1972)]. Also, in an accident where an insured was covered by two policies that had uninsured motorist coverage, the coverage of the two policies could not be "stacked" [*Nelson v. Employers Mutual Casualty Company*, 63 Wis. 2d 558, 217 N.W.2d 670 (1974).

Subsequently, Ch. 28, Laws of 1971, deleted the right of the insured to reject uninsured motorist coverage, effective on November 7, 1971.

In the 1975 Session, Ch. 375, Laws of 1975, a product of the Legislative Council's Insurance Law Revision Committee, created s. 631.43 (1), Stats.

Section 631.43 (1), Stats., provided:

> When 2 or more policies promise to indemnify an insured against the same loss, no "other insurance" provisions of the policy may reduce the aggregate protection of the insured below the lesser of the actual insured loss suffered by the insured or the total indemnification promised by the policies if there were no "other insurance" provisions....

"Stacking" first became applicable to uninsured motorist coverage through *Landvatter v. Globe Security Insurance Company*, 100 Wis. 2d 21, 300 N.W.2d 875 (Ct. App. 1980). In *Landvatter*, the plaintiff was injured while a passenger in a vehicle that was involved in an accident with an uninsured motorist. Her damages exceeded $45,000. The vehicle in which she was riding was insured and the company provided $15,000 of uninsured motorist coverage. It paid that amount. The plaintiff was also insured under a policy issued by another insurance company which provided $30,000 of uninsured motorist benefits. That policy contained a "reducing clause." Under that clause, the amount payable by that insurance company would be reduced by amounts paid by the other insurance company's uninsured motorist coverage. In this case, since the second company's insurance coverage limit was $30,000, payment would be "reduced" by the $15,000 previously paid by the other insurance company.

The Court of Appeals held that s. 631.43 (1), Stats., must be read together with s. 632.32 (3) to permit the "stacking" of uninsured motorist coverage. Thus, the $30,000 of uninsured motorist coverage would be "stacked" on top of the $15,000 coverage previously paid by the first insurance company. The Court held that the "reducing clause" was prohibited under the statute.

Subsequent court opinions extended the prohibition against "reducing clauses" to permit stacking in a situation: (1) in which an individual was covered by three separate policies, all of which were issued by the same insurance company [*Tahtinen v. MSI Insurance Company*, 122 Wis. 2d 158, 361 N.W. 673 (1985)]; and (2) in which the plaintiff paid separate premiums for uninsured motorist coverage on two automobiles that were covered by a single automobile insurance policy [*Burns v. Milwaukee Mutual Insurance Co.*, 121 Wis. 2d 574, 360 N.W.2d 61 (Ct. App. 1984)].

In *Welch v. State Farm Mutual Auto Insurance Company*, 122 Wis. 2d 72, 361 N.W.2d 680 (1985), the Wisconsin Supreme Court concluded that a provision in an uninsured motorist section of an automobile policy that excluded coverage for accidents involving motor vehicles owned by the insured ***but not included in the policy*** was prohibited by s. 631.43 (1), Stats. [Such a provision is referred to as a "drive-other-car" exclusion.] The case involved an accident in which the Welch family was riding in a vehicle which had uninsured motorist coverage of $50,000 for each person insured and $100,000 for all injuries arising out of one accident. A second policy covered Mr. Welch's truck and provided identical uninsured motorist coverage. The insurance company paid its policy limits under the uninsured motorist coverage of the policy covering the first vehicle. The Welch's attempted to obtain payment under the uninsured motorist coverage contained in the policy that covered the truck. The insurance company alleged that the policy terms covering the truck excluded from uninsured motorist coverage any bodily injury an insured sustains while occupying a motor vehicle owned by the insured or resident of the same household if such vehicle was not the motor vehicle set forth in the policy. The Court held that the "drive-other-car" exclusion which served to prohibit stacking of uninsured motorist benefits was prohibited by s. 631.43 (1), Stats. The Court stated, in part:

> We conclude the question is not what this court believes ought to be public policy; that question has been resolved by the legislature. Despite the dissent's protestations to the contrary, we conclude that the legislature clearly and unambiguously expressed its intent to avoid reducing clauses which attempt to prohibit the stacking of multiple policy coverages of uninsured motorist protection issued by the same insurer to the same insured through the express enactment of Wisconsin's stacking statute [*Welch v. State Farm Mutual Auto Insurance Company*, 361 N.W.2d 680, 685].

In *Carrington v. St. Paul Fire and Marine Insurance Company*, 169 Wis. 2d 211, 485 N.W.2d 267 (1992), the Court held that a provision in an uninsured motorist policy which limited maximum coverage for all damages resulting from a single accident, regardless of the number of covered automobiles or protected persons involved, violated the "other insurance"

provisions of s. 631.43 (1), Stats., and was unenforceable. This decision was based on the determination by the Court that where the insurer had collected separate premiums for each of the insured's covered automobiles, the insurer had, in effect, issued separate policies for each automobile and the insured could not lawfully be prohibited from stacking insurance coverage. The Court found that the policy listed each automobile separately, indicated the level of coverage for each and indicated by a checked box that each vehicle had both liability and uninsured motorist coverage. The Court stated that the policy itself indicated that the uninsured motorist coverage attached to each vehicle separately:

> ...it is reasonable for the insured to conclude that the additional premiums applied to uninsured motorist coverage.... In the absence of an express statement in the policy that a single premium is charged for uninsured motorist coverage for all covered autos, we hold that it is reasonable for a named insured to expect the coverage is stackable... [*Carrington*, 485 N.W.2d 267, 273].

b. Underinsured Motorist Coverage

Underinsured motorist coverage is a comparatively recent development and is not required to be purchased under Wisconsin insurance law.

The Wisconsin Supreme Court held, in *Kaun v. Industrial Fire and Casualty Insurance Company*, 148 Wis. 2d 662, 436 N.W.2d 321 (1989), that "the amounts payable" from an ***underinsured*** motorist provision are to be measured against the insured's total damages. Although a "reducing clause" is permissible under s. 631.43 (1), Stats., the Court held that the reducing clause will reduce the underinsured motorist benefits by subtracting from the ***total damages sustained by the insured*** the amount received by the insured from the underinsured driver's liability policy. Thus, where an individual had $50,000 of underinsured motorist coverage, the $15,000 of coverage provided by another insurer would not serve to reduce the amounts payable under the underinsured motorist policy. If it had been permitted, the insurer would have paid only $35,000 ($50,000 minus $15,000). The Court stated in such case the insurer would not be providing the $50,000 of underinsured motorist benefits it indicated it would pay on the declarations page of its policy.

In *Wood v. American Family Mutual Insurance Company*, 148 Wis. 2d 639, 436 N.W.2d 594 (1989), the Court held that s. 631.43 (1), Stats., applies not just to coverages ***mandated by law***, but applies to underinsured motorist coverage. The Court determined that the ability to "stack" insurance coverage does not depend on whether or not the insurance coverage is statutorily mandated. It held that the ability to stack insurance coverage depends solely "on whether the two or more policies at issue promise to indemnify the insured against the same loss." The Court held that a "drive-other-car" exclusion contained in the underinsured motorist policy is invalid and unenforceable under s. 631.43 (1), Stats., and that the insured was entitled to "stack" the underinsured motorist coverage on his two cars. Furthermore, although the Court agreed that the "reducing clause" in the underinsured motorist provisions of each policy was valid and was

not prohibited by s. 631.43 (1), Stats., it found that the language in the reducing clause in each underinsured motorist policy was ambiguous.

The Court determined that because $100,000 of underinsured motorist coverage was provided in each policy issued and the injured party had suffered damages in excess of $225,000, that the insurer would not be allowed to offset its $100,000 liability to the respondent under each policy by the $25,000 paid by the insurance carrier for the negligent party. The Court stated:

> In conclusion, we hold that the "drive-other-car" exclusion in a UIM [underinsured motorist] provision is invalid and unenforceable under s. 631.43 (1), Stats. In addition, we hold that the reducing clause in the UIM provision of each insurance policy at issue in this case does not reduce UIM benefits recoverable under the policy's limit by the amount received by the insured from the underinsured driver's liability policy. Rather, the "amounts payable" from each UIM provision in this case are measured against the insured's total damages, and the reducing clauses reduce UIM benefits by subtracting from the total damages sustained by the insured the amount received by the insured from the underinsured driver's liability policy [*Wood*, 436 N.W.2d 594, 601].

In *West Bend Mutual Ins. Co. v. Playman*, 171 Wis. 2d 37, 489 N.W.2d 915 (1992), the Wisconsin Supreme Court stated that: (1) *Wood v. American Family Insurance Company* (discussed above) had abolished the distinction between uninsured and underinsured coverage and that s. 631.43, Stats., applies to both types of coverage; and (2) the holding in *Carrington v. St. Paul Marine Insurance Co.* (discussed at page 4) would be extended to cases involving stacking of underinsured motorist coverage. The decision invalidated a provision in an insurance policy that attempted to limit recovery to the amount of underinsured coverage for ***one*** vehicle, although three vehicles were insured under the policy with a separate premium for each vehicle.

2. Description of 1995 Wisconsin Act 21

a. "Stacking"

Act 21 amends s. 631.43 (3), Stats., to provide that the prohibition contained in s. 631.43 (1), Stats., does not affect an insurer's right to limit or reduce coverages as provided under s. 632.32 (5) (f) to (j), Stats., as created by the Act.

Section 632.32 (5) (f), Stats., as created by the Act, permits motor vehicle insurance policies to prohibit "stacking" of ***uninsured or underinsured*** motorist coverage or any other coverage, such as medical payments coverage, provided under the policies.

Section 632.32 (5) (g), Stats., as created by the Act, authorizes a policy to provide that, for a person who is injured or killed in an accident but who is not using a motor vehicle at the time of the accident, the maximum amount of uninsured or underinsured motorist coverage that

will be available to that person is the ***highest single limit of uninsured or underinsured coverage, whichever is applicable, for any motor vehicle*** with respect to which the person is insured. For example, a pedestrian will not be able to accumulate the coverages applicable to a series of vehicles.

Under s. 632.32 (5) (h), Stats., as created by the Act, a policy may limit coverage for medical payments for a person who was not using a motor vehicle at the time of the accident to the ***highest single limit of medical payments coverage for any motor vehicle*** with respect to which the person is insured.

Also, s. 632.32 (5) (i), Stats., as created by the Act, permits motor vehicle insurance policies to reduce the limit that is payable for uninsured or underinsured motorist coverage for bodily injury or death by payments received from other sources, such as the amounts paid by a person who is legally responsible for the bodily injury or death for which the payment is made, the amounts paid or payable under the worker's compensation law and by amounts paid or payable under a disability benefits law.

The Act also reversed the court decisions which have invalidated "drive-other-car" exclusions by providing in s. 632.32 (5) (j), Stats., that a policy ***may exclude coverage*** for losses resulting from the use of a vehicle that: (1) is owned by the named insured or a family member residing with the named insured; (2) is not described in the policy under which the claim is made; and (3) is not covered under the terms of the policy as a newly acquired or replacement motor vehicle.

The provisions of s. 632.32 (4) (a) 1., Stats., that permitted insurers to offer ***uninsured*** motorist coverage only up to the bodily injury liability limits provided in the motor vehicle insurance policy was deleted by the Act. Under the Act, a person will be able to purchase as much uninsured motorist coverage as he or she wishes. [No similar change was necessary for underinsured motorist coverage provisions since there was no restriction on the amount of underinsured motorist coverage that a person may purchase.]

b. Offers of Underinsured Motorist Coverage

Section 632.32 (4m), Stats., as created by the Act, requires motor vehicle insurers to ***offer*** underinsured motorist coverage to persons purchasing motor vehicle insurance policies or renewing such policies.

An insurer that writes motor vehicle insurance coverage must provide a written notice of the availability of underinsured motorist coverage, including a brief description of the coverage, to ***one person*** who is insured under each new insurance policy that ***goes into effect*** after the effective date of the provision, if that policy does not include underinsured motorist coverage. This notice is required to be provided only one time and in conjunction with the delivery of the policy.

Also, an insurer must provide a written notice of the availability of underinsured motorist coverage, including a brief description of the coverage, to one insured under each insurance

policy ***that is in effect*** on the effective date of the provision, if that policy does not include underinsured motorist coverage. The insurer must provide the notice only one time and in conjunction with the notice of the first renewal of each policy that occurs at least 120 days after the effective date of the provision.

The acceptance or rejection of underinsured motorist coverage by a person after he or she receives notice need not be in writing. Further, the absence of a premium payment for underinsured motorist coverage is "conclusive proof" that the person has rejected such coverage. The rejection of the coverage by the person who is notified applies to ***all persons*** who may be insured under the policy, including any renewal of the policy.

If a person rejects underinsured motorist coverage after being notified, the insurer is not required to provide the coverage to that person under a policy that is renewed by that insurer unless an insured under the policy subsequently requests the coverage in writing.

If an insured who is notified accepts underinsured motorist coverage, the insurer must provide coverage under the policy to the insured in limits of at least $50,000 per person and $100,000 per accident.

c. Effective Dates

The provision relating to mandatory offers of underinsured motorist coverage became effective for new policies issued on or after October 1, 1995. For policies that were in effect on the date the mandatory offer of the coverage was required to be made with the first renewal of the policy occurring after January 29, 1996.

The other provisions of the Act first applied to motor vehicle insurance policies that were issued or renewed after July 14, 1995. However, if a policy that was in effect on July 15, 1995 contained any provision that is authorized by the Act, the provision is enforceable with respect to claims that arise out of accidents that occur on or after July 15, 1995.

B. 1995 WISCONSIN ACT 295, RELATING TO THE SALE OF BURIAL AGREEMENTS FUNDED WITH LIFE INSURANCE POLICIES

1. Background

Prior to Act 295, life insurance contracts could be sold, the proceeds of which were used to pay for a funeral. Under s. 632.41 (2), 1993 Stats., no contract in which the insurer agreed to pay for any of the incidents of burial or other disposition of the body of a deceased could provide that the benefits are payable to a funeral director or any other person doing business related to burials. However, in 1982, Attorney General Bronson C. La Follette held that the statute did not prohibit a funeral director or a funeral home being named as the beneficiary of a life insurance policy where the insurer and beneficiary separately agree that the purpose of naming the funeral director as beneficiary of the policy is to prearrange payment for funeral and burial services to be provided by the funeral director or beneficiary [71 OAG 7].

Under s. 630.15, Stats., no life insurer may invest directly in or, except as a loan secured by a mortgage on real estate or as a policy loan, lend money to a funeral director or a cemetery or any association of funeral directors or cemeteries. No funeral director or cemetery or association of funeral directors or cemeteries may control a life insurer.

Section 445.125, Stats., regulates burial agreements. When a person makes an agreement with another person who is selling or offering for sale funeral or burial merchandise or services or the furnishing of the services not immediately required, all payments made under the agreement are made in trust.

Thus, prior to Act 295, a ***life insurance salesman*** could sell ***life insurance*** that was to be used for the purpose of paying for a funeral. A ***funeral director*** or ***funeral establishment*** could also enter into an agreement to provide ***burial services***, which agreement could either be:

a. Unfunded.

b. Funded through a burial trust.

c. Funded with life insurance proceeds.

A life insurance agent could ***not*** sell the burial agreement or enter into a burial agreement on behalf of a funeral establishment.

2. Description of Act 295

a. Authorization

A licensed funeral director ("funeral director"), an operator ("operator") of a funeral establishment ("establishment"), an agent of a licensed funeral director or an agent of an operator of a funeral establishment may sell or solicit the sale of a burial agreement that is to be funded with the proceeds of a life insurance policy. The burial agreement must meet the requirements specified in the Act and in the rules promulgated by the Funeral Directors Examining Board ("Board"). Also, the funeral director, operator or agent must be licensed as an ***insurance intermediary under ch. 628, Stats.***

The funeral director or operator may authorize an agent who is an insurance intermediary and who the meets the training requirements established by the Board to sell or solicit the sale of a burial agreement funded with the proceeds of a life insurance policy if it meets the requirements specified in the Act.

The funeral director or operator must report to the Board the identity of any authorized agent and provide evidence that is satisfactory to the Board that the agent meets the training requirements established by the Board. The Board is required to promulgate rules establishing training requirements and procedures for making reports and providing the required evidence of compliance.

No agent of an operator may solicit the sale of or sell a burial agreement funded with the proceeds of a life insurance policy, unless he or she has a contract that authorizes them to act as the agent of a funeral establishment and satisfies the requirements established by the Board. If such an agreement is entered into, the funeral director or operator is ***responsible for and bound*** by any act of an agent that is within the scope of the agent's authority while under a contract between the agent and the funeral director or operator.

If an agent solicits the sale of or sells a burial agreement funded with the proceeds of a life insurance policy, the agent must disclose to the prospective purchaser of the burial agreement the identity of the funeral establishment of which he or she is an agent. He or she must also furnish to the applicant a copy of a booklet prepared and distributed by the Board that describes the differences between funding burial agreements with the proceeds of a life insurance policy and entering into a burial agreement funded by a burial trust.

b. Contents of Burial Agreements

A burial agreement that is funded with the proceeds of a life insurance policy must:

(1) Specify in the agreement the funeral establishment that will be used to provide the funeral services or funeral merchandise.

(2) Include a provision setting forth the nature and extent of any price guarantee for the funeral merchandise or funeral services.

(3) Provide that the licensed funeral director who owns the funeral establishment or is an agent of the operator of the funeral establishment will ratify the burial agreement, in writing, with his or her signature.

(4) State that the price of any funeral merchandise or funeral services may not exceed the price for the merchandise or services that, at the time the merchandise is provided or the services are performed is set forth in the funeral establishment's general price list required under the funeral industry practices regulations of the Federal Trade Commission.

(5) Before the applicant's initial premium is accepted, the agent, funeral director or operator shall comply with requirements specified in the act for termination of a burial trust (if one already exists) and disclose the following, in a writing that is clear and conspicuous to the applicant:

(a) The fact that a life insurance policy is involved in, is connected to, or being used to fund the burial agreement.

(b) The type of insurance instrument that is funding the burial agreement.

(c) The effect of the burial agreement on changing the life insurance policy, including changing the assignment of the policy proceeds, changing the beneficiary designation, or changing the use of the proceeds, any penalties

incurred by the policyholder as a result of failing to make premium payments and any penalties incurred or money received as the result of cancellation or surrender of the insurance policy.

(d) The nature of the relationship between the insurance intermediary who solicits or sells the policy and the funeral establishment that will provide funeral or burial merchandise or services.

(e) The relationship of the life insurance policy to the funding of the burial agreement and terms of any guarantees other than are described in item f, below.

(f) A list of the funeral merchandise and funeral services that are applied for or contracted for under the burial agreement and all relevant information concerning the price of funeral services provided under the burial agreement. This statement must be included on whether the purchase price of the merchandise or services are guaranteed at the time of the purchase or whether the purchase price of the funeral merchandise or services is to be determined at the time of the need and a statement that the price of the funeral merchandise or services is subject to the limit, described previously.

(g) All relevant information concerning what occurs, and whether any entitlements or obligations arise, if there is a difference between the proceeds of the policy and the amount of money actually needed to fund the burial agreement.

(h) Any restrictions, including geographic restrictions, or penalties relating to delivery or performance under the burial agreement, including any restrictions or penalties relating to the inability of the operator of the funeral establishment to perform.

(i) A statement as to whether a sales commission or other form of compensation is being paid to the agent who sold or solicited the sale of the burial agreement and, if so, the identity of the person to which the commission or other compensation is paid.

c. Rule-Making by the Board

The Board is required to promulgate rules establishing the following:

(1) Training requirements that an agent must satisfy to sell or solicit the sale of a burial agreement that is to be funded with the proceeds of a life insurance policy.

(2) Minimum standards that a burial agreement must satisfy if it is to be funded with the proceeds of a life insurance policy.

(3) Minimum standards that a contract between an agent and an operator must satisfy to authorize the agent to sell or solicit the sale of a burial agreement that is to be funded with the proceeds of a life insurance contract on behalf of the operator.

(4) The form and content of written notice that a funeral director, operator or agent is required to provide to the Board with respect to termination of burial trusts.

In addition, the Board is ***authorized***, but not required, to promulgate rules establishing standards for marketing practices for burial agreements, including standards for telephone solicitation of prospective purchasers. The rules may prohibit a method of telephone solicitation if the Board determines that the prohibition is necessary to protect the public.

The Board is required to prepare and distribute a booklet that describes the differences between funding a burial agreement with the proceeds of a life insurance policy and entering into a burial agreement funded by a trust. The Board may charge a reasonable fee for the cost of preparation and distribution of the booklet.

d. Prohibitions

Funeral directors, operators and agents may not solicit the sale of a burial agreement that is to be funded with the proceeds of a life insurance policy by doing any of the following:

(1) Knowingly contacting a prospective purchaser of a burial agreement in a hospital, health care facility or similar facility or institution.

(2) Knowingly contacting a relative of a person whose death is imminent or appears to be imminent.

(3) Contacting a prospective purchaser of a burial agreement by door-to-door solicitation or in a manner that violates the rules promulgated by the Board.

The funeral director, operator or agent may solicit a sale by contacting any person if the prospective purchaser requests the contact or if the contact is part of a mass mailing, television, radio, print or other type of advertising campaign that is not directed solely towards a person in a hospital, health care facility or similar facility or institution or toward the relatives of a person whose death is imminent or appears to be imminent.

A licensed funeral director, agent or operator is not prohibited from using mass marketing practices or in-person contacts or communications permitted under the above provisions or by a rule promulgated by the Board.

Under s. 445.12 (3r), Stats., as created by the Act, no funeral director or operator may require a person who enters into a burial agreement to purchase a life insurance policy that is used to fund the agreement from an agent specified by the funeral director or operator. Further, no funeral director or operator may authorize an agent to solicit or sell a burial agreement funded

by the proceeds of a life insurance policy unless the agent meets the training requirements established by the Board, by rule.

e. Miscellaneous

If an applicant is terminating a burial trust, the agent, licensed funeral director or operator of the funeral establishment must, before accepting the applicant's initial premium, forward a written notice to the Board that satisfies requirements established by the Board, by rule, and may not accept the applicant's initial premium until 30 days after providing written notice.

An agent authorized by a funeral director or operator may not engage in unfair or deceptive acts or practices specified in the funeral industry practices regulations of the Federal Trade Commission and shall comply with requirements to prevent unfair or deceptive acts or practices specified in those regulations.

A funeral director or operator who either directly or through an agent solicits or sells a burial agreement funded with the proceeds of a life insurance policy must maintain a record of the burial agreement that identifies the life insurance policy used to fund the agreement. The record maintained must be made available to the Board if the Board submits a written request to examine the record at least three days before the examination is to occur.

f. Penalties

The Board may limit, suspend or revoke a license of a funeral director, a certificate of registration of an apprentice or a permit of an operator and reprimand such persons for any violation of ch. 445, Stats., or any rule of the Board by an agent authorized by the funeral director or operator.

In addition to, or in lieu of, a reprimand, suspension, limitation or revocation of a license or permit, the Board may assess against any person who violates the provisions of the Act or the implementing rules, a forfeiture of not more than $1,000 for each violation. Further, a funeral director or operator who violates the requirements of s. 445.12 (3r), Stats., described above, may be fined not more than $5,000 for each violation. Each day that an agent authorized by a funeral director or operator fails to meet the training requirements established by the Board constitutes a separate violation.

g. Insurance Provisions

The prior law [s. 632.41 (2), Stats.] that prohibited insurance contracts from providing that the benefits are payable to a funeral director or other person doing a business related to burials, was amended by the Act to provide that a life insurance policy may provide for the assignment of the proceeds of the policy to a funeral director or operator, if the agent who sells or solicits the sale of the policy is not an agent of the funeral director or operator of the funeral establishment or if the assignment of proceeds is contingent on the provision of funeral merchandise or services provided for in a burial agreement that satisfies the requirements of the Act and the rules promulgated by the Board.

The Commissioner must, by rule, establish minimum standards for benefits, claims payments, marketing practices, compensation arrangements and reporting practices for life insurance policies that are sold for the purposes of funding burial agreements.

A life insurance policy sold for this purpose must permit the policyholder to designate a different beneficiary, after written notice to the current beneficiary, and a different funeral director or operator of a funeral establishment that is to receive the assignment of proceeds after written notice to the funeral director or operator of the funeral establishment.

h. Preparation of Rules and Booklet

The Office of the Commissioner must submit its proposed rules to the Legislative Council's Administrative Rules Clearinghouse no later than December 1, 1996. The Board must also submit its proposed rules no later than December 1, 1996.

The Board must prepare for distribution the booklet required by the Act, no later than December 1, 1996.

Except for the above provisions, Act 295 becomes effective on June 1, 1997.

C. OTHER INSURANCE LEGISLATION

1. 1995 Wisconsin Act 177, Relating to Immunity for Reporting Insurance Fraud

1995 Wisconsin Act 177 provides immunity for persons who report insurance fraud. Under the Act, insurance fraud is the presentation of a statement, document or claim or the preparation of a statement, document or claim with the knowledge that the statement, document or claim will be presented, that the person knew or should have known contained materially false, incomplete or misleading information. The Act relates to an application for the issuance of an insurance policy, a claim for payment, reimbursement or benefits payable under an insurance policy, a payment made in accordance with the terms of an insurance policy, a premium on an insurance policy or the rating of an insurance policy.

Under the Act, any person who, absent malice, files a report with or furnishes information concerning suspected, anticipated or completed insurance fraud is immune from civil liability for his or her acts or omissions in filing the report or furnishing the information to the following or their agents, employes or designees: the Commissioner, a law enforcement officer, the National Association of Insurance Commissioners, any governmental agency established to detect and prevent insurance fraud, any nonprofit organization established to detect and prevent insurance fraud and any insurer or authorized representative of an insurer.

Further, any information furnished by an insurer in response to a report or information furnished under the above provision is confidential and may be made public only if required in a civil or criminal action. If a civil action is commenced against a person for damages relating to the filing of a report or the furnishing of information and the court determines that the person

is immune from civil liability for his or her acts or omissions in filing the report or furnishing the information, the person filing the report or furnishing the information shall recover costs and reasonable attorney fees. The Act first applies to reports filed and information furnished on April 6, 1996 or thereafter.

2. 1995 Wisconsin Act 259, Relating to Rescission of Insurance Contracts

1995 Wisconsin Act 259 relates to grounds and notice requirements for rescission of insurance contracts. Under prior law, misrepresentation or a breach of an affirmative warranty on the part of an insured could affect the duties of the insurer under the policy. Under the Act, no misrepresentation and no breach of an affirmative warranty made by a person other than the insurer or an agent of the insurer in the negotiation for or procurement of insurance contracts constitutes grounds for rescission of or affects the insurer's obligations of the policy if the person knew or should have known that the representation of affirmative warranty was false and unless any of the following apply: the insurer relied on the misrepresentation or affirmative warranty and the misrepresentation or affirmative warranty is either material or is made with intent to deceive or the fact misrepresented or falsely warranted contributed to the loss.

The Act became effective on May 7, 1996.

3. 1995 Wisconsin Act 371, Relating to Regulation of Viatical Settlement Contracts, Exempting From the Income Tax Income That is Received From the Sale of a Life Insurance Policy Under a Viatical Settlement Contract

1995 Wisconsin Act 371 establishes standards and requirements for viatical settlements and viatical settlement contracts. A viatical settlement is a payment to the policyholder of a life insurance policy or to the certificate holder of a group life insurance certificate that insures the life of a person who has a catastrophic or life-threatening illness or condition in an amount that is less than the expected death benefit under the policy or certificate in exchange for the sale or other transfer of the ownership or policy or certificate to the person making the payment. The Act exempts from taxation the income received by a person who is terminally ill and who sells his or her life insurance policy or certificate to another person. Under the Act, persons can be licensed as a viatical settlement provider or as a viatical settlement broker. Under the Act, the viatical settlement must meet the following minimum payment requirements:

a. If the insured's life expectancy is six months or less, 80% of the policy or certificate face value after reducing the face value by the amount of any outstanding loans against the policy or certificate.

b. If the insured's life expectancy is more than six months but not more than 12 months, 75% of the policy or certificate face value.

c. If the insured's life expectancy is more than 12 months but not more than 24 months, 65% of the policy or certificate face value.

d. If the insured's life expectancy is more than 24 months but not more than 36 months, 55% of the policy or certificate face value.

e. If the insured's life expectancy is more than 36 months but not more than 48 months, 45% of the policy or certificate value.

f. If the insured's life expectancy is more than 48 months, 30% of the policy or certificate face value.

In each case, the amount is after reducing the face value by the amount of any outstanding loans against the policy or certificate.

Further, if the total of the premiums that the viatical settlement provider expects to pay under the policy or certificate exceeds 5% of the face value of the policy or certificate, the provider may reduce the minimum payment amount by the percentage of the face value that the total of the premiums that the provider expects to pay equals.

Although in general the Act is effective on June 12, 1996, the tax provisions first apply to taxable years beginning on January 1, 1996.

4. 1995 Wisconsin Act 453, Relating to Tax-Exempt Individual Employe Medical Savings Accounts Established by Employers or Self-Employed Persons With the Difference Between the Cost of Low-Cost, High Cost-Share Health Care Coverage and More Costly Health Care Coverage and Excluding Coverage That is Linked to a Medical Savings Account From Certain Coverage Portability Provisions

a. Establishing a Medical Savings Account

An employer that offers its employes a choice of health benefit options that includes a "high cost-share health plan" may establish a medical savings account for an employe who chooses that plan.

A "high cost-share health plan" is any health insurance plan with deductibles, copayments or other cost-sharing provisions of at least $1,500 if the person's coverage is single coverage or at least $3,000 if the coverage is family coverage.

The medical savings account must be established as a separate account in the employe's name and is the employe's property. The account may be established with any "account administrator" approved by the Commissioner to administer medical savings accounts. The commissioner may approve the account administrator if that administrator ensures the principal of the medical savings account against loss from any cause including loss due to market fluctuation.

The following may be account administrators:

(1) A financial institution, the accounts of which are insured by the Federal Deposit Insurance Corporation or the National Credit Union Share Insurance Fund.

(2) A trust company bank.

(3) An insurer authorized to do business in Wisconsin.

(4) A broker dealer licensed by the Commissioner of Securities (that position no longer exists; its responsibilities have been transferred to the Department of Financial Institutions effective July 1, 1996).

(5) A plan administrator licensed by the Commissioner of Insurance.

(6) A certified public accountant licensed to practice in Wisconsin.

(7) An employer that has a self-insured health plan.

(8) An employer that participates in the program under this section.

If the employer establishes a medical savings account, he or she must notify the Wisconsin Department of Revenue (DOR) of the establishment of the account, the employe's name and Social Security number, the name and address of the account administrator and any other information that the DOR requires.

A self-employed person may also establish a medical savings account and notify the DOR of the establishment of the account.

b. Deposits

The employer is required to deposit the difference between what the employer pays on behalf of the employe or the employe and his or her dependents for the "high cost-share health plan" and what the employer would pay on behalf of the employe or the employe and his or her dependents for the most expensive health benefit plan that the employer offers that is not a high cost-share health plan. No other deposits may be made in the account.

The maximum amount that an employer is required to deposit is $2,000 for the employe, if the employe requests single coverage or $2,000 per year for the employe, $2,000 per year for the employe's spouse and $1,000 per year for each nonspouse dependent of the employe if the employe's coverage is family coverage. Beginning in 1998, the amounts specified will be increased each year by a cost-of-living factor.

A self-employed person may also deposit the difference between what he or she pays for a high cost-share health care plan, including coverage for his or her dependents and what the person would pay for a more expensive plan. The maximum deposit is also limited to $2,000 for

single coverage and $2,000 per year for the person, $2,000 per year for his or her spouse and $1,000 per year for each nonspouse dependent for family coverage. These amounts are also adjusted each year beginning in 1998.

If an employe becomes self-employed and purchases a high cost-share health plan, he or she may make deposits in the account. If a person who is a self-employed person becomes employed by an employer and chooses a high cost-share health plan, the employer may make deposits in the account.

c. Use of Medical Savings Accounts

Amounts deposited in a medical savings account and any interest, dividends or other gain may be used:

(1) To pay expenses for medical care as defined in 26 U.S.C. s. 213 (d) (1) and as limited in 26 U.S.C. s. 213 (b), including amounts treated as paid for medical care under 26 U.S.C. s. 213 (d) (2).

(2) To pay long-term care expenses of the employe or self-employed person and any of the employe's or self-employed person's dependents.

(3) To purchase a long-term care insurance policy for the employe or self-employed person or any of the employe's or self-employed person's dependents.

These restrictions do not apply after the death of the employe or self-employed person.

d. Tax Provisions

Amounts deposited by an employer on behalf of his or her employe or by a self-employed person on his or her behalf in a medical savings account, up to $2,000 for an individual, up to $2,000 each year for a spouse and up to $1,000 each year for any nonspouse dependent and any interest, dividends or other gain that accrues in the account if those amounts are redeposited in the account, are exempt from Wisconsin income taxes. The exemption applies only if the account is used exclusively to pay medical care expenses and long-term care expenses of the individual, his or her spouse and each minor dependent or to purchase long-term care insurance.

If the person withdraws principal or interest dividends or other gains from an account and that money is used for any purpose not authorized under item c, above, the amount withdrawn is subject to Wisconsin income taxes and, in addition, the person is required to pay an amount equal to 10% of the amount that is improperly withdrawn from the account as a penalty payment. The penalty does not apply and up to 25% of the balance in the account may be withdrawn each year if: the account holder or his or her spouse reaches the age of 59.5 years during the year in which the withdrawal occurs or the balance in the account exceeds $100,000.

e. Qualifying Coverage for Group Insurance Plans

A high-cost share plan that is linked to a medical savings account is not considered to be "qualifying coverage" for purposes of certain group insurance market provisions contained in the Insurance Code, such as portability of coverage and guaranteed acceptance. This exclusion applies if the employer that provides the individual's new coverage offers its eligible employes a choice of health benefit plan options that includes a high cost-share plan and the individual's new coverage is not a high cost-share plan.

Thus, if an employer furnishes a high cost-share plan and an employe wishes to transfer from that plan to more comprehensive coverage offered by the employer, the waiting period that the person must satisfy before a preexisting medical condition is covered by the comprehensive plan will not include periods of coverage under the high cost-share plan. Also, if a person changes employers, the new employer provides its eligible employes a choice of health benefit plans and the employe chooses a comprehensive coverage, the waiting period that the person must satisfy before a preexisting medical condition is covered by the comprehensive plan will not include periods of coverage under the high cost-share plan.

f. Other Provisions

Under s. 632.898 (7), Stats., as created by Act 453, if the federal government enacts legislation providing for federal income tax exemptions for medical savings accounts, the Commissioner must conduct a study, that is to be completed within four years after enactment of federal legislation, of groups that had coverage under a high cost-share plan and terminated that coverage in order to enroll in a health benefit plan that was not a high cost-share plan. If the Commissioner determines as a result of the study that the qualifying coverage restriction described under item e, above, is not necessary, the Commissioner will certify that determination to the Revisor of Statutes. Upon the certification, a notice will be published in the Wisconsin Administrative Register of the determination, the date of the certification and that on the 31st day after that date the provision is no longer effective.

The provisions relating to the tax exemptions for medical savings accounts will take effect for taxable years beginning on January 1 of the year in which the federal government enacts "a broad-based medical savings account program as certified by" the Secretary of the DOR.

5. 1995 Wisconsin Act 462, Relating to the Interstate Insurance Receivership Compact

1995 Wisconsin Act 462 enacts the Interstate Insurance Receivership Compact and creates the Interstate Insurance Receivership Commission. The Act provides that the Interstate Insurance Receivership Compact is enacted into law and that the members of the Commission representing Wisconsin will be the Commissioner or his or her designated representative. Among the responsibilities of the Commission is to oversee, supervise and coordinate the activities of receivers (a receiver, liquidator, rehabilitator, conservator or ancillary receiver) in the

liquidation, rehabilitation, conservation or ancillary receivership proceedings involving an insurance company.

The Act became effective on July 11, 1996.

6. 1995 Wisconsin Act 463, Relating to the Health Insurance Risk-Sharing Plan

1995 Wisconsin Act 463 creates a provision under which the Board of Governors for the Health Insurance Risk-Sharing Plan (HIRSP) may reduce premiums for the fiscal year beginning July 1, 1996 for eligible persons who do not receive a premium subsidy and who have a household income that is less than $40,000 and who apply to the Board for a reduction in their premium. It further requires the Commissioner and the Department of Health and Family Services to conduct a study for the purposes of establishing a replacement health care program for the HIRSP. The report must be submitted to the Legislature no later than February 1, 1997.

The Act became effective on July 11, 1996.

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HEADLINE: THOMPSON DEFENDS TAX CUT FOR RICH

BYLINE: BY **DAVID CALLENDER**; THE CAPITAL TIMES

BODY:

Gov. Tommy Thompson says it would be a ''mistake'' for Republicans in the Legislature to drop his proposal to cut income taxes for the state's wealthiest residents.

Thompson's proposed 1995-97 budget would cut the state's top income tax rate from 6.93 percent to 6.87 percent.

Republicans hold a majority in both houses and control the Legislature's budget-writing panel, the Joint Finance Committee, which is reviewing the governor's proposed budget.

Key Republican lawmakers, including Senate Majority Leader Michael Ellis, have suggested that the governor's plan to cut income taxes should be scrapped.

They contend the proposed tax cut is ill-timed because it would take effect as the Legislature is scrambling to fund a $ 1.2 billion plan to cut property taxes.

But Thompson said state residents are concerned about income and property taxes, ''and any time you can address both of them, it would be smart for the Republicans to do so.''

He said he would advise lawmakers not to eliminate the income tax cut, ''but that doesn't mean that they won't.''

If the governor's proposal is adopted, the state would collect about $ 25 million less in income taxes.

The proposal would most benefit those who earn more than $ 105,000 a year; taxpayers who earn less than that would pay slightly more in income taxes because the governor wants to eliminate an existing tax credit for renters and homeowners.

The Joint Finance Committee has not yet taken up the proposed cut; the panel is expected to deal with the issue in the next two weeks.

On another budget-related matter, the governor said he continues to favor the elimination of the Public Intervenor's Office, a branch of the state Justice Department that sues other state agencies over environmental issues.

''We have a plethora of lawyers in the Department of Justice doing the same thing, and we don't think it's good public policy to set up a law firm inside the state government to sue us. I think that is counterproductive,'' he said.

Thompson denied assertions by some critics that he is dismantling the Public Intervenor's Office in order to speed approval of a controversial zinc and copper mine near Crandon.

The governor said he would support the proposal only if it wins the approval of the Department of Natural Resources, which is expected to hold extensive hearings on the proposal.

It's presidential: Among the bills Thompson signed into law is a change in the date of the state's presidential primary.

Until the new law was passed earlier this year, the primary had been set for the first Tuesday in April.

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The new law sets the date of the primary for the third Tuesday in March, which coincides with presidential primaries in Illinois, Michigan, Ohio, and probably Pennsylvania.

Thompson, who has been mentioned as a possible Republican presidential contender, said the date change probably wouldn't help his campaign.

''I don't think it's going to help me at all in any way, shape or form,'' he said. ''I'm not a candidate.''

The governor has said repeatedly that he won't consider a presidential bid until later this summer after the Legislature passes his budget.

Some observers have said such a late entry by the governor rules him out as a serious contender

Sweet tort: The governor also signed into law a bill that reduces the liability of businesses involved in personal injury lawsuits.

Under the old law, anyone who is found at least 1 percent negligent in a lawsuit may be held responsible for total damages — a situation that businesses say hurts them.

The new law requires parties to pay full damages only if they're more than 51 percent liable.

The bill is the result of more than 20 years of liability reform sought by the state's top business groups, including Wisconsin Manufacturers and Commerce and the National Federation of Independent Businesses.

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BUSINESS

Reform bill pleases businesses Supporters say firms less likely to be cast a
'deep pockets'

Alan Borsuk

The Journal Sentinel staff

A legislative campaign that has lasted more than a decade finally has produced a victory for business leaders seeking to ease their fears of being stuck holding huge bills for liability verdicts in which they played minor roles.

When Gov. Tommy G. Thompson signs a bill that has cleared both the state Senate and Assembly, as he is expected to do, Wisconsin will join two- thirds the states in at least modifying the legal doctrine of joint and several liability. It is the first major piece of liability law reform legislation to succeed in Wisconsin.

Supporters say the change will make businesses or their insurers less vulnerable to being cast as "deep pockets" in a lawsuit.

Under the doctrine of joint and several liability and under existing state law a defendant found as little as 1% liable in the outcome of a suit could b forced to pay for most or all of the damages if other defendants don't have enough money to pay their share.

The bill, passed by the Senate, 24-8, and by the Assembly, 69-27, would dra a line across the middle of liability. A defendant who is 51% or more at fault could be required to pay the full award in a case. A defendant who is found 50 or less responsible would pay no more than the fraction of the award equal to its share of the liability. Smith

Bill G. Smith, state director of the National Federation of Independent Business, said the bill would "help restore an atmosphere of reasonableness an common sense to a system that now compensates one victim by victimizing anothe and penalizes the many for the benefit of the few."

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Nick George, director of government relations for Wisconsin Manufacturers & Commerce, said, "This could be the most significant piece of pro-business legislation to pass the Legislature this session."

George expects businesses to be named defendants in fewer lawsuits and to feel a reduced sense of dread of being sued. That will allow them to concentra more on business and give them a freer hand in developing new products, he sai

But Robert Habush, a Milwaukee attorney who is nationally prominent for representing plaintiffs in liability suits, predicted the opposite.

"You know what's going to happen?" Habush said. "It's going to increase litigation." He said defendants would try to get more parties involved in case in hopes of getting themselves below the 51% line, and there would be less incentive to settle out of court. The result will be increased court congestio and increased costs to defendants, Habush said. Both Sides Cite Unfairness

Both sides in the debate over the bill have argued that it is unfair for th bulk of financial burden in a liability case to fall on someone who doesn't deserve to bear it. But they differ on which side that points to.

On the one side, the argument is that the injured or harmed victim shouldn' be left without the compensation the person is entitled to, and that those who are found responsible for the harm should pool together to pay up. If that mea someone found with a small fraction of the liability has to carry the weight, be it.

On the other side, the argument is largely one of simple logic: Someone fou 20% responsible for damages shouldn't have to pay more than 20% of the bill. I a plaintiff who has been harmed is unable to recover some of the damages, that is unfortunate, but it's a problem between the plaintiff and whoever isn't abl to pay up.

Furthermore, under the existing system, manufacturers, particularly small businesses, must live in fear of unpredictable and potentially huge financial burdens for which they don't really bear responsibility.

An example of the difference the new law could make can be found in an anecdote that was told in testimony before the bill was passed. John D. Scott, president of Scott Construction of Lake Delton, which builds and repairs aspha roads, said his company worked on a road in 1983 in Brown County. A few weeks later, there was an auto accident on the road and a passenger was left paralyz from the chest down.

A jury eventually awarded $3.6 million in damages to the passenger, ruling that the driver was 80% at fault but that Scott Construction was 20% at fault because of poor workmanship on the road. Scott still doesn't accept that he says the road had been inspected and approved by the government but he was especially galled that the driver paid only the $100,000 provided by his insurer, while Scott's insurance company had to deal with the remaining 97% of the verdict.

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"That is not only grossly unfair, it is completely contrary to the jury's intent," Scott said in a statement submitted for the public hearing Feb. 1.

Although that case was not argued specifically, defenders of joint and several liability would say that Scott's case showed how a victim who would hav received little compensation for life-changing injuries was able to collect in line with what the jury found.

---- INDEX REFERENCES ----

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STATE OF WISCONSIN

IN THE ASSEMBLY

In re the matter of:

TORT REFORM

Floor Debate

April 6, 1995

State Capitol

Madison, Wisconsin

MAGNE-SCRIPT®
4401 Travis Terrace
Madison, Wisconsin 53711
Voice or Fax (608) 233-3312

1 MR. SPEAKER: The members and visitors, please
2 take their seats. The Assembly is back in session. Would the
3 clerk report what we were acting on when the Assembly went to
4 caucus.
5 CLERK: We're on concurrence in Senate Substitute
6 Amendment 1 to Assembly Bill 36.
7 MR. SPEAKER: The question is concurrence to
8 Assembly Substitute Amendment 1, as amended, on Assembly
9 Bill 36. The question is concurrence. Is there any discussion?
10 The gentleman from the 29th.
11 29TH: Mr. Speaker and Members, the Senate did a
12 bad thing. When a person is given an award for medical
13 purposes, under current law that person is given the money.
14 Now, under the bill as the way the Senate did it, another
15 decision has been made. They've decided that we're going to set
16 up a paternalistic system, a socialistic system, and decide how
17 that's going to be paid out. Now, that's not all that bad. That --
18 that – that could be all right if the opposite of privatizing. It's
19 the opposite of private initiative. It's the opposite of having an
20 insurance company to do it, and there surely are enough
21 insurance companies in this state who would be willing to do
22 that, convert that payment into an annuity and make out monthly
23 payments.
24 Now, if you're thinking about that annuity, you ought to
25 think about now what the next step is, because if you buy an

1 annuity and if you're -- when you retire, that's about what
2 happens, you get an annuity, and you probably elect a joint and
3 two-thirds. That is, you'll be -- you and your wife will get so
4 many dollars a month for as long as you live, and then your wife
5 will get so many dollars a month for as long as she lives. And
6 so they've sort of half-bought that idea in this plan, except they
7 haven't carried that out.
8 Under this plan, the way that the Senate has written it, I
9 get a cash settlement. And then something happens -- I'm in an
10 automobile accident and I'm dead the next week -- I never even
11 got a payment. Guess who gets the money? The Patient
12 Compensation Fund wins. Now, those are the folks who sue --
13 who were sued in order to get this payment. The family gets
14 nothing. The whole thing goes back into the Patient
15 Compensation Fund.
16 Okay, if you're drawing an annuity that would be fair.
17 Now, then let's look at the other end of it. You are 26 years old
18 and your assessment is that you're going to live to be 72. And
19 so they pro-rate the amount of money that you would get until
20 you're 72, and incidentally add interest to it, and then if it's in
21 true annuity form, then that should pay you for as long as you
22 live. That's the principles of an annuity.
23 If you're going to take the money away from the guy that
24 dies today, then you ought to give it to the person who lives
25 longer than expected. That's the way annuity principles work,

1 and this, the Patient Compensation Fund, is in the Office of the
2 Commissioner of Insurance. It seems to me that you ought to
3 use legitimate insurance principles to do it. If you're going to
4 set up a socialistic system, a paternalistic system, you at least
5 ought to be fair about it.
6 MR. SPEAKER: Would the gentleman withhold his
7 remarks for a moment. There's too much noise in the chamber.
8 The gentleman deserves to be heard. Gentleman from the 29th.
9 29TH: This is patently unfair. It was written that
10 way when it was in the Assembly, and it was called to the
11 attention to the Chair, and we fixed that. We changed it. We
12 made it fair. I understand that the Patient Compensation Fund
13 would probably like to have that lapse back into the Fund, and I
14 understand also that it reduces their payments, that is, the
15 insurance that a doctor has to buy or so forth, by 11 percent.
16 But by golly, what we're supposed to be doing here is being --
17 doing fairness. I mean, why should we compensate back to the
18 medical practitioners who created the problem and give them a
19 reward back? That just simply doesn't make sense. And I think
20 that anybody who votes for this as it is, has turned his
21 conscience in. He doesn't have one anymore. That's where I
22 come from.
23 MR. SPEAKER: The lady from the 45th.
24 45TH: Thank you, Mr. Speaker and Members. I
25 wonder if the kindly gentleman from the 29th would answer a

question? If the Patient Compensation Fund has this extra
2 money, and they don't distribute it to the clients that have been
3 harmed, for example, a diabetic patient that has the wrong leg
4 amputated, what does the Patient Compensation Fund do with
5 that money? Does it sit there?
6 29TH: Actually it stays in the Patient Compensation
7 Fund and will be used to reduce premiums for the people that
8 have to buy policies from the Patient Compensation Fund. I
9 think it's – it's rewarding the very people that caused the
10 problem, and that's certainly an unfair thing to do.
11 I guess if I wanted to have this bill challenged in court,
12 I'm not an attorney; I don't know, but it would seem to me those
of you people who are concerned about takings, this is a taking.
14 Now, if it were an annuity principle, that's a fair -- everybody
15 can understand that. But this isn't. This is a taking from that
16 person who was awarded, and there's no compensation. There's
17 no fairness about it.
18 MR. SPEAKER: The lady from the 45th.
19 45TH: Thank you. I have another question for the
20 kindly gentleman from the 29th. So in other words, does the
21 money sit there or is it invested? Are you telling --
22 29TH: When the – when the award is first made it
23 goes into Patient Compensation Fund, yes, it is. It is invested,
24 and yes, the interest is added onto it. To arrive at the
25 calculation to determine the person's morbidity rate or mortality

1 rate, whichever table you use, and let's say you're going to live
2 until you're 72 years old, then you would get payments with that
3 calculation. And it could be on a monthly basis or a yearly basis
4 or whatever the election is and however the rules are made.
5 They would draw interest. But when you get to that time, when
6 your money is gone, that's it, buddy. Doesn't matter how much
7 you need. Your money's gone, and the amount that they took
8 from the person who died too young, that stays in the Patient
9 Compensation. It's not used to -- as it ought to be to put
10 fairness into this circumstance.
11 45TH: Thank you.
12 MR. SPEAKER: The gentleman from the 8th.
13 8TH: Well, Mr. Speaker and Members, and I hope
14 the press is tuning in to this, because remember the politics of
15 this all started out that certain people want to protect the Patient
16 Compensation Fund. Certain people want to get the trial
17 attorneys. Certain people think this is a lottery, and we've got
18 to get it under control.
19 Well, when this bill left this House, the language that's
20 incorporated in this amendment was the opposite of what this
21 amendment does. Not total opposite, but this goes a long way
22 towards negating what we originally passed out of this House.
23 And it's not -- believe me, the trial attorneys don't care how you
24 vote on this. The only people that would care how you vote on
25 this amendment is the consumer, all right? The trial attorneys

1 would rather have this just be concurred in so you don't go to a
2 conference committee, and you can get back at them. All right?
3 So now that we've got the political dynamics set, so
4 there's only one person getting screwed under this, and that's the
5 consumer. When this -- under both the Assembly and the Senate
6 version of the bill, we did stop the lump-sum pay-out to the
7 consumer. The attorneys get their cash up front. They're all set
8 under both versions of the bill. But, under the Assembly
9 version, we said that, okay, we're going to give the money to
10 the Patient Compensation Fund, and they get to manage it. We
11 also said if the person dies early, the Patient Compensation Fund
12 gets to keep the money and not the estate which is a tremendous
13 advantage to the Patient Compensation Fund, as opposed to
14 current law because you gave the money out, the lump-sum
15 payment, and you don't get the money back if the person dies
16 early.
17 Now, was that enough? That wasn't enough. We had to
18 go and get the rest. Under the Senate version and under this
19 amendment, not only do you get the money if the person dies
20 early, but you say to the individual, when the award is made,
21 that you'll base it on their average life expectancy, and if the
22 money is used up for medical expenses come that age and you
23 live ten years longer. Sorry, we can't help you. Under the
24 Assembly version we said, no, we got a lot of the money from
25 people who died early and we're going to basically use that

1 money to take care of the people who live beyond their life
2 expectancy. And you did it in your own committee because the
3 bill was originally drafted with this Senate language in, and your
4 own insurance committee took it out. And I would believe they
5 knew why they'd taken it out, because they believed that was
6 fair.
7 But we couldn't stop there. And make no mistake about
8 it. This has got nothing to do with any attorneys. The attorneys
9 would like this not to go to a conference committee, so that we
10 open this up because this isn't their money. Now, I would hope
11 that we would non-concur in this, and I don't believe it's going
12 to put the other issues of this at risk.
13 Unknown: Move non-concurrence.
14 8TH: I'm going to move non-concurrence. I want
15 to just finish up my remarks. Now, the cap stayed the same, did
16 it not? Did they jack the cap? The cap stayed the same. Did
17 the cap not stay the same in the Senate? It went to 350?
18 Unknown: Yeah.
19 8TH: Well, the cap went to 350. That's the other
20 significant change. Is this the quid pro quo? Give the lawyers
21 another $100,000? Oh, we did that here in the Assembly? So
22 the 350 did stay the same; we changed it here on the floor. So
23 this was no quid pro quo. It's just let's get the consumer one
24 more time here.
25 I think what the Assembly committee did was fair. I think

1 under any -- anyone that's paying attention and would apply any
2 rule of common sense would have to agree with that. Your own
3 committee did. We voted for it. The cap didn't change. Is this
4 like the last bit of blood we got to get out of the consumer? Can
5 you see when this happens, and all of a sudden that account is
6 depleted, and the person's medical expenses are still there?
7 Where do you think that person's going to go? Did you ever
8 hear of Title IX? What's that person going to do? God, for the
9 life of me, can't you just figure this one out? It was good
10 enough for us. It was good enough for the committee. The
11 lawyers didn't get more.
12 I would move non-concurrence, Mr. Speaker, and I would
13 hope the Assembly would adhere to its position and don't fear
14 this baloney that we got to open this whole bill up. Sure, budget
15 conference committees are free-wheeling, but when we've had
16 conference committees on bills they pretty much, for the most
17 part, have been limited to the differences between the two
18 Houses. If we can't get our position, at least let's say five years
19 or if they -- you know, let's give them something, half of it. I
20 think we got the consumer here pretty good, and you can't hide
21 behind the political argument here that this is for the lawyers or
22 -- this has got nothing to do with lawyers.
23 MR. SPEAKER: Gentleman from the 52nd.
24 52ND: Thank you, Mr. Speaker. I would like to
25 interrupt the proceedings to introduce in the gallery, and some of

1 you have already been up and talked to them: the Wisconsin
2 Sheriffs and Deputy Sheriffs Association Board of Directors. If
3 they could please stand, many of them are your sheriffs, and
4 please give them a hand.
5 MR. SPEAKER: I believe the gentleman from the
6 8th moved non-concurrence. Is that correct? All right, the
7 gentleman from the 67th.
8 67TH: Mr. Speaker, thank you. I just want to
9 interrupt the proceedings to introduce one of my good friends
10 from Chippewa Falls who's down here with the sheriffs and
11 deputies, James Cardinel.
12 MR. SPEAKER: The gentleman from the 87th.
13 87TH: I just ask to be allowed to continue the
14 interruption. The sheriff of Taylor County is Bill Breneman who
15 is with the same group, and I'd like to introduce him at this
16 time. Thank you. Thanks, Bill.
17 MR. SPEAKER: Does anyone seek recognition?
18 The question is non-concurrence. All those in favor of
19 non-concurrence will vote aye; all those opposed will vote no.
20 Clerk will open the roll.
21 Have all members voted as they wish? Clerk will close
22 the roll. There are 43 votes to non-concur, 55 to not
23 non-concur. The motion fails.
24 The question now is concurrence in the Senate Substitute
25 Amendment as amended. The question is concurrence. All

1 those in favor of concurrence will vote aye; all those opposed
2 will vote no. Clerk will open the roll.
3 Have all members voted as they wish? Clerk will close
4 the roll. There are 56 concurrence votes; there are 42 votes
5 against that motion. The bill is concurred in. Gentleman from
6 the 32nd.
7 32ND: Thank you, Mr. Speaker. I would ask
8 unanimous consent that the rules be suspended and that our
9 actions on Assembly Bill 36 be immediately messaged to the
10 Senate.
11 MR. SPEAKER: Is there any objection? Seeing --
12 (break in tape)
13 CLERK: Senate Bill 6 relating to stacking of motor
14 vehicle insurance coverage and drive other car exclusions under
15 motor vehicle policies.
16 MR. SPEAKER: We are on the 13th order of
17 business. The clerk has read the title of Senate Bill 6.
18 Gentleman from the 72nd.
19 72ND: Mr. Speaker, I would like to ask unanimous
20 consent that under Assembly Rule 77 that the lady from the 48th
21 be excused from voting on this issue.
22 MR. SPEAKER: Seeing no objection, it is so
23 ordered. The question is ordering the bill to a third reading.
24 All those in favor of ordering -- I'm sorry. The question is
25 adoption of Assembly Substitute Amendment 1. All those in

1 favor of adoption of Assembly Substitute Amendment 1 will
2 signify by saying aye. All those opposed no. The ayes have it.
3 The question now is ordering the bill to a third reading.
4 All those in favor of ordering the bill to a third reading will vote
5 aye; all those opposed will vote no. Clerk will open the roll.
6 Have all members voted as they wish? Clerk will close
7 the roll. There are 96 ayes, no nos. The bill will be given a
8 third reading. The clerk will read the title of the bill.
9 CLERK: Senate Bill 6 relating to stacking of motor
10 vehicle insurance coverage and drive other car exclusions under
11 motor vehicle insurance policies.
12 MR. SPEAKER: The question is concurrence.
13 Gentleman from the 8th.
14 8TH: Mr. Speaker, I'd just like to take this
15 opportunity to make a comment that I think that whoever the
16 people are on both sides that worked on this issue, that at least
17 they kept the consumer in mind and there was some legitimate
18 trade-offs in that. I wish that could have been the case or would
19 have been the case on med mal and on joint and several. You
20 know, this I think is something that the consumer can
21 understand. It provides some protections, gives them some
22 choices, and you know, I think that this is the type of reform and
23 the type of product that we can live with.
24 The joint and several bill and the med mal bill, I think, I
25 mean you got the attorneys. We had the consumer. We

1 protected the Fund, and then we had to go and eke out one little
2 more -- a little bit more out of the consumer to protect the docs.
3 And this joint and several bill that's about ready to come up, I
4 mean, I think there are even Republicans -- attorneys that
5 disagree with that. But I -- I plan on voting -- obviously we're
6 going to support this because this is the way legislation ought to
7 work.
8 MR. SPEAKER: The question -- the gentleman
9 from the 42nd.
10 42ND: Well, Mr. Speaker and Members, gentleman
11 from the 8th acknowledgements are in order and I think it should
12 be recognized that the gentleman from the 25th and the
13 gentleman from the 40th, the lady from the 50th, I appreciate
14 very much their work on this bill and bringing the various
15 interest groups together to resolve the differences so we have a
16 pretty good bill in shape, and I think this is the bill that protects
17 the public, gives them options, and still addresses an issue that
18 we had before us. So thank you very much to those individuals.
19 MR. SPEAKER: Gentleman from the 72nd.
20 72ND: Well, Mr. Speaker and Members, since
21 we're thanking everybody, we should -- and now understand
22 how well the process can work when it's done this way, perhaps
23 we ought to encourage the gentleman from the 42nd to ask his
24 leadership whether or not we couldn't convene the bipartisan
25 group to work on the budget and the property tax relief

1 mechanism.
2 Would the gentleman from the 42nd yield to a question?
3 No, that's part of the silent majority once again, because it only
4 works when they want it to work. And so once again, it's
5 obvious that you're going to shut us out of the budget. That's
6 what you're going to do. Then you're going to get up and make
7 speeches about how nice every nicey-nicey kootchie-koo,
8 kissy-kiss, but when it gets to the real issue, then it's stick it to
9 'em. No more kissy-koo for you at the towns meetings,
10 Gentleman from the 42nd.
11 MR. SPEAKER: The question is concurrence.
12 Gentleman from the 28th.
13 28TH: Thank you, Mr. Speaker. After the AB36
14 came back and -- to the -- to the chambers with the amendment
15 on it, I supported that bill when we initially passed it. The
16 amendment that was put on it took everything away from that
17 bill that gave me a reason for supporting it, and it passed out of
18 here with flying colors again. I look at this bill; I don't think no
19 matter how much I thought there was some, on AB36, I thought
20 there had been some -- some joint agreement, some joint work
21 between our two aisles, and I see what happened on it.
22 I'm looking at this, and I don't see on the surface looking
23 at the bill where this is doing one thing for the constituents in
24 my district or the people of the state. It does -- it satisfied the
25 attorneys. It satisfied the insurance companies, but I don't see

1 where it's done anything for my constituents. I'm going to vote
2 against it. Thank you.
3 MR. SPEAKER: The question is concurrence. All
4 those in favor of concurrence will vote aye; all those opposed
5 will vote no. The clerk will open the roll.
6 Have all members voted as they wish? Clerk will close
7 the roll. There are 96 ayes, one no. The bill is concurred in.
8 Gentleman from the 32nd.
9 32ND: Mr. Speaker I'd ask unanimous consent that
10 the rules be suspended and our actions on Senate Bill 6 be
11 immediately messaged to the Senate.
12 MR. SPEAKER: Is there any objection? Seeing no
13 objection, the bill is in the Senate. Clerk will please read the
14 title of the next bill.
15 CLERK: Senate Bill 11 relating to comparative
16 negligence and punitive damages.
17 MR. SPEAKER: The question is adoption of
18 Assembly Substitute Amendment 2 to Senate Bill 11. Gentleman
19 from the 4th.
20 4TH: I move tabling of Assembly Substitute
21 Amendment 2.
22 MR. SPEAKER: Gentleman from the 68th.
23 68TH: Thank you, Mr. Speaker. Well, here we
24 go. I think what -- next to the motion to pull the budget, may be
25 one of the longest debates of the day. Joint and several liability,

1 this is the bogey-man of tort reform issues, that are driving
2 insurance premiums for business out of control and costing
3 consumers millions and millions of dollars every single day.
4 And the fact of the matter is it's just not true. And what we're
5 trying to do here is we're trying to address many of the issues
6 that were brought up in the past years --
7 MR. SPEAKER: For what purpose does the
8 gentleman from the 4th arise?
9 4TH: With due respect to my colleague, it might
10 help our discussion if he could, and I'm not trying to cut him
11 off, if he could begin perhaps by an explanation of his substitute
12 amendment. It might help with the discussion that we're going
13 to undertake.
14 68TH: Gentleman from the 4th, I'm getting to that,
15 and I will get to that right away. But I just kind of want to
16 bring it to a point. Last year this bill came through the Senate
17 as soon as the Republicans took control of the Senate. It was
18 one of the first bills that they addressed upon taking the
19 majority.
20 I pulled all the testimony I could from the committee
21 hearings and tried to learn about this very, very complex issue.
22 And it seems it's really kind of funny that the compromise plan
23 that was worked out right now with the trial attorneys and the
24 insurance industry and WMC and the Senate Republicans to limit
25 a -- the liability for people at the percentage of -- of damages

1 awarded if you're less than 50 percent liable, and if you're more
2 than 50 percent liable we keep the current joint and several
3 actions.
4 But when I went back to the testimony, it seemed that all
5 the arguments for getting rid of this bogey-man in our civil
6 justice system was because we had the one percent case, one
7 percent liable, you'll be held to 100 percent of the award. Or
8 there were even five percent from some of the submitted
9 testimony, and there was even one that talked about ten percent.
10 But it seems that in the compromise that's come through the
11 Senate we're going all the way to 50 percent, and I think without
12 a heck of a lot of guts the trial attorneys have backed down on
13 this and given up just to hopefully to save some part of joint and
14 several and leaving the victims out in the cold.
15 This substitute amendment -- now to get to your point,
16 Gentleman from the 4th -- basically addresses the arguments that
17 were put forth against joint and several. If you are less than ten,
18 percent negligent you can be held to only 50 percent of the
19 damages. And if you are ten percent or more, current joint and
20 several applies. Much of what you're going to hear in other
21 amendments have come up from the gentleman from the 13th --
22 are going to, I guess, kind of move toward what the Senate
23 compromise, so-called compromise, and I think what we're
24 going to find is that compromise is simply a compromise to the
25 victims of negligence.

1 My substitute amendment simply tries to address the
2 arguments that have been made to totally repeal joint and several
3 from our, you know, tort reform laws. Now I'd like to ask the
4 members also to just briefly take one look at all the papers that
5 we've got in our boxes today. All the people who support this,
6 and please, please, please, do not amend SB11 -- NFIB, the
7 Wisconsin Restaurant Association, WMC, the Wisconsin
8 Innkeepers Association, Wisconsin Association of Consulting
9 Engineers, Wisconsin Mortgage Bankers Association, the
10 Wisconsin Insurance Alliance, the CPAs, and on and on and on.
11 There's not one memo in our box from victims of negligence in
12 support of this bill.
13 The original bill did away with joint and several liability
14 completely. And with the majority in both houses in the hands
15 of the Republican, if the bill -- if there was no compromise made
16 at all, those victims could go wholly uncompensated.
17 So what we're asking simply is Assembly Amendment 2 to
18 address those arguments that we've heard for years about
19 throwing out the current joint and several liability -- to address
20 those concerns. If you're less than ten percent negligent, we're
21 going to hold you only up to 50 percent of the award. But if
22 you're more than ten percent negligent, probably that accident or
23 action would not have occurred. And if that's the case, then we
24 are here to protect the victims.
25 This is not a system that is out of control, although you're

1 going to hear arguments from the other side that all these
2 arguments never make it to court, that they're always settled out
3 of court. You have no figures to prove it. The insurance
4 industry can't come up with any figures to prove it, and we also
5 cannot get any promises from the insurance industry that liability
6 premiums are going to go down if we pass this bill.
7 All we're going to do is pick one more -- pick one more
8 time on victims of negligence. We did that already in med mal.
9 We're doing it again here. We're kicking people out on the
10 streets in all the welfare reform bills we've got here. We've got
11 a budget that wants to pick on the poor and the crippled and the
12 old people. This is just one more example of where --
13 government is here to protect people from the powerful, from
14 those who have the money who can hire the most important and
15 most expensive attorneys they can to defend them. And this is
16 just another example.
17 So this puts a little bit of common sense into it and
18 addresses those issues. So I would urge the members to vote yes
19 and adopt this -- excuse me, vote red on tabling this substitute
20 and vote green on adoption, and let's just have a little bit of
21 common sense in addressing this issue.
22 MR. SPEAKER: The question is tabling.
23 Gentleman from the 4th.
24 4TH: Thank you, Mr. Speaker. It's no secret that
25 people have little faith in our civil justice system and even less

1 faith in attorneys. And almost every day that I come in here the
2 gentleman from the 72nd and I exchange a lawyer joke or two.
3 Survey after survey tells us that people want the abuse of
4 our legal system to end. Now, these aren't surveys of big
5 corporations. These are surveys of small businesses, of local
6 governments, of non-profits, groups like Big Brothers and Big
7 Sisters which is supporting legislation like this.
8 Today I think we can take a significant step in restoring
9 some of the people's faith in this system. We're talking about,
10 as the gentleman referred to, the concept or doctrine of joint and
11 several, also known as the deep pockets syndrome, also known
12 as scapegoat litigation, also known as legal (missing)-- that's the
13 problem that we're trying to address.
14 Understand, of course, that this only comes into play with
15 multiple defendants. I would disagree with the gentleman about
16 this compromise totally doing away with joint and several
17 liability. In fact, some of us would argue that that's what we
18 wanted it to do. This bill doesn't. SB11 as it comes back from
19 the Senate preserves joint and several liability where people are
20 at least 51 percent negligent; in other words, where they are the
21 largest person at fault.
22 Now, the gentleman has suggested that this amendment
23 addresses the problem. I'm afraid it doesn't. Under his
24 amendment, if you are only one percent negligent, you could be
25 held up to 50 times that percentage in fault. It doesn't do away

1 with the problem of the one percent case, of the minimally
2 negligent case. And I will grant you that the one percent case is
3 a relatively small number. I think that's true, but our problem is
4 it's the threat of the one percent case that forces settlement.
5 That's the legal extortion that we often talk about. That's what
6 you hear about. That's the case that we're trying to address
7 here.
8 This bill again preserves joint and several liability where it
9 makes some sense to do so. Many argue that this approach is
10 too timid, is too modest. Put this into perspective. Understand
11 that 37 other states, 37 others, have already drastically reformed
12 joint and several. Some of those never had it in the first place,
13 and our testimony on this bill and the testimony that took place
14 in the Senate hearing, over 75 organizations registered or
15 testified in favor of SB11, of the compromise. I would urge you
16 to vote green, to vote aye on tabling this.
17 MR. SPEAKER: Gentleman from the 68th.
18 68TH: Thank you, Mr. Speaker. Gentleman from
19 the 4th, will you yield to a question?
20 4TH: Sure.
21 MR. SPEAKER: Gentleman from the 4th yield?
22 4TH: Yes.
23 MR. SPEAKER: Yes.
24 68TH: Do you know of any one percent case that's
25 ever gone to litigation in the state of Wisconsin's history?

1 MR. SPEAKER: Gentleman from the 4th.
2 4TH: I've got some examples, the Thomas Bus
3 case, the city of Milwaukee case, those are among them. There
4 are others.
5 68TH: But they've never gone to court; they've
6 never gone to trial?
7 4TH: They've gone to court. They've gone to
8 trial. They may --
9 68TH: They've been settled out of court.
10 4TH: They've -- I can't give you a certain answer.
11 They may well have been settled.
12 68TH: They have been settled out of court. Mr.
13 Chairman, these cases are not tried by the companies themselves.
14 They're tried by the insurance companies that cover the liability
15 insurance for these companies, and in a one percent case, if
16 you're one percent liable, I think we've got to realize that
17 insurance companies are not charitable institutions in this
18 country.
19 You know, if they feel that -- that if it's doubtful that the
20 court will find them -- if they're only one percent liable, if they
21 feel that that's the case where they're at, that they're only one
22 percent liable in the case, if that's what the jury will find them,
23 one percent, they're going to go to court. They're not going to
24 take the chance to settle for millions of dollars outside of court.
25 There was -- I think the last study that was done was done

1 by the State Bar Association dealing with this issue. There's
2 about 13 – they did a two-year study, and this was back in the
3 70s, I think it was, in the '76 '77 period, something like that.
4 They went back to the actual number of court cases that were
5 settled on joint and several in a two-year period there was 13
6 cases. Maybe the information of the gentleman from the 4th is
7 different from what I've had that actually went to litigation. I'll
8 yield to the gentleman from the 4th.
9 MR. SPEAKER: The gentleman from the 4th.
10 4TH: Thank you. Just a point of clarification,
11 those 13 cases -- are those 13 jury verdicts or 13 cases? Which
12 is it, Gentleman?
13 68TH: I'm sorry I cannot answer your question on
14 that, but those are the cases that actually were settled by the
15 court. Okay, now the majority of these cases are settled out of
16 court by the insurance companies for undisclosed amounts.
17 Usually the amounts are sealed, so we don't know what they're
18 settling for, whether they're settling for what they feel if they
19 had gone to court and been found one percent or five percent or
20 ten percent, we don't know because there never was a settlement
21 number. And we don't know what the award would have been.
22 There was a settlement out of court; nobody knows. And all --
23 the only information that we know and in all these businesses
24 that support the repeal of joint and several and the incursion into
25 that law right now, have got the insurance companies that tell

1 their clients who are all these small businesses, all these
2 corporations, all these Big Brothers and Big Sisters, your
3 insurance premiums are so high because we had to settle so
4 many cases out of court. But because the records are sealed and
5 because we can't tell you the amounts, and because, you know,
6 we just -- that information is not there; that's why your
7 premiums are so high. And I remember asking some people last
8 year that were at the -- it was at the Senate testimony on I think
9 it was Senate Bill 152 at that time.
10 Did anybody ask the insurance companies right out what
11 percentage will you lower your premium, your liability and
12 premium cost, if we repeal joint and several liability. There was
13 no answer, no commitments, no promises that liability will
14 definitely go down. But we will guarantee that. It's a promise
15 out there that maybe will happen, maybe it will. We'll think
16 about it. But it's just not going to happen. This is a bogus
17 issue. It's not going to lower premiums.
18 It's not going -- you know, they put words like deep
19 pockets on this issue, but it's just a fallacy out there. And those
20 people who are -- who work in insurance industry, whose
21 responsibility is to insure companies against negligence, don't
22 like to pay negligence awards. That's why in the medical field,
23 insurance companies don't like to insure the sick, because they
24 cost money. And all they want to do is take away the ability of
25 victims who are wronged under negligence, the ability to collect.

1 And all the arguments that we hear is there's this one
2 percent case out there somewhere, never actually gone to court,
3 never actually been settled with a judge, neither jury, or without
4 the jury in this state, and it's a bogus issue. And this is
5 anti-consumer. This is -- this is bad legislation, so let's address
6 their issue, though. That's what this substitute amendment does.
7 Let's address the big issue, but let's keep it within a range. The
8 Senate compromise goes way too far in compromising the
9 victims' opportunities to collect for negligence.
10 MR. SPEAKER: The question is tabling. All those
11 in favor of tabling will vote aye; all those opposed will vote no.
12 Clerk will open the roll.
13 Have all the members voted as they wish? Clerk will
14 close the roll. There are 60 votes to table, 38 not to table.
15 Assembly Substitute Amendment 2 is on the table.
16 The Chair recognizes the gentleman from the 13th.
17 13TH: Thank you, Mr. Speaker. At this point I
18 would move to revive Assembly Sub 1. And on that motion.
19 MR. SPEAKER: The gentleman from the 13th may
20 proceed.
21 13TH: Assembly Sub 1 was -- was discussed a bit
22 in committee. We (missing) final vote on that, and it is a
23 compromise, I think, between both sides of this issue: the
24 defense bar, the plaintiffs bar. This -- this was proposed by
25 some of the experts within the Bar Association as to how we

1 should accomplish this. It does give some things to the
2 defendant, and I hope people are listening and can understand
3 what they're voting on.
4 It abolishes joint and several liability for punitive damages.
5 It allows any defendant who is sued under this and is found zero
6 percent negligent to receive double statutory attorneys' fees from
7 the person that sued them. So that's a great disincentive to bring
8 in parties that should not be involved.
9 What it does do is -- could I have some order, Mr.
10 Speaker. Mr. Speaker. Mr. Speaker, could I have some order,
11 please.
12 MR. SPEAKER: Sure.
13 13TH: Thank you.
14 MR. SPEAKER: The gentleman from the 13th
15 deserves to be heard on this motion.
16 13TH: I think that I speak too much on the floor
17 and people are sick of hearing me is what the problem is. The --
18 the floor this particular bill establishes is that it has joint and
19 several liability for 15 percent instead of 51, but if you're less
20 than 15 percent at fault there is no joint and several liability if
21 your liability is less than twice what the plaintiff's liability is.
22 Let me give you an example.
23 You have a plaintiff who is found four percent negligent
24 (missing) seven percent negligent, and the other defendants 89
25 percent negligent. That seven percent person could not be found

1 jointly and severally liable. If it was zero, ten and 90, the ten
2 percent could. So I think that this again is -- is a very good
3 compromise.
4 The other part of this issue that I think answers some of
5 the small business concerns is that it only allows recovery up to
6 the amount of the defendant's insurance policy, so that if there is
7 a $2 million verdict, for instance, and the defendant is only
8 insured for $50,000 but they would be jointly and severally
9 liable, they are only on the hook for $50,000.
10 And again, this isn't a plaintiff's view; this isn't the
11 defendant's view. It's a real middle-of-the-road compromise. It
12 was presented to us at the committee very eloquently by someone
13 from the State Bar, and I would hope that you would seriously
14 consider it. Thank you.
15 MR. SPEAKER: The question is revival of
16 Assembly Substitute Amendment 1. The gentleman from the 4th
17 is recognized.
18 4TH: Thank you, Mr. Speaker. Well, I ask that
19 you vote not to revive this amendment. One important thing, I
20 think, about the State Bar's action in presenting this amendment,
21 and I do give them credit, is they recognize there's a problem.
22 The State Bar recognizes and their testimony indicated they
23 understand that the current law of joint and several liability is in
24 fact a problem.
25 I took a very serious look at this amendment. It's true,

1 although we introduced it in committee, out of courtesy I
2 allowed the gentleman from the 13th to withdraw it; we did not
3 actually vote on this amendment. But the more I looked at this
4 amendment, the more I realized how little it offers,
5 unfortunately.
6 The threshold of 15 percent, in my opinion, is too low.
7 Secondly, what the gentleman may have mentioned -- I didn't
8 quite catch that part of his speech -- is that the 15 percent isn't
9 even firm. It says that if that defendant, even though that
10 defendant may be below 15, if that defendant has negligence
11 twice as great as that of the plaintiff -- think about all the zero
12 percent plaintiff cases -- then joint and several continues. So it
13 doesn't address that situation. I think, unfortunately, the
14 threshold is a false hope. It's an illusion.
15 The reference to double attorneys' fees: Don't be mislead
16 by that. Those are statutory attorneys' fees, not actual attorneys'
17 fees. There's a big, big difference. One of the problems I see
18 with current law outside of this discussion is that statutory
19 attorneys' fees which judges are able to award are too low. I
20 think -- I think if those were raised, maybe we would have some
21 disincentive towards cases.
22 I think the most telling problem with this, though, as the
23 previous speaker, the gentleman from Eau Claire, had
24 mentioned, the State Bar did a study of jury verdicts in the area
25 of joint and several liability, 1985 to 1986. And in terms of

1 those that went all the way through to a jury verdict, excluding
2 med mal cases -- they didn't count med mal cases -- it was
3 something like 13. Not one of those would be helped by this
4 amendment. So the State Bar's amendment, its own amendment,
5 fails to address the problems that the State Bar itself identified.
6 So I'm afraid while I think it's a positive step that they
7 came forward with some kind of proposal, I'm afraid it just falls
8 far too short in addressing the problem that we have of the
9 minimally negligent defendant.
10 MR. SPEAKER: The question is revival of
11 Amendment -- Substitute Amendment 1. Gentleman from the
12 13th.
13 13TH: Thank you, Mr. Speaker. I think the
14 important point to remember here, even with the one percent but
15 if you have a 14 percent negligent defendant, is who should pay
16 that? Should it be the zero percent plaintiff who was injured?
17 Should they not be able to recover the damages that a jury
18 awards them at the expense of someone who has caused their
19 damages?
20 I think it's a very simple, basic issue. During the
21 committee process the gentleman from the 4th and I discussed
22 this at length, and I asked him if there was some way that we
23 could come up with a proposal that would meet his concern of
24 what he calls a minimally negligent defendant. I don't know
25 how you tell an injured party that their injuries are minimal. He

1 really didn't want to do that, so he -- he tends to me, on this
2 particular amendment, to be a tad disingenuous. There were
3 some opportunities to discuss a meaningful compromise. I think
4 he knows that the bill before us is not a meaningful compromise,
5 but it's something as a member from the other side of the aisle
6 told me: if I don't vote for it, the WMC's going to go crazy on
7 me.
8 So I think that kind of tells us where we're going to be on
9 this bill, but I do hope that members will try to look inside
10 themselves and decide who they want to punish: the injured party
11 or the person who injured them. Thank you.
12 MR. SPEAKER: The question is revival. All those
13 in favor of revival will vote aye; all those opposed to revival will
14 vote no. Clerk will open the roll.
15 Have all the members voted as they wish? Clerk will
16 close the roll. There are 42 votes for revival, 56 against; the
17 amendment is not revived.
18 The question is engrossment in ordering the bill to a third
19 reading. Gentleman from the 13th.
20 13TH: At this time I would move revival of
21 Assembly Amendment 1. And on the motion.
22 MR. SPEAKER: Gentleman may proceed.
23 13TH: Thank you. What Assembly Amendment 1
24 seeks to correct is a serious defect in this bill concerning the
25 effective date. Currently the effective date of the bill is when

1 the bill is signed. Let me give you an example of how that
2 particular situation might be a problem. Let's say we have a
3 lawyer in a small firm up in Green Bay who doesn't normally
4 practice in personal injury cases. But his next-door neighbor had
5 a car accident and came to him and said, "Will you represent
6 me?" And it looked like an easy case so he figured well, what
7 the heck? I can take this case.
8 Well, he hasn't been actively pursuing it at this point and
9 there is some question as to (missing) and how much they are
10 negligent. When this bill is signed into law, the rules change.
11 That means that under the old rules, if the case had gone to trial,
12 this particular plaintiff may have won. Under the new rules, he
13 may lose.
14 So let's say this particular attorney up in Green Bay
15 doesn't -- doesn't realize that the world revolves around the State
16 Capitol in Madison and doesn't know that we're passing this bill
17 today and doesn't know that the Governor could sign it as early
18 as tomorrow. Let's -- maybe he's even off on vacation with his
19 family. So he hasn't filed this case; it's a couple months old.
20 So he files the case, goes to trial, and they don't recover. His
21 neighbor says, "Why didn't you file under the old system?" And
22 he says, "I didn't know." There's some legal malpractice.
23 That's a very real problem that's going to be created for small
24 practitioners. This isn't a Bob Habush amendment. Those
25 people know what's going on. They know that this is coming;

1 and they're going to crank out the lawsuits.
2 The other issue that this particular effective date creates is
3 that you're going to have a rush of lawsuits that maybe shouldn't
4 be filed and could be settled because people are not going to
5 have the opportunity to determine how this particular law affects
6 their case. They're going to say -- if they've heard about it,
7 they're going to say I'd better file because I don't know what's
8 going to happen. So this brings up back to where we were, the
9 same type of language that we had on the medical malpractice
10 bill, AB36, and goes to the acts or omissions that occur after the
11 bill is signed into law, which I think is a much fairer way to go.
12 So I would -- the vote would be green on revival of Amendment
13 1.
14 MR. SPEAKER: The lady from the 75th.
15 75TH: Well, gentleman from the 13th, to stand
16 here and say that lawyers don't know that we're talking about
17 this issue or don't understand that we're debating tort reform
18 boggles my mind. I personally don't like the rule that we all
19 have to belong to the Bar, and in that interim when we didn't
20 have to belong to the Bar I didn't. But we do have to belong to
21 the Bar. We all get the Bar bulletin. We all get the Bar notes
22 monthly. We all know what's going on down here in Madison
23 because Linda Barth said it -- Linda Barth, excuse me, -- Linda
24 Barth, George Brown, they do their job. They report it. Every
25 lawyer in the state of Wisconsin knows.

1 MR. SPEAKER: Gentleman from the 13th.
2 13TH: Thank you. Just briefly, Mr. Speaker, if I
3 could just show an illustration. I certainly don't mean to cast
4 dispersions on Mr. Brown or Ms. Barth as to how they do their
5 job, but I know many lawyers who don't read their Bar bulletin
6 from cover to cover and maybe I'm one of them sometime.
7 But I had a – I have a friend who does insurance defense
8 work, represents insurance companies exclusively. When the
9 stacking bill passed the Senate, he said to me, "Did I hear right
10 that a stacking bill passed?" Now, I don't know if he didn't read
11 his Bar bulletin, but he was not up to date on that issue. And I
12 would venture to say that there are people who don't practice in
13 this field regularly that aren't up to date on this particular thing,
14 so I would beg to differ with the lady from the 75th that every
15 lawyer in the state knows what's going on. I wish that were
16 true, but it's not.
17 MR. SPEAKER: The question is revival of
18 Assembly Amendment 1. All those in favor of revival will vote
19 aye; all those opposed to revival will vote no. The clerk will
20 open the roll.
21 Have all the members voted as they wish? Clerk will
22 close the roll. There are 42 ayes, 56 nos; Amendment 1 is not
23 revived. Gentleman from the 82nd.
24 82ND: Mr. Speaker and Members, when we had
25 our committee executive in Judiciary, we brought up another

1 issue of interest on this bill, and I think it's an important issue
2 and I'm going to have go through a short fact situation to try to
3 explain it to you.
4 Let's assume that you have an automobile accident
5 situation, and the plaintiff who was injured is found by the jury
6 to be 35 percent negligent in the accident. And you have two
7 defendants that the plaintiff is suing, and the jury finds that
8 defendant one is 40 percent negligent and defendant two is 25
9 percent negligent. Let's further assume that there's $100,000 of
10 liability that the jury finds that the plaintiff is owed as a result of
11 the damages found by the jury.
12 What this bill does is, I think, create a real injustice.
13 What happens is, if you have the plaintiff 35 percent negligent,
14 you subtract that percentage from the total damage award which
15 would create a pool of $65,000 that the plaintiff should be
16 entitled to. But what does this bill do? It measures the
17 negligence and imputes the negligence of defendant two to the
18 plaintiff and takes away another $25,000.
19 And if I understand the example correctly, that is a real
20 injustice. And this amendment would cure that problem, so I
21 hope you would go on, revive the amendment, and pass it.
22 MR. SPEAKER: Gentleman from the 82nd, it was
23 not clear to me which amendment you're referring to.
24 82ND: I'm sorry, this is Amendment 3.
25 MR. SPEAKER: All right. The gentleman from

1 the 82nd moves to revive Assembly Amendment 3. Gentleman
2 from the 4th.
3 4TH: Thank you, Mr. Speaker. The gentleman and
4 I did discuss and debate this amendment in committee, and I
5 appreciate the spirit behind this. The gentleman is trying to
6 make the system better.
7 The problem with the approach that he's taken is that it
8 makes it worse, not better, because this type of system would
9 allow a plaintiff to recover from a defendant who is less at fault
10 than the plaintiff. So you could have, in theory, a 90 percent
11 negligent plaintiff recovering damages from a ten percent
12 negligent defendant. I don't think that's what we want. I don't
13 think that is common-sensical.
14 I do appreciate the gentleman's effort and I – as I
15 indicated to him, I certainly have an interest in continuing on
16 these larger issues, but I'm afraid I think this amendment falls
17 far short.
18 MR. SPEAKER: The question is revival of
19 Assembly Amendment 3. Gentleman from the 13th.
20 13TH: Thank you, Mr. Speaker. I think it's
21 important to remember when we're talking about recovering
22 from a defendant that's less negligent than is plaintiff that the
23 plaintiff's damages are already reduced, so that, let's take the
24 gentleman from the 4th's example.
25 We have a plaintiff who's been found 90 percent

1 negligent, and a defendant who's been found ten percent
2 negligent. Actually in this case I don't even think it would occur
3 because the amendment seeks to compare the negligence of the
4 plaintiff to all the defendants, so the plaintiff would still be more
5 negligent, and they wouldn't recover at all.
6 MR. SPEAKER: Would the gentleman withhold his
7 remarks. Please keep the noise down in the chamber. If
8 members wish to confer with each other they should go to the
9 rear of the chamber or far off to the side. The gentleman from
10 the 13th is entitled to be heard.
11 13TH: Thank you. Let's take a better example.
12 Let's -- one that fits the amendment. Let's say we have a 40
13 percent negligent defendant, and another -- I mean a plaintiff,
14 and a defendant that's 45 percent negligent and another defendant
15 at 15. What this -- and the jury awards $100,000. Well, let's
16 see how much this plaintiff is going to recover from these
17 people.
18 Well, we have a little thing called personal responsibility
19 in this particular amendment. We take that $100,000 and we lop
20 off 40,000 right away because that's the plaintiff's portion.
21 Then we have 45,000 that's the 45 percent defendant's portion.
22 Thank you. I appreciate your efforts.
23 And then we have the 15 percent defendant who we're so
24 vigorously trying to protect. This person has been found by a
25 jury to be 15 percent causally negligent of this particular

1 accident, of these damages. Why shouldn't that person pay their
2 share? They're going to pay $15,000. They're not going to pay
3 100; they're not going to pay 45; they're not going to pay 85.
4 They're going to recover -- the plaintiff's going to recover
5 $15,000 because that's their portion.
6 I don't see what's the matter with that since the plaintiff
7 has already lost $40,000 because of his 40 percent negligence.
8 So the vote is green on revival of Amendment 3.
9 MR. SPEAKER: The question is revival of
10 Assembly Amendment -- oh, I'm sorry. The gentleman from the
11 25th.
12 25TH: Mr. Speaker, could I ask unanimous consent
13 that on the roll call for revival of Assembly Substitute
14 Amendment 1 that my vote be changed from green to red.
15 MR. SPEAKER: The gentleman asks to change his
16 vote from green to red on the -- on which Substitute Amendment
17 1 or 2? One. Is there any objection? Without objection it is so
18 ordered.
19 The question is revival of Assembly Amendment 3. All
20 those in favor of revival will vote aye; all those opposed to
21 revival of Assembly Amendment 3 will vote no. The clerk will
22 open the roll.
23 Have all the members voted as they wish? The clerk will
24 close the roll: 41 ayes; 57 nos. The Amendment is not revived.
25 Gentleman from the 82nd.

1 82ND: Mr. Speaker and Members, I move that
2 Assembly Amendment 4 be revived and on the amendment, Mr.
3 Speaker.
4 MR. SPEAKER: Gentleman from the 82nd.
5 82ND: What Amendment 4 would do is establish
6 the old rule of joint and several liability in a cause of action
7 resulting from environmental pollution, hazardous waste or
8 substances or waste disposal sites. And what we want to talk
9 about here for a minute is the difficulty of proof when you have
10 a situation, and usually it's a water situation. You have a
11 stream, a river, or a lake where there are a number of
12 manufacturing concerns on that body of water and they keep
13 polluting that stream, and as a result of their pollution people are
14 injured.
15 Now, when a plaintiff goes to sue and can prove damages,
16 it's almost impossible to prove who caused the damage to this
17 particular plaintiff. Therefore, it makes sense that we have a
18 rule of joint and several liability and that each and every
19 manufacturer be liable for all the damage that the plaintiff can
20 prove. I would hope the members would go on and revive
21 Assembly Amendment 4.
22 MR. SPEAKER: Gentleman from the 4th.
23 4TH: Thank you, Mr. Speaker. As you might have
24 guessed, I would hope that we don't revive this amendment.
25 Just by way of information, I think this is real important to

1 understand the environmental area. This bill -- what we are
2 doing today -- does not displace environmental statutes, rules, or
3 regulations which are the rules and regs that define liability in
4 this area. It doesn't change it, so those laws that we have
5 already enacted which define, perhaps joint and several liability
6 for certain types of environmental remedial actions, continue.
7 This only deals with a very small portion, and that is common
8 law state tort actions.
9 When we were working on this bill and in working out a
10 compromise we had actually looked at this issue, and I spoke
11 with some of the businesses doing business in my neck of the
12 woods for whom environmental concerns are great. And they
13 said, you know, it's not really that big of an issue for us because
14 the vast majority of cases are covered by statutes, rules, and regs
15 like Chapter 144 covering the area you referred to.
16 Or, secondly, the real cutting edge in this area is federal
17 common law, federal claims. This does not change Superfund.
18 This does not change the statutory right side of remediation.
19 And for those very small, narrow cases that might be covered by
20 this, it seems to me that if the majority here believes that joint
21 and several is unfair -- holding a minimally-negligent, one
22 percent negligent defendant completely, 100 percent liable -- then
23 that same unfairness, that same concept of inequity, should apply
24 here. I would hope that you would not revive this amendment.
25 MR. SPEAKER: Gentleman from the 82nd.

1 82ND: Well, Mr. Speaker and Members, I think
2 the argument that the gentleman from the 4th made was
3 somewhat cogent but not completely on base. He says that you
4 don't use tort law as defined in our common law very much in
5 these types of actions, and I think he's right about that. But
6 when there are rare cases when tort law is used, it only makes
7 sense that you use joint and several liability in these cases. So
8 even though what he's saying that you'd use it only rarely, make
9 the cases fair when they occur, so I would hope you would go
10 on and revive Amendment 4.
11 MR. SPEAKER: The question is revival of
12 Assembly Amendment 4. All those in favor of reviving the
13 amendment will vote aye; all those opposed to reviving the
14 amendment will vote no. The clerk will open the roll.
15 Have the members voted as they wish? The clerk will
16 close the roll; 41 ayes, 57 nos. Amendment 4 is not revived.
17 Gentleman from the 13th.
18 13TH: Thank you, Mr. Speaker. At this time I
19 would move revival of Assembly Amendment 5 and on the
20 motion.
21 MR. SPEAKER: Gentleman from the 13th.
22 13TH: Well, this one is my favorite, believe it or
23 not. This deals with punitive damages. If -- what SB11 does is
24 it changes the standard for punitive damages from malicious
25 conduct and wanton or willful disregard to malicious or

1 intentional acts, so let's hearken back to our debate on medical
2 malpractice. We had the gentleman from the 4th, who is the
3 lead sponsor on this and coincidentally the lead sponsor on that
4 bill. We had him and several others get up and tell us if we
5 have a -- for instance, a physician who does his or her job while
6 intoxicated, you can go get him under punitive damages. And
7 everybody around here who was for that bill and some who even
8 weren't that much for the bill, just kind of nodded their heads
9 and said, yeah, yeah, we can get 'em.
10 Now what we have under SB11 is that you have to find
11 that the person acted intentionally, so those of you who have for
12 instance kept up with the cases in that wonderful hospital in
13 Florida, whose name escapes me at the moment, where a wrong
14 leg was amputated -- and the gentleman from the 52nd tells me
15 it's Tampa General; I'll take his word for it -- where a wrong
16 leg was amputated and in one case someone went in and turned
17 off the life support system of the wrong person -- oops -- we
18 would now have to prove in order to get punitive damages that
19 this was done intentionally.
20 I can -- I would imagine that if a surgeon amputated a
21 wrong leg that one of their defenses would be "I made a mistake.
22 I didn't do it intentionally." And I think most of us would
23 believe that, if we were on the jury; I think I certainly would.
24 There are other types of cases. I don't mean to pick on the
25 health care field, but I just find it very unusual that this

1 particular aspect of punitive damages wasn't in the medical
2 malpractice bill and then comes before us about three weeks
3 later. It's a very interesting coincidence, I find.
4 I also found it interesting that the Medical Society at the
5 committee hearing registered in favor of the bill. They didn't
6 testify in favor of this bill. I guess they didn't want to face these
7 types of questions.
8 There are other types of cases that this could happen.
9 Let's imagine we have a drunk driver going down the road. A
10 little girl runs out in front of him. He hits her. She's -- she's
11 horribly injured. Well, we have some damages. Now we want
12 to go after some punitive damages. We say, well, we don't like
13 this person who has three previous drunk drivings out on the
14 road, doing it again. He says it was an accident. I didn't mean
15 to hit her. No punitive damages.
16 So the clear message of this bill is to essentially eliminate
17 punitive damages, and I don't think that that was what this body
18 wanted to do three weeks ago when we were debating medical
19 malpractice. We viewed that as a last-ditch attempt when
20 someone has a grievous violation. Now we're taking that route
21 away from injured people, so the vote is green on revival of
22 Amendment 5.
23 MR. SPEAKER: The question is reviving
24 Amendment 5. All those in favor -- oh, I'm sorry. Gentleman
25 from the 8th.

1 8TH: Thank you, Mr. Speaker. Now if I
2 understood what the gentleman is trying to do here is that, I
3 mean, he changed the whole burden of proof in this bill, too. Is
4 that what you just said, so that now the person that's a victim
5 has to prove intent? I mean how far -- I mean -- you know, the
6 Republicans are really good at delivering for, you know, these
7 groups. You know, some of these groups here that are on this,
8 they're going to have this big rally next week: bankers and
9 mortgage bankers and all of the Manufacturers and Commerce
10 and the realtors and the professional engineers, apartment
11 owners, building owners, Federation of Independent Business,
12 agribusiness, consulting engineers, health underwriters, truck
13 dealers, builders, all -- a lot of these people affected by this bill.
14 I mean they didn't even ask for all this. We got to give it to
15 them all at once? I mean you're giving them more than they
16 even asked for.
17 Now you want to change the burden of proof so you've
18 got to prove intent, create a higher standard for the person that
19 gets hurt? I mean what is going on here? We had to give them
20 more on med mal; they didn't ask for that. Where did -- I mean
21 where are the people that come up with some of these ideas?
22 Didn't these people have, like parents, or what schools did they
23 go to that thinks up some of these great ideas? I mean, what
24 consumer group called you or wrote you a letter? I mean, who
25 asked for this?

1 I don't think it's anybody on this floor that came up with
2 this bright idea to change the burden of proof. I have a hard
3 time believing that it would be anybody -- any member of this
4 body. So I'm assuming that, you know, either the builders or
5 the realtors or the Manufacturers and Commerce and their
6 high-paid attorneys -- I mean, only an attorney could come up
7 with something this ruthless. And the gentleman here from the
8 4th, he had me to believe that the Big Brothers and the Big
9 Sisters are asking for this. I mean this is ridiculous. You don't
10 have to give 'em what they're not even asking for.
11 Okay, my understanding in talking to some of the
12 members that attended the public hearings is that there were even
13 people that were identifying themselves as Republicans that
14 showed up at the hearing and said you're going too far here. I
15 believe the hearing was in the Green Bay area. I believe the
16 gentleman said, "I'm glad that you folks are in the majority; I'm
17 a Republican. But this goes too far." Can't you give 'em a
18 little this session, see how it works? Give 'em a little next
19 session? Man, I can't -- I can't believe this.
20 So now you're going to -- you've already got 90 percent
21 of what you want. At least you can give a person an out if it's
22 willful neglect. And when we tried to get to that, that was the
23 argument on med mal, wasn't it? Wasn't that the argument?
24 The physician from our side of the aisle, that was his
25 argument. Well, you know, it's non-economic damages but then

1 they can go after them under punitive damages. Do you
2 remember that? That was the discussion that everybody sort of
3 agreed to. Yeah, we can get 'em over there. They shouldn't
4 have two avenues. Well, now you're cutting out both avenues or
5 at least making it tremendously harder to prove that it was
6 neglect and punitive. You're creating a new standard. I mean,
7 you don't have to give it all to 'em right now. I mean, geez,
8 can't you just wait till fall?
9 I -- you know, I -- this is just like -- I hope some of you
10 people are around here long enough to have to deal with some of
11 these cases that you're putting on the books. That's all I hope.
12 MR. SPEAKER: The question is -- gentleman from
13 the 82nd.
14 82ND: Mr. Speaker and Members, I think the
15 gentleman from the 13th, Representative Cullen, brought up the
16 case that everybody cringes at. It's the case where the doctor
17 comes along and cuts off the patient's wrong leg. Now, the only
18 two ways you can get punitive damages under this amendment
19 and the way we're amending the law now and the way we're
20 taking away the patient's right is if you can prove that the doctor
21 did it on purpose, which I think would almost never happen, or
22 the second case would have to fall on the language showing that
23 the defendant acted maliciously or in wanton, willful disregard of
24 the plaintiff's rights. The only situation -- one of the few
25 situations I can think that that can happen is if a doctor would go

1 into the operating room, know that he was drunk, and make the
2 mistake. Then you might be able to get punitive damages under
3 this law. It just seems to me when somebody is as careless as
4 cutting off the wrong leg in an operation situation, you should be
5 able to bring and get punitive damages if you could argue
6 effectively to a jury that it's the right thing to do. So I would
7 hope you would certainly go on and vote green for revival.
8 MR. SPEAKER: Gentleman from the 18th.
9 18TH: Thank you, Mr. Speaker and Members.
10 You know, I think this bill comes down to one simple issue: It's
11 a question of having equal access to be made whole in a court of
12 law. I mean from listening to this debate, I mean it sounds to
13 me and it's quite clear that the whole burden of proof has been
14 shifted. How in the good Lord's name you're going to prove
15 that some doctor knowingly and willingly, with intent, chopped
16 off the wrong foot? I mean, that's crazy. Can you imagine?
17 You're someone who's been wronged that way and now you
18 have to go into a court of law and prove that this doctor
19 knowingly and willingly chopped off the wrong foot. You're not
20 going to have access to equal justice here, Mr. Speaker and
21 Members. I think that we should most certainly vote to revive
22 this motion that will make this bill much better, but I don't know
23 how you prove that somebody knowingly and willingly chopped
24 off the wrong foot. That's what it simply comes down to.
25 Thank you, Mr. Speaker and Members.

1 MR. SPEAKER: Does the lady from the 62nd seek
2 recognition? The question is revival of Assembly Amendment 5.
3 Lady from the 45th.
4 45TH: Thank you, Mr. Speaker and Members. I
5 have a question for the kindly gentleman from the 13th, if he
6 would answer a question. Okay. Since I'm not an attorney and
7 I don't quite understand sometimes the shift of burden of proof,
8 if the plaintiff or the person has to determine in a court of law
9 that there had been intent -- you know, that there really had been
10 an intention to do something wrong such as read a test wrong so
11 the person then missed the diagnosis of cancer or perhaps they
12 missed a diagnosis and then did do surgery on the wrong foot,
13 and the court of law then had to prove that there was intent, an
14 intentional neglect -- would that not then bounce into the
15 criminal court because there would be criminal neglect that you
16 would say that that person intentionally cut off the wrong foot or
17 they intentionally read the lab tests wrong? So then wouldn't the
18 shift not only be in this situation where you're trying to get
19 punitive damages, then wouldn't that practitioner then end up in
20 the criminal court as well and be tried for an even greater extent
21 which means that perhaps there would be even more of an
22 adversarial relationship between the client and the physician,
23 let's say, and therefore increase and escalate suits? And I don't
24 know, could you answer that?
25 MR. SPEAKER: The gentleman from the 13th.

1 13TH: Thank you, Mr. Speaker. That is going on
2 right now in Milwaukee County. There is a case where there
3 were two Pap smears read incorrectly; two women developed
4 cervical cancer. And I haven't followed the case all that closely,
5 but there seems to be some very real allegations that some
6 criminal conduct has taken place, and that isn't -- that isn't
7 intentional conduct in this particular case. That's just very
8 negligent, criminally negligent. I think this could lead to the fact
9 that if you did find, whether it's a doctor or a drunk driver or
10 just a driver of any automobile, that if, in fact, you were able to
11 get punitive damages that the victim could very well want the
12 district attorney to then investigate. But maybe some of the
13 district attorneys from our body could answer that a little bit
14 better than I could.
15 MR. SPEAKER: The question is revival of
16 Assembly Amendment 5. All those in favor -- gentleman from
17 the 8th.
18 8TH: Well, Mr. Speaker and Members, I don't
19 know, I'm trying to figure out whether or not there isn't like a
20 glint of human kindness or decency on that other side of the
21 aisle. Judging by some of the twitches I think at least I'm
22 getting to their conscience, but I don't know that I'm getting to
23 their finger. Because you certainly aren't using your head if you
24 don't support revival of this amendment. I mean you've got 'em
25 on the joint and several already. Now you're cutting off the

1 other avenue if it's just total negligence. I mean I -- I guess I
2 would look at the lady from the 75th. Are we going to lose on
3 this one, too? Are we going to lose on this one, too? I'd like to
4 ask your opinion of this amendment.
5 MR. SPEAKER: Does the lady from the 75th yield
6 to the gentleman from the 8th?
7 75TH: Doesn't change the burden of proof at all.
8 8TH: Well, if it doesn't change the burden of
9 proof, why don't you explain to me what it does.
10 75TH: Well, it clearly changes the language.
11 Doesn't change the burden of proof, in my opinion. I think this
12 is a close one. I -- I -- I could support this amendment.
13 8TH: Okay.
14 75TH: But I -- but I do believe that it doesn't --
15 doesn't change the burden of proof.
16 8TH: Okay, I have an additional question. If --
17 how would you, if you were representing a victim, prove the
18 physician or whoever -- let's not pick on physicians. How
19 would you -- under this standard, how would you prove this if
20 you were representing the victim? What? I can't hear you?
21 75TH: Depends on the facts.
22 MR. SPEAKER: Does the --
23 8TH: Does it make it harder to prove on behalf of
24 the victim?
25 75TH: Depends on the facts.

1 MR. SPEAKER: The gentleman from the 8th.
2 8TH: The answer was it depends on the facts. That
3 was the answer. This -- I mean lawyers are lawyers, but the
4 way I read this most of the lawyers at least on this side of the
5 aisle seem to think -- I mean the gentleman from Southwest
6 Wisconsin here or south -- southern -- southwest suburbs of
7 Wisconsin -- I wish we could call one another by region. He
8 doesn't -- he was chairman of this committee for -- I don't know
9 -- 20 years. He doesn't even get up to speak very often. I mean
10 I can count probably on two hands the number of times he's
11 gotten up in 14 years to speak on an amendment. And he hasn't
12 been talking very much on these other amendments, but he got
13 up on this one and moved -- made the motion himself.
14 Now, he happens to be an attorney and I think most of you
15 that know him, you happen to think he's a pretty reasonable guy.
16 I mean he's not a blazing liberal by any standard. I mean I've
17 got to believe that he feels that this is going to impinge on the
18 rights of individuals. And in the context of the whole bill, I
19 mean you've already got 95 percent of what you are looking for
20 here. Why take this right away from the victim or at least put
21 him in this position?
22 And I just would wish that some of the people -- I've been
23 looking at some of the roll calls, and I haven't -- you know, we
24 did caucus on this. I thought we were going to stay together for
25 the most part with the gentleman from the 11th. I wish, because

1 it is a close call, I mean I don't understand why we just can't err
2 on the side of caution and give a little, throw a bone here to the
3 victim.
4 I mean you've already got this thing nailed 95 percent of
5 the way, and if it's a close call, why wouldn't we err on the side
6 of caution? And if we were sort of reckless in our judgment in
7 erring that way, I mean, why don't you take care of this at the
8 fall session or something? I mean, it just seems to me that this
9 -- this goes a little bit too far. I would hope that we could
10 support revival of this amendment, and I wish that the other side
11 of the aisle could, you know, at least have a glint of human
12 kindness here.
13 MR. SPEAKER: The lady from the 12th.
14 12TH: Thank you, Mr. Speaker, and I'll be very
15 brief. The lady from the 75th gave kind of an intriguing answer
16 to the question because what she said is that, well, you really
17 can't tell. It doesn't seem to make a difference. But what's
18 interesting is when the courts look at things like this, if we
19 change the language even if it wasn't our intent to make a
20 difference but we just changed the language in the statutes, they
21 assume we know what we're doing. They assume that there is a
22 reason to change language, and the legislature doesn't do it just
23 for fun or capriciously or out of error, that there has to be a
24 reason.
25 So if we really don't want to do this and we're not quite

1 sure what the impact of changing the language is, then we ought
2 not to do it and we should be cautious just as the floor leader has
3 said. And I don't see any rousing defense on the other side of
4 why we should hold onto this language, so even though the roll
5 calls have been very lop-sided on the other amendments that
6 we've looked at, I hope that people would be at least
7 open-minded on this particular one.
8 MR. SPEAKER: The gentleman from the 67th.
9 67TH: Thank you, Mr. Speaker. Well, for the last
10 couple of years that I've been in the Assembly -- I guess the
11 only couple years I've been in the Assembly -- I have probably
12 voted for more tort reform on this side of the aisle than most of
13 the members over here, and I am also on this bill. I believe that
14 most tort reform is good. But as far as this amendment is
15 concerned, I would join with my speaker or my leader and the
16 other people on this side of the aisle and urge some compassion
17 from the other side of the aisle. This is basically a good
18 amendment. Let's bring it up and include it in the bill and --
19 and I just urge you to do that. Thank you.
20 MR. SPEAKER: The gentleman from the 68th.
21 68TH: Thank you, Mr. Speaker. I don't think it's
22 very difficult, I mean, if you look at the bill and according to the
23 gentleman from the 13th, the amendment returns punitive
24 damages and the burden of proof back to where we are under
25 current law, because the substitute amendment -- the Senate

1 Substitute does change the language. And when you're a
2 lawyer, when you're a judge, every word, every comma, every
3 phrase has a meaning.
4 Now, if you look at the lines that they're talking about on
5 page two, line 21: each time that the plaintiff receives punitive
6 damages if evidence is submitted showing that the defendant
7 acted maliciously. Now, that's all the same. That's where it
8 changes. Under the -- under the current law besides acting
9 maliciously they have to act in a wanton, willful or reckless
10 disregard of the plaintiff's rights. Under the sub, they have to
11 be an intentional disregard of the rights of the plaintiff. There's
12 the word: intentional.
13 So it's very obvious that if you recover your medical
14 expenses and we limit to a $350,000 award under pain and
15 suffering for non-economic damages, and the economic damages
16 of a newborn child may be minimal because we don't know what
17 the potential of that child would have been, that we have punitive
18 damages left. And as what has been repeated several times in
19 the argument for this amendment, we shift the burden of proof
20 into proving that it was intentional there is going to be absolutely
21 no way for victims of negligence, people that we place our trust
22 in sometimes, to recover for damages.
23 I don't think that's too much to ask while we're already
24 stripping away the ability of people who are found less than 50
25 percent, or we're going to just hold them to that percentage. I

1 think we should – I think there's a few members of your side of
2 the aisle that can at least give in for that. Please vote green on
3 revival of this amendment.
4 MR. SPEAKER: Gentleman from the 87th.
5 87TH: Thank you, Mr. Speaker. I had no intention
6 of even talking on this proposal, and even though I have voted
7 against med mal and a few other fairly liberal bleeding-heart
8 positions, I'm going to ask or at least make the comment that it
9 was my intention coming in here today to support this substitute
10 amendment. I'm not an attorney and a lawyer. I'm a
11 contractor. I'm a plumber, and I've been on the wrong side of
12 joint and several liability, being two percent and finding – been
13 finding myself paying $80,000-some because of that two percent
14 liability. I don't like the concept of joint and several liability.
15 I don't know that I was on the original bill, but I was
16 certainly on the – the concept of the original bill. But as I said,
17 I'm not an attorney, but I do feel a little bit uncomfortable with
18 the concept of intentional disregard. I think it's just a little bit
19 too open-ended, and I guess I would – I would ask for your
20 support for Assembly Amendment 5 because I think wanton,
21 willful and reckless is a lot tighter than intentional disregard. So
22 I just – I guess I would ask for your support on Assembly
23 Amendment 5. As I said, I intend to support the substitute, but
24 I'm also going to support this amendment.
25 MR. SPEAKER: Gentleman from the 44th and the

1 lady from the 19th.
2 44TH: Thank you, Mr. Speaker. I really hadn't
3 intended to speak on this bill, but I'm asking myself the
4 question: Now, am I in Wisconsin or am I in Kansas? This –
5 this amendment I'm going to call the Wizard of Oz amendment.
6 Now, you remember Dorothy and Toto. You remember them.
7 They took a little journey, and along the journey they met some
8 characters. And I remember the characters, and I try not to get
9 them mixed up. We talked earlier; some of the members on the
10 other side of the aisle and myself were talking about the tin man
11 and – and the scarecrow. And one of them was looking for a
12 brain; the other one was looking for a heart. Okay? Today I'm
13 looking for a heart on that side of the aisle. I'm looking for a
14 heart.
15 I think that there's a tremendous change when you go to
16 intentional. Now, it's true and I think the gentleman – I was
17 going to ask the gentleman from the 13th to respond to this, but
18 I won't – but I won't ask him to answer this question. But
19 when you go to criminal court with criminal negligence, and the
20 defendant is fined, the fine doesn't go to the plaintiff. Well, it
21 does because the plaintiff is the state. But the injured party
22 doesn't get that in a criminal case. The fines go to the court.
23 Seems to me that by changing the standard to intentional –
24 well, there are two standards in the bill: malicious or intentional.
25 Those are pretty – pretty tough standards to meet if you're the

1 injured party. And it does seem to me that the amendment at
2 least gives a faint heartbeat to the bill -- a faint heartbeat. I'd
3 urge -- urge you just to look from a standpoint of compassion.
4 We're not in Kansas. We're in Wisconsin. We have a heart.
5 So have a heart. Look into your heart and vote green.
6 MR. SPEAKER: Lady from the 19th. Gentleman
7 from the 8th.
8 8TH: Well, I think we've pretty well exhausted the
9 merits. At a minimum, it's a close call. The lady from the 75th
10 has been a supporter of this bill for 11 years, a Democrat. She
11 says at a minimum it's a close call. I -- I'd argue it's a little bit
12 better than close, but let's forget about compassion. Let's forget
13 about the merits. Maybe if we can't persuade you on that, let's
14 talk about politics. All right?
15 See, these groups that want this bill, they're Republicans
16 for the most part. All right? They're going to support you
17 whether this amendment prevails or if it doesn't. They're all up
18 in the galleries. You know, a lot of them are my friends. I've
19 served with some of them. I've, you know, broken bread with
20 them. You know, you're new to the majority. You don't -- you
21 don't have to give them everything they want. Quite frankly, a
22 lot of them, even though they tell you they want everything, it's
23 almost better if they don't get everything. What are they going
24 to have left to work on?
25 All right? That's how that works. Now, we have made

1 every argument, and I haven't heard one good argument.
2 Gentleman from the 4th got up, gave some song and dance, and
3 no one else has chosen to debate this thing because I think it's
4 pretty -- it is, at a minimum, a real close call.
5 Now, the other house, if this amendment is revived and
6 added on, you know, they added on an amendment on the med
7 mal bill that you folks probably didn't agree with and sent it
8 back over here and made you swallow. I mean, send them one
9 back. They'll take the bill up. It doesn't kill the bill. The
10 Senate won't go away. It won't wilt. They'll either agree with
11 it or they won't agree with it. The trial attorneys, they're
12 nervous because they don't want a conference committee. All
13 right? So they'll be working just to pass the amendment.
14 But can't you just like -- legislate? I mean it's okay.
15 Those people up there, they'll still talk to you. They're still
16 going to support you. They're not going to support us. Trial
17 attorneys are probably going to support you more than us now,
18 too. All right? World's not going to end. Make yourselves feel
19 a little better.
20 I think this is not a bad amendment. I think it makes a
21 bad bill a little better for the victim, rather than making it a little
22 worse. I don't think it's going to upset the political apple cart
23 with all those groups that are advocating for it. I don't think it's
24 going to offend the Senate. They're not afraid of offending you,
25 believe me. They tell me probably a lot more than they tell you

1 about what they think of you. So, you know, if you -- if you
2 believe that this is a close call, why wouldn't you err on the side
3 of the victim when you've just, sort of, like, got 95 percent and
4 then some of the bill?
5 MR. SPEAKER: Lady from the 19th.
6 19TH: Thank you, Mr. Speaker. I'm a member of
7 the Judiciary Committee, and I want to talk a little bit about
8 some of the testimony we heard, particularly at the hearing in
9 Green Bay. The Green Bay hearing had a lot of individuals at it
10 who were not hired guns. They were not hired suits. They
11 were people who in some cases are supporters of joint and
12 several liability -- excuse me, of changes to joint and several
13 liability, who felt there are some unfairnesses in our current
14 statute. But these people also came to the hearing because they
15 wanted to talk about the fact that while they want some changes,
16 they felt that this bill that we have before us is extremely unfair
17 and ought not be passed.
18 I want to talk about two of the attorneys who came to that
19 hearing, people I'd never met before, very interesting
20 individuals. A woman named Marie Stanton who practices law
21 in Green Bay. She also happens to chair the Litigation Section
22 of the Bar Association in Green Bay.
23 She deals with a board that's divided equally between the
24 attorneys that represent plaintiffs and those attorneys that
25 represent defendants, and she herself represents insurance

1 companies in these kinds of cases. She came to us to say that
2 she thinks that the current joint and several liability law is very
3 unfair and that she wanted it changed. But she has two
4 standards for making any kind of change: One is that we treat
5 nominally negligent defendants more fairly, and the other is that
6 when we do that, we treat the victims fairly and we ensure that
7 anything we do does not re-victimize them.
8 This woman who was a representative of insurance
9 companies came to tell us that this bill is a terrible bill. She
10 came to tell us that this bill victimizes again the victims. She
11 did not want us to pass the bill. She urged us to defeat it.
12 The second attorney that I want to talk about came before
13 the committee, I believe his name was Bert Liebmann. He's an
14 attorney who also practices in Green Bay. He considers himself
15 to be a businessman and a Republican. He said that his -- his
16 small business or small law firm deals with corporate and
17 business law, and about 56 percent of their cases -- five percent
18 of his cases have to do with personal injury.
19 This man came and identified himself as a Republican and
20 then he modified it. He said, "No, I'm not just a Republican;
21 I'm a conservative Republican, and I came here today to talk to
22 you members of the committee who are Republicans. I came to
23 tell you that now you're in the majority you should use your
24 power judiciously. And I want to tell you that this bill is not
25 that kind of a bill. This is a bad bill, and now that you're in the

1 majority, I want you to use your power and your leadership
2 differently. Do not use your power and your leadership to hurt
3 people in this state. Use it to do what ought to be done which is
4 fair and right."
5 And he urged us – he urged the Democrats and the
6 Republicans on that committee to vote against this bill and not to
7 allow it to advance. And that's what we should be doing today.
8 But at a minimum, at a minimum, we should be reviving the
9 gentleman's amendment and adopting it because it will strike a
10 small blow for fairness, a small effort to protect victims. The
11 Republicans came before this committee in Green Bay and asked
12 us to please do.
13 MR. SPEAKER: Gentleman from the 85th.
14 85TH: Thank you. I hadn't meant to address this,
15 but I've heard a few things. One is the question if this changes
16 the burden of proof. Well, as some people know here
17 technically it doesn't change the burden of proof. That's
18 something like beyond a reasonable doubt, clear and convincing,
19 so that's not affected by this bill. What's affected by this bill is
20 the standard of conduct. It changes the standard of conduct that
21 relates to whether you get punitive damages or not.
22 Now, the only people that benefit from this – not reviving
23 this amendment – are people who act toward a victim in a
24 wanton or reckless disregard of them. Those are the only people
25 that are going to benefit from this, are those who act in a

1 reckless or wanton disregard.
2 Now, one of the things we've always been told: if it's not
3 broke, don't fix it. And I put out to you, how many of you have
4 gotten letters from people complaining about the punitive
5 damages that are awarded in this state, the abuse of the punitive
6 damage system? I bet none of you have gotten a letter.
7 Gentleman from the 4th, would you yield to a question?
8 MR. SPEAKER: Would the gentleman from the 4th
9 yield?
10 85TH: During the last year, two years, five years,
11 ten years, how many punitive damages awards have there been
12 made in a court under the current system? That's my question.
13 4TH: I couldn't tell you.
14 85TH: A follow-up, have you – have you had
15 testimony or correspondence from people saying that the punitive
16 damages are a serious problem in this state or a problem in this
17 state that need to be changed and cite some sort of a case in this
18 state in which it has been a problem?
19 4TH: The interesting thing, Gentleman, is that
20 nobody testified against this provision. You hear everyone
21 talking here about all the people who testified against this bill.
22 Not one person in Green Bay testified against the changes to
23 punitive damages. In fact, I don't remember anyone testifying in
24 Madison against it. I guess that's my answer.
25 85TH: Thank you. I think it goes to show that it

1 ain't broke, don't fix it. I don't think these people paid attention
2 to it because they looked at all the other provisions of this, and I
3 don't think anyone was alerted to this in here. So I think that
4 the proper vote is green on reviving.
5 MR. SPEAKER: The question is revival of
6 Assembly Amendment 5. All those in favor of reviving the
7 amendment will vote aye; all those opposed to reviving the
8 amendment will vote no. The clerk will open the roll.
9 Have the members voted as they wish? The clerk will
10 close the roll. There are 50 ayes, there are 48 noes. The
11 amendment is revived.
12 The question is the adoption of the amendment. The
13 gentleman from the 4th.
14 4TH: Mr. Speaker, I move tabling and on the
15 motion.
16 MR. SPEAKER: Gentleman from the 4th.
17 4TH: Thank you, Mr. Speaker. I didn't want to
18 break up the very eloquent filibuster that was taking place on the
19 other side of the aisle, but I guess I will get up and respond to
20 this issue of punitives, because there's been a lot here that has
21 been spoken that is inaccurate, that is false, and that is
22 misleading.
23 First off, let's understand that punitives have never been
24 designed or intended to compensate victims. That's not what
25 punitives are for. Never have been, not in this state, nor in any

1 of the other states that have punitives. In fact, in many if not
2 most states that have punitive damages, the money doesn't even
3 go to the victim. Instead it goes into a fund that they use to
4 compensate other victims. And in this state we'd actually taken
5 a look at that but discovered that there weren't enough punitives
6 in order to make that fund work. So punitives have never been
7 designed to compensate.
8 Secondly, punitives have never been designed or intended
9 to arise from mere negligence, never have been. In fact, in the
10 main work on negligence in tort, which coincidentally is known
11 as *Prosser on Torts* -- I've never asked the Speaker if he's a
12 relation -- but *Prosser on Torts* is very specific. Punitive
13 damages should not be used for compensation. They do not
14 arise out of negligence. They instead are designed to punish. If
15 they're designed to punish, I think it is appropriate that intent or
16 maliciousness is the standard.
17 The next point I would say --
18 MR. SPEAKER: Gentleman from the 4th. The
19 gentleman will withhold his remarks. There's going to be order
20 in the chamber. The gentleman may proceed. The gentleman
21 from the 72nd.
22 72ND: Mr. Speaker, I move a call of the house.
23 MR. SPEAKER: Are there sufficient seconds?
24 There are not sufficient seconds. The question is tabling
25 Amendment 5. Gentleman from the 4th.

1 4TH: I'll just wind up my remarks by reminding
2 people again: Punitives have never been intended to arise from
3 mere negligence -- never. Not in this state, nor in the other
4 states that provide for punitives. Not designed to compensate
5 victims, not in this state nor the other states that have punitives.
6 And let's not forget where punitives can arise, there are other
7 ways of punishing. It's called criminal statutes and criminal
8 laws.
9 MR. SPEAKER: The question is tabling. All -- the
10 lady from the 45th.
11 45TH: Thank you, Mr. Speaker. I wonder if the
12 gentleman from the 4th would yield to a question.
13 MR. SPEAKER: The gentleman from the 4th yield?
14 The gentleman yields.
15 45TH: Thank you, Gentleman from the 4th.
16 MR. SPEAKER: Lady -- I'd like some order in the
17 House. People take their conversations to the rear of (missing)
18 the corridors. The lady may proceed.
19 45TH: Thank you. Gentleman from the 4th, do
20 you recall when we -- we share a committee, the Insurance
21 Committee, and we had the bill, the med mal bill, up. And one
22 of the amendments that I had was to remove the cap for pain and
23 suffering, for non-economic damages, if a health care provider
24 was under the influence of alcohol or other -- or controlled
25 substances and then caused damage. And I recall that you very

1 eloquently, because you're an attorney, told the committee that
2 we should not put a cap -- or we should maintain the cap if a
3 physician or a nurse or another health care provider was
4 intoxicated or under the influence of mind-altering drugs because
5 they would be able to be punished under punitive.
6 And so the question that I have before you -- or the
7 question that I have, then, is if we remove the current statutes,
8 then we would have to prove that that physician or that nurse
9 intentionally got drunk and then intentionally or maliciously or in
10 other ways had to goof so badly that they brought the wrong
11 x-ray so that the patient's left leg was amputated instead of their
12 right leg; that they intentionally took cocaine and then that
13 altered their decision-making and they were therefore unable to
14 think clearly and made this mistake. Wouldn't it be difficult
15 then to prove under this change, if we don't adopt -- do you
16 want me to continue?
17 MR. SPEAKER: The lady may proceed.
18 45TH: Thank you, Mr. Speaker. Wouldn't it then
19 -- aren't you sort of talking out of both sides of your mouth?
20 Because I remember you saying very eloquently well, you know,
21 we can't use the med mal and the non-cap to punish those health
22 care providers that willfully take alcohol knowing that they are
23 alcoholics and continue to practice their profession.
24 But on the other hand, on this bill, we're doing just the
25 opposite. So what's a poor client -- what's a poor victim to do?

1 They had their lab work read wrong and therefore they
2 developed cancer and then perhaps have to have extensive
3 surgery and chemotherapy, or they're a diabetic and their left
4 foot was cut off instead – or amputated instead of their right foot
5 so now they're going to have to hobble around with no feet. So,
6 you know, what's the poor person to do?
7 MR. SPEAKER: Gentleman from the 4th.
8 4TH: Thank you, Mr. Speaker. I finally got a
9 question out of that. First off, I do believe that the current
10 standard that we are talking about in this bill would cover that
11 situation. It is not the – you don't have to prove an intent that
12 the act took place. You have to prove instead, if you look at it,
13 maliciousness which is the current standard or intentional
14 disregard for plaintiff's rights – not the action being intentional,
15 but disregard for plaintiff's rights. So that would be my
16 response.
17 45TH: If I might continue, Gentleman -- kindly
18 gentleman from the 4th, what about the situation when the nurse
19 has – is under the influence of alcohol and brings the wrong
20 x-ray to the physician and therefore he does amputate the wrong
21 leg? Wouldn't it – the burden be very, very difficult to prove
22 that they were intentionally under the influence under that
23 situation? And we have then gone backward (missing)
24 4TH: I guess they found a question there, too.
25 Yes, I do think it would be covered – the intoxication.

1 Secondly, we do have criminal statutes that would apply, I
2 believe, negligence by use of intoxicants. As you're probably
3 aware, that – that is a statute. I think we've talked about that
4 before. We're certainly seeing the potential for criminal charges
5 being brought right now in Milwaukee. Given any specific case,
6 I'm not the jury. It is for the jury to decide. You're asking me
7 in a hypothetical. Yeah, I think it would be covered.
8 45TH: Okay, thank you.
9 MR. SPEAKER: Lady from the 45th.
10 45TH: Thank you, Gentleman from the 4th. I feel
11 as though you have spoken out of both sides of your mouth on –
12 on this issue and that you're really not being fair to the victim
13 who has been intentionally or non – or actually
14 non-intentionally, everybody makes a mistake, but if you were
15 under the influence of alcohol or mind-altering drugs then it
16 would be very difficult for a court of law to say that you
17 intentionally went into that operating room under those
18 circumstances. And so therefore the victim becomes victimized
19 twice.
20 MR. SPEAKER: Gentleman from the 8th.
21 8TH: Thank you, Mr. Speaker. Well, see, doesn't
22 that like feel a little liberating? You know, they're still up there.
23 They're still alive. They're still Republican. They're not
24 tearing up their cards. I mean you did the right thing.
25 Now, at worst this is a – this is a close call. Everybody's

1 admitted that. You've already extracted, you know, ten pounds
2 of flesh from the consumer here. You've got to have the
3 eleventh? I don't – I don't understand for what purpose.
4 I mean the gentleman from the 4th is usually much more
5 precise in his answers and much more direct. I remember that
6 debate. I remember what he was saying. These are just – we
7 were just talking about non-economic damages. You still have
8 all these rights under punitive damages. We are not talking
9 about punitive damages.
10 Well, now we are talking about punitive damages. I will
11 even go so far as to agree with the lady from the 75th; okay,
12 you're not changing – technically, you're not changing the
13 standard. But you're nudging the ability of the victim to sort of
14 – you're shifting that burden more onto the victim and off of
15 whoever's at fault. There's no question about that. There's no
16 question about that.
17 So why, after you've taken ten pounds of flesh from the
18 consumer, do we have to kind of, like, push the envelope?
19 Now, you've had a few people over there – two, I believe, that
20 voted to revive this amendment. I assume it's because they were
21 listening to the debate.
22 I wish that for once we could legislate. I mean, I think
23 the merits are clearly here. I think that in terms of the art of
24 compromise when you're going after changing a law like this,
25 clearly you have given the proponents of this legislation more

1 than they've asked for. Under the politics of it you've won.
2 These people aren't going to abandon you. They're not mad at
3 you. I just, for the life of me, don't understand why we have to
4 go all the way.
5 You heard testimony from your own public hearing from
6 people who identified themselves as Republicans, not
7 misinformed Republicans at that: a Republican who chaired a
8 section of her local Bar who said that this goes too far on the
9 negligent and punitive damages, and even though she wants tort
10 reform and believes it has to be reformed, that it goes too far.
11 Now, if the lady from the 19th has misrepresented that
12 testimony, then you tell me, Gentleman from the 4th. Is that or
13 is that not what that person said? The lady from the 19th, who's
14 a member of the committee, who said she was listening to the
15 testimony, took notes. A local Republican who said that she was
16 happy the Republicans were in control, chaired the Litigation
17 Section of the local Bar -- Oh, she didn't do that? Oh, she did
18 do that. She did chair it -- was not -- represented insurance
19 companies. That's not accurate? Okay, that part of it's not
20 accurate. But said that this particular part goes too far.
21 4TH: Mr. Speaker, the lady from the 19th has
22 actually merged two different people. The person who identified
23 himself as a Republican was not Marie Stanton, the chair of
24 Litigation Section of the Bar. It was Bert Liebmann, who is a
25 good friend of mine. Neither of those individuals complained

1 about the punitives. They didn't talk on the punitive section.
2 They didn't testify on the punitives provision, but what they did
3 do, which was interesting, is both of them agreed, as I think has
4 been alluded to, that the current system doesn't work. Both of
5 them said they supported tort reform. Both of them said that
6 joint and several needed to be changed. Neither one of them
7 complained or testified against the punitives provisions.
8 8TH: What did they say about their position on the
9 bill?
10 4TH: Both of them felt -- well, I shouldn't say. I
11 don't know that Bert Liebmann gave his specific position.
12 Attorney Stanton said she felt the bill, while she agreed with our
13 desire to change joint and several, she didn't care for the way
14 that we did. She did not support the particular approach that we
15 took. As I indicated earlier I appreciate the fact that the State
16 Bar and Attorney Stanton has taken -- has brought forward a
17 proposal which this body voted down, and as we took a look at,
18 I think it became clear that it doesn't really address the problems
19 that we're talking about: the minimally negligent defendant. As
20 I've said, I appreciate their willingness and their coming
21 forward, but that provision we've taken up and voted down.
22 MR. SPEAKER: The question is tabling Assembly
23 Amendment 5. Lady from the 19th.
24 19TH: Thank you, Mr. Speaker. The gentleman
25 from the 4th is being somewhat, I think, disingenuous here. It is

1 true that Marie Stanton did not identify herself as a Republican,
2 although Bert Liebmann did. Both of these individuals made it
3 very clear and said in no uncertain terms that they do not like
4 this bill, that they did not want to see it passed. And, in fact,
5 Bert Liebmann went on to question the motivations of the
6 Republicans who were advancing this bill and went on to talk
7 about how unworthy he felt this bill was of your leadership,
8 because he felt that the real purpose of this bill was not to do
9 tort reform but was, in fact, to reward your friends and punish
10 your enemies, and that if you were really interested in tort
11 reform, if you really wanted to make some changes in joint and
12 several liability, that this is not the bill that you'd be advancing.
13 This bill is designed to reward your friends, the Wisconsin
14 Association of Manufacturers and Commerce, and to punish
15 lawyers and victims who haven't supported you. And that's
16 what Bert Liebmann, Republican, said about Republicans.
17 MR. SPEAKER: Gentleman from the 68th.
18 68TH: Thank you, Mr. Speaker. Gentleman from
19 the 4th, I've always found to be a rather nice guy and reasonable
20 and not too partisan, but I do take offense at your insinuation
21 that we are filibustering on this bill. We feel very strongly
22 about this bill, and we believe that the point has to be made.
23 This amendment, in particular, shows that there is some heart.
24 We did -- we're able to tweak a couple hearts on your side of
25 the aisle. We have yet to hear an argument to change the

1 standard of conduct.
2 Now, I do take offense with the comment that you made,
3 though, and -- excuse me, not offense but exception. You said
4 that punitive damages are meant to punish, and that's correct.
5 But should not somebody who acts in a wanton, willful or
6 reckless disregard of the plaintiff's rights not be punished? And
7 with $350,000 caps on non-economic damages, you're basically
8 throwing away one of the only ways that they can be made
9 whole. I haven't heard one argument yet to change the standard
10 of conduct from current law which where currently the defendant
11 is acting in a wanton, willful, and a reckless disregard; that's the
12 only way we can award punitive damages. Now we've got to
13 show that they're intentionally disregarded. I applaud those
14 members of that side of the aisle who had the courage to revive
15 this amendment. I sure hope that you'll maintain that courage,
16 like the gentleman from the 44th says, as we journey down
17 through Oz to vote for -- against tabling and vote for adoption of
18 this amendment.
19 First, punitive damages do not make a person whole,
20 especially in -- they will -- they do work to make a person
21 whole. If you use just criminal statutes, that isn't going to make
22 the victim whole. It doesn't do anything for the victim. And
23 that's what this bill is. This bill is a get-the-victim bill. It does
24 absolutely nothing for those that claim that this bill is going to
25 lower insurance costs and liability costs and everything else.

1 This is a get-the-victim bill, and by adopting this
2 amendment and voting red on tabling, we'll at least maintain that
3 standard of conduct. So I'd urge the members to please vote red
4 on tabling.
5 MR. SPEAKER: The gentleman from the 85th.
6 85TH: Criminal statutes are good if you're going to
7 get after a person for their conduct. If you're going after a
8 business, criminal statutes don't help much.
9 TAPE FLIP TO TAPE #2
10 Now, I think that the gentleman from the 4th did bring up
11 a point that you can't focus on the victim. The focus here with
12 the punitive is focusing on the perpetrator, the offender. Now,
13 some -- there are lots of homicides that occur, unfortunately, in
14 this state and in this country, and there are some who think that
15 in a very small number of those homicides the conduct of the
16 defendant or the perpetrator is so bad they ought to be treated
17 differently. They support capital punishment. This is similar to
18 that inasmuch as most negligence cases, it would not apply. But
19 where that negligence is so gross, so intentionally, so -- so
20 recklessly disregarding the rights of someone else, at that point,
21 that's when the punitive would kick in. It's rare, but at that
22 point when someone is wanton and reckless disregard of
23 someone else, that's a proper punishment for them. It's not for
24 the victim. It's a punishment for them to benefit the rest of
25 society for punishing that person for that reckless conduct. That

1 could have been directed toward any one of us and not just that
2 one victim. So for that reason, this amendment should not be
3 tabled.
4 MR. SPEAKER: Gentleman from the 55th.
5 55TH: Thank you, Mr. Speaker. Just let me say
6 that, before the blood gets flowing too – too much over there,
7 earlier today about a dozen people got up and made a vote
8 change; you know, after the fact, stood up and said, you know, I
9 want my vote changed. I'm not going to do that because I think
10 there was some good dialogue, some very good discussion on
11 why we should approve this amendment.
12 This is a close call. Just the facts, though. Running –
13 going from the gentleman from the 25th to my button, I pushed
14 the wrong button. But I'm not going to stand up and say that I
15 – I did that like many people did earlier, because I think
16 reviving the amendment and talking about it and discussing why
17 it's good or why it's bad, there's nothing wrong with that. But
18 even though it's a close call, as a small businessman and
19 someone who has paid out some liability claims where I didn't
20 think I was negligent, but because the act happened on my
21 property of my business – snowing, we didn't have enough ice
22 melt out or something like that – someone who's been affected
23 by this, I know the need for small business to have some relief.
24 And whether the language says what this amendment says
25 or whether the language says what's in the substitute amendment,

1 I don't think that we're going to -- that I as a law -- you know,
2 I'm not a lawyer. I don't think that I'm going to be able to
3 jeopardize that or distinguish between that. So I'm going to vote
4 to table this amendment, provide the opportunity for the citizens
5 of this state to have SB11 go -- go forward, and offer some --
6 allow this bill to go forward. So that's where we're at. Thank
7 you.
8 MR. SPEAKER: Gentleman from the 67th.
9 67TH: Thank you, Mr. Speaker. Well, I wasn't
10 going to talk again, but as another small businessman who has a
11 business on the main street of my town, who does pay lots of
12 insurance to my favorite insurance company in Chippewa Falls,
13 I'm still going to vote for this, and I ask you to vote for this.
14 This is a good amendment, folks.
15 You know, somebody -- if one of your family members
16 had something drastically happen like this, wouldn't you want
17 some recourse? I mean, have you thought about that, what
18 happened to your child or your loved ones, brothers, sisters?
19 This is the -- this is a chance for them to get something back.
20 By not voting for it, you're shutting the door on yourself and
21 everyone else.
22 I would plead with you to please consider voting for this
23 amendment. This is a good amendment. I think the vote is
24 green. Red -- I'm sorry, the vote's red.
25 MR. SPEAKER: The question is tabling. Any

1 other seek to speak? All those in favor of tabling will vote aye;
2 all those will – against will vote no. The clerk will open the
3 roll.
4 The clerk will close the roll. There are 51 ayes, 47 nays.
5 The amendment is tabled.
6 The question is giving the bill a third reading, ordering the
7 bill to a third reading. Gentleman from the 8th.
8 8TH: Mr. Speaker, I think that I would ask just that
9 for – for purposes of people understanding what's going on, if I
10 think the – is it third reading? Because it's a Senate bill?
11 MR. SPEAKER: It's the Senate Bill 11.
12 8TH: Why don't you read the bill, and then I'll
13 object.
14 MR. SPEAKER: Okay. The question is ordering
15 the bill to a third reading.
16 8TH: The question – my point earlier was the
17 question is a little bit misleading as stated, and I don't mean to
18 be – I'm just – it's suspension of the rules, is it not? It's
19 engrossment? Okay. That's where – sometimes you've been –
20 on Assembly bills you've been going – rather than asking for
21 suspension of the rules, you've been going right to third reading,
22 and some of my people have missed their opportunity to object
23 given the question that's being asked. So this a Senate bill and it
24 goes right to third reading and then I'll object.
25 MR. SPEAKER: The question is shall Senate Bill

1 11 be ordered to a third reading. All those in favor will -- will
2 vote aye; all those opposed will vote no. The clerk will open the
3 roll.
4 Have all members voted as they wish? The clerk will
5 close the roll. There are 70 ayes, 28 noes. The bill is ordered
6 to a third reading. Would the clerk please read the title of the
7 bill.
8 CLERK: Senate Bill 11 relating to comparative
9 negligence and punitive damages.
10 MR. SPEAKER: I am -- the Chair is in error. The
11 Chair is in error. The gentleman -- the bill has been ordered to
12 a third reading. The gentleman from the 32nd.
13 32ND: Mr. Speaker, I'd ask unanimous consent
14 that the rules be suspended and that Senate Bill 11 be given its
15 third reading at this time. Unanimous consent, excuse me.
16 MR. SPEAKER: He objects.
17 32ND: Mr. Speaker, I would move that the rules be
18 suspended and that Senate Bill 11 be given its third reading at
19 this time. 70 to 20.
20 MR. SPEAKER: All those in favor of suspending
21 the rules and giving Senate Bill 11 a third reading at this time
22 will vote aye; all those opposed will vote no. The clerk will
23 open the roll.
24 Have all members voted as they wished? The clerk will
25 close the roll. There are 65 ayes, 33 nos. The rules are not

1 suspended.
2 Gentleman from the 32nd.
3 32ND: Mr. Speaker, I wanted to -- I have a
4 question for the clerk with regards to the calendar, then I've had
5 a number of questions from members regards the calendar, so I
6 just want to keep people informed. On what day's calendar is --
7 will Senate Bill 11 now appear?
8 CLERK: Senate Bill 11 will be the second bill on
9 Saturday's calendar.
10 32ND: Mr. Speaker, we -- Mr. Speaker, we have
11 had a number of members who have asked with regards to
12 tomorrow's calendar how we expect to proceed on that, and I'd
13 like to just talk to you about that for a second. We will make a
14 motion later in the day to ask unanimous consent to bring up
15 Friday's calendar and -- and take it up at this time. If we are
16 unable to complete Thursday's business and Friday's business, it
17 is our intention to come back tomorrow. It is our intention to
18 begin at about noon. I've had a chance to talk with a number of
19 members here about their appointments. That allows us to allow
20 a number of members on both sides of the aisle to meet certain
21 commitments that they have, and I'm trying -- I'm telling people
22 now in the hopes that you can make it -- rearrange whatever you
23 possibly can with regards to tomorrow's calendar. If we are
24 unable to complete our business for the week by 8 o'clock
25 tonight, then we'll be back here tomorrow at noon.

1 MR. SPEAKER: We're on the 13th order of
2 business. The clerk will read the title of the next -- gentleman
3 from the 28th.
4 (End of session that dealt with Senate Bill 11.)
5
6 CERTIFICATION
7 I certify that the foregoing is a correct
8 transcript from the record of proceedings
9 in the above-entitled matter.
10
11
12
13 Frank J. Wiener
14 April 14, 1995
15

WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

One East Main Street, Suite 401; P.O. Box 2536; Madison, WI 53701–2536
Telephone (608) 266–1304
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DATE: January 31, 1995

TO: SENATOR JOANNE HUELSMAN

FROM: Gordon A. Anderson, Senior Staff Attorney

SUBJECT: 1995 Senate Bill 11, Relating to Comparative Negligence and Punitive Damages

This memorandum provides background information on, and describes the provisions of, 1995 Senate Bill 11, relating to comparative negligence and punitive damages. Senate Bill 11 was introduced by Senator Huelsman and others; cosponsored by Representative Green and others. The Senate Committee on Judiciary and Insurance will hold a public hearing on the Bill on Wednesday, February 1, 1995, at 9:00 a.m., in Room 421 South, State Capitol, Madison.

A. PUNITIVE DAMAGES

1. Current Law

The following discussion is taken from Legislative Council Staff Brief 86-14, *Overview of Issues Relating to Liability Law and Insurance* (revised August 26, 1986).

Ordinarily, in tort actions, damages are awarded for the purpose of making the claimant "whole," i.e., to compensate the claimant for past and future losses which arise from the tort. However, under some circumstances, punitive damages (sometimes referred to as "exemplary damages") also may be awarded to a claimant. The purposes of punitive damages are to: (a) punish the defendant for outrageous conduct; and (b) deter the defendant and others from engaging in similar conduct in the future.

Critics argue that punitive damages make it possible for plaintiffs to receive unpredictable and unjustified "windfalls" which may greatly exceed their actual and provable damages. Further, insurers contend that when an insurance company must pay these damages, any deterrent impact from a punitive damages award is lost on the wrongdoer and the cost of such damages is passed along to all of the company's policyholders. Others argue that punitive damages should be prohibited, because punishment has no place in the civil law; and, therefore, the conduct covered by punitive damages should be dealt with under the criminal law.

Recent preliminary research on punitive damage awards, conducted by the American Bar Foundation, suggests that punitive damage awards are not routine but are clustered in certain types of cases. Also, according to the preliminary research, extremely high punitive damage awards are not the norm, but tend to appear in a handful of causes of action in which plaintiffs are not likely to be successful, primarily medical malpractice and product liability cases. [See Daniels, "Punitive Damages: The Real Story," ABA Journal, August 1, 1986 (American Bar Association, Chicago, Ill.).]

In Wisconsin, common law allows punitive damages to be awarded, if the defendant acted either maliciously or with a wanton, wilful or reckless disregard of the plaintiff's rights [Kink v. Combs, 28 Wis. 2d 65, 79 (1965)]. The plaintiff must prove that the defendant so acted by presenting evidence that is "clear and convincing." The "clear and convincing" evidentiary standard (or "burden of proof") falls between the lower "preponderance of the evidence" standard applicable to civil actions and the higher "beyond-a-reasonable-doubt" standard required in criminal actions; Wangen v. Ford Motor Company, 97 Wis. 2d 260 (1980). Thus, to receive punitive damages, the plaintiff must show that the defendant's conduct was beyond mere negligence and the plaintiff must meet a higher standard of proof than is ordinarily required in civil actions.

In cases tried before a jury where punitive damages have been claimed, the jury: (a) determines whether punitive damages are to be awarded; and (b) assesses the amount of punitive damages to be awarded. However, punitive damages are not a matter of right; even if the plaintiff meets the burden of proof, the jury is not required to award punitive damages. The jury's verdict to award and assess punitive damages must be supported by 5/6ths of the jurors.

In assessing the amount of punitive damages to be awarded, the jury may consider the defendant's wealth, because punitive damages, to accomplish the damages' purpose, may be proportionate to the defendant's ability to pay [Thomas v. Williams, 139 Wis. 467 (1909)]. However, where there are two or more defendants, evidence of the wealth of the defendants is inadmissible, because of the possible prejudice to, and resultant high punitive damage award against, a defendant whose wealth is disproportionately low [Ogodziski v. Gara, 173 Wis. 380 (1921)]. Other appropriate factors for consideration in determining the amount of punitive damages to be awarded include: "...the grievousness of defendant's acts; the degree of malicious intention; [and] the potential damage which might have been done by such acts as well as the actual damage..." (citations omitted) [Fahrenberg v. Tengel, 96 Wis. 2d 211 (1980)].

A jury may not award punitive damages unless compensatory damages have been awarded. Further, a court may find an award of punitive damages excessive, if it finds that the award is more than necessary to serve its purposes (punishment and deterrence) or if the award inflicts a penalty or burden on a defendant which is disproportionate to the wrongdoing [Fahrenberg, at 234].

The Wisconsin Supreme Court has stated that it is not contrary to Wisconsin public policy to insure against punitive damages [Brown v. Maxey, 124 Wis. 2d 426 (1985)]. However, this and similar decisions do not affect the insurers' ability to expressly exclude punitive damages from liability policy coverage.

2. Provisions of Senate Bill 11

Senate Bill 11 makes the following changes in punitive damages:

a. A plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in a wilful disregard of the rights of the plaintiff. [Currently, the defendant must have acted maliciously or in a wilful or wanton manner in reckless disregard of the rights or interests of the plaintiff.]

b. If the plaintiff has established a legally sufficient (a prima facie) case for the allowance of punitive damages:

(1) The plaintiff may introduce evidence of the wealth of the plaintiff; and

(2) The judge is required to submit to the jury a special verdict as to punitive damages or, if the case is tried to the court, the judge is required to issue a special verdict for punitive damages.

c. The rule of joint and several liability (discussed in the next section of this memorandum) does not apply to punitive damages.

d. The new provisions on punitive damages does not apply to awards or double damages or triple damages, or to the award of exemplary damages under:

(1) Section 46.90 (6) (c), Stats., for violation of confidentiality of records relating to elder abuse.

(2) Section 51.30 (9), Stats., for violation of confidentiality of records relating to persons who are receiving or have received services for mental illness, developmental disabilities, alcoholism or drug dependency.

(3) Section 51.61 (7), Stats., for violations of patients' rights of persons receiving services for mental illness, developmental disabilities, alcoholism or drug dependency.

(4) Section 103.96 (2), Stats., for unlawful retaliation against migrant workers who exercise their rights under federal or state laws and regulations.

(5) Section 153.85, Stats., for violation of confidentiality of patient information obtained by the Office of Health Care Information.

(6) Section 252.14 (4), Stats., for discrimination against persons with Acquired Immunodeficiency Syndrome or positive tests for the presence of HIV (human immunodeficiency virus).

(7) Section 252.15 (8) (a), Stats., for violation of restrictions on use or reporting of a test for HIV.

(8) Section 943.245 (2) and (3), Stats., for civil actions for the issuance of worthless checks.

(9) Section 943.51 (2) and (3), Stats., for civil actions for retail theft.

B. COMPARATIVE NEGLIGENCE

1. Current Law

The following discussion is a revision of information taken from Staff Brief 86-14, *Overview of Issues Relating to Liability Law and Insurance* (revised August 26, 1986).

Until comparatively recently in American legal history, most states adhered to the common law tort doctrine of "contributory" negligence, which prohibits a plaintiff from recovering damages if his or her own negligence (no matter how slight) contributed in any way to the accident or the plaintiff's own injury. Contributory negligence reflects a belief that a person whose own negligence contributed to his or her own injury should not be entitled to recover any damages.

By 1985, 44 states (including, since 1931, Wisconsin) had abandoned the doctrine of contributory negligence in favor of "comparative" negligence. The doctrine of comparative negligence makes it possible for a plaintiff who is guilty of contributory negligence to recover damages. Comparative negligence is a rejection of the harsh results of contributory negligence and reflects the view that even negligent plaintiffs should be entitled to some relief, particularly against defendants who were more negligent than the plaintiff.

Under "pure" comparative negligence, each person injured in an accident may recover damages from the other parties, but the amount recovered is reduced in proportion to the plaintiff's own negligence. Many states have adopted a "modified" comparative negligence doctrine whereby parties who are the least to blame for an accident may recover damages, reduced in proportion to their own negligence. However, the party who is determined to be more at fault cannot recover any damages. Some states allow a plaintiff to recover partial damages, if his or her negligence is "not as great as" the defendant's. Other states, including Wisconsin, will permit recoveries only if the plaintiff's own negligence is "not greater than" the defendant's negligence.

Of the states that adopted comparative negligence in 1985, most also adhered to the rule of "joint and several liability." Under this rule, when two or more defendants are guilty of negligence which contributed to the plaintiff's injury, either defendant may be held liable for the entire amount of the judgment without regard to their respective degrees of negligence. The rule reflects a social policy that injured parties should not be denied fair compensation, just because the defendant who is primarily at fault in causing an accident is unable to pay the judgment.

An effect of the joint and several liability rule is sometimes referred to as the "deep pocket" theory of recovery. In other words, whenever a negligent co-defendant is uninsured,

Wisconsin Briefs from the Legislative Reference Bureau

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TORTS AND DAMAGES: THE CIVIL JUSTICE REFORM ISSUE

I. INTRODUCTION

The continuing debate over revising the civil justice system, sometimes called "tort reform", is again the focus of legislative attention. Among the reasons for heightened interest in the issue, both in Wisconsin and the rest of the nation, is the persistent rise in the size of medical malpractice damage awards and the escalating effect they have on the cost of malpractice insurance premiums and on health care in general. Another reason is the widespread publicity given to large damage awards won in seemingly frivolous lawsuits. A third contributing factor is the recent electoral gains of the of the Republican Party, which has generally supported changes in the civil legal system.

While some groups, such as insurance companies, doctors, manufacturers and other businesses, see a need for significant reform in the civil justice ground rules, many others, such as trial lawyers, labor unions and advocates for consumers and the financially disadvantaged, disagree. They assert that the system is generally working well and believe that little, if any, change is warranted. This brief examines key elements of the tort reform issue and presents commonly expressed arguments for and against various proposed modifications in the civil justice system.

What is a Tort? A tort is a wrongful act or omission, constituting negligence, that results in identifiable harm to a person and for which relief may be obtained in a court of law, typically in the form of monetary damages. Negligence may be the failure to do what a reasonably prudent person would ordinarily have done to prevent foreseeable harm to another under the circumstances. It can also be the doing of a careless, reckless or intentionally malicious act that a prudent and reasonable person would not have done. Essentially, the negligence standard seeks to punish abnormal or inappropriate behavior that harms others. Torts can take the form of causing actual physical or psychological injuries; violating a business relationship by fraud, libel or slander; or any other negligent act or nonact which causes economic losses to another. A tort claim is a civil action in contrast to a criminal action for which the penalty can include imprisonment.

Prepared by Daniel F. Ritsche, Research Analyst

Purpose of a Tort Action. In general, a tort claim seeks redress by relying on the civil justice system to assign fault and, as much as practicable, to make an injured or wronged person "whole" again by forcing the guilty party ("tort-feasor") to pay for the harmed person's present and future medical expenses, income reduction or other tangible or intangible losses. While money alone is often inadequate to compensate a person for the severe pain and suffering resulting from physical or mental injuries or loss of reputation, it is the chief tool available to the civil court. The system is also designed to punish wrongdoing and provide warnings in hopes of preventing future similar unacceptable behavior.

Types of Damage Awards. Money can be awarded to successful plaintiffs in civil suits in the form of three basic types of damages — economic, noneconomic and punitive damages. **Economic damages** include compensation for the actual and estimated costs of present and future medical care, loss of income or earnings capacity, harm to reputation, and damage to or loss of property. **Noneconomic damages** can include awards for so-called "pain and suffering"; mental distress; worry or emotional anguish of the injured individual; embarrassment or humiliation; loss of enjoyment of the normal activities, benefits and pleasures of life; loss of well-being or bodily functions; and the loss of consortium, companionship, and affection suffered by the family of a person who is severely injured or dies as a result of a tortious act. `**unitive damages** may be awarded to the victim but are intended to serve as punishment to the party at fault and to deter similar future wrongdoing by the guilty party and others.

II. ISSUES AND ARGUMENTS

Medical Malpractice. Health care costs consume an increasingly larger share of national wealth each year, rising at a significantly faster pace than the general rate of inflation. It is argued that the escalation of health care costs is partly attributable to patients and their families trying to affix blame for unsatisfactory outcomes and to excessively large "pain and suffering" and punitive damage awards.

Tort reform advocates assert that doctors often resort to practicing so-called "defensive medicine" in order to avoid lawsuits. They may order unnecessary tests, medical interventions of dubious merit and prolonged hospital stays in order to prove later, if called into court, that everything possible was done to diagnose and treat a patient. Such procedures, in some cases performed against a physician's better judgment, may drive up the expense of health care for all.

Noneconomic and punitive damages make up increasingly large proportions of medical malpractice awards. The right of an injured individual to seek compensation for actual and quantifiable economic damages is generally not disputed. Similarly, most people agree that n injured person or surviving family members deserve fair compensation for the pain and

anguish caused by crippling injury or the death of a loved one. Tort reform advocates generally do not propose placing restrictions on awards for actual economic costs but believe some caps on difficult-to-calculate losses, such as "pain and suffering", are appropriate. They also assert that there should be reasonable limits on punitive damages. Critics of restrictions counter that malpractice caps will hamper the ability of juries to punish negligent doctors and adequately compensate victims for the diminished length and quality of life.

The cost of medical malpractice insurance premiums (currently estimated at between 1% and 3% of a physician's expenses) is a small but growing portion of the health care budget. However, those supporting caps argue that the accelerating cost of insurance, especially in certain high risk medical specialties, is prompting many doctors to retire and may discourage replacements. A prime example cited is obstetrics. Parents are apt to sue the doctor who delivered the baby if there are medical complications, particularly in cases of life-long handicaps. It is argued that statutory caps on the size of punitive damages will help control medical costs by stabilizing malpractice insurance premiums. Opponents claim, however, the prospect of damage awards provides a strong financial incentive for medical providers to practice within acceptable standards of care. Both sides admit the medical malpractice system is imperfect. Some deserving victims never get into court, while some parties file false claims. The process itself may be slow, costly and sometimes unjust.

Although several states have instituted caps on noneconomic awards, such as "pain and suffering" and punitive damages, there are currently no limits in Wisconsin on these types of damages. (1985 Wisconsin Act 340 placed a $1 million cap on noneconomic damages for claims filed after June 14, 1986, but that provision sunset on January 1, 1991.)

Some states limit the amount of time a patient has to bring suit, either as calculated from the date on which the alleged malpractice occurred or from the date the injury was discovered. In Wisconsin, for example, medical malpractice actions must be filed within three years of the date of the injury or one year from the date the injury was discovered or with reasonable diligence should have been discovered. However, no action may be commenced more than five years from the date of the negligent act or omission. This statute of limitations was upheld as a legitimate exercise of legislative discretion by the Wisconsin Third District Court of Appeals in *Miller v. Kretz* on February 7, 1995. Although many other tort actions have more lenient grace periods for filing claims, the court ruled that the limitation was not a denial of the constitutional guarantee of equal protection under the law because the legislature had a rational reason to enact it. The court noted: "Because of the distinct nature of medical malpractice claims, the costs involved and the insurance issues, distinguishing health care providers in medical malpractice claims is reasonable."

Excessive Damage Awards. As discussed previously, awards for noneconomic and punitive damages have increased greatly in size and frequently appear to be out of proportion to the actual economic losses. Critics point to the recent case in which a jury awarded almost $3 million to an elderly woman burned by a cup of McDonald's coffee. She sustained the burns when she attempted to pry the top off the cup while holding it between her legs as she was riding in a car. The judge later reduced the award to $640,000.

Some juries have arbitrarily set punitive awards so high as to call into question whether they may violate the prohibition of the U.S. Constitution against the imposition of excessive fines. In a land title dispute several years ago, a West Virginia jury imposed a $10 million punitive sanction against a gas and oil company — 526 times the $19,000 actually lost.

Some argue that punitive damages should not be paid in full to the harmed individual. Rather, since their purpose is to punish wrongdoers and promote public safety, such awards should accrue, in whole or part, to the public treasury.

Contributory and Comparative Negligence. The tort system is based on fault and the principle that whoever caused an injury should pay the costs resulting from the irresponsible behavior or negligence. This means that, in general, compensation is based on the percentage of the blame assigned to each individual involved. If one tort-feasor is responsible for the whole incident, then he or she pays all of the costs. Multiple tort-feasors share the costs based on their portion of the fault. Finally, the total costs to be paid to the injured victim are reduced by any percentage of fault attributed to the injured individual. For example, if A and B are involved in an automobile accident in which B is 85% at fault and the total damages awarded to A in a civil trial are $100,000, then the damages B will be required to pay will be reduced by $15,000, leaving A with a total award of $85,000. Under the doctrine of comparative negligence, recovery is barred unless the defendant's negligence was greater than the plaintiff's on the theory that if a person is more than 50% at fault for an accident, the other party involved should not be liable.

Joint and Several Liability. In cases in which more than one party is found to be at fault, theoretically all are supposed to pay a portion of the total cost of the damages based upon their allotted share of the blame. However, if one or more of the persons at fault are unable to pay all or part of their share, the burden to pay is shifted to the tort-feasors who do have sufficient financial resources, those with so-called "deep pockets". The result of joint and several liability is that a person who is found to be as little as 1% at fault could wind up paying 100% of the judgment if the other guilty parties are indigent. Some jurisdictions permit a person who is forced to pay more than his or her rightful share of the award to bring a civil action against the parties who were initially unable to pay, but the person with "deep pockets" may never be fully compensated by the less well-off defendants.

Proponents of the joint and several liability doctrine claim that justice requires that an injured or wronged person who suffers harm due to the negligence of others should receive compensation for pain and income losses, regardless of which defendant pays. They also argue that it spreads tort costs over the broad range of society in instances where awards are covered by liability insurance. Opponents assert joint and several liability should be altered so that a defendant found guilty should only have to pay his or her fair share of the damages based on the proportion of the fault assigned.

Contingency Fees. Because some of those injured are reluctant to file suit due to their inability to afford legal fees, attorneys often agree to take cases that have some merit in return for a percentage of any damage awards recovered. Such contingency fees are commonly set at one-third of the award but sometimes range up to one-half in particularly risky or complicated actions. Contingency fee arrangements may ensure that less affluent persons with legitimate complaints have access to the courts, but critics charge that the system encourages too many claims that are unlikely to prevail on their own merits. While some assert that lawyers will decline cases in which the chances of winning are small, others argue that attorneys may gamble on these weaker cases in hopes that defendants will settle out of court in order to avoid the high costs of litigation.

1985 Wisconsin Act 340 created Section 655.013, Wisconsin Statutes, which limits the amount of contingency fees that attorneys may collect in medical malpractice cases. In general, lawyers working on such a basis in claims against health care providers may collect one-third of the first $1 million recovered and 20% of any payment above that amount. Attorney fees are limited to 25% of the first $1 million if the case is settled within 180 days of filing the claim and at least 60 days before the first scheduled day of trial.

Product Liability. Manufacturers have a duty to produce products that are not defective or inherently unsafe. However, tort reform advocates claim that companies should not be held liable for products that meet government or accepted industry safety standards when they are made. They also say that manufacturers should not be liable if safety equipment is removed or if instructions are disregarded and the product is used incorrectly. They further argue that retail stores and dealers should not be responsible for selling defective equipment which they believed to be safe.

Reform proponents claim that product innovation is discouraged because of the propensity of people to sue for injuries that could have been prevented with a little common sense. Companies, such as pharmaceutical manufacturers, may even hesitate to undertake development and marketing if their liabilities may outrun product income. A case in point occurred at Abbott Laboratories in 1993 when it discontinued testing of an experimental vaccine to pre-

vent the transmission of the HIV virus from infected mothers to their children. The company voiced worries that the cost of potential liability lawsuits outweighed any anticipated profits.

There are notable cases where defective product design has made an item blatantly unsafe — a prominent example being the Ford Pinto automobile which exhibited a tendency for gas tank explosions in rear-end collisions. But there are also many examples of products, thought to be safe when initially marketed, that later were judged to have been manufactured or used negligently. In some cases where the products have been widely distributed, numerous plaintiffs may join in a class-action lawsuit, which can drive companies into bankruptcy. Well-known examples include the damages awarded against the manufacturers of asbestos products, silicone breast implants and Dalkon Shield intrauterine contraceptive devices. In many instances of alleged defective products, the maker will often settle out of court, without admitting guilt, to avoid the considerable legal costs and negative publicity resulting from a trial. In February 1995, for example, the Kellogg Company agreed to pay $2,400 in damages to a man who insisted the company's Pop-Tarts were to blame for a fire in his toaster which caused damage to his kitchen. Products are sometimes recalled for repair or replacement in order to forestall public relations disasters, but out-of-court settlements that bar plaintiffs from discussing their claims may mean the public at large is not warned about unsafe products.

Frivolous Suits. Some say that a prime contributor to the clogged state of the civil court system is the large number of suits of dubious merit filed for purposes of harassment, extortion or intimidation or because plaintiffs mistakenly believe that their frivolous claims are legitimate. One example was a girl in Maryland who sued her school for $1.5 million for injuries sustained playing on the football team on the grounds that no one told her of the risks involved. Some file relatively groundless suits in hopes that a sympathetic jury will side with them or that a wealthy defendant will settle out of court to avoid the costs and embarrassment of a public trial. Alleged personal injuries are an ample source of frivolous lawsuits because of the difficulty of proving or disproving pain in soft tissues, such as backaches, headaches or allergic reactions to alleged contaminants.

While there are remedies available to combat overburdening the justice system, judges are reluctant to sanction frivolous petitioners for fear of discouraging people from seeking just redress from the courts. Section 814.025, Wisconsin Statutes, permits judges to penalize those filing lawsuits found to be frivolous, either during the proceedings or upon judgment, by awarding the successful party court costs and reasonable attorney fees. To impose punishment for a groundless action, the judge must find that the suit was commenced in bad faith solely for the purposes of harassing or maliciously injuring another or that the plaintiff or the plaintiff's lawyer knew, or should have known, that the action was without any reasonable basis in law or equity and could not be supported by a good faith argument for modification

or reversal of existing law. The Wisconsin Court of Appeals ruled in *Minniecheske v. Griesbach*, 161 Wis. 2d 743 (1991), that restricting access to the courts as a sanction for frivolous actions was acceptable if narrowly tailored to balance the interests of public access to the courts against the citizens' right not to have frivolous litigation draining public resources.

III. PROPOSALS FOR REFORM

There continues to be considerable disagreement about whether radical tort reform is justified. Some claim that the so-called "litigation explosion" has been overblown and that altering the system will make it less responsive and accessible to the people who rely on it for redress of wrongs. They assert that the number of lawsuits and size of awards are not increasing as rapidly as in the recent past and that the system is working as intended to compensate harmed individuals, punish wrongdoers and promote safe products and practices. They also assert that the size and type of damage awards should be left up to the common sense and compassion of ordinary citizens serving on juries and that an arbitrary limit may not adequately compensate some severely harmed victims.

Federal Legislation. The U.S. Congress is currently considering the "Common Sense Legal Reform Act". Its stated purpose is to discourage frivolous lawsuits and limit excessive and "outrageous" punitive damage awards. The proposed act requires the losers of many federal lawsuits to pay the winner's legal fees, preempts state laws with federal standards, caps punitive damage awards for defective product claims, and requires that courts sanction attorneys for "improper actions and frivolous arguments".

Illinois Legislation. A bill passed by the Illinois House of Representatives in February 1995 would limit noneconomic damage awards, such as for "pain and suffering", to $500,000, an amount that would increase with inflation. It would cap punitive damage awards at three times the amount of actual economic damages and eliminate the concept of joint and several liability. The proposal would also give protection to manufacturers in product liability cases by creating a legal presumption that a product is considered safe if it met state or federal safety standards at the time it was made.

Wisconsin Legislation. The Wisconsin Legislature has enacted a number of limitations on liability over the years. Among them are exemptions for recreational land use (the "berry picker" law), aid and comfort to injured persons (the "Good Samaritan" law), donated food to charitable organizations, and ski patrol duties. In order to be exempt from liability claims, the actions must have been taken in good faith, and reckless negligence or failure to warn someone of a known hazard are not excused.

The 1995 Legislature is currently considering several bills relating to the subject of tort reform. 1995 Assembly Bill 36, which passed the assembly on February 2, 1995, would establish

a limit of $350,000 on the amount of noneconomic damages that a claimant may recover due to an injury caused by the negligence of a health care provider. Noneconomic damages are defined under this measure to include items such as pain and suffering, embarrassment, mental distress, and loss of society and companionship. The bill also limits medical malpractice damages related to loss of society and companionship as the result of a death to a maximum recovery of $150,000, the amount currently established for other civil actions involving death.

1995 Senate Bill 11 proposes significant changes in the areas of comparative negligence in general and in the principle of joint and several liability with respect to punitive damages. The proposal would change the rules of comparative and contributory negligence so that the negligence of the plaintiff, if any, would be measured separately against each of the joint tort-feasors. A tort-feasor's liability and share of the total damage award would be limited to the percentage of the total causal negligence attributed to that party. The doctrine of joint and several liability would be abolished in the area of punitive damages, meaning that a defendant would be responsible for only his or her allotted share of the punitive damages, even if the other parties at fault were unable to pay their assigned portion. In addition, evidence of a defendant's wealth, an indicator of ability to pay, would not be admissible until after the plaintiff had established a legally sufficient case for the allowance of punitive damages.

Continuing Debate Over Tort Reform. Even if all the currently proposed modifications at the state and federal level are enacted, questions of tort reform will persist. Like many other areas of the law, this ongoing debate will center around fair and equal justice and will involve a delicate balance between the rights of wronged or injured individuals and the costs to society as a whole.

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Wisconsin State Journal (Madison, WI)

May 30, 1995, Tuesday, ALL EDITIONS

SECTION: Opinion, Pg. 9A

LENGTH: 585 words

HEADLINE: LIABILITY REFORM NEEDS REFORM

BODY:

In the matter of reforming the law covering liability lawsuits, Washington has once again done what Washington does best: Make a mess of things.

There is no need to point a finger of blame. Just throw up your hands at everybody, from the House and Senate, which passed separately flawed reform bills, to the interest groups now crying wolf by claiming that the reforms would permit big business to kill us all with lethal products.

There is still time to set at least a few things right: House and Senate conferees will be working on a compromise between the two chambers' bills this summer. But for good reform to emerge, everyone, including the critics, will have to think about the following:

Liability law reform is good for the country, not just good for big business.

Reform critics like to argue that President Clinton should veto liability law reform because it serves wealthy conservatives and big businesses while the status quo serves consumers. But note that some measure of reform is supported by such liberal, consumer champions as George McGovern, 1972 Democratic presidential nominee, and Griffin Bell, U.S. attorney general under President Carter, both of whom recognize that when our justice system cranks out too many undeserved or inflated damage awards, the cost reaches us all.

Punitive damage awards are way out of whack.

One study shows punitive damage awards have risen by 117 percent during the past 20 years after -- that's right, after -- factoring in inflation. Moreover, the size of some awards just defies common sense. In the highly publicized case of the elderly woman who burned herself by spilling McDonald's coffee, the damage award of $ 2.9 million included $ 2.7 million in punitivedamages, a figure so ridiculous that a judge later reduced the award to $ 480,000.

The House and Senate bills each place a cap on punitive damages. A cap, however, is more an arbitrary than a satisfactory solution. A more thoughtful, though more radical, approach would be to remove punitive damages from civil lawsuits altogether and make them criminal proceedings. After all, why should plaintiffs and the their lawyers benefit from the punishment of defendants, in addition to compensation for damages? That only provides incentive to file lawsuits for profit. If defendants are deliberately hurting people with defective products or services, the Department of Justice should go after them in criminal complaints.

Weeding out worthless lawsuits should not discriminate against the poor.

One of the most offensive reform ideas is to make the losers of civil lawsuits pay the legal fees of the winners. The intention is to reduce the number of lawsuits filed by gold diggers. But the effect would to be to frighten poor people away from the justice system by telling them they can afford to sue only if they can afford to lose.

The Republican Congress cannot advance some of its principles by violating others.

Wisconsin State Journal (Madison, WI) May 30, 1995, Tuesday,

House Republicans stand for limiting the central government by moving more duties to the states. But in the case of liability reform the House bill amounts to a power grab by the central government because it would impose federal rules on all liability law, which has traditionally been left to the states. The Senate version is less troubling because it is limited to product liability law. Most products enter into interstate commerce, which is within federal reach.

Liability law should be reformed. But the reform should be right.

LOAD-DATE: May 31, 1995

1989 ASSEMBLY BILL 153

March 7, 1989 - Introduced by Representatives HUELSMAN, DEININGER, LEPAK, MUSSER, LEWIS, PORTER, SCHNEIDERS, VAN GORDEN, GOETSCH, SCHMIDT, ZWECK, NELSEN, VERGERONT, KLUSMAN, BRANDEMUEHL, SCHULTZ, ZEUSKE, BRANCEL, ROSENZWEIG, FARROW and TURBA, cosponsored by Senators LEEAN and LORMAN. Referred to Committee on Financial Institutions and Insurance.

1 AN ACT to amend 59.20 (5) (b) and 59.395 (5); and to create 20.455 (5)
2 (i), 59.20 (8g) and 895.85 of the statutes, relating to punitive
3 damages.

Analysis by the Legislative Reference Bureau

This bill revises the standards and procedures for awarding punitive damages in certain civil cases. Under present law, the plaintiff sues for damages, including punitive damages, and submits evidence as to the defendant's behavior and ability to pay. If the defendant acted maliciously or in a wilful or wanton manner in reckless disregard of the rights or interests of the plaintiff, punitive damages may be awarded. The plaintiff uses the rule of joint and several liability to collect punitive damages against any defendant found liable for the plaintiff's loss.

The following changes are made in civil actions covered by the bill:

1. The reference to wanton or reckless action by the defendant is omitted from the standard of conduct necessary to prove punitive damages, allowing the plaintiff to receive punitive damages if the defendant acts maliciously or in a wilful or conscious disregard of the plaintiff's rights.

2. Evidence of the defendant's wealth, an indicator of ability to pay, is admissible only after the plaintiff has established a legally sufficient case for the allowance of punitive damages.

3. The trier of fact is required to issue a special verdict for punitive damages if legally sufficient evidence is introduced to allow those damages.

4. The award of punitive damages is split evenly between the plaintiff and the state.

5. The court is prohibited from informing or instructing the jury about the punitive damage allocation.

6. The rule of joint and several liability is abolished as to punitive damages.

If punitive damages are awarded, the state's portion of the award in cases involving a personal injury claim will be used for the crime victim compensation program and the crime victim and witness services program. In other cases, the funds will be deposited in the general fund.

For further information see the state and local fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 SECTION 1. 20.005 (3) (schedule) of the statutes: at the appropriate
2 place, insert the following amounts for the purposes indicated:
3

		1989-90	1990-91
4 20.455 JUSTICE, DEPARTMENT OF			
5 (5) VICTIMS AND WITNESSES			
6 (i) Crime victim and witness			
7 assistance and			
8 compensation	PR A	-0-	-0-

9 SECTION 2. 20.455 (5) (i) of the statutes is created to read:
10 20.455 (5) (i) Crime victim and witness assistance and compensation.
11 The amounts in the schedule for purposes of chs. 949 and 950. All moneys
12 received as punitive damage awards under s. 895.85 (5) (c) shall be cred-
13 ited to this appropriation.
14 SECTION 3. 59.20 (5) (b) of the statutes is amended to read:
15 59.20 (5) (b) For all court imposed fines and forfeitures required by
16 law to be deposited in the state treasury, the amounts required by s.
17 165.87 for the penalty assessment surcharge, the amounts required by s.
18 167.31 (5) for the weapons assessment, the amounts required by s. 973.045
19 for the crime victim and witness assistance surcharge, the amounts
20 required by s. 161.41 (5) for the drug abuse program improvement
21 surcharge, the amounts authorized by s. 971.37 (1m) (c) 1 or required by
22 s. 973.055 for the domestic abuse assessment surcharge, the amounts
23 required by s. 346.655 for the driver improvement surcharge, the amounts
24 collected under s. 895.85 as punitive damage awards, the amounts required

1 by s. 29.997 for the natural resources assessment surcharge and the amount
2 required by s. 29.998 for natural resources restitution payments, transmit
3 to the state treasurer a statement of all moneys required by law to be
4 paid on the actions so entered during the preceding month on or before the
5 first day of the next succeeding month, certified by personal affidavit
6 endorsed upon or attached thereto, and at the same time pay to the state
7 treasurer the amount thereof.

8 SECTION 4. 59.20 (8g) of the statutes is created to read:

9 59.20 (8g) Retain 10% for fees in receiving and paying into the state
10 treasury all moneys received by him or her for the state for punitive
11 damage awards under s. 895.85 (5).

12 SECTION 5. 59.395 (5) of the statutes is amended to read:

13 59.395 (5) Pay monthly to the county treasurer for the use of the
14 state the state's percentage of the fees required to be paid on each civil
15 action, criminal action and special proceeding filed during the preceding
16 month and pay monthly to the county treasurer for the use of the state the
17 percentage of court imposed fines and forfeitures required by law to be
18 deposited in the state treasury, the amounts required by s. 165.87 (2) (b)
19 for the penalty assessment surcharge, the amounts required by s. 167.31
20 (5) for the weapons assessment, the amounts required by s. 973.045 for the
21 crime victim and witness assistance surcharge, the amounts required by s.
22 161.41 (5) for the drug abuse program improvement surcharge, the amounts
23 authorized by s. 971.37 (1m) (c) 1 or required by s. 973.055 for the
24 domestic abuse assessment surcharge, the amounts required by s. 346.655
25 for the driver improvement surcharge, <u>the amounts collected under s.</u>
26 <u>895.85 as punitive damage awards,</u> the amounts required under s. 29.997 (1)
27 (d) for the natural resources assessment surcharge and the amounts
28 required under s. 29.998 (1) (d) for the natural resources restitution

1 payments. The payments shall be made by the 15th day of the month
2 following receipt thereof.
3 SECTION 6. 895.85 of the statutes is created to read:
4 895.85 PUNITIVE DAMAGES. (1) DEFINITIONS. In this section:
5 (a) "Defendant" means the party against whom punitive damages are
6 sought.
7 (b) "Double damages" means those court awards made under a statute
8 providing for twice, 2 times or double the amount of damages suffered by
9 the injured party.
10 (c) "Plaintiff" means the party seeking to recover punitive damages.
11 (d) "Treple damages" means those court awards made under a statute
12 providing for 3 times or treble the amount of damages suffered by the
13 injured party.
14 (2) SCOPE. This section does not apply to awards of double damages
15 or treble damages, or to the award of exemplary damages under ss. 46.90
16 (6) (c), 51.30 (9), 51.61 (7), 103.96 (2), 146.025 (8) (a), 153.85,
17 943.245 (2) and (3) and 943.51 (2) and (3).
18 (3) STANDARD OF CONDUCT. The plaintiff may receive punitive damages
19 if evidence is submitted showing that the defendant acted maliciously
20 toward the plaintiff or in a wilful or conscious disregard of the rights
21 of the plaintiff.
22 (4) PROCEDURE. If the plaintiff establishes a prima facie case for
23 the allowance of punitive damages:
24 (a) The plaintiff may introduce evidence of the wealth of a
25 defendant; and
26 (b) The trier of fact shall return a special verdict as to punitive
27 damages.

1 (5) PUNITIVE DAMAGE AWARDS. (a) Except for awards under ss. 23.29
2 (24) and 949.17 (3), if punitive damages are awarded, the court shall
3 apportion 50% of the punitive damages award to the plaintiff and 50% to
4 the state.

5 (b) After the clerk of court determines the total amount of punitive
6 damages due, the clerk shall collect and transmit to the county treasurer
7 under s. 59.395 (5) 50% of that amount. The county treasurer shall make
8 payment to the state treasurer under s. 59.20 (5) (b).

9 (c) If the cause of action was based on a personal injury claim, the
10 state treasurer shall deposit the moneys collected as punitive damages as
11 specified in s. 20.455 (5) (i) for use under chs. 949 and 950. In all
12 other cases, the state treasurer shall deposit the moneys collected as
13 punitive damages in the general fund.

14 (d) Plaintiff's attorney fees may not be based, in whole or in part,
15 on the portion of the punitive damages awarded to the state.

16 (e) A jury shall not be informed or given jury instructions as to
17 this subsection.

18 (6) APPLICATION OF JOINT AND SEVERAL LIABILITY. The rule of joint
19 and several liability does not apply to punitive damages.

20 SECTION 7. INITIAL APPLICABILITY. This act first applies to civil
21 actions commenced on the effective date of this SECTION.

22 (End)

1989 ASSEMBLY BILL 385

Chief Clerk's Correction

May 31, 1989 - Introduced by Representatives LOUCKS, HUBLER, DEININGER, ZWECK, NELSEN, LINTON, RADTKE, HAMILTON, ZEUSKE, HASENOHRL, TREGONING, GRONEMUS, HUELSMAN, SCHNEIDERS, VAN GORDEN, SCHULTZ, DUFF, WELCH, LADWIG, JOHNSRUD, SCHMIDT, LEHMAN, KLUSMAN, MUSSER, GOETSCH, FARROW, FOTI, ROSENZWEIG, ZIEN, OURADA, LEPAK, VERGERONT, UNDERHEIM, LAHN, GARD and LEWIS, cosponsored by Senators ROSHELL, BUETTNER, PLEWA, LEEAN, ANDREA, RUDE, STITT, KREUL, LORMAN, LASEE and COWLES. Referred to Committee on Financial Institutions and Insurance.

AN ACT to amend 895.70 (3) and 949.15 (3); and to create 20.455 (1) (g), 20.455 (1) (ga), 20.455 (1) (gb), 20.680 (2) (r), 20.680 (2) (s), 25.80, 165.25 (8m), 758.19 (4), 895.046 and 895.047 of the statutes, relating to punitive damage awards and payments to persons who have obtained judgments in tort actions and making appropriations.

Analysis by the Legislative Reference Bureau

This bill establishes a fund to assist any person who has been injured and has obtained a judgment in a tort action for the injury but who has not received reimbursement in full for the injury. The bill requires the judge to award any punitive damages in a tort action to the state. The department of justice collects those awards and sends the money collected to the director of state courts. The director of state courts uses the moneys to pay the injured parties the amount of their unsatisfied judgments. If the amount in the fund is insufficient to pay all the eligible injured parties, they are each paid a proportional share. The amount paid to each injured party becomes a claim the state has against the judgment debtor.

This bill revises the standards and procedures for awarding punitive damages in certain civil cases. Under present law, the plaintiff sues for damages, including punitive damages, and submits evidence as to the defendant's behavior and ability to pay. If the defendant acted maliciously or in a wilful or wanton manner in reckless disregard of the rights or interests of the plaintiff, punitive damages may be awarded. Under this bill, the reference to wanton or reckless action by the defendant is omitted from the standard of conduct necessary to prove punitive damages. The bill allows evidence of the defendant's wealth, an indicator of ability to pay, to be admitted only after the plaintiff has established a legally sufficient case for the allowance of punitive damages. A judge is allowed to issue a special verdict for punitive damages if legally sufficient evidence is introduced to allow those damages. Punitive damage awards are limited to 3 times the amount of damages suffered by the injured party.

For further information see the state and local fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 SECTION 1. 20.455 (1) (g) of the statutes is created to read:

2 20.455 (1) (g) Collection on judgments. All moneys received from the
3 collection of civil judgments under s. 895.047 for the purpose of reim-
4 bursing the collection expenses of the department of justice approved by
5 the department of administration under s. 895.047 and for distribution to
6 the director of state courts for payment into the fund to assist the
7 injured through restitution under s. 25.80. The department of adminis-
8 tration shall first transfer money from this appropriation to par. (ga)
9 for approved collection expenses of the department of justice. The
10 department of administration shall transfer any remaining moneys to par.
11 (gb) for distribution under that appropriation.

12 SECTION 2. 20.455 (1) (ga) of the statutes is created to read:

13 20.455 (1) (ga) Debt collection expenses. As a continuing
14 appropriation, all moneys transferred from par. (g) for the purpose of
15 reimbursing the department of justice for expenses approved by the
16 department of administration incurred in the collection of funds from
17 civil judgments under s. 895.047.

18 SECTION 3. 20.455 (1) (gb) of the statutes is created to read:

19 20.455 (1) (gb) State courts payment. As a continuing appropriation,
20 all moneys transferred from par. (g) for the purpose of paying the direc-
21 tor of state courts as provided under s. 895.047.

22 SECTION 4. 20.680 (2) (r) of the statutes is created to read:

23 20.680 (2) (r) Assistance to the injured. From the fund to assist
24 the injured through restitution under s. 25.80, all moneys received to be
25 used for payments under s. 895.047 (3).

1 SECTION 5. 20.680 (2) (s) of the statutes is created to read:
2 20.680 (2) (s) Assistance to the injured; administration. From the
3 fund to assist the injured through restitution under s. 25.80, all moneys
4 received to reimburse the director of state courts for administrative
5 expenses incurred under s. 895.047.
6 SECTION 6. 25.80 of the statutes is created to read:
7 25.80 FUND TO ASSIST THE INJURED THROUGH RESTITUTION. There is
8 established a separate nonlapsible trust fund designated as the fund to
9 assist the injured through restitution to consist of the moneys received
10 by the director of state courts under s. 895.047. Moneys in the fund
11 shall be expended only for the purposes under s. 895.047.
12 SECTION 7. 165.25 (8m) of the statutes is created to read:
13 165.25 (8m) COLLECTION OF PUNITIVE DAMAGE JUDGMENTS. Represent the
14 state in any action related to collection of judgments under s. 895.047.
15 SECTION 8. 758.19 (4) of the statutes is created to read:
16 758.19 (4) If the department of justice sends moneys collected under
17 s. 895.047 (1) to the director of state courts, the director of state
18 courts shall deposit those moneys in the fund to assist the injured
19 through restitution under s. 25.80 for distribution as provided under s.
20 895.047 (3). The director of state courts may be reimbursed from that
21 fund for the administrative costs incurred under s. 895.047.
22 SECTION 9. 895.046 of the statutes is created to read:
23 895.046 PUNITIVE DAMAGES. (1) DEFINITIONS. In this section:
24 (a) "Defendant" means the party against whom punitive damages are
25 sought.
26 (b) "Double damages" means those court awards made under a statute
27 providing for twice, 2 times or double the amount of damages suffered by
28 the injured party.

1 (c) "Treble damages" means those court awards made under a statute
2 providing for 3 times or treble the amount of damages suffered by the
3 injured party.
4 (2) SCOPE. This section does not apply to awards of double damages
5 or treble damages, or to the award of exemplary damages under ss. 46.90
6 (6) (c), 51.30 (9), 51.61 (7), 103.96 (2), 146.025 (8) (a), 153.85,
7 943.245 (2) and (3) and 943.51 (2) and (3).
8 (3) STANDARD OF CONDUCT. A court may award punitive damages if evi-
9 dence is submitted showing that the defendant acted maliciously toward the
10 injured party or in a wilful or conscious disregard of the rights of the
11 injured party.
12 (4) PROCEDURE. If the injured party establishes a prima facie case
13 for the allowance of punitive damages:
14 (a) The injured party may introduce evidence of the wealth of a
15 defendant; and
16 (b) The judge shall return a special verdict as to punitive damages.
17 (5) AWARDS. The award of punitive damages may not exceed treble the
18 amount of damages suffered by the injured party.
19 SECTION 10. 895.047 of the statutes is created to read:
20 <u>895.047 ASSISTANCE TO INJURED PARTIES.</u> (1) If a court determines
21 that punitive damages should be awarded in a tort action, the court shall
22 award those damages to the state. If punitive damages are awarded to the
23 state, the attorney fees of the injured party may not be based, in whole
24 or in part, on the amount of punitive damages awarded. On the day the
25 judgment for punitive damages is entered under s. 806.06, the clerk of
26 court shall send a copy of that judgment to the department of justice.
27 The department of justice shall represent the state in any action to col-
28 lect on any judgment awarded to the state under this section. The

1 department of justice shall deposit all moneys collected as a result of
2 that action in the appropriation under s. 20.455 (1) (g). That money
3 shall be expended as provided by this section. The department of justice
4 shall certify any costs incurred in collecting the money to the department
5 of administration and shall be reimbursed for those costs that are
6 approved by the department of administration from the appropriation under
7 s. 20.455 (1) (ga). If any moneys collected on the judgment remain after
8 that reimbursement, the department of justice shall, from the appropria-
9 tion under s. 20.455 (1) (gb), pay that money to the director of state
10 courts. The director of state courts shall credit those moneys to the
11 fund to assist the injured through restitution under s. 25.80.
12 (2) The clerk of circuit court in each county shall, on forms pro-
13 vided by the director of state courts, submit to the director of state
14 courts information regarding judgments in tort actions commenced on or
15 after the effective date of this section .... [revisor inserts date], that
16 remain unsatisfied in whole or in part 60 days after the judgment is
17 docketed under s. 806.10. The clerk shall include the date the judgment
18 was docketed, the amount of the judgment unsatisfied and the full name and
19 address of each judgment creditor and judgment debtor. The clerk of cir-
20 cuit court shall send this information to the director of state courts no
21 later than 80 days after the judgment was docketed. The director of state
22 courts shall, within 20 days of receiving this information, mail to the
23 judgment creditor an application to complete and return to the director of
24 state courts. The application shall include the amount of the judgment
25 reported by the clerk of court as unsatisfied and shall ask the judgment
26 creditor to list any amount paid on that judgment. The director of state
27 courts shall include with that application an explanation of how to com-
28 plete the application, why the application was sent and of the assistance

1 available under this section. The director of state courts shall also
2 include with the application a notice that the judgment creditor inform
3 the director of state courts if he or she receives payment on the
4 judgment. A minor's parent or guardian or an incompetent's guardian or
5 other person authorized to administer the incompetent's estate may com-
6 plete the application. Within 20 days after receipt of an application,
7 the director of state courts shall send the judgment creditor a written
8 acknowledgment of receipt of the completed application, giving the date
9 received and the amount of the unsatisfied judgment.

10 (3) No later than March 1, from the appropriation under s. 20.680 (2)
11 (r), the director of state courts shall pay each judgment creditor who
12 submitted a completed application to the director of state courts during
13 the period from January 1 to December 31 of the previous year. If the
14 amount in the appropriation under s. 20.680 (2) (r) is insufficient to
15 pay in full the judgment creditors' unsatisfied judgments, they shall be
16 paid on a proportional basis. A judgment creditor who receives a payment
17 under this subsection may not receive any future payment under this sub-
18 section for the same judgment.

19 (4) If a payment is made to a judgment creditor under sub. (3), the
20 state is subrogated to the rights of the judgment creditor and may bring
21 an action on the judgment against the judgment debtor for the amount of
22 the payment made by the state to the judgment creditor. The department of
23 justice shall represent the state in that action. The director of state
24 courts shall provide the department of justice with any information
25 regarding the judgment requested by the department to enable the depart-
26 ment to represent the state in an action against a judgment debtor. The
27 department of justice shall deposit any moneys collected under this sub-

section in the appropriation under s. 20.455 (1) (g) and those moneys shall be expended in the same manner as funds collected under sub. (1).

SECTION 11. 895.70 (3) of the statutes is amended to read:

895.70 (3) PUNITIVE DAMAGES. A ~~court or jury~~ judge may award punitive damages to a person bringing an action under this section.

SECTION 12. 949.15 (3) of the statutes is amended to read:

949.15 (3) If a judgment or verdict in an action under sub. (1) or (2) indicates separately economic loss and noneconomic detriment, payments on the judgment shall be allocated between them in proportion to the amounts indicated. In such an action, the judge, on timely motion, may return a special verdict awarding punitive damages, and shall direct the jury to return a special verdict, indicating separately the awards for noneconomic detriment~~, punitive damages~~ and economic loss.

SECTION 13. INITIAL APPLICABILITY. This act first applies to actions commenced on the effective date of this SECTION.

(End)

1989 SENATE BILL 251

July 26, 1989 - Introduced by Senators BUETTNER, ROSHELL, PLEWA, LEEAN, ANDREA, RUDE, STITT, KREUL, LORMAN, LASEE, COWLES and FARROW; co-sponsored by Representatives LOUCKS, HUBLER, KLUSMAN, DEININGER, ZWECK, NELSON, LINTON, RADTKE, HAMILTON, ZEUSKE, HASENOHRL, TREGONING, GRONEMUS, HUELSMAN, SCHNEIDERS, VAN GORDEN, SCHULTZ, DUFF, WELCH, LADWIG, JOHNSRUD, SCHMIDT, LEHMAN, MUSSER, GOETSCH, FOTI, ROSENZWEIG, ZIEN, OURADA, LEPAK, VERGERONT, UNDERHEIM, LAHN, GARD and LEWIS. Referred to Committee on Judiciary and Consumer Affairs.

1 AN ACT to amend 895.70 (3) and 949.15 (3); and to create 20.455 (1) (g),
2 20.455 (1) (ga), 20.455 (1) (gb), 20.680 (2) (r), 20.680 (2) (s),
3 25.80, 165.25 (8m), 758.19 (4), 895.046 and 895.047 of the statutes,
4 relating to punitive damage awards and payments to persons who have
5 obtained judgments in tort actions and making appropriations.

Analysis by the Legislative Reference Bureau

This bill establishes a fund to assist any person who has been injured and has obtained a judgment in a tort action for the injury but who has not received reimbursement in full for the injury. The bill requires the judge to award any punitive damages in a tort action to the state. The department of justice collects those awards and sends the money collected to the director of state courts. The director of state courts uses the moneys to pay the injured parties the amount of their unsatisfied judgments. If the amount in the fund is insufficient to pay all the eligible injured parties, they are each paid a proportional share. The amount paid to each injured party becomes a claim the state has against the judgment debtor.

This bill revises the standards and procedures for awarding punitive damages in certain civil cases. Under present law, the plaintiff sues for damages, including punitive damages, and submits evidence as to the defendant's behavior and ability to pay. If the defendant acted maliciously or in a wilful or wanton manner in reckless disregard of the rights or interests of the plaintiff, punitive damages may be awarded. Under this bill, the reference to wanton or reckless action by the defendant is omitted from the standard of conduct necessary to prove punitive damages. The bill allows evidence of the defendant's wealth, an indicator of ability to pay, to be admitted only after the plaintiff has established a legally sufficient case for the allowance of punitive damages. A judge is allowed to issue a special verdict for punitive damages if legally sufficient evidence is introduced to allow those damages. Punitive damage awards are limited to 3 times the amount of damages suffered by the injured party.

For further information see the state and local fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 SECTION 1. 20.455 (1) (g) of the statutes is created to read:

2 20.455 (1) (g) Collection on judgments. All moneys received from the
3 collection of civil judgments under s. 895.047 for the purpose of reim-
4 bursing the collection expenses of the department of justice approved by
5 the department of administration under s. 895.047 and for distribution to
6 the director of state courts for payment into the fund to assist the
7 injured through restitution under s. 25.80. The department of adminis-
8 tration shall first transfer money from this appropriation to par. (ga)
9 for approved collection expenses of the department of justice. The
10 department of administration shall transfer any remaining moneys to par.
11 (gb) for distribution under that appropriation.

12 SECTION 2. 20.455 (1) (ga) of the statutes is created to read:

13 20.455 (1) (ga) Debt collection expenses. As a continuing
14 appropriation, all moneys transferred from par. (g) for the purpose of
15 reimbursing the department of justice for expenses approved by the
16 department of administration incurred in the collection of funds from
17 civil judgments under s. 895.047.

18 SECTION 3. 20.455 (1) (gb) of the statutes is created to read:

19 20.455 (1) (gb) State courts payment. As a continuing appropriation,
20 all moneys transferred from par. (g) for the purpose of paying the direc-
21 tor of state courts as provided under s. 895.047.

22 SECTION 4. 20.680 (2) (r) of the statutes is created to read:

23 20.680 (2) (r) Assistance to the injured. From the fund to assist
24 the injured through restitution under s. 25.80, all moneys received to be
25 used for payments under s. 895.047 (3).

1 SECTION 5. 20.680 (2) (s) of the statutes is created to read:

2 20.680 (2) (s) Assistance to the injured; administration. From the
3 fund to assist the injured through restitution under s. 25.80, all moneys
4 received to reimburse the director of state courts for administrative
5 expenses incurred under s. 895.047.

6 SECTION 6. 25.80 of the statutes is created to read:

7 25.80 FUND TO ASSIST THE INJURED THROUGH RESTITUTION. There is
8 established a separate nonlapsible trust fund designated as the fund to
9 assist the injured through restitution to consist of the moneys received
10 by the director of state courts under s. 895.047. Moneys in the fund
11 shall be expended only for the purposes under s. 895.047.

12 SECTION 7. 165.25 (8m) of the statutes is created to read:

13 165.25 (8m) COLLECTION OF PUNITIVE DAMAGE JUDGMENTS. Represent the
14 state in any action related to collection of judgments under s. 895.047.

15 SECTION 8. 758.19 (4) of the statutes is created to read:

16 758.19 (4) If the department of justice sends moneys collected under
17 s. 895.047 (1) to the director of state courts, the director of state
18 courts shall deposit those moneys in the fund to assist the injured
19 through restitution under s. 25.80 for distribution as provided under s.
20 895.047 (3). The director of state courts may be reimbursed from that
21 fund for the administrative costs incurred under s. 895.047.

22 SECTION 9. 895.046 of the statutes is created to read:

23 895.046 PUNITIVE DAMAGES. (1) DEFINITIONS. In this section:

24 (a) "Defendant" means the party against whom punitive damages are
25 sought.

26 (b) "Double damages" means those court awards made under a statute
27 providing for twice, 2 times or double the amount of damages suffered by
28 the injured party.

1 (c) "Treble damages" means those court awards made under a statute
2 providing for 3 times or treble the amount of damages suffered by the
3 injured party.

4 (2) SCOPE. This section does not apply to awards of double damages
5 or treble damages, or to the award of exemplary damages under ss. 46.90
6 (6) (c), 51.30 (9), 51.61 (7), 103.96 (2), 146.025 (8) (a), 153.85,
7 943.245 (2) and (3) and 943.51 (2) and (3).

8 (3) STANDARD OF CONDUCT. A court may award punitive damages if evi-
9 dence is submitted showing that the defendant acted maliciously toward the
10 injured party or in a wilful or conscious disregard of the rights of the
11 injured party.

12 (4) PROCEDURE. If the injured party establishes a prima facie case
13 for the allowance of punitive damages:

14 (a) The injured party may introduce evidence of the wealth of a
15 defendant; and

16 (b) The judge shall return a special verdict as to punitive damages.

17 (5) AWARDS. The award of punitive damages may not exceed treble the
18 amount of damages suffered by the injured party.

19 SECTION 10. 895.047 of the statutes is created to read:

20 <u>895.047 ASSISTANCE TO INJURED PARTIES.</u> (1) If a court determines
21 that punitive damages should be awarded in a tort action, the court shall
22 award those damages to the state. If punitive damages are awarded to the
23 state, the attorney fees of the injured party may not be based, in whole
24 or in part, on the amount of punitive damages awarded. On the day the
25 judgment for punitive damages is entered under s. 806.06, the clerk of
26 court shall send a copy of that judgment to the department of justice.
27 The department of justice shall represent the state in any action to col-
28 lect on any judgment awarded to the state under this section. The

1 department of justice shall deposit all moneys collected as a result of
2 that action in the appropriation under s. 20.455 (1) (g). That money
3 shall be expended as provided by this section. The department of justice
4 shall certify any costs incurred in collecting the money to the department
5 of administration and shall be reimbursed for those costs that are
6 approved by the department of administration from the appropriation under
7 s. 20.455 (1) (ga). If any moneys collected on the judgment remain after
8 that reimbursement, the department of justice shall, from the appropria-
9 tion under s. 20.455 (1) (gb), pay that money to the director of state
10 courts. The director of state courts shall credit those moneys to the
11 fund to assist the injured through restitution under s. 25.80.
12 (2) The clerk of circuit court in each county shall, on forms pro-
13 vided by the director of state courts, submit to the director of state
14 courts information regarding judgments in tort actions commenced on or
15 after the effective date of this section .... [revisor inserts date], that
16 remain unsatisfied in whole or in part 60 days after the judgment is
17 docketed under s. 806.10. The clerk shall include the date the judgment
18 was docketed, the amount of the judgment unsatisfied and the full name and
19 address of each judgment creditor and judgment debtor. The clerk of cir-
20 cuit court shall send this information to the director of state courts no
21 later than 80 days after the judgment was docketed. The director of state
22 courts shall, within 20 days of receiving this information, mail to the
23 judgment creditor an application to complete and return to the director of
24 state courts. The application shall include the amount of the judgment
25 reported by the clerk of court as unsatisfied and shall ask the judgment
26 creditor to list any amount paid on that judgment. The director of state
27 courts shall include with that application an explanation of how to com-
28 plete the application, why the application was sent and of the assistance

1 available under this section. The director of state courts shall also
2 include with the application a notice that the judgment creditor inform
3 the director of state courts if he or she receives payment on the
4 judgment. A minor's parent or guardian or an incompetent's guardian or
5 other person authorized to administer the incompetent's estate may com-
6 plete the application. Within 20 days after receipt of an application,
7 the director of state courts shall send the judgment creditor a written
8 acknowledgment of receipt of the completed application, giving the date
9 received and the amount of the unsatisfied judgment.

10 (3) No later than March 1, from the appropriation under s. 20.680 (2)
11 (r), the director of state courts shall pay each judgment creditor who
12 submitted a completed application to the director of state courts during
13 the period from January 1 to December 31 of the previous year. If the
14 amount in the appropriation under s. 20.680 (2) (r) is insufficient to
15 pay in full the judgment creditors' unsatisfied judgments, they shall be
16 paid on a proportional basis. A judgment creditor who receives a payment
17 under this subsection may not receive any future payment under this sub-
18 section for the same judgment.

19 (4) If a payment is made to a judgment creditor under sub. (3), the
20 state is subrogated to the rights of the judgment creditor and may bring
21 an action on the judgment against the judgment debtor for the amount of
22 the payment made by the state to the judgment creditor. The department of
23 justice shall represent the state in that action. The director of state
24 courts shall provide the department of justice with any information
25 regarding the judgment requested by the department to enable the depart-
26 ment to represent the state in an action against a judgment debtor. The
27 department of justice shall deposit any moneys collected under this sub-

1 section in the appropriation under s. 20 455 (1) (g) and those moneys
2 shall be expended in the same manner as funds collected under sub. (1).
3 SECTION 11. 895.70 (3) of the statutes is amended to read:
4 895.70 (3) PUNITIVE DAMAGES. A ~~court or jury~~ judge may award puni-
5 tive damages to a person bringing an action under this section.
6 SECTION 12. 949.15 (3) of the statutes is amended to read:
7 949.15 (3) If a judgment or verdict in an action under sub. (1) or
8 (2) indicates separately economic loss and noneconomic detriment, payments
9 on the judgment shall be allocated between them in proportion to the
10 amounts indicated. In such an action, the judge, on timely motion, may
11 return a special verdict awarding punitive damages, and shall direct the
12 jury to return a special verdict, indicating separately the awards for
13 noneconomic detriment~~, punitive damages~~ and economic loss.
14 SECTION 13. INITIAL APPLICABILITY. This act first applies to actions
15 commenced on the effective date of this SECTION.
16 (End)

1991 ASSEMBLY BILL 217

March 12, 1991 - Introduced by Representatives LOUCKS, ZWECK, HASENOHRL, KLUSMAN, HAMILTON, URBAN, NASS, AINSWORTH, SCHNEIDERS, LEHMAN, ROSENZWEIG, SILBAUGH, ZIEN, DUFF, GOETSCH, VAN GORDEN, VERGERONT, LADWIG, WELCH, OURADA and JOHNSRUD, cosponsored by Senators BUETTNER, ROSHELL, HUELSMAN, ANDREA, KREUL, LEEAN, STITT, LASEE, LORMAN, RUDE and FARROW. Referred to special committee on Reform of Health Insurance.

AN ACT to amend 895.70 (3) and 949.15 (3); and to create 16.503, 20.455 (1) (q), 20.680 (2) (r), 20.680 (2) (s), 25.78, 165.25 (10), 758.19 (5), 895.046 and 895.047 of the statutes, relating to punitive damage awards and payments to persons who have unsatisfied judgments in tort actions and making an appropriation.

Analysis by the Legislative Reference Bureau

This bill establishes a fund to assist any person who has been injured and has obtained a judgment in a tort action for the injury but who has not received reimbursement in full for the injury. The bill requires the judge to award any punitive damages in a tort action to the state. The department of justice (DOJ) collects those awards. The moneys collected are deposited in the separate fund. The director of state courts is required to use the moneys in the fund, minus its administrative costs and the collection expenses of DOJ, to pay injured parties the amount of their unsatisfied judgments. If the amount in the fund is insufficient to pay all the eligible injured parties, they are each paid a proportional share. The amount paid to each injured party becomes a claim the state has against the judgment debtor.

This bill revises the standards and procedures for awarding punitive damages in certain civil cases. Under present law, the plaintiff sues for damages, including punitive damages, and submits evidence as to the defendant's behavior and ability to pay. If the defendant acted maliciously or in a wilful or wanton manner in reckless disregard of the rights or interests of the plaintiff, punitive damages may be awarded. Under this bill, punitive damages may be awarded if the defendant acted maliciously or in a wilful or conscious disregard of the rights of the injured party. The bill allows evidence of the defendant's wealth, an indicator of ability to pay, to be admitted only after the plaintiff has established a legally sufficient case for the allowance of punitive damages. Only a judge is allowed to issue a special verdict for punitive damages and only if legally sufficient evidence is introduced to allow those damages. Punitive damage awards are limited to 3 times the amount of actual damages suffered by the injured party.

For further information see the state and local fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 SECTION 1. 16.503 of the statutes is created to read:

2 16.503 INJURED PERSONS FUND. (1) No funds may be expended under s.
3 20.455 (1) (q) until the department of justice submits a request for
4 reimbursement to the department of administration for the amounts expended
5 under s. 165.25 (10) for the collection of punitive damage awards or
6 subrogated judgments under s. 895.047 and the department of administration
7 approves the expenditure of those funds.

8 (2) No funds may be expended under s. 20.680 (2) (s) until the
9 director of state courts submits a request for reimbursement to the
10 department for the amounts expended for the administrative expenses
11 incurred under s. 758.19 (5) for payment of the assistance to injured
12 persons under s. 895.047 and the department approves the expenditure of
13 those funds.

14 (3) The department shall review all requests received under subs. (1)
15 and (2) and may approve those requests in whole or in part, except that
16 the department shall not approve any request submitted under sub. (1) or
17 (2) after January 15 for expenses incurred during the previous calendar
18 year.

19 (4) By January 30 the department shall complete the review and any
20 approval of the requests received under this section for expenses of the
21 previous year and determine the amount remaining in the injured persons
22 fund for the previous year. The department shall transfer that amount to
23 the appropriation under s. 20.680 (2) (r) and notify the director of state
24 courts of the amount paid into that appropriation.

1 SECTION 2. 20.005 (3) (schedule) of the statutes: at the appropriate
2 place, insert the following amounts for the purposes indicated:

		1991-92	1992-93
20.455 JUSTICE, DEPARTMENT OF			
(1) LEGAL SERVICES			
(q) Collection of civil judgments	SEG C	-0-	-0-
20.680 SUPREME COURT			
(2) DIRECTOR OF STATE COURTS			
(s) Assistance to the injured; administration	SEG C	-0-	-0-

12 SECTION 3. 20.455 (1) (q) of the statutes is created to read:
13 20.455 (1) (q) Collection of civil judgments. From the injured per-
14 sons fund, as a continuing appropriation, the amounts in the schedule to
15 reimburse the department for the collection expenses incurred under ss.
16 165.25 (10) and 895.047 and approved by the department of administration
17 under s. 16.503.
18 SECTION 4. 20.680 (2) (r) of the statutes is created to read:
19 20.680 (2) (r) Assistance to the injured. From the injured persons
20 fund, all moneys received, less the moneys appropriated under ss. 20.455
21 (1) (q) and 20.680 (2) (s), for the purpose of making payments to injured
22 persons under s. 895.047 (3).
23 SECTION 5. 20.680 (2) (s) of the statutes is created to read:
24 20.680 (2) (s) Assistance to the injured; administration. From the
25 injured persons fund, as a continuing appropriation, the amounts in the
26 schedule to reimburse the director of state courts for administrative
27 expenses incurred under ss. 758.19 (5) and 895.047 and approved by the
28 department of administration under s. 16.503.

1 SECTION 6. 25.78 of the statutes is created to read:

2 25.78 INJURED PERSONS FUND. There is established a separate nonlap-
3 sible trust fund designated as the injured persons fund to consist of the
4 moneys collected by the department of justice under ss. 165.25 (10) and
5 895.047.

6 SECTION 7. 165.25 (10) of the statutes is created to read:

7 165.25 (10) COLLECTION OF PUNITIVE DAMAGE JUDGMENTS. Represent the
8 state in any action related to collection of punitive damage awards and
9 subrogated judgments under s. 895.047. The department shall be reimbursed
10 for the collection expenses from the appropriation under s. 20.455 (1)
11 (q). The department of justice shall submit requests to the department of
12 administration for reimbursement of those collection expenses as they are
13 incurred. The department of justice shall submit any request for reim-
14 bursement for collection expenses of the previous year no later than the
15 following January 15 or be barred from reimbursement for those expenses.

16 SECTION 8. 758.19 (5) of the statutes is created to read:

17 758.19 (5) The director of state courts shall administer the assis-
18 tance to injured persons program under s. 895.047. The director of state
19 courts shall receive reimbursement for the expenses related to the admin-
20 istration of the program from the appropriation under s. 20.680 (2) (s).
21 The director of state courts shall submit any request to the department
22 of administration for reimbursement of the administrative expenses as they
23 are incurred. The director of state courts shall submit any request for
24 reimbursement for administration expenses of the previous year no later
25 than the following January 15 or be barred from reimbursement for those
26 expenses.

27 SECTION 9. 895.046 of the statutes is created to read:

28 895.046 PUNITIVE DAMAGES. (1) DEFINITIONS. In this section:

1 (a) "Defendant" means the party against whom punitive damages are
2 sought.
3 (b) "Double damages" means those court awards made under a statute
4 providing for twice, 2 times or double the amount of damages suffered by
5 the injured party.
6 (c) "Treble damages" means those court awards made under a statute
7 providing for 3 times or treble the amount of damages suffered by the
8 injured party.
9 (2) SCOPE. This section does not apply to awards of double damages
10 or treble damages, or to the award of exemplary damages under ss. 46.90
11 (6) (c), 51.30 (9), 51.61 (7), 103.96 (2), 146.024 (4), 146.025 (8) (a),
12 153.85, 943.245 (2) (c) and (3) and 943.51 (2) (a) and (3).
13 (3) STANDARD OF CONDUCT. A judge may award punitive damages if evi-
14 dence is submitted showing that the defendant acted maliciously toward the
15 injured party or in a wilful or conscious disregard of the rights of the
16 injured party.
17 (4) PROCEDURE. If the injured party establishes a prima facie case
18 for the allowance of punitive damages:
19 (a) The injured party may introduce evidence of the wealth of a
20 defendant; and
21 (b) The judge shall return a special verdict as to punitive damages..
22 (5) AWARDS. The award of punitive damages may not exceed treble the
23 amount of actual damages suffered by the injured party.
24 SECTION 10. 895.047 of the statutes is created to read:
25 <u>895.047 ASSISTANCE TO INJURED PARTIES.</u> (1) If a judge determines
26 that punitive damages should be awarded in a tort action, the judge shall
27 award those damages to the state. If punitive damages are awarded to the
28 state, the attorney fees of the injured party may not be based, in whole

1 or in part, on the amount of punitive damages awarded. On the day th
2 judgment for punitive damages is entered under s. 806.06, the clerk o
3 court shall send a copy of that judgment to the department of justice
4 The department of justice shall represent the state in any action to col
5 lect on any judgment awarded to the state under this subsection. Th
6 department of justice shall deposit all moneys collected as a result of a
7 action to collect punitive damages in the injured persons fund under s
8 25.78. The department of justice shall certify any costs incurred i
9 collecting the money to the department of administration and may reques
10 reimbursement of those costs under s. 16.503.

11 (2) The clerk of circuit court in each county shall, on forms pro-
12 vided by the director of state courts, send to the director of stat
13 courts information regarding judgments in tort actions commenced on o
14 after the effective date of this section .... [revisor inserts date], tha
15 remain unsatisfied in whole or in part 60 days after the judgment i
16 docketed under s. 806.10. The clerk shall include the date the judgmen
17 was docketed, the amount of the judgment unsatisfied and the full name an
18 address of each judgment creditor and judgment debtor. The clerk of cir-
19 cuit court shall send this information to the director of state courts n
20 later than 80 days after the judgment was docketed. The director of stat
21 courts shall, within 20 days of receiving this information, mail to the
22 judgment creditor an application to complete and return to the director o
23 state courts. The application shall include the amount of the judgment
24 reported by the clerk of court as unsatisfied and shall ask the judgment
25 creditor to list any amount paid on that judgment. The director of state
26 courts shall include with that application an explanation of how to com-
27 plete the application, why the application was sent and of the assistance
28 available under this section. The director of state courts shall also

1 include with the application a notice that the judgment creditor inform
2 the director of state courts if he or she receives payment on the
3 judgment. A minor's parent or guardian or an incompetent's guardian or
4 other person authorized to administer the incompetent's estate may com-
5 plete the application for the minor or incompetent person. Within 20 days
6 after receipt of an application, the director of state courts shall send
7 the judgment creditor a written acknowledgment of receipt of the completed
8 application, giving the date received and the amount of the unsatisfied
9 judgment.

10 (3) No later than March 1, from the amount transferred to the appro-
11 priation under s. 20.680 (2) (r) by the department of administration under
12 s. 16.503 (4), the director of state courts shall pay each judgment cred-
13 itor who submitted a completed application to the director of state courts
14 during the previous year the amount of the judgment unsatisfied, as indi-
15 cated in the application completed under sub. (2). If the amount in the
16 appropriation under s. 20.680 (2) (r) is insufficient to pay in full the
17 judgment creditors' unsatisfied judgments, they shall be paid on a pro-
18 portional basis. A judgment creditor who receives a payment under this
19 subsection may not receive any future payment under this subsection for
20 the same judgment.

21 (4) If a payment is made to a judgment creditor under sub. (3), the
22 state is subrogated to the rights of the judgment creditor and may bring
23 an action on the judgment against the judgment debtor for the amount of
24 the payment made by the state to the judgment creditor. The department of
25 justice shall represent the state in that action. The director of state
26 courts shall provide the department of justice with any information
27 regarding the judgment requested by the department to enable the depart-
28 ment to represent the state in an action against a judgment debtor. The

department of justice shall deposit any moneys collected under this subsection in the injured persons fund under s. 25.78. The department of justice shall certify any costs incurred in collecting the money to the department of administration and may request reimbursement of those costs under s. 16.503. Any moneys collected shall be expended in the same manner as funds collected under sub. (1).

SECTION 11. 895.70 (3) of the statutes is amended to read:

895.70 (3) PUNITIVE DAMAGES. A ~~court or jury~~ judge may award punitive damages to a person bringing an action under this section.

SECTION 12. 949.15 (3) of the statutes is amended to read:

949.15 (3) If a judgment or verdict in an action under sub. (1) or (2) indicates separately economic loss and noneconomic detriment, payments on the judgment shall be allocated between them in proportion to the amounts indicated. In such an action, the judge, on timely motion, may return a special verdict awarding punitive damages, and shall direct the jury to return a special verdict, indicating separately the awards for noneconomic detriment~~, punitive damages~~ and economic loss.

SECTION 13. INITIAL APPLICABILITY. This act first applies to actions commenced on the effective date of this SECTION.

(End)

1991 SENATE BILL 274

September 25, 1991 - Introduced by Senators BUETTNER, ROSHELL, HUELSMAN, LEEAN, STITT, LASEE, LORMAN, FARROW and RUDE; cosponsored by Representatives LOUCKS, KLUSMAN, HAMILTON, URBAN, AINSWORTH, SCHNEIDERS, LEHMAN, SILBAUGH, DUFF, GOETSCH, VAN GORDEN, VERGERONT, LADWIG and JOHNSRUD. Referred to Committee on Judiciary and Consumer Affairs.

AN ACT to amend 895.70 (3) and 949.15 (3); and to create 16.503, 20.455 (1) (q), 20.680 (2) (r), 20.680 (2) (s), 25.78, 165.25 (10), 758.19 (5), 895.046 and 895.047 of the statutes, relating to punitive damage awards and payments to persons who have unsatisfied judgments in tort actions and making an appropriation.

Analysis by the Legislative Reference Bureau

This bill establishes a fund to assist any person who has been injured and has obtained a judgment in a tort action for the injury but who has not received reimbursement in full for the injury. The bill requires the judge to award any punitive damages in a tort action to the state. The department of justice (DOJ) collects those awards. The moneys collected are deposited in the separate fund. The director of state courts is required to use the moneys in the fund, minus its administrative costs and the collection expenses of DOJ, to pay injured parties the amount of their unsatisfied judgments. If the amount in the fund is insufficient to pay all the eligible injured parties, they are each paid a proportional share. The amount paid to each injured party becomes a claim the state has against the judgment debtor.

This bill revises the standards and procedures for awarding punitive damages in certain civil cases. Under present law, the plaintiff sues for damages, including punitive damages, and submits evidence as to the defendant's behavior and ability to pay. If the defendant acted maliciously or in a wilful or wanton manner in reckless disregard of the rights or interests of the plaintiff, punitive damages may be awarded. Under this bill, punitive damages may be awarded if the defendant acted maliciously or in a wilful or conscious disregard of the rights of the injured party. The bill allows evidence of the defendant's wealth, an indicator of ability to pay, to be admitted only after the plaintiff has established a legally sufficient case for the allowance of punitive damages. Only a judge is allowed to issue a special verdict for punitive damages and only if legally sufficient evidence is introduced to allow those damages. Punitive damage awards are limited to 3 times the amount of actual damages suffered by the injured party.

For further information see the state and local fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 SECTION 1. 16.503 of the statutes is created to read:

2 16.503 INJURED PERSONS FUND. (1) No funds may be expended under s.
3 20.455 (1) (q) until the department of justice submits a request for
4 reimbursement to the department of administration for the amounts expended
5 under s. 165.25 (10) for the collection of punitive damage awards or
6 subrogated judgments under s. 895.047 and the department of administration
7 approves the expenditure of those funds.

8 (2) No funds may be expended under s. 20.680 (2) (s) until the
9 director of state courts submits a request for reimbursement to the
10 department for the amounts expended for the administrative expenses
11 incurred under s. 758.19 (5) for payment of the assistance to injured
12 persons under s. 895.047 and the department approves the expenditure of
13 those funds.

14 (3) The department shall review all requests received under subs. (1)
15 and (2) and may approve those requests in whole or in part, except that
16 the department shall not approve any request submitted under sub. (1) or
17 (2) after January 15 for expenses incurred during the previous calendar
18 year.

19 (4) By January 30 the department shall complete the review and any
20 approval of the requests received under this section for expenses of the
21 previous year and determine the amount remaining in the injured persons
22 fund for the previous year. The department shall transfer that amount to
23 the appropriation under s. 20.680 (2) (r) and notify the director of state
24 courts of the amount paid into that appropriation.

1 SECTION 2. 20.005 (3) (schedule) of the statutes: at the appropriate
2 place, insert the following amounts for the purposes indicated:

		1991-92	1992-93
20.455 JUSTICE, DEPARTMENT OF			
(1) LEGAL SERVICES			
(q) Collection of civil judgments	SEG C	-0-	-0-
20.680 SUPREME COURT			
(2) DIRECTOR OF STATE COURTS			
(s) Assistance to the injured; administration	SEG C	-0-	-0-

12 SECTION 3. 20.455 (1) (q) of the statutes is created to read:
13 20.455 (1) (q) Collection of civil judgments. From the injured per-
14 sons fund, as a continuing appropriation, the amounts in the schedule to
15 reimburse the department for the collection expenses incurred under ss.
16 165.25 (10) and 895.047 and approved by the department of administration
17 under s. 16.503.
18 SECTION 4. 20.680 (2) (r) of the statutes is created to read:
19 20.680 (2) (r) Assistance to the injured. From the injured persons
20 fund, all moneys received, less the moneys appropriated under ss. 20.455
21 (1) (q) and 20.680 (2) (s), for the purpose of making payments to injured
22 persons under s. 895.047 (3).
23 SECTION 5. 20.680 (2) (s) of the statutes is created to read:
24 20.680 (2) (s) Assistance to the injured; administration. From the
25 injured persons fund, as a continuing appropriation, the amounts in the
26 schedule to reimburse the director of state courts for administrative
27 expenses incurred under ss. 758.19 (5) and 895.047 and approved by the
28 department of administration under s. 16.503.

1 SECTION 6. 25.78 of the statutes is created to read:

2 25.78 INJURED PERSONS FUND. There is established a separate nonlap-
3 sible trust fund designated as the injured persons fund to consist of the
4 moneys collected by the department of justice under ss. 165.25 (10) and
5 895.047.

6 SECTION 7. 165.25 (10) of the statutes is created to read:

7 165.25 (10) COLLECTION OF PUNITIVE DAMAGE JUDGMENTS. Represent the
8 state in any action related to collection of punitive damage awards and
9 subrogated judgments under s. 895.047. The department shall be reimbursed
10 for the collection expenses from the appropriation under s. 20.455 (1)
11 (q). The department of justice shall submit requests to the department of
12 administration for reimbursement of those collection expenses as they are
13 incurred. The department of justice shall submit any request for reim-
14 bursement for collection expenses of the previous year no later than the
15 following January 15 or be barred from reimbursement for those expenses.

16 SECTION 8. 758.19 (5) of the statutes is created to read:

17 758.19 (5) The director of state courts shall administer the assis-
18 tance to injured persons program under s. 895.047. The director of state
19 courts shall receive reimbursement for the expenses related to the admin-
20 istration of the program from the appropriation under s. 20.680 (2) (s).
21 The director of state courts shall submit any request to the department
22 of administration for reimbursement of the administrative expenses as they
23 are incurred. The director of state courts shall submit any request for
24 reimbursement for administration expenses of the previous year no later
25 than the following January 15 or be barred from reimbursement for those
26 expenses.

27 SECTION 9. 895.046 of the statutes is created to read:

28 895.046 PUNITIVE DAMAGES. (1) DEFINITIONS. In this section:

1 (a) "Defendant" means the party against whom punitive damages are
2 sought.
3 (b) "Double damages" means those court awards made under a statute
4 providing for twice, 2 times or double the amount of damages suffered by
5 the injured party.
6 (c) "Treble damages" means those court awards made under a statute
7 providing for 3 times or treble the amount of damages suffered by the
8 injured party.
9 (2) SCOPE. This section does not apply to awards of double damages
10 or treble damages, or to the award of exemplary damages under ss. 46.90
11 (6) (c), 51.30 (9), 51.61 (7), 103.96 (2), 146.024 (4), 146.025 (8) (a),
12 153.85, 943.245 (2) (c) and (3) and 943.51 (2) (a) and (3).
13 (3) STANDARD OF CONDUCT. A judge may award punitive damages if evi-
14 dence is submitted showing that the defendant acted maliciously toward the
15 injured party or in a wilful or conscious disregard of the rights of the
16 injured party.
17 (4) PROCEDURE. If the injured party establishes a prima facie case
18 for the allowance of punitive damages:
19 (a) The injured party may introduce evidence of the wealth of a
20 defendant; and
21 (b) The judge shall return a special verdict as to punitive damages.
22 (5) AWARDS. The award of punitive damages may not exceed treble the
23 amount of actual damages suffered by the injured party.
24 SECTION 10. 895.047 of the statutes is created to read:
25 <u>895.047 ASSISTANCE TO INJURED PARTIES.</u> (1) If a judge determines
26 that punitive damages should be awarded in a tort action, the judge shall
27 award those damages to the state. If punitive damages are awarded to the
28 state, the attorney fees of the injured party may not be based, in whole

1 or in part, on the amount of punitive damages awarded. On the day the
2 judgment for punitive damages is entered under s. 806.06, the clerk of
3 court shall send a copy of that judgment to the department of justice.
4 The department of justice shall represent the state in any action to col-
5 lect on any judgment awarded to the state under this subsection. The
6 department of justice shall deposit all moneys collected as a result of an
7 action to collect punitive damages in the injured persons fund under s.
8 25.78. The department of justice shall certify any costs incurred in
9 collecting the money to the department of administration and may request
10 reimbursement of those costs under s. 16.503.

11 (2) The clerk of circuit court in each county shall, on forms pro-
12 vided by the director of state courts, send to the director of state
13 courts information regarding judgments in tort actions commenced on or
14 after the effective date of this section .... [revisor inserts date], that
15 remain unsatisfied in whole or in part 60 days after the judgment is
16 docketed under s. 806.10. The clerk shall include the date the judgment
17 was docketed, the amount of the judgment unsatisfied and the full name and
18 address of each judgment creditor and judgment debtor. The clerk of cir-
19 cuit court shall send this information to the director of state courts no
20 later than 80 days after the judgment was docketed. The director of state
21 courts shall, within 20 days of receiving this information, mail to the
22 judgment creditor an application to complete and return to the director of
23 state courts. The application shall include the amount of the judgment
24 reported by the clerk of court as unsatisfied and shall ask the judgment
25 creditor to list any amount paid on that judgment. The director of state
26 courts shall include with that application an explanation of how to com-
27 plete the application, why the application was sent and of the assistance
28 available under this section. The director of state courts shall also

1 include with the application a notice that the judgment creditor inform
2 the director of state courts if he or she receives payment on the
3 judgment. A minor's parent or guardian or an incompetent's guardian or
4 other person authorized to administer the incompetent's estate may com-
5 plete the application for the minor or incompetent person. Within 20 days
6 after receipt of an application, the director of state courts shall send
7 the judgment creditor a written acknowledgment of receipt of the completed
8 application, giving the date received and the amount of the unsatisfied
9 judgment.

10 (3) No later than March 1, from the amount transferred to the appro-
11 priation under s. 20.680 (2) (r) by the department of administration under
12 s. 16.503 (4), the director of state courts shall pay each judgment cred-
13 itor who submitted a completed application to the director of state courts
14 during the previous year the amount of the judgment unsatisfied, as indi-
15 cated in the application completed under sub. (2). If the amount in the
16 appropriation under s. 20.680 (2) (r) is insufficient to pay in full the
17 judgment creditors' unsatisfied judgments, they shall be paid on a pro-
18 portional basis. A judgment creditor who receives a payment under this
19 subsection may not receive any future payment under this subsection for
20 the same judgment.

21 (4) If a payment is made to a judgment creditor under sub. (3), the
22 state is subrogated to the rights of the judgment creditor and may bring
23 an action on the judgment against the judgment debtor for the amount of
24 the payment made by the state to the judgment creditor. The department of
25 justice shall represent the state in that action. The director of state
26 courts shall provide the department of justice with any information
27 regarding the judgment requested by the department to enable the depart-
28 ment to represent the state in an action against a judgment debtor. The

department of justice shall deposit any moneys collected under this subsection in the injured persons fund under s. 25.78. The department of justice shall certify any costs incurred in collecting the money to the department of administration and may request reimbursement of those costs under s. 16.503. Any moneys collected shall be expended in the same manner as funds collected under sub. (1).

SECTION 11. 895.70 (3) of the statutes is amended to read:

895.70 (3) PUNITIVE DAMAGES. A ~~court or jury~~ judge may award punitive damages to a person bringing an action under this section.

SECTION 12. 949.15 (3) of the statutes is amended to read:

949.15 (3) If a judgment or verdict in an action under sub. (1) or (2) indicates separately economic loss and noneconomic detriment, payments on the judgment shall be allocated between them in proportion to the amounts indicated. In such an action, the judge, on timely motion, may return a special verdict awarding punitive damages, and shall direct the jury to return a special verdict, indicating separately the awards for noneconomic detriment~~, punitive damages~~ and economic loss.

SECTION 13. INITIAL APPLICABILITY. This act first applies to actions commenced on the effective date of this SECTION.

(End)

1991 SENATE BILL 458

January 22, 1992 - Introduced by Senators ROSHELL, ANDREA, BRESKE, VAN SISTINE, PLEWA, HUELSMAN, FARROW, LASEE, BUETTNER, LORMAN and SCHULTZ; cosponsored by Representatives HUBLER and LOUCKS. Referred to Committee on Judiciary and Consumer Affairs.

AN ACT to renumber and amend 895.045; to amend 655.017, 893.55 (4) (b) to (d), 893.55 (5) (intro.), 895.70 (3) and 949.15 (3); and to create 20.455 (1) (q), 20.680 (2) (r), 20.680 (2) (s), 25.17 (1) (fs), 25.82, 165.25 (8g), 758.19 (5), 893.55 (4) (dm), 893.55 (4) (f), 895.045 (2) to (4), 895.046 and 895.047 of the statutes, relating to comparative negligence, punitive damage awards, payments to persons who have obtained a judgment in tort actions, limits on noneconomic damages and making appropriations.

Analysis by the Legislative Reference Bureau

This bill establishes a fund to assist any person who has been injured and has obtained a judgment in a tort action for the injury but who has not received reimbursement in full for the injury. The bill requires the judge to award any punitive damages in a tort action to the state. The department of justice (DOJ) collects those awards. The moneys collected are deposited in the separate fund. The director of state courts is required to use the moneys in the fund, minus its administrative costs and the collection expenses of DOJ, to pay injured parties the amount of their unsatisfied judgments. If the amount in the fund is insufficient to pay all of the eligible injured parties, they are each paid a proportional share. The amount paid to each injured party becomes a claim that the state has against the judgment debtor.

This bill revises the standards and procedures for awarding punitive damages in certain civil cases. Under present law, the plaintiff sues for damages, including punitive damages, and submits evidence as to the defendant's behavior and ability to pay. If the defendant acted maliciously or in a wilful or wanton manner in reckless disregard of the rights or interests of the plaintiff, punitive damages may be awarded. Under this bill, punitive damages may be awarded if the defendant acted maliciously or in a wilful or conscious disregard of the rights of the injured party. The bill allows evidence of the defendant's wealth, an indicator of ability to pay, to be admitted only after the plaintiff has

established a legally sufficient case for the allowance of punitive damages. Only a judge is allowed to issue a special verdict for punitive damages and only if legally sufficient evidence is introduced to allow those damages. Punitive damage awards are limited to 3 times the amount of actual damages suffered by the injured party.

Wisconsin has a modified system of comparative negligence. Contributory negligence does not bar recovery for an action unless the negligence of the person seeking recovery (plaintiff) is greater than the negligence of the person against whom recovery is sought (defendant). In the situation where more than one party contributes to an injury (joint tort-feasors), Wisconsin generally follows a rule of joint and several liability. That is, a plaintiff may collect the total damages against any of the joint tort-feasors whose negligence combines to cause the injury, as reduced by the plaintiff's percentage of the negligence. A joint tort-feasor who pays more than his or her proportionate share has a cause of action for contribution against the other joint tort-feasors.

This bill modifies the comparative negligence system in several ways. The bill requires that the negligence of the plaintiff be measured separately against each of the joint tort-feasors. Under this bill, a joint tort-feasor's liability is limited to the percentage determined by dividing his or her negligence by the total negligence of all of the joint tort-feasors who are found liable for damages.

The bill specifies that the changes in the rule of joint and several liability do not apply to parties whose concerted action results in damages or to causes of action resulting from environmental pollution, hazardous waste or substances or waste disposal sites. Under the bill, the rule of joint and several liability does not apply to punitive damages.

This bill reinstates the maximum amount that a claimant may recover for noneconomic damages caused by the negligence of a health care provider. From June, 1986, to January 1, 1991, the maximum was determined by the director of state courts by annually adjusting $1,000,000 to reflect changes in the consumer price index since June 1986. This bill reestablishes a maximum of $250,000. Noneconomic damages are defined in the law to include items such as pain and suffering, embarrassment, mental distress and loss of society and companionship.

For further information see the state and local fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 SECTION 1. 20.455 (1) (q) of the statutes is created to read:

2 20.455 (1) (q) Debt collection expenses. From the fund to assist the
3 injured through restitution under s. 25.82, a sum sufficient to reimburse
4 the department of justice for expenses approved by the department of
5 administration that are incurred in the collection of funds from civil
6 judgments under s. 895.047.

SECTION 2. 20.680 (2) (r) of the statutes is created to read:

20.680 (2) (r) Assistance to the injured. From the fund to assist the injured through restitution under s. 25.82, all moneys not appropriated under s. 20.455 (1) (q) or under par. (s), to be used for payments under s. 895.047 (3).

SECTION 3. 20.680 (2) (s) of the statutes is created to read:

20.680 (2) (s) Assistance to the injured; administration. From the fund to assist the injured through restitution under s. 25.82, a sum sufficient to reimburse the director of state courts for administrative expenses incurred under s. 895.047.

SECTION 4. 25.17 (1) (fs) of the statutes is created to read:

25.17 (1) (fs) Fund to assist the injured through restitution (s. 25.82);

SECTION 5. 25.82 of the statutes is created to read:

25.82 FUND TO ASSIST THE INJURED THROUGH RESTITUTION. There is established a separate nonlapsible trust fund designated as the fund to assist the injured through restitution to consist of the moneys collected by the department of justice under s. 895.047 (1) and (4). Moneys in the fund shall be expended only for the purposes under s. 895.047.

SECTION 6. 165.25 (8g) of the statutes is created to read:

165.25 (8g) COLLECTION OF PUNITIVE DAMAGE JUDGMENTS. Represent the state in any action related to collection of judgments under s. 895.047.

SECTION 7. 655.017 of the statutes is amended to read:

655.017 LIMITATION ON NONECONOMIC DAMAGES. The amount of noneconomic damages recoverable by a claimant or plaintiff under this chapter for acts or omissions of a health care provider if the action is filed on or after June 14, 1986 ~~and before January 1, 1991~~, and for acts or omissions of an employe of a health care provider, acting within the scope of his or her

1 employment and providing health care services, for actions filed on or
2 after June 14, 1986 ~~and before January 1, 1991~~, is subject to the limit
3 under s. 893.55 (4).

4 SECTION 8. 758.19 (5) of the statutes is created to read:

5 758.19 (5) The director of state courts shall perform those duties
6 assigned to the director under s. 895.047 and shall be reimbursed from the
7 appropriation under s. 20.680 (2) (s) for the administrative costs incur-
8 red under s. 895.047.

9 SECTION 9. 893.55 (4) (b) to (d) of the statutes are amended to read:

10 893.55 (4) (b) The total noneconomic damages recoverable under ch.
11 655 for bodily injury or death, including any action or proceeding based
12 on contribution or indemnification, may not exceed the limit under par.
13 (d) <u>or (dm)</u> for each occurrence from all health care providers and all
14 employes of health care providers acting within the scope of their
15 employment and providing health care services who are found negligent and
16 from the patients compensation fund for any action filed ~~on or~~ after June
17 ~~14~~ <u>13</u>, 1986 ~~and before January 1, 1991~~.

18 (c) A court in an action tried without a jury shall make a finding as
19 to noneconomic damages without regard to the limit under par. (d) <u>or (dm)</u>.
20 If noneconomic damages in excess of the limit are found, the court shall
21 make any reduction required under s. 895.045 and shall award as noneco-
22 nomic damages the lesser of the reduced amount or the limit. If an action
23 is before a jury, the jury shall make a finding as to noneconomic damages
24 without regard to the limit under par. (d) <u>or (dm)</u>. If the jury finds
25 that noneconomic damages exceed the limit, the jury shall make any reduc-
26 tion required under s. 895.045 and the court shall award as noneconomic
27 damages the lesser of the reduced amount or the limit.

(d) The limit on total noneconomic damages for each occurrence under par. (b) shall be $1,000,000 for actions filed ~~on or~~ after June ~~14~~ 13, 1986, and before the effective date of this paragraph .... [revisor inserts date], and shall be adjusted by the director of state courts to reflect changes in the consumer price index for all urban consumers, U.S. city average, as determined by the U.S. department of labor, at least annually thereafter, with the adjusted limit to apply to awards subsequent to ~~such~~ the adjustments.

SECTION 10. 893.55 (4) (dm) of the statutes is created to read:

893.55 (4) (dm) The limit on total noneconomic damages for each occurrence under par. (b) shall be $250,000 for actions filed on or after the effective date of this paragraph .... [revisor inserts date].

SECTION 11. 893.55 (4) (f) of the statutes is created to read:

893.55 (4) (f) Notwithstanding the limits on noneconomic damages under this subsection, damages recoverable under ch. 655 for wrongful death are subject to the limit under s. 895.04 (4). If damages in excess of the limit under s. 895.04 (4) are found, the court shall make any reduction required under s. 895.045 and shall award the lesser of the reduced amount or the limit under s. 895.04 (4).

SECTION 12. 893.55 (5) (intro.) of the statutes is amended to read:

893.55 (5) (intro.) Every award of damages under ch. 655 shall specify the sum of money, if any, awarded for each of the following for each claimant for the period from the date of injury to the date of award and for the period after the date of award, without regard to the limit under sub. (4) (d) or (dm):

SECTION 13. 895.045 of the statutes is renumbered 895.045 (1) and amended to read:

895.045 (1) (title) COMPARATIVE NEGLIGENCE. Contributory negligence ~~shall~~ does not bar recovery in an action by any person or ~~his~~ the person's legal representative to recover damages for negligence resulting in death or in injury to person or property, if ~~such~~ that negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence ~~attributable~~ attributed to the person recovering. The negligence of the plaintiff shall be measured separately against the negligence of each party against whom recovery is sought. The liability of each party against whom recovery is sought is limited to the percentage determined by dividing the percentage of that party's causal negligence by the percentage of causal negligence attributed to all of the parties against whom damages are awarded.

SECTION 14. 895.045 (2) to (4) of the statutes are created to read:

895.045 (2) CONCERTED ACTION. Notwithstanding sub. (1), if 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for all damages resulting from that action, except as provided in sub. (4).

(3) JOINT AND SEVERAL LIABILITY. Except as provided in sub. (4), nothing in this section prohibits the imposition of joint and several liability in a cause of action for damages resulting from environmental pollution, hazardous waste or substances or waste disposal sites.

(4) PUNITIVE DAMAGES. The rule of joint and several liability does not apply to punitive damages.

SECTION 15. 895.046 of the statutes is created to read:

895.046 PUNITIVE DAMAGES. (1) DEFINITIONS. In this section:

(a) "Defendant" means the party against whom punitive damages are sought.

1 (b) "Double damages" means those court awards made under a statute
2 providing for twice, 2 times or double the amount of damages suffered by
3 the injured party.
4 (c) "Treble damages" means those court awards made under a statute
5 providing for 3 times or treble the amount of damages suffered by the
6 injured party.
7 (2) SCOPE. This section does not apply to awards of double damages
8 or treble damages, or to the award of exemplary damages under ss. 46.90
9 (6) (c), 51.30 (9), 51.61 (7), 103.96 (2), 146.025 (8) (a), 153.85,
10 943.245 (2) and (3) and 943.51 (2) and (3).
11 (3) STANDARD OF CONDUCT. A court may award punitive damages if evi-
12 dence is submitted showing that the defendant acted maliciously toward the
13 injured party or in a wilful or conscious disregard of the rights of the
14 injured party.
15 (4) PROCEDURE. If the injured party establishes a prima facie case
16 for the allowance of punitive damages:
17 (a) The injured party may introduce evidence of the wealth of a
18 defendant; and
19 (b) The judge shall return a special verdict as to punitive damages.
20 (5) AWARDS. The award of punitive damages may not exceed treble the
21 amount of damages suffered by the injured party.
22 SECTION 16. 895.047 of the statutes is created to read:
23 895.047 ASSISTANCE TO INJURED PARTIES. (1) If a court determines
24 that punitive damages should be awarded in a tort action, the court shall
25 award those damages to the state. If punitive damages are awarded to the
26 state, the attorney fees of the injured party may not be based, in whole
27 or in part, on the amount of punitive damages awarded. On the day that
28 the judgment for punitive damages is entered under s. 806.06, the clerk of

1 court shall send a copy of that judgment to the department of justice.
2 The department of justice shall represent the state in any action to col-
3 lect on any judgment awarded to the state under this section. The
4 department of justice shall deposit all moneys collected as a result of
5 that action in the fund to assist the injured through restitution under s.
6 25.82. That money shall be expended as provided by this section. The
7 department of justice shall certify any costs incurred in collecting the
8 money to the department of administration and shall be reimbursed for
9 those costs that are approved by the department of administration from the
10 appropriation under s. 20.455 (1) (q).

11 (2) The clerk of circuit court in each county shall, on forms pro-
12 vided by the director of state courts, submit to the director of state
13 courts information regarding judgments in tort actions commenced on or
14 after the effective date of this subsection .... [revisor inserts date],
15 that remain unsatisfied, in whole or in part, 60 days after the judgments
16 are docketed under s. 806.10. The clerk shall include the date on which
17 each judgment was docketed, the amount of the judgment unsatisfied and the
18 full name and address of each judgment creditor and judgment debtor. The
19 clerk of circuit court shall send this information to the director of
20 state courts no later than 80 days after the judgment was docketed. The
21 director of state courts shall, within 20 days after receiving this
22 information, mail to the judgment creditor an application to complete and
23 return to the director of state courts. The application shall include the
24 amount of the judgment reported by the clerk of court as unsatisfied and
25 shall ask the judgment creditor to list any amount paid on that judgment.
26 The director of state courts shall include with that application an
27 explanation of how to complete the application, of why the application was
28 sent and of the assistance available under this section. The director of

1 state courts shall also include with the application a notice that the
2 judgment creditor must inform the director of state courts if he or she
3 receives payment on the judgment. A minor's parent or guardian or an
4 incompetent's guardian or other person authorized to administer the
5 incompetent's estate may complete the application. Within 20 days after
6 receipt of an application, the director of state courts shall send the
7 judgment creditor a written acknowledgment of receipt of the completed
8 application, giving the date received and the amount of the unsatisfied
9 judgment.

10 (3) No later than March 1, from the appropriation under s. 20.680 (2)
11 (r), the director of state courts shall pay each judgment creditor who
12 submitted a completed application to the director of state courts during
13 the period from January 1 to December 31 of the previous year. If the
14 amount in the appropriation under s. 20.680 (2) (r) is insufficient to
15 pay in full the judgment creditors' unsatisfied judgments, they shall be
16 paid on a proportional basis. A judgment creditor who receives a payment
17 under this subsection may not receive any future payment under this sub-
18 section for the same judgment.

19 (4) If a payment is made to a judgment creditor under sub. (3), the
20 state is subrogated to the rights of the judgment creditor and may bring
21 an action on the judgment against the judgment debtor for the amount of
22 the payment made by the state to the judgment creditor. The department of
23 justice shall represent the state in that action. The director of state
24 courts shall provide the department of justice with any information
25 regarding the judgment requested by the department to enable the depart-
26 ment to represent the state in an action against a judgment debtor. The
27 department of justice shall deposit any moneys collected under this sub-
28 section in the fund to assist the injured through restitution under s.

25.82 and those moneys shall be expended in the same manner as funds collected under sub. (1).

SECTION 17. 895.70 (3) of the statutes is amended to read:

895.70 (3) PUNITIVE DAMAGES. A ~~court or jury~~ judge may award punitive damages to a person bringing an action under this section.

SECTION 18. 949.15 (3) of the statutes is amended to read:

949.15 (3) If a judgment or verdict in an action under sub. (1) or (2) indicates separately economic loss and noneconomic detriment, payments on the judgment shall be allocated between them in proportion to the amounts indicated. In such an action, the judge, on timely motion, may return a special verdict awarding punitive damages, and shall direct the jury to return a special verdict, indicating separately the awards for noneconomic detriment~~, punitive damages~~ and economic loss.

SECTION 19. INITIAL APPLICABILITY. The treatment of sections 20.455 (1) (q), 20.680 (2) (r) and (s), 165.25 (8g), 758.19 (5), 895.045, 895.046, 895.047, 895.70 (3) and 949.15 (3) of the statutes and the creation of section 895.045 (2) to (4) of the statutes first apply to actions commenced on the effective date of this SECTION.

(End)

1991 SENATE BILL 138

March 27, 1991 - Introduced by Senators HUELSMAN, ROSHELL, KREUL, BUETTNER, RUDE, ANDREA, LEEAN, STITT, LORMAN and FARROW; cosponsored by Representatives LEHMAN, LOUCKS, ZWECK, TURBA, VERGERONT, SCHULTZ, SILBAUGH, ROSENZWEIG, HAHN, KLUSMAN, SCHNEIDERS, HAMILTON, URBAN, DUFF, ZIEN, DARLING, GOETSCH, VAN GORDEN, LADWIG, BRANDEMUEHL, PORTER and BRANCEL. Referred to Committee on Judiciary and Consumer Affairs.

1 AN ACT to create 16.503, 20.455 (1) (q), 20.680 (2) (r), 20.680 (2) (s),
2 25.17 (1) (hs), 25.78, 165.25 (10), 758.19 (5), 895.85 and 895.855 of
3 the statutes, relating to punitive damages and payments to persons who
4 have unsatisfied judgments in tort actions and making an
5 appropriation.

Analysis by the Legislative Reference Bureau

This bill revises the standards and procedures for awarding punitive damages in certain civil cases. Under present law, the plaintiff sues for damages, including punitive damages, and submits evidence as to the defendant's behavior and ability to pay. If the defendant acted maliciously or in a wilful or wanton manner in reckless disregard of the rights or interests of the plaintiff, punitive damages may be awarded. The plaintiff uses the rule of joint and several liability to collect punitive damages against any defendant found liable for the plaintiff's loss.

The following changes are made in civil actions covered by the bill:

1. The reference to wanton or reckless action by the defendant is omitted from the standard of conduct necessary to prove punitive damages, allowing the plaintiff to receive punitive damages if the defendant acts maliciously or in a wilful disregard of the plaintiff's rights.

2. Evidence of the defendant's wealth, an indicator of ability to pay, is admissible only after the plaintiff has established a legally sufficient case for the allowance of punitive damages.

3. The trier of fact is required to issue a special verdict for punitive damages if legally sufficient evidence is introduced to allow those damages.

4. The award of punitive damages is split evenly between the plaintiff and the state.

5. The plaintiff's attorney fees may not be based on the amount of the punitive damages awarded to the state.

6. The court is prohibited from informing or instructing the jury about the punitive damage allocation.

7. The rule of joint and several liability is abolished as to punitive damages.

The bill establishes a fund to assist any person who has been injured and has obtained a judgment in a tort action for the injury but who has not received reimbursement in full for the injury. The bill requires the department of justice (DOJ) to collect the state share of the punitive damage awards. The moneys collected are deposited in the separate fund. The director of state courts is required to use the moneys in the fund, minus its administrative costs and the collection expenses of DOJ, to pay injured parties the amount of their unsatisfied judgments. If the amount in the fund is insufficient to pay all of the eligible injured parties, they are each paid a proportional share. The amount paid to each injured party becomes a claim that the state has against the judgment debtor.

For further information see the state and local fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 SECTION 1. 16.503 of the statutes is created to read:

2 16.503 INJURED PERSONS FUND. (1) No funds may be expended under s.
3 20.455 (1) (q) until the department of justice submits a request for
4 reimbursement to the department of administration for the amounts expended
5 under s. 165.25 (10) for the collection of punitive damage awards or
6 subrogated judgments under s. 895.855 and the department of administration
7 approves the expenditure of those funds.

8 (2) No funds may be expended under s. 20.680 (2) (s) until the
9 director of state courts submits a request for reimbursement to the
10 department for the amounts expended for the administrative expenses
11 incurred under s. 758.19 (5) for payment of the assistance to injured
12 persons under s. 895.855 and the department approves the expenditure of
13 those funds.

14 (3) The department shall review all requests received under subs. (1)
15 and (2) and may approve those requests in whole or in part, except that
16 the department shall not approve any request submitted under sub. (1) or
17 (2) after January 15 for expenses incurred during the previous calendar
18 year.

(4) By January 30 the department shall complete the review and any approval of the requests received under this section for expenses of the previous year and determine the amount remaining in the injured persons fund for the previous year. The department shall transfer that amount to the appropriation under s. 20.680 (2) (r) and notify the director of state courts of the amount paid into that appropriation.

SECTION 2. 20.005 (3) (schedule) of the statutes: at the appropriate place, insert the following amounts for the purposes indicated:

		1991-92	1992-93
20.455 JUSTICE, DEPARTMENT OF			
(1) LEGAL SERVICES			
(q) Collection of civil judgments	SEG C	-0-	-0-
20.680 SUPREME COURT			
(2) DIRECTOR OF STATE COURTS			
(s) Assistance to the injured; administration	SEG C	-0-	-0-

SECTION 3. 20.455 (1) (q) of the statutes is created to read:

20.455 (1) (q) Collection of civil judgments. From the injured persons fund, as a continuing appropriation, the amounts in the schedule to reimburse the department for the collection expenses incurred under ss. 165.25 (10) and 895.855 and approved by the department of administration under s. 16.503.

SECTION 4. 20.680 (2) (r) of the statutes is created to read:

20.680 (2) (r) Assistance to the injured. From the injured persons fund, all moneys received, less the moneys appropriated under ss. 20.455 (1) (q) and 20.680 (2) (s), for the purpose of making payments to injured persons under s. 895.855 (3).

1 SECTION 5. 20.680 (2) (s) of the statutes is created to read:

2 20.680 (2) (s) Assistance to the injured; administration. From the
3 injured persons fund, as a continuing appropriation, the amounts in the
4 schedule to reimburse the director of state courts for administrative
5 expenses incurred under ss. 758.19 (5) and 895.855 and approved by the
6 department of administration under s. 16.503.

7 SECTION 6. 25.17 (1) (hs) of the statutes is created to read:

8 25.17 (1) (hs) Injured persons fund (s. 25.78);

9 SECTION 7. 25.78 of the statutes is created to read:

10 25.78 INJURED PERSONS FUND. There is established a separate nonlap-
11 sible trust fund designated as the injured persons fund to consist of the
12 moneys collected by the department of justice under ss. 165.25 (10) and
13 895.855.

14 SECTION 8. 165.25 (10) of the statutes is created to read:

15 165.25 (10) COLLECTION OF PUNITIVE DAMAGE JUDGMENTS. Represent the
16 state in any action related to collection of punitive damage awards and
17 subrogated judgments under s. 895.855. The department shall be reimbursed
18 for the collection expenses from the appropriation under s. 20.455 (1)
19 (q). The department of justice shall submit requests to the department of
20 administration for reimbursement of those collection expenses as they are
21 incurred. The department of justice shall submit any request for reim-
22 bursement for collection expenses of the previous year no later than the
23 following January 15 or be barred from reimbursement for those expenses.

24 SECTION 9. 758.19 (5) of the statutes is created to read:

25 758.19 (5) The director of state courts shall administer the assis-
26 tance to injured persons program under s. 895.855. The director of state
27 courts shall receive reimbursement for the expenses related to the admin-
28 istration of the program from the appropriation under s. 20.680 (2) (s).

1 The director of state courts shall submit any request to the department
2 of administration for reimbursement of the administrative expenses as they
3 are incurred. The director of state courts shall submit any request for
4 reimbursement for administration expenses of the previous year no later
5 than the following January 15 or be barred from reimbursement for those
6 expenses.

7 SECTION 10. 895.85 of the statutes is created to read:

8 895.85 PUNITIVE DAMAGES. (1) DEFINITIONS. In this section:

9 (a) "Defendant" means the party against whom punitive damages are
10 sought.

11 (b) "Double damages" means those court awards made under a statute
12 providing for twice, 2 times or double the amount of damages suffered by
13 the injured party.

14 (c) "Plaintiff" means the party seeking to recover punitive damages.

15 (d) "Treble damages" means those court awards made under a statute
16 providing for 3 times or treble the amount of damages suffered by the
17 injured party.

18 (2) SCOPE. This section does not apply to awards of double damages
19 or treble damages, or to the award of exemplary damages under ss. 46.90
20 (6) (c), 51.30 (9), 51.61 (7), 103.96 (2), 146.024 (4), 146.025 (8) (a),
21 153.85, 943.245 (2) and (3) and 943.51 (2) and (3).

22 (3) STANDARD OF CONDUCT. The plaintiff may receive punitive damages
23 if evidence is submitted showing that the defendant acted maliciously
24 toward the plaintiff or in a wilful disregard of the rights of the
25 plaintiff.

26 (4) PROCEDURE. If the plaintiff establishes a prima facie case for
27 the allowance of punitive damages:

1 (a) The plaintiff may introduce evidence of the wealth of a
2 defendant; and
3 (b) The trier of fact shall return a special verdict as to punitive
4 damages.
5 (5) PUNITIVE DAMAGE AWARDS. (a) Except for awards under ss. 23.29
6 (24) and 949.17 (3), if punitive damages are awarded, the court shall
7 apportion 50% of the punitive damages award to the plaintiff and 50% to
8 the state.
9 (b) Plaintiff's attorney fees may not be based, in whole or in part,
10 on the amount of the punitive damages awarded to the state.
11 (c) A jury shall not be informed or given jury instructions as to
12 this subsection.
13 (6) APPLICATION OF JOINT AND SEVERAL LIABILITY. The rule of joint
14 and several liability does not apply to punitive damages.
15 SECTION 11. 895.855 of the statutes is created to read:
16 895.855 ASSISTANCE TO INJURED PARTIES. (1) On the day that a judg-
17 ment for punitive damages under s. 895.85 is entered under s. 806.06, the
18 clerk of court shall send a copy of that judgment to the department of
19 justice. The department of justice shall represent the state in any
20 action to collect on any judgment awarded to the state under this
21 subsection. The department of justice shall deposit all moneys collected
22 as a result of an action to collect punitive damages in the injured per-
23 sons fund under s. 25.78. The department of justice shall certify any
24 costs incurred in collecting the money to the department of administration
25 and may request reimbursement of those costs under s. 16.503.
26 (2) The clerk of circuit court in each county shall, on forms pro-
27 vided by the director of state courts, send to the director of state
28 courts information regarding judgments in tort actions commenced on or

1 after the effective date of this subsection .... [revisor inserts date],
2 that remain unsatisfied in whole or in part 60 days after the judgment is
3 docketed under s. 806.10. The clerk shall include the date on which the
4 judgment was docketed, the amount of the judgment that is unsatisfied and
5 the full name and address of each judgment creditor and judgment debtor.
6 The clerk of circuit court shall send this information to the director of
7 state courts no later than 80 days after the judgment is docketed. The
8 director of state courts shall, within 20 days after receiving this
9 information, mail to the judgment creditor an application to complete and
10 return to the director of state courts. The application shall include the
11 amount of the judgment reported by the clerk of court as unsatisfied and
12 shall ask the judgment creditor to list any amount paid on that judgment.
13 The director of state courts shall include with that application an
14 explanation of how to complete the application and why the application was
15 sent and of the assistance available under this section. The director of
16 state courts shall also include with the application a notice that the
17 judgment creditor must inform the director of state courts if he or she
18 receives payment on the judgment. A minor's parent or guardian or an
19 incompetent's guardian or other person authorized to administer the
20 incompetent's estate may complete the application for the minor or
21 incompetent person. Within 20 days after receipt of an application, the
22 director of state courts shall send the judgment creditor a written
23 acknowledgment of receipt of the completed application, giving the date
24 received and the amount of the unsatisfied judgment.
25 (3) No later than March 1, from the amount transferred to the appro-
26 priation under s. 20.680 (2) (r) by the department of administration under
27 s. 16.503 (4), the director of state courts shall pay each judgment cred-
28 itor who submitted a completed application to the director of state courts

1 during the previous year the amount of the judgment that is unsatisfied,
2 as indicated in the application completed under sub. (2). If the amount
3 in the appropriation under s. 20.680 (2) (r) is insufficient to pay in
4 full the judgment creditors' unsatisfied judgments, they shall be paid on
5 a proportional basis. A judgment creditor who receives a payment under
6 this subsection may not receive any future payment under this subsection
7 for the same judgment.

8 (4) If a payment is made to a judgment creditor under sub. (3), the
9 state is subrogated to the rights of the judgment creditor and may bring
10 an action on the judgment against the judgment debtor for the amount of
11 the payment made by the state to the judgment creditor. The department of
12 justice shall represent the state in that action. The director of state
13 courts shall provide the department of justice with any information
14 regarding the judgment requested by the department to enable the depart-
15 ment to represent the state in an action against a judgment debtor. The
16 department of justice shall deposit any moneys collected under this sub-
17 section in the injured persons fund under s. 25.78. The department of
18 justice shall certify any costs incurred in collecting the money to the
19 department of administration and may request reimbursement of those costs
20 under s. 16.503. Any moneys collected shall be expended in the same man-
21 ner as funds collected under sub. (1).

22 SECTION 12. <u>INITIAL APPLICABILITY.</u> This act first applies to civil
23 actions commenced on the effective date of this SECTION.

24 (End)

1991 ASSEMBLY BILL 1022

March 2, 1992 - Introduced by Representatives LOUCKS and HUBLER, cosponsored by Senators ROSHELL, ANDREA, VAN SISTINE, HUELSMAN, FARROW, LASEE, BUETTNER, LORMAN and SCHULTZ. Referred to special committee on Reform of Health Insurance.

AN ACT to renumber and amend 895.045; to amend 655.017, 893.55 (4) (b) to (d), 893.55 (5) (intro.), 895.70 (3) and 949.15 (3); and to create 20.455 (1) (q), 20.680 (2) (r), 20.680 (2) (s), 25.17 (1) (fs), 25.82, 165.25 (8g), 758.19 (5), 893.55 (4) (dm), 893.55 (4) (f), 895.045 (2) to (4), 895.046 and 895.047 of the statutes, relating to comparative negligence, punitive damage awards, payments to persons who have obtained a judgment in tort actions, limits on noneconomic damages and making appropriations.

Analysis by the Legislative Reference Bureau

This bill establishes a fund to assist any person who has been injured and has obtained a judgment in a tort action for the injury but who has not received reimbursement in full for the injury. The bill requires the judge to award any punitive damages in a tort action to the state. The department of justice (DOJ) collects those awards. The moneys collected are deposited in the separate fund. The director of state courts is required to use the moneys in the fund, minus its administrative costs and the collection expenses of DOJ, to pay injured parties the amount of their unsatisfied judgments. If the amount in the fund is insufficient to pay all of the eligible injured parties, they are each paid a proportional share. The amount paid to each injured party becomes a claim that the state has against the judgment debtor.

This bill revises the standards and procedures for awarding punitive damages in certain civil cases. Under present law, the plaintiff sues for damages, including punitive damages, and submits evidence as to the defendant's behavior and ability to pay. If the defendant acted maliciously or in a wilful or wanton manner in reckless disregard of the rights or interests of the plaintiff, punitive damages may be awarded. Under this bill, punitive damages may be awarded if the defendant acted maliciously or in a wilful or conscious disregard of the rights of the injured party. The bill allows evidence of the defendant's wealth, an indicator of ability to pay, to be admitted only after the plaintiff has

established a legally sufficient case for the allowance of punitive damages. Only a judge is allowed to issue a special verdict for punitive damages and only if legally sufficient evidence is introduced to allow those damages. Punitive damage awards are limited to 3 times the amount of actual damages suffered by the injured party.

Wisconsin has a modified system of comparative negligence. Contributory negligence does not bar recovery for an action unless the negligence of the person seeking recovery (plaintiff) is greater than the negligence of the person against whom recovery is sought (defendant). In the situation where more than one party contributes to an injury (joint tort-feasors), Wisconsin generally follows a rule of joint and several liability. That is, a plaintiff may collect the total damages against any of the joint tort-feasors whose negligence combines to cause the injury, as reduced by the plaintiff's percentage of the negligence. A joint tort-feasor who pays more than his or her proportionate share has a cause of action for contribution against the other joint tort-feasors.

This bill modifies the comparative negligence system in several ways. The bill requires that the negligence of the plaintiff be measured separately against each of the joint tort-feasors. Under this bill, a joint tort-feasor's liability is limited to the percentage determined by dividing his or her negligence by the total negligence of all of the joint tort-feasors who are found liable for damages.

The bill specifies that the changes in the rule of joint and several liability do not apply to parties whose concerted action results in damages or to causes of action resulting from environmental pollution, hazardous waste or substances or waste disposal sites. Under the bill, the rule of joint and several liability does not apply to punitive damages.

This bill reinstates the maximum amount that a claimant may recover for noneconomic damages caused by the negligence of a health care provider. From June, 1986, to January 1, 1991, the maximum was determined by the director of state courts by annually adjusting $1,000,000 to reflect changes in the consumer price index since June 1986. This bill reestablishes a maximum of $250,000. Noneconomic damages are defined in the law to include items such as pain and suffering, embarrassment, mental distress and loss of society and companionship.

For further information see the state and local fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 SECTION 1. 20.455 (1) (q) of the statutes is created to read:

2 20.455 (1) (q) Debt collection expenses. From the fund to assist the
3 injured through restitution under s. 25.82, a sum sufficient to reimburse
4 the department of justice for expenses approved by the department of
5 administration that are incurred in the collection of funds from civil
6 judgments under s. 895.047.

1 SECTION 2. 20.680 (2) (r) of the statutes is created to read:

2 20.680 (2) (r) Assistance to the injured. From the fund to assist
3 the injured through restitution under s. 25.82, all moneys not appropri-
4 ated under s. 20.455 (1) (q) or under par. (s), to be used for payments
5 under s. 895.047 (3).

6 SECTION 3. 20.680 (2) (s) of the statutes is created to read:

7 20.680 (2) (s) Assistance to the injured; administration. From the
8 fund to assist the injured through restitution under s. 25.82, a sum suf-
9 ficient to reimburse the director of state courts for administrative
10 expenses incurred under s. 895.047.

11 SECTION 4. 25.17 (1) (fs) of the statutes is created to read:

12 25.17 (1) (fs) Fund to assist the injured through restitution (s.
13 25.82);

14 SECTION 5. 25.82 of the statutes is created to read:

15 25.82 FUND TO ASSIST THE INJURED THROUGH RESTITUTION. There is
16 established a separate nonlapsible trust fund designated as the fund to
17 assist the injured through restitution to consist of the moneys collected
18 by the department of justice under s. 895.047 (1) and (4). Moneys in the
19 fund shall be expended only for the purposes under s. 895.047.

20 SECTION 6. 165.25 (8g) of the statutes is created to read:

21 165.25 (8g) COLLECTION OF PUNITIVE DAMAGE JUDGMENTS. Represent the
22 state in any action related to collection of judgments under s. 895.047.

23 SECTION 7. 655.017 of the statutes is amended to read:

24 655.017 LIMITATION ON NONECONOMIC DAMAGES. The amount of noneconomic
25 damages recoverable by a claimant or plaintiff under this chapter for acts
26 or omissions of a health care provider if the action is filed on or after
27 June 14, 1986 ~~and before January 1, 1991~~, and for acts or omissions of an
28 employe of a health care provider, acting within the scope of his or her

1 employment and providing health care services, for actions filed on or
2 after June 14, 1986 ~~and before January 1, 1991~~, is subject to the limit
3 under s. 893.55 (4).

4 SECTION 8. 758.19 (5) of the statutes is created to read:

5 758.19 (5) The director of state courts shall perform those duties
6 assigned to the director under s. 895.047 and shall be reimbursed from the
7 appropriation under s. 20.680 (2) (s) for the administrative costs incur-
8 red under s. 895.047.

9 SECTION 9. 893.55 (4) (b) to (d) of the statutes are amended to read:

10 893.55 (4) (b) The total noneconomic damages recoverable under ch.
11 655 for bodily injury or death, including any action or proceeding based
12 on contribution or indemnification, may not exceed the limit under par.
13 (d) or (dm) for each occurrence from all health care providers and all
14 employes of health care providers acting within the scope of their
15 employment and providing health care services who are found negligent and
16 from the patients compensation fund for any action filed ~~on or~~ after June
17 ~~14~~ 13, 1986 ~~and before January 1, 1991~~.

18 (c) A court in an action tried without a jury shall make a finding as
19 to noneconomic damages without regard to the limit under par. (d) or (dm).
20 If noneconomic damages in excess of the limit are found, the court shall
21 make any reduction required under s. 895.045 and shall award as noneco-
22 nomic damages the lesser of the reduced amount or the limit. If an action
23 is before a jury, the jury shall make a finding as to noneconomic damages
24 without regard to the limit under par. (d) or (dm). If the jury finds
25 that noneconomic damages exceed the limit, the jury shall make any reduc-
26 tion required under s. 895.045 and the court shall award as noneconomic
27 damages the lesser of the reduced amount or the limit.

1 (d) The limit on total noneconomic damages for each occurrence under
2 par. (b) shall be $1,000,000 for actions filed ~~on or~~ after June ~~14~~ 13,
3 1986, and before the effective date of this paragraph .... [revisor
4 inserts date], and shall be adjusted by the director of state courts to
5 reflect changes in the consumer price index for all urban consumers, U.S.
6 city average, as determined by the U.S. department of labor, at least
7 annually thereafter, with the adjusted limit to apply to awards subsequent
8 to ~~such~~ the adjustments.

9 SECTION 10. 893.55 (4) (dm) of the statutes is created to read:

10 893.55 (4) (dm) The limit on total noneconomic damages for each
11 occurrence under par. (b) shall be $250,000 for actions filed on or after
12 the effective date of this paragraph .... [revisor inserts date].

13 SECTION 11. 893.55 (4) (f) of the statutes is created to read:

14 893.55 (4) (f) Notwithstanding the limits on noneconomic damages
15 under this subsection, damages recoverable under ch. 655 for wrongful
16 death are subject to the limit under s. 895.04 (4). If damages in excess
17 of the limit under s. 895.04 (4) are found, the court shall make any
18 reduction required under s. 895.045 and shall award the lesser of the
19 reduced amount or the limit under s. 895.04 (4).

20 SECTION 12. 893.55 (5) (intro.) of the statutes is amended to read:

21 893.55 (5) (intro.) Every award of damages under ch. 655 shall spec-
22 ify the sum of money, if any, awarded for each of the following for each
23 claimant for the period from the date of injury to the date of award and
24 for the period after the date of award, without regard to the limit under
25 sub. (4) (d) or (dm):

26 SECTION 13. 895.045 of the statutes is renumbered 895.045 (1) and
27 amended to read:

895.045 (1) (title) COMPARATIVE NEGLIGENCE. Contributory negligence ~~shall~~ does not bar recovery in an action by any person or ~~his~~ the person's legal representative to recover damages for negligence resulting in death or in injury to person or property, if ~~such~~ that negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence ~~attributable~~ attributed to the person recovering. The negligence of the plaintiff shall be measured separately against the negligence of each party against whom recovery is sought. The liability of each party against whom recovery is sought is limited to the percentage determined by dividing the percentage of that party's causal negligence by the percentage of causal negligence attributed to all of the parties against whom damages are awarded.

SECTION 14. 895.045 (2) to (4) of the statutes are created to read:

895.045 (2) CONCERTED ACTION. Notwithstanding sub. (1), if 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for all damages resulting from that action, except as provided in sub. (4).

(3) JOINT AND SEVERAL LIABILITY. Except as provided in sub. (4), nothing in this section prohibits the imposition of joint and several liability in a cause of action for damages resulting from environmental pollution, hazardous waste or substances or waste disposal sites.

(4) PUNITIVE DAMAGES. The rule of joint and several liability does not apply to punitive damages.

SECTION 15. 895.046 of the statutes is created to read:

895.046 PUNITIVE DAMAGES. (1) DEFINITIONS. In this section:

(a) "Defendant" means the party against whom punitive damages are sought.

1 (b) "Double damages" means those court awards made under a statute
2 providing for twice, 2 times or double the amount of damages suffered by
3 the injured party.
4 (c) "Treble damages" means those court awards made under a statute
5 providing for 3 times or treble the amount of damages suffered by the
6 injured party.
7 (2) SCOPE. This section does not apply to awards of double damages
8 or treble damages, or to the award of exemplary damages under ss. 46.90
9 (6) (c), 51.30 (9), 51.61 (7), 103.96 (2), 146.025 (8) (a), 153.85,
10 943.245 (2) and (3) and 943.51 (2) and (3).
11 (3) STANDARD OF CONDUCT. A court may award punitive damages if evi-
12 dence is submitted showing that the defendant acted maliciously toward the
13 injured party or in a wilful or conscious disregard of the rights of the
14 injured party.
15 (4) PROCEDURE. If the injured party establishes a prima facie case
16 for the allowance of punitive damages:
17 (a) The injured party may introduce evidence of the wealth of a
18 defendant; and
19 (b) The judge shall return a special verdict as to punitive damages.
20 (5) AWARDS. The award of punitive damages may not exceed treble the
21 amount of damages suffered by the injured party.
22 SECTION 16. 895.047 of the statutes is created to read:
23 <u>895.047 ASSISTANCE TO INJURED PARTIES.</u> (1) If a court determines
24 that punitive damages should be awarded in a tort action, the court shall
25 award those damages to the state. If punitive damages are awarded to the
26 state, the attorney fees of the injured party may not be based, in whole
27 or in part, on the amount of punitive damages awarded. On the day that
28 the judgment for punitive damages is entered under s. 806.06, the clerk of

1 court shall send a copy of that judgment to the department of justice.
2 The department of justice shall represent the state in any action to col-
3 lect on any judgment awarded to the state under this section. The
4 department of justice shall deposit all moneys collected as a result of
5 that action in the fund to assist the injured through restitution under s.
6 25.82. That money shall be expended as provided by this section. The
7 department of justice shall certify any costs incurred in collecting the
8 money to the department of administration and shall be reimbursed for
9 those costs that are approved by the department of administration from the
10 appropriation under s. 20.455 (1) (q).

11 (2) The clerk of circuit court in each county shall, on forms pro-
12 vided by the director of state courts, submit to the director of state
13 courts information regarding judgments in tort actions commenced on or
14 after the effective date of this subsection .... [revisor inserts date],
15 that remain unsatisfied, in whole or in part, 60 days after the judgments
16 are docketed under s. 806.10. The clerk shall include the date on which
17 each judgment was docketed, the amount of the judgment unsatisfied and the
18 full name and address of each judgment creditor and judgment debtor. The
19 clerk of circuit court shall send this information to the director of
20 state courts no later than 80 days after the judgment was docketed. The
21 director of state courts shall, within 20 days after receiving this
22 information, mail to the judgment creditor an application to complete and
23 return to the director of state courts. The application shall include the
24 amount of the judgment reported by the clerk of court as unsatisfied and
25 shall ask the judgment creditor to list any amount paid on that judgment.
26 The director of state courts shall include with that application an
27 explanation of how to complete the application, of why the application was
28 sent and of the assistance available under this section. The director of

1 state courts shall also include with the application a notice that the
2 judgment creditor must inform the director of state courts if he or she
3 receives payment on the judgment. A minor's parent or guardian or an
4 incompetent's guardian or other person authorized to administer the
5 incompetent's estate may complete the application. Within 20 days after
6 receipt of an application, the director of state courts shall send the
7 judgment creditor a written acknowledgment of receipt of the completed
8 application, giving the date received and the amount of the unsatisfied
9 judgment.

10 (3) No later than March 1, from the appropriation under s. 20.680 (2)
11 (r), the director of state courts shall pay each judgment creditor who
12 submitted a completed application to the director of state courts during
13 the period from January 1 to December 31 of the previous year. If the
14 amount in the appropriation under s. 20.680 (2) (r) is insufficient to
15 pay in full the judgment creditors' unsatisfied judgments, they shall be
16 paid on a proportional basis. A judgment creditor who receives a payment
17 under this subsection may not receive any future payment under this sub-
18 section for the same judgment.

19 (4) If a payment is made to a judgment creditor under sub. (3), the
20 state is subrogated to the rights of the judgment creditor and may bring
21 an action on the judgment against the judgment debtor for the amount of
22 the payment made by the state to the judgment creditor. The department of
23 justice shall represent the state in that action. The director of state
24 courts shall provide the department of justice with any information
25 regarding the judgment requested by the department to enable the depart-
26 ment to represent the state in an action against a judgment debtor. The
27 department of justice shall deposit any moneys collected under this sub-
28 section in the fund to assist the injured through restitution under s.

25.82 and those moneys shall be expended in the same manner as funds collected under sub. (1).

SECTION 17. 895.70 (3) of the statutes is amended to read:

895.70 (3) PUNITIVE DAMAGES. A ~~court or jury~~ judge may award punitive damages to a person bringing an action under this section.

SECTION 18. 949.15 (3) of the statutes is amended to read:

949.15 (3) If a judgment or verdict in an action under sub. (1) or (2) indicates separately economic loss and noneconomic detriment, payments on the judgment shall be allocated between them in proportion to the amounts indicated. In such an action, the judge, on timely motion, may return a special verdict awarding punitive damages, and shall direct the jury to return a special verdict, indicating separately the awards for noneconomic detriment~~, punitive damages~~ and economic loss.

SECTION 19. INITIAL APPLICABILITY. The treatment of sections 20.455 (1) (q), 20.680 (2) (r) and (s), 165.25 (8g), 758.19 (5), 895.045, 895.046, 895.047, 895.70 (3) and 949.15 (3) of the statutes and the creation of section 895.045 (2) to (4) of the statutes first apply to actions commenced on the effective date of this SECTION.

(End)

1993 SENATE BILL 152

April 22, 1993 - Introduced by Senators HUELSMAN, ANDREA, DARLING, LEEAN, SCHULTZ, WEEDEN, STITT, LORMAN, BUETTNER, DRZEWIECKI, FARROW, PETAK, ZIEN and ROSENZWEIG; cosponsored by Representatives HUBLER, DEININGER, PORTER, BRANDEMUEHL, LEHMAN, JENSEN, MUSSER, TURNER, BRANCEL, LADWIG, VERGERONT, DOBYNS, HAHN, DUFF, HASENOHRL, GOETSCH, BEAL, ALBERS, AINSWORTH, GRONEMUS, SCHNEIDERS, OURADA, KLUSMAN, SILBAUGH, SERATTI, GREEN, RYBA, KREIBICH and LAZICH. Referred to Committee on Judiciary and Insurance.

AN ACT to renumber and amend 895.045; and to create 16.503, 20.455 (1) (q), 20.680 (2) (r), 20.680 (2) (s), 25.17 (1) (hs), 25.78, 165.25 (10), 758.19 (5), 895.045 (2) and (3), 895.85 and 895.855 of the statutes, relating to comparative negligence, punitive damages and payments to persons who have unsatisfied judgments in tort actions and making an appropriation.

Analysis by the Legislative Reference Bureau

This bill revises the standards and procedures for awarding punitive damages in certain civil cases. Under present law, the plaintiff sues for damages, including punitive damages, and submits evidence as to the defendant's behavior and ability to pay. If the defendant acted maliciously or in a wilful or wanton manner in reckless disregard of the rights or interests of the plaintiff, punitive damages may be awarded. The plaintiff uses the rule of joint and several liability to collect punitive damages against any defendant found liable for the plaintiff's loss.

The following changes are made in civil actions covered by the bill:

1. The award of punitive damages is split evenly between the plaintiff and the state.
2. The plaintiff's attorney fees may not be based on the amount of the punitive damages awarded to the state.
3. The court is prohibited from informing or instructing the jury about the punitive damage allocation.
4. The rule of joint and several liability is abolished as to punitive damages.
5. The reference to wanton or reckless action by the defendant is omitted from the standard of conduct necessary to prove punitive damages, allowing the plaintiff to receive punitive damages if the defendant acts maliciously or in a wilful disregard of the plaintiff's rights.
6. Evidence of the defendant's wealth, an indicator of ability to pay, is admissible only after the plaintiff has established a legally sufficient case for the allowance of punitive damages.

7. The judge is required to issue a special verdict for punitive damages if legally sufficient evidence is introduced to allow those damages.

The bill establishes a fund to assist any person who has been injured and has obtained a judgment in a tort action for the injury but who has not received reimbursement in full for the injury. The bill requires the department of justice (DOJ) to collect the state share of the punitive damage awards. The moneys collected are deposited in the separate fund. The director of state courts is required to use the moneys in the fund, minus its administrative costs and the collection expenses of DOJ, to pay injured parties the amount of their unsatisfied judgments. If the amount in the fund is insufficient to pay all of the eligible injured parties, they are each paid a proportional share. The amount paid to each injured party becomes a claim that the state has against the judgment debtor.

Wisconsin has a modified system of comparative negligence. Contributory negligence does not bar recovery for an action unless the negligence of the person seeking recovery (plaintiff) is greater than the negligence of the person against whom recovery is sought (defendant). In the situation where more than one party contributes to an injury (joint tort-feasors), Wisconsin generally follows a rule of joint and several liability. That is, a plaintiff may collect the total damages against any of the joint tort-feasors whose negligence combines to cause the injury, as reduced by the plaintiff's percentage of the negligence. A joint tort-feasor who pays more than his or her proportionate share has a cause of action for contribution against the other joint tort-feasors.

This bill modifies the comparative negligence system in several ways. The bill requires that the negligence of the plaintiff be measured separately against each of the joint tort-feasors. Under this bill, a joint tort-feasor's liability is limited to the percentage determined by dividing his or her negligence by the total negligence of all of the joint tort-feasors who are found liable for damages.

The bill specifies that the changes in the rule of joint and several liability do not apply to parties whose concerted action results in damages or to causes of action resulting from environmental pollution, hazardous waste or substances or waste disposal sites.

For further information see the state and local fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 SECTION 1. 16.503 of the statutes is created to read:

2 16.503 INJURED PERSONS FUND. (1) No funds may be expended under s.
3 20.455 (1) (q) until the department of justice submits a request for
4 reimbursement to the department of administration for the amounts expended
5 under s. 165.25 (10) for the collection of punitive damage awards or

1 subrogated judgments under s. 895.855 and the department of administration
2 approves the expenditure of those funds.
3 (2) No funds may be expended under s. 20.680 (2) (s) until the
4 director of state courts submits a request for reimbursement to the
5 department for the amounts expended for the administrative expenses
6 incurred under s. 758.19 (5) for payment of the assistance to injured
7 persons under s. 895.855 and the department approves the expenditure of
8 those funds.
9 (3) The department shall review all requests received under subs. (1)
10 and (2) and may approve those requests in whole or in part, except that
11 the department shall not approve any request submitted under sub. (1) or
12 (2) after February 15 for expenses incurred during the previous calendar
13 year.
14 (4) By February 30 the department shall complete the review and any
15 approval of the requests received under this section for expenses of the
16 previous year and determine the amount remaining in the injured persons
17 fund for the previous year. The department shall transfer that amount to
18 the appropriation under s. 20.680 (2) (r) and notify the director of state
19 courts of the amount paid into that appropriation.
20 SECTION 2. 20.005 (3) (schedule) of the statutes: at the appropriate
21 place, insert the following amounts for the purposes indicated:

		1993-94	1994-95
22			
23	20.455 JUSTICE, DEPARTMENT OF		
24	(1) LEGAL SERVICES		
25	(q) Collection of civil		
26	judgments SEG C	-0-	-0-

1 20.680 SUPREME COURT

2 (2) DIRECTOR OF STATE COURTS

3 (s) Assistance to the injured;

4 administration SEG C -0- -0-

5 SECTION 3. 20.455 (1) (q) of the statutes is created to read:

6 20.455 (1) (q) Collection of civil judgments. From the injured per-
7 sons fund, as a continuing appropriation, the amounts in the schedule to
8 reimburse the department for the collection expenses incurred under ss.
9 165.25 (10) and 895.855 and approved by the department of administration
10 under s. 16.503.

11 SECTION 4. 20.680 (2) (r) of the statutes is created to read:

12 20.680 (2) (r) Assistance to the injured. From the injured persons
13 fund, all moneys received, less the moneys appropriated under par. (s) and
14 s. 20.455 (1) (q), for the purpose of making payments to injured persons
15 under s. 895.855 (3).

16 SECTION 5. 20.680 (2) (s) of the statutes is created to read:

17 20.680 (2) (s) Assistance to the injured; administration. From the
18 injured persons fund, as a continuing appropriation, the amounts in the
19 schedule to reimburse the director of state courts for administrative
20 expenses incurred under ss. 758.19 (5) and 895.855 and approved by the
21 department of administration under s. 16.503.

22 SECTION 6. 25.17 (1) (hs) of the statutes is created to read:

23 25.17 (1) (hs) Injured persons fund (s. 25.78);

24 SECTION 7. 25.78 of the statutes is created to read:

25 25.78 INJURED PERSONS FUND. There is established a separate nonlap-
26 sible trust fund designated as the injured persons fund, to consist of the
27 moneys collected by the department of justice under ss. 165.25 (10) and
28 895.855.

1 SECTION 8. 165.25 (10) of the statutes is created to read:

2 165.25 (10) COLLECTION OF PUNITIVE DAMAGE JUDGMENTS. Represent the
3 state in any action related to collection of punitive damage awards and
4 subrogated judgments under s. 895.855. The department shall be reimbursed
5 for the collection expenses from the appropriation under s. 20.455 (1)
6 (q). The department of justice shall submit requests to the department of
7 administration for reimbursement of those collection expenses as they are
8 incurred. The department of justice shall submit any request for reim-
9 bursement for collection expenses of the previous year no later than the
10 following February 15 or be barred from reimbursement for those expenses.

11 SECTION 9. 758.19 (5) of the statutes is created to read:

12 758.19 (5) The director of state courts shall administer the assis-
13 tance to injured persons program under s. 895.855. The director of state
14 courts shall receive reimbursement for the expenses related to the admin-
15 istration of the program from the appropriation under s. 20.680 (2) (s).
16 The director of state courts shall submit any request to the department
17 of administration for reimbursement of the administrative expenses as they
18 are incurred. The director of state courts shall submit any request for
19 reimbursement for administration expenses of the previous year no later
20 than the following February 15 or be barred from reimbursement for those
21 expenses.

22 SECTION 10. 895.045 of the statutes is renumbered 895.045 (1) and
23 amended to read:

24 895.045 (1) (title) COMPARATIVE NEGLIGENCE. Contributory negligence
25 ~~shall~~ does not bar recovery in an action by any person or ~~his~~ the person's
26 legal representative to recover damages for negligence resulting in death
27 or in injury to person or property, if ~~such~~ that negligence was not
28 greater than the negligence of the person against whom recovery is sought,

1 but any damages allowed shall be diminished in the proportion to the
2 amount of negligence ~~attributable~~ attributed to the person recovering.
3 The negligence of the plaintiff shall be measured separately against the
4 negligence of each party against whom recovery is sought. The liability
5 of each party against whom recovery is sought is limited to the percentage
6 determined by dividing the percentage of that party's causal negligence by
7 the percentage of causal negligence attributed to all of the parties
8 against whom damages are awarded.

9 SECTION 11. 895.045 (2) and (3) of the statutes are created to read:

10 895.045 (2) CONCERTED ACTION. Notwithstanding sub. (1), if 2 or more
11 parties act in accordance with a common scheme or plan, those parties are
12 jointly and severally liable for all damages resulting from that action,
13 except as provided in s. 895.85 (6).

14 (3) JOINT AND SEVERAL LIABILITY. Except as provided in s. 895.85
15 (6), nothing in this section prohibits the imposition of joint and several
16 liability in a cause of action for damages resulting from environmental
17 pollution, hazardous waste or substances or waste disposal sites.

18 SECTION 12. 895.85 of the statutes is created to read:

19 895.85 PUNITIVE DAMAGES. (1) DEFINITIONS. In this section:

20 (a) "Defendant" means the party against whom punitive damages are
21 sought.

22 (b) "Double damages" means those court awards made under a statute
23 providing for twice, 2 times or double the amount of damages suffered by
24 the injured party.

25 (c) "Plaintiff" means the party seeking to recover punitive damages.

26 (d) "Treble damages" means those court awards made under a statute
27 providing for 3 times or treble the amount of damages suffered by the
28 injured party.

1 (2) SCOPE. This section does not apply to awards of double damages
2 or treble damages, or to the award of exemplary damages under ss. 46.90
3 (6) (c), 51.30 (9), 51.61 (7), 103.96 (2), 146.024 (4), 146.025 (8) (a),
4 153.85, 943.245 (2) and (3) and 943.51 (2) and (3).
5 (3) STANDARD OF CONDUCT. The plaintiff may receive punitive damages
6 if evidence is submitted showing that the defendant acted maliciously
7 toward the plaintiff or in a wilful disregard of the rights of the
8 plaintiff.
9 (4) PROCEDURE. If the plaintiff establishes a prima facie case for
10 the allowance of punitive damages:
11 (a) The plaintiff may introduce evidence of the wealth of a
12 defendant; and
13 (b) The judge shall return a special verdict as to punitive damages.
14 (5) PUNITIVE DAMAGE AWARDS. (a) Except for awards under ss. 23.29
15 (24) and 949.17 (3), if punitive damages are awarded, the court shall
16 apportion 50% of the punitive damages award to the plaintiff and 50% to
17 the state.
18 (b) Plaintiff's attorney fees may not be based, in whole or in part,
19 on the amount of the punitive damages awarded to the state.
20 (c) A jury shall not be informed or given jury instructions as to
21 this subsection.
22 (6) APPLICATION OF JOINT AND SEVERAL LIABILITY. The rule of joint
23 and several liability does not apply to punitive damages.
24 SECTION 13. 895.855 of the statutes is created to read:
25 895.855 ASSISTANCE TO INJURED PARTIES. (1) On the day that a judg-
26 ment for punitive damages under s. 895.85 is entered under s. 806.06, the
27 clerk of court shall send a copy of that judgment to the department of
28 justice. The department of justice shall represent the state in any

1 action to collect on any judgment awarded to the state under this
2 subsection. The department of justice shall deposit all moneys collected
3 as a result of an action to collect punitive damages in the injured per-
4 sons fund under s. 25.78. The department of justice shall certify any
5 costs incurred in collecting the money to the department of administration
6 and may request reimbursement of those costs under s. 16.503.

7 (2) The clerk of circuit court in each county shall, on forms pro-
8 vided by the director of state courts, send to the director of state
9 courts information regarding judgments in tort actions commenced on or
10 after the effective date of this subsection .... [revisor inserts date],
11 that remain unsatisfied in whole or in part 60 days after the judgment is
12 docketed under s. 806.10. The clerk shall include the date on which the
13 judgment was docketed, the amount of the judgment that is unsatisfied and
14 the full name and address of each judgment creditor and judgment debtor.
15 The clerk of circuit court shall send this information to the director of
16 state courts no later than 80 days after the judgment is docketed. The
17 director of state courts shall, within 20 days after receiving this
18 information, mail to the judgment creditor an application to complete and
19 return to the director of state courts. The application shall include the
20 amount of the judgment reported by the clerk of court as unsatisfied and
21 shall ask the judgment creditor to list any amount paid on that judgment.
22 The director of state courts shall include with that application an
23 explanation of how to complete the application and why the application was
24 sent and of the assistance available under this section. The director of
25 state courts shall also include with the application a notice that the
26 judgment creditor must inform the director of state courts if he or she
27 receives payment on the judgment. A minor's parent or guardian or an
28 incompetent's guardian or other person authorized to administer the

1 incompetent's estate may complete the application for the minor or
2 incompetent person. Within 20 days after receipt of an application, the
3 director of state courts shall send the judgment creditor a written
4 acknowledgment of receipt of the completed application, giving the date
5 received and the amount of the unsatisfied judgment.

6 (3) No later than April 1, from the amount transferred to the appro-
7 priation under s. 20.680 (2) (r) by the department of administration under
8 s. 16.503 (4), the director of state courts shall pay each judgment cred-
9 itor who submitted a completed application to the director of state courts
10 during the previous year the amount of the judgment that is unsatisfied,
11 as indicated in the application completed under sub. (2). If the amount
12 in the appropriation under s. 20.680 (2) (r) is insufficient to pay in
13 full the judgment creditors' unsatisfied judgments, they shall be paid on
14 a proportional basis. A judgment creditor who receives a payment under
15 this subsection may not receive any future payment under this subsection
16 for the same judgment.

17 (4) If a payment is made to a judgment creditor under sub. (3), the
18 state is subrogated to the rights of the judgment creditor and may bring
19 an action on the judgment against the judgment debtor for the amount of
20 the payment made by the state to the judgment creditor. The department of
21 justice shall represent the state in that action. The director of state
22 courts shall provide the department of justice with any information
23 regarding the judgment requested by the department to enable the depart-
24 ment to represent the state in an action against a judgment debtor. The
25 department of justice shall deposit any moneys collected under this sub-
26 section in the injured persons fund under s. 25.78. The department of
27 justice shall certify any costs incurred in collecting the money to the
28 department of administration and may request reimbursement of those costs

1 under s. 16.503. Any moneys collected shall be expended in the same man-
2 ner as funds collected under sub. (1).

3 SECTION 14. INITIAL APPLICABILITY. This act first applies to civil
4 actions commenced on the effective date of this SECTION.

5 (End)

History of 1995 SENATE BILL 11

An Act to renumber and amend 895.045; and to create 895.045 (2) and (3) and 895.85 of the statutes; relating to: comparative negligence and punitive damages.

1995

01-17. S. Introduced by Senators Huelsman, Drzewiecki, Darling, Petak, Zien, Andrea, Buettner, Schultz, A. Lasee, Panzer, Cowles, Leean, Farrow, Rude, Weeden, Rosenzweig, Fitzgerald and Ellis; cosponsored by Representatives Green, Albers, Hubler, Kelso, Jensen, Freese, Gard, M. Lehman, Goetsch, Ladwig, Duff, Musser, Brandemuehl, Silbaugh, Wilder, Urban, Schneiders, Owens, Walker, Kreibich, Ainsworth, Vrakas, Ward, F. Lasee, Olsen, Powers, Lazich, Handrick, Hahn, Brancel, Grothman, Gronemus, Kaufert, Klusman, Nass, Ryba, Seratti and Dobyns.

01-17. S. Read first time and referred to committee on Judiciary 19

02-01. S. Public hearing held.

02-07. S. Fiscal estimate received.

02-27. S. Executive action taken.

02-28. S. Report introduction and adoption of Senate substitute amendment 1 recommended by committee on Judiciary, Ayes 4, Noes 3 by committee on Judiciary .97

02-28. S. Report passage as amended recommended by committee on Judiciary, Ayes 4, Noes 3 97

02-28. S. Available for scheduling.

03-01. S. Placed at the foot of the calendar of 3-1-95 105

03-01. S. Read a second time 105

03-01. S. Senate amendment 1 to Senate substitute amendment 1 offered by Senator Huelsman 105

03-01. S. Senate amendment 1 to Senate substitute amendment 1 adopted 105

03-01. S. Senate amendment 2 to Senate substitute amendment 1 offered by Senators Burke, Chvala, Wineke, Decker, Jauch, Risser, George, Moore and Adelman 105

03-01. S. Senate amendment 2 to Senate substitute amendment 1 rejected, Ayes 17, Noes 15 105

03-01. S. Senate amendment 3 to Senate substitute amendment 1 offered by Senator Adelman 105

03-01. S. Senate amendment 3 to Senate substitute amendment 1 rejected, Ayes 17, Noes 15 105

03-01. S. Senate amendment 4 to Senate substitute amendment 1 offered by Senator Adelman 105

03-01. S. Senate amendment 4 to Senate substitute amendment 1 rejected, Ayes 17, Noes 15 105

03-01. S. Senate amendment 5 to Senate substitute amendment 1 offered by Senator Adelman 105

03-01. S. Senate amendment 5 to Senate substitute amendment 1 laid on table 106

03-01. S. Senate amendment 6 to Senate substitute amendment 1 offered by Senator Adelman 106

03-01. S. Senate amendment 6 to Senate substitute amendment 1 rejected, Ayes 17, Noes 14 106

03-01. S. Senate amendment 7 to Senate substitute amendment 1 offered by Senators Chvala, Burke, Adelman and C. Potter 106

03-01. S. Senate amendment 7 to Senate substitute amendment 1 rejected 106

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03-01. S. Senate substitute amendment 1 adopted 106
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03-01. S. Rules suspended 106
-01. S. Read a third time and passed, Ayes 24, Noes 8 106
-01. S. Ordered immediately messaged 106
03-02. A. Received from Senate 128
03-02. A. Read first time and referred to committee on Judiciary 129
03-21. A. Public hearing held.
03-24. A. Public hearing held.
04-04. A. Executive action taken.
04-04. A. Assembly substitute amendment 1 offered by committee on Judiciary 181
04-04. A. Assembly amendment 1 offered by committee on Judiciary 181
04-04. A. Assembly amendment 2 offered by committee on Judiciary 181
04-04. A. Assembly amendment 3 offered by committee on Judiciary 181
04-04. A. Assembly amendment 4 offered by committee on Judiciary 181
04-04. A. Assembly amendment 5 offered by committee on Judiciary 181
04-04. A. Report concurrence recommended by committee on Judiciary, Ayes 5, Noes 3 183
04-04. A. Referred to committee on Rules 183
04-04. A. Placed on calendar 4-6-95 by committee on Rules.
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04-06. A. Assembly substitute amendment 2 laid on table, Ayes 60, Noes 38 217
04-06. A. Refused to revive Assembly substitute amendment 1, Ayes 42, Noes 56 217
04-06. A. Refused to revive Assembly amendment 1, Ayes 42, Noes 56 217
04-06. A. Refused to revive Assembly amendment 3, Ayes 41, Noes 57 218
04-06. A. Refused to revive Assembly amendment 4, Ayes 41, Noes 57 218
04-06. A. Assembly amendment 5 revived, Ayes 50, Noes 48 218
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04-06. A. Ordered to a third reading, Ayes 70, Noes 28 219
04-06. A. Refused to suspend rules to read a third time, Ayes 65, Noes 33 219
04-07. A. Refused to suspend rules to withdraw from calendar of 4-8-95 and take up, Ayes 50, Noes 48 226
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04-12. S. LRB correction 168
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05-16. S. Report approved by the Governor on 5-16-95. 1995 Wisconsin Act 17. Published 5-16-95 199

State of Wisconsin
1995 – 1996 LEGISLATURE

LRB–1744/1
RPN:kmg:kaf

1995 SENATE BILL 11

January 17, 1995 – Introduced by Senators HUELSMAN, DRZEWIECKI, DARLING, PETAK, ZIEN, ANDREA, BUETTNER, SCHULTZ, A. LASEE, PANZER, COWLES, LEEAN, FARROW, RUDE, WEEDEN, ROSENZWEIG, FITZGERALD and ELLIS, cosponsored by Representatives GREEN, ALBERS, HUBLER, KELSO, JENSEN, FREESE, GARD, LEHMAN, GOETSCH, LADWIG, DUFF, MUSSER, BRANDEMUEHL, SILBAUGH, WILDER, URBAN, SCHNEIDERS, OWENS, WALKER, KREIBICH, AINSWORTH, VRAKAS, WARD, F. LASEE, OLSEN, POWERS, LAZICH, HANDRICK, HAHN, BRANCEL, GROTHMAN, GRONEMUS, KAUFERT, KLUSMAN, NASS, RYBA, SERATTI and DOBYNS. Referred to Committee on Judiciary.

AN ACT ***to renumber and amend*** 895.045; and ***to create*** 895.045 (2) and (3) and 895.85 of the statutes; **relating to:** comparative negligence and punitive damages.

Analysis by the Legislative Reference Bureau

This bill revises the standards and procedures for awarding punitive damages in certain civil cases. Under present law, the plaintiff sues for damages, including punitive damages, and submits evidence as to the defendant's behavior and ability to pay. If the defendant acted maliciously or in a wilful or wanton manner in reckless disregard of the rights or interests of the plaintiff, punitive damages may be awarded. The plaintiff uses the rule of joint and several liability to collect punitive damages against any defendant found liable for the plaintiff's loss.

The following changes are made in civil actions covered by the bill:

1. The rule of joint and several liability is abolished as to punitive damages.

2. The reference to wanton or reckless action by the defendant is omitted from the standard of conduct necessary to prove punitive damages, allowing the plaintiff to receive punitive damages if the defendant acts maliciously or in a wilful disregard of the plaintiff's rights.

3. Evidence of the defendant's wealth, an indicator of ability to pay, is admissible only after the plaintiff has established a legally sufficient case for the allowance of punitive damages.

4. The judge is required to issue a special verdict for punitive damages if legally sufficient evidence is introduced to allow those damages.

Wisconsin has a modified system of comparative negligence. Contributory negligence does not bar recovery for an action unless the negligence of the person seeking recovery (plaintiff) is greater than the negligence of the person against whom recovery is sought (defendant). In the situation where more than one party contributes to an injury (joint tort–feasors), Wisconsin generally follows a rule of joint and sever-

al liability. That is, a plaintiff may collect the total damages against any of the joint tort–feasors whose negligence combines to cause the injury, as reduced by the plaintiff's percentage of the negligence. A joint tort–feasor who pays more than his or her proportionate share has a cause of action for contribution against the other joint tort–feasors.

This bill modifies the comparative negligence system in several ways. The bill requires that the negligence of the plaintiff be measured separately against each of the joint tort–feasors. Under this bill, a joint tort–feasor's liability is limited to the percentage of the total causal negligence attributed to that party.

The bill specifies that the changes in the rule of joint and several liability do not apply to parties whose concerted action results in damages or to causes of action resulting from environmental pollution, hazardous waste or substances or waste disposal sites.

For further information see the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 895.045 of the statutes is renumbered 895.045 (1) and amended to
2 read:

3 895.045 **(1)** (title) COMPARATIVE NEGLIGENCE. Contributory negligence ~~shall~~
4 does not bar recovery in an action by any person or the ~~preson's~~ person's legal repre-
5 sentative to recover damages for negligence resulting in death or in injury to person
6 or property, if ~~such~~ that negligence was not greater than the negligence of the person
7 against whom recovery is sought, but any damages allowed shall be diminished in
8 the proportion to the amount of negligence ~~attributable~~ attributed to the person re-
9 covering. The negligence of the plaintiff shall be measured separately against the
10 negligence of each party found to be causally negligent. The liability of each party
11 found to be causally negligent is limited to the percentage of the total causal negli-
12 gence attributed to that party.

13 **SECTION 2.** 895.045 (2) and (3) of the statutes are created to read:

1 895.045 (2) CONCERTED ACTION. Notwithstanding sub. (1), if 2 or more parties
2 act in accordance with a common scheme or plan, those parties are jointly and sever-
3 ally liable for all damages resulting from that action, except as provided in s. 895.85
4 (5).

5 (3) JOINT AND SEVERAL LIABILITY. Except as provided in s. 895.85 (5), nothing in
6 this section prohibits the imposition of joint and several liability in a cause of action
7 for damages resulting from environmental pollution, hazardous waste or substances
8 or waste disposal sites.

9 SECTION 3. 895.85 of the statutes is created to read:

10 **895.85 Punitive damages.** (1) DEFINITIONS. In this section:

11 (a) "Defendant" means the party against whom punitive damages are sought.

12 (b) "Double damages" means those court awards made under a statute provid-
13 ing for twice, 2 times or double the amount of damages suffered by the injured party.

14 (c) "Plaintiff" means the party seeking to recover punitive damages.

15 (d) "Treble damages" means those court awards made under a statute provid-
16 ing for 3 times or treble the amount of damages suffered by the injured party.

17 (2) SCOPE. This section does not apply to awards of double damages or treble
18 damages, or to the award of exemplary damages under ss. 46.90 (6) (c), 51.30 (9),
19 51.61 (7), 103.96 (2), 153.85, 252.14 (4), 252.15 (8) (a), 943.245 (2) and (3) and 943.51
20 (2) and (3).

21 (3) STANDARD OF CONDUCT. The plaintiff may receive punitive damages if evi-
22 dence is submitted showing that the defendant acted maliciously toward the plaintiff
23 or in a wilful disregard of the rights of the plaintiff.

24 (4) PROCEDURE. If the plaintiff establishes a prima facie case for the allowance
25 of punitive damages:

1 (a) The plaintiff may introduce evidence of the wealth of a defendant; and

2 (b) The judge shall submit to the jury a special verdict as to punitive damages

3 or, if the case is tried to the court, the judge shall issue a special verdict as to punitive

4 damages.

5 **(5)** APPLICATION OF JOINT AND SEVERAL LIABILITY. The rule of joint and several

6 liability does not apply to punitive damages.

7 **SECTION 4. Initial applicability.**

8 (1) This act first applies to civil actions commenced on the effective date of this

9 subsection.

10 **(END)**

State of Wisconsin
1995 – 1996 LEGISLATURE

LRBs0035/1
RPN:kmg:kaf

SENATE SUBSTITUTE AMENDMENT,

TO 1995 SENATE BILL 11

2 changes – See pages 2+3,

1 AN ACT *to renumber and amend* 895.045; and *to create* 895.045 (2) and (3) and
2 895.85 of the statutes; **relating to:** comparative negligence and punitive dam-
3 ages.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

4 SECTION 1. 895.045 of the statutes is renumbered 895.045 (1) and amended to
5 read:

6 895.045 (1) (title) COMPARATIVE NEGLIGENCE. Contributory negligence ~~shall~~
7 does not bar recovery in an action by any person or the ~~preson's~~ person's legal repre-
8 sentative to recover damages for negligence resulting in death or in injury to person
9 or property, if ~~such~~ that negligence was not greater than the negligence of the person
10 against whom recovery is sought, but any damages allowed shall be diminished in
11 the proportion to the amount of negligence ~~attributable~~ attributed to the person re-
12 covering. The negligence of the plaintiff shall be measured separately against the
13 negligence of each party found to be causally negligent. The liability of each party
14 found to be causally negligent whose percentage of causal negligence is less than 51%

is limited to the percentage of the total causal negligence attributed to that party. A party found to be causally negligent whose percentage of causal negligence is 51% or more shall be jointly and severally liable for the damages allowed.

SECTION 2. 895.045 (2) and (3) of the statutes are created to read:

895.045 **(2)** CONCERTED ACTION. Notwithstanding sub. (1), if 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for all damages resulting from that action, except as provided in s. 895.85 (5).

~~**(3)** JOINT AND SEVERAL LIABILITY. Except as provided in s. 895.85 (5), nothing in this section prohibits the imposition of joint and several liability in a cause of action for damages resulting from environmental pollution, hazardous waste or substances or waste disposal sites.~~

SECTION 3. 895.85 of the statutes is created to read:

895.85 Punitive damages. (1) DEFINITIONS. In this section:

(a) "Defendant" means the party against whom punitive damages are sought.

(b) "Double damages" means those court awards made under a statute providing for twice, 2 times or double the amount of damages suffered by the injured party.

(c) "Plaintiff" means the party seeking to recover punitive damages.

(d) "Treble damages" means those court awards made under a statute providing for 3 times or treble the amount of damages suffered by the injured party.

(2) SCOPE. This section does not apply to awards of double damages or treble damages, or to the award of exemplary damages under ss. 46.90 (6) (c), 51.30 (9), 51.61 (7), 103.96 (2), 153.85, 252.14 (4), 252.15 (8) (a), 943.245 (2) and (3) and 943.51 (2) and (3).

1 (3) STANDARD OF CONDUCT. The plaintiff may receive punitive damages if evi-
2 dence is submitted showing that the defendant acted maliciously toward the plaintiff
3 or in ~~a willful~~ an intentional disregard of the rights of the plaintiff.

4 (4) PROCEDURE. If the plaintiff establishes a prima facie case for the allowance
5 of punitive damages:

6 (a) The plaintiff may introduce evidence of the wealth of a defendant; and

7 (b) The judge shall submit to the jury a special verdict as to punitive damages
8 or, if the case is tried to the court, the judge shall issue a special verdict as to punitive
9 damages.

10 (5) APPLICATION OF JOINT AND SEVERAL LIABILITY. The rule of joint and several
11 liability does not apply to punitive damages.

12 **SECTION 4. Initial applicability.**

13 (1) This act first applies to civil actions commenced on the effective date of this
14 subsection.

15 (END)

2/23 4pm

State of Wisconsin
1995 – 1996 LEGISLATURE

LRBs0035/1
RPN:kmg:kaf

SENATE SUBSTITUTE AMENDMENT ,

TO 1995 SENATE BILL 11

AN ACT *to renumber and amend* 895.045; and *to create* 895.045 (2) ~~and (3)~~ and 895.85 of the statutes; **relating to:** comparative negligence and punitive damages.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 895.045 of the statutes is renumbered 895.045 (1) and amended to read:

895.045 (1) (title) COMPARATIVE NEGLIGENCE. Contributory negligence ~~shall~~ does not bar recovery in an action by any person or the ~~preson's~~ person's legal representative to recover damages for negligence resulting in death or in injury to person or property, if ~~such~~ that negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence ~~attributable~~ attributed to the person recovering. The negligence of the plaintiff shall be measured separately against the negligence of each party found to be causally negligent. The liability of each party found to be causally negligent whose percentage of causal negligence is less than 51%

is limited to the percentage of the total causal negligence attributed to that party. A party found to be causally negligent whose percentage of causal negligence is 51% or more shall be jointly and severally liable for the damages allowed.

SECTION 2. 895.045 (2) and (3) of the statutes are created to read:

895.045 (2) CONCERTED ACTION. Notwithstanding sub. (1), if 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for all damages resulting from that action, except as provided in s. 895.85 (5).

(3) JOINT AND SEVERAL LIABILITY. Except as provided in s. 895.85 (5), nothing in this section prohibits the imposition of joint and several liability in a cause of action for damages resulting from environmental pollution, hazardous waste or substances or waste disposal sites.

SECTION 3. 895.85 of the statutes is created to read:

895.85 Punitive damages. (1) DEFINITIONS. In this section:

(a) "Defendant" means the party against whom punitive damages are sought.

(b) "Double damages" means those court awards made under a statute providing for twice, 2 times or double the amount of damages suffered by the injured party.

(c) "Plaintiff" means the party seeking to recover punitive damages.

(d) "Treble damages" means those court awards made under a statute providing for 3 times or treble the amount of damages suffered by the injured party.

(2) SCOPE. This section does not apply to awards of double damages or treble damages, or to the award of exemplary damages under ss. 46.90 (6) (c), 51.30 (9), 51.61 (7), 103.96 (2), 153.85, 252.14 (4), 252.15 (8) (a), 943.245 (2) and (3) and 943.51 (2) and (3).

1 (3) STANDARD OF CONDUCT. The plaintiff may receive punitive damages if evi-
2 dence is submitted showing that the defendant acted maliciously toward the plaintiff
3 or in ~~a willful~~ an intentional disregard of the rights of the plaintiff.
4 (4) PROCEDURE. If the plaintiff establishes a prima facie case for the allowance
5 of punitive damages:
6 (a) The plaintiff may introduce evidence of the wealth of a defendant; and
7 (b) The judge shall submit to the jury a special verdict as to punitive damages
8 or, if the case is tried to the court, the judge shall issue a special verdict as to punitive
9 damages.
10 (5) APPLICATION OF JOINT AND SEVERAL LIABILITY. The rule of joint and several
11 liability does not apply to punitive damages.
12 **SECTION 4. Initial applicability.**
13 (1) This act first applies to civil actions commenced on the effective date of this
14 subsection.
15 (END)

State of Wisconsin
1995 – 1996 LEGISLATURE

LRBs0035/2
RPN:kmg:jlb

SENATE SUBSTITUTE AMENDMENT 1,

TO 1995 SENATE BILL 11

February 28, 1995 – Offered by COMMITTEE ON JUDICIARY.

1 AN ACT ***to renumber and amend*** 895.045; and ***to create*** 895.045 (2) and 895.85
2 of the statutes; **relating to:** comparative negligence and punitive damages.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

3 **SECTION 1.** 895.045 of the statutes is renumbered 895.045 (1) and amended to
4 read:

5 895.045 **(1)** (title) COMPARATIVE NEGLIGENCE. Contributory negligence ~~shall~~
6 does not bar recovery in an action by any person or the ~~preson's~~ person's legal repre-
7 sentative to recover damages for negligence resulting in death or in injury to person
8 or property, if ~~such~~ that negligence was not greater than the negligence of the person
9 against whom recovery is sought, but any damages allowed shall be diminished in
10 the proportion to the amount of negligence ~~attributable~~ attributed to the person re-
11 covering. The negligence of the plaintiff shall be measured separately against the
12 negligence of each party found to be causally negligent. The liability of each party
13 found to be causally negligent whose percentage of causal negligence is less than 51%
14 is limited to the percentage of the total causal negligence attributed to that party.

1 A party found to be causally negligent whose percentage of causal negligence is 51%
2 or more shall be jointly and severally liable for the damages allowed.

3 **SECTION 2.** 895.045 (2) of the statutes is created to read:

4 895.045 **(2)** CONCERTED ACTION. Notwithstanding sub. (1), if 2 or more parties
5 act in accordance with a common scheme or plan, those parties are jointly and sever-
6 ally liable for all damages resulting from that action, except as provided in s. 895.85
7 (5).

8 **SECTION 3.** 895.85 of the statutes is created to read:

9 **895.85 Punitive damages. (1)** DEFINITIONS. In this section:

10 (a) "Defendant" means the party against whom punitive damages are sought.

11 (b) "Double damages" means those court awards made under a statute provid-
12 ing for twice, 2 times or double the amount of damages suffered by the injured party.

13 (c) "Plaintiff" means the party seeking to recover punitive damages.

14 (d) "Treble damages" means those court awards made under a statute provid-
15 ing for 3 times or treble the amount of damages suffered by the injured party.

16 **(2)** SCOPE. This section does not apply to awards of double damages or treble
17 damages, or to the award of exemplary damages under ss. 46.90 (6) (c), 51.30 (9),
18 51.61 (7), 103.96 (2), 153.85, 252.14 (4), 252.15 (8) (a), 943.245 (2) and (3) and 943.51
19 (2) and (3).

20 **(3)** STANDARD OF CONDUCT. The plaintiff may receive punitive damages if evi-
21 dence is submitted showing that the defendant acted maliciously toward the plaintiff
22 or in an intentional disregard of the rights of the plaintiff.

23 **(4)** PROCEDURE. If the plaintiff establishes a prima facie case for the allowance
24 of punitive damages:

25 (a) The plaintiff may introduce evidence of the wealth of a defendant; and

1 (b) The judge shall submit to the jury a special verdict as to punitive damages
2 or, if the case is tried to the court, the judge shall issue a special verdict as to punitive
3 damages.

4 (5) APPLICATION OF JOINT AND SEVERAL LIABILITY. The rule of joint and several
5 liability does not apply to punitive damages.

6 **SECTION 4. Initial applicability.**

7 (1) This act first applies to civil actions commenced on the effective date of this
8 subsection.

9 **(END)**

State of Wisconsin
1995 – 1996 LEGISLATURE

LRBa0421/1
RPN:kmg:km

SENATE AMENDMENT 4,

TO SENATE SUBSTITUTE AMENDMENT 1,

TO 1995 SENATE BILL 11

March 1, 1995 – Offered by Senator ADELMAN.

At the locations indicated, amend the substitute amendment as follows:

1. Page 2, line 22: substitute "reckless" for "an intentional".

(END)

LRBa0421

1995 DRAFTING REQUEST

Senate Amendment (SA-SSA(LRBs0035/2)-SB11)

Received: 2/28/95

Received By: nelsorp1

Wanted: 2/28/95 4:00 PM

Drafter: nelsorp1

For: Lynn Adelman (608) 266-5400

By/Representing: Mary

This file may be shown to any legislator: NO

Identical to LRB:

May Contact:

Subject: Courts Pro. - liability

Extra Copies:

Topic:

Comparative negl. and punitive damages

Instructions:

reckless instead of intentional disregard

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/1	nelsorp1 2/28/95	gilfokm 2/28/95	martykr 2/28/95	_____ _____	gretskl 2/28/95	lrb_docadmin	

FE Sent For:

<END>

State of Wisconsin
1995 – 1996 LEGISLATURE

LRBa0719/1
RPN:jrd:jlb

ASSEMBLY AMENDMENT 5,

TO 1995 SENATE BILL 11

April 4, 1995 – Offered by COMMITTEE ON JUDICIARY.

At the locations indicated, amend the bill, as shown by senate substitute amendment 1, as follows:

1. Page 2, line 21: delete lines 21 and 22 and substitute: "dence is submitted showing that the defendant acted maliciously or in wanton, wilful or reckless disregard of the plaintiff's rights.".

(END)

LRBa0719

1995 DRAFTING REQUEST

Assembly Amendment (AA-SB11)

Received: **04/3/95**

Received By: **nelsorp1**

Wanted: **04/3/95**

Drafter: **nelsorp1**

For: **David Cullen (608) 267-9836**

By/Representing: **Don Dyke**

This file may be shown to any legislator: **NO**

Identical to LRB:

May Contact:

Subject: **Courts Pro. - liability**

Extra Copies: **Don Dyke, LC**

Topic:

Joint and several liability

Instructions:

Use current punitive damages standard

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/1	nelsorp1 04/3/95	delpjr 04/3/95	bakerjl 04/3/95	_____ _____	gretskl 04/3/95	lrb_docadmin	

FE Sent For:

<END>

LRBa0719

1995 DRAFTING REQUEST

Assembly Amendment (AA-SB11)

Received: 04/3/95

Received By: nelsorp1

Wanted: 04/3/95

Drafter: nelsorp1

For: David Cullen (608) 267-9836

By/Representing: Don Dyke

This file may be shown to any legislator: NO

Identical to LRB:

May Contact:

Subject: Courts Pro. - liability

Extra Copies: Don Dyke, LC

Topic:

Joint and several liability

Instructions:

Use current punitive damages standard — W Jury Inst, 1707 A

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/1	nelsorp1		JLB	AJ/JLB 4/3/95			

FE Sent For:

<END>

1987 SENATE BILL 330

September 9, 1987 - Introduced by Senators HELBACH, KREUL, HARSDORF and LEEAN; cosponsored by Representatives HOLPERIN, LADWIG and LINTON; by request of Acoustical Contractors Assn. of Milwaukee, American Academy of Pediatrics - Wisconsin Chapter, American College of Emergency Physicians - Wisconsin Chapter, American Corporate Council Assn. - Wisconsin Chapter, Associated Builders & Contractors of Wisconsin, Inc., Associated General Contractors of America, Inc. - Wisconsin Chapter, Associated General Contractors of Greater Milwaukee, Association of Wisconsin School Administrators, Community Fair Share, Inc., Experimental Aircraft Assn., Independent Auto & Truck Repair Centers, Independent Business Assn. of Wisconsin, Independent Insurance Agents of Wisconsin, Institute of Scrap Iron & Steel - Wisconsin Chapter, Lake States Lumber Assn., Inc., League of Wisconsin Municipalities, Mason Contractors Assn. of Milwaukee, Master Builders Assn. of Wisconsin, Inc., Mechanical Contractors Assn. of Central Wisconsin, Inc., Metropolitan Milwaukee Assn. of Commerce, Milwaukee Orthopaedic Group, Ltd., Milwaukee Painting & Decorating Contractors Assn., National Federation of Independent Business, Oil Jobbers of Wisconsin, Plumbing & Mechanical Contractors Assn. of Milwaukee and SE Wisconsin, Professional Insurance Agents of Wisconsin, Public Expenditure Survey of Wisconsin, Retail Gasoline Dealers of Wisconsin, Inc., Roofing Contractors Assn. of Greater Milwaukee, Sheet Metal & Air Conditioners Contractors Assn. of Milwaukee, Inc., Sheet Metal & Air Conditioners Contractors Assn. of Wisconsin, State Medical Society of Wisconsin, Tavern Hosts of Wisconsin, Timber Producers Assn. of Michigan and Wisconsin, United Foundrymen of Wisconsin, Wisconsin Academy of Family Physicians, Wisconsin Agri-Business Council, Wisconsin Agricultural Aviation Assn., Wisconsin Amusement & Music Operators, Inc., Wisconsin Assn. of Consulting Engineers, Wisconsin Assn. of Convenience Stores, Wisconsin Assn. of Fairs, Wisconsin Assn. of Health Underwriters, Wisconsin Assn. of Independent Colleges and Universities, Wisconsin Assn. of Life Underwriters, Wisconsin Assn. of Nursing Homes, Wisconsin Assn. of School Boards, Wisconsin Assn. of School District Administrators, Wisconsin Auto Collision Technical Assn., Ltd., Wisconsin Auto & Truck Dealers Assn., Wisconsin Automatic Merchandising Council, Wisconsin Automotive Parts Assn., Wisconsin Aviation Trades Assn., Wisconsin Bakers Assn., Inc., Wisconsin Broadcasters Assn., Wisconsin Builders Assn., Wisconsin Chiropractic Assn., Wisconsin Concrete Products Assn., Wisconsin Counties Assn., Wisconsin Credit Union League, Wisconsin Dairy Products Assn., Wisconsin Dental Assn., Wisconsin Economic Development Assn., Wisconsin Fabricare Institute, Inc., Wisconsin Farm Bureau Federation, Wisconsin Farm Equipment Assn., Wisconsin Federation of Co-ops, Wisconsin Federation of Women's Clubs, Wisconsin Fertilizer & Chemical Assn., Wisconsin Food Processors Assn., Wisconsin Fox Valley Sheet Metal Contractors Assn., Wisconsin Hospital Assn., Wisconsin Innkeepers Assn., Wisconsin Institute of CPA's, Wisconsin Insulation Contractors Assn., Wisconsin Interscholastic Athletic Assn., Wisconsin Landscape Federation, Wisconsin Liquid Waste Carriers, Wisconsin Manufacturers & Commerce, Wisconsin Motor Carriers Assn., Wisconsin Movers Assn., Wisconsin Mortgage Bankers Assn., Wisconsin Optometric Assn., Wisconsin Orthopaedic Society,

Wisconsin Petroleum Council, Wisconsin Railroad Assn., Wisconsin Ready Mixed Concrete Assn., Wisconsin Realtors Assn., Wisconsin Recreation Industries, Wisconsin Restaurant Assn., Wisconsin Retail Lumbermens Assn., Wisconsin River Valley Mechanical Contractors Assn., Wisconsin Road Builders Assn., Wisconsin School Bus Assn., Wisconsin Society of Anesthesiologists, Wisconsin Society of Architects, Wisconsin Society of Association Executives, Wisconsin Society of Clinical & Consulting Psychologists, Wisconsin Society of Land Surveyors, Wisconsin Society of Obstetrics & Gynecology, Wisconsin Society of Podiatric Medicine, Wisconsin Society of Professional Engineers, Wisconsin State Brewers Assn., Wisconsin Towing Assn., Wisconsin Truck Stop Operators, Wisconsin Truss Manufacturers Assn., Wisconsin Underground Contractors Assn., Wisconsin Utilities Assn. and Wisconsin Water Well Assn. Referred to committee on Judiciary and Consumer Affairs.

AN ACT to repeal 655.017, 893.55 (4) and (5), 943.245 (2) (c) 2 and 943.51 (2) (a) 2; to renumber and amend 943.245 (2) (c) 1 and 943.51 (2) (a) 1; to amend 19.37 (3), 23.29 (24), 46.90 (6) (c) 1, 46.90 (6) (c) 2, 51.30 (9) (a), 51.30 (9) (b), 51.61 (7) (a), 51.61 (7) (b), 101.22 (7) (a), 102.26 (2), 103.96 (2), 134.90 (4) (b), 146.025 (8) (a), 177.33 (5), 425.301 (1), 618.48, 706.06 (4), 706.13 (1), 893.55 (title), 895.045, 895.70 (3), 946.86 (4), 949.14 (1), 949.17 (3) and 968.31 (2) (d) 2; and to create 655.013 (3), 757.44, 895.71, 895.72, 895.73, 895.74 and 895.75 of the statutes, relating to comparative negligence; adjustment of damages in civil actions for recovery from other sources and rights of other sources to subrogation; limitations on attorneys receiving contingency fees; punitive damages; and limitations on awards for noneconomic damages.

Analysis by the Legislative Reference Bureau

This bill makes various changes affecting civil actions, including the following:

COMPARATIVE NEGLIGENCE

Wisconsin has a modified system of comparative negligence. Contributory negligence does not bar recovery for an action unless the negligence of the person seeking recovery (plaintiff) is greater than the negligence of the person against whom recovery is sought (defendant). In the situa-

tion where more than one party contributes to an injury (joint tort-feasors), Wisconsin generally follows a rule of joint and several liability. That is, a plaintiff may collect the total damages against any of the joint tort-feasors whose negligence combines to cause the injury, as reduced by the plaintiff's percentage of the negligence. A joint tort-feasor who pays more than his or her proportionate share has a cause of action for contribution against the other joint tort-feasors.

Under this bill, the liability of each joint tort-feasor is generally limited to his or her proportionate share of the causal negligence. Also, the bill codifies supreme court rulings using the individual comparison method (plaintiff compared to each defendant) in cases involving multiple tort-feasors.

COLLATERAL SOURCE RULE

Presently, Wisconsin courts follow the collateral source rule, which is that a person who brings a civil action may recover from a wrongdoer the reasonable value of all items of loss, regardless of whether the person also received compensation for his or her damages from a source other than the wrongdoer against whom the action is brought. American Standard Insurance Co. of Wisconsin v. Cleveland, 124 Wis. 2d 258, 369 N.W. 2d 168 (1985).

This bill establishes revised rules for recovery from a wrongdoer when there is a collateral source of compensation and for the right of a collateral source to subrogation (a cause of action in place of the injured person for the amount of compensation paid to the injured person). First, the bill defines a collateral source to be any source, other than the defendant in a civil action, which has provided or is obligated to provide compensation to a person for an injury for which the person has commenced a civil action. This includes compensation through government benefits, employe or service benefits, worker's compensation and health and disability insurance. The bill requires the plaintiff to provide written notice of any collateral source to the court and the defendant no later than 30 days after commencing a civil action for damages for an injury. The bill also requires the defendant to provide written notice of an award or settlement to each known collateral source no later than 10 days after an award or settlement occurs in a civil action.

If the collateral source has a right of subrogation to recover for payments made to the plaintiff, the collateral source may apply for reimbursement directly from the defendant. The bill further provides that if the award or settlement specifies the items of damages, each collateral source with a right of subrogation may recover the amount of compensation paid to the plaintiff for a particular item of damages, subject to certain exceptions. If the award or settlement does not specify the items of damages, each collateral source with a right of subrogation may apply for reimbursement from the plaintiff, subject to court review of the amount reimbursed.

Finally, the bill provides that in a civil action in which the liability of the defendant is admitted or established in court, the court must hold a hearing to determine whether any collateral source of compensation exists. If there is a collateral source which does not have a right of subrogation, the court must reduce the amount of the plaintiff's award by the amount paid by the collateral source, less an amount equal to the annual premium paid by the plaintiff for the benefit provided by the collateral source. If there is a collateral source which has a right of

subrogation, the court must notify the collateral source of the award and allow the collateral source to exercise its right of subrogation.

ATTORNEY CONTINGENCY FEE AGREEMENTS

With limited exceptions, present law does not place limitations on the practice of attorneys to take cases on a contingency fee basis. Under a typical contingency fee agreement, an attorney takes a case for a percentage of the amount recovered. The percentage may often vary depending on how far the case has progressed (such as resolved before trial, after trial or after appeal).

Under this bill, if an attorney agrees to represent a client, on a contingency fee basis, in a civil lawsuit seeking damages against another person, the contingency fee is limited as follows:

1. No contingency fee may be paid on any amount recovered prior to the commencement of the action.

2. The contingency fee on any amount recovered within 120 days after the commencement of the lawsuit is limited to 10% of the amount recovered.

In addition, the total amount of every such contingency fee to be paid is subject to court approval before a lawsuit is concluded. The court reviews the fee to determine if it is reasonable.

The bill does not impose limits on hourly fee or fixed fee arrangements and does not provide for court review of those arrangements.

PUNITIVE DAMAGES

Under present law, in civil actions, an award of punitive damages (also referred to as vindictive damages or exemplary damages) is authorized in certain cases to penalize a party for outrageous conduct. This bill limits the awarding of punitive damages to cases involving an intentional tort or cases where the statutes specifically authorize an award of punitive damages. The bill also requires that the party seeking punitive damages must prove beyond a reasonable doubt that the other party's conduct was intentional and in malicious and wanton disregard of the party's personal rights.

NONECONOMIC DAMAGES

Under current law, the following requirements apply in medical malpractice cases:

1. Recovery for noneconomic damages, such as pain and suffering, for any single occurrence of malpractice, before January 1, 1991, against all health care providers and providers' employes responsible for that injury, is limited to $1,000,000, adjusted according to changes in the consumer price index.

2. Awards must state separately the elements of damages and specify the amounts assigned to each element.

3. Awards must reduce economic damages to present value, taking into account the effects of inflation.

Under current law, there is no general limit on courts or juries regarding an award of noneconomic damages, such as pain and suffering, in civil actions other than medical malpractice actions. Also, current law provides that punitive damages may be awarded in civil actions in order to penalize a defendant for outrageous conduct.

This bill eliminates the current limitation on noneconomic damages in medical malpractice cases and creates a limitation of $250,000 for the

recovery of noneconomic damages, including punitive, exemplary or vindictive damages, in any civil action. Further, the bill provides that a finding as to noneconomic damages by the court or a jury must be limited to $250,000 before any reduction required for contributory negligence. The bill also provides that every award of damages in a civil action for bodily injury or death shall state separately the elements of damages and specify the amounts assigned to each element. In addition, the bill makes the provision of current law that requires medical malpractice awards to reduce economic damages to present value applicable in all civil actions for bodily injury or death.

For further information, see the state and local fiscal estimate which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 SECTION 1. 19.37 (3) of the statutes is amended to read:

2 19.37 (3) PUNITIVE DAMAGES. If a court finds that an authority or
3 legal custodian under s. 19.33 has arbitrarily and capriciously denied or
4 delayed response to a request or charged excessive fees, the court may
5 award punitive damages to the requester, subject to s. 895.75 (3).

6 SECTION 2. 23.29 (24) of the statutes is amended to read:

7 23.29 (24) INJUNCTIVE RELIEF; RECOVERY OF COSTS; PUNITIVE DAMAGES.
8 The department, or the department of justice on its own initiative or at
9 the request of the department, may initiate an action seeking injunctive
10 relief against any person violating the articles of dedication of a dedi-
11 cated state natural area or restrictions authorized under sub. (21). Any
12 citizen may initiate an action seeking injunctive relief against any
13 person violating the articles of dedication of a dedicated state natural
14 area as a beneficiary of the interest in that land held in the public
15 trust. The department, or the department of justice at the department's
16 request, may initiate an action to recover costs for stewardship expenses
17 from the party originally responsible under sub. (9). The department, or
18 the department of justice at the department's request, may initiate an

action for punitive damages against any person violating the articles of dedication of a dedicated state natural area, subject to s. 895.75 (3). Punitive damages are in addition to any penalty imposed under sub. (25).

SECTION 3. 46.90 (6) (c) 1 of the statutes is amended to read:

46.90 (6) (c) 1. Any person, including the state or any political subdivision of the state, violating this subsection ~~shall be~~ is liable to any person damaged as a result of the violation for such damages as may be proved, together with exemplary damages of not less than $100 nor more than $500 for each violation, subject to s. 895.75 (3), and such costs and reasonable actual attorney fees as may be incurred by the person damaged. A custodian of records incurs no liability under this subdivision for the release of records in accordance with this subsection while acting in good faith.

SECTION 4. 46.90 (6) (c) 2 of the statutes is amended to read:

46.90 (6) (c) 2. In any action brought under subd. 1 in which the court determines that the violator acted in a manner that was knowing and wilful, the violator ~~shall be~~ is liable for such damages as may be proved together with exemplary damages of not less than $500 nor more than $1,000 for each violation, subject to s. 895.75 (3), together with costs and reasonable actual attorney fees as may be incurred. It is not a prerequisite to an action under this paragraph that the plaintiff suffer or be threatened with actual damages.

SECTION 5. 51.30 (9) (a) of the statutes is amended to read:

51.30 (9) (a) Any person, including the state or any political subdivision of the state, violating this section ~~shall be~~ is liable to any person damaged as a result of the violation for such damages as may be proved, together with exemplary damages of not less than $100 for each violation, subject to s. 895.75 (3), and such costs and reasonable actual

1 attorney fees as may be incurred by the person damaged. A custodian of
2 records incurs no liability under this paragraph for the release of
3 records in accordance with this section while acting in good faith.

4 SECTION 6. 51.30 (9) (b) of the statutes is amended to read:

5 51.30 (9) (b) In any action brought under par. (a) in which the
6 court determines that the violator acted in a manner that was knowing and
7 wilful, the violator shall be liable for such damages as may be proved
8 together with exemplary damages of not less than $500 nor more than $1,000
9 for each violation, subject to s. 895.75 (3), together with costs and
10 reasonable actual attorney fees as may be incurred. It is not a pre-
11 requisite to an action under this subsection that the plaintiff suffer or
12 be threatened with actual damages.

13 SECTION 7. 51.61 (7) (a) of the statutes is amended to read:

14 51.61 (7) (a) Any patient whose rights are protected under this
15 section who suffers damage as the result of the unlawful denial or viola-
16 tion of any of these rights may bring an action against the person,
17 including the state or any political subdivision thereof, which unlawfully
18 denies or violates the right in question. The individual may recover any
19 damages as may be proved, together with exemplary damages of not less than
20 $100 for each violation, subject to s. 895.75 (3), and such costs and
21 reasonable actual attorney fees as may be incurred.

22 SECTION 8. 51.61 (7) (b) of the statutes is amended to read:

23 51.61 (7) (b) Any patient whose rights are protected under this
24 section may bring an action against any person, including the state or any
25 political subdivision thereof, which wilfully, knowingly and unlawfully
26 denies or violates any of his or her rights protected under this section.
27 The patient may recover such damages as may be proved together with exem-
28 plary damages of not less than $500 nor more than $1,000 for each

1 violation, subject to s. 895.75 (3), together with costs and reasonable
2 actual attorney fees. It is not a prerequisite to an action under this
3 paragraph that the plaintiff suffer or be threatened with actual damages.
4 SECTION 9. 101.22 (7) (a) of the statutes is amended to read:
5 101.22 (7) (a) Any person, including the state, alleging a violation
6 of this section may bring a civil action for appropriate injunctive
7 relief, for damages including punitive damages, subject to s. 895.75 (3),
8 and for court costs and reasonable attorney fees in the case of a pre-
9 vailing plaintiff. The attorney general shall represent the department in
10 any action to which the department is a party.
11 SECTION 10. 102.26 (2) of the statutes is amended to read:
12 102.26 (2) Unless previously authorized by the department, no fee may
13 be charged or received for the enforcement or collection of any claim for
14 compensation, nor may any contract therefor be enforceable where such fee,
15 inclusive of all taxable attorney's fees paid or agreed to be paid for
16 such enforcement or collection, exceeds 20% of the amount at which ~~such~~
17 the claim is compromised or of the amount awarded, adjudged or collected,
18 except that in cases of admitted liability where there is no dispute as to
19 amount of compensation due and in which no hearing or appeal is necessary,
20 the fee charged shall not exceed 10% but not to exceed $100, of the amount
21 at which such claim is compromised or of the amount awarded, adjudged or
22 collected. The limitation as to fees ~~shall apply~~ applies to the combined
23 charges of attorneys, solicitors, representatives and adjusters who know-
24 ingly combine their efforts toward the enforcement or collection of any
25 compensation claim. Attorney fees which are subject to this section are
26 not subject to s. 757.44.
27 SECTION 11. 103.96 (2) of the statutes is amended to read:

1 103.96 (2) Any person aggrieved under this section may maintain an
2 action against the employer or migrant labor contractor. In addition to
3 any other damages awarded, an employer or migrant labor contractor found
4 to have violated this section ~~shall be~~ is liable to ~~such~~ the person ag-
5 grieved for full reinstatement and for back wages accumulated during the
6 period of ~~such~~ the unlawful retaliation. In cases of wilful violation of
7 this section, the court may assess exemplary damages up to double the
8 amount of back wages found due in addition to any other damages awarded,
9 subject to s. 895.75 (3). In cases of aggravated circumstances, the court
10 may also assess reasonable ~~attorney's~~ attorney fees in addition to any
11 other damages awarded.

12 SECTION 12. 134.90 (4) (b) of the statutes is amended to read:

13 134.90 (4) (b) If a violation of sub. (2) is wilful and malicious,
14 the court may award punitive damages in an amount not exceeding twice any
15 award under par. (a), subject to s. 895.75 (3).

16 SECTION 13. 146.025 (8) (a) of the statutes is amended to read:

17 146.025 (8) (a) Any person violating sub. (2), (5) (a), (6) or (7)
18 (c) is liable to the subject of the test for actual damages and costs,
19 plus exemplary damages of up to $1,000 for a negligent violation and up to
20 $5,000 for an intentional violation, subject to s. 895.75 (3).

21 SECTION 14. 177.33 (5) of the statutes is amended to read:

22 177.33 (5) The administrator may request the attorney general of
23 another state or any other person to bring an action in the other state in
24 the name of the administrator. This state shall pay all expenses includ-
25 ing attorney fees in any action under this subsection. The administrator
26 may agree to pay the person bringing the action attorney fees based in
27 whole or in part on a percentage of the value of any property recovered in
28 the action, subject to any limitations which may apply under s. 757.44.

1 No expenses paid under this subsection may be deducted from the amount
2 that is subject to the claim by the owner under this chapter.

3 SECTION 15. 425.301 (1) of the statutes is amended to read:

4 425.301 (1) The remedies provided by this subchapter shall be lib-
5 erally administered to the end that the customer as the aggrieved party
6 shall be put in at least as good a position as if the creditor had fully
7 complied with chs. 421 to 427. ~~Recoveries under chs. 421 to 427 shall not~~
8 ~~in themselves preclude the award of punitive damages in appropriate cases.~~

9 SECTION 16. 618.48 of the statutes is amended to read:

10 618.48 ATTORNEY FEES. In an action against an unauthorized person
11 upon a contract of insurance issued in violation of this chapter, if the
12 unauthorized person fails to make payment in accordance with the contract
13 for 30 days after the payment is due and demand is made, and it appears to
14 the court that the refusal was without reasonable cause, the court may
15 allow the plaintiff a reasonable attorney fee and include the fee in any
16 judgment that may be rendered in the action. Failure of the unauthorized
17 person to defend any such action is prima facie evidence that the failure
18 to pay was without reasonable cause. If the unauthorized person knew or
19 should have known that the contract was in violation of this chapter, the
20 court may also award punitive damages, subject to s. 895.75 (3).

21 SECTION 17. 655.013 (3) of the statutes is created to read:

22 655.013 (3) An attorney fee subject to the limitations of this
23 section is also subject to the limitations of s. 757.44.

24 SECTION 18. 655.017 of the statutes is repealed.

25 SECTION 19. 706.06 (4) of the statutes is amended to read:

26 706.06 (4) In addition to any criminal penalty or civil remedy
27 otherwise provided by law, knowingly false authentication of an instrument

1 shall subject the authenticator to liability in tort for compensatory and
2 punitive damages caused thereby to any person, subject to s. 895.75 (3).
3 SECTION 20. 706.13 (1) of the statutes is amended to read:
4 706.13 (1) In addition to any criminal penalty or civil remedy pro-
5 vided by law, any person who submits for filing, docketing or recording,
6 any lien, claim of lien, lis pendens, writ of attachment or any other
7 instrument relating to the title in real or personal property, knowing the
8 contents or any part of the contents to be false, sham or frivolous, is
9 liable in tort to any person interested in the property whose title is
10 thereby impaired, for punitive damages of $1,000, subject to s. 895.75
11 (3), plus any actual damages caused thereby.
12 SECTION 21. 757.44 of the statutes is created to read:
13 757.44 LIMITATION ON ATTORNEY FEES. (1) In this section,
14 "recovered" means the net sum recovered or to be recovered after deducting
15 any costs or disbursements incurred in connection with the prosecution or
16 settlement of a claim.
17 (2) An attorney shall not contract for or collect a contingency fee
18 for representing any client in a civil action seeking damages against any
19 other person:
20 (a) On any amount recovered which was paid or agreed in writing to
21 the client to be paid by the other person prior to the commencement of
22 representation by the attorney; and
23 (b) In excess of 10% of the amount recovered which, within 120 days
24 after the commencement of the action, is paid or agreed in writing to the
25 attorney or client to be paid by the other person.
26 (3) In addition to the limitations under sub. (2) applicable to cer-
27 tain amounts recovered, the total amount of an attorney's contingency fee
28 for representing any client in a civil action seeking damages against any

other person must be reasonable to the circumstances of the representation provided. After the amount recovered in any such action has been determined but before the action is dismissed or concluded, the judge must review any contingency fee subject to this subsection and determine if it is reasonable to the circumstances of the representation provided.

SECTION 22. 893.55 (title) of the statutes is amended to read:

893.55 (title) MEDICAL MALPRACTICE; LIMITATION OF ACTIONS.

SECTION 23. 893.55 (4) and (5) of the statutes are repealed.

SECTION 24. 895.045 of the statutes is amended to read:

895.045 CONTRIBUTORY NEGLIGENCE. Contributory negligence shall not bar recovery in an action by any person or ~~his~~ the person's legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering. Unless otherwise provided by statute, a judgment in any such action in which damages are awarded against more than one party shall be entered severally and not jointly against each such party. The negligence of the plaintiff shall be measured separately against the negligence of each party against whom recovery is sought. Each such party is liable only for the proportion of the damages that the amount of his or her causal negligence bears to the amount of the causal negligence attributed to all parties against whom damages are awarded.

SECTION 25. 895.70 (3) of the statutes is amended to read:

895.70 (3) PUNITIVE DAMAGES. A court or jury may award punitive damages to a person bringing an action under this section, subject to s. 895.75 (3).

1 SECTION 26. 895.71 of the statutes is created to read:

2 895.71 SPECIFICATION OF ELEMENTS OF DAMAGES. (1) Every award of
3 damages in a civil action for bodily injury or death shall specify the sum
4 of money, if any, awarded for each of the following for each claimant for
5 the period from the date of injury to the date of award and for the period
6 after the date of award:

7 (a) Noneconomic damages, as defined in s. 895.73 (1).

8 (b) Loss of earnings or earning capacity.

9 (c) Each element of medical expenses.

10 (d) Other economic injuries and damages.

11 (2) Every award of damages in a civil action for bodily injury or
12 death shall specify the sum of money, if any, attributed to each item of
13 noneconomic damages under sub. (1) (a).

14 SECTION 27. 895.72 of the statutes is created to read:

15 895.72 REDUCTION OF ECONOMIC DAMAGES TO PRESENT VALUE. Economic
16 damages recovered in a civil action for bodily injury or death, including
17 any action or proceeding based on contribution or indemnification, shall
18 be determined for the period during which the damages are expected to
19 accrue, taking into account the estimated life expectancy of the person,
20 then reduced to present value, taking into account the effects of
21 inflation.

22 SECTION 28. 895.73 of the statutes is created to read:

23 895.73 LIMITATION ON AWARD FOR NONECONOMIC DAMAGES. (1) In this
24 section, "noneconomic damages" means moneys intended to compensate for
25 pain and suffering; humiliation; embarrassment; worry; mental distress;
26 noneconomic effects of disability including loss of enjoyment of the
27 normal activities, benefits and pleasures of life and loss of mental or
28 physical health, well-being or bodily functions; loss of consortium,

1 society and companionship; or loss of love and affection; and includes,
2 subject to s. 895.75, any moneys awarded as punitive, exemplary or
3 vindictive damages.

4 (2) (a) The total noneconomic damages recoverable from all defendants
5 in a civil action, including any action or proceeding based on contribu-
6 tion or indemnification and including all claims and derivative claims
7 arising out of a single action, shall not exceed $250,000.

8 (b) A court in an action tried without a jury shall make a finding as
9 to noneconomic damages subject to the limit under par. (a). The court
10 then shall make any reduction required under s. 895.045. If an action is
11 before a jury, the jury shall make a finding as to noneconomic damages
12 without regard to or notice of the limit under par. (a). If the jury
13 finds an amount of noneconomic damages that exceeds the limit, the court
14 shall reduce the amount to the limit under par. (a) and then shall make
15 any reduction required under s. 895.045.

16 SECTION 29. 895.74 of the statutes is created to read:

17 895.74 COLLATERAL SOURCES; RIGHT OF SUBROGATION. (1) In this
18 section, "collateral source" means any source, other than the defendant in
19 a civil action, which has provided or is obligated to provide compensation
20 to a person for an injury for which the person has commenced a civil
21 action. "Collateral source" includes, but is not limited to, any source
22 which provides compensation through government benefits, employe or ser-
23 vice benefit programs, worker's compensation and health and disability
24 insurance but does not include any source which provides compensation
25 through life insurance.

26 (2) No later than 30 days after commencing a civil action for damages
27 for an injury, the plaintiff shall provide written notice to the court and
28 to the defendant of any collateral source of compensation for costs or

1 expenses incurred by the plaintiff for medical or custodial care, reha-
2 bilitation services, loss of earnings or earning capacity or other eco-
3 nomic injuries and damages.

4 (3) No later than 10 days after an award of damages in a civil action
5 is made or a settlement in a civil action is reached, the defendant shall
6 provide written notice of the award or settlement to each known collateral
7 source interested in the action. If the collateral source has a right of
8 subrogation to recover for payments made to the plaintiff, the collateral
9 source may apply for reimbursement directly from the defendant or the
10 defendant's insurer.

11 (4) If the award of damages or the settlement specifies the sum of
12 money to be paid for the separate items of damages, then each collateral
13 source with a right of subrogation may recover the amount of compensation
14 paid to the plaintiff for a particular item of damages, except that no
15 collateral source may recover an amount greater than the amount specified
16 to be paid for that particular item of damages in the award or settlement.
17 If more than one collateral source has a right of subrogation to recover
18 for compensation paid to the plaintiff for the same item of damages and
19 the total amount of payments by collateral sources exceeds the amount
20 specified to be paid for that item of damages, then reimbursement of
21 collateral sources shall be prorated based on each collateral source's
22 percentage of the total payments for that item of damages.

23 (5) If the award of damages or the settlement does not specify the
24 sum of money to be paid for the separate items of damages, then each
25 collateral source with a right of subrogation may apply for reimbursement,
26 in whole or part, from the plaintiff or the plaintiff's insurer. If the
27 total amount of the award of damages or the settlement exceeds the amount
28 reimbursed to all collateral sources by more than 50%, then any collateral

1 source with a right of subrogation which is not fully reimbursed may
2 petition the court to review the amount reimbursed to the collateral
3 source. Upon review, the court may order the plaintiff to adjust the
4 amount reimbursed to the collateral source. Any statement in a stipu-
5 lation or settlement regarding whether the plaintiff has been made whole
6 by the award or settlement shall not affect this subsection.

7 (6) In a civil action in which the liability of the defendant is
8 established or admitted in court, a hearing shall be held before the court
9 to admit evidence regarding the existence of any collateral source of
10 compensation for costs or expenses incurred by the plaintiff for medical
11 or custodial care, rehabilitation services, loss of earnings or earnings
12 capacity or other economic injuries and damages. If the court determines
13 that any such cost or expense was paid or is obligated to be paid, in
14 whole or part, by any collateral source without a right of subrogation,
15 the court shall reduce the amount of the plaintiff's award of damages by
16 the amount paid or obligated to be paid by the collateral source, less an
17 amount equal to the annual premium paid by the plaintiff for the benefits
18 provided by the collateral source. If the court determines that any such
19 cost or expense was paid or is obligated to be paid, in whole or part, by
20 any collateral source with a right of subrogation, the court shall notify
21 the collateral source of the award of damages and allow the collateral
22 source to exercise its right of subrogation.

23 SECTION 30. 895.75 of the statutes is created to read:

24 <u>895.75 STANDARDS FOR AWARD OF PUNITIVE DAMAGES.</u> (1) In this
25 section, "punitive damages" includes exemplary or vindictive damages.

26 (2) Punitive damages may not be awarded in a civil action, except:

27 (a) In any action to recover damages for an intentional tort under s.
28 893.57.

1 (b) In any other action in which punitive damages are specifically
2 authorized by statute.
3 (3) Punitive damages may be awarded only if a party proves beyond a
4 reasonable doubt that the party against whom the punitive damages are
5 awarded acted intentionally, and in malicious and wanton disregard of the
6 rights of the party seeking punitive damages. Failure to provide the
7 proof required under this subsection does not preclude a party from re-
8 covering ordinary damages.
9 SECTION 31. 943.245 (2) (c) 1 of the statutes is renumbered 943.245
10 (2) (c) and amended to read:
11 943.245 (2) (c) Exemplary damages of not more than 3 times the amount
12 under pars. (a) and (b)<u>, subject to s. 895.75 (3)</u>.
13 SECTION 32. 943.245 (2) (c) 2 of the statutes is repealed.
14 SECTION 33. 943.51 (2) (a) 1 of the statutes is renumbered 943.51 (2)
15 (a) and amended to read:
16 943.51 (2) (a) Exemplary damages of not more than 3 times the amount
17 under sub. (1) (a) and (b)<u>, subject to s. 895.75 (3)</u>.
18 SECTION 34. 943.51 (2) (a) 2 of the statutes is repealed.
19 SECTION 35. 946.86 (4) of the statutes is amended to read:
20 946.86 (4) Any person who is injured by reason of any violation of s.
21 946.83 or 946.85 has a cause of action for 2 times the actual damages
22 sustained and, when appropriate, punitive damages<u>, subject to s. 895.75</u>
23 <u>(3)</u>. The person shall also recover attorney fees and costs of the
24 investigation and litigation reasonably incurred. The defendant or any
25 injured person may demand a trial by jury in any civil action brought
26 under this section.
27 SECTION 36. 949.14 (1) of the statutes is amended to read:

1 949.14 (1) The department may determine and allow reasonable attorney
2 fees to be paid out of, but not in addition to, the amount of the award
3 granted to a claimant. No attorney may ask for, contract for or receive
4 any larger sum than the amount so allowed. Attorney fees shall not exceed
5 10% of the amount the attorney assisted the victim in obtaining. An
6 attorney fee subject to the limitations of this subsection is also subject
7 to the limitations of s. 757.44.

8 SECTION 37. 949.17 (3) of the statutes is amended to read:

9 949.17 (3) DAMAGES. The state has a civil cause of action for relief
10 against any person who violates this section for the amount of damages
11 which the state sustained by reason of the violation and, in addition, for
12 punitive damages, subject to s. 895.75 (3), not more than double the
13 amount of damages which the state may have sustained, together with
14 interest, and the cost of the suit.

15 SECTION 38. 968.31 (2) (d) 2 of the statutes is amended to read:

16 968.31 (2) (d) 2. Punitive damages, subject to s. 895.75 (3); and

17 SECTION 39. INITIAL APPLICABILITY. (1) Except as provided under
18 subs. (2) and (3), this act applies to actions commenced on or after the
19 effective date of this subsection.

20 (2) The creation of section 757.44 (1) and (2) of the statutes
21 applies to contingency fee agreements made on or after the effective date
22 of this subsection.

23 (3) The creation of section 757.44 (3) of the statutes applies to
24 every civil action dismissed or concluded on or after the first day of the
25 6th month commencing after the effective date of this subsection.

26 (End)

1707 PUNITIVE DAMAGES; MALICE

If you find from the evidence that the defendant,_____ _____, *(struck the plaintiff and that such striking was not justified)* and further find that the defendant acted either maliciously or in a willful or reckless disregard of the plaintiff's rights, you may, if you see fit, but you are not obliged to do so, award, in addition to compensatory damages, such sum as punitive damages as you may think proper under the circumstances of the case, by way of example or punishment, in order to deter the defendant and others from offending in like manner in the future. You may also consider the seriousness of the offense committed, in reaching your answer.

Acts are malicious when they are actuated by ill will, a desire for revenge, or inflicted under circumstances where insult is intended.

Punitive damages are never a matter of right, but, when allowable, may be awarded or withheld in the discretion of the jury. Punitive damages may not be awarded unless the acts of the defendant in question were done maliciously or in willful or reckless disregard of the plaintiff's rights, and, even if malicius, willful or reckless, you may withhold or allow punitive damages as you see fit. You may not, however, award punitive damages unless you have awarded compensatory damages.

(If you award punitive damages, you may consider the defendant's wealth so far as it appears from the evidence, because such damages, to accomplish their purpose, may be proportionate in some general way to the defendant's ability to pay.)

COMMENT

This instruction serves several purposes: it defines malice

(paragraph 2); it indicates when punitive damages may be awarded either when the jury finds defendant's conduct malicious, or when they find that defendant's conduct was in "wanton, wilful, or reckless disregard of the plaintiff's rights." Kink v Combs, 28 Wis 2d 65, 79, 135 NW 2d 789 (1965). Some modification or omission of language will be necessary depending on the purpose for which used.

The last paragraph (in parentheses) is used where there is only one defendant.

Kink v Combs, *supra;* Meshane v Second Street Co, 197 Wis 382, 222 NW 320 (1928); Topolewski v Plankinton Packing Co, 143 Wis 52, 70, 126 NW 554, 560 (1910); Thomas v Williams, 139 Wis 467, 121 NW 148 (1909); Robinson v Superior Rapid Transit R Co, 94 Wis 345, 68 NW 961 (1896).

Actual damages must have been suffered before punitive damages can be awarded. Widemshek v Fale, 17 Wis 2d 337, 340, 117 NW 2d 275 (1962).

Evidence of the wealth of the defendant is competent as bearing on the sum which would be just and sufficient as a punishment and deterrent in case of an award of exemplary damages. Thomas v Williams, supra. But where there are two or more defendants, evidence of the wealth of the defendants is inadmissible. Ogodziski v Gara, 173 Wis 380, 181 NW 231 (1921); McAllister v Kimberly-Clark Co, 169 Wis 473, 173 NW 216 (1919).

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WISCONSIN SUPREME COURT

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased

Plaintiffs-Intervenors-Respondents-Petitioners,

Appeal No. 01-0724
(Consolidated)
Trial Court Case No. 99-CV-006553

vs.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant,

NEIL F. LAMPSON, INC.,

Defendant-Respondent,

LAMPSON INTERNATIONAL LTD., FEDERAL INSURANCE COMPANY and THE TOKIO MARINE AND FIRE INSURANCE COMPANY,

Defendants.

RESPONSE BRIEF AND APPENDIX OF MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased,

Plaintiffs-Respondents-Cross-Respondents-Petitioners,

Appeal No. 01-1031
(Consolidated)
Trial Court Case No. 99-CV-006553

vs.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-Cross-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-Petitioner,

NEIL F. LAMPSON, INC. and LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY,

Defendant-Co-Appellant,

THE TOKIO MARINE AND FIRE INSURANCE COMPANY,

Defendant.

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased,

Plaintiffs-Respondents-Cross-Respondents-Petitioners,

Appeal No. 01-2486
(Consolidated)
Trial Court Case No. 99-CV-006553

vs.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-Cross-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-Cross-Respondent,

NEIL F. LAMPSON, INC. and LAMPSON INTERNATIONAL LTD.,

Defendants,

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INTRODUCTION

The Wischer plaintiffs concede that our Wisconsin legislature raised the standard for punitive damages. Section 895.85(3), adopted and signed into law in 1995, responded to widely-held concerns that our civil justice system needed reform. The new standard places Wisconsin "among the states having the most stringent punitive damage requirements." Richard L. Blatt, *Punitive Damages: A State by State Guide to Law and Practice*, § 8.59 at 546 (2003).

Although no one in this case challenges the legislature's power to set the threshold for punitive damages, the Wischer plaintiffs try to negate the statute through a novel interpretation of the phrase "disregard of rights." They argue that the statute should allow a jury to impose punitive damages upon a defendant who intentionally violates "rights" even without intending to cause harm.

Neither the statute nor the common law supports the Wischer plaintiffs' interpretation. A constellation of Supreme Court cases – *Brown v. Maxey*,[1] *Loveridge v. Chartier*,[2] and *Gouger v. Hardtke*[3] – hold

---

[1] *Brown v. Maxey*, 124 Wis. 2d 426, 433, 369 N.W.2d 677 (1985) (the first type of conduct justifying punitive damages is where "the defendant desires to cause ***harm*** sustained by the plaintiff or believes that the ***harm*** is substantially certain to follow from his conduct.") (quoting J. Ghiardi & J. Kircher, *Punitive Damages Law and Practice*, Ch. 5, § 5.01 at 8-9 (1984)) (emphasis supplied).

[2] *Loveridge v. Chartier*, 161 Wis. 2d 150, 189-90, 468 N.W.2d 146 (1991) (to recover punitive damages under the common law standard there must be evidence that the defendant subjectively intended to "***injure*** or harm [the plaintiff]," or was aware that his conduct was substantially certain to "***injure*** or harm [the plaintiff]," or knew that his conduct created a strong probability though not a substantial certainty that "[the plaintiff] would be ***injured*** or harmed.") (emphasis supplied).

[3] *Gouger v. Hardke*, 167 Wis. 2d 504, 512, 482 N.W.2d 84 (1992) ("Intent requires both an intent to do an act and an intent to cause ***injury*** by the act.") (emphasis supplied).

that there must be a direct connection between the defendant's state of mind and the injury that gave rise to the plaintiff's cause of action. As applied here, the defendant must either intend to injure the plaintiff or be aware that his conduct is practically certain to cause injury. The Wischer plaintiffs' reading of "disregard of rights" spurns this common law requirement. Moreover, contrary to the statute's conceded purpose of narrowing the occasions for consideration of punitive damages, the Wischer plaintiffs' approach would increase the number of cases in which trial courts would submit punitive damages to the jury – including cases in which such damages were disallowed under common law.

The Wisconsin Supreme Court should affirm the court of appeals' decision that the statute requires clear and convincing evidence that a defendant intended to injure the plaintiff or was aware that his conduct was practically certain to cause an injury. As detailed below, *infra at* 6–9, the Wischer plaintiffs concede that the conduct of Mitsubishi Heavy Industries America, Inc. ("MHIA") does not meet this standard.

STATEMENT OF THE ISSUE

What proof is required for a plaintiff to recover punitive damages under the phrase "in an intentional disregard of the rights of the plaintiff" as provided in Wis. Stat. § 895.85(3)?

PROCEDURAL HISTORY

The plaintiffs sued MHIA for negligence in connection with a construction accident – a crane collapse in which three workers, Jeffrey

Wischer, William DeGrave and Jerry Starr lost their lives.[4] They sought compensatory damages and "punitive damages incident to the damages for pain and suffering sustained."[5] Other defendants included Neil F. Lampson, Inc., the manufacturer of the crane that toppled, causing the personal injuries at issue in this case, and Lampson International Ltd., the lessor and operator of the crane.[6] The trial court dismissed Neil F. at the close of evidence, and the plaintiffs withdrew their punitive damage claim against Lampson International.[7] Thus, the jury was asked only to determine whether MHIA and Lampson were negligent and whether to award punitive damages against MHIA. The jury allotted 97% of liability to MHIA and 3% to Lampson International. It assessed $5.25 million in compensatory damages and awarded $94 million in punitive damages against MHIA.[8] MHIA appealed, and the court of appeals vacated the punitive damage award.[9]

Over the course of this litigation, the Wischer plaintiffs have received $27 million in settlement payments – more than five times the

---

[4] Amended Complaint, R.81.

[5] R.81, ¶ 45.

[6] R.81.

[7] Order dismissing Neil F., R.554; Stipulation and order dismissing punitive damages claim against Lampson, R.357.

[8] Special verdict regarding tort issues, R.488.

[9] *Wischer v. Mitsubishi Heavy Industries America, Inc.*, 2003 WI App 202, 267 Wis. 2d 638, 673 N.W.2d 303.

compensatory damages awarded by the jury.[10] Neither MHIA nor its insurers have challenged their right to these funds. They will keep the settlement regardless of the Supreme Court's decision here.

STATEMENT OF FACTS

I. Overview.

The Wischer plaintiffs present a distorted, exaggerated version of what happened during the Miller Park accident. They focus on such matters as MHIA's "course of conduct," "pre-accident" conduct, and "post-accident" conduct, none of which addresses MHIA's intent to cause injury.[11] They also spend two pages describing the "hazardous workplace" that MHIA allegedly created, appearing to forget that they once brought a "safe work place" claim against MHIA but then dismissed it ***with prejudice***. (Plaintiffs' Brief at 4-5).[12] Because the jury was not asked whether MHIA maintained an unsafe work place, the plaintiffs' attempt to convince this Court otherwise is irrelevant and inappropriate.

---

[10] *Id.*, 2003 WI App 202 at ¶ 31.

[11] *See State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-23 (2003) ("A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for conduct that harmed the plaintiff, not for being an unsavory individual or business."); *Kehl v. Economy Fire & Cas. Co.*, 147 Wis. 2d 531, 536, 433 N.W.2d 279 (Ct. App. 1988) (only the conduct that ***causes*** the plaintiff's injuries can support an award for punitive damages); *Tucker v. Marcus*, 142 Wis. 2d 425, 441-43, 418 N.W.2d 818 (1988) (a plaintiff may recover punitive damages only for conduct that is a legally cognizable cause of the plaintiff's harm).

[12] Stipulation and order for dismissal of safe place claim, R.120.

The evidence important to a punitive damages analysis is the defendant's state of mind at the time of the tortious injury.[13] This is where the Wischer plaintiffs' statement of facts is deceptive; it overlooks "state of mind" evidence. Consider just three examples which demonstrate that this crane collapse was due to a mistaken belief that the lift could proceed safely. It was a tragic accident; nothing less and nothing more.

First, Lampson International Ltd. was the lessor of Big Blue, the crane that collapsed and crashed into another crane holding Wischer, DeGrave and Starr.[14] Before the accident, Allen Watts, the Lampson supervisor, actually touted Big Blue's ability to withstand winds of 40 miles per hour, giving an impression that the crane was invincible.

> Q. And isn't it a fact that you had told people at the Miller Park job that you had operated this crane or a Big Blue crane in winds of 40 miles an hour with comparable loads?
>
> A. Yes.
>
> Q. And that was before the accident occurred; is that right?
>
> A. Yes.[15]

---

[13] *See Brown*, 124 Wis. 2d at 434 (to determine whether defendant's conduct meets the standard for punitive damages "we focus on the defendant's knowledge and state of mind . . ."). For an extensive discussion of how the defendant's state of mind relates to a punitive damages analysis *see Kolstad v. American Dental Ass'n*, 527 U.S. 526, 534-39 (1999).

[14] MHIA Ex. 3237, R.699.

[15] Oct. 31, 2000 Tr. at 126; R.733.

Second, just before the accident – when the winds were allegedly 26-29 miles per hour – Watts was with Big Blue. He spoke with Victor Grotlisch (MHIA's site manager) and assured him that there were not "any problems with the lift."[16]

Third, at the time of the accident, MHIA employees (Moto Baba and Harumi Saeki), MHIA's safety superintendent (Wayne Noel), and Grotlisch were all standing in or around the stadium watching the lift. They were literally in the zone of danger.[17] Had they thought there was any chance that the crane would break, they would not have put their own lives in jeopardy.

The Supreme Court need not take MHIA's word for these "state of mind" facts. The Wischer plaintiffs have admitted this evidence and validated MHIA's interpretation of it over and over, as the next section reveals.

II. The Wischer Plaintiffs Have Conceded MHIA's State of Mind at the Time of the Accident.

Throughout this litigation, the Wischer plaintiffs have maintained that to collect punitive damages under Wis. Stat. § 895.85(3) they needed to show an intentional disregard of rights, not an intent to injure or even an

[16] Nov. 8, 2000 Tr. at 11, R.739; *see also*, excerpt from plaintiffs' reply brief in support of summary judgment against Federal, R.925 at 6. (App. 16).

[17] Oct. 20, 2000 Tr. at 145, R.726; Oct. 30, 2000 Tr. at 224, R.732; Nov. 3, 2000 Tr. at 133-35, R.736.

awareness of the potential for injury.[18] Consistent with their understanding of the statute, they have admitted repeatedly that MHIA: (a) did not act maliciously toward Wischer, DeGrave and Starr; and (b) neither intended to cause injury nor was aware that its conduct (even as described on pages 3-9 of their brief) would cause an accident or injury.[19]

With respect to Victor Grotlisch's testimony regarding the probability that a tragedy would occur, the plaintiffs have admitted that he did not believe an accident or injury would occur:

> ***None of Grotlisch's testimony . . . shows that there was a substantial certainty that bodily injury would occur.*** Moreover, ***these few pieces of testimony*** cannot be viewed in isolation. Other portions of Grotlisch's testimony must be considered. Grotlisch testified that ***at about 4:45 p.m. on July 14, 1999, he had a discussion with Allan Watts about the fact that there were no problems*** with the lift, and it was decided that Grotlisch would go up to the track beam girder where the roof piece would be set . . . ***The fact that Victor Grotlisch was in the zone of danger indicates that he could not have believed that there was a substantial certainty that injury would occur.***[20]

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[18] Plaintiffs' brief in support of summary judgment against Federal, R.886 at 18. (App. 24).

[19] Excerpt from plaintiffs' brief in support of summary judgment against Federal, R.886 at 18, 21. (App. 24, 27). The $94 million punitive damage award was three times MHIA's net worth. *See* MHIA's offer of proof re financial status, R.436. The plaintiffs had to establish insurance coverage in order to collect the full award, and thus they conceded that MHIA's conduct was not intentional.

[20] Excerpt from plaintiffs' reply brief in support of summary judgment against Federal, R.925 at 6; excerpt from plaintiffs' brief in opposition to Federal's motion for summary judgment, R.909 at 10. (Emphasis supplied). (App. 16, 20).

Regarding the testimony by Howard Shapiro (the plaintiffs' crane expert) that MHIA engaged in a callous, outrageous disregard of worker safety, the plaintiffs have acknowledged that Shapiro never testified that MHIA's conduct was substantially certain to cause injury:

> This testimony simply supports the jury's finding that MHIA acted in an intentional disregard of the decedent's rights, ***but it does not show that bodily injury to the decedents was substantially certain to result from MHIA's conduct.*** The expression "playing Russian Roulette" is merely a figure of speech. It denotes the taking of a chance; it does not quantify the degree of certainty of injury. Thus, Mr. Shapiro's use of that expression in characterizing MHIA's conduct actually ***underscores the lack of certainty of bodily injury***, not the opposite.[21]

The plaintiffs also concede that the combined testimony of Victor Grotlisch, Howard Shapiro and William Keefe[22] failed to create a fact issue as to whether MHIA's conduct was substantially certain to cause injury:

> None of this testimony [Grotlisch, Shapiro, Keefe], however, is sufficient by itself or in combination, to establish that ***MHIA's employees' acts on July 14, 1999 were substantially certain to result in bodily injury. The testimony is not even sufficient to create an issue of fact on the matter.***[23]

Finally, as to literally ***all*** of the evidence presented at trial, the plaintiffs admitted:

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[21] Excerpt from plaintiffs' reply brief in support of summary judgment against Federal, R.925 at 6. (Emphasis supplied). (App. 16).

[22] William Keefe was another of the plaintiffs' expert witnesses.

[23] Excerpt from plaintiffs' brief in opposition to Federal's motion for summary judgment, R.909 at 9. (Emphasis supplied). (App. 19).

> ***The record is devoid of any evidence that any MHIA employee, subjectively or objectively, intended bodily injury on July 14, 1999.*** This is demonstrated not only by the evidence in the record, but also by the conduct of all the litigants based on the evidence.[24]
>
> ***Nowhere in the record is there any evidence that MHIA employees subjectively intended to cause bodily injury to the decedents.***[25]
>
> ***[T]here is no evidence to permit a reasonable jury to conclude that the MHIA employees intended to cause bodily injury to the decedents or that they knew or should have known that bodily injury to the decedents was substantially certain to follow from their acts.***[26]

III. The Lower Court Decisions.

At the close of evidence, the plaintiffs asked Judge Dominic Amato to rule that the evidence was sufficient to submit a punitive damages question to the jury, and he did.[27] He said there was evidence that MHIA intentionally disregarded rights by putting people in harm's way where they faced a high probability of physical injury or death, and he allowed the plaintiffs' punitive damages case to go forward.[28] The jury awarded the

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[24] Excerpt from plaintiffs' brief in support of summary judgment against Federal, R.886 at 17. (Emphasis supplied). (App. 23).

[25] *Id.*, R.886 at 21. (Emphasis supplied). (App. 27).

[26] *Id.*, R.886 at 21. (Emphasis supplied). (App. 27).

[27] Oct. 30, 2000 Tr. at 250-261, R.732.

[28] Oct. 30, 2000 Tr. at 256-57, R.732. (App. 2). In other words, Judge Amato found that MHIA met the common law standard for reckless behavior. Under the common law, a punitive damages question could go to the jury if the evidence showed that the defendant "knows, or should have reason to know, not only that his conduct creates an ***unreasonable risk of harm***, but also that there is a ***strong probability, although not a***

plaintiffs $94 million in punitive damages, an amount three times MHIA's net worth.[29]

After trial, Judge Amato ruled as a matter of law that the Wischer plaintiffs could recover from MHIA's insurers, stating that absolutely none of the evidence presented to the jury showed that MHIA ***intended*** to cause harm to anyone:

> There has ***never been anything in this record that the conduct on behalf of Mitsubishi or its employees, Mr. Grotlisch, or anyone else was intentional.*** No one tried to ***intentionally*** hurt anyone.[30]
>
> In [Wis. JI-Civil No. 2001], intentional versus negligent conduct, it says in part, "intent requires both an intent to do an act and an intent to cause injury by that act. An intent to cause injury exists where the actor actually means to cause injury by his or her conduct or where injury is almost certain to occur from the actor's conduct."
>
> ***There is absolutely no evidence in this record to show that it was an intent of anyone, let alone Mitsubishi, there was never any evidence to indicate that Mitsubishi or anyone else intended to cause an injury.***[31]

The plaintiffs have never appealed or in any way challenged this decision.

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substantial certainty, that the harm will result, but nevertheless, he proceeds with his conduct in reckless or conscious disregard of the consequences." *Brown*, 124 Wis. 2d at 433-34. (Emphasis supplied).

[29] Special verdict regarding tort issues, R.488; MHIA's offer of proof re financial status, R.436.

[30] Aug. 6, 2001 Tr. at 19-20, R.985. (App. 3-4).

[31] Aug. 6, 2001 Tr. at 20-21, R.985. (App. 4-5).

MHIA and three insurers filed appeals raising 19 issues for review.[32] The court of appeals decided just one of them. It reversed Judge Amato's interpretation of Wis. Stat. § 895.85(3), holding that the statute raised the threshold for punitive damages so that a plaintiff must now prove that the defendant either intended to cause an accident or injury, or that the defendant had knowledge that his act was practically certain to cause an accident or injury.[33] The court of appeals rejected the plaintiffs' interpretation (the statute requires an intent to act, not an intent to injure) because it would expand rather than narrow the type of cases in which punitive damages can be awarded, contrary to the legislature's objective.[34]

ARGUMENT

Whether the Court confines itself to the plain language of the statute or looks to sources beyond the statute to determine the legislature's intent, it will reach the same conclusion – to recover punitive damages under Wis. Stat. § 895.85(3), the plaintiff must establish that the defendant either intended to injure the plaintiff or was aware that his conduct was practically certain to cause an accident or injury.[35] Thus, it does not matter whether

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[32] *Wischer*, 2003 WI App at ¶¶ 2-3, n.3-n.4.

[33] *Wischer* at ¶ 44.

[34] *Wischer* at ¶¶ 40-41.

[35] MHIA concurs in the Wischer plaintiffs' statement of the standard of review. The interpretation of a statute is a question of law, which the Supreme Court decides *de novo*, although the Court may benefit from the lower courts' analyses. *Ahrens v. Town of Fulton*, 2002 WI 29, ¶ 15, 251 Wis. 2d 135, 641 N.W.2d 423. MHIA also agrees with the plaintiffs' statement of the principles of statutory construction. MHIA notes only that the Wisconsin Supreme Court clarified these principles in decisions issued after the

the Supreme Court deems Wis. Stat. § 895.85(3) to be ambiguous or unambiguous.

I. The Court of Appeals Interpreted and Applied Wis. Stat. § 895.85(3) Correctly, Without Adding Any Words to the Statute.

The only issue in this appeal is the proper interpretation of Wis. Stat. § 895.85(3). Here is the plain language of the statute:

> The plaintiff may receive punitive damages if evidence is submitted showing the defendant acted maliciously toward the plaintiff or in an ***intentional*** disregard of the rights of the plaintiff.

Wis. Stat. § 895.85(3) (emphasis supplied).

The term "intentional" or "intent" has an established meaning under Wisconsin tort law:

> Intent requires both an intent to do an act ***and an intent to cause injury*** by that act. ***An intent to cause injury exists where the actor subjectively intends to cause injury or where injury is substantially certain to occur from the actor's conduct.***

Gouger v. Hardtke, 167 Wis. 2d 504, 512, 482 N.W.2d 84 (1992) (emphasis supplied).[36]

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plaintiffs filed their brief. *See, e.g., State of Wisconsin ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶¶ 36-52, __ Wis. 2d __, __ N.W.2d __.

[36] *See also*, Wis. Stat. § 939.23(3), which states: "'Intentionally' means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his conduct is practically certain to cause that result." The terms "substantially certain" and "practically certain" appear to be interchangeable. An outcome is practically certain when it approaches being inevitable. *Boomsma v. Starr Transport, Inc.*, 202 F. Supp. 2d 869, 881 (E.D. Wis. 2002).

The phrase "intentional disregard of the rights of the plaintiff" therefore means, at a minimum, that the defendant possesses a "general" intent to cause injury – that he is aware that his conduct is substantially (or practically) certain to cause injury. This construction does not require the insertion of the word "injury" into the statute. It only requires the definition of intent that the Wisconsin Supreme Court established in *Gouger* – a personal injury case.[37]

Now compare MHIA's conduct to this "plain language" construction of the statute. The plaintiffs have conceded that:

> ***[T]here is no evidence to permit a reasonable jury to conclude that the MHIA employees*** intended to cause bodily injury to the decedents or that they ***knew or should have known that bodily injury to the decedents was substantially certain to follow from their acts.***[38]
>
> ***The record is devoid of any evidence that any MHIA employee, subjectively or objectively, intended bodily injury on July 14, 1999. This is demonstrated not only by the evidence in the record, but also by the conduct of all the litigants based on the evidence.***[39]

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[37] The Wischer plaintiffs note repeatedly that the statute does not explicitly contain the word "injury." (Plaintiffs' Brief at 14, 25). The statute does not contain the word "safety" either, nor would that interpretation make sense in a negligent misrepresentation or a conversion case, for example. MHIA submits that for a personal injury case, the term "disregard of the plaintiff's rights" means injury to the plaintiff.

[38] Excerpt from plaintiffs' summary judgment brief against Federal, R.886 at 21. (App. 27).

[39] *Id.*, R.886 at 17. (App. 23).

The court of appeals applied the "plain language" construction of Wis. Stat. § 895.85(3) to this undisputed record and concluded that the Wischer plaintiffs could not recover punitive damages in this case. *Wischer v. Mitsubishi Heavy Industries America, Inc.*, 2003 WI App 202, ¶¶ 45-46, 267 Wis. 2d 638, 673 N.W.2d 303. The resolution of this appeal is that simple, and the Supreme Court should affirm it. Argument Sections II, III and IV serve merely to show how this straightforward application of the statute (using the *Gouger* definition of intent) to the undisputed facts is consistent with the legislature's intent, the common law, and the general framework of Wisconsin tort law.

II. The Court of Appeals' Interpretation of the Statutory Phrase "Intentional Disregard of the Rights of the Plaintiff" Is Consistent with the Legislature's Objective and the Common Law.

A. The Legislature's Goal Was to Make it *More Difficult* for Plaintiffs to Recover Punitive Damages.

In 1995, the legislature considered sweeping reform of Wisconsin's tort system, including caps on non-economic damages in medical malpractice litigation, comparative negligence, joint and several liability for punitive damages, and indeed the very standard for awarding punitive damages. Daniel F. Ritsche, *Torts and Damages: The Civil Justice Reform Issues*, L.R. B. Brief 95-5 (1995). (App. 29). Reform proponents voiced concerns about runaway jury verdicts like the one where the jury awarded almost $3 million to an elderly woman who was burned by an overheated cup of McDonald's coffee. (*Id.* at 4). As part of those reforms, the

legislature made a deliberate decision to limit the availability of punitive damages in Wisconsin. Wis. Stat. § 895.85(3).

The common law permitted punitive damages where the defendant acted either maliciously or with a wanton, willful or reckless disregard of the plaintiff's rights. *Kink v. Combs*, 28 Wis. 2d 65, 79, 135 N.W.2d 789 (1965). The Wisconsin legislature retained this standard with one exception – it substituted the word "intentional" for the phrase "wanton, willful or reckless." The plaintiffs concede that this one change made it more difficult to recover punitive damages. (Plaintiffs' Brief at 10-11, 30). *See also*, *Unified Catholic Schools of Beaver Dam Educational Ass'n v. Universal Card Services Corp.*, 34 F. Supp. 2d 714, 718 (E.D. 1999) (citing Wis. JI-Civil 1707.1 n.2 for the proposition "the 'intentional disregard standard' was clearly intended to be more narrow than the case law standard . . .").[40] As a result of that change, "Wisconsin is among the states having the most stringent punitive damage requirements." Blatt, *Punitive Damages* at § 8.59.

B. The Legislature Accomplished this Goal by Substituting the Word "Intentional" for the Phrase "Wanton, Willful, or Reckless."

A brief review of the common law definitions of negligent, reckless, intentional, and malicious conduct, in ascending order of grievousness,

[40] Judge Lynn Adelman wrote this opinion. In 1995, he was a state senator who opposed the "intentional disregard of the plaintiff's rights" standard for punitive damages. Senate Amendment 4 to SSA 1 to 1995 SB 11. (App. 37).

highlights the impact of the legislature's decision to use the word "intentional."

1. Negligent conduct. Under common law, when a defendant's conduct creates a risk of harm that may or may not occur, the conduct is negligent as opposed to intentional. Wis. JI-Civil No. 2001. *See also*, *Gouger,* 167 Wis. 2d at 512 ("If the conduct merely creates a foreseeable risk of some harm to someone, which may or may not result, the conduct is negligent.").

2. Reckless conduct. The term "reckless" moves one step higher. At common law, a defendant engages in reckless conduct when he "knows, or should have reason to know, not only that his conduct creates an unreasonable risk of harm, but also that there is a strong probability, ***although not a substantial certainty***, that the harm will result but, nevertheless, he proceeds with his conduct in reckless or conscious disregard of the consequences." *Brown v. Maxey*, 124 Wis. 2d 426, 433-434, 369 N.W.2d 677 (1985) (*quoting* J. Ghiardi & J. Kircher, *Punitive Damages Law and Practice*, Ch. 5, § 5.01 at 8-9 (1984)) (emphasis supplied). The difference between negligent and reckless conduct is the defendant's state of mind and his awareness of the degree of probability that his conduct will cause harm.

3. Intentional conduct. The term "intentional" is yet another step up. The common-law definition of "intentional" embraces two categories of conduct – one is specific intent (or actual knowledge) and the other is general intent (or constructive knowledge).

> Intent requires both an intent to do an act and an intent to cause injury by that act. An intent to cause injury exists where the actor subjectively intends to cause injury or where injury is substantially certain to occur from the actor's conduct.

Gouger 167 Wis. 2d at 512.[41]

The first definition of "intent" above refers to subjective or specific intent – that the person had the mental purpose to cause the result of his actions. The second definition refers to general intent – the defendant's awareness that his conduct was practically certain to cause its ultimate result. *See* Wis. JI-Criminal 923B; *Allied Processors, Inc. v. Western Nat'l Mut. Ins. Co.*, 2001 WI App 129, ¶ 37 n.6, 246 Wis. 2d 579, 629 N.W.2d 329 (citing *Shepard v. Outagamie County*, 189 Wis. 2d 279, 286-87, 525 N.W.2d 764 (Ct. App. 1994)). Both "reckless" conduct and "general" intent involve conscious risk creation. The difference between them is the degree of probability that harm will occur. A person engaging in "reckless" conduct knows there is a ***strong probability, though not a substantial certainty***, that harm will occur. With "general" intent, the defendant knows that it is ***practically certain*** that harm will occur.[42] And with specific intent, the defendant caused the very harm that he planned to bring about.

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[41] Note that this conforms to the concept "intent" described by W. Page Keeton, *Prosser and Keeton on the Law of Torts*, § 8 at 35 (1984) ("'Intent' is the word commonly used to describe the purpose to bring about stated ***physical consequences***; the more remote objective which inspires the act and the intent is called 'motive.'") (emphasis supplied).

[42] Note that general intent does not require evidence that the defendant intended to harm a particular plaintiff. Wis. JI-Criminal 923B, Cmt 1.

4. Malicious conduct. The term "malicious" is at the top of the staircase. Malicious conduct is done with "wicked, evil or mischievous intentions or motives." *Ervin v. City of Kenosha*, 159 Wis. 2d 464, 484, 464 N.W.2d 654 (1991) (*citing* Black's Law Dictionary definition of malice). It is "wrongful and done intentionally without just cause or excuse." *Id.* "A person's acts are malicious when they are the result of hatred, ill will, a desire for revenge, or inflicted under circumstances where insult or injury is intended." Wis. JI-Civil No. 1707.1.

5. The Wischer plaintiffs' interpretation of Wis. Stat. § 895.85(3) blurs these distinctions. One problem with the plaintiffs' analysis is that it ignores the distinctions between these states of mind. They define the term "wanton, willful or reckless" to mean that the defendant has knowledge of a risk of injury but proceeds to act in disregard of the consequences. (Plaintiffs' Brief at 19). They do not acknowledge the degree of risk required to prove reckless conduct (*i.e.,* strong probability, but ***not a substantial certainty***). Yet this is critical for understanding the difference between recklessness and "general intent" – the difference in the degree of probability that conduct will cause harm. That is the change the legislature made in 1995.

The Wischer plaintiffs then suggest that all intentional conduct is malicious, and thus MHIA's interpretation of Wis. Stat. § 895.85(3) would render the "intentional disregard of rights" element superfluous. (Plaintiffs' Brief at 27). But the plaintiffs misunderstand the word "malicious." It has no concrete definition in Wisconsin or elsewhere. *See Ervin*, 159 Wis. 2d

at 488 (Bablitch, J., dissenting) ("'Malicious,' and its counterparts, 'malice,' and 'maliciously' have been construed in different ways depending on the context in which they are used"); *see also, Fahrenberg v. Tengel*, 96 Wis. 2d 211, 220 n.5, 291 N.W.2d 516 (1980) (quoting *Meshane v. Second Street Co.*, 197 Wis. 382, 387, 222 N.W. 320 (1928)) (concluding that "any exact and precise definition" of the term malice "is hard to find, and still harder to frame.") On some occasions, Wisconsin common law has even equated malicious conduct with reckless conduct. *Ervin*, 159 Wis. 2d at 488-89.

The vague meaning of the term "malicious" notwithstanding, Wis. Stat. § 895.85(3) can be read sensibly as setting up two categories of conduct justifying punitive damages. The statutory phrase "maliciously ***toward the plaintiff***" can include either the defendant's motive for an act (meaning that it was done with hatred, ill will, or a desire for revenge) or the defendant's ***specific intent*** to injure or insult the plaintiff in question. The phrase "intentional disregard of rights" requires, at a minimum, ***general intent*** – that the defendant is aware that his act is practically certain to cause injury. As a practical matter, courts reviewing a plaintiff's case for punitive damages will decide whether the evidence meets the lowest possible statutory threshold (*i.e.*, general intent), just as they formerly looked for evidence of "recklessness," the lowest threshold under the common law standard. *See e.g., Kink*, 28 Wis. 2d at 79 (an assault and battery case where the court considered whether the defendant's conduct qualified as "wanton, willful or reckless" rather than malicious).

C. The Legislature Retained the Common Law Meaning of "Disregard of the Plaintiff's Rights," a Term that Always Referred to the Tortious Injury that the Defendant Inflicted Upon the Plaintiff.

Section 895.85(3) does not define the phrase "disregard of rights." And the Wischer plaintiffs agree that when construing the statute, the Court assumes that this phrase retains its common law meaning. (Plaintiffs' Brief at 15, 28). *See also*, 2B *Sutherland Statutory Construction*, § 50:03 (6th ed. 2000) ("The interpretation of well-defined words and phrases in the common law carries over to statutes dealing with the same or similar subject matter."). Thus, boiled down, the dispute in this appeal is over how the common law defined the term "disregard of rights."

The Wischer plaintiffs assert that under the common law "disregard of rights" referred to conduct that was independent from the conduct that caused the plaintiff's tort injury. This separate conduct was called "aggravated," which meant that the defendant displayed an "indifference to safety." (Plaintiffs' Brief at 20-22, 34, 39).[43] The Wischer plaintiffs contend that the common law supports their position, but their analysis does not withstand scrutiny. In describing the common law cases, they simply spotlight the phrase "wanton, willful, or reckless disregard of the plaintiff's

[43] Throughout their brief, the Wischer plaintiffs argue that to get punitive damages, they need only show an "indifference to rights." *See e.g.*, Plaintiffs' Brief at 34 ("a plaintiff must show proof of an act or course of conduct that (1) is indifferent to a right of the plaintiff, whether it be a right to safety, health or life or a property right . . . "). Note from the discussion at Argument Section II B that this is the common law definition of "reckless conduct." The Wischer plaintiffs are attempting to reinsert the recklessness standard into the statute under the auspices of "disregard of rights."

rights" or the word "aggravated" and stop. They do not read further to see how the common law actually defined and applied those terms.

Under Wisconsin tort law, a set of operative facts gives rise to a cause of action, and that cause of action can give rise to different kinds of remedies – compensatory damages or punitive damages, for example. *Wussow v. Commercial Mechanisms, Inc.*, 97 Wis. 2d 136, 145-46, 293 N.W.2d 902 (1980); *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 275, 294 N.W.2d 437 (1980).[44] Punitive damages are allowed when "'circumstances of aggravation' in the ***tortious injury***" are present. *Id.*, 97 Wis. 2d at 268 (quoting *Mid-Continent Refrigerator Co. v. Straka*, 47 Wis. 2d 739, 746, 178 N.W.2d 28 (1970)) (emphasis supplied). So, in deciding whether punitive damages are appropriate in a given case, the fact finder looks to the operative facts – the ***injury*** that gave rise to the cause of action – and then considers whether there were aggravating circumstances in the

[44] The plaintiffs rely heavily upon *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437 (1980) for their interpretation of the phrase "disregard of rights." But this is an example of where they highlight the phrase "disregard of rights" and then ignore how the court interpreted and applied the term. The *Wangen* plaintiffs sued Ford for burn injury and death caused when a fuel tank in its cars ruptured. The court held that the plaintiffs stated a claim for punitive damages because they alleged that Ford knew of defects in the design of its car, knew that the defects were causing "***serious burn injuries***," knew how to correct the defects, but intentionally withheld the information from the public and the government in order to avoid repair costs and bad publicity. The court held that "[t]hese facts, if proved by the plaintiff, portray conduct which is willful and wanton and in reckless disregard of the plaintiff's rights." *Id.*, 97 Wis. 2d at 309. Elsewhere in the opinion, the court held that in a survival action a claim for punitive damages passes to the victim's estate so that "[p]unitive damages incident to damages for pain and suffering may be awarded to the estate." *Id.*, 97 Wis. 2d at 311. In other words, punitive damages are tied to the plaintiff's injuries. *Wangen* did not hold that the plaintiffs could recover punitive damages for a disregard of a right other than the right not to be injured.

infliction of that injury. Under the common law, the "aggravating factor" was the defendant's display of a reckless, intentional or malicious state of mind in inflicting the ***injury***.

Three common law cases cast the link between the defendant's state of mind and the plaintiff's injury in bold relief.

1. *Kehl v. Economy Fire & Cas. Co.*, 147 Wis. 2d 531, 433 N.W.2d 279 (Ct. App. 1988).

The *Kehl* court specifically rejected punitive damages in a case where the defendant's "reckless disregard of the plaintiff's rights" was something different from, although related to, the conduct that actually injured the plaintiff. The defendant in that case caused a car accident and then fled the scene. The plaintiff sued the defendant for negligence and requested punitive damages. A jury found that the defendant's negligence caused the collision and that the defendant's "conduct in leaving the accident scene was 'willful, wanton or in reckless disregard' of the [plaintiff's] rights." *Id.*, 147 Wis. 2d at 533.

The *Kehl* court refused to permit punitive damages for the "separate volitional" act of fleeing the accident scene because it did not cause the plaintiff's harm. The act of fleeing could support a punitive damage award only if it aggravated the plaintiff's injuries or caused new harm. *Id.*, 147 Wis. 2d at 535-36. The court explained:

> Punitive damages may not . . . be awarded *in vacuo*. Juries are not given license to roam the caverns of their consciences to punish conduct they deem despicable unless a plaintiff can

> prove that he or she has suffered some ***actual damage as a result of the conduct.***

Id., 147 Wis. 2d at 534 (emphasis supplied). *See also*, *State Farm Mutual Auto. Ins. v. Campbell*, 538 U.S. 408, 422-23 (2003) ("A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for ***conduct that harmed the plaintiff***, not for being an unsavory individual or business.") (emphasis supplied).[45]

2. *Brown v. Maxey*, 124 Wis. 2d 426, 369 N.W.2d 677 (1985).

The Wisconsin Supreme Court has also emphasized the necessary connection between the defendant's state of mind and the plaintiff's injury. In *Brown*, the landlord of an apartment complex knew that security problems were allowing vandals to start fires on the premises. A tenant injured in a fire sued the landlord for negligence, requesting both compensatory and punitive damages. The court began its consideration of whether there was sufficient evidence to support the jury's punitive damage award by noting that two types of conduct could fulfill the standard:

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[45] Common law product liability cases underscore the point that "disregard of rights" refers to the conduct causing the plaintiff's injury. *See e.g. Sharp v. Case Corp.*, 227 Wis. 2d 1, 595 N.W.2d 380 (1999). The *Sharp* court held: "Punitive damages may be awarded in product liability suits if the plaintiff proves by clear and convincing evidence that ***the harm suffered was the result of the*** manufacturer's reckless disregard for the safety of product users, consumers or others who might be harmed by the product." *Id.*, 227 Wis. 2d at 21. (Emphasis supplied). The Wischer plaintiffs selectively quote from this sentence (omitting the reference to harm) to create the impression that *Sharp* authorized punitive damages for a "reckless disregard for the safety of product users . . ." (Plaintiffs' Brief at 18 n.3).

> The first type is that in which the defendant ***desires to cause the harm sustained by the plaintiff***, or believes that ***harm*** is substantially certain to follow his conduct. With the second type of conduct the defendant ***knows not only that his conduct creates an unreasonable risk of harm, but also that there is a strong probability, although not a substantial certainty***, that the ***harm will result*** but, nevertheless, he proceeds with his conduct in reckless or conscious disregard of the ***consequences***. Neither form of conduct, therefore, involves mere inadvertence or what, in the traditional tort sense, would be called ordinary negligence.

Id., 124 Wis. 2d at 433-34 (quoting J. Ghiardi & J. Kircher, *Punitive Damages Law and Practice*, Ch. 5, § 5.01 at 8-9 (1984)) (emphasis supplied).

The *Brown* court noted that in Wisconsin a plaintiff was not required to prove intent (the first type of conduct); he just had to prove recklessness (the second type of conduct). *Id.*, 124 Wis. 2d at 434. In reviewing the evidence, the court did not look for the disregard of an amorphous "right to safety" such as the Wischer plaintiffs advance in this case. Rather, it focused on "the defendant's knowledge and state of mind at the time of the fire." *Id.* As a result, the court upheld the plaintiff's punitive damage award based on evidence that the landlord had "***knowledge*** with respect to the security problem and the history of ***fires*** at Apollo Village and his conscious refusal to reduce the risk of ***fires*** [*i.e.,* the tortious injury to the plaintiff]." *Id.,* 124 Wis. 2d at 437 (emphasis supplied).

3. *Loveridge v. Chartier*, 161 Wis. 2d 150, 468 N.W.2d 146 (1991).

The *Loveridge* court applied the *Brown* methodology to a personal injury claim where the defendant intended to perform an act that inadvertently caused injury. The Supreme Court held that a defendant with cold sores who performed oral sex on a young woman never "***intended*** to ***injure*** or ***harm*** [the plaintiff]." *Id.,* 161 Wis. 2d at 189 (emphasis supplied). The court further held that a reasonable person in the defendant's position "would not believe that his sexual contact with [the plaintiff] was substantially certain to result in ***injury*** or ***harm*** to [the plaintiff]." *Id.* The court said that there was no evidence that the defendant met the reckless standard – *i.e.,* knew that his conduct "created a strong probability, although not a substantial certainty that [the plaintiff] would be ***injured*** or ***harmed***." *Id.*, 161 Wis. 2d at 190 (emphasis supplied). The court therefore concluded that the punitive damages question should not have been submitted to the jury.

Kehl, *Brown*, and *Loveridge* discredit the plaintiffs' rendition of Wisconsin common law. Punitive damages were not available for an abstract "disregard of rights" or even a "disregard of right to safety." Under common law, punitive damages rested upon the defendant's state of mind as it related to the plaintiff's tortious injury. The jury could award them only for the conduct that caused the plaintiff's injuries.[46] Thus, when

[46] *See, Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 202, 342 N.W.2d 37 (1984) ("where punishment is to be exacted, it must be certain that the wrongdoer is punished because his or her ***conduct actually caused the plaintiff's injuries***.") (emphasis supplied).

common law cases use the phrase "disregard of the rights of the plaintiff," they are referring to the ***injury*** the defendant inflicted upon the plaintiff – the injury that gave rise to the plaintiff's cause of action and the remedy of punitive damages.

D. The Common Law Used Terms Like "Aggravated" and "Outrageous" Simply as Abbreviations for Conduct that Fulfilled the Punitive Damages Standard.

The Wischer plaintiffs base their separate "disregard of rights" argument in part on the fact that several Wisconsin cases have held that conduct that is "aggravated" warranted punitive damages. The plaintiffs misunderstand the common law's use of this term. Wisconsin courts have explained – repeatedly – that describing conduct as "aggravated" or "outrageous" is just another way of saying that it is conduct that can give rise to punitive damages. *Tucker v. Marcus*, 142 Wis. 2d 425, 435 n.3, 418 N.W.2d 818 (1988) (noting that "aggravated conduct characterized as 'outrageous' conduct" is used to mean conduct that justifies an award of punitive damages) (citing *Wangen*, 97 Wis. 2d at 275). *See also*, *Wangen*, 97 Wis. 2d at 293 n.18) (noting that "reckless disregard" denotes "aggravated conduct"); *Loveridge*, 161 Wis. 2d at 189 (reciting the two forms of conduct warranting punitive damages and then stating: "This court often uses the term 'outrageous' as an abbreviation for both types of conduct which justify the award of punitive damages."); *Brown,* 124 Wis. 2d at 431 n.1 (noting that the Supreme Court uses the term

"outrageous" as an "abbreviation for the type of conduct justifying the imposition of punitive damages.").[47]

The Wischer plaintiffs have missed the point. Wisconsin courts used the terms "aggravated" or "outrageous" as shorthand references for the long common law version of the punitive damages standard (recited in *Brown* and *Loveridge*). The common law did not allow punitive damages for aggravated or outrageous conduct that was separate from the conduct that caused a plaintiff's injury. Nor does § 895.85(3) permit punitive damages for such conduct today. *Jones v. Secura Ins. Co.*, 2002 WI 11, ¶ 14 n.6, 249 Wis. 2d 623, 638 N.W.2d 575.[48]

III. The Wischer Plaintiffs' Interpretation of Wis. Stat. § 895.85(3) Produces Absurd Results.

The Wischer plaintiffs read Wis. Stat. § 895.85(3) as authorizing punitive damages for conduct separate from the tortious injury inflicted upon the plaintiff. "Intent," they say, means only an intent to do an act, not an intent to cause injury. Their interpretation yields absurd results because

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[47] Similarly, the United States Supreme Court has noted that while conduct done with malice or reckless indifference may be characterized as "egregious" that does not mean that a defendant "must engage in conduct with some independent 'egregious' quality before being subject to a punitive award." *Kolstad*, 527 U.S. at 538.

[48] In one recent case, the Wisconsin Supreme Court recited the standard that the jury could consider punitive damages where the defendant's conduct showed "(1) evil intent deserving of punishment or something in the nature of ill will or (2) wanton disregard of duty, or (3) gross or outrageous conduct." *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 2003 WI 46, ¶ 45, 261 Wis. 2d 333, 661 N.W.2d 789. The *Trinity* court, however, was referring to a common law case for that standard. *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 697, 271 N.W.2d 368 (1978).

it would allow punitive damages in simple negligence cases where the common law has historically – and expressly – denied them.

For instance, the Wischer plaintiffs' interpretation of Wis. Stat. § 895.85(3) would allow punitive damages under the facts of *Kehl*, the case where the defendant fled the scene of a car accident, and a jury found that the defendant's decision to flee was as a "wanton, willful, or reckless" disregard of the plaintiff's rights but had nothing to do with causing injury to the plaintiff. *Kehl*, 147 Wis. 2d at 533.

The Wischer plaintiffs' interpretation of Wis. Stat. § 895.85(3) would also render punitive damages appropriate under the facts of *Loveridge*, the case where the defendant, afflicted with cold sores, intentionally performed oral sex on a young woman but did not intend the resulting harm – the transmission of herpes.[49]

It is not difficult to imagine all sorts of cases that would fall within the bounds of Wis. Stat. § 895.85(3) under the plaintiffs' theory. The tortfeasor who, in disregard of highway safety, intentionally drank a cup of coffee while driving and caused an accident would be subject to punitive damages. *Wischer*, 2003 WI App 202 at ¶¶ 41, 43. Similarly, the driver who sees a "no u-turn sign," intentionally makes a u-turn believing the coast to be clear, and then unintentionally causes an accident would be subject to punitive damages. A grocery store employee who sees a small

[49] At oral argument in *Wischer*, a member of the court of appeals observed that this was the crux of the problem with the plaintiffs' reading of Wis. Stat. § 895.85(3). Court of Appeals Tr. at 118-19. (App. 10).

puddle of water on the store floor but intentionally finishes other work before cleaning it up, would also be subject to punitive damages when a customer slips in the puddle and sprains her wrist.[50] The point is, under the plaintiffs' interpretation of Wis. Stat. § 895.85(3), common, intentional safety violations could yield punitive damages. This is an absurd result.

IV. MHIA's Interpretation of "Intentional Disregard of the Plaintiff's Rights" Does Not Upend Wisconsin Tort Law.

The Wischer plaintiffs allege that MHIA's interpretation of Wis. Stat. § 895.85(3): (a) disrupts Wisconsin tort law by eliminating punitive damages in all but "extreme cases" of negligence; (b) erroneously uses the definition of intent that applies to intentional tort cases rather than a definition applicable to negligence cases; and (c) "possibly" eliminates punitive damages in products liability cases. (Plaintiffs' Brief at 41-42, 45-46). They are wrong on all counts. MHIA's interpretation of the statute fits comfortably within the framework of Wisconsin's tort jurisprudence.

A. Punitive Damages Were Always Limited to "Extreme" Negligence Cases.

Under Wisconsin law, punitive damages were never available where the plaintiff proved ***only*** negligence:

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[50] In a bankruptcy case applying the "willful injury" exception to dischargeable debts, Justice Ginsburg described the difference between an intentional injury and an intentional act that leads to an injury. With respect to the second category of conduct, she said: "Every traffic accident stemming from an initial intentional act – for example, intentionally rotating the wheel of an automobile to make a left-hand turn without first checking oncoming traffic – could fit the description." *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998).

> In a negligence case, if the plaintiff proves only those elements constituting the cause of action, punitive damages are not available. ***In fact the vast majority of negligence cases do not give rise to the remedy of punitive damages.***

Brown, 124 Wis. 2d at 432 (emphasis supplied). To qualify for punitive damages under common law, the plaintiff had to prove – in addition to negligence – the type of conduct typically associated with a crime. *Kink*, 28 Wis. 2d at 80 (punitive damages serve the purpose of punishing conduct frequently associated with a crime but that often goes unpublished by a public prosecutor); *Wangen*, 97 Wis. 2d at 279-80, 281 (punitive damages serve the function of criminal law). The point is, common law punitive damages were never available in garden-variety negligence cases; they were allowed only in extreme cases. In raising the bar from reckless to intentional conduct, the legislature simply required that the defendant's mental state in committing the tort be more extreme.

B. Under MHIA's Interpretation of Wis. Stat. § 895.85(3), Punitive Damages Remain Available in "Unintentional" Tort Cases.

The Wischer plaintiffs warn that MHIA's interpretation of Wis. Stat. § 895.85(3) will produce a dramatic change in tort law – eliminating punitive damages in all "unintentional tort" cases. They take issue with the *Gouger* definition (that "intent" means either a subjective or objective intent to cause ***injury***), arguing that the court could not have meant that

definition to apply to all tort cases. (Plaintiffs' Brief at 45-46) (citing *Gouger*, 167 Wis. 2d at 512; Wis. JI Civil 2001).[51]

The plaintiffs appear to be advocating one definition of "intent" for negligence tort law and a different definition for intentional tort law. They cite no authority for this novel proposition. The Restatement of Torts certainly does not follow their split-screen approach.

> The word "intent" is used throughout the Restatement of this Subject to denote that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it.

Restatement (Second) of Torts § 8A (1965). Nor do Wisconsin cases support the plaintiffs: "the legal definition of 'intentional' is essentially the same, whether in tort law or criminal law." *Allied Processors,* 2001 WI App 129 at ¶ 37 n.6. For purposes of maintaining uniformity in Wisconsin's tort system, it makes sense for one definition of "intent" or "intentional" to apply across the board.

Furthermore, defining "intentional" in Wis. Stat. § 895.85(3) to mean general intent *a la Gouger* will not confine punitive damages to intentional tort cases. When a person is injured, she can file a lawsuit alleging an intentional tort such as battery.[52] Or she can file a lawsuit for

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[51] Another example of the Wischer plaintiffs' inconsistent positions is that they attempt to rely upon the common law for their interpretation of "disregard of rights" while they distance themselves from the common law definition of "intent."

[52] Note that the elements of a battery claim are different from the elements of a negligence claim requesting punitive damages. A "battery" requires proof that: (1) the defendant intended to cause bodily harm (as defined in *Gouger*) and (2) the plaintiff did not consent to the harm. Wis. JI-Civil 2005 Battery (Physical Harm).

negligence and allege that she is entitled to the remedies of compensatory and punitive damages. To recover punitive damages she will have to prove, at a minimum, that the defendant acted with general intent as defined in *Gouger* (and *Brown* and *Loveridge*). She might choose to pursue the negligence action in order to gain at least compensatory damages, in the event she cannot meet *Gouger*'s intent standard. She might also prefer Wisconsin's three-year statute of limitations for negligence claims over the two-year statute of limitations for intentional tort claims. In short, under MHIA's interpretation of Wis. Stat. § 895.85(3), plaintiffs still have incentive to pursue punitive damages under negligence/personal injury law.

C. Under MHIA's Interpretation of Wis. Stat. § 895.85(3), Punitive Damages Remain Available in Products Liability Cases.

Under common law, the jury had to examine a corporation's state of mind before it could impose punitive damages in a products liability case. *Sharp v. Case Corp.*, 227 Wis. 2d 1, 22, 595 N.W.2d 380 (1999). The *Sharp* court explained how this analysis worked:

> In a products liability case, a manufacturer may be found to have acted in reckless disregard if, after having ***gained specific knowledge of a product's defect and its potential for harm, the manufacturer fails to take some action*** that the defect demands, such as adequate testing procedures, effective quality control, sufficient warnings or adequate remedial procedures such as product recalls or post-sale warnings.

Id., 227 Wis. 2d at 23 (emphasis supplied). *See also*, *Walter v. Cessna Aircraft Co.*, 121 Wis. 2d 221, 227, 358 N.W.2d 816 (Ct. App. 1984)

("*Wangen*, as well as other punitive damages cases in the products liability area, demands that the defendant have ***specific knowledge*** of a product's defect and its ***potential for harm*** before an exemplary award is appropriate.") (emphasis supplied).

Using this same framework, punitive damages would also be available in a products liability lawsuit under the statutory "intentional disregard" standard. A plaintiff would have to demonstrate the defendant's knowledge of a defect, as well as an awareness of its potential for injury, and a refusal to take remedial measures. If the evidence showed that the defendant knew his failure to take corrective measures was "practically certain" to cause injury (*i.e.* the general intent standard), then the plaintiff would be eligible for punitive damages. In sum, MHIA's interpretation of the Wis. Stat. § 895.85(3) does not eliminate punitive damages in products liability cases.

CONCLUSION

The Wischer plaintiffs conclude by asking the Court: Is the type of conduct displayed in this case the kind that the public policy underlying punitive damages was intended to address? (Plaintiffs' Brief at 50). That is the wrong question. The ***legislature*** made the public policy decision about what type of conduct qualifies for punitive damages when it replaced the words "wanton, willful, and reckless" with the word "intentional." The relevant question in this case is whether – under the definitions approved by the Wisconsin Supreme Court in *Brown*, *Loveridge* and *Gouger* – MHIA intended to injure the plaintiffs or was aware that its conduct was

practically certain to cause injury? The plaintiffs themselves have answered "no" emphatically and repeatedly. MHIA therefore respectfully requests that the Wisconsin Supreme Court affirm the court of appeals decision.

Dated at Milwaukee, Wisconsin this 11th day of June, 2004.

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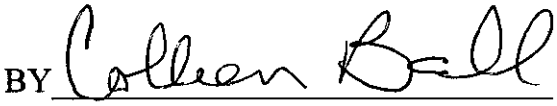
BY 
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FORM AND LENGTH CERTIFICATION

I hereby certify that the response brief of Mitsubishi Heavy Industries America, Inc. conforms to the rules contained in Section 809.19(8)(b) and (c) of the Wisconsin Statutes for a response brief produced with a proportional serif font. The length of this brief is 9,046 words.

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1 Daylight Savings Time, so it's probably dark or
2 getting close to it, so I'm going to send you home
3 now. There are some issues that the lawyers and I
4 have to take up that have nothing to do with anything
5 that you have to bother to hear about. So I'm going
6 to send you home. All those admonishments continue,
7 please, I know you are, just be aware of it. We'll
8 see you. Be back up there at 9:00 tomorrow morning.
9 We'll see you at nine o'clock bright and early.
10 I again want to thank the gentleman
11 from Interstate Brands and Interstate Brands is
12 bringing the treats. We don't have the resources to
13 bring them, and I hope they're just good. We'll see
14 you tomorrow, everybody. Please rise.
15 (The jury was excused.)
16 THE COURT: The jury is out. You may be
17 seated. Mr. Habush?
18 MR. HABUSH: Yes, Your Honor, I'd like the
19 court to rule as a matter of law that we established
20 a prima facie case to go to the jury with on punitive
21 damages. I not only believe we went through the
22 threshold, but we're in the house and went out the
23 back door. So I think the evidence that we have
24 established shows compliance with the statute of
25 intentional disregard by the testimony, expert

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1 testimony, by their conduct, and if the court would
2 like, I can go to specific references, but I think we
3 all remember it pretty clearly. It's only been a
4 couple of weeks. So that's my request, Your Honor.
5 THE COURT: I'll address the insurance
6 coverage issue real quickly.
7 MR. HABUSH: Excuse me, sir?
8 THE COURT: Punitive damages on the
9 insurance. You asked for the insurance policies too.
10 MR. HABUSH: Yes. If the court rules
11 affirmatively, then I would like the financials kept
12 under seal turned over to us so I can have them
13 examined this evening by an accountant, at which time
14 I will decide whether to request the asset -- the
15 insurance policies be put into evidence as well as
16 one of the assets. I may decide not to use the
17 insurance policy or the financials, I may decide to
18 use one or the other, but I'd like to have that
19 option.
20 THE COURT: You want the option?
21 MR. HABUSH: The option, yes.
22 THE COURT: Mr. Carlson, do you want to be
23 heard on this?
24 MR. CARLSON: I have no interest in that
25 particular issue.

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1 THE COURT: Mr. Bell, Mr. Weber, Mr. Owens?
2 MR. WEBER: The question, Your Honor, is
3 one of law for the court, and this would be the
4 appropriate time to move pursuant to 805.14 as well
5 or --
6 THE COURT: Why don't you do that when
7 Mr. Habush rests his case. Subject to housekeeping
8 on exhibits, both Mitsubishi's and Lampson's rights
9 will automatically be preserved to bring a motion at
10 the close of the testimony, and we'll defer that the
11 next time the jury is out. So you're all safe on
12 that. I just want to address the issues raised by
13 plaintiffs on punitive damages.
14 MR. WEBER: Right. Your Honor, first, the
15 standard is clear and convincing evidence. Second,
16 as noted in the comments of the jury instruction,
17 that this law was changed after 1995, so we're
18 talking about a different standard, a different
19 approach from a law that previously existed. In
20 particular, Your Honor, there has to be a showing
21 that the individuals, the individual employees of
22 Mitsubishi, particularly Wayne Noel and Victor
23 Grotlisch, were practically certain on July 14 that
24 Big Blue was certain to fall, tip over, and cause the
25 death of these individuals.

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1 The evidence brought forth to this
2 date is exactly to the opposite. In fact, Wayne Noel
3 himself was in the zone of danger at the time of the
4 accident and had to run for his life. Victor
5 Grotlisch was about to go up on the track beam and,
6 likewise, was in the zone of danger as defined by
7 plaintiffs' own witness. So what we have is evidence
8 of alleged reckless conduct, conduct that no longer
9 meets the standard for punitives under Wisconsin law.
10 There is no evidence that anyone told Victor
11 Grotlisch to stop this lift. To the contrary, once
12 the -- once the pick was off the ground in the late
13 morning hours, it proceeded under the control of
14 Allen Watts and Fred Flowers.
15 Very interesting testimony today.
16 Amazing admission by Mr. Flowers that contrary to
17 everything that's been said over the last two weeks,
18 he had not in mind a 20 mile an hour speed limit but
19 rather a 25 to 27 before he was even going to say
20 anything to Allen Watts.
21 This -- there's no evidence any of
22 that information was shared with anyone at
23 Mitsubishi, and so there is a break in any alleged
24 causal chain before it ever gets to Mitsubishi. So
25 for those reasons, Your Honor, and the other reasons

1 set forth with more specificity in our brief --
2 THE COURT: In your brief?
3 MR. WEBER: Yes -- we oppose the motion.
4 THE COURT: Those you don't have to -- I
5 pulled all those documents out and read them --
6 MR. WEBER: Right.
7 THE COURT: -- just recently.
8 MR. WEBER: Yeah, as to the insurance
9 issue -- and, likewise, Judge, that's been briefed.
10 We don't oppose Mr. Habush having a copy of it, but
11 it's quite a different issue, a substantial issue of
12 Wisconsin public policy whether that would be
13 allowed.
14 THE COURT: Thank you. I reread everything
15 again. A part of your argument, Mr. Weber, setting
16 aside what's contained in your briefs and your
17 motions in limine, but part of the argument that you
18 just made now is really arguing the merits of the
19 case and the weight of the testimony and balancing
20 out, and those issues are for the jury to ultimately
21 decide the weight and the credibility they put on
22 witnesses and who they believe and who they don't
23 believe in searching for the truth to do justice.
24 Section 895.85 on punitive damages,
25 subsection 3, standard of conduct, says, "The

1 plaintiff may receive punitive damages if evidence is
2 submitted showing that the defendant acted
3 maliciously towards the plaintiff or in an
4 intentional disregard of the rights of the
5 plaintiff."
6 The procedure under sub. 4 is that if
7 the plaintiff establishes a prima facie case for the
8 allowance of punitive damages, A, the plaintiff may
9 introduce evidence of the wealth of the defendant."
10 All the plaintiff has to do at this
11 stage of the proceedings is show a prima facia case.
12 He doesn't have to do anything other than present
13 competent evidence that would support a prima facie
14 case under the appropriate burden of proof. The
15 testimony on this subject could only be invaded, as
16 argued by Mr. Weber, if it was inherently incredible
17 or inherently implausible, and the testimony offered
18 to support a prima facie case for punitive damages
19 does not rise to testimony that would be inherently
20 incredible or inherently implausible.
21 Setting aside the testimony of the
22 experts on this subject and the references that some
23 of experts testified, such as Mr. Shapiro, just
24 setting that aside, the evidence offered by the
25 people there working at Miller Park, along with the

1 admissions by Mr. Grotlisch, Mr. Noel, that in and of
2 itself rises to the level of the plaintiff
3 establishing a prima facie case for the allowance of
4 punitive damages. I don't have to reach the
5 testimony of the experts. I don't want to get
6 involved in their descriptive phraseology of what is
7 or what is not. I know there was testimony by some
8 of the experts as to a conscious disregard. The
9 court doesn't have to reach that because there's
10 enough evidence in the record to show not only a
11 conscious disregard but an intentional disregard of
12 the rights of the plaintiffs in this case.
13 The evidence has been established to
14 support a prima facie case that those acting on
15 behalf of Mitsubishi, their employees, Mr. Grotlisch
16 and Mr. Noel, that the acts, actions and inactions,
17 the verbal dialog, the non-verbal dialog, the
18 communication, course of conduct and the way the
19 testimony shows how the people interacted, along with
20 the responsibility and decision-making -- ultimate
21 decision-making, that Mitsubishi, through its agents
22 and employees, put these people, in addition to other
23 people, in harm's way where there was a high
24 probability of physical injury and/or death. And
25 under those circumstances, the court is satisfied

1 that the plaintiffs in this case can seek and argue
2 punitive damages to the jury.
3 It's ultimately up to the jury to
4 decide who they believe or they do not believe and
5 the jury to decide what, if any, punitive damages are
6 appropriate. They also have to decide, the jury,
7 whether or not the actions of Mitsubishi are
8 intentional disregard for plaintiffs' rights. So
9 those are issues of fact for the jury to ultimately
10 make. All I'm deciding today is based upon the
11 evidence proffered and tendered and garnered through
12 the exhibits and witnesses on the witness stand as to
13 whether or not a prima facie case has been made. And
14 it clearly has been made.
15 With regard -- and in such cases of
16 punitive damage, the plaintiffs at that point in time
17 have the opportunity to offer evidence because
18 punitive damages are there to punish the wrongdoer.
19 And when you deal with the issue of punitive damages,
20 you deal with the economic wealth of the party who
21 punitive damages are being sought against.
22 The insurance issue, insurance
23 coverage, is inadmissible upon the issue of whether
24 or not someone is negligent or someone is at fault
25 and caused the -- carelessness caused the injury.

1 But the response on the punitive damage question
2 was that it was approximately $47 million to bill
3 that, and they doubled that amount.
4 But the important comment was that the
5 jury said there was an expectation that when one's
6 husband or wife leaves home and goes to work, that
7 there is an expectation that they will go to work
8 and be reasonably safe in the environment, that
9 they work and come home. And it was deterrence.
10 That's what the jury talked about on the punitive
11 damage issue. They did not talk about, nor was
12 there any dialogue, but they focused on deterrence
13 as opposed to labeling someone as a wrongdoer, or
14 as opposed to labeling someone as a bad guy, or as
15 opposed to focusing in on anything else. I say
16 that because we're all bound by what the jury found
17 in this case. And if there is going to be issues
18 at the appellate level, the appellate court should
19 at least have the benefit of the jury giving
20 further expression on the subject that this was
21 done to deter and the basis for them reaching the
22 $94 million.
23 There is no finding by this jury,
24 contrary to what Mr. Rattan of Travelers argues,
25 that there was intentional conduct. There has

1 never been anything in this record that the conduct
2 on behalf of Mitsubishi or its employees,
3 Mr. Grotlisch, or anyone else, was intentional. No
4 one tried to intentionally hurt anyone.
5 I pulled some jury instructions I want to
6 read a little bit into the record, because it's
7 part of the analysis that the Court has considered
8 in reaching its decision today. Negligence
9 defined, 1005, under the Wisconsin Jury
10 Instructions states in part, "A person is not using
11 ordinary care and is negligent, if the person,
12 without intending to do harm, does something (or
13 fails to do something) that a reasonable person
14 would recognize as creating an unreasonable risk of
15 injury or damage to a person or property." All the
16 negligence instructions address those concepts.
17 In 2001, intentional versus intentional
18 conduct, it says in part, "Intent requires both an
19 intent to do an act and an intent to cause injury
20 by that act. An intent to cause injury exists
21 where the actor actually means to cause injury by
22 his or her conduct or where injury is almost
23 certain to occur from the actor's conduct."
24 There is absolutely no evidence in this
25 record to show that it was the intent of anyone,

1 let alone Mitsubishi, there was never any evidence
2 to indicate that Mitsubishi or anyone intended to
3 cause an injury. There was a finding by the jury
4 on the punitive damage questions that there was an
5 intentional disregard of the rights of the
6 plaintiffs and others.
7 There is a meaningful distinction with
8 the difference between disregarding the rights of
9 others, intentionally disregarding the rights of
10 others, such as, the safety of the workplace
11 vis-a-vis an intent to injure a particular person.
12 Someone may be approaching an intersection on a
13 busy day downtown Milwaukee on 6th and Wells
14 driving his or her vehicle and makes a purposeful
15 decision and intends to go through that
16 intersection feeling that he or she can get through
17 that intersection, even though the light is
18 changing from green to amber to red, and making
19 that choice decision that they were going to
20 proceed through that intersection without intending
21 to get into an accident or hurting anybody or
22 injuring anybody. Pure rules of the road, safety
23 standards, can be in negligent cases, not just
24 automobile accident cases, and just about any area
25 that tort negligence covers, from flying planes to

1 COURT OF APPEALS OF WISCONSIN
2 DISTRICT 1
3 ---
4 PATRICIA WISCHER, Individually, and as
Special Administrator of the Estate of
5 Jeffrey A. Wischer, deceased; MARJORIE
DEGRAVE, Individually, and as Special
6 Administrator of the Estate of William R.
DeGrave, deceased; RAMONA DULDE-STARR,
7 Individually, and as Special Administrator
of the Estate of Jerome W. Starr, deceased,
8 Plaintiffs-Respondents-Cross-Respondents,
9 -vs- Appeal No. 01-0724
Trial Case No. 99-cv-006553
10
MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,
11 Defendant-Respondent-Cross-Appellant,
12 THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,
Defendant-Respondent-Petitioner,
13
NEIL F. LAMPSON, INC., and LAMPSON INTERNATIONAL, LTD.,
14 Defendants,
15 FEDERAL INSURANCE COMPANY,
Defendant-Co-Appellant,
16
THE TOKIO MARINE and FIRE INSURANCE COMPANY,
17 Defendant.
---
18 July 1, 2003
19 Proceedings Before Court of Appeals
20
21 Before: HONORABLE CHARLES B. SCHUDSON,
22 HONORABLE TED B. WEDEMEYER,
23 HONORABLE RALPH ADAM FINE
24
25 Reported by Kara D. Shawhan, RPR, CMR

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1 being fostered by the Dostal and Price-type cases.
2 And as a result, we request that the Court vacate
3 those judgments in favor of Travelers against Tokio
4 Marine. Thank you, your Honor.
5 HONORABLE WEDEMEYER: Thank you, Counsel.
6 Mr. Habush?
7 MR. HABUSH: I'm sure you're tired. You
8 can't imagine how frustrating it was to sit here
9 for over two hours and hear what I am supposed to
10 say. And I hope that the Court will allow me to
11 respond to each of the issues that have been raised
12 here this afternoon. And I'll try to be as brief
13 as I can.
14 Let me engage in what I'd like to think
15 is a scholarly assessment and evaluation of 895.85.
16 You've heard a lot of people talk about what they
17 think it is. But I think that if we examine it
18 using the rules of statutory construction and
19 examining the common law which existed prior to
20 895.85 and since, you're going to see, if you
21 haven't already concluded, that the attempt by the
22 defendants here to make this into an intentional
23 tort statute is badly misplaced.
24 In fact, what they're intending to do is
25 to have the disregard of rights conduct mean the

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1 same as malicious, because malicious conduct is
2 defined as an intent to injure with ill will. And
3 they suggest that "disregard of rights" means the
4 same thing. At best it makes the intentional
5 disregard of rights superfluous.
6 So let's examine, does the statute afford
7 two categories of conduct? The answer is "yes".
8 It has malicious conduct and it has intentional
9 disregard of rights conduct. Now, in the common
10 law, the other -- second category was described as
11 conscious, wanton, willful, reckless disregard of
12 plaintiff's rights. Often it was described as
13 conduct that was outrageous. And punitive damages
14 was a way to express the state's interest not only
15 in punishment but in deterring repetition.
16 Now, let's look at some cases that
17 occurred before 1995 in which the Courts recognized
18 not one but two categories of conduct. Brown
19 versus Maxey, where Mr. Maxey's conduct or
20 Dr. Maxey's conduct was described as outrageous and
21 wanton, allowing the apartment project to
22 deteriorate in which a man was severely burned in a
23 fire.
24 The Court recognized that this wasn't an
25 intentional tort. And interestingly enough, the

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1 insurance company in that case tried to get the
2 Court to apply the expected or intended exclusion,
3 and the Court rejected that. Despite how
4 outrageous Dr. Maxey's conduct was, he did not
5 cross the line into intentional conduct,
6 recognizing the two categories.
7 HONORABLE FINE: In your view, if the
8 Brown case were tried today under 895 --
9 MR. HABUSH: It still would be found
10 intentional disregard, yes, in my view.
11 Dr. Maxey's conduct -- Yes. The answer to your
12 question is "yes," and let me just explain -- just
13 quickly. Dr. Maxey intended to disregard the
14 rights of who? Tenants. He did not intend that
15 there be a fire. He did not intend that someone
16 would burn up in the fire. But he did disregard
17 the rights. And although at that time the common
18 law said, "reckless," you bet. Under that case, it
19 would fulfill "intentional disregard," because
20 he -- Those were deliberate acts on his part not to
21 fix that apartment. Now --
22 HONORABLE FINE: Can I just segue off of
23 that with a hypothetical? If you don't mind.
24 MR. HABUSH: Sure.
25 HONORABLE FINE: We all have rights to be

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1 safe users of a highway. You're driving along,
2 let's say, on a highway with a 55-mile-an-hour
3 speed limit, and somebody intentionally drives at
4 80, weaving in and out. That person is, arguably,
5 intentionally disregarding the rights of other
6 drivers. If an accident results from that weaving
7 in and out, in your view, is punitive damages
8 permitted under 895.85?
9 MR. HABUSH: Possibly. Because it's
10 fact-driven, Judge. You'd have to look at the
11 facts of a case.
12 HONORABLE FINE: I just gave you the
13 facts.
14 MR. HABUSH: I understand. But add to
15 the facts that there was racing involved. Add to
16 the facts that it was in a congested street versus
17 a rural highway.
18 HONORABLE FINE: Normal fast-moving,
19 flowing traffic, no racing, just weaving in and out
20 because the yellow Corvette wants to get to the
21 exit faster than anybody else. No racing, just
22 weaving like they do all the time.
23 MR. HABUSH: Yes. It is possible under
24 those fact situations that a Court can determine an
25 intentional disregard of the rights of other

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1 drivers to a safe highway, that's where Boomsma was
2 wrong, and I'll get to that in a moment.
3 Sharp versus Case, a products liability
4 case. The group protected were product users, and
5 the Court found in that instance justification for
6 punitive damages. They didn't know who the product
7 user was going to be. They did not identify a
8 particular plaintiff, but identified a group. That
9 is, consumers or users of that product were
10 protected. And what did Case do? Disregarded the
11 rights of those product users.
12 Wangen versus Ford. Again, in that fact
13 situation, a products liability case, product users
14 were involved. In both Case and in Wangen, one
15 could find on those facts that there was
16 intentional disregard. They didn't have to in that
17 case because they had the reckless disregard
18 standard. But both of those corporations had the
19 hazard identified. They had notice of injury.
20 They had notice of problems. In one case, with a
21 power takeoff, in another case with the fuel
22 system. The court identified two separate
23 categories.
24 So what did 895.85(3) do? They retained
25 "malicious conduct," and in my view what they did.

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1 they took the language of the common law, "willful,
2 conscious and wanton" and codified it into one
3 word, "intentional," and they retained "disregard
4 of rights".
5 HONORABLE FINE: Did they retain "harm"?
6 MR. HABUSH: Good question. What is
7 harm?
8 HONORABLE FINE: I asked that of
9 Mr. Williamson earlier.
10 MR. HABUSH: Well, what is "harm"? Harm
11 is disregard of rights, is harm. Harm can also be
12 property rights. Harm can also be being defamed.
13 Harm can also be trespassing.
14 HONORABLE FINE: Well, defamed --
15 MR. HABUSH: Harm can also be bodily
16 injury.
17 HONORABLE FINE: Yeah. Defamed is an
18 injury.
19 MR. HABUSH: Correct. So the word "harm"
20 can encompass "disregard of rights." And when they
21 say -- the defendants say that I have only limited
22 myself to what's an intentional act, they're wrong.
23 HONORABLE FINE: All right. Just one
24 second, please. On my hypothetical, the yellow
25 Corvette weaves in and out, no accident. No

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1 accident. Has harm been created?
2 MR. HABUSH: Yes, but it didn't result in
3 an ultimate injury. So there was disregarding of
4 rights. There could have been -- For instance, let
5 me give you an example in our case to respond to
6 that. On nine prior lifts, there had been
7 disregard of safety and disregard of rights by
8 Mr. Grotlisch, and he and others were plain lucky
9 that nothing bad happened like happened on July 14.
10 There was a disregard of rights, but due to good
11 fortune, there was no ultimate harm.
12 So you have to look beyond the "disregard
13 of rights" when you're talking about what was
14 intended. As I said, Dr. Maxey did not intend the
15 fire to start and did not intend for someone
16 getting burned up. But nonetheless, he disregarded
17 rights. So did the word "intentional" raise the
18 bar? The answer is "yes". But the question is
19 "How far?" Was it raised an inch or was it raised
20 a foot?
21 It seems to me that what they did was
22 they removed the "ought to have known". They
23 removed "mistake" or "misjudgment". They removed
24 "omission". In other words, the difference between
25 before the common law and the statute now is there

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1 has to be an identification of a hazard, which
2 creates an unreasonable risk of harm, whatever that
3 harm might be, to somebody or some group, and
4 instead of doing nothing, there is a deliberate act
5 to proceed.
6 So you need -- There's a certain
7 deliberateness about the requirement now -- a
8 commission versus omission. It's a state of mind
9 almost in terms of subjective knowledge of the fact
10 that people are going to be put in harm's way, "but
11 I don't intend to kill anyone. I don't intend to
12 injure anyone, but I know darn well I'm putting
13 them in some unreasonable risk of harm." And
14 there's a difference.
15 Conduct is a continuum from negligence to
16 what used to be recklessness, what used to be
17 reckless -- intentional -- reckless disregard of
18 rights, what is now intentional disregard of
19 rights. And it's continuous conduct, and it's
20 fact-driven, and where each fact situation fits in
21 that continuum of conduct is going to depend on
22 each case.
23 HONORABLE FINE: Does the person have to
24 -- Do the defendants have to comprehend, either
25 objectively or subjectively, where harm is

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1 practically certain to occur?
2 MR. HABUSH: If you defined harm as
3 "intentional disregard of rights," yes. If you
4 define harm is that "I intend to bodily injure
5 someone or kill someone," no.
6 HONORABLE FINE: So under your
7 formulation of the statute, the defendant does not
8 have to, either objectively or subjectively, be
9 aware that his or her intentional act will be
10 practically certain to result in injury; is that
11 right?
12 MR. HABUSH: Oh, that's right.
13 HONORABLE FINE: Okay.
14 MR. HABUSH: Yes.
15 HONORABLE FINE: That person realizes it.
16 MR. HABUSH: Right. But they have to be
17 practically certain that disregard of rights is
18 going to occur. Okay? And I don't believe all the
19 case law, in the common law that occurred before or
20 since, requires a specific person to be identified.
21 You know what that would do, Judge? That would
22 knock out punitive damages in all products
23 liability cases. That's what it would do.
24 HONORABLE FINE: Maybe they intended
25 that.

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1 MR. HABUSH: If they intended that, they
2 should have said that, and they didn't. And if
3 they intended to -- If they wanted to eliminate
4 conduct other than malicious conduct, all they had
5 to do is chop out of that statute "intentional
6 disregard of rights". Just leave "malicious
7 conduct" in there. Or they could have said
8 "malicious conduct or intent to cause harm, and in
9 bodily injury cases, we mean intent to cause bodily
10 injury." They didn't. They could have, and they
11 didn't.
12 Now, a statute must be construed as --
13 must not be construed as changing the common law
14 unless such purpose is expressed therein by
15 unambiguous and preempting language. That's one
16 rule of construction. The legislature is presumed
17 to act with the knowledge of existing case law,
18 which defined in that case malicious conduct --
19 another rule of construction.
20 Construction resulting in any part of the
21 statute being superfluous should be avoided. And
22 with the defense interpretation, they make
23 "disregard of rights" superfluous because what
24 they're saying is that the statute now requires
25 "intent to injure" which is what? Malicious

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1 conduct.
2 HONORABLE FINE: Well, isn't there a
3 distinction between intent and malice? I could
4 intentionally do something that I'm practically
5 certain will result in injury without harboring ill
6 which towards the person.
7 MR. HABUSH: Well, if you intend to punch
8 me in the nose, I would have -- I would think that
9 that was a malicious act on your part.
10 HONORABLE FINE: It may or may not be.
11 MR. HABUSH: Really? Well, let's not put
12 it to the test.
13 HONORABLE FINE: You're stronger than I
14 am.
15 MR. HABUSH: Well, I doubt that. Let me
16 talk about the cases since, because they're
17 instructive. Okay? Since 1995. Allied Processing
18 versus Western National, which is a bad faith case,
19 but they found punitive damages. Dorr versus
20 Sacred Heart Hospital, which was the filing of a
21 lien on a settlement, but they found permissible
22 punitive damages. Trinity versus Tower, we've
23 talked about, but they found punitive damages.
24 Each one of those cases has recognized two
25 categories -- malicious or intentional. And let me

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1 just cite to one in particular, which I don't
2 particularly like the case for reasons which will
3 be obvious, but Boomsma.
4 In Boomsma, Judge Randa said -- And this
5 is the bodily injury case. "The plaintiffs do not
6 allege that either Star or Bennett acted
7 maliciously or with a purpose to injure the
8 decedents. Thus, if there's an argument to be made
9 for punitive damages, it must be that the defendant
10 acted with intentional disregard for the rights of
11 the plaintiffs." What could be clearer? What will
12 be clearer that he recognized two categories --
13 malicious or intentional disregard of rights.
14 Therefore, under the rules of statutory
15 construction, under the previous cases and under
16 the cases subsequent to '95, there have to be two
17 categories of conduct. Now, in none of the
18 cases -- In none of the cases since 1995 did any
19 insurer or defendant suggest that the actors had to
20 subjectively intend to harm, as you put the word,
21 harm or injure the plaintiffs. Now, they could
22 have. For instance --
23 HONORABLE FINE: It would be subjective
24 or objective.
25 MR. HABUSH: Or objective. It could be a

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1 reasonable certain. For instance, in Allied
2 Processor, there was no proof or requirement of
3 proof that the insurer knew there was -- wanted an
4 excess judgment against him -- that they wanted the
5 insured to suffer an excess judgment.
6 In Doer, there was no proof or
7 requirement that the actor wanted to injure the
8 plaintiff by the lien on the settlement. In
9 Trinity, there was no requirement that Tower
10 Insurance wanted the insureds to have to pay the
11 third-party action, but yet in each cases, they
12 disregarded the rights.
13 HONORABLE FINE: Would you say in
14 Loveridge, the young man disregarded the rights of
15 the young woman?
16 MR. HABUSH: Yes.
17 HONORABLE FINE: So under Loveridge,
18 under the new statute, there would be punitive
19 damage coverage?
20 MR. HABUSH: Yes. You can have
21 punitive -- You obviously --
22 HONORABLE FINE: But there wasn't
23 punitive damage coverage under the old law. So
24 you're saying that there's more coverage under the
25 new law than the old law?

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1 MR. HABUSH: No, I'm not. I'm saying
2 under the new law, there is no requirement that you
3 have to show that the actor intended bodily harm in
4 a bodily injury case or property right harm in a
5 property injury case because that makes the second
6 clause a nullity and superfluous, and the cases
7 have not said that.
8 HONORABLE FINE: No. I think you just
9 put your finger on the crux, because under your
10 reading of 895.85, there would be punitive damages
11 under Loveridge, but under the common law, there is
12 no punitive damages under Loveridge. Therefore, an
13 expansion of the scope of punitive damages rather
14 than a restriction of the scope of punitive
15 damages.
16 MR. HABUSH: I think that you still,
17 under the new statute -- under the statute as it
18 now codified the common law, you have to show
19 intentional disregard of someone's rights. Now,
20 that does not mean the sine qua non, that there was
21 intention to do bodily injury. Now, there are
22 cases -- the Pachucki case and the Rabie (phonetic)
23 case -- in which the courts have held as a matter
24 of law -- as a matter of law, "We will find intent
25 to injure." One was an armed robbery. I think

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1 that was the Rabie case. You know, a guy sitting
2 outside, his co-robber goes in and shoots a clerk,
3 the parents of the clerk sue the driver, and he
4 says, "I didn't want to -- I didn't mean to kill
5 anyone." They said, "Look. In a dangerous thing
6 like that, we're going to infer as a matter of law
7 --" and as a matter of fact, he pleaded guilty to
8 second degree murder in that case, and accomplice
9 to a crime.
10 The same in Pachucki. They're playing
11 with rubber bands and paper clips, and the guy
12 who's shooting the paper clip at the victim says,
13 "I intended to hit his body. I didn't intend to
14 blind him, but I intended to hit his body." And
15 the Court says, "We aren't going to excuse you
16 because you didn't intend to blind him, because the
17 -- You didn't anticipate the magnitude of the
18 crime, but nonetheless we're going to infer as a
19 matter of law."
20 In the K.A.T. case, this was a sexual
21 molestation case, they said the same thing. But
22 they also say, "These are very narrow circumstances
23 that a court should, as a matter of law, infer
24 intent to injure." And I'm talking about the
25 ultimate injury. I'm not talking about disregard

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1 of rights harm. I'm talking about behind that --
2 the ultimate injury that occurs.
3 As a civil jury injection, 17.7,
4 "Retained two categories of conduct?" "Answer:
5 Yes." "Has it defined intentional disregard of
6 rights to mean the same as malicious conduct?"
7 "Answer: No." "Has the jury instruction
8 interpreted plaintiff's rights to require
9 specifically target plaintiffs in punitive damage
10 cases?" "Answer: No." And I just discussed the
11 Pachucki case and the Rabie case.
12 Another case is the Beahm case versus
13 Pautsch, where a farmer started a fire. He was
14 found guilty of arson. There was smoke on the
15 highway. Cars got in accidents. People were
16 killed and injured. What did the Court say? This
17 is a fact-driven determination. "We cannot say as
18 a matter of law that he intended these people to
19 have accidents, that he intended these people to
20 get killed or injured." It's the same thing.
21 Now, Mitsubishi suggests that this was a
22 mere accident. They suggest that at most, it was
23 negligence. As a matter of fact, there's
24 inferences if not expressions of stipulation to the
25 fact they were negligent, both in final argument,

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1 And 895.85(3) is the only way the civil
2 justice system can give punitive damages in a
3 justifiable case. It's the only thing that we've
4 got going. The defense would have you say, "It's
5 only related now," as Judge Schudson observed, "for
6 criminal-type acts." That's nonsense. That isn't
7 what's happened since the statute was enacted.
8 Now, let's talk about the next meaty
9 subject, before I get into the other stuff, the
10 excessiveness issue, also known as the ratio
11 issue -- r-a-t-i-o -- ratio. Ratio -- not racial.
12 Let's just think for a moment. And this morning I
13 said, "You know, this case isn't about cranes.
14 This case is about conduct." And it's about
15 conduct in the face of tremendously obvious,
16 unequivocal, unambiguous excessive wind. We're
17 talking here about wind that was in excess of 20
18 miles an hour, 25 miles an hour, gusts up to 32
19 miles an hour, and the load chart on that crane
20 said. "Do not use this crane if it's over 20 miles
21 an hour." And Mitsubishi ignored the
22 manufacturer's specifications.
23 They abused that crane. They misused
24 that crane in -- That crane design -- It just
25 didn't fall down in absence of wind. It fell down

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1 because somebody made a decision that we had to go
2 ahead with a lift on a day that you had to be nuts
3 to do it. It was windy and it was dangerous.
4 Now, this wasn't a single act. This man
5 had a history of disregarding the rights of safety
6 in that place. And in our brief, we have
7 illustrated the things -- And they were similar.
8 These weren't dissimilar. They all involved
9 disregarding the rights of safe workplace and
10 disregarding the rights of workers. He was
11 intimidating. I was contemptuous. He got a guy
12 who complained about safety problems kicked off the
13 job. He was contemptuous by saying, "I hire guys
14 from the neck down."
15 Mr. Shapiro, who everyone recognized as
16 one of the finest crane experts in the country, if
17 not the world, said in his 30 years of -- involved
18 in crane safety, he has never seen a more callous
19 and unconscionable disregard of the rights of
20 workers.
21 HONORABLE FINE: Judge Amato overruled,
22 the objection to leading on that question, as I
23 recall.
24 MR. HABUSH: Leading? Me, leading?
25 Unimaginable. In any event, it's --

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1 HONORABLE FINE: It's priceless little
2 Q and A.
3 MR. HABUSH: Well, it was --
4 HONORABLE FINE: I tip my hat to you. I
5 say that with admiration, sir.
6 MR. HABUSH: I don't recall if it was an
7 objection to leading. I wouldn't be surprised.
8 HONORABLE FINE: Well, it was an
9 objection overruled. It was overruled.
10 MR. HABUSH: Was it? Okay. In any
11 event, I didn't need to have that leading question
12 in order -- The evidence leaks for itself.
13 Grotlisch, on the day, told one of the workers,
14 "We're going to fly this piece just to show the
15 media that workers aren't on strike." He lied to
16 the workers when he said the wind was dying down
17 and in the face of evidence from meteorologists,
18 from weather reports, from dozens of workers that
19 had the wind getting worse or at best not getting
20 better, he said the wind was just a light, light
21 wind.
22 HONORABLE FINE: What about their point
23 that if he thought that there was a danger, if he
24 thought he was disregarding rights, he would not
25 have put himself in harm's way?

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1 MR. HABUSH: I don't think he thought the
2 crane was going to go down, Judge. I thought he
3 thought he was going to luck out like he did on the
4 nine prior lifts. He was going to push the
5 envelope, but maybe I can -- snake eyes won't come
6 up this time. Of course snake eyes did come up
7 this time.
8 HONORABLE FINE: No. But snake eyes with
9 his own life at stake.
10 MR. HABUSH: Some guys are willing to
11 take risk for themselves. That doesn't mean they
12 have a right to take risk for other people. I
13 mean, if you want to be nuts, you can be nuts, but
14 that doesn't mean you have to involve other people.
15 And don't forget, these are workers. You know,
16 what are they going to do? Walk off the job? They
17 need this job to put bread on -- and food on the
18 table, and they were intimidated by this guy in the
19 past. And so they sucked it up, they went up, and,
20 of course, three guys paid with their lives. But,
21 you know, in addition to the deceit I've talked
22 about, do you think he learned his lessen? No.
23 The bodies were still laying there, the dust hadn't
24 settled, and he rushed off to his trailer to
25 destroy evidence. Then, a few days or a week

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1 later, on the new crane operator, he tried to push
2 him to increase the wind speed allowances.
3 Unrepentant. In your face. Does he need a
4 message? Does he need to be deterred? Oh, yeah.
5 I don't think there's any question about that.
6 Trinity and Campbell. Both of them
7 involved economic loss only, and I'm not minimizing
8 that, but the Court itself makes a distinction
9 between cases that involve physical injury and
10 cases that involve economic loss. The Court says,
11 "We've instructed courts determine the
12 reprehensibility of a defendant by considering
13 whether the harm was physical as opposed to
14 economic, the tortious conduct evinced in a
15 difference or reckless disregard of the health and
16 safety of others" -- Here we've got more than that.
17 We've got intentional disregard. "The target of
18 the conduct --
19 HONORABLE FINE: Which case is that?
20 MR. HABUSH: This is right from Campbell.
21 I'm quoting from Campbell.
22 HONORABLE FINE: Oh. I thought you were
23 quoting from Trinity, and --
24 MR. HABUSH: Well, I think they repeat.
25 HONORABLE FINE: They used reckless

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1 disregard there.
2 MR. HABUSH: Yeah. They used the word
3 there, but here we have "intentional disregard,"
4 but it's Campbell. "Financial vulnerability" --
5 the workers -- "the conduct involved repeated
6 actions rather than an isolated incident," which
7 we've got here. "The harm was a result of
8 intentional malice, trickery or deceit or mere
9 accident." We've got deceit.
10 So by any standard, including Trinity,
11 Justice Sykes in her dissent makes a point on the
12 fact that there was no physical injury involved
13 here. It was just economic harm. So although she
14 quarrels with the decision by the majority, she
15 does make that distinct notice that this wasn't a
16 case involving physical injury. Physical injury?
17 We've got three deaths here -- three deaths and
18 some injuries as well and substantial property
19 damage.
20 So the Court said, "We don't want to
21 apply ratios," and then they talk about ratios.
22 "We don't want to draw bright lines," and then they
23 draw a bright line. Are you obliged to follow what
24 they said then? No. You're obliged to do what you
25 think is right, what you think serves the State's

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1 interests without worrying about mathematical
2 formulas here.
3 HONORABLE FINE: Justice Thomas says the
4 Supreme Court was legislating for the states.
5 MR. HABUSH: I guess he was. I guess the
6 Court was. I agree with him.
7 HONORABLE FINE: Well, then don't we have
8 to follow what they say?
9 MR. HABUSH: No, you don't. No. You
10 don't, any more than the courts that have had the
11 cases remanded back to them don't follow -- have to
12 follow. One case was sent back -- I think the
13 Willow -- It was called Willow Inn versus Public
14 Service Corporation, U.S. Court of Appeals, Third
15 Circuit, May of 2003 -- a bad faith case. The
16 Judge just did the same thing again.
17 In the Valdez case, the Judge was ordered
18 to lower the punitive damages which were $5
19 billion, that's with a "B". He did. He lowered it
20 to $4 billion. So you are free to exercise what
21 you think is the interest of this State for
22 punishment and for deterrence wherever it fits.
23 And there are cases which need something more than
24 9:1, and this is such a case. This is such a case.
25 You are sitting as if you were, in

Page 133

1 effect, a jury. That's -- This is an unusual
2 situation. If someone says that emotion is
3 involved, moral indignation is involved, the need
4 of punishment is involved, the need of deterrence
5 is involved, and you three are the instrument of
6 that. And what you think is fair and right should
7 not be guided by 7:1. If you want to have Trinity
8 as 7:1, I look at it as a floor. Why? It's an
9 economic case. Okay. Now, anything more on that
10 before I go on? I've got a bunch of other stuff to
11 cover, and I'll try to cover it as fast as I can,
12 but I thought we needed to talk about these things.
13 Let me just take a whack at a couple
14 issues which you heard of from defendants this
15 afternoon. Loaned employ. This is probably the
16 most frivolous of all arguments made in this entire
17 case. Mitsubishi, in their brief, says, "Don, the
18 day of the accident, DCCI controlled Wischer,
19 DeGrave and Starr as well as Joe Edwards, the
20 operator of the crane, that lifted these men to
21 watch and help and direct the roof piece into
22 position."
23 In the case in chief, they admitted the
24 allegations in the complaint that these were DCCI
25 employees. They didn't raise as an affirmative

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1 later, on the new crane operator, he tried to push
2 him to increase the wind speed allowances.
3 Unrepentant. In your face. Does he need a
4 message? Does he need to be deterred? Oh, yeah.
5 I don't think there's any question about that.
6 Trinity and Campbell. Both of them
7 involved economic loss only, and I'm not minimizing
8 that, but the Court itself makes a distinction
9 between cases that involve physical injury and
10 cases that involve economic loss. The Court says,
11 "We've instructed courts determine the
12 reprehensibility of a defendant by considering
13 whether the harm was physical as opposed to
14 economic, the tortious conduct evinced in a
15 difference or reckless disregard of the health and
16 safety of others" -- Here we've got more than that.
17 We've got intentional disregard. "The target of
18 the conduct --
19 HONORABLE FINE: Which case is that?
20 MR. HABUSH: This is right from Campbell.
21 I'm quoting from Campbell.
22 HONORABLE FINE: Oh. I thought you were
23 quoting from Trinity, and --
24 MR. HABUSH: Well, I think they repeat.
25 HONORABLE FINE: They used reckless

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1 disregard there.
2 MR. HABUSH: Yeah. They used the word
3 there, but here we have "intentional disregard,"
4 but it's Campbell. "Financial vulnerability" --
5 the workers -- "the conduct involved repeated
6 actions rather than an isolated incident," which
7 we've got here. "The harm was a result of
8 intentional malice, trickery or deceit or mere
9 accident." We've got deceit.
10 So by any standard, including Trinity,
11 Justice Sykes in her dissent makes a point on the
12 fact that there was no physical injury involved
13 here. It was just economic harm. So although she
14 quarrels with the decision by the majority, she
15 does make that distinct notice that this wasn't a
16 case involving physical injury. Physical injury?
17 We've got three deaths here -- three deaths and
18 some injuries as well and substantial property
19 damage.
20 So the Court said, "We don't want to
21 apply ratios," and then they talk about ratios.
22 "We don't want to draw bright lines," and then they
23 draw a bright line. Are you obliged to follow what
24 they said then? No. You're obliged to do what you
25 think is right, what you think serves the State's

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1 interests without worrying about mathematical
2 formulas here.
3 HONORABLE FINE: Justice Thomas says the
4 Supreme Court was legislating for the states.
5 MR. HABUSH: I guess he was. I guess the
6 Court was. I agree with him.
7 HONORABLE FINE: Well, then don't we have
8 to follow what they say?
9 MR. HABUSH: No, you don't. No. You
10 don't, any more than the courts that have had the
11 cases remanded back to them don't follow -- have to
12 follow. One case was sent back -- I think the
13 Willow -- It was called Willow Inn versus Public
14 Service Corporation, U.S. Court of Appeals, Third
15 Circuit, May of 2003 -- a bad faith case. The
16 Judge just did the same thing again.
17 In the Valdez case, the Judge was ordered
18 to lower the punitive damages which were $5
19 billion, that's with a "B". He did. He lowered it
20 to $4 billion. So you are free to exercise what
21 you think is the interest of this State for
22 punishment and for deterrence wherever it fits.
23 And there are cases which need something more than
24 9:1, and this is such a case. This is such a case.
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7/27/01

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

PATRICIA WISCHER, et al.,

Plaintiffs,

vs.

Case No. 99-CV-006553

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., et al.,

Personal Injury, Other: 30107
Wrongful Death: 30105

Defendants.

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AGAINST FEDERAL INSURANCE COMPANY

I. COVERAGE IS PROVIDED UNDER THE INSURING AGREEMENT OF THE TRAVELERS AND FEDERAL POLICIES.

In their principal brief, the plaintiffs argued that the language of the Insuring Agreement of the Travelers policy that was incorporated into the Federal policy is broad enough to provide coverage for punitive damages, and that coverage is provided under the Insuring Agreement because the decedents' fatal bodily injuries were caused by an "occurrence," as that term in defined in the Travelers policy. In its response brief, Federal does not oppose these arguments and, thus, Federal must be deemed to have agreed with them. Accordingly, the plaintiffs have met their burden to prove that there is coverage under the coverage provisions of the Federal and Travelers policies.

Federal contends that the Insuring Agreement does not cover the damages the plaintiffs seek from Federal because that agreement is limited by Federal's $50 million policy limit and that limit cannot be implicated since, under the terms of the plaintiffs' settlement agreement with Indemnity Insurance Company of North America ("IINA"), MHIA is only liable for a maximum of $10 million in punitive damages. The argument that MHIA is only liable for a maximum of $10 million in punitive damages was made by Federal in March 2001 in support of Federal's motion to dismiss the plaintiffs' second amended complaint. In an April 20 hearing on that motion, the court rejected this argument. The court should reject the argument again.

First, Federal ignores the judgment that this court entered in favor of the plaintiffs and against MHIA, pursuant to which MHIA is now liable to the plaintiffs for $77 million. Second, Federal's assertion that MHIA has a $10 million maximum liability for punitive damages is erroneous and is

regarding Wayne Noel's observation of winds, not Grotlisch's observation. In any event, this testimony supports the jury's finding that MHIA acted in an intentional disregard of the decedents' rights, but it does not show that bodily injury to the decedents was substantially certain to result from MHIA's acts.

None of Grotlish's testimony on which Federal relies shows that there was a substantial certainty that bodily injury would occur. Moreover, these few pieces of testimony cannot be viewed in isolation. Other portions of Grotlisch's testimony must be considered. Grotlisch testified that at about 4:45 p.m. on July 14, 1999, he had a discussion with Allan Watts about the fact that there were no problems with the lift, and it was decided that Grotlisch would go up to the track beam girder where the roof piece would be set, and that at the time of the collapse, Grotlisch was close to the elevator getting ready to go up to the track beam. (Tr. 11/8/00, p. 65, 67-68, 71, 72) The fact that Grotlisch was in the zone of danger indicates that he could not have believed that there was a substantial certainty that injury would occur. Also, he acknowledged that because of the size and shape of the roof piece, a 15 mph wind might make the lift unsafe, but this did not cause him concern. (Tr. 11/8/00, p. 75-76)

In addition to Grotlisch's testimony, Federal attempts to rely on the testimony of Howard Shapiro, who testified that the conduct of MHIA was the most callous and outrageous disregard of workers' safety that he had ever experienced where someone was injured or killed, and he likened it to playing Russian Roulette with someone else's life. This testimony simply supports the jury's finding that MHIA acted in an intentional disregard of the decedents' rights, but it does not show that bodily injury to the decedents was substantially certain to result from MHIA's conduct. The expression "playing Russian Roulette" is merely a figure of speech. It denotes the taking of a chance; it does not quantify the degree of certainty of injury. Thus, Mr. Shapiro's use of that expression in characterizing MHIA's conduct actually underscores the <u>lack</u> of certainty of bodily injury, not the opposite.

Finally, Federal relies on the following testimony of William Keefe:

> Q And is it -- In your opinion, sir, is it reasonably certain that on July 14th, 1999, in the face of the hazardous wind conditions, that intentionally preceding with that -- that lift on that day was reasonably certain to result in some injury or death to somebody?
>
> MR. WEBER: Object to form.
>
> THE COURT: Overruled. You can answer.

Dated at Milwaukee, Wisconsin this 27th day of July, 2001.

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7/17/01

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

PATRICIA WISCHER, et al.,

Plaintiffs,

vs.

Case No. 99-CV-006553

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., et al.,

Personal Injury, Other: 30107
Wrongful Death: 30105

Defendants.

PLAINTIFFS' BRIEF IN OPPOSITION TO FEDERAL INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Federal Insurance Company ("Federal") has moved for summary judgment on the ground that its policy does not cover the damages for which the jury found Mitsubishi Heavy Industries America, Inc. ("MHIA") liable to the plaintiffs. The plaintiffs request the court to deny Federal's motion and to grant the plaintiffs' motion for summary judgment against Federal.

ARGUMENT

I. THE "PROFESSIONAL SERVICES" EXCLUSION DOES NOT APPLY.

Federal contends that MHIA's liability was the result of its rendering of and/or failure to render "professional services" and, therefore, coverage is excluded by the "professional services" exclusion. Federal's arguments must be rejected.

Federal has failed to show how or why the "professional services" exclusion is applicable to a contractor such as MHIA. As explained on pages 37-40 of the plaintiffs' brief in support of their motion for summary judgment, Federal's policy contains an "additional insured" endorsement that clearly indicates that the policy was intended to provide coverage to contractors like MHIA and that only engineers, architects and surveyors were intended to be deprived of coverage for damages arising out of "professional services." Therefore, the professional services exclusion does not apply to MHIA.

does not explain how the MHIA employees' acts were of such a nature that bodily injury was substantially certain to result from those acts. Therefore, Federal has not established the foundation which would be necessary for the court to infer that the MHIA employees intended to cause bodily injury to the decedents.

"A court may infer intent to injure as a matter of law only in narrow circumstances." Loveridge v. Chartier, 161 Wis.2d 150, 170, 468 N.W.2d 146 (1991). The circumstances in which the courts have inferred an intent to injure are indeed narrow. E.g., N.N. v. Moraine Mutual Ins. Co., 153 Wis.2d 84, 450 N.W.2d 445 (1990) (insured sexually assaulted a 9-year old girl and pleaded guilty to first degree sexual assault); K.A.G. v. Stanford, supra (insured sexually molested a 6-year old girl); Raby v. Moe, supra (insured participated in an armed robbery); Smith v. Keller, 151 Wis.2d 264, 444 N.W.2d 396 (Ct.App. 1989) (insured hit another person in the face with a closed fist); Schwersenska v. American Fam. Mut. Ins. Co., 206 Wis.2d 549, 557 N.W.2d 469 (Ct.App. 1996) (insured conspired with a friend to scare their adversaries with a semi-automatic rifle). This case is not a case in which the facts would permit the court to infer that the insured intended to cause bodily injury. Attempting to liken MHIA's conduct to a sexual assault of a child or hitting someone in the face or using a weapon is preposterous.

In support of its contention that the court should infer that MHIA intended to cause bodily injury to the decedents, Federal relies on small portions of the testimony of three individuals. None of this testimony, however, is sufficient, by itself or in combination, to establish that the MHIA's employees acts on July 14, 1999 were substantially certain to result in bodily injury. The testimony is not even sufficient to create an issue of fact on the matter.

Federal relies on the testimony of Victor Grotlisch. In particular, Federal claims that Grotlisch testified that he was reasonably certain that if wind load calculations were not being done with respect to a roof piece the size of 4R3, "there was a probability that a tragedy would occur." (Emphasis supplied) (Federal's brief, p. 12) These were not Grotlisch's words, however. They were Robert Habush's words framed in a question to which Grotlisch agreed. Also, Federal has misstated the words. Federal uses the word "would" when the actual word was "could." (Tr. 10/23/00, p. 48-49) By finding it necessary to fabricate Grotlisch's testimony by changing a word, Federal has admitted

that the actual testimony is insufficient to support an inference of intent to cause bodily injury. Moreover, the mere statement of a "probability" that a tragedy could occur does not amount to a showing that there was a "substantial certainty" of bodily injury, because it does not state the degree of probability. Federal also relies on Grolisch's testimony that "if he observed winds" in excess of 20 miles per hour, it would be a conscious disregard of the safety of the workers to fail to bring this fact to someone's attention. (Federal's brief, p. 12) Again, these are not Grotlisch's words. Grotlisch was responding to Mr. Habush's question regarding Wayne Noel's observation of winds, not Grotlisch's observation. In any event, this testimony supports the jury's finding that MHIA acted in an intentional disregard of the decedents' rights, but it does not show that bodily injury to the decedents was substantially certain to result from MHIA's acts or omissions.

None of Grotlish's testimony on which Federal relies establishes that there was a substantial certainty that bodily injury would occur. Moreover, these few pieces of testimony cannot be viewed in isolation from the rest of Grotlisch's testimony. Other portions of his testimony must be considered. Grotlisch testified that at about 4:45 p.m. on July 14, 1999, he had a discussion with Allan Watts about the fact that there were no problems with the lift, and it was decided that Grotlisch would go up to the track beam girder where the roof piece would be set, and that at the time of the collapse, Grotlisch was close to the elevator getting ready to go up to the track beam. (Tr. 11/8/00, p. 65, 67-68, 71, 72) The fact that Grotlisch was in the zone of danger indicates that he could not have believed that there was a substantial certainty that injury would occur. Also, he acknowledged that because of the size and shape of the roof piece, a 15 mph wind might make the lift unsafe, but this did not cause him concern. (Tr. 11/8/00, p. 75-76)

In addition to Grotlisch's testimony, Federal attempts to rely on the testimony of Howard Shapiro, who testified that the conduct of MHIA was the most callous and outrageous disregard of workers' safety that he had ever experienced where someone was injured or killed, and he likened it to playing Russian Roulette with someone else's life. This testimony simply supports the jury's finding that MHIA acted in an intentional disregard of the decedents' rights, but it does not show that bodily injury to the decedents was substantially certain to result from MHIA's conduct. The expression

action for damages caused by negligence, because the plaintiffs sought compensatory damages, as well as punitive damages, that were caused by negligence.

CONCLUSION

In a last desperate attempt to escape financial responsibility for the conduct of MHIA's employees, and despite the failure of all the insurers to exclude punitive damages from coverage, Federal tries to convert the "expected or intended injury" exclusion into a punitive damages exclusion, which would have the effect of excluding even compensatory damages. Federal further tries to escape responsibility by urging the application of the "professional services" exclusion and the "employer's liability" exclusion. All of these Houdini-type efforts fly in the face of the fact that three insurers paid the plaintiffs $19,375,000 for compensatory damages and one of those insurers paid $7,625,000 toward punitive damages, without being concerned about these so-called coverage defenses. When one adds to the foregoing the fact that at no time did Federal attempt to assert its presently-held views prior to, during, or immediately after, trial, the disingenuousness of its efforts becomes clear.

The plaintiffs request the court to deny Federal's summary judgment motion and to grant summary judgment to the plaintiffs against Federal, determining as a matter of law that Federal's policy provides coverage to MHIA for the damages awarded to the plaintiffs.

Dated at Milwaukee, Wisconsin this 17th day of July, 2001.

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7/2/01

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

PATRICIA WISCHER, et al.,

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MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., et al.,

Personal Injury, Other: 30107
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PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AGAINST FEDERAL INSURANCE COMPANY

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punitive damages and the matters that the jurors were requested to consider.

As the court is aware, Wis. Stat. §895.85(3) defines the standard of conduct for punitive damages, and it permits a plaintiff to receive punitive damages if the plaintiff shows that the defendant either (1) "acted maliciously toward the plaintiff" or (2) acted "in an intentional disregard of the rights of the plaintiff." The plaintiffs made it very clear before trial that they were not claiming that MHIA acted maliciously. The plaintiffs only claimed that MHIA acted in an intentional disregard of the decedents' rights, and the case was submitted to the jury on that theory.

The special verdict contained the following question: "Did the defendant Mitsubishi Heavy Industries America, Inc. act in an intentional disregard of the decedents' rights?" The jury answered this question "yes." The "expected or intended injury" exclusion only applies when the insured acted intentionally **and** the insured intended some bodily injury to follow from that act. In answering the special verdict question, the jury only found that the MHIA employees acted in an intentional disregard of the decedents' rights; the jury did not find that the MHIA employees intended some bodily injury to follow from their acts. Therefore, contrary to Federal's position, the jury finding does not result in rendering the "expected or intended injury" exclusion applicable.

Both the punitive damages statute and the special verdict question speak in terms of "intentional disregard of rights." The "expected or intended injury" exclusion, however, requires proof of intent to cause bodily injury. The two concepts are not equivalent. Intending a disregard of rights is not equivalent to intending bodily injury, which is necessary in order for the "expected or intended injury" exclusion to apply. Thus, the jury's finding as to punitive damages does not support the conclusion, as claimed by Federal, that coverage for those damages is excluded.

c. The record is devoid of any evidence that MHIA intended bodily injury to the decedents.

The record is devoid of any evidence that any MHIA employee, subjectively or objectively, intended bodily injury to the decedents on July 14, 1999. This is demonstrated not only by the evidence in the record, but also by the conduct of all of the litigants based on that evidence.

(1) The plaintiffs and MHIA both contended that there was no intent to cause bodily injury to anyone.

The plaintiffs have never contended that MHIA employees intended to cause bodily injury to the decedents, and, throughout this litigation, MHIA has taken the position that the crane collapse was an accident and there was no intent to cause bodily injury. Prior to trial, MHIA brought a motion for summary judgment on the punitive damages claims asserting:

> [T]wo facts have become well-established:
>
> - No one acted on July 14, 1999 with malice toward Jeff Wischer, William DeGrave or Jerry Starr; and
> - No one acted on July 14, 1999 with the subjective awareness that Lampson's Big Blue crane was substantially certain to fall over and thereby harm Jeffrey Wischer, William DeGrave or Jerry Starr.
>
> * * *
>
> No MHIA employee was subjectively aware that Messrs. Wischer, DeGrave or Starr was virtually sure to be injured by Lampson's Big Blue falling over. (Exhibit 10)

In opposition to this motion, the plaintiffs admitted there was no claim that MHIA acted maliciously toward the decedents and pointed out that under Wis. Stat. §895.85(3), the plaintiffs did not have to show that MHIA employees intended to injure the decedents, but only needed to show that MHIA employees acted in an intentional disregard of the decedents' rights. (Exhibit 11)

At the hearing regarding MHIA's motion for summary judgment on the punitive damage claim, MHIA's counsel, Ralph Weber, argued that the evidence showed that Victor Grotlisch and Wayne Noel were not aware that the crane was practically certain to tip over and cause the deaths of the decedents. (Transcript ("Tr.") 9/26/00, p.m., p. 34-35) Robert Habush, plaintiffs' counsel, conceded that there was no malicious act on the part of MHIA and asserted that under Wisconsin law, it was not necessary to show an intent to cause harm to the decedents. (Id. at 36)

On opening statement, plaintiffs' counsel told the jury that there was no claim that the MHIA employees intended any bodily injury:

> They [MHIA] will tell you I believe, and I agree, the evidence will not be that anyone at Mitsubishi intended to kill these three men. They did not. ... What they intended was to proceed with the lift in the face of hazardous wind conditions, and what they did was disregard the safety of the workplace and the rights of these deceased.

(Tr. 10/18/00, p. 35)

Counsel for MHIA similarly told the jury on opening statement that the crane disaster was an accident and there was no intent to operate unsafely or to have an accident:

> But to suggest to you, ladies and gentlemen, that Mitsubishi or anyone else out there was attempting to operate recklessly, unsafely, to put their own lives in danger of being seriously injured or killed by this accident, I don't believe that to be true. I believe the evidence will establish this was an accident. There was no intent to have an accident. Quite the contrary. Intent was to operate as safely as we could.

(Tr. 10/18/00, p. 96)

During the trial, when plaintiffs' counsel asked the court to rule that the plaintiffs had established a prima facie case regarding punitive damages, MHIA's counsel again told the court that there was no showing the MHIA employees were practically certain the crane would fall and cause the death of the workers:

> Your Honor, there has to be a showing that the individuals, the individual employees of Mitsubishi, particularly Wayne Noel and Victor Grotlisch, were practically certain on July 14 that Big Blue was certain to fall, tip over, and cause the death of these individuals.
>
> The evidence brought forth to this date is exactly to the opposite.

(Tr. 10/30/00, p. 252-253)

Counsel for MHIA reiterated the same argument in making a motion to dismiss at the close of the plaintiffs' case, claiming that there was no showing that Noel and Grotlisch had a subjective awareness that the crane was practically certain to fail and the decedents were going to be injured.

(Tr. 10/31/00, p. 86-87)

In closing argument, both plaintiffs' and MHIA's counsel commented that the evidence did not show that MHIA employees intended to cause bodily injury. Plaintiffs' counsel stated:

> I believe the evidence has shown to you that there was intentional disregard of the rights of the three deceased ironworkers. The intentional part is easy. They intended to do the lift. They made the decision to do the lift. It was an intentional decision. They didn't stumble into it. It was an intentional decision in the face of hazards and obvious wind conditions, and in doing so, they ignored, they disregarded the rights of those three men . . .
>
> * * *
>
> We don't have to prove that Victor Grotlisch intended to kill these guys. This is not a criminal case. We don't have to prove that they knew for sure that the crane was going to go down.

(Tr. 11/28/00, p. 65-66)

Counsel for MHIA argued in closing argument:

> I suggest with respect to punitive damages, ladies and gentlemen, this was an accident. There was no intent to operate unsafely out there. To the exact opposite, we were attempting to operate safely.

(Tr. 11/28/00, p. 166)

Finally, in motions after verdict, counsel for MHIA argued: "[T]he evidence does not show that MHIA was subjectively aware that Messrs. Wischer, DeGrave or Starr were practically certain to be injured by lifting 4R3 on July 14." (Exhibit 17)

Thus, throughout this litigation, both the plaintiffs and MHIA, based on the evidence, agreed that there was no evidence of intent to cause bodily injury to the decedents.

(2) There is no evidence that bodily injury to the decedents was intended by MHIA employees.

To support its contention that the "expected or intended injury" exclusion is applicable, Federal must prove that the MHIA employees intended to cause bodily injury to the decedents. Federal bears the middle burden of proof with respect this contention.

In Macherey v. Home Insurance Co., 184 Wis.2d 1, 15-17, 515 N.W.2d 434 (Ct.App. 1994), the court held that the trial court properly instructed the jury that the insurer bore the middle burden of proof with respect to its claim that the incident at issue fell within an intentional tort exclusion, because the claim involved proof of an act which would be considered criminal.

Wis. Stat. §940.01(1) provides that whoever causes the death of another human being with intent to kill that person is guilty of a Class A felony. Wis. Stat. §940.19(1) provides that whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without consent is guilty of a Class A misdemeanor. Thus, the conduct which Federal claims MHIA committed would be considered criminal. Accordingly, Federal must meet the middle burden of proof. In order for the "expected or intended injury" exclusion to be applicable, Federal must submit evidence that is clear, satisfactory and convincing that the MHIA employees intended to cause bodily injury to the decedents. Federal will be unable to meet this burden.

Nowhere in the record is there any evidence that the MHIA employees subjectively intended to cause bodily injury to the decedents. Therefore, Federal will be unable to put forward any evidence showing a subjective intent on the part of any MHIA employee to cause bodily injury to the decedents. In addition to the fact that there can be no showing of any such subjective intent on the part of any MHIA employee, Federal cannot show that any injury to the decedents was substantially certain to occur from the MHIA employees' acts. Therefore, Federal will be unable to establish, from an objective point of view, that any MHIA employee intended to cause bodily injury to the decedents. Under the facts of this case, there is really no distinction between a subjective analysis of intent and an objective analysis, because there is nothing about the subjective point of view as demonstrated in the record which is inconsistent with what a reasonable person might have anticipated would occur.

Although there was ample evidence to show that MHIA's acts in proceeding with the roof lift under hazardous conditions constituted an intentional disregard of the decedents' rights, as the jury found, there is no evidence to permit a reasonable jury to conclude that the MHIA employees intended to cause bodily injury to the decedents or that they knew or should have known that bodily injury to the decedents was substantially certain to follow from their acts. Because Federal will not be able to prove that the MHIA employees intended to cause bodily injury to the decedents, the court must hold as a matter of law that the "expected or intended injury" exclusion does not apply.

C. The Decedents Were Not Employed by MHIA, So the "Employer's Liability" Exclusion Does Not Apply.

Another exclusion appearing in the Travelers policy on which Federal attempts to rely is the "employer's liability" exclusion. Federal claims that the exclusion applies because the decedents were employees of MHIA at the time of the accident. That exclusion states in part:

> This insurance does not apply to:
>
> * * *
>
> e. Employer's Liability
>
> "Bodily injury" to:
>
> (1) An employee of the insured arising out of and in the course of:

pages 32-33 of this brief, is particularly instructive on this point.

The plaintiffs do not believe that any acts of MHIA that resulted in bodily injury to the decedents were "professional services." However, even if it could be concluded that the failure to perform wind sail calculations played a part in causing the bodily injuries and that this failure was the failure to render "professional services," this conclusion could not lead to a determination of no coverage unless Federal could prove that the jury considered this failure to be the sole cause of the bodily injuries. Federal will not be able to meet that burden, however, since it is well established from the evidence that the principal and most proximate cause of the bodily injuries was MHIA's decision to proceed with the roof lift in the face of excessive winds. It cannot be determined as a matter of law that the failure to perform wind sail calculations was the sole cause.

CONCLUSION

The plaintiffs respectfully request the court to grant summary judgment to the plaintiffs on their second amended complaint against Federal, determining as a matter of law that Federal's policy provides coverage to MHIA for the damages awarded to the plaintiffs.

Dated at Milwaukee, Wisconsin this 2nd day of July, 2001.

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Wisconsin Briefs from the Legislative Reference Bureau

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TORTS AND DAMAGES: THE CIVIL JUSTICE REFORM ISSUE

I. INTRODUCTION

The continuing debate over revising the civil justice system, sometimes called "tort reform", is again the focus of legislative attention. Among the reasons for heightened interest in the issue, both in Wisconsin and the rest of the nation, is the persistent rise in the size of medical malpractice damage awards and the escalating effect they have on the cost of malpractice insurance premiums and on health care in general. Another reason is the widespread publicity given to large damage awards won in seemingly frivolous lawsuits. A third contributing factor is the recent electoral gains of the of the Republican Party, which has generally supported changes in the civil legal system.

While some groups, such as insurance companies, doctors, manufacturers and other businesses, see a need for significant reform in the civil justice ground rules, many others, such as trial lawyers, labor unions and advocates for consumers and the financially disadvantaged, disagree. They assert that the system is generally working well and believe that little, if any, change is warranted. This brief examines key elements of the tort reform issue and presents commonly expressed arguments for and against various proposed modifications in the civil justice system.

What is a Tort? A tort is a wrongful act or omission, constituting negligence, that results in identifiable harm to a person and for which relief may be obtained in a court of law, typically in the form of monetary damages. Negligence may be the failure to do what a reasonably prudent person would ordinarily have done to prevent foreseeable harm to another under the circumstances. It can also be the doing of a careless, reckless or intentionally malicious act that a prudent and reasonable person would not have done. Essentially, the negligence standard seeks to punish abnormal or inappropriate behavior that harms others. Torts can take the form of causing actual physical or psychological injuries; violating a business relationship by fraud, libel or slander; or any other negligent act or nonact which causes economic losses to another. A tort claim is a civil action in contrast to a criminal action for which the penalty can include imprisonment.

Prepared by Daniel F. Ritsche, Research Analyst

Purpose of a Tort Action. In general, a tort claim seeks redress by relying on the civil justice system to assign fault and, as much as practicable, to make an injured or wronged person "whole" again by forcing the guilty party ("tort-feasor") to pay for the harmed person's present and future medical expenses, income reduction or other tangible or intangible losses. While money alone is often inadequate to compensate a person for the severe pain and suffering resulting from physical or mental injuries or loss of reputation, it is the chief tool available to the civil court. The system is also designed to punish wrongdoing and provide warnings in hopes of preventing future similar unacceptable behavior.

Types of Damage Awards. Money can be awarded to successful plaintiffs in civil suits in the form of three basic types of damages — economic, noneconomic and punitive damages. **Economic damages** include compensation for the actual and estimated costs of present and future medical care, loss of income or earnings capacity, harm to reputation, and damage to or loss of property. **Noneconomic damages** can include awards for so-called "pain and suffering"; mental distress; worry or emotional anguish of the injured individual; embarrassment or humiliation; loss of enjoyment of the normal activities, benefits and pleasures of life; loss of well-being or bodily functions; and the loss of consortium, companionship, and affection suffered by the family of a person who is severely injured or dies as a result of a tortious act. **Punitive damages** may be awarded to the victim but are intended to serve as punishment to the party at fault and to deter similar future wrongdoing by the guilty party and others.

II. ISSUES AND ARGUMENTS

Medical Malpractice. Health care costs consume an increasingly larger share of national wealth each year, rising at a significantly faster pace than the general rate of inflation. It is argued that the escalation of health care costs is partly attributable to patients and their families trying to affix blame for unsatisfactory outcomes and to excessively large "pain and suffering" and punitive damage awards.

Tort reform advocates assert that doctors often resort to practicing so-called "defensive medicine" in order to avoid lawsuits. They may order unnecessary tests, medical interventions of dubious merit and prolonged hospital stays in order to prove later, if called into court, that everything possible was done to diagnose and treat a patient. Such procedures, in some cases performed against a physician's better judgment, may drive up the expense of health care for all.

Noneconomic and punitive damages make up increasingly large proportions of medical malpractice awards. The right of an injured individual to seek compensation for actual and quantifiable economic damages is generally not disputed. Similarly, most people agree that an injured person or surviving family members deserve fair compensation for the pain and

anguish caused by crippling injury or the death of a loved one. Tort reform advocates generally do not propose placing restrictions on awards for actual economic costs but believe some caps on difficult-to-calculate losses, such as "pain and suffering", are appropriate. They also assert that there should be reasonable limits on punitive damages. Critics of restrictions counter that malpractice caps will hamper the ability of juries to punish negligent doctors and adequately compensate victims for the diminished length and quality of life.

The cost of medical malpractice insurance premiums (currently estimated at between 1% and 3% of a physician's expenses) is a small but growing portion of the health care budget. However, those supporting caps argue that the accelerating cost of insurance, especially in certain high risk medical specialties, is prompting many doctors to retire and may discourage replacements. A prime example cited is obstetrics. Parents are apt to sue the doctor who delivered the baby if there are medical complications, particularly in cases of life-long handicaps. It is argued that statutory caps on the size of punitive damages will help control medical costs by stabilizing malpractice insurance premiums. Opponents claim, however, the prospect of damage awards provides a strong financial incentive for medical providers to practice within acceptable standards of care. Both sides admit the medical malpractice system is imperfect. Some deserving victims never get into court, while some parties file false claims. The process itself may be slow, costly and sometimes unjust.

Although several states have instituted caps on noneconomic awards, such as "pain and suffering" and punitive damages, there are currently no limits in Wisconsin on these types of damages. (1985 Wisconsin Act 340 placed a $1 million cap on noneconomic damages for claims filed after June 14, 1986, but that provision sunset on January 1, 1991.)

Some states limit the amount of time a patient has to bring suit, either as calculated from the date on which the alleged malpractice occurred or from the date the injury was discovered. In Wisconsin, for example, medical malpractice actions must be filed within three years of the date of the injury or one year from the date the injury was discovered or with reasonable diligence should have been discovered. However, no action may be commenced more than five years from the date of the negligent act or omission. This statute of limitations was upheld as a legitimate exercise of legislative discretion by the Wisconsin Third District Court of Appeals in *Miller v. Kretz* on February 7, 1995. Although many other tort actions have more lenient grace periods for filing claims, the court ruled that the limitation was not a denial of the constitutional guarantee of equal protection under the law because the legislature had a rational reason to enact it. The court noted: "Because of the distinct nature of medical malpractice claims, the costs involved and the insurance issues, distinguishing health care providers in medical malpractice claims is reasonable."

Excessive Damage Awards. As discussed previously, awards for noneconomic and punitive damages have increased greatly in size and frequently appear to be out of proportion to the actual economic losses. Critics point to the recent case in which a jury awarded almost $3 million to an elderly woman burned by a cup of McDonald's coffee. She sustained the burns when she attempted to pry the top off the cup while holding it between her legs as she was riding in a car. The judge later reduced the award to $640,000.

Some juries have arbitrarily set punitive awards so high as to call into question whether they may violate the prohibition of the U.S. Constitution against the imposition of excessive fines. In a land title dispute several years ago, a West Virginia jury imposed a $10 million punitive sanction against a gas and oil company — 526 times the $19,000 actually lost.

Some argue that punitive damages should not be paid in full to the harmed individual. Rather, since their purpose is to punish wrongdoers and promote public safety, such awards should accrue, in whole or part, to the public treasury.

Contributory and Comparative Negligence. The tort system is based on fault and the principle that whoever caused an injury should pay the costs resulting from the irresponsible behavior or negligence. This means that, in general, compensation is based on the percentage of the blame assigned to each individual involved. If one tort-feasor is responsible for the whole incident, then he or she pays all of the costs. Multiple tort-feasors share the costs based on their portion of the fault. Finally, the total costs to be paid to the injured victim are reduced by any percentage of fault attributed to the injured individual. For example, if A and B are involved in an automobile accident in which B is 85% at fault and the total damages awarded to A in a civil trial are $100,000, then the damages B will be required to pay will be reduced by $15,000, leaving A with a total award of $85,000. Under the doctrine of comparative negligence, recovery is barred unless the defendant's negligence was greater than the plaintiff's on the theory that if a person is more than 50% at fault for an accident, the other party involved should not be liable.

Joint and Several Liability. In cases in which more than one party is found to be at fault, theoretically all are supposed to pay a portion of the total cost of the damages based upon their allotted share of the blame. However, if one or more of the persons at fault are unable to pay all or part of their share, the burden to pay is shifted to the tort-feasors who do have sufficient financial resources, those with so-called "deep pockets". The result of joint and several liability is that a person who is found to be as little as 1% at fault could wind up paying 100% of the judgment if the other guilty parties are indigent. Some jurisdictions permit a person who is forced to pay more than his or her rightful share of the award to bring a civil action against the parties who were initially unable to pay, but the person with "deep pockets" may never be fully compensated by the less well-off defendants.

Proponents of the joint and several liability doctrine claim that justice requires that an injured or wronged person who suffers harm due to the negligence of others should receive compensation for pain and income losses, regardless of which defendant pays. They also argue that it spreads tort costs over the broad range of society in instances where awards are covered by liability insurance. Opponents assert joint and several liability should be altered so that a defendant found guilty should only have to pay his or her fair share of the damages based on the proportion of the fault assigned.

Contingency Fees. Because some of those injured are reluctant to file suit due to their inability to afford legal fees, attorneys often agree to take cases that have some merit in return for a percentage of any damage awards recovered. Such contingency fees are commonly set at one-third of the award but sometimes range up to one-half in particularly risky or complicated actions. Contingency fee arrangements may ensure that less affluent persons with legitimate complaints have access to the courts, but critics charge that the system encourages too many claims that are unlikely to prevail on their own merits. While some assert that lawyers will decline cases in which the chances of winning are small, others argue that attorneys may gamble on these weaker cases in hopes that defendants will settle out of court in order to avoid the high costs of litigation.

1985 Wisconsin Act 340 created Section 655.013, Wisconsin Statutes, which limits the amount of contingency fees that attorneys may collect in medical malpractice cases. In general, lawyers working on such a basis in claims against health care providers may collect one-third of the first $1 million recovered and 20% of any payment above that amount. Attorney fees are limited to 25% of the first $1 million if the case is settled within 180 days of filing the claim and at least 60 days before the first scheduled day of trial.

Product Liability. Manufacturers have a duty to produce products that are not defective or inherently unsafe. However, tort reform advocates claim that companies should not be held liable for products that meet government or accepted industry safety standards when they are made. They also say that manufacturers should not be liable if safety equipment is removed or if instructions are disregarded and the product is used incorrectly. They further argue that retail stores and dealers should not be responsible for selling defective equipment which they believed to be safe.

Reform proponents claim that product innovation is discouraged because of the propensity of people to sue for injuries that could have been prevented with a little common sense. Companies, such as pharmaceutical manufacturers, may even hesitate to undertake development and marketing if their liabilities may outrun product income. A case in point occurred at Abbott Laboratories in 1993 when it discontinued testing of an experimental vaccine to pre-

vent the transmission of the HIV virus from infected mothers to their children. The company voiced worries that the cost of potential liability lawsuits outweighed any anticipated profits.

There are notable cases where defective product design has made an item blatantly unsafe — a prominent example being the Ford Pinto automobile which exhibited a tendency for gas tank explosions in rear-end collisions. But there are also many examples of products, thought to be safe when initially marketed, that later were judged to have been manufactured or used negligently. In some cases where the products have been widely distributed, numerous plaintiffs may join in a class-action lawsuit, which can drive companies into bankruptcy. Well-known examples include the damages awarded against the manufacturers of asbestos products, silicone breast implants and Dalkon Shield intrauterine contraceptive devices. In many instances of alleged defective products, the maker will often settle out of court, without admitting guilt, to avoid the considerable legal costs and negative publicity resulting from a trial. In February 1995, for example, the Kellogg Company agreed to pay $2,400 in damages to a man who insisted the company's Pop-Tarts were to blame for a fire in his toaster which caused damage to his kitchen. Products are sometimes recalled for repair or replacement in order to forestall public relations disasters, but out-of-court settlements that bar plaintiffs from discussing their claims may mean the public at large is not warned about unsafe products.

Frivolous Suits. Some say that a prime contributor to the clogged state of the civil court system is the large number of suits of dubious merit filed for purposes of harassment, extortion or intimidation or because plaintiffs mistakenly believe that their frivolous claims are legitimate. One example was a girl in Maryland who sued her school for $1.5 million for injuries sustained playing on the football team on the grounds that no one told her of the risks involved. Some file relatively groundless suits in hopes that a sympathetic jury will side with them or that a wealthy defendant will settle out of court to avoid the costs and embarrassment of a public trial. Alleged personal injuries are an ample source of frivolous lawsuits because of the difficulty of proving or disproving pain in soft tissues, such as backaches, headaches or allergic reactions to alleged contaminants.

While there are remedies available to combat overburdening the justice system, judges are reluctant to sanction frivolous petitioners for fear of discouraging people from seeking just redress from the courts. Section 814.025, Wisconsin Statutes, permits judges to penalize those filing lawsuits found to be frivolous, either during the proceedings or upon judgment, by awarding the successful party court costs and reasonable attorney fees. To impose punishment for a groundless action, the judge must find that the suit was commenced in bad faith solely for the purposes of harassing or maliciously injuring another or that the plaintiff or the plaintiff's lawyer knew, or should have known, that the action was without any reasonable basis in law or equity and could not be supported by a good faith argument for modification

or reversal of existing law. The Wisconsin Court of Appeals ruled in *Minniecheske v. Griesbach*, 161 Wis. 2d 743 (1991), that restricting access to the courts as a sanction for frivolous actions was acceptable if narrowly tailored to balance the interests of public access to the courts against the citizens' right not to have frivolous litigation draining public resources.

III. PROPOSALS FOR REFORM

There continues to be considerable disagreement about whether radical tort reform is justified. Some claim that the so-called "litigation explosion" has been overblown and that altering the system will make it less responsive and accessible to the people who rely on it for redress of wrongs. They assert that the number of lawsuits and size of awards are not increasing as rapidly as in the recent past and that the system is working as intended to compensate harmed individuals, punish wrongdoers and promote safe products and practices. They also assert that the size and type of damage awards should be left up to the common sense and compassion of ordinary citizens serving on juries and that an arbitrary limit may not adequately compensate some severely harmed victims.

Federal Legislation. The U.S. Congress is currently considering the "Common Sense Legal Reform Act". Its stated purpose is to discourage frivolous lawsuits and limit excessive and "outrageous" punitive damage awards. The proposed act requires the losers of many federal lawsuits to pay the winner's legal fees, preempts state laws with federal standards, caps punitive damage awards for defective product claims, and requires that courts sanction attorneys for "improper actions and frivolous arguments".

Illinois Legislation. A bill passed by the Illinois House of Representatives in February 1995 would limit noneconomic damage awards, such as for "pain and suffering", to $500,000, an amount that would increase with inflation. It would cap punitive damage awards at three times the amount of actual economic damages and eliminate the concept of joint and several liability. The proposal would also give protection to manufacturers in product liability cases by creating a legal presumption that a product is considered safe if it met state or federal safety standards at the time it was made.

Wisconsin Legislation. The Wisconsin Legislature has enacted a number of limitations on liability over the years. Among them are exemptions for recreational land use (the "berry picker" law), aid and comfort to injured persons (the "Good Samaritan" law), donated food to charitable organizations, and ski patrol duties. In order to be exempt from liability claims, the actions must have been taken in good faith, and reckless negligence or failure to warn someone of a known hazard are not excused.

The 1995 Legislature is currently considering several bills relating to the subject of tort reform. 1995 Assembly Bill 36, which passed the assembly on February 2, 1995, would establish

a limit of $350,000 on the amount of noneconomic damages that a claimant may recover due to an injury caused by the negligence of a health care provider. Noneconomic damages are defined under this measure to include items such as pain and suffering, embarrassment, mental distress, and loss of society and companionship. The bill also limits medical malpractice damages related to loss of society and companionship as the result of a death to a maximum recovery of $150,000, the amount currently established for other civil actions involving death.

1995 Senate Bill 11 proposes significant changes in the areas of comparative negligence in general and in the principle of joint and several liability with respect to punitive damages. The proposal would change the rules of comparative and contributory negligence so that the negligence of the plaintiff, if any, would be measured separately against each of the joint tort-feasors. A tort-feasor's liability and share of the total damage award would be limited to the percentage of the total causal negligence attributed to that party. The doctrine of joint and several liability would be abolished in the area of punitive damages, meaning that a defendant would be responsible for only his or her allotted share of the punitive damages, even if the other parties at fault were unable to pay their assigned portion. In addition, evidence of a defendant's wealth, an indicator of ability to pay, would not be admissible until after the plaintiff had established a legally sufficient case for the allowance of punitive damages.

Continuing Debate Over Tort Reform. Even if all the currently proposed modifications at the state and federal level are enacted, questions of tort reform will persist. Like many other areas of the law, this ongoing debate will center around fair and equal justice and will involve a delicate balance between the rights of wronged or injured individuals and the costs to society as a whole.

State of Wisconsin
1995 – 1996 LEGISLATURE

LRBa0421/1
RPN:kmg:km

SENATE AMENDMENT 4,

TO SENATE SUBSTITUTE AMENDMENT 1,

TO 1995 SENATE BILL 11

March 1, 1995 – Offered by Senator ADELMAN.

At the locations indicated, amend the substitute amendment as follows:

1. Page 2, line 22: substitute "reckless" for "an intentional".

(END)

LRBa0421

1995 DRAFTING REQUEST

Senate Amendment (SA-SSA(LRBs0035/2)-SB11)

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STATE OF WISCONSIN
IN THE SUPREME COURT

Patricia Wischer, individually, and as Special Administrator of the Estate of Jeffrey A. Wischer, deceased, Marjorie DeGrave, individually, and as Special Administrator of the Estate of William R. DeGrave, deceased, and Ramona Dulde-Starr, individually, and as Special Administrator of the Estate of Jerome W. Starr, deceased;
Plaintiffs-Intervenors-Respondents-Petitioners,

v.

Mitsubishi Heavy Industries America, Inc.,
Defendant-Appellant,

The Travelers Indemnity Company of Illinois,
Defendant,

Neil F. Lampson, Inc.,
Defendant-Respondent,

Lampson International Ltd., Federal Insurance Company, and The Tokio Marine & Fire Insurance Company,
Defendants.

Case No. 01-0724
(consolidated with Case Nos. 01-1031 and 01-2486)

REVIEW OF A DECISION OF THE
COURT OF APPEALS, DISTRICT I
DATED SEPTEMBER 30, 2003

RESPONSE BRIEF OF FEDERAL INSURANCE COMPANY, INC. AND THE TOKIO MARINE & FIRE INSURANCE COMPANY

Patricia Wischer, individually, and as Special Administrator of the Estate of Jeffrey A. Wischer, deceased, Marjorie DeGrave, individually, and as Special Administrator of the Estate of William R. DeGrave, deceased, and Ramona Dulde-Starr, individually, and as Special Administrator of the Estate of Jerome W. Starr, deceased;

Plaintiffs-Respondents-Cross-Respondents-Petitioners,

v.

Mitsubishi Heavy Industries America, Inc.,

Defendant-Respondent-Cross-Appellant,

The Travelers Indemnity Company of Illinois,

Defendant-Appellant-Petitioner,

Neil F. Lampson, Inc. and Lampson International, Ltd.,

Defendants,

Federal Insurance Company,

Defendant-Co-Appellant,

The Tokio Marine & Fire Insurance Company,

Defendant.

Case No. 01-1031 (consolidated with Case Nos. 01-0724 and 01-2486

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Plaintiffs-Respondents-Cross-Respondents-Petitioners,

v.

Mitsubishi Heavy Industries America, Inc.,

Defendant-Respondent-Cross-Appellant,

The Travelers Indemnity Company of Illinois,

Defendant-Appellant-Cross-Respondent,

Neil F. Lampson, Inc. and Lampson International Ltd.,

Defendants,

Federal Insurance Company, and The Tokio Marine & Fire Insurance Company,

Defendants-Respondents-Cross-Appellants.

Case No. 01-2486 (consolidated with Case Nos. 01-0724 and 01-1031

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STATEMENT OF ISSUE PRESENTED

In accepting review of this case, this Court has limited review to the following single issue:

> What proof is required for a plaintiff to recover punitive damages under the phrase "in an intentional disregard of the rights of the plaintiff" as provided in Wis. Stat. § 895.85(3)?

Federal Insurance Company, Inc. ("Federal") and Tokio Fire & Marine Insurance Company[1] contend and the Court of Appeals held that in a personal injury suit in the absence of malice, punitive damages may be awarded if the plaintiff proves that the defendant acted with a purpose to cause injury or is aware that his/her acts are practically certain to cause injury.

Patricia Wischer, Marjorie DeGrave and Ramona-Dulde-Starr ("the Wischer Plaintiffs") contend that punitive damages in a personal injury suit may be awarded if the plaintiff proves that the defendant is aware that his/her acts are practically certain to result in the disregard of a right of plaintiff to a safe workplace, separate from the conduct causing the injury.[2]

---

[1] For the purpose of brevity, throughout this brief "Federal" will be used.

[2] The phrases "practically certain" and "substantially certain" appear throughout Wisconsin punitive damages case law (and elsewhere). This brief will use the term "practically certain" throughout except when quoting from a source using the phrase "substantially certain." However, it appears to

STATEMENT OF THE CASE

I. NATURE OF THE CASE

While this case began with the tragic collapse of the crane known as "Big Blue" on July 14, 1999, the nature of this case as accepted for review by the Wisconsin Supreme Court is limited. The nature of the controversy before the Supreme Court is to determine the meaning of Wis. Stat. § 895.85(3).

II. STATEMENT OF FACTS

Because the Supreme Court has significantly narrowed the issue for review, the relevant facts are also limited.

A. The Facts Regarding The Probability Of The Injury Suffered By Plaintiffs.

Federal adopts the statement of facts recited by MHIA and adds only the following. The Wischer Plaintiffs have repeatedly conceded, and the trial court held, that MHIA's conduct was not practically certain to cause the injuries upon which this action is predicated. The Wischer Plaintiffs stated:

> There is no evidence to permit a reasonable jury to conclude that the MHIA employees intended to cause bodily injury to the decedents, or that they knew or should have known that bodily injury to the decedents was substantially certain to follow.

Federal that the two phrases have the same meaning in application and should be viewed as interchangeable in the case law.

R.886, Plaintiffs' Brief In Opposition to Summary Judgment, p. 21.

The Trial Court independently reached the same conclusion. The Trial Court initially ruled that there was a "high probability of physical injury and/or death." R.732, Transcript at 256-257. In subsequent rulings, and upon the urging of the Wischer Plaintiffs, the Trial Court clarified that it had specifically found intent of any kind missing: "There has never been anything in this record that the conduct on behalf of Mitsubishi or its employees, Mr. Grotlisch, or anyone else was intentional." R.985, Transcript at 19-20; "…there was never any evidence to indicate that Mitsubishi or anyone else intended to cause injury" R.985 Transcript at 20-21.

For purposes of the analysis of the sole issue accepted it is conceded by all that MHIA was not aware that its conduct was practically certain to cause injury.

B. The Facts Regarding The Settlement Agreement Entered During Trial.

As will be analyzed later, the development of this case has been dramatically impacted by the existence of several settlement agreements entered before and during the trial. The key settlement agreement was entered on November 7, 2000 between the Wischer Plaintiffs and MHIA - the alleged "wrongdoers"; Mitsubishi Heavy Industries, LTD; Neil F.

Lampson, Inc.; and Lampson International, LTD. and Indemnity Insurance Company of North America ("IINA Agreement"). (R.513, App. 5-13) On November 7, 2000, the underlying trial was still in progress. (R.738) Indeed, the verdict would not be returned for more than three weeks. (R.754) The IINA Agreement was kept confidential. It would never be disclosed to the jury and was not disclosed to the Court until January 3, 2001. (R.513, App. 5-13)

Pursuant to the IINA Agreement, as executed on November 7, 2000, the Wischer Plaintiffs received an immediate payment of $12,375,000[3]. In exchange the Wischer Plaintiffs fully exculpated MHIA from responsibility for any punitive damages unless the punitive damages were not covered by insurance because of a policy exclusion or because of public policy. If so excluded, the Wischer Plaintiffs could recover a maximum of $10 million in punitive damages from MHIA. In other words, MHIA's potential punitive damage liability was absolutely capped at $10,000,000.

The IINA Agreement specifically recognized the absolute cap of $10,000,000, as follows:

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[3] As a result of payments under the IINA Agreement and two previously executed settlements, Plaintiffs received $19,325,000 as of November 7, 2000. Subsequently, IINA paid an additional $7,625,000, making the total amount paid to date $27,000,000. Pursuant to the agreements, those funds are not refundable regardless of the ultimate outcome of this appeal. (R.105, 145, 844) (R.513, App. 1-9)

> MHIA and MHI shall obtain a bond or letter of credit from a U.S. based company within 30 days from the date of this Release to secure and guarantee MHIA's potential $10 million maximum exposure to the plaintiffs.

R.513, App.8.

The upshot of the IINA Agreement is that for the Wischer Plaintiffs to collect the punitive damages before this Court, those damages must be not excluded from the contract of insurance issued by the defendant insurers. As will be discussed in detail below, this unique fact has a dramatic impact upon what proof and what arguments Plaintiffs could make during and after trial.

STANDARD OF REVIEW

The standard of review for the interpretation and application of Wis. Stat. § 895.85(3) to this matter is *de novo*. Ahrens v. Town of Fulton, 2002 WI 29, ¶15, 251 Wis.2d. 135, 641 N.W.2d 423. However, the finding of fact by the trial court that MHIA did not intend to cause injury, and therefore it was not a practical certainty that injury would result from the conduct of MHIA, is given deference and may only be overturned if clearly erroneous. Wis. Stat. § 805.17(2).

SUMMARY OF ARGUMENT

For the purposes of brevity and to spare the Court repetition, Federal joins in the arguments advanced by MHIA on why the Court of Appeals correctly interpreted Wis. Stat. § 895.85(3), holding that to support an award of punitive damages the defendant must be aware to a practical certainty that injury will result from his conduct. As thoroughly examined by MHIA, the well-settled definitions of the term "intentional" and the phrase "disregard of the rights of the plaintiff" in the common-law of punitive damages compel this result. We will address this initially for the purpose of supplementing but not supplanting MHIA's analysis.

Federal writes separately to highlight two issues. First, Federal will examine in detail why the interpretation of Wis. Stat. § 895.85(3) summarized by the Wischer Plaintiffs at page 34 of their brief simply cannot be correct. The implications of that interpretation are staggering. Such an interpretation would allow punitive damages in virtually all litigation, in direct contradiction to the clear intent of the Legislature, would violate precedent and would raise serious due process problems.

Second, Federal will highlight the unique posture created by the IINA Agreement. As will be explained below, the Wischer Plaintiffs were mindful of how they argued for punitive damages because they had released MHIA from those

punitive damages prior to submitting the case to the jury. The Wischer Plaintiffs could collect those damages only if the "intended and expected" exclusion in MHIA's insurance was not triggered.

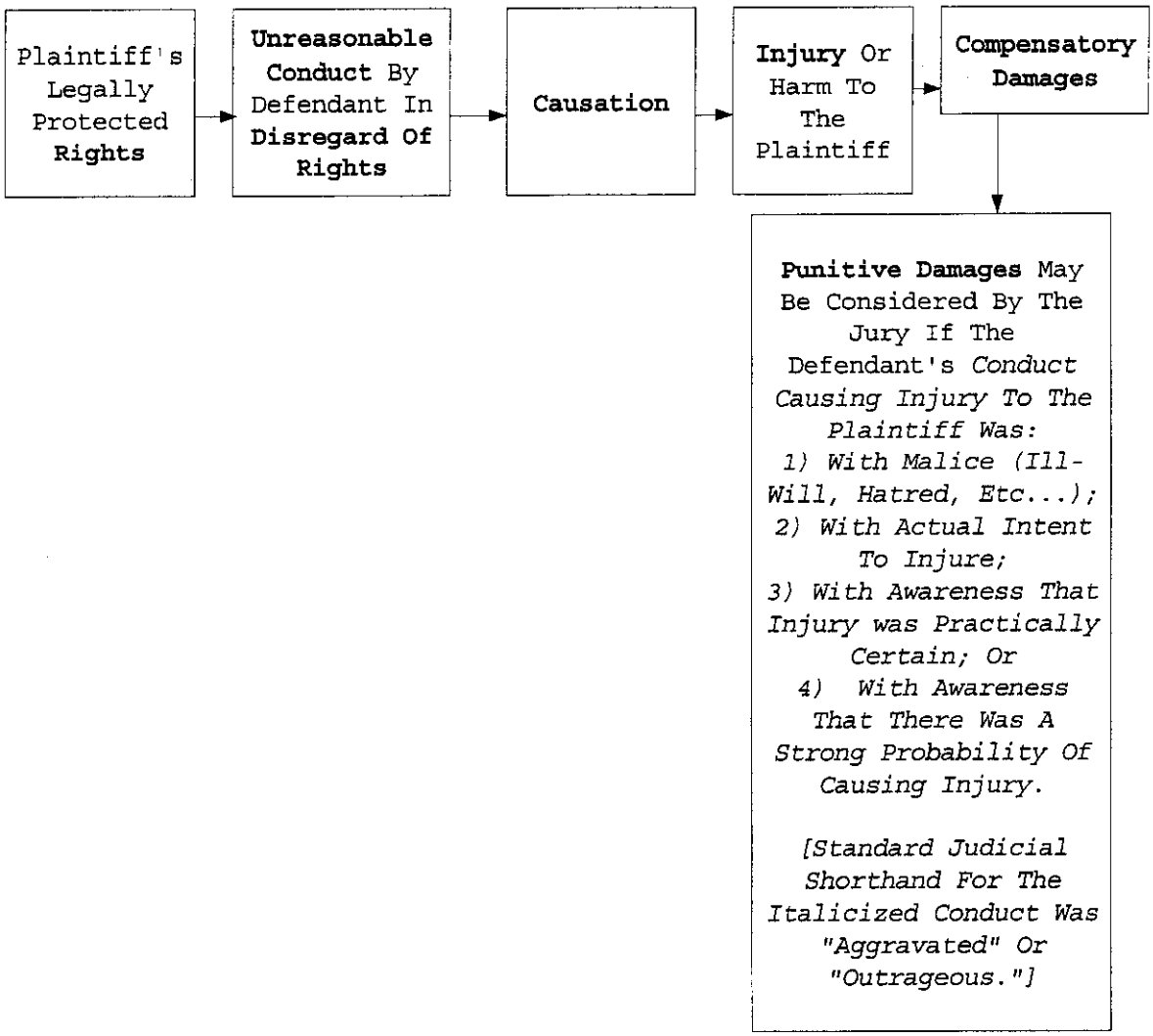
However, before turning to why the Wischer Plaintiffs' proposed interpretation of Wis. Stat. § 895.85(3) cannot be correct, it is important to emphasize how Plaintiffs' proposed interpretation differs from the pre-1995 common law of punitive damages and how it differs from the interpretation of Wis. Stat. § 895.85(3) adopted by the Court of Appeals.

ARGUMENT

I. UNDERSTANDING THE SINGLE CHANGE TO THE COMMON-LAW ADOPTED BY THE LEGISLATURE VERSUS THE RADICAL CHANGE EMBODIED IN PLAINTIFFS' PROPOSED INTERPRETATION OF WIS. STAT. § 895.85(3).

Prior to 1995, punitive damages were governed solely by the common-law in Wisconsin. That body of law, developed over a century is well described in Wis. JI-Civil 1707. The shorthand "outrageous conduct" allowed punitive damages if the plaintiff at least demonstrated a reckless disregard of rights, meaning a strong probability the injury or harm would occur. See Wis. JI-Civil 1707, Comment A. Pre-1995 punitive damages law can be easily charted as follows:

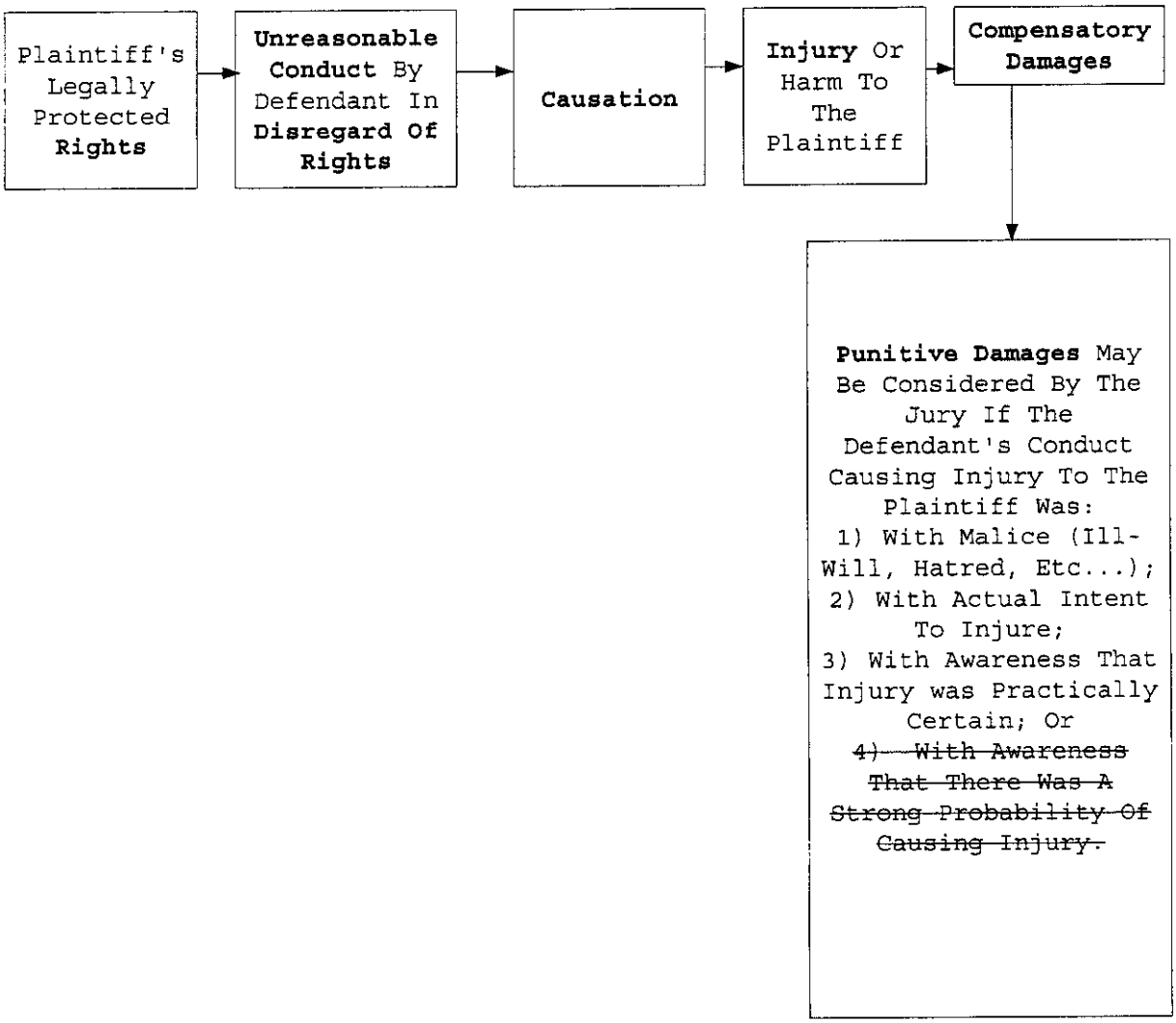
WISCONSIN PUNITIVE DAMAGES LAW PRIOR TO 1995
(Chart 1)



When the Wisconsin Legislature adopted Wis. Stat. § 895.85(3), it made a single and straightforward adjustment to the pre-1995 common-law of punitive damages. The Wisconsin Legislature removed recklessness—strong probability of injury—as a potential basis to support punitive damages. That is all. Charting this single and

straightforward change that the Legislature made yields the following chart:

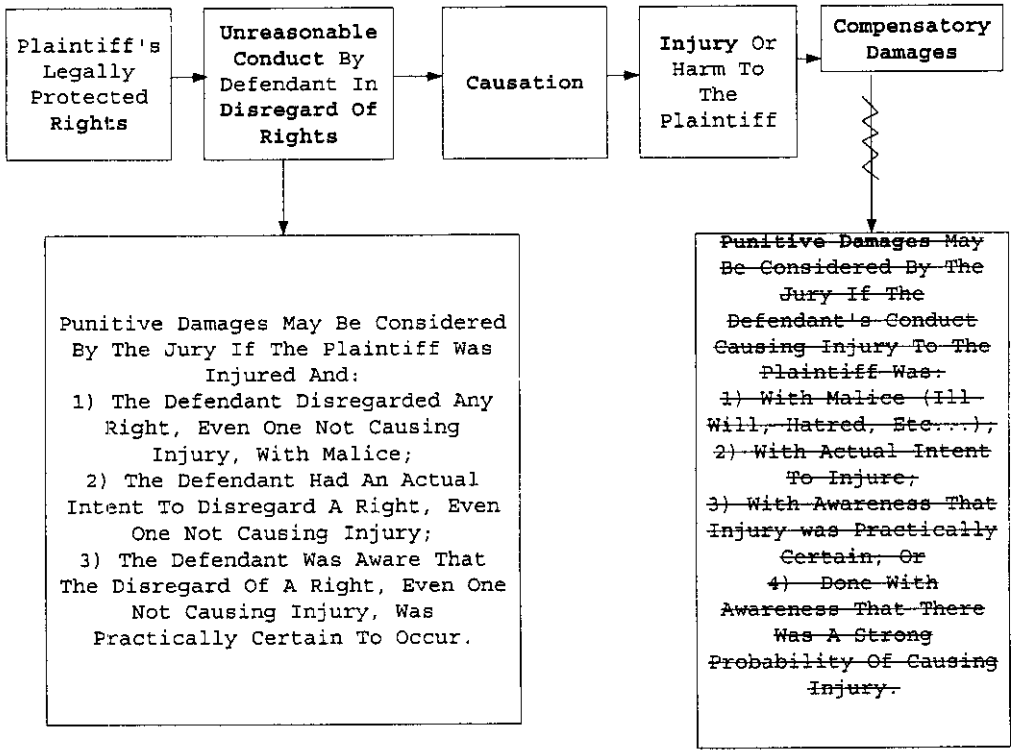
WISCONSIN PUNITIVE DAMAGES LAW POST-1995
(Showing the change from pre-1995)
(Chart 2)



The Wischer Plaintiffs' proposed interpretation of Wis. Stat. § 895.85(3) contends that something much more radical occurred in 1995. According to the Wischer Plaintiffs, punitive damages may now be awarded if a defendant was aware

his conduct was practically certain to disregard the rights of the plaintiff, even if the defendant was unaware that the "disregard" was practically certain to cause injury. The Wischer Plaintiffs emphatically argue that it is only the awareness of the disregard of the right (here, the right of safety) to which the standard of intent – practically certain – must be applied, not to the awareness of injury. Below is a chart of how, **IF** the Wischer Plaintiffs' proposed interpretation were adopted, Wis. Stat. § 895.85(3) changed the common-law of punitive damages in Wisconsin:

WISCONSIN PUNITIVE DAMAGES LAW POST-1995
ACCORDING TO PLAINTIFFS (Showing the change from pre-1995)
(Chart 3)



MHIA has presented extensive analysis demonstrating that Chart 1 is the appropriate understanding of the pre-1995 law of punitive damages and that Chart 2 is the appropriate understanding of the straight-forward change adopted by the Legislature. Federal adopts that analysis. The Wisconsin Legislature simply removed recklessness – strong probability – as a supporting standard, as exhibited in Chart 2.[4]

The Wischer Plaintiffs argue that Chart 3 is now the status of punitive damages law in Wisconsin and that the Wisconsin Legislature, in addition to removing recklessness as a standard for punitive damages, also changed the conduct to which the standard of "intentional" is applied. Plaintiffs argue that now the conduct to which the intentional standard must be applied is the disregard of a right (here, a right of safety), distinct from any conduct causing injury.

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[4] Charts 1, 2 and 3 are reproduced in the appendix to this brief on a single page and as separate full page versions. App. 1-4.

II. THE PROPOSED INTERPRETATION OF WIS. STAT. § 895.85(3) ADVANCED BY PLAINTIFFS CANNOT BE CORRECT.

A. In Direct Contradiction To Legislative Intent, The Wischer Plaintiffs' Proposed Interpretation Would Allow The Jury To Consider Punitive Damages In Virtually All Litigation.

It is undisputed that the legislature intended to narrow, not broaden, the law of punitive damages. Following the Wischer Plaintiffs' logic, almost any litigation could result in the award of punitive damages. Virtually all torts begin with an intentional disregard of the plaintiff's rights. In many, if not most automobile accident cases, the defendant intentionally disregarded the rights of fellow motorists to a safe highway. From talking on a cell phone, to adjusting the radio, to eating a sandwich, to driving 64 MPH in a 55-MPH zone, these are all intentional choices to disregard the right to safety of others. According to the Wischer Plaintiffs, if an injury results when one of these intentional choices to disregard the safety of others has been made, punitive damages may be awarded, even if the defendant was unaware that his intentional choice was practically certain to cause injury.

B. The Wischer Plaintiffs' Proposed Interpretation Violates Precedent.

Fleeing the scene of an accident (Kehl v. Economy Fire & Casualty Company, 147 Wis. 2d 531, 433 N.W.2d 279 Ct. App. 1988)) intentionally disregards the rights of the victims of

the accident. But punitive damages were not allowed. Marketing a dangerous pharmaceutical product (Collins v. Eli Lilly, Co., 116 Wis. 2d 166, 342, N.W.2d 37 (1984)) intentionally disregards the rights of consumers. But punitive damages were not allowed. Engaging in oral sex while infected with cold sores (Loveridge V. Chartier, 161 Wis. 2d 150, 187-88, 468 N.W.2d 146 (1969), intentionally disregards the rights of the plaintiff not to be exposed to disease. But punitive damages were not allowed. Consuming alcohol prior to driving, even if not to a level of legal intoxication (Lievrouw v. Roth, 157 Wis. 2d 332, 459 N.W.2d 850 (1990)) disregards the safety of other drivers on the road. But punitive damages were not allowed.

Under the interpretation urged by Plaintiffs, the conduct listed above and virtually all conscious acts would subject actors to punitive damages.

"The rule is well established in this state that a claim for punitive damages alone is not sufficient to support a cause of action. There must be a showing of some actual injury *which would justify an award of actual or compensatory damages* before punitive damages may be awarded." Tucker v. Marcus, 142 Wis. 2d 425, 440 (emphasis in original).

Stated alternatively, conduct constituting a disregard of "rights" divorced from conduct causing injury does not

justify an award of compensatory damages, let alone punitive damages. In this case, compensatory damages were awarded for conduct causing pain and suffering. Under Tucker, it is only from the conduct causing the injury, not from some separate violation of "rights," that any punitive damages must spring. Where "compensatory damages cannot be given...neither can punitive damages." 142 Wis. 2d at 440. If compensatory damages cannot be granted for a violation of rights divorced from the actual injury, than "neither can punitive damages." Id.

C. The Wischer Plaintiffs' Proposed Interpretation Violates Due Process.

The problems with the Wischer Plaintiffs' proposed interpretation do not end with merely ignoring established punitive damages caselaw. An approach to punitive damages that divorces "rights" from actual injury or harm also raises constitutional issues.

Due process requires that an award of punitive damages be premised upon the same conduct that caused the injury or harm and that the award must bear a reasonable relationship to the underlying award of compensatory damages. See State Farm Mutual Auto Ins. Co v. Campbell, 538 U.S. 408 (2003).

The Wischer Plaintiffs' contention that punitive damages can be premised upon the intentional disregard of the right of safety, distinct and different from the admittedly non-intentional conduct of MHIA in causing the

injury suffered simply cannot be squared with the following directive:

> A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.

State Farm Mutual Auto Ins. Co v. Campbell, 538 U.S. 408, 423.

Compensatory damages are not awarded for the disregard of the Plaintiffs' right to a safe work place. Compensatory damages are awarded to compensate for a specific loss, harm or injury. According to the Wischer Plaintiffs, punitive damages are now to be awarded for the abstract "disregard of rights." According to the Wischer Plaintiffs, knowing that injury or harm was practically certain is no longer the issue. Quite simply, that is not a constitutionally sufficient basis for an award of punitive damages, and literally begs the question of what "rights" are covered.

Further, the Wischer Plaintiffs' interpretation would make the constitutionally required balancing between the compensatory award and the punitive award impossible. The two awards would no longer spring from the same conduct. The actual injury itself becomes distinct from and irrelevant to the punishment, a proposition that flies in the face of the established due process jurisprudence. See Tucker v. Marcus, 142 Wis. 2d 425, 446 ("The general principle that punitive damages **must be supported by** 'actual

damages' requires that damages actually be awarded is further indicated by principles applied in determining the reasonableness of the amount of an award of punitive damages…")

D. The Wischer Plaintiffs Did Not (And Could Not) Base Their Demand For Punitive Damages Upon A Disregard Of Safety.

Finally, as a simple statutory and practical matter, the Wischer Plaintiffs did not bring and could not have maintained what they now assert exists. Claims that may be brought by the estate of the decedents are specifically delineated in Wis. Stat. § 895.01(1). "Under 895.01(1), causes of action for the recovery of 'damage to the person,' that is, personal injury actions, survive." Wangen v. Ford Motor Company, 97 Wis. 2d 260, 310, 294 N.W.2d 437 (1980). Wis. Stat. § 895.01(1) does not preserve an action based upon the violation of a right to safety. Indeed, had the Wischer Plaintiffs attempted to bring an action for "disregard of the right of safety," as they now claim exists, it would have been subject to dismissal pursuant Wis. Stat. § 895.01(1).

This reality is reflected in the Wischer Plaintiffs' Complaint. In their Complaint, punitive damages were sought under the following language, the "...reckless conduct of Mitsubishi was such as to subject it to punitive damages

incident to the damages for pain and suffering sustained...." R.81

III. THE WISCHER PLAINTIFFS' LEGAL INTERPRETATION WAS NECESSITATED BY THEIR STRATEGY TO SETTLE WITH THE ALLEGED WRONGDOERS DURING TRIAL.

A. Under The IINA Agreement MHIA Is Released From Punitive Damages And The Wischer Plaintiffs Can Only Collect If Punitive Damages Are Not Excluded From Coverage By MHIA's Insurance Policy.

The Wischer Plaintiffs can never collect the punitive damages the jury awarded in this case from the wrongdoer, MHIA. As noted above, during the trial, in return for an immediate and guaranteed payment of over $12 million from IINA (one of MHIA's insurers) Plaintiffs released MHIA from responsibility for any punitive damages in excess of $10 million. Moreover, the $10,000,000 in punitive damages may be collected from MHIA <u>only</u> if the punitive damages awarded are not covered by insurance for: (1) a policy exclusion, or (2) a public policy reason.

The Wischer Plaintiffs' election to link their ability to recover punitive damages in excess of $10,000,000 to avoiding an insurance policy exclusion impacts the legal issue this Court accepted for review.

B. If The Wischer Plaintiffs Had Argued Or Proven That MHIA Was Aware Injury Was Practically Certain To Result From MHIA's Conduct, Under The IINA Agreement They Would Be Unable To Collect These Punitive Damages.

The obvious and understandable question some members of this Court must have is this: why did The Wischer Plaintiffs concede that the alleged wrongdoers did not intend to cause the accident nor were aware that their conduct would cause the accident or injury?

To understand why this concession was made is to understand why the Wischer Plaintiffs now argue, and in fact must argue, that MHIA acted with a purpose to disregard the right of the Wischer Plaintiffs to a safe workplace. The answer: this is their only avenue to recover punitive damages.

As noted above, the Wischer Plaintiffs settled with the wrongdoers during trial for over $12 million, thus guaranteeing they would at least have in their pockets that amount regardless of how the jury verdict came out. But that put them on the horns of a dilemma. The settlement left only the insurance companies as targets for punitive damages. However, every insurance policy contained an exclusionary clause for expected or intended injuries. The expected or intended exclusion is triggered when the insured is aware that his conduct is "substantially certain" or "practically certain" to cause the injury in question.

Pachucki v. Republic Insurance Company, 89 Wis.2d 703, 711, 278 N.W.2d 898 (1979). Thus, proofs or arguments that MHIA was aware that the accident and injuries were substantially certain to follow from the lift were and are of no value to the Wischer Plaintiffs. A verdict so premised would trigger the policy exclusion—the expected and intended clause—and thus limit the Wischer Plaintiffs' recovery to $10,000,000.

Accordingly, the only way the Wischer Plaintiffs could recover punitive damages against the insurance companies was to avoid the exclusionary clause. They were forced to argue some legal theory other than that the defendants intended to cause injury.

Necessity is the mother of invention. And here, the Wischer Plaintiffs really invented. They invented a legal interpretation that avoided the exclusionary clause. Thus was born their theory that recovery could be premised on a disregard of the plaintiffs' right to a safe workplace. If the Court accepts that interpretation, then punitive damages could be collected. If not, there are no punitive damages available: the wrongdoer has settled, and the wrongdoer's insurance companies have an exclusion for intended or expected injury.

C. The Wischer Plaintiffs' Recovery Strategy Of Releasing The Wrongdoer During Trial And Foisting All Punitive Damages Directly Upon The Wrongdoer's Insurer Is No Basis Upon Which To Reinterpret The Phrase "Disregard Of Rights" To Mean Something Distinct and Separate From The Actual Injury Suffered.

The unique twist engineered by the Wischer Plaintiffs, to wit, linking insurability to collectability of punitive damage, directly impacts the specific legal question the Court has accepted for review[5]. In the normal trial in which punitive damages are sought, plaintiffs will elicit evidence and argue that a defendant was aware that his conduct was practically certain to cause injury. In the normal trial, the plaintiff has not previously capped the wrongdoer's exposure to punitive damages or agreed that a full collection of any award will come solely through a direct action against the wrongdoer's insurer. However, the normal dynamic of a trial involving punitive damages was absent here. It was replaced by a dynamic where the plaintiff could not and chose not to attempt to prove and did not argue anything that would trigger the expected or intended exclusion in the wrongdoer's insurance policy.

Further, for this unique strategy to succeed, a reinterpretation of the phrase "disregard of the rights" to

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[5] This "unique" approach also raises very serious constitutional, public policy, and statutory issues that are not before the court today.

mean something other than conduct causing injury is required. The Wischer Plaintiffs need to "thread the needle" created by the interplay of the IINA Agreement, Wis. Stat. § 895.85(3), and the expected or intended policy exclusion. Thus, the Wischer Plaintiffs submit:

> " . . . that, as proof which a court must consider in determining whether to submit the punitive damages issue to the jury, a plaintiff must show proof of an act or course of conduct that (1) is indifferent to a right of the plaintiff, whether it be a right to safety, health or life, a property right, the right to financial integrity, or some other right; (2) the conduct must demonstrate an appreciation of an attendant risk and intent to proceed with the conduct in the face of such risk; (3) the disregard of the risk and right must be deliberate and intentional; and (4) the character of the conduct must be sufficiently aggravated to cause the judicial observer to believe that punishment by punitive damages is warranted, without the necessity of having to prove intent, subjective or objective, to cause the consequences that ensue from the disregard of rights."

Plaintiffs' Brief at P. 34.

This novel and tortured interpretation arises not from legislation or case law, but as a result of a settlement agreement that exculpated the wrongdoer and as a result of the Wischer Plaintiffs' need to avoid triggering an insurance policy exclusion. The IINA Agreement should not be the basis for this Court to reinterpret punitive damages law in Wisconsin. The Wischer Plaintiffs' strategy rests upon severing awareness that a right may be disregarded from

awareness that disregarding that right is practically certain to cause injury. The Court should not adopt Plaintiffs' interpretation and thereby jettison precedent, run afoul of due process and increase the incidence of punitive damages directly contrary to the legislature's intent.

CONCLUSION

For all the forgoing reasons, this Court should uphold the result reached in the Court of Appeals.

Dated this 11 day of June, 2004.

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I hereby certify that this reply brief conforms to the rules contained in § 809.19(8) (b) and (c) for a brief produced with a monospaced font. The length of this brief is 22 pages.

Dated this 11th day of June, 2004.

By: _____
Christopher C. Mohrman

STATE OF WISCONSIN
IN THE SUPREME COURT

Patricia Wischer, individually, and as Special Administrator of the Estate of Jeffrey A. Wischer, deceased, Marjorie DeGrave, individually, and as Special Administrator of the Estate of William R. DeGrave, deceased, and Ramona Dulde-Starr, individually, and as Special Administrator of the Estate of Jerome W. Starr, deceased;
Plaintiffs-Intervenors-Respondents-Petitioners,

v.

Mitsubishi Heavy Industries America, Inc.,
Defendant-Appellant,

The Travelers Indemnity Company of Illinois,
Defendant,

Neil F. Lampson, Inc.,
Defendant-Respondent,

Lampson International Ltd., Federal Insurance Company, and The Tokio Marine & Fire Insurance Company,
Defendants.

Case No. 01-0724
(consolidated with Case Nos. 01-1031 and 01-2486)

REVIEW OF A DECISION OF THE
COURT OF APPEALS, DISTRICT I
DATED SEPTEMBER 30, 2003

APPENDIX TO
RESPONSE BRIEF OF FEDERAL INSURANCE COMPANY, INC.
AND THE TOKIO MARINE & FIRE INSURANCE COMPANY

Patricia Wischer, individually, and as Special Administrator of the Estate of Jeffrey A. Wischer, deceased, Marjorie DeGrave, individually, and as Special Administrator of the Estate of William R. DeGrave, deceased, and Ramona Dulde-Starr, individually, and as Special Administrator of the Estate of Jerome W. Starr, deceased;
Plaintiffs-Respondents-Cross-Respondents-Petitioners,

v.
Mitsubishi Heavy Industries America, Inc.,
Defendant-Respondent-Cross-Appellant,

The Travelers Indemnity Company of Illinois,
Defendant-Appellant-Petitioner,

Neil F. Lampson, Inc. and Lampson International, Ltd.,
Defendants,

Federal Insurance Company,
Defendant-Co-Appellant,

The Tokio Marine & Fire Insurance Company,
Defendant.

Case No. 01-1031 (consolidated with Case Nos. 01-0724 and 01-2486

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v.

Mitsubishi Heavy Industries America, Inc.,

Defendant-Respondent-Cross-Appellant,

The Travelers Indemnity Company of Illinois,

Defendant-Appellant-Cross-Respondent,

Neil F. Lampson, Inc. and Lampson International Ltd.,

Defendants,

Federal Insurance Company, and The Tokio Marine & Fire Insurance Company,

Defendants-Respondents-Cross-Appellants.

Case No. 01-2486 (consolidated with Case Nos. 01-0724 and 01-1031

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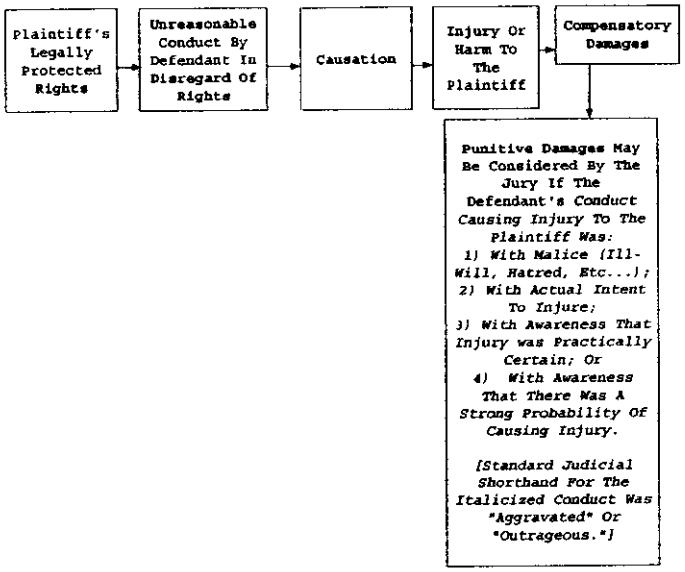
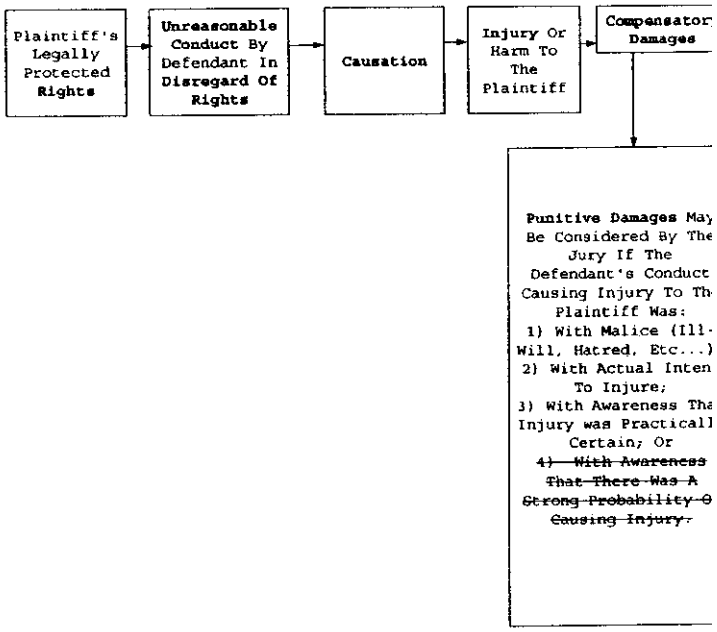
Chart 3 From Federal's Response Brief ..... App. 004

IINA Agreement ..... App. 005 - 013

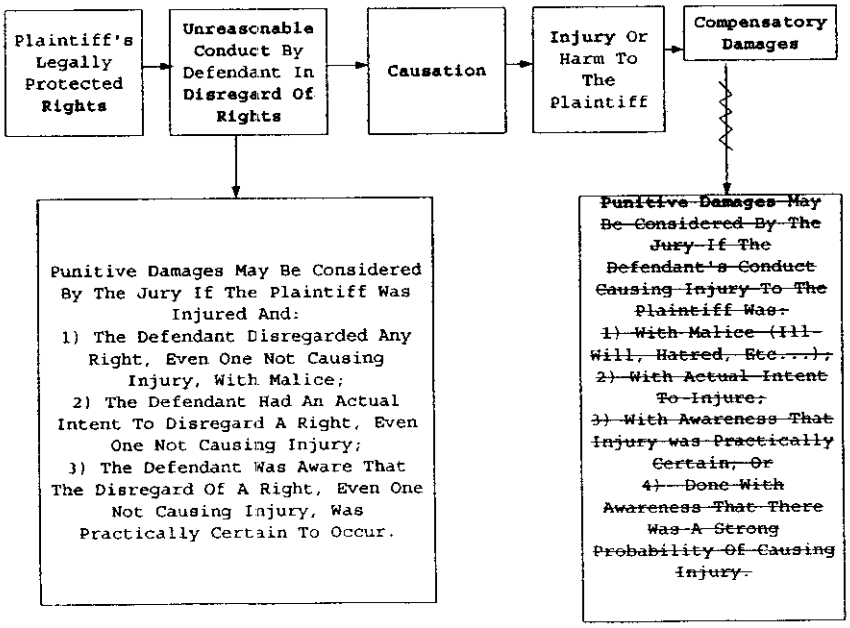
WISCONSIN PUNITIVE DAMAGES LAW PRIOR TO 1995 (Chart 1)



WISCONSIN PUNITIVE DAMAGES LAW POST-1995 (Showing the change from pre-1995) (Chart 2)



WISCONSIN PUNITIVE DAMAGES LAW POST-1995 ACCORDING TO PLAINTIFFS (Showing the change from pre-1995) (Chart 3)



WISCONSIN PUNITIVE DAMAGES LAW PRIOR TO 1995
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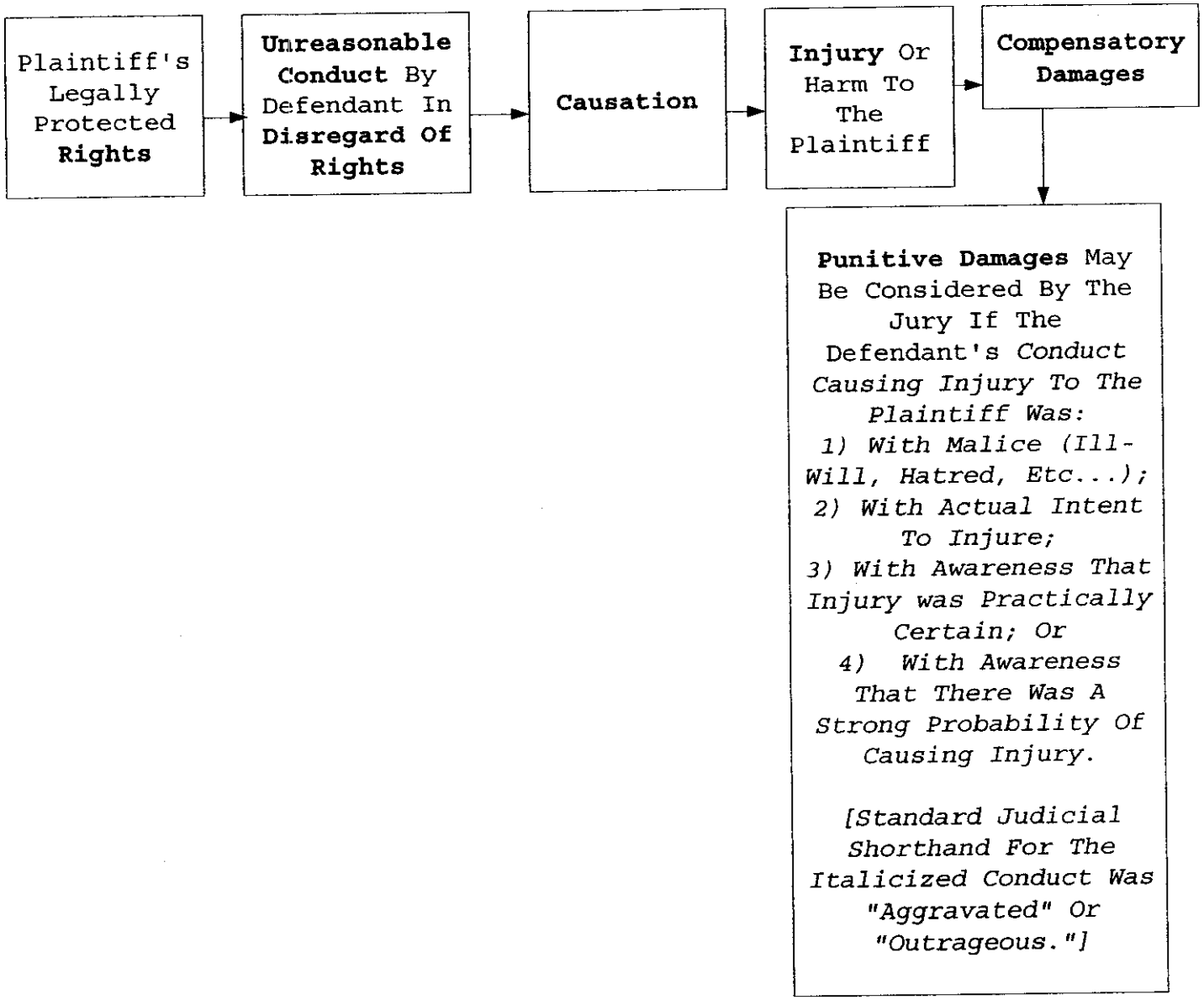

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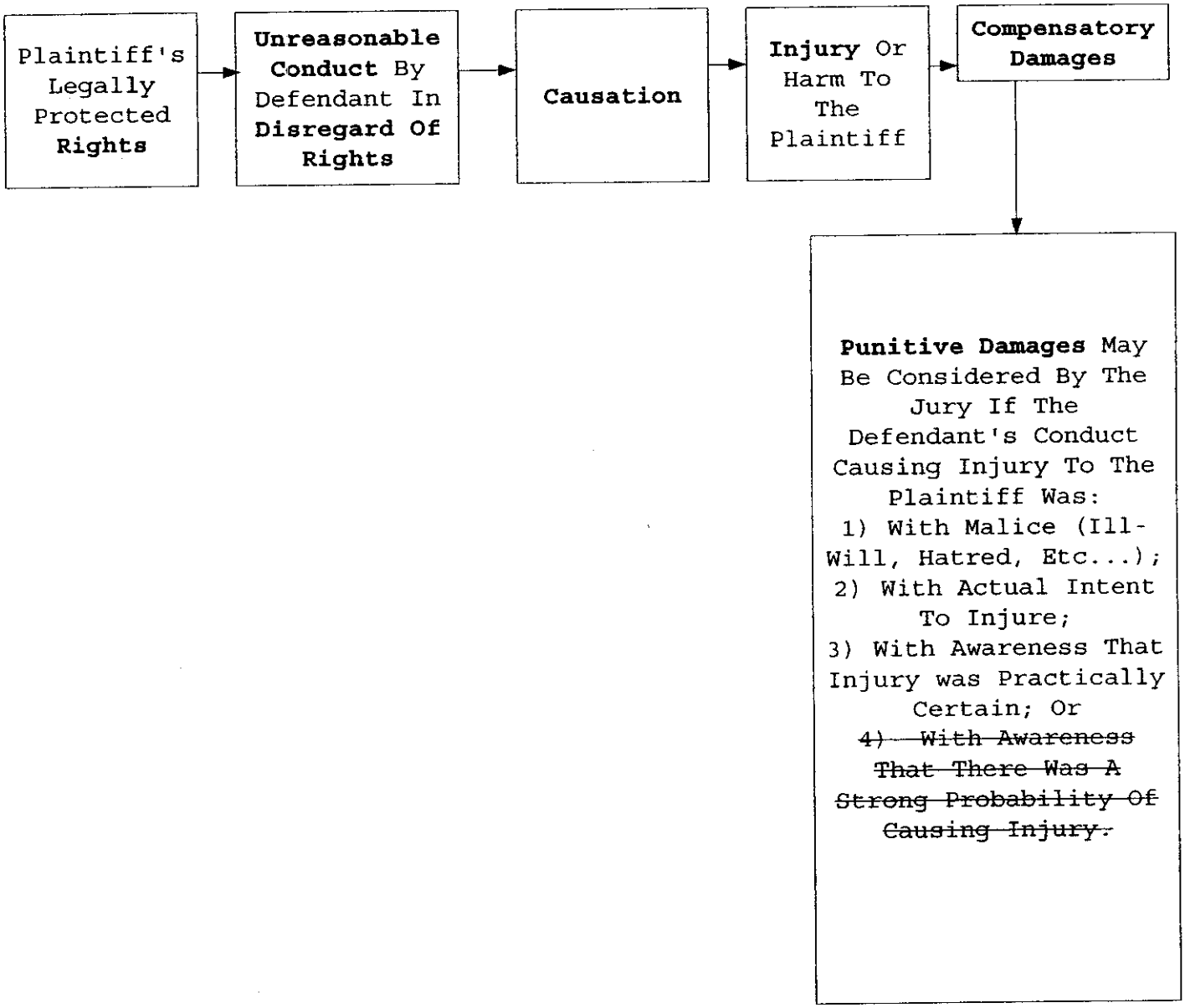

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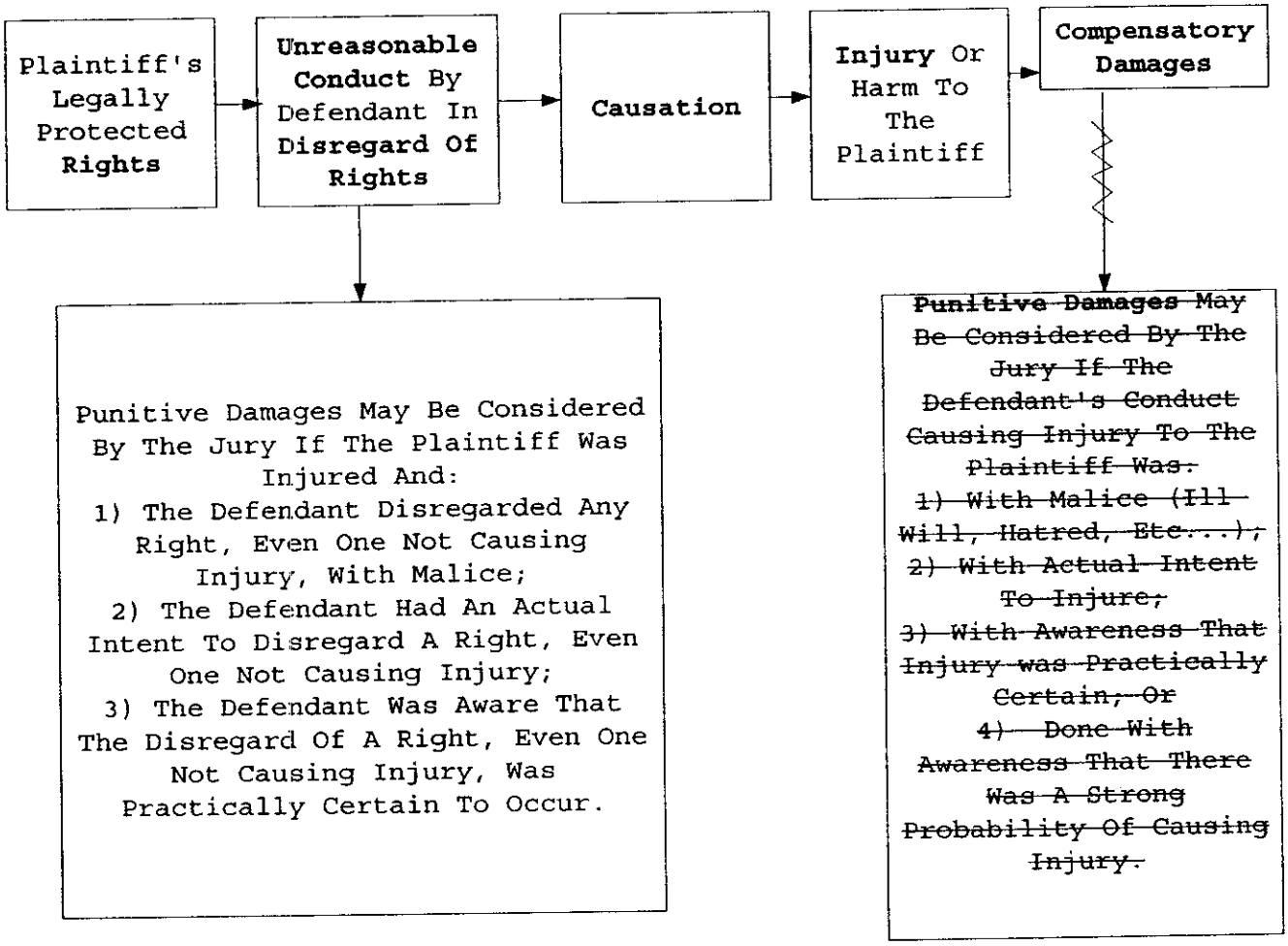

PARTIAL RELEASE AND COVENANTS

RECITALS

Jeffrey A. Wischer, William R. DeGrave and Jerome W. Starr died in an accident on July 14, 1999 while working in the course of their employment at a baseball stadium construction site commonly known as Miller Park in Milwaukee County, Wisconsin (the "Miller Park accident").

Patricia Wischer is the widow of Jeffrey A. Wischer and is the lawfully appointed Special Administrator of the Estate of Jeffrey A. Wischer.

Marjorie DeGrave is the widow of William R. DeGrave and is the lawfully appointed Special Administrator of the Estate of William R. DeGrave.

Ramona Dulde-Starr is the widow of Jerome W. Starr and is the lawfully appointed Special Administrator of the Estate of Jerome W. Starr.

On August 12, 1999 Patricia Wischer, Marjorie DeGrave and Ramona Dulde-Starr filed a lawsuit (the "Suit") in the Circuit Court of Milwaukee County, alleging that the deaths of their husbands in the Miller Park accident were caused by the wrongful conduct of Mitsubishi Heavy Industries America, Inc. ("MHIA"), Neil F. Lampson, Inc., HCH Miller Park Joint Venture, Hunzinger Construction Company, Clark Construction Builders, Inc. (identified in the plaintiffs' Amended Complaint as The Clark Construction Group, Inc.) and Huber, Hunt & Nichols, Inc., the defendants named in the Suit; on October 1, 1999 MHIA filed an answer to the plaintiffs' complaint, denying any and all liability for the Miller Park accident; on December 1, 1999 the plaintiffs filed an amended complaint naming Lampson International, Ltd. and Mitsubishi Heavy Industries, Ltd. ("MHI") as additional defendants; and on February 11, 2000 the plaintiffs voluntarily dismissed MHI from the Suit. In the balance of this Release, Neil F. Lampson, Inc. and Lampson International, Ltd. are referred to individually and collectively as Lampson.

HCH Miller Park Joint Venture is a joint venture formed for the purpose of providing construction management services in connection with the construction of Miller Park. The members of the joint venture are Hunzinger Construction Company, The Clark Construction Group, Inc. and Huber, Hunt & Nichols, Inc. In the balance of this Release, HCH Miller Park Joint Venture and its three constituent members are referred to individually and collectively as HCH.

The owner of Miller Park is the Southeast Wisconsin Professional Baseball Park District (the "District"). Before the start of the construction of Miller Park, the District purchased an Owner Controlled Insurance Program ("OCIP") providing, among other insurance, commercial general liability coverage ("CGL") for the project. The OCIP provides the following tiered layers of CGL coverage, with the per occurrence and aggregate limits indicated:

INSURER	POLICY NO.	COVERAGE
Travelers Indemnity Company of Illinois ("Travelers")	RTJ-GLSA-275T3079-TIL-99 (the "RTJ policy")	$2,000,000
Royal Insurance Company of America ("Royal")	PHA 0011211	$5,000,000
Indemnity Insurance Company of North America ("IINA")	XLX G18879621	$20,000,000
Federal Insurance Company ("Federal")	(00) 7974-01-75	$50,000,000
Travelers Indemnity Company of Illinois ("Travelers")	7PSJ-EX-271T241-7-TIL-96 (the "FSJ policy")	$25,000,000

In the balance of this Release, Travelers, Royal, IINA and Federal are referred to collectively as the "OCIP insurers."

MHIA is insured under the OCIP.

ACE USA ("ACE") is authorized to settle claims under the IINA policy.

In addition to, and over and above the layers of CGL coverage provided by the OCIP, MHIA has excess liability coverage through a policy of insurance issued by The Tokio Marine and Fire Insurance Company, Ltd., policy number CLL424075600, with per occurrence and aggregate limits of $2 million (the "Tokio Marine policy").

The plaintiffs desire to partially release their claims against IINA under the IINA policy, to partially release their claims against MHIA, to fully release their claims against MHI except for MHI's obligations set forth in ¶ 2 on page 4 hereof, to partially release their claims against Lampson, and to receive partial payment toward their loss.

1. Description of Claims Released Against MHIA and MHI

In the balance of this Release, any and all claims, actions, demands and causes of action arising out of, or relating to, the Miller Park accident are referred to collectively as the "Claims."

Patricia Wischer, individually and as Special Administrator of the Estate of Jeffrey A. Wischer; Marjorie DeGrave, individually and as Special Administrator of the Estate of William R. DeGrave; and Ramona Dulde-Starr, individually and as Special Administrator of the Estate of

Jerome W. Starr (all of whom are referred to collectively in the remainder of this Release as "Releasors") hereby release MHIA from:

(a) the first $12,375,000 of compensatory damages for any and all Claims;

(b) any and all compensatory damages, punitive damages and other liability in excess of $84,625,000 for any and all Claims; and

(c) any and all compensatory damages above $12,375,000 and below $84,625,000, and any and all punitive damages and other liability below $84,625,000, for which MHIA is not indemnified by valid and collectible insurance under the OCIP or the Tokio Marine policy for any and all Claims, unless it is finally determined after exhaustion of all appeals that punitive damages otherwise falling within the available limits of the IINA policy, the Federal policy, the Travelers FSJ policy or the Tokio Marine policy are not covered by those policies because of some policy exclusion or public policy reason, in which case MHIA shall be responsible for a maximum of $10 million of those punitive damages which would otherwise have been covered by those policies.

Releasors also hereby fully release MHI from any and all Claims except for MHI's obligations set forth in ¶ 2 on page 4 hereof.

Releasors agree that IINA's policy provides $20 million of liability coverage under the OCIP, in excess of $7 million, but that it provides no liability coverage under the OCIP after the exhaustion of its $20 million policy limits. Accordingly, Releasors agree that, upon payment of the $12,375,000 under the IINA policy, they will not seek recovery from ACE or IINA for any damages over the remaining $7,625,000 of the IINA policy, for any and all Claims arising out of, or relating to, the Miller Park accident.

The liability released, as described above, relates to claims of every kind and nature now existing or which hereafter arise, including any consequences thereof now existing or which may develop, whether or not such consequences are presently known or anticipated, whether based upon matters presently known as well as unknown, anticipated as well as unanticipated, whether directly or indirectly incurred, including any contingent or derivative claims as well as any claims arising by subrogation or contribution, and including claims actually asserted, or which could have been asserted, in the Suit.

Releasors maintain that the injuries and damages sustained are, or in some cases may be, progressive, and that the precise amount of damages is uncertain and indefinite. In making this Release, it is understood and agreed that the Releasors rely upon their own judgment, belief and knowledge of the nature, extent, effect and duration of damages and liability therefor, and upon the advice of their selected advisors. This Release is made without reliance upon any statement or representation of any Released Parties, or their representatives.

2. **Bond or Letter of Credit**

MHIA and MHI shall obtain a bond or letter of credit from a U.S. based company within 30 days from the date of this Release to secure and guarantee MHIA's potential $10 million maximum exposure to the plaintiffs.

3. **Consideration**

The consideration for this Release is payment by ACE, under the IINA policy, on behalf of MHIA in the amount of $12,375,000 within 30 days of the date of this Release, in partial settlement of Releasors' claims, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged. The $12,375,000 shall be paid to the trust account of Habush, Habush, Davis & Rottier, S.C., and shall not be disbursed until this settlement has been approved by the court. Releasors agree that they will decide how the consideration paid for this Release will be divided among themselves. The $12,375,000 is to be treated as an offset against compensatory damages.

4. **Lampson**

Releasors also hereby release Lampson from:

(a) The first $5,000,000 of liability for any and all Claims, which the Releasors previously released on June 22, 2000;

(b) Any and all liability above $5,125,000 and below $17,500,000 for any and all Claims;

(c) Any and all liability in excess of $84,625,000 for any and all Claims;

(d) Any and all liability above $5,000,000 and below $5,125,000 for which Lampson is not indemnified by valid and collectible insurance under the OCIP for any and all Claims; and

(e) Any and all liability above $17,500,000 and below $84,625,000 for which Lampson is not indemnified by valid

and collectible insurance under the OCIP for any and all Claims.

5. **Reservation of Claims**

This Release does not relinquish any claims or release any party other than those claims and parties specifically identified herein. Releasors reserve the right to prosecute all other claims against any party who may be responsible for their damages, specifically including without limitation Lampson, MHIA (for the claims reserved), the OCIP insurers and The Tokio Marine and Fire Insurance Company; Ltd. ("Tokio Marine").

Nothing contained in this Release shall be deemed to operate as a waiver of any claims that MHIA or IINA may have against any other party. MHIA and IINA specifically reserve any claims that they may have against any other party arising out of the Miller Park accident.

6. **Accident**

The accident referred to in this Release is the collapse of a crane commonly known as "Big Blue" on July 14, 1999 at the Miller Park construction site.

7. **Offset and Credit For Payment**

Releasors agree to offset the first $12,375,000 of compensatory damages for any and all Claims they may have against MHIA, MHI, the OCIP insurers or Tokio Marine, arising out of, or relating to, the Miller Park accident. Releasors further agree to credit $12,375,000 toward any verdict against MHIA, MHI, any OCIP insurer or Tokio Marine, that is required, because of such a verdict, to make a payment for any compensatory damage Claims.

8. **Offset and Credit - Claims of Other Parties**

Releasors agree to offset any amount that they recover by settlement, verdict or judgment from any other party to this action by the amount which the other party could enforce by way of a contribution or indemnification claim against MHIA or MHI, unless the amount which the other party could enforce against MHIA or MHI is indemnified by valid and collectible insurance under the OCIP or the Tokio Marine policy.

9. **Indemnification**

Releasors agree to indemnify and save harmless ACE, IINA, MHIA and MHI from any and all claims of any party for contribution or indemnification made by others adjudged jointly liable with MHIA or MHI, but only to the extent that the amount of available and collectible insurance afforded to MHIA under the OCIP or the Tokio Marine policy is insufficient to satisfy those claims.

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10. **Subrogation**

Except as otherwise provided in this paragraph, Releasors agree that, to the extent of the Released Amount, they will remain responsible to satisfy lien interests, if any, such as any lien arising from worker's compensation payments, subrogation for medical insurance payments and attorney's liens. To the extent of the Released Amount, Releasors agree to indemnify and hold harmless MHIA, MHI and IINA against claims made against them arising out of lien interests.

11. **No Admission of Liability**

Neither this Release, nor any payment, concession or any other action by MHIA, MHI, ACE or IINA is to be construed as a waiver of any rights or an admission of any liability, all rights being fully reserved and liability being expressly denied. This Release is a compromise partial settlement which is the result of settlement negotiations.

12. **Persons Bound and Benefitted**

This Release binds the Releasors, their heirs, executors, administrators, successors and assigns, and inures to the benefit of the named Released Parties and their officers, directors, agents, employees, successors and assigns.

13. **Construction of Ambiguities**

This Release is the joint work product of the Releasors and the Released Parties and their respective counsel. Accordingly, the Releasors, ACE, IINA, MHIA and MHI agree that any rule of construction resolving ambiguities against the drafting party is inapplicable to the interpretation of this Release.

14. **Entire Agreement**

Releasors represent that no promise, inducement or agreement, not set forth herein, has been made. This Release contains the entire agreement between the parties. Each numbered paragraph of this Release is contractual and not a mere recital. Each person signing this Release acknowledges that he or she has read the Release, reviewed it with his or her attorneys, and understands it in its entirety.

15. **Governing Law**

This agreement shall be governed by Wisconsin law.

16. The confidentiality requirements of the letter agreement dated 10/27/00 are incorporated into this agreement.

IN WITNESS WHEREOF each of the undersigned has hereunto set her hand and seal this 7 day of November, 2000.

Patricia Wischer, Individually and as Special Administrator of the Estate of Jeffrey A. Wischer.

Marjorie DeGrave, Individually and as Special Administrator of the Estate of William R. DeGrave.

Ramona Dulde-Starr, Individually and as Special Administrator of the Estate of Jerome W. Starr.

CONSENT OF ATTORNEYS FOR PATRICIA WISCHER AND MARJORIE DEGRAVE

Pursuant to Wis. Stats. § 757.38, the undersigned attorneys for Patricia Wischer and Marjorie DeGrave hereby consent to and approve the settlement set forth in this Release.

Dated this 7 day of November, 2000.

HABUSH, HABUSH, DAVIS & ROTTIER, S.C.

By: Robert L. Habush

CONSENT OF ATTORNEYS FOR RAMONA DULDE-STARR

Pursuant to Wis. Stats. § 757.38, the undersigned attorneys for Ramona Dulde-Starr hereby consent to and approve the settlement set forth in this Release.

Dated this 7 day of November, 2000.

JACQUART & LOWE, S.C.

By: _____
David P. Lowe

Dated this _____ day of November, 2000.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA

_____
Authorized Representative

Dated this 8th 10th day of November, 2000.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.

_____
Authorized Representative

Dated this 13th day of November, 2000.

MITSUBISHI HEAVY INDUSTRIES, LTD.

_____
Authorized Representative

Dated this 7th day of November, 2000.

NEIL F. LAMPSON, INC.

Authorized Representative

Dated this 7th day of November, 2000.

LAMPSON INTERNATIONAL, LTD.

Authorized Representative

STATE OF WISCONSIN
IN SUPREME COURT

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased,

Plaintiffs-Intervenors-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant,

NEIL F. LAMPSON, INC.,

Defendant-Respondent,

LAMPSON INTERNATIONAL LTD., FEDERAL INSURANCE COMPANY, and THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendants.

Case No. 01-0724
(consolidated with Case Nos. 01-1031 and 01-2486)

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I, DATED SEPTEMBER 30, 2003

REPLY BRIEF OF PATRICIA WISCHER, MARJORIE DeGRAVE AND RAMONA DULDE-STARR IN REPLY TO THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS' RESPONSE BRIEF

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased;

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-
Cross-Appellant,

Case No. 01-1031
(consolidated with
Case Nos. 01-0724
and 01-2486)

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-Petitioner,

NEIL F. LAMPSON, INC., and LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY,

Defendant-Co-Appellant,

THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendant.

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased;

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-
Cross-Appellant,

Case No. 01-2486
(consolidated with
Case Nos. 01-0724
and 01-1031)

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-
Cross-Respondent,

NEIL F. LAMPSON, INC., and LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY, and THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendants-Respondents-
Cross-Appellants.

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I. THE PLAIN MEANING OF THE WORDS IN WIS. STAT. §895.85(3) DOES NOT SUPPORT TRAVELERS' INTERPRETATION.

While Travelers, like MHIA and Federal, interprets Wis. Stat. §895.85(3) to require an intent to harm, Travelers is more straightforward than the others about the result of this interpretation -- that "punitive damages are only available for intentional torts." (Travelers brief, p. 14) Travelers uses two inconsistent approaches to arrive at this interpretation. In the first approach, Travelers defines "intentional" to mean an intentional tort, which means acting with an intent to harm. This approach ignores the statutory words "disregard of rights." In the second approach, Travelers brings "disregard of rights" back into its analysis and defines "disregard of rights" to mean harm, such that an "intentional disregard of rights" means an intent to cause harm. Wischer discussed the flaws in these approaches in her reply to MHIA's brief and will not repeat that discussion here, except to note a few points.

To attempt to find support for its first approach, Travelers quotes portions of tort treatises where the writers differentiate an intentional tort from negligence (Travelers' brief, p. 16), which is not the issue here, and ignores those treatises' definitions of "intent" that are on point: "What is the state of mind required for an intent? The defendant has an intent to achieve a specified result when the defendant either (1) has a purpose to accomplish that result or (2) lacks such a purpose but

knows to a substantial certainty that the defendant's actions will bring about the result." Dan B. Dobbs, *The Law of Torts* §25, p. 48 (2000). *See also:* W. Page Keeton, *Prosser and Keeton on Torts*, §8, p. 34 (5th ed. 1984). Here, the "specified result" in §895.85(3) that must be "intentional" is a "disregard of rights," not an injury.

To support its second approach, Travelers cites many of the cases MHIA cites.[1] None of them says that a "disregard of rights" is equivalent to the harm the plaintiff sustained. One case in particular that Travelers cites, *Sharp v. Case Corp.*, 227 Wis.2d 1, 595 N.W.2d 380 (1999), contradicts Travelers' argument. At page 21, *Sharp* states: "Punitive damages may be awarded ... if the plaintiff proves ... that the harm suffered was the result of the manufacturer's reckless disregard for the safety of product users." If the "harm suffered" is a "result" of the "disregard" for safety, the "disregard" cannot be the "harm."

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[1] To suit its purpose, Travelers has pieced together two separate sentences from *Brown v. Maxey*, 124 Wis.2d 426, 369 N.W.2d 677 (1985). It claims *Brown* states that "'the conduct necessary to impose punitive damages' focuses on '*the harm sustained by the plaintiff.*'" (emphasis added by Travelers; Travelers' brief, p. 19, n. 6) Travelers, however, has combined parts of two sentences from *Brown* and has added the word "focuses" between them in an improper manner. In one sentence, the *Brown* court actually stated that "a brief review of the conduct necessary to impose punitive damages will be beneficial." In the other sentence, the court stated that a punitive damages treatise had defined malicious conduct as "'that in which the defendant desires to cause the harm sustained by the plaintiff, ...'" *Brown*, 124 Wis.2d at 433.

Travelers' interpretation of §895.85(3) is not supported by the plain meaning of the statute. This court's recent discussion in *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, regarding the meaning of statutory words is instructive here. Quoting 2A Norman J. Singer, *Sutherland Statutory Construction*, §45.08, p. 40 (2000), the court noted that "'inquiry into the "meaning of the statute" generally manifests greater concern for what members of the public to whom it is addressed, understand.'" *Kalal*, at ¶40. Members of the public would certainly not understand "intentional disregard of the rights of the plaintiff" to mean an intent to cause injury.

II. OTHER SOURCES OF LEGISLATIVE INTENT DO NOT SUPPORT TRAVELERS' INTERPRETATION.

Travelers asserts that §895.85(3) is ambiguous (Travelers brief, p. 43), and urges the court to examine other sources of legislative intent besides the statute's words. None of those sources, however, supports Travelers' interpretation.

A. The Legislative History of §895.85(3) Does Not Support the Characterization of the Statute As Limiting Punitive Damages to Intentional Torts.

Travelers attempts to rely on aspects of the drafting history of 1995 Wis. Act 17, which enacted §895.85(3). These do not aid Travelers. They do not indicate in any way that the legislature intended "intentional disregard of rights" to be the equivalent of an intent to injure and to limit punitive damages to intentional torts.

Although there were efforts in the drafting of 1995 Senate Bill 11 to use the words "wilful" or "reckless," instead of "intentional," nothing indicates that those words were to be used as anything but a modifier of "disregard of rights."

In referencing legislative debate, Travelers ignores the most pointed exchange which sheds light on the issue before this court. Responding to a colleague's question of whether 1995 SB 11 would allow the imposition of punitive damages against an intoxicated surgeon who amputates the wrong leg, Rep. Green, a sponsor of the bill, commented:

> First off, I do believe that the current standard that we are talking about in this bill would cover that situation. It is not the -- you don't have to prove an intent that the act took place. You have to prove instead, if you look at it, maliciousness which is the current standard or intentional disregard for plaintiff's rights -- ***not the action being intentional, but disregard for plaintiff's rights.***

(emphasis added) (Travelers App. 189)[2] Rep. Green's understanding supports Wischer here.

Although 1995 Wis. Act 17 was enacted during the same legislative session as other provisions that limit civil

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[2] Many of the hypothetical cases discussed during the debate on 1995 SB 11 concerned scenarios involving punitive damages against health care providers. *See, e.g.*, Travelers App. 163-4, 168, 187. Ironically, subsequent to that debate, the court of appeals held that punitive damages cannot be recovered in medical malpractice cases because Chapter 655 fails to mention punitive damages explicitly. *See, Lund v. Kokemoor*, 195 Wis.2d 727, 537 N.W.2d 21 (Ct.App. 1995) (*review denied*).

liability, nothing in the legislative record indicates that there were any advocates supporting the position of Travelers that punitive damages should be limited to intentional torts.[3]

B. Other Legislative Activity Provides Support for Wischer's Position.

Though not enacted, 1987 Senate Bill 330 proposed a statute that demonstrates that the legislature knows what words to use if they wish to limit punitive damages to intentional torts:

> 895.75 STANDARDS FOR AWARD OF PUNITIVE DAMAGES.
> (1) In this section, "punitive damages" includes exemplary or vindictive damages.
> (2) Punitive damages may not be awarded in a civil action, ***except:***
> (a) ***In any action to recover damages for an intentional tort*** under s. 893.57.
> (b) In any other action in which punitive damages are specifically authorized by statute.

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[3] No "legislative findings" accompanied §895.85(3). To the contrary, unmentioned by Travelers, but appearing at p. 204 of its Appendix, is a 1995 Wisconsin Legislative Council Staff Memorandum to Sen. Joanne Huelsman, a sponsor of 1995 SB 11, which observes that recent ABA research "suggests that punitive damage awards are not routine but are clustered in certain types of cases," and that "extremely high punitive damage awards are not the norm, but tend to appear in a handful of causes of action in which plaintiffs are not likely to be successful, primarily medical malpractice and product liability cases." Similar-ly, Prof. Galanter's law review article, cited by the court of appeals, *Wischer v. Mitsubishi Heavy Industries America, Inc.*, 2003 WI App 202, ¶41, 267 Wis.2d 638, 673 N.W.2d 303, demonstrates that punitive damage awards are not a widespread problem requiring drastic legislative measures. *See*, M. Galanter, "Shadow Play: The Fabled Menace of Punitive Damages," 1998 Wis.L.Rev. 1 (1998).

> (3) Punitive damages may be awarded only if a party proves beyond a reasonable doubt that the party against whom the punitive damages are awarded ***acted intentionally, and in malicious and wanton disregard of the rights*** of the party seeking punitive damages. Failure to provide the proof required under this subsection does not preclude a party from recovering ordinary damages.

(emphasis added) (Travelers App. 326-327)

The analysis by the Legislative Reference Bureau regarding 1987 SB 330 states: "This bill limits the awarding of punitive damages ***to cases involving an intentional tort*** or cases where the statutes specifically authorize an award of punitive damages." (emphasis added) (Travelers App. 314)[4]

Thus, the legislature understood what words to use if they wished to limit punitive damages to intentional torts. The fact that they did not use those words in §895.85(3) indicates they did not intend to so limit punitive damages.

The legislature also understood how to specify an "intent to injure" requirement in legislation where that was its purpose. ***This*** very legislature understood. Another provision enacted during the same session as §895.85(3) was 1995 Wis. Act 447. That Act created §895.525(4m), which specifies liability of contact sports

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[4] Senator Leean was a sponsor of 1987 SB 330, as well as 1995 SB 11, which was enacted as 1995 Wis. Act 17. (Travelers App. 311, 293) He and his colleagues knew how to limit punitive damages to cases involving intentional torts if that had been their goal again in 1995.

participants only "if the participant who caused the injury acted recklessly or with intent to cause injury." (*See* Travelers App. 99)[5] Had the legislature wished to include an intent to cause injury as a requirement in §895.85(3), it could have used those words. The legislature's choice not to use those words is convincing evidence that they did not wish to impose that requirement.

Even if Travelers' argument regarding legislative history had any merit, it would not be controlling here. *Kalal*, 2004 WI 58, ¶52, makes clear, "it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated." (internal quotations omitted)

C. Travelers' Non-Legislative Sources Do Not Support Travelers' Position.

1. Wis JI-Civil 1707.1.

Travelers attempts to rely on the notes of the Wisconsin Civil Jury Instruction Committee ("Committee") to Wis JI-Civil 1701.1. The Committee, however, had no difficulty with the concept that "intentional" is a modifier of "disregard of rights." As a definition of "intentional," the Committee simply used the definition of "intentionally" in Wis. Stat. §939.23(3), which defines

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[5] In other statutes, the legislature has used the words "intent to injure." *See*, Wis. Stat. §70.47(18), §215.12, §221.0636(1)(a)3., §610.70(6)(b), §856.05(3), §943.39, §943.392, §946.72(1).

"intentionally" as describing an actor's purpose to "cause the result specified" or awareness that his or her conduct is practically certain to cause "that result." In applying that definition when drafting the instruction, the Committee recognized that the "result" which §895.85(3) requires to be "intentional" is the "disregard of rights."

Travelers points to the Committee's deletion of the phrase "even though he or she may not intend insult or injury," which had been included in Wis JI-Civil 1707 (1996) before the enactment of §895.85(3). (Travelers brief, p. 51) The purpose of a jury instruction, however, is to inform the jury of what needs to be proven, not what is unnecessary to prove. The absence from Wis JI-Civil 1707.1 of language stating that proof of an intent to injure is unnecessary does not mean that such proof is necessary.[6]

2. U.S. Supreme Court Decisions Are Not a Source of Legislative Intent.

Travelers argues that "the most recent punitive damages decisions of the U.S. Supreme Court themselves provide extrinsic evidence that should inform the application of section 895.85(3). *See, Kalal*, 2004 WI 58,

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[6] Earlier versions of Wis JI-Civil 1707 from 1966, 1981, and 1989, the first of which is in Travelers' Appendix at App. 329, did not include the words "even though he or she may not intend insult or injury," but, clearly, the common law did not require intent to cause injury at that time. *See*: *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 267, 294 N.W.2d 437 (1980).

¶69 (Abrahamson, C.J., concurring)." (Travelers brief, p. 54) Thus, it cites *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), issued the year after §895.85 was enacted, and *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), issued eight years later, to support its interpretation. Travelers is wrong. Though the separate opinions in *Kalal* discuss different approaches about when to consult other sources and which sources to consult, none of the opinions or the sources listed at ¶69 of *Kalal* suggest that U.S. Supreme Court opinions decided after the enactment of a statute should be consulted for the meaning of words chosen by the legislature years previously.

III. TRAVELERS' INTERPRETATION OF §895.85(3) WOULD RESULT IN A DRAMATIC CHANGE IN PUNITIVE DAMAGES LAW IN DRUNK DRIVING, PRODUCTS LIABILITY AND BAD FAITH CASES.

It is important for this court to consider the implications of the court of appeals' interpretation of §895.85(3) and that proposed by Travelers and the other respondents. Such an interpretation would virtually eliminate punitive damages in drunk driving, products liability and bad faith cases.

At common law, drunk driving was the type of conduct that could support an award of punitive damages in an appropriate case. *Lievrouw v. Roth*, 157 Wis.2d 332, 347, 459 N.W.2d 850 (Ct.App. 1990). In that case, the court stated: "Drunk driving is a terrible scourge," and "Intentionally driving while alcohol-impaired is the type of outrageous conduct that punitive damages should punish

and can deter." 157 Wis.2d at 345, 346.[7]

Similarly, the important role of punitive damages in product liability cases was cited in *Wangen v. Ford Motor Co.*, 97 Wis.2d at 285: "[T]he need for punitive damages may be particularly appropriate in a product liability case because mere compensatory damages might be insufficient to deter the defendant from further wrongdoing."

Despite Travelers' assurance that a "practical certainty test" will provide ample room for a punitive damages role in those cases, the reality is otherwise. The fact that there might someday be a products liability case where the defect was so harmful and the manufacturer acted with an intent to cause harm or was aware that harm was practically certain to occur, such that Travelers' standard would be met, does not answer the reality that practically all of the product liability cases would not rise to that level of proof. The same holds true for drunk driving cases. If *Boomsma v. Star Transport, Inc.*, 202 F.Supp.2d 869 (E.D.Wis. 2002), is correct in requiring that the defendant must direct its conduct to a specific plaintiff, one can eliminate the balance of the cases.

In addition, if the court accepts Travelers' interpretation, insurance bad faith cases will also be

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[7] In that case, the evidence did not support the submission of the punitive damages issue to the jury because the proof did not show that Roth was alcohol-impaired, or that her drinking was a cause of the collision or aggravated the plaintiff's injuries, or that her driving was otherwise "outrageous." *Lievrouw*, 157 Wis.2d at 347-48.

affected. Although bad faith has been characterized as an intentional tort, *Anderson v. Continental Ins. Co.*, 85 Wis.2d 675, 691, 271 N.W.2d 368 (1978), the tort does not require a showing of an intent to cause harm. A plaintiff need only show "the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." *Anderson*, 85 Wis.2d at 691, quoted with approval in *Trinity Ev. Lutheran Church v. Tower Ins. Co.*, 2003 WI 46, ¶34, 261 Wis.2d 333, 661 N.W.2d 789. Therefore, under Travelers' interpretation, which requires the underlying tort to include an intent to harm, punitive damages would not be available in bad faith cases.

Travelers' attempt to characterize *Trinity* as supporting its interpretation is wrong. (Travelers' brief, p. 32) There was no proof in *Trinity* that the insurer intended to cause harm to its insured. The court ruled that the evidence showed "Tower's reckless disregard toward its insured," *Trinity*, 2003 WI 46, ¶37, and even ruled that the insured "was not required to make a showing of *intentional disregard* in order to succeed on a claim of bad faith." (emphasis in the original) *Trinity*, ¶37. Thus, a logical result of accepting Travelers' interpretation is that *Trinity* was wrongly decided.

Travelers, in an effort to rebut Wischer's assertion that its interpretation of §895.85(3) will effectively eliminate punitive damages in drunk driving cases, cites

the court of appeals' recent certification of *Strenke v. Hogner*, case no. 03-2527, 2004 WL 1097753. This certification does not answer Wischer's prediction.

The certification states: "If *Wischer* ... is correct, are there sufficient facts from which a jury could conclude [that the defendant] was aware his acts were 'practically certain' to cause injury?" 2004 WL 1097753 at *1.

Clearly, the conduct of the four-time OWI offender in *Strenke* would meet the "intentional disregard of the rights of the plaintiff" standard, as interpreted by Wischer, since the "potential for harm" certainly exists, as does aggravated conduct. With all the drunk drivers on the road, who fortunately never cause an accident or injury, how would the plaintiff ever prove that the defendant was aware that his conduct was practically certain to cause injury?

The next question in the certification asks: "Must a defendant's conduct giving rise to punitive damages have been directed at the specific plaintiff seeking punitive damages?" *Strenke*, 2004 WL 1097753 at *1. This is the holding in *Boomsma* and it is embraced by Travelers. The court of appeals, in comments contained in the certification, stated:

> We question the soundness of the conclusion that the defendant's conduct must knowingly be targeted at a particular plaintiff who eventually seeks punitive damages. In many situations, this literal interpretation of Wis. Stat. §895.85(3) would manifestly defeat the purpose of punitive damages: to punish the wrongdoer and to deter similar conduct in the future.

2004 WL 1097753 at *3. Wischer agrees.[8]

Although §895.85(3) focuses on "the plaintiff," and "plaintiff" is specifically defined in §895.85(1)(c), that does not lead to a conclusion that the statute requires proof that when the defendant's conduct is committed, it must be directed at the particular plaintiff. In the common law's "disregard of rights" standard, the "disregard" was "of the rights of the plaintiff;" yet, punitive damages were available in products liability cases where no showing was made that the manufacturer's conduct was specifically directed at the particular plaintiff. *E.g.*, *Sharp v. Case Corp.*; *Wussow v. Commercial Mechanisms, Inc.*, 97 Wis.2d 136, 293 N.W.2d 897 (1980); *Walter v. Cessna Aircraft Co.*, 121 Wis.2d 221, 358 N.W.2d 816 (Ct.App. 1984).

Wischer requests this court to reverse the decision of the court of appeals.

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[8] In *Wischer*, the special verdict used, and answered in the affirmative, this question: "Did [MHIA] act in an intentional disregard of the rights of the decedents?" (R.488:3)

CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a reply brief produced with a monospaced font. The length of this reply brief is 13 pages.

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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2004, I served copies of the Reply Brief of Patricia Wischer, Marjorie DeGrave and Ramona Dulde-Starr in Reply to The Travelers Indemnity Company of Illinois' Response Brief upon counsel for the parties in the manner designated below, at the addresses indicated below:

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STATE OF WISCONSIN
IN SUPREME COURT

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased,

Plaintiffs-Intervenors-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant,

NEIL F. LAMPSON, INC.,

Defendant-Respondent,

LAMPSON INTERNATIONAL LTD., FEDERAL INSURANCE COMPANY, and THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendants.

Case No. 01-0724
(consolidated with Case Nos. 01-1031 and 01-2486)

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I, DATED SEPTEMBER 30, 2003

REPLY BRIEF OF PATRICIA WISCHER, MARJORIE DeGRAVE AND RAMONA DULDE-STARR IN REPLY TO RESPONSE BRIEF OF MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased;

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-
Cross-Appellant,

Case No. 01-1031
(consolidated with
Case Nos. 01-0724
and 01-2486)

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-Petitioner,

NEIL F. LAMPSON, INC., and LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY,

Defendant-Co-Appellant,

THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendant.

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased;

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-
Cross-Appellant,

Case No. 01-2486
(consolidated with
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and 01-1031)

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-
Cross-Respondent,

NEIL F. LAMPSON, INC., and LAMPSON INTERNATIONAL LTD.,

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I. MHIA MISREPRESENTS THE FACTS.

MHIA erroneously claims that Wischer's statement of facts overlooks "state of mind evidence." MHIA presents no version of the facts contrary to Wischer's. It merely clings to its conclusory statement that the Miller Park disaster was just an accident.

MHIA notes that Allan Watts had told people the crane could withstand 40 mph winds and he told Grotlisch before the crash that there were no problems with the lift. Watts, however, testified he was worried all day that the wind could have a bad effect and cause the crane to collapse, that he was hoping and praying that Grotlisch would call off the lift, but the call never came. (R.729:96-97) Watts testified that what prevented him from telling Grotlisch to stop the lift was the orders he received from his bosses to obey Grotlisch and his prior dealings with Grotlisch's intimidation, all to his "ever lasting regret." (*Id.*)

MHIA's claim that the evidence of course of conduct and pre- and post-accident behavior is irrelevant lacks merit.[1] Such evidence is directly related to MHIA's conduct

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[1] MHIA seizes upon the fact that one section of Wischer's brief is entitled "The Hazardous Workplace" and claims that Wischer dismissed her safe place claim. That section focuses not upon conditions, but upon the conduct and state of mind of MHIA employees at Miller Park. It was this conduct that made the workplace unsafe. A safe place claim may be based only upon unsafe conditions of premises, not activities conducted on the premises, *Hofflander v. St. Catherine's Hospital, Inc.*, 2003 WI 77, ¶91, 262 Wis.2d 539, 664 N.W.2d 545, and MHIA's conduct has nothing to do with a safe place claim. The dismissal of the safe place claim only reinforces Wischer's position on conduct.

and state of mind regarding worker safety at Miller Park, and particularly roof lifts. This is the type of course-of-conduct evidence that this court found so relevant in *Trinity Ev. Lutheran Church v. Tower Ins. Co.*, 2003 WI 46, 261 Wis.2d 333, 661 N.W.2d 789, and is other acts evidence.[2]

MHIA does not dispute that MHIA has admitted the sufficiency of the evidence here, if Wischer's interpretation of Wis. Stat. §895.85(3) is correct.

II. SUMMARY OF WISCHER'S POSITION.

MHIA and other respondents persist in misrepresenting Wischer's position. In the faint hope of a cessation of this intentional misrepresentation, Wischer states:

(1) Wischer does not believe that any disregard of rights or, in particular, an intentional disregard of rights, standing alone, will justify punitive damages.

(2) Wischer does not believe that any volitional or intentional act, standing alone, will justify an award of punitive damages, whether that act be grounded in negligence, recklessness, or intentional tort.

(3) Wischer believes there must be an injury or harm in order for a cause of action to exist.

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[2] Other cases hold that other acts evidence is relevant as to punitive damages. *Anello v. Savignac*, 116 Wis.2d 246, 251, 342 N.W.2d 440 (Ct.App. 1983); *Lievrouw v. Roth*, 157 Wis.2d 332, 348-49, 459 N.W.2d 850 (Ct.App. 1990); *Smith v. Golde*, 224 Wis.2d 518, 532-33, 592 N.W.2d 287 (Ct.App. 1999); *Mucek v. Nationwide Communications, Inc.*, 2002 WI App 60, ¶¶38-42, 252 Wis.2d 426, 643 N.W.2d 98.

(4) Wischer believes that punitive damages are a remedy that can only be considered after an award of compensatory damages is made and then only after careful analysis of the wrongdoer's conduct, and that the aggravated conduct which is the basis for the remedy must have caused the injury or harm.

(5) Wischer believes that not all causes of action grounded in negligence, or intentional conduct, will permit a consideration of punitive damages.

(6) Wischer agrees that the legislature intended to "heighten" the standard of conduct for punitive damages when it enacted §895.85(3). She believes that the heightening occurred with respect to the defendant's state of mind in committing a disregard of rights. The state of mind must be intentional in the face of an awareness of a potential for harm. The heightening was not addressed to increasing the potential for harm which must be posed by the defendant's conduct. It did not make an intent to harm or a "practical certainty" of harm a condition precedent to the imposition of punitive damages, as opposed to, as Wischer believes, a factor to consider in analyzing whether or not the conduct warrants punitive damages.

(7) Wischer believes that the greater the potential for harm and the more serious the nature of the harm, if it does occur, the greater the likelihood that the conduct and state of mind being analyzed will warrant punitive damages.

(8) Wischer believes that the legislature did not

intend to make punitive damages only available for intentional torts or to make them automatically available whenever an intentional tort is committed.

III. MHIA'S THREE APPROACHES TO THE INTERPRETATION OF WIS. STAT. §895.85(3) ARE INCONSISTENT AND FLAWED.

MHIA uses three flawed approaches to reach its conclusion that the phrase "intentional disregard of the rights of the plaintiff" in §895.85(3) means an intent (either specific intent or general intent) to cause injury.

A. MHIA's First Approach Misconstrues "Intentional" and Ignores "Disregard of Rights."

In its first approach, MHIA asserts that the word "intentional" means acting with an intent (either specific or general) to cause injury.[3] MHIA's interpretation is not supported by the language of §895.85(3). MHIA misconstrues the meaning of "intentional" by using a definition of an intentional tort. It also ignores the statutory words "disregard of rights," ignores the fact that §895.85(3) uses "intentional" as an adjective to modify "disregard of rights," and inserts the word "injury" into the statute.[4]

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[3] MHIA essentially concedes that its position renders the "intentional disregard of rights" standard of §895.85(3) superfluous, at least in part. MHIA concedes that the "malicious" standard in §895.85(3) includes a specific intent to injure the plaintiff. (MHIA brief, p. 19) Yet, by means of its definition of "intentional," MHIA leads one to believe that MHIA's concept of "intentional disregard of rights" also includes a specific intent to injure the plaintiff. *Id.* at 12-13, 16-17.

[4] In footnote 37, MHIA attempts to criticize Wischer's argument by claiming that Wischer's interpretation adds the

The only support MHIA could find for its concept of "intentional" is an inapplicable statement regarding "intent" that appears in *Gouger v. Hardtke*, 167 Wis.2d 504, 512, 482 N.W.2d 84 (1992). *Gouger* was not a punitive damages case. The issue there was whether the defendant had committed an intentional tort or the tort of negligence. A tort requires a causing of injury, and so the issue focused on whether the defendant had intended to cause injury. The court's statement regarding "intent" was addressed to the meaning of an intent to cause injury. That is not the issue here. Sec. 895.85(3) contains no reference to an intentional tort. The issue here is what does "intentional" as a modifier of "disregard of rights" mean.

Several authorities provide a general definition of "intentional" that applies with respect to all conduct. They define "intent" and "intentional" as describing an actor's purpose to bring about a certain result or consequence or the actor's knowledge that a certain result or consequence is substantially certain to result from the act.[5] Since §895.85(3) requires the "disregard of rights"

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word "safety" to the statute. Wischer does not add words to the statute. Her argument is respectful of the fact that the statute uses the words "disregard of rights." She simply argues that, under the common law, the word "rights," when used in a personal injury case, included a right to safety, and that the word "rights" in the statute should mean the same thing as under the common law.

[5] *See:* Wis. Stat. §939.23(3) and (4); *Shepard v. Outagamie County Circuit Court*, 189 Wis.2d 279, 286-87, 525 N.W.2d 764 (Ct.App. 1994); *Restatement (Second) of Torts* §8A; W.

to be "intentional," the ***result*** or consequence which must be "intentional" is the "disregard of rights."[6]

B. MHIA's Second Approach Misuses Definitions of "Reckless" and "Intentional" and Distorts the Meaning of "Disregard of Rights."

In its second approach to the interpretation of §895.85(3), MHIA attempts to compare four different types of tortious conduct -- negligent, reckless, intentional and malicious -- and asserts that the difference between the second and third is the degree of probability of harm. (MHIA brief, p. 15-18) MHIA then argues that when the legislature enacted §895.85(3), it eliminated "reckless conduct" as a basis for punitive damages and thus eliminated conduct involving a strong probability of harm, leaving only "intentional conduct," which requires an intent to cause harm or knowledge of a practical certainty of harm.

One basic problem with MHIA's approach is that MHIA erroneously contends that the statute's use of the word "intentional" means an intentional tort, which requires an

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Page Keeton, *Prosser and Keeton on Torts*, §8, p. 34 (1984); Dan B. Dobbs, *The Law of Torts*, §25, p. 48 (2000).

[6] MHIA cites these definitions in other parts of its brief (MHIA brief, p. 12, 17, 31) and acknowledges that "intent" means a purpose to cause, or a substantial certainty of causing, a result, but refuses to acknowledge that the result of the "intent" to which §895.85(3) refers is the "disregard of rights," not an injury. Wischer uses a single definition of "intentional." She simply claims that the meaning of "intentional" as an adjective to modify "disregard of rights" does not mean an intentional tort.

intent to injure or a practical certainty that injury will occur. MHIA is wrong. Sec. 895.85(3) does not refer to an intentional tort; it refers to an "intentional disregard of rights."

Second, MHIA attempts to define "reckless conduct" so that it can compare that definition to its notion of "intentional conduct." In defining "reckless conduct," MHIA uses an explanation of the common law standard of "wanton, willful or reckless disregard of rights," and overlooks the fact that the standard involved two elements: a showing that (1) the defendant had specific knowledge that his or her conduct posed a ***potential*** for harm, and (2) the defendant proceeded with that conduct in wanton, willful or reckless disregard of the consequences of the conduct. *See*: *Sharp v. Case Corp.*, 227 Wis.2d 1, 21-23, 595 N.W.2d 380 (1999), which drew upon the discussion in *Walter v. Cessna Aircraft Co.*, 121 Wis.2d 221, 227-28, 358 N.W.2d 816 (Ct.App. 1984) (*review denied*).[7] MHIA focuses

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[7] Although *Brown v. Maxey*, 124 Wis.2d 426, 433, 369 N.W.2d 677 (1985), referred to a "strong probability of harm," in cases both before and after *Brown* -- *Walter* and *Sharp*, the courts spoke of a "potential for harm," and *Brown* did not set a minimum standard of a probability of harm. This matter was put to rest in *Wheeler v. General Tire and Rubber Co.*, 142 Wis.2d 798, 419 N.W.2d 331 (Ct.App. 1987), decided after *Brown* and before *Sharp*. Responding to the defendant's argument that the evidence was insufficient to support punitive damages because the likelihood of an accident was too remote, the *Wheeler* court stated: "Remoteness of an injury is not dispositive if the potential harm is severe and the cost and feasibility of reducing the probability of injury are low." 142 Wis.2d at

only on the first element and ignores the second. This allows it to define its notion of "intentional conduct" as involving only one element. MHIA uses that definition as a definition of "intentional disregard of rights" and thus ignores the fact that "intentional disregard of rights" is ***conduct*** involving a disregard of consequences.

MHIA also ignores the fact that, in enacting §895.85(3), the legislature changed only the modifier for "disregard of rights" and thus changed only ***the state of mind*** with which the defendant must commit a disregard of rights; it did not change or increase the potential for harm that must be posed by the defendant's conduct which disregards rights.

C. MHIA's Third Approach Misinterprets the Common Law; Under the Common Law, a "Disregard of Rights" Did Not Refer To an Injury.

In its third approach to the interpretation of §895.85(3), MHIA argues that, under the common law, a "disregard of rights" meant an injury and, therefore, an "intentional disregard of rights" means an intent to cause an injury. This argument misinterprets the common law. The common law used the term "disregard of rights" to describe a type of ***conduct*** that caused the plaintiff's injury, not the injury itself.

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819. The court ruled that "[t]he jury could have concluded that appellants' conduct was outrageous even if the likelihood of injury was slight since the cost of avoiding the injury was insubstantial and the possible harm was serious." *Id.*

In *Sharp v. Case Corp.*, 227 Wis.2d at 21, the court stated: "Punitive damages may be awarded in product liability suits if the plaintiff proves by clear and convincing evidence that the ***harm suffered*** was the ***result*** of the manufacturer's reckless disregard for the safety of product users, consumers and others who might be harmed by the product." (emphasis added) The "harm suffered" is the ultimate "result" of the disregard of rights; thus, the disregard of rights is not, and cannot be, the harm suffered or the tortious injury.

MHIA's argument is based upon an invalid analysis of selected cases. The cases MHIA cites on pages 21-25 of its brief only indicate that the conduct warranting punitive damages caused, or must cause, the plaintiff's injury. They do not say that "disregard of rights" conduct that causes the injury ***is*** the injury.

MHIA quotes, out of context, a portion of one sentence from *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 268, 294 N.W.2d 437 (1980), when it states: "Punitive damages are allowed when '"circumstances of aggravation" in the ***tortious injury*** are present.' *Id. [Wangen]*, 97 Wis.2d at 268 (quoting *Mid-Continent Refrigerator Co. v. Straka*, 47 Wis.2d 739, 746, 178 N.W.2d 28 (1970))." (emphasis supplied by MHIA; MHIA brief, p. 21) The full sentence actually says: "'A governing principle of these cases in allowing punitive damages has been the presence of "circumstances of aggravation" in the tortious injury.'"

The paragraph which contains that sentence discussed the type of conduct that will support a punitive damages award. *Wangen*, 97 Wis.2d at 267-68.[8] "Circumstances of aggravation" refers to the type of conduct that results in the tortious injury, not the injury itself.[9]

In *Kehl v. Economy Fire & Casualty Co.*, 147 Wis.2d 531, 433 N.W.2d 279 (Ct.App. 1988), the conduct that caused the plaintiff's injury was not claimed to meet the standard of conduct for punitive damages, and the conduct that was claimed to be a "wanton, willful or reckless disregard" of the plaintiff's rights did not cause any injury, so punitive damages were not available.

Although, in *Brown v. Maxey*, the defendant's knowledge of a potential for harm from fire at the apartment complex was a factor, along with his conscious refusal to reduce the risk of fires, that led the court to conclude that he

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[8] Earlier in the opinion, *Wangen*, 97 Wis.2d at 267, the court stated: "Punitive damages rest on allegations which, if proved, demonstrate a particular kind of conduct on the part of the wrongdoer, which has variously been characterized ... as malicious conduct or willful or wanton conduct in reckless disregard of rights or interests." MHIA's argument that a "disregard of rights" is an injury is inconsistent with its acknowledgement, in quoting *Wangen* on page 26 and in footnote 44 of its brief, that a "disregard of rights" is a type of conduct. How can a "disregard of rights" be an "injury" and "conduct?"

[9] In *Walters v. Cessna Aircraft Co.*, 121 Wis.2d at 225, the court of appeals summarized the discussion in *Wangen* by stating: "In other words, there must be circumstances of aggravation in the tortious injury, *i.e.*, outrageous conduct."

had disregarded the plaintiff's rights, this does not mean that a disregard of rights is equivalent to an injury. A disregard of rights is simply the "conduct" that led to the injury, as the court indicated when it stated that "Maxey's conduct evidences a reckless disregard of the rights and safety of Mr. Brown." *Brown*, 124 Wis.2d at 437.

In *Loveridge v. Chartier*, 161 Wis.2d 150, 188-93, 468 N.W.2d 146 (1991), the court simply held that because the defendant did not know that the herpes virus could be transmitted by cold sores, the evidence was insufficient to show that the defendant's conduct was sufficiently aggravated to fall within either category of conduct that justified the imposition of punitive damages.[10]

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[10] Judge Ralph Adam Fine suggested during oral argument before the court of appeals, and this suggestion was restated in the majority opinion, *Wischer v. Mitsubishi Heavy Industries America, Inc.*, 2003 WI App 202, ¶42, 267 Wis.2d 638, 673 N.W.2d 303, that Wischer believed that §895.85(3) was an expansion of the common law of punitive damages. This unfounded assertion was contradicted twice in the oral argument and in the brief filed in that appeal. (Wischer court of appeals brief, p. 18) The oral argument reflects: "HONORABLE FINE: ... So you're saying that there's more coverage under the new law than the old law?" "MR HABUSH: "No I'm not. ..." (oral argument trans., p. 118-19) Earlier in the argument, Mr. Habush said: "So did the word 'intentional' raise the bar? The answer is 'yes'. But the question is 'How far?' Was it raised an inch or was it raised a foot?" (*Id.* at 112) Wischer asserted that the statute made the law of punitive damages more restrictive by adding "intentional" as a modifier of "disregard of rights" and dropping the modifier "reckless." (Wischer court of appeals brief, p. 18; petition for review, p. 19; Wischer principal supreme court brief, p. 10-11, 30)

MHIA's argument is not only unsupported by the cases it cites, it is directly contrary to the common law. The common law permitted the imposition of punitive damages for an intentional or willful, in addition to a reckless, disregard of rights. If a "disregard of rights" were equivalent to an "injury" under the common law, then punitive damages would have been available under the common law in any case in which the defendant caused an injury intentionally. This was not so, however, since even in intentional tort cases, punitive damages were not automatically available. *See, e.g., Bank of Sun Prairie v. Esser*, 155 Wis.2d 724, 456 N.W.2d 585 (1990).

IV. MHIA CANNOT LEGITIMATELY DENY THAT ITS INTERPRETATION OF WIS. STAT. §895.85(3) WOULD ELIMINATE PUNITIVE DAMAGES IN NEGLIGENCE CASES.

MHIA attempts to downplay the fact that its interpretation of §895.85(3) would eliminate punitive damages in negligence cases by claiming that punitive damages "were always limited to 'extreme' negligence cases." (MHIA brief, p. 29-30)[11] Although the negligence cases in which punitive damages were awarded usually involved "extreme" types of negligence, MHIA's interpretation would eliminate punitive damages in even those types of cases.

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[11] MHIA's assertion that a plaintiff in a negligence case was required to prove a "type of conduct typically associated with a crime" (MHIA brief, p. 30) is wrong. Punitive damages were available in negligence cases "if the plaintiff prove[d] the necessary aggravating circumstances beyond ordinary negligence." *Brown*, 124 Wis.2d at 432.

V. THERE IS NO SUPPORT FOR THE CLAIM THAT WIS. STAT. §895.85(3) IS AMONG THE MOST STRINGENT PUNITIVE DAMAGES REQUIREMENTS IN THE COUNTRY.

MHIA and the court of appeals, as support for the claim that §895.85(3) must be interpreted to impose a restrictive standard, cite to Richard L. Blatt, et al., *Punitive Damages: A State by State Guide to Law and Practice*, §8.59 at 546 (2003), for the statement that Wisconsin is "among the states having the most stringent punitive damage conduct requirements."[12] The Blatt statement is taken out of context. There are more stringent punitive damage laws than Wisconsin's, including states that ban punitive damages or states that limit punitive damages to malice. *See: Id.* at p. 546.

Wischer requests this court to reverse the decision of the court of appeals.

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[12] *See*, MHIA brief, p. 1, 15; *Wischer*, 2003 WI App. 202, ¶41, n. 10. Travelers cites the same section of the 2004 edition of that treatise. (Travelers brief, p. 37)

CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a reply brief produced with a monospaced font. The length of this reply brief is 13 pages.

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I hereby certify that on May 28, 2004, I served copies of the Reply Brief of Patricia Wischer, Marjorie DeGrave and Ramona Dulde-Starr in Reply to Response Brief of Mitsubishi Heavy Industries America, Inc. upon counsel for the parties in the manner designated below, at the addresses indicated below:

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STATE OF WISCONSIN
IN SUPREME COURT

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased,

Plaintiffs-Intervenors-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant,

NEIL F. LAMPSON, INC.,

Defendant-Respondent,

LAMPSON INTERNATIONAL LTD., FEDERAL INSURANCE COMPANY, and THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendants.

Case No. 01-0724
(consolidated with Case Nos. 01-1031 and 01-2486)

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I, DATED SEPTEMBER 30, 2003

REPLY BRIEF OF PATRICIA WISCHER, MARJORIE DeGRAVE AND RAMONA DULDE-STARR IN REPLY TO RESPONSE BRIEF OF FEDERAL INSURANCE COMPANY AND THE TOKIO MARINE & FIRE INSURANCE COMPANY

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased;

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-
Cross-Appellant,

Case No. 01-1031
(consolidated with
Case Nos. 01-0724
and 01-2486)

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-Petitioner,

NEIL F. LAMPSON, INC., and LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY,

Defendant-Co-Appellant,

THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendant.

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased;

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-
Cross-Appellant,

Case No. 01-2486
(consolidated with
Case Nos. 01-0724
and 01-1031)

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-
Cross-Respondent,

NEIL F. LAMPSON, INC., and LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY, and THE TOKIO MARINE & FIRE INSURANCE COMPANY,

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I. FEDERAL'S ARGUMENT MISINTERPRETS THE COMMON LAW AND §895.85(3) AND MISCHARACTERIZES WISCHER'S ARGUMENT.

Federal Insurance Company and Tokio Fire & Marine Insurance Company (hereafter collectively "Federal") present charts concocted to further exaggerate Wischer's position by distorting common law as to: (1) the elements of the tort and (2) the standard for punitive damages.

Wischer's states her view of the common law and the statute in her reply to MHIA's brief, which Federal adopts. Wischer attaches two charts to this brief showing her interpretation of the common law before the enactment of §895.85(3)(Chart A, page 12) and her interpretation of §895.85(3)(Chart B, page 13). Comparison of charts shows the invalidity of Federal's and the merits of Wischer's.

A. Wischer's Charts.

Under the common law, if the plaintiff proved entitlement to compensatory damages and, in addition, proved that the defendant's conduct that caused the plaintiff's injury met the standard for punitive damages -- the defendant acted maliciously or acted in wanton, willful or reckless disregard of the plaintiff's rights, then the punitive damages issue could be submitted to the jury. *Sharp v Case Corp.*, 227 Wis.2d 1, 21, 595 N.W.2d 380(1999).

In *Sharp,* drawing from *Walter v. Cessna Aircraft Co.*, 121 Wis.2d 221, 227-28, 358 N.W.2d 816 (Ct.App.1984) (review denied), this court explained a "willful, wanton or reckless disregard of rights" as a showing that (1) the

defendant had specific knowledge that his conduct posed a potential for harm, and (2) the defendant proceeded in willful, wanton or reckless disregard of the consequences of the conduct. 227 Wis.2d at 21-24. *Sharp*, like *Walter*, spoke only of a "potential for harm" and said nothing about a strong probability of harm. *Sharp*, 227 Wis.2d at 23; *Walter*, 121 Wis.2d at 227.[1] Wischer's Chart A (common law) specifies these elements from *Sharp*.

Federal acknowledges that the legislature made a "single" change, removing "reckless" disregard of rights as a basis for punitive damages. (Fed. brief, p. 8, 11)

The legislature's change to an "intentional disregard of rights" was not directed to *Sharp's* first element (defendant must have knowledge of a potential for harm). The legislature did not require an increased potential for harm, as Federal and MHIA contend when they argue that §895.85(3) requires that the defendant intend injury or have knowledge that an injury was practically certain to occur. Rather, the change was directed to the state of mind with which the defendant must commit a disregard of rights - the second element in *Sharp*. The legislature required the disregard of rights to be "intentional" and thus more conscious and deliberate than reckless. Thus, under the statute, a defendant who commits an "intentional

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[1]*Wheeler v. General Tire and Rubber Company*, 142 Wis.2d 798, 818-19, 419 N.W.2d 331 (Ct.App.1987), held that depending on the nature of the injury, its potential may be remote or even slight, and punitive damages may still be warranted.

disregard of rights" (1) must have knowledge that his or her conduct poses a potential for harm, and (2) he must proceed in "intentional" disregard of the consequences of the conduct.

Wischer's Chart B incorporates this change.

B. Federal's Charts Are Incorrect.

Federal's three charts erroneously place the term "disregard of rights" in the elements of the tort itself, in the second box. The elements of tort are commonly called duty, breach, cause and damage, yet Federal calls "breach of duty" a "disregard of rights."

The term "disregard of rights" is used in the punitive damages analysis in both the common law and §895.85(3), but it is not used in the tort analysis, as Federal contends. Federal does this to create its Chart 3, the purported version of Wischer's position. Federal draws the line to punitive damages down from "disregard of rights" in the second box, in order to claim that Wischer's position would lead to punitive damages where there is no injury, no cause and the conduct has no relation to the injury. Of course, Wischer never made such a claim. She acknowledges that punitive damages, and thus "disregard of rights," may not be considered unless the defendant's conduct gives rise to a tort, causing an injury and warranting compensatory damages.[2]

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[2] Federal attempts a due process attack on Wischer's interpretation of §895.85(3), arguing that Wischer "divorces" the proof of disregard of rights from proof of

Federal's charts also use a contrived definition of common law conduct for punitive damages. In its "punitive damages" box on Chart 1, Federal specifies that punitive damages could be awarded if the defendant's conduct in causing the injury was committed "(1) With Malice (Ill-Will, Hatred, Etc...),(2) With Actual Intent To Injure, (3) With Awareness That Injury Was Practically Certain, Or (4) With Awareness Of A Strong Probability Of Injury."

First, Federal's items (2) and (3) are improperly separated out from item (1). "Malicious" conduct under the common law includes conduct with actual intent and objective intent to cause injury (in the "Etc." in Federal's item (1)), *Ervin v. City of* Kenosha, 159 Wis.2d 464, 483, 464 N.W.2d 654 (1991) Federal tries to obscure this in a failed attempt to defuse Wischer's argument that Federal's interpretation of the phrase "intentional disregard of rights" as requiring intent to injure would render the phrase superfluous, since "malice" already includes conduct with intent to cause harm.

Second, by listing a "strong probability" of injury in its item 4, Federal is completely wrong about the conduct

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the injury suffered by the tortious conduct. This attack fails in its premise because Wischer does not contend that the proof of disregard of rights is "divorced" from the underlying tort. Federal goes off on an equally spurious tangent on p. 16, arguing that §895.01(1) does not authorize an estate to sue for a disregard of safety. Wischer's claim for punitive damages is not an independent cause of action, just a demand for an additional remedy.

denominated in the common law as "wanton, willful or reckless disregard of rights." As stated on page 2 of this brief, although *Sharp's* first element refers to knowledge of a potential of harm, neither element says anything about strong probability. Federal ignores the defendant's state of mind, which is at the core of a disregard of rights.

Thus, Federal's item 4 is not compliant with *Walter* or *Sharp*, and to the extent it relies on the use of the term "strong probability" of harm in *Brown v. Maxey*, 124 Wis.2d 426, 369 N.W.2d 667 (1985), it is an overstatement, because *Brown* did not hold that a "strong probability" of harm was a minimum requirement under the common law, and both before and after *Brown*, the courts only referred to a "potential" for harm.

Wheeler, v. General Tire and Rubber Company, 142 Wis.2d 798, 818-19, 419 N.W.2d 331 (Ct.App.1987), decided two years after *Brown*, shows that *Brown* did not impose a requirement of "strong probability." In *Wheeler*, the defendant claimed an insufficiency of evidence for punitive damages, because the likelihood of an accident was too remote. The court held that remoteness of injury was not dispositive and punitive damages could be justified, depending on the serious of the injury, even if the probability of injury was slight.[3]

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[3] "Remoteness of an injury is not dispositive if the potential harm is severe and the cost and feasibility of reducing the probability of injury are low. . . . The jury could have concluded appellant's conduct was outrageous

Federal misrepresents the punitive damage analysis in order to argue that the legislative change related to a probability of harm rather than the actor's state of mind in disregarding the consequences. The change pertains not to a step up a ladder of probability of harm, but rather to the second part of the *Sharp* test - that the defendant proceeded with the conduct in "wanton, willful or reckless" disregard of the consequences. Under §895.85(3), the defendant must proceed in "intentional" disregard of the consequences.

Unlike Federal's charts, Wischer's charts reaffirm that punitive damages are a remedy, not a cause of action, and accurately depict the law of punitive damages, making clear that the punitive damages analysis is dependent on a finding of liability and an award of compensatory damages and then proceeds on a separate track which includes the analysis of a "disregard of rights."

C. Federal's Dire Predictions of an Increase in Punitive Damage Cases is Based on a Misrepresentation of Wischer's Views.

In the "theatre of the absurd," Federal and the other respondents predict dire consequences if this court accepts Wischer's interpretation of §895.85(3). The fatal flaw in this "sky is falling" scenario is that the respondents totally misrepresent Wischer's position.

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even if the likelihood of injury was slight since the cost of avoiding the injury was insubstantial and the possible harm was serious." *Wheeler,* 142 Wis.2d at 819.

The respondents suggest that Wischer believes:

(1) That only an intent to act is enough to obtain punitive damages;

(2) Talking on a cell phone, adjusting the radio, eating a sandwich, driving 64 mph in a 55 mph zone, running a stop sign, exceeding the speed limit, parking in a no parking zone -all intentional acts and if they cause injury or death would lead to punitive damages;

3) Few negligent decisions would escape the submission of punitive damages.

The foregoing nonsense is based on Wischer's contention that §895.85(3) does not require intent to injure or awareness that an injury was practically certain to occur and on Wischer's final argument that stated that MHIA intentionally decided to do the lift.[4]

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[4]Federal and the respondents contend that according to Wischer, the "intentional" part of the statute is satisfied by any volitional act. They claim this is supported by Wischer's counsel's statement in closing argument that "[t]he intentional part is easy. They intended to do the lift." (R.751:65) The court of appeals also referred to this. *Wischer v. Mitsubishi Heavy Industries of America,* 2003 WI App 202, ¶3, 267 Wis.2d 638, 673 N.W.2d 303. Aside from the fact that this was only argument, no objection was made to this statement, and the jury was properly instructed, it is clear from a full reading of counsel's argument that he did not contend that the intentional disregard of rights was simply due to the intent to do the lift. Immediately before the portion quoted by the court of appeals and respondents, Wischer's counsel said: "[T]he tragedy . . . was due to the intentional and outrageous decision by Victor Grotlisch to lift the huge roof piece in the face of obvious danger and hazardous wind. This, members of the jury, is the basis of our punitive damages

Wischer does not contend a mere intent to do an act will result in punitive damages. She believes that conduct which is creates potential harm or injury to others and which reflects an intent to disregard rights may be worthy of punitive damages if it causes the harm or injury.

Wischer believes *Kehl v. Economy Fire & Casualty.*, 147 Wis.2d 531, 433 N.W.2d 279(Ct.App 1988), was a correct decision and would also be correct under §895.85(3); Wischer agrees that *Loveridge v. Chartier,* 161 Wis.2d 150, 468 N.W.2d 146(1991) was also correctly decided on the evidence and would be similarly decided under §895.85(3).

Punitive damages are a remedy, under the common law and the statute. "Disregard of rights" was, in the common law, the threshold consideration by a court of the defendant's conduct. The only change under the statute is that now this disregard of rights must be intentional; no longer can it be reckless. Thus, it is now more difficult to obtain punitive damages in Wisconsin.

The potential for causing harm is certainly a factor to consider. Great certainty of harm may be accompanied by

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claim against [MHIA]." (R.751:64-65) In the very quote cited by respondents and the court of appeals, Wischer's counsel said of the intentional decision to do the lift: "It was an intentional decision in the face of hazards and obvious wind conditions, and in doing so, they disregarded the rights of those three men." (R.751:65-66) Nothing could be clearer that counsel was referring to the conscious decision to disregard the consequences in the face of known and understood danger as the basis for the intentional disregard of rights, exactly as contemplated by the statute.

minor consequences or less certainty of harm may be accompanied by tragic and enormous consequences--each case will be considered on its own particular facts. *See Walter,* 121 Wis.2d at 229; *Wheeler,* 142 Wis.2d at 818-19.

II. FEDERAL'S ARGUMENTS ABOUT SETTLEMENTS ARE IRRELEVANT AND FACTUALLY AND LEGALLY FLAWED.

Although this appeal is about the interpretation of §895.85(3), Federal argues that a settlement during trial "impacts the . . . legal question" here because it caused Wischer to "invent" her "novel and tortured" statutory interpretation. (Fed. Brief, pp. 17-21) Federal cites no authority for these irrelevant arguments. They should be seen for what they are: a naked attempt to bias the court by amounts received by Wischer and to impugn Wischer's motives as to statutory interpretation. Even so, Federal has factually and legally misrepresented the matter.

A. The Plaintiffs Never Invented a Legal Interpretation Because of the IINA Settlement.

Federal's claim (Fed. Brief, pp. 19-21) that Wischer "invented" her strategy or that it was "born," because of the IINA settlement is false. From the filing of the complaint (R.81), Wischer held the same position that the statute does not require intent to cause harm. She never changed strategy because of the settlement during trial.

The IINA settlement concluded on November 7, 2000 (Fed. App. 005-013) In her brief opposing MHIA's motion for summary judgment on punitive damages claims, filed

September 21, 2000, Wischer presented the same statutory interpretation as she does here that the "conduct that must be proven is not an intent to harm, but an intentional disregard of rights." (R.297:50-54)

Also, Federal's peculiar and unsupported claims about a so-called "normal" trial depart from reality. Wischer proved her case "normally" - the record did not support an intent to injure. In contrast, Federal attempted to escape coverage by arguing that MHIA intended to cause the disaster and deaths. (R.901:7-13)

B. MHIA Was Not Released and Remains Legally Liable, Because the Condition Precedent of No Insurance Was Not Satisfied.

The IINA settlement did not "exculpate the wrongdoer" or "cap" MHIA's punitive damages liability at $10 million, as claimed by Federal. (Fed. Brief, pp. 4, 21)

MHIA had coverage layers totaling $104 million: $2M from Travelers, $5M from Royal, $20M from IINA, $50M from Federal, $25M from Travelers, $2M from Tokio. After pretrial settlements for the first two layers, MHIA retained $97M of liability coverage.

During trial, IINA paid $12,375,000 on behalf of MHIA. (Fed. App. 005-013) In consideration, MHIA was released from punitive damages below $84,625,000, "for which MHIA is not indemnified by valid and collectible insurance . . . in which case MHIA shall be responsible for a maximum of $10

million of those punitive damages which would otherwise have been covered by those policies."[5]

The IINA settlement clearly conditions the release of MHIA for punitive damages below $84,625,000 upon a finding of no valid and collectible insurance. The trial court found that MHIA is insured for punitive damages, and entered judgment against MHIA for $84,625,000, the amount allowed under the IINA settlement, equating to MHIA's remaining coverage. Thus, no release occurred and MHIA remains legally obligated to pay, because the condition precedent of no insurance was not satisfied.[6]

Wischer requests that the court reverse the decision of the court of appeals.

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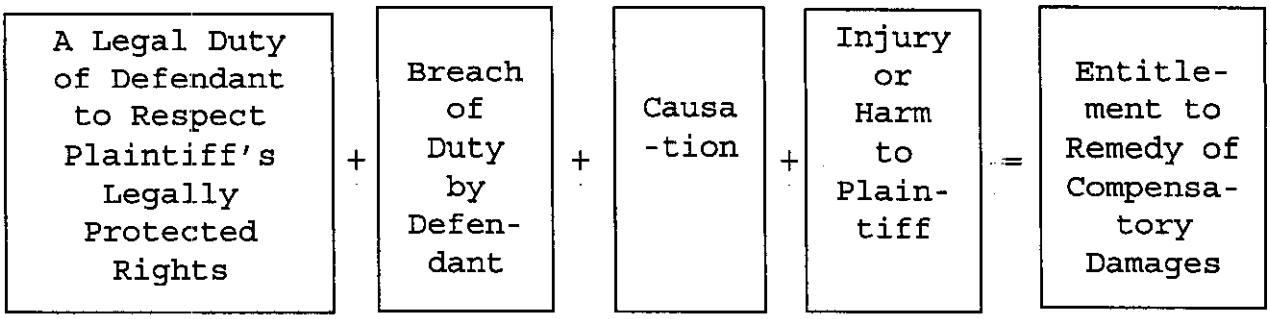
[5] The $84,625,000 reflected the MHIA's $104M in coverage less the $19,375,000 paid in settlements. After judgment, IINA paid its remaining coverage for MHIA, reducing MHIA's punitive damage obligation to $77M.

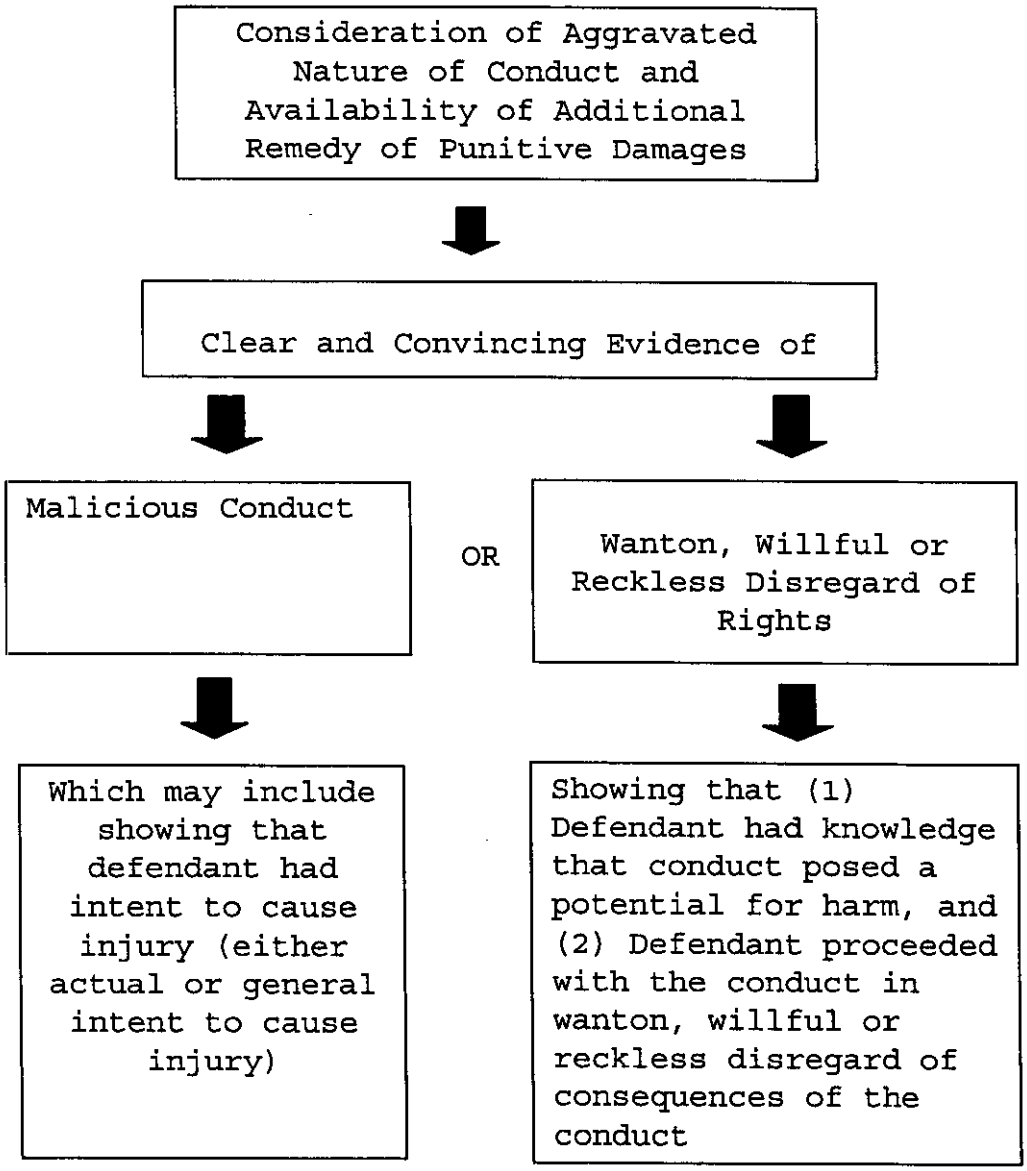
[6] It is not against public policy for a wrongdoer to insure for punitive damages, as MHIA did here. *Brown v. Maxey*, 124 Wis.2d 426, 445-45, 369 N.W.2d 677(1985).

The Wischer Chart A

Common Law Before Enactment of Wis. Stat. §895.85(3)

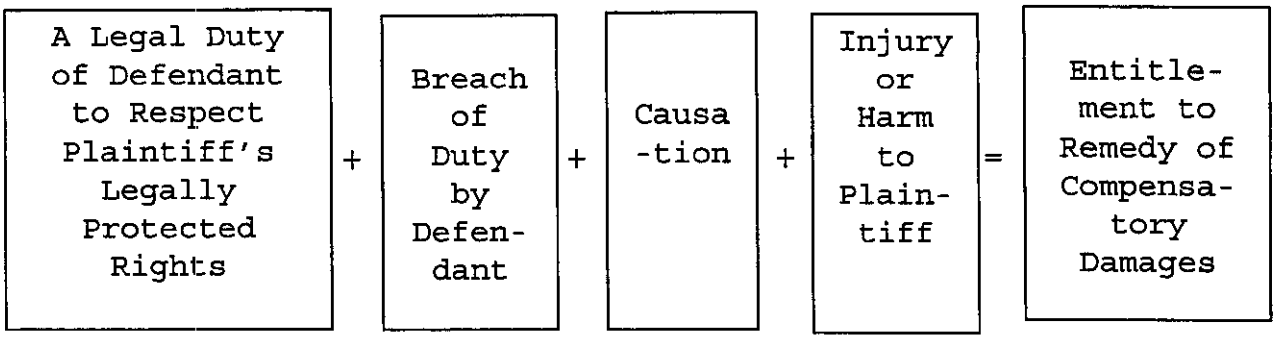


IF LIABILITY AND COMPENSATORY DAMAGES ARE FOUND



The Wischer Chart B

Wischer's Interpretation of Wis. Stat. §895.85(3)



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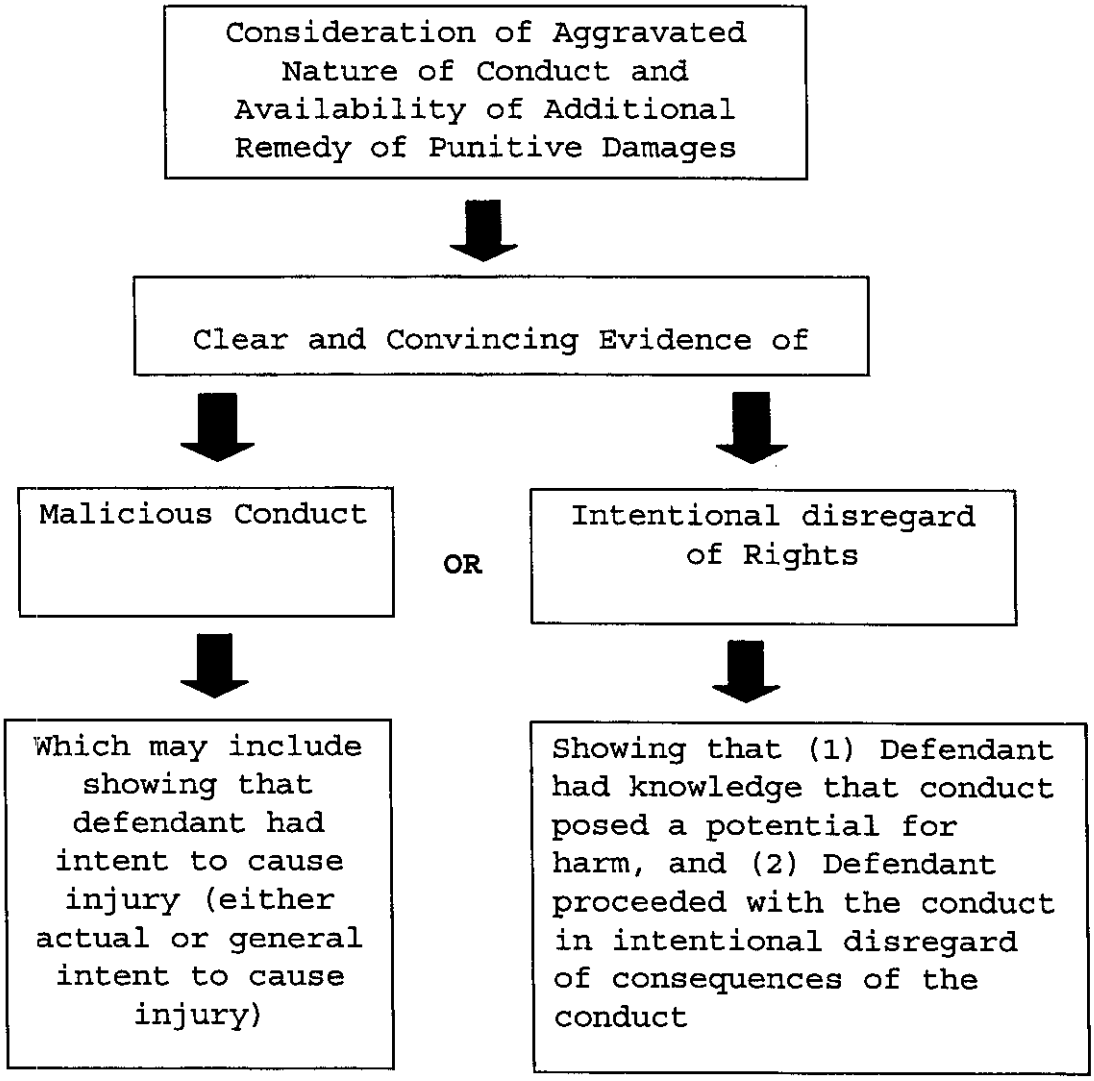

CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a reply brief produced with a monospaced font. The length of this reply brief is 13 pages.

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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2004, I served copies of the Reply Brief of Patricia Wischer, Marjorie DeGrave and Ramona Dulde-Starr in Reply to Response Brief of Federal Insurance Company and The Tokio Marine & Fire Insurance Company upon counsel for the parties in the manner designated below, at the addresses indicated below:

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STATE OF WISCONSIN
IN SUPREME COURT

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased,

Plaintiffs-Intervenors-Respondents; Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Appellant,

Case No. 01-0724
(consolidated with
Case Nos. 01-1031
and 01-2486)

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant,

NEIL F. LAMPSON, INC.,

Defendant-Respondent,

LAMPSON INTERNATIONAL LTD., FEDERAL INSURANCE COMPANY, and THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendants.

APPEAL FROM THE CIRCUIT COURT FOR MILWAUKEE COUNTY
THE HONORABLE DOMINIC S. AMATO, PRESIDING

AMICUS CURIAE BRIEF OF WISCONSIN STATE AFL-CIO, MILWAUKEE BUILDING & CONSTRUCTION TRADES COUNCIL, AND WISCONSIN TEAMSTERS JOINT COUNCIL 39

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased;

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-
Cross-Appellant,

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(consolidated with
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THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-Petitioner,

NEIL F. LAMPSON, INC., and LAMPSON INTERNATIONAL, LTD.,

Defendants,

FEDERAL INSURANCE COMPANY,

Defendant-Co-Appellant,

THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendant.

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased;

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-
Cross-Appellant,

Case No. 01-2486
(consolidated with
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THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-
Cross-Respondent,

NEIL F. LAMPSON, INC., and LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY and THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendants-Respondents-
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AMICUS INTEREST

The Wisconsin State AFL-CIO, Milwaukee Building & Construction Trades Council, and Wisconsin Teamsters Joint Council 39 have a deep and abiding interest in promoting workers' rights to a safe workplace. As labor organizations, they have a continuing interest in the remedies that the law provides to ensure that workers are not victims of corporate indifference to or intentional disregard of such rights. They respectfully submit this brief in support of the position of Plaintiffs-Intervenors-Respondents-Petitioners Patricia Wischer, Marjorie DeGrave and Ramona Dulde-Starr.

ARGUMENT

INTRODUCTION

This case arises out of a workplace accident where there was substantial evidence of a pattern of exposing workers to great risk by knowingly operating under unsafe conditions in the months before the crane crash, on the day of the crash, and even after the deaths of three iron workers. Wischer v. Mitsubishi Heavy Industries America, Inc., 2003 WI App. 202, ¶64 n.2, 267 Wis.2d 638, 673 N.W.2d 303. This pattern proved fatal when the crane collapsed because it was misused by Mitsubishi in excessive winds. Mitsubishi never performed wind load calculations, and wind conditions on the day of the accident far exceeded load limitations. Id. at ¶22 n.6.

The jury found such evidence compelling and credible and returned a verdict in favor of the plaintiffs with a compensatory damage award of $5,250,000 and a punitive damage award of $94 million dollars against Mitsubishi. Id. at ¶24. It is undisputed in this appeal that there was sufficient evidence to support the jury's punitive damage finding. What is in dispute is the court of appeals' interpretation of Wis. Stat. §895.85(3), which permits a plaintiff to recover punitive damages upon a showing that the defendant acted "in intentional disregard of the rights of the plaintiff." The court of appeals held that, under the statute, for the right to a safe workplace to be disregarded, harm or injury must be intended. It reversed the punitive damage award. Yet, under the statute, the right to a safe workplace may be intentionally disregarded such that punitive damages are warranted regardless of the defendants' intent to cause harm or injury.

The court of appeals' construction of Wis. Stat. §895.85(3) conflicts with other cases previously decided under the statute. Its construction of "intent" virtually eliminates punitive damages in workplace accident cases. Punitive damages are often the only means by which the public at large can vindicate its legitimate

interest in punishing wrongdoing and deterring future misconduct by corporate defendants or others. The court of appeals' construction of Wis. Stat. §895.85(3) deprives the working people of Wisconsin of an effective deterrent to conduct harmful to society. Consequently, we urge the Court to reverse the court of appeals' decision.

I. THE COURT OF APPEALS' DECISION VIRTUALLY ELIMINATES PUNITIVE DAMAGES IN CASES INVOLVING WORKPLACE ACCIDENTS.

The court of appeals' interpretation of Wis. Stat. §895.85(3) eliminates punitive damages for any conduct, no matter how egregious, that does not evince an intent to cause injury. It eliminates punitive damages in cases that involve conduct threatening public health and safety and a disregard for a worker's right to a safe workplace. By construing "intentional disregard of rights" to require evidence of intent to cause injury or proof that injury was practically certain to occur, the court of appeals has eliminated any right to recover punitive damages in workplace cases. Consequently, the working people of Wisconsin have been deprived of an effective means to deter conduct harmful to their health and safety.

This court has long recognized that the purpose of punitive damages is to punish the wrongdoer, and to deter the wrongdoer and others from similar conduct rather than compensate the plaintiff for any loss. Wangen v. Ford Motor

Company, 97 Wis.2d 260, 303, 294 N.W.2d 437 (1980). Allowing an injured person to receive punitive damages is often the only means by which the public can vindicate its legitimate interest in punishing wrongdoing and deterring future misconduct by the defendant or others. Jacque v. Steenberg Homes, Inc., 209 Wis.2d 605, 620, 563 N.W.2d 157 (1997).

In Jacque, this court concluded that nominal damages can support a punitive damage award in the case of an intentional trespass to land. Id. at 621. In reaching this conclusion, the court focused on the societal response to trespass to land, commenting that "punitive damages have the effect of bringing to punishment types of conduct that, though oppressive and hurtful to the individual, almost invariably go unpunished by the public prosecutor." Id. at 620.

Jacque is instructive here because the court was concerned not only with the nature of the harm but also the nature of society's response. It continued to adhere to the principle of punitive damages as a valuable and effective tool in the control of conduct harmful to society. The court of appeals' construction of Wis. Stat. §895.85(3) conflicts with this principle. It deprives society of a valuable tool to promote the public good by securing a safe workplace for its citizens.

The public interest in a safe workplace overrides Judge Fine's concern in his concurring opinion that punitive damage awards against large corporations hurt only their shareholders. Wischer, 262 Wis.2d at ¶52. Even "innocent shareholders" should not be permitted to benefit from corporate decisions made with intentional disregard of worker safety. Wangen, 97 Wis.2d at 291. It is precisely on behalf of their "innocent" shareholders that corporations seek to maximize profits at the expense of worker safety, and it is the shareholders who ultimately enjoy the rewards of such conduct. "Shareholders of errant corporations are thus hardly more 'innocent' than the absentee shareholder who hires an overseer to drive his slaves and to forward resulting profits, but who claims 'innocence' because he has not himself wielded the whip." Robinson & Kane, *Punitive Damages in Product Liability Cases*, 6 Pepperdine L. Rev. 139, 143 (1978).

Punitive damages effectively deter corporate intentional disregard of workplace safety. Corporations are sophisticated in the operation of the civil law, and the potential of punitive damages causes them to pause to reflect before certain conduct is undertaken. To that extent punitive damages serve a useful end.

The commerce of Wisconsin cannot flourish without its workers. The citizens of Wisconsin have an interest in

ensuring workers' safety so that the state's economy can thrive. But too often, employees are the victims of corporate disregard of their right to a safe workplace. The public has an interest in preserving the ability of the legal system to enforce these rights. "Rights" under Wis. Stat. §895.85(3) include the right to a safe workplace, and such rights where intentionally disregarded warrant punitive damages.

The court of appeals' decision that the right to a safe workplace may be disregarded, unless harm or injury is intended, virtually eliminates punitive damages in cases involving workplace accidents. As such, it deprives the working people of Wisconsin of a valuable and effective tool to control egregious conduct harmful to their health and safety.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH OTHER DECISIONS PREVIOUSLY DECIDED UNDER THE STATUTE.

The court of appeals' holding that the phrase "intentional disregard of the rights of the plaintiff" in Wis. Stat. §895.85(3), requires an intent by the defendant to injure or harm the plaintiff, conflicts with other cases previously decided under the statute. None of these cases required evidence of a specific intent to cause injury to support a punitive damages finding.

In Trinity Evangelical Lutheran Church v. Tower Insurance Company, 2003 WI 46, 261 Wis.2d 333, 661 N.W.2d 789, the court

upheld a $3.5 million dollar punitive damage award based on credible evidence that the insurer had acted with intentional disregard of the insured's rights. Trinity Evangelical Church and School requested "hired and non-owned automobile insurance coverage" because its teachers occasionally transported students. Its insurance agent inadvertently failed to check the appropriate box in the application so that the policy omitted the requested coverage. The mistake was discovered when a teacher transporting students caused a serious accident. The insurance agent documented the mistake and requested that Tower back-date coverage for Trinity. It was undisputed that Tower knew of the mutual mistake attributable to its agent when it denied coverage to Trinity. Tower denied coverage without investigating the agent's request for back-dating and without seeking available in-house counsel or contacting the underwriter with whom the agent worked. Tower also moved for summary judgment without informing the trial court of the dispute regarding the agent's error and request for back-dating. Id. at ¶¶61-62.

Based on these undisputed material facts, the court concluded that Tower's conduct demonstrated a continuing, egregious and flagrant pattern of disregard toward the duty it owed to its insured. Id. at ¶62. The court referenced Wis. Stat. §895.85(3) and cited with approval the jury instruction

based on the statute that states "punitive damages may be awarded if you find that the defendant acted in an intentional disregard of the rights of the plaintiff." Id. at ¶45 n.5; Wis JI-Civil 1707.1. The court made no mention of a specific intent to harm or injure.

Allied Processors, Inc. v. Western National Mutual Insurance Co., 2001 WI App 129, 246 Wis.2d 579, 629 N.W.2d 329, was a bad faith case in which the court affirmed an award of punitive damages against the insurer. The court held that, under Wis. Stat. §895.85(3), there was sufficient evidence for the jury to conclude that Western National acted in intentional disregard of the insured's rights. Id. at ¶¶37-38. This evidence included Western National's failure to disclose accurate insurance coverage information, to properly evaluate a punitive damage claim, and to effectuate a proper claim settlement in order to prevent an excess verdict against the insured. As in Trinity, the court made no mention of a specific intent to harm or injure.

In Dorr v. Sacred Heart Hospital, 228 Wis.2d 425, 597 N.W.2d 462 (Ct. App. 1999), the court of appeals reversed the trial court's summary judgment dismissal of the plaintiffs' punitive damage claims, and concluded there was ample evidence to raise a jury question whether the hospital acted with intentional disregard of the plaintiffs' rights. 228 Wis.2d

at 454-55. In that case, the hospital attached an unenforceable lien on the proceeds of the Dorrs' personal injury settlement. It refused the Dorrs' and their attorney's request to drop the lien and submit its bill to the HMO. It was undisputed that the Dorrs as HMO enrollees were immune from payment to the hospital under statutory law and under the hospital's contract with the HMO.

Nevertheless, when there was an accident, it was standard hospital policy to collect the patient's claim from the tortfeasor's liability carrier rather than bill the patient's HMO. 228 Wis.2d at 455. There was also evidence that the hospital filed liens despite a patient's HMO coverage because the hospital recognized it could collect more money from the liability carrier. Id.

The court concluded that there was sufficient credible evidence to allow a jury to find that the hospital acted with intentional disregard of the Dorrs' rights. Id. Without any reference to the hospital's intent to harm the plaintiff, the court concluded that the hospital's intentional disregard of the Dorrs' right to be free from the hospital's improper lien could establish the basis for a punitive damage claim.

In City of West Allis v. WEPCO, 2001 WI App 226, 248 Wis.2d 10, 635 N.W.2d 873, the court held that punitive damages were properly submitted to the jury pursuant to

Wis.Stat. §895.85(3). Id. at ¶¶21-22. The court cited Wis JI-Civil-1707.1 for the proposition that "a person acts in an intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the plaintiff's rights or is aware that his or her acts are practically certain to result in the plaintiff's rights being disregarded." Id. at ¶25. The court independently reviewed the evidence in accord with the jury instruction and confirmed the trial court's finding that WEPCO acted outrageously when it intentionally disregarded the plaintiffs' rights by discharging pollutants on their property. Id. at ¶¶25-26.

In City of West Allis, as in the other cases discussed above, the court reviewed the submission of punitive damages to the jury under the intentional disregard of the plaintiff's rights standard in Wis. Stat. §895.85(3). The standard it applied did not require evidence that the defendant intended to injure the plaintiff or knew that injury was certain to occur.

In Trinity, Allied Processors, Dorr, and City of West Allis, the court correctly applied the "intentional disregard of the plaintiffs' rights" language of Wis. Stat. §895.85(3) to require an intentional disregard of rights. The court of appeals' ruling here that the statutory language means that

the defendant intended to cause injury or harm to the plaintiff conflicts with these cases.

CONCLUSION

For the foregoing reasons, the Wisconsin State AFL-CIO, Milwaukee Building & Construction Trades Council, and Wisconsin Teamsters Joint Council 39 respectfully request that the Court reverse the decision of the court of appeals.

Dated this 29th day of June, 2004.

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MILWAUKEE BUILDING & CONSTRUCTION
TRADES COUNCIL, and
WISCONSIN TEAMSTERS JOINT COUNCIL 39

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CERTIFICATION

I hereby certify that this Brief confirms to the rules contained in §809.19(8)(b)(c), Wis. Stat., for a brief and appendix produced using the following font: monospaced font; 10 characters per inch; double-spaced; 1.5 inch margin on left and 1 inch margin on the other three sides. The length of this brief is 11 pages.

Dated this 29th day of June, 2004.

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414/271-4500

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STATE OF WISCONSIN
SUPREME COURT
Consolidated Appeals: 01-0724, 01-1031 and 01-2486

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased;

Plaintiffs-Intervenors-Respondents-Petitioners,

Case No. 01-0724
(consolidated with
Case No. 01-1031
and 01-2486)

v.

MITSUBISHI HEAVY INDUSTRIES
AMERICA, INC.,

Defendant-Appellant,

THE TRAVELERS INDEMNITY COMPANY
OF ILLINOIS,

Defendant,

NEIL F. LAMPSON, INC.,

Defendant-Respondent,

LAMPSON INTERNATIONAL LTD.,
FEDERAL INSURANCE COMPANY, and
THE TOKIO MARINE AND FIRE
INSURANCE CO.,

Defendants.

REVIEW OF A DECISION OF THE COURT OF APPEALS,
DISTRICT I, DATED SEPTEMBER 30, 2003 AND PUBLISHED
AT 2003 WI APP 202, 267 WIS.2d 638, 673 N.W.2d 303

AMICUS CURIAE BRIEF AND APPENDIX
OF THE WISCONSIN ACADEMY OF TRIAL LAWYERS

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased;

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

Case No. 01-1031
(consolidated with
Case Nos. 01-0724
and 01-2486)

v.

MITSUBISHI HEAVY INDUSTRIES
AMERICA, INC.,

Defendant-Respondent-
Cross-Appellant,

THE TRAVELERS INDEMNITY COMPANY
OF ILLINOIS,

Defendant-Appellant-Petitioner,

NEIL F. LAMPSON, INC., and
LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY,

Defendant-Co-Appellant,

THE TOKIO MARINE AND FIRE INSURANCE CO.,

Defendant.

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased;

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

Case No. 01-2486
(consolidated with
Case Nos. 01-0724
and 01-1031)

v.

MITSUBISHI HEAVY INDUSTRIES
AMERICA, INC.,

Defendant-Respondent-
Cross-Appellant,

THE TRAVELERS INDEMNITY COMPANY
OF ILLINOIS,

Defendant-Appellant-Cross-Respondent,

NEIL F. LAMPSON, INC., and
LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY, and
THE TOKIO MARINE AND FIRE INSURANCE CO.,

Defendants-Respondents-Cross-Appellants.

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STATEMENT OF AMICUS INTEREST OF THE WISCONSIN ACADEMY OF TRIAL LAWYERS

The Court of Appeals' decision below, 2003 WI App 202, will adversely impact the rights of all citizens and in particular tort victims, many of whom are represented by members of the Wisconsin Academy of Trial Lawyers (WATL), by creating an impermissibly heightened standard for awarding punitive damages and will, unless reversed, deprive private citizens of what this Court has often recognized as an important tool for the achievement of justice.

ARGUMENT

Introduction

In *Wangen v. Ford Motor Co.* 97 Wis. 2d 260, 294 N.W.2d 437 (1980), this Court emphasized the historical importance of punitive damages. "[Punitive damage law] tends to elevate the jury as a responsible instrument of government, discourages private reprisals, restrains the strong, influential, and unscrupulous, vindicates the right of the weak, and encourages recourse to and confidence in the courts of law by those wronged or oppressed by acts or practices not cognizable in or not sufficiently punished by the criminal law." *Id.* at 280. Beyond that, however, punitive damages serve a function which is of paramount importance to the preservation of our system of justice. This Court put it very well in *Jacque v. Steenberg Homes,* 209 Wis. 2d 605, 563 N.W.2d 154 (1997):

> Society has an interest in preserving the integrity of the legal system. ... People expect wrongdoers to be appropriately punished. Punitive damages have the effect of bringing to punishment types of conduct that, though oppressive and hurtful to the individual, almost invariably go unpunished by the public prosecutor.

Id. at 620.

Three people died because of the actions of Defendant MHIA and its agents. There was no criminal prosecution. Punitive damages represent the single most important tool available to private citizens to hold private wrongdoers accountable for the intentional disregard of the rights of citizens and to deter other wrongdoers in the future.

I. The Court of Appeals Decision Below will Deprive Deserving Citizens of an Important Tool for Achieving Justice.

The Court of Appeals below has held that punitive damages can only be recovered where a defendant either intended to do harm to a plaintiff or knew that his or her conduct was practically certain to cause an injury to a plaintiff. 2003 WI App 202, ¶¶ 5 & 46. The Court of Appeals below has in effect eviscerated the Common Law of Wisconsin and abolished punitive damages in a wide variety of cases, unsupported by the plain language of Wis. Stats. §895.85(3).

A. The Court of Appeals Decision Jeopardizes the Use of Punitive Damages to Deter Repeat Drunk Drivers.

The Court of Appeals decision jeopardizes the use of punitive damages to help protect society from drunk drivers or other repeat offenders who act when they are under the influence of drugs or intoxicants.

A repeat drunk driver does not set out to do harm to another;[1] nor is such a driver practically certain that harm will occur. A repeat drunk driver intends to

[1] Of course, it is possible that a drunk driver intends harm, and thus would be subject to punitive damages under the "malicious" standard in Wis. Stats. §895.85(3).

drink, and then drive. While the horrors caused by drunk drivers are widely known,[2] such a driver is likely to argue from the State's own statistics that his or her conduct was not practically certain to cause harm because, of those drunk drivers who are caught, less than one fourth get in crashes.[3] Armed with those statistics, even repeat drunk drivers, who have already been through an alcohol assessment and are well acquainted with the serious risks presented by drunk driving but deliberately consume alcohol and get behind the wheel, can legitimately argue they had no intent to cause harm and that their conduct was not practically certain to cause harm. This underscores the importance of distinguishing intent to disregard rights from intent to injure.

WATL wishes to call to this Court's attention an important comment of Representative Green, one of the sponsors of the Wisconsin Senate Bill that became Wis. Stats. §895.85 (3).[4] This comment a) serves to demonstrate that the Legislature never intended to preclude punitive damages in the case of an intoxicated person who acted without intent to do harm and b) serves to otherwise undercut significantly the Court of Appeals very expansive interpretation of Wis. Stat. §895.85 (3).

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[2] *Lievrouw v. Roth*, 157 Wis.2d 332, 347, 459 N.W.2d 850 (Ct.App. 1990) ("Drunk driving is a terrible scourge," ... and "is the type of outrageous conduct that punitive damages should punish and can deter." 157 Wis.2d at 345, 346).

[3] According to the Wisconsin Department of Transportation (DOT), the state-wide total of OWI convictions for 2002 was 35,160, and the total number of alcohol related crashes for 2002 was 8,922. (25.4%). Thus, a drinking driver (one who is so drunk that he or she gets caught, arrested & convicted) has only a 25.4% chance of being involved in an accident, let alone causing injury. We know that many repeat drunk drivers do not get caught; therefore such a driver has much less than a 25% chance of causing injury. A repeat drunk driver could argue from these statistics that his or her conduct was not "practically certain" to cause harm. *See* DOT charts in WATL's Appendix B.

[4] The comments of Representative Green are insightful but may not be relevant if it is determined that §895.85(3) is unambiguous and, as noted below, WATL does contend that it is unambiguous.

On April 6, 1995 there was a floor debate in the Wisconsin Assembly regarding 1995 SB 11 which later evolved into §895.85 (3). At pp. 64-66 of the transcript of that debate, Representative Robson asked Representative Green, one of the authors of SB 11, whether the new statute would permit the recovery of punitive damages against an intoxicated doctor who committed malpractice. Representative Green responded:

> ... I do believe that the current standard that we are talking about in this bill would cover that situation. It is not the – you don't have to prove intent that an act took place. You have to prove instead, if you look at it, maliciousness which is the current standard or intentional disregard for plaintiff' rights – <u>not the action being intentional, but disregard for plaintiff's rights</u> [Emphasis supplied].

Id. at 66 [WATL's Appendix A].

B. The Court of Appeals Decision Jeopardizes the Use of Punitive Damages to Remove Dangerous Products from the Market.

In cases such as *Wangen v. Ford Motor Co.,* 97 Wis. 2d 260, 294 N.W.2d 437 (1980), the Court of Appeals decision below could often eliminate the punitive damages remedy as a tool for eliminating dangerous products from the market.

In most instances, a manufacturer of a product may intentionally place a defective product into the stream of commerce for the purposes of financial gain but with no intent to cause injury to anyone. However such an act may well be construed as being in intentional disregard of the rights of consumers. This Court continues to recognize the important purpose served by products liability litigation. *See Fuchsgruber v. Custom Accessories, Inc.* 2001 WI 81, ¶ 25, 244 Wis. 2d 758, 628 N.W.2d 833. Without the deterrence of punitive damages, many manufacturers

will simply factor into their cost benefit analysis their exposure to compensatory damages and feel free to distribute a defective product.

C. The Court of Appeals Decision Jeopardizes the Use of Punitive Damages to Deter Acts of Bad Faith by Fiduciaries.

The Court of Appeals decision jeopardizes the use of punitive damages to prevent acts of bad faith by insurers. The Court of Appeals has changed the common law relating to bad faith. While bad faith has been characterized as an intentional tort, cases involving bad faith have never required intent to harm an insured or practical certainty that harm will occur.[5]

This Court affirmed a punitive damage award in *Trinity Evangelical v. Tower Ins.*, 2003 WI 46, 261 Wis. 2d 333, 661 N.W.2d 789 under the current statute where there was no proof that the insured had formed an intent to harm the insured or that it was practically certain that injury would occur to the insured. Indeed, in *Trinity* there was no practical certainty of injury to the insured since the agent who mistakenly applied for the wrong coverage had his own errors and omissions insurance coverage protecting the insured. *Id.* at ¶10. Likewise, in *Allied Processors, Inc. v. Western National Ins.*, 2001 WI App 129, 246 Wis. 2d 579, 629 N.W.2d 329 there was no proof of intent to harm the insured or that an excess

[5] *See* Wis. JI - Civil 2760 "Bad faith by insurance company (Excess Verdict)," defines bad faith as "whether the company, in failing to perform the duties it owed to (plaintiff), demonstrated a significant disregard of (plaintiff)'s rights and economic interests," and states that the jury can find bad faith on part of the company if it concludes that the insurance company's decision not to settle the case was "not an honest and reasonable decision." No intent to injure or harm or practical certainty of injury or harm is required. Likewise, Wis. JI – Civil 2761 "Bad faith by insurance company (Assured's claims)" instructs a jury that "[b]ad faith exists if . . . you are able to conclude that (defendant) had no reasonable basis for denying (plaintiff)'s claim" or that there was a "reckless disregard on the part of the company to learn that there was no reasonable basis for it to deny (plaintiff)'s claim." No intent to injure or harm or practical certainty of injury or harm is contained in that instruction.

judgment would occur. *Id.* at ¶35. And yet, under the Court of Appeals interpretation of §895.85 (3) there would have been no recovery of punitive damages in *Trinity* or *Allied Processors.*

What has been said of bad faith is equally true of other cases involving a business which seeks to further its financial goals but does not intend to harm anyone. For instance, in *Dorr v. Sacred Heart Hospital,* 228 Wis. 2d 425, 597 N.W.2d 462 (1999) a punitive damage award was allowed to stand, although there was no showing that by filing an unenforceable lien a hospital intended to cause pecuniary injury or other harm to a patient. *Id.* at 455.

D. The Court of Appeals Decision Jeopardizes the Use of Punitive Damages to Insure Workers' Safety.

As pointed out in the amicus brief of the Wisconsin State AFL-CIO, et al., the decision of the Court of Appeals below will all but eliminate punitive damages in cases involving workplace injuries.

Under the Court of Appeals interpretation of §895.85(3), a contractor with a history of pushing the envelope on safety and violating safety rules in the workplace will have little to fear from punitive damages unless it is found that the contractor intended to injure other parties or that its conduct was so bad that injury was practically certain to occur. Consider the contractor in the case at bar; it is hard to imagine conduct that is more outrageous than that which occurred at Miller Park and yet the facts of this case do not support an allegation that the Mitsubishi employees intended to kill the three iron workers or that they were aware that their conduct was practically certain to injure or kill the three iron workers.

II. Wis. Stats. §895.85 (3) Is Unambiguous and because It Is in Derogation of the Common Law it must be Read in Connection with the Common Law in Force when it was Enacted.

The statute in question is unambiguous. By its terms, § 895.85 (3) specifies that punitive damages may be recovered if a defendant acts maliciously toward a plaintiff **or** in intentional disregard of the rights of a plaintiff. The Legislature could have eliminated punitive damages; it did not. The Legislature could have placed a cap on punitive damages; it did not. The Legislature could have allowed punitive damages only in the case of malicious conduct; it did not. The Legislature could have limited punitive damages to cases where there was an intent to cause injury; it did not. The Legislature could have specifically eliminated punitive damages in negligence actions; it did not. Where a statute is unambiguous, courts should not seek to explore the meaning of a statute by recourse to legislative history or other extrinsic aids. 2A Sutherland on Statutory Construction §45.02 (Clark Boardman Callaghan 1992).

Even if § 895.85 (3) were to be found ambiguous, it is important to note that this statute is in derogation of the Common Law. This Court enunciated the Common Law in *Wangen v. Ford Motor Co., supra*:

> This court has not required proof of an intentional desire to injure, vex or annoy, or proof of malice, in order to sustain an award for punitive damages. '[M]alice or vindictiveness are not the *sine qua non* of punitive damages.'...

Id. 97 Wis. 2d at 268.

A statute in derogation of the common law must be strictly construed. *Fuchsgruber v. Custom Accessories, Inc., supra,* 2001 WI 81, at ¶ 25. The Court of

Appeals did not strictly construe § 895.85 (3); it expanded its reach. It also violated the very guidelines this Court has accepted as a basis for evaluating a statute and its relationship to the common law. *See In re the Custody of DMM,* 137 Wis. 2d 375, 404 N.W.2d 530 (1987) where this Court set forth some of those guidelines:

> '[A statute] should be construed in connection with the common law in force when the statute was enacted. And **there is a presumption that the lawmakers did not intend to abrogate or alter it in any manner... Even where this intention appears, there is a further presumption that the lawmakers did not intend to alter the common law beyond the scope clearly expressed, or fairly implied.'... [A]ll legislation must be interpreted in ... light of the common law ... existing at the time of its enactment.** [Emphasis supplied].'

Id. at 389-90.

III. The "Disregard of Rights" Standard in Wis. Stats. §895.85 (3) is the same as It was at Common Law, although the Conduct Meriting the Imposition of Punitives has changed.

The Court of Appeals below appears to have misapprehended the legal meaning of "rights" in our jurisprudence. In our legal system, before we reach the question of injury there is the question of the "right" which gives rise to a relevant duty. "Rights" are widely recognized in our jurisprudence as entities which command protection as much as one's property or person.

In our society, a "citizen" consists of three parts: his person, his possessions and his rights. A defendant can cause injury to a citizen's person or property. Just as surely, a defendant can damage a citizen's rights. A defendant can be held accountable for an invasion of any or all of those three facets of citizenship. In other contexts, one need not establish physical or property injury in order to find that a

citizen's rights have been invaded.[6] In the context of the case at bar, who can argue that a worker attempting to earn a living and support a family should not be protected from the intentional disregard of his right to do so?[7]

At common law punitive damages could be imposed as a remedy if the evidence showed 1) the defendant's conduct created a "potential" for harm and 2) the defendant proceeded in willful, wanton or reckless disregard of the consequences of his conduct. *Cf. Wangen v. Ford Motor Co., supra*; *Walter v. Cessna Aircraft Co.,* 121 Wis. 2d 221, 358 N.W.2d 816 (1984); *Wheeler v. General Tire,* 142 Wis. 2d 798, 419 N.W.2d 331 (Ct. App. 1987); *Sharp v. Case Corp.* 227 Wis. 2d 1, 595 N.W.2d 380 (1999). Under the current statute, the only change is to the second prong which now requires proof that a defendant intentionally proceeded without regard to the consequences of his conduct.

Because of the use of the words "strong probability" of harm in the quote from the Ghiardi and Kircher treatise in *Brown v. Maxey,* 124 Wis.2d 426, 433-34, 369 N.W.2d 667 (1985) MHIA contends that at common law punitive damages could only be awarded if such a "strong probability" of harm was shown. However, *Brown* did not impose a requirement of "strong probability" of harm. The fallacy of respondents' argument is demonstrated by (1) the *Brown* case itself, because the court never found a "strong probability" of harm, but only that

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[6] *See Derek Case v. Milewski*, 327 F.3d 564 (7th Cir. 2003) ("To state a claim under § 1983 a plaintiff must allege two elements: (1) Conduct complained of was committed by a person acting under color of state law; and (2) the activity deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Id.* at 566).

[7] Of course, not every invasion of a right will give rise to a valid claim for punitive damages. A number of factors must be considered before a claim for punitive damages can be sustained. *Wheeler v. General Tire,* 142 Wis. 2d 798, 819, 419 N.W.2d 331 (Ct. App. 1987).

Maxey knew there was a danger and knowingly failed to do anything about it, and (2) cases after *Brown*, where courts expressly require only a "potential" of harm, including that which may be "remote," depending on the circumstances. In *Wheeler v. General Tire and Rubber Company*, *supra*, the court held that depending on the nature of the potential injury or harm, punitive damages may be appropriate even if the potential is remote or slight. *Id.* 142 Wis. 2d at 818-19. In *Sharp v. Case Corp*, *supra*, a products liability case, this court spoke only of the manufacturer's knowledge of a defect and its "potential" for harm, not a "strong probability." *Id.*. 227 Wis. 2d at 23.

Conclusion

For all of the foregoing reasons, the Wisconsin Academy of Trial Lawyers respectfully requests that this Court reverse the Court of Appeals.

Dated this 20th day of July, 2004.

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§ 809.19 (8) CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that the foregoing Brief conforms to the rules contained in § 809.19 (8) (b) and (c), Wis. Stats., for a Brief produced using the following font:

Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this Brief is 2,996 words.

Dated this 20th of July, 2004.

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WATL APPENDIX

WATL APPENDIX

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Appendix B: 2002 Wisconsin Alcohol
Traffic Facts, Excerpts from the official
Site of the Wisconsin Department of
Transportation (DOT)[1] ..... WATL App. B-1 to B-3

[1] These excerpts are taken from the following DOT web sites:
(1) http://www.dot.wisconsin.gov/safety/motorist/crashfacts/docs/alcohol-section5.pdf (alcohol convictions - adjudicated OWI citations, p 20);
(2) http://www.dot.wisconsin.gov/safety/motorist/crashfacts/docs/alcohol-section6.pdf (alcohol crashes - alcohol related crashes, p.32)

STATE OF WISCONSIN

IN THE ASSEMBLY

In re the matter of:

TORT REFORM

Floor Debate

April 6, 1995

State Capitol

Madison, Wisconsin

MAGNE-SCRIPT®
4401 Travis Terrace
Madison, Wisconsin 53711
Voice or Fax (608) 233-3312

1 4TH: I'll just wind up my remarks by reminding
2 people again: Punitives have never been intended to arise from
3 mere negligence -- never. Not in this state, nor in the other
4 states that provide for punitives. Not designed to compensate
5 victims, not in this state nor the other states that have punitives.
6 And let's not forget where punitives can arise, there are other
7 ways of punishing. It's called criminal statutes and criminal
8 laws.
9 MR. SPEAKER: The question is tabling. All -- the
10 lady from the 45th.
11 45TH: Thank you, Mr. Speaker. I wonder if the
12 gentleman from the 4th would yield to a question.
13 MR. SPEAKER: The gentleman from the 4th yield?
14 The gentleman yields.
15 45TH: Thank you, Gentleman from the 4th.
16 MR. SPEAKER: Lady -- I'd like some order in the
17 House. People take their conversations to the rear of (missing)
18 the corridors. The lady may proceed.
19 45TH: Thank you. Gentleman from the 4th, do
20 you recall when we -- we share a committee, the Insurance
21 Committee, and we had the bill, the med mal bill, up. And one
22 of the amendments that I had was to remove the cap for pain and
23 suffering, for non-economic damages, if a health care provider
24 was under the influence of alcohol or other -- or controlled
25 substances and then caused damage. And I recall that you very

1 eloquently, because you're an attorney, told the committee that
2 we should not put a cap -- or we should maintain the cap if a
3 physician or a nurse or another health care provider was
4 intoxicated or under the influence of mind-altering drugs because
5 they would be able to be punished under punitive.
6 And so the question that I have before you -- or the
7 question that I have, then, is if we remove the current statutes,
8 then we would have to prove that that physician or that nurse
9 intentionally got drunk and then intentionally or maliciously or in
10 other ways had to goof so badly that they brought the wrong
11 x-ray so that the patient's left leg was amputated instead of their
12 right leg; that they intentionally took cocaine and then that
13 altered their decision-making and they were therefore unable to
14 think clearly and made this mistake. Wouldn't it be difficult
15 then to prove under this change, if we don't adopt -- do you
16 want me to continue?
17 MR. SPEAKER: The lady may proceed.
18 45TH: Thank you, Mr. Speaker. Wouldn't it then
19 -- aren't you sort of talking out of both sides of your mouth?
20 Because I remember you saying very eloquently well, you know,
21 we can't use the med mal and the non-cap to punish those health
22 care providers that willfully take alcohol knowing that they are
23 alcoholics and continue to practice their profession.
24 But on the other hand, on this bill, we're doing just the
25 opposite. So what's a poor client -- what's a poor victim to do?

1 They had their lab work read wrong and therefore they
2 developed cancer and then perhaps have to have extensive
3 surgery and chemotherapy, or they're a diabetic and their left
4 foot was cut off instead -- or amputated instead of their right foot
5 so now they're going to have to hobble around with no feet. So,
6 you know, what's the poor person to do?
7 MR. SPEAKER: Gentleman from the 4th.
8 4TH: Thank you, Mr. Speaker. I finally got a
9 question out of that. First off, I do believe that the current
10 standard that we are talking about in this bill would cover that
11 situation. It is not the -- you don't have to prove an intent that
12 the act took place. You have to prove instead, if you look at it,
13 maliciousness which is the current standard or intentional
14 disregard for plaintiff's rights -- not the action being intentional,
15 but disregard for plaintiff's rights. So that would be my
16 response.
17 45TH: If I might continue, Gentleman -- kindly
18 gentleman from the 4th, what about the situation when the nurse
19 has -- is under the influence of alcohol and brings the wrong
20 x-ray to the physician and therefore he does amputate the wrong
21 leg? Wouldn't it -- the burden be very, very difficult to prove
22 that they were intentionally under the influence under that
23 situation? And we have then gone backward (missing)
24 4TH: I guess they found a question there, too.
25 Yes, I do think it would be covered -- the intoxication.

Wisconsin Department of Transportation

Jim Doyle
Governor

Frank J. Busalacchi
Secretary

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February 2004

Dear Traffic Safety Partners:

The Wisconsin Department of Transportation, Bureau of Transportation Safety is pleased to provide you with a copy of the *2002 Wisconsin Alcohol Traffic Facts* book. Please note that the title of this book reflects the year for which the most recent data was compiled, not the year of publication.

This book provides statewide traffic-related alcohol information. The emphasis on traffic crashes, arrests, convictions and driver safety plan data presents a variety of alcohol-related data that will serve as a resource for safety, health and social service professionals.

We want to thank the Wisconsin Departments of Health and Family Services, Public Instruction, Natural Resources, Revenue, the Office of Justice Assistance, the University of Wisconsin Law School Resource Center on Impaired Driving, and the WisDOT Division of Motor Vehicles for their contributions to the content of this book.

This document can be viewed online at www.dot.wisconsin.gov. To obtain additional copies of this book or for more information, please contact us.

Sincerely,

Major Daniel W. Lonsdorf
Director, Bureau of Transportation Safety

DT1454

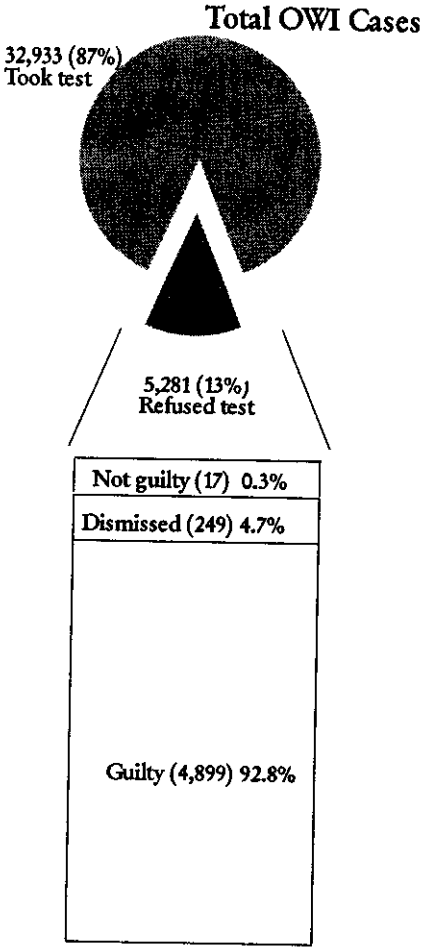
ADJUDICATED OWI CITATIONS BY COUNTY

County	Total Adjudicated Citations 2000	Total Adjudicated Citations 2001	Dispositions of Adjudicated Citations: 2002 Not Guilty	Dismissed	Amended	Guilty	Total Adjudicated	Percent Guilty
ADAMS	217	196	0	14	3	170	187	90.9%
ASHLAND	130	106	0	10	2	145	157	92.4%
BARRON	297	357	0	19	3	291	313	93.0%
BAYFIELD	123	140	0	15	5	173	193	89.6%
BROWN	1,712	1,679	1	42	22	1,540	1,605	96.0%
BUFFALO	94	70	0	5	1	87	93	93.5%
BURNETT	183	164	0	26	7	136	169	80.5%
CALUMET	182	161	2	10	2	193	207	93.2%
CHIPPEWA	415	483	1	39	37	387	464	83.4%
CLARK	158	255	1	8	17	228	254	89.8%
COLUMBIA	584	859	3	36	34	640	713	89.8%
CRAWFORD	67	79	1	8	0	55	64	85.9%
DANE	2,713	3,078	1	87	112	2,996	3,196	93.7%
DODGE	571	525	1	39	26	473	539	87.8%
DOOR	275	288	0	8	1	298	307	97.1%
DOUGLAS	314	371	0	15	7	369	391	94.4%
DUNN	392	404	0	14	33	430	477	90.1%
EAU CLAIRE	819	679	4	51	12	648	715	90.6%
FLORENCE	28	32	0	4	0	33	37	89.2%
FOND DU LAC	613	696	2	26	33	629	690	91.2%
FOREST	110	110	2	10	4	132	148	89.2%
GRANT	291	318	1	7	11	230	249	92.4%
GREEN	231	209	0	22	18	234	274	85.4%
GREEN LAKE	180	192	0	22	12	198	232	85.3%
IOWA	137	178	0	5	5	153	163	93.9%
IRON	72	56	0	19	6	54	79	68.4%
JACKSON	123	177	0	24	3	196	223	87.9%
JEFFERSON	495	550	3	36	29	615	683	90.0%
JUNEAU	272	253	0	18	8	234	260	90.0%
KENOSHA	914	1,000	0	43	36	862	941	91.6%
KEWAUNEE	151	111	0	9	4	109	122	89.3%
LA CROSSE	760	812	3	73	31	849	956	88.8%
LAFAYETTE	44	75	0	6	0	72	78	92.3%
LANGLADE	127	112	0	11	1	102	114	89.5%
LINCOLN	193	231	0	14	4	180	198	90.9%
MANITOWOC	734	766	0	37	20	688	745	92.3%
MARATHON	809	914	0	59	30	748	837	89.4%
MARINETTE	357	376	2	21	9	407	439	92.7%
MARQUETTE	155	147	1	3	6	134	144	93.1%
MENOMINEE	23	27	0	4	1	33	38	86.8%
MILWAUKEE	3,678	3,541	9	74	63	3,094	3,240	95.5%
MONROE	293	353	0	25	11	315	351	89.7%
OCONTO	173	171	0	5	4	150	159	94.3%
ONEIDA	377	301	0	19	14	309	342	90.4%
OUTAGAMIE	1,355	1,430	2	54	31	1,392	1,479	94.1%
OZAUKEE	552	566	0	21	14	544	579	94.0%
PEPIN	56	47	0	3	3	46	52	88.5%
PIERCE	212	266	1	19	7	212	239	88.7%
POLK	384	368	2	56	34	296	388	76.3%
PORTAGE	507	547	0	31	8	467	506	92.3%
PRICE	114	110	0	5	7	92	104	88.5%
RACINE	1,141	1,120	2	32	32	1,003	1,069	93.8%
RICHLAND	96	116	2	2	15	115	134	85.8%
ROCK	1,235	1,109	0	38	35	986	1,059	93.1%
RUSK	96	91	0	8	3	78	89	87.6%
ST CROIX	484	466	2	35	22	453	512	88.5%
SAUK	627	600	0	51	6	613	670	91.5%
SAWYER	203	165	0	7	10	93	110	84.5%
SHAWANO	404	453	1	8	4	383	396	96.7%
SHEBOYGAN	897	866	2	41	40	764	847	90.2%
TAYLOR	130	130	3	15	12	113	143	79.0%
TREMPEALEAU	268	211	0	18	5	193	216	89.4%
VERNON	149	157	0	13	6	146	165	88.5%
VILAS	252	245	0	18	25	263	306	85.9%
WALWORTH	866	931	2	38	29	879	948	92.7%
WASHBURN	102	210	3	9	5	172	189	91.0%
WASHINGTON	713	654	0	12	12	709	733	96.7%
WAUKESHA	2,525	2,751	3	115	91	2,658	2,867	92.7%
WAUPACA	493	398	1	28	18	356	403	88.3%
WAUSHARA	171	176	0	4	2	196	202	97.0%
WINNEBAGO	1,408	1,369	0	38	24	1,289	1,351	95.4%
WOOD	504	564	0	21	21	630	672	93.8%
TOTAL	36,530	37,718	64	1,782	1,208	35,160	38,214	92.0%
% Adjudicated	-	-	0.2%	4.7%	3.2%	92.0%	100.0%	-

NOTE: The numbers in this table and graphic represent a compilation of OWI citations adjudicated during the past three years (status as of July, 2003). The violations themselves may have occurred in a prior year. Only citations where county, test refusal, court type, and outcome were known are included. Violations are adjudicated in the county in which the citation was issued. Dismissed cases were rejected by a judge before trial, withdrawn, or denied. Amended cases were ones where the original citation was reduced to a lesser or different charge. Keep in mind that the DMV's files may not be complete and that the conviction rate for a county is only one measure of its commitment to OWI prosecution.

SOURCE: DOT-DMV Driver Record Extract File, DOT-DMV Citation File

DISPOSITIONS OF OWI TEST REFUSALS



Driver refused to take OWI test

The above graphic depicts the outcome of citatations that were adjudicated in 2002 and entered on the DOT-DMV's Driver Record File by July 2003. Municipal courts see only those who have violated OWI laws for the first time, because they are not equipped to handle cases where jail time is an option. Circuit courts see both multiple and first-time offenders, but the proportions are unknown.

Out of 38,214 total OWI citations adjudicated in 2002, the alcohol test was refused 5,281(13%) times. Of the 5,281 cases where the alcohol test was refused, nearly 93 percent (4,899) were eventually found guilty.

NOTE: *Refusals* are instances where drivers do not consent to taking an alcohol test.

WATL Appendix B-2

ALCOHOL RELATED CRASHES BY COUNTY AND AS PERCENT OF TOTAL CRASHES: FOUR YEAR REVIEW

County	1999 Alcohol Crashes	1999 Total Crashes	1999 % of Crashes	2000 Alcohol Crashes	2000 Total Crashes	2000 % of Crashes	2001 Alcohol Crashes	2001 Total Crashes	2001 % of Crashes	2002 Alcohol Crashes	2002 Total Crashes	2002 % of Crashes
ADAMS	52	823	6.3	57	834	6.8	57	775	7.4	66	689	9.6
ASHLAND	25	285	8.8	28	319	8.8	28	314	8.9	34	292	11.6
BARRON	68	992	6.9	70	941	7.4	73	898	8.1	80	983	8.1
BAYFIELD	16	299	5.4	32	330	9.7	30	315	9.5	35	328	10.7
BROWN	388	4,384	8.9	416	4,838	8.6	402	4,213	9.5	369	4,293	8.6
BUFFALO	45	319	14.1	36	307	11.7	30	296	10.1	31	295	10.5
BURNETT	44	262	16.8	49	301	16.3	47	308	15.3	49	301	16.3
CALUMET	43	732	5.9	56	766	7.3	39	671	5.8	44	660	6.7
CHIPPEWA	108	1,395	7.7	110	1,337	8.2	99	1,335	7.4	101	1,394	7.2
CLARK	56	943	5.9	47	883	5.3	56	877	6.4	61	910	6.7
COLUMBIA	124	1,899	6.5	106	1,938	5.5	118	1,753	6.7	126	1,740	7.2
CRAWFORD	37	479	7.7	44	399	11.0	37	359	10.3	35	372	9.4
DANE	711	9,928	7.2	798	10,968	7.3	797	10,085	7.9	772	10,244	7.5
DODGE	128	1,848	6.9	158	1,936	8.2	129	1,687	7.6	153	1,733	8.8
DOOR	53	820	6.5	45	833	5.4	59	788	7.5	49	858	5.7
DOUGLAS	84	1,003	8.4	112	1,088	10.3	109	966	11.3	103	943	10.9
DUNN	86	1,198	7.2	78	1,215	6.4	52	1,112	4.7	56	1,180	4.7
EAU CLAIRE	133	2,438	5.5	134	2,580	5.2	118	2,387	4.9	156	2,476	6.3
FLORENCE	13	232	5.6	20	235	8.5	16	164	9.8	9	209	4.3
FOND DU LAC	156	2,704	5.8	167	2,762	6.0	168	2,559	6.6	210	2,579	8.1
FOREST	23	300	7.7	37	334	11.1	26	256	10.2	37	312	11.9
GRANT	77	1,352	5.7	83	1,284	6.5	98	1,112	8.8	83	1,197	6.9
GREEN	75	899	8.3	72	958	7.5	71	861	8.2	69	877	7.9
GREEN LAKE	31	611	5.1	31	664	4.7	40	623	6.4	41	697	5.9
IOWA	46	626	7.3	73	675	10.8	51	573	8.9	56	623	9.0
IRON	18	116	15.5	22	132	16.7	20	141	14.2	8	114	7.0
JACKSON	41	913	4.5	49	967	5.1	44	799	5.5	61	807	7.6
JEFFERSON	118	1,739	6.8	115	1,868	6.2	131	1,607	8.2	133	1,648	8.1
JUNEAU	61	810	7.5	54	891	6.1	50	698	7.2	57	774	7.4
KENOSHA	305	3,415	8.9	325	3,798	8.6	338	3,399	9.9	310	3,599	8.6
KEWAUNEE	23	255	9.0	24	246	9.8	19	222	8.6	30	280	10.7
LA CROSSE	180	2,886	6.2	172	2,870	6.0	184	2,632	7.0	150	2,411	6.2
LAFAYETTE	43	453	9.5	30	445	6.7	32	434	7.4	35	472	7.4
LANGLADE	42	373	11.3	39	350	11.1	39	317	12.3	48	375	12.8
LINCOLN	56	893	6.3	54	895	6.0	41	802	5.1	56	905	6.2
MANITOWOC	162	2,005	8.1	130	2,180	6.0	124	1,954	6.3	134	1,867	7.2
MARATHON	198	3,551	5.6	228	3,726	6.1	240	3,099	7.7	215	3,222	6.7
MARINETTE	84	909	9.2	120	1,004	12.0	97	857	11.3	111	1,022	10.9
MARQUETTE	42	582	7.2	44	559	7.9	47	514	9.1	44	510	8.6
MENOMINEE	10	39	25.6	5	47	10.6	10	44	22.7	8	45	17.8
MILWAUKEE	1,016	23,815	4.3	1,058	25,747	4.1	1,028	23,713	4.3	991	23,466	4.2
MONROE	70	1,378	5.1	89	1,406	6.3	73	1,232	5.9	80	1,303	6.1
OCONTO	77	721	10.7	75	683	11.0	63	664	9.5	44	632	7.0
ONEIDA	55	975	5.6	78	1,036	7.5	76	951	8.0	94	1,086	8.7
OUTAGAMIE	226	3,702	6.1	243	3,668	6.6	271	3,549	7.6	227	3,627	6.3
OZAUKEE	70	1,400	5.0	74	1,547	4.8	72	1,232	5.8	82	1,351	6.1
PEPIN	12	145	8.3	10	143	7.0	12	171	7.0	10	174	5.7
PIERCE	64	719	8.9	70	734	9.5	73	771	9.5	80	818	9.8
POLK	90	671	13.4	83	728	11.4	69	631	10.9	80	719	11.1
PORTAGE	123	2,134	5.8	115	2,116	5.4	103	1,797	5.7	113	1,789	6.3
PRICE	17	251	6.8	18	273	6.6	16	241	6.6	32	233	13.7
RACINE	306	4,038	7.6	325	4,412	7.4	316	4,199	7.5	292	4,177	7.0
RICHLAND	39	554	7.0	38	637	6.0	31	494	6.3	32	587	5.5
ROCK	346	4,120	8.4	357	4,356	8.2	309	3,618	8.5	346	3,882	8.9
RUSK	30	267	11.2	33	258	12.8	17	223	7.6	29	243	11.9
ST. CROIX	126	1,701	7.4	117	1,868	6.3	125	1,871	6.7	125	1,924	6.5
SAUK	144	2,080	6.9	152	2,227	6.8	158	1,930	8.2	150	2,110	7.1
SAWYER	55	343	16.0	60	377	15.9	45	317	14.2	34	366	9.3
SHAWANO	91	1,460	6.2	97	1,601	6.1	103	1,519	6.8	143	1,717	8.3
SHEBOYGAN	134	2,805	4.8	146	3,099	4.7	169	2,554	6.6	158	2,548	6.2
TAYLOR	31	650	4.8	40	609	6.6	21	619	3.4	45	703	6.4
TREMPEALEAU	47	505	9.3	57	529	10.8	47	469	10.0	61	466	13.1
VERNON	44	653	6.7	53	777	6.8	44	632	7.0	58	794	7.3
VILAS	59	512	11.5	49	628	7.8	62	591	10.5	54	616	8.8
WALWORTH	171	1,927	8.9	173	1,966	8.8	166	1,701	9.8	187	1,983	9.4
WASHBURN	33	332	9.9	34	326	10.4	40	377	10.6	40	379	10.6
WASHINGTON	161	2,339	6.9	182	2,524	7.2	188	2,232	8.4	183	2,337	7.8
WAUKESHA	309	7,454	4.1	420	8,288	5.1	376	6,987	5.4	418	7,233	5.8
WAUPACA	110	1,705	6.5	127	1,702	7.5	101	1,595	6.3	121	1,785	6.8
WAUSHARA	32	673	4.8	45	660	6.8	29	606	4.8	45	677	6.6
WINNEBAGO	250	3,644	6.9	292	4,253	6.9	229	3,715	6.2	226	3,744	6.0
WOOD	103	1,567	6.6	116	1,629	7.1	97	1,396	6.9	117	1,367	8.6
TOTAL	**8,446**	**130,950**	**6.4**	**9,096**	**139,510**	**6.5**	**8,695**	**125,403**	**6.9**	**8,922**	**129,072**	**6.9**
% Change from 1999				7.7%	6.5%	1.1%	2.9%	-4.2%	7.5%	5.6%	-1.4%	7.2%

NOTE: An example of how to read this chart would be, "In Washburn County during 2002, 10.6% of the total motor vehicle crashes were alcohol-related."

SOURCE: DOT-DMV Accident Database

STATE OF WISCONSIN
IN THE
SUPREME COURT

RECEIVED
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OF WISCONSIN

Appeal No. 01-0724 (Consolidated by the Court of Appeals with Nos. 01-1031 and 01-2486)
Milwaukee County Circuit Court Case No. 99-CV-6553

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased, MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased, and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE OF JEROME W. STARR, deceased,

Plaintiffs-Intervenors-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant,

NEIL F. LAMPSON, INC.,

Defendant-Respondent,

LAMPSON INTERNATIONAL LTD., FEDERAL INSURANCE COMPANY, and THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendants.

WISCONSIN INSURANCE ALLIANCE'S NON-PARTY BRIEF

WISCONSIN INSURANCE ALLIANCE
Eric Englund, State Bar No. 1015037
44 East Mifflin Street, Madison, WI 53703
(608) 255-1749

STATE OF WISCONSIN
IN THE
SUPREME COURT

Appeal No. 01-1031 (Consolidated by the Court of Appeals with Nos. 01-0724 and 01-2486)
Milwaukee County Circuit Court Case No. 99-CV-6553

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased, MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased, and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE OF JEROME W. STARR, deceased,

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-Cross-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-Petitioner,

NEIL F. LAMPSON, INC. and LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY,

Defendant-Co-Appellant,

THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendant.

STATE OF WISCONSIN
IN THE
SUPREME COURT

Appeal No. 01-2486 (Consolidated by the Court of Appeals with Nos. 01-0724 and 01-1031)
Milwaukee County Circuit Court Case No. 99-CV-6553

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased, MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased, and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE OF JEROME W. STARR, deceased,

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-Cross-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-Cross-Respondent,

NEIL F. LAMPSON, INC. and LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY, and THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendants-Respondents-Cross-Appellants.

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Worker's Compensation Act ..... passim

The Wisconsin Insurance Alliance (the "WIA") submits this brief pursuant to the Court's June 29, 2004 Order and section 809.19(7) of the Wisconsin Statutes. The WIA represents more than 40 Wisconsin-domiciled property and casualty insurance companies and several non-domestic carriers. For its members, WIA speaks on issues of importance to the insurance industry in Wisconsin. This appeal presents just such an issue: the availability of punitive damages. The appeal will have a significant impact on the state's insurance industry and insurance markets.

The WIA appreciates the Court's permission to participate in this appeal as a friend of the Court and, on behalf of Wisconsin insurers, it will respond in this brief to several points made by other non-parties in this proceeding.

ARGUMENT

I. WITH THE 1995 STATUTE, THE LEGISLATURE INTENDED TO CHANGE THE COMMON LAW OF PUNITIVE DAMAGES.

In seeking leave to file its non-party brief, the Wisconsin Academy of Trial Lawyers ("WATL") asserts that

the Court of Appeals' holding created "an erroneously heightened standard for awarding punitive damages contrary to the will of the State Legislature and the Common Law of Wisconsin." Motion for Leave to File Amicus Curiae Brief on Behalf of the Wisconsin Academy of Trial Lawyers, p. 2. The "Common Law" is a predominant theme in WATL's motion. Yet the common law of punitive damages, however characterized, has not governed civil cases in Wisconsin for almost 10 years.

The plaintiffs and WATL cling to the common law of punitive damages despite the legislature's unquestionable right, which it has exercised, to change that law. "The doctrine of separation of powers, while not explicitly set forth in the Wisconsin constitution, is implicit in the division of governmental powers among the judicial, legislative and executive branches." *State ex rel. Friedrich v. Dane County Cir. Ct.*, 192 Wis. 2d 1, 13, 531 N.W.2d 32 (1995). The principle of separation of powers has always allowed the boundaries of legal rights and remedies to be set primarily by

the legislature. *See McGowan v. Story*, 70 Wis. 2d 189, 197-99, 234 N.W.2d 325 (1975).

Without question, the legislature may alter or suspend the common law. Wis. Const. art. XIV, § 13 ("Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state *until altered or suspended by the legislature*.") (emphasis added); *see Maurin v. Hall*, 2004 WI 100, ¶ 103. One of the very purposes of this Court's statutory interpretation role is to avoid the substitution of judicially-made policy for the policy enacted by the legislature. *State ex rel. Griffin v. Smith*, 2004 WI 36, ¶ 19, 270 Wis. 2d 235, 677 N.W.2d 259. Thus, litigants and the courts must defer to the legislative policy judgment that, in 1995, resulted in the common law's replacement with a more stringent statutory standard for punitive damages. It is not a question of choice, nor even judicial power. The legislature makes the law. *Flynn v. Department of*

Administration, 216 Wis. 2d 521, 555, 576 N.W.2d 245 (1998).

The goal of the punitive damages statute, demonstrated by the legislative history described in the parties' briefs, was to change the vague common law standard and impose structure upon punitive damages. This is consistent with the legislature's core function to establish the parameters of policy consistent with the changing needs of society. *See Guzman v. St. Francis Hospital, Inc.*, 2001 WI App 21, ¶ 8, 240 Wis. 2d 559, 623 N.W.2d 776.

Longing for the lenient common law standard, WATL argues that the statute must be strictly construed as "in derogation of the Common Law," citing *Fuchsgruber v. Custom Accessories, Inc.* 2001 WI 81, ¶ 25, 244 Wis. 2d 758, 628 N.W.2d 833.[1] Yet that "canon is a rule of construction only, not a rule of law. It must yield to clear evidence of an intention on the part of the legislature. . . ." *Herchelroth v.*

[1] "In a sense, that maxim is senseless, for, as Grant Gilmore once quipped, 'what statute is not?'" Bryan A. Garner, *Dictionary of Modern Legal Usage* 268 (2d ed. 1995), *citing* Grant Gilmore, *The Ages of American Law* 62 (1977).

Mahar, 24 Wis. 2d 444, 448-49, 129 N.W.2d 140 (1964); *see also Schumacher v. Milwaukee*, 209 Wis. 43, 46, 243 N.W. 756 (1932) (court should not "struggle to defeat the purpose of the legislature.") Even so, nothing in the punitive damages statute "derogates" the common law.

This Court in *Fuchsgruber* analyzed the phrase "derogation of the common law," interpreting a provision in the same act, 1995 Wis. Act 17, that created the punitive damages statute. The issue in *Fuchsgruber* was whether a change in comparative negligence law applied to cases grounded not in negligence but in strict liability. This Court concluded that it did not apply. The law of strict liability, always a common law construct, was not mentioned in 1995 Wis. Act 17, and no evidence suggested the legislature intended to change the long-established law of products liability:

> The language of the new statute . . . clearly expresses a legislative purpose to partially eliminate joint and several liability in negligence actions. The new statute does not, however, explicitly or even implicitly suggest a legislative purpose to change the common law of strict product liability.

Fuchsgruber, 2001 WI 81, ¶ 26.

Applying the new comparative negligence rules to products liability cases would, indeed, have been a derogation of the common law of products liability because strict liability and negligence are separate theories of liability. If the legislature had intended to legislate in the strict liability arena, it would have passed a strict products liability statute.

"Derogation" means "the partial repeal or abrogation of a law by a later act that limits its scope or impairs its utility and force . . . ." *Blacks Law Dictionary*, 476 (8th ed. 2004). "Abrogate" means "to abolish (a law or custom) by formal or authoritative action; to annul or repeal." *Id.* at 7. The legislature here created a new standard for punitive damages liability. Whether that legislation abrogates the common law, however, is largely an academic debate. All of the parties here already have agreed that the statute *changed* the common law by heightening the standard for punitive damages.

Moreover, before the statute's enactment, though occasional exceptions occurred, most punitive damages cases

involved intentional harm.[2] The statute, replacing the words "wanton, willful, or reckless" (the common law standard) with the word "intentional," reinforced the need for proof of "intentional" harm. The Court of Appeals properly determined that the legislature intended to codify the norm (allowing punitive damages in cases of intentional harm) and eliminate punitive damages in cases involving merely reckless conduct.

II. PUNITIVE DAMAGES PUNISH AND DETER: THEY DO NOT COMPENSATE PLAINTIFFS.

WATL says it seeks to protect "the rights of tort victims" by preserving the ready availability of punitive damages as a remedy. The "rights of tort victims" are not at issue. Under no standard, common law or statutory, does a plaintiff ever have a "right" to punitive damages. *See* WI JI-CIVIL 1707.1 (2004) ("A plaintiff is not entitled to punitive damages as a matter of right."); WI JI-CIVIL 1707

[2] "Until the mid-20th century, punitive damages were available only for a relatively small group of torts involving conscious and intentional harm inflicted by one person on another." Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 Yale J. L. 347, 359 n.23 (2003), (citation omitted).

(1996) (same language applicable to cases before the statute's effective date).

Plaintiffs are entitled to be made whole through the award of compensatory damages.[3] Punitive damages, by contrast, are at the sole discretion of a jury under the supervision of a judge bound by procedural and constitutional fairness. It should go without saying that punitive damages serve a societal function of punishment and deterrence and properly focus on the defendant's conduct—not the "rights of tort victims."

Making punitive damages about "victim's rights" may well have emotional appeal. Yet framing punitive damages

[3] Even compensatory damages contribute to deterrence. "As it happens, the right amount of deterrence is produced by compelling negligent injurers to make good the victim's losses. . . . It is thus essential that the defendant be made to pay damages and that they be equal to the plaintiff's loss." Sharkey, 113 Yale L. J. at 365, *citing* Richard A. Posner, *Economic Analysis of Law* 143 (2d ed. 1977). Last year, Judge Posner wrote the opinion in a $372,000 punitive damages decision involving bedbug bites in an infested hotel. *Matthias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 677 (2003) (placing the case in that narrow category of cases where compensatory damages "would not do the trick . . . because [among other reasons] they are difficult to determine in the case of acts that inflict largely dignitory harms . . . .").

as anything other than an inquiry into what penalty will appropriately punish and deter a *defendant's* misconduct creates enormous potential for abuse. That is precisely the reason the United States Supreme Court has repeatedly tempered perhaps well-meaning, yet constitutionally excessive, punitive verdicts. *See, e.g.*, *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

Searching constitutional review is necessary precisely because of punitive damages' role—not as compensation for plaintiffs, but as punishment for defendants. "Elementary notions of fairness . . . dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." *Gore*, 517 U.S. at 574. In fact, the "most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the *defendant's* conduct."

Id. at 575 (emphasis added). While the plaintiff's injury is relevant to the level of punishment, the focus remains on the defendant's conduct. In upholding the Court of Appeals' interpretation of Wisconsin's statute, this Court should reaffirm that the focus of the state's punitive damages policy is punishment and deterrence, not plaintiff's rights.

III. WISCONSIN'S WORKER'S COMPENSATION LAW, NOT THE PUNITIVE DAMAGES STATUTE, APPROPRIATELY ADDRESSES WORKPLACE SAFETY.

The plaintiffs' brief contains repeated references to workplace safety. *See* Brief of Patricia Wischer, Marjorie DeGrave and Ramona Dulde-Starr, p. 3 (accusing MHIA of "intentionally disregarding worker safety for months"), p. 4 (heading "The Hazardous Workplace"), p. 5 ("MHIA's indifference to the right to a safe workplace"), p. 9 ("conscious disregard of the safety of workers," "worker safety," and "callous and outrageous disregard of worker safety"), p. 12 (". . . placed the Miller Park workers at such a high risk . . ."). Yet most workplace accidents are addressed within the confines of the state's worker's compensation law.

Other state and federal statutes, including OSHA, of course, help ensure safe work sites. *See, e.g.*, 29 U.S.C. §§ 651-658, § 101.11, Stats. (2001-02).

The plaintiffs here sustained a separate right of action against MHIA only because of their status as employees of a sub-contractor.[4] While workplace safety surely is a compelling public policy issue, the legislature addressed it more than 100 years ago when it enacted one of the nation's first worker's compensation systems.

A. The Worker's Compensation Act Created An Exclusive Remedy For Workplace Injuries.

The legislature passed the Worker's Compensation Act (the "Act") in 1911, making it the first worker's

[4] In September 2000, the Wisconsin Department of Workforce Development ("DWD") initially determined that the decedents were loaned employees of MHIA, subject to the worker's compensation law. *See* R.330, Exhibit 2, MHIA's Memorandum in Support of its Motion to Dismiss Amended Complaint or Join Department of Work Force and Development as a Party. The trial court, by contrast, ruled that MHIA was not the decedents' employer. R.714, September 26, 2000 Hearing Transcript, pp. 72-78. The trial court's ruling is one of the many issues properly presented to the Court of Appeals but not (yet) before this Court.

compensation system to take effect in the United States.[5] Since then, this "all-pervasive" legislative framework has successfully balanced the competing economic and societal interests of employees and their employers in workplace accidents.[6] The Act requires employers to compensate employees immediately for injuries at work, regardless of fault and without the necessity of legal action, but it also provides limited liability for employers. *Mulder*, 95 Wis. 2d at 180-81.

Before the Act, no one received compensation for workplace injuries unless he or she prevailed in a tort action. Employees had to prove their employer's negligence. As the common law developed, however, available defenses began to limit an employee's prospects for recovering her actual

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[5] Harry Weiss, *Employers' Liability and Workmen's Compensation*, *in* 4 *History Of Labour In The United States, 1896-1935*, at 575 (John R. Commons ed., 1935) ("Weiss").

[6] *Mulder v. Acme-Cleveland Corp.*, 95 Wis. 2d 173, 180, 290 N.W.2d 276, 279-80 (1980).

damages. In fact, before the Act, employees rarely recovered damages for injuries on the job.[7]

To protect this balance of interests, the Act includes an exclusive remedy provision. When an employer-employee relationship exists, the Act is the exclusive remedy against employers for compensation. § 102.03(2), Stats.[8] In *Mulder*, this Court reaffirmed that exclusive remedy as "an integral feature of the compromise between the interest of the employer and the interest of the worker." 95 Wis. 2d at 181.

Shortly after the Act's adoption, this Court clarified the purpose of the new law and its exclusive remedy:

> The legislature, in response to a public sentiment which cannot be mistaken, . . . has endeavored by this law to provide a way by which employer and employed may . . . escape entirely from that very troublesome and economically absurd luxury known as "personal injury litigation," and resort to a system by which every employee . . . may receive at once a reasonable recompense for injuries accidentally received in his employment

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[7] *See* Weiss, *supra* note 5, p. 567.

[8] The statute originally provided: "Liability for the compensation hereinafter provided for, *in lieu of any other liability whatsoever*, shall exist against an employer for any personal injury accidentally sustained by his employe[e], and for his death. . . ." *Guse v. A.O. Smith Corp.*, 260 Wis. 403, 406, 51 N.W.2d 24 (1952), citing Laws 1911, c. 50 § 2394-4 (emphasis in original). Although this language was deleted in 1931, it was not intended to alter the statute substantively. *Id.*

> under certain fixed rules, without a lawsuit and without friction.
>
> . . . [T]he . . . employer . . . can never be mulcted in heavy damages, and will know whenever an employé is injured practically just what must be paid for the injury.

Borgnis v. Falk Co., 147 Wis. 327, 337, 354, 133 N.W. 209 (1911).

B. Punitive Damages Were Never Intended To Protect Workplace Safety.

The punitive damages statute, section 895.85(3), Stats., was never intended to protect workplace safety. Indeed, adding punitive damages to the "all-pervasive" worker's compensation system would destroy the balance struck by the legislature to compensate victims of workplace accidents. The amicus brief filed by labor unions in this case blames the Court of Appeals' interpretation of the punitive damages statute for precluding those damages in workplace cases. In fact, the legislature eliminated those damages in workplace cases 95 years ago. *See Beck v. Hamann*, 263 Wis. 131, 137, 56 N.W.2d 837 (1953) (even employer's gross negligence

does not create common law right of action for compensation or punitive damages).

Workers injured during the course of employment are entitled to benefits for, among other things, medical costs, wage loss, permanent disability, job retraining or placement, and death and burial expenses. *See* Chapter 102, Stats. Neither the punitive damages statute nor its legislative history mentions workplace safety or worker's compensation. Had the legislature intended the punitive damages statute to apply in workplace cases and alter the balance established by the worker's compensation system, it would have said so explicitly.

Virtually unlimited potential liability under a punitive damages statute is vastly different from the predictable, limited liability guaranteed under the Act. Unlike the statutory limits in the Act, punitive damages under section 895.85(3) are limited only by the discretion of civil juries. This is precisely the unpredictable liability the worker's compensation system was designed to eliminate.

A penalty provision in the Worker's Compensation Act itself emphasizes that punitive damages are not intended for workplace cases. Employers are penalized an additional 15 percent in increased disability and/or death benefits when a safety violation is a substantial factor in any workplace injury. § 102.57, Stats.; *see Eau Claire Elec. Coop. v. Industrial Comm'n*, 10 Wis. 2d 209, 217-18, 102 N.W.2d 274 (1960). Thus, the failure to maintain a safe workplace can increase an employer's worker's compensation liability, but it cannot create liability for punitive damages where that liability does not exist by statute. The penalty provision in section 101.11(1), Stats., is the only form of punishment and deterrence the legislature enacted to help ensure workplace safety. This predictable, legislatively-established system only works, however, if an employer's liability is limited to that explicitly provided by the Act.

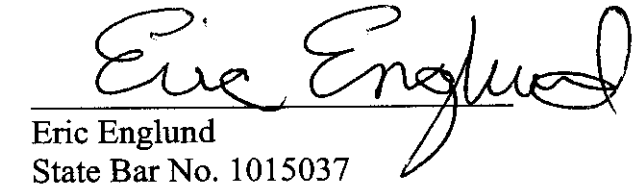
CONCLUSION

The WIA thanks the Court for this opportunity to participate in this important appeal. The trial court's

judgments against the insurer-defendants in this case should be reversed.

Dated this 20th day of July, 2004.

WISCONSIN INSURANCE ALLIANCE

By: 

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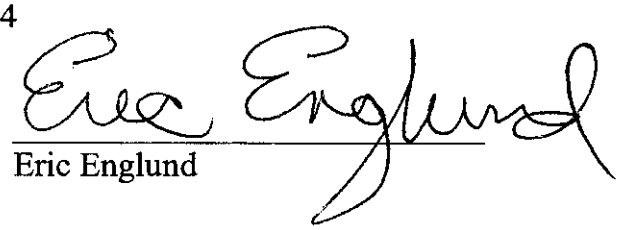
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §§ 809.19(8)(b) and (c), for a brief produced with a proportional serif font. The length of this brief is 2,892 words.

Dated: July 20, 2004



Eric Englund

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STATE OF WISCONSIN
IN THE
SUPREME COURT

Appeal No. 01-0724 (Consolidated by the Court of Appeals with Nos. 01-1031 and 01-2486)
Milwaukee County Circuit Court Case No. 99-CV-6553

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased, MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased, and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE OF JEROME W. STARR, deceased,

Plaintiffs-Intervenors-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant,

NEIL F. LAMPSON, INC.,

Defendant-Respondent,

LAMPSON INTERNATIONAL LTD., FEDERAL INSURANCE COMPANY, and THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendants.

NON-PARTY BRIEF OF WISCONSIN MANUFACTURERS & COMMERCE

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STATE OF WISCONSIN
IN THE
SUPREME COURT

Appeal No. 01-1031 (Consolidated by the Court of Appeals with Nos. 01-0724 and 01-2486)
Milwaukee County Circuit Court Case No. 99-CV-6553

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased, MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased, and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE OF JEROME W. STARR, deceased,

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-Cross-Appellant,

THE TRAVELERS INDEMNITY COMPANY
OF ILLINOIS,

Defendant-Appellant-Petitioner,

NEIL F. LAMPSON, INC. and LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY,

Defendant-Co-Appellant,

THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendant.

STATE OF WISCONSIN
IN THE
SUPREME COURT

Appeal No. 01-2486 (Consolidated by the Court of Appeals with Nos. 01-0724 and 01-1031)
Milwaukee County Circuit Court Case No. 99-CV-6553

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased, MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased, and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE OF JEROME W. STARR, deceased,

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-Cross-Appellant,

THE TRAVELERS INDEMNITY COMPANY
OF ILLINOIS,

Defendant-Appellant-Cross-Respondent,

NEIL F. LAMPSON, INC. and LAMPSON
INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY, and THE TOKIO
MARINE & FIRE INSURANCE COMPANY,

Defendants-Respondents-Cross-Appellants.

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Representing Wisconsin businesses for nearly 100 years, Wisconsin Manufacturers and Commerce ("WMC") has consistently supported legislation to ensure fairness and predictability in the legal system.[1] To further this objective, WMC worked with legislators during the 1980s and 1990s to change the law of punitive damages. That change came in 1995 Act 17 ("the Act"). All of the parties here agree that the Act significantly raised the standard of conduct required to justify any award of punitive damages.[2]

WMC actively participated in the legislative process that led to the Act, giving it a unique perspective on the statutory interpretation issue presented in this case. WMC believes the Court of Appeals accurately captured the intent of the Act. As a matter of public policy, the legislature intended to prohibit punitive damages unless a defendant exhibited "both a general intent to perform an act *and a specific intent to cause injury by that act or knowledge*

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[1] WMC is a statewide association with nearly 4,300 business members of every size and in every business sector. WMC has represented the interests of its members by filing non-party briefs in a variety of cases. The sound and fair administration of the civil justice system, including the availability of punitive damages, is a matter of profound concern to WMC's members.

[2] *Wischer v. Mitsubishi Heavy Industries America, Inc.*, 2003 WI App 202, ¶ 41, 267 Wis. 2d 638, 673 N.W.2d 303 (citations omitted).

that the act [was] practically certain to result in injury, and not, as the plaintiffs would have it, a volitional act that results in unintended and unforeseen injuries." *Wischer*, 2003 WI App 202, ¶ 40 (emphasis in original).

By raising the common law standard, the legislature intended to reaffirm two basic characteristics of punitive damages. First, punitive damages have always served a quasi-criminal function, to punish and deter extraordinarily egregious conduct. Second, punitive damages were established to penalize *intentionally* egregious conduct directed at and resulting in harm to specific individuals.

Through the Act, the legislature defined a standard of conduct it deemed commensurate with these two fundamental policy objectives. The Court of Appeals accurately interpreted the statute; and its opinion should be affirmed.

I. Two Elements Characterize Punitive Damages.

A. Quasi-Criminal Penalties.

Punitive damages are designed to punish particularly reprehensible conduct and deter its repetition. *See Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 302, 294 N.W.2d 437, 458-59 (1980). Even if a defendant's conduct is so egregious that it meets the standard of reprehensibility established by legislatures or courts, punitive damages may, but need not, be awarded. *Id.* at 301. "An award

which is more than necessary to serve its purposes (punishment and deterrence) or which inflicts a penalty or burden on the defendant … disproportionate to the wrongdoing is excessive and is contrary to public policy." *Id.* at 303 (citations omitted).

Reasonable punitive awards "serve the same purposes as criminal penalties." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003); *see Kink v. Combs*, 28 Wis. 2d 65, 80-81, 135 N.W.2d 789, 798 (1965). Put simply, punitive damages give civil courts and juries the ability to punish conduct that might otherwise go unpunished in the criminal courts and to deter others from engaging in such conduct. *Kink*, 28 Wis. 2d at 80-81. Addressing this quasi-criminal function of punitive damages, however, Justice O'Connor has expressed concern that, in a civil setting, parties lack the constitutional protections afforded in criminal proceedings:

> Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm.

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 42 (1991) (O'Connor, J. dissenting).

Punitive damages have never been meant "to compensate … plaintiff[s] for any loss." *Trinity Evangelical Lutheran*

Church v. Tower Ins. Co., 2003 WI 46, ¶ 50 261 Wis. 2d 333, 661 N.W.2d 789. Instead, punitive damages "should only be awarded if the defendant's culpability, *after having paid compensatory damages*, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm*, 538 U.S. at 419 (emphasis added). Because punitive damages are awarded, by definition, only after a plaintiff has been made whole, these awards amount to windfalls for successful plaintiffs.[3]

B. Designed to Punish and Deter Intentionally Egregious Conduct.

Historically, punitive damages have been available only in a narrow category of cases where the tortfeasor consciously and intentionally inflicted harm.[4] Historically, punitive damages have been awarded only in cases involving intentional torts with plainly egregious

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[3] *Prosser and Keeton on the Law of Torts* § 2, at 14 (5th ed. 1984).

[4] *See* Victor Schwartz and Mark Behrens, *Punitive Damages Reform - State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in* Haslip, 42 Am. U.L. Rev. 1365, 1369-70 (1993).

conduct directed at specific individuals.[5] Prior to the mid-1900s, moreover, punitive awards were rarely assessed and, even when they were, verdicts were modest.[6]

As the law on punitive damages developed, courts began to depart from these common law moorings. For example, before the Act, punitive damages were available in Wisconsin if the defendant acted maliciously or with a wanton, willful or reckless disregard of the plaintiff's rights. *Wangen*, 97 Wis. 2d at 275. This standard clearly required proof of more than simple negligence. *Id.*[7]

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[5] *Id.* at 1369 (citations omitted)("In their origins in England and in America, punitive damages were confined to a narrow category of … intentional torts, such as assault and battery, libel and slander, malicious prosecution, false imprisonment, and intentional interferences with property such as trespass and conversion.")

[6] Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 So. Cal. L. Rev. 1, 15 (1982).

[7]One of the attorneys for the Wischer plaintiffs has publicly acknowledged the difficulty of justifying a punitive damages claim in a negligence action. "[U]ntil 2000, despite my trying roughly 150 cases over four decades, I was unable to put together a punitive damages case to present to a jury. What makes that confession unusual is that for the last 30 years, my practice has been principally engaged in products liability cases, which frequently produce facts that provide a basis for punitive damages." Robert L. Habush, *Punishing a Wrongdoer—and Achieving a Career Goal*, Trial, July 2003, at 54.

The plaintiffs also argue that, under the Court of Appeals' statutory interpretation, "practically all of the product liability cases would not rise to [the requisite] level of proof." Plaintiff's Reply to The Travelers Indemnity Co. Of Illinois' Response Brief, p. 10. The

However, it did not require direct proof of intent to harm. Under similarly less demanding standards, "[T]he frequency and size of punitive damages awards … 'skyrocketed,'"[8] ultimately becoming a matter of national public concern.[9]

The imprecise common law standard in Wisconsin led the WMC and other proponents of punitive damage reform to press for change in this state for a variety of reasons. The less demanding standard did not reflect the intentional tort roots of punitive damages, and juries across the country were awarding punitive damages in cases for which they were not originally intended.[10] Moreover, widespread publicity given to these awards, which often dwarfed the actual

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concession by the plaintiffs' own counsel, however, suggests that products liability cases have never been fertile punitive damages ground in Wisconsin.

[8] Schwartz, *supra* note 4, at 1369-70 (citation omitted).

[9] Richard L. Blatt et al., *Punitive Damages: A State-by-State Guide to Law and Practice* § 1.2, at 4-8 (2004 ed.).

[10] Like the jury in this case, many juries made punitive awards after being urged by plaintiffs' lawyers to "send a message." R. 751, Transcript, Nov. 28, 2000, p. 65, lines 11-15. Although that may be a common tactic in punitive damages cases, and on occasion may be related to genuine concerns about punishment and deterrence, it can also be an invitation to excess. One of the plaintiffs' counsel recently described himself as "the knight on the white horse coming to the rescue of whoever is in peril." For him, it has been reported, this case has always been "about revenge … about getting even … about having [him] as the instrument of punishment of Mitsubishi [MHIA]." Erik Gunn, *Punitive Damages*, Milwaukee Magazine, July 2004, at 50, 58.

economic losses suffered by the plaintiffs,[11] encouraged potential plaintiffs to play the "lawsuit lottery."[12]

Proponents of change objected to the huge punitive damage windfalls realized by plaintiffs who had already been made whole. Many argued that if punitive awards were truly intended to serve the same purpose as criminal penalties and benefit society as a whole, at least a portion of such awards should be shared with the state.[13]

Intent on restricting the availability of punitive damages in cases for which they were not intended, states across the country, including Wisconsin, considered a number of alternatives to their punitive damages standards.[14] Some suggested abolishing punitive damages altogether, leaving the role of punishment and deterrence to criminal courts with defendants guaranteed the due

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[11] *See Torts and Damages: The Civil Justice Reform Issue*, LRB Brief 95-5, p. 4 (February 1995).

[12] *See Tort Actions and Civil Damages*, LRB Brief 01-11, p. 1 (November 2001).

[13] *See Exorbitant Damage Awards*, Wis. State Journal Editorial, Feb. 12, 1993, at 9A.

[14] *See* John J. Kircher and Christine M. Wiseman, Punitive Damages: Law and Practice § 21 (2nd ed. 2000).

process protections of criminal procedure.[15] Other legislative proposals have included:

- Increasing the burden of proof and standard of conduct required to justify a punitive damage award;[16]
- Imposing quantitative limits on punitive damage awards;[17]
- Prohibiting or limiting attorneys from basing contingent fees on punitive damage awards;[18] and
- Splitting punitive damage awards between plaintiffs and a state fund.[19]

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[15] *See* Justice Lewis Powell, *The 'Bizarre Results' of Punitive Damages*, Wall St. J., March 8, 1995, at A21.

[16] Some proposed legislation in Wisconsin would have required plaintiffs to show the defendant acted "in a wilful or conscious disregard" of the plaintiff's rights. *See* 1989 AB 153; 1989 AB 385; 1989 SB 251; 1991 AB 217; 1991 SB 274; 1991 SB 458. Other bills would have required plaintiffs to show the defendant acted "in a wilful disregard" of the plaintiff's rights. 1991 AB 1022; 1991 SB 138; 1993 SB 152. Finally, 1987 SB 330 would have required plaintiffs to prove *beyond a reasonable doubt* that the defendant acted "intentionally, and in malicious and wanton disregard" of the plaintiff's rights.

[17] For example, the following legislative proposals would have limited punitive damages to three times the amount of compensatory damages: 1989 SB 251; 1989 AB 385; 1991 SB 274; 1991 AB 1022; 1991 AB 217; 1991 SB 458; *see also Torts and Damages: The Civil Justice Reform Issue*, LRB Brief 95-5, p. 3 (general discussion of liability limits).

[18] 1991 SB 152 and 1991 SB 138 would have prohibited an attorney from basing fees on that portion of a punitive damage award shared with the state as required under the bill.

[19] Eight states have split-recovery laws, and others are considering similar legislation. *See* Adam Liptak, *Schwarzenegger Sees Money for State in Punitive Damages*,

Bent on preventing change, however, legislative committee chairs consistently blocked these proposals from leaving committee - until the adoption of the Act.[20]

II. 1995 Act 17 Re-Captured the Purpose and History of Punitive Damages.

The Wisconsin legislature passed the Act with bi-partisan support.[21] As a result, punitive damages are now available for a jury's consideration in Wisconsin only if a defendant acts "maliciously … or in an intentional disregard" of the plaintiff's rights. § 895.85(3), Stats.

N.Y. Times, May 30, 2004 at 16. A Utah judge, however, recently ruled that its state's split-recovery law amounted to an unconstitutional taking. *See* Elizabeth Neff, *Damage-Awards Law Tossed*, Salt Lake Tribune, June 12, 2004 at B1, citing *Smith v. Price Development Co.*, No. 94-0904312, District Court of the Third Judicial District, Salt Lake County; *but see Demendoza v. Huffman*, 51 P.3d 1232 (Or. 2002) (rejecting takings challenge). In addition, Ohio's Supreme Court, noting that "it is the societal element [of punitive damages] that is most important," on its own initiative ordered two thirds of a $30 million punitive award directed to a cancer research fund. *Dardinger v. Anthem Blue Cross & Blue Shield*, 2002 Ohio 7113, ¶ 187, 781 N.E.2d 121.

[20] *See* Brian Kerhin, *Bring Bills to the Floor, Say Tort-Reform Advocates*, The [Green Bay] News Chronicle, Sept. 14, 1993; *see also* Barbara Kueny, *Business Contortions*, Corp. Rep. Wis., Feb. 1993, at 11.

[21] The Act passed the Senate and the Assembly by votes of 24-8 and 69-27, respectively. In fact, the 1995-96 legislative session was a banner year for proponents of liability limits in Wisconsin. *See Legislation Relating to Liability and Insurance Enacted During the 1995-96*

This new standard was intended to be — and is — more stringent than the common law standards that had eroded over the years. Indeed, it has been described as one of the "most stringent" punitive damages standards in the nation.[22]

More fundamentally, however, the new standard: (1) restricts punitive damage awards to cases the legislature deemed commensurate with the quasi-criminal purposes of punishment and deterrence; and (2) recaptures the historical link between punitive damage awards and intentionally egregious conduct directed at specific individuals.

That the legislature deemed only *intentionally* egregious conduct commensurate with quasi-criminal punishment and deterrence should not be in doubt. The "intentional disregard" standard was first adopted by the Senate Judiciary Committee as a substitute for the "wilful disregard" standard in the original bill. *See* Senate Substitute Amendment (SSA) 1 to 1995 SB 11. Thereafter, the intentional standard withstood efforts in both chambers to replace it with the less stringent common law "wanton, willful, or reckless disregard" standard. *See* Senate Amendment 4 to SSA 1, 1995 SB 11; Assembly Amendment 5 to 1995 SB 11.

Legislative Session, Wis. Leg. Council Staff Memorandum 96-25 (July 26, 1996).

[22] Blatt, *supra* n.9 at § 8.59, at 544.

The statute's history reflects the legislature's keen awareness of the dual purposes behind punitive damages and its intent to re-associate such damages with malicious or intentional quasi-*criminal* conduct. Rep. Mark Green, who described the Act as "the 'lynchpin' of efforts to change Wisconsin's liability system,"[23] advanced the intentional disregard standard during floor debate.

> First off, let's understand that *punitives have never been designed or intended to compensate victims. That's not what punitives are for. Never have been, not in this state, nor in any of the other states that have punitives.*
>
> …Secondly, *punitives have never been designed or intended to arise from mere negligence, never have been.* In fact, in the main work on negligence in tort … is very specific. *Punitive damages should not be used for compensation. They do not arise out of negligence. They instead are designed to punish.* ***If they're designed to punish, I think it is appropriate that intent or maliciousness is the standard.***

Assembly Transcript, April 6, 1995, pp. 62-63, 64 (emphasis added). Finally, the Act's history shows that legislators knew the intentional disregard standard would eliminate the availability of punitive damages, even in some of the most egregious situations, unless a defendant intended to injure a specific plaintiff. *See id.*

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[23] Scott Hildebrand, *New Liability Law Praised, Criticized*, Green Bay Press Gazette, May 17, 1995.

In light of the legislature's intent, the Jury Instructions Committee and the Court of Appeals in this case logically and correctly relied on the criminal definition of intent and the complementary jury instruction to interpret section 895.85(3), Stats. *See Wischer*, ¶ 39-40. Specifically, the new standard was intended to: (1) re-associate punitive damages with intentional quasi-criminal conduct, and (2) require a level of conduct commensurate with criminal punishment and deterrence. Accordingly, the appellate court concluded that the only reasonable interpretation of the new standard required reliance on the criminal definition of intent:

> [W]e are convinced that there is only one reasonable interpretation of Wis. Stat. § 895.85(3). The more demanding statute requires both a general intent to perform an act *and a specific intent to cause injury by that act or knowledge that the act is practically certain to result in injury*, and not, as the plaintiffs would have it, a volitional act that results in unintended and unforeseen injuries.
>
> To conclude otherwise would lead to unreasonable results and *expand*, rather than narrow, the scope of cases where punitive damages may be awarded. To affirm the trial court's interpretation of the statute would permit the request for punitive damages in almost any negligence case, contrary to the intent of the legislative enactment.

Id. at ¶¶ 40-41 (emphasis in original).

In the end, the Court of Appeals based its interpretation on the historical evolution of punitive

damages. Noting that "the heartland of punitive damages awards is in intentional torts," the court explained:

> In recent years, punitive damage awards have become commonplace in unintentional tort cases; however, with the passage of Wis. Stat. § 895.85(3), our legislature, as a matter of public policy, has decided to return punitive awards to its place of origin.

Id. at ¶ 41 (citation omitted).

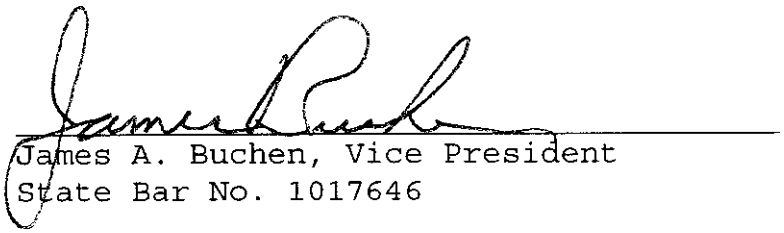
The WMC and its members supported the punitive damages statute at each step of the legislative process. *See Legislative/Executive Insight*, Vol. 17, No. 10, March 7, 1995 (newsletter to WMC membership reporting on the legislation's progress). WMC supported reform because, by limiting plaintiffs' ability to leverage unjustified settlements with the threat of punitive damages, it would restore fairness to the civil justice system. The Court of Appeals upheld that objective. So should this Court.

CONCLUSION

The Court of Appeals' opinion is true both to the statute's intent and the appropriate standard of conduct necessary to justify an award of punitive damages under § 895.85(3), Wis. Stats. In light of the foregoing arguments, this Court should affirm the Court of Appeals' decision.

Dated: July 20, 2004.

WISCONSIN MANUFACTURERS & COMMERCE

By: 

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sections 809.19(8(b) and (c) for a brief produced with a monospaced font. The length of this brief is 13 pages.

Dated: July 20, 2004.

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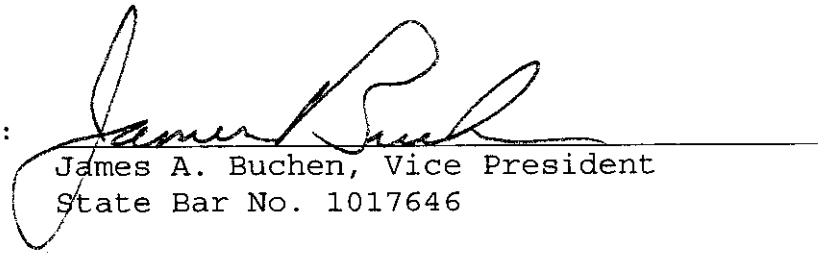
By: 

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STATE OF WISCONSIN
IN SUPREME COURT

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER,deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased,

Plaintiffs-Intervenors-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant,

NEIL F. LAMPSON, INC.,

Defendant-Respondent,

LAMPSON INTERNATIONAL LTD., FEDERAL INSURANCE COMPANY, and THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendants.

Case No. 01-0724
(consolidated with Case Nos. 01-1031 and 01-2486)

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I, DATED SEPTEMBER 30, 2003

SUPPLEMENTAL BRIEF OF PATRICIA WISCHER, MARJORIE DeGRAVE AND RAMONA DULDE-STARR

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased;

Plaintiffs-Respondents-Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-Cross-Appellant,

Case No. 01-1031 (consolidated with Case Nos. 01-0724 and 01-2486)

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-Petitioner,

NEIL F. LAMPSON, INC., and LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY,

Defendant-Co-Appellant,

THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendant.

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased;

Plaintiffs-Respondents-Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-Cross-Appellant,

Case No. 01-2486 (consolidated with Case Nos. 01-0724 and 01-1031)

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-Cross-Respondent,

NEIL F. LAMPSON, INC., and LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY, and THE TOKIO MARINE & FIRE INSURANCE COMPANY,

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ISSUE PRESENTED

Is the punitive damage award in this case unconstitutional?

Answered by circuit court: No.

ARGUMENT

THE PUNITIVE DAMAGE AWARD IS NOT UNCONSTITUTIONAL.

I. EVEN *DE NOVO* APPELLATE REVIEW OF THE CONSTITUTIONALITY OF A PUNITIVE DAMAGE AWARD REQUIRES DEFERENCE TO THE JURY'S FINDINGS.

In *Cooper Industries, Inc. v. Leatherman Tool Group*, Inc., 532 U.S. 424 (2001), the U.S. Supreme Court held that an appellate court should apply a *de novo* standard when reviewing a lower court's determination regarding the constitutionality of a punitive damage award. The *de novo* standard applies only to that ruling of the lower court, *Cooper*, 532 U.S. at 433; *State Farm Mutual Auto Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003); *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 2003 WI 46, ¶¶48, 56, 261 Wis.2d 333, 661 N.W.2d 789; the reviewing court must defer to the jury's findings of fact. *Cooper*, 532 U.S. at 437-39 n. 11, 12, 14. Here, the jury found that Mitsubishi Heavy Industries America, Inc. ("MHIA") acted in an intentional disregard of the rights of the decedents. (App.75-76) This finding, and the evidence that supports it, must be viewed in the light most favorable to Patricia Wischer, Marjorie DeGrave and Ramona Dulde-Starr (hereinafter referred to as "plaintiffs") *Trinity*, 2003 WI 46, ¶56.

II. A CONSIDERATION OF THE GUIDEPOSTS THE COURTS HAVE OUTLINED DEMONSTRATES THAT THE PUNITIVE DAMAGE AWARD IS NOT UNCONSTITUTIONALLY EXCESSIVE.

A punitive damage award that is the product of a fair process is entitled to a strong presumption of validity. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993).

A state may, consistent with the Constitution, further its goals of punishment and deterrence through the imposition of punitive damages. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991). Due process requires that a person receive fair notice of the conduct that will subject him or her to punishment and the severity of the penalty that a state may impose. *Gore*, 517 U.S. at 574. Only when a punitive damage award can be characterized as grossly excessive in relation to the legitimate state interests in punishment and deterrence does it become arbitrary and, hence, violate due process. *Id.* at 568.

In *Gore*, 517 U.S. at 575, the Court delineated three guideposts for determining whether a defendant had adequate notice of the size of the possible sanction and thus whether the size of a punitive damages award violates due process: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual and potential harm and

the punitive damage award; and (3) the difference between the award and the civil or criminal penalties authorized or imposed in comparable circumstances.

When applying a very similar test, this court has encouraged courts to consider, from the following list, those factors that are most relevant to the case, to determine whether a punitive damage award is excessive: (1) the grievousness of the acts, (2) the degree of malicious intent, (3) whether the award bears a reasonable relationship to the compensatory damage award, (4) the potential damage that might have been caused by the acts, (5) the ratio of the award to the civil or criminal penalties that could be imposed for comparable misconduct, and (6) the wrongdoer's wealth. *Trinity*, 2003 WI 46, ¶53; *Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis.2d 158, 194, 557 N.W.2d 67 (1996).

A consideration of the relevant factors demonstrates that the punitive damage award here is not excessive.

A. The Reprehensibility of MHIA's Conduct Supports the Award.

The most important indicium of the reasonableness of a punitive damage award is the degree of reprehensibility of the defendant's conduct. *Gore*, 517 U.S. at 575. *See also: Trinity*, 2003 WI 46, ¶57. This principle reflects the view that some wrongs are more blameworthy than others and the award should reflect the egregiousness of the conduct. *Gore*,

517 U.S. at 575-76.

The reprehensibility factor can be influenced by the demeanor and credibility of the witnesses, matters on which any appellate court must defer substantially to the jury. *Cooper*, 532 U.S. at 440.

In *Gore*, 517 U.S. at 576-80, the Court noted that certain "aggravating factors" are associated with particularly reprehensible conduct: (1) disregard for the health and safety of others; (2) conduct causing personal injury, not mere economic harm; (3) affirmative acts of misconduct; (4) repeated misconduct; (5) deliberate false statements; (6) concealment of evidence.

In *Campbell*, 538 U.S. at 419, the Court expanded upon its statement in *Gore* and enunciated five sub-factors for assessing reprehensibility: (1) whether "the harm caused was physical as opposed to economic"; (2) whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others"; (3) whether "the target of the conduct had financial vulnerability"; (4) whether "the conduct involved repeated actions or was an isolated incident"; and (5) whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident."

1. MHIA's conduct was reprehensible.

The reprehensibility of MHIA's conduct is beyond dispute. The evidence demonstrating reprehensibility is

summarized on pages 3-10 of plaintiffs' initial brief. The evidence reflects each of the aggravating factors listed in *Gore* and *Campbell*. First, MHIA's conduct evinced an intentional disregard for the safety of workers on the Miller Park construction site, and this caused the most serious form of physical harm -- death, and multiple deaths at that. Second, MHIA's acts were affirmative acts of misconduct, not merely acts of misfeasance. The jury found that such misconduct was not just indifference, but an *intentional* disregard of the safety of others. Third, MHIA's conduct was part of a pattern of unsafe practices and repeated misconduct at Miller Park that reflected a disregard of work site safety, jeopardizing the safety of hundreds of workers. As noted in *Gore*, 517 U.S. at 576-77, repeated misconduct is more reprehensible, more deserving of severe punishment, and more in need of deterrence than one instance of misconduct. *See also: Trinity*, 2003 WI 46, ¶¶59, 60. Fourth, the target of the misconduct was financially vulnerable; workers do not have the same leverage as employers to halt a construction project when they feel conditions are unsafe. They need to put food on the table. This vulnerability was underscored by testimony that Victor Grotlisch, MHIA's site manager, said that he hired workers "from the neck down." (App.290, 348-49, 375) Fifth, trickery and deceit were involved. Grotlisch assured those involved in the lift that he was going to monitor the weather,

thus lulling them into the false belief that wind limits were being observed. After the crane crash, Grotlisch, Wayne Noel, who was MHIA's safety director, and other MHIA employees lied about their knowledge of the wind conditions and the absence of wind load calculations. Grotlisch unplugged MHIA's weather computer after the crash, thus destroying evidence about wind speeds. After the tragedy, Grotlisch, whom MHIA kept in place as site manager, pressured the replacement crane operator to raise the allowable wind speeds for use of the crane to speed up construction.

Given the strength of the evidence of reprehensibility -- the most important of the three guideposts, the punitive damage award is not excessive.

2. The jury properly considered evidence regarding MHIA's repeated misconduct in assessing reprehensibility.

MHIA, relying on *Campbell*, may attempt to argue that the jury's finding as to reprehensibility was improperly grounded upon evidence regarding MHIA's pre- and post-accident conduct that was not relevant. Any such argument should be rejected.

First, in contrast to *Campbell*, where State Farm raised the issue of whether its other bad acts were admissible, MHIA did not raise on appeal the issue of the admissibility of evidence of its pre- or post-accident conduct.

Second, Wisconsin law states that evidence of other wrongs and acts of a defendant is relevant as to punitive damages. *Trinity*, 2003 WI 46, ¶¶57, 59 (referring to Tower Insurance Company as a repeat offender, this court considered Tower's breach of its duty to an insured that occurred more than 25 years earlier). *See also: Anello v. Savignac*, 116 Wis.2d 246, 251, 342 N.W.2d 440 (Ct.App. 1983); *Lievrouw v. Roth*, 157 Wis.2d 332, 348-49, 459 N.W.2d 850 (Ct.App. 1990); *Smith v. Golde*, 224 Wis.2d 518, 532-33, 592 N.W.2d 287 (Ct.App. 1999); *Mucek v. Nationwide Communications, Inc.*, 2002 WI App 60, ¶¶38-42, 252 Wis.2d 426, 643 N.W.2d 98.

Third, MHIA's pre- and post-accident conduct was highly relevant; it all occurred on the construction site where the decedents were killed and was similar to MHIA's conduct that led to the decedents' deaths. MHIA's pre-accident conduct was relevant as showing a pattern of MHIA's unsafe practices at Miller Park that evinced an intentional disregard for workers' safety. MHIA's post-accident conduct, in particular, Grotlisch's unplugging of the weather computer and his pressuring the new crane operator to raise the allowable wind speeds, was relevant for impeachment purposes and as showing a destruction and, thus concealment, of evidence, and unrepentant behavior evidencing the need for greater deterrence. All of such conduct was also relevant to counter

MHIA's position that the crane crash was an accident, not an intentional disregard of the decedents' rights.

Fourth, *Campbell* does not prohibit the admission of such evidence. *Campbell* is a reaffirmation of *Gore* and other cases holding that other similar conduct is relevant. *See*, *Haslip*, 499 U.S. at 21-22; *TXO*, 509 U.S. at 462; *Gore*, 517 U.S. at 576-80. In *Campbell*, 538 U.S. at 419, the Court noted that whether the defendant's conduct involved repeated actions or was the result of trickery or deceit are valid considerations in the reprehensibility analysis. It ruled that similar misconduct by the defendant has a bearing on reprehensibility, and "need not be identical to have relevance." *Campbell*, 538 U.S. at 422-23.

Campbell does not preclude the consideration of MHIA's pre- and post-accident conduct. There, the Court simply held that evidence of State Farm's nationwide conduct was not relevant because it bore no relation to the conduct that harmed the Campbells. *Campbell*, 538 U.S. at 419-24.[1] The facts there are unlike the facts here.

B. The Size of the Punitive Damage Award Is Not Excessive Compared to the Actual and Potential Harm.

Another guidepost in assessing whether a punitive damage award is excessive is the comparison of the award to

[1] The Campbells were harmed by State Farm's handling of a third-party claim. Yet, little, if any, of the conduct on which the Campbells attempted to rely to show reprehensibility related to State Farm's handling of third-party claims. *Campbell*, 538 U.S. at 415.

the actual or potential harm that the conduct caused or could have caused. This is a guidepost only. It is simply not possible to capture in one ratio all of the qualitative factors involved in assessing the appropriate level of punishment. Thus, the U.S. Supreme Court has favored a general inquiry into reasonableness. *Gore*, 517 U.S. at 582-83.

1. The courts have not imposed a bright-line ratio which a punitive damage award cannot exceed.

a. The U.S. Supreme Court has not imposed a bright-line ratio.

In *Haslip*, 499 U.S. at 18, the Court stated that when considering punitive damage awards, "[w]e need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." In *Gore*, 517 U.S. at 582, the Court again rejected the "notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award." (emphasis in the original) In *Campbell*, the Court "decline[d] again to impose a bright-line ratio which a punitive damages award cannot exceed." 538 U.S. at 425. "[T]here are no rigid bench-marks that a punitive damages award may not surpass." *Id.*

Despite the Court's specific disavowal of any bright-line rule, MHIA and its insurers will no doubt assert that the Court

established such a rule by the following comment: "Our jurisprudence and the principles it has now established demonstrate, ..., that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 538 U.S. at 425. This passage, however, does not establish a "single-digit rule." Judge Posner, writing for the Seventh Circuit in *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir. 2003), explained that "[t]he Supreme Court [in *Campbell*] did not, however, lay down a 4-to-1 or single-digit-ratio rule -- it said merely that 'there is a presumption against an award that has a 145-to-1 ratio'."[2]

The *Campbell* Court's reference to a "single-digit ratio" stemmed from its consideration of punitive damage awards in cases that did not involve death or bodily injury. Examination of those cases is thus necessary.

In *Haslip*, 499 U.S. 1, which involved an insurance dispute that caused economic hardship, the Court upheld a punitive damage award where the ratio between punitive and compensatory damages was 4 to 1 and the ratio between punitive damages and the insureds' out-of-pocket expenses was 200 to 1.

In *TXO*, which involved slander by one business against another about title to oil and gas development rights, the Court

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[2] In *Mathias*, the court upheld a punitive damage award that was 37.2 times the compensatory damage award.

upheld a punitive damage award of $10 million, which, when compared to the compensatory damage award of $19,000, resulted in a ratio of 526 to 1. The Court noted that the ratio was less (*i.e.*, 10-to-1) when the punitive damages were compared to the potential harm. *TXO*, 509 U.S. at 462.

In *Gore*, which involved the undisclosed repainting of an automobile that was sold as new, the Court held excessive a $2 million punitive damage award that represented a ratio of 500 to 1 when compared to compensatory damages of $4,000. There, the harm was purely economic in nature, BMW's conduct evinced no disregard for the safety of others, there was no suggestion of any potential harm, the claimant was not financially vulnerable, and the record disclosed no deliberate false statements, acts of affirmative misconduct or concealment of evidence.

In *Campbell*, involving an insurer's bad faith, the Court held that an award of $145 million in punitive damages on a $1 million compensatory judgment violated due process. There, the insurer's culpability did not warrant the punitive damage award, and the harm was minor and only economic.

None of these cases[3] involved the first two sub-factors of reprehensibility listed in *Campbell*, 538 U.S. at 419 -- personal injury and disregard of health and safety, and none

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[3] *See also: Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), where no due process issue was raised, and Court upheld a punitive damages award with a ratio of 117 to 1.

of them holds that only a single-digit ratio can comport with due process when those factors (or even all five sub-factors, as here) are present. The precise award of punitive damages must be based upon the circumstances of each case. *Campbell*, 538 U.S. at 425.

b. This court has not imposed a bright-line ratio.

Like the U.S. Supreme Court, this court has rejected the notion that the excessiveness of a punitive damage award is measured by a mathematical formula.

In *Trinity*, 2003 WI 46, ¶63, the court stated that "Wisconsin law expressly rejects the use of a fixed multiplier, [including] a fixed ratio of compensatory to punitive damages ..., to calculate the amount of reasonable punitive damages."

In a similar vein, this court has stated: "The test of excessiveness does not necessarily depend upon some arbitrary proportion." *Malco, Inc. v. Midwest Aluminum Sales, Inc.*, 14 Wis.2d 57, 66, 109 N.W.2d 516 (1961).

This court has recognized that a higher ratio of punitive damages to compensatory damages may be justified if egregious acts result in noneconomic harm that is difficult to measure. *Jacque v. Steenberg Homes, Inc.*, 209 Wis.2d 605, 629-30, 563 N.W.2d 154 (1997).[4]

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[4] Thus, *Management Computer*, 206 Wis.2d 158, where the court reduced a punitive damage award from 27 times the compensatory damages to 10 times the compensatory damages, should not be used as

2. The denominator of the ratio cannot be limited to the amount of the compensatory damages award alone.

The second guidepost calls for a comparison of the punitive damage award with the actual and potential harm caused to the victim and others. *Gore*, 517 U.S. at 581-82; *TXO*, 509 U.S. at 460. In *TXO*, 509 U.S. at 460, the Court confirmed that a court may properly take "account of the potential harm that might result from the defendant's conduct." The Court has "eschewed an approach that concentrates entirely on the relationship between actual and punitive damages. It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim ..., as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." (emphasis in the original) *Id.*

Similarly, in *Trinity*, 2003 WI 46, ¶¶53, 65, and *Management Computer*, 206 Wis.2d at 194, the court stated that a court should consider "whether the [punitive damage] award bears a reasonable relationship to the award of compensatory damages" and "the potential damage that might have been caused by the acts."[5]

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a barometer, because the defendant's conduct caused only economic harm to a corporation, not bodily injury to a human being.

[5] In *Trinity*, 2003 WI 46, ¶65, the court considered the potential harm in the ratio. In *Jacque*, 209 Wis.2d at 629-30, the court upheld a punitive damage award of $100,000 where the defendant's intentional trespass to the plaintiffs' land resulted only in a nominal compensatory damage award of $1, noting that a damage award may not reflect the actual harm.

Thus, in this case, it would be incorrect to focus only on the ratio of the punitive damage award to the compensatory damage award (about 18 to 1). The compensatory damage award alone cannot be used as the denominator in the ratio here, because that award does not reflect the actual harm or the potential harm. When actual and potential harm are considered, the ratio is substantially less than 18 to 1.[6]

a. The actual harm to the plaintiffs was substantial.

MHIA's conduct was particularly egregious and the actual harm it caused to the plaintiffs is substantial. MHIA caused the deaths of three men who were husbands and fathers. It is difficult to place a value on the loss of human life. The difficulty in measuring in financial terms the loss of one man's life, let alone three lives, demonstrates the need for a higher ratio, a circumstance recognized in *Campbell* ("a higher ratio *might* be necessary where 'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.'") 538 U.S. at 425, quoting *Gore*, 517 U.S. at 582. (emphasis in the original).

One of the components -- and only one -- of the actual harm MHIA caused to the plaintiffs is the jury's compensatory

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[6] In *Trinity*, which involved only economic harm, the court upheld a punitive damage award of $3.5 million, which reflected a ratio of about 205 to 1 when compared to the actual damages of $17,000, but reflected a ratio of 7 to 1 when compared to the potential damage of $490,000.

damage award, which included (1) the decedents' pre-death pain and suffering, which the jury valued at $4.2 million, and (2) the plaintiffs' loss of their husbands' society and companionship, which was included in the jury award at $1.05 million. These amounts, however, are not a true measure of actual harm. The award for loss of society and companionship was artificially limited by the $350,000 limitation of Wis. Stat. §895.04(4). That limit is not a measure of ***actual damages*** or even a limit upon the amount of damages the jury may award. It is only a limit on the amount of ***recoverable damages***. *Chang v. State Farm Mut. Auto. Ins. Co.*, 182 Wis.2d 549, 565, 514 N.W.2d 399 (1994). When considering the ratio of the ***actual harm*** in comparison to a punitive damage award, the court should not be constrained to use that limitation as a measure of actual harm.[7]

Another component of the actual harm MHIA caused is the plaintiffs' pecuniary loss, which was valued before trial at $4,527,000. (R.545:5) The value of that loss was not included in the jury's verdict only because of plaintiffs'

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[7] The comparison calls for a consideration of actual harm. The court's ability to assess actual harm for purposes of the comparison should not be dependent upon whether a component of actual harm can form the basis for the recovery of punitive damages. The mere fact that an award for loss of society and companionship in a wrongful death action cannot, standing alone, support a punitive damage award because of the wording of Wis. Stat. §895.04, *see Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 312-15, 294 N.W.2d 437 (1980), does not render that loss non-existent as a component of actual harm and preclude its consideration in the comparison. For instance, potential harm may be considered in the comparison, *Trinity*, 2003 WI 46, ¶¶53, 65, yet potential harm cannot support the recovery of punitive damages.

counsel's tactical decision not to seek an award of damages for that loss. Nevertheless, that loss is part of the actual harm.

These three components -- pre-death pain and suffering, loss of society and companionship, and pecuniary loss -- are the only damage components on which a specific value was placed. If one were to just compare the total of these amounts (the verdict amount of $5.25 million plus the pecuniary loss of $4.527 million) to the punitive damage award, even given the artificial limitation on loss of society and companionship, one would arrive at a ratio of about 9.6 to 1.

Even this ratio, however, does not truly compare the punitive damage award to the actual harm. The actual harm is the deaths of three men and the enormous loss suffered by not only their wives, but their children as well. The children's loss could not be expressed in the jury's verdict due to the fact that Wis. Stat. §895.04(2) does not permit children to recover damages for the wrongful death of a parent when the decedent is survived by a spouse. That statutory rule, however, does not cause the children's loss to cease to exist. That loss is real and it must be considered as part of the actual harm when comparing actual harm to the punitive damage award.

The due process analysis focuses on the notice to the defendant of the conduct that will subject him or her to punishment and the severity of the penalty that a state may

impose. *Gore*, 517 U.S. at 574; *Trinity*, 2003 WI 46, ¶51. The court may thus appropriately consider all of the actual harm and potential harm to the plaintiffs, including their pecuniary loss and their children's loss, and not just the amount of damages awarded or recoverable, because MHIA had notice of these components of the actual and potential harm. Although the jury did not hear evidence of, or award damages for, pecuniary loss or the children's loss, the *Gore* guideposts do not limit the court to a consideration of only the evidence that the jury considered.[8]

Another measure of the actual harm that the court should consider is the $12,375,000 that the insurers for MHIA paid to the plaintiffs before verdict as a credit against the plaintiffs' compensatory damage claims. That figure represents a reasonable estimate of the potential compensatory damage award.[9] The court can consider that amount as part of the compensatory component of the ratio even though the jury did not know about the payment, because MHIA had notice of this amount. When that figure alone is compared to the punitive damage award, the ratio is 7.6 to 1.

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[8] For instance, the third guidepost permits the court to consider the civil and criminal penalties that could be imposed, even though the jury does not consider them.

[9] If the plaintiffs had not gone to trial on their compensatory damage claims, the settlement amount could have supported an award of punitive damages. *See: Wussow v. Commercial Mechanisms, Inc.*, 97 Wis.2d 136, 149-51, 293 N.W.2d 897 (1980).

b. The potential harm was enormous.

Even all of the figures for the actual harm, however, do not include the potential harm that MHIA's conduct could have caused on July 14, 1999 or the potential harm that could result if similar future behavior by MHIA is not deterred.

Besides the decedents, there were many workers at Miller Park in the zone of danger. Fred Flowers, the operator of the crane, was injured and could have been killed when the crane tipped over. (R.733:283-84, 287-88) Steven Aldrich, Daniel Finucan, Bob Becker and Charlie Christie were also part of the crane crew (R.726:165; 733:164, 283-84, 287-88; 734:21, 24-25), Allan Watts was directing them (R.724:188), and they could have been seriously injured or killed. The life of Joe Edwards, the operator of the crane holding the man basket carrying the decedents, was spared only by chance when the crane and stadium structure rained down upon him. (R.725:168-70) Six other workers were in the potential zone of danger. (R.725:219, 221, 231; 728:72) It was pure luck that they avoided death or serious injury.

If MHIA were to engage in this type of reprehensible conduct again on other construction projects, it could injure or kill other victims and cause millions in damages. Indeed, Grotlisch's post-accident efforts to attempt to lift roof pieces in unsafe winds is evidence of that very real possibility. This large punitive damage award may serve the deterrent purpose

of making MHIA and other construction contractors think twice[10] before engaging in callous disregard of worker safety as that demonstrated by MHIA.

Thus, while MHIA and its insurers will stress the disparity between the punitive damage award and the compensatory damage award, that disparity decreases substantially when one considers the actual harm that was not reflected in the verdict and the potential harm.

Even if the appropriate ratio were 18 to 1, however, the punitive damage award would comport with due process, given the reprehensibility of MHIA's conduct. Punitive damages are aimed at deterrence and retribution. *Campbell*, 538 U.S. at 416. In *Trinity*, 2003 WI 46, ¶¶46, 51, this court stated that punitive damages may properly be imposed to further a state's interests in punishing unlawful conduct and deterring its repetition, and that "only when an award can be fairly categorized as 'grossly excessive' in relation to the state's interests in punishment and deterrence, does it enter the zone of arbitrariness that violates due process." The punitive damage award in this case effectively serves Wisconsin's interests in maintaining workers' safety and punishing and deterring misconduct that threatens their safety.

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[10] The verdict in this case fostered a safe environment for those working on the replacement of damaged portions of the Hoan Bridge in Milwaukee in December 2000. (*See* Appendix A to Amicus Curiae Brief of Wisconsin Academy of Trial Lawyers filed in the court of appeals)

See, *Id.* at ¶54.

Consideration of the second *Gore* guidepost does not support any conclusion that the punitive damage award is excessive.

C. The Statutory Penalties Are Less Important to the Analysis, But Nevertheless Support the Award Here.

The third guidepost in assessing the excessiveness of a punitive damage award is the difference between the award and the civil penalties that could be imposed for comparable misconduct. *Gore*, 517 U.S. at 575, 583; *Campbell*, 538 U.S. at 428. The existence of a criminal penalty also has a "bearing on the seriousness with which a State views the wrongful action." *Campbell*, 538 U.S. at 428.

This court has considered both civil and criminal penalties. *Trinity*, 2003 WI 46, ¶66; *Jacque*, 209 Wis.2d at 630. However, the court has stated that "Wisconsin law expressly rejects the use of a fixed multiplier, [including] a fixed ratio ... of civil or criminal penalties to punitive damages, to calculate the amount of reasonable punitive damages." *Trinity*, 2003 WI 46, ¶63. In *Trinity*, 2003 WI 46, ¶68, the court concluded that the $3.5 million punitive damage award was not excessive even though the maximum criminal penalty for the type of conduct in which Tower engaged was only $10,000.

The highest criminal penalty that can be imposed for the

type of conduct in which MHIA engaged is set out in Wis. Stat. §940.02. That statute imposes a maximum penalty of 60 years in prison on anyone who "recklessly causes the death of another human being under circumstances which show utter disregard for human life." Causing three deaths could pose a maximum penalty of 180 years' imprisonment. That penalty, though, is not an adequate consideration here, since MHIA cannot be imprisoned for its conduct. The imprisonment penalty does, however, counterbalance the monetary penalties imposed by the statutes on which MHIA and its insurers will undoubtedly rely[11] and makes less relevant the difference between the punitive damage award and the monetary penalties. *See*: *Haslip*, 499 U.S. at 23.[12] Indeed, it is precisely because a corporation is not susceptible to incarceration that a comparison between punitive damages and statutory penalties is inexact.

The only purpose of the comparison of the punitive damage award to statutory penalties is to determine whether the defendant had fair notice that its conduct would be subject

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[11] Wis. Stat. §102.57 is not a valid comparison to a punitive damage award, because it is part of the no-fault scheme of the Worker's Compensation Act and it only sanctions an employer's "failure" to comply with a safety provision, as opposed to MHIA's "intentional disregard" of worker safety. *See also:* 29 U.S.C. §666(e); Wis. Stat. §940.06(1), and §941.30, which contain an imprisonment component.

[12] There, the Court upheld a punitive damage award against a corporation even though the award was "much in excess of the fine" that could be imposed, and noted: "Imprisonment, however, could also be required of an individual in the criminal context." *Haslip*, 499 U.S. at 23.

to a severe sanction. *Gore*, 517 U.S. at 584. The imprisonment penalty indicates that Wisconsin views the conduct in which MHIA engaged very seriously, provides notice to MHIA that the penalty can be severe, and demonstrates the propriety of a substantial punitive damage award here. Only through a large punitive damage award against a corporation can one approach the level of retribution a society exacts from an individual when he is deprived of his liberty.

The potential monetary penalties of the statutes on which MHIA and its insurers will rely do not address, and were not intended to punish, the conduct of MHIA that evidenced a corporate disregard for worker safety. That is precisely why a large punitive damage award is needed here.

MHIA cannot legitimately argue that the size of the punitive damage award is so beyond MHIA's expectations as to constitute a deprivation of its due process right to notice. The Miller Park construction program secured $102 million of insurance precisely because of the vast scope of the project, the large number of workers, and the possibility of catastrophic claims. The insurers who underwrote the risk did so without an exclusion for punitive damages. Neither MHIA nor its insurers can argue that the modest size of statutory penalties allowed them to discount their exposure to a large punitive damage award for an intentional disregard of worker

safety.

The punitive damage award is consistent with the scope of the project and the available insurance. More importantly, it is consistent with the punishment deserved and the need for deterrence.

III. CONSIDERATION OF MHIA'S NET WORTH IS NOT RELEVANT OR NECESSARY TO THE CONSTITUTUTIONAL ISSUE.

MHIA may attempt to argue that the punitive damage award is unconstitutional because the award exceeds MHIA's claimed net worth. Any such argument should be rejected.

First, the circuit court excluded net worth evidence.[13] The propriety of that ruling is not before this court.

Second, the U.S. Supreme Court has not held that wealth is a necessary consideration in a due process challenge to a punitive damage award. In *Haslip*, 499 U.S. at 19, evidence of the insurer's wealth was excluded in accord with Alabama law.

Third, although Wisconsin law allows a court to consider wealth when it is relevant, *Trinity*, 2003 WI 46, ¶53, no rule requires a court to consider wealth in deciding whether a punitive damage award is excessive. *Fahrenberg v. Tengel*, 96 Wis.2d 211, 235, 291 N.W.2d 516 (1980) ("Failure to show net worth does not invalidate the award of punitive damages, but eliminates one factor by which the reasonableness of the

[13] (See pages 44-50 of plaintiffs' brief in court of appeals)

award can be gauged.")

Fourth, due to the existence of $102 million in insurance coverage for punitive damages, the issue of net worth is academic.

CONCLUSION

The plaintiffs urge the court to rule that the punitive damage award is not unconstitutional.

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CERTIFICATION

I hereby certify that this supplemental brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced with a proportional font, and complies with the supreme court's order of October 5, 2004. The length of this brief is 5,488 words.

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STATE OF WISCONSIN
IN THE
SUPREME COURT

Appeal No. 01-0724 (Consolidated by the Court of Appeals with Nos. 01-1031 and 01-2486)
Milwaukee County Circuit Court Case No. 99-CV-6553

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased, MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased, and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE OF JEROME W. STARR, deceased,

Plaintiffs-Intervenors-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant,

NEIL F. LAMPSON, INC.,

Defendant-Respondent,

LAMPSON INTERNATIONAL LTD., FEDERAL INSURANCE COMPANY and THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendants.

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS' SUPPLEMENTAL BRIEF

STATE OF WISCONSIN
IN THE
SUPREME COURT

Appeal No. 01-1031 (Consolidated by the Court of Appeals with Nos. 01-0724 and 01-2486)
Milwaukee County Circuit Court Case No. 99-CV-6553

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased, MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased, and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE OF JEROME W. STARR, deceased,

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-Cross-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-Petitioner,

NEIL F. LAMPSON, INC. and LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY,

Defendant-Co-Appellant,

THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendant.

STATE OF WISCONSIN
IN THE
SUPREME COURT

Appeal No. 01-2486 (Consolidated by the Court of Appeals with Nos. 01-0724 and 01-1031)
Milwaukee County Circuit Court Case No. 99-CV-6553

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased, MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased, and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE OF JEROME W. STARR, deceased,

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-Cross-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-Cross-Respondent,

NEIL F. LAMPSON, INC. and LAMPSON INTERNATIONAL LTD.,

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INTRODUCTION

Punitive damages, the extraordinary power of civil punishment and deterrence that can be placed in a jury's hands, have been an integral part of this country's common law for 200 years. Unchecked by an independent judiciary, however, a jury's punitive award may well be grounded more in raw emotion and bias than in rational deliberation.

State law has long required both trial and appellate courts to review punitive damage awards carefully. State law provides judges with the tools, including remittitur, to ensure that punitive awards are not excessive. Now, the U.S. Supreme Court has again emphasized, punitive damages must meet demanding federal constitutional standards.

If this Court concludes that the $94 million punitive award in this case satisfied the requirements of section 895.85(3), Stats., notwithstanding the statute's command and the Court of Appeals' decision, it should still vacate the judgment. The punitive award violates the constitution.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

This Court's April 22, 2004 Order, granting the petition for review after the Court of Appeals vacated the entire punitive damage award, specified a single issue:

> What proof is required for a plaintiff to recover punitive damages under the phrase "in an intentional disregard of the rights of the plaintiff" as provided in Wis. Stat. § 89[5].85(3)?

On October 5, 2004, the Court expanded the appeal to ask "[w]hether the punitive damage award in this case is unconstitutional." With this brief, The Travelers Indemnity Company of Illinois ("Travelers")[1] reiterates the constitutional arguments that the Court of Appeals had no need to reach, supplementing them with the developments since last year's landmark decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

ARGUMENT

The jury awarded the Wischer plaintiffs $5.25 million in compensatory damages. That award had two components:

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[1] Travelers is now known as Travelers Property Casualty Company of America.

$1.4 million each for the pain and suffering of the three iron workers who died and $350,000, the statutory maximum, for each of their family's non-economic losses.[2] The Wischer plaintiffs made a calculated decision not to request *any* economic damages. They presented no evidence of the wages and benefits the decedents would have earned over their lifetimes.

Instead, the Wischer plaintiffs asked for a massive punitive award, a "multiple" of the $47 million price of the roof or an amount equivalent to the "hundred million" dollars in property damage from the crane's collapse. "I don't know if you can do less," their counsel said, "for three human beings." R.751, Supplemental Appendix ("Supp.App.") 76. Responding to that plea, the jury awarded $94 million in punitive damages, precisely twice the price of the roof.[3]

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[2] Section 895.94(4), Stats., capped the non-economic component of the award. No punitive damages are permitted by law for wrongful death. *See The Law of Damages in Wisconsin* §§ 2.10, 16.44 (Russell M. Ware *et al.* eds., 3d ed. 2000 & Supp. 2003).

[3] The trial judge noted on the record that, in their comments to the media, jurors had said they doubled the $47 million contract price for the roof. R.756, Supp.App.79-80.

At more than 22 times the $4.2 million awarded for the workers' pain and suffering, the punitive damages are unconstitutional because they are disproportionate to the actual damages award.

Since Travelers first made its constitutional arguments on appeal more than two years ago, the U.S. Supreme Court has decided *State Farm*; this Court has decided *Trinity Evangelical Lutheran Church v. Tower Insurance Co.*, 2003 WI 46, 261 Wis. 2d 333, 661 N.W.2d 789, *cert. denied*, 124 S.Ct. 925 (2003). The two decisions stand indisputably for these principles:

- Punitive damages are subject to *de novo* review at every level of the judicial process.
- Punitive damages are available only to punish and deter. They are designed neither to compensate victims nor to punish conduct unrelated to the plaintiffs' actual harm.
- In cases with a substantial compensatory award, punitive damages roughly equivalent to compensatory damages are generally all the constitution will allow.
- The ratio of punitive-to-compensatory damages should rarely, if ever, exceed a "single digit."

Applying these principles, the trial court's punitive damages judgment should be vacated. In the alternative, this

Court should reduce the award so that it does not exceed the maximum permitted by the Constitution.[4]

The Court of Appeals correctly held that under section 895.85(3), Stats., the punitive damages question should never have gone to the jury. Even if this Court disagrees with that conclusion, the $94 million civil punishment cannot survive the probing constitutional scrutiny that this Court must apply.

I. THE U.S. SUPREME COURT NOW HAS ESTABLISHED STRICT CONSTITUTIONAL STANDARDS FOR PUNITIVE DAMAGES.

Three separate, yet complementary, sets of restrictions constrain a jury's discretion to award punitive damages—the U.S. Supreme Court's, this Court's and the state legislature's. The trial court defied all of those limitations when it accepted, unquestioned, a $94 million punitive verdict. While the U.S. Supreme Court's restrictions are paramount, any one of the three sets of restrictions is dispositive here on its own.

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[4] *See Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1049 (8th Cir. 2002) ("Unlike a remittitur, which is discretionary...a court has a mandatory duty to correct an unconstitutionally excessive verdict [to] conform to...due process....")

Historically, courts have used punitive damages to punish and deter particularly reprehensible behavior. While punitive damages remain a jury issue, juries have *never* had unbridled discretion to punish defendants. The *State Farm* decision has brought the constitutional dimensions of punitive damages to the forefront, safeguarding due process against excessive verdicts.

Declaring the case "neither close nor difficult," the Supreme Court established a "single-digit" rule for the ratio of punitive-to-compensatory damages, significantly strengthening the constitutional arguments here. The punitive damages award cannot survive because it exceeds the already "substantial" compensatory award that, by law, has made the plaintiffs whole.

A. A Decade Of Constitutional Development Led to *State Farm*.

While *State Farm* is the U.S. Supreme Court's latest word on punitive damages, the Supreme Court's substantive analysis began in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), a fraud case against an insurance company. The jury awarded $200,000 in compensatory

damages and $840,000 in punitive damages. The Supreme Court ruled that courts are constitutionally required to check a jury's rush to punish:

> [U]nlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. We need not...draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable....We can say, however, that *general concerns of reasonableness and adequate guidance from the court*...properly enter into the constitutional calculus.

Id. at 18 (citations omitted; emphasis added). Expressly "concern[ed] about punitive damages that 'run wild,'" the Supreme Court emphasized the importance of objective standards and searching review. *Id.* at 18 (citations omitted). The concerns articulated in *Haslip*—"extreme results" and the need for reasonableness—and the Court's approval of a punitive award just four times compensatory damages remain compelling today.

Five years later, a punitive award crossed "the [4-to-1] line" drawn in *Haslip*. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the plaintiff had purchased a "new" luxury sedan. After discovering that the car had been repainted to hide minor damage, he sued for consumer fraud.

BMW acknowledged it had a nationwide policy of selling damaged cars as new.

The jury awarded $4,000 in compensatory damages and $4 million in punitive damages. *Id.* at 565. While the Alabama Supreme Court reduced the award by half, the U.S. Supreme Court still held the punitive damages excessive, articulating the now familiar three-part test for constitutionality:

> Elementary notions of fairness...dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose. Three guideposts...lead us to the conclusion that the $2 million award against BMW is grossly excessive:
>
> > the degree of reprehensibility of the nondisclosure [of the defect];
> >
> > the disparity between the harm or potential harm suffered...[and the] punitive damages award; and
> >
> > the difference between this remedy and the civil penalties authorized or imposed in comparable cases.

Id. at 574-75.

The *BMW* analysis emphasized the long accepted view that punitive awards may not be "wholly disproportion[ate] to the offense." *Id.* at 575. "[P]erhaps [the] most commonly cited indicium of an unreasonable or excessive punitive

damages award," the Court said, is "its ratio to the actual harm inflicted on the plaintiff." Even the 4-to-1 ratio in *Haslip*, the Court reiterated, had been "close to the line." *Id.* at 580-81 (citing *Haslip* with approval). In *BMW*, the punitive damages were 500 times the actual damages.

Unpersuaded by the argument for severe sanctions because BMW is a large corporation, the Court said a defendant's corporate status "does not diminish its entitlement to fair notice of the demands...impose[d] on the conduct of its business." The Court concluded that the "grossly excessive award...transcends the constitutional limit." *Id.* at 585-86.

B. ***State Farm* Has Quantified The Constitutional Limit.**

In *State Farm*, the U.S. Supreme Court rejected a 145-to-1 punitive-to-compensatory damages ratio for insurance bad faith. The decision heightens every court's constitutional obligation, established in *BMW v. Gore*, to ensure that punitive damages comply with due process. *State*

Farm now provides the definitive constitutional standard, quantitative and qualitative, for punitive damages.[5]

The U.S. Supreme Court focused generally on "the imprecise manner in which [state] punitive damages systems are administered." 538 U.S. at 417. Addressing *BMW*'s reprehensibility standard, the Court specifically criticized the state court for allowing the jury to hear extensive evidence of State Farm's nationwide "scheme" to underpay claims.

State Farm's general practices might have been probative had they "a nexus to the specific harm suffered by the plaintiff." *Id.* at 422. But "[d]ue process does not permit courts…to adjudicate the merits of other parties' hypothetical claims..." through evidence of harm or potential harm to others. *Id.* at 423. The conduct that harmed the plaintiffs is the "only conduct relevant to the reprehensibility analysis." *Id.* at 423-24.

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[5] The 6-3 majority also reiterated the mandate of *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), that courts review punitive awards *de novo*. "Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform treatment…that is the essence of law itself." *Id.* at 436.

Expanding the second *BMW* standard, proportionality, *State Farm* has imposed an explicit limit on the appropriate ratio of punitive-to-compensatory damages. While the opinion's language was not absolute, it was precise:

> [I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.

Id. at 425. The Court stressed, however, that the single-digit rule is itself an exception to an *even more limited* quantitative standard:

> When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.

Id. This is the most significant aspect of *State Farm*: the Supreme Court has quantified, for the first time, a constitutional limit for punitive damages.

In *State Farm*, as in this case, the plaintiffs received compensation for an intangible harm. In its proportionality analysis, the Supreme Court emphasized that emotional distress damages *themselves* contain a punitive element, impermissibly duplicated in the punitive award. *See* 538 U.S.

at 426 (citations omitted).[6] Accordingly, compensatory damages with an inherent and intangible punitive component, whether for emotional harm or pain and suffering, are even less likely to support a punitive award at the high end of the constitutional range than awards solidly grounded on measurable economic loss.

On remand, the Utah Supreme Court set the punitive award at $9 million, a ratio of 9-to-1. 2004 UT 34. Earlier this month, the U.S. Supreme Court denied the petition for a *writ of certiorari* filed by the insurance company. No. 04-116, 2004 WL 2074132 (U.S. Oct. 4, 2004). While the denial of a petition has no formal precedential significance, *United States v. Carver*, 260 U.S. 482, 490 (1923), the Utah Supreme Court nevertheless honored the single digit rule created in *State Farm*, meeting the quantitative constitutional standard.

That case is finally over. This case is not. Even if this Court reverses the Court of Appeals' statutory interpretation, it should affirm—on constitutional grounds—the decision

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[6] *See also* Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 Va. L. Rev. 1401 (2004).

vacating the entire punitive award. The plaintiffs have already received $27 million, which they will keep, almost five times the compensatory award. Any additional payment would violate the constitution.

C. State Decisions Reinforce The U.S. Supreme Court's Mandate.

Both the quantitative and qualitative standards in *State Farm*, like the Constitution itself bind this Court. *See, e.g.*, *State v. Jennings*, 2002 WI 44, ¶ 18, 252 Wis. 2d 228, 647 N.W.2d 142. This Court cannot ignore the constitutional standards, as the plaintiffs will suggest, or manipulate them. In fact, this Court's own punitive damages cases have already evolved in generally the same direction taken by the U.S. Supreme Court.

In *Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 557 N.W.2d 67 (1996), an accounting firm had copied a plaintiff's software. The jury awarded $65,000 in compensatory and $1.75 million in punitive damages—a ratio of 27-to-1. This Court ruled the punitive award "excessive and therefore a violation of due process, because it is more than is necessary to serve the

purposes of punitive damages." *Id.* at 196. The Supreme Court found the $650,000 reduced award imposed by the Court of Appeals (a 10-to-1 ratio) "substantial enough to serve the goals of punishment and deterrence...[with] a reasonable relationship to the amount of compensatory damages and possible criminal sanctions." *Id.* at 196-97.

Little more than a month after *State Farm*, this Court in *Trinity* reiterated the state judiciary's obligation to review punitive damages *de novo*. 2003 WI 46, ¶ 48. Tower Insurance was accused of bad faith for denying coverage that would have been in place absent an agent's error. Based upon the trial court's finding of bad faith on summary judgment, the jury awarded $3.5 million in punitive damages. In a 4-3 decision, this Court reinstated the trial court's summary judgment and, citing *State Farm*, upheld the punitive award because it was only seven times the $490,000 in exposure the plaintiff had faced if uninsured.

Even before *State Farm*, this Court had exercised great care in reviewing punitive awards, holding them at or near single digits in a series of cases that all involved intentional

torts. The sole exception was a nominal damages case, also involving an intentional tort, reflecting the proportionality exception in *BMW* for cases with little measurable damage.[7] 517 U.S. at 582.

If this Court were to approve anything close to the unprecedented punitive damages award in this case, it would reverse the course of the law's development. This Court has *never* affirmed a punitive award where the punitive-to-compensatory ratio exceeded 10-to-1. In *Sharp v. Case Corp.*, 227 Wis. 2d 1, 595 N.W.2d 380 (1999), for example, this Court approved $2 million in punitive damages in a gruesome farming accident where, with actual damages at $6.3 million, the ratio was *less* than 1-to-3.[8] Indeed, from the outset, this Court has emphasized the need for the judiciary to reduce unjustified awards. *See, e.g., Malco v.*

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[7] In *Jacque v. Steenberg Homes*, 209 Wis. 2d 605, 563 N.W.2d 154 (1997), a mobile home manufacturer had asked an elderly landowner's permission to move a unit across his land. When the farmer refused, the company did it anyway, paying a minimal civil fine for trespassing. The jury awarded $1 in compensatory damages and $100,000 in punitive damages. This Court upheld the award, rejecting the use of a multiplier for the punitive award because the compensatory damages were so nominal.

[8] *Sharp* and *Trinity* still stand as the largest punitive awards affirmed on appeal in this state.

Midwest Aluminum Sales, Inc., 14 Wis. 2d 57, 63-67, 109 N.W.2d 516 (1961) (citing authority for reducing excessive punitive awards). The need for that searching review has never been more apparent.

II. THE $94 MILLION PUNITIVE DAMAGES AWARD IS UNCONSTITUTIONAL.

This appeal presents a punitive damages award nearing $100 million based on an untested statute in a new constitutional environment. The punitive damages award cannot withstand appellate review under section 895.85, Stats. Even if it could, it still violates the constitution.

A. Reprehensibility: The Jury Improperly Considered Conduct Unrelated To The Wischer Plaintiffs' Harm.

The evidence introduced by the Wischer plaintiffs to support their punitive damages demand violated *State Farm*'s constitutional standard: "[a] defendant should be punished for the *conduct that harmed the plaintiff*, not for being an unsavory individual or business." 538 U.S. at 423 (emphasis added). The trial court impermissibly admitted a litany of

evidence of "bad acts" at the construction site that bore no relationship to lifting the roof section in high wind.

According to the Wischer plaintiffs, MHIA conducted other roof lifts "unsafely," requiring "men to work until 3:00 a.m. in the snow and cold, with no lights...to impress the media...." Plaintiffs' Initial Court of Appeals Brief, p. 6. Victor Grotlisch, the MHIA site supervisor, fired a crew supervisor who disagreed with him on safety issues and ordered a roof lift "after workers had put in 10 hours, so people at a [Milwaukee] Brewers [baseball] game could see it." *Id.* None of this "evidence" demonstrates the constitutionally-required nexus to the conduct that harmed the plaintiffs.

Moreover, the Wischer plaintiffs' counsel repeatedly focused the jury's attention not on the corporate defendant but on a single individual, Victor Grotlisch, to vilify him:

> And so, members of the jury, before July 14th of 1999, we had a perfect recipe for a disaster. A man in charge of operations who is intolerant of other people's advice, who is contemptuous of the men who worked under him, and who was pushing the envelope of safety again and again and again.

R.751, Supp.App.75.

Under the *State Farm* standard, only evidence of conduct "similar" to that which ultimately harmed the plaintiffs is appropriate for consideration. "Intolerant" remarks about employees, post-accident conduct and asserted safety violations unrelated to wind conditions have no place in the determination of punitive damages.

Travelers does not dispute that the evidence permitted the jury to find MHIA negligent for its failure to conduct the wind calculations that might have prevented this tragedy. Yet, to punish a corporation with unprecedented financial consequences, bearing no relationship to the actual harm, collides with common sense and the law.[9]

The dual goals of punitive damages—punishment and deterrence—cannot justify $94 million in insured corporate liability for negligent conduct. While MHIA is certainly responsible for its employees, the decisions by those employees—many unrelated to the conduct that harmed the

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[9] In *Union Pacific Railroad Co. v. Barber*, No. 03-57, 2004 WL 352525 (Ark. Feb. 26, 2004), *cert. denied*, No. 04-47, 2004 WL 2072459 (U.S. Oct. 12, 2004), the state supreme court affirmed a $25 million punitive award for death and serious injury caused by a poorly-maintained crossing. The railroad was not only aware of several near-misses, it destroyed evidence. Even with a finding of malicious intent, the punitive-compensatory damages ratio was just under 5-to-1.

Wischer plaintiffs—do not rise to the level of corporate intent to harm these plaintiffs sufficient to justify these punitive damages. That award has been entered against a company, moreover, whose net worth is less than one-third that amount, a fact improperly kept from the jury. *See* R.525, Supp.App.57; *see also Trinity*, 2003 WI 46, ¶ 69.

B. Proportionality: The 22-to-1 Punitive To Compensatory Damages Ratio Far Exceeds The Single-Digit Limit.

The punitive award violates *State Farm*'s "marching orders." 538 U.S. at 439 (Ginsberg, J., dissenting). The $4.2 million in compensatory damages for the workers is the *only* award component that can support punitive damages. *See supra* at 3 n.2. The ratio, accordingly, is 22.38-to-1. In light of that substantial award, a punitive award at or near $4.2 million is all that constitutional due process will allow. Even the maximum permissible award under *State Farm* ($37.8 million, a ratio of 9-to-1) is but a fraction of the jury's excessive award.

Not surprisingly, the Wischer plaintiffs will attempt to manipulate the ratio to avoid *State Farm's* command. After seeking *no* damages for economic loss, they will complain

that the compensatory award understates their damages. Plaintiff's Supplemental Court of Appeals Brief ("Plaintiff's Supplemental Brief"), pp.6-7. The law, however, "presume[s] [that] a plaintiff has been made whole...by [the jury's] compensatory damages...." *State Farm*, 538 U.S. at 419.

The Wischer plaintiffs themselves have argued, moreover, that *de novo* review "does not allow the court to reassess the basic facts found by the jury...." Plaintiffs' Initial Court of Appeals Brief, pp. 31-32. Therefore, the $4.2 million the jury determined would fully compensate the plaintiffs is the ratio's only possible denominator.

Next, the Wischer plaintiffs will assert that the pre-verdict settlements totaling $12,375,000 somehow "increase" their damages and lower the ratio. *See* Plaintiff's Supplemental Brief, p. 7. The jury was *never* aware of the pre-verdict settlement, however, and evidence of a settlement is inadmissible to prove either liability or a claim amount. Sec. 904.08, Stats. (2001-02). To allow the plaintiffs to

deflate the ratio by using undisclosed pre-verdict settlements would make the proportionality inquiry a farce.

The jury awarded substantial compensatory damages based on the evidence the plaintiffs introduced. They cannot "retry" their case now, embracing the economic losses they ignored at trial, any more than they can twist *State Farm* to try to accommodate their arguments.

Trying again to avoid *State Farm*'s inexorable impact, the Wischer plaintiffs may claim that the single-digit rule should not apply to personal injury cases. *See* Plaintiff's Supplemental Brief, p. 13. The Wischer plaintiffs provide no justification, however, for exempting personal injury cases from due process. While the Supreme Court in *State Farm* suggested a higher ratio *might* be appropriate in rare cases, there was no suggestion—not even remotely—that death or injury cases escape constitutional scrutiny.[10]

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[10] "[E]ven where a plaintiff has suffered a physical harm as a result of a recidivist defendant's intentional and malicious [conduct]...still that plaintiff's punitive damages award could probably not constitutionally exceed the 10-to-1 ratio." *Eden Electrical, Ltd. v. Amana Co.*, 258 F. Supp. 2d 958, 974 (N.D. Iowa 2003), *aff'd*, 370 F.3d 824 (8th Cir. 2004) (punitive damages reduced from a ratio of 8.5-to-1 to 4.5-to-1).

Moreover, the Supreme Court promptly remanded several personal injury awards to apply *State Farm*'s standards. In *Ford Motor Co. v. Romo*, 538 U.S. 1028 (2003), the Court vacated $290 million in punitive damages for a couple and their son who died when their 1978 Bronco overturned. The California appellate court, on remand, reduced the punitive award to $23.7 million, a ratio of 5-to-1. *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793 (Cal. Ct. App. 2003); *accord Ford Motor Co. v. Estate of Tommy Smith*, 538 U.S. 1028 (2003) (Supreme Court vacated and remanded $15 million in punitive damages [a 5-to-1 ratio] for a worker's death); *see Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153 (Ky. 2004) (on remand, new trial ordered based on impermissible admission of unrelated "bad acts" evidence).[11]

The $94 million award in this case is subject to the same "exacting" review, 538 U.S. at 418, that applies in other cases. If anything, that scrutiny should be even more probing

[11] *See also Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570 (Or. Ct. App. 2003) ($1 million punitive damages award based on $100,854 in compensatory damages for injuries reduced to 4-to-1).

here. Faced with tragedy and unconstrained by limiting instructions, juries in personal injury cases are most vulnerable to inflammatory evidence and rhetoric calculated to arouse passion.

Finally, the plaintiffs will attempt to justify the excessive award by repeatedly citing the "potential harm to the victim[s] and others." *See* Plaintiffs' Initial Court of Appeals Brief, p. 35 (citations omitted). The plaintiffs have argued, for example, that "many workers in the zone of danger" avoided death or serious injury only by "pure luck." *Id.*, p. 37. Both *Trinity* and *State Farm* illuminate the constitutional flaw in the plaintiffs' reasoning.

To protect due process by testing proportionality, courts must consider "the disparity between the actual or potential harm suffered *by the plaintiff* and the punitive damages award...." 538 U.S. at 418 (emphasis added). In *State Farm,* the court used the trial court's compensatory award, $1 million, to calculate the ratio it found grossly excessive. In *Trinity*, the Court used the $490,000 in

potential harm *to the plaintiffs* to calculate the permissible 7-to-1 ratio. *See* 2003 WI 46, ¶ 65.

In this case, however, the "potential harm" upon which the plaintiffs so heavily rely is to "other" workers. Potential harm to others, however defined, cannot sustain a 22-to-1 punitive damages award. If it could, the proportionality standard would become meaningless.

State Farm recognized that punishment for harm "in the aggregate" risks "multiple punitive damage awards for the same conduct; for in the usual case, non-parties are not bound by the judgment some other plaintiff obtains." 538 U.S. at 423. *Trinity*, in turn, did not even discuss the "other" insureds and beneficiaries who might have been harmed by the insurance company's bad faith practices. "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims...." *Id.* The Wischer plaintiffs, however, ask this Court to do just that. It cannot.

C. Comparability: MHIA Had No Notice Of Its Potential Liability For Massive Punitive Damages.

The comparability factor in the *BMW* analysis focuses on the constitutional "notice" requirement. A reasonable punitive award may have presumptive validity if a civil or criminal statute provides comparable punishment for comparable conduct. Penal laws give defendants notice of the potential consequences of their conduct. A verdict that imposes punishment far beyond any financial or criminal penalty that a defendant might expect, however, violates the right to due process.

That happened here. While there may not be a direct quantitative comparison for the jury's civil punishment, this Court cannot discount the final *BMW* factor. First, in section 895.04(4), Stats., the state legislature has placed a $350,000 cap on non-economic compensation for the "loss of society and companionship" attributable to wrongful death. That limit reflects the state's judgment about the non-economic compensation appropriate when mistakes lead

to death, and the jury awarded that statutory maximum for each ironworker.

Yet, with three decedents, the punitive damages are almost 90 times the $1,050,000 cumulative award permitted by the wrongful death statute.[12] The legislature, as a matter of public policy, has prohibited the award of punitive damages for wrongful death claims to prevent runaway verdicts. The result here eviscerates that policy.

State workers compensation laws provide notice of potential punishment. If an employer's failure to comply with safety provisions causes injury or death, the *maximum* penalty is $15,000. *See* sec. 102.57, Stats. The Wisconsin Department of Workforce Development ("DWD"), in fact, assessed $45,000 in penalties against MHIA under this statutory provision.[13]

The jury's award was more than 2,000 times the actual DWD penalty. MHIA had no notice it faced potential

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[12] The decedents' pain and suffering was the *only* other compensatory damages issue addressed by the jury. R.488, Supp.App.53.

[13] The DWD's determination that the decedents were loaned employees of MHIA, subjecting them to workers compensation as an exclusive remedy, was expressly rejected by the trial court. *See* R.714; Supp.App.67-73. It is another issue that remains open on appeal.

sanctions approaching $100 million and, accordingly, the punitive damages award violates the constitutional guarantee of due process on the comparability ground as well.

III. APPLYING *STATE FARM* TO VACATE THE JUDGMENT WILL RE-EMPHASIZE THE JUDICIARY'S OVERSIGHT OF PUNITIVE AWARDS.

This Court should affirm the Court of Appeals' application of section 895.85(3), Stats., vacating the judgment. If it does not, however, the Court should find the $94 million punitive award unconstitutional. In either event, the Court should reassert the judiciary's ultimate authority and responsibility for the amount of punitive damages. The importance of judicial oversight, no less than the quantitative standard, is the lesson of *State Farm*; and state courts across the country are relentlessly applying that lesson to reduce excessive punitive awards.[14]

The mandate from this Court—to the trial and appellate courts, to the Civil Jury Instruction Committee and, most importantly, to litigants—should be unmistakable.

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[14] *See* Samuel A. Thumma, *Post-'Campbell' Cases*, Nat'l L.J., June 7, 2004, at 13 (examining 80 cases and concluding that two-thirds approved ratios of 5-to-1 or less).

Punitive awards have a place in the judicial system. It is a limited place, however, cabined by the constitution and designed to advance society's goals, not to provide an emotional outlet for jurors or a windfall for plaintiffs already compensated for their loss.

A. Courts Across The Country Have Followed The Letter Of *State Farm*.

Though *State Farm* may have only "clarif[ied] limitations...prior cases had already established, its proportionality analysis for the first time established a 4:1 benchmark ratio [from *Haslip*] between punitive and compensatory damages...." Laura J. Hines, *Due Process Limitations on Punitive Damages*, 37 Akron L. Rev. 779, 799 (2004). To be sure, since *State Farm*, there have been outliers—state courts that strain to avoid the single digit "benchmark."

With remarkable consistency, however, even in cases involving severe injury or death, punitive damage ratios in state courts have generally remained within *State Farm*'s

mandate.[15] A California appellate court, to describe only one example, affirmed a trial court's remittitur from $3 billion to $50 million, a 9-to-1 ratio, despite a man's slow and painful cancer death. *Boeken v. Phillip Morris, Inc.*, 19 Cal. Rptr. 3d 101 (Cal. Ct. App. 2004).[16]

Like these courts, this Court can eliminate any lingering uncertainty about punitive damages. The Civil Jury Instruction Committee has delayed its re-evaluation of the punitive damages instruction pending the resolution of this case. *See* Wis. JI-Civil 1707.1 (2004), reporter's note. Supp.App.51. Moreover, at least one post-*State Farm*, post-*Wischer* case is already in the Court of Appeals, *Staskal*

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[15] *See, e.g.*, *Shiv-Ram, Inc. v. McCaleb*, No. 1012112, 2003 WL 23025586 (Ala. Dec. 30, 2003) (3-to-1 award punishing hotel owner for wanton conduct that injured a guest); *Harrelson v. R.J.*, 2003 WL 22520219 (Ala. Nov. 7, 2003) (5-to-1 ratio to punish sexual assault of a minor); *Austin v. Specialty Transportation Services*, 594 S.E.2d 867 (S.C. Ct. App. 2004) (affirming punitive award 2.5 times actual damages for permanently disabled driver).

[16] *See also Advocat, Inc. v. Sauer*, 111 S.W.3d 346 (Ark. 2003), *cert. denied*, 124 S.Ct. 535 (2003) (reducing $63 million punitive damages to $21 million, though an elderly woman died due to negligence); *McClain v. Metabolife International, Inc.*, 259 F. Supp. 2d 1225 (N.D. Ala. 2003) (applying single-digit rule to reduce $1 million in punitive damages to $450,000 where compensatory damages for diet supplement side effects were $50,000); *Liggett Group, Inc. v. Engle*, 853 So. 2d 434 (Fla. Dist. Ct. App. 2003) (review granted, 873 So. 2d 1222 (Fla. 2004) (oral argument held October 6, 2004) (invalidating multi-billion dollar award against tobacco companies).

v. Symons Corporation, No. 04-0663 ($15 million punitive/$9.3 million compensatory damages verdict in UW Pharmacy building collapse).

This case, set for argument with *Strenke v. Hogner* (No. 03-2527) on October 28, 2004, will provide definitive guidance to litigants and courts throughout the state. The conduct under review in *Strenke* involved $2,000 in actual damages. Thus, *Strenke* falls at one end of *State Farm*'s spectrum, justifying a high-single-digit ratio—though certainly not the 112.5-to-1 ratio awarded there. This case, with the Wischer plaintiffs already paid $27 million, falls at the other end—justifying, at most, a 1-to-1 ratio.

B. This Court Should Bring This Case To An End—Either Affirming The Court Of Appeals' Mandate Or Reducing The Award.

This Court can bring this case to a just end, dispelling the uncertainty over punitive damages, by vacating the award on statutory grounds or by finding the punitive award unconstitutional. In either event, the case ends with the Wischer plaintiffs paid $27 million for their tragic loss and with litigants and courts in this state better equipped to

address the challenges inherent in any request for punitive damages.

The alternative is Dickensian. It is impossible for the Wischer plaintiffs to leave this Court with their punitive verdict restored. No fewer than 16 issues would remain for resolution by the Court of Appeals, preserved by law and this Court's May 12, 2004 Order. *See Wischer*, 2003 WI App 202, ¶¶ 2, 3, nn.3, 4.

Even if the Court of Appeals were wrong about section 895.85 and even if the award is constitutional, the trial was so rife with error that, at the most, the plaintiffs would be entitled to a new trial. This Court can so order, finding the punitive verdict "excessive" and determining a "reasonable" amount for punitive damages. To comply with *State Farm* and the constitution, however, the new trial court must have no doubt: the award, if any, can be no greater than nine times compensatory damages.[17]

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[17] In any event, MHIA would retain its right to challenge the flaws associated with the negligence verdict. *See* MHIA's May 20, 2002 Initial Brief in the Court of Appeals, pp. 20-23.

CONCLUSION

For the reasons stated above and in its initial briefs, The Travelers Indemnity Company of Illinois, now known as Travelers Property Casualty Company of America, asks this Court to affirm the decision of the Court of Appeals vacating the trial court's judgment. In the alternative, the Court should find the award unconstitutional and vacate the punitive damages judgment or reduce the award to an amount that meets the constitutional requirements imposed by the U.S. Supreme Court and the standard of reasonableness.

Dated: October 15, 2004.

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CERTIFICATION

I hereby certify that this brief conforms to the requirements of sections 809.19(8)(b) and (c), Stats., and this Court's October 5, 2004 Order for a brief produced with a proportional font. The length of this brief is 5,499 words.

Dated: October 15, 2004.

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CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN
IN THE
SUPREME COURT

Appeal No. 01-0724 (Consolidated by the Court of Appeals with Nos. 01-1031 and 01-2486)
Milwaukee County Circuit Court Case No. 99-CV-6553

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased, MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased, and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE OF JEROME W. STARR, deceased,

Plaintiffs-Intervenors-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant,

NEIL F. LAMPSON, INC.,

Defendant-Respondent,

LAMPSON INTERNATIONAL LTD., FEDERAL INSURANCE COMPANY and THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendants.

SUPPLEMENTAL APPENDIX OF THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS

STATE OF WISCONSIN
IN THE
SUPREME COURT

Appeal No. 01-1031 (Consolidated by the Court of Appeals with Nos. 01-0724 and 01-2486)
Milwaukee County Circuit Court Case No. 99-CV-6553

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased, MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased, and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE OF JEROME W. STARR, deceased,

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-Cross-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-Petitioner,

NEIL F. LAMPSON, INC. and LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY,

Defendant-Co-Appellant,

THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendant.

STATE OF WISCONSIN
IN THE
SUPREME COURT

Appeal No. 01-2486 (Consolidated by the Court of Appeals with Nos. 01-0724 and 01-1031)
Milwaukee County Circuit Court Case No. 99-CV-6553

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased, MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased, and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE OF JEROME W. STARR, deceased,

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

v.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-Cross-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-Cross-Respondent,

NEIL F. LAMPSON, INC. and LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY and THE TOKIO MARINE & FIRE INSURANCE COMPANY,

Defendants-Respondents-Cross-Appellants.

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COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Cir. Ct. No. 99 CV 6553

Appeal Nos. 01-0724
01-1031
01-2486

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

NO. 01-0724

PATRICIA WISCHER, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JEFFREY A. WISCHER, DECEASED, MARJORIE DEGRAVE, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF WILLIAM R. DEGRAVE, DECEASED, AND RAMONA DULDE-STARR, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JEROME W. STARR, DECEASED,

PLAINTIFFS-INTERVENORS-RESPONDENTS,

V.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

DEFENDANT-APPELLANT,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

DEFENDANT,

NEIL F. LAMPSON, INC.,

DEFENDANT-RESPONDENT,

LAMPSON INTERNATIONAL LTD., FEDERAL INSURANCE COMPANY, AND THE TOKIO MARINE & FIRE INSURANCE COMPANY,

DEFENDANTS.

NO. 01-1031

PATRICIA WISCHER, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JEFFREY A. WISCHER, DECEASED, MARJORIE DEGRAVE, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF WILLIAM R. DEGRAVE, DECEASED, AND RAMONA DULDE-STARR, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JEROME W. STARR, DECEASED,

PLAINTIFFS-RESPONDENTS-
CROSS-RESPONDENTS,

V.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

DEFENDANT-RESPONDENT-
CROSS-APPELLANT,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

DEFENDANT-APPELLANT-PETITIONER,

NEIL F. LAMPSON, INC. AND
LAMPSON INTERNATIONAL LTD.,

DEFENDANTS,

FEDERAL INSURANCE COMPANY,

DEFENDANT-CO-APPELLANT,

THE TOKIO MARINE & FIRE INSURANCE COMPANY,

DEFENDANT.

NO. 01-2486

PATRICIA WISCHER, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JEFFREY A. WISCHER, DECEASED, MARJORIE DEGRAVE, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF WILLIAM R. DEGRAVE, DECEASED, AND RAMONA DULDE-STARR, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JEROME W. STARR, DECEASED,

PLAINTIFFS-RESPONDENTS-
CROSS-RESPONDENTS,

V.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

DEFENDANT-RESPONDENT-
CROSS-APPELLANT,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

DEFENDANT-APPELLANT-
CROSS-RESPONDENT,

NEIL F. LAMPSON, INC. AND
LAMPSON INTERNATIONAL LTD.,

DEFENDANTS,

FEDERAL INSURANCE COMPANY AND
THE TOKIO MARINE & FIRE INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS-
CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from judgments and orders of the circuit court for Milwaukee County: DOMINIC S. AMATO, Judge. *Affirmed in part; reversed in part.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 WEDEMEYER, P.J. This case involves three consolidated cases in the so-called "Miller Park" appeals.[1] Although the cases underlying this consolidated appeal present many issues of varying complexity, there is one dispositive issue: whether, based on the facts as conceded by the plaintiffs, the $94,000,000 punitive-damage award is contrary to the calls of WIS. STAT. § 895.85(3) (1999-2000).[2] We hold that it is. Accordingly, we reverse the punitive-damage award, and consequently do not address the other issues. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed). The judgment relative to the compensatory damage award is affirmed.

I. PROCEDURAL BACKGROUND

¶2 In appeal number 01-0724, Mitsubishi Heavy Industries America, Inc., appeals from a judgment dismissing Neil F. Lampson, Inc. (the designer and

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[1] On February 21, 2002, this court ordered case numbers 01-1031 and 01-2486 consolidated for the purposes of briefing and disposition. On this court's own motion, we now order that case number 01-0724 be consolidated with the aforereferenced appeals for dispositional purposes.

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

manufacturer of the crane involved), following the trial court's decision directing a verdict in Neil F.'s favor. Patricia Wischer, Marjorie DeGrave and Ramona Dulde-Starr (the plaintiffs) filed a motion to intervene in this appeal, which was granted.[3]

¶3 In the other consolidated cases, The Travelers Indemnity Company of Illinois and Federal Insurance Company appeal from judgments entered against them and in favor of the plaintiffs and in favor of Mitsubishi, its insured. Mitsubishi filed a cross-appeal challenging the judgment rendered in favor of the plaintiffs following a seven-week jury trial. In addition, Travelers appeals from the trial court's judgment ordering it to pay the entire jury verdict as a consequence of its failure to plead and prove its policy limits during the trial. Federal and The Tokio Marine & Fire Insurance Company cross-appeal from the judgments rendered against them and in favor of the plaintiffs and Travelers, ordering the insurers to pay their policy limits of $50,000,000 and $2,000,000, respectively. In this case, Mitsubishi also maintains a cross-appeal against the plaintiffs.[4]

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[3] Mitsubishi claims the trial court erred when it: (1) directed a verdict in favor of defendant Neil F.; (2) erroneously precluded expert testimony from Mitsubishi's expert, which would have bolstered Mitsubishi's negligence case against Neil F.; and (3) declared that Neil F.'s potential liability was moot.

[4] Travelers presents seven claims: (1) the $94,000,000 punitive damage award is unconstitutional; (2) the trial court's post-verdict decision on punitive damages deprived the defendants of statutory due process; (3) WIS. STAT. § 895.85(3) was erroneously interpreted by the trial court, leading to erroneous instructions to the jury, and an improper award of punitive damages; (4) the trial court erred in ruling that Travelers is responsible for the entire amount of the verdict despite its $25,000,000 policy limit; (5) exclusions in the policy preclude coverage for the judgment against Mitsubishi; (6) the trial court erroneously ignored the Department of Workforce Development's preliminary determination that the three decedents involved were loaned employees to Mitsubishi; and (7) the mid-trial settlement agreement limits the recovery amount.

(continued)

¶4 The dispositive issue in this appeal is governed by WIS. STAT. § 895.85(3), enacted by our legislature in 1995, which provides: "The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff."

¶5 Based upon our analysis of the statute, we hold that the phrase "intentional disregard of the rights of the plaintiff" in WIS. STAT. § 895.85(3) can only be reasonably interpreted to require either an intent by a defendant to cause injury to the plaintiffs or knowledge that the defendant's conduct was practically certain to cause the accident or injury to the plaintiffs. Based on this conclusion, together with the concession by both the plaintiffs and the trial court that there is no evidence demonstrating that Mitsubishi intended to cause injury or knew that its conduct was practically certain to cause injury, we reverse the award of punitive damages.[5]

Federal and Tokio Marine claim: (1) Wisconsin's direct action statutes do not permit a claim solely based on punitive damages; (2) the insurance policies do not provide coverage for the damages; (3) the judgment directly against the insurers here is unconstitutional and violates public policy; (4) the settlement agreement caps liability and therefore no post-judgment interest may be awarded; and (5) the trial court erred in ruling that Travelers has a valid claim to equitable subrogation against Federal and Tokio Marine.

Mitsubishi makes four arguments in support of its claim that the trial court erred: (1) the trial court erroneously refused to include the decedents' employer on the verdict; (2) the trial court misinterpreted the new punitive damage statute, which led to an improper punitive damage award; (3) the trial court erroneously excluded evidence of Mitsubishi's wealth; and (4) the punitive damage award is excessive.

[5] The court acknowledges, with gratitude, the amicus curiae briefs filed by the Wisconsin Academy of Trial Lawyers, the Wisconsin Insurance Alliance and the Wisconsin Manufacturers and Commerce.

¶6 Because we have reached this conclusion, it is not necessary for us to address any of the other issues raised in this appeal. All of the remaining issues are moot.

II. FACTUAL BACKGROUND

¶7 July 14, 1999, was to be an exciting day in the construction of Miller Park stadium, the home of the Milwaukee Brewers major league professional baseball team. On that day, a crane known as "Big Blue" was to lift a large piece of the retractable roof of the stadium so workers could bolt it into place. Unfortunately, the lift did not go as planned. The crane broke and its boom struck the crane holding three ironworkers who were to secure the roof. All three workers fell to their instant death.

¶8 In order to understand the events of July 14, 1999, it is important to know who the relevant parties and non-parties are and how they came to work together that fateful day.

The Parties

¶9 The construction of Miller Park stadium was a joint effort involving many individuals and business organizations. The general contractor for the construction project was a joint venture of three companies: Hunzinger Construction Company, Clark Construction Builders, Inc., and Huber, Hunt & Nichols, Inc. ("general-contractor joint venture"). The general-contractor joint venture hired eighty contractors and those contractors hired approximately two hundred subcontractors.

¶10 One of the contractors hired by the general-contractor joint venture was Mitsubishi Heavy Industries America, Inc. Mitsubishi was hired to build the stadium roof according to an architectural design, to erect the roof, and to design, build, and install the drive system that moved the roof panels. Victor Grotlisch was Mitsubishi's site manager, and Wayne Noel was Mitsubishi's safety superintendent.

¶11 Mitsubishi hired Lampson International Ltd., an industry leader in performing heavy lifts, to help install the roof of the stadium. Lampson International leased a crane known as "Big Blue" to Mitsubishi. On April 22, 1998, Mitsubishi and Lampson International entered into an agreement for the lease of a crane to assist in the lift of the Miller Park roof. The lease agreement stated that Lampson International would provide a TransiLift 1200 Series IIA crane; however, Lampson International actually provided a TransiLift 1500 Series IIIA crane.

¶12 A transi-lift crane is a crane that is not stationary; it can pick up and transport extremely heavy loads. Big Blue is a TransiLift crane that stands forty-five stories high and rests on a base only ten yards wide. The crane sits on two crawlers, the means by which it moves. A car body sits on each crawler, and on each body are a table and a plastic bearing. The boom is the long lattice arm extending from the plastic bearing. At the end of the boom is a joint, and extending beyond the joint is a shorter lattice called the jib. Any load carried by the crane hangs from the jib.

¶13 Lampson International also supplied a crew to assemble Big Blue on site, and provided a crew to operate the crane. Fred Flowers was the crane operator; Alan Watts was the flagger and supervisor for the Lampson crew.

¶14 Neil F. Lampson was the principal designer and manufacturer of the TransiLift crane known as Big Blue. As designer, Neil F. made changes to the design of Big Blue and a last minute addition to the assembly of the crane. Both changes and the possibility of a negligent design of the crane were raised as issues in this case.

¶15 Danny's Construction Company, Inc. (DCCI) was hired to bolt the stadium roof into place. The deceased ironworkers employed by DCCI included Jeffrey Wischer, William DeGrave and Jerome Starr. Red Lewis was DCCI's superintendent and Joe Edwards was the operator of the crane that lifted the ironworkers.

Insurance

¶16 The stadium's owner, Southeast Wisconsin Professional Baseball Park District, purchased an Owners Controlled Insurance Program (OCIP) to provide commercial general liability insurance coverage for the Miller Park construction project. The coverage was "layered" in that each insurer's coverage attached when the underlying policy was exhausted. Thus, one insurer provided coverage up to a certain amount and, when that amount was exhausted, another insurer provided coverage up to a certain amount, and so on. The priority for coverage under the OCIP was as follows:

The Travelers Indemnity Company of Illinois	$2,000,000
Royal Insurance Company of America	$5,000,000
Indemnity Insurance Company of North America	$20,000,000
Federal Insurance Company	$50,000,000
The Travelers Indemnity Company of Illinois	$25,000,000
The Tokio Marine & Fire Insurance Company	$2,000,000 in separate coverage for MHIA, attaches at $75,000,000.

¶17 The parties entered into three settlement agreements. The first two were entered into before trial and involved the payment of $2,000,000 (Travelers) and $5,000,000 (Royal) to the plaintiffs. The third settlement is known as the IINA agreement, which was entered into during trial on November 7, 2000. Under the IINA settlement, the plaintiffs entered into an agreement with Mitsubishi, its parent company, Mitsubishi Heavy Industries LTD, and Indemnity Insurance Company of North America (IINA). The agreement provided for an immediate payment of $12,375,000, which would be credited against any compensatory damages awarded by the jury. The IINA agreement then capped punitive damages at $84,626,000 if it was later determined that Mitsubishi had insurance coverage, and $10,000,000 if Mitsubishi did not have insurance coverage.

¶18 The IINA agreement was not disclosed to the trial court or any other party until one month after the jury reached its verdict. The jury returned a compensatory damage verdict of $5,250,000 and a punitive damage award of $94,000,000 against Mitsubishi.

The Day of the Lift

¶19 At 7:30 a.m. on July 14, 1999, several people participated in a pre-lift meeting at Miller Park. At that meeting, Victor Grotlisch, Mitsubishi's site manager, discussed the weather report, Allen Watts, the Lampson supervisor, discussed how the lift would occur, and Wayne Noel, Mitsubishi's safety supervisor, discussed safety issues involved in the lift, including rescue, radio communication, and responsibilities. At this meeting, Noel told the workers that anyone could stop the lift for any reason at any time if it was unsafe to continue.

¶20 While Mitsubishi stresses the importance of this statement because the lift requires people at different locations watching the lift from different angles, the plaintiffs claim that the workers are in no position to tell supervisors to stop a lift because the workers, having families to support, do not want to risk their jobs.

¶21 At about 10 a.m., Big Blue picked the roof piece off of the ground and crews checked the load stabilization and center of gravity. By 11:00 or 11:30 a.m., Grotlisch, Watts, and a DCCI representative agreed that the lift could proceed. Watts, Lampson's supervisor, was then in charge of the lift.

¶22 Later in the afternoon, Grotlisch checked the wind speeds and was informed by Watts that the lift was going fine. Wischer, DeGrave and Starr entered the man basket and were lifted so that they could bolt the roof into place. As the roof was being lifted, there was a squeal of brakes and a loud snap. Big Blue toppled and struck the boom of the crane holding the ironworkers. Wischer, DeGrave and Starr fell to an instant death.[6]

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[6] The parties disagree in many respects as to the cause of the crane collapse. The plaintiffs claim that the crane collapsed because it was misused by Mitsubishi in excessive winds, that Mitsubishi never performed wind load calculations, and that the wind conditions that day far exceeded the load chart limitations. Mitsubishi, however, claims that Lampson International never told Mitsubishi that wind sail calculations had to be done or that Lampson International did not do the calculations.

The parties also contest wind speeds that day. Mitsubishi site manager Victor Grotlisch claims he checked the weather forecast and that winds were between 15-17 mph. Because the load chart limited Big Blue to winds less than 20 mph, Grotlisch and Noel claim they continued with the lift within appropriate wind speeds. Lampson International claims that the wind speeds that day were between 20-25 mph, with gusts between 25 and 35 mph. Plaintiffs agree with those figures, adding that at 5:00 p.m., just minutes before the collapse, the wind speeds at Mitchell Field were 21 mph, with gusts of 26 mph. Mitchell Field is 9.6 miles from Miller Park.

Procedural History

¶23 On August 12, 1999, plaintiffs, the wives of the decedents, filed a lawsuit charging the general-contractor joint venture, Mitsubishi, Lampson International, and Neil F. Lampson with negligence, seeking compensatory and punitive damages. On September 15, 2000, based on a settlement, the court dismissed the general-contractor joint venture from the lawsuit. On October 16, 2000, the case went to trial. During trial, the parties disagreed on the interpretation of Wisconsin's punitive damages statute, WIS. STAT. § 895.85(3). As noted, the statute states:

> The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

WIS. STAT. § 895.85(3).

¶24 During the trial, the court directed a verdict in favor of Neil F., leaving Mitsubishi and Lampson as the only defendants in the lawsuit. On November 7, 2000, the IINA agreement was executed, limiting Mitsubishi's liability, and on December 1, 2000, the jury returned a verdict attributing 97% liability to Mitsubishi and 3% liability to Lampson International. As noted, the jury awarded $5,250,000 million in compensatory damages and $94,000,000 in punitive damages against Mitsubishi. Mitsubishi filed several post-verdict motions, all of which were denied by the trial court.

¶25 After the jury verdict was returned, the plaintiffs amended their complaint to seek recovery of punitive damages from Federal Insurance Company, claiming that Federal was liable to the plaintiffs for the damages. The plaintiffs

also amended the complaint to seek recovery of punitive damages from Tokio Marine, seeking a declaratory judgment that its policy provided coverage for punitive damages. After motions and hearings, the trial court entered summary judgment against Federal and Tokio Marine in their direct actions.

¶26 Separate from Federal and Tokio Marine's liability to the plaintiffs is their liability to Travelers. The trial court entered judgment against Travelers Insurance Company for $84,625,000 for Travelers's failure to plead and prove its policy limits as part of the OCIP. As a result, Travelers filed cross-claims against Federal and Tokio Marine for equitable subrogation, equitable contribution, and unjust enrichment. The trial court concluded that Travelers was entitled to judgment against Federal and Tokio Marine on a theory of equitable subrogation. The trial court concluded that the $77,000,000 judgment against Mitsubishi was payable as follows:

> With respect to the plaintiffs' judgment against [Mitsubishi], the remaining amount of which is $77 million plus taxable costs and interest, the first $50 million plus corresponding taxable costs and interest is insured by Federal ... the next $25 million plus corresponding taxable costs and interest is insured by Travelers ... and the last $2 million plus corresponding taxable costs and interest is insured by Tokio Marine .... For the benefit of [Mitsubishi] only, the entire $77 million plus corresponding taxable costs and interest, as previously adjudged, is insured by Travelers ....

¶27 Based on the above judgments, Mitsubishi appeals the punitive damage award as excessive and not warranted by the evidence contending that there is no evidence of either intent to injure the decedents or knowledge that such injury was practically certain to occur. Mitsubishi also appeals the trial court order dismissing Neil F. from the action, the trial court's refusal to include DCCI

on the verdict, and the trial court's refusal to admit evidence of Mitsubishi's wealth. The plaintiffs intervened in this appeal because they believed resolution of this matter might affect the punitive damage judgment.

¶28 Travelers Insurance appeals the $77,000,000 judgment against it for failing to plead and prove its policy limits in the trial court. Travelers argues that its policy limit was $25,000,000, and its policy attaches at the $27,000,000 mark; therefore, it should not be liable for $77,000,000 because Travelers cannot be liable for more than its policy limits. Travelers also argues that if the judgment against it is affirmed, the cross-claims against Federal and Tokio Marine should also be affirmed because the judgments do "no more than enforce those two insurance contracts, preventing both an injustice to Travelers and an outrageous windfall for Federal and Tokio."

¶29 Federal Insurance appeals the direct action judgment against it in favor of the plaintiffs and the judgment against it in favor of Travelers on the cross-claim. Federal claims that the Wisconsin direct action statute does not provide the plaintiffs with a cause of action against it and, even if the statute does, the insurance policy does not cover punitive damages because such an award is against public policy and in excess of Mitsubishi's liability under the IINA agreement.

¶30 Tokio Marine appeals the direct action judgment against it in favor of the plaintiffs and the portion of the judgment against it in favor of Travelers on its cross-claim. Tokio Marine claims that Travelers must be liable for the amount of damages because it failed to prove its policy limits. In addition, Tokio Marine claims that its policy does not cover punitive damages because such an award is in excess of Mitsubishi's liability under the IINA agreement.

III. DISCUSSION

¶31 Indeed, there is no dispute that this case involved a horrible tragedy. The three men who died gave their lives in the process of erecting a state-of-the-art structure. The wives and families of the decedents suffered an immeasurable loss. In compensation for the loss, the three plaintiffs have received a total of $27,000,000. Regardless of our decision on this appeal, that compensation stands.[7]

¶32 The dispositive issue in this case involves the interpretation of a statute. Accordingly, our review is independent from that of the trial court. *Stephenson v. Universal Metrics, Inc.*, 2002 WI 30, ¶26, 251 Wis. 2d 171, 641 N.W.2d 158. As a part of our interpretation, we strive to ascertain and enforce the intent of the legislature; our first consideration is the plain language of the statute. *Id.*, ¶27. The language of the statute provides: "The plaintiff may receive punitive damage if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff." WIS. STAT. § 895.85(3). We conclude that the statute is not ambiguous. *See State v. Peters*, 2003 WI 88, ¶14, ___ Wis. 2d ___, 665 N.W.2d 171. When the language of a statute is clear, we need only apply "the statutory text to determine the statute's meaning." *Id.* (citation omitted). If the language of the statute "unambiguously expresses the intent of the legislature, we apply that meaning without resorting to extrinsic sources of legislative intent." *Id.* (citation

[7] Before trial, Travelers paid $2,000,000 and Royal paid $5,000,000. Pursuant to the mid-trial settlement, IINA paid $12,375,000 and, after the verdict, IINA paid $7,625,000. It is undisputed that this appeal will not in any way affect the $27,000,000 already paid to the plaintiffs.

omitted). "Statutory language is given its common, ordinary and accepted meaning." *Id.* (citation omitted). "Rules of statutory construction are inapplicable if the language of the statute has a plain and reasonable meaning on its face." *Id.* (citation omitted). Moreover, "[w]hether there is sufficient evidence to submit the question of punitive damages to the jury is a question of law which this court independently reviews." ***Loveridge v. Chartier***, 161 Wis. 2d 150, 187-88, 468 N.W.2d 146 (1990).

¶33 Here, the plain language of the statute sets forth two standards under which punitive damages may be appropriate. The first category indicates punitive damages may be appropriate if the conduct is *malicious*. The second category allows a punitive damage award when there is *an intentional disregard of the rights of the plaintiff*.

¶34 All parties concede that the record here is devoid of malicious conduct. Plaintiffs' lead counsel, Robert L. Habush, stated:

> We concede that there was no malicious act here, we concede it is not necessary for them to intend to have harmed these people.... [T]he hazard, the wind, and doing a lift in the face of this wind without any engineering calculations whatsoever, once that's known, they affirmatively decided to go ahead with this lift, and that is the intentional disregard.

The dispute then specifically entails the interpretation of the phrase "intentional disregard of the rights of the plaintiff." The plaintiffs argue that this standard simply requires evidence demonstrating that Mitsubishi acted volitionally to do something that resulted in the rights of the decedents to a safe work environment being disregarded, and that this part of the statute does not require that any of Mitsubishi's employees either intended that harm result or have either subjective

or objective knowledge that such harm was practically certain to occur. They contend that Grotlisch's decision to proceed with the lift on such a windy day under hazardous conditions demonstrated his disregard for the rights of the plaintiffs, thus satisfying the statutory standard and justifying the jury's punitive damage award.[8] The plaintiffs thus argue that punitive damages are appropriate when the defendant intentionally disregards the injured party's right to safety, but that intent to injure is not required. In his closing argument, plaintiffs' counsel stated:

> I believe the evidence has shown to you that there was intentional disregard of the rights of the three deceased ironworkers. The intentional part is easy. They intended to do the lift. They made the decision to do the lift. It was an intentional decision. They didn't stumble into it. It was an intentional decision in the face of hazards and obvious wind conditions, and in doing so, they ignored, they disregarded the rights of those three men.
>
> And what were those rights? The right to a safe workplace. The right to life. And in so doing, they intentionally disregarded those rights of the three deceased ironworkers.
>
> We don't have to prove that Victor Grotlisch intended to kill these guys. This is not a criminal case. We don't have to prove that they knew for sure that crane was going to go down.
>
> Let me give you an example. A person decides to run the stop sign, I'm going to run that stop sign, and in running that stop sign crashes into a crossing vehicle, killing the occupants. Would we hear that driver be able to say, I didn't intend to kill those occupants, I didn't know Sally, I didn't know Bill, I didn't intend to kill them?

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[8] Specifically, the plaintiffs claimed that no one did the necessary wind calculations for the roof piece involved, that Grotlisch knew it was unsafe to proceed with the lift without the calculations, and that Grotlisch knew the crane's performance could be impeded if exposed to winds in excess of 20 m.p.h.

> But that person intended to run that stop sign and, in so doing, must bear the consequences of an intentional disregard of the rights of any other vehicle or pedestrian that might have come into harm's way by that intentional act.
>
> ....
>
> There can't be any question, members of the jury, that this was an intentional decision on the part of Grotlisch, concurred in by Noel, that the hazards were obvious and ignored, that the rights of these three men, the right to life, the right to limb, the right to a safe workplace, were ignored and disregarded, as the law calls.

¶35 On the other hand, the defendants argue that punitive damages would be appropriate only if Mitsubishi either: (1) intended to cause the accident or injury; or (2) was aware that its conduct was practically certain to cause the accident or injury. Based on this standard, Mitsubishi claims that this case is not appropriate for a punitive damages award because, as the plaintiffs concede, Mitsubishi did not intend to cause injury or believe with substantial certainty that injury would occur. In their brief in opposition to Federal's summary judgment motion, the plaintiffs concede the following:

> The fact that Grotlisch was in the zone of danger indicates that he could not have believed that there was a substantial certainty that injury would occur.
>
> ....
>
> [T]here is no evidence to permit a reasonable jury to conclude that the [Mitsubishi] employees intended to cause bodily injury to the decedents or that they knew or should have known that bodily injury was substantially certain to follow from their acts.

Mitsubishi argues that because the defendants did not act with malice, and because the plaintiffs concede that the defendants did not intend to injure the plaintiffs, there was no punitive damages issue for the jury.[9]

¶36 Mitsubishi contends that its interpretation of the new statutory standard is supported by the legislature's intent to narrow the types of cases in which a punitive damage award would be appropriate. Mitsubishi points to the guidance offered by the jury instruction committee in interpreting the new statute and suggests that the proper interpretation of the statutory standard requires either intent to cause the accident or injury *or* knowledge that its conduct was practically certain to cause the accident or injury.

¶37 When faced with this disputed issue during the trial, the trial court agreed with the statutory interpretation proffered by the plaintiffs. Adopting the

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[9] The conflict in interpretation of the statute was clear even before the trial began. The plaintiffs stated:

> If the legislature had intended to wipe out punitive damages, they [sic] could have. If the legislature had intended to limit the malicious acts, they [sic] could have. All they changed was the word reckless disregard into intentional disregard. And concede, Your Honor, that that did make it tougher, and that with respect to some other cases, acts of omission would not meet that burden, 'cause that would be reckless, it's a negligence connotation, but when they intended to go forward in the face of known hazards, that intentional disregard, and that's all the law requires us to meet.

Defendants responded:

> [W]e have an entirely different view of the law. We think [plaintiffs' counsel is] using old recklessness standard, but we'll deal with that at the time of the trial.

plaintiffs' interpretation, the trial court determined that there was sufficient evidence to submit the issue of punitive damages to the jury. The court ruled:

> There is absolutely no evidence in this record to show that it was the intent of anyone, let alone Mitsubishi, there was never any evidence to indicate that Mitsubishi or anyone intended to cause an injury. There was a finding by the jury on the punitive damage questions that there was an intentional disregard of the rights of the plaintiffs and others.
>
> ....
>
> People may do things in a negligent way, they may intend to do a certain act without intending to actually injure or hurt someone, and that's the standard of negligence, care without intending to do harm, does something or fails to do something that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.
>
> That is the negligence the jury found in this case, and the jury also found that there was just an intentional disregard with regard to the rights of the plaintiff and others to have a safe environment to work in. It's just that simple.

¶38 We conclude that the trial court's interpretation of the statute was erroneous. We reach the opposite conclusion based on the reasoning that follows. Before the enactment of WIS. STAT. § 895.85(3), punitive damages were governed by the common law. There was a variety of terms used to describe circumstances under which punitive damages were appropriate: acting maliciously or in wanton, willful, or reckless disregard of the plaintiff's rights. *See* WIS JI—CIVIL 1707; ***Wangen v. Ford Motor Co.***, 97 Wis. 2d 260, 267, 294 N.W.2d 437 (1980) (Punitive damages may be awarded if the party seeking those damages demonstrates by the middle burden of proof that there was "a reckless indifference to or disregard of the rights of others and conscious action in deliberate disregard of them."). The legislature, intending to limit circumstances where juries could

award punitive damages, enacted § 895.85(3) which, as we have seen, now requires that there be an intentional disregard of the rights of the plaintiff, not merely "reckless indifference" to those rights.

¶39 Clearly, by using the word *intentional*, the legislature intended to heighten the standard for the recovery of punitive damages. Although the legislature did not supply a definition of the new phrase "intentional disregard of the rights of the plaintiff," Note 2 accompanying WIS JI—CIVIL 1707.1, offers some guidance:

> The [second] basis for punitive damages is if the "defendant acted ... in an intentional disregard of the rights of the plaintiff." This part of the standard was clearly intended to be more narrow than the case law standard which allowed punitive damages for conduct which "shows a reckless indifference to or disregard of the rights of others on the part of the wrongdoer." ... The legislative history reveals only that "intentional disregard" was ultimately favored over earlier drafts and bills which provided recovery for "wilful disregard" of the rights of the plaintiff. See LRB-1744 drafted 12/3/94, 1993 S.B. 152, 1991 S.B. 138, 1989 S.B. 153 (which provided "wilful or conscious" disregard).
>
> There is, of course, no case law which defines "intentional disregard of the plaintiff's rights." The Committee finds the statutory formulation of criminal intent in WIS. STAT. § 939.23, to be helpful. "'Intentionally' means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." The Committee's reference to the Criminal Code's formulation of the definition of "intentionally" is well supported by the court of appeals decision in ***Shepard v. Outagamie County***, 189 Wis. 2d 279, 286-87, 525 N.W.2d 764 (1994). In ***Shepard***, the court of appeals found that: "The legal definition of 'intentional' is essentially the same, whether found in tort law or criminal law, and we see no reason to use a separate definition when interpreting the same word...." *Id.* ... Accordingly, the Committee largely adapted the definition of "intentionally" as set forth in section 939.23.

WISCONSIN STAT. § 939.23(3) defines intent under criminal law: "'Intentionally' means that the actor either has a purpose to do the thing or cause the result specified, *or* is aware that his or her conduct is practically certain to cause that result." (Emphasis supplied.) This conclusion is further supported by WIS JI—CIVIL 2001, which provides a definition of "intent":

> Intent requires both an intent to do an act and an intent to cause injury by that act. An intent to cause injury exists where the actor actually means to cause injury by his or her conduct or where injury is almost certain to occur from the actor's conduct.
>
> ....
>
> If ... the conduct of (defendant) merely created a risk of some harm to someone, which may or may not have resulted, then (defendant)'s conduct was negligent as opposed to intentional.

¶40 Based on this analysis offered by the jury instruction and the Jury Instruction Committee, which our supreme court acknowledges can offer "insightful and persuasive" assistance in interpreting legislative enactments, *see Nommensen v. American Cont'l Ins. Co.*, 2001 WI 112, ¶47, 246 Wis. 2d 132, 629 N.W.2d 301, we are convinced that there is only one reasonable interpretation of WIS. STAT. § 895.85(3). The more demanding statute requires both a general intent to perform an act *and a specific intent to cause injury by that act or knowledge that the act is practically certain to result in injury*, and not, as the plaintiffs would have it, a volitional act that results in unintended and unforeseen injuries.

¶41 To conclude otherwise would lead to unreasonable results and *expand*, rather than narrow, the scope of cases where punitive damages may be awarded. To affirm the trial court's interpretation of the statute would permit the

request for punitive damages in almost any negligence case, contrary to the intent of the legislative enactment. For example, in a vehicle collision caused because the tortfeasor was talking on a cellular telephone, punitive damages could be sought and awarded. Under the trial court's standard, the victim could argue that the tortfeasor intentionally disregarded his or her rights by deliberately choosing to talk on the phone while driving. We hold that the intent of the legislature with respect to the new punitive damages statute was to "make it more difficult for a plaintiff to recover punitive damages." *See* ***Unified Catholic Sch. v. Universal Credit Card Servs. Corp.***, 34 F. Supp. 2d 714, 718 (E.D. Wis. 1999); *see also* ***Boomsma v. Star Transp., Inc.***, 202 F. Supp. 2d 869, 880 (E.D. Wis. 2002). As aptly observed by Marc Galanter in his treatise on punitive damages:

> [T]he heartland of punitive damages awards is in *intentional* torts and in cases involving financial rather than physical harm. Such cases produce punitive damages awards in larger numbers and at a higher rate than do cases involving other types of harm. In particular, the rates in personal injury cases are far lower ....

Marc Galanter, *Shadow Play: The Fabled Menace of Punitive Damages*, 1998 WIS. L. REV. 1, 2 (1998) (emphasis added). In recent years, punitive damage awards have become commonplace in unintentional tort cases; however, with the passage of WIS. STAT. § 895.85(3), our legislature, as a matter of public policy, has decided to return punitive awards to its place of origin.[10]

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[10] As one treatise notes, by enacting the new statute, our legislature places Wisconsin "among the states having the most stringent punitive damage conduct requirements." RICHARD L. BLATT, ET AL., PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE § 8.59, at 546 (2003).

¶42 During oral argument in this case, plaintiffs' counsel admitted that his interpretation of the statute would expand rather than narrow the number of cases under which punitive damages could be awarded. A member of our panel asked plaintiffs' counsel what he saw as the result under his interpretation of WIS. STAT. § 895.85(3) and ***Loveridge***, 161 Wis. 2d 150, 468 N.W.2d 146 (1990), where the supreme court overturned an award of punitive damages to a woman whom the defendant infected with genital herpes. ***Loveridge*** noted that under the common law, punitive damages, as material here, could only be recovered if

> the defendant knows, or should have reason to know, not only that his conduct creates an unreasonable risk of harm, but also that there is a strong probability, although not a substantial certainty, that the harm will result but, nevertheless, he proceeds with his conduct in reckless or conscious disregard of the consequences.

Id. at 188 (citation omitted). The supreme court held that punitive damages could not be recovered because there was

> no credible evidence in the record to support the conclusion that Chartier subjectively intended to injure or harm Loveridge. [The ***Loveridge*** court] also held that a reasonable person in Chartier's position would not believe that his sexual contact with Loveridge was substantially certain to result in injury or harm to Loveridge.

Id. at 189. Moreover, there was no evidence that the "defendant knew or should have known that his or her conduct created an unreasonable and strong probability of harm." ***Id.*** at 191 (citation omitted). Thus, although the defendant in ***Loveridge*** volitionally did something that caused the plaintiff to get herpes from him, the supreme court held that punitive damages could not be recovered. In the instant appeal, plaintiffs' counsel indicated that in his view of § 895.85(3), punitive damages under the ***Loveridge*** scenario *could be recovered*:

> [PANEL MEMBER]: Would you say in ***Loveridge***, the young man disregarded the rights of the young woman?
>
> [PLAINTIFFS' COUNSEL]: Yes.
>
> [PANEL MEMBER]: So under ***Loveridge***, under the new statute, there would be punitive damage coverage?
>
> [PLAINTIFFS' COUNSEL]: Yes. You can have punitive -- You obviously --
>
> [PANEL MEMBER]: But there wasn't punitive damage coverage under the old law. So you're saying that there's more coverage under the new law than the old law?
>
> [PLAINTIFFS' COUNSEL]: No, I'm not. I'm saying under the new law, there is no requirement that you have to show that the actor intended bodily harm in a bodily injury case or property right harm in a property injury case because that makes the second clause a nullity and superfluous, and the cases have not said that.
>
> [PANEL MEMBER]: No. I think you just put your finger on the crux, because under your reading of 895.85, there would be punitive damages under ***Loveridge***, but under the common law, there is no punitive damages under ***Loveridge***. Therefore, an expansion of the scope of punitive damages rather than a restriction of the scope of punitive damages.

Although plaintiffs' counsel attempted to deny the effects of his interpretation, he was unsuccessful. His interpretation of the statute, both under the facts of ***Loveridge*** and under the facts here, would expand the scope of punitive damages awards in clear contravention to the intent of the legislature when it enacted § 895.85(3). If punitive damages would be awarded under his interpretation of the statute in a case where punitive damages were not appropriate under the common law, then his interpretation would not "heighten the standard for recovery of punitive damages." ***Boomsma***, 202 F. Supp. 2d at 880. Rather, it would lower the standard.

¶43 The dissent's analysis of the statute is unreasonable and would lead to absurd results. After conceding that the legislature intended to heighten the standard for punitive damages, it disregards the consequences of that action. Based on that disregard, the dissent goes on to explain why there is no need to bring an intent to harm element into the statute. If the dissent's interpretation is correct, instead of narrowing the scope of punitive damages with the enactment of WIS. STAT. § 895.85(3), the legislature has not only opened the door wider, but knocked down the entire wall. If we apply the dissent's interpretation, practically any ordinary negligence case will permit an award of punitive damages. Under the dissent's interpretation, anyone who is negligent could be considered to be intentionally disregarding the rights of someone. Examples are numerous: someone who is drinking a cup of coffee while driving, or eating while driving, or adjusting the radio while driving, or even driving over the speed limit. In each of these examples, an injured plaintiff could argue that the tortfeasor driver intentionally disregarded the rights of the other drivers on the road, and thus justify a punitive damage award. Such an interpretation is simply illogical. The only reasonable interpretation of § 895.85(3) is to apply the definition of "intentional" used within the statute as the legislature instructed. Thus, the statute requires both an intent to do an act *and* an intent that harm will result or knowledge that harm is practically certain to result. We are not adding words to the language of the statute; we are simply applying it as the legislature intended.[11]

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[11] We also comment briefly on the dissent's criticism regarding ascertaining the meaning of legislative intent in the face of an unambiguous statute. The law clearly states that in construing a statute, our role is to determine the intent of the legislature. This occurs regardless of whether the statute is ambiguous or not. In reviewing a statute, our goal is to "take a comprehensive view toward discerning legislative intent." *State v. Peters*, 2003 WI 88, ¶34, ___
(continued)

¶44 Based on the foregoing, we hold that the trial court's interpretation of the statute was erroneous. The correct interpretation demands that the phrase "intentional disregard of the rights of the plaintiff" be defined to mean either that the actor intended to cause the accident or injury *or* the actor was practically certain that his conduct could result in accident or injury.

¶45 Having reached this conclusion, we must also conclude that the trial court erred in submitting the punitive damages issue to the jury. The trial court specifically ruled, and the plaintiffs agreed, that there was no evidence that the defendants intended to harm the decedents or that the defendant knew their conduct was practically certain to result in injury. The plaintiffs, through counsel, conceded that the evidence does not rise to the level of intent to harm. Specifically, in his brief to this court, plaintiffs' counsel admits: "[T]here is no evidence to permit a conclusion that the [Mitsubishi] employees intended to cause bodily injury to the decedents or that they knew or should have known that bodily injury to the decedents was substantially certain to follow."

¶46 Accordingly, because it is undisputed that the record does not contain any evidence to support a specific intent to harm or knowledge that Mitsubishi's conduct was practically certain to result in harm, we must reverse the judgment pertaining to punitive damages. The issue should not have been

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Wis. 2d ___, 664 N.W.2d 171 (Abrahamson, C.J., concurring). The Chief Justice of our supreme court has repeatedly called our attention to this rule in recent opinions from that court. *See, e.g., id.*, ***State v. Byers***, 2003 WI 86, ¶50, ___ Wis. 2d ___, 665 N.W.2d 729 (Abrahamson, C.J., concurring); *see also* ***Bruno v. Milwaukee County***, 2003 WI 28, ¶18, 260 Wis. 2d 633, 660 N.W.2d 656 (disagreement as to the plain meaning of a statute does not make it ambiguous).

submitted to the jury because there was insufficient evidence to send a punitive damages question to the fact-finder. Accordingly, the punitive damages award of $94,000,000 is hereby vacated.

¶47 Based on our disposition, it is not necessary for us to decide any of the other issues raised. The plaintiffs retain the $27,000,000, which has already been paid. The case does not need to be retried because the evidentiary and insurance issues are now moot. Therefore, we decline to address the merits of any of the other issues raised in this appeal.

By the Court.—Judgments and orders affirmed in part; reversed in part.

Recommended for publication in the official reports.

¶48 FINE, J. (*concurring*). I fully join in Judge Wedemeyer's opinion. I wish to add a few words, however, about what I believe has been a general transformation of punitive damages from a useful social tool into something filled with the seeds of dangerous, albeit unintended, consequences. None of my comments has influenced my decision in this matter; as the Majority opinion explains, the recovery of punitive damages in these cases is barred by WIS. STAT. § 895.85, and as judges on an intermediate appellate court we are bound by the law given to us by the Wisconsin Supreme Court, the legislature, and, on matters of federal-constitutional interpretation, the United States Supreme Court.

¶49 Punitive damages, as the term denotes, are designed to punish and deter egregious anti-social conduct. Indeed, under the Wisconsin Supreme Court's most recent analysis, punishment and deterrence are the *only* purposes for which punitive damages may be awarded in this state. ***Trinity Evangelical Lutheran Church v. Tower Ins. Co.***, 2003 WI 46, ¶50, 261 Wis. 2d 333, 355, 661 N.W.2d 789, 799 ("[T]he purpose of punitive damages is to punish the wrongdoer, and to deter the wrongdoer and others from similar conduct, rather than to compensate the plaintiff for any loss.").

¶50 Until the Wisconsin legislature enacted WIS. STAT. § 895.85, the right to recover punitive damages was created and shaped wholly by judges in this state, and not by the legislature. Punitive damages were designed to be a "quasi-criminal" way to punish conduct that would otherwise go unpunished. ***Kink v. Combs***, 28 Wis. 2d 65, 80, 135 N.W.2d 789, 798 (1965).

> Suffice it to say that whatever shortcomings the award of punitive damages may have, nevertheless, it must be remembered that it has the effect of bringing to punishment types of conduct that though oppressive and hurtful to the individual almost invariably go unpunished by the public prosecutor.

Ibid. Thus, punitive damages are similar to and supplement the criminal law. ***State Farm Mut. Auto. Ins. Co. v. Campbell***, 538 U.S. ___, 123 S. Ct. 1513, 1520 (2003) (punitive-damage "awards serve the same purposes as criminal penalties"). To be effective, however, they must, as one case colorfully noted, be sufficiently painful to "sting." ***Gianoli v. Pfleiderer***, 209 Wis. 2d 509, 531, 563 N.W.2d 562, 570 (Ct. App. 1997). In the early days, if "A" hurt "B" by conduct that was sufficiently egregious to warrant an award of punitive damages, assessment of punitive damages against "A" would not only punish "A" but would also deter "A" and others like "A" from doing it again.

¶51 Circumstances have changed, however, from an "A" versus "B" situation to one where the harm sought to be punished by punitive damages may have been caused by an employee or employees of large corporations. At first blush, it may seem that "large corporations" are fair game. First, many persons have a "prejudice against large corporations," especially if they are from out of town. ***TXO Prod. Corp. v. Alliance Res. Corp.***, 509 U.S. 443, 464 (1993) (Stevens, J., for a plurality of the Court and announcing its judgment). Second, large corporations are seen as golden-eggs-laden geese from which there is an endless supply of "free money." This is a dangerous myth unsupported by economic realities; just as there is no "free lunch," there is no "free money"—the money has to come from someone, and, in the case of large corporations, it comes from employees, shareholders, and customers.

¶52 Unlike small, closely held corporations, sole proprietorships, or small partnerships, large corporations are generally far-flung businesses employing thousands or tens of thousands employees. These businesses, so vital to our economy, are owned not by the managers who control what the corporations do, but by stockholders who, with rare exceptions, have *no* control over either those managers or corporate policy. And these corporations are not living creatures that can be punished like a person can be punished; they cannot be sent to prison. Subjecting corporations to draconian criminal or criminal-like penalties, hurts *only* their employees, shareholders, and customers. Thus, by one estimate, the criminal prosecution of the large public-accounting firm Arthur Andersen cost 80,000 employees their jobs, all but a few of whom were not guilty of anything related to the firm's prosecution.[1] Imposition of punitive damages can have similar life-derailing consequences for those innocent of *any* wrongdoing, because, to repeat, when corporations are forced to pay punitive damages most of the pain falls on employees, shareholders, and customers. Indeed, often the culpable employee escapes any punishment.

¶53 I recognize that the Wisconsin Supreme Court has said that all of this is OK by ruling, without supporting economic data or analysis, that it is unlikely for a corporation to be able to pass to consumers punitive-damages-related increased costs, and, also, that it is not unfair to force shareholders to pay penalties flowing from punitive-damages awards. ***Wangen v. Ford Motor Co.***, 97 Wis. 2d 260, 287–288, 291, 294 N.W.2d 437, 452, 453 (1980) ("But the loss of

[1] Interview with Samuel A. DiPiazza, Global Chief Executive Officer, PricewaterhouseCoopers, *at* http://www.pwcglobal.com/ru/eng/ins-sol/issues/03-07-08_sd_ve.html (last visited Aug. 26, 2003).

investment and the decline in value of investments are risks which investors knowingly undertake, and investors should not enjoy ill-gotten gains."). I respectfully disagree. Although *Wangen*'s assessment of the equities is logical in the abstract, consequences of punitive-damage awards can be malignant in practice. Oliver Wendell Holmes, Jr., once presciently observed: "The life of the law has not been logic: it has been experience." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881). Experience tells us that something is terribly wrong when the sting of "quasi-criminal" punitive damages falls on innocent employees, stockholders, customers, and, in some cases, taxpayers. *Wangen*, 97 Wis. 2d at 327, 294 N.W.2d at 470–471 (Coffey, J., dissenting).[2]

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[2]

> There are two categories of persons who will automatically bear the costs of the majority decision, depending on the strength and market position of the manufacturer: (1) the employees and stockholders; or (2) the consumer-taxpayer. If the manufacturer is not in a strong financial position so as to be able to bear these added costs, he will be faced with the threat of being forced out of business or into bankruptcy, thus resulting in a loss of jobs (unemployment) and the curtailment of competition, to the detriment of the consumer. If bankruptcy or the loss of business and jobs is to be avoided, it is the consumer who will ultimately bear the burden of punitive damage awards through the payment of higher prices for the goods in the market place. As the cost of such damages is passed on through higher product prices, the consumer will foot the bill for a penalty imposed for its very own protection. If the consumer does not pay higher prices, as a taxpayer, he will pay for the hidden costs of government with higher taxes for increased welfare, retraining and unemployment programs occasioned by business failures. Moreover, imposition of multiple punitive damage awards could have an adverse impact not only on the manufacturer, Ford, but also those commercial businesses that supply materials for use in construction of cars, such as the producers of automobile locks, tires,

(continued)

¶54 But punitive-damage awards are loved by personal-injury lawyers, and judges are thus reluctant to staunch their flow. Indeed, ***Wangen*** conceded that punitive-damage awards (ostensibly designed to punish only) are also a back-door way to pay lawyers: "[P]ayment of punitive damages to the injured party is justifiable as a practical matter, because such damages do serve to compensate the injured party for uncompensated expenses, *e.g.*, attorneys' fees and litigation expenses, and that the [punitive-damages] windfall motivates reluctant plaintiffs to go forward with their claims." *Id.*, 97 Wis. 2d at 292, 294 N.W.2d at 454.[3]

¶55 There is also a roll-of-the-dice aspect to punitive damages; very few persons who are harmed by conduct warranting imposition of punitive damages *ever* get to recover from those who caused the harm even compensatory damages, no less punitive damages. The plaintiffs in this case suffered grievous losses, but, sadly, their pain is not unique to them. Last year in Wisconsin, for example, 164 persons were homicide victims.[4] Nation-wide, the toll was more than 16,100, or,

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> catalytic converters, etc. Are we going to further intimidate Wisconsin manufacturers with the threat of high punitive damage awards? The recovery of punitive damages against American businesses resulting in higher product costs obviously magnifies their disadvantage in competition with foreign manufacturers.

Wangen v. Ford Motor Co., 97 Wis. 2d 260, 327, 294 N.W.2d 437, 470–471 (1980) (Coffey, J., dissenting).

[3] Similarly, "compensatory" but noneconomic damages work "essentially as a pool from which the attorney's fees of personal-injury plaintiffs" are paid. ***Guzman v. St. Francis Hosp., Inc.***, 2001 WI App 21, ¶5, 240 Wis. 2d 559, 571, 623 N.W.2d 776, 782 (Ct. App. 2000) (upholding statutory cap on noneconomic damages in medical-malpractice cases).

[4] Tom Rybarczyk & Kelly Wells, *Homicides Reported in State at 14-year Low*, MILWAUKEE J.S., July 1, 2003, *available at* http://www.jsonline.com/news/state/june03/151979.asp (June 30, 2003).

on the average, forty-four *per day*.[5] My guess is that few if any of the families of these victims will receive *anything* from those who killed their loved ones. And then, of course, there are the countless other victims of crime who suffer horrendous injuries short of death. They, too, rarely, if *ever*, receive *any* payment from those who raped or maimed them. These victims, to borrow Horace's poignant words, suffer "unwept, unknown, because they lack a sacred poet." HORACE, 4 Odes ix 1. 25. Our current system of punitive damages is of no help to them.

¶56 Courts have recognized the out-of-balance unfairness of huge punitive-damage awards, and have gradually attempted to trim some of the rougher edges. *See* ***Campbell***, 123 S. Ct. at 1527 (Ginsburg, J., dissenting) (collecting cases). This is not enough; tinkering with the engine is useless when that engine is, as I believe it is, in need of an overhaul. As noted, our task as judges on an intermediate appellate court is to apply the law as it is given to us by the legislature and the Wisconsin Supreme Court. Both the Wisconsin Supreme Court, which can only act in the context of cases brought to it by lawyers, and the Wisconsin legislature, which has broad plenary power to make law, should set things right. As Justice Antonin Scalia has observed: "State legislatures and courts have the power to restrict or abolish the common-law practice of punitive damages, and in recent years have increasingly done so." ***Pacific Mut. Life Ins. Co. v. Haslip***, 499 U.S. 1, 39 (1991) (Scalia, J., concurring); *see also* ***BMW of N.***

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[5] Callie Marie Rennison, Ph.D. & Michael R. Rand, U.S. Department of Justice Office of Justice Programs Bureau of Justice Statistics Criminal Victimization, 2002, Aug. 2003, NCJ 199994, *available at* http://www.ojp.usdoj.gov/bjs/pub/ascii/cv02.txt (August 13, 2003).

Am., Inc. v. Gore, 517 U.S. 559, 614–619 (1996) (Ginsburg, J., dissenting) (table of "State Legislative Activity Regarding Punitive Damages").

¶57 We should have a system that punishes the guilty, not the innocent, and, further, punitive damages should not be lottery-like windfalls for a tiny percentage of those who suffer pain inflicted by others.[6]

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[6] One approach to solving the windfall part of the problem was tried by ***Dardinger v. Anthem Blue Cross & Blue Shield***, 781 N.E.2d 121 (Ohio 2002), when it directed that a significant portion of the punitive damages awarded be distributed to a cancer hospital and research institute at Ohio State University, even though no statute authorized such a distribution. ***Id.***, 781 N.E.2d at 146. ***Dardinger*** noted, however, that its approach was similar to that authorized by statute in some other states: "Numerous states have formalized through legislation a mechanical means to divide a punitive damages award between the plaintiff and the state. In some states, the state's portion goes to a special fund, in others, to the general fund. Annotation (1993), 16 A.L.R. 5th 129." ***Id.***, 781 N.E.2d at 145. I offer no opinion as to whether such an approach or one similar to it should be adopted in Wisconsin; that is an issue for either the legislature following extensive inquiry, or the Wisconsin Supreme Court after briefing and argument.

Nos. 01-0724(D)
01-1031(D)
01-2486(D)

¶58 SCHUDSON, J. (*dissenting*). These appeals present numerous issues and, on the basis of one or more of them, it is possible that the punitive damages award will fall.[1] It also is possible that the Wisconsin Supreme Court, weaving policy considerations into the legal analysis, will interpret WIS. STAT. § 895.85(3) in a manner that precludes or reduces the punitive damages awarded in this case. If it does so, however, it should not embrace the majority's analysis lest it upend fundamental, well-settled principles underlying the essential difference between compensatory and punitive damages.

¶59 I write separately, therefore, to explain that WIS. STAT. § 895.85(3): (1) if deemed *unambiguous*, cannot mean what the majority claims; and (2) if deemed *ambiguous*, could mean what the majority claims but, consistent with the logic underlying the difference between compensatory and punitive damages, probably does not. Further, in light of Judge Fine's concurring opinion, I shall comment briefly on the importance of prosecuting corporate officers who try to hide their crimes behind corporate veils.

I. WISCONSIN STAT. § 895.85(3)

[1] I mention this, at the outset, not to signal my opinion on any issue we have not yet addressed, but rather, to acknowledge that many substantial issues remain. I would hope, therefore, that if the supreme court embraces my understanding of WIS. STAT. § 895.85(3), it will also address the constitutional challenge to the punitive damages award.

¶60 Quite properly, the majority focuses on the words of WIS. STAT. § 895.85(3): "The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff *or in an intentional disregard of the rights of the plaintiff.*" (Emphasis added.) Quite curiously, however, the majority, despite concluding "that the statute is not ambiguous," majority at ¶32, embarks on the kind of long, interpretive cruise generally reserved for judicial travelers viewing *ambiguous* statutes.

¶61 So, although portions of its analysis are helpful, the majority's statutory discussion, as a whole, is internally inconsistent, confusing and, ultimately, incorrect. Accordingly, if only to advance the discussion of what, no doubt, will call for supreme court review, let me try to re-align the analysis.

A. WISCONSIN STAT. § 895.85(3) — Unambiguous?

¶62 The majority says WIS. STAT. § 895.85(3) is unambiguous. But, in the midst of so much uncertainty in these appeals, perhaps the only certainty is this: if WIS. STAT. § 895.85(3) is *unambiguous*, it supports the plaintiffs. The analysis is simple and clear.

¶63 The statutory words at issue are: "or in an intentional disregard of the rights of the plaintiff." The statute says nothing about "harm" or "injury," intentional or otherwise. And WIS JI—CRIMINAL 1701.1 doesn't either; it elaborates: "A person acts in an intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the plaintiff's rights, or is aware that his or her acts are practically certain to result in the plaintiff's rights being disregarded" (footnote omitted). In this case, the plaintiffs accept the unadorned statutory language; the defendants, and now the majority, do not.

¶64 The plaintiffs' premise is, in part, that "rights" under WIS. STAT. § 895.85(3) includes the right to a safe workplace. That part of their premise is unremarkable; the defendants do not dispute it. The plaintiffs' premise, however, also includes the understanding that, under the statute, their right to a safe workplace may be intentionally disregarded, such that punitive damages may be warranted, *regardless of the defendants' intent to cause harm or injury*. They explain:

> Intent to cause physical injury is not necessary to intentionally disregard rights. This case is a perfect example, *where there was a pattern of exposing workers to great risk by knowingly operating in unsafe conditions*. Each time, workers' rights were disregarded, even if no injury occurred. When the decedents were killed, [Mitsubishi's] conduct exposed it to punitive damages under § 895.85(3). There is no basis to say that in a personal injury case, the statute requires an intent to cause physical injury when the statute contains no such distinction, and such intent has not been required in the cases previously decided under § 895.85(3), regardless of the liability theory.

(Emphasis added.)[2] The defendants disagree; they contend that for the right to a safe workplace to be disregarded, harm or injury must be intended.

¶65 Clearly, *if* the statute is *unambiguous*, the defendants are wrong. Their position would require the addition of essential words: "with intent to cause harm or injury." The majority simply does not explain where it has located those

[2] I add emphasis to "where there was a pattern of exposing workers to great risk by knowingly operating in unsafe conditions" because the majority, in its factual summary, fails to acknowledge that this *pattern* was critical to the plaintiffs' proof. *See* majority at ¶34. Instead, the majority concentrates on the factual allegations relating to Mitsubishi's conduct on the fateful day. *See id.* The particulars of that day, however, comprised only the last chapter of the tragedy. Standing alone, the events of that final day constitute an incomplete account of the evidence the jury apparently found so compelling.

missing words or how it can graft them to the statute. Thus, if the majority is correct in concluding that WIS. STAT. § 895.85(3) is *unambiguous*, the plaintiffs' statutory argument prevails.

B. WISCONSIN STAT. § 895.85(3) — Ambiguous?

¶66 If, as the defendants contend, "with intent to cause harm or injury" must be grafted to the statute, it could only be because "rights" is ambiguous and courts, interpreting far beyond the face of the statute, say it must be so. So let us consider that and, in doing so, let me try to locate the best theory I can to support the majority's view. And then let us see if the theory holds.

¶67 The majority relies on jury instructions and a note to one of them. Here, the majority finds some support (but not quite where the majority leans).

¶68 First, the majority points out that Note 2 to WIS JI—CIVIL 1707.1 declares that the statute "was clearly intended to be more narrow than the case law standard." But that does not advance the analysis of the parties' dispute. After all, no one is contending that the statute fails to do that. All agree that the statute has tightened the standard for establishing "intentional disregard." *The issue, however, is whether, somehow, the intentional disregarding of "rights" necessarily includes the intent to cause harm or injury.*

¶69 Second, and far more helpfully, the majority notes that WIS JI—CIVIL 2001 defines "intent" in a way that carves away negligence by explaining that if a defendant's conduct "merely created a risk of some harm to someone, which may or may not have resulted, then (defendant)'s conduct was negligent as opposed to intentional." That, then, may set the foundation for the syllogism essential to the defendants' position: (1) WIS. STAT. § 895.85(3) requires an

"intentional" act; (2) WIS JI—CIVIL 2001 provides that creating "risk," without intending "harm," is negligent, not intentional; and, therefore (3) the intentional disregarding of rights, under § 895.85(3), necessarily includes intending "harm."

¶70 So what's the problem? Well, in the first place, this is the only authority the majority can locate for its grafting. This single, tangentially-related jury instruction is, I think, a terribly thin thread from which to hang the full, framed portrait of punitive damages. And, in the second place, the majority's theory—interpretively adding "with intent to cause harm or injury" to the statute—makes little sense. To add these words is to obliterate the most fundamental difference between compensatory and punitive damages. Let's examine that.

¶71 The majority maintains that the evolution from the common law to the 1995 statute supports the defendants' position. But that begs the obvious question: If the legislature, in addition to tightening the standard, also wanted to require intended "harm" or "injury," why didn't it say so? Why didn't the legislature add the simple words, "with intent to cause harm or injury"? As the parties explained to this court, the legislative history does not answer. It seems, however, that law and logic do.

¶72 Law, addressing "harm" or "injury," enters the realm of *compensatory* damages, and does so regardless of intent. But law, addressing the "intentional disregarding of rights," *see* WIS. STAT. § 895.85(3), points directly at a defendant's *conduct*. And where Wisconsin law provides the statutory potential for punitive damages to deter dangerous conduct, it does so with *some* regard for intent and the extent of the resulting harm or injury, *but it also preserves the*

potential for punitive damages even in the absence of all but nominal harm or injury.[3]

¶73 Any possible doubt about that was recently erased in ***Trinity Evangelical Lutheran Church v. Tower Insurance Co.***, 2003 WI 46, 261 Wis. 2d 333, 661 N.W.2d 789. In ***Trinity***, the supreme court reiterated:

> The factors necessary for an award of punitive damages[] require a showing of: (1) evil intent deserving of punishment or of something in the nature of special ill-will; or (2) wanton disregard of duty; or (3) gross or outrageous conduct.
>
> Punitive damages may properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition.

Id., ¶¶45-46 (citations omitted). *The supreme court did not add any "with-intent-to-cause-harm-or-injury" element.* The state's "legitimate interests in punishing unlawful conduct and deterring its repetition," ***id.***, ¶46, remain solidly in place *regardless* of whether a defendant intends harm or injury to result from the disregarding of rights.

¶74 Were this not enough, the supreme court, in ***Trinity***, quoted, with approval, a punitive damages jury instruction that explicitly provides, "Punitive damages may be awarded, if you find that the defendant acted in an intentional disregard of the rights of the plaintiff." ***Id.***, ¶45 n.5. It made no mention of intending harm or injury. The instruction then goes on to explain that "[p]unitive

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[3] ***See Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 393, 541 N.W.2d 753 (1995) ("Wisconsin does not allow punitive damages to be awarded in the absence of an award of actual damages."); ***Jacque v. Steenberg Homes, Inc.***, 209 Wis. 2d 605, 626, 563 N.W.2d 154 (1997) (nominal damages will suffice if a legal right has been violated).

damages *are not awarded to compensate the plaintiff for any loss he or she has sustained.*" *Id.* (emphasis added). Then, most definitively, the instruction absolutely separates the jury's determination of *whether* punitive damages should be awarded (regardless of intended harm of injury), from *how much* should be awarded (taking harm or injury—actual *and potential*—into consideration):

> *If* you determine that punitive damages should be awarded, you may then award such sum as will accomplish the purpose of punishing or deterring wrongful conduct.
>
> Factors you should consider in answering this question include:
>
> 1. The grievousness of the defendant's acts,
>
> 2. *The potential damage which might have been done by such acts as well as the actual damage,* and
>
> 3. The defendant's ability to pay....

Id. (emphases added).

¶75 The message could not be more clear: (1) Punitive damages are intended to punish unlawful conduct and deter its repetition. *Id.*, ¶46. (2) Punitive damages serve those purposes regardless of intended harm or injury. *Id.*, ¶¶45-46. (3) Punitive damages may be awarded in recognition of "the *potential damage* which *might* have been done by such acts." *Id.*, ¶45 n.5 (emphasis added). (4) The amount of punitive damages may increase if "actual damage" has resulted. *Id.*[4]

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[4] Other recent Wisconsin decisions support the same proposition. *See, e.g.*, ***Dorr v. Sacred Heart Hosp.***, 228 Wis. 2d 425, 454-55, 597 N.W.2d 462 (Ct. App. 1999) (*without any reference to harm or injury,* concludes that, under WIS. STAT. § 895.85(3), for purposes of summary judgment analysis, intentional disregard of plaintiffs' right to be free from hospital's improper lien can establish the basis for punitive damages claim); ***Allied Processors, Inc. v. Western Nat'l Mut. Ins. Co.***, 2001 WI App 129, ¶38, 246 Wis. 2d 579, 629 N.W.2d 329 (*without*
(continued)

¶76 And indeed, how could it be otherwise? The separation between compensatory and punitive damages, and the potential for punitive damages even in the absence of intended harm or injury, are at the foundation of our common law. In 1763, in one of the seminal cases allowing punitive damages, Lord Chief Justice Sir Charles Pratt declared that juries have the "power to give *damages for more than the injury received* ... as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury *to the action itself*." ***Wilkes v. Wood***, 98 Eng. Rep. 489, 498-99 (C.P. 1763) (emphases added).

¶77 Early American courts soon echoed the ***Wilkes*** principles. The New Jersey Supreme Court, for example, in 1791, approved a jury instruction that emphasized that, in determining punitive damages, the jury was "*not to estimate the damages by any particular proof of suffering or actual loss*; but to give damages for *example's* sake, to prevent such offenses in [the] future." ***Coryell v. Colbaugh***, 1 N.J.L. 77, 77 (1791) (first emphasis added). The ***Wilkes*** principles remain solid. Lest any doubt linger, the United States Supreme Court recently reiterated that while compensatory damages flow from a jury's factual determinations of actual loss, punitive damages are "an expression of [the jury's] moral condemnation." ***Cooper Indus., Inc. v. Leatherman Tool Group, Inc.***, 532 U.S. 424, 432 (2001).

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any reference to harm or injury, concludes that, under WIS. STAT. § 895.85(3), for purposes of measuring the sufficiency of evidence to support a jury's punitive damages verdict, intentional disregard of plaintiff's rights to disclosure of accurate insurance coverage information, proper evaluation of punitive damages claim, and proper claim settlement in order to prevent an excess verdict, can establish the basis for punitive damages award).

¶78 Thus, I conclude, the majority's attempt to graft a "with-intent-to-cause-harm-or-injury" element to WIS. STAT. § 895.85(3) violates the traditional distinction between compensatory and punitive damages—a distinction that removes "harm" or "injury" from a jury's initial determination of *whether* punitive damages are warranted and, under Wisconsin law, relegates the intent and extent of any harm or injury to the criteria affecting a jury's subsequent determination of *how much* should be awarded. *See Trinity*, 261 Wis. 2d 333, ¶45. From ***Wilkes*** to ***Trinity***, from 1761 to 2003, the separation is certain; the grafting cannot hold.

C. The Bottom Line — WIS. STAT. § 895.85(3) — Unambiguous or Ambiguous

¶79 In short, whether simply following the course of what appears to be an unambiguous statute, or interpretively traveling through WIS. STAT. § 895.85(3), we arrive at the same destination. The legislature did indeed tighten the standard for punitive damages; at the same time, however, the legislature maintained the critical distinction between compensatory and punitive damages. Thus, consistent with that distinction and the traditional, sound public policy it embodies, the statute preserves the *potential* for punitive damages in a case where a defendant intentionally disregards rights by creating an unsafe workplace, regardless of whether the defendant intended any harm or injury to result.

II. Corporate Responsibility

¶80 Judge Fine's concurring opinion could call for extensive, additional discussion. Here, however, I offer only a few thoughts.

¶81 Most helpfully, Judge Fine's comments can help courts shed the polemics often included in arguments about corporate responsibility. It is safe to say, I think, that corporations are neither as demonic nor angelic as their critics

and apologists claim. And corporations, I think, do not fall neatly into any political category. After all, we all have seen corporate conduct liberals applaud as well as corporate misconduct conservatives condemn.

¶82 Corporations, I suspect, often are as good or bad, constructive or destructive, as the individuals directing their affairs. Some corporate leaders reach the right balance. Carefully attending to both community responsibility and shareholder return, they recognize that healthy communities are good for business, and good businesses help make healthy communities. Other corporate leaders, however, lose their way. They cut corners, carelessly cut jobs, give-in to greed, and break laws.

¶83 When that occurs, as Judge Fine points out, firing a shotgun at "the corporation" may wound the innocent. Thus, carefully aimed criminal prosecution of individual corporate officers becomes all the more important. Thorough investigation and tenacious prosecution can help protect our communities from criminals who would try to hide behind their corporate veils.[5]

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[5] For a discussion of the importance of criminal prosecution of individual, corporate officers, *see* Charles B. Schudson, et al., *Nailing An Omelet to the Wall: Prosecuting Nursing Home Homicide*, in CORPORATIONS AS CRIMINALS—PERSPECTIVES IN CRIMINAL JUSTICE 6, 131, 134-36 (Ellen Hochstedler, ed., 1984).

1707.1 PUNITIVE DAMAGES: NONPRODUCTS LIABILITY [FOR ACTIONS COMMENCED ON OR AFTER MAY 17, 1995]

Punitive damages may be awarded, in addition to compensatory damages, if you find that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.[1]

A person's acts are malicious when they are the result of hatred, ill will, a desire for revenge, or inflicted under circumstances where insult or injury is intended. A person acts in an intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the plaintiff's rights, or is aware that his or her acts are practically certain to result in the plaintiff's rights being disregarded.[2]

The purpose of punitive damages is to punish a wrongdoer or deter the wrongdoer and others from engaging in similar conduct in the future. Punitive damages are not awarded to compensate the plaintiff for any loss he or she has sustained. A plaintiff is not entitled to punitive damages as a matter of right. Even if you find that the defendant acted maliciously or in an intentional disregard of the plaintiff's rights, you do not have to award punitive damages. Such damages may be awarded or withheld at your discretion. You may not, however, award punitive damages unless you have awarded compensatory damages.

If you determine that punitive damages should be awarded, you may then award such sum as will accomplish the purpose of punishing or deterring wrongful conduct.

Factors you should consider in answering this question include:

1. the grievousness of the defendant's acts,
2. the degree of malice involved,[3]

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3. the potential damage which might have been done by such acts as well as the actual damage, and
4. the defendant's ability to pay. You may consider the defendant's wealth in determining what sum of punitive damages will be enough to punish the defendant and deter the defendant and others from the same conduct in the future.

(Burden of Proof, Middle Burden, use Wis JI-Civil 205.)

SPECIAL VERDICT

If you answered "yes" to question ___,* answer this question:

Did the defendant act maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff?[4]

Answer:_____

Yes or No

If you answered the preceding question "yes," answer this question:

What sum, if any, do you assess against (defendant) as punitive damages?

Answer: $_____

*[Note to trial judge: This blank refers to the question(s) to which a "yes" answer would support an award of punitive damages.]

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COMMENT

This instruction and comment were approved in 1995. The comment was updated in 1996, 1997, 1998, and 2002.

In 2003, the Committee reviewed the current instruction to determine if the instruction is consistent with the supreme court's decision in Trinity Evangelical Lutheran Church v. Tower Insurance Co., 2003 WI 46, 261 Wis.2d 333, 661 N.W.2d 789. The Committee concluded that this instruction remains a correct statement of both Wisconsin and federal punitive damage law as set forth in Trinity and State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. ___, 123 S. Ct. 1513 (2003).

The Committee reviewed this instruction in 2002 to determine if the following changes were required:

1. the instruction should re-introduce the concept of "outrageous conduct;"

2. the instruction should clarify that reckless conduct does not suffice as a basis for punitive damages;

3. the instruction should refer to the United States Supreme Court standard that the conduct must be "reprehensible;"

4. the instruction should indicate that the amount of a punitive damages award must have some relationship to the compensatory damages and may not be grossly excessive.

The Committee concluded that the current instruction was consistent with current case and properly states the required standard for a punitive damages award. The instruction adopts the precise language of the punitive damages statute (§ 895.85).

Insurance Coverage. Evidence of insurance coverage for a punitive damages award is not admissible, City of West Allis v. WEPCO, 2001 WI App 226, 248 Wis.2d 10, 635 N.W.2d 873. In this decision, the court of appeals stated:

> [T]he existence of insurance is immaterial when fairly assessing money damages because it diverts the jury's attention from the actual harm suffered to what the defendant will be able to pay. We believe the rationale for this rule applies as well to punitive damages questions. 2001 WI App. 226, ¶ 48.

Ratio of compensatory damages or criminal fine to punitive damages. See Trinity Evangelical Lutheran Church v. Tower Insurance Co., 2002 WI App 46, 251 Wis.2d 212, 641 N.W.2d 504.

Constitutional Review. The United States Supreme Court has stated that: "The Due Process Clause of the Fourteenth Amendment prohibits a state from imposing a "grossly excessive punishment on a tortfeasor." BMW of North America, Inc. v. Gore, 116 S. Ct. 1589, 1592 (1996). The Court overturned a $2,000,000 punitive damage award wherein $4,000 in compensatory damages were awarded. BMW had

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failed to apprise a new car purchaser that his automobile had been repainted following damage in shipment. Recognizing the states' legitimate interest in punishing unlawful conduct and deterring its repetition, the Court refused to adopt any bright line mathematical formula in determining when punitive damages are excessive. However, the Court did say that a "general concern of reasonableness. . . properly enters into the constitutional calculus." BMW at 1602, quoting TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 458 (1993).

Three considerations enter into the determination of whether an award is "grossly excessive" (1) the degree of reprehensibility of the conduct; (2) the disparity between the actual and potential harm suffered and the amount of the punitive damage award; and (3) the difference between the punitive damage award and any statutorily imposed state civil or criminal punishment for comparable conduct.

Finally, the Court in BMW stated that punitive damages in state courts are limited to vindicating that state's (as opposed to other states' or the nation's) interest in punishment and deterrence. Evidence of a tortfeasor's out of state conduct may nevertheless be relevant but only on the issue of the reprehensibility of the defendant's conduct. BMW, at 1594, 1598. The trial judge may want to include a limiting instruction if out of state conduct is admitted in the record.

In Management Comp. Serv. v. Hawkins, Ash, Baptie, 206 Wis.2d 157, 557 N.W.2d 67 (1996), the supreme court rejected the notion courts can use a multiplier, or fixed ratio of compensatory-to-punitive damages or criminal fines to punitive damages, to calculate the amount of reasonable damages. It said a reviewing court can consider, in addition to the factors listed in this instruction, the relationship between the punitive damages and the amount of compensatory damages and criminal penalties. The Committee concluded that these additional factors are not for the jury but for a reviewing court assessing the reasonableness of the jury's determination of punitive damages.

Trespass. The supreme court has held that when nominal damages are awarded for an intentional trespass to land, punitive damages may be awarded. Jacque v. Steenberg Homes, Inc., 209 Wis.2d 605, 563 N.W.2d 154 (1997). In Jacque, the supreme court said the United States Supreme Court has recently clarified the three factors the court must consider when determining whether a punitive damages award violates the due process clause: (1) the degree of reprehensibility of the conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between this remedy and the civil or criminal penalties authorized or imposed in comparable cases. 209 Wis.2d, at 627. The court said the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. Punitive damages should reflect the egregiousness of the offense. In other words, some wrongs are more blameworthy than others and the punishment should fit the crime. The court also said that in examining the disparity between the harm or potential harm suffered by plaintiffs and the punitive damages award that courts have expressly rejected the use of a fixed multiplier, either a fixed ratio of compensatory to punitive damages or of criminal fine to punitive damages, to calculate the amount of reasonable punitive damages. However, it said in the appropriate case, a comparison of the compensatory damages and the punitive award is important. While a constitutional line ought not be marked by a simple mathematical formula, the proportionate rule for punitive damages is one factor in determining the reasonableness of the punitive damages award. The court said that when nominal damages support a punitive damages award, use of a multiplier is of dubious assistance because

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the nominal damage award may not reflect the actual harm caused. Finally, the court looked at the third factor and compared the punitive damages award and the civil or criminal penalties that could be imposed for comparable conduct. The court citing the United States Supreme Court held that a reviewing court engaged in determining whether a punitive damages award is excessive should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue. Nevertheless, the Wisconsin Supreme Court said that punitive damages, by removing the profit from illegal activity, can help to deter such conduct. In order to effectively do this, punitive damages must be in excess of the profit created by the misconduct so that the defendant recognizes a loss. It said that a substantial punitive damages award serves to assure that tort claims involving egregious conduct will be prosecuted. In concluding, the court said that although actual harm and criminal penalties have some relevance to the amount of punitive damages and may be factors in determining the reasonableness of the punitive damages award, it has not been willing in the past and is not willing in this case to adopt a mathematical formula for awarding such damages. Jacque v. Steenberg Homes, Inc., supra at 632.

Subsequent or Unrelated Bad Acts by the Defendant. If evidence is presented regarding conduct by the defendant that is unrelated to the defendant's conduct causing the plaintiff's injuries, consider giving the following limiting instruction:

> Furthermore, the conduct for which you find punitive damages should be assessed must have caused or contributed to the plaintiff's injuries.

The language suggested above is not appropriate in all cases in which punitive damages are sought. However, case law supports the concept that the jury in answering the punitive damages special verdict question must focus on the acts causing the injuries for which compensatory damages are assessed. Kehl v. Economy Fire & Casualty Co., 147 Wis.2d 531, 534-38, 433 N.W.2d 279 (Ct. App. 1988);Lievrow v. Roth, 157 Wis.2d 332, 459 N.W.2d 850 (Ct. App. 1990).

NOTES

1. 1995 Wisconsin Act 17, Section 3 creates a new statute, Wis. Stat. § 895.85, which revises the standard and procedures for awarding punitive damages. Section 895.85 limits the potential for recovering punitive damages to cases where there is evidence "that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff." Under previous case law, the standard for awarding punitive damages was whether the defendant's conduct was "outrageous." Brown v. Maxey, 124 Wis.2d 426, 369 N.W.2d 677 (1985). 'Outrageous' conduct was a broader concept which included conduct which was "willful or wanton, in a reckless disregard of rights or interests." Id at 433, citing, Wangen v. Ford Motor Co., 97 Wis.2d 260, 294 N.W.2d 437 (1980). Accordingly, the Committee has omitted reference to 'outrageous' conduct and substituted the statutory standard.

2. Section 895.85 is consistent with case law in permitting punitive damages for acts which are "malicious." "Malicious" acts have been previously defined by the Committee as acts which are "the result of hatred, ill will, a desire for revenge, or inflicted under circumstances where insult or injury is intended." The committee finds nothing in the statute or its legislative history which would require a different explanation

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of "malicious" acts.

The other basis for punitive damages is if the "defendant acted . . . in an intentional disregard of the rights of the plaintiff." This part of the standard was clearly intended to be more narrow than the case law standard which allowed punitive damages for conduct which "shows a reckless indifference to or disregard of the rights of others on the part of the wrongdoer." Brown v. Maxey, supra at 434 (quoting, Wangen 97 Wis.2d at 267). There is no further explanation in the statute as to the meaning of "intentional disregard of the plaintiff's rights." The legislative history reveals only that "intentional disregard" was ultimately favored over earlier drafts and bills which provided recovery for "wilful disregard" of the rights of the plaintiff. See LRB-1744 drafted 12/3/94, 1993 S.B. 152, 1991 S.B. 138, 1989 S.B. 153 (which provided "wilful or conscious" disregard).

There is, of course, no case law which defines "intentional disregard of the plaintiff's rights." The Committee finds the statutory formulation of criminal intent in Wis. Stat. § 939.23, to be helpful. "'Intentionally' means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." The Committee's reference to the Criminal Code's formulation of the definition of "intentionally" is well supported by the court of appeals decision in Shepard v. Outagamie County, 189 Wis. 2d 279, 286-87, 525 N.W. 764 (1994). InShepard, the court of appeals found that: "The legal definition of 'intentional' is essentially the same, whether found in tort law or criminal law, and we see no reason to use a separate definition when interpreting the same word. . . ." Id. The Shepard decision then expressly approved of a definition set forth in Wis. Stat. § 939.23(3), to help define the word "intentionally" which was found in a different chapter of Wisconsin Statutes. Accordingly, the Committee largely adapted the definition of "intentionally" as set forth in section 939.23.

[REPORTER'S NOTE: If the supreme court accepts review in Wischer v. Mitsubishi Henry Industries, case No. 01-0724, its decision will likely have a significant impact on the standard of conduct required for an award of punitive damages under Wis. Stat. § 895.85(3). The dispute in Wischer involves the interpretation of the statutory phrase "intentional disregard of the rights of the plaintiff." The court of appeals' decision in Wischer (recommended for publication) cites Wis. JI-1707.1 and the commentary. The court of appeals held:

> we are convinced that there is only one reasonable interpretation of Wis. Stat. § 895.85(3). The more demanding statute requires both a general intent to perform an act*and a specific intent to cause injury by that act or knowledge that the act is practically certain to result in injury*, and not, as the plaintiffs would have it, a volitional act that results in unintended and unforeseen injuries.
>
> ¶41. To conclude otherwise would lead to unreasonable results and*expand*, rather than narrow, the scope of cases where punitive damages may be awarded. To affirm the trial court's interpretation of the statute would permit the request for punitive damages in almost any negligence case, contrary to the intent of the legislative enactment. For example, in a vehicle collision caused because the tortfeasor was talking on a cellular telephone, punitive damages could be sought and awarded. Under the trial court's standard, the victim could argue that the tortfeasor intentionally disregarded his or her rights by deliberately choosing

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to talk on the phone while driving. We hold that the intent of the legislature with respect to the new punitive damages statute was to "make it more difficult for a plaintiff to recover punitive damages."]

3. Civil-JI 1707, which applies to actions commenced before May 17, 1995, includes the factor:

2. "the degree of malicious intention of the defendant or the recklessness of the defendant's conduct."

This factor was modified to omit the reference to reckless conduct.

4. The suggested special verdict question has been modified to conform with the new statutory standard of conduct.

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12/1/00

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

PATRICIA WISCHER, individually,
and as Special Administrator of the
ESTATE OF JEFFREY A. WISCHER, deceased,
MARJORIE DeGRAVE, individually,
and as Special Administrator of the
ESTATE OF WILLIAM R. DeGRAVE, deceased,
and RAMONA DULDE-STARR, individually,
and as Special Administrator of the
ESTATE OF JEROME W. STARR, deceased,

Plaintiffs,

vs.

MITSUBISHI HEAVY INDUSTRIES AMERICA,
INC. and LAMPSON INTERNATIONAL, LTD.,

Defendants.

FILED
CIVIL DIVISION
11 NOV 28 11
HON. DOMINIC S. AMATO PRESIDING
JOHN BARRETT-CLERK OF COURTS

Case No. 99-CV-6553

Case Code:
Personal Injury, Other: 30107
Wrongful Death: 30105

SPECIAL VERDICT REGARDING TORT ISSUES

1. Without considering the conduct of Allen Watts, Fred Flowers and Steven Aldrich, was defendant Mitsubishi Heavy Industries America, Inc. negligent?

Yes
YES or NO

2. If you answered "yes" to Question No. 1, then answer this question: Was such negligence of defendant Mitsubishi Heavy Industries America, Inc., a cause of the plaintiffs' damages?

FILED
CIVIL DIVISION
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HON. DOMINIC S. AMATO PRESIDING
JOHN BARRETT-CLERK OF COURTS

Yes
YES or NO

3. Without considering the conduct of Allen Watts, Fred Flowers and Steven Aldrich, was defendant Lampson International Ltd. negligent?

Yes
YES or NO

4. If you answered "yes" to Question No. 3, then answer this question: Was such negligence of defendant Lampson International Ltd. a cause of the plaintiffs' damages?

Yes
YES or NO

5. Were Allen Watts, Fred Flowers or Steven Aldrich negligent?

No
YES or NO

6. If you answered "yes" to Question No. 5, then answer this question: Was such negligence of Allen Watts, Fred Flowers or Steven Aldrich a cause of the plaintiffs' damages?

_____
YES or NO

7. If you answered "yes" to two or more of Question Nos. 2, 4, or 6, then answer this question: Assuming the total negligence that caused the plaintiffs' damages to be 100%, what percentage of the negligence do you attribute to:

A.	Mitsubishi Heavy Industries America, Inc. (without considering the conduct of Allen Watts, Fred Flowers and Steven Aldrich)	97 %
B.	Lampson International Ltd. (without considering the conduct of Allen Watts, Fred Flowers and Steven Aldrich)	3 %
C.	Allen Watts, Fred Flowers or Steven Aldrich	0 %
		100 %

8. On July 14, 1999, were Allen Watts, Fred Flowers and Steven Aldrich loaned employees of defendant Mitsubishi Heavy Industries America, Inc.?

YES
YES or NO

REGARDLESS OF HOW YOU HAVE ANSWERED THE PREVIOUS QUESTIONS, YOU MUST ANSWER QUESTIONS 9 and 10:

9. What sum of money will fairly and reasonably compensate the Estate of Jeffrey A. Wischer, the Estate of William R. DeGrave, and the Estate of Jerome W. Starr for the pain, suffering, mental anguish and distress experienced by:

A. Jeffrey A. Wischer $ 1,400,000.

B. William R. DeGrave $ 1,400,000.

C. Jerome W. Starr $ 1,400,000.

10. What sum of money will fairly and reasonably compensate each of the following plaintiffs for the loss of the society and companionship of their respective husbands:

A. Patricia Wischer: $ 350,000

B. Marjorie DeGrave: $ 350,000

C. Ramona Dulde-Starr: $ 350,000

11. If you answered "yes" to Question No. 2 and awarded a sum of money in answer to Question No. 9, then answer this question: Did defendant Mitsubishi Heavy Industries America, Inc. act in an intentional disregard of the rights of the decedents?

YES
YES or NO

12. If you answered "yes" to Question No. 11, then answer this question: What sum, if any, do you assess against defendant Mitsubishi Heavy Industries America, Inc. as punitive damages?

$ 94,000,000.

Dated at Milwaukee, Wisconsin this 1 day of DECEMBER, 2000.

Foreperson

Dissenting Jurors:

1-8-01

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

PATRICIA WISCHER, et al.,

Plaintiffs,

vs.

Case No. 99-CV-006553
Personal Injury - Other - 30107
Wrongful Death - 30105

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., et al.,

Defendants.

BRIEF IN SUPPORT OF MHIA'S POST-VERDICT MOTION FOR A NEW TRIAL OR REMITTITUR OF THE PUNITIVE DAMAGES AWARD

Introduction

The Miller Park accident was just that—an accident. It was not a malicious or intentional act to damage the stadium or injure the three workers who died. Therefore, punitive damages are not appropriate in this action. However, if the court disagrees, then it should at least order the plaintiffs to choose between a dramatically-reduced award or a new trial. Under Wisconsin's and the United States constitutional standards for assessing punitive damages, the jury's $94 million award will not withstand appellate scrutiny. It is at least three times greater than MHIA's net worth; nearly 20 times the amount of compensatory damages; and several thousand times greater than the maximum potential criminal or civil penalties for similar conduct. The punitive damage award was far more than necessary to punish and deter MHIA, and therefore it violates MHIA's state and federal rights to due process of law.

Argument

I. The Standard for Remittitur of Punitive Damages.

According to the Wisconsin statutes, when a damage award is excessive, the trial court must offer the plaintiff the choice between a reasonable amount or a new trial.

> If a trial court determines that a verdict is excessive or inadequate, not due to perversity or prejudice or as a result of error during trial (other than an error as to damages), the court shall determine an amount which as a matter of law is reasonable, and shall order a new trial on the issue of damages, unless within 10 days the party to whom the option is offered elects to accept judgment in the changed amount.

Wis. Stat. § 805.15(6).

The Wisconsin Supreme Court recently analyzed an excessive punitive damage award and ordered remittitur in a case called *Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 557 N.W.2d 67 (1996). The court noted that "the Due Process Clause of the Fourteenth Amendment imposes substantive limits on the size of punitive damage awards." *Id.*, 206 Wis. 2d at 193. *See also*, *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 1592 (1996)). "An award is excessive and therefore violates due process if it is more than necessary to serve the purposes of punitive damages or inflicts a penalty or burden on the defendant that is disproportionate to the wrongdoing." *Management Computers*, 206 Wis. 2d at 193.

To determine whether a punitive damage award is excessive,

> courts should consider the grievousness of the acts, the degree of malicious intent, whether the award bears a reasonable relationship to the award of compensatory damages, the potential damage that

> might have been caused by the acts, the ratio of the award to civil or criminal penalties that could be imposed for comparable misconduct, and the wealth of the wrongdoer.

Id. at 194.

The *Management Computer* court applied these factors to a situation where a regional accounting firm copied software that the plaintiff had entrusted to it and then used the software to compete against the plaintiff. The jury awarded $65,000 in compensatory damages and $1.75 million in punitive damages. The court considered the punitive damage award excessive and in violation of due process because: (a) the defendant's conduct caused only economic damages, (b) the punitive award was considerably greater than the amount of compensatory damages or possible criminal sanctions, and (c) the defendant was not a large national accounting firm. The court decided that $650,000 was a reasonable amount to punish a regional accounting firm of the defendant's size. *Id.* at 196-197.

II. The Punitive Damages Awarded by the Jury Are Excessive, and Therefore the Court Should Order Remittitur or a New Trial.

Applying *Management Computers*, and the factors set forth therein, the jury's $94 million punitive damage award against MHIA is excessive and should be eliminated or at least reduced to a fraction (not a multiple) of MHIA's net worth.[1]

[1] MHIA makes this argument in the alternative. MHIA has also argued that the evidence was insufficient to submit the punitive damage issue to the jury and, alternatively, that MHIA is entitled to a new trial because the punitive damage award was the product of perversity or prejudice.

A. The Defendant Did Not Engage in Particularly Grievous Acts or Exhibit Malicious Intent.

MHIA addressed the supposed "malicious nature" of its conduct in its accompanying brief regarding the trial court's refusal to grant a directed verdict on this issue (incorporated here by reference). The plaintiffs have conceded that this is not a case involving malice. Rather, the plaintiffs argued that they were entitled to punitive damages because MHIA's Victor Grotlisch made the decision to lift a roof piece "in the face of obvious danger and hazardous wind." (11/28/00 T. Tr. at at 64-65). The problem with this rendition of the facts is that while it arguably suggests negligence or at most reckless conduct, it does not show that MHIA acted with the purpose to disregard the three deceased workers' rights or that MHIA was aware that death was practically certain to result from its conduct. Wis. Ji-Civ. 1707.1. The plaintiffs have not claimed that Victor Grotlisch or MHIA harbored a "malicious" desire to kill or injure anyone. Despite all the rhetoric, the events of July 14, 1999 were an accident. Thus, the first *Management Computer* factor favors MHIA.

B. The Punitive Damage Award Does Not Bear a Reasonable Relationship to the Award of Compensatory Damages.

Both the United States Supreme Court and the Wisconsin Supreme Court have "rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares the actual and potential damages to the punitive award." *Management Computers*, 206 Wis. 2d at 194-195(citing *BMW*, 116 S. Ct. at 1602-1603). Nevertheless, both courts continue to insist that it is important to consider the disparity between the harm suffered by the plaintiff and the punitive damage award.

Here, the jury awarded at total of $5,250,000 in compensatory damages ($4.2 million for fear of impending death and $1,050,000 for loss of society and companionship). That is an overall punitive-to-compensatory ratio of 18 to 1. In light of the fact that MHIA is, according to the verdict, liable for 97% of compensatory damages, the ratio becomes 18.5 to 1. MHIA has argued in a post-trial brief regarding compensatory damages that the jury's award for fear of impending death was grossly excessive and should be reduced to an amount no more than $350,000 per decedent (or $1,050,000). If the court considers this amount reasonable, then the ratio of punitive damages to MHIA's liability for compensatory damages is actually closer to 46 to 1.[2]

The *Management Computers* court declared a punitive damages award that was 27 times larger than the compensatory damage award to be constitutionally excessive. *Id.*, 206 Wis. 2d at 196. The *BMW* court noted that punitive damage award of 4 to 1 might be close to the constitutional line. *BMW*, 116 S. Ct. at 1602 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032 (1991). And some courts consider 18 to 1 ratios so excessive as to require a new trial. *Maiorino v. Schering-Plough Corp*, 695 A.2d 353 (N.J. Super Ct. App. Div. 1997). By these standards, the jury's punitive damage award was grossly disproportionate to the plaintiffs' reasonable compensatory damages.

C. The Punitive Damage Award Is Disproportionate to the Potential Damage that Might Have Been caused by MHIA's Conduct.

The plaintiffs have asserted that MHIA failed to do wind sail calculations before the July 14th lift and that this negligence caused the Miller Park accident. However, when considering the potential damage that might have

[2] 97% of ($350,000 x 6) = $2,037,000. $94 million/$2,037,000 = 46.

been caused in this accident, it is unfair to focus exclusively on MHIA's conduct. Assuming that MHIA was negligent for not doing wind sail calculations, nothing would have happened but for the acts and omissions of others, including for example, the fact that (1) Lampson did not do wind sail calculations and did not inquire whether others had done wind sail calculations, and (2) the plaintiffs' employer (Danny's Construction Co., Inc.) allowed the three decedents to go up in man basket on a day that was (according to the plaintiffs) obviously and excessively windy. It would be disproportionate for the law to impose a punitive damage award of this magnitude against one defendant while ignoring other contributory causes to the damage that occurred or the damage that might have occurred.

D. The Punitive Damage Award Is Grossly Disproportionate to the Potential Criminal and Civil Penalties for Similar Misconduct.

The plaintiffs' punitive damage award is also grossly disproportionate to the potential criminal and civil penalties for similar misconduct. The highest potential criminal penalty for a corporation is second degree reckless homicide under Wis. Stat. § 940.06. That is a Class C felony, which carries a maximum penalty of $10,000 or 10 years imprisonment. Wis. Stat. § 939.50(3)(c). Given that three men died in the accident, the total penalty could be $30,000, and the ratio to punitive damages would be 3,133 to 1.

There does not appear to be any statutory "civil" penalty for the type of conduct at issue here, unless of course, the court were to consider the three deceased workers to be MHIA's "loaned employees." In that situation, the civil "penalty" imposed upon the employer would be $15,000 per worker (or $45,000 total), pursuant to the Worker's Compensation Act. This yields a ratio of 2,088

to 1. Clearly, the punitive damage award is staggering when compared to both maximum criminal and civil penalties imposed for the conduct of which MHIA is accused.

E. The Punitive Damage Award Is at Least Three Times More than the Net Worth of MHIA.

Finally, as the brief in support of a new trial due to the court's failure to admit evidence of wealth points out, MHIA is not the same as Mitsubishi of Japan. Though the plaintiffs and Lampson repeatedly tried to identify MHIA with Mitsubishi Japan, MHIA is the only Mitsubishi defendant in this action. It is a comparatively small company. And at least as of 1999, its net worth was approximately $30 million. (See financials attached to MHIA's brief regarding failure to admit wealth evidence). Despite Wisconsin case law to the contrary, the trial court refused to admit evidence of MHIA's financial condition so that the jury to assess an amount of damages that could "punish and deter" a company of MHIA's size. As a result, the jury imposed an award that was over 3 times MHIA's entire net worth. Clearly the amount of the punitive damage award was grossly and unconstitutionally excessive.

Conclusion

For the reasons stated above, MHIA respectfully requests that (if punitive damages are appropriate at all) the trial court give the plaintiffs a choice between a new trial or a punitive damages award reduced to a small fraction of MHIA's net worth.

Dated this 8th day of January, 2001.

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Attorneys for Defendant Mitsubishi
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STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased, MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased, and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE OF JEROME STARR, deceased,

COPY

Plaintiffs,

-vs- Case No. 99CV006553

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., TRAVELERS PROPERTY CASUALTY INSURANCE COMPANY, THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS, NEIL F. LAMPSON, INC., LAMPSON INTERNATIONAL, LTD., HCH MILLER PARK JOINT VENTURE, HUNZINGER CONSTRUCTION COMPANY, THE CLARK CONSTRUCTION GROUP, INC., and HUBER, HUNT & NICHOLS, INC.,

Defendants.

SEPTEMBER 26, 2000
A.M. SESSION

PROCEEDINGS HELD BEFORE THE

HONORABLE DOMINIC S. AMATO,

CIRCUIT JUDGE, BR. 11, PRESIDING

Robert H. Dettmann, RMR
Official Reporter

TRANSCRIPT OF MOTION HEARING

A P P E A R A N C E S:

Robert L. Habush, Esq.,
Attorney at Law,
Appearing for Plaintiffs Wischer & DeGrave.

1
David Lowe, Esq.,
2 Attorney at Law,
Appearing for Plaintiff Starr.
3
Ralph Weber, Esq., Kevin Owens, Esq. &
4 John Bell, Esq.,
Attorneys at Law,
5 Appearing for Mitsubishi.

6 Donald Carlson, Esq., Timothy Mentkowski, Esq.,
William Ehrke, Esq. & Jeffrey Nichols, Esq.,
7 Attorneys at Law,
Appearing for Lampson.
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1 his moving papers.

2 THE COURT: Which letter is also hearsay.

3 MR. HABUSH: Exactly.

4 MR. CARLSON: Your Honor, one last thing. That

5 also by this motion is an attempt to bind us to those

6 proceedings. We have claim for contribution against them.

7 We are not a party to DWD proceedings at all. We can't be

8 bound by that.

9 THE COURT: All right. Thank you.

10 Well, the best way to issue an oral bench decision on

11 this is not to suggest that any particular decision of the

12 court with regard to the underlying issues has any

13 particular priority order of preference. They all are

14 important issues, but there are a number of issues that

15 have to be addressed, and for the sake of brevity, I'm

16 just going to start out. It may be the last one is the

17 most important one to me, but I'm just going to start

18 someplace.

19 There's a scheduling order issued in the case. There

20 is a complaint, there's an amended complaint, there's an

21 answer, there's an amended answer. Mitsubishi never

22 maintained that the deceased individuals were employes.

23 There was never a dispute before the filing of this

24 emergency motion, which Mitsubishi calls an emergency

25 motion, and that's their buzz word, that's not my buzz

1 word. I don't see any emergency. There has never been a
2 position different for over 13 months of litigation. They
3 admitted that the deceased employes were with Danny. They
4 never raised an affirmative defense. The admission and
5 failure to raise an affirmative defense is a knowing,
6 intelligent, voluntary, understanding, reflective, well
7 thought out waiver by not only Mitsubishi, but each and
8 every one of its lawyers representing Mitsubishi in this
9 case.
10 If you can waive constitutional rights, you can waive
11 rights in a civil action too. That's first.
12 Second, the letter by its very own language, it's in
13 the initial stages. It is not final, it is inconclusive,
14 it is not a determination on the merits, there has been no
15 due process of law accorded to any party to these
16 proceedings. There is nothing suggesting in this initial
17 letter that the Department is doing anything other than
18 telling the parties this is where we are today, and if you
19 disagree, please advise and we'll give you a due process
20 hearing.
21 It's no different than receiving a traffic citation
22 on the street. You're accused of speeding, go to court,
23 and that issue is going to have to be resolved after a due
24 process hearing. At best it is a charging document, but
25 not a document making a decision on the merits.

1 I am not going to get into whether or not Attorney
2 Pat Knight did or didn't do things. I'm not going to
3 touch that. That's for a different tribunal. I know most
4 of the lawyers very well in here, and if I had a problem,
5 I'm not shy. I'm very open. But whether there was some
6 tinkering or tampering with the process is not an issue
7 before me. Though as I talked about yesterday, a number
8 of you lawyers were submitting documentation with regards
9 to the unity of interest issues as to whether some type of
10 alleged impropriety or conspiracy is going on when Carlson
11 and Habush passes notes, and all this other stuff, and
12 that's, you know, it's almost childish, the way you're
13 each trying to document each other's moves to show that
14 there is some type of inappropriate action on the part of
15 the lawyers in representing their clients, and there's
16 nothing inappropriate for lawyers to go out and do things.
17 Doesn't mean that they're conspiring against anyone else.
18 It's fair play, it's due process. And it almost borders
19 on being paranoid, which I'd like to think of lawyers not
20 being paranoid, but rather having, quote, heightened
21 sensitivity, unquote, and an awareness. But you're
22 throwing a lot of mud at each other, you're accusing
23 yourselves of lots of intentional misconduct and
24 misrepresentation, and that bothers me. I don't want to
25 see that in this case, because I've got really good

1 lawyers. I believe that tempers run high at times,
2 because of what is occurring in their zealously
3 representing your -- their clients, but -- and I know
4 there's outbursts, and I know there's frustrations, but I
5 don't relegate the lawyers in this courtroom to any level
6 other than the utmost professionalism and competence. And
7 if you end up destroying your own character and reputation
8 in this courtroom, you have the First Amendment right to
9 do so, but you certainly don't have my blessing. And when
10 it encroaches on the ability to get a fair and impartial
11 trial, or if it has an effect or a taint on the jury, I'm
12 going to stop you, I'm going to shut you down. If you
13 want to be treated like professionals, act like
14 professionals.
15 There was also an admission in Mitsubishi's answer
16 that they were employes of Danny. We have the testimony
17 of Mr. Victor Grotlisch as set forth in Mr. Habush's
18 brief, and the testimony of Pat Ostrenga. We also have
19 the testimony of DCCI supervisor Kurt Upton. And the
20 consistent position throughout this litigation of
21 Mitsubishi that the three deceaseds were not employes of
22 Mitsubishi. And that the documentation they submitted
23 with regard to all these cross motions for summary
24 judgment, and motions in limine, is that they did not have
25 control over the activities of the three descendants --

1 decedents rather.

2 I would surmise to say on the record that for a one

3 page letter, there has been an attempt to create an issue

4 to prevent this trial from going on. It almost borders on

5 being frivolous.

6 In the brief filed by Mr. Habush on judicial

7 estoppel, in State v. Petty, 201 Wis. 2d 337, quote, the

8 equitable doctrine of judicial estoppel as traditionally

9 applied in this state is intended to protect against a

10 litigant playing fast and loose with the court by

11 asserting inconsistent positions.

12 You just have to look at the paper trail that

13 Mitsubishi has left in this court, the Court of Appeals,

14 the Supreme Court decision on the press, and look at the

15 overwhelming documents filed back here on the trial court

16 level, and the fact that we've been up at the Court of

17 Appeals twice. And there's one thing that Mitsubishi

18 hasn't been, and that is they have never been consistent.

19 The record demonstrates that Mitsubishi has taken the

20 position it wants to take depending upon the tribunal it's

21 before, and it has taken inconsistent positions as to the

22 factual underpinning that occurred.

23 The prime example is the argument on a change of

24 venue with regard to the surrounding counties and that

25 this has -- the tax creates an environment where the

1 people have to pay the tax from the southwestern --
2 southeastern part of Wisconsin could not participate in
3 the trial because it would have an impact, and argument
4 was made that this was all public. But on appeal to the
5 Supreme Court to prevent the Journal Sentinel from getting
6 access to depositions when I ruled that the originals were
7 being held by the lawyers for space purposes, Mitsubishi
8 got the Supreme Court to decide that this was purely
9 private litigation. And I can't stop lawyers from arguing
10 one thing here, and then going to a different tribunal and
11 completely arguing another thing. I wish I knew how to do
12 it, but I haven't figured out a way.
13 So this case is a perfect example of the efforts of
14 Mitsubishi to play fast and loose by asserting
15 inconsistent positions in this court and the Court of
16 Appeals and the Wisconsin State Supreme Court.
17 Judicial estoppel is to be invoked if the court finds
18 that the position, the latest position is clearly
19 inconsistent with the earlier positions, and that's
20 undisputed on the record, and I do so find.
21 Second, the facts at issue are the same in both
22 cases, and that's undisputed on the record. And thirdly,
23 the party to be estopped convince the first court to adopt
24 its position.
25 There was no prior first court to adopt its position

1 other than this court dealing with issues that resulted in
2 subsequent writs and reviews. And it's been the position
3 of this court -- strike that. It's been the experience of
4 this court that no matter which way this court rules, it's
5 the right of any party to appeal to another court, and
6 that has continuingly been demonstrated to be the general
7 rule as opposed to the exception.
8 So when I talk about a party to be estopped convince
9 the first court to adopt its position, I'm referring to
10 the situation where at earlier days before this court
11 their position was made known. At a later date they again
12 change their position. It's almost an abuse of the
13 litigatory process.
14 You have enough for me to find that your position is
15 not frivolous under section 814.025 of the Wisconsin
16 statutes because you have the letter, and it's enough to
17 insulate you from making that finding. But everything
18 else has absolutely no merit, no substance.
19 This court has proper subject matter jurisdiction,
20 this court has proper personal jurisdiction.
21 I said this case was going to be tried and there's
22 only two ways that it won't get tried, World War III and I
23 die. I forgot to add that an appellate court can issue a
24 stay order on me, which they have done, as a matter in
25 which they handle things.

1 IN THE CIRCUIT COURT OF MILWAUKEE COUNTY

2 STATE OF WISCONSIN

3

4 PATRICIA WISCHER, individually,
and as Special Administrator of the
5 ESTATE OF JEFFREY A. WISCHER, deceased;
MARJORIE DeGRAVE, individually,
6 and as Special Administrator of the.
ESTATE OF WILLIAM R. DeGRAVE, deceased;
7 and RAMONA DULDE-STARR, individually,
and as Special Administrator of the
8 ESTATE OF JEROME STARR, deceased,

9 Plaintiffs,

10 -vs- Case No. 99-CV-006553

11

12 MITSUBISHI HEAVY INDUSTRIES,
AMERICA, INC., TRAVELERS
13 PROPERTY CASUALTY INSURANCE
COMPANY, THE TRAVELERS INDEMNITY
14 COMPANY OF ILLINOIS, NEIL F. LAMPSON,
INC., HCH MILLER PARK JOINT VENTURE,
15 HUNZINGER CONSTRUCTION COMPANY,
CLARK CONSTRUCTION BUILDERS, INC.,
16 and HUBER, HUNT & NICHOLS, INC.,

17 Defendants.

18

19 November 28th, 2000

20 VOLUME XXX

21 TRANSCRIPT OF JURY TRIAL

22 Before:
HONORABLE DOMINIC S. AMATO
23 Circuit Court Judge Presiding

24 Court Reporters: Constance L. Bauer, CRR/RMR
Debra A. Wisniewski, CRR/RMR
25 Julie A. Poenitsch, CRR/RMR

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while the piece hangs in the air for 11 days. And you heard the dangers that was -- people were exposed to from Mr. Bengtson when he testified.

Before July 14th of 1999, Mr. Grotlisch admitted to you, under my questioning, a number of things that showed he knew, he knew the risks. He admitted that he knew that the load chart, when it said 20 miles an hour, applied to the crane only, that it did not apply to the wind effect on that which was being lifted, the load.

He admitted he knew what this Paragraph 10 in the load chart said, that it doesn't take into consideration the wind on the load. He admitted, members of the jury, that lifting that huge 4R3 piece without wind sail calculations being done was dangerous -- that was out of his mouth -- dangerous and unsafe.

He admitted that he had worked on jobs, 50 jobs, where they had done these calculations on the effect of wind on the load and that he had seen on the lift plans a no-go speed, a speed that you shouldn't lift in.

But he admitted, members of the jury, that on the nine prior lifts, nine prior lifts, never once was there a no-go speed on that lift

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plan, and he knew it had never been on a lift plan, and he knew that it hadn't been done.

He knew that MHII -- MHIA wasn't doing the calculations. He says, we didn't have anyone who could. But you may have forgotten that Paul Deasy, the fella you saw that was testifying from the Far East, he said, I can do the wind sail calculations. Apparently no one ever asked him. I can do them, he said.

He admits that although he thought Lampson was doing them, he never saw it on a lift plan. He never picked up the phone and said, hey, are you doing them? I haven't seen them on any lift plan. No one ever told him that Lampson was doing these calculations. He didn't know that anyone was doing the calculations. So he says.

And so he tells us, well, it was my responsibility to find out. And what does he say to you? After great hesitation, I dropped the ball. Do you remember that testimony? I dropped the ball.

He's too easy on himself. He didn't just drop the ball. He knew that these calculations were not being done, and he didn't care. Because if they had been done and you would have had restrictions on what kind of winds you can lift in,

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his style would have been cramped. His unbridled power would have been limited to make decisions.

So I dropped the ball. He knew that calculations were not being done, otherwise you would have seen something on those lift plans. He would have picked up the telephone. He would have done something. Because who was it that said it was dangerous? Him.

So Allen Watts arrives. Milo Bengtson's out. Allen Watts is told by his bosses, don't make waves. He knows why Bengtson was pulled off the job. So he arrives, and he's greeted by Mr. Grotlisch. And what is the first thing he says to him? No politics here. Just follow my directions. From the neck down.

And remember the foreboding that Jeff Wischer felt before this fateful day when he came home and told Trish instructions and directions, the kind of things a person would say if he doesn't expect to be there?

And Bill DeGrave came home and told Marge, somebody is going to get killed. He didn't know how true his concern was and that it would be him.

And so, members of the jury, before

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July 14th of 1999, we had the perfect recipe for a disaster. A man in charge of operations who is intolerant of other people's advice, who is contemptuous of the men who worked under him, and who was pushing the envelope of safety again and again and again.

July 14th, 1999. A lift involving 450 tons. The biggest piece lifted at Miller Park. A piece larger than this courtroom. A piece that had wind surface of three and a half 747 wings. A natural wind catcher with a curve to it. 9100 square feet, members of the jury. More surface area than the crane itself.

A botched lift plan. The weights were wrong. The center of gravity was miscalculated, so they had to put a cement block on there to get it straight rather than take it down and rerig it, which would have taken too much time. They had to change directions on which way it was going to be lifted and how high it was going to be lifted.

They had a prelift meeting, and at that prelift meeting Victor Grotlisch said, I will monitor the weather. Now, he doesn't recall that, but Wayne Noel remembers he said that, and every single person who came into this courtroom who was

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1 experience contemplation of death. And he told you
2 they were terrified, they knew they were going to
3 die, it must have been a terrible experience,
4 psychologically, philosophically, spiritually, and
5 emotionally.
6 He went on to say, these are
7 experienced ironworkers. They knew what kind of
8 trouble they were in. I'm sure they expected to
9 die. And based on my experience, they had adequate
10 time to experience all the things I talked about,
11 unfortunately.
12 There were no good-byes, no "I love
13 yous." Only who's going to take care of my babies?
14 Who's going to take care of my wife? I suggest in
15 that line that a reasonable figure for these men
16 would be the sum of two million dollars each for
17 those 14 seconds of hell.
18 Now let's talk about punitive damages.
19 This is where you can speak out, members of the
20 jury, an indignation. This is where you can punish
21 the wrongdoer and send a message so it won't happen
22 again to other families.
23 The law says, as the judge told you,
24 consider the grievousness of the action. How much
25 more grievous can it be? The law says, consider the

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1 actual damages. How much more serious can death be?
2 And the law says, consider the potential of what
3 might have happened if there had been more people
4 under that roof piece. Dozens could have been
5 killed.
6 I bring you no appraisers. There are
7 no appraisers I can bring to you to tell you what to
8 do on this question and how much to insert. All I
9 know is it can't be a slap on the wrist. They've
10 got to get a clear message from you. Otherwise
11 they'll shrug it off and go about their business.
12 Every day we hear numbers, stadiums
13 costing 350 million, 250 million, ballplayers who
14 play in these stadiums making tens of millions of
15 dollars to play baseball or football or basketball.
16 Their contract, their contract, was
17 for $47 million. I think there's some poetic
18 justice that they should be assessed for the death
19 of one of these men to the extent of the bargain
20 they got from their contract of $47 million. That
21 was their contract.
22 These men had a contract also to live,
23 to live a full and free life. And if I was
24 representing one of these people, not three, but
25 one, and speaking for one and not three, I would say

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1 that would give them a clear message.
2 The 47 million of their contract for
3 punitive damages, for the punishment for their
4 behavior, to make sure they don't do it again, but
5 more importantly, that other contractors coming into
6 our town will know how you feel about people who
7 play fast and loose with the lives of our men and
8 women on construction sites.
9 But we have three men here. So you
10 should consider a multiple of that 47, and I leave
11 that to your discretion. Remember, you've heard
12 that the steel, the bricks, and the mortar had a
13 hundred millillion in damage. I don't know if you can
14 do less for three human beings than the loss in the
15 property damage in this tragedy.
16 Members of the jury, this is the kind
17 of case this courthouse was built for. This is the
18 kind of case that this courtroom was designed for.
19 This is the kind of case that I became a lawyer to
20 handle. Something special can still come out of
21 this tragedy. Some good may still come out of these
22 losses. It's in your hands, and you can ensure and
23 send a message so that other families will not have
24 to have me or any other lawyer standing up here
25 talking with you like this today.

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1 We are confident, on behalf of the
2 families, that you will do the right thing, and I
3 thank you.
4 THE COURT: Thank you, Mr. Habush.
5 What we're going to do is we're going to go into
6 recess. All the admonishments continue to apply.
7 Jerry has made arrangements for downstairs. We're a
8 little bit ahead of schedule, but I don't want to
9 start the next series of closing arguments because
10 they were each going to run approximately an hour
11 and a half, and it's time for a break and to give
12 everybody time to proceed further.
13 Please be ready to go by -- Be back
14 here by quarter to one, and we'll start the next
15 series of closing arguments at one o'clock. And
16 you'll be taken care of in good hands by my bailiff,
17 Jerry. All right. Please rise. Admonishments
18 apply.
19 (Jury excused.)
20 THE COURT: Please shut it for me.
21 Thank you. Jury's out. Please be ready to go by
22 promptly at quarter to one, and we'll start with
23 closing arguments of Mr. Bell promptly at one
24 o'clock.
25 Mr. Habush, you have a half hour left

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased, MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased, and RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE OF JEROME STARR, deceased,

Plaintiffs,

ORIGINAL

-vs-

Case No. 99CV006553

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., and LAMPSON INTERNATIONAL, LTD.,

Defendants.

JANUARY 30, 2001

PROCEEDINGS HELD BEFORE THE

HONORABLE DOMINIC S. AMATO,

CIRCUIT JUDGE, BR. 11, PRESIDING

Robert H. Dettmann, RMR
Official Reporter

FILED
CIVIL DIVISION
FEB - 6 2001
HON. DOMINIC S. AMATO PRESIDING
JOHN BARRETT-CLERK OF COURTS

TRANSCRIPT OF PROCEEDINGS

A P P E A R A N C E S:

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Attorney at Law,
11 Appearing for Tokio Marine.

12

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1 I would note for the record, and I'm referring to the
2 plaintiff's brief and as documented by very clear
3 Wisconsin case law -- I'm going to mispronounce the name
4 -- it's J-a-c-q-u-e, 209 Wis. 2d at page 626. And that
5 case dealt with trespass to land. The compensatory
6 damages were really one dollar nominal damages, and the
7 jury awarded a hundred thousand dollars punitive damages,
8 and Wisconsin law made it clear that you do not apply a
9 multiplier. You do a qualitative analysis, not a
10 quantitative or a numerical analysis when addressing the
11 issues of punitive damages.
12 I'm supposed to look at the evidence in favor of
13 supporting the jury's verdict, and in looking at the
14 evidence in favor of supporting the jury's verdict there
15 is more than sufficient evidence to support the jury's
16 verdict that MHIA's conduct was reprehensible and
17 grievous. There is substantial evidence in the record to
18 support the jury's verdict that there was an intentional
19 disregard of the rights of others, not just the
20 plaintiffs.
21 I'll have to get to this later, but I will note for
22 the record that Mr. Habush in closing arguments discussed
23 the jury -- to the jury the cost of MHIA in putting on the
24 roof. He said forty-seven million dollars.
25 Well, you were all here, though I'm not going to

1 bring the jury testimony into this case, but you did have
2 the benefit of hearing the media and the press talk to the
3 jury. They did very clearly say that they reached the
4 ninety-four million dollars by doubling the forty-seven.
5 They also discussed the punitive damage verdict.
6 Strike that. They also discussed the compensatory damage
7 verdict. And I'm not relying on what the jury said or
8 didn't say, but I think the record should indicate that
9 we've all had the benefit of hearing the jury express some
10 of their thoughts at the request of the media, since this
11 is a public trial. And the jury in this case themselves
12 chose to proceed with that inquiry, based upon that
13 format, because they did not want to discuss the case
14 again with anyone and they wanted to be left alone. And
15 that's basically the reason why the court entered the
16 orders dealing with any of the parties having any contact
17 with the jury.
18 Now, in the case of United States v. Lane, 474 U.S.
19 438, a 1986 case, at page 11, the court talks about
20 evidence and the harmless error rule. The court stated at
21 page 450 of that decision, page 11 of the computer Lexis
22 printout: "In the face of overwhelming evidence of guilt
23 shown here, we are satisfied that the claimed error was
24 harmless. When evidence on misjoined count 1 was
25 introduced, the District Court provided a proper limiting

WISCONSIN SUPREME COURT

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased

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CLERK OF SUPREME COURT
OF WISCONSIN

Plaintiffs-Intervenors-
Respondents-Petitioners,

Appeal No. 01-0724
(Consolidated)
Trial Court Case No. 99-CV-006553

vs.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant,

NEIL F. LAMPSON, INC.,

Defendant-Respondent,

LAMPSON INTERNATIONAL LTD., FEDERAL INSURANCE COMPANY and THE TOKIO MARINE AND FIRE INSURANCE COMPANY,

Defendants.

SUPPLEMENTAL BRIEF AND APPENDIX OF MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased,

Plaintiffs-Respondents-
Cross-Respondents-Petitioners,

Appeal No. 01-1031
(Consolidated)
Trial Court Case No. 99-CV-006553

vs.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-
Cross-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-Petitioner,

NEIL F. LAMPSON, INC. and LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY,

Defendant-Co-Appellant,

THE TOKIO MARINE AND FIRE INSURANCE COMPANY,

Defendant.

PATRICIA WISCHER, individually, and as Special Administrator of the ESTATE OF JEFFREY A. WISCHER, deceased; MARJORIE DeGRAVE, individually, and as Special Administrator of the ESTATE OF WILLIAM R. DeGRAVE, deceased; RAMONA DULDE-STARR, individually, and as Special Administrator of the ESTATE of JEROME W. STARR, deceased,

Plaintiffs-Respondents-Cross-Respondents-Petitioners,

Appeal No. 01-2486
(Consolidated)
Trial Court Case No. 99-CV-006553

vs.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.,

Defendant-Respondent-Cross-Appellant,

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendant-Appellant-Cross-Respondent,

NEIL F. LAMPSON, INC. and LAMPSON INTERNATIONAL LTD.,

Defendants,

FEDERAL INSURANCE COMPANY and THE TOKIO MARINE & FIRE INSURANCE COMPANY,

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INTRODUCTION

An excessive punitive damages award serves no legitimate State interest and constitutes an arbitrary deprivation of property. Although punitive damages are like criminal penalties, defendants subject to them do not receive the protections of a criminal proceeding.[1] That is why appellate courts scrutinize a jury's effort to translate moral outrage into dollars so carefully—to ensure that it is not based upon improper considerations. Accordingly, the United States Constitution imposes both substantive and procedural limitations to protect defendants and the civil justice system.

A constitutional review of the jury's $94 million punitive damages award would thus address whether the amount was reasonable and whether the process generating it was fair. In this case, the "fair process" question opens a Pandora's Box of procedural transgressions. The trial judge, for instance, omitted tortfeasors from the verdict and excluded evidence of Mitsubishi Heavy Industries America Inc.'s ("MHIA's") net worth. Later, the judge justified the amount of the award by citing what jurors said at a post-trial press conference—which he himself hosted.

This Court recently ordered the parties to brief whether the punitive damages award is unconstitutional, but the issue should not be decided in a vacuum. Before the Court considers whether $94 million is too much, it should determine whether the misconduct of other tortfeasors was improperly attributed to MHIA and whether the jury was erroneously

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[1] *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003).

denied evidence of MHIA's net worth. Those issues were briefed to the court of appeals, are preserved in the event of a remand, and, if decided in MHIA's favor, would result in a new trial without a constitutional analysis.[2] MHIA respectfully requests that, if it is necessary to proceed beyond the proper interpretation of § 895.85(3), the Court remand this case to the court of appeals so that those narrower, predicate issues may be addressed before the constitutional question.[3]

ISSUE FOR REVIEW

Whether the punitive damage award in this case is unconstitutional. The trial court answered "no." The court of appeals vacated the award on other grounds.

STATEMENT OF CASE

Before submitting this case to the jury, Judge Dominic S. Amato: (1) directed a verdict for Neil F. Lampson, Inc. ("Neil F"), the designer of the crane that collapsed causing the Miller Park accident; (2) instructed the jury that, as a matter of law, the crane was not defective; (3) omitted Danny's Construction Company, Inc. ("DCCI"), the company that lifted the decedents in a man basket, from the verdict; and (4) barred MHIA from offering evidence of its net worth. The jury found MHIA and Lampson International, Ltd. ("Lampson") negligent and assigned them 97% and 3% of liability respectively. The jury awarded $5.25 million in compensatory

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[2] *See* May 12, 2004 order. App.1.

[3] *State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (court will not reach a constitutional issue where the resolution of other issues disposes of an appeal).

damages, including $4.2 million for pain and suffering and $1.05 million for loss of society and companionship.[4] And the jury assessed $94 million in punitive damages against MHIA—an amount three times the company's net worth.

MHIA's post-verdict motions included requests for: (1) a new trial because Neil F and DCCI were omitted from the verdict; (2) a new trial because the judge instructed the jury that the crane was not defective; (3) a new trial due to the omission of net worth evidence; and (4) remittitur or a new trial on the grounds that the $94 million punitive damages award was excessive under Wisconsin law and the United States Constitution.[5] MHIA appealed these decisions (and others), but the court of appeals did not address them. Instead, it vacated the entire punitive damages award because the evidence did not meet the threshold for punitive damages under § 895.85(3). The Court granted review on this one issue. On October 5, 2004, the Court ordered briefing on the constitutional issue, though MHIA, Federal and Tokio Marine objected, explaining that threshold procedural errors should be addressed first.[6]

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[4] R.488.

[5] R. 525.

[6] App.4-13

BACKGROUND

The Miller Park Accident

MHIA was hired to build the Miller Park stadium roof according to an architectural plan and to design, build and install the drive system that moved the roof panels. MHIA hired Lampson, the industry leader in performing heavy lifts, to assist with the project.[7] Lampson leased to MHIA a transi-lift crane, designed and built by Neil F which was supposed to be able to pick up and transport extremely heavy loads like the 450-ton roof piece at issue in this case.[8] Due to the crane's unique design, Lampson also leased MHIA a specially-trained three-man crew to operate the crane.[9]

On the morning of the accident, Wayne Noel, MHIA's safety superintendent, held a meeting with all of the workers who were to be involved in the lift that day.[10] He told them: "Anyone in this room can stop this [lift] for any reason at any time if it is unsafe to continue."[11] After the meeting, the crane picked the roof piece off the ground, and Allen Watts (supervisor of the Lampson crane crew) assumed control of the lift.[12] The crane slowly transported the roof piece toward the stadium, approaching the

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[7] App.35:117-118. This refers to Appendix page 35, miniscript pages 117-118.

[8] App.25:119-120.

[9] App.47:100.

[10] App.27:124-125.

[11] App.29:130-131.

[12] App.43:97; App.28:128-129.

set point at about 4:45 p.m. Victor Grotlisch, MHIA's site supervisor, and several other MHIA employees were standing on or by the stadium—literally in the shadow of the crane—helping to direct the roof piece into place.[13] Watts, Lampson's supervisor, assured Grotlisch that "there were not any problems with the lift."[14] He was wrong. As the crane moved the roof piece onto the stadium structure, it toppled. Its boom struck the crane carrying the Wischer plaintiffs, and all three men fell to their deaths.

Causes of the Accident

The combined negligence of several parties caused the Miller Park accident. The Court must have some sense of the relative roles of these tortfeasors before attempting to gauge whether the punitive damages award against MHIA is excessive. *See infra* at 17-20.

Neil F changed the design of the crane's "king pin"[15] before it arrived at Miller Park.[16] Expert testimony established that the original king pin design was two to three times stronger.[17] The design change created a gap in the king pin unit.[18] To rectify the problem, a Lampson employee

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[13] App.30:134-135; App.49:71-72.

[14] App.49:71.

[15] The king pin is a long steel cylinder which connects the boom of the crane to its front crawler.

[16] App.51:73.

[17] App.52:75.

[18] The crane stood 45 stories high. It arrived at Miller Park in 97 truckloads of parts. Workers, under Lampson's supervision, assembled it. App.150:28.

added a soft copper spacer to the unit, and this further weakened the crane.[19] MHIA's expert testified that the Miller Park accident would not have occurred if Neil F had not changed the king pin design.[20] He and other experts testified that the crane's spring-like base (akin to shock absorbers) made it more sensitive to "side load"[21] and caused it to fail at less than its design standard.[22] Additional expert testimony established that the crane had such a tight levelness requirement that Neil F should have equipped it with a tiltmeter (or slope indicator) to alert the operator to unsafe operating conditions.[23] According to MHIA's expert, a tiltmeter on the crane would have prevented the accident.[24]

DCCI also could have prevented the injuries sustained in the Miller Park accident. OSHA regulations provide that the hoisting of employees in a man basket must cease in any dangerous weather conditions.[25] DCCI ordered Wischer, DeGrave and Starr into the man basket and controlled their movements.[26] DCCI operated the crane that carried them.[27] The trial

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[19] App.51:71; App.57:222.

[20] App.53-54:85-86.

[21] "Side load" is a force pushing sideways on the boom and the jib.

[22] App.55:201.

[23] App.46:89.

[24] App.56:18.

[25] 29 C.F.R. § 1926.550(g)(6)(v).

[26] App.1700:100; App.68-69.

[27] App.42:224-225.

record is filled with evidence of high winds.[28] DCCI's decision to lift Wischer, DeGrave and Starr in the man basket, placing them in harm's way, violated OSHA regulations and contributed to their deaths.

Finally, the jury found that both MHIA and Lampson contributed to the accident. There were nine injury-free lifts before the Miller Park accident. MHIA and Lampson each thought that the other had conducted wind studies to determine the effect of wind on the crane and the load.[29] Watts of Lampson told people at Miller Park that he had operated the crane in winds of 40 miles per hour with comparable loads.[30] After the accident, Grotlisch acknowledged that he had "dropped the ball" by failing to ensure that Lampson had done the wind sail calculations.[31] But he also testified that if he had known that Lampson had neglected the calculations, he would not have proceeded with the lift.[32]

Procedural Errors

A series of highly-prejudicial trial court errors in this case created an atmosphere conducive to an inflated punitive damages award. On the first day of trial, the Wischer plaintiffs dropped their punitive damages claim against Lampson, leaving only MHIA vulnerable to such an award.[33]

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[28] *See* the Wischer plaintiffs' initial brief on § 895.85(3) at pages 6-8.

[29] App.36:121; App.37:202; App.26:55.

[30] App.45:126.

[31] App.35:117-118.

[32] App.39:171.

[33] R.357.

Pursuant to a court-ordered procedure, MHIA filed its financial statements with the court.[34] A few weeks later, the Wischer plaintiffs asked the judge to rule that they had established a case for punitive damages. The judge answered "yes" and gave them MHIA's financial statements.[35] Upon reviewing the statements, the plaintiffs realized that MHIA's net worth ranged from only $31 to $33 million, so they reversed course and moved to exclude the statements from evidence on the grounds that the information would cause prejudice and confusion.[36] The judge became upset, accused MHIA (not the plaintiffs) of "trial by ambush" and barred all net worth evidence.[37] At one point he accepted MHIA's offer of proof, but, in the next breath, struck it from the record.[38]

The judge's procedural errors continued through the jury instruction conference. He directed a verdict in favor of Neil F, the crane designer, insisting "there is to be [sic] no evidence that could support a jury's verdict of liability against Neil F. Lampson, Inc."[39] He refused to include DCCI on the verdict because "it did nothing wrong as a matter of law" and "no jury could come back with any other conclusion."[40] He omitted "ability to pay"

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[34] App.24:4.

[35] App.44:258-259.

[36] R.392.

[37] App.48:14-17.

[38] App.50:6.

[39] App.59:31.

[40] App.60:102-103.

from the standard punitive damages jury instruction.[41] His parting instruction to the jury was that the crane was not defective.[42]

During closing arguments, plaintiffs' counsel urged the jury to award punitive damages. He told them to consider "the extent of the bargain [MHIA] got from their contract of $47 million" and award at least that much for the death of an iron worker and multiples of that amount since three men had died.[43] So advised, the jury returned a massive verdict against MHIA, including $94 million in punitive damages, exactly double $47 million.

Post-trial, MHIA argued that the Court should not have directed a verdict for Neil F. and DCCI.[44] Without discussing the evidence, the judge replied that the issues were moot and his prior decision would stand.[45] When MHIA argued for remittitur or a new trial due to the excessive amount of the award, the judge declared: "The court's prior decisions on this subject stand."[46] In fact, there were no prior decisions on excessiveness. Later in the hearing, he said that he should do "a qualitative analysis not a quantitative or numerical analysis when addressing the issue

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[41] App.61:125.

[42] App.62:58.

[43] App.63:103-104. This was the original gross contract price, not the profit from the contract. App.66:20-21.

[44] R.525

[45] App.14; App.23.

[46] App.16; *see generally,* App.14-22.

of punitive damages."[47] He added that MHIA's conduct was "reprehensible" and "grievous" because it displayed "an intentional disregard of the rights of others, not just the plaintiffs."[48] Then he explained how the jury hit upon the $94 million figure:

> Well, you were all here [when the press interviewed the jury], though I'm not going to bring the jury testimony into this case, but you did have the benefit of hearing the media and the press talk to the jury. They did very clearly say that they reached the ninety-four million dollars by doubling the forty-seven.[49]

That was the trial judge's remittitur and constitutional analysis of the $94 million punitive damage award.[50]

ARGUMENT

I. The Court Should Defer the Constitutional Analysis.

The constitutional analysis of the punitive damages award in this case should occur, if at all, only after the court of appeals decides whether a new trial is warranted due to verdict, jury instruction, and evidentiary

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[47] App.21.

[48] *Id.* In subsequent hearings, the judge acknowledged that MHIA did not intend to hurt anyone. *See* MHIA's brief regarding § 895.85(3) at 10.

[49] App.21-22.

[50] MHIA recognizes that a court may not receive evidence as to how a jury reached its verdict. Wis. Stat. § 906.06(2). However, the trial judge *sua sponte* and repeatedly used juror interviews to justify his decisions. "If there are going to be issues at the appellate level," he said, "the appellate court should at least have the benefit of the jury giving further expression on the subject that this was done to deter and the basis for them reaching $94 million." App.65. During argument, Judge Fine queried whether a jury press conference called by the court is an exception to § 906.06(2). App.67:22.

errors. "Any punitive damages claim is necessarily interwoven in the underlying determination of liability or fault." *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 2003 WI 46, ¶ 97, 261 Wis. 2d 333, 661 N.W.2d 789 (Sykes, J., dissenting). The jury's verdict is a reaction to and a melding of the facts establishing liability and the evidence of intentional conduct. *Hardin v. Caterpillar, Inc.*, 227 F.3d 268, 272 (5th Cir. 2000) (finding issues of intent, emotional injury, and punitive damages inseparable). An error in a jury's assessment of compensatory damages or comparative fault thus forces a new trial on the issue of punitive damages. *Schwigel v. Kohlmann*, 2002 WI App. 121, ¶ 18, 254 Wis. 2d 830, 647 N.W.2d 362 (where the amount of compensatory damages, the premise of the jury's punitive damages award, was wrong, a new trial on both forms of damages was necessary); *Shields v. Cape Fox Corp.*, 42 P.3d 1083, 1092 (Alaska 2002) (a new trial on comparative fault compels a new trial on the entitlement and amount of punitive damages). It is difficult to perform a full-blown constitutional analysis—and impossible to order remittitur—without threshold decisions on such issues as whether the crane was defective, DCCI contributed to the plaintiffs' injuries, and the jury was denied net worth evidence.

II. The Standard of Review Is *De Novo.*

If the Court proceeds to decide whether the punitive damages award is excessive, then it should do so *de novo*. *Cooper Industries v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001). Independent review is necessary so that courts can maintain control of the applicable

legal principles, unify precedent and stabilize the law. *Id.* at 436. "Exacting appellate review ensures that an award of punitive damages is based upon an 'application of law, rather than a decision maker's caprice.'" *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003). This Court has embraced the *de novo* standard and noted that it is even more appropriate in cases where the trial judge's constitutional analysis is perfunctory. *Trinity*, 2003 WI 46, ¶ 48 (citing *Management Computer Servs. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 192, 557 N.W.2d 67 (1996)).

III. The Constitutional Standard.

Due to the imprecise manner in which punitive damages systems have been administered, the United States Supreme Court has, through a series of decisions, worked to insert rationality into the process. *State Farm*, 538 U.S. at 417; *Cooper*, 532 U.S. at 436; *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993) (plurality opinion); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). *Gore* established three guideposts for the review of punitive damages awards:

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

State Farm, 538 U.S. at 418; *Gore*, 517 U.S. at 575.

While *Gore* established the minimum framework for the constitutional analysis, States are permitted to build upon it. Wisconsin has adopted a "virtually identical test" which includes *Gore*'s guideposts plus one additional factor—the net worth of the defendant. *Trinity*, 2003 WI 46, ¶ 53.[51]

IV. Application of the Constitutional Standard.

A. MHIA's Conduct Was Not Reprehensible.

The reprehensibility of the defendant's conduct is the "most important indicium of the reasonableness of a punitive damages award." *Id.* at ¶ 57; *State Farm*, 538 U.S. at 419. To make the assessment, courts consider whether:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id.

Although early punitive damages cases sowed confusion over the breadth of evidence permitted under this guidepost, *State Farm* settled the

[51] Wisconsin courts consider: (1) the grievousness of the defendant's acts; (2) the degree of the defendant's malicious intent; (3) whether the award bears a reasonable relationship to the award of compensatory damages; (4) the potential damage that might have been caused by the acts; (5) the ratio of the award to civil or criminal penalties for comparable misconduct; and (6) the defendant's wealth. *Trinity*, 2003 WI 46, ¶ 53. The first and second factors fall within *Gore*'s "reprehensibility" guidepost. The third and fourth factors fall within *Gore*'s "disparity between harm and punitive damages" guidepost.

matter conclusively: "[*T*]***he conduct that harmed [the plaintiffs] is the only conduct relevant to the reprehensibility analysis***." *Id.* at 424. (Emphasis supplied). The *State Farm* court vacated a $145 million punitive damages award stemming from a bad faith claim against an insurer. The plaintiffs tried to establish "reprehensibility" by exposing "the perceived deficiencies of State Farm's operations throughout the country" and by painting State Farm as a recidivist.

The Court rejected these ploys partly because they violated principles of federalism., *id.* at 421, but also for a more fundamental reason:

> A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . .

Id. at 422-23. Hammering the point, the Court declared: "The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period." *Id.* at 424. Here, then, the Court's reprehensibility analysis should focus only upon the conduct that harmed the Wischer plaintiffs.

1. The Harm Was Physical.

All agree that the Wischer plaintiffs suffered personal injury.

2. MHIA Did Not Engage in Malice, Trickery or Deceit.

The Wischer plaintiffs admit that MHIA's conduct did not display malice. "We concede that there was no malicious act here . . ."[52] As for trickery or deceit, the Wischer plaintiffs' compensatory damages flowed from negligent conduct, not fraud.[53]

3. "Reckless Disregard" Is Not the Standard in Wisconsin.

While recommending consideration of whether the defendant showed a reckless disregard of health and safety, the United States Supreme Court also recognized that "States possess discretion over the imposition of punitive damages." *Id.* at 416. Exercising that very discretion, the Wisconsin legislature explicitly raised the threshold for punitive damages from "***reckless*** disregard" to "***intentional*** disregard." Wis. Stat. § 895.85(3). Thus, in Wisconsin, conduct displaying a "reckless disregard of health and safety" is no longer sufficiently reprehensible to support a punitive damages award. The conduct must be intentional. On this score, the Wischer plaintiffs conceded and the trial judge ruled, repeatedly, that: (a) MHIA did not intend to hurt anyone; (b) Grotlisch did not believe that his conduct would cause injury because he himself was in the zone of danger; and (c) all of the expert testimony combined was insufficient to

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[52] App.64.

[53] On this point, the plaintiffs often claim that Grotlisch unplugged a computer with Doppler radar information as if to suggest that he destroyed evidence. Look closely at their record cites. Grotlisch testified that he found the computer unplugged. This evidence was uncontested. Neither the plaintiffs nor the jury could properly infer that Grotlisch unplugged the computer. App.32-34; App.38.

permit a jury inference that MHIA was substantially certain its conduct would cause injury. *See* testimony quoted on pages 7-9 of MHIA's brief regarding § 895.85(3).

4. MHIA Did Not Target Financially Vulnerable Individuals.

This is not a fraud case, and MHIA did not "target" anyone. The Wischer plaintiffs have categorically denied that MHIA: (a) chose the Wischer plaintiffs to go up in the man basket; (b) controlled their movements; or (c) even had the authority to control their work on the day of the accident.[54] These decisions were made by DCCI, a tortfeasor excluded from the verdict form.[55]

5. MHIA's Conduct Was Not Recidivistic.

Describing an alleged pattern of safety violations at Miller Park, the Wischer plaintiffs label MHIA a "recidivist." But most of the conduct they cite (allegedly hiring employees "from the neck down," working over-time or in snow, dismissing complaints, making lifts to "show the media," etc.) fall into the category of "dissimilar acts," banned from consideration under *State Farm*. *See also*, *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004) (by defining harm at a high level of abstraction, a plaintiff can turn any prior bad act into evidence of recidivism; post-*State Farm*, the recidivist conduct must be both factually and legally similar to the plaintiffs' claims). The only relevant repeated conduct in this case is

[54] App.68-69.

[55] *See infra* pages 6-7.

MHIA's failure to perform wind sail calculations on the day of the accident and on nine prior lifts. MHIA believed that Lampson was doing the calculations.[56] According to the Wischer plaintiffs, Lampson told MHIA that it was doing "rigging studies," not wind sail calculations.[57] This hardly qualifies as recidivistic, unlawful conduct.[58]

B. The Disparity Between Punitive and Compensatory Damages Is Enormous.

Although the Supreme Court will not impose a bright-line ratio to limit a punitive damages award, it has instructed: "Single-digit multipliers are more likely to comport with due process." *State Farm*, 538 U.S. at 425. When egregious conduct has caused only a small amount of economic damages, a larger ratio may be warranted. "When compensatory damages are substantial, a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.*; *see also*, *Trinity*, 2003 WI 46, ¶ 64.

Here, the jury awarded $1.05 million for loss of society and companionship and $4.2 million for pain and suffering. The loss of society and companionship for wrongful death, authorized and capped by § 895.94(4), cannot support a punitive damage award. Russell M. Ware, *The Law of*

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[56] App.36:121-122; App.37:202.

[57] App.26:55.

[58] MHIA's brief regarding § 895.85(3) analyzes the type of conduct that can support punitive damages and should be considered on the reprehensibility and recidivism issues here.

Damages in Wisconsin, § 2.14 (2000). Arguably, that leaves $4.2 million as the maximum possible denominator, yielding a 22:1 ratio.

In a multi-defendant case, an additional adjustment is necessary. The Court must divide the individual punitive damage award by each defendant's pro rata share of actual compensatory damages. *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1026 (8th Cir. 2000). This is especially important in jurisdictions where defendants may not be jointly and severally liable for the negligence damages. "[O]ne defendant's liability should not be a predicate for increasing punitive damages assessed against another." *Diversified Holdings, L.C. v. Turner*, 63 P.3d 686, 698 (Utah 2002). At a minimum, the Court should subtract Lampson's 3% share from the $4.2 million denominator, which yields a 23:1 ratio. If the Court were to undertake the constitutional analysis, this ratio would clearly violate due process. *State Farm*, 538 U.S. at 425 (when compensatory damages are substantial an equal ratio "can reach the outermost limit of the due process guarantee.")[59]

However, it is impossible to compute the precise ratio given the procedural posture of this case. If MHIA is correct that a new trial would establish that Neil F (the crane) and DCCI contributed to the accident, then

[59] Although there are exceptions, post-*State Farm* courts are following the single digit ratio advice. *Trinity*, 2003 WI 46, ¶ 65 (approving 7:1 ratio); *Textron Financial Corp. v. National Union Fire Ins. Co.*, 13 Cal. Rptr. 3d 586 (Ct App. 2004) (reducing to 4:1 ratio); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004) (reducing to 1:1 ratio); *McClain v. Metabolife International, Inc.*, 259 F. Supp. 2d 1225 (N.D. Ala. 2003) (reducing to 9:1 ratio); *TVT Record v. The Island Def Jam Music Group*, 259 F. Supp. 2d 506 (S.D.N.Y. 2003) (reducing to 1:1 ratio).

their pro rata shares of compensatory damages should be deducted from the denominator too. Hypothetically assigning 25% liability to each of them (and keeping Lampson at 3%) would leave MHIA with only 47% of liability. This apportionment would generate an astonishing 47:1 ratio ($94 million/.47($4.2 million)). It would also influence the jury's perception of MHIA's conduct, making a $94 million punitive damage award improbable.

The Wischer plaintiffs have sometimes defended the size of the punitive damage award by describing the property damage and personal injury the Miller Park accident could have caused, if the wind had blown the other way. However, *State Farm* clarified that the only "potential harm" that may justify punitive damages is the potential harm to the plaintiff seeking punitive damages. *State Farm*, 538 U.S. at 423 (due process does not allow courts to adjudicate the merits of other parties' hypothetical claims against the defendant).

> [P]erhaps one of the most important aspects of *State Farm*'s focus on the bases of punitive damages was the Court's clarification that the punitive damages analysis should focus on the plaintiff. ***Contrary to the common practice of looking to the "total harm" of a defendant's conduct in determining the appropriate amount of punitive damages, the Court determined that the punitive damages should be awarded only to vindicate the rights of the plaintiff, not nonparties*** who also may have been injured by the defendants' conduct.

Anthony J. Franze, *Instructing Juries on Punitive Damages: Due Process*

Revisited After State Farm, 6 U. Pa. J. Const. L. 423, 499-500 (Mar. 2004). (Emphasis supplied).[60]

Wischer, DeGrave and Starr lost their lives in the Miller Park accident. That is the worst potential harm they or their estates could suffer. Neither the estimated amount of property damage nor hypothetical injuries to non-existent plaintiffs should factor into the punitive-to-compensatory damages ratio here.

C. The Punitive Damages Award Dwarfs the Applicable Civil or Criminal Penalties.

Gore also requires some consideration of the disparity between the punitive damages award and the civil or criminal penalties authorized for such cases. Several statutes offer a point of comparison. Wisconsin's Worker's Compensation statute provides that if an employee's injury is caused by an employer's failure to comply with safety provisions, the maximum penalty for a death is $15,000. Wis. Stat. § 102.57. For three deaths it would be $45,000, which yields a "punitive damage to civil penalty" ratio in this case of 2,088 to 1. The highest potential criminal penalty for a corporation is second degree reckless homicide, a Class C felony, which carries a maximum fine of $10,000 or 10 years imprisonment. The punitive damage award is 3,133 times $30,000. Compared to these civil and criminal penalties, the jury's punitive damages award is staggering and constitutionally excessive.

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[60] Note that the ratio is computed using the ***jury's*** awards. *Schwigel,* 2002 WI App at ¶ 18. That excludes settlements.

D. The Punitive Damages Award Was Three Times MHIA's Net Worth.

Trinity established that net worth evidence is often a "significant factor" in assessing the constitutionality of a punitive damages award. *Trinity*, 2003 WI 46, ¶ 69 (approving an award amounting to 14% of defendant's net worth).[61] *State Farm*, 538 U.S. at 427-28 (jury may consider wealth evidence but not to inflate punitive damages). Awards exceeding a defendant's net worth are unconstitutional as a matter of law. *Liggett Group Inc. v. Engle*, 853 So. 2d 434, 456 (Fla. Ct. App. 2003); 22 Am. Jur. 2d *Damages* § 607 (punitive damages must not be disproportionate to the defendant's ability to pay; courts may not invite financial ruination of the defendant).

Liggett, a tobacco case, struck down punitive damage awards that were 12, 18, 20, and 23 times the net worth of the various defendants. *Liggett*, 853 So. 2d at 457 n.29. Up to that point, the largest awards approved in Florida ranged from 2% to 20% of the defendant's net worth. No case had permitted punitive damages exceeding net worth. Rejecting these awards, the court held: "It is well established that punitive damages may not be assessed in any amount which will financially destroy or bankrupt a defendant." *Id.* at 456.

The Wischer plaintiffs dismiss the authorities above, claiming that an award three times MHIA's net worth is harmless because MHIA has

[61] The most recent Wisconsin case approved an award of only .008% of the defendant's net worth. *Gibson v. Overnite Transp.* Co., 2003 WI App 210, ¶ 24, 267 Wis. 2d 429, 671 N.W.2d 388.

insurance coverage for punitive damages.[62] This argument has no pulse. Wisconsin law specifically permits juries to consider a defendant's net worth when computing punitive damages, but it also prohibits juries from hearing evidence of insurance coverage for those damages. *City of West Allis v. WEPCO*, 2001 WI App. 226, ¶¶ 48-49, 248 Wis. 2d 10, 635 N.W.2d 873. The rationale is that juries will be tempted to use the insurance coverage as a floor for setting the amount of punitive damages while ignoring relevant evidence. *Id.*

Here, when the trial judge barred MHIA from offering its financial statements, he knew that MHIA's net worth was only about $31 million, but he did not know whether MHIA had insurance coverage for punitive damages.[63] By excluding net worth evidence, he all but invited MHIA's financial ruin. Post-trial, when he justified the $94 million amount by reference to the juror statements to the press, he knew that "contract price" is not one of the six factors that a Wisconsin jury may use to compute punitive damages. His mishandling of the issue allowed the jury to impose

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[62] Pursuant to the IINA settlement agreement, if MHIA is somehow denied insurance coverage for punitive damages, it may be liable for up to $10 million. Punitive awards consuming 30% of a defendant's wealth are automatically unconstitutional. *Vasbinder v. Scott*, 976 F.2d 118, 121 (2d Cir. 1992); *Merlo v. Standard Life and Accident Ins. Co.*, 130 Cal. Rptr. 416, 425 (Ct. App. 1976); *Zhadan v. Downtown L.A. Motors*, 136 Cal. Rptr. 132, 143 (Ct. App. 1976).

[63] The trial judge did not decide that MHIA had insurance coverage for punitive damages until after the trial.

a punitive damages award exceeding a corporate defendant's net worth—unprecedented in Wisconsin and unconstitutional.[64]

CONCLUSON

The pervasive procedural errors in this case tilted the scales of justice toward a $94 million punitive damages award that is 23 times compensatory damages, 2,000 to 3,000 times the comparable civil and criminal penalties, and three times MHIA's net worth. The award is constitutionally excessive. However, addressing the point now places the cart before the horse. It should not be necessary to proceed beyond the proper interpretation of § 895.85(3). But if it is, then MHIA respectfully requests that the Court remand this case to the court of appeals for resolution of the predicate procedural errors. A reversal on any one of them would obviate the need for the constitutional analysis.

Dated this 15th day of October, 2004.

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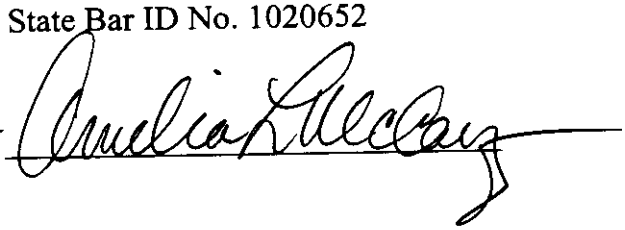

[64] The Wischer plaintiffs have argued that Wisconsin allows punitive damages to exceed a defendant's net worth under *Anello v. Savignac*, 116 Wis. 2d 246, 342 N.W.2d 440 (Ct. App. 1983); *Reyes v. Greatway Ins. Co.*, 220 Wis. 2d 285, 582 N.W.2d 480 (Ct. App. 1998). These cases only prove that punitive damages may exceed the net worth of an impecunious, juvenile defendant; not that they may exceed the net worth of a financially robust corporation.

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FORM AND LENGTH CERTIFICATION

I hereby certify that the Supplemental Brief and Appendix of Mitsubishi Heavy Industries America, Inc. conforms to the rules contained in Section 809.19(8)(b) and (c) of the Wisconsin Statutes for a brief produced with a proportional serif font. The length of this brief is 5,487 words.

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CERTIFICATE OF SERVICE

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	September 24, 2004 correspondence from MHIA.	App. 7
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R.756	Excerpts from post-verdict motions hearing.	App. 14
R.720, R.723-751, R.985	Excerpts from trial testimony and other rulings.	App. 24
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R.430	Plaintiffs' admissions regarding control of Wischer, DeGrave and Starr.	App. 68

OFFICE OF THE CLERK

Supreme Court of Wisconsin

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May 12, 2004

To:

Hon. Dominic S. Amato
Milwaukee County Circuit Court
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Milwaukee, WI 53233

John Barrett
Milwaukee County Clerk of Courts
Appeals Processing Division
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(Additional attorneys on Pages 2-3)

You are hereby notified that the Court has entered the following order:

Nos. 01-0724
01-1031
01-2486

Patricia Wischer, et al. v. Mitsubishi Heavy Industries America, Inc., et al.
L.C. #99CV6553

Upon consideration of the defendants-respondents' motions for clarification of this court's April 22, 2004 order granting review in this matter, and upon consideration of the plaintiffs-petitioners' motion also seeking clarification of that order and the responses filed thereto,

IT IS ORDERED the plaintiffs-petitioners' motion is denied; each respondent may file separate briefs in this matter.

(Continued on Page Two)

MAY 13 2004 RECEIVED

IT IS FURTHER ORDERED that the defendants-respondents' motions for clarification are granted and that this court on review will only address the specific issue identified in the April 22, 2004 order granting review in this matter; however, this limitation of issues shall not be interpreted to mean that the other issues raised by the respondents in their briefs filed in the court of appeals and identified in their responses to the petition for review filed in this court have been waived for purposes of further briefing and appellate consideration on any remand to the court of appeals that might be ordered by this court.

Cornelia G. Clark
Clerk of Supreme Court

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October 5, 2004

To:

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(Additional attorneys on Page 2)

You are hereby notified that the Court has entered the following order:

Nos. 01-0724
01-1031
01-2486

Patricia Wischer, et al. v. Mitsubishi Heavy Industries America, Inc., et al.
L.C. #99CV6553

Upon consideration of the parties' responses to this court's September 17, 2004 order,

IT IS ORDERED this court's review in this matter will be expanded to include the following issue:

Whether the punitive damage award in this case is unconstitutional.

IT IS FURTHER ORDERED the parties may stand on their briefs filed in the court of appeals which address this issue or may file supplemental briefs not to exceed 5,500 words, on or before October 15, 2004; if the parties choose to stand on the briefs previously submitted in the

(Continued on Page Two)

OCT - 6 2004

court of appeals, they shall inform the clerk of this court of that fact on or before October 15, 2004;

IT IS FURTHER ORDERED the plaintiffs-petitioners shall have an additional 15 minutes of oral argument time and each of the four respondents in this court shall have an additional 7.5 minutes of oral argument time.

Cornelia G. Clark
Clerk of Supreme Court

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September 24, 2004

Cornelia G. Clark, Clerk
Wisconsin Supreme Court
110 East Main Street, # 215
Madison, WI 53207-1688

Re: *Wischer v. Mitsubishi Heavy Industries America, Inc., et al.*,
Appeal Nos. 01-0724, 01-1031, 01-2486

Dear Ms. Clark:

On September 17, 2004, the Wisconsin Supreme Court issued an order directing the parties to file a letter addressing whether the Court should add the following issue for review: Whether the punitive damages award in this case is unconstitutional? Mitsubishi Heavy Industries America ("MHIA") respectfully requests that the Court refrain from taking up the constitutional issue at this time.

A number of trial court errors influenced the jury's calculation of the punitive damages in this case. An appellate court would need to decide and could reverse on any one of those threshold issues without ever reaching the constitutional question. To understand MHIA's position on this question, a short recap of the procedural posture of this appeal is necessary.

As the Court is aware, the accident occurred when a crane carrying a piece of the Miller Park stadium roof buckled and crashed into a nearby crane carrying three workers, causing them to fall to their deaths. The case generated three appeals involving six parties (aligned differently in each appeal) and some 19 issues for review. *Wischer v. Mitsubishi Heavy Industries America, Inc.*, 2003 WI App. 202, ¶¶ 2-3, n.3-4, 267 Wis. 2d 638, 673 N.W.2d 303. For its part, MHIA highlighted various trial court errors that directly undermined the jury's verdict including the punitive damages award.

For example, the trial court excluded the manufacturer of the crane, Neil F. Lampson, Inc. from the verdict, notwithstanding evidence (1) that Neil F. Lampson was at fault and (2) that its conduct was a substantial factor in causing the accident. Likewise, the trial court excluded plaintiffs' employer, Danny's Construction Company, from the verdict notwithstanding evidence that Danny's could have (and under plaintiffs' theory should have) stopped the lift.

The trial court also refused to admit evidence of MHIA's limited wealth, thus allowing the jury to award punitive damages three times greater MHIA's net worth. The trial court also erroneously excluded testimony and evidence of International Safety Standards and prior Lampson crane accidents which would have cast both MHIA and Lampson in a much different light. Finally, MHIA also raised the plaintiffs' right to recover punitive damages at all under § 895.85(3) as well as the constitutionality of the award.

The Court of Appeals decided just one of these issues, adopting MHIA's interpretation of Wis. Stat. § 895.85(3) and vacating the jury's $94 million punitive damages award. The plaintiffs petitioned for review, and in their responses all of the defendants (MHIA and its insurers) reminded the Wisconsin Supreme Court of the remaining issues briefed and argued but never addressed by the Court of Appeals. On May 12, 2004, the Wisconsin Supreme Court entered an order clarifying that it would review only the statutory punitive damages issue and assuring the defendants that they had not waived any of the other issues, raised in the appellate court "for purposes of further briefing and appellate consideration on any remand to the court of appeals that might be ordered by this court."

Given this procedural history, MHIA opposes a constitutional review of the size of the punitive damages award at this juncture. First, this appeal involves a spectrum of issues ranging from trial court errors on the one hand to a constitutional issue on the other. The Wisconsin Supreme Court has instructed that: "[a]n appellate court should decide cases on the narrowest possible grounds. Consistent with this rule is the recognition that the court will not reach constitutional issues where the resolution of other issues disposes of an appeal." *State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (citations omitted). Giving the lone constitutional issue in this case, preferential treatment would uproot the established procedure for deciding an appeal.

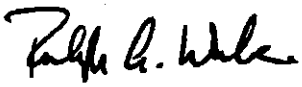
Second, if a remand to the Court of Appeals should become necessary, a victory for MHIA on nearly any of the narrower issues listed above would obviate the need for a constitutional analysis of the punitive damages award. Indeed, it would be premature to examine the size of the award when the jury that picked the $94 million

number had no opportunity to: (a) evaluate how MHIA's conduct compared to Neil F. Lampson's and DCCI's misconduct or (b) consider that MHIA's wealth amounted only to about $30 million. The Court would be reviewing the constitutionality of an award reached through a trial process that itself was flawed—in effect, placing the cart before the horse.

The Court's September 17th order was presumably prompted by Travelers' motion to intervene and brief the constitutionality of the punitive damages award at issue in *Strenke v. Hogner*, Appeal No. 03-2527. But if this Court affirms the Court of Appeals' decision here in the *Wischer* case, there literally will be no punitive damages award to review. If the Court reverses, then the May 12th order protects all of the defendants' rights to appellate review of the remaining issues—including the constitutionality of the punitive damages award, assuming that it is not vacated due to threshold errors in the trial process.

MHIA requests that the Wisconsin Supreme Court refrain from deciding whether the size of the punitive damages award is unconstitutional at this time. This appeal has been pending for three and one-half years. It is scheduled for oral argument on October 28th. The Court should not disrupt this schedule in order to permit Travelers to cut in line with the type of issue that is traditionally—and logically—decided last. The appeal should proceed without any further delay.

Sincerely,



Ralph A. Weber

cc: Mr. Robert Habush (by Facsimile)
Mr. David P. Lowe (by Facsimile)
Mr. Donald H. Carlson (by Facsimile)
Mr. Edward B. Ruff (by Facsimile)
Mr. Jeffrey S. Fertl (by Facsimile)
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Mr. Brady C. Williamson (by Facsimile)
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September 24, 2004

VIA MESSENGER

Ms. Cornelia Clark, Clerk
Supreme Court of Wisconsin
110 East Main Street, #215
P.O. Box 1688
Madison, WI 53701-1688

Re: Patricia Wischer, et al v. Mitsubishi Heavy Industries of America, Inc., et al.
Appeal Case Nos. 01-2486, 01-0724, 01-1031
Consolidated Circuit Court Case No. 99 CV 6553

Dear Ms. Clark:

On September 17, 2004, The Wisconsin Supreme Court directed the parties in the above referenced case to submit a letter addressing whether it should consider the following issue for review:

Whether the punitive damage award in this case is unconstitutional?

Federal Insurance Company opposes any such inclusion.

In the order granting review issued by the Wisconsin Supreme Court on April 22, 2004, in this matter ("Review Order") the Court stated:

> The petition for review is granted limited to the following issue: What proof is required for a plaintiff to recover punitive damages under the phrase 'in an intentional disregard of the rights of the plaintiff' as provided in Wis. Stat. § 893.85(3)?"

The Review Order also states:

> The parties shall not incorporate by reference any portion of their court of appeals' brief or petition for review or response; instead,

> any material in these documents upon which there is reliance should be restated in the brief filed in this court.

The sole issue to which the Court limited its review is also the sole issue upon which the Court of Appeals relied. The Court of Appeals wrote:

> Although the cases underlying this consolidated appeal present many issues of varying complexity, there is one dispositive issue: whether, based on the facts as conceded by the plaintiffs, the $94,000,000 punitive-damage award is contrary to the calls of Wis. Stat. § 895.(3)(1999-2000). We hold that it is. Accordingly, we reverse the punitive- damage award, and **consequently do not address the other issues.**

2003 WI App 202, ¶ 1 (emphasis added).

In footnote 4 of its decision the Court of Appeals, outlined all of the issues that it had been presented but did not address. These issues, briefed to the Court of Appeals, are also discussed in Federal's Response To Petition For Review at pages 24-32 (referred to hereafter as "Other Issues").

The Reviewing Order left Federal concerned that the Other Issues not be deemed waived if not fully briefed to the Court, notwithstanding that review would be limited to the interpretation of Wis. Stat. § 895.85(3). Federal moved for clarification. In response to Federal's motion the Court issued another Order on May 12, 2004 ("Clarifying Order"). The Clarifying Order granted Federal's motion, stating that,

> the limitation of issues shall not be interpreted to mean that the other issues raised by the respondents I their briefs filed in the court of appeals and identified in their response to the petition for review filed in this court have been waived for purposes of further briefing and appellate consideration on any remand to the court of appeals that might be ordered by this court.

Federal believes that the careful consideration given to both the Review Order and Clarifying Order should not be revisited, and that this matter should proceed as scheduled and outlined.

This is a complex case that presents distinct questions, many of which could be dispositive. However, the Court of Appeals correctly concluded that because the case could be disposed

through the interpretation of Wis. Stat. § 895.85(3), the Other Issues (including the constitutional issue) need not be reached.

To the extent that any reconsideration of the Court's Review Order is grounded in concerns that the Court will be reviewing constitutional issues in Strenke v. Hogner, Case No. 03-2527, those concerns are not well-founded. Review of punitive damages for compliance with due process is an inherently fact and case specific exercise. (See Apex Electronics Corp v. Gee, 217 Wis.2d 378, ¶ 27 (1998), Jacque v. Steenberg Homes, Inc., 209 Wis.2d 605, ¶ 42 (1997)).

In Strenke, the defendant engaged in repeated criminal behavior, and arguably created a situation where a jury could conclude that punitive damages were appropriate.

In this case the Trial Court found, and the Plaintiffs admitted, that injury was not practically certain to occur. There was no prior criminal sanction and the injured parties have received full compensatory damages in excess of $5 million, which certainly could not be considered "*de minimus*" under any possible definition of the term.

A decision by this Court on the constitutional issues in Strenke, whatever it may be, can not be viewed as dispositive (indeed may not even be relevant if based on the *de minimus* or criminal issues) to the constitutional analysis in this case.

Generally, this Court has the benefit of an analysis and thorough opinion from the Court of Appeals on the issues it accepts for review. In this case, the Court of Appeals explicitly reserved expressing any opinion on the Other Issues. However, the Court of Appeals did take the effort to list all the Other Issues raised by each party in footnote 4 of its opinion. The Court of Appeals took extensive briefing and conducted an entire day of oral argument on this case (which is actually three combined cases), including extensive argument on the Other Issues.

Having invested such judicial resources, it would seem wise to allow the Court of Appeals to opine on the Other Issues if those issues must be reached. Such an approach would represent a better use of the judicial time and effort already expended in this case, and will give this court the benefit of an opinion below if that becomes necessary.

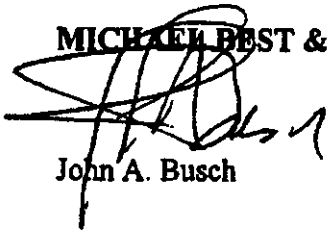
Finally, it is an oft-cited proposition that constitutional issues should not be reached when other issues may dispose of the matter. (See State v. Castillo, 213 Wis.2d 488, 492 (1997) ("An appellate court should decide cases on the narrowest possible grounds. Consistent with this rule is the recognition that a court will not reach constitutional issues where the resolution of other issues disposes of an appeal.")) If this Court were to take the Constitutional issue for review now, it would be doing just that. A review of the Other Issues raised by Federal and by the initial Defendant, MHIA, demonstrates that the Other Issues of statutory interpretation and the exercise

of discretion by the Trial Court could also be dispositive. The constitutionality of the award should not be reviewed when such matters are yet to be resolved with finality.

For all the above reasons, Federal urges the Court to proceed as has been outlined in the Review Order and the Clarifying Order. Per the direction of Attorney Jeffrey Fertl, we are authorized to state that Tokio Marine & Fire Insurance Company joins in this letter.

Respectfully submitted,

MICHAEL BEST & FRIEDRICH LLP



John A. Busch

JAB:cdl

cc: *See attached service list*

1 been motions filed just about potentially everything that
2 there could be filed, and lot of them again interrelate.
3 Mr. Habush and Mr. Lowe, in response to Mitsubishi's
4 request for a credit of settlement in their motion, on
5 anything that could be potentially entered, the plaintiff
6 in their brief did not oppose MHIA's request that a credit
7 be given against the compensatory damage award by virtue
8 of the pre-verdict settlement agreement of October 27 of
9 2000. And Mr. Carlson from Lampson does not object to
10 that. And Mitsubishi is asking for it. And the plaintiff
11 -- plaintiffs want to give it. And therefore, there's no
12 dispute on that issue. It's satisfied. Credit's given,
13 and it's satisfied.
14 That does render, and I agree with the plaintiff,
15 that does render everything that relates to the
16 compensatory damages as no longer an issue in the case.
17 It's resolved. It's been satisfied. It's moot.
18 The only thing remaining is the punitive damage
19 issues. Because no matter how the verdict would turn out,
20 or no matter how the court would treat the jury's verdict,
21 or how or any appellate court would deal with the issues,
22 whether it's the Court of Appeals or the Wisconsin State
23 Supreme Court, or any other tribunal, you've got millions
24 of dollars given in partial settlement credits, and it was
25 to the benefit of Lampson, it was to the benefit for MHIA,

1 it was also there for the insurance companies, and they
2 were to take care of the compensatory damages, and the
3 compensatory damages have been completely paid, so there's
4 nothing to argue about any more. It is moot. And if
5 judgment is entered, whether it's interlocutory or final
6 judgment, it is satisfied. But what I'll try to deal with
7 though is some of the motions for relief that still argue
8 error under the standards and the cases and statute I've
9 cited, in the event an appellate court disagrees with this
10 trial court's ruling.
11 But I do agree with plaintiff's brief at page 8,
12 where it's stated: "By settling all compensatory damage
13 claims, MHIA's issues with the jury awards for
14 compensatory damages are moot, and it would be a massive
15 waste of resources to retry damage issues that have been
16 settled. MHIA has also failed to show that the damage
17 awards are unsupported by the credible evidence or that
18 they are against the great weight or clear preponderance
19 of the evidence. Finally, there is nothing to suggest
20 that the jury acted with passion or prejudice so as to
21 justify throwing out its carefully considered verdict.
22 The motion for a new trial of compensatory damages should
23 be denied."
24 That's basically saying why are we having a new trial
25 on compensatory damages when it's basically paid out and

1 accepted. And I agree with that.

2 MHIA also brings a motion for a new trial or

3 remittitur of the punitive damage award, and that I want

4 to address a little bit.

5 The court's prior decisions on this subject stand. I

6 think it's very clear, if you look at the record -- one of

7 my reporters advised me that during the course of this

8 trial there was seven thousand pages of trial testimony,

9 and arguments, and not counting exhibits, not counting the

10 motions in limine that we spent several whole days on, and

11 not counting all the other pretrial proceedings and

12 discovery that took place.

13 The issue of punitive damages was brought up

14 throughout the whole course of this litigation, and the

15 positions of the plaintiffs were made fairly clear. At

16 one time they were also seeking punitive damages against

17 Lampson, and the position of Lampson by Mr. Carlson was

18 made fairly clear, but the position taken by the lawyers

19 for Mitsubishi become very unclear and blurred.

20 And when any appellate court or tribunal that would

21 address these issues, it becomes very important to look at

22 the entire record and consider the entire record, because

23 the record will demonstrate unequivocally, if you track

24 the punitive damage issue or some other issues, that the

25 lawyers for Mitsubishi took inconsistent and contradictory

positions throughout the litigation. And when they determined that a position was favorable to them, they would assert it. And when they determined that the position they previously asserted was not favorable, they disregarded it and asserted an opposite or contradictory position.

So if one simply just at first blush looked at the record, for every argument that the lawyers for Mitsubishi made today, you could find somewhere in the record a consistent position they asserted earlier, but by the same token, you can find the exact opposite position that they asserted earlier. So they've picked and choosed their positions in this case on behalf of their client.

Punitive damages. When the issue first came up, and the plaintiffs sought to get discovery, Mitsubishi lawyers vehemently objected to any discovery on punitive damages. They talked about the privacy of their client, which this court respected, the disclosure of information that may not be evidence that would be provided during the course of trial that would rise to the level of allowing a jury to consider punitive damages, and that it was simply not discoverable.

They also took the position that since the plaintiffs were seeking punitive damages against Lampson, that when the plaintiffs seek punitive damages against two or more

defendants, that wealth cannot be discovered, it cannot be provided, and it cannot be addressed to the jury.

And after a lot of court rulings on this subject, the court asked that the information as to the financial status of Mitsubishi and Lampson -- Mr. Carlson was not at a point where he had to take a position for Lampson, but he was going to wait and see how the court was going to rule on it as relates to Mitsubishi, but bottom line is all that information with regard to Mitsubishi was placed in an envelope, held by the Mitsubishi lawyers, and at the appropriate time during the course of trial considered by the court as to whether there was enough evidence, applying the standards, looking at the evidence in the best light of the plaintiff, and not prejudging the case, whether they'd be able to have access to that information. And I ordered access.

No one has showed me that packet of information. I set guidelines on what that packet of information should include. And just looking at the way and the manner in which the parties have responded, it doesn't appear that the information that I requested be held in camera by the lawyers provided a fair, accurate, complete set of documents so that all parties could be on a level playing field with respect to the issue of punitive damages and the wealth of the -- of the defendant Mitsubishi or the

wealth of the defendant Lampson. And the plaintiffs withdrew their request for punitive damages as it relates to Lampson.

There was also a lot of argument as to whether or not there was insurance coverage for punitive damages, and there was a lot of position taking by the parties as to whether the jury could be aware of whether there was insurance coverage for punitive damages in this case. And there was a lot of posturing.

The very bottom line is that the Mitsubishi lawyers, who didn't want any discovery of the wealth or liabilities of Mitsubishi to be disclosed to anyone in the whole world, not just the plaintiffs and Carlson, but not be accessed by anyone, that after that in camera material was turned over pursuant to the court order, Mitsubishi filed an offer of proof with regard to their financial health or ill health with respect to the punitive damage award. And when they filed it, they filed the wrong documents. They filed Mitsubishi Heavy Industries of Japan. Their offer of proof, they grabbed the wrong set of documents and they filed them. And that's in the record. And then they picked up their own error, and then they filed another set of documents as an offer of proof involving MHIA. And they tried to withdraw their offer of proof for Mitsubishi of Japan. But they wouldn't let the plaintiff or any of

1 the other parties to this action have discovery, but they
2 wanted to use it during the course of this trial. That
3 created unfairness to the plaintiffs and the defendant
4 Lampson, and it was to their prejudice.
5 There was a disregard to follow the prior scheduling
6 orders of the court, and there was a disregard to carry
7 out the orders of the court during the course of trial.
8 They vehemently, the lawyers, argued that wealth or the
9 economic health of Mitsubishi could not be brought before
10 this jury before trial. Now, in their motions for
11 punitive damages, they argue that they should have been
12 allowed to deal with the health and economic posture of
13 Mitsubishi America, MHIA, here before the jury.
14 So they've been on both sides of the fence so often
15 that the record's replete with them taking inconsistent
16 and contrary positions on behalf of their clients. On one
17 end they say we shouldn't know wealth, on the other end
18 they say well, we should have been able to tell them about
19 our wealth because our records would not support a
20 punitive damage verdict in that amount.
21 And as I indicated in the prior rulings of this case,
22 the lawyers, in taking their position on behalf of their
23 client, have waived any opportunity to be further heard on
24 that subject, and the court's prior sanctions and orders
25 stand.

1 I would note for the record, and I'm referring to the
2 plaintiff's brief and as documented by very clear
3 Wisconsin case law -- I'm going to mispronounce the name
4 -- it's J-a-c-q-u-e, 209 Wis. 2d at page 626. And that
5 case dealt with trespass to land. The compensatory
6 damages were really one dollar nominal damages, and the
7 jury awarded a hundred thousand dollars punitive damages,
8 and Wisconsin law made it clear that you do not apply a
9 multiplier. You do a qualitative analysis, not a
10 quantitative or a numerical analysis when addressing the
11 issues of punitive damages.
12 I'm supposed to look at the evidence in favor of
13 supporting the jury's verdict, and in looking at the
14 evidence in favor of supporting the jury's verdict there
15 is more than sufficient evidence to support the jury's
16 verdict that MHIA's conduct was reprehensible and
17 grievous. There is substantial evidence in the record to
18 support the jury's verdict that there was an intentional
19 disregard of the rights of others, not just the
20 plaintiffs.
21 I'll have to get to this later, but I will note for
22 the record that Mr. Habush in closing arguments discussed
23 the jury -- to the jury the cost of MHIA in putting on the
24 roof. He said forty-seven million dollars.
25 Well, you were all here, though I'm not going to

1 bring the jury testimony into this case, but you did have
2 the benefit of hearing the media and the press talk to the
3 jury. They did very clearly say that they reached the
4 ninety-four million dollars by doubling the forty-seven.
5 They also discussed the punitive damage verdict.
6 Strike that. They also discussed the compensatory damage
7 verdict. And I'm not relying on what the jury said or
8 didn't say, but I think the record should indicate that
9 we've all had the benefit of hearing the jury express some
10 of their thoughts at the request of the media, since this
11 is a public trial. And the jury in this case themselves
12 chose to proceed with that inquiry, based upon that
13 format, because they did not want to discuss the case
14 again with anyone and they wanted to be left alone. And
15 that's basically the reason why the court entered the
16 orders dealing with any of the parties having any contact
17 with the jury.
18 Now, in the case of United States v. Lane, 474 U.S.
19 438, a 1986 case, at page 11, the court talks about
20 evidence and the harmless error rule. The court stated at
21 page 450 of that decision, page 11 of the computer Lexis
22 printout: "In the face of overwhelming evidence of guilt
23 shown here, we are satisfied that the claimed error was
24 harmless. When evidence on misjoined count 1 was
25 introduced, the District Court provided a proper limiting

1 THE COURT: Yes, sir.

2 MR. HABUSH: And incorporating as basis that
3 which is stated today as well as that stated in prior
4 briefs, on motions in limine, motions on evidence, and
5 motions on dispositive motions?

6 THE COURT: There is no question about it.

7 MR. HABUSH: Okay.

8 THE COURT: I came to the conclusion that it
9 would be a waste of time, and it would create more
10 confusion than what has already been attempted to be
11 created by some of the litigators in this case, by trying
12 to restate that which has been previously decided. So all
13 the prior court rulings on its motion -- on the motions
14 after verdict, all the prior court's rulings on the
15 motions during the course of the trial, motions in limine,
16 stand and are reaffirmed, and I adopt the reasoning,
17 rationale and the arguments asserted, in not only the
18 plaintiffs' briefs and documentation submitted in
19 opposition to those motions, but also those submitted by
20 the plaintiff -- by the defendant Lampson. Otherwise I
21 could issue an oral bench decision longer than Tolstoy's
22 War and Peace.

23 All right, we will take a 15 minute break and we'll
24 reconvene. Thank you. We're in recess.

25 (Whereupon a recess was taken.)

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25

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13 EXHIBITS
14
(None.)
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1 TRANSCRIPT OF PROCEEDINGS
2 (Whereupon, the following proceedings
3 were held in chambers outside the presence of the
4 jury:)
5 THE COURT: We're on the record.
6 MR. WEBER: Before we get started, I
7 am filing with the Court, under seal pursuant to the
8 Court's request, MHIA financial statements for 1997,
9 1998 and 1999. Mr. Habush and I had a discussion
10 about the scope of the request and this is what we
11 had greed MHIA would produce.
12 THE COURT: Thank you. I will hold it
13 until the appropriate time and make a decision.
14 Joan?
15 Have you gentlemen come to any
16 consensus on this jury issue where Mr. Habush said
17 his rough running tally on the questionnaires
18 indicated 60 people had no opinions, no problems
19 serving this long? I mean, are we -- are you able
20 to stipulate -- I'm not looking for positions. I'm
21 just wondering, are you able to stipulate as to any
22 of that to reduce the panel to a good healthy group
23 that none of you think have any real problems, or
24 are we still back where we were yesterday?
25 MR. BELL: We haven't had a chance to

1 talk amongst ourselves yet.
2 THE COURT: Okay. Let me tell you
3 what I'm thinking about then, all right, so you can
4 make choices. Whether you swim with the piranhas or
5 you swim with the great whites, that's the best I
6 can give, and maybe you'll be in the blue lagoon and
7 I'll be happy, but let me give you some of the
8 thoughts that I -- and I get in trouble by this
9 because I end up setting myself up by allowing you
10 lawyers to come back and think of reasons I'm wrong,
11 but I'd rather do that. In fairness to you, letting
12 you know where I'm going enables you to represent
13 your clients in the best possible light and you
14 don't have to try to guess as to what I'm saying.
15 And I'll keep an open mind if I'm
16 wrong, but I would suspect that I could just ask --
17 just keep the participation with the first 60
18 jurors, ask the remaining just to sit there so that
19 they hear everything, okay. I will allow -- I will
20 continue to allow for a little bit longer each of
21 you to present your case during voir dire.
22 Mr. Carlson will have, in a general sense, about
23 another 15 minutes.
24 MR. BELL: This is closing arguments,
25 your Honor?

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1 you will move the rear crawler and this tub rotates.
2 The kingpin that Mr. Bell mentioned to you is
3 located as a centering device right in here, okay.
4 The Transi-lift comes in a variety of sizes, from
5 around 350 tons up to around 2,600 tons. It has the
6 capacity to pick up for the smaller ones 350 tons
7 without falling over, without breaking. For the
8 2,600, you can pick up 2,600 tons. It's a lot of
9 weight, 2,600 times 2,000, without breaking, without
10 falling over, and it's used worldwide.
11 Lampson International is proud of its
12 crane for good reason. It's used in the nuclear
13 power field, it's been used by our government to
14 pick up live nuclear warheads, it's used to pick up
15 huge rocket motors for the Triton missile, it's used
16 to build stadiums such as the Olympic Stadium, it's
17 used to build huge bridges, buildings, used a lot in
18 the petroleum refinery industry. It is used in any
19 application where large engineering construction or
20 architectural firms, companies and refineries have a
21 need to pick up a large, heavy object and move it
22 from one place to another.
23 The cranes -- this crane, as it's
24 designed, is used in Australia, it's used in Pacific
25 rim, it's used in Japan, it's been used -- a larger

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1 Transi-lift has been used by Mitsubishi in Japan,
2 it's used in Russia, it's been used in Europe, it's
3 been used in the United States of course, Canada,
4 South America, Brazil, Chile. It's a crane and it's
5 designed in a configuration that has been used and
6 accepted everywhere.
7 Mitsubishi is a huge engineering,
8 construction and manufacturing organization. It
9 does build domed stadiums. It does build stadiums
10 that you can expand from 6,000 feet -- 6,000 person
11 capacity to 40,000 in 20 minutes. It builds huge
12 ocean-going vessels. It uses cranes every day in
13 this activity. It builds bridges, nuclear power
14 plants, kilo thermal plants, has wind farms. It
15 uses cranes every day. Mitsubishi has a crane
16 division. It has its own crane division.
17 Mitsubishi has fine crane engineers and Mitsubishi
18 in Japan knows how to run the crane. It does not
19 need -- and the evidence will show this -- Lampson
20 International, Bill Lampson to tell them how to run
21 cranes. It uses them every day.
22 Lampson International and Neil F., and
23 you can tell from where the name Neil F. Lampson
24 came from. It's from Bill Lampson's dad. Bill
25 Lampson is president of Lampson International now.

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1 It's a family company and it is in Washington, and
2 it has not only built cranes such as this but it
3 also buys, purchases cranes and leases them,
4 including a lot of Manitowoc cranes, and there's
5 some significance to that which we'll talk about in
6 a little bit.
7 I have to put one more line in here.
8 In designing this crane, it has certain unique
9 characteristics to it. A normal crane's track
10 pressure -- just going to make a real small -- as
11 the boom moves forward, it has counterweights and
12 you can have track pressure that's uneven. You can
13 have -- if it doesn't have anything on the load, it
14 would be heavy back here, and if it does have
15 something, a heavy weight on the load, then the
16 pressure is heavier here. It's different than a
17 Transi-lift.
18 Transi-lift by its design has even
19 track pressure throughout. That has particular
20 value when you're working in areas, for example, if
21 you have soil conditions that perhaps are somewhat
22 unstable, the Transi-lift gives you the opportunity
23 to work in an area which can maximize your
24 stability. All right. Now, I'm going to move this
25 out of the way. With any luck at all, I can do it

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1 without hitting anybody.
2 The Transi-lift can be used and is
3 often used to pick up heavy objects and there's
4 virtually no chance of having a side load on it.
5 There's no wind -- when you have a slim, long, round
6 heavy object and no wind, you're never going to have
7 a problem with any kind of a side load. If it's
8 used with some types of structures, such as the
9 Mitsubishi roof truss, it will almost act like a
10 wind sock catching the wind.
11 When Mitsubishi decided it wanted to
12 use a Transi-lift, it had a number of options.
13 There's about -- there's more than 30 Transi-lifts.
14 There's about seven of this size. There's about 30
15 or 31 Transi-lifts available for use worldwide.
16 Mitsubishi could buy one. Pretty expensive and --
17 but Lampson does sell them. They could have
18 contracted with Lampson for Lampson to do all of the
19 lifts, okay. In other words, Lampson would -- could
20 be contracted with, come in and do everything from
21 setting up the crane, the ground preparation, to
22 engineering of the lifts, all right, determining all
23 of the information necessary to do it right, and
24 then put the pieces in place. Lampson could be
25 contracted to do that.

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1 at a walk -- what they would need for assembly.
2 pardon me, look at a walk path, a walkway to get
3 inside the stadium, so they could hire a geotech
4 person to quantify the ground where the crawler
5 would be walking.
6 Milo could basically say, here's the
7 area we're going to need to walk from where you put
8 it together to how you get in the stadium so they
9 could do their proper ground inspections and do
10 their geotech surveys.
11 Q Did you make it clear to Victor and Moto that
12 Lampson was not going to be doing the wind
13 calculations?
14 A We basically told them that the only help we would
15 give them would be the rigging -- rigging studies,
16 as far as the amounts and lengths of rigging. The
17 size of rigging, once they get their center of
18 gravity, and the size of their picks, that would be
19 the service that John Bozung would provide, and
20 that's all that we had offered.
21 We had offered, as well, to assign
22 John on a more permanent basis, Bozung, to the
23 project, and they felt that was not necessary. They
24 felt he could make a site visit as necessary and
25 communicate with Moto and Victor and Dennis on what

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1 communication information he might need and get the
2 information forwarded to them.
3 Q At the time of your deposition that I took on
4 August 23rd, 2000 -- Do you remember when I took a
5 deposition of you?
6 A Yes, sir.
7 Q And on page 32, I asked you this question:
8 "Who did you make that clear to at
9 Mitsubishi that you would not be doing any wind sail
10 calculations on the load?
11 "Answer. Victor and Moto were both in
12 the meetings.
13 "Question. And did they indicate by
14 either vocal response or nodding of the head that
15 they understood that?
16 "Answer. They understood very clearly
17 that we were not doing anything but helping with
18 rigging and capacities of the machine.
19 "Question. Did they say okay, nod
20 their heads, did they indicate assent?
21 "Answer. Yes. There was always a lot
22 of head noddings in this case."
23 Do you remember those questions and
24 answers?
25 A Yes, sir.

Page

1 Q Do you stick by those?
2 A Yes, sir.
3 Q And on page 31 of the same deposition, this questior
4 and these answers were given to you:
5 "Question. Was there any discussion
6 between you and Victor as to how he might ensure
7 that wind would not be a problem on specific loads?
8 "Answer. He needed to take into
9 effect, once the pieces were decided, how big they
10 were going to pick, and where they were going to be
11 picked, take into account all the ramifications
12 taking a pick of this size and how the wind would
13 affect it.
14 "Question. Did you say to him in
15 these meetings that that's going to require some
16 engineering considerations and calculations for you
17 to have to do in order to make sure it would be a
18 safe pick?
19 "Answer. I told Victor that whatever
20 forces it took, his engineering, Moto, whoever he
21 had on-site, all these factors had to be considered
22 before the lift was made in any kind of wind."
23 Do you remember that?
24 A Yes, sir.
25 Q Do you stand by that?

Page 5

1 A Yes, sir.
2 Q Now, at some point the negotiations got down to hard
3 numbers and hard information, correct?
4 A Yes, sir.
5 Q And eventually what was decided on was what is known
6 in the trade as a bare lease?
7 A Bare lease, yes, sir.
8 Q And that's a lease in which the equipment is leased
9 in a contract to the user, correct?
10 A Yes, sir.
11 Q That can be with or without crew.
12 A Yes, sir.
13 Q In this instance it was decided in negotiations to
14 send along a crew.
15 A Yes, sir.
16 Q And that required a crane operator.
17 A Yes, sir.
18 Q A mechanic, who turned out also to be the rear
19 crawler operator.
20 A Yes, sir.
21 Q Mr. Aldrich. The crane operator at that time, the
22 first one who went over there, was what, Randy
23 Meise?
24 A Randy Meise, yes, sir.
25 Q And you guys picked Milo Bengtson to be the crane

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1 The other book could be used by MHIA on any job
2 other than here at Miller Park. It's for their
3 employees.
4 Q Now, what you haven't told them is how those books
5 came into existence and what role you played with
6 regard to those, to those manuals.
7 A All these books that I've compiled here were from
8 other jobs, the things that worked on my other jobs,
9 what made the jobs safe. Are they my original
10 thoughts? No. People had these thoughts prior to
11 me coming to this job or prior to me becoming a
12 safety man, but they are accumulated over a period
13 of time through OSHA, through ANSI, and it's the
14 rules and regulations governing our particular types
15 of work. And companies can have stronger ones or
16 weaker rules depending if they meet the OSHA
17 standards.
18 The OSHA standards are the minor
19 stuff. Companies can say instead of being allowed
20 to work in 20 miles an hour, a company could say
21 well, you have a right, we're not going to allow you
22 to work in less than 5 miles an hour. A company has
23 that right to make it stronger or use the minimums.
24 Q Now, Mr. Noel, what we haven't told the ladies and
25 gentlemen of the jury is what is your background,

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1 what --
2 A I -- I came out of the West and metal fabrication
3 shops. I was a nonunion ironworker. I'm sorry, out
4 West there's people that are nonunion. We do work
5 on mines, heavy structural steels. I have expertise
6 in welding. I spent many hours in a man-basket. I
7 spent many hours signaling cranes. I -- I have
8 grace on the iron -- or I had grace on the iron.
9 When I was younger, I could walk the iron. I know
10 what those guys do when they're up there. I know
11 what type of work they are -- I know the type of
12 work that they do and I understand what they go
13 through.
14 Q You ever been injured as an ironworker?
15 MR. HABUSH: Objection --
16 THE WITNESS: Yes, sir.
17 MR. HABUSH: -- relevancy.
18 THE COURT: Sustained. Jury can
19 disregard it.
20 MR. BELL:
21 Q Are you a crane operator?
22 A No, sir.
23 Q You answered a question of Mr. Habush's that you've
24 been involved in over a hundred critical lifts. Is
25 that as someone operating the cranes?

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1 A No, sir, I wasn't operating the crane.
2 Q Were you involved with the operators of the cranes
3 in those lifts? What role did you play in those
4 lifts?
5 A Basically making sure that the men were in safe
6 positions, that they weren't -- the load wasn't
7 going to be flying over them, that we had the proper
8 rigging. In other words, the rigging wasn't bad,
9 old, rusty, so on and so forth. I did rigging
10 inspections.
11 I have also inspected them as far as
12 their personal tools, being save to use at
13 elevations, and also making sure that any electrical
14 cords or anything else that they might be using at
15 an elevation would be safe for them to operate with;
16 making sure that other people didn't interfere with
17 them or with the crane; that there was coordination
18 between cranes operating.
19 Q Briefly, the prelift meeting that morning, can you
20 tell me the type of discussions that were held
21 during that meeting, what was discussed with the men
22 about the lift that was planned for that day?
23 A We did the safe plan of action. We covered rescue.
24 I don't have it here in front of me, but rescue,
25 communication, who's in charge, different means of

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1 concerns, radio communication, what channels
2 possibly we would be using. That was normally done
3 by myself, and the guys were used to me saying it
4 because basically it was over and over again because
5 those are the key factors in a safe plan.
6 You also had Victor Grotlisch, who I
7 turned the meeting over to after I did my part, and
8 then after Victor did his talk, it went to Mr. Allen
9 Watts and he explained what was going on that day,
10 what we were trying to accomplish, the methods and
11 means that would be utilized, all parties involved
12 in that pick, support groups from other companies
13 would be there. That's pretty much it.
14 Q Let me show you -- you mentioned safe plan of
15 action.
16 A Yes, sir.
17 Q Mr. Noel, behind you, is that what you were
18 referring to?
19 A Yes, that's what I'm referring to.
20 Q Was that discussed at the prelift meeting that
21 morning?
22 A Yes, it was.
23 Q And have you discussed with us the various items
24 that were talked about there?
25 A No, but I could go over those if you want me to go

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1 over it, or they can read it.
2 Q Well, can we –
3 MR. HABUSH: Can we have it question
4 and answer, please?
5 MR. BELL:
6 Q Was weather discussed?
7 A Yes.
8 Q And what was discussed with regard to how you were
9 going to obtain your weather?
10 A The weather would be acquired through the Doppler
11 system that we have on site.
12 THE WITNESS: Everybody here know what
13 a Doppler system is?
14 THE COURT: You asked a question
15 now –
16 MR. HABUSH: Excuse me.
17 THE COURT: Just a second. You answer
18 the question. You're not here to explain.
19 THE WITNESS: Okay.
20 THE COURT: Okay. Thank you.
21 THE WITNESS: Okay.
22 MR. BELL:
23 Q Explain to the ladies and gentlemen what that
24 Doppler system was that you had at the site. Where
25 was it located?

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1 A The Doppler system was located in my trailer, the
2 safety trailer, and everybody had access to it.
3 Q What did it look like?
4 A It looks like a monitor. It's a little fatter than
5 this one and it has a screen. It has a mouse like a
6 computer, and you could go to different items of
7 concern on it, an index.
8 Q I see the item 12 it talks about man-basket use.
9 What is the safe plan there that you have next to
10 that, to the right?
11 A The safe man-basket use is a set of forms that the
12 men would have to fill out, the operator and the men
13 that were going in the basket. All those criteria
14 would have to be fulfilled before they could use the
15 man-basket, and everybody that was involved with
16 that man-basket, the operator and the people in it,
17 would have to say yes, it's safe to use.
18 Q There was -- was there an actual document that had
19 to be prepared?
20 A Yes, there is.
21 Q And who set up those procedures of these particular
22 forms and documents that had to be filled out?
23 A There are forms and procedures that I've used on
24 other projects that we brought here, and DCCI would
25 be the ones that would use the procedures and fill

Pa

1 them out. In other words, their superintendent,
2 Mr. Wischer, Mr. Diver -- Mr. DeGrave, I'm sorry
3 they would fill these out with their men and then
4 their men would sign it and then the operator wou
5 sign it that all conditions had been met and it was
6 safe to operate.
7 MR. BELL: Ralph, at the top of the
8 document? Item –
9 MR. CARLSON: Your Honor, while he'
10 doing that, would you ask Mr. Bell to advise us w
11 the exhibit number is, please?
12 MR. OWENS: It's Defendant's 2157.
13 MR. CARLSON: 2157. Thank you.
14 MR. BELL:
15 Q Item number 4, who was in control of the pick?
16 A Who's in control of the pick would be the flagge
17 Mr. Allen Watts. He would be in control of the
18 pick. Mr. Dennis Frazer is also –
19 MR. HABUSH: Excuse me. Excuse me
20 Could I have that question again? Sorry, I was
21 daydreaming.
22 MR. BELL: I'm asking him what the
23 document's item number 4 says, who was in contr
24 the pick, and I'm having him explain that.
25 THE WITNESS: Mr. Dennis Frazer was

Pa

1 control of the block when it was on the ground.
2 When the block left the ground, Mr. Watts was in
3 control of the piece, along with his operator.
4 MR. BELL:
5 Q Explain to the ladies and gentlemen of the jury wh
6 you mean when the block is on the ground. What i
7 that about?
8 A It's safer to build the blocks on the ground so that
9 it's closer to the ground, it's safer for the men to
10 build them, and that way we build them on the
11 ground, we don't expose them to the hazards in the
12 air. It's done on the ground. And there's always
13 problems, things don't fit, this weld, that weld,
14 whatever, there might be something wrong or some
15 fabricated it wrong. What happens is it's repaired
16 and done on the ground. That's what Mr. Frazer w
17 in charge of, making sure that those blocks were
18 ready to fly.
19 Q Now, did you discuss at the prelift meeting who w
20 going to be in control of the lift once the block is
21 off the ground?
22 A Yes, sir, I did.
23 Q Mr. Noel, I'm going to show you a two-page docu
24 MR. BELL: Which is Mitsubishi Exhibit
25 2213, Kevin?

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1 MR. OWENS: Yes.
2 MR. BELL:
3 Q It's two pages. Can you tell us what that two-page
4 document is?
5 A These are my notes for the prelift meeting.
6 Unfortunately when I get up there, I talk to people
7 and I want to make sure --
8 MR. HABUSH: Your Honor, I believe he
9 answered the question.
10 THE COURT: Yes.
11 MR. HABUSH: Without the speech,
12 please.
13 THE COURT: Sustained, the answer will
14 be stricken.
15 MR. BELL: I'm going to put this up so
16 that the ladies and gentlemen can see what we're
17 talking about.
18 Q Mr. Noel, above you I've just placed that document.
19 Can you explain what is on there and how you used
20 that at the prelift meeting?
21 A Yes. These are the notes that I used myself at the
22 prelift meeting to make sure that I cover certain
23 points that are important. In the prelift meeting I
24 go over, and I want to say I -- and I know what this
25 means because I'm the one that says it. Anyone in

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1 this room or outside this room can stop this pick on
2 the LTL number 3, block 3, for any reason at any
3 time if it's unsafe to continue.
4 THE WITNESS: And, ladies and
5 gentlemen --
6 MR. HABUSH: Excuse me.
7 THE WITNESS: -- that's what I meant.
8 MR. BELL:
9 Q And what do you mean by unsafe? What were you
10 referring to? Give us an idea.
11 THE COURT: Just a second. You can
12 rephrase that question again. Just -- you can
13 restate the question again.
14 MR. BELL:
15 Q When you use the term --
16 THE COURT: Just a second, sir. You
17 cannot do anything other than be responsive to the
18 question. Don't say anything else, nothing
19 superfluous, only answer the question in a
20 responsive way. Do you understand that?
21 THE WITNESS: I'll try very hard, sir.
22 THE COURT: No. You'll do it. You
23 just don't try because we've talked about it.
24 Continue.
25

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1 MR. BELL:
2 Q Mr. Noel, when you used the term unsafe on this
3 note, what were you referring to?
4 A I was -- I was referring to anything that could be
5 objectable by anyone that they thought this would be
6 unsafe. It could be wind, it could be any condition
7 with the block, it could be a piece of equipment's
8 not operating properly. If they had problems with
9 the tugger and they said, Hey, this isn't safe, we
10 can't continue, that person, that tugger operator
11 could have said, Hey, we're shutting this down.
12 That crane would stop.
13 Q Now, what did you expect these men to do? Who did
14 you expect them to call? Were you going to be
15 involved in this?
16 A I expected them to call myself, Mr. Watts, anybody
17 that had a radio, Mitsubishi, anybody for Mitsubishi
18 that was there. Mr. Watts is the person that's in
19 control of that pick once it's off the ground.
20 Q Did they -- did you expect them to call you if they
21 had a safety concern?
22 MR. HABUSH: Objected to leading.
23 THE COURT: Sustained. Rephrase it
24 for clarification.
25

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1 MR. BELL:
2 Q Can you tell us whether or not you expected to be
3 involved in any questions concerning safety?
4 A Yes. Normally they are quite vocal. They don't
5 like something, they'll come and tell me or they'll
6 tell one of the other safety people --
7 THE COURT: You know, you answered the
8 question. Now -- now you're going on and you're
9 telling stories, and I don't want you to tell
10 stories. I just want you to answer the questions.
11 Do you understand me, sir? Otherwise I'm going to
12 have all the lawyers ask you very, very specific
13 questions. We might go down to a yes or a no.
14 Let's proceed.
15 MR. BELL: Ralph, would you put the
16 second page of his notes up there?
17 Q Mr. Noel, there's a note up there clear all levels.
18 Can you explain to the ladies and gentlemen what
19 that refers to?
20 THE COURT: You can explain it. He
21 asked you to explain it. Now you can explain it.
22 Just explain that; okay? Thank you.
23 THE WITNESS: Yes, sir. OSHA says
24 that you cannot fly a load over anybody, okay, and
25 that's in the pathway of where this piece is going

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1 to fly. The building is in the pathway where the
2 block would fly, so I had to make sure with other
3 safety people that the building was completely clear
4 and that it was deemed safe.
5 MR. BELL:
6 Q Can you recall the questions from Mr. Habush earlier
7 this morning about where you were located during the
8 afternoon of this lift, where we had an overhead, an
9 overhead photograph shot? And I want to put that up
10 on the, so the ladies and gentlemen can see where
11 you were located.
12 MR. BELL: Ken, that was Exhibit
13 1831A. 1831A.
14 MR. OWENS: Here, John.
15 MR. BELL: I have the board copy of
16 it. It's 1831H on this board, and it's also
17 TRI08618.
18 Q Mr. Noel, let's work with the board. You marked X's
19 on this this morning. Can you explain to the ladies
20 and gentlemen of the jury what you were, what you
21 were doing up there on the terrace level?
22 A I was -- this is the terrace level. I was up there
23 to make sure that no ironworkers would get up on the
24 iron prior to the piece being deemed safe for them
25 to get on.

Page 13

1 A It -- back then, it probably took anywhere between
2 35 minutes to 55 minutes. I can't be -- I didn't
3 time myself.
4 Q During the course of the day, did any -- any of
5 these supervisors come up to that terrace level
6 during the course of the lift prior to the accident?
7 A Right towards the end, yes, sir.
8 Q You heard a gentleman by the name of Mr. Upton. Do
9 you recall him coming up there that day?
10 A Yes. Mr. Kurt Upton came up there that day.
11 Q And can you tell the ladies and gentlemen of the
12 jury where he came from?
13 A When I saw Mr. Upton, Mr. Upton was on the terrace
14 roof walking across this area here at that time.
15 Q And which direction was he walking?
16 A He was -- he was on the south side and he was
17 walking from south to north.
18 Q And where were you standing when you saw him?
19 A I was standing probably somewhere right in this area
20 (pointing) or this area here (pointing).
21 Q And did you have any discussion with him?
22 A Yes, I did.
23 Q What was it about, what did you say?
24 A I started -- could you repeat the question?
25 Q What did you say to him?

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1 I was also up there to make sure that
2 nobody would go in this area or underneath the
3 block. We red flagged five levels, checked all of
4 the rooms to make sure that nobody was in there, and
5 that was my purpose of being there, sir.
6 Q What time of day did you get notification that you
7 should begin to clear the area?
8 A I got notification at 11:40 a.m.
9 Q And who did you get notification from?
10 A I got notification from Victor Grotlisch.
11 Q And did you remain at that level for the rest of the
12 day?
13 A Yes, sir. I remained at that level or the level
14 right directly below it the rest of the day.
15 Q With respect to the raising of the man-basket with
16 Mr. Wischer and Mr. DeGrave and Mr. Starr, who gave
17 the order for that man-basket to go up?
18 A Allen Watts would call for them. He would need the
19 men in the man-basket to sight over the top of the
20 roof or the structure.
21 Q How long did it take you to clear that section of
22 the stadium?
23 (End of take.)
24
25

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1 A I was hostile at first to him because he violated
2 the space up there. I saw that it was a
3 superintendent, his first day. And then we moved
4 from that point there to this point there where we
5 couldn't -- where we concluded our conversation or
6 continued our conversation on other subjects.
7 Q You were asked about the concrete block that had
8 been placed on panel 4R3. Do you recall that
9 discussion this morning?
10 A Yes, sir.
11 Q And I believe you indicated that you had no concern
12 about the placement of the concrete block there?
13 A That's correct, sir.
14 Q Can you explain that to the ladies and gentlemen of
15 the jury?
16 A Yes. The ironworkers that were working out there
17 are the ones that place it on the block in the
18 position that Mr. Watts told them to position it to
19 do whatever they were trying to do. Actually, they
20 were trying to lower it a couple inches into a
21 position so that it could fly.
22 Q And can you tell us why you said you had no concern
23 about it?
24 A Because I had union riggers, journeymen, union
25 riggers rig the piece and I had Mr. Allen Watts

1 respect to that meeting, you were there for two to
2 three hours, correct?
3 A That is correct.
4 Q That you were only out of the meeting 10 to 15
5 minutes.
6 A At the beginning.
7 Q Would you refer to the administrative statement,
8 please, page 87. If you'd start on line 14 on page
9 87. Are you there?
10 A Yes, I am.
11 Q "Question. So you didn't make a
12 statement in the meeting to the effect the lift was
13 not stopped.
14 "Answer. No.
15 "Question. Did you say anything in
16 the meeting about --
17 "Answer. I don't think it ever came
18 up. That's why I'm saying, this is -- when I was
19 there this subject in the meeting never came up
20 regarding the lift being stopped.
21 "Question. Were you there for the
22 whole meeting?
23 "Answer. No, I wasn't.
24 "Question. I guess you were pulled
25 out at one point?

1 "Answer. Pulled out at one point.
2 "Question. Who pulled you out?
3 "Answer. Bob Decker.
4 "How long were you gone during that
5 period.
6 "Answer. Ten to fifteen minutes.
7 "Question. Apart from that period of
8 time you were at the meeting?
9 "Right, and then I asked to be excused
10 to go back down to the site while the lift was going
11 on.
12 "Answer -- Question. How long all
13 together were you at that meeting?
14 "Answer. A range of two to three
15 hours, to my recollection."
16 Did I read that correctly?
17 A Yes.
18 Q Now, is it your testimony that that was never said
19 at the meeting, or you didn't hear it said?
20 A It wasn't said in my presence.
21 Q Now, did anyone at that meeting tell you that they
22 had heard that said?
23 A What -- what do you mean --
24 Q That the lift had been suspended due to the wind.
25 A On the day of the 14th?

1 Q Yes, sir.
2 A No.
3 Q Now, Mr. Baba has testified that he heard that
4 statement being made by Mr. Saito. Are you aware of
5 that?
6 A Yes, I'm aware of that.
7 Q And Mr. Saito has told us in his deposition that he
8 did make that statement. Are you aware of that?
9 A Yes, I am aware of that.
10 Q Now, Mr. Noel, before this Court and jury, said that
11 he didn't know that the lift was suspended. Are you
12 aware of that?
13 A Yes, sir.
14 Q Are you telling us you didn't know the lift was
15 suspended because of the wind?
16 A That is correct.
17 Q Are you aware that Mr. Ostrenga from OSHA has
18 testified in the deposition and will testify in this
19 courtroom that Mr. Noel did tell him around 2:00 or
20 2:30 that the lift had been postponed and possibly
21 could go over to another day because of the wind;
22 are you aware of that?
23 A I'm aware of that.
24 Q Another subject. You had nothing to do with the
25 functions or the operators of the three men in the

1 man-basket; am I correct?
2 A I don't believe they were operators in the
3 man-basket; they were ironworkers in the man-basket,
4 sir.
5 Q Let me rephrase the question. You had nothing to do
6 with the functions or operations of Mr. Wischer,
7 Mr. DeGrave, or Mr. Starr in that man-basket that
8 day; am I correct?
9 A That is correct.
10 Q With respect to the man-basket operation lift, that
11 was handled by the ironworkers and the crane
12 operators.
13 A That is correct.
14 Q And that with respect to Mr. Wischer and Mr. DeGrave
15 and Mr. Starr, who were employees of DCCI, their
16 supervisors supervised them.
17 A That is correct.
18 Q And not you.
19 A That is correct.
20 Q And that's true on July 14th and in the weeks
21 preceding July 14th.
22 A That is correct.
23 Q You knew that there were OSHA inspectors on the site
24 on July 14th?
25 A Yes, sir.

1 a file.
2 Q Was any information retained about what that Doppler
3 showed on July 14th?
4 A Yes, sir.
5 Q Have you seen that?
6 A I saw it on the 15th.
7 Q And has that been produced in this lawsuit?
8 A I don't -- There's 30,000 documents. I don't know
9 what's been produced, sir.
10 Q The Doppler was -- Or the computer was unplugged,
11 was it not?
12 A Yes, it was.
13 Q Did you unplug it?
14 A No, sir, I did not.
15 Q Do you know who unplugged it?
16 A No, sir, I do not.
17 Q Do you know when it was unplugged?
18 A The -- I have -- There's a time on the Doppler
19 when it was plugged back in, and it -- I believe it
20 showed 8:00 or 8:30.
21 Q It showed 8:30 p.m. on July 14th when it got
22 replugged in the next day?
23 A On the 15th I was instructed to plug it back in.
24 Q And up popped 8:30 p.m., correct?
25 A I believe it may have been 8:00 or 8:30.

1 Q So if you had gotten back to the trailer on the 14th
2 around 5:30 p.m. and if you had looked at the screen
3 and pulled up the wind information at about 5:30
4 p.m. and then unplugged it at 5:30 p.m., then the
5 first screen that would have shown when it was
6 replugged would have been July 14th, 5:30, correct?
7 A That is correct.
8 Q So if there had been something on that screen which
9 supported your opinion what the winds were at about
10 5:00 or 5:30 p.m. that you wanted to show people,
11 all you had to do was unplug it and then replug it
12 when someone wanted to look at it, correct?
13 A No, sir.
14 Q No? Let's assume, Mr. Grotlisch, that the wind
15 speed that showed up on that Doppler at 5:30 p.m.
16 was winds in excess of 20 miles an hour with wind
17 gusts close to 30 miles an hour and that was on the
18 wind screen that Mr. Baba saw when he went back to
19 the trailer that day with you after you asked him,
20 according to him, to do so. Let's assume that just
21 for the purpose of my question, all right? Now, if
22 you wanted to preserve that on the screen, you could
23 have just walked away from the screen and left it on
24 the screen, correct?
25 A That is correct.

1 Q Or if someone had unplugged it at that point in
2 time, the next time it got plugged back in, it would
3 have that same information show up, right?
4 A If it was unplugged at 5:30, it would show the --
5 Q Right, right.
6 A -- the 5:30 conditions, not the 8:30 conditions.
7 Q But you don't have any idea why someone unplugged it
8 at 8:30.
9 A I didn't hear your question. Excuse me.
10 Q You don't have any idea why somebody chose to unplug
11 that system at 8:30.
12 A No, I -- I don't know anything -- how it happened or
13 who did it or -- or what happened.
14 Q Did you ever observe any man-baskets that afternoon
15 before the crane went over that were in use while
16 you were at the -- on the site?
17 A I don't recall, Mr. Habush.
18 Q Just before the crane went down, you were where on
19 that picture right behind you?
20 (End of take.)
21
22
23
24
25

1 positioned during this final installation?
2 A Allen was going to remain on the ground. At one
3 time Allen and I were both going to go up in the
4 man-basket, but Allen decided that he would stay on
5 the ground and I would go up and assist.
6 Q Mr. Grotlisch, I noticed that you have a hearing
7 aid; is that correct?
8 A That is correct.
9 Q Are you somewhat hard of hearing?
10 A I have loss of hearing in my left ear.
11 Q If you don't hear any of my questions, let me know
12 that, please.
13 A Yes, sir.
14 Q Now in this morning's examination, Mr. Habush asked
15 you a question about dropping the ball. Can you
16 explain to the ladies and gentlemen of the jury what
17 you meant by that?
18 A What I meant by that was Mitsubishi had hired
19 Lampson as the leader in the industry of heavy
20 lifts. We had hired them to do the engineering on
21 the rigging studies. They were the manufacturer of
22 Big Blue and leased Big Blue to us and leased us the
23 operation, so we had hired them to operate Big Blue.
24 We had paid them over $3 million for these services,
25 for the operation and lease of Big Blue. We had

1 THE COURT: Sure. No problem.
2 MR. BELL:
3 Q Could you explain to the ladies and gentlemen of th
4 jury what those meetings were about and what these
5 minutes discuss?
6 A These are minutes produced by Lampson, and there
7 were a number of meetings that were held over a
8 five-day period, and we had representatives of
9 Lampson from several of their different offices,
10 including their corporate engineering, come to the
11 site, and these are the topics that we went through
12 to prepare for the delivery of the Transi-lift and
13 site preparation of the Transi-lift and the
14 activities associated with the operation of the
15 Transi-lift.
16 Q Now I see in item 4, "Wind criteria for tie-off and
17 lay-down area." Can you explain what that is to the
18 ladies and gentlemen of the jury?
19 A This was a subject that was talked about. With the
20 crane some 500 feet in the air and when it's not
21 being used, in the event of high winds or storm
22 coming, the crane, their operation manual requires
23 that you tie the crane off to secure it because you
24 can't just bring it down to the ground that easy.
25 Smaller cranes, you have the opportunity to lower

1 paid them over $100,000 in engineering to do rigging
2 engineering studies, including the wind studies, and
3 I had faith in Lampson following through with those
4 and that would be how I dropped the ball.
5 Q In what sense did you drop the ball?
6 A In believing that they did those studies.
7 Q Was wind -- were wind study calculations ever
8 specifically discussed with -- between you and
9 anybody from Lampson at any of these meetings?
10 A No, sir, they were not.
11 Q Mr. Grotlisch, I'm going to show you some minutes of
12 a meeting between you and members of Lampson back in
13 April. The meeting minutes are April 22nd, 1998-
14 April 27, 1998. Mr. Grotlisch, I'm going to hand
15 you a copy of those minutes. Can you see the
16 screen? You can see the screen okay?
17 A Yeah, it's -- I prefer to have those copies, they're
18 clearer.
19 Q I'm sorry?
20 THE COURT: He would prefer to have the
21 copies you have because they're clearer.
22 THE WITNESS: This screen is hard to
23 read.
24 MR. BELL: Can I stand over here, Your
25 Honor, because, again, this is my copy?

1 them to the ground. This crane is so big, you do
2 not have that opportunity. So this topic was the
3 wind criteria for tie-off in the lay-down area.
4 Q Is there anywhere in those notes that there's a
5 representation that wind sail calculations were
6 going to be the responsibility of Mitsubishi Heavy
7 Industries of America?
8 A No, sir.
9 MR. CARLSON: Your Honor -- Wait. Tin
10 out. I know that I'm not a participant, but I
11 believe I still have the right to object. These are
12 not notes of a meeting. The document itself says it
13 is a meeting that will be held. These are not notes
14 of a meeting.
15 THE COURT: Objection sustained.
16 Rephrase the question.
17 MR. BELL:
18 Q Mr. Grotlisch, during the meetings -- did those
19 meetings take place?
20 A Yes, they did.
21 Q And during those meetings, was there ever a
22 discussion that the wind effect or wind sail
23 calculations were going to be MHIA's responsibilit
24 A No, sir.
25 Q As I believe the evidence has indicated, this pick

of 4R3 was the tenth pick of this project?
A That is correct.
Q And the first pick of the project occurred when?
A Well, it was the tenth panel pick.
Q The tenth roof section?
A Roof section pick, yes. And the first roof section pick was in January of '98.
Q January '98?
A Excuse me. January of '99.
Q January of '99. So between January of '99 and July 14 of '99, there had been nine previous roof panel picks?
A That is correct.
Q During the course of that period of time, did Lampson ever call to your attention the need for wind sail calculations on any of these picks?
A No, sir.
Q Now you heard questions that -- concerning whether Mr. Bucky Gros at these meetings that you -- that we have on the document here mentioned be careful in winds. Did he ever tell you that you had to do the wind sail calculations on any of these picks?
A No, sir.
Q The load chart -- the lift plan for this particular pick, Mr. Habush showed you that. Let me see if we

can put it up on the screen. This is 3680.
MR. BELL: And keep going. Go to the one for 7/14. Stop right there.
Q Mr. Grotlisch, do you see the lift plan behind you?
A Yes, sir.
Q And that is the lift plan for what pick, what's the date of that lift plan?
A July the 1st, '99.
Q And who prepared that lift plan?
A That was prepared by Lampson.
Q And who in particular, can you read that name?
A Allen Watts.
Q What was Mr. Watts's role in these lifts?
A Mr. Watts was the supervisor in charge of the Transi-lift.
Q And what did you understand his responsibility would be?
A To supervise the operation of the Transi-lift.
Q And for the ladies and gentlemen of the jury, what does that mean?
A The Transi-lift has three other operators that are on it, you have a front crawler that has an operator -- Excuse me.
THE COURT: Do you want some more water? Sir, would you like some more water?

THE WITNESS: I've got some. I'm okay. -- it has a rear crawler with an operator on it; it has a boom and load hoist operator that controls the load and controls the raising and lowering of the boom, so you have three operators that it requires to choreograph with, and Mr. Watts is really the choreographer of those three operators.
MR. BELL:
Q Now you've seen the lift plan for the day of this accident, July 14th?
A Yes, sir.
MR. BELL: Can you put that up on the screen? Can you enlarge it, enlarge the document?
Q Now I want you to see in the box here that it says, "Special instructions or restrictions for crane." Do you see that, Mr. Grotlisch, down on the right there where the arrow is?
A Yes, sir.
Q What does it say?
A "None."
Q It says none. So according to Mr. Watts's lift plan for the day of this lift, there were no restrictions according to that lift plan?
A That is correct.
MR. BELL: Now would you go back to the

lift plan for April 21st, 1999, prepared by Mr. Bozung? Can you focus in on the restrictions?
Q This particular lift plan of April 21st, 1999 was prepared by Mr. Bozung?
A I believe it was.
Q Who was Mr. Bozung?
A The Lampson head office engineer assigned to do the lift plans and rigging studies for this project for Mitsubishi.
Q Was he an on-site employee of Lampson's?
A No, he was not.
Q Where did he do his work?
A Out of Kennewick, Washington, I believe.
Q So with respect to this particular lift plan that occurred on April 21st, he included some restrictions; is that correct?
A That is correct.
Q The next lift plan is April 29, 1999. Who prepared that lift plan?
A It looks like Milo Bengtson.
Q And let's look at the restrictions on that lift plan.
A None.
Q Let's go to the next lift plan, April -- I mean, May 3rd, 1999. Who prepared that one?

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1 A In our engineering department.
2 Q The conversation with Frank Sterk at Van Seumeren
3 that Mr. Habush was questioning you about.
4 A Yes, sir.
5 Q Is that the conversation that I questioned you about
6 concerning the different elements of a lift, the
7 portions that occur close to the ground, as opposed
8 to those that are occurring up at elevation?
9 A That is correct.
10 Q Is that the same conversation?
11 A I believe it is.
12 Q Did they subsequently give you different wind speeds
13 for doing the work closer to the ground?
14 A Yes, sir, they did.
15 Q When did Van Seumeren begin using their crane on the
16 job site making roof lifts?
17 A I believe January of 2000.
18 Q So the first roof pick was done by Lampson in
19 January of 1999?
20 A Correct.
21 Q And the first roof pick was done by Van Seumeren in
22 January of 2000?
23 A I believe so.
24 Q And Van Seumeren did how many roof picks to complete
25 the job of setting the entire roof on the stadium?

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1 A Approximately 30, I believe.
2 Q And when did they do the last pick?
3 A Last Monday, I believe.
4 Q And Lampson did nine picks prior to July 14 of 1999?
5 A Prior to July 14th, yes, nine.
6 Q Did Mr. Watts or Mr. Bengtson ever ask you or
7 Mitsubishi for information about wind sail
8 calculations on any of these picks?
9 A No, sir.
10 Q Tell me how many times you've worked with Big Blue
11 prior to this project.
12 MR. HABUSH: I believe this is outside
13 my recross.
14 THE COURT: Pardon me?
15 MR. HABUSH: I believe this is outside
16 my re-examination area.
17 MR. BELL: It's a familiar area with
18 the crane, Your Honor. It's what the whole
19 examination is about.
20 THE COURT: I'll allow it. Just a few
21 questions, then let's get back on track.
22 THE WITNESS: None.
23 BY MR. BELL:
24 Q As between you and Lampson's engineers and their --
25 their lift supervisors, who was more knowledgeable

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1 about their crane and the crane's limitation?
2 A Lampson.
3 MR. BELL: Thank you. That's all I
4 have.
5 MR. HABUSH: One question.
6 THE COURT: Go ahead.
7 FURTHER ADVERSE EXAMINATION
8 BY MR. HABUSH:
9 Q Remember that chart I put up that showed the winds
10 that would be allowable for various pieces being
11 lifted by Van Seumeren?
12 A The Van Seumeren chart?
13 Q Yes. Remember that?
14 A Yes.
15 Q Van Seumeren never raised the no-go or go speeds on
16 what winds were allowable for the various loads
17 being lifted, they never raised those pursuant to
18 your request, did they, that would affect the roof
19 piece being lifted up in the air and being placed
20 onto the structure?
21 THE COURT: He's asking is that true.
22 THE WITNESS: I'd have to look and
23 see. Some of them have been revised because the
24 weight of the blocks were revised which allow the
25 wind speed of the block to be increased.

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1 BY MR. HABUSH:
2 Q But they never gave into your request that you
3 should raise the wind speeds on when you shouldn't
4 lift a piece that they had set at 11, 12, 13, 14, 15
5 miles an hour on average; they never did that, did
6 they?
7 A We didn't ask for that increase.
8 Q Well, Mr. Sterk testified that you did ask --
9 MR. BELL: Objection. That's
10 counsel's interpretation of Mr. Sterk's testimony.
11 MR. HABUSH: No more questions.
12 That's it.
13 THE COURT: Thank you, sir.
14 MR. CARLSON: Your Honor, could we
15 have a quick sidebar before the witness leaves?
16 (Sidebar discussion held off the
17 record.)
18 THE COURT: Ladies and gentlemen of
19 the jury, again, this is a case where one side can
20 call the other side adversely. When someone's
21 called adversely, their lawyers can only ask for
22 clarifying questions, and other litigants do not
23 participate, so Lampson has not had a chance to
24 participate in the examination of this witness. And
25 the instruction said you're supposed to keep an open

1 on the Transi-lift.

2 They were aware that we had a Doppler

3 weather station in the trailer, so the station was

4 not on, and Mr. Mackey, I believe with the sheriff's

5 department, asked me to show them and show him, I

6 believe that it was both the sheriff's department

7 and OSHA, I could be mistaken, they wanted to see

8 the Doppler and see how it operates, so they --

9 sometime in the night, it was between 8 or 8:30,

10 this Doppler was unplugged, and so they asked me to

11 plug it in and show them, and I proceeded with

12 plugging the Doppler in, and the Doppler fired up

13 and showed the data that was still sitting on -- or

14 still retained in its files as of 8 or 8:30, it

15 shows the time and it also showed the wind chart

16 that was on and it showed the mile per hour in some

17 50-mile radius of Miller Park, and it retained that

18 for a couple minutes until it finally uplinked with

19 the satellite and brought it up to current date,

20 current time.

21 Q And do you recall the data that came up when you

22 turned the machine on?

23 A Yes, sir, I do.

24 Q And what did it show?

25 A In the Miller Park area, it was 11-, 12-,

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1 encountering with the lift or with the wind and the
2 lift?
3 A Not the wind.
4 Q Any problems with the lift?
5 A In the beginning, in the CG stage, load
6 stabilization at CG stage we had subsidence, where
7 the front crawler had sunk into the ground.
8 Q Can you show the area that you're talking about on
9 the photograph behind you?
10 A Well, this is not a very good drawing, but Big Blue
11 was -- there's an underground concrete runway
12 that -- there's a big turning concrete pad here --
13 (witness indicates) -- with two fingers coming out
14 so that the crane can walk back to this concrete pad
15 and then turn. There is then a concrete runway that
16 runs the entire length of this down to another big
17 pad and another set of runways coming out so you
18 have a concrete runway system for this piece of
19 equipment to travel.
20 Big Blue had to go off of the concrete
21 runway system to get closer to where the 4L -- 4R3
22 block was assembled. That area had to be mined out,
23 material put back in, wooden mats put back in as an
24 extension of our runway so it could walk out. While
25 it was sitting out there and we were doing this CG

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1 and load stabilization process, the front crawler
2 started to sink, and she sank three inches, four
3 inches.
4 Q Was that on the concrete runway?
5 A No, it was off of the concrete runway out into
6 the -- out into the site area that had been prepped
7 and wooden mats put down for it. But it, it sank
8 after we -- even though we had prepped the area and
9 put the wooden mats in it for it to extend the
10 runway out to get closer to the block to pick it,
11 during that process it settled down. As you pick
12 up, then all the load goes to the front crawler
13 because you're picking up the weight off the ground
14 and it's transferred to the front crawler, and she
15 evenly sank into the ground.
16 Q So what was done about that?
17 A What was done about that was the -- what Allen
18 recommended is that we come straight back out
19 instead of -- the original plan was to swing the
20 counterweight crawler over to the north, which would
21 swing the load over to the south and go over the
22 Veteran's property until we got the piece of
23 equipment around you, around to then continue down
24 the engineered path.
25 So it required a flight change in the

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1 block. Instead of the block flying south, around
2 and then over the structure and going down, it
3 required the block to swing around to the right,
4 over to north, over the structure and down. So we
5 had to change the flight pattern of the block and
6 then back the piece of equipment and get back on the
7 engineered runway that was used in two previous
8 picks.
9 Q And when did that conversation take place?
10 A In the morning, I'd say sometime around 10:00,
11 11:00.
12 Q And did you agree with his proposal?
13 A Yes, I did.
14 Q Did the ironworkers -- who was, who was responsible
15 for the ironworkers on this?
16 A Yes, they -- there wasn't a problem with it.
17 Q You had authority to stop this lift?
18 A Yes, sir.
19 Q If you had known that wind effect calculations had
20 not been done, what would you have done regarding
21 this lift?
22 A Not proceeded.
23 Q Would that have been true on the previous nine
24 lifts?
25 A Yes, sir.

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1 MR. BELL: One moment, your Honor.
2 Your Honor, I have some exhibits that I have shown
3 that I would like to move into evidence. I can do
4 that now or I can do that in my case.
5 MR. HABUSH: No objection, depending
6 what they are.
7 THE COURT: Just why don't you rattle
8 them off and we'll take care of them right now.
9 MR. BELL: You want to do it right
10 now, your Honor?
11 THE COURT: Sure.
12 MR. BELL: Exhibit 3680.
13 MR. HABUSH: No objection.
14 MR. CARLSON: No objection.
15 THE COURT: Received.
16 MR. BELL: 2168.
17 MR. HABUSH: No objection.
18 MR. CARLSON: No objection.
19 THE COURT: Received.
20 MR. BELL: 3768B.
21 MR. HABUSH: No objection.
22 MR. CARLSON: No objection.
23 THE COURT: Received.
24 MR. BELL: 3237.
25 MR. HABUSH: Okay.

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1 A In our engineering department.
2 Q The conversation with Frank Sterk at Van Seumeren
3 that Mr. Habush was questioning you about.
4 A Yes, sir.
5 Q Is that the conversation that I questioned you about
6 concerning the different elements of a lift, the
7 portions that occur close to the ground, as opposed
8 to those that are occurring up at elevation?
9 A That is correct.
10 Q Is that the same conversation?
11 A I believe it is.
12 Q Did they subsequently give you different wind speeds
13 for doing the work closer to the ground?
14 A Yes, sir, they did.
15 Q When did Van Seumeren begin using their crane on the
16 job site making roof lifts?
17 A I believe January of 2000.
18 Q So the first roof pick was done by Lampson in
19 January of 1999?
20 A Correct.
21 Q And the first roof pick was done by Van Seumeren in
22 January of 2000?
23 A I believe so.
24 Q And Van Seumeren did how many roof picks to complete
25 the job of setting the entire roof on the stadium?

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1 A Approximately 30, I believe.
2 Q And when did they do the last pick?
3 A Last Monday, I believe.
4 Q And Lampson did nine picks prior to July 14 of 1999?
5 A Prior to July 14th, yes, nine.
6 Q Did Mr. Watts or Mr. Bengtson ever ask you or
7 Mitsubishi for information about wind sail
8 calculations on any of these picks?
9 A No, sir.
10 Q Tell me how many times you've worked with Big Blue
11 prior to this project.
12 MR. HABUSH: I believe this is outside
13 my recross.
14 THE COURT: Pardon me?
15 MR. HABUSH: I believe this is outside
16 my re-examination area.
17 MR. BELL: It's a familiar area with
18 the crane, Your Honor. It's what the whole
19 examination is about.
20 THE COURT: I'll allow it. Just a few
21 questions, then let's get back on track.
22 THE WITNESS: None.
23 BY MR. BELL:
24 Q As between you and Lampson's engineers and their --
25 their lift supervisors, who was more knowledgeable

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1 about their crane and the crane's limitation?
2 A Lampson.
3 MR. BELL: Thank you. That's all I
4 have.
5 MR. HABUSH: One question.
6 THE COURT: Go ahead.
7 FURTHER ADVERSE EXAMINATION
8 BY MR. HABUSH:
9 Q Remember that chart I put up that showed the winds
10 that would be allowable for various pieces being
11 lifted by Van Seumeren?
12 A The Van Seumeren chart?
13 Q Yes. Remember that?
14 A Yes.
15 Q Van Seumeren never raised the no-go or go speeds on
16 what winds were allowable for the various loads
17 being lifted, they never raised those pursuant to
18 your request, did they, that would affect the roof
19 piece being lifted up in the air and being placed
20 onto the structure?
21 THE COURT: He's asking is that true.
22 THE WITNESS: I'd have to look and
23 see. Some of them have been revised because the
24 weight of the blocks were revised which allow the
25 wind speed of the block to be increased.

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1 BY MR. HABUSH:
2 Q But they never gave into your request that you
3 should raise the wind speeds on when you shouldn't
4 lift a piece that they had set at 11, 12, 13, 14, 15
5 miles an hour on average; they never did that, did
6 they?
7 A We didn't ask for that increase.
8 Q Well, Mr. Sterk testified that you did ask --
9 MR. BELL: Objection. That's
10 counsel's interpretation of Mr. Sterk's testimony.
11 MR. HABUSH: No more questions.
12 That's it.
13 THE COURT: Thank you, sir.
14 MR. CARLSON: Your Honor, could we
15 have a quick sidebar before the witness leaves?
16 (Sidebar discussion held off the
17 record.)
18 THE COURT: Ladies and gentlemen of
19 the jury, again, this is a case where one side can
20 call the other side adversely. When someone's
21 called adversely, their lawyers can only ask for
22 clarifying questions, and other litigants do not
23 participate, so Lampson has not had a chance to
24 participate in the examination of this witness. And
25 the instruction said you're supposed to keep an open

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1 facing with respect to where the load was?
2 A We were facing south.
3 Q Towards the load?
4 A Correct.
5 Q Did you have any more conversations with him, sir,
6 with Mr. Noel about anything?
7 A Just -- There was casual conversation until a point
8 in time when I proceeded down the roof. I don't
9 remember what.
10 Q All right. And did you see the incident happen?
11 A Yes, sir.
12 Q And what did you see the crane doing with respect to
13 where you and Mr. Noel were?
14 A When I felt the crane -- I felt the crane travel
15 abruptly to the south, at which point I heard a
16 bang. I initially thought that the bang was that
17 they had rubbed the existing structure. I looked
18 up. I was very close to being either at that point
19 or beyond that point. When I realized that they
20 hadn't, that there was quite a bit of head room
21 clearance, at that point in time I heard another
22 bang, at which point in time I looked up at the
23 boom, I seen the boom begin to deflect, seen the
24 load shift back to the north, and turned and ran.
25 Q All right. Did you -- Were you able to see what

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1 Mr. Noel was doing or what happened to him?
2 A Mr. Noel was following closely behind me. How
3 close, I couldn't tell you.
4 Q Then what happened?
5 A He also turned and ran.
6 Q Okay. Then what happened? What happened to
7 Mr. Noel?
8 A Mr. Noel fell down.
9 Q And what did you do?
10 A I helped pick Mr. Noel up.
11 Q All right. And what did you say to him then?
12 A Well, there was still stuff falling. I mean, the
13 boom came over, the cables came over. I took
14 Mr. Noel to the pivot point or behind the pivot
15 point. He was very winded, very upset, as we both
16 were, and he began to use his cell phone to call
17 911.
18 Q And did you eventually go down to the ground level?
19 A Yes, sir. I, on multiple occasions, tried to get
20 Mr. Noel to go with me. He was trying to use the
21 phone. As I said, he was pretty shook up. I told
22 him that I was going to go down and that if he -- if
23 I did not see him in a matter of so many minutes,
24 that I would send someone back up, we would be back
25 up to find him.

Page 2

1 Q How much experience have you had in the constructi
2 business prior to coming to Miller Park, Mr. Upton?
3 A I've done this for 20 years.
4 Q And basically what did you do during that 20 years?
5 A Steel erection.
6 Q And you were a superintendent at that time?
7 A For the whole 20 years, no, sir.
8 Q No, sir. I mean on July 14th. I beg your pardon.
9 A Yes, sir.
10 Q And who was under your supervision at that time?
11 A Basically all the people employed by DCCI.
12 Q And that would include the men who were killed in
13 the accident?
14 A That's correct, sir.
15 Q Now, Mr. Upton, after the accident, you had occasion
16 to talk to a sheriff's investigator as well as an
17 OSHA investigator, did you not?
18 A Yes, sir.
19 Q And what is the fact as to whether or not you
20 advised those people when you talked to them after
21 the accident whether you saw Mr. Wayne Noel holdin
22 a hand-held anemometer on the day of the accident
23 just before the crane went down?
24 A No, sir, I never said anything to either party.
25 Q Why didn't you?

Page 2

1 A I didn't see that -- I guess I didn't see the
2 importance, and I assumed that everyone knew that
3 the wind was being monitored.
4 Q What is the fact as to whether or not you assumed
5 that Mr. Noel would have told the authorities that
6 he had had a hand-held anemometer and that he would
7 have told the authorities?
8 MR. WEBER: Objection, leading. Also
9 contradicts his prior testimony.
10 THE COURT: I don't want you to
11 speculate. You can't get into another person's
12 mind. If you know, you can answer. If you don't
13 know, you can't answer. The other grounds for the
14 objection's overruled. Do you know?
15 BY MR. HABUSH:
16 Q Let me repeat the question. What is the fact as to
17 whether or not you would assume Mr. Noel had told
18 the authorities he had a hand-held anemometer.
19 MR. WEBER: Objection.
20 THE COURT: Sustained.
21 BY MR. HABUSH:
22 Q Now, Mr. Upton, you didn't know Mr. Noel before y
23 were involved in this incident on the 14th of July;
24 am I correct?
25 A No, sir, I did not.

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1 was really a short deposition, you know, 30, 40
2 pages, I would have just let you read it all in.
3 But you're -- you're allowed to go for
4 explanation, just like we did with the other
5 witnesses that were called adversely. He was a part
6 of the -- of the Mitsubishi organization at the time
7 of the incident, and that's the real time test. All
8 right.
9 MR. OWENS: So is it your suggestion,
10 Your Honor, that they can play a videotape with
11 their portion?
12 THE COURT: Nope. It's just got to be
13 read. It's just got to be read. That's fair,
14 Mr. Owens. I'm not going to let them play a video
15 and not let them see the other portion of the video.
16 I'm not going to do that.
17 So it can be read into the record,
18 that part you're seeking the adverse, and you can
19 read that part in for clarification, and then when
20 you get in the presentation of your case, you can
21 read the whole thing in, if you so choose. And
22 Mr. Carlson will be able to participate at that time
23 but --
24 MR. CARLSON: Not yet.
25 THE COURT: Not yet.

Page

1 objections to testimony that were made during the
2 course of that deposition that I think need to be
3 resolved before it's read.
4 MR. HABUSH: What objections? What
5 page? We can deal with it as we're reading it. Th
6 judge can follow along with us. I think they were
7 as to form or something most of them.
8 THE COURT: Everyone please rise.
9 (Whereupon, the following proceedings
10 were held in open court in the presence of the
11 jury:)
12 THE COURT: Welcome back. Please be
13 seated. Let's continue.
14 CROSS-EXAMINATION
15 BY MR. WEBER:
16 Q Mr. Upton, on July 14th you worked for DCCI, al
17 known as Danny's, right?
18 A That's correct, sir.
19 Q You were a supervisor, right?
20 A Yes, sir.
21 Q And DCCI people were under your supervision a
22 control, correct?
23 A Correct.
24 Q And Mr. Starr was under your supervision and
25 control?

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1 MR. OWENS: Thank you, Judge.
2 THE COURT: Sure.
3 (There was discussion off the record.)
4 MR. HABUSH: Can I ask a question,
5 Judge, about this issue? You're saying that we had
6 edited a two-and-a-half-hour deposition down to
7 approximately what, a half an hour?
8 MR. JARVIS: Or less.
9 MR. HABUSH: About 30 minutes on the
10 video, not the two and a half hours and -- You
11 understand what I'm saying?
12 THE COURT: If you two good lawyers --
13 You're all good lawyers. If you two, in light of
14 the Court's ruling, can go back and redo it,
15 re-edit, that's fine. If you can't agree, I know no
16 other fair way of doing it.
17 MR. HABUSH: Well, what I'm concerned
18 about is that we not be allowed to use this video in
19 our case but they be allowed to use the video in
20 theirs.
21 THE COURT: No. It's the same level
22 playing field. When we talked about whoever's
23 deposition was overseas, it's the same level playing
24 field.
25 MR. OWENS: And there were issues of

Page

1 A Correct.
2 Q Mr. DeGrave was under your supervision and control?
3 A Correct.
4 Q Mr. Wischer was under your supervision and control?
5 A Also correct.
6 Q So those men who were in the man-basket that day on
7 July 14th were under the direction and control of
8 DCCI, right?
9 A Yes, sir.
10 Q Not Mitsubishi.
11 A No, sir.
12 Q It was DCCI that determined that these men would go
13 in the man-baskets and perform these functions,
14 right?
15 A Yes, sir.
16 Q Not Mitsubishi.
17 A No, sir.
18 Q Now, you mentioned that you were interviewed by OSH
19 shortly after the accident, right?
20 A I don't know if I mentioned that today or not, but
21 you're right, I was interviewed by OSHA.
22 Q Okay. And I placed in front of you a transcript of
23 that interview dated July 29th, 1999, right?
24 A That's correct, sir.
25 Q There was a court reporter there?

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1 30, that would be something that Manitowoc would
2 engineer for its style crane; correct?
3 A Yes.
4 Q Just as Lampson engineered its 3/4 in 30 for this
5 style crane?
6 A That's correct.
7 Q Which you found to be appropriate?
8 A Yes, sir.
9 Q In a project of this size, from your experience is
10 it important to have sufficient professional people
11 available to do the work so that incidents like this
12 can be avoided?
13 A On any project you need the people you need,
14 depending on the circumstances of the project.
15 Q And if a project is understaffed, that can lead to
16 unfortunate incidents?
17 A Absolutely.
18 Q In this case, have you read Mr. Baba's testimony?
19 A Yes, sir.
20 Q Do you recall Mr. Baba testifying that he was
21 overworked, and after the accident they had to bring
22 in a crew of additional engineers?
23 A Well, they brought in additional engineers before
24 the accident as well, but I remember reading him
25 saying that he was overworked or something to that

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1 effect.
2 Q And actually what they were doing, because of being
3 overworked here in Milwaukee, was they were sending
4 work back to Japan to be done?
5 A I don't know. I know they were sending work back to
6 Japan, but whether that was the original plan or not
7 or it was done because they were overworked, I don't
8 know why they did that.
9 Q You would expect that the engineers at Mitsubishi
10 Heavy Industries in Japan would have the knowledge
11 and the experience to know that wind-sail
12 calculations should be done on the large pieces that
13 were being lifted?
14 MR. BELL: Objection if it calls for
15 speculation.
16 THE COURT: I don't want you to
17 speculate.
18 THE WITNESS: I won't.
19 MR. CARLSON: Okay.
20 THE WITNESS: I don't know.
21 THE COURT: Objection's sustained.
22 MR. CARLSON:
23 Q Have you read Mr. Grotlisch's testimony in this
24 case?
25 A Yes, sir.

Pag

1 Q And are you aware that Mr. Grotlisch has explained
2 that he knew the wind-sail calculations should be
3 done on pieces of this size out at Miller Park?
4 A Yes, sir.
5 Q He didn't need, from your reading of the testimony,
6 anything on the load chart to tell him that because
7 as a person in charge of this project, that's
8 something he knew; fair comment?
9 A My recollection is that he knew it from past
10 experience.
11 Q And for someone in that position, you would expect
12 him to know that, wouldn't you?
13 A Yes, sir.
14 Q The piece itself weighed almost a million pounds
15 that was on the hook?
16 A That's correct.
17 Q And was not -- and this isn't something that blows
18 around like a flag in the breeze, does it?
19 A No, it blows.
20 Q All right.
21 A It moves from the wind.
22 Q We've seen the OSHA video of this, and from the OSH
23 video it appears as though the movements are very
24 slow in some degree, in some areas very subtle?
25 A Yes, sir.

Page

1 Q And in this case you understand that Mr. Watts di
2 not pick up that movement until it was too late?
3 A I don't know that he picked up on it at all.
4 Q At all. Mr. Watts had a lot of things that he was
5 responsible for that day?
6 A Well, he was responsible for the whole lift, yes.
7 Q Right. And is one of the reasons it's important to
8 have a lift plan like we've talked about before,
9 which includes a maximum wind speed for the piec
10 is so that people in the field don't find themselves
11 in this position trying -- in this position at all?
12 That's why you have a plan in the first place; isn't
13 it?
14 A Precisely. You don't want surprises.
15 Q Everything that you found that Mr. Watts was doi
16 that day were things that he was asked to do by his
17 supervisor Mr. Grotlisch?
18 A I don't know that I could say that.
19 Q Okay. Well, with regards to whether or not that
20 lift was going to be made that day, let's take that
21 as the subject matter, did you find any testimony
22 where Mr. Watts had gone to Mr. Grotlisch says --
23 saying this is probably a good day, let's make the
24 lift today?
25 A No, sir.

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1 The insurance is not -- the punitive damage
2 provisions of the insurance policy, whatever they --
3 whatever they say or wherever they exist, those
4 provisions of the policy are not being sought by the
5 plaintiffs in this case on the issue of whether or
6 not Mitsubishi was negligent. They're only being
7 sought on the issue of punitive damages dealing with
8 punishing, if there is to be an award of punitive
9 damages, for the acts of the party. And in providing
10 a case of punitive damage to a jury, the plaintiff is
11 entitled to submit information to the jury as to
12 Mitsubishi's wealth and ability to pay punitive
13 damages, and the wealth and ability to pay is
14 admissible and relevant in awarding punitive damages
15 in an amount sufficient to justify punishment.
16 That's why it's called punitive in nature.
17 The -- since the insurance issue is
18 not being provided to show negligence but solely on
19 the issue of punitive damage, I agree with the Court
20 of Appeals, Judge Ralph Adam Fine, and his treatise
21 saying the evidence of insurance is admissible for
22 any reason other than fault, and it's not being
23 offered for fault.
24 I noticed that a trial judge of
25 concurrent jurisdiction did a decision in West Allis

Page

1 THE COURT: Let me give you a generic
2 response without boiling the water over the pot. Tl
3 lawyers have used the words "intentional disregard
4 and so as a judge, I'm limiting myself to that focus.
5 But the statute also says malicious and/or
6 intentional disregard, and it's something at the
7 close of all this testimony when you lawyers have r
8 out of the presence of the jury as to what the
9 verbiage should be on that verdict, and it may very
10 well be both, I don't know. That's No. 1.
11 No. 2, insurance companies are a party
12 to this action, and you're here not only representing
13 Mitsubishi, but you're also acting on their step, and
14 we have a direct action statute. And if they thought
15 there was going to be a problem, they should have
16 gotten in here earlier and asked me for relief on
17 coverage in that area, punitive damage, and asked to
18 have a bifurcation. And they failed to do that, and
19 that very well may constitute a waiver, to their
20 detriment, to the benefit of Mitsubishi.
21 So I say that without getting into
22 more detail, Mr. Weber, just to preserve everyone's
23 posture in here. I want to tell all of you lawyers
24 that I know you have collectively a tremendous
25 responsibility on each of your shoulders, and what

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1 v. WEPCO case, 96-CV-005061, and I'm in agreement
2 with the philosophy of that judge, and the treatise
3 on Judge Ralph Adam Fine, and under Brown v. Maxey,
4 M-A-X-E-Y, 124 Wis.2d 445, it's certainly permissible
5 for Mr. Habush on behalf of the plaintiffs and
6 Mr. Lowe on behalf of his plaintiff client to look at
7 those policies, along with the economic information
8 that Mitsubishi was to produce on the subject and, if
9 appropriate, go into the subject matter regarding the
10 punitive damage claims. So the motions for the
11 plaintiffs are granted on this subject and the
12 motions of the defendant are again denied,
13 Mitsubishi's motions.
14 So turn over the documentation,
15 counselors for Mitsubishi, to Mr. Habush and Mr. Lowe
16 tonight. I would appreciate that. Is there any
17 other housekeeping we have to do, or can we adjourn
18 until tomorrow?
19 MR. WEBER: There is one related point,
20 Your Honor, that the court didn't address on the
21 insurance issue. As the court is aware from other
22 discussions, there is a -- the fact of insurance is
23 not established, and I'm not sure how we handle that
24 in terms of admissibility. Again, that was an issue
25 raised in briefing.

Page 2

1 I've tried to do is prevent anything out there from
2 disrupting any of you in zealously representing you
3 respective clients. So that's where I end. If I
4 have to get to that bridge, you call it to my
5 attention and I'll cross it and try to make an
6 informed decision to protect the integrity of the
7 parties and their lawyers that are in this courtroom
8 right now.
9 MR. WEBER: Just as a factual matter, we
10 represent Mitsubishi Heavy Industries of America.
11 The insurance companies are separately represented
12 THE COURT: That's correct. I understand
13 that, but by them allowing you to act in that
14 capacity and not sending in their own set of lawyers
15 to actually participate, there is some acquiescence
16 as ts to what's going on here, and that's the posture
17 I'm addressing. It's called risk assumption. If you
18 don't participate, you can't be heard to complain.
19 Basic rule.
20 See you tomorrow morning at ten to
21 9:00. Good night, everybody.
22 (Whereupon the proceedings were adjourned.)
23
24
25

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1 MR. BELL: October 14, 1999 dep.
2 MR. WEBER: October 25, 1999.
3 MR. BELL: October 14.
4 MR. WEBER: Fourteen, sorry.
5 THE COURT: We're using our sophisticated
6 retrieval system, Bob and I, so just give us a
7 moment.
8 MR. BELL:
9 Q Can you see that, Mr. Watts, is it up on your
10 monitor?
11 A (No response.)
12 Q Mr. Watts?
13 A Yes.
14 Q Do you see that?
15 A Yes.
16 Q Was that question asked of you on October 14, 1999
17 and did you give that answer?
18 A Yes, sir.
19 Q And isn't it a fact that you had told people at the
20 Miller Park job that you had operated this crane or
21 a Big Blue crane in winds of 40 miles an hour with
22 comparable loads?
23 A Yes.
24 Q And that was before the accident occurred; is that
25 right?

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1 A Yes.
2 Q You had a lot of confidence in Big Blue, didn't you?
3 A Yes, sir.
4 Q The strength of that crane?
5 A Yes, sir.
6 Q It's a super crane in terms of its strength; isn't
7 that right?
8 A There's a lot bigger cranes in the world, but it's a
9 very impressive crane.
10 Q And you've had very successful experience in using
11 that crane in high winds, in your experience?
12 A I haven't had very many bad experiences, no.
13 Q The answer to my question is you've had successful
14 experience with that crane in high winds in the
15 past, have you not?
16 A Yes.
17 Q How did Victor and Wayne determine the various wind
18 speeds, what they were throughout the day on July
19 14, 1999?
20 A The only thing that I was told that day and prior to
21 that day was the Doppler radar.
22 Q They had a computer in their office, in one of the
23 construction trailers --
24 A Yes.
25 Q -- with a Doppler on it?

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1 A Yes.
2 Q Just to clarify this wind issue, this wind speed
3 issue, at what wind speed on July 14 would you have
4 stopped the pick?
5 A Knowing what I know now? Probably 5 or 6.
6 Q Five to 6 miles per hour?
7 A Knowing what I know now.
8 Q Let me show you what you told OSHA, let's see if
9 this refreshes your recollection. This is your
10 statement to OSHA on October 21st, 1999.
11 MR. BELL: Can we put that up on the
12 screen?
13 MR. WEBER: What page?
14 MR. BELL: It's page 164.
15 (Mr. Weber complies.)
16 THE WITNESS: Yes, I agree with that.
17 MR. BELL:
18 Q And what you told OSHA was, "Well, the 20-mile-an-
19 hour wind chart, which we were working under as a
20 guideline, and because of the fact, like I had
21 stated earlier, you can't always terminate a lift
22 when you want to, I would say that whenever I saw
23 the load being adversely affected by an outside
24 force, I would have stopped the lift."
25 A Yes.

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1 Q Is that what you told OSHA?
2 A Yes.
3 Q And it's true, is it not, on July 14, 1999, prior to
4 5:15, prior to that first bang that we've all seen
5 on the OSHA video, you had not seen anything that
6 adversely affected the load on the hook or adversely
7 affected the crane to suggest to you to stop the
8 lift?
9 A No. I stopped the lift for about five to ten
10 minutes while I was walking down the runway because
11 both crawlers were moving, so therefore you get
12 movement in the load, and I stopped it and then I
13 started it back up.
14 Q And what you're referring to there, for the ladies
15 and gentlemen of the jury, is you got some inertial
16 movement of the load itself, some swinging of the
17 load from the movement of the crawlers?
18 A Yes.
19 Q It was small movement, a couple of feet?
20 A Yes.
21 Q And you just stopped the crawler and let the
22 movement stop by itself?
23 A Yes.
24 Q And then you proceeded on?
25 A Yes.

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1 A Van Seumeren.
2 Q Van Seumeren. And you're aware that Van Seumeren is
3 the company that replaced your company at Miller
4 Park after Big Blue broke, right?
5 A That's correct.
6 Q And you're aware, I take it, that Van Seumeren is
7 the company that successfully set the last roof
8 piece on the ballpark about two weeks ago, right?
9 MR. CARLSON: Objection. It's
10 irrelevant.
11 THE COURT: We've had testimony on
12 this. He can answer.
13 THE WITNESS: I believe they were,
14 yes, sir. I understand Mitsubishi was proud that
15 they made that last lift piece, and they used
16 Van Seumeren's crane as part of that operation.
17 BY MR. OWENS:
18 Q In fact, part of that pride was the fact that using
19 the crane supplied by Van Seumeren, they were able
20 to accomplish 30 lifts in a year's time; are you
21 aware of that?
22 MR. CARLSON: Your Honor, that's
23 totally irrelevant to the issues in this case.
24 THE COURT: That's irrelevant.
25 Objection sustained.

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1 MR. OWENS: Thank you, Judge.
2 Q Are you at all familiar with the Demag crane that
3 Van Seumeren brought to Miller Park?
4 A A little. Slightly.
5 Q Are you aware that the Demag crane that replaced
6 your crane at Miller Park had an anemometer at the
7 tip of the boom?
8 A Yes, sir.
9 MR. CARLSON: Your Honor, just for the
10 sake of the record and only for the record, I'm
11 going to object to any reference to equipment on the
12 Demag crane as being irrelevant to the issues in
13 this case. I understand the Court's prior ruling.
14 THE COURT: You know, you have to
15 object to each question. To allow a continuing
16 objection of any lawyer, I don't know where the
17 objections start and where they end. So don't --
18 don't feel -- None of the lawyers should feel they
19 have a problem in that area. But right now I'm
20 going to overrule based on the prior testimony.
21 MR. OWENS: Thank you. I forgot the
22 answer.
23 THE COURT: Read it back, Madam
24 Reporter.
25 MR. OWENS: Thank you.

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1 (The last question and answer were
2 read.)
3 BY MR. OWENS:
4 Q Did Big Blue have an anemometer at the tip of the
5 boom?
6 A No, sir.
7 Q Are you aware that the Demag crane that replaced
8 your crane at Miller Park had an electronic
9 levelness monitor built in to monitor levelness in
10 all directions?
11 A Yes, sir.
12 MR. CARLSON: Object as irrelevant.
13 THE COURT: Overruled on the previous
14 grounds. The answer -- the answer can stand.
15 MR. OWENS: Thank you.
16 Q Was that a yes?
17 A Yes.
18 THE COURT: You have to give me a
19 chance to respond.
20 THE WITNESS: Sorry.
21 THE COURT: No one has to apologize to
22 me. Just give a second or a pause before you answer
23 so that if there's a response or an objection by the
24 lawyers. Because we can't all hear you at the same
25 time. All right. Let's proceed.

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1 BY MR. OWENS:
2 Q Did Big Blue have a levelness monitoring device?
3 A Just the man with the transit shooting the ground.
4 Q The surveyor we heard from earlier in the trial.
5 A And Mr. Watts's eyes.
6 Q True, eyeballing that three-quarter of an inch over
7 30 foot levelness requirement, right?
8 A Right.
9 Q I want to talk to you a little bit about your
10 testimony on your initial contacts with Mitsubishi.
11 You told us earlier that you were introduced to this
12 opportunity or introduced to Mitsubishi in part
13 through this Ed Macias, a crane consultant that
14 Mitsubishi was working with; is that fair?
15 A I wouldn't say a crane consultant. He was just a
16 business relationship consultant, business
17 relationship whatever.
18 Q He was how you hooked up with Mitsubishi?
19 A He called for Mitsubishi, correct.
20 Q In fact, you went to Chicago for a meeting with Moto
21 Baba to preliminarily discuss your crane coming to
22 Milwaukee, correct?
23 A Yes, I explained that.
24 Q You brought some brochures and some promotional
25 information about your company?

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1 Q And indeed we see, there's a provision here at part
2 2, and if we could zero in on that, where it's the
3 part 2 rental rates and use. Perfect. There we go.
4 I see two categories on this lease form; bare and
5 fully operated. Am I correct?
6 A That's correct.
7 Q Okay. You can resume the stand, please. Bare and
8 fully operate. Now, I see that you checked bare?
9 A That's correct.
10 Q And that was done by you or somebody at your
11 company?
12 A That was done by me.
13 Q By you personally?
14 A I drafted it, had it typed and I proofread it and
15 signed it.
16 Q So that box was checked by you or someone at your
17 direction within your company?
18 A That's correct.
19 Q The other category is fully operate. I don't see in
20 the form any other category or any middle ground on
21 that form. It's either bare or fully operated,
22 right?
23 A Right.
24 Q There's nowhere on there that describes a premium
25 package, is there, on the form?

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1 A No, sir.
2 Q Okay. It's true, though, in the case of the Miller
3 Park project that your company furnished a crew with
4 the crane, correct?
5 A No, sir.
6 Q It's not?
7 A No, sir. We did not provide a crew. We loaned some
8 personnel to work for Mitsubishi.
9 Q Okay. People on the Lampson payroll who came to
10 Milwaukee to operate that crane, correct?
11 A We provided a payroll service for Mitsubishi.
12 Q You sent originally Milo Bengston, correct?
13 A Correct.
14 Q Randy Meise?
15 A Randy Meise.
16 Q Meise. Thank you. Mr. Aldrich who we heard from
17 this morning?
18 A Steve Aldrich.
19 Q Okay. And those were people who were in the first
20 instance qualified by your company to operate the
21 crane, correct?
22 A They were qualified, yes, sir.
23 Q Your company qualified them to operate the crane,
24 correct?
25 A Our company and others, yes, sir.

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1 Q They were trained by you folks at Lampson, right?
2 A By ourself and others, yes, sir.
3 Q And the fact is that you would never have sent that
4 crane here to Milwaukee without a Lampson crew to
5 operate it, true?
6 A That's incorrect.
7 Q Well, sir, didn't you tell this jury just last week
8 that that crane wouldn't have come to Milwaukee
9 without your own crew?
10 A To receive and assemble. I think you'll see, we
11 record a crew to offload and assemble the equipment
12 and then they had to have qualified operators there.
13 Q Well, I have the transcript of your testimony on
14 direct. May I approach, Judge?
15 THE COURT: Sure. Do we have his full
16 transcript too?
17 MR. OWENS: I'm referring to his trial
18 testimony, Your Honor, from October 19, page 69,
19 beginning at line 5, were you asked this question by
20 Mr. Habush and did you give this answer.
21 THE COURT: Why don't you let him see it.
22 You can get right up there.
23 Question: "You wouldn't have let your
24 machine go to Milwaukee with a group of people who
25 didn't know how to handle it; is that true?

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1 Answer: That is correct."
2 MR. OWENS:
3 Q Did you give that answer to that question?
4 A That concurs exactly with what I just said.
5 Q And do you recall giving your deposition in this
6 case in November of last year, November 1999?
7 A If that's the day you say it is, yes.
8 Q November 18, 1999 and I think the original is in one
9 of those envelopes there.
10 THE COURT: Do you know where to look for
11 the date on those?
12 THE WITNESS: The part that's covered, I
13 think.
14 MR. CARLSON: Do we have a page number?
15 MR. OWENS: We're getting there.
16 THE WITNESS: I'm checking to see if it
17 shows the date on this. 50 percent chance it's
18 right.
19 THE COURT: Here's the 18th. Give me
20 this. Go ahead.
21 MR. OWENS:
22 Q Okay. Sir, I want to refer you to page 22, line 4
23 from your November 18, 1999 deposition, and ask if
24 you heard this question and gave this answer:
25 Question: "Would you ever send the kind

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1 financial worth or ability to pay.
2 And so the argument was is even if the
3 plaintiffs had a great punitive damage case, that
4 they can't get any of this stuff because the
5 plaintiffs are seeking damages against two
6 defendants, and the law says you can't do that. And
7 I basically accepted that argument and understanding
8 of the law.
9 So we go through 15-plus months of --
10 of discovery in this case, and we're in our fourth
11 week of trial, and I set up scheduling orders, and I
12 asked everybody to share information and that the
13 lawyers should not sandbag each other, the lawyers
14 should not try to ambush each other by
15 non-disclosure, and the lawyers should not create
16 surprise. And now Mitsubishi's lawyers, at the
17 eleventh hour, wants to offer all kinds of
18 information as to their client's financial posture.
19 The plaintiffs in this case chose not
20 to offer any evidence to the jury at this stage of
21 the proceedings with regard to the financial health
22 or ill health of Mitsubishi. And I sort of regret
23 now not doing everything absolutely positively on
24 the record, but in trying to get these lawyers to
25 work together and telling these lawyers as to the

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1 direction the Court was going so in hopes that this
2 trial could go smoothly, I would have sidebar
3 conferences or conferences in chambers, not
4 excluding anybody, but that's the way it was -- it
5 was happening, and there was all kinds of discussion
6 in there about what the insurance companies would be
7 doing or would not be doing in this case, and there
8 was all kinds of concerns by all the lawyers, not
9 just by the plaintiffs' lawyers, not just by the
10 Lampson lawyers, but also the Mitsubishi lawyers,
11 especially as to whether or not there's punitive
12 damage coverage.
13 So the record should be aware of that,
14 that the lawyers share things with me, and I'm not
15 going to rebuild the record, but the record should
16 be aware of the fact that these issues are not being
17 addressed for the first time this morning. They've
18 been out there, and they've been discussed.
19 And because of the inability of the
20 lawyers to agree on certain things, and if you look
21 at the briefs and the paperwork, the lawyers are at
22 the stages -- stage of each accusing each other of
23 mischaracterization, misrepresentation, misciting
24 the law, being untruthful, and being false, that at
25 this point of the proceedings I've got to do it all

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1 on the record and ask the lawyers in their
2 representation of their client to submit their
3 positions in the written format that I've been
4 dealing with for the last week.
5 Mitsubishi is barred from offering any
6 testimony as to its ability or inability with
7 respect to the punitive damage claim on the
8 financial issues. They didn't provide a level
9 playing field to Lampson or the plaintiffs. They
10 didn't allow discovery. They allowed absolutely
11 nothing, and the reason they allowed nothing is they
12 convinced this Court to give nothing. And now, when
13 it comes down to actually trying this case, the
14 lawyers are changing their position again. And it's
15 unfair, and it's trial by surprise, trial by ambush,
16 and I'm not going to allow it.
17 So the lawyers are barred from
18 offering any testimony concerning the positive or
19 negative financial status or health of MHIA.
20 MR. HABUSH: Your Honor, is that under
21 904.03?
22 THE COURT: Yes, especially that
23 provision of balancing.
24 MHIA's written offer of proof
25 concerning testimony -- No, I want to take one

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1 other first. Excuse me.
2 By the way, on the last one, I agree
3 with the State of Idaho in Schaefer, S-c-h-a-e-f-e-r
4 versus Ready, R-e-a-d-y, 3 P.3d 56, Idaho 2000 case,
5 since there are no Wisconsin cases on line, and I
6 think the scheduling order, along with that case, is
7 persuasive on the punitive damage issue.
8 I'm missing something. Just give me a
9 second. I know what I'm looking for, I just don't
10 have it at my fingertips. I found it.
11 I have Defendant MHIA's written offer
12 of proof regarding the testimony of John Nelson. I
13 dealt with this before. I indicated the format of
14 making offers of proof when the trial reached the
15 point of Mr. Bell wanting to make an offer of proof
16 of Mr. Ostrenga and wanted to do it by putting that
17 OSHA investigator back on the witness stand and do
18 it by a question and answer. And the case law is
19 clear that the Court has other alternatives than
20 doing it by question and answer.
21 And I asked that it be submitted in
22 the form of a written offer of proof in fairness to
23 everybody so everyone would have advanced notice of
24 what everyone else was seeing and so that everyone
25 else could submit, if any, counteroffers of proof,

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1 A This is what we call the pivot area. This is Block
2 1, Block 2, so the block was flown over this way and
3 then heading down this way, its eventual path going
4 down to its set point.
5 Q What did you do next, Mr. Grotlisch, where did you
6 go?
7 A I believe -- I was on site for -- in the area for
8 30, 45 more minutes, and then I went back to our
9 trailer.
10 Q And what did you do there?
11 A I had other tasks I had to take care of with the
12 project.
13 MR. HABUSH: Could I have that question
14 and answer, please?
15 (Pending question and answer read by
16 reporter.)
17 MR. HABUSH: Can we have a time line?
18 MR. BELL:
19 Q Approximately what time did you leave the site after
20 your meeting with Mr. Watts about 3:30?
21 A Somewhere after 3:30. I don't recall the exact --
22 Q All right.
23 A -- the exact time.
24 Q Did you ever come back to the site prior to the
25 accident?

Pa

1 Q Now, we heard from Mr. Moto Baba, who told us he
2 up on the track beam in that area of the bearing.
3 Is that where you were intending to go?
4 A Yes, sir, that's correct, that's where I was headed.
5 Q And what was Mr. Watts going to do?
6 A He was going to stay on the ground and continue fror
7 the ground.
8 Q We've heard testimony from Mr. Watts that he was
9 going to be getting in a man-basket to go up for the
10 connection?
11 A That was originally planned.
12 Q Where was this conversation at 4:45? Where were
13 you, and where was the block, and how high was it?
14 A The block was over the structure, somewhere in here,
15 and the Transi-lift was the rear crawler down here,
16 and the front crawler here with the block over the
17 structure, and this meeting occurred right here at
18 the base of the Transi-lift, somewhere in that area.
19 I don't recall exactly.
20 Q Where were you at 5:15?
21 A 5:15 I was over close to the elevator getting ready
22 to go up in the elevator to go to the position on
23 the track beam, the base of the elevator.
24 Q Did you have to have certain type of safety
25 equipment for you to go up on the track beam?

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1 A Yes, I did. I came back about 4:45.
2 Q And why did you come back?
3 A The block was getting close to where it was -- would
4 be reaching its set point, and I went to meet with
5 Allen to see how it was going and also discuss where
6 we would locate ourselves during the setting of the
7 block.
8 Q Did you have a discussion with Mr. Watts?
9 A Yes, I did.
10 Q Did you discuss how the lift was going?
11 A Yes, I did.
12 Q And what -- can you tell the ladies and gentlemen
13 what he said to you and what you said to him as best
14 you can recall?
15 A There wasn't any problems with the lift and we
16 discussed whether both of us would go up in the
17 man-basket and -- to fly this in, and the result of
18 our discussions were that I would go to the track
19 beam girder because I was familiar with 4L3 setting
20 where we had difficulties with this Toblerone room
21 section coming in to land on the bearings, and since
22 I was most familiar with the problems that we had in
23 the past, that would be the best location for me was
24 up on the track beam.
25

Page

1 A Yes, sir.
2 Q And what -- what was required for you to go up
3 there?
4 A My body harness, hundred percent fall gear.
5 Q We've heard that this was a hundred percent fall
6 protected site above six feet.
7 A Yes, sir.
8 Q And what does that mean?
9 A Exactly what it says. You have to be tied off when
10 you're elevated in the air, --
11 Q Did you --
12 A -- and a hundred percent tie-off means that you had
13 two tie-offs.
14 Q I interrupted your answer, and I'm not sure the jury
15 heard that. Would you --
16 A The hundred percent tie-off is where you have two
17 lanyards that you tie yourself off so that when
18 you're switching from one, the other one is always
19 connected so that you're not suspended without a
20 tie-off when you're transitioning from one piece or
21 from one elevation or in midair to another piece,
22 that you're always tied off in some form or fashion,
23 and you have two devices to do that.
24 Q Had you put on your safety gear?
25 A Yes, sir. I had my body harness on, and I was

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1 that, and I made my ruling on the 7th.
2 Giving everyone the benefit of the doubt,
3 let's just assume I did it on the 8th, but now it's
4 the 14th of November and I get their offer of proof,
5 and under the prior directives of the court on the
6 scheduling order and the order we processed this
7 trial, I indicated that if anything was going to be
8 submitted, it had to be submitted timely, and this
9 financial status report offer of proof is almost a
10 week late, and it's stricken from the record for not
11 complying with the court's directives.
12 MR. WEBER: May I be heard, Your Honor?
13 THE COURT: No. You'll be heard by
14 submitting your offer of proof. I'm not going to go
15 through argument and argument and argument.
16 Do you want to take up, Mr. Carlson,
17 Mr. Morin right now before we get the jury down
18 here? I still could do it by question and answer,
19 but it seems that Mr. Bell has laid a very good
20 foundation where he can testify in certain areas.
21 MR. CARLSON: Well, if you feel that way,
22 then I suppose I should.
23 THE COURT: Well, I'm listening. I've
24 got to accept his testimony in the best light, like
25 I have to accept Shapiro's and everyone else's,

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1 okay, so, you know, I can do it by question and
2 answer, but what I don't want to do is push this
3 jury in and out.
4 MR. CARLSON: What I would suggest, I
5 don't think Mr. Bell is done with his qualifica-
6 tions, and if I'm wrong, he can correct me. If he's
7 done with his qualifications, then I could ask him
8 questions that remain to the issue that we're
9 talking about and you can see at least how the
10 issues --
11 THE COURT: Bear with me. I have not --
12 I have not found him, because I haven't heard the
13 testimony, I have not found him at a plateau level
14 where he can testify as to anything he wants with
15 regard to what his expertise is or is not. I'm just
16 saying that the basic inquiry, does he -- does he
17 meet the -- just the minimum basic requirements of
18 907.02, says, "If scientific" -- that's the statute,
19 "If scientific, technical, or other specialized
20 knowledge will assist the trier of fact to
21 understand the evidence or to determine a fact in
22 issue, a witness qualified as an expert by
23 knowledge, skill, experience, training, or education
24 may testify thereto in the form of an opinion or
25 otherwise."

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1 Unless you dispute -- Hold on. Unless
2 you dispute that he doesn't have a degree in
3 metallurgical engineering and he doesn't have a
4 specialty in forensic failure analysis in
5 engineering and he doesn't have a master's degree
6 from Ohio State University and he really didn't
7 teach failure analysis at DuPage College for the FAA
8 and the National Transportation Safety Accident
9 Board, it seems to me that he's met minimum
10 qualifications.
11 And the reason I -- I'm asking you now is
12 because I believe your motions in limine said he
13 couldn't even get off the block, the starter block,
14 he couldn't even take a first step, and I'm saying
15 he's got this, and if you're telling me he hasn't
16 got it, that's what I want to hear now; otherwise,
17 when we actually go through the trial, there may be
18 areas where he, like any other expert witness, can
19 or cannot testify to. That's a different horse.
20 MR. CARLSON: And that's -- I think the
21 court's perception is mine as well and accurate that
22 he established credentials to do with failure
23 analysis, how much force it takes to break
24 something, those types of things. He has not been
25 qualified on a custom and practice, industry

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1 practice, manufacturing practices, standards
2 applicable to cranes and those issues, so I think if
3 you listen to a question-by-question procedure, that
4 will be fine.
5 THE COURT: Yeah, because I didn't know
6 how else to do it, and I thought maybe if there was
7 something out there that was missing, maybe you
8 could tell me so I could hear from Mr. Weber,
9 Mr. Bell, or Mr. Owens.
10 MR. CARLSON: We may disagree, but he
11 certainly has a right to express his opinion on
12 those areas.
13 THE COURT: Okay. I was preanticipating
14 everybody's objection too much, is that what this
15 boils down to? Let's get the jury.
16 (Jury returned.)
17 THE COURT: Welcome back. Please have a
18 seat. Before we start the testimony again, there
19 has been a request and agreement by all the lawyers
20 in this case to try to accommodate a particular
21 schedule that can't be changed, and I -- I -- I
22 talked to these lawyers and I'm satisfied that,
23 after doing that, and I felt that after I explained
24 everything you would hopefully also be in accord,
25 we're -- I'm going to give you an hour and a half

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1 parts were clean and dry at the time they were in
2 the crane.
3 Our analysis on the other hand assumes
4 that the parts have some lubrication on them, which
5 is what I have observed on the parts. And with the
6 part being lubricated, the friction number that is
7 most appropriate is about .1, or 10 percent, not 50
8 percent or 70 percent.
9 We have subjected our analysis to peer
10 review and have reconfirmed --
11 THE COURT: Just a second.
12 MR. CARLSON: I'm going to object to
13 any hearsay about peer review.
14 THE COURT: Hold on a second. The
15 objection is sustained to the extent that the
16 witness testified we subjected our analysis to peer
17 review, and we have that part stricken. The balance
18 of the answer can stand. Can the jury follow that
19 instruction?
20 (Jurors nod heads.)
21 THE COURT: All right. Thank you. Do
22 you want the lights on, by the way?
23 MR. BELL: Yes, we can turn them on.
24 Q Mr. Morin, based upon a reasonable degree of
25 engineering and metallurgical certainty and the

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1 certainty in the field of failure analysis, can you
2 give us an opinion as to the cause of the kingpin
3 failure?
4 A The cause of the kingpin failure was an uplifting
5 load on the kingpin in the neighborhood of 2,400
6 kips that first failed the spacer. The spacer
7 compressed and failed, and when the spacer was
8 objected -- ejected, there was a gap in the kingpin
9 system. The kingpin had to pull up to close that
10 gap -- or the kingpin did pull up to close that gap.
11 When the kingpin pulls up, the crane
12 leans more. The loads were then imposed upon the
13 thrust bushing, which is about three-quarters of an
14 inch thick. The thrust bushing was broken and
15 ejected, creating another gap below the crane. The
16 kingpin pulled up another three-quarters of an inch.
17 The crane leaned further yet because the kingpin is
18 not reacting to the load unless the parts are tight.
19 When the kingpin was rising freely
20 because the copper parts were gone, the load
21 achieved speed and momentum, and by the time the gap
22 was finally closed, when the split retainer hit the
23 bottom of the carbody, it hit the carbody with an
24 impact factor because of the momentum of the load,
25 and that was then enough to pull the end off the

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1 kingpin, and once the end is off the kingpin, the
2 crane cannot stand up.
3 Q Now, what you've just described takes some time.
4 What are we talking about in time? Is this
5 something that occurs very quickly?
6 A No. It took -- all together it took seven or eight
7 seconds for those events to occur.
8 Q Have you examined the drawings from Lampson on the
9 kingpin assembly?
10 A Yes.
11 MR. BELL: Let's put up drawing 3660.
12 Q What do we see here, Mr. Morin?
13 A This is a drawing -- that is a drawing of the
14 kingpin for a Transi-lift Series III, Roman numeral
15 III, crane. This shows a kingpin variation with a
16 threaded connection at both ends, threaded at this
17 end, threaded at that end -- (witness indicates).
18 This kingpin arrangement does not have the split
19 retainer and the button head feature.
20 MR. BELL: Can I see the ESI diagram
21 2091? 2091-H.
22 Q Well, while you have this up here, what do we see
23 here, Mr. Morin?
24 A This is, once again, a Lampson drawing. This
25 happens to be for a Transi-lift series Roman numeral

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1 II, and over here highlighted for clarity in blue is
2 the kingpin assembly connecting the tub and the
3 carbody together, and this particular variation has
4 a large nut at the top of the kingpin and also a
5 large nut underneath the carbody.
6 MR. BELL: Now, if we could put up the
7 ESI diagram 2091-H.
8 Q Can you explain what we -- what we have here for the
9 ladies and gentlemen?
10 A This is an illustration that was put together by our
11 graphics department illustrating the actual as-built
12 configuration of the kingpin as existed at Miller
13 Park. Left-hand side shows the entire kingpin
14 assembly at scale. The upper right is a -- is an
15 enlargement for clarity purposes to illustrate the
16 way in which the large nut that's on the top of the
17 kingpin is positioned.
18 You have a large nut here -- (witness
19 indicates) -- and underneath the large nut is a
20 large, flat thrust bushing that is about the same
21 size as the nut, and it, this thrust bushing, bears
22 against the nut the full diameter and bears against
23 the top of the carbody almost full diameter. At the
24 lower end down here -- (witness indicates) -- the
25 lower right --

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1 Perhaps we could even zoom this in.
2 Is it possible to zoom that to full scale?
3 What this does, on the left-hand side
4 of the diagram shows the parts as though you could
5 see the outside surface of them. The right-hand
6 side of the diagram shows the parts as though
7 they've been sliced so that you can see the parts in
8 cross-section. In this instance what we have is a
9 split retainer positioned here -- (witness
10 indicates). This is the end of the kingpin. This
11 is the -- where the button will eventually form as
12 this -- (witness indicates) -- shears off. Here's
13 the half-inch thick spacer, here's the three-quarter
14 inch thick thrust bushing -- (witness indicates).
15 So together those two copper parts comprise just
16 about an inch and a quarter of metal.
17 MR. BELL: And let's put up Exhibit
18 2091-I.
19 Q What do we see here?
20 A Okay. This is a representation of the same type of
21 kingpin but for the fact of a nut being installed on
22 a lower side, as compared to a nut only on the upper
23 side. And this is a drawing that would be similar
24 to the Transi-lift III drawing that I showed you
25 earlier that had the nut at the top and bottom.

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1 When you have a nut like this, the
2 thrust bushing that would be in here -- (witness
3 indicates) -- would be loaded uniformly by the upper
4 surface of the nut, here, and would be loaded
5 uniformly by the carbody in that area right there --
6 (witness indicates).
7 Q Based upon a reasonable degree of metallurgical and
8 engineering certainty, do you have an opinion as to
9 which design of kingpin assembly is stronger?
10 A Yes.
11 Q Can you tell us what your opinion is?
12 A Okay. We're talking about the assembly now; not the
13 kingpin per se but the assembly. The assembly of
14 the crane, as it was assembled at Miller Park, has a
15 limiting strength of 2,400 kip. If the kingpin were
16 arranged with stronger connections, such as a nut on
17 the top and the bottom, the strength of the kingpin
18 is between two and three times stronger.
19 Q Well, what if we just took out the copper spacer?
20 A If you take out both of the copper parts below, in
21 other words, with the split retainer and just take
22 out the copper parts so that you have all steel
23 parts, the kingpin is about twice as strong.
24 MR. BELL: Let's look at photograph
25 3658.

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1 Q What do we see here, Mr. Morin?
2 A This is a photograph produced by Dr. Ross, who is
3 one of the principals at Exponent. Dr. Ross is an
4 expert for Lampson. He went to Texas and
5 photographed a Lampson crane in Texas that was in
6 service and produced this photograph at his
7 deposition. This photograph shows a sister Big
8 Blue. Big Blue's sister.
9 Q Do we see a copper spacer in that assembly?
10 A No. This -- this assembly has neither a spacer nor
11 a thrust bushing, copper thrust bushing below. It
12 has a split retainer. This is the split retainer
13 here -- (witness indicates). This is a locking
14 ring, but between the split retainer and the carbody
15 there is neither a spacer nor a thrust bushing.
16 Q Is this part --
17 A None of the copper parts, in other words.
18 Q Is this assembly greasy and oily?
19 A You bet it is.
20 MR. BELL: Can we look at Exhibit
21 3134-A? Can we zoom in?
22 Q Mr. Morin, for the ladies and gentlemen of the jury,
23 can you explain to them what they're looking at
24 here?
25 A Yes. This is a handwritten message from Walt Trask

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1 to Mr. Bill Lampson that was written within days of
2 the accident, and Walt Trask is the recently
3 deceased lead engineer at Lampson. And this
4 document provides information from Lampson
5 engineering to Mr. Lampson about history and
6 features of Big Blue.
7 MR. BELL: Can we zoom it on line 2,
8 sentence 2?
9 Q What does this tell us, Mr. Morin?
10 A This -- this shows us that Walt informed Mr. Lampson
11 that the kingpin -- Well, he's talking about the
12 design history of the Big Blue-type crane, and he
13 tells us that the crane is unique and that because
14 it's unique and it has a rotating bed design, which
15 was that as it rotates on the plastic side bearing,
16 that it requires a kingpin configuration, which has
17 two purposes: First, to resist uplift, and
18 secondly, to maintain a fixed center of rotation.
19 Uplift means tension. Uplift means
20 that when the crane tries to rock, the kingpin is
21 what keeps everything down and firm and prevents the
22 superstructure from teetering on top of the carbody.
23 It's the kingpin that creates that connection that
24 holds the superstructure down and prevents it from
25 rocking on the carbody.

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1 (Whereupon, the following proceedings
2 were held in open court in the presence of the
3 jury:)
4 MR. BELL:
5 Q Mr. Morin, we now have before the ladies and
6 gentlemen of the jury an exhibit that we have marked
7 as Mitsubishi Exhibit 2117. Can you explain to the
8 ladies and gentlemen what this is, what it's to
9 demonstrate?
10 A Yes. The lower portion of this exhibit, that's the
11 portion that's painted black, that represents the
12 two crawlers for the front crawler unit and also the
13 carbody that spans between the two crawlers. Those
14 parts that are painted black are built out of steel,
15 solid steel, and they're also built to scale. The
16 scale on this model is one inch equals five feet.
17 What's sitting on top of the carbody,
18 the blue, blue aspect, is to -- built to scale up
19 through and including where the tub is. The part
20 that Mr. Weber has his right hand on, the vertical
21 upright, is not intended to exactly represent the
22 boom and the jib, but the length of that is the
23 overall height of the crane. The -- at this scale,
24 inch is five feet, that is just a little over ten
25 feet tall. So you get a sense of the proportions.

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1 That is, you get a sense of the base of support, the
2 size of the base of support versus the overall
3 height of the crane.
4 There's also a -- a bolt with two nuts
5 there connecting the tub and the carbody together,
6 and that bolt represents the kingpin. And with that
7 bolt tight -- or, I shouldn't say tight, snug so
8 that the superstructure is closely coupled or
9 rigidly connected, shall we say, to the carbody and
10 the track, then the entire crane moves as a unit,
11 and the entire base of support for the crawlers is
12 what is supporting the crane from overturning
13 moments.
14 On the other hand, we can loosen that
15 kingpin that's -- that representation of the
16 kingpin, we could loosen that nut, and what you will
17 see happen is the superstructure rocks back and
18 forth because it's sitting on a 14 foot diameter
19 plastic circle, and it's not really sitting any
20 longer rigidly connected to the tracks, which are
21 very much bigger.
22 MR. CARLSON: Move to strike that
23 portion that relates to the loosening of the nut.
24 Without foundation and without support of evidence.
25 THE COURT: Sustained. The jury is to

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1 disregard that portion of the testimony. If any
2 juror cannot do that please, raise your right hand.
3 (No response from jurors.)
4 THE COURT: The balance of the answer
5 may stand. Thank you.
6 MR. BELL:
7 Q Mr. Morin, how is this model -- What does it
8 demonstrate for the ladies and gentlemen of the
9 jury, what concepts?
10 A It demonstrates the concept that has been testified
11 to in depositions by people on the project that they
12 recognized the kingpin nut had to be kept tight, and
13 the kingpin nut would be periodically tightened so
14 that there was no looseness between the tub and the
15 carbody.
16 Generally the way that was done is
17 once they get a lot of weight on the crane,
18 everything gets settled, everything deforms and
19 flexes, they come and tighten the nut. I believe
20 the testimony that I've read says that they
21 tightened the nut at least twice on the project to
22 make sure that looseness did not develop between the
23 tub and the carbody.
24 Q Thank you. Mr. Morin, can -- Do you have an
25 opinion based upon a reasonable degree of

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1 engineering and metallurgical certainty as to
2 whether or not this accident would happen if the
3 copper spacer doesn't fail or --
4 A Based upon all the analysis that I've done in this
5 case, but for the copper spacer failing and starting
6 a chain of events that really couldn't be halted,
7 that up until the time something broke in that lower
8 kingpin connection, the crane was not about to go
9 over.
10 On the other hand, once the spacer
11 breaks, it breaks the next part, and the breaking of
12 those two parts together causes -- allows the
13 kingpin to pull up enough and the crane to lean far
14 enough to the side that the kingpin's strength, the
15 button, was finally sheared off. The kingpin button
16 would not have sheared off but for the looseness
17 that was created in that joint after the copper
18 parts broke.
19 Q Do you have an opinion based upon a reasonable
20 degree of engineering and metallurgical certainty as
21 to whether or not this accident would have occurred
22 if Lampson had used the other design of a double
23 nut, with a nut at the top and bottom of the kingpin
24 assembly?
25 A There's --

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1 MR. CARLSON: Excuse me. I'm going to
2 object. Lack of foundation.
3 THE COURT: Overruled, as long as you
4 opine to a reasonable degree of professional
5 certainty in the areas you testify with respect
6 to --
7 THE WITNESS: I understand.
8 THE COURT: -- your testimony. Go
9 ahead.
10 THE WITNESS: My analysis shows that
11 the stronger kingpin would have prevented the
12 accident.
13 MR. BELL:
14 Q Is the kingpin assembly with a nut at the top and
15 the bottom stronger than what was out at Miller
16 Park?
17 A Yes.
18 Q By a factor of what?
19 A At least two, based upon just the copper parts being
20 removed, and two to three times stronger if it was a
21 double-nutted connection.
22 Q Do you have an opinion based upon a reasonable
23 degree of engineering and metallurgical certainty as
24 to whether or not if the sister crane to Big Blue
25 had been out at Miller Park with no copper spacer

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1 and no copper thrust bearing, this accident would
2 have occurred?
3 MR. CARLSON: Objection, lack of
4 foundation.
5 THE COURT: Sustained.
6 MR. BELL:
7 Q Do you have an opinion based upon a reasonable
8 degree of engineering and metallurgical certainty as
9 to whether or not the kingpin assembly without the
10 copper spacer and copper thrust bearing was
11 stronger?
12 A Yes.
13 Q And by a factor of what?
14 A At least two.
15 Q And in your opinion, would the sister crane be as
16 strong in the kingpin assembly --
17 MR. CARLSON: Objection.
18 MR. BELL:
19 Q -- than what was out at Miller Park?
20 MR. CARLSON: Objection, lack of
21 foundation.
22 THE COURT: Sustained.
23 MR. BELL:
24 Q The sister crane in use that Lampson's picture --
25 took a picture of, did it have a copper spacer and

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1 copper thrust bearing in the kingpin assembly?
2 MR. CARLSON: Object, Your Honor, for
3 the same reasons.
4 THE COURT: Sustained.
5 MR. BELL:
6 Q Can you tell the ladies and gentlemen what caused
7 the kingpin to be loaded in tension?
8 A Yes. There was a series of factors that come into
9 play. The first factor is that when the crane
10 arrived at its final site, the soil was non-uniform.
11 Because the soil wasn't uniform, the crane began to
12 lean a little bit, and it leaned about four-tenths
13 of an inch or so. The basis of three-quarters inch
14 in 30 is this standard. It leaned about four-tenths
15 of an inch or about half of the permitted amount
16 just because of the soil. No other factors
17 considered.
18 Secondly, when they arrived at the
19 site and stopped, the load was swinging, and a
20 swinging load, of necessity, causes side loading to
21 be introduced into the crane. So you could think of
22 it as a pendulum effect. If there's a pendulum
23 acting, it means the load is off center line, and if
24 the load gets off center, that creates a side force.
25 So the second factor was the swinging load.

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1 The third factor was the wind and the
2 gusting that existed out there on that day most
3 likely contributed to difficulty in controlling the
4 load. It probably contributed to the amount of
5 swing, and the period of the swing from the
6 standpoint of exactly what gusts might have occurred
7 would affect the swing in a complex way.
8 The next factor is that the side
9 loading that was introduced to the crane from all
10 causes -- from any and all causes caused the track
11 pressures to be non-uniform. And the pressure under
12 the track, especially the pressure under the
13 northeast track, became -- became quite large.
14 There was an assumption that the track pressure
15 would be uniform. That turns out not to be the case
16 with side loading, and the side loading caused the
17 pressure on the northeast aspect of the track to go
18 from about 8,000 pounds per square foot up to about
19 20,000 pounds per square foot.
20 And under that pressure, the northeast
21 quadrant of the track subsided or suffered
22 differential settlement, which was very large. It
23 suffered a differential settlement of probably three
24 inches of differential settlement, which causes
25 additional side loading because the crane is now

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1 field and the crane is within the level of tolerance
2 required, do you have any reason to dispute that it
3 would have a side load imposed of no more than .5
4 percent?
5 A You're assuming no wind --
6 Q That's right.
7 A -- in that question?
8 Q That's right.
9 A Calm day. And you're assuming a rigid ground?
10 Q Rigid ground.
11 A Rigid ground?
12 Q Right.
13 A That's probably, in that theoretical, yes.
14 Q You personally don't know in the day-to-day
15 operations of the Transi-lift what the maximum side
16 load is that it sees, do you?
17 A I think nobody knows that. It depends upon what the
18 crew does with it.
19 Q We'd have to talk to the people that own and operate
20 the cranes to get that kind of information, do you
21 agree?
22 A I doubt that they know it, unless they have a
23 continuous monitor on there. In other words, the
24 amount of side load that would be on a crane on any
25 one day is explicitly dependent upon exactly what's

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1 happening. It doesn't depend upon what's on the
2 hook.
3 Q Do you think that perhaps we have an understanding
4 of what that is?
5 A You mean Lampson?
6 Q Yes.
7 A From my analysis, they had a very poor
8 understanding.
9 Q We'll let them address that, because these are the
10 folks in the industry, aren't they?
11 A They're the folks that built this crane.
12 Q They're the folks that have cranes throughout the
13 world?
14 A I understand that.
15 Q They're the folks that also have Manitowoc cranes?
16 A I understand that.
17 Q They have a lot of experience with cranes, don't
18 they?
19 A I'm not talking about experience. I'm talking about
20 knowledge.
21 Q You don't think that they've learned a lot in the
22 course of their experience? That's a yes or no.
23 A I think they have more to learn.
24 Q And you'd like to be their teacher?
25 A I hope they take the lesson.

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1 Q Now, when did you think -- Strike that.
2 You've worked with Mr. Bell before?
3 A Yes, I have.
4 Q Actually, you worked with him on a ladder case, the
5 ladder broke?
6 A Yes.
7 Q And you do a fair amount of ladder work for what.
8 Louisville Ladder I think Mr. Habush mentioned?
9 A Yes.
10 Q And at some point you thought this is going to
11 involve litigation, didn't you?
12 A At some point I became aware that there was
13 litigation, but that was not the assignment in the
14 beginning.
15 Q Now when you became aware that there was going to
16 become litigation, you were aware that Mitsubishi
17 was being sued as well as we were being sued?
18 A Once the litigation started?
19 Q Right.
20 A Yes. Sure.
21 Q And certainly a lot of your work in this matter has
22 gone on since your company and our -- Mitsubishi and
23 our company was sued, right?
24 A I think that's fair.
25 Q And during that time you came to appreciate the

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1 issue of the kingpin and under what circumstances it
2 may or may not be loaded?
3 A I did, yes.
4 Q And you found that the kingpin is not loaded at all
5 if the side load of the crane is 2 percent or less?
6 A Not exactly. It depends upon how the 2 percent is
7 defined and how the 2 percent is applied. If the 2
8 percent is defined as a static wind and the crane is
9 on a rigid surface and the crane doesn't have too
10 much flexibility, then the kingpin will not be
11 loaded.
12 If, on the other hand, the 2 percent side
13 load is applied by a gust of some duration, not a
14 short gust but a gust of some duration, and if this
15 crane is on a flexible foundation with the
16 Rolli-Flex and the other features, this crane will
17 fail. That's the problem.
18 Q Well, the problem is that if you do that, it's more
19 than a 2 percent side load. If you start -- if the
20 crane is operated within 2 percent side load,
21 whether it be from the wind or the ground or the
22 Rolli-Flex, if it's operated within 2 percent total,
23 nothing happens, right?
24 A If you have a theoretical circumstance where the 2
25 percent side load is applied slowly, statically, and

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1 THE COURT: Just hold on. The
2 objection is sustained. The answer is stricken.
3 The jury is to disregard that. Can all of you do
4 that? If you can't, please raise your right hand.
5 (No response.)
6 THE COURT: All right. Let's proceed.
7 Ask another question.
8 BY MR. BELL:
9 Q What other preventions could Lampson --
10 MR. CARLSON: Your Honor, I think he's
11 got to flip his little note there.
12 MR. BELL: We don't want the jury to
13 see this.
14 Q What other preventions could Lampson have
15 incorporated into their crane to have prevented this
16 accident?
17 A Because the tilting or the leaning of the crane is
18 important, a mechanism, a viable mechanism, to give
19 the operators information about what the actual
20 angle of tilt is of the crane or angle of leaning so
21 that if the crane were to lean too far, the
22 operators would be advised of that.
23 MR. CARLSON: Objection. I move to
24 strike that as being without foundation.
25 THE COURT: Overruled. That can

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1 stand.
2 BY MR. BELL:
3 Q Rather than relying on someone's vision to detect
4 the levelness, as you showed the ladies and
5 gentlemen of the jury with the bubble measure?
6 A Yeah. The bubble measure, in my view, would not be
7 effective. It would be impractical to do that.
8 Something -- something more automatic than that.
9 Q What other preventions in terms of an ounce of
10 prevention is worth a pound of cure could Lampson
11 have incorporated to have prevented this accident?
12 A I believe that the specifications for the track
13 pressure for the crane need to be provided in a more
14 realistic fashion. The track pressures should be
15 calculated, including an aspect of side load, or, as
16 a minimum, a clear statement that would guide the
17 foundation designer to understand how much side load
18 may be developed in this crane because of its unique
19 properties, including the uniqueness of the
20 Rolli-Flex and the fact that this crane is quite
21 flexible.
22 MR. CARLSON: Move to strike that
23 entire response as being without foundation.
24 THE COURT: Objection sustained. The
25 answer is stricken. Can all the jurors disregard

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1 that response? If any of you cannot, please raise
2 your right hand.
3 (No response.)
4 THE COURT: Let's proceed.
5 BY MR. BELL:
6 Q Any other ounces of prevention that Lampson could
7 have incorporated, Mr. Morin, to have prevented this
8 accident?
9 A I believe so. I believe that the Lampson operating
10 crew was not aware of the actual limitations of the
11 crane, and the limitations of the crane should have
12 been made more apparent to the operators.
13 MR. CARLSON: Objection. Move to
14 strike. Wait. Object. Move to strike. Lack of
15 foundation.
16 THE COURT: Sustained. The answer is
17 stricken. The jury is to disregard it. I have to
18 do this on a question-by-answer basis. You have to
19 be very patient with the witness and the lawyers and
20 the Court. And I -- I know that when you hear a
21 question and you hear an answer, it's there, but
22 this is the fairest way to do this for everyone, and
23 I have to do it on a question-by-answer basis. So
24 it's stricken. The jury is to disregard it. If
25 anyone's having a problem with that, please raise

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1 your right hand.
2 (No response.)
3 THE COURT: Thank you very much.
4 BY MR. BELL:
5 Q Let me put on the overhead one of Mr. Shapiro's
6 letters to Mr. Habush early on in this litigation.
7 MR. CARLSON: Is this in evidence?
8 MR. BELL: Yes, it's in evidence. I
9 used it to cross-examine Mr. Shapiro from it.
10 THE WITNESS: That's sideways.
11 MR. CARLSON: I object to reference to
12 Mr. Shapiro's testimony or documents --
13 THE COURT: I have it --
14 MR. CARLSON: -- if they relate to the
15 subject matter beyond this witness's --
16 THE COURT: Just a second. You're
17 arguing a little bit.
18 MR. CARLSON: Sorry.
19 THE COURT: Certain aspects he's
20 qualified to address. There have been certain
21 information that everyone's touched upon that no
22 matter where your expertise is, there's a common
23 denominator. Where it hits the area of the common
24 denominator, he can testify. Where it doesn't reach
25 the area of common denominator, I'll make the ruling

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1 the gentleman who was on site as the superintendent
2 when Milo was off with some health problems, when he
3 started to install the kingpin, he didn't like the
4 way it stacked up.
5 Q What does that mean?
6 A Well, there's a great deal of interchangeability
7 between our components. As I said, the upper works
8 of this machine had just come off a barge. Its
9 previous job, it didn't have transporters.
10 Q Okay.
11 A So when it was assembled here and Tim put the
12 machine together, once he stacked up the kingpin, he
13 didn't feel he could adequately tighten the nut to
14 his satisfaction, and so he called back to have our
15 machine shop build a spacer.
16 Q Why would an assembler care about whether or not the
17 nut on top is tightened?
18 A Well, it's just prudent part of his
19 responsibilities, is to make sure the machine is
20 assembled properly, and the kingpin being tight is
21 one of those duties.
22 Q The spacer that's involved, could that have been
23 been put on underneath the nut?
24 A Yes.
25 Q And here it was put on on the bottom of the kingpin

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1 assembly?
2 A Yes.
3 Q Is there anything from an assembly purpose within
4 Lampson that would make that spacer have been put in
5 wrong? Is there anything wrong with doing that?
6 A No.
7 Q Are spacers put in on kingpins of Transi-lifts at
8 the lower position on a regular basis?
9 A Yes. Upper or lower, it most of the -- most of the
10 time makes no difference.
11 Q And the side load test you told us about earlier
12 today?
13 A Yes.
14 Q Does that have a kingpin with a split ring retainer?
15 A I know of at least two machines that were side
16 loaded during J987 testing that had split ring
17 copper center pins.
18 Q Did they have spacers?
19 A I -- I don't know for sure.
20 Q Okay. The crane down in Texas, there's been
21 testimony about that.
22 A Yes.
23 Q And the jury has seen photographs showing that that
24 one did not have a spacer above the split ring
25 retainer.

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1 A That's correct.
2 Q And why would that be?
3 A Well, even though it's a sister crane, not all
4 sisters are twins. There are some differences
5 between the transporters and the tub in that
6 machine.
7 Q And what would account then for not having a spacer
8 on that assembly?
9 A Well, just the stack-up height is a little bit
10 different. That kingpin that's utilized there could
11 be a little bit shorter to where it's not possible
12 to use a spacer or need a spacer in that stack-up.
13 Q Anemometers that there's been reference to in this
14 case, I'd like to talk to you just about that for a
15 second.
16 A Okay.
17 Q First of all, are anemometers called for or required
18 by any codes that you're aware of?
19 A No.
20 Q In this particular case there was an anemometer put
21 on the machine?
22 A Yes.
23 Q Are anemometers put on the tops of cabs of cranes?
24 A Oh, yes. That's a normal meteorological height,
25 almost the 10 meters.

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1 Q In this particular case it was put on top of the
2 mast?
3 A Yes.
4 Q Is there anything wrong, from a manufacturing or
5 design standpoint, that makes it inappropriate to
6 put the anemometer on the mast of this crane?
7 A On the mast?
8 Q Yes.
9 A No, sir.
10 Q How -- we talked about that's up what, about how
11 high?
12 A Approximately 175 or 180 feet.
13 Q Can we compare that to, like, how many -- how many
14 stories would that be of a building?
15 A About ten.
16 Q All right. So the anemometer is about ten stories
17 high?
18 A Yes.
19 Q From your experience in the crane industry, is that
20 an appropriate place to put an anemometer?
21 A It is for the Transi-lift, yes.
22 Q When the Transi-lifts are assembled, is there any
23 reason to grease the spacer if one's going to be
24 used?
25 A No, not particularly.

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1 correct with the exception that I wouldn't expect
2 that it would be any older than the machine itself,
3 which was put together in 1993."
4 So on August 22nd Bill Lampson is
5 being asked about the origin of this spacer; right?
6 A Yes.
7 Q Now, Lampson knew that Mr. Goforth was sent out to
8 Milwaukee to help put this machine together; right?
9 A I would imagine.
10 Q Well, you were in charge of the investigation into
11 where this spacer came from, weren't you?
12 A No, not exactly. I was looking into why the crane
13 tipped over.
14 Q Well, I'm sorry, I thought you told us yesterday
15 that one of your jobs, as part of the investigation,
16 was to look into the origin of the spacer. Am I
17 wrong?
18 A I may have -- may have said that. It became one of
19 my duties, but originally I was looking at why the
20 accident happened and if the crane was capable of
21 withstanding the loads that were imposed on it.
22 Q Was one of your responsibilities, as part of your
23 investigation in helping with this litigation, to
24 determine the origin of the spacer?
25 A I -- I guess so, yes.

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1 Q And did you think to yourself, as you're trying to
2 figure out the origin of the spacer, well, maybe I
3 ought to talk to the people that Lampson sent out to
4 put this crane together? Did you ask yourself that
5 question?
6 A Yes, but it wasn't until late.
7 Q There's time records that show who was on site to
8 put the crane together from Lampson; right?
9 A Yes.
10 Q And we know that Mr. Bengtson went out there. He
11 traveled on July 4th to start work on July 6th;
12 right?
13 A I'd have to take your word for that, yes.
14 Q And he was there for several days, and then he had a
15 health issue and Mr. Goforth filled in for him for
16 awhile; right?
17 A Yes.
18 Q And Mr. Aldrich, he was out there; right?
19 A Yes.
20 Q And they were all working with the ironworkers to
21 put this thing together; right?
22 A Yes.
23 Q And that -- and they were using the drawings; right?
24 A I would imagine, yes.
25 Q But the drawings alone, I mean, you can't just hand

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1 the drawings over to somebody and say, okay, build
2 this Transi-lift 1500; right?
3 A You could, yes.
4 Q Oh, you could?
5 A Yes.
6 Q Is that how do you it at Lampson --
7 A Not necessary --
8 Q -- here's the drawings?
9 A Excuse me. Not necessarily, no. We usually send a
10 technical representative to assist in that project,
11 yes.
12 Q Right. Have you ever just handed over the drawings
13 and said, Here's the parts, here's the drawings,
14 good luck?
15 A I wouldn't put it that way, no, but there are
16 several companies that have purchased Transi-lifts
17 from us that take on that responsibility themselves.
18 Q How about a lease situation. In all your years at
19 Lampson, have you ever, when leasing a crane, ever
20 said, Here's 97 truckloads of parts, here's the
21 drawings, call us if you have any questions, here's
22 our 800 number?
23 A I wouldn't put it that way, but not to my knowledge.
24 I think we've always sent a technical rep at the
25 request of the client, yes.

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1 Q And you sent a technical rep to Miller Park; right?
2 A Yes.
3 Q And the technical reps worked with the ironworkers
4 to put it together; right?
5 A I would hope so, yes.
6 Q Right. So the notion that, that somehow Milo
7 couldn't talk to the ironworkers putting the parts
8 together, that's -- that's just silly, isn't it?
9 A You'd have to ask Milo about that.
10 Q Okay. In any event, you could go back and look at
11 records and find out who from Lampson was there
12 putting this thing together; right?
13 A I suppose, yes.
14 Q And if you really wanted to find out the origin of
15 the spacer, you'd go and talk to those people;
16 right?
17 A Yes.
18 Q And are you telling us that you didn't do that?
19 A I'm telling you that I didn't do that. I didn't
20 talk to Tim about where the spacer came from. Like
21 I said, whether we're talking spacer, they're
22 thinking thrust washer, whether it's a nomenclature
23 thing or what, Tim and I sat down finally, nobody
24 could recall exactly where the part came from until
25 we kind of reconstructed how we put it together.

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1 the same. I've received no evidence on that, to
2 pierce the corporate veil, nor has that been pled.
3 And MHIA has not cross-claimed for strict liability.
4 Cross-claims do not reference any relief for strict
5 liability.
6 The entire focus of the evidence was
7 with respect to the assembly of the Transi-lift 1500
8 at the Miller Park site, and what was compared was
9 that it was put together wrong. And then Mitsubishi
10 lawyers pointed the fingers at other Big Blue
11 Transi-lift cranes, where they did not have the
12 spacer -- they did not have the spacer and they did
13 not have the copper thrust bearing and it was
14 screwed in on the bottom, which would have been
15 stronger.
16 So all that goes to the issue of
17 assembly, and that's the testimony that was elicited
18 during the course of this trial, even from
19 Mr. Morin, the accident reconstruction expert, and
20 that's how he came in to testify as an accident
21 reconstruction expert, that there was the spacer
22 that was put in there that wasn't part of the
23 drawings, and they should have used a screw on the
24 bottom of the kingpin instead of using the spacer,
25 and then a fortiori the thrust bearing.

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1 So looking at all the evidence as a
2 matter of law, with Mitsubishi not cross-claiming
3 for strict liability against Neil F. Lampson, for
4 not cross-claiming that the corporate veil should be
5 pierced between Neil F. Lampson and Lampson
6 International, nor offering any evidence, yet alone
7 cross-claiming, and that all the testimony goes to
8 the assembly of the Transi-lift 1500 at Miller Park,
9 referred to as Big Blue, and that all those who
10 assembled, whether they be considered loaned
11 employees of Mitsubishi, MHIA, or employees of
12 Lampson International, the Court can rule as a
13 matter of law that there is to be no evidence that
14 could support a jury's verdict of liability against
15 Neil F. Lampson, Inc., and they are dismissed out of
16 the case, and that being hereby is the judgment of
17 the Court for all the additional reasons set forth
18 in Mr. Carlson's moving papers and Mr. Habush's
19 moving papers.
20 That leaves Lampson International in
21 the action. There is no document that Neil F.
22 Lampson signed with respect to the bare lease or the
23 minutes or the -- any of the other contractual
24 documents, which is referenced as Exhibit 4012, and
25 there is enough in the record -- I'm not going to

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1 detail the record and spend an hour going through
2 all this -- but the Court's satisfied that
3 Mr. Morin, the accident reconstrucruction expert,
4 talked about how the accident happened and what
5 could have been done to prevent the accident, and
6 everything was focused on the assembly. He did not
7 testify in any other capacity to a reasonable degree
8 of professional certainty in his discipline, and you
9 need that type of testimony in a venue like this.
10 It would be no difference than a
11 medical malpractice case. You need some expert
12 testimony to talk about whether the doctor properly
13 performed heart surgery according to the standards
14 that are applicable.
15 So judgment's granted in that respect
16 for all those reasons.
17 Give me the balance of your motions to
18 dismiss, Mr. Carlson. Then I'll hear from
19 Mr. Weber. And I'd like you to both -- argue both
20 ways in your motions to dismiss, and I guess we'll
21 have to go round robin twice. All right.
22 MR. CARLSON: Sorry.
23 THE COURT: Sure. I'm going to limit
24 you to -- And I know you lawyers prefer to express
25 yourself verbally. I've got the stuff in writing

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1 and I've listened to the testimony. I would ask you
2 to try to reduce it to five minutes, if you can,
3 because we've got so much material to cover.
4 I left here last night saying the
5 issues to be decided after Thanksgiving with the
6 jury verdict questions -- we're not talking about
7 Albert Einstein's E equals MC squared. I think I'm
8 wrong, after looking at all the paperwork.
9 MR. CARLSON: Your Honor, I came to
10 the same conclusion. I was trying to determine how
11 to bring this together to the jury, if I need to.
12 I need to go back to the crane issue
13 again because there is still a claim by Mitsubishi
14 of negligent assembly, which, of course, the Court
15 just made reference to, and the difficulty we have
16 is that Mr. Morin, their expert, who does not have
17 experience in the crane industry, has testified
18 without any equivocation that the crane exceeded the
19 code-required design standards. For the crane to be
20 used by Mitsubishi under OSHA regulations, there is
21 that two percent side load requirement, and there is
22 no question that the crane exceeded that. Mr. Morin
23 told us that it took four percent to break out that
24 spacer, if you were going to believe this scenario.
25 The problem we run into is that the

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1 and that would have also resulted, as a matter of
2 law, in death or serious bodily injury. So that as
3 an alternative is inherently incredible and
4 inherently implausible testimony. That's the first
5 thing.
6 The second thing is that they were all
7 strapped in. There's no testimony that they weren't
8 strapped in before Mr. Starr got thrown out during
9 that 14-second tragedy and there is no testimony
10 showing that that man-basket wasn't tested and
11 there's no testimony showing that the operator of
12 that crane, which held the three men in that
13 man-basket, was acting in a negligent way.
14 In addition to that, a big crane like
15 that holding, I'll say these gentlemen are roughly
16 200 pounds, holding 600 pounds' worth of -- 600
17 pounds, considering that each weighed 200, so you
18 have 600 pounds, three individuals, so you could put
19 a couple hundred thousand pounds -- I mean, a couple
20 hundred more pounds in the man-basket and let's say
21 the whole thing weighed 2- or 3,000 pounds, there's
22 no indication that that crane couldn't lift that
23 man-basket easily and safely.
24 What caused the death of the three
25 individuals is when the crane collapsed with the

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1 roof piece coming down on them, and the Court rules
2 as a matter of law that there is no negligence based
3 upon the three deceased ironworkers nor Danny's
4 Construction, and I agree with the arguments made by
5 Mr. Habush, concurrence made by Mr. Carlson, and the
6 prior documents that address this issue, and they
7 will not be included in the verdict.
8 The Danny's -- Danny's did nothing wrong
9 and the three deceased ironworkers in that
10 man-basket did nothing wrong as a matter of law. No
11 jury could come back with any other conclusion in
12 reviewing the evidence.
13 Which verdict do you want me to deal
14 with, Mr. Habush, your amended one, or which one do
15 you want me to deal with?
16 MR. HABUSH: I'd like you to look at our
17 second amended requested special verdict.
18 THE COURT: All right.
19 MR. HABUSH: Looking at special verdicts,
20 Your Honor, the cardinal rule to abide by is less is
21 better. Simple is better. Ultimate facts are
22 better. We framed it in terms of the way you could
23 recommend it, a special verdict should look, were
24 they negligent, what was the cause. We put it, I
25 believe, in the proper order with the questions of

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1 negligence and comparison and then the damages
2 2 because in order to get into punitive damages, you
3 need to have the conscious pain and suffering and a
4 negligence finding and then the intentional
5 disregard.
6 The Questions 9 and 10 I think are
7 phrased in conformity with what the instructions
8 are. Did the Defendant Mitsubishi Heavy Industries
9 act in an intentional disregard of the rights of the
10 decedents?
11 THE COURT: I don't have a problem
12 between the damage questions.
13 MR. HABUSH: Well, I think --
14 THE COURT: Here's where you -- you have
15 to help me a little bit, okay?
16 MR. HABUSH: Sure.
17 THE COURT: Why do I -- why do I need
18 Question No. 1, Were Flowers, Aldrich and Watts
19 loaned employees of Defendant Mitsubishi, when I can
20 deal with that on the cross-complaint -- cross-claim
21 under the suggested questions I was drafting -- I'm
22 not saying I'm going to give them -- but separate
23 that on the verdict of cross-claim and just get down
24 to the question was Mitsubishi Industries America,
25 Inc. negligent with regard to the lift on that day

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1 And if they answer yes, was it a cause, and then I
2 do the same thing with Lampson International.
3 MR. HABUSH: The answer is you can
4 include that on this other separated verdict, and
5 lawyers then are free to argue that if they find
6 that they're loaned employees, then when you get to
7 the question of was Defendant Mitsubishi Heavy
8 Industries negligent, that then Watts, Flowers,
9 Aldrich, any negligence that they attribute to them,
10 would go onto Mitsubishi, and if they don't, then it
11 would go onto Lampson. So this is something we can
12 all argue on final argument and explain to the jury
13 the effect of the finding of loaned employees.
14 THE COURT: Bear with me on this.
15 MR. HABUSH: Yeah.
16 THE COURT: Okay. Let's say we cut
17 out Question 1, were they loaned employees. Let's
18 just say we deal with that on the cross-claims
19 between MHIA and Lampson. And we get down to a
20 basic tort question like we'd have in an auto
21 accident case, was so and so negligent in operating
22 his motor vehicle on July 14th, whatever the date
23 is, and then a yes or no. And then the second
24 question, if you answer the first question yes,
25 answer this question: Was it a cause of the

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1 employees, then Defendant Mitsubishi Heavy
2 Industries has responsibility for conduct of Fred
3 Flowers, Steve Aldrich, and Allen Watts as well and
4 have them answer the negligence question.
5 Do the same thing, treat us exactly
6 the same way in reverse, and then ask them to
7 inquire as to our negligence. That way, if they are
8 loaned to Mitsubishi, Mitsubishi will still be able
9 to argue our conduct, and vice versa. And so I
10 think that's a practical solution as well and may be
11 a little simpler than the one that was just
12 proposed.
13 THE COURT: You're not in accord with
14 this, Mr. Habush?
15 MR. HABUSH: No. I think that's too
16 fraught with problems. I think it's much clearer --
17 THE COURT: I got them almost thinking
18 in the hypothetical, giving me verdict answers in
19 the hypothetical, and I don't want to do that.
20 MR. HABUSH: I think if the jury
21 understands that Lampson could be found negligent
22 without regard to those three guys, Mitsubishi's got
23 all they need on that. Then if these three guys are
24 found negligent or not, those are -- that'll be
25 added onto Lampson, so Mitsubishi should be happy

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1 with that if they're not loaned. And if they are
2 loaned, then they're added onto Mitsubishi, and the
3 only time that becomes real important is in the
4 comparison question.
5 THE COURT: Mr. Weber, any final
6 remarks?
7 MR. WEBER: Yes. Just so we have
8 separate apportionments for Lampson and these three
9 individuals so that if, on appeal, issues were
10 resolved one way or the other, we would understand
11 what the impact on the -- on the apportionment is.
12 It's important that we keep them separated in the
13 apportionment phase.
14 MR. HABUSH: Both -- Depends on how
15 they answer that question of loaned employee.
16 THE COURT: I'm in agreement with the
17 proposal by Mr. Habush. That's the appropriate
18 instruction. It's fair to everybody.
19 You're going to have to somehow use
20 all of your resources and get something on this
21 drafted and get -- get it back here this afternoon
22 so we can see a final copy.
23 MR. HABUSH: We can do that right here
24 for you. We brought along the technology to get
25 another proposed verdict so we can all take a look

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1 at it.
2 THE COURT: I see you brought along
3 your best lawyer, too.
4 MR. HABUSH: You got that right.
5 MR. CARLSON: We have a printer as
6 well. I don't want the record to reflect that --
7 THE COURT: I only did that because he
8 said he pined you away back there -- Because I
9 thought you should be up here. All right. Go
10 ahead.
11 MR. CARLSON: I don't want the record
12 to reflect that because John Bozung is not being
13 incorporated into a question on the loaned employee
14 that I'm waiving my position on the record. I
15 understand the Court has taken him out of that mix,
16 but I just don't want that to remain -- I don't want
17 that silence on that issue to be a waiver of the
18 issue. That's all I wanted to say.
19 THE COURT: No, you're not waiving
20 anything. All right. So then we get to comparative
21 negligence question, which should be fairly
22 straightforward.
23 Let me -- let me do this by process of
24 elimination. Let me just make a quick jump here.
25 No, I'm going to try to finish this. I don't have

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1 any problem with damage questions asked by
2 Mr. Habush. I have a problem with the way they're
3 worded by MHIA. They're unfairly suggestive.
4 And some of you have put in pecuniary
5 loss, which Mr. Lowe and Mr. Habush is not seeking,
6 so I assume that's a zestful oversight in your
7 effort to cover all bases and continue to try to
8 confuse this lowly, subservient judge. Now I'm
9 speaking with tongue in cheek.
10 I'm not picking on anybody. I don't
11 have a problem with the punitive damage instruction.
12 I don't have a problem with the punitive damages
13 questions. They're textbook. The only thing that's
14 being knocked out of there is the word "wealth."
15 And we've already went to that issue
16 over and over again from the day we had motions as
17 to the wealth of MHIA, the wealth of Lampson,
18 whether Mr. Lowe or Mr. Habush could get those
19 records, and what's what and where's where. So I
20 don't have a problem with any of that.
21 Where I have a -- I have an issue,
22 though, Mr. Weber, is this enhanced injury doctrine.
23 I don't see any enhanced injury doctrine. You can
24 make your argument real quickly, and I'll make my
25 final ruling, but I don't see any basis to ask a

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1 may exist there.
2 I have to see the lawyers. I think I'm
3 missing one instruction.
4 (Conference held at sidebar off the
5 record.)
6 THE COURT: I was right. During the
7 course of trial, an issue developed as to whether
8 Mitsubishi Heavy Industries of America, Inc.
9 received the crane originally identified in the
10 lease agreement. The Court has ruled that
11 Mitsubishi Heavy Industries of America, Inc.
12 accepted the Lampson Transi-lift 1500 as a
13 substitute crane. Further, the Court has ruled that
14 the Lampson Transi-lift 1500 crane is not defective.
15 Now, members of the jury, this case is to
16 be -- ready to be submitted to you for closing
17 arguments and then your serious deliberations. You
18 will consider the case fairly, honestly,
19 impartially, in light of reason and common sense.
20 Give each question in the verdict your careful and
21 conscientious consideration.
22 In answering each question, free your
23 minds of all feelings of sympathy, bias or
24 prejudice. Let your verdict speak the truth,
25 whatever the truth might be.

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1 When you retire to the jury room after
2 closing arguments, your first duty will be to elect
3 a juror, that juror will be referred to as a
4 foreperson. That foreperson will preside over your
5 deliberations and write in the answers you have
6 agreed upon in your verdict.
7 The vote of a presiding juror or the
8 foreperson however is entitled to no greater weight
9 than the vote of any other juror.
10 When your deliberations are concluded and
11 your answer is inserted in the verdicts, both
12 verdicts, the presiding juror or the foreperson will
13 sign it and date the verdicts and all of you will
14 return to this courtroom with your verdict.
15 And then if you have any questions,
16 there's a system by which you can communicate to my
17 bailiffs, and you write me the question and I
18 discuss it, share it with the lawyers, and then I
19 give you some type of response.
20 All right. What I'm going to do for
21 ease, because we have to set up, I'm going to give
22 you a quick 15-minute break, and then we're going to
23 start with closing arguments of the plaintiff.
24 After that occurs, I'll probably give you another
25 short break or we'll probably go to lunch, depending

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1 upon where we are.
2 I want to limit you to an hour lunch if
3 that's okay. Lunch will be provided to you. You
4 have to indicate to Jerry what's your preference, up
5 there, down there, and then we'll take care of the
6 closing arguments, the balance, of Mitsubishi Heavy
7 Industries of America, Inc. and Lampson
8 International Ltd.
9 All those admonishments apply. Everyone
10 please stand. Be ready to go at twenty after.
11 Thank you, folks.
12 (Jury excused.)
13 THE COURT: All right the jury is out.
14 Be ready to go at twenty after. The lawyers,
15 they've got to substitute these papers. If you'll
16 see, I almost read one instruction twice, which is
17 fine. Okay. Thank you.
18 (Short recess taken.)
19 THE COURT: We're back in session. Can I
20 have everyone's attention so we can go? Can I talk
21 to the lawyers? We're back in session, please. I
22 have to do a little housekeeping with the lawyers.
23 With all rights preserved, did I miss any
24 instructions? I know I missed one. No one asked
25 for it, but I covered it during the trial. Did I

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1 miss anything that we all agreed upon?
2 MR. CARLSON: No, Your Honor.
3 MR. YOUNG: No, Your Honor.
4 THE COURT: And silence, Mr. Weber
5 or -- Did I miss something that --
6 MR. WEBER: I don't believe you did,
7 Your Honor.
8 THE COURT: Okay. There is an
9 instruction on sensory perceptions by laypeople, see
10 something, I think the car's going 40 miles an hour,
11 it smells like straw berries, chocolate, and I did
12 not give that instruction. It wasn't asked for.
13 But the jury was instructed during the course of the
14 trial. That's the only thing, upon reflection, I
15 felt the record should be made aware of. Bring the
16 jury down.
17 Mr. Habush, how much do you want to
18 reserve?
19 MR. HABUSH: Pardon me?
20 THE COURT: How much do you want to
21 reserve? Fifteen minutes, a half hour?
22 MR. HABUSH: I expect I'll have a half
23 an hour or more. I don't think this is going to
24 take much more than an hour.
25 THE COURT: I'll reserve 45 minutes

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1 experience contemplation of death. And he told you
2 they were terrified, they knew they were going to
3 die, it must have been a terrible experience.
4 psychologically, philosophically, spiritually, and
5 emotionally.
6 He went on to say, these are
7 experienced ironworkers. They knew what kind of
8 trouble they were in. I'm sure they expected to
9 die. And based on my experience, they had adequate
10 time to experience all the things I talked about,
11 unfortunately.
12 There were no good-byes, no "I love
13 yous." Only who's going to take care of my babies?
14 Who's going to take care of my wife? I suggest in
15 that line that a reasonable figure for these men
16 would be the sum of two million dollars each for
17 those 14 seconds of hell.
18 Now let's talk about punitive damages.
19 This is where you can speak out, members of the
20 jury, an indignation. This is where you can punish
21 the wrongdoer and send a message so it won't happen
22 again to other families.
23 The law says, as the judge told you,
24 consider the grievousness of the action. How much
25 more grievous can it be? The law says, consider the

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1 actual damages. How much more serious can death be?
2 And the law says, consider the potential of what
3 might have happened if there had been more people
4 under that roof piece. Dozens could have been
5 killed.
6 I bring you no appraisers. There are
7 no appraisers I can bring to you to tell you what to
8 do on this question and how much to insert. All I
9 know is it can't be a slap on the wrist. They've
10 got to get a clear message from you. Otherwise
11 they'll shrug it off and go about their business.
12 Every day we hear numbers, stadiums
13 costing 350 million, 250 million, ballplayers who
14 play in these stadiums making tens of millions of
15 dollars to play baseball or football or basketball.
16 Their contract, their contract, was
17 for $47 million. I think there's some poetic
18 justice that they should be assessed for the death
19 of one of these men to the extent of the bargain
20 they got from their contract of $47 million. That
21 was their contract.
22 These men had a contract also to live,
23 to live a full and free life. And if I was
24 representing one of these people, not three, but
25 one, and speaking for one and not three, I would say

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1 that would give them a clear message.
2 The 47 million of their contract for
3 punitive damages, for the punishment for their
4 behavior, to make sure they don't do it again, but
5 more importantly, that other contractors coming into
6 our town will know how you feel about people who
7 play fast and loose with the lives of our men and
8 women on construction sites.
9 But we have three men here. So you
10 should consider a multiple of that 47, and I leave
11 that to your discretion. Remember, you've heard
12 that the steel, the bricks, and the mortar had a
13 hundred millillion in damage. I don't know if you can
14 do less for three human beings than the loss in the
15 property damage in this tragedy.
16 Members of the jury, this is the kind
17 of case this courthouse was built for. This is the
18 kind of case that this courtroom was designed for.
19 This is the kind of case that I became a lawyer to
20 handle. Something special can still come out of
21 this tragedy. Some good may still come out of these
22 losses. It's in your hands, and you can ensure and
23 send a message so that other families will not have
24 to have me or any other lawyer standing up here
25 talking with you like this today.

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1 We are confident, on behalf of the
2 families, that you will do the right thing, and I
3 thank you.
4 THE COURT: Thank you, Mr. Habush.
5 What we're going to do is we're going to go into
6 recess. All the admonishments continue to apply.
7 Jerry has made arrangements for downstairs. We're a
8 little bit ahead of schedule, but I don't want to
9 start the next series of closing arguments because
10 they were each going to run approximately an hour
11 and a half, and it's time for a break and to give
12 everybody time to proceed further.
13 Please be ready to go by — Be back
14 here by quarter to one, and we'll start the next
15 series of closing arguments at one o'clock. And
16 you'll be taken care of in good hands by my bailiff,
17 Jerry. All right. Please rise. Admonishments
18 apply.
19 (Jury excused.)
20 THE COURT: Please shut it for me.
21 Thank you. Jury's out. Please be ready to go by
22 promptly at quarter to one, and we'll start with
23 closing arguments of Mr. Bell promptly at one
24 o'clock.
25 Mr. Habush, you have a half hour left

over the place, about the way Mitsubishi ran the operations, how they treated everybody there, how they pushed, and how reckless or willful or malicious they acted through either a course of conduct or a pattern of conduct prior to and up to the time of the tragedy.

You want to add anything to make your record, or can I just deny the motion, Mr. Habush?

MR. HABUSH: Yeah, I would very briefly. So that the court is not inadvertently misled by Mr. Weber's comments. The test, and we've filed an extremely long brief on this issue, is not whether or not -- not whether Mitsubishi's employes were reasonably certain Big Blue was to fall over. The test is whether or not they intentionally disregarded the rights of the plaintiffs, the rights to be out of harm's way, the rights to be free of injury or death, and the law which we cited to the court indicates it can be a subjective and objective test.

We concede that there was no malicious act here, we concede it is not necessary for them to intend to have harmed these people. It's the same thing as the guy who shoots a gun, a bullet into a house full of occupants and then can't be heard to say well, I didn't know that Mary Smith was going to get hit by the bullet, or it's the same as the bomb theory, throws a bomb into a crowds, say I didn't know Bill was going to be killed, or that Denny was

But the response on the punitive damage question was that it was approximately $47 million to bill that, and they doubled that amount.

But the important comment was that the jury said there was an expectation that when one's husband or wife leaves home and goes to work, that there is an expectation that they will go to work and be reasonably safe in the environment, that they work and come home. And it was deterrence. That's what the jury talked about on the punitive damage issue. They did not talk about, nor was there any dialogue, but they focused on deterrence as opposed to labeling someone as a wrongdoer, or as opposed to labeling someone as a bad guy, or as opposed to focusing in on anything else. I say that because we're all bound by what the jury found in this case. And if there is going to be issues at the appellate level, the appellate court should at least have the benefit of the jury giving further expression on the subject that this was done to deter and the basis for them reaching the $94 million.

There is no finding by this jury, contrary to what Mr. Rattan of Travelers argues, that there was intentional conduct. There has

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1 in the spacer.
2 HONORABLE FINE: Who put in the spacer?
3 MR. WEBER: Lampson International,
4 actually.
5 HONORABLE FINE: So that was the
6 assembler, and that was made out of copper or
7 something?
8 MR. WEBER: Right. Much weaker material.
9 So you have all this very strong, incredibly high-
10 strength steel, and then you put into the system a
11 very soft, relatively, copper spacer that became
12 the weakest link.
13 HONORABLE FINE: So in a very real sense,
14 if putting in -- Let me rephrase that. If Lampson
15 International's assertion of what you claim to be
16 the weakened material was caused by the omission of
17 the nut by the manufacturer, then, by traditional
18 law, the omission of the nut would be the
19 precipitating factor of that train of causation.
20 MR. WEBER: Exactly right. Because if
21 you leave the nut and the threads in the bottom,
22 then you can tighten it up. But substituting the
23 split ring out -- you know, like a cotter pin, then
24 you have play in the system. And when you're
25 talking about a device -- a machine really that's

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1 as tall as the Firstar Building, now U.S. Bank, and
2 only 30 feet wide, you can imagine how important
3 all these different components are. We've learned
4 about it --
5 HONORABLE FINE: Is that the old First
6 Wisconsin Building?
7 MR. WEBER: That's right.
8 HONORABLE FINE: Okay. The last two
9 names -- Perhaps I still live in the twilight zone,
10 but I still call it the First Wisconsin Building.
11 MR. WEBER: Let's call it the First
12 Wisconsin Building. And thus, as plaintiffs'
13 expert conceded, this crane had a very sensitive
14 levelness requirement. Because what happens, you
15 know, we know from basic geometry, I guess, what
16 happens down at the ground level of an inch or so,
17 translates into huge movement 500 feet in the air.
18 HONORABLE SCHUDSON: Mr. Weber, were you
19 able to argue all of that at trial?
20 MR. WEBER: Some of those things, yes, we
21 were able to argue. But again, leaving Neil F. off
22 as the initiator, the jury could not and did not
23 deliberate about what role Neil F. played in all of
24 this.
25 HONORABLE SCHUDSON: No, but --

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1 MR. WEBER: And I'm not asking the Court
2 to say we're right. I'm just saying that under our
3 system, the jury is supposed to make these calls,
4 not the Court.
5 HONORABLE SCHUDSON: I understand. Of
6 the things you've just mentioned, what were you not
7 able to argue?
8 MR. WEBER: Okay. We'll have somebody
9 check the transcript of the closing for you while
10 I'm arguing. To go back to your point, the Judge's
11 instruction appears at the Supplemental Appendix
12 261.
13 HONORABLE WEDEMEYER: Thank you.
14 MR. WEBER: And I -- In further response
15 to your question, it was a fairly unusual
16 procedure, so I'm not sure if it's fair game for me
17 to talk about this or not, but after the jury came
18 back, the Court, one floor below us, put the jury
19 in the jury box and had a press conference with the
20 jurors, and had reporters come up and query the
21 jurors about why they did what they did. And the
22 Judge put some of that in the record in terms of
23 his description, justifying the punitive damage
24 award at twice the roof price. And we'll talk
25 about that this afternoon.

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1 HONORABLE FINE: Oh. Wait. I'm glad you
2 mentioned roof price, because I've been meaning to
3 jog my memory to ask you, is that gross or net?
4 MR. WEBER: That was the original gross
5 price.
6 HONORABLE FINE: So that's not profit on
7 the contract?
8 MR. WEBER: It's not. Not at all. And
9 in fact, as the Court may be aware, there's another
10 huge lawsuit going on about what the price -- the
11 gross price should been, but no. The $47 million
12 number was an original gross price -- had nothing
13 to do with profit.
14 HONORABLE FINE: Is there anything in the
15 record of any of these cases as to what, A, the
16 expected profit was from the contract, and B, what
17 the actual profit was?
18 MR. WEBER: No, I do not believe there
19 was.
20 HONORABLE FINE: Nothing?
21 MR. WEBER: No.
22 HONORABLE FINE: No percentages that
23 estimates can be gleaned from?
24 MR. WEBER: I don't think there was
25 anything like that at all -- just the gross number.

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1 And as I said, in this unusual in-court proceeding,
2 the jurors said -- One of reporters asked the
3 juror, "Well, you heard all this about the spacer.
4 What did you think about the spacer?" And the
5 juror said, "Well, we didn't think about the
6 spacer. The Court told us the crane was not
7 defective." So we had an in-court admission of the
8 power of what it is the trial court had done that
9 obliterated all the work Mitsubishi had done to
10 show, "Look --"
11 HONORABLE FINE: I know you guys haven't
12 briefed this, but this is a fascinating law school
13 question as to whether a jury press conference
14 called by the Court, as you described it, is an
15 exception to the exclusion of jurors explanation of
16 their verdict.
17 MR. WEBER: I would say that it was
18 because it occurred under Court sanction called by
19 the Court, controlled by the Court, and as part of
20 -- before he discharged the jurors to go off and
21 continue on with their lives. So -- And further,
22 the Judge himself brought the process into the
23 record by saying, "Hey, the punitives were
24 reasonable. The jury told us how they got to them.
25 They just doubled the roof price."

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1 HONORABLE FINE: So you're saying that
2 the trial court used what the jurors told him as a
3 basis for sustaining the verdict?
4 MR. WEBER: He did. Absolutely.
5 HONORABLE WEDEMEYER: Let's move on.
6 MR. WEBER: Okay. Evidence admitted --
7 SAE standard. There was no dispute that the SAE
8 standard was applicable. And the testimony from
9 Mr. Morin at Supp. App. 12 was that the crane
10 failed at less than 2 percent. So it violated the
11 standard. And importantly, these industry
12 standards -- The trial court treated them as if
13 they were rules of law -- as if there was some kind
14 of a Federal preemption involved if you found that
15 you had met the standard. And, of course, these
16 are minimums, and the jury is entitled that
17 something more was required. But even as to the
18 minimum of 2 percent, there was evidence that the
19 crane failed at less than the 2 percent minimum.
20 Now, there was debate about that, and some people
21 said --
22 HONORABLE WEDEMEYER: There was a lengthy
23 discussion about that in the instruction conference
24 as well.
25 MR. WEBER: Yes. And there was debate

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1 about whether it failed at 2 percent. But again,
2 that's, with all respect, for the jury to sort out,
3 and the evidence was there of Neil F.'s role in
4 this accident.
5 The second and third points, their own
6 design. We talked about the Trask memo and the
7 failure and the weakening, and that appears at the
8 Appendix at 57, 81 and 114. The other own design
9 problem, levelness and the Rolli-Flex. You may
10 have seen in the briefs, this crane -- this huge,
11 enormous machine had a very unusual and what
12 plaintiffs' experts said was completely unnecessary
13 suspension system -- sort of like putting shock
14 absorbers on your car, is the way Mr. Habush
15 described it. And the consequence of that is, you
16 add flexibility to the crane.
17 And Neil F. conceded that they didn't
18 test the effect of this Rolli-Flex suspension
19 system. So, you know, we talked about the duty to
20 test. They admitted they hadn't tested. And guess
21 what? They tested in this case, and we talked
22 about a .75 levelness requirement, which they said
23 was ground only. Well, when you did the test, you
24 found that this suspension system in the
25 Transi-Lift added .38 all by itself, under a

Page 25

1 2-percent side load. So you have operators
2 thinking, "Okay. Now, I'm just getting up to .75
3 three-quarters of an inch over 30 feet --
4 incredibly tight levelness requirement, but I'm all
5 right." But Lampson didn't tell us -- Neil F.
6 didn't tell us, because they didn't know, because
7 they didn't test, "Guess what? When you have a
8 2-percent side load, folks, those -- that
9 suspension system, like you're sitting on the
10 corner of a car, it's adding flexibility." It's
11 leaning unfortunately in the direction that the
12 crane collapsed and tipped over.
13 So you have a variety of things coming
14 together on July 14 that led to this accident. It
15 wasn't the single factor case, and the jury should
16 have been entitled to weigh that. So no test.
17 Plaintiffs' expert at Supp. App. 115 describes how
18 unneccesary it was. Lampson's own expert, Keefe,
19 admitted that if this Rolli-Flex added flexibility
20 such that you couldn't stay within your levelness
21 requirement, it would make it defective.
22 Fourth point, kingpin weakened. We've
23 talked about that. The threaded, the split ring,
24 that's at Appendix 115.
25 Fifth, the missing tipover warning

Wischer

***

INTERROGATORY NO. 24: Do you contend that MHIA managed or supervised the details of the ironworkers including Jeffrey Wischer's work on a day-to-day basis? If so, please identify all witnesses, documents, and facts that support your contention.

ANSWER: Objection. The phrase "managed or supervised the details" in the context of this question is vague. Subject to and without waiving such objection, no.

INTERROGATORY NO. 25: Do you contend that Danny's Construction's responsibility during the lifts at Miller Park was only to provide manpower to MHIA to assist in the lifts? If so, please identify all witnesses, documents and facts that support your contention.

ANSWER: No.

INTERROGATORY NO. 26: Do you contend that MHIA's supervisory personnel routinely overruled Danny's Construction's supervisory personnel? If so, please identify all witnesses, documents and facts that support your contention.

ANSWER: Objection, vague as to "routinely" and "overruled." Subject to and without waiving said objection, no.

INTERROGATORY NO. 27: Do you contend that MHIA routinely gave direct orders to the ironworkers, including Jeffrey Wischer, in disregard of the safety of the ironworkers, including Jeffrey Wischer? If so, please identify all witnesses, documents and facts that support your contention.

ANSWER: Objection. The term "routinely" is vague. Subject to and without waiving such objection, no.

INTERROGATORY NO. 28: Do you contend that MHIA's supervisory personnel routinely ordered the ironworkers, including Jeffrey Wischer, to complete their tasks in a manner determined by MHIA? If so, please identify all witnesses, documents and facts that support your contention.

ANSWER: Objection. Vague as to "routinely." Subject to and without waiving said objection, no.

INTERROGATORY NO. 29: Do you contend that Jeffrey Wischer went up in the man basket on July 14, 1999 under MHIA's control?

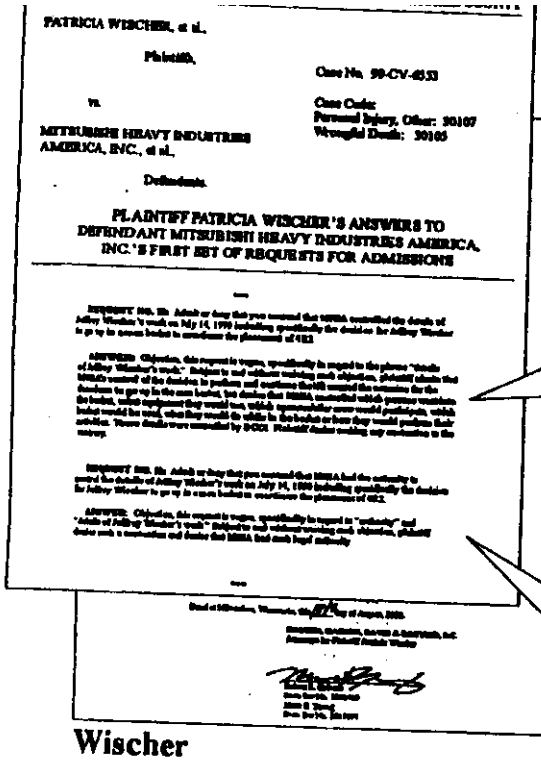
ANSWER: No.

***

EXHIBIT
MHIA
3818

EXHIBIT
A

DeGrave *(same)*


PATRICIA WISCHER, et al.,

Plaintiffs,

vs.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., et al.,

Defendants.

Case No. 99-CV-4533

Case Code:
Personal Injury, Other: 30107
Wrongful Death: 30105

PLAINTIFF PATRICIA WISCHER'S ANSWERS TO DEFENDANT MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.'S FIRST SET OF REQUESTS FOR ADMISSIONS

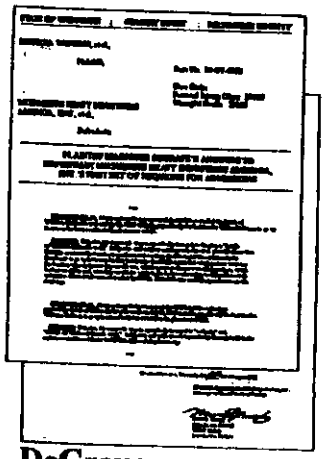
Wischer

REQUEST NO. 10: Admit or deny that you contend that MHIA controlled the details of Jeffrey Wischer's work on July 14, 1999 including specifically the decision for Jeffrey Wischer to go up in a man basket to coordinate the placement of 4R3.

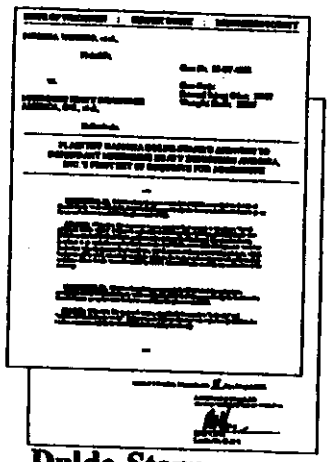
ANSWER: ...plaintiff admits that MHIA's control of the decision to perform and continue the lift created the occasion for the decedents to go up in the man basket, but denies that MHIA controlled which persons went into the basket, what equipment they would use, which operator/oiler crew would participate, which basket would be used, what they would do while in the basket or **how they would perform their activities. These details were controlled by DCCI. Plaintiff denies making any contention to the contrary.**

REQUEST NO. 11: Admit or deny that you contend that MHIA had the authority to control the details of Jeffrey Wischer's work on July 14, 1999 including specifically the decision for Jeffrey Wischer to go up in a man basket to coordinate the placement of 4R3.

ANSWER: ...plaintiff denies such a contention and denies that MHIA had such legal authority.



DeGrave
(same)



Dulde-Starr
(same)

EXHIBIT
3819

EXHIBIT
B

1 But the response on the punitive damage question
2 was that it was approximately $47 million to bill
3 that, and they doubled that amount.
4 But the important comment was that the
5 jury said there was an expectation that when one's
6 husband or wife leaves home and goes to work, that
7 there is an expectation that they will go to work
8 and be reasonably safe in the environment, that
9 they work and come home. And it was deterrence.
10 That's what the jury talked about on the punitive
11 damage issue. They did not talk about, nor was
12 there any dialogue, but they focused on deterrence
13 as opposed to labeling someone as a wrongdoer, or
14 as opposed to labeling someone as a bad guy, or as
15 opposed to focusing in on anything else. I say
16 that because we're all bound by what the jury found
17 in this case. And if there is going to be issues
18 at the appellate level, the appellate court should
19 at least have the benefit of the jury giving
20 further expression on the subject that this was
1 done to deter and the basis for them reaching the
2 $94 million.
3 There is no finding by this jury,
1 contrary to what Mr. Rattan of Travelers argues,
that there was intentional conduct. There has

STATE OF WISCONSIN
IN THE SUPREME COURT

Patricia Wischer, individually, and as Special Administrator of the Estate of Jeffrey A. Wischer, deceased, Marjorie DeGrave, individually, and as Special Administrator of the Estate of William R. DeGrave, deceased, and Ramona Dulde-Starr, individually, and as Special Administrator of the Estate of Jerome W. Starr, deceased;
Plaintiffs-Intervenors-Respondents-Petitioners,

v.

Mitsubishi Heavy Industries America, Inc.,
Defendant-Appellant,

The Travelers Indemnity Company of Illinois,
Defendant,

Neil F. Lampson, Inc.,
Defendant-Respondent,

Lampson International Ltd., Federal Insurance Company, and The Tokio Marine & Fire Insurance Company,
Defendants.

Case No. 01-0724 (consolidated with Case Nos. 01-1031 and 01-2486)

REVIEW OF A DECISION OF THE
COURT OF APPEALS, DISTRICT I
DATED SEPTEMBER 30, 2003

COURT REQUESTED BRIEF OF FEDERAL INSURANCE COMPANY, INC. ON CONSTITUTIONAL ISSUES

Patricia Wischer, individually, and as Special Administrator of the Estate of Jeffrey A. Wischer, deceased, Marjorie DeGrave, individually, and as Special Administrator of the Estate of William R. DeGrave, deceased, and Ramona Dulde-Starr, individually, and as Special Administrator of the Estate of Jerome W. Starr, deceased;
Plaintiffs-Respondents-Cross-Respondents-Petitioners,

v.

Mitsubishi Heavy Industries America, Inc.,
Defendant-Respondent-Cross- Appellant,

The Travelers Indemnity Company of Illinois,
Defendant-Appellant-Petitioner,

Neil F. Lampson, Inc. and Lampson International, Ltd.,
Defendants,

Federal Insurance Company,
Defendant-Co-Appellant,

The Tokio Marine & Fire Insurance Company,
Defendant.

Case No. 01-1031 (consolidated with Case Nos. 01-0724 and 01-2486

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Plaintiffs-Respondents-Cross- Respondents-Petitioners,

v.

Mitsubishi Heavy Industries America, Inc.,

Defendant-Respondent-Cross-Appellant,

The Travelers Indemnity Company of Illinois,

Defendant-Appellant-Cross-Respondent,

Neil F. Lampson, Inc. and Lampson International Ltd.,

Defendants,

Federal Insurance Company, and The Tokio Marine & Fire Insurance Company,

Defendants-Respondents-Cross-Appellants.

Case No. 01-2486 (consolidated with Case Nos. 01-0724 and 01-1031

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INTRODUCTION

The constitutional excessiveness of the $94,000,000 punitive damage verdict is certainly one of the reasons that the punitive damage judgments in this case are unconstitutional, but it is far from the only reason. Beyond the excessiveness of the $94,000,000 award, to properly analyze this case it is imperative to recognize two unique factors.

First, the punitive damage judgment entered against the alleged wrongdoer, Mitsubishi Heavy Industries America, Inc. ("MHIA"), is NOT the only judgment for punitive damages that must be reviewed. MHIA has analyzed why the verdict against it and in favor of the Wischer Plaintiffs (the "MHIA Punitive Judgment") is unconstitutionally excessive. Federal Insurance Company ("Federal"), one of MHIA's insurers, joins in those arguments.

But the Wischer Plaintiffs also possess a judgment for punitive damages running DIRECTLY against Federal (the "Federal Punitive Judgment"), completely bypassing the wrongdoer. This distinct judgment, entered in post-trial proceedings (Federal was not even a party to this action

during the trial), requires independent constitutional analysis. When subjected to that analysis, it is clear that the Federal Punitive Judgment is unconstitutional.

Second, when the jury adjourned to consider punitive damages, a secret deal was already in place between the Wischer Plaintiffs and the alleged wrongdoer. That deal, not disclosed until after the trial, will be discussed in detail below. But, the key point is this, the Wischer Plaintiffs agreed (in return for a $12,375,000 payment) never to hold MHIA responsible for punitive damages in excess of $10,000,000. The only way any punitive damages in excess of $10,000,000 would ever be paid is if paid directly to the Wischer Plaintiffs by insurers of MHIA. These insurers, such as Federal, had no idea that MHIA had cut a deal purporting to make them directly liable for punitive damages.

It is unconstitutional to enter a judgment for punitive damages directly against anyone but the actual wrongdoer. Under some circumstances, a wrongdoer can seek reimbursement for punitive damages from its insurer, but that is NOT what happened here. The deal struck during this trial makes the unconstitutionality all the more glaring. A deal under which the plaintiff agrees to forego collection of the

jury's punitive damage award unless it is paid directly to the plaintiff by somebody other than the wrongdoer makes a mockery of the fundamental principals of due process.

In sum, two unique factors permeate the entire constitutional analysis: (1) The existence of a judgment, distinct from the MHIA Punitive Judgment, running directly against Federal and (2) The existence of a pre-verdict deal exculpating the alleged wrongdoer from responsibility for punitive damages.

BACKGROUND

Shortly after the "Big Blue" crane at Miller Park collapsed, the Wischer Plaintiffs filed suit against MHIA and several other defendants. Federal was not named a defendant until after the jury returned its verdicts. However, to fully understand the context of the punitive damages judgments, it is important to begin when the contracts for insurance were entered for the Miller Park project. Federal provides insurance to MHIA under an Owner Controlled Insurance Program ("OCIP"). Federal's liability policy is for $50,000,000.

The OCIP was comprised of four insurers, providing as follows:

$0 to $2,000,000: Travelers Indemnity Company ("Travelers")

$2 to $5,000,000: Royal Insurance Company of North America ("Royal")

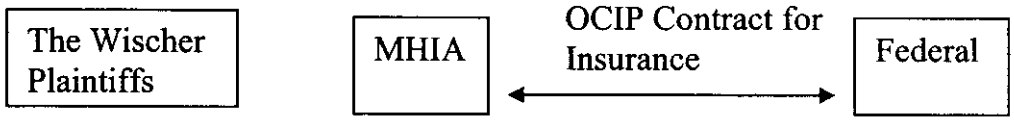
$5 to $25,000,000: Indemnity Insurance Company of North America ("IINA")

$25 to $75,000,000: Federal

$75 to $100,000,000: Travelers

MHIA also had $2,000,000 million in excess coverage with The Tokio Marine And Fire Insurance Company.

Charting helps to clarify the legal relationships. During the Miller Park Project, MHIA was in a contractual relationship under the OCIP with Federal and several other insurers.



After the collapse, the Wischer Plaintiffs filed suit seeking compensatory damages for "negligence" and punitive damages "incident to the damages for pain and suffering sustained" by the decedents. Federal was not named.

The first critical event after the accident defining the parties' legal relations occurred well before the jury returned

with verdicts. On November 7, 2000, Plaintiffs, MHIA, and IINA executed a settlement agreement. (R.513, App. 31-39) [1] Because part of the Agreement involved a payment of $12,375,000[2] from IINA to the Wischer Plaintiffs, it is called the "IINA Agreement." On November 7, 2000, the underlying trial was in progress. (R.738) Indeed, the verdict would not be returned for more than three weeks. (R.754)

Significantly, on November 7, 2000, Federal was not a party defendant, was not asked and did not sign the IINA Agreement, and the existence of the IINA Agreement was kept confidential. It would never be disclosed to the jury and was not disclosed to the Court until after the verdict. (R.513)

In addition to the payment to the Wischer Plaintiffs, the IINA Agreement released MHIA from liability for compensatory damages under $12,375,000 and from liability for compensatory damages, punitive damages or otherwise, in excess of $84,625,000. (R.153, App. 31-39) The Wischer Plaintiffs also fully exculpated MHIA from responsibility for

---

[1] App. are cites to the appendix accompanying this brief.

[2] Plaintiffs received a total of $19,325,000 as of November 7, 2000. Subsequently, IINA paid an additional $7,625,000, making the total paid $27,000,000, which is not refundable regardless of the outcome here. (R.105, 145, 844) (R.513, App. 31-39).

any punitive damages below $84,625,000 except if one of two limited exceptions occurred. If one of those two exceptions occurred, then a "savings clause" would allow Plaintiffs to recover a maximum of $10,000,000 in punitive damages from MHIA. In other words, MHIA's potential punitive damage liability was absolutely capped at $10,000,000.[3]

When the IINA Agreement was presented in court, rendering it part of the judgment pursuant Wis. Stat. § 807.05, Attorney Habush stated:

> The plaintiffs have agreed, in consideration of the twelve

---

[3] Section 1(a) through 1(c) of the IINA Agreement specify the releases and hard caps, and Section 2 recognizes and securitizes MHIA's maximum possible exposure. Section 1 releases MHIA from all of the following (emphasis added):
(a) the first $12,375,000 of compensatory damages for any and all Claims;
(b) <u>any and all compensatory damages, punitive damages and other liability in excess of $84,625,000</u> for any and all Claims; and
(c) <u>any and all compensatory damages above $12,375,000 and below $84,625,000, and any and all punitive damages and other liability below $84,625,000, for which MHIA is not indemnified by valid and collectible insurance under the OCIP</u> or the Tokio Marine policy for any and all Claims, <u>unless</u> it has finally determined after exhaustion of all appeals that <u>punitive damages</u> otherwise falling within the available limits of the IINA policy, the Federal policy, the Travelers FSJ policy or the Tokio Marine policy <u>are not covered by those policies because of some policy exclusion or public policy reason, in which case MHIA shall be responsible for a maximum of $10 million of those punitive damages</u> which would have otherwise been covered by those policies.

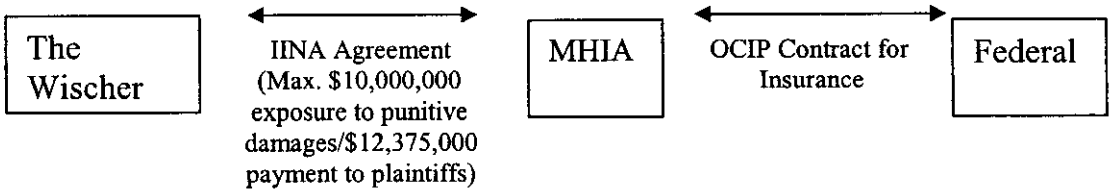
Section 2 operates with Section 1(c), recognizing the absolute cap of $10,000,000. MHIA and MHI shall obtain a bond or letter of credit from a U.S. based company within 30 days from the date of this Release to secure and guarantee MHIA's <u>potential $10 million maximum exposure to the plaintiffs</u>.

> million three seventy-five, that if they are successful on appeal, that they will approach only the applicable insurance coverage for purposes of recovery. That is just like the previous two, **there will be no personal attachment or judgment or excess judgment against Mitsubishi itself.** (R.755)

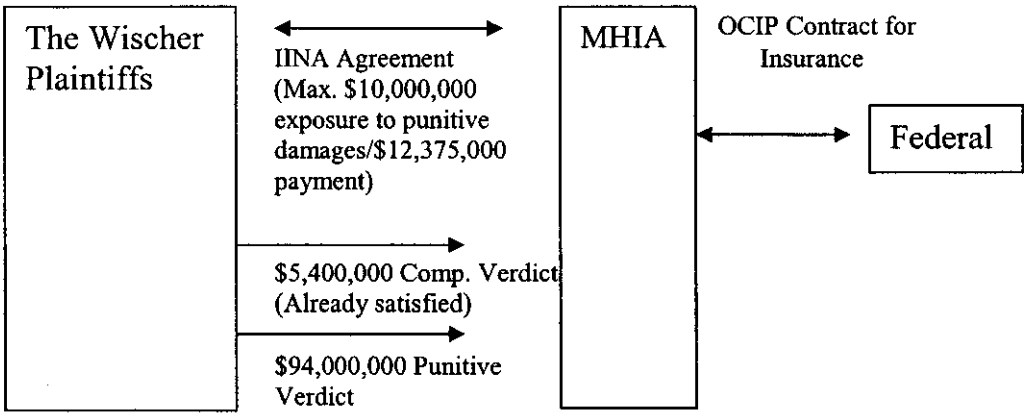
MHIA also understood it was exculpated from responsibility (except the limited possibility of $10,000,000) for any punitive damages verdict. MHIA's counsel stated,

> Under the - - under the deal struck with the plaintiffs, it is - - **Mitsubishi is completely off the hook** from any liability except where this happens, where punitive damages are found not to be covered by the policies because either, one, of some policy exclusion, or two, a public policy reason. That's it. If there's found to be no coverage for any other reason, Mitsubishi's off the hook. Or if those limits are reduced, for whatever reason, because other claimants come and stand in line to pay, Mitsubishi's off the hook, except under those limited circumstances. (R.756)

As of November 7, 2000, after the accident but prior to any verdicts, the legal relationships were:



The jury returned its verdicts on December 1, 2000, awarding $5,400,000 in various compensatory damages, and assessing punitive damages against MHIA of $94,000,000. Because the Wischer Plaintiffs had already received more than $5,400,000 in compensatory damages, the compensatory portion of this case was satisfied. All that remained were punitive damages. On December 1, 2000, when the jury returned its verdicts, the chart changed as follows:

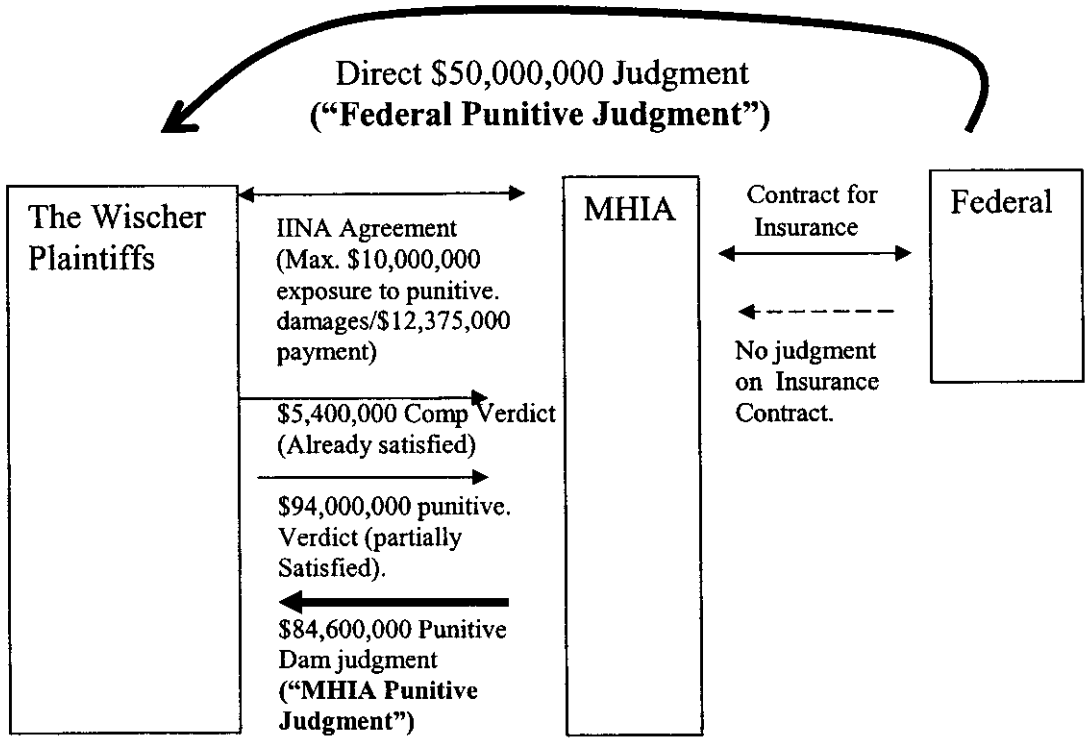


After the verdict, the Wischer Plaintiffs filed an Amended Complaint stating a direct action against Federal and marking Federal's first appearance as a party. (R.494, App. 40-44) Between January 30, 2001 and November 12, 2001, the Trial Court entered a series of orders and judgments. Two are relevant: (1) The MHIA Punitive

Judgment for $84,625,000[4] in punitive damages running directly from MHIA to the Wischer Plaintiffs (R.601; App.1-2); and (2) The Federal Punitive Judgment for $50,000,000 in punitive damages, running directly from Federal to the Wischer Plaintiffs (R.953; App. 3-5).

To reiterate, these are distinct judgments. While Federal will analyze both judgments, it is worth noting a judgment that does NOT exist. There is no money judgment, and none was ever sought, between Federal and MHIA.

After the Trial Court's work, the chart changed again:



[4] Although the jury awarded $94,000,000, the Trial Court reduced it to $84,625,000 pursuant to the IINA Agreement cap.

The "MHIA Punitive Judgment" and the "Federal Punitive Judgment" must be analyzed separately.

This begs the question, if the MHIA Punitive Judgment survives review, what difference does it make to Federal if it pays its $50,000,000 policy limit under a punitive damages judgment running directly to the Wischer Plaintiffs (the existing "Federal Punitive Judgment"), or under a potential contract judgment running to MHIA[5]. It matters for two reasons. First, a punitive damage judgment is qualitatively different from any other civil judgment. A punitive damage judgment is about much more – or at least should be – than moving money around. Constitutional and public policy principles should never be taken lightly in punitive damages. The appropriate way – as recognized by Brown v. Maxey – for a plaintiff to collect punitive damages when an insurer is involved is collecting them in the first instance from the wrongdoer, who can look to its insurer for potential coverage. Second, the reality created by the IINA Agreement and explicitly recognized by Attorney Habush is

[5] Federal in no way concedes that its policy covers the punitive damages in this case.

that the Wischer Plaintiffs could never execute the MHIA Punitive Judgment. Therefore, the only way the punitive damages will ever be paid is if they are paid directly to the Wischer Plaintiffs by the insurers.

ARGUMENT

The $94 million punitive damages award is unconstitutional for reasons that apply with equal force to both the MHIA Punitive Judgment and the Federal Punitive Judgment. However, there are other reasons that distinctly render the Federal Punitive Judgment unconstitutional. Federal will first review constitutional issues specific to the Federal Punitive Judgment, and then the overall constitutional deficiency of the jury's award.[6]

I. THE FEDERAL PUNITIVE JUDGMENT IS UNCONSTITUTIONAL

A. A Judgment For Punitive Damages Directly Against The Insurer Does Not Punish Or Deter, And Therefore Violates Due Process.

1. Brown V. Maxey Does Not Address This Issue, And Is Not Challenged In Any Way By Federal.

We first address the issue of Brown v. Maxey, 124 Wis. 2d 426, 369 N.W.2d 677 (1985). In this action,

[6] Pursuant this Court's previous Order, non-constitutional issues not briefed are preserved.

Federal's objection to the entry of a punitive damages judgment directly against it has been brushed aside by the Wischer Plaintiffs with a reference to Brown. But Brown simply does not address the issue. The Brown Court directly stated:

> The two issues before this court are whether punitive damages are available in this case, and if so, whether the policy of insurance issued by State Farm to Maxey provides coverage for the punitive damage award.

Brown v. Maxey, 124 Wis. 2d at 430.

Brown says nothing whatsoever about the ability of the Wischer Plaintiffs to have a judgment for punitive damages directly against Federal. The Brown Court only concluded that State Farm's policy provided coverage; and in so determining held that allowing a wrongdoer to have such coverage does not violate public policy. Brown, 124 Wis. 2d at 477. The ability of a plaintiff to recover directly against the defendant's insurer is a wholly distinct issue.

2. Punishment And Deterrence Are Not Advanced By The Federal Punitive Judgment, And In Fact Are Undermined By The Pre-Verdict Scheme Adopted In This Case.

Although compensatory damages and punitive damages are typically awarded simultaneously by the same decision-maker, they serve distinct purposes. Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001). Punitive damages are described as "quasi-criminal" and as "private fines." Id. "Punitive damages are private fines intended to punish the defendant and to deter future wrongdoing." Pacific Mut. Life Ins. Co. v Haslip, 499 U.S. 1 (1991). While states possess discretion whether to impose punitive damages, there are procedural and substantive constitutional limitations on these awards. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) ("State Farm"). The due process clause prohibits the imposition of either excessive or arbitrary punishments. Id.

The Federal Punitive Judgment violates due process because it fails to advance, and even undermines, the required purposes of the quasi-criminal sanction; it violates "procedural and substantive constitutional limitations;" and it is "arbitrary."

Importantly, after the IINA Agreement was entered, only two possible scenarios would result in MHIA paying

punitive damages, and then only a **maximum** of $10,000,000. Reiterating the key portion of Attorney Habush's explanation:

> **...there will be no personal attachment or judgment or excess judgment against Mitsubishi itself.**

MHIA's representation to the Trial Court is also crucial: "**Mitsubishi is completely off the hook...,**" except for the limited possibility of paying $10,000,000. For reasons not clear in the record, the Trial Court entered a judgment against MHIA (over MHIA's objection) for $84,600,000 in punitive damages. That fact notwithstanding, under the unambiguous terms of the IINA Agreement, the MHIA Punitive Judgment can never be executed by the Wischer Plaintiffs.

When the IINA Agreement was signed by the Wischer Plaintiffs and MHIA, this case left the Brown framework and entered new territory. In Brown, because a collectable judgment would lie against the wrongdoer, Dr. Maxey still bore significant risks, notwithstanding his insurance. Dr. Maxey bore the risk that a policy exclusion may apply, the risk of entry of an excess verdict, or the risk of an insurer's refusal to reimburse him for other reasons. In short, Dr.

Maxey suffered the negative consequences of having a **collectable** judgment for punitive damages directly against him.

Here, in exchange for a payment of $12,375,000, MHIA, the alleged wrongdoer, bore no risk (other than the limited potential exposure to $10,000,000). Punitive damages became nothing more than a collection action. Other than the maximum $10,000,000, MHIA had no risk of a policy exclusion, no risk of uncollectability for a public policy reason, no risk of an excess verdict, and no risk that Federal may not pay the punitive damage award. The Wischer Plaintiffs excused and exculpated the wrongdoer, MHIA, from all the risks of a direct and collectable punitive damages judgment in excess of $10,000,000, all before the verdict was rendered.

After the secret entry of the IINA Agreement, this trial was no longer about punishment or deterrence. It could not be. This trial was simply an exercise in how much money could be extracted from the remaining insurers of MHIA, which were not even parties at trial and had no idea of the scheme in place.

Punitive damages are properly imposed to forward the state's interests in punishment and deterrence. Trinity Evangelical v. Tower Insurance Company, 2003 WI 46, ¶ 46, 261 Wis. 2d 333, 661 N.W.2d 789. Punitive damages are properly denominated "smart money" and are designed to hurt in order to punish and deter. Tucker v. Marcus, 142 Wis. 2d 425, 437, 418 N.W.2d 818 (1988). If a punitive damage judgment does not forward punishment and deterrence – if it can not be denominated "smart money" – it is improper.

Even absent the IINA Agreement, a direct judgment against an insurer for punitive damages (as opposed to an insured collecting on a policy) does not forward punishment and deterrence. If an insurer has any exposure to a sum awarded in punitive damages, it must be via the contract with its insured. A contractual obligation to pay is not "smart money." Thus, even without the IINA Agreement, the Federal Punitive Judgment cannot withstand due process review.

The IINA Agreement makes the Federal Punitive Judgment more egregious. It gives the Federal Punitive Judgment a "lottery" quality. While Federal in no way diminishes the terrible loss suffered, it is important not to lose

sight of the fundamental constitutional issues at stake here. Punitive damages are "given to the plaintiff over and above the full compensation for the injuries." Tucker, 142 Wis. 2d at 436. "It is generally agreed that punitive damages are a windfall to the plaintiff..." Tucker, 142 Wis. 2d at 453. Because punitive damages in Wisconsin are, by definition, in excess of full compensation, a "Plaintiff is not entitled to punitive damages as a matter of right." Wangen v. Ford Motor Co., 97 Wis. 2d 260, 301, 294 N.W.2d 437 (1980).

This deal, wherein the plaintiff agreed to collect the jury's punitive damage award only if it was paid directly to the plaintiff by somebody other than the wrongdoer, makes a mockery of the fundamental principals of due process, and renders the Federal Punitive Judgment unconstitutional.

B. A Judgment For Punitive Damages Directly Against Federal Does Not Satisfy The Required Gore Analysis.

Federal has appealed a distinct judgment entered against it. Federal possesses its own constitutional due process rights, which must be respected. The award of $50,000,000 in punitive damages directly from Federal to the Wischer Plaintiffs must withstand constitutional scrutiny on its own.

"Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the due process clause of the Fourteenth Amendment to the Federal Constitutional imposes substantive limits on that discretion." Cooper Industries, Inc., 532 U.S. at 434. "The Due Process Clause of its own force also prohibits the States from imposing 'grossly excessive' punishments on tortfeasors." Id.

In evaluating the consistency of any punitive damage award with due process, the Court must consider three criteria: (1) the degree or reprehensibility of the defendant's misconduct, (2) the disparity between the harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized in comparable cases. See BMW of North America Inc. v. Gore, 517 U.S. 559, 574-575 (1996). A Court of Appeals must review the trial court's application of the Gore factors *de novo*." Cooper Industries, Inc., 532 U.S. at 435; Trinity Evangelical Lutheran Church, 2002 WI App. 46.

This constitutionally required analysis yields a clear result. Federal is the defendant, and the award of punitive

damages is directly in favor of the Wischer Plaintiffs. Yet, Federal engaged in no conduct, much less "reprehensible conduct," vis-a-vis the Wischer Plaintiffs. The Wischer Plaintiffs suffered no harm from Federal. Finally, Federal could be exposed to no penalties. The Federal Punitive Judgment cannot stand.

This required scrutiny was never attempted by the Trial Court. Further, the requirement of such scrutiny indicates why this Court must not interpret Wis. Stats. §§ 632.24 and 803.04(2)(a) to allow a direct action against an insurer solely for the purpose of awarding punitive damages.

C. If Wisconsin's Direct Action Statutes Allow Entry Of A Judgment For Punitive Damages Directly Against Federal In This Matter, Then Those Statutes Function Unconstitutionally.

The application of the Gore factors holds true for any punitive damage judgment entered directly against an insurer for the wrongdoing of the insured. Therefore, if this Court determines that Wis. Stats. §§ 632.24 and 803.04(2)(a) create a direct action for punitive damages against an insurer, then the statutes function unconstitutionally. No such judgment could withstand the due process analysis to which the

Supreme Court says every defendant, even an insurance company, is entitled.

While the construction of Wisconsin's direct action statutes is not before the Court, Federal has preserved the issue. Wisconsin imposes a "duty to construe a statute to avoid *potential* constitutional violation." Plumbers Local No. 75 v. Coughlin, 166 Wis. 2d 971, 994, 481 N.W.2d 297 (Ct. App. 1992) (emphasis in original.). The constitutional deficiencies of the Federal Punitive Judgment could implicate the constitutionality of Wis. Stats. §§ 632.24 and 803.04(2)(a) if the Federal Punitive Judgment stands.

Finally, the Wischer Plaintiffs and MHIA insist they have done nothing more then enter a Loy release, pursuant to Loy v. Bunderson, 107 Wis. 2d 400, 320 N.W.2d 175 (1982). Loy was not a punitive damages case. Here, when the Wischer Plaintiffs sued Federal, this case was only about punitive damages. That is not authorized by Loy, and is impermissible both statutorily and constitutionally.

D. Federal Was Not On Notice That A Punitive Damage Judgment Could Be Entered Directly Against It, Even During The Trial Of This Matter, Violating Due Process.

Because punitive damages are "punishment" meted by the state, due process requires that fair notice exist that the judgment could be entered. Jacque v. Steenberg Homes, Inc., 209 Wis. 2d 605, 627, 563 N.W.2d 154 (1997). Federal was on notice from its insured, MHIA, that MHIA might assert a claim on the contract of insurance. But Federal was never on notice that a punitive damages judgment could be entered directly against it.

Further, Federal was not aware that during the pendancy of this action the Wischer Plaintiffs and MHIA had secretly agreed that the Wischer Plaintiffs would not seek more than $10,00,000 in punitive damages from MHIA, (instead agreeing to proceed only against Federal directly). Federal was the real party in interest after entry of the IINA Agreement, but was not at the trial.

Finally, neither Federal nor any other insurer could be aware from reading Wis. Stats. §§ 632.24 and 803.04(2)(a) that a judgment for anything but "damages for negligence" could be entered directly against it. The Wisconsin Supreme Court has clearly held when a statute applies to damages for negligence, the statute does **NOT** include punitive damages. Tucker, 142 Wis. 2d 425 "The legislature cannot be presumed

to have intended damages for negligence to include punitive damages absent express language so indicating." Tucker at 435. Given the clear guidance of Tucker, Federal could not have been on notice that Wis. Stats. §§ 632.24 and 803.04(2)(a) authorized entry of the Federal Punitive Judgment.

II. THE MHIA PUNITIVE JUDGMENT IS UNCONSTITUTIONAL

A. The Judgment Against MHIA Is Unconstitutionally Excessive.

MHIA has explained why the MHIA Punitive Judgment is constitutionally excessive. Federal joins in that portion of MHIA's argument.

B. Due Process Requires That Punitive Damages Be Awarded Incident To The Actual Injury For Which The Jury Compensated The Plaintiff, Not The Violation Of The Right To Safety As Argued By The Wischer Plaintiffs.

In previous briefs, Federal has demonstrated why Wis. Stat. § 895.85(3) requires that the actual harm suffered by the plaintiff be practically certain to occur in order to support an award of punitive damages. The Wischer Plaintiffs have

countered that the practical certainty that a "right to safety" would be violated can support an award of punitive damages, and indeed is what supported the award here. The Wischer Plaintiffs have conceded, and the Trial Court held, that the injuries suffered were not practically certain to occur as a result of MHIA's conduct.

The proposition, that a punitive damage award must be based on the injury for which the plaintiff was compensated and not on the violation of a right to safety, is more than statutory. Due process requires that a defendant have "fair notice not only of the conduct that will subject him or her to punishment, but also the severity of the penalty that a state may impose." Jacque, 209 Wis. 2d at 627.

In Wisconsin, it is well-established that punitive damages may be awarded only incident to the plaintiff's actual injury, not an amorphous "violation of rights." According to the Wischer Plaintiffs, the punitive award in this case is not incident to the actual injuries suffered, but rather incident to the violation of the right to a safe workplace. If so, the award violates due process. MHIA could not have been on notice that punitive damages could be awarded incident to a violation of the right of a safe workplace.

Further, the jury made no award, and in fact was never asked to consider an award, for the violation of the right of safety. "We hold today that punitive damages are not available where there has been no 'award' of actual damages." Tucker, 142 Wis. 2d at 425. "An 'award' represents a remedy **recoverable in accordance with an order for judgment**." Id. (emphasis added). The Wischer Plaintiffs have no "order" or "judgment" to recover an award of actual damages for the violation of safety. The Wischer Plaintiffs have a judgment to recover an award for the actual "damages" incident to personal injury. (Question 7, Special Verdict, R: 488).

> Was such negligence of defendant Mitsubishi Heavy Industries America, Inc., a cause of the plaintiffs' damages?

This is the question upon which the jury made, in the words of Tucker, a "recoverable" award "in accordance with an order for judgment." Because no compensation was awarded for the violation of the right of safety, no punitive damages may be awarded on that basis.

"Punitive damages **incident** to damages for pain and suffering may therefore be awarded to the estate." Wangen v.

Ford Motor Co., 97 Wis. 2d at 311. In Wangen, the court meticulously analyzed five distinct types of compensatory damages, all arising from the same occurrence, and determined only four of them could support punitive damages. Such an analysis is irrelevant if punitive damages could be awarded for a violation of right to safety because that was obviously present in each compensatory award. Stated alternatively, under the theory here advanced, punitive damages would be available incident to Ford's violation of the right to a safe automobile, rather than incident to the specific injuries for which compensation was awarded.

Kehl v. Economy Fire & Casualty, 147 Wis. 2d. 531, 534, 433 N.W.2d 279 (1988) captures this concept:

> Punitive damages may not, however, be awarded *in vacuo*. Juries are not given license to roam the caverns of their consciences to punish conduct they deem despicable unless a plaintiff can prove that he or she has suffered some actual damage as a result of the conduct.

The law of Wisconsin is clear: There can be no distinction between the injury for which the jury awards compensation and the basis which supports an award of punitive damages. Tucker, Wangen, and Kehl (independent

of Wis. Stat. § 895.85(3)), mandate this result. If the Wischer Plaintiffs' position is correct, that the MHIA Punitive Award is based upon the practical certainty that the rights of workers to safety would be violated, then the jury's verdict is unconstitutional because MHIA and its insurers were not on notice that such an award was possible.

III. THIS CASE IS NOT RELATED TO THE AWARD OF PUNITIVE DAMAGES IN THE OWI CONTEXT.

It is important for this Court to recognize the striking distinctions between the Strenke and Wischer cases, since they are being heard on the same day.

First, in Strenke the "practical certainty" that injury would result from the conduct of the tortfeasor is an open question. Here, the Wischer Plaintiffs have admitted, and the Trial Court held, that injury was not practically certain.

Second, Strenke presents both a conviction for criminal behavior and several prior convictions for the same offense. Nothing here is similar.

Third, only $2,000 in compensatory damages were awarded in Strenke. Given the small compensatory award, Strenke arguably fits in a special category recognized by the Supreme Court where a "particular egregious act has resulted

in only a small amount of economic damages." State Farm, 538 U.S. at 425. This "*de minimus* damages" exception might be applicable in Strenke, but obviously is not applicable here.

Finally, as the differences between Strenke and Wischer illustrate, the constitutional analysis of every punitive damage award must be on a "case-by-case basis." Wangen v. Ford Motor Co., 97 Wis. 2d at 302.

IV. CONSTITUTIONAL ISSUES SHOULD NOT BE REACHED UNTIL OTHER POTENTIALLY DISPOSITIVE ISSUES ARE ADDRESSED.

Finally, Federal reiterates its position, outlined in its September 24, 2004 letter to the Court, that constitutional issues should not be reached when other issues may dispose of the matter. (See State v. Castillo, 213 Wis. 2d 488, 492 750 N.W.2d 44 (1997). ("Consistent with this rule is the recognition that a court will not reach constitutional issues where the resolution of other issues disposes of an appeal.")

This proposition was recognized in another significant punitive damage case. "We decline to address WEPCO's constitutional challenges. When a case may be resolved on non-constitutional grounds, we need not reach constitutional questions." City of West Allis v. WEPCO, 2001 WI App

226, ¶46, 248 Wis. 2d 10, 635 N.W.2d 873. As in WEPCO, other grounds, resolve this case.

CONCLUSION

Federal encourages this Court to follow the rule of reaching constitutional issues only when necessary. That rule notwithstanding the MHIA Punitive Judgment and the Federal Punitive Judgment fail to pass constitutional muster.

Dated this 15 day of October, 2004.

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FORM AND LENGTH CERTIFICATION

I hereby certify that Federal Insurance Company's brief conforms to the Court's Order dated October 15, 2004 and Wis. Stat. § 809.19(8). The length of this brief is 5,022 words.

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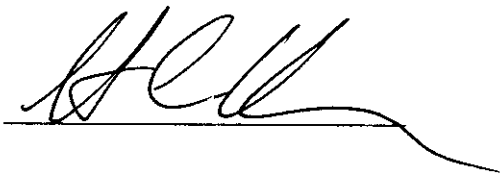
By: 

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2004, I served copies of the Court Requested Brief of Federal Insurance Company, Inc. on Constitutional Issues submitted on October 15, 2004, upon counsel for the parties by first class mail and messenger as indicated to the addresses on the attached pages.

Dated this 15th day of October, 2004.

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SUPREME COURT OF WISCONSIN

Patricia Wischer, individually, and as Special Administrator of the Estate of Jeffrey A. Wischer, deceased, Marjorie DeGrave, individually, as Special Administrator of the Estate of William R. DeGrave, deceased, Ramona Dulde-Starr, individually, and as Special Administrator of the Estate of Jerome W. Starr, deceased,

Plaintiffs-Intervenors-Respondents,

v.

Mitsubishi Heavy Industries America, Inc.,
Defendant-Appellant,
The Travelers Indemnity Company of Illinois,
Defendant,
Neil F. Lampson, Inc. and Lampson International, Ltd.,
Defendants-Respondents,
Federal Insurance Company,
Defendant-Co-Appellant,
The Tokio Marine & Fire Insurance Company,
Defendants.

Appeal No. 01-0724 (and 01-1031 Consolidated) Same Case Appeal No. 01-02486

APPENDIX TO
FEDERAL INSURANCE COMPANY'S COURT REQUESTED BRIEF ON CONSTITUTIONAL ISSUES

Patricia Wischer, individually, and as Special Administrator of the Estate of Jeffrey A. Wischer, deceased, Marjorie DeGrave, individually, as Special Administrator of the Estate of William R. DeGrave, deceased, Ramona Dulde-Starr, individually, and as Special Administrator of the Estate of Jerome W. Starr, deceased,

Plaintiffs-Respondents-Cross-Respondents-Petitioners,

v.

Mitsubishi Heavy Industries America, Inc.,
Defendant-Respondent-Cross-Appellant,
The Travelers Indemnity Company of Illinois,
Defendant-Appellant-Petitioner,
Neil F. Lampson, Inc. and Lampson International, Ltd.,
Defendants,
Federal Insurance Company,
Defendant-Co-Appellant,
The Tokio Marine & Fire Insurance Company,
Defendants.

Appeal No. 01-1031 (and 01-2486 Consolidated) Same Case Appeal No. 01-0724

Patricia Wischer, individually, and as Special Administrator of the Estate of Jeffrey A. Wischer, deceased, Marjorie DeGrave, individually, as Special Administrator of the Estate of William R. DeGrave, deceased, Ramona Dulde-Starr, individually, and as Special Administrator of the Estate of Jerome W. Starr, deceased,

Appeal No. 01-2486 (and 01-1031 Consolidated) Same Case Appeal No. 01-0724

Plaintiffs-Respondents-Cross-Respondents-Petitioners,

v.

Mitsubishi Heavy Industries America, Inc., Defendant-Respondent-Cross-Appellant,
The Travelers Indemnity Company of Illinois, Defendant-Appellant-Cross-Respondent
Neil F. Lampson, Inc. and Lampson International, Ltd., Defendants,
Federal Insurance Company and The Tokio Marine & Fire Insurance Company, Defendants-Respondents-Cross-Appellants,

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STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

PATRICIA WISCHER, et al.,

Plaintiffs,

vs.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., et al.,

Defendants.

FEB 26 2001

$5.00 JUDGMENT FEE PAID

FILED
CIVIL DIVISION
FEB 23 2001
HON. DOMINIC S. AMATO PRESIDING
CLERK OF COURTS

Case No. 99-CV-006553

Personal Injury, Other: 30107
Wrongful Death: 30105

INTERLOCUTORY JUDGMENT
FOR PUNITIVE DAMAGES AGAINST
MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.

Upon the Order for Interlocutory Judgment for Punitive Damages, dated the 23rd day of February, 2001,

IT IS HEREBY ADJUDGED AND DECREED that:

Plaintiffs Patricia Wischer, as Special Administrator of the Estate of Jeffrey A. Wischer, deceased; Marjorie DeGrave, as Special Administrator of the Estate of William R. DeGrave, deceased; and Ramona Dulde-Starr, as Special Administrator of the Estate of Jerome W. Starr, deceased, have and recover from defendant Mitsubishi Heavy Industries America, Inc., the sum of Eighty-Four Million Six Hundred Twenty-Five Thousand and no/100 Dollars ($84,625,000.00), plus taxable costs and interest.

In accordance with the provisions of Wis. Stat. § 806.01(1), the places of residence of the parties are as follows:

1. Plaintiff Patricia Wischer, Special Administrator of the Estate of Jeffrey A. Wischer, deceased, resides at 543 West Wisconsin Avenue, Pewaukee, Wisconsin 53072;

2. Plaintiff Marjorie DeGrave, Special Administrator of the Estate of William R. DeGrave, deceased, resides at 140 Darboy Road, Kimberly, Wisconsin 54136;

AP1

3. Plaintiff Ramona Dulde-Starr, Special Administrator of the Estate of Jerome W. Starr, deceased, resides at 920 East Mason Street, Milwaukee, WI 53202; and

4. Defendant Mitsubishi Heavy Industries America, Inc., is a foreign corporation with its principal offices at 520 Madison Avenue, New York, New York 10167.

Costs and interest are hereby allowed and taxed in favor of the plaintiffs and against defendant Mitsubishi Heavy Industries America, Inc., in the amount of to be determined by the Court.

Entered at Milwaukee, Wisconsin this 23rd day of February, 2001.

BY THE COURT:

HONORABLE DOMINIC S. AMATO
Circuit Court Judge

Judgment Entered: 2-26-01 and Docketed: 02-26-01.

BY THE COURT
JOHN BARRETT
CLERK OF CIRCUIT COURT
BY _____
JUDGMENT CLERK

FILED
FEB 26 2001 0
JOHN BARRETT
Clerk of Circuit Court

COSTS TO BE TAXED WITHIN
30 DAYS OR FORFEITED
WIS. STATUTE 806.06(4)

AP2

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

PATRICIA WISCHER, et al.,

Plaintiffs,

vs.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., et al.,

Defendants.

AUG 23 2001

Case No. 99-CV-006553

Personal Injury, Other: 30107
Wrongful Death: 30105

FINAL JUDGMENT AGAINST FEDERAL INSURANCE COMPANY AND THE TOKIO MARINE AND FIRE INSURANCE COMPANY

Upon the Order dated the 23rd day of August, 2001,

IT IS HEREBY DECLARED that:

1. The insurance policy issued by defendant Federal Insurance Company as part of the Owner Controlled Insurance Program, policy number (00) 7974-01-75, provides coverage to defendant Mitsubishi Heavy Industries America, Inc. ("MHIA") for the damages that the jury awarded in the plaintiffs' favor against MHIA.

2. The insurance policy issued by defendant The Tokio Marine and Fire Insurance Company to MHIA, policy number CLL424075600, provides coverage to MHIA for the damages that the jury awarded in the plaintiffs' favor against MHIA.

3. If defendant The Travelers Indemnity Company of Illinois makes a payment in excess of $25 million plus such corresponding taxable costs and interest for which MHIA is responsible in satisfaction or on account of the judgment in favor of MHIA against Travelers, Travelers shall be entitled to immediate equitable subrogation and payment, dollar for dollar, from Federal and Tokio Marine, in accordance with the layers of insurance coverage that Federal

and Tokio Marine provide to MHIA. Travelers shall not be required to pay its $25 million policy limit toward the amount of money for which MHIA is liable to the plaintiffs more than once, and neither the plaintiffs nor MHIA will be entitled to a double recovery.

IT IS HEREBY ADJUDGED AND DECREED that:

1. Plaintiffs Patricia Wischer, as Special Administrator of the Estate of Jeffrey A. Wischer, deceased; Marjorie DeGrave, as Special Administrator of the Estate of William R. DeGrave, deceased; and Ramona Dulde-Starr, as Special Administrator of the Estate of Jerome W. Starr, deceased, have and recover from defendant Federal Insurance Company the sum of Fifty Million and no/100 Dollars ($50,000,000.00), plus such corresponding taxable costs and interest for which MHIA is responsible. The amount of fifty million dollars ($50,000,000) represents the fifty million dollars ($50,000,000) of excess liability insurance coverage provided by Federal Insurance Company, which is the layer between $27,000,000 and $77,000,000 of liability coverage under the Owner Controlled Insurance Program. When paid, the fifty million dollars ($50,000,000), plus such corresponding taxable costs and interest for which MHIA is responsible, will represent and satisfy that layer of outstanding liability of MHIA to the plaintiffs between $1 and $50,000,000 plus such corresponding taxable costs and interest for which MHIA is responsible.

2. Plaintiffs Patricia Wischer, as Special Administrator of the Estate of Jeffrey A. Wischer, deceased; Marjorie DeGrave, as Special Administrator of the Estate of William R. DeGrave, deceased; and Ramona Dulde-Starr, as Special Administrator of the Estate of Jerome W. Starr, deceased, have and recover from defendant The Tokio Marine and Fire Insurance Company the sum of Two Million and no/100 Dollars ($2,000,000.00), plus such corresponding taxable costs and interest for which MHIA is responsible. The amount of two million dollars ($2,000,000) represents the two million dollars ($2,000,000) of excess liability insurance coverage provided by The Tokio Marine and Fire Insurance Company, which is the layer above

all of the layers of liability coverage under the Owner Controlled Insurance Program. When paid, the two million dollars ($2,000,000), plus such corresponding taxable costs and interest for which MHIA is responsible, will represent and satisfy that layer of outstanding liability of MHIA to the plaintiffs between $75,000,000 and $77,000,000 plus such corresponding taxable costs and interest for which MHIA is responsible.

In accordance with the provisions of Wis. Stat. §806.01(1), the places of residence of the parties are as follows:

1. Plaintiff Patricia Wischer resides at 543 West Wisconsin Avenue, Pewaukee, Wisconsin 53072.

2. Plaintiff Marjorie DeGrave resides at 140 Darboy Road, Kimberly, Wisconsin 54136.

3. Plaintiff Ramona Dulde-Starr resides at 920 East Mason Street, Milwaukee, Wisconsin 53202.

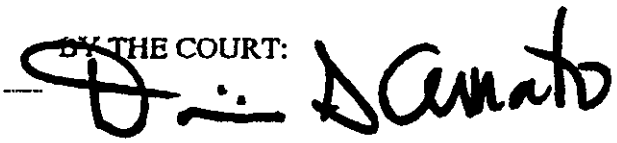
4. Defendant Federal Insurance Company is a foreign corporation with its principal offices at 15 Mountain View Road, Warren, New Jersey 07061.

5. Defendant The Tokio Marine and Fire Insurance Company is a foreign corporation with its principal offices at 101 Park Avenue, New York, New York 10178.

6. Defendant The Travelers Indemnity Company of Illinois is a foreign corporation with its principal offices at 2500 Cabot Drive, Lisle, Illinois 60563.

Dated at Milwaukee, Wisconsin this 23rd day of August, 2001.

BY THE COURT:



HONORABLE DOMINIC S. AMATO
Circuit Court Judge

AP5

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

PATRICIA WISCHER, individually,
and as Special Administrator of the
ESTATE OF JEFFREY A. WISCHER, deceased,
109 North Charles Street
Waukesha, WI 53188,

MARJORIE DeGRAVE, individually,
and as Special Administrator of the
ESTATE OF WILLIAM R. DeGRAVE, deceased,
140 Darboy Road
Kimberly, WI 54136,

RAMONA DULDE-STARR, individually,
and as Special Administrator of the
ESTATE of JEROME W. STARR, deceased,
2400 East Bradford Street
Milwaukee, WI 53211,

Plaintiffs,

vs.

MITSUBISHI HEAVY INDUSTRIES
AMERICA, INC.
a foreign corporation
c/o its registered agent,
CT Corporation Systems
44 East Mifflin Street
Madison, WI 53703

TRAVELERS PROPERTY CASUALTY
INSURANCE COMPANY
a foreign corporation
c/o its registered agent,
David B. Myhre
445 South Moorland Road
Brookfield, WI 53005

COMPLAINT

Case No. 99CV006553

Case Code:
Personal Injury, Other: 30107
Wrongful Death: 30105

AUG 12 1999
JOHN BARRETT
Clerk of Circuit Court

THE TRAVELERS INDEMNITY
COMPANY OF ILLINOIS
a foreign corporation
c/o its registered agent,
David B. Myhre
445 South Moorland Road
Brookfield, WI 53005

NEIL F. LAMPSON, INC.
a foreign corporation
c/o its registered agent,
William N. Lampson
607 East Columbia Drive
Kennewick, WA 99336

HCH MILLER PARK JOINT VENTURE
162 North 44th Street
Milwaukee, WI 53208

HUNZINGER CONSTRUCTION COMPANY
a Wisconsin corporation
c/o its registered agent,
John C. Hunzinger
21100 Enterprise Avenue
Brookfield, WI 53045-5218

CLARK CONSTRUCTION BUILDERS, INC.
a foreign corporation
c/o its registered agent,
The Corporation Trust, Inc.
300 East Lombard Street
Baltimore, MD 21202

HUBER, HUNT & NICHOLS, INC.
a foreign corporation
c/o its registered agent,
CT Corporation Systems
44 East Mifflin Street
Madison, WI 53703,

Defendants.

Plaintiff Patricia Wischer, individually and as Special Administrator of the Estate of Jeffrey A. Wischer, deceased, and plaintiff Marjorie DeGrave, individually and as Special Administrator of the Estate of William R. DeGrave, deceased, by their attorneys, HABUSH, HABUSH, DAVIS & ROTTIER, S.C., and plaintiff Ramona Dulde-Starr, individually and as Special Administrator of the Estate of Jerome W. Starr, deceased, by her attorneys, JACQUART & LOWE, S.C., as and for a Complaint against the above-named defendants, allege and show to the Court as follows:

GENERAL ALLEGATIONS APPLICABLE TO ALL CLAIMS FOR DAMAGES

1. At the present time, plaintiff Patricia Wischer is a citizen and resident of the State of Wisconsin residing at 109 North Charles Street, Waukesha, Wisconsin 53188. On the 6th day of August, 1999, Patricia Wischer was appointed the Special Administrator of the Estate of Jeffrey A. Wischer, deceased, by the Circuit Court for Waukesha County. At all times material, Patricia Wischer and Jeffrey A. Wischer were lawfully husband and wife.

2. At the present time, plaintiff Marjorie DeGrave is a citizen and resident of the State of Wisconsin residing at 140 Darboy Road, Kimberly, Wisconsin 54136. On the 29th day of July, 1999, Marjorie DeGrave was appointed the Special Administrator of the Estate of William R. DeGrave, deceased, by the Circuit Court for Outagamie County. At all times material, Marjorie DeGrave and William R. DeGrave were lawfully husband and wife.

3. At the present time, plaintiff Ramona Dulde-Starr is a citizen and resident of the State of Wisconsin residing at 2400 East Bradford Street, Milwaukee, Wisconsin 53211. On the 2nd day of August, 1999, Ramona Dulde-Starr was appointed the Special Administrator of the Estate of Jerome W. Starr, deceased, by the Circuit Court for Milwaukee County. At all times material,

Ramona Dulde-Starr and Jerome W. Starr were lawfully husband and wife.

4. At the present time, defendant Mitsubishi Heavy Industries America, Inc. (hereinafter referred to as "Mitsubishi") is a foreign corporation duly licensed to do business in the State of Wisconsin, with offices of its registered agent, CT Corporation Systems, located at 44 East Mifflin Street, Madison, Wisconsin 53703; Mitsubishi is at the present time engaged in substantial and not isolated activities within this state and in Milwaukee County.

5. At the present time, defendant Travelers Property Casualty Insurance Company is a foreign corporation duly licensed to do business in the State of Wisconsin, with offices of its registered agent, David B. Myhre, at 445 South Moorland Road, Brookfield, Wisconsin, 53005. Upon information and belief, Travelers Property Casualty Insurance Company does substantial business in Milwaukee County. Travelers Property Casualty Insurance Company is engaged in the business of writing and selling liability insurance.

6. At the present time, defendant The Travelers Indemnity Company of Illinois is a foreign corporation duly licensed to do business in the State of Wisconsin, with offices of its registered agent, David B. Myhre, at 445 South Moorland Road, Brookfield, Wisconsin, 53005. Upon information and belief, The Travelers Indemnity Company of Illinois does substantial business in Milwaukee County. The Travelers Indemnity Company of Illinois is engaged in the business of writing and selling liability insurance.

7. Upon information and belief, prior to the date of the matter hereinafter described, July 14, 1999, defendant Travelers Property Casualty Insurance Company and/or defendant The Travelers Indemnity Company of Illinois had issued a policy of insurance to defendants Mitsubishi Heavy Industries America, Inc., Neil F. Lampson, Inc., and HCH Miller Park Joint

Venture, which policy provided coverage to said defendants for claims such as those hereinafter set forth in this Complaint, and which policy of insurance was in full force and effect at the time of the hereinafter described matter. In the contract of insurance, Travelers Property Casualty Insurance Company and/or The Travelers Indemnity Company of Illinois reserved the right to settle or adjust any claims arising thereunder and to defend any lawsuits instituted by virtue of any such claims, and they have a direct interest in this litigation; by reason of Wisconsin Statute 803.04(2), they are proper defendants herein.

8. At the present time, defendant Neil F. Lampson, Inc. (hereinafter referred to as "Lampson") is a foreign corporation with offices of its registered agent, William N. Lampson, located at 607 East Columbia Drive, Kennewick, Washington 99336; Lampson is at the present time engaged in substantial and not isolated activities within this state and in Milwaukee County.

9. At the present time, defendant HCH Miller Park Joint Venture (hereinafter referred to as "HCH") is a joint venture among defendants Hunzinger Construction Company, Clark Construction Builders, Inc., and Huber, Hunt & Nichols, Inc., with its offices located at 162 North 44th Street, Milwaukee, Wisconsin 53208. Upon information and belief, HCH was formed for the purpose of providing general contractor services for the construction of Miller Park, a baseball stadium in Milwaukee, Wisconsin.

10. At the present time, defendant Hunzinger Construction Company (hereinafter referred to as "Hunzinger") is a Wisconsin corporation with offices of its registered agent, John C. Hunzinger, located at 21100 Enterprise Avenue, Brookfield, Wisconsin 53045-5218, and is engaged in the construction business. Upon information and belief, at all times material, Hunzinger was part of a joint venture, HCH, and as part of that joint venture, provided general

contractor services for the construction of Miller Park.

11. At the present time, defendant Clark Construction Builders, Inc. (hereinafter referred to as "Clark") is a foreign corporation with offices of its registered agent, The Corporation Trust, Inc., located at 330 East Lombard Street, Baltimore, Maryland 21202, and with its principal offices located at 7500 Old Georgetown Road, Bethesda, Maryland 20814-6133, and is engaged in the construction business; Clark is at the present time engaged in substantial and not isolated activities within this state and in Milwaukee County. Upon information and belief, at all times material, Clark was part of a joint venture, HCH, and as part of that joint venture, provided general contractor services for the construction of Miller Park.

12. At the present time, defendant Huber, Hunt & Nichols, Inc. (hereinafter referred to as "Huber") is a foreign corporation duly licensed to do business in the State of Wisconsin, with offices of its registered agent, CT Corporation Systems, located at 44 East Mifflin Street, Madison, Wisconsin 53703, and with its principal offices located at 2450 South Tibbs Avenue, Indianapolis, Indiana 46241-4837, and is engaged in the construction business; Huber is at the present time engaged in substantial and not isolated activities within this state and in Milwaukee County. Upon information and belief, at all times material, Huber was part of a joint venture, HCH, and as part of that joint venture, provided general contractor services for the construction of Miller Park.

13. Upon information and belief, defendant Travelers Property Casualty Insurance Company and/or defendant The Travelers Indemnity Company of Illinois was the worker's compensation insurer for the employer of Jeffrey A. Wischer, William R. DeGrave, and Jerome W. Starr at the time of their injuries and subsequent deaths; Travelers Property Casualty

Insurance Company and/or The Travelers Indemnity Company of Illinois was and is obliged to pay to or on behalf of Jeffrey A. Wischer, deceased, William R. DeGrave, deceased, and Jerome W. Starr, deceased, worker's compensation benefits and, therefore, has or may have an interest herein to the extent of its payments in accordance with Section 102.29, Wis. Stats.

14. Defendants Mitsubishi, Lampson, HCH, and Hunzinger, Clark and Huber, through HCH, were negligent, and such negligence was the proximate cause of the injuries to and deaths of Jeffrey A. Wischer, William R. DeGrave, and Jerome W. Starr, and the injuries and damages sustained by the plaintiffs; their negligence is joined for this action, but the plaintiffs ask for a separate judgment against each of the defendants.

15. The plaintiffs sustained injuries and damages by reason of the negligence on the part of defendants Mitsubishi, Lampson, HCH, and Hunzinger, Clark and Huber, through HCH; all actions arise out of the same subject matter and all plaintiffs join in one action for the purpose of a joint trial on the issues involved, but each plaintiff specifically asks for a separate judgment.

16. Upon information and belief, at all times material, HCH was the general contractor for the construction of Miller Park, a baseball stadium located in Milwaukee, Wisconsin. Upon information and belief, prior to July 14, 1999, HCH entered into a subcontract with Mitsubishi whereby Mitsubishi agreed to construct the retractable roof of Miller Park, and Mitsubishi entered into a subcontract with Lampson whereby Lampson agreed to supply a crane to be used in the construction of the retractable roof. Upon information and belief, Lampson subsequently leased to Mitsubishi a construction crane, nicknamed "Big Blue," which is the subject of this lawsuit and which weighed 2,100 tons and had an extended height of 567 feet.

17. Upon information and belief, one of the purposes for which the Big Blue crane was

to be used was to lift sections of the retractable roof into place at Miller Park. Upon information and belief, Lampson designed, manufactured, owned, and leased the Big Blue crane. Upon information and belief, Lampson also made alterations to the Big Blue crane to accommodate the lifts of the roof sections, and participated in the lift plan for various lifts, including the lift hereinafter described which took place on July 14, 1999. Upon information and belief, on July 14, 1999, Lampson had personnel on the construction site to assist Mitsubishi in the lift hereinafter described, and to oversee the details of the lift, the safeguards necessary to accomplish the lift, and whether the lift should be performed.

18. Upon information and belief, Mitsubishi leased the Big Blue crane from Lampson, and had responsibility for the construction of the retractable roof of Miller Park. Upon information and belief, Victor Grotlisch, an employee of Mitsubishi, was lead supervisor for the lifts of the roof sections; he was in charge of the lift operations, including the lift hereinafter described which took place on July 14, 1999; he directed that that lift operation proceed, he ignored warnings and concerns of others on the construction site, and he ignored the hazards involved in performing the lift on that day.

19. Upon information and belief, HCH was responsible for the overall safety of the construction site and workplace at Miller Park.

20. Upon information and belief, on July 14, 1999, the Big Blue crane was being operated under the direction of an employee of Lampson and an employee of Mitsubishi on the site of the construction of Miller Park and was in the process of lifting a 400-ton steel section of the stadium's retractable roof. Upon information and belief, at the same time, Jeffrey A. Wischer, William R. DeGrave, and Jerome W. Starr, during the course of their employment with

Danny's Construction Company, were working as ironworkers on the construction site and were standing in a man basket which was suspended in the air from another crane, waiting for the roof section to be lowered into place so that they could begin their work. Upon information and belief, while the lift was in progress and while the roof section was suspended in the air, the Big Blue crane became unstable, the Big Blue crane collapsed and struck the crane that was lifting the basket in which Jeffrey A. Wischer, William R. DeGrave, and Jerome W. Starr were standing, causing the basket to fall to the ground, and seriously injuring Jeffrey A. Wischer, William R. DeGrave, and Jerome W. Starr, and ultimately causing their deaths.

21. As a direct and proximate result of the aforedescribed injuries, Jeffrey A. Wischer, deceased, was caused pain, suffering, worry and mental distress and anguish, and said injuries were a substantial factor in producing his death.

22. As a direct and proximate result of the aforedescribed injuries to and death of Jeffrey A. Wischer, plaintiff Patricia Wischer is entitled to damages under the wrongful death statutes, all to plaintiff's damage.

23. As a direct and proximate result of the aforedescribed injuries, William R. DeGrave, deceased, was caused pain, suffering, worry and mental distress and anguish, and said injuries were a substantial factor in producing his death.

24. As a direct and proximate result of the aforedescribed injuries to and death of William R. DeGrave, Marjorie DeGrave is entitled to damages under the wrongful death statutes, all to plaintiff's damage.

25. As a direct and proximate result of the aforedescribed injuries, Jerome W. Starr, deceased, was caused pain, suffering, worry and mental distress and anguish, and said injuries

were a substantial factor in producing his death.

26. As a direct and proximate result of the aforedescribed injuries to and death of Jerome W. Starr, Ramona Dulde-Starr is entitled to damages under the wrongful death statutes, all to plaintiff's damage.

27. The conduct of Jeffrey A. Wischer, William R. DeGrave, and Jerome W. Starr did not contribute in any way to the incident described above or to the deaths of Jeffrey A. Wischer, William R. DeGrave and Jerome W. Starr.

CLAIMS FOR DAMAGES BASED ON THE NEGLIGENCE OF MITSUBISHI

28. The plaintiffs reallege and incorporate herein by reference all of the allegations contained in paragraphs 1-27, inclusive, of this Complaint.

29. Upon information and belief, Mitsubishi, through its agents, servants and employees, was negligent and careless in conducting its operations on July 14, 1999, and in allowing the lift to proceed on that day, for the following reasons:

a. Mitsubishi knew or should have known that it was inappropriate to allow a lift to proceed on July 14, 1999, at the sustained velocity of the wind then prevailing and that there were wind gusts substantially in excess of that velocity.

b. Mitsubishi knew or should have known that on July 14, 1999, the design and configuration of the Big Blue crane, the counterweights, balances and calculations were not adequate or sufficient to permit the crane to withstand the forces of the wind and stresses associated with the wind, having in mind the weight and configuration of the load being lifted by the crane.

c. Mitsubishi knew or should have known that the configuration and shape of the

load being lifted by the Big Blue crane on July 14, 1999 created a highly dangerous situation in which the wind could play a primary factor in causing the crane and load to become unstable.

d. Mitsubishi knew or should have known that the roof section which was to be lifted on July 14, 1999 had louvers attached to it and those louvers added more weight and surface area to the section, and Mitsubishi knew or should have known that the added weight and the added surface area would create additional instability. Victor Grotlisch, an employee of Mitsubishi, made a decision not to open the louvers so as to reduce the area that the wind could act on.

e. Mitsubishi knew or should have known that the topography of the land at the location where the lift was to take place caused changes in the wind direction and subjected the load to variable winds and higher wind velocities and created increased danger associated with the lift.

f. Mitsubishi knew or should have known that, if the lift plan had calculations based upon a wind velocity of 20 miles per hour, that was an inappropriate wind velocity, in view of the configuration of the Big Blue crane and the weight and configuration of the load being lifted on July 14, 1999.

g. Mitsubishi knew or should have known that the size and configuration of the load that was lifted on July 14, 1999, were in excess of the characteristics of the load that was used in establishing a normal lift plan that set wind velocity restrictions at 20 miles per hour.

h. Mitsubishi ignored the warnings and concerns expressed by many individuals in

or about the construction site about the wind conditions.

i. Mitsubishi ignored the fact that some other crane operations on the construction site had been terminated on July 14, 1999, due to excessive wind conditions.

j. Mitsubishi knew or should have known that the lift on July 14, 1999 was not in conformity with the lift plan and the parameters that make lift conditions appropriate.

k. Mitsubishi violated customs and practices in the lift industry concerning the matter of when the wind velocity would dictate that a lift of the size, weight and configuration of the lift on July 14, 1999, should be avoided.

l. Mitsubishi was otherwise negligent.

m. Victor Grotlisch, an employee of Mitsubishi, in his haste to catch up in the work schedule that had fallen behind, on July 14, 1999, approved the lift and insisted that the lift proceed despite the wind conditions, despite the fact that the lift exceeded the lift plan, and despite the weight and configuration of the load.

n. Victor Grotlisch failed to notify inspectors and others on the construction site that he was going to be directing a lift that was not in conformity with safe practices or the lift plans that had been established prior to this particular lift.

o. Victor Grotlisch, through his prior conduct with other workers and companies, intimidated co-workers and employees of other companies working on the construction site so that they were reluctant to complain about unsafe conditions.

30. The aforedescribed negligence and carelessness of Mitsubishi, through its agents, servants and employees, was a proximate cause of the injuries and damages sustained by Jeffrey

A. Wischer, William R. DeGrave, and Jerome W. Starr, and was a proximate cause of their deaths.

31. The aforedescribed negligence and carelessness of Mitsubishi, through its agents, servants and employees, was a proximate cause of the injuries and damages sustained by Patricia Wischer, Marjorie DeGrave, and Ramona Dulde-Starr, and as a result thereof, they are entitled to damages under the wrongful death statutes.

CLAIM BY ESTATE OF JEFFREY A. WISCHER, DECEASED, FOR PUNITIVE DAMAGES AGAINST MITSUBISHI

32. The plaintiffs reallege and incorporate herein by reference all of the allegations of paragraphs 1-27, and 29-31 of this Complaint.

33. Upon information and belief, Mitsubishi acted maliciously toward Jeffrey A. Wischer and in intentional disregard of his rights in the manner in which Mitsubishi acted on July 14, 1999, as described in paragraph 29 of this Complaint.

34. Upon information and belief, this reckless conduct of Mitsubishi was such as to subject it to punitive damages incident to the damages for pain and suffering sustained by Jeffrey A. Wischer prior to his death.

CLAIM BY ESTATE OF WILLIAM R. DeGRAVE, DECEASED, FOR PUNITIVE DAMAGES AGAINST MITSUBISHI

35. The plaintiffs reallege and incorporate herein by reference all of the allegations of paragraphs 1-27, and 29-31 of this Complaint.

36. Upon information and belief, Mitsubishi acted maliciously toward William R. DeGrave and in intentional disregard of his rights in the manner in which Mitsubishi acted on July 14, 1999, as described in paragraph 29 of this Complaint.

37. Upon information and belief, this reckless conduct of Mitsubishi was such as to subject it to punitive damages incident to the damages for pain and suffering sustained by William R. DeGrave prior to his death.

CLAIM BY ESTATE OF JEROME W. STARR, DECEASED, FOR PUNITIVE DAMAGES AGAINST MITSUBISHI

38. The plaintiffs reallege and incorporate herein by reference all of the allegations of paragraphs 1-27, and 29-31 of this Complaint.

39. Upon information and belief, Mitsubishi acted maliciously toward Jerome W. Starr and in intentional disregard of his rights in the manner in which Mitsubishi acted on July 14, 1999, as described in paragraph 29 of this Complaint.

40. Upon information and belief, this reckless conduct of Mitsubishi was such as to subject it to punitive damages incident to the damages for pain and suffering sustained by Jerome W. Starr prior to his death.

CLAIMS FOR DAMAGES BASED ON THE NEGLIGENCE OF LAMPSON

41. The plaintiffs reallege and incorporate herein by reference all of the allegations contained in paragraphs 1-27, inclusive, of this Complaint.

42. Upon information and belief, Lampson, through its agents, servants and employees, was negligent and careless in conducting its operations on July 14, 1999, and in allowing the lift to proceed on that day, for the following reasons:

a. Lampson knew or should have known that it was inappropriate to allow a lift to proceed on July 14, 1999, at the sustained velocity of the wind then prevailing and that there were wind gusts substantially in excess of that velocity.

b. Lampson knew or should have known that on July 14, 1999, the design and/or the

assembly of the Big Blue crane and the configuration of the Big Blue crane, the counterweights, balances and calculations were not adequate or sufficient to permit the crane to withstand the forces of the wind and stresses associated with the wind, having in mind the weight and configuration of the load being lifted by the crane.

c. Lampson knew or should have known that the configuration and shape of the load being lifted by the Big Blue crane on July 14, 1999 created a highly dangerous situation in which the wind could play a primary factor in causing the crane to become unstable.

d. Lampson knew or should have known that the roof section which was to be lifted on July 14, 1999 had louvers attached to it and those louvers added more weight and surface area to the section, and Lampson knew or should have known that the added weight and the added surface area would create additional instability.

e. Lampson knew or should have known that the topography of the land at the location where the lift was to take place caused changes in the wind direction and subjected the load to variable winds and higher wind velocities and created increased danger associated with the lift.

f. Lampson knew or should have known that, if the lift plan had calculations based upon a wind velocity of 20 miles per hour, that was an inappropriate wind velocity, in view of the configuration of the Big Blue crane and the weight and configuration of the load being lifted on July 14, 1999.

g. Lampson knew or should have known that the size and configuration of the load

that was lifted on July 14, 1999, were in excess of the characteristics of the load that was used in establishing a normal lift plan that set wind velocity restrictions at 20 miles per hour.

h. Lampson ignored the warnings and concerns expressed by many individuals in or about the construction site about the wind conditions.

i. Lampson ignored the fact that some other crane operations on the construction site had been terminated on July 14, 1999, due to excessive wind conditions.

j. Lampson knew or should have known that the lift on July 14, 1999 was not in conformity with the lift plan and the parameters that make lift conditions appropriate.

k. Lampson violated customs and practices in the lift industry concerning the matter of when the wind velocity would dictate that a lift of the size, weight and configuration of the lift on July 14, 1999, should be avoided.

l. Lampson was otherwise negligent.

43. Upon information and belief, the aforedescribed negligence and carelessness of Lampson, through its agents, servants and employees, was a proximate cause of the injuries and damages sustained by Jeffrey A. Wischer, William R. DeGrave, and Jerome W. Starr, and was a proximate cause of their deaths.

44. Upon information and belief, the aforedescribed negligence and carelessness of Lampson, through its agents, servants and employees, was a proximate cause of the injuries and damages sustained by Patricia Wischer, Marjorie DeGrave, and Ramona Dulde-Starr, and as a result thereof, they are entitled to damages under the wrongful death statutes.

CLAIM BY ESTATE OF JEFFREY A. WISCHER, DECEASED, FOR PUNITIVE DAMAGES AGAINST LAMPSON

45. The plaintiffs reallege and incorporate herein by reference all of the allegations of paragraphs 1-27, and 42-44 of this Complaint.

46. Upon information and belief, Lampson acted maliciously toward Jeffrey A. Wischer and in intentional disregard of his rights in the manner in which Lampson acted on July 14, 1999, as described in paragraph 42 of this Complaint.

47. Upon information and belief, this reckless conduct of Lampson was such as to subject it to punitive damages incident to the damages for pain and suffering sustained by Jeffrey A. Wischer prior to his death.

CLAIM BY ESTATE OF WILLIAM R. DeGRAVE, DECEASED, FOR PUNITIVE DAMAGES AGAINST LAMPSON

48. The plaintiffs reallege and incorporate herein by reference all of the allegations of paragraphs 1-27, and 42-44 of this Complaint.

49. Upon information and belief, Lampson acted maliciously toward William R. DeGrave and in intentional disregard of his rights in the manner in which Lampson acted on July 14, 1999, as described in paragraph 42 of this Complaint.

50. Upon information and belief, this reckless conduct of Lampson was such as to subject it to punitive damages incident to the damages for pain and suffering sustained by William R. DeGrave prior to his death.

CLAIM BY ESTATE OF JEROME W. STARR, DECEASED, FOR PUNITIVE DAMAGES AGAINST LAMPSON

51. The plaintiffs reallege and incorporate herein by reference all of the allegations of paragraphs 1-27, and 42-44 of this Complaint.

52. Upon information and belief, Lampson acted maliciously toward Jerome W. Starr and in intentional disregard of his rights in the manner in which Lampson acted on July 14, 1999, as described in paragraph 42 of this Complaint.

53. Upon information and belief, this reckless conduct of Lampson was such as to subject it to punitive damages incident to the damages for pain and suffering sustained by Jerome W. Starr prior to his death.

CLAIMS FOR DAMAGES BASED ON THE NEGLIGENCE OF HCH

54. The plaintiffs reallege and incorporate herein by reference all of the allegations contained in paragraphs 1-27, inclusive, of this Complaint.

55. Upon information and belief, HCH and Hunzinger, Clark and Huber, through HCH, and through their agents, servants and employees, were negligent and careless in the manner in which they carried out their responsibilities for the safety of the construction site, and in allowing the lift to proceed on July 14, 1999, for the following reasons:

a. HCH and Hunzinger, Clark and Huber, through HCH, knew or should have known that it was inappropriate to allow a lift to proceed on July 14, 1999, at the sustained velocity of the wind then prevailing and that there were wind gusts substantially in excess of that velocity.

b. HCH and Hunzinger, Clark and Huber, through HCH, knew or should have known that on July 14, 1999, the design and configuration of the Big Blue crane, the counterweights, balances and calculations were not adequate or sufficient to permit the crane to withstand the forces of the wind and stresses associated with the wind, having in mind the weight and configuration of the load being lifted by

the crane.

c. HCH and Hunzinger, Clark and Huber, through HCH, knew or should have known that the configuration and shape of the load being lifted by the Big Blue crane on July 14, 1999 created a highly dangerous situation in which the wind could play a primary factor in causing the crane to become unstable.

d. HCH and Hunzinger, Clark and Huber, through HCH, knew or should have known that the roof section which was to be lifted on July 14, 1999 had louvers attached to it and those louvers added more weight and surface area to the section, and knew or should have known that the added weight and the added surface area would create additional instability.

e. HCH and Hunzinger, Clark and Huber, through HCH, knew or should have known that the topography of the land at the location where the lift was to take place caused changes in the wind direction and subjected the load to variable winds and higher wind velocities and created increased danger associated with the lift.

f. HCH and Hunzinger, Clark and Huber, through HCH, knew or should have known that, if the lift plan had calculations based upon a wind velocity of 20 miles per hour, that was an inappropriate wind velocity, in view of the configuration of the Big Blue crane and the weight and configuration of the load being lifted on July 14, 1999.

g. HCH and Hunzinger, Clark and Huber, through HCH, knew or should have known that the size and configuration of the load that was lifted on July 14, 1999,

were in excess of the characteristics of the load that was used in establishing a normal lift plan that set wind velocity restrictions at 20 miles per hour.

h. HCH and Hunzinger, Clark and Huber, through HCH, ignored the warnings and concerns expressed by many individuals in or about the construction site about the wind conditions.

i. HCH and Hunzinger, Clark and Huber, through HCH, ignored the fact that some other crane operations on the construction site had been terminated on July 14, 1999, due to excessive wind conditions.

j. HCH and Hunzinger, Clark and Huber, through HCH, knew or should have known that the lift on July 14, 1999 was not in conformity with the lift plan and the parameters that make lift conditions appropriate.

k. HCH and Hunzinger, Clark and Huber, through HCH, knew or should have known that Mitsubishi and Lampson were not conducting their operations in a careful and safe manner.

l. HCH and Hunzinger, Clark and Huber, through HCH, knew or should have known that Mitsubishi and Lampson were not following the lift plan on July 14, 1999.

m. HCH and Hunzinger, Clark and Huber, through HCH, was otherwise negligent.

56. Upon information and belief, the aforedescribed negligence and carelessness of HCH and Hunzinger, Clark and Huber, through HCH, and through their agents, servants and employees, was a proximate cause of the injuries and damages sustained by Jeffrey A. Wischer, William R. DeGrave, and Jerome W. Starr, and was a proximate cause of their deaths.

57. Upon information and belief, the aforedescribed negligence and carelessness of HCH and Hunzinger, Clark and Huber, through HCH, and through their agents, servants and employees, was a proximate cause of the injuries and damages sustained by Patricia Wischer, Marjorie DeGrave, and Ramona Dulde-Starr, and as a result thereof, they are entitled to damages under the wrongful death statutes.

CLAIM BY ESTATE OF JEFFREY A. WISCHER, DECEASED, FOR PUNITIVE DAMAGES AGAINST HCH

58. The plaintiffs reallege and incorporate herein by reference all of the allegations of paragraphs 1-27, and 55-57 of this Complaint.

59. Upon information and belief, HCH and Hunzinger, Clark and Huber, through HCH, acted maliciously toward Jeffrey A. Wischer and in intentional disregard of his rights in the manner in which they acted on July 14, 1999, as described in paragraph 55 of this Complaint.

60. Upon information and belief, this reckless conduct of HCH and Hunzinger, Clark and Huber, through HCH, was such as to subject them to punitive damages incident to the damages for pain and suffering sustained by Jeffrey A. Wischer prior to his death.

CLAIM BY ESTATE OF WILLIAM R. DeGRAVE, DECEASED, FOR PUNITIVE DAMAGES AGAINST HCH

61. The plaintiffs reallege and incorporate herein by reference all of the allegations of paragraphs 1-27, and 55-57 of this Complaint.

62. Upon information and belief, HCH and Hunzinger, Clark and Huber, through HCH, acted maliciously toward William R. DeGrave and in intentional disregard of his rights in the manner in which they acted on July 14, 1999, as described in paragraph 55 of this Complaint.

63. Upon information and belief, this reckless conduct of HCH and Hunzinger, Clark and

Huber, through HCH, was such as to subject them to punitive damages incident to the damages for pain and suffering sustained by William R. DeGrave prior to his death.

CLAIM BY ESTATE OF JEROME W. STARR, DECEASED, FOR PUNITIVE DAMAGES AGAINST HCH

64. The plaintiffs reallege and incorporate herein by reference all of the allegations of paragraphs 1-27, and 55-57 of this Complaint.

65. Upon information and belief, HCH and Hunzinger, Clark and Huber, through HCH, acted maliciously toward Jerome W. Starr and in intentional disregard of his rights in the manner in which they acted on July 14, 1999, as described in paragraph 55 of this Complaint.

66. Upon information and belief, this reckless conduct of HCH and Hunzinger, Clark and Huber, through HCH, was such as to subject them to punitive damages incident to the damages for pain and suffering sustained by Jerome W. Starr prior to his death.

WHEREFORE, the plaintiffs demand judgment against the defendants as follows:

Plaintiff Patricia Wischer, as Special Administrator of the Estate of Jeffrey A. Wischer, deceased, demands judgment against the defendants for damages for the pain and suffering and other damages sustained by Jeffrey A. Wischer prior to his death.

Plaintiff Patricia Wischer, as Special Administrator of the Estate of Jeffrey A. Wischer, deceased, demands judgment against Mitsubishi for punitive damages incident to the damages for the pain and suffering and other damages sustained by Jeffrey A. Wischer prior to his death.

Plaintiff Patricia Wischer, as Special Administrator of the Estate of Jeffrey A. Wischer, deceased, demands judgment against Lampson for punitive damages incident to the damages for the pain and suffering and other damages sustained by Jeffrey A. Wischer prior to his death.

Plaintiff Patricia Wischer, as Special Administrator of the Estate of Jeffrey A. Wischer,

deceased, demands judgment against HCH and Hunzinger, Clark and Huber, for punitive damages incident to the damages for the pain and suffering and other damages sustained by Jeffrey A. Wischer prior to his death.

Plaintiff Patricia Wischer, individually, demands judgment against the defendants for damages under the wrongful death statutes.

Plaintiff Marjorie DeGrave, as Special Administrator of the Estate of William R. DeGrave, deceased, demands judgment against the defendants for damages for the pain and suffering and other damages sustained by William R. DeGrave prior to his death.

Plaintiff Marjorie DeGrave, as Special Administrator of the Estate of William R. DeGrave, deceased, demands judgment against Mitsubishi for punitive damages incident to the damages for the pain and suffering and other damages sustained by William R. DeGrave prior to his death.

Plaintiff Marjorie DeGrave, as Special Administrator of the Estate of William R. DeGrave, deceased, demands judgment against Lampson for punitive damages incident to the damages for the pain and suffering and other damages sustained by William R. DeGrave prior to his death.

Plaintiff Marjorie DeGrave, as Special Administrator of the Estate of William R. DeGrave, deceased, demands judgment against HCH and Hunzinger, Clark and Huber, for punitive damages incident to the damages for the pain and suffering and other damages sustained by William R. DeGrave prior to his death

Plaintiff Marjorie DeGrave, individually, demands judgment against the defendants for damages under the wrongful death statutes.

Plaintiff Ramona Dulde-Starr, as Special Administrator of the Estate of Jerome W. Starr, deceased, demands judgment against the defendants for damages for the pain and suffering and other damages sustained by Jerome W. Starr prior to his death.

Plaintiff Ramona Dulde-Starr, as Special Administrator of the Estate of Jerome W. Starr, deceased, demands judgment against Mitsubishi for punitive damages incident to the damages for the pain and suffering and other damages sustained by Jerome W. Starr prior to his death.

Plaintiff Ramona Dulde-Starr, as Special Administrator of the Estate of Jerome W. Starr, deceased, demands judgment against Lampson for punitive damages incident to the damages for the pain and suffering and other damages sustained by Jerome W. Starr prior to his death.

Plaintiff Ramona Dulde-Starr, as Special Administrator of the Estate of Jerome W. Starr, deceased, demands judgment against HCH and Hunzinger, Clark and Huber, for punitive damages incident to the damages for the pain and suffering and other damages sustained by Jerome W. Starr prior to his death

Plaintiff Ramona Dulde-Starr, individually, demands judgment against the defendants for damages under the wrongful death statutes.

Plaintiffs Patricia Wischer, individually and as Special Administrator of the Estate of Jeffrey A. Wischer, deceased, Marjorie DeGrave, individually and as Special Administrator of the Estate of William R. DeGrave, deceased, and Ramona Dulde-Starr, individually and as Special Administrator of the Estate of Jerome W. Starr, deceased, demand judgment against the defendants for the costs, disbursements and prejudgment interest in this action.

The plaintiffs allege that their damages are more than the minimum amount necessary to invoke the jurisdiction of this Court.

HABUSH, HABUSH, DAVIS & ROTTIER, S.C.
Attorneys for Plaintiffs
Patricia Wischer and Marjorie DeGrave

By _____
Robert L. Habush
State Bar No. 1008419
Charles F. Stierman
State Bar No. 1017112

Firstar Center, Suite 2300
777 East Wisconsin Avenue
Milwaukee, WI 53202-5381
(414) 271-0900

JACQUART & LOWE, S.C.
Attorneys for Plaintiff Ramona Dulde-Starr

By _____
David P. Lowe
State Bar No. 1018378

One Plaza East, Suite 745
330 East Kilbourn Avenue
Milwaukee, WI 53202
(414) 271-8828

PLEASE TAKE NOTICE THAT THE PLAINTIFFS DEMAND THAT THE ABOVE ENTITLED ACTION BE TRIED BY A TWELVE PERSON JURY.

PARTIAL RELEASE AND COVENANTS

RECITALS

Jeffrey A. Wischer, William R. DeGrave and Jerome W. Starr died in an accident on July 14, 1999 while working in the course of their employment at a baseball stadium construction site commonly known as Miller Park in Milwaukee County, Wisconsin (the "Miller Park accident").

Patricia Wischer is the widow of Jeffrey A. Wischer and is the lawfully appointed Special Administrator of the Estate of Jeffrey A. Wischer.

Marjorie DeGrave is the widow of William R. DeGrave and is the lawfully appointed Special Administrator of the Estate of William R. DeGrave.

Ramona Dulde-Starr is the widow of Jerome W. Starr and is the lawfully appointed Special Administrator of the Estate of Jerome W. Starr.

On August 12, 1999 Patricia Wischer, Marjorie DeGrave and Ramona Dulde-Starr filed a lawsuit (the "Suit") in the Circuit Court of Milwaukee County, alleging that the deaths of their husbands in the Miller Park accident were caused by the wrongful conduct of Mitsubishi Heavy Industries America, Inc. ("MHIA"), Neil F. Lampson, Inc., HCH Miller Park Joint Venture, Hunzinger Construction Company, Clark Construction Builders, Inc. (identified in the plaintiffs' Amended Complaint as The Clark Construction Group, Inc.) and Huber, Hunt & Nichols, Inc., the defendants named in the Suit; on October 1, 1999 MHIA filed an answer to the plaintiffs' complaint, denying any and all liability for the Miller Park accident; on December 1, 1999 the plaintiffs filed an amended complaint naming Lampson International, Ltd. and Mitsubishi Heavy Industries, Ltd. ("MHI") as additional defendants; and on February 11, 2000 the plaintiffs voluntarily dismissed MHI from the Suit. In the balance of this Release, Neil F. Lampson, Inc. and Lampson International, Ltd. are referred to individually and collectively as Lampson.

HCH Miller Park Joint Venture is a joint venture formed for the purpose of providing construction management services in connection with the construction of Miller Park. The members of the joint venture are Hunzinger Construction Company, The Clark Construction Group, Inc. and Huber, Hunt & Nichols, Inc. In the balance of this Release, HCH Miller Park Joint Venture and its three constituent members are referred to individually and collectively as HCH.

The owner of Miller Park is the Southeast Wisconsin Professional Baseball Park District (the "District"). Before the start of the construction of Miller Park, the District purchased an Owner Controlled Insurance Program ("OCIP") providing, among other insurance, commercial general liability coverage ("CGL") for the project. The OCIP provides the following tiered layers of CGL coverage, with the per occurrence and aggregate limits indicated:

INSURER	POLICY NO.	COVERAGE
Travelers Indemnity Company of Illinois ("Travelers")	RTJ-GLSA-275T3079-TIL-99 (the "RTJ policy")	$2,000,000
Royal Insurance Company of America ("Royal")	PHA 0011211	$5,000,000
Indemnity Insurance Company of North America ("IINA")	XLX G18879621	$20,000,000
Federal Insurance Company ("Federal")	(00) 7974-01-75	$50,000,000
Travelers Indemnity Company of Illinois ("Travelers")	7PSJ-EX-271T241-7-TIL-96 (the "FSJ policy")	$25,000,000

In the balance of this Release, Travelers, Royal, IINA and Federal are referred to collectively as the "OCIP insurers."

MHIA is insured under the OCIP.

ACE USA ("ACE") is authorized to settle claims under the IINA policy.

In addition to, and over and above the layers of CGL coverage provided by the OCIP, MHIA has excess liability coverage through a policy of insurance issued by The Tokio Marine and Fire Insurance Company, Ltd., policy number CLL424075600, with per occurrence and aggregate limits of $2 million (the "Tokio Marine policy").

The plaintiffs desire to partially release their claims against IINA under the IINA policy, to partially release their claims against MHIA, to fully release their claims against MHI except for MHI's obligations set forth in ¶ 2 on page 4 hereof, to partially release their claims against Lampson, and to receive partial payment toward their loss.

1. Description of Claims Released Against MHIA and MHI

In the balance of this Release, any and all claims, actions, demands and causes of action arising out of, or relating to, the Miller Park accident are referred to collectively as the "Claims."

Patricia Wischer, individually and as Special Administrator of the Estate of Jeffrey A. Wischer; Marjorie DeGrave, individually and as Special Administrator of the Estate of William R. DeGrave; and Ramona Dulde-Starr, individually and as Special Administrator of the Estate of

Jerome W. Starr (all of whom are referred to collectively in the remainder of this Release as "Releasors") hereby release MHIA from:

(a) the first $12,375,000 of compensatory damages for any and all Claims;

(b) any and all compensatory damages, punitive damages and other liability in excess of $84,625,000 for any and all Claims; and

(c) any and all compensatory damages above $12,375,000 and below $84,625,000, and any and all punitive damages and other liability below $84,625,000, for which MHIA is not indemnified by valid and collectible insurance under the OCIP or the Tokio Marine policy for any and all Claims, unless it is finally determined after exhaustion of all appeals that punitive damages otherwise falling within the available limits of the IINA policy, the Federal policy, the Travelers FSJ policy or the Tokio Marine policy are not covered by those policies because of some policy exclusion or public policy reason, in which case MHIA shall be responsible for a maximum of $10 million of those punitive damages which would otherwise have been covered by those policies.

Releasors also hereby fully release MHI from any and all Claims except for MHI's obligations set forth in ¶ 2 on page 4 hereof.

Releasors agree that IINA's policy provides $20 million of liability coverage under the OCIP, in excess of $7 million, but that it provides no liability coverage under the OCIP after the exhaustion of its $20 million policy limits. Accordingly, Releasors agree that, upon payment of the $12,375,000 under the IINA policy, they will not seek recovery from ACE or IINA for any damages over the remaining $7,625,000 of the IINA policy, for any and all Claims arising out of, or relating to, the Miller Park accident.

The liability released, as described above, relates to claims of every kind and nature now existing or which hereafter arise, including any consequences thereof now existing or which may develop, whether or not such consequences are presently known or anticipated, whether based upon matters presently known as well as unknown, anticipated as well as unanticipated, whether directly or indirectly incurred, including any contingent or derivative claims as well as any claims arising by subrogation or contribution, and including claims actually asserted, or which could have been asserted, in the Suit.

Releasors maintain that the injuries and damages sustained are, or in some cases may be, progressive, and that the precise amount of damages is uncertain and indefinite. In making this Release, it is understood and agreed that the Releasors rely upon their own judgment, belief and knowledge of the nature, extent, effect and duration of damages and liability therefor, and upon the advice of their selected advisors. This Release is made without reliance upon any statement or representation of any Released Parties, or their representatives.

2. **Bond or Letter of Credit**

MHIA and MHI shall obtain a bond or letter of credit from a U.S. based company within 30 days from the date of this Release to secure and guarantee MHIA's potential $10 million maximum exposure to the plaintiffs.

3. **Consideration**

The consideration for this Release is payment by ACE, under the IINA policy, on behalf of MHIA in the amount of $12,375,000 within 30 days of the date of this Release, in partial settlement of Releasors' claims, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged. The $12,375,000 shall be paid to the trust account of Habush, Habush, Davis & Rottier, S.C., and shall not be disbursed until this settlement has been approved by the court. Releasors agree that they will decide how the consideration paid for this Release will be divided among themselves. The $12,375,000 is to be treated as an offset against compensatory damages.

4. **Lampson**

Releasors also hereby release Lampson from:

(a) The first $5,000,000 of liability for any and all Claims, which the Releasors previously released on June 22, 2000;

(b) Any and all liability above $5,125,000 and below $17,500,000 for any and all Claims;

(c) Any and all liability in excess of $84,625,000 for any and all Claims;

(d) Any and all liability above $5,000,000 and below $5,125,000 for which Lampson is not indemnified by valid and collectible insurance under the OCIP for any and all Claims; and

(e) Any and all liability above $17,500,000 and below $84,625,000 for which Lampson is not indemnified by valid

and collectible insurance under the OCIP for any and all Claims.

5. **Reservation of Claims**

This Release does not relinquish any claims or release any party other than those claims and parties specifically identified herein. Releasors reserve the right to prosecute all other claims against any party who may be responsible for their damages, specifically including without limitation Lampson, MHIA (for the claims reserved), the OCIP insurers and The Tokio Marine and Fire Insurance Company; Ltd. ("Tokio Marine").

Nothing contained in this Release shall be deemed to constitute as a waiver of any claims that MHIA or IINA may have against any other party. Lampson MHIA and IINA specifically reserve any claims that they may have against any other party arising out of the Miller Park accident.

6. **Accident**

The accident referred to in this Release is the collapse of a crane commonly known as "Big Blue" on July 14, 1999 at the Miller Park construction site.

7. **Offset and Credit For Payment**

Releasors agree to offset the first $12,375,000 of compensatory damages for any and all Claims they may have against MHIA, MHI, the OCIP insurers or Tokio Marine, arising out of, or relating to, the Miller Park accident. Releasors further agree to credit $12,375,000 toward any verdict against MHIA, MHI, any OCIP insurer or Tokio Marine, that is required, because of such a verdict, to make a payment for any compensatory damage Claims.

8. **Offset and Credit - Claims of Other Parties**

Releasors agree to offset any amount that they recover by settlement, verdict or judgment from any other party to this action by the amount which the other party could enforce by way of a contribution or indemnification claim against MHIA or MHI, unless the amount which the other party could enforce against MHIA or MHI is indemnified by valid and collectible insurance under the OCIP or the Tokio Marine policy.

9. **Indemnification**

Releasors agree to indemnify and save harmless Lampson ACE, IINA, MHIA and MHI from any and all claims of any party for contribution or indemnification made by others adjudged jointly liable with MHIA or MHI, but only to the extent that the amount of available and collectible insurance afforded to MHIA under the OCIP or the Tokio Marine policy is insufficient to satisfy those claims.

10. **Subrogation**

Except as otherwise provided in this paragraph, Releasors agree that, to the extent of the Released Amount, they will remain responsible to satisfy lien interests, if any, such as any lien arising from worker's compensation payments, subrogation for medical insurance payments and attorney's liens. To the extent of the Released Amount, Releasors agree to indemnify and hold harmless MHIA, MHI and IINA against claims made against them arising out of lien interests.

11. **No Admission of Liability**

Neither this Release, nor any payment, concession or any other action by MHIA, MHI, ACE or IINA is to be construed as a waiver of any rights or an admission of any liability, all rights being fully reserved and liability being expressly denied. This Release is a compromise partial settlement which is the result of settlement negotiations.

12. **Persons Bound and Benefitted**

This Release binds the Releasors, their heirs, executors, administrators, successors and assigns, and inures to the benefit of the named Released Parties and their officers, directors, agents, employees, successors and assigns.

13. **Construction of Ambiguities**

This Release is the joint work product of the Releasors and the Released Parties and their respective counsel. Accordingly, the Releasors, ACE, IINA, MHIA and MHI agree that any rule of construction resolving ambiguities against the drafting party is inapplicable to the interpretation of this Release.

14. **Entire Agreement**

Releasors represent that no promise, inducement or agreement, not set forth herein, has been made. This Release contains the entire agreement between the parties. Each numbered paragraph of this Release is contractual and not a mere recital. Each person signing this Release acknowledges that he or she has read the Release, reviewed it with his or her attorneys, and understands it in its entirety.

15. **Governing Law**

This agreement shall be governed by Wisconsin law.

16. The confidentiality requirements of the letter agreement dated 10/27/00 are incorporated into this agreement.

IN WITNESS WHEREOF each of the undersigned has hereunto set her hand and seal this 7 day of November, 2000.

Patricia Wischer, Individually and as Special Administrator of the Estate of Jeffrey A. Wischer.

Marjorie M. DeGrave, Individually and as Special Administrator of the Estate of William R. DeGrave.

Ramona Dulde-Starr, Individually and as Special Administrator of the Estate of Jerome W. Starr.

CONSENT OF ATTORNEYS FOR PATRICIA WISCHER AND MARJORIE DEGRAVE

Pursuant to Wis. Stats. § 757.38, the undersigned attorneys for Patricia Wischer and Marjorie DeGrave hereby consent to and approve the settlement set forth in this Release.

Dated this 7 day of November, 2000.

HABUSH, HABUSH, DAVIS & ROTTIER, S.C.

By: Robert L. Habush

CONSENT OF ATTORNEYS FOR RAMONA DULDE-STARR

Pursuant to Wis. Stats. § 757.38, the undersigned attorneys for Ramona Dulde-Starr hereby consent to and approve the settlement set forth in this Release.

Dated this 7 day of November, 2000.

JACQUART & LOWE, S.C.

By: _____
David P. Lowe

Dated this _____ day of November, 2000.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA

_____
Authorized Representative

Dated this 8th 10th day of November, 2000.

MITSUBISHI HEAVY INDUSTRIES AMERICA, INC.

_____
Authorized Representative

Dated this 13th day of November, 2000.

MITSUBISHI HEAVY INDUSTRIES, LTD.

_____
Authorized Representative

Dated this 7th day of November, 2000.

NEIL F. LAMPSON, INC.

Authorized Representative

Dated this 7th day of November, 2000.

LAMPSON INTERNATIONAL, LTD.

Authorized Representative

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

PATRICIA WISCHER, individually,
and as Special Administrator of the
ESTATE OF JEFFREY A. WISCHER, deceased,
109 North Charles Street
Waukesha, WI 53188,

MARJORIE DeGRAVE, individually,
and as Special Administrator of the
ESTATE OF WILLIAM R. DeGRAVE, deceased,
140 Darbay Road
Kimberly, WI 54136,

RAMONA DULDE-STARR, individually,
and as Special Administrator of the
ESTATE of JEROME W. STARR, deceased,
2400 East Bradford Street
Milwaukee, WI 53211,

Plaintiffs,

vs.

MITSUBISHI HEAVY INDUSTRIES AMERICA INC.
a foreign corporation
c/o its registered agent,
CT Corporation Systems
44 East Mifflin Street
Madison, WI 53703

TRAVELERS PROPERTY CASUALTY INSURANCE COMPANY
a foreign corporation
c/o its registered agent,
David B. Myhre
445 South Moorland Road
Brookfield, WI 53005

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS
a foreign corporation
c/o its registered agent,
David B. Myhre
445 South Moorland Road
Brookfield, WI 53005

SECOND AMENDED COMPLAINT

Case No. 99-CV-006553

Case Code:
Personal Injury, Other: 30107
Wrongful Death: 30105

FILED AND AUTHENTICATED
DEC - 4 2000
JOHN BARRETT
Clerk of Circuit Court

LAMPSON INTERNATIONAL LTD.
a foreign corporation
c/o its registered agent,
Neil F. Lampson
607 East Columbia Drive
Kennewick, WA 99336

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA
a foreign corporation
c/o its registered agent,
CT Corporation Systems
44 East Mifflin Street
Madison, WI 53703

FEDERAL INSURANCE COMPANY
a foreign corporation
c/o its registered agent,
Roberta L. Mayer
330 East Kilbourn Avenue, Suite 1450
Milwaukee, WI 53202

THE TOKIO MARINE AND FIRE INSURANCE COMPANY
a foreign corporation
c/o its registered agent,
CT Corporation Systems
44 East Mifflin Street
Madison, WI 53730

Defendants.

Plaintiff Patricia Wischer, individually and as Special Administrator of the Estate of Jeffrey A. Wischer, deceased, and plaintiff Marjorie DeGrave, individually and as Special Administrator of the Estate of William R. DeGrave, deceased, by their attorneys, HABUSH, HABUSH, DAVIS & ROTTIER, S.C., and plaintiff Ramona Dulde-Starr, individually and as Special Administrator of the Estate of Jerome W. Starr, deceased, by her attorneys, JACQUART & LOWE, S.C., as and for a Second Amended Complaint, allege and show to the Court as follows:

1. On December 1, 2000, a jury returned a verdict in this action in which the jury (a) found that defendant Mitsubishi Heavy Industries America, Inc. and defendant Lampson International, Ltd. were causally negligent in causing damages to the plaintiffs, (b) awarded compensatory damages to the plaintiffs, (c) found that defendant Mitsubishi Heavy Industries America, Inc. had engaged in conduct warranting the imposition of punitive damages and (d) assessed punitive damages against defendant Mitsubishi Heavy Industries America Inc. Attached is a copy of the Special Verdict Regarding Tort Issues.

2. Upon information and belief, defendant The Travelers Indemnity Company of Illinois issued a policy of insurance, policy number 7FSJ-EX-271T241-7-TIL-96, to defendants Mitsubishi Heavy Industries America, Inc. and Lampson International Ltd., which policy provided coverage to said defendants for the damages that were awarded to the plaintiffs by the jury in this matter.

3. At the present time, defendant Indemnity Insurance Company of North America is a foreign corporation duly licensed to do business in the State of Wisconsin, with offices of its registered agent, CT Corporation Systems, at 44 East Mifflin Street, Madison, Wisconsin, 53703. Indemnity Insurance Company of North America is engaged in the business of writing and selling liability insurance. Upon information and belief, defendant Indemnity Insurance Company of North America issued a policy of insurance, policy number XLX G18879621, to defendants Mitsubishi Heavy Industries America, Inc. and Lampson International Ltd., which policy provided coverage to said defendants for the damages that were awarded to the plaintiffs by the jury in this matter.

4. At the present time, defendant Federal Insurance Company is a foreign corporation duly licensed to do business in the State of Wisconsin, with offices of its registered agent,

Roberta L. Mayer, at 330 East Kilbourn Avenue, Suite 1450, Milwaukee, Wisconsin, 53202. Federal Insurance Company is engaged in the business of writing and selling liability insurance. Upon information and belief, defendant Federal Insurance Company issued a policy of insurance, policy number (00) 7974-01-75, to defendants Mitsubishi Heavy Industries America, Inc. and Lampson International Ltd., which policy provided coverage to said defendants for the damages that were awarded to the plaintiffs by the jury in this matter.

5. At the present time, defendant The Tokio Marine and Fire Insurance Company is a foreign corporation duly licensed to do business in the State of Wisconsin, with offices of its registered agent, CT Corporation Systems, at 44 East Mifflin Street, Madison, Wisconsin, 53703. The Tokio Marine and Fire Insurance Company is engaged in the business of writing and selling liability insurance. Upon information and belief, defendant The Tokio Marine and Fire Insurance Company issued a policy of insurance to defendant Mitsubishi Heavy Industries America, Inc., which policy provided coverage to said defendant for the damages that were awarded to the plaintiffs by the jury in this matter.

6. By virtue of the policies of insurance as alleged herein, defendants The Travelers Indemnity Company of Illinois, Indemnity Insurance Company of North America, and Federal Insurance Company are liable to the plaintiffs for the damages awarded to the plaintiffs by the jury in this matter.

7. By virtue of the policy of insurance as alleged herein, defendant The Tokio Marine and Fire Insurance Company is liable to the plaintiffs for the damages awarded against defendant Mitsubishi Heavy Industries America, Inc. by the jury in this matter.

WHEREFORE, the plaintiffs demand judgment as follows:

The plaintiffs seek a judgment, pursuant to Wis. Stat. §806.04, for a declaration of the

responsibilities of defendants The Travelers Indemnity Company of Illinois, Indemnity Insurance Company of North America, Federal Insurance Company, and The Tokio Marine and Fire Insurance Company.

The plaintiffs demand judgment for damages against defendants The Travelers Indemnity Company of Illinois, Indemnity Insurance Company of North America, Federal Insurance Company, and The Tokio Marine and Fire Insurance Company in accordance with the court's declaration.

The plaintiffs also demand judgment for the costs of this lawsuit and such other and further relief as the Court may deem proper.

Dated this 4th day of December, 2000.

HABUSH, HABUSH, DAVIS & ROTTIER S.C.
Attorneys for Plaintiffs Patricia Wischer
and Marjorie DeGrave

By Virginia M. Antoine

Robert L. Habush, SB #1008419
Virginia M. Antoine, SB #1004853

777 East Wisconsin Avenue, Suite 2300
Milwaukee, WI 53202-5381
(414) 271-0900

JACQUART & LOWE, S.C.
Attorneys for Plaintiff Ramona Dulde-Starr
By David P. Lowe, SB #1018378
330 East Kilbourn Avenue, Suite 805
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(414) 271-8828