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Supreme Court of Texas.
Fairfield Insurance Company, Plaintiff-Appellant,
v.
Stevens Martin Paving, LP, and Carrie Bennett Defendants-Appellees.
No. 04-0728.

November 9, 2004

Appearances:
David M. Pruessner, The Law Offices of David M. Pruessner, Dallas TX, for appellant.
Charles C. Self III, Whitten & Young, P.C., Abilene TX, for appellee.

Before:

Phil Johnson, Nathan L. Hecht, Scott A. Brister, David M. Medina, and Don R. Willett

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JUSTICE: Please be seated. The Court is ready to hear argument on 04- 0728, Fairfield Insurance Company versus Stevens Martin Paving, Lp, .

COURT ATTENDANT: May it please the Court. Mr. David Pruessner will present argument for the appellant [inaudible] five minutes for rebuttal.

ORAL ARGUMENT OF DAVID M. PRUESSNER ON BEHALF OF THE PETITIONER

MR. PRUESSNER: May it please the Court. And I long what just how it do to represent Fairfield Insurance Company in this matter. The question is very straight forward in terms of a certified question from the Fifth Circuit, whether punitive damages should be insurable in Texas under Texas Public Policy. After this Court decided not to ...

JUSTICE: Don't you think we should, I think we should look at the defense duty to [inaudible].

MR. PRUESSNER: Yes your Honor, I did. I believe that under the certification procedure from the Fifth Circuit by Hajji in this state, they're not attempting to control whether this Court decides all the issues in the case or not, not kind of-- ask just a narrow question and since only two questions were presented to this circuit, a duty to defend and duty to indemnify and since they gave no hint that they wish to reserve any portion of the case for themselves and in fact said that

this Court's ruling would be dispositive of the entire case. I think if they are reading as opposed duty to defend and duty to indemnified should be addressed. Recall that the duty to defend is the most standard duty in the Insurance Policy which is the duty to hire lawyer bare the cause of deposition in filing fees and now to defense for the company or the individual who has been sued. But the duty to indemnify is quite different it actually means that it's about rare case or punitive damages award has actually been entered and even affirms as stated by the Trial Court under the Transportation Insurance Company versus Moriel's Criteria and even affirmed by the appellate courts. In fact, that's actually where I'd like to start is by stating that if this Court were ruled in favor of Fairfield, what would the future look like for taxes litigation? Well, I'd love to believe that I've argued the case was in effect 99 percent of the cases but actually 99 percent of the cases would not be any different. That is the standard automobile read, the standard industrial accident. It's not the claim for punitive damages even that's made that triggers the Insurance Policy, it's usually the sixth claim or seventh claim in the petition is the claims battling injury that trigger the insurance policy. And since the duty to defend is triggered and the insurance company owes a duty to defend, to fully defend the entire case if even one claim comes within the policy. It sues the plaintiff's suits for battling injury, then it would whether be an Industrial accident or car wreck. The insurance company will still have the duty to defend even if this Court ruled completely in my favor.

JUSTICE: So you don't think that your experience that if the work-- this punitive damage claim in that kind of a car wreck case. It was clearly not subject to indemnification and not even a subject to the duty to defend that the insurer will go ahead and defend that claim and not tell the insurer, "Well, there's this claim your on your own."

MR. PRUESSNER: Oh no, they, they just couldn't possibly did that in the vast present and I mean King versus Dallas star which this Court is held all the way back to the argument of case, 40 or 50 years ago. This Court has consistently held that if even one claim, a claim for battle injury, a claim for, for a step-to-toe triggers the insurance policy. The fact that there might be another claim for an intentional stabbing or for intentional misconduct that include outside the policy, the insurance company still has the duty to defend.

JUSTICE: Isn't there case law from other States that say that if the insurer defense all claims that if, say for example 90 percent of the judgment [inaudible] that insurer can seek revered from the insurer could for the portion of the defense that's allocatable to the none punitive elements.

MR. PRUESSNER: Other States deal on that do-- to have done that allocation rule and I represent Insurance Company regularly and I've look high and low to try and find some Texas precedent that says, "An Insurance Company could go down in that allocation trail," and I can't find it.

JUSTICE: Well, that's coming the next case that's going to come up, that's going to be near allocate. I mean that's a public policy consideration you have to take that you can.

MR. PRUESSNER: It is, it is a consideration your Honor, I agree but since cases are defended everyday where there is one claim that's not covered; for example, there will be a claim. Trying to think of just something as standard there'll be a claim against an employer that they negligently hired somebody and that employee beat them up so there's a claim and they allege, you know, you intended to assault me

you negligently hired this employee there's a vast to rate a claim. And since the insurance Companies regularly defend whole losses even if where one claim is not covered or two claims are not covered. They simply do it under the reservation of ranks and they've never in Texas been able to come back and allocate between covered and none covered claims ...

JUSTICE: They've never known it, that's not been resolved.

MR. PRUESSNER: That's true, that's true. That question has not been resolved, that's true, Justice O'Neill. It's, it's never been resolved.

JUSTICE: Is there no dispute that the-- but for your public policy argument that the Insurance Policy would cover punitive -

MR. PRUESSNER: Well, ...

JUSTICE: - damages. In other words there's no exclusion for gross negligence or exclusion for punitive damages in the contract.

MR. PRUESSNER: Justice Wainwright the-- I'm tempted to say yes but that's not quite right because the policy just really doesn't specifically speak to the issue. It doesn't say punitive damages are covered, it doesn't say punitive damages are excluded, and when Court say, "We want to look at simply the meaning of the policy." It's just in the Millican the recent Millican and Shaper I mean since Moriel. The Millican and Shaper cases were the court wrote in, what does this policy mean? An insured moderate policy? In the language most certainly the same language as our policy. They said this policy language does not cover punitive damages. But there-- you can tell by reading it, that the reading of the policy language in light of what they believe Texas Public Policy is.

JUSTICE: In light of statutes?

MR. PRUESSNER: Yes, statutes.

JUSTICE: And there is no statute at issue here.

MR. PRUESSNER: Your Honor, there is no statute at issue here, that's correct. We are not in the ...

JUSTICE: Are there, are there any constitutional issue raised here? Right to contract for instance?

MR. PRUESSNER: Well, I mean certainly the appellees have argued the freedom of contract and freedom of contract is a right not only recognized by, by common law but by a Constitution, defend certain freedom of contract. The reason we don't believe that that issue is present here is this: A worker's compensation policy is not written by the Insurance Company nor negotiated, it's a standard form. That Texas says, "You either operate under this policy or not." and Texas Insurance Company are now looking to see whether they're going to have to pay for punitive damages under this policy wording because ...

JUSTICE: Well, presumably -

JUSTICE: Well, it doesn't concern.

MR. PRUESSNER: - under policy wording part two employers liability insurance subsection C, does specifically exclude from indemnity because a bodily injury-- I mean exclude punitive damages specifically from-- because of bodily injury to an employer-- employee in violation of the law. So by specifically excluding in that instance, doesn't that mean that it is in effect covered?

MR. PRUESSNER: Well, your Honor that maybe a correct reading of the language in the policy.

JUSTICE: Well, let me-- And I will change that if that is a correct reading and if in fact it is covered. What about the fact that premiums had been paid based upon the expectation of coverage?

MR. PRUESSNER: Well, that's a good question your Honor. The, the

main thing I would point out is that Fairfield's position has been from the beginning that its argue in public policy. So it is has attempted rightly wrong and just trying to begin with the Court. Fairfield has taken the position that it's, it's an overwriting public policy consideration so it's not been argue in lower court. This is what our policy mean or doesn't mean, it's been argued public policy.

JUSTICE: I understand but ...

MR. PRUESSNER: But, but your question about not having-- have interest been collected premiums to cover punitive damages and now you're not going to cover them. And your Honor, all I can say is, since 1998. The-- Steve the controlling case stated that punitive damages weren't insurable in Texas. It is-- after this Court spoke to Transportation Insurance Company versus Moriel. There was guards at direction except for a great cogent opinion written by Judge McBride which analyze Texas Law extensively from ...

JUSTICE: And insurance companies did not lower their rates in response to Moriel?

MR. PRUESSNER: Your Honor, I don't know that the Insurance Company lowered their rates in response to Moriel and not have take that issue, certainly not on the record in this case.

JUSTICE: But the form of the state insurance contracts could be changed. We are in the hold that they are covered or can be covered or he's going to agree or-- to cover on life. Then the board of insurance could draft two alternative for that [inaudible].

MR. PRUESSNER: They could if found-- If this Court were to hold the Texas public policy prohibits the, the insurance of punitive damages. I guess since the technically the department of, of insurance is of speaking arm of the legislature. It would be a question of whether the legislature or the courts should have the last word on this issue. And I don't think anybody in this ...

JUSTICE: No I, I, I was the -

MR. PRUESSNER: -I'm sorry.

JUSTICE: Well, well you are saying well but, you know we, we're stuck with this policies, you know, policy but-- the policy aren't written in stone likely change?

MR. PRUESSNER: Yes.

JUSTICE: Process of good faith.

MR. PRUESSNER: There-- they are not written in stone. But they do rarely change, I mean I think, I can't remember the year, but I want to say with an upright knew this thing, were the policy for about eight years and0-- it's almost identical to the policy that preceded that for about ten years. Well, it did changed-- every once a while but it's pretty rare but the main legislative directive that we would like to remember is the legislature stated that juries have specifically posed to award punitive damages based upon the net worth of the defendant. Now, keep in mind the legislature was following this Court's lead. This Court has always considered that it govern punitive damages because after all, punitive damages are a child of the courts, I mean. The Court created them and of government and in Transportation Insurance Company versus Moriel. This Court tag first then the legislature agreed and said vir-- virtually statutory enacted Moriel had said, consider the net worth of the defendant. So here's what will happen if you have rules, if the court ruled, that punitive damages were insurable. A jury would be arguing this fiction. It would be a delusional exercise, where counsel say, "This for mama and papa operation has a \$100,000 worth of, of networkths and so only fit them for a fraction of that networkth." Even though they may have done something like intentionally or as you'd

say knowingly exposed the worker to a very dangerous product like benzene is something like this. And cause one worker to get sick and replace him with another worker, they could engage in heinous conduct but the jury says, "Oh we're all going to work and save \$50,000 because this net worth of this defendant really is not large." It's a delusional exercise as they actually have a \$300,000 or a million dollar policy. Now we submit that anytime this Court does something that renders an act of the legislature to get delusional exercises to jury where there, there literally deliberating that was something has nothing to do with where, where punitive damages will ultimately be paid or who will truly be committed because the question is, to punish the defendant and so the jury believes that punishing the defendant and argues about the net worth of the defendant and the net worth of the defendant is completely irrelevant if punitive damages are insurable.

JUSTICE: That sounds close to suggestion that we leave this issue to the legislature. Is that where you heading?

MR. PRUESSNER: No, your Honor, we're not saying this. The legislature has already spoken, that's my argument. And perhaps it wasn't clear but what I'm arguing is that the Texas legislature has already spoken and said since the jury should consider the net worth of the defendant and since that would just the clips by insurer in punitive damages.

JUSTICE: Of course, of course. All insurance does have some degree.

MR. PRUESSNER: Yes.

JUSTICE: I mean we-- The idea in a tort case should call to the persons that call it. So we're not on a shift to call the person that calls it if they have liability insurance.

MR. PRUESSNER: That's true. But what you're talking about compensatory damages where the goal is to compensate the plaintiff. If our goal is to punish the defendant I've really don't know how anybody can say with a straight cause. We want that punish this defendant but it's okay if he's not really punish. If he just ...

JUSTICE: All of the arguments that made, that this significant punishment to have, you know, policy erosion lost of insurance, higher premiums and for your argument to succeed we've got to sort of equate gross negligence with intentional conduct.

MR. PRUESSNER: I, I'm not sure I follow that last part your Honor but to ...

JUSTICE: Well, well, I mean your, your, your presuming that the punishment is for something that has been done intentionally. When it back gross negligence as something sure of intentional conduct and if he's sure of an intentional conduct, why is it high premiums or the trade of loss returns, officially returns in that conduct?

MR. PRUESSNER: Your Honor we believe that gross negligence is so close to intentional misconduct now. It's actually easier in Texas to convict somebody have criminally negligence homicide. Then it is to get a gross negligence finding and punitive damages in a civil case. So it is so close to intentional misconduct, it means that you know that dissipate very dangerous situation such as diverting the product. You subjectively appreciated it, you still just deciding to go ahead and exposed somebody to that. And so that's the-- it's the rare case we're talking about, where somebody would be hit with punitive damages and not be able to pass it on to their Insurance Company. It's a very rare case for both the jury and the court have decided to punish somebody and that's rare case was to me this Court should not blessed insurance coverage and it should pronounce the public policy. We do not believe

that this Court should wait for the legislature still. Not rule, after Harferd versus Powell in 98, when the prevailing opinion state, I mean, then the name it, dispositive opinion in terms of the internal analysis of Texas laws said, "The punitive damages are not insurable," there was no movement on the legislature the sound spell Texas go wrong and we need to pass the statute in favor of that. Texas stood or Texas legislature stood by as well. Justice Mc'Bryan clearly talks about the fact that punitive damages are to punish somebody in reference to their network. That seems two system would not insurer punitive damages.

JUSTICE: You say the legislature has spoken, amicus raised the point that the legislature has an at least two specific instances. Ones allowing insurability of punitive damages and once precluding insurability of punitive damages specifically instances in the medical liability here.

MR. PRUESSNER: Yeah, your Honor can I have to -

JUSTICE: And I, and I, and I point to that is an indication that the legislature wanted to conclude an insurability of punitive damages across the board of could have that did not. So they, they suggest the legislature spoken in a different fashion. How is that change your argument?

MR. PRUESSNER: With the Court's permission can I agree allocate the two minutes of my time?

JUSTICE: You may, you may.

MR. PRUESSNER: Thank you, your Honor. I believe it's a very good question because that's a one time the legislature spoken. Is it a very narrow area of medical liability, lawsuits against doctors. This state treats doctors differently legally and should I state that not only because I have obtained doctors back here but also because throughout Texas procedure and Texas self them deploy. We want to protect doctors from any liability, as best we can if the doctors practicing the Texas. And it was a very narrow area with the stated, with a specifically addressed situation and I think that trigger different procedurally, you have to have a different mechanism to sue a doctor. I believe that that should not be read as a public policy that state as a whole instead you should turn to the legislature, the legislation speaks that punitive damages as a whole that say that the network of the defendant should be a bound of consideration.

JUSTICE: Except that one of the statute to precludes provided insurance for position in health care providers. That, that runs counter to your argument that doctors should protect it generally.

MR. PRUESSNER: Your Honor if I remember the, the statute correctly they wanted to allow a larger group such as corporation and health care providers as corporations. They address that is allowing insurabil-- are allowing punitive damages prohibiting insurance but when address the specific doctor, the specific physician in a subpart of the Texas insurance code. That's what they said the Insurance Commission can adopt the form that does cover punitive damages for a doctor and a text vision commission approve one form that was never used so it's going to be a none issue.

JUSTICE: That was in one provision and another provision just precludes insurance coverage for punitive damages assess against the physician or health care provider when that in turn his offer about the Texas medical liability insurance underwriting association. Someone instance stake did allow it, another instance they precluded insuring punitive damages as to medical liability. Type cases for certainly health care providers. But you think the area of doctors and health cares different in Texas and it should be generalize at least stature

position?

MR. PRUESSNER: Yes your Honor, that's my position. Thank you.

JUSTICE: Thank you counsel. The Court is ready to hear argument from the Catholic.

JUSTICE: May it please the Court. Mr. Charles Self to present argument from appellees [inaudible].

ORAL ARGUMENT OF CHARLES C. SELF III ON BEHALF OF THE RESPONDENT

MR. SELF: By the end of the Court, counsel, counsel. I'm Arnold French start my argument by saying this a simple issue but it is a pre-pretty much straight forward issue that at least you agreed to sing it and that is my line in insurance policy such as policy we had in pleasure. The cover of punitive damages is my client that can be punch, there is been a rely in this case back to earlier argument it's not necessary to pour this Court on case. We deport the case we'd note it, worth worst the National gadget that inverse with Milton. Which same to go against the line of punitive damages be covered by insurance because the punishment of the not-- the wrongdoer would be necessary be punished. It will be pass on to someone else and that, that was follow through all the way to Transportation Insurance Company versus Moriel which spoke to punishing the wrongdoer returning to conduct in finding as, as Moriel said appropriate level. The Austin Court of Appeals, I believe, in Safeway Steel discuss this and went through some of the things that, that cab work against the argument that if the natures got to pay this damage is wrong and would be punished. Some of those are already been touched down suggest back then. Insurance bring into arise. The inability to obtain an Insurance Policy, other factors such as that. My client Stephens Martin Paving is a perfect example of how-- whether or not they claim this punitive damages or the Insurance Company faces of punitive damages. If in fact in your awarding they're going to be punished. Stephens Martin Paving ...

JUSTICE: Sure, sure it wouldn't-- sure it wouldn't be quite same, you know, isn't that-- In a figure of punitive damages is awarded to a number and you don't have to right a check for that or pay additional premiums but they're not going to be the same number, do you think it will?

MR. SELF: I think eventually it will be. Yes, your Honor.

JUSTICE: I thought, a part of insurance was for all of us to get together and made help paid for your access and may have paid for mind.

MR. SELF: Yes, sir I believe that it is. But I think that that my client Linda paying a substantial is not all of that. My client is a, is a set of contract paying company about all the work they do is a public bid. They show up in Austin or Taylor County or wherever they are. To bet on to and county road 155, and they hope they did that bid. When they make that bid, one of the things they required is show is we have insurance, we have insurance to cover everything. This is not a situation where Bob's Manufacturing Company gets that stock with fire premium towards campSPELLCHECK

JUSTICE: Let me ask you about the appellant brief says you took a different position a lot?

MR. SELF: Yes Sir, I did. I take a different 'cause when I'm sure I keep knocking this clab in that pop chase to the court-- I, I did take a different position because when I first got in to this case,

when I first reviewed Moriel. I thought that yes, that' probably correct. The public policy doesn't allow for carry the punitive damages. I think I, I, I surely misstated the law because as wrote here, we abandoned the fifth circuit, now we're here. I don't know what the law is. Like I said I, I, I kind of fearful to say-- this simply question it's not a simple question,. I don't mean it that way, a phony is it's, it's either a-- are we going to be punish or are we not going to be punished. I think it's overwhelming that we're going to be punish, if, is that what were basing this on.

JUSTICE: We're going to answer the, you know, question about, you know, a defendant will be arguing that that worth is low or maybe it's not existing but not informed the jury about the insurance coverage.

MR. SELF: I'm not sure that I was having that argue. Had to address that, I don't know that you could walking and say, "Our, our network is zero or network is \$10,000," lots of different ways to play ...

JUSTICE: Are your, are your premiums for punitive damages can be based on some, somehow in your net worth?

MR. SELF: I would think to that too, yes your Honor. I mean I'm, I'm certainly not trying to understand the appellant's brief for Insurance industry. Don't misunderstand but I would think it if, if Court's rules I guess, this policy or this type of policies covered punitive damages. Then when the Insurance Company goes it goes there under radical order or they go through to do this. They're going to have probably try to look at that because if the jury has want to look at, if the only thing the jury is could be allow to look is the net worth. And based on their decision for punitive damages on that and yes they are going-- beyond the radicals they are going to take that ...

JUSTICE: It's really in the indications currently under running to takes that into a camp.

JUSTICE: I, I mam, I don't know-- I'm not sure.

JUSTICE: But doesn't all of this sort of sound like a you know-- we and we did accept the question and, and we resolve this cases. Doesn't that sounds like something the legislature ought to be deciding and committee hearing, you know, what impact were there beyond premiums out of public policy of the state where to insurer the punitive damages. How the, you know-- what, what are the actuary in table should we revise or you know, write the statute on questions that go to jury in terms of network. And should-- did not sound like a marble legislation process.

MR. SELF: I, I would agree with you. Yes your Honor because I'm, I'm standing up to you now speculating as the facts that what the natures got be may or may not do probably a legislature or a legislative committee is guessing. Much better equipped to handle that question.

JUSTICE: You raise any constitutional excuse in this Court?

MR. SELF: No sir, I don't believe I have.

JUSTICE: But we can't certified the question for the legislature, what, what do we ...

MR. SELF: Your Honor, what do you all do? I guess just would I like you to do. Hold this policy would cover punitive damages? and, and a nice meet on as the-- upset earlier. The charge for lack for better term for Moriel to make sure they're finished, make sure that happens to trun this future conduct and the Insurance Company pays this I can assure you. My client sitting back there, he's going tro be punished and not necessarily be punish that day. He beck he's going to be punish probably for a lot long period of time.

JUSTICE: And with respect to question ask earlier, once we tell the jury? I don't think we should tell jury that there is insurances recovered punitive damages so much for it, so long.

MR. SELF: I would agree your Honor because on what experience I have on drug cases if the jury ever finds that there is an Insurance Policy that everybody I think has seen have changed.

JUSTICE: Don't jury is the only presume that the party is recovered by insurance? That they don't know but don't they don't presume that?

MR. SELF: I might get drowse like this. I might Tino what Kino in range your Honor ... Favoring me your Honor or you can call me I'm not. Thank you, I won't reserve that's my time is [inaudible].

JUSTICE: May it please the Court, to both counsel. Your of the same sound of this case with left to share.

MR. SELF: I'm on the same sound [inaudible]. I would like to answer your question first, question of right in check. Isn't that great of punishment it seems that the question was there if we have that pay with insurance depending they could did it to an insurance. I might sure this your Honor because of this the effect of having to pay greater insurance premiums in the future as a result of having a punitive damages claim judgment against you. Isn't effect that those right to the bottom line for use the camp. In effects a persons or a cup of each process in years to come and it's upto you that he will continue to see you for, for a long time, that's suppose to simply sit down right with chest your the effects in him.

JUSTICE: I, I guess what I was wondering is soon that if that if we search by this, by the hundred and church 99 and they have never have to clue to heinous crime and more on thus and the laws. Somehow, paid by all the insurance premiums may we not try by the body because of the church. A long journey, a number of people is a wonder why there is a private to double check that money as a publish to have in share by the premium generation process of insurance premiums wouldn't be, would be different body. I thank you Court for the come up of time.

MR. SELF: Yes, the other thing is that I would point out in this Court that, that I think it's important here in deciding this public policy issue is that this is a sum rejection of case that came down as a result to the declare to the judgment by the Insurance Company. That the declaratory judgment, did the summary judgment motion that would expelled shortly after the declaratory judgment the action was filed. There is no record by which one can look at this years we're talking about. And, and determine really what the effect of Insurance Premium is? A great of premiums will engage in search premium. How that will be pass off? And I did think that if you look at the history of Texas as it is dealt with punitive damages you used that my large it is left that to the legislature because that can be develop through hearings and, and on a certified record in sulfa. And I think that is one of the problems that is why I think it simply rule that because an Insurance Policy may insurer and indemnify against the world of punitive damages that there is no punishment is to simply dig approach to the issue. I-- when I brief those case for judge committee in the, in the-- in District Court I, I felt that judge-- that judging for court in the fab case was wrong because I look at this case and as I look at that case and as I look at a lot of these cases that have come down on the part of punitive, holding the punitive damages are against public policy. A lot of them relied greatly on the uninsured moderates cases and the uninsured moderates cases or public Internet because there are your Honors your S-king, the, the victims in church policy that pay the

punitive damage claim as oppose to the tort freezes insurance policy. And there are all kinds of the, of reasons not to do that apart from the Public Policy Insurance so these cases that are seem rely heavily on that and I think, and I think that is wrong. Another aspect to this case that, that, that from my aspect that I would point out to the Court. I represent a legal and, and, and priestmal children in a, in a claim yet in which for compensation was lost. That's why I'm here on the beloved code, on a punitive damages issue because that is the only claim that she has other than the claims that we're brought that the famous that she got from the workers compensation.

JUSTICE: And this presume, what the cases they would allege in punitive damages when your a surname begins an employer. There is a greater tendency to believe punitive damages, we're just have briefs.

MR. SELF: That would give joint fully they've got.

JUSTICE: So, if you want to be insured against that, the only way to do that because the workers come far encourages people to do that in workers count cases if they want some more than a monthly and weekly wage.

MR. SELF: Disgust your Honor.

JUSTICE: But, so argument is-- we're really turn in with, with otherwise be a compensation of claim and the punitive damages claim. How come you could cover that if it's outside workers come and you can cover inside workers?

MR. SELF: I don't know the answer of that. All I can say is this is the generally and, and particularly in Cana case I got, the, the type of economic damages that my client could prospectively have recovered in this case where there not work his compensation. Our much greater than the amount of the economic damages that she will recover as a result to the workers compensation statute.

JUSTICE: But, but my, my point is when, when a jury decides whether to stock money in the middle anguish or stock in the punitive damages, you got a lot of leway.

MR. SELF: That's true.

JUSTICE: And that would be guided by Hens perhaps from the trial attorney to say, "We're not asking for that much little anguish that we want a lot of punitive damages," or the other way around. Why should one be covered by insurance and one not at the other not? When there is so much leway for the jury to just swat the money back from home.

MR. SELF: I'm not saying that, that one should be covered by insurance and not. I'm not arguing that in pub-- in, in, in the, in Almor Bell accident cases, for example the punitive damages should be covered by insurance sir. I, I don't think the public policy arguments are really different, I don't see a reason that if an Insurance Comp-- if, if an employer-- if a tort freezer is really to pay the premium that cover the punitive damages and an Insurance Company is really the right that I see no reason why that shouldn't be act.

JUSTICE: That, that's the question that you say willing to write it. If the loss within insurance we don't know that willing to write it or not.

MR. SELF: I don't know other, other than any case of the, other than the case of health providers. I know no statute to prevents an Insurance Company to, to, to insure against punitive damages is a will to do.

JUSTICE: We should-- some states it's in effective gone to station between intentional torts and I guess question to gross negligence. And should we, should we cite all right to intentionally stabs someone, sexually assault them and side it they can into back room. So I don't

care I'm insured.

MR. SELF: Well, your Honor I think I will, I think I'm might have included that. I think there is a difference between an intentional tort for somebody intentionally says, "I want to go up and bash this guy over the head and I want to do it, and I don't have to worry about it". And, and the type of showing you have to lay to recover punitive damages under civil practice and remedies go in this case.

JUSTICE: That is pass.

MR. SELF: I think there is a big difference -

JUSTICE: Police policies uniform-- this policies uniformly have intentional conduct exclusion, is that that

MR. SELF: Yes, yes I do but I think there's-- I think that's a big step to go from intentional tort. To what the definition of malice was discovered my case under the civil practice of remedies ...

JUSTICE: And under that rationale then you would allow insurability of conduct that satisfies the criminal negligence definition in Texas.

MR. SELF: When you say criminal negligence you're talking about criminal statute and I think that's different. I think there's a difference between insuring for criminal acts and for civil acts. Criminal negligence there's, there's, there's all kinds of a, of other issues involved there. For example, persons charge with criminal negligence in need to go to the indictment of process or he's going to the complaint process. If it were Mr. Beader there's a constitutional issues there. And there's also some issues that the, the burden of proof to prove that is significantly different. The burden of proof I think there's a significant different beyond proving a criminal case beyond a reasonable doubt. And the clear and convincing evidence the standard would've apply in this case.

JUSTICE: Let, let me ask you bout something else, US Supreme Court has said in state from case, that we need to, as a matter of due process review the ratio between punitive and actual damages. What would be the actual damages since you're going to trial you hope only on punitive damages goes negligence? What would be the actual damages? Did you have all the workers come indemnity payments? What would be the actual damages in the world?

MR. SELF: Incidentally there is a case I forget to cite. They have it in the Court of Appeals right now that, that has to do with goverdening whether the \$200,000 limitation in a single practice of remedies code would, would apply in a case like this. And there's some, some question that you would be entitle even though you're not-- you can't recover economic damages such as actual damages that you would be entitle to put on evidence of what could be, what those would be for determining the formula under the civil practice in remedies code to determine of whether it exceed the \$200,000. In this case probably the, the economic damages you would be looking at would be the value of what the plaintiffs will receive under the Working Compensation Act. And that is that maybe the, the-- that maybe the numbers you would put in under that formula to determine that. But that county goes to, I don't see an inconsistency; for example in, in, in the-- in considering the net worth of the, of the employer in writing the punitive damages in a case like this. The, the consideration of net worth standard is there to give some substance that are you think your punitive damages. So that jury is just aren't speculating that. It guess some substance to it and obviously I don't think that you'd give that substance by Insurance Policy because absolutely in finding this speculate.

JUSTICE: I can help, are there any further question? Thank you.

REBUTTAL ARGUMENT OF DAVID M. PRUESSNER ON BEHALF OF PETITIONER

MR. PRUESSNER: May it please the Court. In my limited time I'd like to specifically address the question raised by Justice Wainwright when he said, "The United States Supreme Court ask the look they look at teh ratio." Thank goodness the United States Supreme Court did not say, "Well, this is a controversial error-- area what was congress decide about this issue that position will just play for Congress to act that punitive damages". Likewise, seven years ago United States Supreme Court say, "There must be a procedural due process limitations on punitive damages." Thank goodness they didn't say, "This is a controversial area waiting for the Congress and when this sports spoke in Transportation Insurance Company versus Moriel and said punitive damages rather in line and their net punished. Thank goodness this Court did not differ and say, "Why do we just leave question open and allowed the legislature to speak." Punitive damages are the creations of the court, in a court recovering. That's my abstract argument. I would like to just address a specific argument if read, if you raise, raise the question. About a business who wants to protect themselves. If this Court find that the duty to defend will exist which is no alternative argument we make. The average business which still be protective from a lawsuit, they would not only be protective from a final conclusion at the end of the entire corp process.

JUSTICE: My, my question was you, you don't disagree jury has a legal way, whether to put an extra zeroes into the cup. It's tort damages or the punitive damages.

MR. PRUESSNER: Your Honor, I see-- I did disagree. What the jury commit us does numbers around.

JUSTICE: I wrote an opinion. In chamber allowator, where the jury worth 11 million in actual damages and a hundred thousand in punitive damages and when that newspaper pass to him after trial. Why aren't you do so low they said we will all the punitive and the visitor. We didn't know that's going to be another part of the trout.

MR. PRUESSNER: Really? thus -

JUSTICE: No, no question juries do that.

MR. PRUESSNER: I, I really no spoken, there's no doubt, doubt no's, no doubt the juries do that but -

JUSTICE: And so, so why?

MR. PRUESSNER: But through the full process.

JUSTICE: Why, why should one be insurable and the other not?

MR. PRUESSNER: Because through the appellat process, the punitive damage award is very likely to be eliminated because of the law of the heart scriptures. And because the bifurcation of the trial procedure, where you have many language damages awarded then they only get to the separate trial on punitive damages that's perfect gross negligence findings. I think that keeps the ships from occurring. Thank you.

JUSTICE: Indeed let me ask you about the settlement two million dollars, whether you do or don't cover punitive damages? You don't divide that out when you settle the case?

MR. PRUESSNER: That's correct.

JUSTICE: So probably, some Insurance Company right now are settling for a little higher because there's an aspect of potential punitive damages that the plaintiffs demanding more.

MR. PRUESSNER: That's correct.

JUSTICE: So probably, today all ready Insurance Companies are paying impart punitive damages.

MR. PRUESSNER: That's correct, and if, if this Court would have find a duty to defend and slightly that they will sometimes cut checks to get rid of this mis statute that it wouldn't have to defend.

JUSTICE: Does-- Counsel, do you see a distinction with respect to this case between intentional and gross negligent conduct or share position entirely position on punitive damages having a public purpose of deterring and punishing irrespective of the conduct that lead to the award of punitive's.

MR. PRUESSNER: I do believe that there is a difference between an Intentional Acting Prosly Negligent Act but the difference is so small that in Transportation versus Moriel. This Court stated that a punitive damages were quasi criminal in nature that is rep-- replenishing quasi criminal conduct. So that's basis very, very thin.

JUSTICE: But it is there.

MR. PRUESSNER: It is there.

JUSTICE: I mean you got an intentional exclusion and said to rule your way we have to say that really in effect, it's criminal. They would take up quasi case. Better.

MR. PRUESSNER: Well-- No your Honor, I think beside it's quasi criminal. I think all these workings the decided. When we ni-- When we said this [inaudible] to punish the defendant. We really meant this-- we really hand it's to punishment the defendant not to make everybody's Insurance Premiums go out. The people are completely innocent but more say, "Why my premiums go out"? Thank you.

JUSTICE: Thank you counsel. That concludes oral argument for today and be closure ...

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