STATE OF WISCONSIN
SUPREME COURT

APPEAL NO: 07AP2873

CITY OF MILWAUKEE,
a municipal corporation,

Plaintiff-Appellant,

v.

NL INDUSTRIES, INC.,

Defendant-Respondent,

and

MAUTZ PAINT CO.,

Defendant.

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

DEFENDANT-RESPONDENT'S RESPONSE TO PLAINTIFF-APPELLANT'S PETITION FOR REVIEW

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I. STATEMENT OF LACK OF CRITERIA FOR REVIEW

None of the three issues presented in the City of Milwaukee's ("the City") petition merit Supreme Court review.

The first issue is whether the Court of Appeals correctly concluded that the trial court's collateral source instruction rendered harmless any error respecting the admission of evidence concerning funding sources for the City's lead program. As an initial matter, the City did not object to the trial court's collateral source instruction and has therefore waived all arguments concerning the sufficiency of that instruction. Wis. Stat. § 805.13(3). Moreover, the garden-variety question of whether a curative instruction renders the introduction of certain evidence harmless does not satisfy any of the standards of review set forth in Rule 809.62. *See Hagenkord v. State*, 100 Wis. 2d 452, 458, 302 N.W.2d 421, 425 (1981). Contrary to the City's suggestion, the Court of Appeals' decision concerning the implications of the trial court's curative instruction is not in conflict with *Leitinger v. DBart, Inc.*, 2007 WI 84, 302 Wis. 2d 110, 736 N.W.2d 1, as no curative instruction was given in *Leitinger* and neither the trial court, the Court of Appeals, nor the Supreme Court addressed the question of whether the introduction of collateral source evidence in *Leitinger* was harmless. Finally, as the trial court concluded here, the City waived any objection to use of collateral source evidence because the City itself

introduced all of the evidence concerning the funding sources for its lead program and used that evidence for its own strategic purposes; purposes to which NL Industries, Inc.'s ("NL") closing arguments were addressed.

The second issue is whether the City was required to prove that NL's conduct was both intentional and unreasonable in order to impose liability for the intentional creation of a public nuisance. Supreme Court review of this issue is not warranted because the Court of Appeals did not decide this issue. Rather, the Court of Appeals concluded that even if the trial court erred by including an unreasonable conduct requirement in its intentional conduct jury instruction, such an error was harmless because of the jury's determination - which the City did not appeal - that NL did not negligently create a public nuisance. Moreover, review is unnecessary because this Court has already specifically resolved this very issue, as did the trial court here, holding that intentional nuisance liability requires the plaintiff to show that the defendant's conduct was both intentional and unreasonable. *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, ¶33, 277 Wis. 2d 635, 661-662, 691 N.W.2d 658, 671.

The third issue is whether the City was entitled to a "continuing conduct" jury instruction based upon *Restatement (Second) of Torts* § 825, comment d. The trial court's decision not to give the City's proposed instruction was merely an exercise of its "wide discretion in issuing jury

instructions based on the facts and circumstances of the case." *State v. Vick*, 104 Wis. 2d 678, 690, 312 N.W.2d 489, 496 (1981), and Supreme Court review is therefore unwarranted. *Winkie, Inc. v. Heritage Bank of Whitefish Bay*, 99 Wis. 2d 616, 621, 299 N.W.2d 829, 832 (1981). Moreover, as both the trial court and the Court of Appeals concluded, the City was not entitled to a continuing conduct instruction because that instruction is only applicable in circumstances where the defendant continues its conduct after learning that conduct is causing the alleged nuisance. Op. ¶ 59. These circumstances do not exist here because the alleged nuisance (the presence of lead-based paint in and on homes in the City of Milwaukee from 1992 - 2006) post-dated NL's conduct (the promotion and sale of lead pigment and lead-based paint until 1978) by over a decade. *Id.*

II. STATEMENT OF THE CASE

In the trial below, the City of Milwaukee sought to hold NL liable for the creation of a public nuisance. To establish liability, the City had to prove not only the existence of a public nuisance, but also that NL's allegedly tortious conduct caused the claimed public nuisance. Special Verdict, R-App. 372.

The changing medical concept of "lead poisoning" occupied a central place in the evidence presented on these issues. One medical concept prevailed through most of the 20th century when lead-based paint was actually being sold,

and another, much different concept emerged only after the mid-1970s when the sale of lead-based paint had ended.

The known cases of "lead poisoning" before the mid-1970s were children who ate large quantities of paint or were exposed to other significant lead sources. Lead poisoning was known by its physical symptoms, and these recognized physical effects of high-lead came with blood lead levels typically above 100 micrograms per deciliter ("µg/dL") and always above 60µg/dL.[1]

By contrast, in today's science, many believe that blood lead levels as low as 10 µg/dL can harm a child, although there is a question as to the permanence of the harm from such blood lead levels. The difference between the current view of lead poisoning and the earlier scientific understanding is not just a difference in amount, but one of kind. The harm alleged at today's lower lead levels is invisible; it displays no physical symptoms; and it is detectable only by statistical comparisons within large groups of children. Invisible, asymptomatic effects of this sort were first suspected in the mid-1970s, and scientists first formalized a 10 µg/dL level of concern only in 1991.[2]

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[1] R-App. 235:7-236:13, 6/5/07 Tr. 1712:7-1713:13; R-App. 238:20-23, 6/5/07 Tr. 1715:20-23.

[2] R-App. 235:24-236:13, 6/5/07 Tr. 1712:24-1713:13; R-App. 239:19-240:11, 6/5/07 Tr. 1716:19-1717:11; R-App. 218:22-220:16, 6/5/07 Tr. 1626:22-1628:16; R-App. 2-12, Ex. 170 at 1-12.

The City used this modern concept of low-level, invisible, asymptomatic lead poisoning to argue that the continued presence of lead-based paint poses a widespread risk of harm to Milwaukee children and, therefore, is a public nuisance. The City's evidence to prove the public nuisance focused on the number of children in Milwaukee having blood lead levels at or above 10 µg/dL.[3]

However, when the City turned to arguing NL's tortious conduct, it tried to ignore the historical gap between the two differing concepts of lead poisoning: it argued that NL had some knowledge of the older, less prevalent kind of lead poisoning as it was understood in the early 20th century, so it must have intended to cause the newer, more widespread kind of lead poisoning first recognized by science near the close of the 20th century. The City's goal was to finesse the intent requirement of an "intentional" public nuisance by making it a tort requiring even less than negligence - *i.e.*, NL would have liability for an "intentional" public nuisance even if the public nuisance alleged in this case (or any remotely similar systemic health hazard) was medically unknown and unforeseeable in the era of lead paint sales. The jury rejected the City's "intent" theory because it made no sense.

A review of the evidence presented concerning these two different eras is necessary to frame the issues presented in the City's petition.

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[3] *See, e.g.*, R-App. 19-22, Ex. 209; R-App. 24, Ex. 409.

A. The Evolving Nature and Understanding of Lead Paint Hazards

The first report of lead paint poisoning in children in the United States occurred in 1914.[4] This report involved a child who suffered severe seizures as a consequence of chewing all of the lead paint off his crib.[5] Similar high-lead cases were reported in 1917 and then again sporadically in the 1920s.[6] These instances of lead poisoning were tracked by public health officials, including various city health departments and the U.S. Public Health Service.[7] Based upon these reports, in the late 1920s public health officials reached a consensus that lead poisoning was a consequence of the eating disorder "pica" (an abnormal appetite for non-food substances) and that children with pica were exposed to lead by eating substantial quantities of paint off of cribs, toys, and - less commonly - woodwork.[8] To combat these exposure pathways, public health officials including the Surgeon General recommended that cribs and toys not be painted with lead paint and that parents prevent their toddlers from chewing on household woodwork.[9]

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[4] R-App. 55-58, Ex. 675.
[5] R-App. 288:3-289:4, 6/11/07 Tr. 2260:3-2261:4.
[6] R-App. 289:19-290:9, 6/11/07 Tr. 2261:19-2262:9; R-App. 290:24-292:3, 6/11/07 Tr. 2262:24-2264:3; R-App. 181:22-182:12, 5/31/07 Tr. 1234:22-1235:12; R-App. 183:2-178, 5/31/07 Tr. 1236:2-1237; R-App. 73-75, Ex. 798.
[7] R-App. 53-54, Ex. 632; R-App. 59-60, Ex. 679; R-App. 296:17-299:22, 6/11/07 Tr. 2275:17-2278:22.
[8] R-App. 295:2-296:9, 6/11/07 Tr. 2274:2-2275:9.
[9] R-App. 295:24-296:16, 6/11/07 Tr. 2274:24-2275:16; R-App. 53-54, Ex. 632.

In the 1930s, public health officials in Baltimore and researchers at Baltimore's Johns Hopkins University developed a clinically usable test to measure blood lead levels.[10] The Baltimore Health Department thereafter used this test to study lead poisoning. Results from these studies showed that "lead poisoning" was found only in children with clinically observable symptoms at blood lead levels ranging from 80 µg/dL to 300 µg/dL.[11] At that time, 80 µg/dL was considered the threshold blood lead level for adverse effects in children, while the average blood lead level in children from all sources was about 35 µg/dL.[12]

The public health consensus concerning the pathways of lead exposure did not change until the 1950s. Based upon continuing studies in Baltimore, the public health consensus evolved to include a new exposure pathway, namely the ingestion of paint chips and flakes in deteriorated buildings. The ingestion of paint in all forms, whether on toys, cribs, woodwork, or flakes, was still attributed to the eating disorder pica, and "lead poisoning" still was diagnosed only in children who had consumed significant quantities of lead and displayed observable symptoms of the disease.[13] Public health officials concluded that the presence of paint flakes was attributable to poor

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[10] R-App. 302:2-11, 6/11/07 Tr. 2304:2-11.

[11] R-App. 305:17-306:23, 6/11/07 Tr. 2307:17-2308:23; R-App. 61-66, Ex. 684.

[12] R-App. 307:17-23, 6/11/07 Tr. 2309:17-23; R-App. 304:9-305:15, 6/11/07 Tr. 2306:9-2307:15; R-App. 61-66, Ex. 684.

[13] R-App. 310:18-311:10, 6/11/07 Tr. 2325:18-2326:10; R-App. 42, 46, Ex. 602 at 230, 234.

maintenance and painting practices, and they recommended educating the public to safely maintain painted surfaces.[14] In addition, the public health professionals and government agencies worked with the lead industry, including NL, to develop a voluntary standard that limited the lead content of interior paint to 1%. This standard issued in 1955.[15]

The public health consensus concerning lead paint did not change again until the 1970s when the use of lead in household paint was federally banned. At that time, public health officials first became concerned about exposure to lead dust through children's normal hand-to-mouth activity, as opposed to pica, and the possibility that "low doses of lead" could produce adverse health effects.[16] In the early 1970s, a blood lead level up to 60 µg/dL in children was still considered safe.[17] Between 1976 and 1980, the average blood lead level of U.S. children 1-5 years old was 15 µg/dL - mostly from the airborne exhaust of leaded gasoline - and 75% of U.S. children had blood lead levels of at least 12 µg/dL.[18] As late as 1971, federal health officials concluded it was safe for a child to consume up to 300 µg of

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[14] R-App. 314:14-315:19, 6/11/07 Tr. 2331:14-2332:19.
[15] R-App. 315:20-316:24, 6/11/07 Tr. 2332:20-2333:24.
[16] R-App. 235:24-236:13, 6/5/07 Tr. 1712:24-1713:13; R-App. 239:19-240:11, 6/5/07 Tr. 1716:19-1717:11; R-App. 237:20-238:8, 6/5/07 Tr. 1714:20-1715:8.
[17] R-App. 12, Ex. 170 at 12.
[18] R-App. 76, Ex. 875; R-App. 77, Ex. 876; R-App. 242:12-243:13, 6/5/07 Tr. 1719:12-1720:13.

lead each day, because such consumption was associated with blood lead levels no higher than 40 µg/dL.[19]

B. The Reasonableness of NL's Conduct in Selling and Promoting the Use of Lead Paint

The City introduced evidence showing that NL learned of some instances of symptomatic high-level lead paint poisoning during the time it was selling and promoting lead pigment and lead-based paint. *See, e.g.*, Pet. at 32-34. However, the City's witnesses agreed that these incidents were all in the "published literature" and were known to "the public health community."[20] The City's witnesses agreed that NL and the public health community had the same knowledge of lead paint poisoning, for there was "no knowledge of any medical or scientific information known to the National Lead Company that was concealed or hidden from either the public health community or the public." R-App. 160:8-11, 5/31/07 Tr. 1191:8-11.

Despite having this knowledge, no federal health agency called for a ban of household lead paint prior to 1971 – not, *e.g.*, the Children's Bureau, not the Public Health Service, not the Surgeon General.[21] Nor did the City of Milwaukee. Quite the opposite, numerous federal and local government agencies recommended and specified the use of lead paint, including its use in schools and home

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[19] R-App. 327:25-328:25, 6/11/07 Tr. 2345:25-2346:25; R-App. 49-52, Ex. 619.

[20] R-App. 163:16-24, 5/31/07 Tr. 1195:16-24; R-App. 160:6-15, 5/31/07 Tr. 1191:6-15.

[21] R-App. 193:3-16, 6/1/07 Tr. 1346:3-16.

interiors.[22] For example, the City of Milwaukee "consistently" specified the use of lead paint from 1900 through the 1960s "for nearly every conceivable public building: schools, libraries, museums, play pavilions on playgrounds, hospitals." R-App. 333:18-25, 6/12/07 Tr. 2570:18-25.[23]

The federal government and the City of Milwaukee specified the use of lead-based paint for all those years, ending only in the 1970s, because it was more durable and water-resistant than the available alternative paints.[24]

C. The Alleged Public Nuisance

The public nuisance at issue in this case did not arise until 1992. Special Verdict, R-App. 372. The City sought to establish the existence of a public nuisance by linking the presence of lead paint to an "epidemic" of childhood lead poisoning in Milwaukee.[25]

According to the City, a child with a blood lead level of 10 µg/dL or greater is lead poisoned. The Centers for Disease Control first adopted 10 µg/dL as its blood lead

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[22] R-App. 166:8-14, 5/31/07 Tr. 1211:8-14; R-App. 169:24-171:2, 5/31/07 Tr. 1217:24-1219:2; R-App. 173:14-23, 5/31/07 Tr. 1221:14-23; R-App. 173:24-174:12, 5/31/07 Tr. 1221:24-1222:12; R-App. 177:24-178:11, 5/31/07 Tr. 1227:24-1228:11; R-App. 189:23-190:23, 6/1/07 Tr. 1317:23-1318:23; R-App. 319:16-327:3, 6/11/07 Tr. 2337:16-2345:3; R-App. 32-33, Ex. 559; R-App. 27-28, Ex. 542 at 6; R-App. 30-31, Ex. 544 at 1; R-App. 40-41, Ex. 592 at 18.

[23] R-App. 37-39, Ex. 586 at 123-124, R-App. 34-36, Ex. 567 at 5-6; R-App. 336:5-15, 6/12/07 Tr. 2578:5-15.

[24] R-App. 29, Ex. 542 at 19; R-App. 86, 91-92, 95-96, 97, 103-105, 110 and 114, Ex. 960 at 8, 13-14, 17-18, 19, 25-27, 32 and 36.

[25] R-App. 223:24-224:8, 6/5/07 Tr. 1674:24-1675:8; R-App. 355:9-357:22, 6/19/07 Tr. 3339:9-3341:22.

"level of concern" in 1991, lowering that level from 25 µg/dL. In 1991 the "incidence rate" in the City of Milwaukee - *i.e.*, percentage of tested children with a blood lead level equal to or greater than 10 ug/dL - was 83.3%.[26] During the period of the claimed public nuisance, from 1992 to 2006, over 19,000 Milwaukee children had blood lead levels equal to or greater than 10 ug/dL.[27] Of these, however, approximately 86% had blood lead levels in the range 10-19 µg/dL, which was not even a level of concern in 1990 just before the CDC lowered its threshold.[28]

The City's witnesses explained that "99%" of these elevated blood lead levels were the result of exposure to "microscopic quantities" of lead dust from normal "hand-to-mouth activity" and that the exposure "pathway" was "*not . . . chewing on the lead painted surfaces.*"[29] Thus, 99% of the cases cited by the City to prove its alleged public nuisance were of a type unknown to medical science, and unknowable to NL, before the end of lead paint sales in the mid-1970s.

The City presented evidence that elevated blood lead levels between 10 and 30 µg/dL can be associated with a variety of cognitive and behavioral effects.[30] The jury

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[26] R-App. 149:3-19, 5/29/07 Tr. 819:3-19; R-App. 19-22, Ex. 209; R-App. 24, Ex. 409.
[27] R-App. 145:14-146:1, 5/29/07 Tr. 787:14-788:1; R-App. 19-22, Ex. 209.
[28] R-App. 19-22, Ex. 209.
[29] R-App. 141:8-142:18, 5/29/07 Tr. 774:8-775:18; R-App. 221b:1-21, 6/5/07 Tr. 1654:1-21.
[30] R-App. 227:9-228:20, 6/5/07 Tr. 1683:9-1684:20.

heard conflicting testimony on the question whether such effects are permanent or temporary, including the latest research from the National Institutes of Health that found no continuing, permanent sign of adverse lead effects on IQ or behavior several years after children reduce their lead levels through natural processes of excretion.[31] Whether temporary or permanent, the effects are asymptomatic and clinically undetectable in an individual child.[32]

The City also sought to show that the presence of lead paint was a public nuisance with evidence concerning the scope of the City's response to the problem of childhood lead poisoning. Over the last ten years the Milwaukee Health Department continuously employed 35 to 40 officials "focus[ed]" on "controlling lead-based paint."[33] Based on this evidence, the City argued in its closing that the presence of lead paint was a public nuisance because "the only way" the City could "protect the public health" was to "put 35 to 45 people to work full time, . . . to try and eradicate this disease."[34]

D. The Jury's Resolution of the Case

The special verdict form presented to the jury asked it to first determine whether the presence of lead-based paint

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[31] Compare R-App. 231:10-232:1, 6/5/07 Tr. 1705:10-1706:1 with R-App. 282:14-303:14, 6/8/07 Tr. 2171:14-2172:14; R-App. 67-69, Ex. 764 at 599-600; R-App. 70-72, Ex. 765 at 653, 657.

[32] R-App. 13-14, Ex. 170 at 29-30; see also R-App. 25-26, Ex. 508.

[33] R-App. 251:10-14, 6/6/07 Tr.1789:10-14.

[34] R-App. 357:17-22, 6/19/07 Tr.3341:17-22.

in and on houses in the City of Milwaukee between 1992 and the end of 2006 was a public nuisance. Special Verdict, R-App. 372. The jury answered Special Verdict Question 1 "Yes."

The second and third special verdict questions asked the jury, respectively, whether "NL Industries intentionally and unreasonably engage[d] in conduct that was a cause of the public nuisance" and whether "NL Industries negligently engage[d] in conduct that was a cause of the public nuisance." Special Verdict, R-App. 372. The jury answered both of these questions "No."

The City did not appeal the jury's resolution of Special Verdict Question 3. By contrast, both in its post-trial motions and before the Court of Appeals, the City moved to change the jury's answer to Special Verdict Question 2. The trial court denied the City's motion, holding that "*no one* anticipated the 'public health catastrophe' that eventually led to the injury suffered by the City" and that the jury was therefore "entitled to find that the City's evidence was woefully insufficient and to answer the question 'No,'" Decision Den. Pl.'s Special Verdict Mot., R-App. 395-96 (emphasis in original), and the Court of Appeals affirmed. Op. ¶ 38.

III. ARGUMENT

A. Collateral Source Instruction

The issue of whether the trial court's collateral source instruction cured any error respecting the admission

of such evidence does not merit Supreme Court review. To be clear, the City is not seeking review of the admission of such evidence, but rather of the sufficiency of the trial court's collateral source jury instruction. As to the admission of evidence, the City itself, not NL, introduced all collateral source evidence that came before the jury. As to the instruction, the City did not object to the trial court's proposed collateral source instruction at the jury instruction conference. *See* Decision Den. Pl.'s New Trial Mot., R-App. 389. Accordingly, the City has waived any claim that the trial court's collateral source instruction was erroneous. Wis. Stat. § 805.13(3).[35]

Contrary to the City's contention, Petition at 6-7, Supreme Court review is not warranted to resolve a conflict between the Court of Appeals decision in the instant case and *Leitinger*. In *Leitinger* "the issue of law presented on review [was] whether, in light of the collateral source rule, evidence of the amount actually paid by a plaintiff's health insurance company for the plaintiff's medical treatment is admissible . . . for the purpose of establishing the reasonable value of the medical treatment rendered." *Leitinger*, 2007 WI 84 ¶ 4. *Leitinger* simply has no bearing on the issue presented by the City here, as

[35] Although the City proposed a collateral source instruction that differed from the instruction given by the trial court, the City's proposal did not relieve it of the duty to object to the trial court's instruction at the jury instruction conference. *Gosse v. Navistar Intern. Transp. Corp.*, 232 Wis. 2d 163, 176, 605 N.W.2d 896, 903 (1999).

Leitinger did not involve a curative instruction (or any instruction relating to the collateral source issue) or any harmless error analysis. As such, there is no conflict between *Leitinger* and the Court of Appeals decision in the instant case.

The City contends otherwise, claiming that *Leitinger* suggested that collateral source evidence may prejudice a plaintiff on issues relating to both damages *and* liability, while the trial court's curative instruction related only to damages. Pet. at 21-22. This was precisely the issue that the City failed to raise in any fashion before the trial court, as noted in its decision denying a new trial, quoted *supra*.

As an initial matter, *Leitinger* confirmed that the central purpose of the collateral source rule is that a plaintiff's damages may not be decreased or offset by the fact that the plaintiff has received funds from sources other than the defendant:

> [T]he 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. In other words, the tortfeasor is not given credit for payments or benefits conferred upon the injured person by any person other than the tortfeasor."

Id. ¶ 26. And the sole holding of *Leitinger*, namely that "evidence of the amount actually paid by a collateral source for medical treatment" is inadmissible "to prove the reasonable value of the medical treatment" vindicated this central purpose. *Id.* ¶ 75. The trial court's collateral

source jury instruction reflected this central purpose. Jury Instructions, R-App. 368.

Leitinger also explained that the "collateral source rule protects plaintiffs by guarding against the potential misuse of collateral source evidence to deny the plaintiff full recovery to which he is entitled." *Leitinger* 2007 WI 84, ¶ 31. In a footnote at the end of this sentence containing various examples of non-Wisconsin authorities on the collateral source rule, *Leitinger* quotes *Loncar v. Gray*, 28 P.3d 928, 933 (Alaska 2001), for the statement that "[t]he 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.'" *Id.* ¶ 31 n.28. Notably, this is the only statement in the *Leitinger* opinion that suggests collateral source evidence may prejudice a plaintiff on issues relating to both damages and liability. Neither this conclusory sentence from Alaska's *Loncar* nor anything in the *Leitinger* opinion suggests that such evidence is always prejudicial on issues relating to liability or that a curative instruction must contain language relating both to damages and liability.[36] Nor do

[36] Notably, *Loncar* parallels the Court of Appeals' decision here. In *Loncar* the Alaska Supreme Court refused to grant the plaintiff's request for a new trial notwithstanding the admission of collateral source evidence. The Court concluded that, although there was "potential for prejudice against Loncar because the jury heard a reference to her Medicaid coverage," that prejudice was cured by the trial court's instruction that the jury was to "award the full amount of necessary … expenses … regardless of whether

these cases alter the well-settled rule that "a trial judge may exercise wide discretion in issuing jury instructions based on the facts and circumstances of the case." *Vick*, 104 Wis. 2d at 690.

Here the trial court exercised that discretion to formulate a jury instruction that reflected the facts and circumstances of this case and cured the only possible prejudice posed by the presence of collateral source evidence, namely the reduction in the City's otherwise recoverable damages. Indeed the City has not and cannot explain how evidence about funding that the City received starting in the early 1990s for its lead program could have influenced the jury's resolution of special verdict questions that pertained to NL's conduct many decades earlier. As the trial court concluded,

> while there may be cases in which a jury's decision on liability could be affected by knowledge that the plaintiff has been reimbursed from other sources, this is simply not such a case. 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.

Decision Den. Pl.'s New Trial Mot., R-App 389. The Court of Appeals likewise concluded that "there is no basis in the record, other than one that calls for speculation, to support the conclusion that the collateral source evidence

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they have been paid or who actually paid the bill." *Loncar*, 28 P.3d at 933-34. Thus, both the Alaska Supreme Court in *Loncar* and the Court of Appeals here concluded that any harm associated with the introduction of collateral source evidence was cured by an instruction that pertained *only* to damages.

affected the jury's liability findings." Op. ¶ 70. The trial court's discretionary formulation of the collateral source jury instruction and the Court of Appeals' conclusion regarding that instruction thus do not conflict with *Leitinger* and are not worthy of Supreme Court review.

Supreme Court review is also unwarranted because the peculiar way in which the City chose to introduce the collateral source evidence during direct examination of its own witnesses is unlikely to recur, and thus a resolution concerning the propriety of the trial court's jury instruction is unlikely to have statewide impact. All of the evidence concerning the funding sources for the City's lead program was introduced and first discussed by the City itself so that the City could lay a foundation for its damages claim. *See* Decision Den. Pl.'s New Trial Mot., R-App. 388. Accordingly, as the trial court concluded, the City has waived any claim that such evidence was improperly admitted, *id.* at R-App. 389.

The City claims that it was forced to introduce evidence of funding source because of the trial court's resolution of the City's motion *in limine* to preclude NL from introducing evidence or argument concerning the City's funding sources for its lead program. But the trial court's resolution of that motion was "not necessarily a final ruling." Mot. Hr'g 5/15/07 at 92-97, R-App. 126-31. And while the trial court's resolution of that motion may have permitted NL to introduce evidence of the City's funding

source (which it never did), it did not prevent the City from presenting its damages case without reference to funding sources.

The City's conduct at trial confirms that the *in limine* ruling did not preclude the City from presenting its damages case without reference to external funding. The City initially attempted to lay a foundation for its damages claim without reference to the various sources of funding for its lead program. During the testimony of John Egan, the City tried to lay a foundation for Exhibit 392,[37] which summarized the City's lead expenditures without mentioning the funding sources. R-App. 196b-197, 6/4/07 Tr. 1501-04. The City was unable to lay a foundation because Mr. Egan lacked personal knowledge that even one dollar of the City's lead program expenditures was spent to address problems related to lead paint as opposed to lead from non-paint sources. R-App. 202:7-25, 205:18-206:6, 209:22-210:18; 6/4/07 Tr. 1511:7-25, 1516:18-1517:6, 1533:22-1534:18.[38] The Court sustained NL's foundation objection to Exhibit 392, R-App. 198:3-199:7, 6/4/07 Tr. 1505:3-1506:7, and the

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[37] The City acknowledged that the purpose of using Exhibit 392 was to summarize evidence concerning its damages claim without reference to collateral source evidence. R-App. 206:9-14, 6/4/07 Tr. 1517:9-14.

[38] In sustaining NL's objection to Exhibit 392, the trial court considered the deposition testimony of Mr. Egan where he testified that the sole basis for his testimony that "even one dollar" of lead program expenditures were related to paint - as opposed to lead from some other source - was not personal knowledge but reliance on statements from health department employees. R-App. 210:10-18, 6/4/07 Tr. 1534:10-18; R-App. 117:7-119:10, Egan Dep. Tr. 217:7-219:10.

City ultimately withdrew Mr. Egan from the stand. R-App. 213:14-19, 6/4/07 Tr. 1541:14-19. The City has not appealed from the trial court's ruling sustaining NL's objection to Exhibit 392.

The City returned to give evidence concerning its damages claim, namely the past expenditures of Milwaukee's lead program, through the testimony of Amy Murphy. Instead of attempting to summarize the lead program's previous expenditures without reference to funding sources, the City elicited testimony from Ms. Murphy regarding the foundation for Exhibit 404.04, R-App. 23, which summarized the City's lead program expenditures from 1992-2006 with particularized reference to its funding sources. Accordingly, on *direct examination by the City*, Ms. Murphy testified that the City's lead program received "annual funding from the Centers for Disease Control," R-App. 256:5-7, 6/6/07 Tr. 1795:5-7, numerous "HUD grants," R-App. 256:12-257:4, 6/6/07 1795:12-1796:4, as well as funds from the EPA, R-App. 254:15-255:20, 6/6/07 Tr. 1793:15-1794:20. Perhaps to overcome the foundational problems that the City confronted in Mr. Egan's testimony, Ms. Murphy assured the jury that lead program funds were spent to address problems related to lead paint (as opposed to lead from some non-paint source) because the program's external "funding was conditional on the prevention and ultimate elimination of childhood lead poisoning through a focus on lead paint." R-App. 260:11-20, 6/6/07 Tr. 1802:11-20. Ms. Murphy further testified that

the City regularly reported to its funding "agencies," such as HUD, concerning the manner in which the City was expending those agencies' money. R-App. 269:18-25, 6/6/07 Tr. at 1833:18-25 ("Q [by City's counsel]. Were there any external controls, outside of the Health Department, on expenditures to assure that expenditures were made for the purpose of the 16 projects listed on [Exhibit] 2009? A. Yes. The external controls were with the Health Department business operations arm, the City comptroller, and then eventually *the agency that provided funding for the project.*"); R-App. 263-64, 6/6/07 Tr. 1825-26; R-App. 267:11-23, 6/6/07 Tr. 1830:11-23. At the end of Ms. Murphy's testimony, Exhibit 404.04, R-App. 23 - the City's own exhibit that identified funding sources of the City's lead program - was received without objection. R-App. 277:2-5, 6/6/07 Tr. 1912:2-5.

In short, all of the evidence concerning external funding sources for the City's lead program was either introduced through the City's direct examination of Ms. Murphy or through the City's Exhibit 404.04. Evidence of external funding sources was not only introduced by the City, but used by the City to assure the jury that the vast majority of the City's lead program expenditures were on lead paint as opposed to lead from another source, and further to assure the jury that the figures in the City's summary of evidence exhibit were reliable because of oversight and reporting requirements imposed by the lead

program's outside funding agencies. The "deliberate choice" by the City to use this evidence to "support [its] theory of the case" waived any objection the City may have had to its introduction. *State v. Ruud*, 41 Wis. 2d 720, 726, 165 N.W.2d 153, 156 (1969); *see also State v. Gary M.B.*, 2004 WI 33, ¶ 11, 270 Wis. 2d 62, 72, 676 N.W.2d 475, 481.[39]

The City's petition oversimplifies the multiple independent grounds supporting the trial court's judgment for NL, all of which must be addressed if this Court were to accept the petition and rule in the City's favor. To resolve the collateral source issue presented in the City's petition, this Court would not only have to resolve whether the curative instruction was sufficient, but also resolve whether and how the trial court erred and whether the City waived its objection to the introduction of collateral source evidence.

The Court of Appeals' decision creates a puzzle over what it deemed to be the error below. On the one hand, the Court stated without further explanation that the "admission of evidence of collateral sources of funds was error." Op. ¶ 65. On the other hand, the Court stated that it did not resolve whether the City had waived its objection to the admission of collateral source evidence or whether it was

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[39] Notably, the Court of Appeals rested its conclusion that it "fail[ed] to see how [collateral source evidence] would have affected the jury's liability findings" on the fact that the City placed that evidence in the context of damages - as opposed to liability - because it introduced that evidence "to make its *prima facie* case *for damages*." Op. ¶ 70 (emphasis in the original).

"forced" to introduce that evidence by the denial of the City's motion *in limine*. Op. ¶ 70. To reconcile the two paragraphs, the "error" must have been something that was later waivable. The decision, read as a whole, appears to mean that the "error" was the trial court's denial of the City's motion *in limine* to prevent NL from introducing collateral source evidence. This reading makes sense: while the City can argue "error" where the trial court ruled with NL (as in denying the City's motion *in limine*), it obviously cannot argue "error" where the trial court ruled with the City (as in allowing the City's use of collateral source evidence to prove damages). If denial of the City's motion *in limine* was the "error," it is hard to avoid the conclusion - as the trial court found - that the City subsequently waived its objection to the introduction of collateral source evidence by voluntarily introducing and strategically relying on that evidence.

Nor did NL improperly exploit the City's introduction of collateral source evidence. NL's closing argument properly referenced the City's evidence of funding sources for three purposes. First, this evidence rebutted the City's suggestion that the jury should find a public nuisance because the cost of its lead program, including subsidizing landlords to replace windows in private residences, added to the local tax burden. *See supra* at 10-11. In fact, because of federal funding, the City's "windows" program had not added to the tax burden; because

the program used earmarked funding, it had not diverted resources from other City programs.

Second, the cost of the City's "windows" program was not even a good measure of the burden of preventing lead-paint poisoning in Milwaukee. The City had chosen to subsidize landlords to replace windows as opposed to using the City enforcement authority to order those landlords to make their own properties lead-safe. The City chose to subsidize landlords, only when federal funding became available, because it was a more popular choice than to prosecute landlords. It also dovetailed with the City's interest in increasing property values. The City spent whatever federal money came its way for windows replacement, even attempting to stimulate landlord demand for new windows so as to use up all the federal money available.[40] The City continued the windows subsidies even after HUD-sponsored studies found the program was not an effective method to reduce children's blood lead levels.[41]

Third, evidence of funding source was proper to rebut the City's argument in closing that NL could do its fair share to address problems related to lead paint and sit at the "table of responsibility" with the Milwaukee Health

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[40] R-App. 78, Ex. 897; R-App. 272:18-274:18, 6/6/07 Tr. 1898:18-1900:18.

[41] R-App. 15-18, Ex. 207 at 6, 26-27; R-App. 341:16-342:5, 6/14/07 Tr. 2903:16-2904:5; R-App. 345:16-346:16, 6/14/07 2909:16-2910:16.

Department. R-App. 351:6-352:8, 6/19/07 Tr. 3320:6-3321:8.[42]

The City cannot complain of these responsive, relevant uses of its own evidence. *State v. Harvey*, 2006 WI App 26, ¶ 40, 289 Wis. 2d 222, 246-7, 710 N.W.2d 482, 493-4. Thus, as the trial court correctly concluded, the admission of this evidence was proper. Decision Den. Pl.'s New Trial Mot., R-App. 388; *see also* Op. ¶ 70.

B. Unreasonable Conduct

Review of the trial court's decision to include an "unreasonable conduct" element in the intentional nuisance jury instructions is unwarranted because this Court has previously resolved the issue.

This Court has adopted *Restatement (Second) of Torts* § 822(a) which provides that nuisance liability may not be imposed unless an actor's conduct is both "intentional and unreasonable." *Milwaukee Metro. Sewerage Dist.*, 2005 WI 8, ¶ 32. Contrary to the City's suggestion that "reasonableness" in this context applies exclusively to the determination of the "seriousness of the interference" with the public right, Petition at 25, this Court in *Milwaukee Metropolitan* held that "'a finding of intentional but unreasonable *conduct*'" is required "'to meet the

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[42] The City's "table of responsibility" argument contravened the trial court's ruling that the City could not introduce evidence or argument concerning "what NL Industries has or has not done to abate lead paint in Milwaukee." R-App. 135:16-25, 5/25/07 Tr. 587:16-25.

requirements of the Restatement under subsection [822](a).'" *Id.* ¶ 33 (quoting *Stunkel v. Price Electric Coop.*, 229 Wis. 2d 664, 670, 559 N.W.2d 919, 922 (Wis. App. 1999)) (emphasis added); *see also Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen*, 129 Wis. 2d 129, 144, 384 N.W.2d 692, 698 (1986)(holding that to impose nuisance liability under §822(a) "a fact finder must . . . determine the reasonableness of an actor's *conduct* in relation to the plaintiff") (emphasis added); Decision Den. Pl.'s New Trial Mot., R-App. 383.

As this Court has already resolved the issue raised in the City's petition, review is unwarranted.[43]

Review is also unwarranted because this issue was not addressed by the Court of Appeals; rather, it determined that any claimed error was harmless. An intentional tort requires a greater showing of culpability than torts based upon negligence. The jury here found no negligence; the

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[43] The Court of Appeals found that language in *Vogel v. Grant-Lafayette Elec. Coop.*, 201 Wis. 2d 416, 430, 548 N.W.2d 829, 836 (1996), suggests that nuisance liability can be imposed notwithstanding the reasonableness of a defendant's conduct. But *Vogel*'s statement that "[a]n invasion . . . is intentional" even where "the actor knowingly causes [it] in the pursuit of a laudable enterprise without any desire to cause harm" addresses the question of when conduct is intentional not whether liability may be imposed without a finding that conduct is both intentional and unreasonable. And *Stunkel*, quoted approvingly by this Court in *Milwaukee Metropolitan*, confronted and rejected precisely this argument, holding that notwithstanding language in some cases that "suggest[] a strict liability analysis" under the Restatement a plaintiff must show the defendant engaged in "intentional but unreasonable conduct." *Stunkel*, 229 Wis. 2d at 670; *see also id.* at 671.

City did not appeal that finding; thus, any error in the intentional nuisance instructions would be harmless. Op. ¶¶ 52-53.

The Court of Appeals was correct. Intentional torts do require a greater showing of culpability than do torts based upon reckless or negligent conduct. This Court has observed that "recklessness apparently falls somewhere on a continuum between an intentional act and an act of negligence." *Lestina v. West Bend Mut. Ins. Co.*, 176 Wis. 2d 901, 907, 501 N.W.2d 28, 31 (1993); *see also Restatement (Second) of Torts* § 500 cmts. f and g (1965) (explaining differences between intentional, reckless, and negligent conduct). Professors Prosser and Keeton have explained the difference between negligence and intentional conduct as follows:

> In negligence, the actor does not desire to bring about the consequences which follow, nor does he know that they are substantially certain to occur, or believe that they will. There is merely a risk of such consequences, sufficiently great to lead a reasonable person in his position to anticipate them, and to guard against them. . . . As the probability of injury to another, apparent from the facts within the acting party's knowledge, becomes greater, his conduct takes on more of the attributes of intent, until it approaches and finally becomes indistinguishable from that substantial certainty of harm that underlies intent.

W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts*, § 31, pp. 169-170 (5th ed. 1984).

Based upon the decreasing level of culpability corresponding to intentional, reckless, and negligent conduct, Wisconsin courts have determined that principles of contributory negligence are applicable in negligence actions

but not in actions based upon intentional conduct, *see Imark Industries, Inc. v. Arthur Young & Co.*, 148 Wis. 2d 605, 625, 436 N.W.2d 311, 319 (1989), and that exculpatory contract clauses may permissibly cover negligent conduct but not reckless or intentional conduct, *see Finch v. Southside Lincoln-Mercury, Inc.*, 2004 WI App 110, 274 Wis. 2d 719, 685 N.W.2d 154.

The City claims that the jury's resolution of the special verdict question pertaining to negligence in NL's favor is "of no legal consequence to the question as to whether NL caused an intentional nuisance." Pet. at 28. As supporting authority for this statement, the City cites a number of cases that explain the unremarkable propositions that intentional conduct cannot give rise to a claim of negligence and that negligent conduct cannot give rise to a claim for an intentional tort. *Id.* at 29. These propositions do not undermine the separate proposition - confirmed by this Court and the *Restatement (Second) of Torts* - that intentional conduct requires a greater showing of culpability than does negligent conduct and thus that the jury's resolution of the negligence Special Verdict question in NL's favor renders any error relating to the intentional conduct Special Verdict question harmless.

The inclusion of an unreasonable conduct requirement was also harmless because overwhelming evidence supported the jury's conclusion that NL did not act intentionally - namely that NL did not know that its conduct was

substantially certain to cause the public nuisance at issue. Jury Instructions, R-App. 362-63. As previously described, the City argued that the presence of lead paint was a public nuisance because it has resulted in thousands of instances of childhood lead poisoning over the last fifteen years, according to the CDC's 10 µg/dL level of concern, and has necessitated a large response from the Milwaukee Health Department. But the kind of childhood lead exposure that underpins the City's nuisance claims was unknown during the entire time that NL sold lead paint.

On this subject, the City's own expert witness, Dr. Landrigan, conceded that the prevailing view of public health officials even through the 1960s was that "pica was the sole source, the sole route for children's exposure to lead" and that "concepts of dust started to come . . . in the 1970s." R-App. 236:9-13, 6/5/07 Tr. 1713:9-13. Dr. Landrigan further conceded that the public health community did not consider "the question of whether low doses of lead also produce adverse health effects" until the late 1970s, that, as of 1970, "a lead level as high as 60 micrograms was considered safe in children," and that "the whole science of lead poisoning has been changing dramatically throughout the 20th century." R-App. 237:20-238:8 and 238:20-23, 6/5/07 Tr. 1714:20-1715:8 and 1715:20-23; R-App. 246:17-25, 6/5/07 Tr. 1775:17-25. Accordingly, both the trial court and Court of Appeals concluded the public nuisance at issue here was unforeseeable while NL was selling lead-based paint.

Decision Den. Pl.'s Special Verdict Mot., R-App. 395-96; Op. ¶¶ 36; 59.

The inclusion of a reasonableness element in the intentional conduct verdict question and accompanying instructions was particularly appropriate in this case. Here the City did not contend that NL acted for the purpose of causing the asserted public nuisance. Nor did the City contend NL knew its conduct would or even could result in the asserted public nuisance. Rather, the City argued that NL knew ingestion of large quantities of lead-based paint could cause "harm", and that this knowledge was sufficient to impose liability for the intentional creation of a public nuisance based upon wholly different harms. But this approach would greatly expand the reach of public nuisance liability into a form of no-fault liability. Once a defendant can be shown to have known of any potential "harm" from its product - even one that no jury would find to be a public nuisance (*e.g.* auto manufacturers who sell cars knowing that some cars will be involved in accidents that result in fatalities or other serious injuries) - that defendant is liable for a public nuisance based upon any harm thereafter discovered by the advance of science. *See* Decision Den. Pl.'s New Trial Mot., R-App. 379.

C. Continuing Conduct Instruction

The trial court's discretionary determination that the City was not entitled to a continuing conduct instruction

for its claim that NL intentionally created a public nuisance is not worthy of review.

The City claims that it was entitled to an instruction based upon the *Restatement (Second) of Torts* § 825, comment d. Pet. at 30. Comment d provides as follows:

> Most of the litigation over private nuisances involves situations in which there are continuing or recurrent invasions resulting from continuing or recurrent conduct; and the same is true of many public nuisances. In these cases the first invasion resulting from the 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.

The trial court properly rejected the City's proposed instruction. The foregoing provision applies where a nuisance is caused by ongoing conduct, and the actor continues its conduct notwithstanding its knowledge that *the* conduct is causing *the* nuisance. Notably, these circumstances usually arise when the defendant's conduct is contemporaneous with the asserted interference, such as odor emanating from an egg farm or smoke blowing from a factory. The instant case does not - indeed could not - involve these circumstances. NL ceased selling lead pigment and lead-based paints at least twenty years before the alleged nuisance at issue here - namely the presence of lead-based paint in and on houses in the City of Milwaukee between 1992 and the end of 2006 - and, indeed, before anyone was concerned with clinically unobservable exposure to lead resulting from contact with lead dust. *See supra* at 26. As the Court of Appeals concluded, this instruction was not

required "where the evidence reflected that the nuisance was unknown to NL Industries until after its conduct had ceased." Op. ¶ 59.

The trial court also properly rejected the City's continuing conduct instruction because that proposed instruction was not faithful to the *Restatement* and was not consistent with the trial court's intentional conduct instruction. The trial court instructed the jury that "[a]n interference with a public right is deemed to be 'intentional' if the defendant acted for the purpose of causing it or knows that it is resulting or substantially certain to result from his conduct. Thus, NL Industries acted intentionally if it intended to create the public nuisance at *issue in this case*, or if it knew that its conduct was substantially certain to cause such a nuisance." Jury Instructions, R-App. 362-63 (emphasis added). The City has not appealed the trial court's intentional conduct instruction.

The City's proposed continuing conduct instruction - which was proposed as an addition to the intentional conduct instructions - provided that "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." Op. ¶ 57 (emphasis added). The City's proposed continuing conduct instruction, which would permit the imposition of

intentional tort liability based upon NL's knowledge that its conduct caused any sort of harm, was inconsistent with the trial court's intentional conduct instruction which permitted the imposition of intentional tort liability only if the City could establish that NL knew its conduct was substantially certain to cause the nuisance "at issue in this case." The City's failure to appeal the trial court's intentional conduct instruction thus forecloses the City's claim that it was entitled to its inconsistent continuing conduct instruction.

As the City's proposed continuing conduct instruction makes clear, the City sought a means of imposing intentional tort liability based upon NL's knowledge that its conduct was causing some lesser harm than the later nuisance. As explained above, this is inconsistent with § 825 comment d.

It is also contrary to established Wisconsin law. Section 825 of the *Restatement (Second) of Torts*, which has been adopted by the Wisconsin Supreme Court,[44] sets forth the requirements for establishing intentional conduct in the nuisance context. That section provides:

> An invasion of another's interest in the use and enjoyment of land or an interference with the public right, is intentional if the actor (a) acts for the purpose of causing it, or (b) knows that it is resulting or is substantially certain to result from his conduct.

The framework set forth in § 825(B) requires the City to establish that NL knew its conduct was causing or

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[44] *Milwaukee Metro. Sewerage Dist.*, 2005 WI 8, ¶ 37.

substantially certain to cause the injury that the City has asserted here. The fact that NL knew that lead pigment could result in harm under certain circumstances is not sufficient to impose public nuisance liability. This requirement is plain from the text of § 825(B). The antecedent to the pronoun "it" in subsection (B) is the asserted injury, here the asserted "interference with the public right." *See also* Decision Den. Pl.'s New Trial Mot., R-App. 379-80.

This requirement has also been confirmed by this Court. In *Vogel* the plaintiff maintained that the defendant's knowledge that stray voltage was passing through the plaintiff's land and cows was sufficient to sustain a claim of intentional private nuisance. *Vogel*, 201 Wis. 2d 416. This Court disagreed; it was not enough that the defendant knew its stray voltage was causing some invasion of the plaintiff's land or cows. What was necessary for an intentional nuisance was that the defendant knew its stray voltage was causing the very thing that was the nuisance - "excessive" voltage that actually endangered plaintiff's cows. *Id.* at 431 (emphasis added). The Court explained:

> Intentionally supplying electrical current with the resulting stray voltage may be an invasion of the land but it does not constitute a legal cause of action in nuisance. In order for a nuisance to exist in this fact situation, *there must be an unreasonable amount of stray voltage that affects the person's interest in the private use and enjoyment of land.* Therefore, GLEC may be liable for an intentional invasion under the continuing invasion rationale expressed in the Restatement *if it continued to impose excessive levels of stray voltage onto the Vogel's farm that might endanger their cows after it had knowledge of the*

> *problem.* However, that is not the case here. In fact, the record indicates the opposite.

Id. at 433 (emphasis added). Thus, to quote *Vogel*, a defendant must know its conduct is causing the invasion that is "the problem" at issue for this plaintiff, not merely an invasion that could become a problem to another landowner raising different livestock under different circumstances. Both the Court of Appeals and the trial court agreed with this reading of *Vogel*. Op. ¶ 35; Decision Den. Pl.'s New Trial Mot. at 380-81; *see also Milwaukee Metro. Sewerage Dist.*, 277 Wis. 2d ¶ 38; *id.* ¶ 40.

The City's approach would have permitted the jury to find an intentional public nuisance so long as it concluded that NL had knowledge of cases of childhood lead poisoning by any medical definition prior to the early 1970s, no matter how many or few such cases were known, or how many or few ever occurred in Milwaukee. The City's approach also would have permitted the imposition of liability based upon NL's historical knowledge of an uncommon harm rarely occurring today (symptomatic lead poisoning associated with high blood lead levels caused by a medical condition known as pica) that has not been determined to be a public nuisance, where NL could not have known that its conduct would cause the public nuisance at issue (more numerous cases of asymptomatic low blood lead levels).

IV. CONCLUSION

For the foregoing reasons, the City's petition should be denied.

Date: January 9, 2009.

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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 and appendix produced with a monospaced font. The length of this brief is 35 pages.

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