

STATE OF WISCONSIN
SUPREME COURT

IND#
15062

APPEAL NO: 07AP2873

CITY OF MILWAUKEE,

Plaintiff-Appellant,

v.

NL INDUSTRIES, INC,

Defendant-Respondent

and

MAUTZ PAINT CO.

Defendant

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Appeal from the Circuit Court for Milwaukee County,
the Honorable John A. Franke, Circuit Court Judge, Presiding
Circuit Court Case No: 01CV003066

PLAINTIFF-APPELLANT'S PETITION FOR REVIEW

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ISSUES PRESENTED FOR REVIEW

- 1. Does the trial court's curative instruction that exclusively addresses damages - and not liability - overcome the prejudice to Petitioner of admitting collateral source evidence and allowing its use at trial to defeat liability?**

In the trial court, the City of Milwaukee ("Petitioner") filed a motion in *limine* seeking to prohibit the introduction of collateral source evidence, such as the fact that the Milwaukee Health Department had received federal and state grants to help fund its childhood lead paint poisoning abatement and prevention programs. Petitioner argued that the introduction of collateral source evidence would be prejudicial to the jury's determinations of both liability and damages. Further, the City requested that it be allowed to redact any information from its damages documentation regarding its receipt of outside funds when presenting such evidence to the jury. The trial court denied the Petitioner's motion and precluded the City from redacting evidence of collateral funds holding that such redactions would be "impractical" and "totally unnecessary." Instead, the trial court held that it would deal with the issue of collateral source evidence at trial through a curative instruction.

The Petitioner objected to the Respondent's use of collateral source evidence in cross-examination and during the closing argument, but was again overruled. The trial court's "curative" instruction addressed the "distribution of damages," and instructed the jury that the collateral source evidence "may not affect your answer to the damage question," but the instruction made no mention of the fact that any collateral sources of funding should not affect the jury's rulings on liability.

Just after the jury reached a defense verdict as to liability in this case, this Court decided *Leitinger v. Van Buren Mgmt., Inc.*, 2007 WI 84, 302 Wis.2d 110, 736 N.W.2d 1 (2007), which reiterated that collateral evidence should be excluded from trial because such evidence may taint the jury and prejudice the plaintiffs on issues of both liability and damages. Nevertheless, the trial court declined Petitioner's request to order a partial new trial based on *Leitinger* holding that, despite the court's previous refusal to allow Petitioner to redact such evidence, the City had waived any objection by introducing collateral source evidence itself. Further, the trial court found that the Respondent had used the collateral source

evidence in attacking the City's liability case for "legitimate purposes."

All three Court of Appeals judges found that the trial court's admission of collateral source evidence was "error." Opin. at ¶65 (majority); Opin. at ¶88 (dissent). Nevertheless, the majority found that any error was overcome by the trial court's curative instruction. Opin. at ¶70. The dissent, however, deemed this error as "[o]ne of the most significant errors in the case," and noted that even if an instruction on collateral source could cure any prejudice, that it did not do so in this case because the instruction made no mention of liability. The dissent found that this error "affected substantial rights of the City because there is a 'reasonable possibility that that the error contributed to the outcome' of the trial." Opin. at ¶88 (internal citation omitted).

2. Under Wisconsin standards for intentional public nuisance, once a plaintiff proves a tortfeasor knew its conduct was substantially certain to cause harm, does the plaintiff also need to prove that the tortfeasor's conduct was unreasonable?

The Petitioner proposed instructions and a verdict form which required proof that the defendant's conduct was intentional - not intentional *and* unreasonable. Over the Petitioner's objections, however, the trial court framed

Special Verdict Question 2 as “Did NL Industries intentionally and unreasonably engage in conduct that was a cause of the public nuisance?” Further, the trial court instructed the jury that Respondent’s conduct must be both intentional and unreasonable to be a cause of the public nuisance. In denying the Petitioner’s request for a new trial given this additional and unnecessary element of proof, the trial court ruled that “the unreasonableness of the defendant’s conduct is clearly an issue in *any* claim of public nuisance.” (emphasis added).

The majority opinion in the Court of Appeals noted that “there is conflicting law on this issue” but found that “resolution of the conflict is unnecessary.” Opin. at ¶52. The majority noted that “even if the wording of the instruction and verdict question were in error, it was harmless given that the jury answered in the negative the negligence question on the special verdict.” *Id.* The dissent disagreed and noted that this error “had profound implications on the evidence presented.” Opin. at ¶98. In particular, it “allowed NL Industries to argue that liability could only be premised on its foreknowledge of the exact mechanism of the injuries the affected children suffered” and because NL did not have this

knowledge, “its conduct was not unreasonable.” *Id.* The dissent found there was a reasonable possibility that this defense argument “contributed to the outcome” of the trial and, if the instruction was erroneous, entitled the Petitioner to a new trial. *Id.*

3. Did the nature of the evidence surrounding Respondent’s decades of sales and promotion of lead paint and pigment and subsequent changes in knowledge on the subject of childhood lead paint poisoning support Petitioner’s request for a jury instruction under Restatement (Second) of Torts § 825, cmt. d as to continuing conduct?

Due to the lengthy time period during which Respondent’s knowledge on the subject of childhood lead paint poisoning admittedly changed, Petitioner proposed an instruction that stated that if NL continued its activities *after learning that harm was substantially certain to result from its conduct*, that the jury could find that its conduct was intentional. The trial court declined to issue Petitioner’s instruction and denied the City’s request for a new trial based on this alleged error even though the court acknowledged that NL’s knowledge was “significantly evolving” during the more than 75 years it was selling and promoting lead paint.

The Court of Appeals majority found that the trial court “appropriately exercised its discretion in not giving the City’s requested instruction.” Opin. at ¶59.

STATEMENT OF REVIEW CRITERIA

This case presents compelling reasons for review by the Wisconsin Supreme Court under Rule 809.62(1)(d), as well as under Rules 809.62(1)(c)(2) and 809.62(1)(c)(3).

First, pursuant to Rule 809.62(1)(d), review is appropriate because the Court of Appeals holding that the admission of collateral source evidence was harmless error is in conflict with established Wisconsin Supreme Court precedent. For example, most recently in *Leitinger*, this Court recognized that the collateral source rule is both a rule of damages and a rule of evidence pertaining to liability. 2007 WI 84 at ¶¶26, 51.

The trial court’s admission of collateral source evidence and denial of the City’s request to redact such evidence conflicts with *Leitinger*. Furthermore, even if an instruction could cure this prejudice, the Court of Appeals’ reliance on the trial court’s instruction is also in conflict with *Leitinger* because the instruction only mentioned that such

evidence should not be used to reduce damages; there was no collateral source “curative” instruction as to liability.

Review is also appropriate because a decision by this Court will help clarify public nuisance law in important and uncharted areas in Wisconsin. Under Rule 809.62(1)(c)(2), the questions presented by the facts of this case are novel and their resolution will have a statewide impact. Moreover, under 809.62(1)(c)(3), these are questions of law that are likely recur unless resolved by the Supreme Court.

As to the intentional and unreasonable conduct instruction, the majority opinion recognized that there were conflicting decisions on this issue that need clarification. Opin. at ¶52. Moreover, this Court should review the Court of Appeals holding that any error was harmless due to the fact that the jury found that Respondent was not negligent, as the Court of Appeals failed to recognize that intentional conduct and negligent conduct are independent bases for public nuisance liability and not necessary precursors to one another. Additionally, the issue of whether a continuing knowledge instruction is warranted is a novel question that may impact similar nuisance cases wherein a tortfeasor’s knowledge developed over time. A ruling by the Supreme Court will

help resolve these conflicts and clarify intentional public nuisance doctrine on important questions of law likely to recur if not resolved by this Court.

Accordingly, the City of Milwaukee respectfully requests that the Court grant its Petition for Review in this case.

STATEMENT OF THE CASE

I. DESCRIPTION OF THE CASE

In this action, Petitioner brought claims for continuing public nuisance and conspiracy against two entities that manufactured, sold and promoted lead pigments and/or lead paints in the City of Milwaukee: NL Industries, Inc. (previously known as “National Lead Co.”), the dominant national manufacturer of lead pigment and residential lead paint in the country, and Mautz Paint Company (“Mautz”),¹ a Wisconsin-based manufacturer and seller of residential lead paint. The City alleged that residential lead paint poisoning hazards resulting in childhood lead paint poisoning in Milwaukee were a public nuisance and sought to recover funds from the defendants, under Wis. Stat. § 823.01, that the

¹ After its first appeal, the City stayed its claims against Mautz and proceeded to trial solely against NL.

City had expended in abating these hazards and the childhood lead paint poisoning epidemic in Milwaukee.

II. PROCEDURAL STATUS AND DISPOSITION IN THE COURTS BELOW

In 2004, the Court of Appeals unanimously reversed the trial court's initial summary judgment ruling in favor of Respondent. In that opinion, the Court of Appeals defined the elements of public nuisance:

We hold that to establish a claim of creating a public nuisance, a plaintiff must prove that the defendant's conduct was a substantial cause of the existence of a public nuisance and that the nuisance was a substantial factor in causing injury to the public, which injury is the subject of the action.

Milwaukee v. NL Industries, Inc., 2005 WI App 7, ¶12, 278 Wis. 2d 313, 691 N.W.2d 888 (2004). In particular, the Court "agreed" with the City's position that in a public nuisance case, a "*house-by-house approach . . . is not relevant* to the City's ability to prove Respondents were a substantial factor in contributing to the lead public nuisance in the Milwaukee community." *Id.* at ¶15 (emphasis added). Further, the Court found that public nuisance harm is measured by the impact "to the community or the general public, *as opposed to individuals who may have suffered specific personal injury or specific property damage.*" *Id.* (emphasis added). The Court

rejected NL's argument that "the City must prove, at a minimum, that NL Industries' pigment or lead paint . . . is present on windows in Target Area properties and that their conduct somehow caused the paint to become a hazard to children." *Id.* at ¶14.

The Court held that there were two separate lines of evidence the City could proffer to prove causation of the public nuisance: evidence of sales of lead pigment and lead paint and evidence of promotion of lead pigment and lead paint. *Id.* at ¶¶18-19. The Court also reinstated the City's conspiracy and restitution claims and remanded the case for trial on all counts. *Id.* at ¶¶27-29. After the Court issued its opinion, Respondents filed a Petition for Review with the Wisconsin Supreme Court, but promptly withdrew their Petition when this Court released its decision in *Thomas ex rel. Gramling v. Mallet*, 285 Wis. 2d 236, 701 N.W.2d 523 (2005).²

The case proceeded to trial. On June 22, 2007, the jury returned a partial verdict in favor of Petitioners finding that the City had proven that lead paint in and on houses in

² In *Thomas*, the Wisconsin Supreme Court adopted the "risk contribution" theory of liability in white lead pigment litigation. 285 Wis. 2d 236 at ¶ 175.

Milwaukee constituted a public nuisance. Special Verdict (R.585), Opin. at ¶17, n.5. Respondent did not appeal this finding. The jury also found, however, that NL did not intentionally or negligently engage in conduct that was a cause of the nuisance. *Id.* Under the trial court's instructions, the jury was not allowed to also consider whether NL engaged in a conspiracy to commit the public nuisance. The trial court subsequently denied the City's motions to change the special verdict or for a new trial. Memorandum Decision Denying Plaintiff's Motion to Change the Special Verdict (R.600), Pet. 156; Memorandum Decision Denying Plaintiff's Motion for a New Trial (R.601), Pet. 163.

The Petitioner filed a Notice of Appeal on March 24, 2008 and raised several alleged errors in the trial court's instructions, admissions of evidence and other rulings. On November 25, 2008, in a 2-1 split opinion, the Court of Appeals affirmed the judgment of the trial court.

The majority recognized that the trial courts' collateral source ruling was error, but found that the error was harmless due to the trial court's instructions to the jury that it should not consider such evidence in reducing damages. Opin. at ¶70. The majority also found that there was conflicting

Wisconsin law on whether under intentional public nuisance standards a plaintiff must show intentional and unreasonable conduct, but that any error in requiring a finding of unreasonable conduct was harmless. Opin. at ¶52. Finally, the majority found that the trial court properly exercised its discretion in refusing to instruct the jury that subsequently developed knowledge in the face of continuing conduct can cause a nuisance to become intentional. Opin. at ¶59.

The dissent found that the trial court had committed at least three errors which would require a new trial: (1) the admission of collateral source evidence and the failure to provide a curative instruction as to the impact of the collateral source evidence on the jury's determination on liability; (2) the admission of a lack of product identification evidence in contradiction to an earlier Court of Appeals ruling; and (3) a special verdict question and jury instruction that required the City to prove an additional element of unreasonable conduct under the law of intentional public nuisance. Opin. at ¶88-98.

III. FACTS

Petitioner alleged that the childhood lead paint poisoning problem in Milwaukee is severe because of the City's old housing stock. Opin. at ¶4. The disease is caused

by children's ingestion of lead paint in the form of chips, flakes, or dust, and its effects are often devastating and irreversible, including permanent brain damage, neuropsychological disorders, and even death. Opin. at ¶¶4, 12. The City's blood lead testing data showed that over the last ten years, the City as a whole, and, in particular, those areas that the City has targeted for abatement, suffered a disproportionately high rate of childhood lead poisoning. Indeed, more than 19,000 children have been lead poisoned in Milwaukee. Opin. at ¶8.

Importantly, the City's evidence did not focus solely on children with blood lead levels of 10 µg/dL or above as the only manifestation of public harm associated with the public nuisance. In addition to the 19,000 lead poisonings observed in Milwaukee in the 1990s, the City presented evidence of hundreds of children who were chelated. *See, e.g.*, Trial Ex. 374, Pet. 222. Chelation is an emergency medical intervention, which usually occurs in children at blood lead levels of 45 µg/dL or higher, intended to remove lead out of a child's bloodstream to mitigate acute damage. Trial Tr. 6/5/07, R.634, at 1699:11-16, Pet. 186.

NL Industries, Inc., the defendant in the trial below, was formed in 1891 and dominated lead pigment and paint manufacturing throughout the twentieth century. Opin. at ¶9. In 1978, the United States passed legislation effectively banning the sale of residential lead paint. *Id.*

In the 1990s, in response to the City's childhood lead paint poisoning epidemic, Milwaukee enacted a program aimed at abating lead paint hazards, particularly in the most high-risk housing in the city, before the poisoning of children in those homes occurred. Opin. at ¶5. The City spent approximately \$50 million abating lead paint hazards in Milwaukee homes. *Id.* at ¶15. Through this action, the City sought to recover the funds the City had spent to abate the lead paint nuisance from the primary party responsible for the widespread sale and promotion of lead pigments and lead paints in Milwaukee: NL.

ARGUMENT

I. THE TRIAL COURT IMPROPERLY ADMITTED COLLATERAL SOURCE EVIDENCE PREJUDICING PETITIONER'S LIABILITY CASE.

The City moved to preclude NL from presenting evidence to the jury regarding collateral sources of funds

(e.g., federal and state grants) that the Milwaukee Health Department obtained which helped to fund its childhood lead paint poisoning abatement and prevention programs. *See* Plaintiff's Brief in Support of Motion in Limine to Exclude Evidence of and Testimony on Collateral Sources (April 30, 2007) (R.498). Although acknowledging that the collateral source rule applied to this case, the trial court denied the City's motion. In particular, the trial court found that it would be "impractical" to exclude such evidence. *Opin.* at ¶68. The City requested that it be allowed to redact any information regarding the receipt of federal funds when presenting its damages evidence. The trial court denied the City's request holding, "I can't imagine working with these exhibits for more than a few minutes and somehow redacting them so that the jury doesn't find out about it, and it just seems to me to be totally unnecessary." *Opin.* at ¶68.

The City first sought to introduce its damages documentation through the City's comptroller, John Egan, without reference to federal grants.³ The trial court, in line with its previous ruling, precluded the City from redacting collateral source information from its damages documentation

³ *See* Trial Tr. 6/4/07, R.633, at 1517:9-14, Pet. 180.

and again held that a limiting instruction would cure any prejudice to the City.⁴ As such, the City was improperly forced to choose between introducing evidence through the testimony of Amy Murphy, the former Director of the Childhood Lead Poisoning Prevention Program that referenced federal grants or waiving its claim for abatement costs. During the cross-examination of Amy Murphy, the City again objected to the introduction of collateral source evidence and NL's repeated questioning about the City's receipt of grants.⁵ NL argued that it was allowed to cross-examine Ms. Murphy about these sources of funding because the City introduced exhibits referencing federal agencies that had provided funds to the City.⁶ The City only introduced those exhibits, however, as a result of the trial court's refusal to allow the City to redact information about grants and the court's belief that the City had to reference federal grants in its case.⁷ The City again objected to the improper use of collateral source evidence during NL's closing argument when NL argued that the City only undertook and continued

⁴ *Id.* at 1521:15-17, Pet. 184.

⁵ Trial Tr. 6/6/07, R.635, at 1864:2-20 (requesting to "preserve" an objection to collateral source evidence), Pet. 189.

⁶ *Id.* at 1865:11-12, Pet. 190.

⁷ *Id.* at 1866:14-19, Pet. 191.

its lead paint abatement program in order to obtain federal subsidies and that no money was diverted from the City's needs to pay for abatement; again, the trial court overruled the objection.

For example, during its closing argument, NL's counsel argued (falsely) that the City only began its childhood lead poisoning abatement program because federal funding was available and that no money was diverted from the City treasury to pay for childhood lead poisoning programs:

[T]he City doesn't really begin [its abatement program] until about 1992 [because this] *is the time when their first federal grant money became available to do this. That's why they waited. . . .* And its still ongoing. They're still receiving this funding. *So it began because they had federal funding to do it.* Then, as they added up different projects, you wonder, well, is the City's expenditures coming out of other city needs, like part of the city budget is being used for the childhood lead program. Well, no So this is all earmarked money coming in -- earmarked money coming in for lead-paint poisoning conditional on being used for that purpose, so its not diverted from the rest of the city's needs.

Trial Transcript 6/19/07 at 3456:13 - 3457:17, Pet. 195-196 (emphasis added). The City objected to this argument based on the collateral source rule and the trial court overruled the City's objection. *Id.* at 3457:18-3458:3, Pet. 195-196.

NL's counsel then continued to tell the jury about the existence of collateral sources in an attempt to avoid liability:

The City made an important choice. It wasn't going to enforce the law against landlords. *Instead, it was going to subsidize the replacement or refurbishment of windows. Why? Because they had a funding source willing to pay for that.* And so they made that choice not to enforce but to subsidize That's what the City chooses to do. *It has a funding source willing to pay for it, so that's their program.*

Id. at 3458:5-9; 3459:6-25, Pet. 197-198 (emphasis added); *see also* 3462:12-24, Pet. 201 (“[Milwaukee] chose the high-cost approach; they chose to do it by subsidies because they had a funding source to do it”).

Just eleven days after the jury reached a defense verdict in this case, the Wisconsin Supreme decided *Leitinger v. Van Buren Mgmt., Inc.*, 2007 WI 84, 302 Wis. 2d 110, 736 N.W.2d 1 (2007). This decision made clear, just as the City had argued to the trial court, that *collateral source evidence should be excluded from trial* because such evidence may taint the jury and prejudice plaintiffs.

The Supreme Court explained the “well-established” collateral source rule as follows:

Simply put, the collateral source rule states that benefits an injured person receives from sources that have nothing to do with the tortfeasor may not be used to reduce the tortfeasor's liability to the injured person.

2007 WI 84, ¶ 26 (internal footnotes omitted).

As a rule of damages, the *Leitinger* Court noted that a damages award cannot be limited by a collateral source payment. *Id.* at ¶ 28. As a rule of evidence, the Court noted that such evidence should generally be *excluded* so as to prevent any improper influence of the fact-finder. *Id.* at ¶¶ 30, 51. The Court also outlined the important policy goals behind the exclusionary rule of protecting plaintiffs by guarding against the misuse of such evidence and of deterring tortious conduct. *Id.* at ¶¶ 31, 33-34.

Nevertheless, in reviewing the City's Motion for a new trial based on *Leitinger* and other Supreme Court precedent, the trial court found that the City "waived any claim of prejudice" on this issue because after the court denied the City's request to allow it to redact collateral source information, the City offered damages documentation which referenced collateral sources of some of its funds. Decision Denying New Trial (R.601) at 14-15, Pet. 176-177. The trial court also found that NL used this collateral source evidence "for legitimate purposes, such as challenging the credibility of HUD studies and challenging the City's policy choices in

attacking the problems created by lead paint.” *Id.* at 15, Pet. 177. Finally, the trial court noted, “I see no meaningful risk that this jury would have altered or compromised its liability decision because of evidence that other government entities may have borne some of the costs.” *Id.* at 16, Pet. 178.

The Court of Appeals majority held that the trial court’s admission of collateral source evidence was an error (Opin. at ¶65), but concluded that the error was harmless as it was cured by a jury instruction. Opin. at ¶37. The instruction given to the jury was as follows:

Evidence in this case has indicated that the City received grants from the federal government or other sources to help pay for some of the costs of its abatement program. However, any issues with respect to the distribution of any damages awarded are not a part of the jury trial in this matter, and this evidence may not affect you[r] answer to the damage question. You may not reduce your award of damages because the City may have received funds for some costs from another source.

Id. at ¶68.

Here, the City sought to exclude collateral source evidence from trial and requested that it be allowed to redact such information when presenting its damages evidence and testimony to the jury. Once the trial court denied the City’s motion and would not allow the City to redact such information, the City was forced to disclose the existence of

collateral sources; thus, it cannot be deemed to have waived its right to claim prejudice. *See State v. Gary M.B.*, 2004 WI 33, ¶ 18, 676 N.W.2d 476 (2004) (finding that a party who loses a motion in *limine* and introduces such evidence related to the motion will not be deemed to have waived its objection to such evidence).

Further, as was made clear by *Leitinger*, there is no difference between the collateral source rule and the evidentiary corollary that goes with it. The Wisconsin Supreme Court explained that this evidence should be excluded to protect the plaintiff from prejudice, despite a potential for double-recovery, and that its admissibility is improper for any purpose. Respondent exploited the City's collateral source evidence, not just in an attempt to reduce any damages award, but to argue that NL should not be held liable because the City did not pay the abatement costs and thus was not injured. NL's argument undermined the principles that the collateral source rule is designed to protect.

The prejudice to the City caused by NL's argument could only have been avoided through the exclusion of collateral source evidence. *Leitinger* recognizes exclusion, not curative instructions, as a means to protect from the

“inherent[] prejudice” of allowing the jury to hear collateral source evidence. *Leitinger*, at ¶30 (“As a rule of evidence, the collateral source rule generally precludes introduction of evidence regarding benefits a plaintiff obtained from sources collateral to the tortfeasor.”); *see also id.* at n. 28 (“The collateral source rule ‘exclud[es] evidence of other compensation on the theory that such evidence would affect the jury’s judgment unfavorably to the plaintiff on the issues of liability and damages.’” (quoting *Loncar v. Gray*, 28 P.3d 928, 933 (Alaska 2001)); “[O]ne justification advanced for the collateral source rule is that ‘the introduction of evidence that the plaintiff received benefits is inherently prejudicial to the plaintiff.’” (quoting 1 Dan B. Dobbs, *Law of Remedies: Damages, Equity, Restitution*, § 3.8(1) at 375 (2d ed. 1993)).

Even if instructions could have been used to cure the inherently prejudicial admission of this evidence, here, the split decision from the Court of Appeals frames the issue of whether the trial court’s instruction adequately protected Petitioner. As noted by the dissent, the instructions specifically *omitted* any mention of or instruction to the jury on the question of the impact of the collateral source evidence on the jury’s *liability* determination:

[A]lthough the jury should not have been permitted to consider the collateral source evidence for *any* purpose, it was allowed to consider it as evidence for any purpose other than damages. Specifically, the jury was free to improperly consider the collateral source evidence when determining liability.

Opin. at ¶93. Further, the dissent noted that the particular curative instruction in this case did not address the impact of the collateral source evidence on the liability finding:

If any curative instruction could disaggregate the finding of erroneously admitted collateral source evidence, the curative instruction given in this case did not.

Opin. at ¶91.

Furthermore, the trial court allowed repeated cross examination of Petitioner's key witness on collateral source evidence and repeated arguments by defense counsel in closing on collateral source evidence, some of which were cited by the dissent in concluding that the "erroneous admission of collateral source evidence prejudicially affected the City's substantial rights, [and] the city is entitled to a new trial." Opin. at ¶94.

II. THE TRIAL COURT IMPROPERLY ADDED AN UNREASONABLE CONDUCT ELEMENT TO PETITIONER'S BURDEN OF PROVING INTENTIONAL PUBLIC NUISANCE.

Over the City's objections, the trial court instructed the jury that NL intentionally created a public nuisance only if its conduct was both intentional *and* unreasonable and the Special Verdict Form required a finding of both. Jury Instructions (R.584) at 3-4, Opin. at ¶32, n.9; Special Verdict (R.585) at Question 2, Opin. at ¶18, n.5. NL used the trial court's instruction to improperly ask the jury to consider whether its intentional conduct was unreasonable. Trial Tr. 6/19/07 at 3431:1-8, Pet. 194. In denying the City's Motion for a new trial due to this error, the trial court ruled that "the unreasonableness of the defendant's conduct is clearly an issue in any claim of public nuisance." Decision Denying New Trial (R.601) at 9, Pet. 171 (emphasis in original).

The Court of Appeals majority recognized that "there is conflicting law on this issue, which may be due in part to inadvertent use of the term 'unreasonable' in relation to conduct and interference or invasion." Opin. at ¶52. Nevertheless, the majority concluded that even if the wording of the instruction and verdict were in error, "it was harmless

given that the jury answered in the negative the negligence question on the special verdict” and negligence “requires a lesser showing of culpability than does a showing that NL Industries acted with intent” *Id.* at ¶¶51-52.

First of all, the trial court’s intentional conduct instruction and the accompanying verdict question are inconsistent with the applicable law as they required the City to prove an additional, nonessential element to prevail on its intentional public nuisance claim.

The Restatement (Second) of Torts § 821B defines a public nuisance as an “unreasonable *interference* with a right common to the general public,” (emphasis added), and § 822(a) provides that the *invasion* must be “intentional and unreasonable.” No Wisconsin court has articulated the intentional creation of a public nuisance as requiring an additional element of “unreasonable” *conduct* separate and apart from the requisite knowledge regarding the harm and the unreasonableness or seriousness of the *interference*. For a public nuisance to be created intentionally, it is the invasion that must be found to be unreasonable, not the conduct. *See Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 277 Wis. 2d 635, ¶¶32, 37, 691 N.W.2d 658 (Wis. 2005). Thus,

liability for creating an intentional nuisance is founded upon knowledge that the actor has at the time he acts irrespective of whether his conduct is reasonable or was “in the pursuit of a laudable enterprise without any desire to cause harm.” *Vogel v. Grant-Lafayette Elec. Coop.*, 201 Wis. 2d 416, 430, 548 N.W.2d 829 (Wis. 1996).

In a similar case on point involving an intentional nuisance, the Connecticut Supreme Court held that an interrogatory to the jury asking about the unreasonableness of defendant’s *conduct* was superfluous and “required the plaintiff to prove an additional, nonessential element to prevail on their claim.” *Pestey v. Cushman*, 788 A.2d 496, 507-508 (Conn. 2002) (“The inquiry is cast more appropriately as whether the defendant’s conduct unreasonably *interfered* with the plaintiff’s use and enjoyment of his or her land rather than whether the defendant’s *conduct* was itself unreasonable.”) (emphasis added). *See also* 58 Am. Jur. 2d Nuisances § 10 (“Thus, as distinguished from negligence liability, liability in nuisance is predicated upon an unreasonable injury rather than upon unreasonable conduct.”). The rationale underpinning the Connecticut court’s decision is consistent with Wisconsin

precedent. See *Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 2002 WI 80, ¶27, 254 Wis. 2d 77, 646 N.W.2d 777 (2002); *Jost v. Dairyland Power Cooperative*, 45 Wis. 2d 164, 173-174, 172 N.W.2d 647, 651-652 (Wis. 1970).

Under the Court of Appeals majority's legal test on this disputed instruction, the jury's negative determination on the presence of intentional conduct could reasonably have been the result of determining that NL's conduct was not "unreasonable" - even if the jury had found NL's conduct to otherwise be intentional. This possibility was created by the trial court's erroneous addition of a new "unreasonable conduct" element to the existing standard for proving intentional public nuisance. As the dissent noted,

Whether the City had to prove NL industries' conduct was unreasonable, in addition to being intentional, is no minor issue: it had profound implications on the evidence required Because NL Industries did not know the ultimate extent to which its product would harm children, it argued, its conduct was not unreasonable. There is a reasonable possibility that this argument, based on the jury instruction, 'contributed to the outcome' of the trial.

Opin. at ¶98. Further, the added requirement of "unreasonable conduct" under the majority's test for intentional public nuisance liability confused the test for negligence and allowed evidence and argument suggesting

that NL was as reasonable as any company manufacturing lead paint to be improperly considered as to intentional nuisance, as well. *See, e.g.*, Trial. Tr. 3431:1-8, Pet. 194 (“Well, the City’s not put in any evidence of what a reasonable business would have done because, in fact, other businesses were making and selling lead pigment, making and selling lead paint, making and selling lead gasoline throughout this entire period until the 1970s. If that’s any measure of what a reasonable business would do, they were doing the same as NL was.”). Such evidence is not probative of whether NL was substantially certain its conduct was causing harm; yet it likely informed the jury’s decision as to whether Respondent’s conduct was “intentional and unreasonable” – an improper assessment that would not have occurred under an appropriate intentional public nuisance instruction.

Moreover, this error was not “harmless,” as the majority held, merely because the jury found for NL on the question of negligence. The jury’s negligence finding is of no legal consequence to the question as to whether NL caused an intentional nuisance as negligent and intentional conduct are distinct and independent bases for liability in public nuisance.

See, e.g., Physicians Plus, 254 Wis.2d 77, ¶20, 646 N.W.2d 777. Moreover, in non-nuisance situations, courts have also recognized the independent nature of negligence and intentional torts. *See, e.g., State v. Asfoor*, 75 Wis.2d 411, 428, 249 N.W.2d 529 (1977) (“[I]ntent and negligence are mutually exclusive and one cannot intend to injure someone by negligent conduct.”). As the Restatement (Second) of Torts notes, negligence “excludes conduct which creates liability because of the actor’s intention to invade a legally protected interest of the person injured or of a third person.” § 282, cmt. d. *See also BP Chemicals Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677, 685 (8th Cir. 2002) (citing cases) (holding that “there is generally no claim of negligence that flows from intentionally tortious conduct”); 57A Am. Jur. 2d Negligence § 30 (“Intent and negligence are mutually exclusive; one cannot intend to injure someone by negligent conduct, and the absence of a positive intent to inflict injury is a distinguishing characteristic of negligence. Thus, there is no claim of negligence that flows from intentionally tortious conduct.”) (citations omitted).

As such, the jury could easily have concluded, under an appropriate legal instruction, that NL’s conduct in creating

the nuisance was intentional, but not negligent as negligence is a not a precursor to intentional liability and negligence includes concepts of reasonability that intentional torts do not.

III. THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY THAT RESPONDENT'S LATER KNOWLEDGE IN THE FACE OF ITS CONTINUING CONDUCT COULD CONSTITUTE AN INTENTIONAL NUISANCE.

Due to the lengthy time period during which Respondent's state of knowledge on the subject of childhood lead paint poisoning changed, Petitioner proposed the following instruction to the jury: "NL's conduct meets this intentional standard, even if it was not substantially certain that harm would result when its conduct began, but NL continued its activities after learning that harm was substantially certain to result from its conduct." Opin. at ¶57. This language is derived from the Restatement (Second) of Torts which states that "the first invasion resulting from an actor's conduct may be either intentional or unintentional; but when the conduct is continued after the actor knows that the invasion is resulting from it, further invasions are intentional." § 825, cmt. d; *see also Vogel*, 201 Wis. 2d at 432.

The trial court declined to present this instruction to the jury and did not mention this issue in declining the City's request for a new trial even though the City had raised it as one of the alleged errors with the juror instructions.

The Court of Appeals majority found that the "trial court was asked to determine whether an instruction on '[c]ontinuing or recurrent invasions' was appropriate where the evidence reflected that the nuisance was unknown to NL Industries until after its conduct had ceased. We conclude that the trial court appropriately exercised its discretion in not giving the City's requested instruction." Opin. at ¶32.

The trial court acknowledged that NL's knowledge was "evolving in significant respect" during the more than 75 years it was selling and promoting lead paint. Decision Denying Motion to Change the Special Verdict (R.600) at 2-3, Pet. 157-158. As such, this point of law was especially pertinent in the instant case where the jury was required to consider a lengthy time period during which the state of knowledge on the subject of childhood lead paint poisoning changed. The majority of the evidence demonstrating NL's knowledge of the threat its products posed to children was found in documents dated in the 1940s and 1950s, after NL

had begun its marketing of lead pigment and paint, but nearly thirty years before that conduct ceased. Thus, it was essential for the jury to understand that it need not establish NL's knowledge at the inception of its conduct in order to find liability, but this understanding could not occur in the absence of the requested instruction.

In contrast to the majority's suggestion, the evidence suggested that NL was well aware, during that time that it was still selling and marketing its products, of the manifestation of harm the public nuisance caused: childhood lead paint poisoning, including deaths and brain damage, particularly in urban, low-income neighborhoods in cities such as Milwaukee.

For example, in 1943, *Time* magazine discussed a landmark medical study which found that early childhood lead poisoning was widespread and had long-lasting and permanent effects, such as brain damage. NL, through the Lead Industries Association, immediately wrote its medical consultant, Dr. Robert Kehoe at University of Cincinnati, asking for his thoughts on the study and stating "if what this article describes is correct, then we have indeed *a most*

serious public health hazard.”⁸ NL’s fears about this widespread health threat were *confirmed* when Dr. Kehoe responded: “I fear you will be disappointed by my answer, I am disposed to agree with the conclusions arrived at by the authors, and to believe that their evidence, if not entirely adequate, is worthy of very serious consideration.”⁹ Further, Dr. Kehoe noted that “children chewed paint ‘off cribs, window sills or furniture’ . . . [and] unfortunately *the environment of small children is not sufficient for their safety.*”¹⁰ Thus, based on this example alone, NL was put on explicit notice of the lead paint public health hazard endangering children in 1944, yet continued to sell and promote lead paint for three more decades.

The City introduced other evidence establishing NL’s knowledge of the harm its products were causing while it was still actively selling and promoting lead paint – for example:

- In 1930, NL was aware that “chronic lead poisoning occurs much more frequently among infants and young children than has been generally supposed” and that “lead poison is a real source

⁸ Trial Ex. 28 (emphasis added), Pet. 211.

⁹ Trial Ex. 29, Pet. 215.

¹⁰ *Id.* (emphasis added).

of danger to infants and young children.”¹¹

- By 1952, NL was aware of significant numbers of childhood lead paint poisoning deaths and nonfatal cases in at least nine U.S. cities.¹²

- In 1957, NL admitted it knew that childhood lead paint poisoning occurred mainly in “slums” of older cities, including “Milwaukee;” that the cause was old, structural lead paint in homes that was “flaking” (and not just paint ingested by chewing toys or cribs); that it resulted in permanent brain damage; and that the problem would be long-lasting (*i.e.*, “continue to plague us”).¹³

Both the trial court and Court of Appeals majority recognized that the City was not required to prove perfect foresight on the part of NL. Opin. at ¶31 (citing trial court) (“I agree with the City that the foreseeability of the injury should not be reduced to foreseeability of harm at some particular blood level measured in micrograms per deciliter.”). As such, Petitioners proposed instruction should have been given as the jury could have determined that at some point from the 1940s to the 1970s - when NL was still

¹¹ Trial Exhibits 11 and 12, Pet. 202-210.

¹² Trial Ex. 39, Pet. 219.

¹³ Trial Ex. 59, Pet. 220-221.

manufacturing and promoting lead pigment and lead paint for use in the City of Milwaukee - that it knew or was substantially certain of the widespread public harm and public nuisance it had caused.

As such, the failure to provide this instruction constituted error and the City should be entitled to a partial new trial.

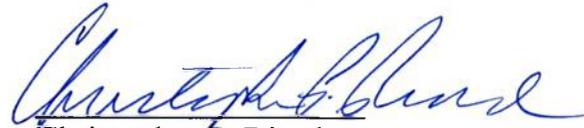
CONCLUSION

Petitioners respectfully submit that for each of the above reasons, this Court should accept review of the Court of Appeals' opinion – a decision that conflicts with this Court's prior decision in *Leitinger* and that departs from well-established principles of intentional public nuisance law in Wisconsin. Furthermore, this Court should take the opportunity to clarify potentially conflicting public nuisance law.

Dated this 23rd day of December, 2008.

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CERTIFICATION

I hereby certify that this Petition for Review 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 Petition is 6,915 words.

Dated this 23rd day of December, 2008.

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