ORAL ARGUMENT — 3/4/98
96-1299
MOBIL OIL V. ELLENDER

LAWYER: This court should reverse the Beaumont CA's decision in this case because it refuses to follow the legal standards set forth by this court for gross negligence and punitive damages. In *Moriel* and *Ung*, and in every punitive damage case since then, this court has held that punitive damages are available only in the most exceptional circumstances to punish egregious quasi criminal conduct in a significantly heightened mental state.

The Beaumont CA abrogated those legal standards when it upheld a $3.3 million judgment against Mobil for conduct that was neither gross negligence nor malice. The CA's judgment is wrong for at least three reasons. First, the CA substituted the ordinary negligence "knew or should have known" standard for the *Moriel* test of actual subjective awareness and imputed knowledge of others to Mobil. Second, the CA improperly transformed general knowledge of potential risk of excessive benzene exposure under conditions not present at Mobil into Mobil's specific knowledge...

BAKER: Are you saying the CA imputed the knowledge of non Mobil people to reach the conclusion that it did?

LAWYER: Yes. What we say is that the CA looked at other companies' purported knowledge, Shell, Conoco, other companies' documents that were in the record and said that whatever those companies knew Mobil also should have known, but any application of a "should have known" test is an ordinary negligence test and does not fit the *Moriel* actual subjective awareness test.

BAKER: You say that's just limited to the ordinary negligence?

LAWYER: Yes. Under *Moriel*, we have to have actual subjective awareness by Mobil. It doesn't matter what anyone else in the industry knew for the *Moriel* gross negligence test. The test was what did Mobil actually know?

PHILLIPS: But the other is relevant for the objective prong?

LAWYER: I don't believe it is. Because I think under the objective prong, the way this court has stated it in *Moriel*, you must determine Mobil's conduct under the objective prong, and you must determine the existence of an extreme risk by examining the events and circumstances from the viewpoint of the defendant at the time the events occurred without viewing the matter in hindsight. When you are viewing the matter and the events and circumstances from the viewpoint of the defendant, I believe you should look at Mobil's conduct.

HANKINSON: But if Mobil belongs to an industry organization in which information is being shared within the organization, why isn't that looking at this evidence from Mobil's perspective?

LAWYER: Because mere membership in an association is not sufficient. Again it is a "should have known" test. As this court held in *National Industrial Sound* for jurisdictional purposes, the court would not impute jurisdiction based upon mere membership in an association.

HANKINSON: But the evidence is beyond just mere membership. It said, the information was widely known among the members at that point in time.

LAWYER: The record indicates that while there was some documentation that while those documents were in circulation, there is no evidence in the record that any of the people at Mobil actually looked at those records. Again whether there was access to it is a matter of a "should have known" test. It's just like the American Bar Association, the fact that any number of us may be a member of the American Bar Association does not mean that each of us reads everything that that publication would put out or agrees with it, or that it's true.

HANKINSON: Why isn't that characterized as circumstantial rather than direct evidence? Just because the respondent in this case maybe did not find a Mobil employee who says, "Yes, I saw it," if they bring in evidence from 4 or 5 other members that show that people knew that, why isn't that some circumstantial evidence that if Mobil was receiving these documents and receiving this information as a regular course as were the others that they too had knowledge?

LAWYER: Because I believe that circumstantial evidence has to be based upon probative evidence. And probative evidence for the *Moriel* test means it has to be actual subjective awareness of Mobil. And to use any other person's knowledge is to impute knowledge to Mobil in violation of *Moriel*. In *Ung,* this court refused to look at anyone else's conduct for the objective prong. Similarly, you shouldn't use it for the subjective prong, which is even more so "What is Mobil's knowledge?" And so we believe that that documentation should not be imputed to us. But all the same if you look at that documentation what does it tell you? It tells you that there is a general risk associated with Benzene at excessive levels for prolonged use in a continuous chronic manner. It doesn't tell you what was going on at Mobil. My point is, any general knowledge in the industry that Benzene is a hazard, or could be dangerous under extreme conditions, or very excessive exposure is just interesting. It's an abstract principle out here in left field, but you can't say that that creates an extreme risk at Mobil, or that Mobil knew of an extreme risk. As this court held in *Havener*, you have to have similarity, you have to have similarity in terms of what the exposure was, in terms of the duration, the level, you have to have scientific knowledge. As this court held in *Havener*, and as the 5th Circuit held in *Allen v. Pennsylvania Engineering,* the minimal that you have to prove in a toxic tort case is scientific knowledge of exposure creating a risk. In this case from *Moriel* an extreme risk. You have to have duration. You have to have some quantification of that exposure. And here, just general knowledge out in the industry that something could be risky, just like driving a car could be risky, doesn't mean that those conditions were present at Mobil's facilities with

respect to Mr. Ellender, and that's the key from *Moriel* in this case. So general knowledge about potential risks does not mean actual knowledge about an extreme risk with respect to this person, which is what is required from *Moriel*.

HECHT: If I understand the Ellender's argument though on this point, it is simply a factual dispute between Mobil and Ellender as to the exposure that was at the plant. It seems to me critical to Mobil's argument is what you just said. Benzene, if you're exposed to it excessively poses an extreme risk. If you're exposed to it periodically or not excessively or in permissible ranges it is not an extreme risk. And Mobil's argument is, there is no showing in the evidence that we were aware of an extreme risk, because our use of Benzene was limited and all appropriate. Responding to that, Ellender has evidence in the record from a co-worker, "Oh, no we washed our hands, we bathed in Benzene on a daily basis." On Mobil's argument and it's a factual dispute, aren't we bound to accept that there was an extreme, the facts of this case, aren't we bound to go with the jury that they were bathing in this Benzene on a daily basis and therefore there was an extreme risk? And then doesn't that hurt your argument that Mobil wasn't aware of an extreme risk because we weren't exposing them to the kind of risks they are talking about?

LAWYER: No, you do not have to accept that as true. First, under this court's cases in *Giles* and any number of cases, the court is allowed to consider undisputed facts. And the undisputed facts in this case are, that Mr. Ellender showed no symptoms of white hands or dermatitis, which he would have shown if he had been bathing in Benzene the way they allege. So, first, everything should be judged against the undisputed evidence of that fact, he had none of those symptoms. Secondly, Mobil denies that that happened.

HANKINSON: But why isn't that just a disputed fact that the jury resolved? If a co-worker says, "yes it a happened," and Mobil says, "no it didn't happen," why isn't that a fact question for the jury?

LAWYER: Whether it happened is a fact question for the jury. But I think that the court must still look at the fact that if it happened it would have violated the undisputed evidence that Mobil had safety precautions against it. Mobil's safety policy was that you would not use Benzene for any purpose: hands, tools, clothing. Just as this court looked at safety regulations recently in the *Mendez* case and said, "We're not going to hold a premise's owner liable for ordinary negligence when an independent contractor violates a safety procedure," I think certainly this court should find it shouldn't be gross negligence when an independent contractor would violate one of Mobil's safety procedures.

SPECTOR: You're saying that Mobil had safety procedures for Benzene? I thought you were saying they didn't know it was dangerous?

LAWYER: No, we did have safety procedures for Benzene. It was against our policy to allow anyone to use Benzene to wash their hands or tools. We also had safety procedures in place

to protect those who could be minimally exposed. We did manufacture Benzene. We knew it was there. We knew that it was important to minimize exposure, and we did that through our safety regulations, through our flushing the system before the independent contractors were allowed to come in, through our safe work authorization where we had the independent contractor's supervisor sign-off that it was safe for these workers to come in.

SPECTOR: I think there was contradiction there. You're saying there is no evidence that Mobil knew this was a risk, and now you're saying they knew it, and they took the necessary precautions?

LAWYER: What I am saying is that while Mobil knew that Benzene is dangerous in excessive quantities in prolonged chronic exposure of excessive amounts, Mobil took steps to minimize that. And that's exactly what the very documentation talks about. The API and the National Safety counsel documents even talk about "chronic exposure can be prevented by good housekeeping, by safety regulations, by minimizing exposure, by ventilation." Again what was talked about in terms of excessive exposure in those circumstances were people in the rubber industry, in the leather shoe industry, in the tire manufacturing industry working indoors all day, every day with solvent putting together tires and shoes and garbage cans, not someone working outdoors, as Mr. Auslander did, in and out as an independent contractor would be, just sometimes at the plant working primarily at the TA plant where no Benzene was made and did not work around Benzene every day.

HANKINSON: How did the CA err in applying the *Kraus* factors in its opinion and decision?

LAWYER: I believe that they erred in applying the *Kraus* factors, as they did with the *Moriel* test. They applied lip service to the test, but they did not meaningfully apply it.

HANKINSON: In what way did they not meaningfully apply it?

LAWYER: Because I don't think that they truly reviewed Mobil's conduct as required in terms of reprehensible conduct. Again, Mobil is complying with industry standards of the day. And I think that they have to look at, "Okay, what was Mobil doing between 1963 and 1977 when these events occurred?" Mobil was complying with industry standards of the day. It had a biological testing program and an air monitoring testing program, the biological testing program showed no abnormalities, which would have been indicative if there had been any leukemia excessive exposure. The air monitoring, while it wasn't 100% perfect under OSHA regulations, it was not consistently high. And what the court said was, "Well we look at that testing but we don't really care, we're going to start over here with the death and we are going to work backwards and we are going to decide over and over and over again Mobil you should have known."

HANKINSON: Talk to us about the *Kraus* factors that are part of the review of the actual punitive damage award. When the court got to that part of its opinion in what way does that discussion of the *Kraus* factors not comply with the appropriate review?

LAWYER: Because they disregarded the undisputed evidence of our conduct. The *Kraus* factors talks about reprehensibility of conduct, nature of conduct. They disregarded what our conduct was. They only looked at the death and tried to work backwards, again misapplying *Moriel* from our standpoint and just repeating again the things that they had misapplied with *Moriel* before. So to me it was a matter of paying lip service. They disregard the undisputed facts that Mr. Ellender never even showed symptoms, never complained to a medical doctor the whole time he was there, never complained to Mobil of any unsafe work practice. There is no indication that his supervisor ever said, "this place is unsafe, I'm not going to let him work here."

BAKER: Are you saying they have to do a factual review? That sounds like what you're arguing that now.

LAWYER: The court has not stated what the scope of review or standard of review is for *Kraus* factors.

BAKER: You can only argue here there is no evidence to meet the *Kraus* factors, and that's why the CA did it wrong, isn't that correct? You can't argue both sides of the facts in the record to this court?

LAWYER: To answer your question, I do not believe the court has ever said what the standard or scope of review is. What I believe is, that the court under the *Kraus* factors just as the TC and the CA should do, is to take the *Kraus* factors and to view Mobil's conduct as it was at these events. And even applying the no evidence tests to it, however, I believe that we satisfy it, that there is no evidence that we created that risk, and certainly more importantly perhaps, no evidence that we knew or a Mobil vice principal knew that Mr. Ellender was subject to an extreme risk and that we didn't care. And that's the test, "that we didn't care." Here we know you're going to be subject to an extreme risk, and we don't care. And there is no evidence of that.

ABBOTT: Isn't it true that other than what we could label as "lawyer talk," of a statement by the lawyer for defense counsel before the jury began their deliberations, that there was a settlement for $500,000? Isn't it true that other than that the first time they provided any type of evidence or documentation to the TC concerning the actual amount of the settlement, was in the motion for new trial?

LAWYER: The answer is no, that's not true. If the court will look in the record, Mobil filed two oppositions to the plaintiff's proposed judgments. One is at 6 TR 654, on February 4, and one is at 7 TR 741 at 42. In both of those, Mobile asked the TC before the judgment was signed for a settlement credit of $500,000. So that is in the record before the TC. Also, under *Banda v. Garcia* which this court just decided last October, the court held that an attorney's unsworn statement on the record about the existence of a settlement was evidence of the settlement absent an objection by the other side. There was no objection here by the other side. As CJ Walker pointed out in his dissent, this wasn't disputed, the $500,000 amount was not at all disputed. It was in the record before the

TC in plaintiff's motion to restyle the case, at the beginning of the case about the settlement. In our motion to modify, we attached the actual settlement agreement, where on page 1 it shows the $500,000 that's attached to our reply brief. So it was in the record, the TC knew about it, we should have been given the credit, the CA erred in saying it was not in the record and before the TC.

HANKINSON: If we were to get to the question of allocation of the settlement between actual and punitive damages, how should allocation be handled in the TC under Ch. 33?

LAWYER: We have asked for the settlement of credit of $500,000 against the actual damages of $622,000. We would ask that you subtract from that amount.

HANKINSON: But the respondents say that Mobil had the burden to show that that settlement credit went towards the payment of actual damages. You've taken the position that that shouldn't be Mobil's burden to do as I understand?

LAWYER: Correct.

HANKINSON: And what I'm asking is in a general way, the statute does not speak procedurally to this situation, what should be the procedure that would be applied? Is there a rebuttable presumption? Who has the burden of proof? How should this allocation question be raised, and how should it be dealt with given Ch. 33 silence on this question?

LAWYER: Because the statute does not have any requirement of it, I think that the court should write an opinion that holds that there is no allocation requirement. In this case, we have a settlement agreement that had no allocation in it. In my experience and in every experience of every trial lawyer I have ever talked to they've never seen an allocation in a settlement agreement. It's not common. It unlikely would be done because most people would never allocate the damages, the settlement amount to punitives either for insurance purposes or tax purposes, or whatever other purposes. In fact, the more common practice these days is for the pleadings to be amended before the settlement is actually signed. So there's no question that they were punitive damages in the case.

But my rule would be, there is no allocation requirement in the statute. There is no allocation requirement on us. It certainly would be bad policy for this court to hold that Mobil has to have that burden of proof when it wasn't even a party to the agreement and doesn't have any control over that. And I think it would discourage settlements which this court has always said it's very much in favor of. If you want to apply a presumption, then you could do that. I don't think that's necessary. I think you could say there's no allocation requirement in the statute. Mobil did absolutely all it had to do under the statute which was to file that written election to give the TC proof of the amount of the settlement, which we did. We are absolutely entitled to that credit. It's an absolute mandatory act under that statute and you would be fully within your right in holding.

BAKER: Under your theory then, when all this happens is not a question, because

whatever the settlement is it's always going to be actual and will be applied as a dollar for dollar credit. Is that your theory?

LAWYER: Yes, when the settlement happens or when the TC receives proof of it, as long as it is within the TC's plenary power should make no difference, because the court has the power over the judgment as long as he has plenary power, and we should get the credit in that way.

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RESPONDENT

SUSMAN: Question No. 1. Is there some objective evidence from which a reasonable juror could conclude that Mobil's conduct created an extreme risk of serious bodily harm to a worker like Ellender?

In our brief, we show you where in the record each of those statements is supported, and the stunning thing is that Mobil does not challenge that there is record evidence for each of these statements. So they are stuck with evidence of the following points:

> Benzene is one of the most insidious poisons used by industry. It is a clear liquid, pleasant to touch and smell that has a long incubation period before it produces symptoms of a disease. The only safe level of exposure to Benzene is zero. Many large chemical companies like Mobil knew that any exposure to Benzene posed extreme risk to health of their workers. Mobil "encouraged and permitted" workers at its chemical plant to wash their hands, tools and clothes in Benzene. Samples taken in Mobil's plant in the 60's and 70's reflected excessive exposure to Benzene of Mobil's own employees. These employees at Mobil's chemical plant were not maintenance workers like Ellender, but rather worked in operations and offices, and were not exposed to Benzene when the pumps are opened up to change the filters and gages and are not working stationar in open equipment over ditches and sewers into which Benzene was spilled.
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> Ellender, a maintenance worker, was exposed to Benzene at Mobil's plant when he was required to open pumps to change seals and gaskets when working in and around ditches into which Mobil had spilled Benzene from emissions from Mobil's stacks, valves and pumps, and when given Benzene by Mobil operators with which to wash his hands, clothes and tools.
>
> Ellender's death, undisputed on this record to you, was caused by exposure to Benzene. Mobil never warned maintenance workers that the exposure to Benzene was harmful. Mobil did not label Benzene containing process lines as required by OSHA. Mobil had no safety program for its contractors who

did the maintenance work at the chemical plant. Mobil did not provide maintenance workers with any protective gear. Personal monitoring is the only sure way to access worker exposure to Benzene and Mobil had a policy not to conduct Benzene monitoring of contractors' employees.

Question No. 2. Is there some subjective evidence, the second prong of *Moriel*, from which a reasonable juror could conclude that Mobil knew its conduct imposed an extreme degree of risk to workers like Ellender? Again, the following statements are taken from the CA's opinion and Mobil does not attempt to demonstrate the absence of record evidence to support these statements.

Point 1. There was both direct and circumstantial evidence that Mobil knew that Benzene posed an extreme risk to the health of its workers. The direct evidence comes from the testimony of their own doctors and industrial hygienist. Dr. Potts testified he knew that Benzene caused blood disease and felt that Mobil knew the hazards since the early 1950s. Dr. Potts probably saw the 1948 API study concluding that the only safe level of exposure to Benzene was zero. Dr. Esslinger knew that Benzene was toxic and harmful and should be avoided. Dr. Esslinger knew that maintenance workers at Mobil's plants used Benzene to wash their hands and tools. Mr. Wiskey, a Mobil Industrial Hygienist knew it was common for maintenance workers to wash their clothes in Benzene.

That's the direct evidence. Now the circumstantial evidence, and this in *Moriel* said, "Recognizing the practical difficulty of producing direct evidence of conscious indifference and short of the defendant's admission," Williams quite recently stated that the plaintiff need not prove the defendant's subjective state of mind by direct evidence and authorized proof of this illness by circumstantial evidence. We hereby reaffirm our holding, the defendant's subjective mental state can be proven by circumstantial evidence. Ten people walk into this courtroom, 9 raise their hand and say it's raining outside. The tenth said, I don't know it's raining outside. Can you use the testimony of the nine as circumstantial evidence that the tenth is lying? Of course. We are not imputing to Mobil knowledge of some other company or trade association, this is not guilt by association. Justice Hankinson got it exactly right. It's circumstantial evidence of what Mobil knew.

ENOCH: On all the evidence that you have, help me understand. This is a company that manufactures Benzene. Is it the manufacturer of Benzene that is the high degree of risk that you're talking about, or is it something else that's the high degree of risk that is...

SUSMAN: The high degree of risk is the exposure to Benzene

ENOCH: They manufacture Benzene. You have a risk. Is it just because there is a risk associated with the manufacture of Benzene that makes this gross negligence?

SUSMAN: No. This is a case of a maintenance worker who they knew was washing dirty tools and clothes in Benzene and was exposed to Benzene when he had to open up the pumps.

ENOCH: That moves to the next thing. It's not the fact that the manufacture Benzene that creates the high degree of risk. It is because he was exposing himself to something beyond just the risk of manufacturing. He is washing his hands in this Benzene.

SUSMAN: With their knowledge and encouragement.

ENOCH: Now the argument that Mobil makes is there was no evidence that a vice principal or anybody in a management position at Mobil was aware that this was happening. In fact, everything that the management was doing was prohibiting this kind of conduct and was not aware that anybody was doing this. The evidence is only that there was somebody who knew about it but no tie-in to the vice principals?

SUSMAN: That's an argument to be made that you didn't grant writ on. You didn't grant writ on any of the vice-principal points. And so I think that should not be argued today. I assume the court was not interested in hearing argument on the vice principal points.

ENOCH: But does that go the notion of Mobil being aware, having knowledge of an extreme degree of risk to the employee? They may have knowledge of the extreme risk of Benzene, period. But do they have knowledge that at this plant at this time our employees were exposed to extreme degree of risk?

SUSMAN: I think so. I mean we are talking about Dr. Esslinger was the top plant doctor. Dr. Witsky was their regional industrial hygienist. These are not just low employees who were testifying, "We know they are washing their hands and clothes in Benzene." These are people who have responsibility for employees' health who know what's going on, and know it's dangerous.

BAKER: But does that beg the question of what a vice principal is in the definition by this court?

SUSMAN: I understand.

BAKER: One way or the other, your client has to have that finding either by the jury or by the court to hold Mobil responsible for punitive damages, isn't that correct?

SUSMAN: Again, I didn't prepare my argument on this because I didn't think the court wanted to hear it, because they didn't grant writ on it. In fact, this point was not preserved by Mobil at the TC by seeking an instruction on vice principal. And the law is, that if you don't request an instruction requiring the jury to find that a vice principal knew, had knowledge of the excessive risk, there's a deemed finding in our favor, that a vice principal...

BAKER: I don't disagree with that. But can Mobil say as the purport to say in their first point, "there is no evidence to support the objective and subjective aspects of punitive damages under *Moriel,* and parcel to that there's no evidence to show that any of these people you are talking about is a vice principal as defined in Texas law?

SUSMAN: My point is, there is a deemed finding to the fact...

BAKER: But can they argue there's no evidence to support the deemed finding, and if not why?

SUSMAN: I don't think they can argue that because this was a wide-spread practice. It was known by people who testified knew the hand washing was going on there. The people who testified testified they got the Benzene from Mobil. They were given it by Mobil operators. Again, that's just one point that we have. There are other points that we have on this knowledge point. We're not just talking about the handwash. Dr. Canella believed that Mobil had the same information that other chemical companies.

BAKER: And he's a Mobil doctor?

SUSMAN: He's a top Mobil doctor.

BAKER: And what evidence is there that he's a vice principal under the definition of a vice principal for Mobil?

SUSMAN: I'm not sure whether there's any evidence that he was a vice principal of Mobil.

BAKER: That's my point. They are trying to argue I think that there is no evidence that anybody that you talk about that did or didn't do something was a vice principal as defined in Texas law. Therefore, there is no evidence to support a finding that Mobil itself is directly liable for_____.

SUSMAN: There was evidence that it was a company policy not to monitor employees, workers like Ellender. There was evidence that it was a company policy not to warn of the dangers of any chemicals unless management was sure the chemicals would cause harm. We are talking about some company policies. There was a company policy of not notifying workers about Benzene exposure levels in spite of the fact that the doctors could see that there was no rational reason not to tell them. Mobil management used health and safety as a bargaining chip with OSHA. Mobil had no leak detection and prevention program, although technology had been available for decades. There is a lot of evidence, putting aside the hand washing and clothes washing, of Mobil's knowledge of the extreme risks that its conduct entailed for workers, which was absolutely taking no precautions. On the face of this incriminating evidence they argue the following points, all of

which make a little sense. The first they say, the evidence of gross negligence in this case does not rise above the evidence in *Universal Services v. Ung*. In *Ung,* there was no evidence that the existence of the pot hole was likely to cause injury to a highway worker like Ung. The only time it caused any problem in the past, no one was hurt.

Here the evidence was that exposure to Benzene is extremely likely to cause serious injury. In *Ung* the defendant had taken great pains to protect workers like Ung engaging in inherently dangerous occupation. The defendant had created a barricade, barreled off where Ung was working traffic. He was allowed to work there only 30 minutes a time. He was provided a bright colored vest. Sign trucks were placed along the working area to direct traffic away from it.

Here, Mobil failed to warn Ellender that he was engaged in inherently dangerous work, failed to warn him of the dangers of Benzene exposure, failed to provide him with any protection from such exposure, and intentionally prevented its hygienist from monitoring the level of his exposure. They encouraged him to use Benzene to wash his hands, tools and clothes.

Mobil, as counsel did, says there is evidence in the record that supports her side of the story, and that is certainly true. But the question before this court is not whether there is some evidence that Mobil was good, but whether there is some evidence that Mobil was bad. Unless this court intends to substitute its judgment for that of the jury, it must disregard the contrary evidence and focus on the existence of Ellender's evidence.

HANKINSON: Will you respond to Mobil's argument that the CA did not properly apply the *Kraus* factors in its discussion of that?

SUSMAN: I can't respond to it because I don't understand it. If you look at the CA's opinion, they aren't necessarily happy with some of your honor's prior decisions, but they do go through in great detail for 30 pages, and they apply all the factors in *Moriel*, and they go through again and apply the *Kraus* factors, not only once but twice. It is hard to understand what they are saying about the failure to apply the *Kraus* factors. I mean we have here if you look at the conduct, the nature of the conduct, is it reprehensible? Does it offend the sensibilities of the parties? The court recites all that with the same evidence that I have given the court.

Mobil argues, and this is a funny argument, that evidence of a strong association between Benzene exposure and leukemia does not establish causation. But since Mobil does not challenge the jury's finding of proximate cause, the most it could be saying here is that Mobil was unaware of the fact that Benzene caused leukemia. But to recover punitive damages all that must be shown by us is that Benzene exposure created an extreme risk of serious harm and that Mobil was aware of the risk. A strong statistical epidemiological association between Benzene exposure and this particular type of leukemia establishes such a small risk, even in the absence of the proof, of proof that Benzene causes disease.

SPECTOR: On the issue of the settlement credit, if Mobil is entitled to the settlement credit, can this court modify the judgment in that respect? In other words, do we have to remand it for some other review?

SUSMAN: That's one possibility. Here are the possibilities. The possibilities is, you can say that, as the CA said, that because they didn't present evidence to the finder of fact before he entered his judgment of the amount of the settlement and the pleading is lawyer talk, everything before he entered the judgment was lawyer talk, the only evidence of the amount of settlement came in the motion for new trial, which is filed after the judgment was entered. You can say as the CA, that that's just too late. And there is probably good rationale for saying that. It's a waste of judicial resources to allow counsel to sit by with knowledge or the ability to find out about a settlement. They knew the settlement.

HANKINSON: But isn't the countervailing argument though under ch. 33, that the TC's obligation to either give the dollar for dollar credit that's been elected or apply the sliding scale is mandatory and that the TC had some obligation, and that's there's not a timeliness question at issue here in terms of a settlement, that apparently was undisputed, and that from the record it seems everyone understood was a $500,000 settlement? You would agree the record reflects that wouldn't you? It seems that from the pretrial, at the point in time the TC was advised of the settlement, that everyone was operating under the assumption that the other defendants were gone by virtue of a $500,000 settlement?

SUSMAN: Proof of the settlement was before the trial judge at the time he entered the judgment. Proof of the amount was not. It came later. And frankly, I'm not even relying on that very much. I think they are definitely entitled to a credit, but the question is whether as something that they are by statute entitled to, it's a benefit to them, they have the burden to plead, which they did plead, and once they plead for it do they also have the burden to prove it? And what we say here, is they failed to prove even at the end, although admitting to the trial judge: that we don't get credit for that potion of the settlement that is allocated to punitive damages And the trial judge said, "Can't you come prove to me what portion there was?" They didn't not take him up on that invitation.

SPECTOR: How would you prove that?

SUSMAN: A), you put the lawyers on the stand. You take the depositions of the lawyers.

HECHT: They are going to disagree.

SUSMAN: They may or they may not disagree.

HECHT: Or they would have put it in there in the first place.

SUSMAN: They may or may not disagree. But you have here the interesting

circumstance, the IRS rules keep them honest. Because whatever position they take under oath when they are deposed or testify before judgment is entered on how much of this goes to punitive and how much goes to actual, I mean they are going to have to be honest because the IRS is going to look at that testimony when the tax man comes to collect.

HANKINSON: How does the IRS treat a settlement agreement like this one in which you have the usual resuscitation of every kind of damage claim known to man being released in exchange for a lump sum payment? Is there any IRS revenue ruling or anything that indicates how that is treated since we have no allocation in this document?

SUSMAN: The answer is, I do not know. I suspect the IRS would not be bound by the face of the document, but there would be factual inquiries made.

HANKINSON: If an agreement is like this one with the lump of the damage claims and the lump sum payment on the other side, is that an ambiguous agreement with respect to allocation, or is that an intent by the parties just to release all claims for a lump sum?

SUSMAN: I don't know.

HANKINSON: My point in that is, why would someone's testimony be relevant about allocation after the fact if the parties did not apparently contemplate an allocation at the time they negotiated a signed settlement agreement? I am trying to figure out how you would prove allocation if it's not something the parties to the agreement ever talked about.

SUSMAN: It may not be. It may be that the person who has the burden, and maybe the court could adopt some rules for example, but they would be rule-making or quasi legislative, that might say, "In a situation where the parties didn't even talk about it, and no one could prove one way or the other, the fairest thing is to give credit on the settlement amount in the same proportion that the jury found punitives to actual." In this case it might be 10 to 1. Or you could say, " the same proportion that after applying the capping statute left your punitives to actual." In this case it would be 5 to 1. And you apply the 5 to 1 ratio to the settlement amount - $500,000. So $400,000 would be punitives, $100,000 actual. You would have to adopt some kind of rules. We do not know in this case by the way.

ABBOTT: So you don't know if it's punitive or actual?

SUSMAN: I don't know because the parties have never been deposed. They discussed it. They talked about it. There is evidence to be produced of the allocation.

ABBOTT: Isn't it true that in about 98 & 99% of the cases that the parties themselves will not know? First of all, the defendant who pays out doesn't care. Secondly, the injured plaintiff really doesn't know. Isn't that true 99% of the time?

SUSMAN: I would say that that's largely true. I think that the party that pays may well care. There may be tax consequences. The deductibility may turn on whether they are paying actual or punitives in some ways. I am not a tax lawyer. But I think that in many cases it's a non issue. People don't think about it.

ABBOTT: So in those non issue cases, how in the world would the defendant be able to prove it up?

SUSMAN: It would be very difficult to prove up. And maybe in those cases had the defendant tried and the plaintiff could not...there was no evidence of how they should be apportioned. Maybe the entire amount should be credited. Or maybe you should adopt one of these formulas apportioning it in the same ratio with punitives to actual _____ in the judgment.

ABBOTT: Would you concede that the party who would have the greater access to knowledge about whether or not it's punitives or actuals would be the plaintiff against whom the credit is being asserted?

SUSMAN: In the usual case, yes. In this case where the lawyer for Mobil actually represented the settling defendants in the settlement negotiations. This is not the usual case. But in the usual case you're right. But that does not mean that the burden should not be put on the party that's pleading for and seeking the credit. Just as it is in every other case. There are plenty of cases where the defendant is best able to show where he committed fraud or was guilty of negligence, and yet, the burden of proof in those cases is on the plaintiffs.

HANKINSON: But since the plaintiff is in the position to negotiating a settlement with the settling defendant to make a determination if a plaintiff wants to negotiate a settlement that is going to all be credited to punitives so they can avoid a dollar for dollar settlement, why shouldn't the plaintiff be able to do that and therefore the burden be on the plaintiff at the point in time? Why would a plaintiff want to give that up?

SUSMAN: I would say one of the reasons that plaintiff would not want to do it was for tax reasons. To avoid having to pay income tax on the punitives.

BAKER: Well so is the reverse true then, you only put a lump sum without saying anything so that at least the document looks like it's all actuals?

SUSMAN: I don't know. You're asking questions about what generally happens, and I don't know, and I'm not sure there's any in the record here.

PHILLIPS: Have you had experience or are you familiar with the burden shifting in federal court in this area?

SUSMAN: You mean after the defendant raises it, the burden then shifts to the plaintiff?

PHILLIPS: Yes.

SUSMAN: To make an apportionment.

PHILLIPS: The defendant has to prove the entire amount?

SUSMAN: The only case on this is the *Hill* case we cite in our brief, which you have cited with approval in the past. Obviously that case holds exactly what we say, they ignore it, but it holds exactly what I say. You can change that case and say that in the settlement contacts that once the defendant pleads the amount of the settlement the burden shifts to the plaintiff to show what portion is attributable to actual punitive. I assume that if you reach that decision, you would remand this case for an evidentiary hearing placing the burden on Ellender to make that allocation.

ABBOTT: Instead of creating a system that would require depositions to be taken and another hearing to be held with testimony provided to the judge, why wouldn't it just make more sense to have a system where the defendant could say, "Your honor, we've settled for $500,000," so in 10 seconds the whole thing can be taken care of unless the plaintiff says, "no, we haven't settled for $500,000," and that's to be a portion of punitive damages? Why shouldn't it just be a system where the plaintiff has to trigger the need for any type of discovery or a hearing?

SUSMAN: I guess the answer to the question is that traditionally the burden in these situations has been placed on the party that's seeking the relief. And if the relief is that they only get credit for that portion of the settlement which settled actual damages, then the burden would be on them to show that. The *Hill* case says it's clearly on the defendant.

I would urge that whatever rule you adopt, and I think the important thing about this case is that this ought to be sorted out before the motion for new trial. I mean at least the defendant can come forward and establish the gross amount for a settlement in the record before the judge enters the judgment. It should not be something which they are allowed to do in a motion for new trial after judgment has been entered because that would be a waste of judicial resources.

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REBUTTAL

LAWYER: Let me dispel the myth that Mobil encouraged workers to use Benzene - it did not. Its safety policy was to prevent the use of Benzene for washing hands, tools or clothes. The evidence is, that Mr. Witsky an industrial hygienist, observed one Mobil employee washing a jacket once in the Benzene unit. While he said it was a common practice, there is no evidence that he ever saw it ever again.

Dr. Esslinger, who was a contract consultant, not even a Mobil employee at the facility, came there two days a week, 4 hours total said that he had heard of older workers who had come over from Mobil Oil saying that they had washed their hands in Benzene, but that that was not a practice that was going on anymore.

This business about washing hands and tools does not link to Mr. Ellender in the sense of Mobil's knowledge. What I would like to do is to emphasize that the conduct again must be viewed from Mobil's standpoint under *Moriel* without the benefit of hindsight and looking prospectively Mobil's industrial hygiene program and its safety regulations were designed to prevent that. We also believe there is no knowledge here. What they have is nameless, faceless Mobil operators, who they claim waltzed in and handed somebody a bucket of Benzene knowing that it was going to kill that person and doing it anyway. That is not true.

GONZALEZ: How about the testimony of Dr. Potts and Dr. Esslinger?

LAWYER: Dr. Potts said he was not aware of that practice, and it would not have been permitted. It was against safety policy. Dr. Esslinger said he had heard again that Mobil Oil people from the old days that would have been before the Benzene unit opened in 1962, so that that was not a practice that was still going on. That is not knowledge that it was going on with respect to Mr. Ellender. Nobody ever saw it being given to Mr. Ellender. And you cannot pin punitive damage liability as this court has held in *Hamerly Oaks*, you cannot pin punitive damage liability on a nameless, faceless Mobil operator. You have to have a vice principal of the company. Operators are not vice principals. They just operate the unit.

GONZALEZ: How about the argument that it was your burden to secure a jury finding on that issue?

LAWYER: It was not, because that was not something that would normally be submitted in a question. Our point is, on the deemed finding point, you cannot have a deemed finding if there is no evidence of vice principal conduct, and there is no evidence here. You cannot have a deemed finding. Our complaint is not to the charge. Our complaint is to the judgment. You cannot impose punitive damage liability in the judgment in the absence of vice principal conduct and knowledge. And here you have neither. What you must look at is what Mobil did to try to minimize exposure. It did not encourage it and it did not have any knowledge of it, and you cannot pin punitive damage liability after the fact.

ENOCH: I'm a little bit lost to the respective positions of the doctors. Dr. Potts or Dr. Ellinger, one of those was identified as being one of the top doctors from Mobil?

LAWYER: So they claim. Dr. Potts was a regional medical director from 1960, but that title is not dispositive.

ENOCH: The title may not be dispositive, but on a deemed finding of vice principal, if this doctor acknowledges that he was aware of washing in the Benzene...

LAWYER: He was not aware. The evidence is Dr. Potts was not aware of that practice and it was not a practice that would have been tolerated. So he didn't have any knowledge that was going on. Dr. Esslinger was just a contracting consultant. He wasn't even an employee. So he wasn't a vice principal. Witsky was just an industrial hygienist. He wasn't a vice principal. And this nameless, faceless operator was certainly not a vice principal. In all the vice principal cases and the gross negligence cases you have conduct by a person, and maybe even a supervisor who knew about it. Here you just have them coming in and saying, "Mobil globally was bad and so that should be evidence of gross negligence and you should pen punitive damages on them." That's not true.

BAKER: Is it correct then that there is no evidence either way on the positions of these regular people who testified on Mobil's behalf? Is that your argument because there is no evidence either way you can't have a deemed finding of vice principal?

LAWYER: Yes, there is no evidence other than their title, which in *Hamerly Oaks* this court held is not dispositive. But there is no evidence that any of the people they claim had knowledge knew of washing hands, certainly with respect to Mr. Ellender. And the point is, you have to link the conduct and the knowledge with respect to this plaintiff. You just can't have general knowledge out here, or general conduct over here. You have to have a nexus with this plaintiff, and there is none.

BAKER: Is it true under Texas law that the punitive damages accrue against a corporation if you show that "the corporation is guilty of the acts?" And one way to show it is that it's a vice principal who did the act or the omission?

LAWYER: You have to have a vice principal doing the act and having knowledge.

BAKER: But his argument is, that there was a company policy instituted by the corporation that you did not warn independent contractors of toxic chemicals? Second, as a company policy you didn't furnish these kind of workers with protective garments, you didn't warn them. Now that's an act of the corporate policy isn't it if what they say is correct?

LAWYER: While that would be the act of a corporate policy, you would still have to take it over to the *Moriel* test and apply it: Did the failure to warn exist with actual creation of an extreme risk? Was there a risk there to warn them about? Was it extreme?

BAKER: I'm just trying to dispose of the issue of the vice principal, yes or no, but without getting to the details of the review under *Moriel*.

LAWYER: My answer is, the policy is not dispositive of the issue. Just having a policy

does not satisfy vice principal conduct in my opinion. In this case, you have to apply the *Moriel* test to the whole case, and it does not satisfy it.

We would ask the court to reverse and render for Mobil on gross negligence, malice and punitive damages. Please grant us the settlement credit and such other relief to which we are entitled.