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Christopher P. Rackers

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Manifestations of a Reluctance to Recognize Punitive Damages in Products Liability

*Angotti v. Celotex Corporation*¹

In this, the last decade of the 20th Century, our judicial system faces an apocalypse in the guise of asbestos cases. As did the "Apocalyptic beast," asbestos rose up "as from the depths of the sea," after having lain dormant for decades, to plague our industries initially and our judicial system consequentially, spreading cancer and asbestosis to thousands of workers along the way.²

I. INTRODUCTION

Asbestos is one of many products which have a once-latent danger now facing consumers. Our judicial system uses many means to confront these dangers, including imposing punitive damages on manufacturers. At what point does a manufacturer's business decisions affect society such that punitive damages become necessary? This issue is increasingly important in our highly industrialized and technological society. *Angotti v. Celotex Corp.* mandates an in-depth examination of this issue: first, how are jurisdictions other than Missouri approaching this problem; second, what considerations affect how punitive damages are used in a products liability setting; third, does Missouri's approach further these considerations; and finally, what will post-*Celotex* courts in Missouri require to support punitive damages? This Note addresses all of these questions.

II. FACTS

The plaintiffs, William and Isabella Angotti, brought an action against Celotex Corporation (Celotex).³ Celotex is the successor corporation to the Philip Carey Company (Philip Carey), and is liable on behalf of Philip

1. 812 S.W.2d 742 (Mo. Ct. App. 1991).

2. *Eagle-Picher Indus. v. Balbos*, 578 A.2d 228, 231 (Md. Ct. App. 1990). According to the Maryland court, over "8,000 asbestos cases . . . have been filed in Maryland since 1980. Although estimates vary, it has been reported that there are as many as 50,000 asbestos cases pending nationally." *Id.*

3. *Celotex*, 812 S.W.2d at 745.

Carey.⁴ William Angotti worked as an insulator of Philip Carey's asbestos-containing products from 1948 until he retired in 1982.⁵

William Angotti learned of the hazards of working with asbestos in 1968, and began experiencing health problems in 1976.⁶ In 1982, William Angotti was diagnosed with asbestosis.⁷

The plaintiffs sued Celotex for personal injuries suffered by William Angotti as a result of his work with Philip Carey's asbestos products and for Isabella Angotti's loss of consortium due to her husband's injury.⁸ The Angottis sought actual and punitive damages.⁹ To obtain punitive damages, the plaintiffs were required to prove that Philip Carey had "actual knowledge" of the product's defect and danger, and that Philip Carey "thereby showed complete indifference to or conscious disregard for the safety of others."¹⁰

The plaintiffs' evidence regarding punitive damages came primarily from correspondence and deposition testimony of John Cantlon.¹¹ From the mid-forties to 1972, Cantlon served as a consulting actuary for Philip Carey.¹²

In the 1950s Philip Carey received its first asbestos-related workers' compensation claim.¹³ Cantlon warned Philip Carey that this "new problem" would be expensive and needed to be solved.¹⁴ Philip Carey received workers' compensation summary cards from five workers' claims from 1956 to 1961.¹⁵ All five claims were made by workers who were exposed to

4. *Id.*

5. *Id.* Angotti worked for Kelly Asbestos from 1951 through 1954, and again from 1958 to 1960; he worked for Central Insulation in 1959, from 1965 to 1968, and in 1973. During all of these jobs, Angotti worked with Philip Carey products. *Id.*

6. *Id.*

7. *Id.* Asbestosis is "a progressive and irreversible pulmonary disease caused by inhaling asbestos fibers. An asbestos victim experiences shortness of breath even during simple daily activities. Also, an asbestosis victim may suffer from heart disorder." *Racich v. Celotex Corp.*, 887 F.2d 393, 394 (2d Cir. 1989).

8. *Celotex*, 812 S.W.2d at 745.

9. *Id.*

10. *Id.* at 746 (citing MO. APPROVED JURY INSTRUCTIONS 10.04 (1991)).

11. *Id.* at 747.

12. *Id.* Cantlon first indicated an awareness of the hazards of asbestos in the 1950s, when he told Philip Carey that asbestos was a new and pressing problem that management should address. Cantlon wrote the Assistant Secretary of Philip Carey, L.A. Pechstein, in 1962, and advised Pechstein that the company had received ten claims between 1956 and 1961 based on disabilities claimed due to exposure to asbestos dust. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

asbestos and developed asbestosis.¹⁶ Evidence was also introduced showing the threshold amount of asbestos to which a worker could be exposed.¹⁷

Upon Cantlon's recommendation in 1962, Philip Carey hired Dr. Thomas Mancuso to study its manufacturing operations.¹⁸ In April of 1963, Cantlon referred to a report written by Dr. Mancuso concerning the effects of asbestos exposure and advised Philip Carey that its product would present potential liability.¹⁹ In May, 1963, Dr. Mancuso warned Philip Carey "that it needed to develop guidelines and manuals for the benefit of consumers in regard to safe handling, ventilation and control of dust for its products."²⁰

In August, 1963, Dr. Mancuso sent medical literature to Philip Carey concerning the "hazards of asbestos exposure in industrial employment, and to the surrounding population."²¹ Dr. Mancuso also warned Philip Carey that it was exposing itself to liability not only to employees, but also to all persons otherwise exposed to asbestos.²²

In October, 1963, Philip Carey discontinued its employment of Dr. Mancuso.²³ Philip Carey reached an agreement with Dr. Mancuso by which his "observations of exposures, sickness and mortality, and [his] evaluation of [the company's] operations would be kept confidential."²⁴

16. *Id.* The evidence revealed the following claims: "one claim was disallowed;" a claim from a man who worked as a utility man and as "a helper on a corrugating machine" at Philip Carey was allowed; a claim from "a man with asbestosis who worked dumping asbestos fiber onto a conveyor from a burlap bag" was allowed; a claim was allowed for a worker with asbestosis who was exposed "to asbestos dust by asbestos being put in beaters;" and a claim from a worker with asbestosis from "inhalation of asbestos over a period of time" was allowed. *Id.*

17. *Id.* at 747-48.

18. *Id.* at 748. Dr. Mancuso was a leading expert in the field of occupational diseases. *Id.*

19. *Id.* Cantlon warned Philip Carey that "[t]here is a danger . . . that a condition either exists, or the fear of a condition will exist, that will effect not only your employees, but the employees of companies which purchase your products for use, and even of customers of your end products." *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* Philip Carey determined that Dr. Mancuso's services would not be needed "until the undertaking of corrective engineering measures and future study of Philip Carey's health problems indicate the need for his additional services." Cantlon responded to Philip Carey's decision by advising that he would continue to "keep Philip Carey informed of information or developments affecting the industry and company," and that "[i]n Dr. Mancuso's mind, it is definite that there will be considerable publicity, investigation and scientific, medical and engineering advances,

In October of 1964, Dr. Mancuso wrote Cantlon about a conference on asbestos exposure, and noted that asbestos would be a lasting problem which would expose Philip Carey to legal liability.²⁵ In November, 1964, Philip Carey rejected Cantlon's suggestion to have Dr. Mancuso continue his investigation of the harmful effects of asbestos.²⁶ In a letter written in May, 1966, Dr. Mancuso warned Philip Carey of increasing awareness of the potential harmful effects of asbestos.²⁷ Finally, in June, 1967, Cantlon sent an article to Philip Carey that supported what Dr. Mancuso had been predicting: "even the minor use of asbestos may someday be considered as dangerous to the general populace."²⁸

In light of this evidence, the jury found in favor of the plaintiffs.²⁹ William Angotti won \$250,000 in actual damages and \$250,000 in punitive

all in relation to asbestosis, not only as an occupational hazard, but as a health hazard." *Id.* at 748-49.

25. *Id.* at 749. The letter states in pertinent part:

1. There is now agreement on an International level, from the facts and evidence presented, that there is an irrefutable association between asbestos [xxx] [xxx]. At present this association has been established for [xxx] and of the [xxx] and of the [xxx] (in the form of [xxx]). There is suggestive evidence but not established for [xxx] [xxx].

2. There is now substantial evidence, that [xxx] [xxx] have developed in environmentally exposed groups, ie. due to air pollution groups, living near asbestos plants, and asbestos mining operations, but not occupationally exposed.

3. Evidence has also been established for [xxx] developing among members of the household, ie. [sic] relatives of workers who are employed in the asbestos plants. [xxx] have developed among wives, laundering the work clothes of asbestos workers.

Id. The bracketed portions with x's represent portions of Mancuso's letter that were "expunged prior to the letter being admitted in evidence." *Id.* at 749 n.2. The letter also contained the following warning: "There should be no delusion, that the problem will disappear or that the consumer or working population will not become aware of the problem and the compensation and legal liability involved." *Id.* at 749.

26. *Id.*

27. *Id.* Dr. Mancuso wrote that "[t]he situation that now confronts all industry users and manufacturers of asbestos products is quite formidable and requires a serious reappraisal and the development of specific plans of operation." *Id.* Dr. Mancuso also advised Philip Carey that he was available to consult with Philip Carey "if it was ready or interested in some serious discussion relative to their overall medical and related activities." *Id.*

28. *Id.* at 750.

29. *Id.* at 745.

damages.³⁰ Isabella Angotti received \$25,000 on her loss of consortium claim.³¹

Celotex appealed to the Missouri Court of Appeals, Western District,³² contending that the trial court erroneously overruled its directed verdict motion on the issue of punitive damages.³³ Celotex argued that its directed verdict motion should have been granted because the plaintiffs failed to establish that Angotti had used the defendant's asbestos products during the relevant time period.³⁴ Celotex also argued that the Angottis failed to prove that the defendant had actual knowledge that its product posed a danger to insulators.³⁵ The appellate court held that the trial court had erred and that Celotex was therefore entitled to the directed verdict as to punitive damages.³⁶

III. LEGAL HISTORY

Missouri courts apply Missouri Approved Instruction (M.A.I.) 10.04 to instruct juries in a strict products liability claim in which punitive damages are submitted.³⁷ Missouri Approved Instruction 10.04 requires that in a products liability case based upon a product containing a manufacturing or design defect, the jury must find two elements before awarding punitive damages. First, the jury must find that the defendant manufacturer "knew of the defective condition and danger [of the product] . . . at the time defendant sold the product." Second, the jury must find that "defendant thereby showed complete indifference to or conscious disregard for the safety of others."³⁸

30. *Id.*

31. *Id.*

32. *Id.* at 742.

33. *Id.* at 746.

34. *Id.*

35. *Id.*

36. *Id.* at 750. Celotex appealed on three other grounds. First, Celotex argued that it was entitled to a directed verdict on the issue of contributory fault. *Id.* Celotex also argued "that the trial court erred in failing to bifurcate the liability issues from the punitive damage issues." *Id.* at 751. Finally, Celotex argued "that the trial court erred in admitting" specific evidence. *Id.* These contentions were also denied by the appellate court. *Id.* at 750-52.

37. *Id.* at 746.

38. *Id.* (citing MO. APPROVED JURY INSTRUCTIONS 10.04 (1991)). The plaintiff is required to prove that defendant knew of the "defective condition and danger" only when a products liability case is submitted under M.A.I. 25.04. *Id.* Missouri Approved Instruction 25.04 is the products liability verdict director to be submitted when the plaintiff is attempting to prove that the product was sold in a dangerous condition. MO. APPROVED JURY INSTRUCTIONS 25.04 (1991). When the case is presented based upon a failure to warn, M.A.I. 25.05 is used as the verdict director.

The drafters of M.A.I. 10.04 based the instruction on the decision of *Racer v. Utterman*.³⁹ In *Racer*, the plaintiff underwent surgery, during which she wore an operating drape manufactured by the defendant.⁴⁰ During surgery, the plaintiff's surgical drape caught fire from a cautery used to stop bleeding.⁴¹ Doctors and nurses conducting the operation testified that they believed that the drape was fire-resistant.⁴² The Eastern District of the Missouri Court of Appeals found that the evidence was sufficient for a jury to find that the defendant had actual knowledge the drape was flammable.⁴³ The evidence also supported a finding that the drape would be exposed to fire during its intended use, and showed the extent of danger the flammability placed on users of its product.⁴⁴

In reviewing this evidence, the court rejected the use of M.A.I. 10.02 as the appropriate instruction for a punitive damages award in a case based upon strict liability.⁴⁵ Missouri Approved Instruction 10.02 allows a jury to award punitive damages if it finds that the defendant's conduct "showed complete indifference to or conscious disregard for the safety of others."⁴⁶ The court held that "[i]f plaintiff, in addition to proving the conduct necessary to support the strict liability claim, can also establish a degree of fault in such conduct sufficient to justify punitive damages, those damages may also be recovered."⁴⁷ Therefore, the court remanded the case and instructed the lower court to determine the extent of the defendant's knowledge of the danger.⁴⁸

Knowledge is required by M.A.I. 10.04 because proof of knowledge is not a requirement to recover under a strict liability claim.⁴⁹ By requiring proof of actual knowledge, the drafters of M.A.I. 10.04 satisfy the require-

MO. APPROVED JURY INSTRUCTIONS 25.05 (1991). When a case is submitted under M.A.I. 25.05, M.A.I. 10.04 is again used to submit a claim for punitive damages. *Id.* However, the plaintiff is required to prove only that the defendant had knowledge of the "danger" of the product. *Id.*

39. Committee Comment, MO. APPROVED JURY INSTRUCTIONS 10.04 (1991).

40. *Racer v. Utterman*, 629 S.W.2d 387, 391 (Mo. Ct. App. 1981).

41. *Id.* at 392.

42. *Id.*

43. *Id.* at 393-94.

44. *Id.* at 396.

45. *Id.*

46. MO. APPROVED JURY INSTRUCTIONS 10.02 (1991).

47. *Racer*, 629 S.W.2d at 396.

48. *Id.*

49. *Hoover's Dairy, Inc. v. Mid-America Dairymen*, 700 S.W.2d 426, 436-37 (Mo. 1985).

ments of *Racer*: a finding of reckless conduct sufficient to justify an award of punitive damages.⁵⁰

Missouri courts have narrowly interpreted M.A.I. 10.04.⁵¹ Courts have held that the knowledge required by M.A.I. 10.04 is "actual knowledge."⁵² No Missouri court has submitted an M.A.I. 10.04 punitive damage instruction in a products liability case based on the theory that the defendant "should have known" of the dangers of its product.⁵³

Missouri courts have been reluctant to uphold an award of punitive damages in a products liability case. One exception is *Wolf v. Goodyear Tire & Rubber Co.*⁵⁴ Wolf was inflating a tire when a portion of the wheel, a

50. *Id.* at 437.

51. See *Racer*, 629 S.W.2d at 387; see also *School Dist. of Independence v. United States Gypsum Co.*, 750 S.W.2d 442 (Mo. Ct. App. 1988); *Love v. Deere & Co.*, 684 S.W.2d 70 (Mo. Ct. App. 1985); *Sparks v. Consol. Aluminum Co.*, 679 S.W.2d 348 (Mo. Ct. App. 1984); *Lewis v. Envirotech Corp.*, 674 S.W.2d 105 (Mo. Ct. App. 1984).

Prior to *Celotex*, perhaps the best example of the reluctance of Missouri courts to affirm punitive damages occurred in *School District of Independence v. United States Gypsum Co.*, 750 S.W.2d 442 (Mo. Ct. App. 1988). In *Gypsum*, the trial court had determined that a defendant asbestos corporation did not have actual knowledge of the danger of the asbestos that the defendant had placed in plaintiff's school. *Id.* at 446. To attempt to establish defendant's "actual knowledge of the defect and danger" of the asbestos product, the plaintiff introduced testimony from an expert in lung diseases. *Id.* at 447. The court summarized the expert's testimony as follows:

[The expert,] acting on his own and without funding [from the defendant] performed experiments in which he exposed laboratory animals to combinations of asbestos and gypsum. During that year he showed the experiments to Edward Beuthine, [defendant's] then safety manager. [The expert] described the "bad results" obtained from combining asbestos in various compounds, the "bad results" being asbestosis, emphysema, and proliferation of epithelial tissues in the lungs. Later, having learned from an advertisement that [the defendant] was marketing a new product which combined gypsum and asbestos, [the expert] wrote to [the defendant] protesting the "folly" of adding asbestos to gypsum, noting his experiments.

Id.

The court determined that while the defendant had knowledge "of [the expert's] experiments and opinions concerning the potential danger of incorporating asbestos into gypsum products," the plaintiff introduced no evidence "of the validity of [the expert's] experiments, nor of the methods by which the experiments were conducted." *Id.* Therefore, the court concluded that plaintiff's expert's testimony did not establish actual knowledge on the part of defendant. *Id.*

52. *Gypsum*, 750 S.W.2d at 446 (citing *Lewis*, 674 S.W.2d at 114).

53. *Id.*

54. 808 S.W.2d 868 (Mo. Ct. App. 1991).

multi-piece rim, came apart and injured him.⁵⁵ Wolf sued the manufacturer for negligent design and negligent failure to warn.⁵⁶ The plaintiff introduced many of the defendant's intra-office memos. One memo warned of the importance of a program that educated users "of potential safety problems resulting from improper tire servicing."⁵⁷ Another memo discussed the development of a multiple-piece rim that would not come loose during inflation.⁵⁸ A third memo urged for the implementation of a safety program concerning the danger of rims.⁵⁹ Wolf also introduced evidence of presentations in which the defendant explained how a new one-piece rim was safer than the multi-piece rim, because it would "eliminate cases where tire changers are hurt due to rings separating from rim bases."⁶⁰

The Western District of the Missouri Court of Appeals was persuaded by this evidence and found that the defendant knew of the danger that their multi-piece rim posed to consumers.⁶¹ Therefore, the court upheld the jury award of punitive damages.⁶² *Wolf* is an exception, however, to the tradition of Missouri courts reversing awards of punitive damages in products liability cases.⁶³

IV. THE INSTANT DECISION

In the instant case the court conceded that the plaintiffs had proven exposure to defendant's asbestos product during the relevant time period.⁶⁴ However, the court ruled that the plaintiffs failed to establish that Philip Carey had actual knowledge that asbestos posed a danger to insulators such as Angotti.⁶⁵

The court concluded that evidence regarding workers involved in the manufacturing process who were exposed to "high volumes of asbestos dust" and who later contracted asbestosis was insufficient to establish that Philip Carey had actual knowledge of asbestos' dangers to insulators.⁶⁶ The court

55. *Id.* at 870.

56. *Id.* at 872.

57. *Id.*

58. *Id.* at 872-73.

59. *Id.* at 873.

60. *Id.*

61. *Id.*

62. *Id.*

63. See, e.g., *Racer*, 629 S.W.2d 387; *Gypsum*, 750 S.W.2d 442; *Love*, 684 S.W.2d 70; *Sparks*, 679 S.W.2d 348; *Lewis*, 674 S.W.2d 105.

64. *Celotex*, 812 S.W.2d at 747.

65. *Id.* at 746-47.

66. *Id.* at 748.

found that Cantlon's testimony that he had advised Philip Carey to be "cautious" and "to develop guidelines for safe handling" established that Philip Carey and Cantlon believed that asbestos could be handled safely.⁶⁷

The court found Cantlon's repeated warnings that asbestos manufacture caused a dangerous condition were insufficient to prove that Philip Carey had actual knowledge or could have had actual knowledge that asbestos was dangerous to insulators.⁶⁸ In addition, Cantlon's forecast that Philip Carey was exposing itself to liability by manufacturing asbestos did not prove that the company actually knew that asbestos was dangerous to insulators.⁶⁹

Further, the court found that Philip Carey's intent "to keep Dr. Mancuso's observations and evaluation confidential" did not prove that it had actual knowledge.⁷⁰ The court also concluded that the opinion that "considerable advances" toward a recognition of the hazards of asbestos would be made, the warning that the potential hazards of asbestos "will not disappear," and knowledge that the public would become increasingly aware of the hazards of asbestos did not establish actual knowledge.⁷¹

Finally, the court determined that warnings of potential effects of asbestos exposure and a forecast of asbestos' future were insufficient to establish that Philip Carey had actual knowledge that asbestos represented a hazard to insulators.⁷² The court found not only that the plaintiffs failed to prove such actual knowledge, but they also had not established that Philip Carey consciously disregarded information about asbestos' dangers to insulators.⁷³

The court held that Philip Carey did not have actual knowledge that asbestos posed a health hazard to insulators such as Angotti.⁷⁴ Therefore, the court reversed the punitive damages award.⁷⁵

In his dissent, Judge Kennedy stated that the majority's decision required "specific, exact and certain knowledge" rather than actual knowledge.⁷⁶ According to Kennedy, this requirement was inconsistent with previous Missouri cases.⁷⁷

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 749.

71. *Id.*

72. *Id.* at 750.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 752.

77. *Id.*

Kennedy found that the plaintiff's evidence was sufficient to prove that Philip Carey had actual knowledge of asbestos' hazardous effects.⁷⁸ From this finding, Kennedy believed that a jury could reasonably infer that asbestos was dangerous to workers such as Angotti, who were involved in "handling, cutting, and sawing the material and freeing the asbestos fibers into the air in enclosed spaces."⁷⁹ Kennedy also noted that it could have been found that Philip Carey's conduct was in "complete indifference to or conscious disregard for the safety of others," and therefore met the second prong of M.A.I. 10.04.⁸⁰ Hence, Kennedy stated that the jury's award of punitive damages should have been upheld by the court.⁸¹

V. COMMENT

A. *Approaches of Other Jurisdictions to the Punitive Damages Problem*

Punitive damages are not a modern tool invented to combat industry; they have been traced as far back as 2000 B.C. in the Code of Hammurabi.⁸² The development of punitive damages was based upon a need to punish and deter individual criminals, such as trespassers and oxen thieves.⁸³ The application of this device to industrial society has resulted in a variety of awkward practical situations.⁸⁴

78. *Id.* at 753.

79. *Id.*

80. *Id.*

81. *Id.* at 752.

82. David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 9-10 (1982).

83. *Id.* at 15.

84. *Id.* Owen cites a few of these practical problems:

Final "decisions" concerning a complex product are often the result of a splintered, bureaucratic process involving a complicated combination of human judgments made by scores of persons at different levels in the hierarchy who pass on different aspects of the problem at different times. Various engineers may have to rely upon the work of research chemists, physicists, and other scientists; input from financial and marketing arms of the enterprise must be factored in along the way. The entire process may take years. Each of these human actors makes decisions based on his own motives and on different types and amounts of information, and even the responsible executive at the end of the decisional line can possess only a small bit of the total information involved. Moreover, the corporate owners of the enterprise are usually far removed from most decisions of even the top executives.

The watershed case in products liability for the award of punitive damages is *Grimshaw v. Ford Motor Co.*⁸⁵ In *Grimshaw*, the plaintiff was injured when the Ford Pinto in which he was a passenger was rear-ended by another car.⁸⁶ When the other car struck the Pinto, the Pinto's gas tank ruptured and caused an explosion.⁸⁷

The plaintiff brought suit against Ford on a strict liability cause of action.⁸⁸ The jury awarded the plaintiff \$125 million in punitive damages, but the award was remitted by the trial court to \$3.5 million.⁸⁹ Ford appealed the punitive damages award on the ground that it "was statutorily unauthorized," "constitutionally invalid," supported by insufficient evidence, and excessive.⁹⁰

The plaintiff was required by California law to prove that the defendant was guilty of malice to recover punitive damages.⁹¹ California courts have interpreted the malice required for a punitive damage award as showing "a conscious disregard of the probability that the actor's conduct will result in injury to others."⁹²

In upholding the punitive damages award, the California Court of Appeal focused upon tests conducted by Ford that showed Ford's knowledge of the dangerous condition of the Pinto's gas tank.⁹³ The plaintiff introduced evidence of Ford's crash tests which showed "that the Pinto's fuel tank . . . would expose consumers to serious injury or death in a . . . collision."⁹⁴ The court found that there was evidence that "Ford could have corrected the hazardous design defects at minimal cost."⁹⁵ However, Ford decided against taking safety precautions after conducting a cost-benefit analysis that balanced the risk to consumers against the profit the Pinto would generate.⁹⁶

Id. (citation omitted).

85. 174 Cal. Rptr. 348 (Ct. App. 1981). See Owen, *supra* note 82. Professor Owen calls *Grimshaw* demonstrative of the "assimilation of the punitive damages remedy into the field of products liability." *Id.* at 3.

86. *Grimshaw*, 174 Cal. Rptr. at 359.

87. *Id.*

88. *Id.* at 362-63.

89. *Id.* at 358.

90. *Id.* at 363.

91. *Id.* at 380.

92. *Id.* at 381 (quoting *Dawes v. Superior Ct.*, 168 Cal. Rptr. 319, 319-22 (Ct. App. 1980)).

93. *Id.* at 384.

94. *Id.*

95. *Id.*

96. *Id.*

Ford contended that because the plaintiff did not introduce evidence to prove that Ford had ratified malicious conduct, it was not liable for punitive damages.⁹⁷ In rejecting this argument, the court noted that evidence showed that several Ford employees were aware of the report.⁹⁸ While the court admitted that the evidence was circumstantial, it concluded that a "jury could reasonably find that Ford's management decided to proceed with the production of the Pinto with knowledge of test results revealing design defects which rendered the fuel tank extremely vulnerable on rear impact at low speeds and endangered the safety and lives of the occupants."⁹⁹ Such a finding, the court concluded, was sufficient to show malice on the part of Ford.¹⁰⁰ Hence, the court upheld the punitive damages award.¹⁰¹

Since *Grimshaw*, most jurisdictions have required plaintiffs seeking punitive damages in a products liability case to prove that a defendant had some level of knowledge of the danger of its product.¹⁰² Most jurisdictions

97. *Id.*

98. *Id.* at 385.

99. *Id.*

100. *Id.*

101. *Id.* at 399.

102. Examples of required conduct include: "wanton or reckless," *Racich v. Celotex Corp.*, 887 F.2d 393, 397 (2d Cir. 1989) (applying New York state law); "maliciousness" or "an intentional or willful failure to inform or act," *Wilkert v. Northern Sand & Gravel, Inc.*, 402 N.W.2d 178, 183 (Minn. Ct. App. 1987); "consciously, i.e. knowingly, indifferent to [plaintiff's] rights, welfare and safety," *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1093 (5th Cir. 1991); "a high degree of moral culpability . . . which manifests a 'conscious disregard of the rights of others or conduct so reckless as to amount to such disregard,'" *Home Ins. Co. v. American Home Prods. Corp.*, 550 N.E.2d 930, 934 (N.Y. 1990) (citation omitted) ("[s]uch conduct need not be intentionally harmful but may consist of actions which constitute willful or wanton negligence or recklessness."); "egregious" conduct, *Fischer v. Johns-Manville Corp.*, 472 A.2d 577, 581 (N.J. Super. Ct. App. Div. 1984), *aff'd*, 512 A.2d 466 (N.J. 1986) (such conduct is egregious if it is "a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences"); "grossly negligent or recklessly indifferent to the rights of others," *Johnson v. Colt Indus. Operating Corp.*, 797 F.2d 1530, 1536 (10th Cir. 1986) (applying Kansas state law); "reckless disregard for the safety of product users, consumers or others who were injured by the product," *Ames v. Sears, Roebuck & Co.*, 514 A.2d 352, 359 (Conn. Ct. App. 1986); "an intentional, willful wanton oppressive and malicious manner," *Croteau v. Olin Corp.*, 644 F. Supp. 208, 213 (D.N.H. 1986) (applying New Hampshire law); "specific knowledge of a product defect and its potential for harm," *Nigh v. Dow Chem. Co.*, 634 F. Supp. 1513, 1516 (W.D. Wis. 1986) (citing *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 444 (1980)) (applying Wisconsin state law); "guilty of oppression, fraud, or malice," *In re Related Asbestos Cases*, 543 F. Supp. 1152, 1157 (N.D. Cal. 1982) (applying California state

require proof that a defendant's conduct was "willful, wanton, malicious, conscious, or [in] reckless disregard of the rights of others."¹⁰³ While these jurisdictions place emphasis on the intent of the manufacturer, these traditional standards differ from M.A.I. 10.04 in that they require a subjective analysis of the defendant's conduct.¹⁰⁴

A few jurisdictions, like Missouri, differ from the majority approach and require proof of a more objective level of knowledge on behalf of the defendant to obtain punitive damages in a products liability case.¹⁰⁵ Many courts requiring proof of the defendant's knowledge have upheld an award of punitive damages. For example, in *Fischer v. Johns-Manville Corp.*, a New Jersey court was confronted with many of the same factual issues as the

law); "reckless disregard for the public safety," *Thiry v. Armstrong World Indus.*, 661 P.2d 515, 518 (Okla. 1983); "willful misconduct, malice, fraud, wantonness or oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences." *Wammock v. Celotex Corp.*, 835 F.2d 818, 822 (11th Cir. 1988) (applying Georgia law).

103. Owen, *supra* note 82, at 21.

104. See, e.g., David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1365-66 (1976). One court has described this article as a "signal event" which persuaded many jurisdictions to determine that there is "neither a conceptual nor a public policy bar to the allowance of punitive damages in products liability actions." *Fischer*, 472 A.2d at 582.

105. For example, in Maryland, "[w]anton or reckless conduct" consisting of "direct evidence of substantial knowledge on the part of the manufacturer that the product is, or is likely to become, dangerous, and a gross indifference to that danger" will support an award of punitive damages. *Eagle-Ficher Indus. v. Balbos*, 578 A.2d 228, 258-59 (Md. Ct. Spec. App. 1990). According to the Maryland Court of Special Appeals, "Under this standard, the plaintiff must prove that the defendant conducted himself in an extraordinary manner characterized by a wanton or reckless disregard for the rights of others." *Id.* at 259.

The New Jersey Supreme Court has held that in a failure-to-warn case in which strict liability is applied, punitive damages are available upon proof that "a manufacturer is (1) aware of or culpably indifferent to an unnecessary risk of injury, and (2) refuses to take steps to reduce that danger to an acceptable level." *Fischer*, 512 A.2d at 480. The court held that the standard could be "met by a showing of a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences." *Id.* (quoting *Berg v. Reaction Motors Div.*, 181 A.2d 487, 496 (N.J. 1962)).

Florida also requires that a plaintiff in a products liability case show that defendant "have knowledge that its product is inherently dangerous to persons or property and that its continued use is likely to cause injury or death, but nevertheless continues to market the product without making feasible modifications to eliminate the danger or making adequate disclosure and warning of such danger." *Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242, 249 (Fla. Dist. Ct. App. 1984).

Missouri Court of Appeals was in *Celotex*.¹⁰⁶ Like William Angotti, the plaintiff, James Fischer, had handled asbestos as an employee of the defendant.¹⁰⁷ As in *Celotex*, the plaintiffs, Fischer and his wife, were required to prove that the defendant-manufacturer had "actual knowledge . . . of the hazards of asbestos during the time of plaintiff's exposure."¹⁰⁸

In answer to the plaintiffs' interrogatories, the defendant, Johns-Manville, admitted that by the early 1930s it had knowledge that a "relationship" existed between asbestos and asbestosis.¹⁰⁹ Further, the defendant acknowledged that by the early 1940s it was aware of the danger asbestos posed to those involved in the manufacture of the product.¹¹⁰

The President of the Industrial Health Foundation [Foundation], Dr. Daniel C. Braun, testified on behalf of the plaintiffs.¹¹¹ The Foundation, to which Johns-Manville belonged, conducts extensive research in the area of occupational diseases.¹¹² According to Dr. Braun, a collection of articles published in scientific journals was sent monthly to the Foundation members beginning in 1937.¹¹³ The subject matter of these articles was occupational disease.¹¹⁴ Evidence presented by the plaintiffs showed that the articles addressed the dangers of asbestos exposure and various preventative measures to protect workers from such dangers.¹¹⁵

By 1933, asbestos workers had filed claims against Johns-Manville.¹¹⁶ The plaintiffs introduced evidence that in November of 1933, the defendant's executive committee had decided to take affirmative steps toward settling these and future actions filed by employees against the corporation.¹¹⁷ The

106. *Fischer*, 472 A.2d at 580.

107. *Id.* at 579.

108. *Id.* at 580.

109. *Id.* Specifically, the defendant admitted the following:

[T]he corporation became aware of the relationship between asbestos and the disease known as asbestosis among workers involved in mining, milling and manufacturing operations and exposed to high levels of virtually 100% raw asbestos fibers over long periods of time by the early 1930s. The corporation has followed and become aware of the general state of the medical art relative to asbestos and its relationship to disease processes, if any.

Id.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

plaintiffs also introduced evidence that the defendant and representatives of a rival asbestos supplier met to discuss the risks to which the asbestos industry was exposed.¹¹⁸

The *Fischer* court found the "most damning of all" evidence to be the actions of Sumner Simpson.¹¹⁹ Simpson served as president of Raybestos, an asbestos supplier.¹²⁰ The editor of *Asbestos*, the periodical of the asbestos industry, wrote to Simpson in October, 1935.¹²¹ In the letter, the editor suggested that, in response to increasing negative publicity asbestos had been receiving, an article detailing asbestos' positive attributes was necessary.¹²² Simpson then forwarded a copy of the letter to Vandiver Brown, the secretary at Johns-Manville.¹²³ In his letter to Brown, Simpson stated that "the less said about asbestos, the better off we are."¹²⁴

In 1941, Brown wrote Simpson in response to a proposal by *Asbestos'* editor to publish a book review claiming that pneumoconiosis was linked to exposure to asbestos.¹²⁵ Brown wrote that many of *Asbestos'* subscribers would disfavor such an article. Therefore, he believed that the book review should not be published.¹²⁶

Finally, the plaintiffs introduced testimony taken from Dr. Kenneth Smith.¹²⁷ Smith, a physician, was hired by Johns-Manville in 1944; he served as medical director of Johns-Manville's Canadian corporation.¹²⁸ Smith testified that from the outset of his employment, he regularly saw employees with asbestosis, and he repeatedly advised Johns-Manville that these employees receive job reclassifications to avoid asbestos exposure.¹²⁹

After reviewing this evidence, the court found that Johns-Manville "acted knowingly and deliberately in subjecting [plaintiff James Fischer] as an asbestos worker to serious health hazards" during the relevant time period.¹³⁰

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 581.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 587. The court was persuaded thusly by plaintiff's evidence: It is indeed appalling to us that Johns-Manville had so much information on the hazards to asbestos workers as early as the mid-1930s and that it not only failed to use that information to protect these workers but, more

The New Jersey Supreme Court upheld the punitive damages award, finding that the plaintiffs' evidence showed that Johns-Manville "actually took affirmative steps to conceal this information from the public."¹³¹

Despite the similarity in evidence between the two cases, *Fischer* and *Celotex's* different results are due to a difference in focus between the two courts. In *Fischer*, the court stated that the issue was whether Johns-Manville had actual knowledge "of the hazards of asbestos" during the time plaintiff was exposed to asbestos as an employee of defendant.¹³² In *Celotex*, however, the court sought a finding on a much more narrow issue: whether Philip Carey had actual knowledge of the hazards of asbestos to *insulators* during the time of William Angotti's exposure.¹³³ The difference in result is a product of the contrast between these two issues.

B. Policy Considerations Underlying Punitive Damages

Missouri courts award punitive damages to advance two policy goals. First, punitive damages are intended to punish the defendant for misconduct. Second, punitive damages are used to deter similar misconduct by the defendant in the future.¹³⁴

1. Punishment

Punitive damages punish a defendant in various ways.¹³⁵ First, awarding punitive damages serves to help a plaintiff's emotional state by seeing the defendant suffer the brunt of punitive damages.¹³⁶ Second, punishment of a manufacturer-defendant provides a mechanism for society to get even with

egregiously, that it also attempted to withhold this information from the public.

Id.

Further, the court was persuaded by strong policy considerations: Johns-Manville was the leader of the Canadian asbestos industry. We are therefore of the view that the jury could properly have inferred that the scope and content of Bell's knowledge were the same as Johns-Manville's and, consequently, that it acted with similar conscious and flagrant disregard of the safety and health of others. We are satisfied that conduct met the standard of egregiousness which must underlie a punitive damages award.

Id. at 588.

131. *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 481 (N.J. 1986).

132. *Fischer*, 472 A.2d at 580 (emphasis added).

133. *Celotex*, 812 S.W.2d at 750.

134. *Lewis v. Envirotech Corp.* 674 S.W.2d 105, 113 (Mo. Ct. App. 1984).

135. Owen, *supra* note 104, at 1279.

136. *Id.*

one who has engaged in misconduct.¹³⁷ Third, punishing a defendant with punitive damages serves to reward the law-abider indirectly and reminds and educates the defendant-manufacturer of the legal values of society.¹³⁸

Two questions must be answered to determine whether punitive damages effectively punish defendant-manufacturers. First, when a court awards punitive damages in a products liability case, is the manufacturer punished? Second, when punitive damages are awarded in products a liability case, do they represent a fair and principled form of punishment?¹³⁹

In response to the first consideration, one problem with punitive damages is that their burden is often not shouldered by the actual wrongdoer at a corporation.¹⁴⁰ Instead, the shareholders, who hold little decision-making power, may be forced to absorb the full impact of punitive damages.¹⁴¹

An analysis of the second question reveals a number of inequitable ramifications of punitive damages in the products liability setting.¹⁴² For instance, many jurisdictions require a plaintiff to prove "malice or reckless conduct" by the defendant; such language is awkward when framed against the conduct of a corporation.¹⁴³ Further, such language does not provide corporate decision-makers with a guideline of acceptable conduct.¹⁴⁴

In many instances, the wrong being punished is the result of a single design defect. Allowing more than one plaintiff to recover punitive damages in these circumstances produces a level of punishment that is inequitable and unfairly burdensome.¹⁴⁵ Finally, there is concern among commentators that the defendant's compensatory damages case is unfairly prejudiced when the plaintiff can seek punitive damages in a strict liability setting.¹⁴⁶

137. *Id.* at 1280.

138. *Id.* at 1281. Owen states that "[b]y punishing the law-breaker, society indirectly rewards the law-abider The punishment of offenders thus reinforces the confidence of the law-abider in the basic fairness of the legal system and in the utility of his personal decision to obey the law." *Id.* Further, Owen states that "punishment serves as a reformatory device to educate the offender to society's legal values and to allow him to atone for his misdeed through suffering." *Id.*

139. Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 40 (1985-1986).

140. *Id.* at 40-41.

141. *Id.*

142. *Id.* at 41.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

2. Deterrence

Punitive damages are also used to deter similar misconduct from occurring in the future.¹⁴⁷ The ability of a court to deter continued misconduct by a manufacturer depends upon four factors.¹⁴⁸

First, potential wrongdoers must be aware that their contemplated conduct is forbidden and punishable.¹⁴⁹ Second, avoiding the punishment must be within the control of the potential wrongdoer.¹⁵⁰ Third, the potential wrongdoer must want to avoid punishment by altering its conduct.¹⁵¹ The fourth factor is the extent the manufacturer seeks to avoid such punishable conduct.¹⁵²

The major argument that punitive damages cannot deter manufacturer conduct is that such an award is too unpredictable.¹⁵³ This criticism is bolstered by the variety of ways jurisdictions approach punitive damages in a products liability case.¹⁵⁴

A second reason punitive damages may not deter corporate misconduct is due to the traditionally slow process of the civil justice system.¹⁵⁵

147. Owen, *supra* note 104, at 1283.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* According to Owen, this goal serves as an additional deterrent effect: [T]he intensity of such a desire in any particular case will depend upon the manufacturer's perception of the likelihood of his being identified and punished as well as on the likely severity of punishment. The availability of punitive damages in products liability cases should make it far more likely that offending manufacturers will be exposed and punished since the remedy supplies an additional financial incentive to both the victims and his attorney to uncover and prove the proscribed behavior.

Id. at 1285.

153. E. Donald Elliot, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA L. REV. 1053, 1057 (1989). Elliot has summarized how the unpredictable nature of punitive damages fails in deterring misconduct:

The modern conception of tort law as a regulatory system depends on predictability, so that the actions taken *ex post* in one case can be used by others as *ex ante* incentives to guide future behavior. From the perspective of potential tortfeasors, punitive damages are an unguided missile: it may or may not strike them, but there is very little that potential tortfeasors can do to alter their risks of punitive damages.

Id.

154. *See supra* note 102.

155. Elliot, *supra* note 153, at 1062.

Products liability cases against corporations are particularly slow, and far too often a corporation is punished for manufacturing decisions that were made decades before the suit.¹⁵⁶

A third concern is that the deterrent effects of punitive damages may be diluted by the remote chance that a corporate decision will result in a punitive damages sanction.¹⁵⁷ Certainty of punitive damages is essential to efficient deterrence.¹⁵⁸

Finally, while the magnitude of the sanctions increases the deterrent effect, courts have reduced deterrence by reducing large punitive damages verdicts.¹⁵⁹ Further, corporate insurance against punitive damages weakens the effect on the corporate defendant.¹⁶⁰

*C. Do Missouri Courts Further the Goals of Punishment
and Deterrence by their Interpretation
of M.A.I. 10.04?*

These policy concerns can best be satisfied by focusing upon the "state of mind" of the defendant-manufacturer.¹⁶¹ But what "state of mind" must a defendant possess to justify punitive damages? Professor Owen answers that in situations where "a manufacturer intentionally misleads consumers into believing that its product is safer than it actually is," punitive damages will usually be appropriate.¹⁶² This situation occurred in *Grimshaw*: the defendant withheld safety test results from the public that showed its product posed a danger to consumers; more importantly, the defendant chose to ignore the safety results after determining that the profit from the product outweighed the risk it posed to consumers.¹⁶³ This is the easy situation; it is clearly the type of conduct that should be punished and deterred. But what about the more difficult cases, such as *Celotex*, in which a manufacturer is seemingly aware of a potential danger posed to consumers but takes no affirmative steps

156. *Id.* Elliot attributes the slow nature of such cases to the "adoption of the 'discovery rule' for starting the statute of limitations." *Id.* Therefore, "it is only a legal fiction that leads us to consider the corporation to be the 'same person' that committed the evil acts." *Id.* at 1063. Elliot compares the effect of punitive damages under such circumstances to "'corruption of the blood,' the ancient common law remedy that punished the children for the sins committed by the parents." *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 1065-66.

160. *Id.*

161. Owen, *supra* note 100, at 1362.

162. *Id.*

163. *See supra* note 96.

to reduce such danger? Professor Owen calls for a standard of constructive knowledge in these situations: punitive damages should be awarded where a plaintiff proves that the defendant was "constructively aware" that its product posed a danger to consumers that outweighed the slight cost of taking safety measures to prevent such risk.¹⁶⁴ This standard is more narrow than that of the majority of jurisdictions.¹⁶⁵ By following a standard that awards punitive damages only upon a showing of constructive knowledge, a court ensures that it is punishing and deterring inappropriate conduct.¹⁶⁶

Missouri courts follow Professor Owen in focusing upon the defendant's "state of mind." The reason for M.A.I. 10.04's focus was explained in *Racer*, which held that requiring proof of defendant's knowledge of the product's danger is necessary to award punitive damages.¹⁶⁷ The proof is required because it ensures a level of predictability as juries review a products liability case.¹⁶⁸ As noted, Missouri courts award punitive damages to punish and deter defendants.¹⁶⁹ By requiring a court to find sufficient fault—actual knowledge—a court ensures that the goals of punishment and deterrence are sufficiently met by the jury. However, the drafters of M.A.I. 10.04 differed from Professor Owen's standard by requiring proof of actual rather than constructive knowledge.

Does Missouri's "actual knowledge" requirement therefore ensure that the policy goals of punitive damages are being attained by Missouri courts? Professor Owen identifies two problems with requiring a plaintiff to prove that a defendant had "actual knowledge" of the danger or defect of its product.¹⁷⁰ First, Professor Owen maintains that the actual knowledge standard fails to confront the situation where the manufacturer is "completely indifferent to consumer safety."¹⁷¹ Second, he contends that the "actual knowledge" standard fails because it does not presume that a manufacturer has "expert knowledge in its particular field" and therefore is aware of available safety measures that might reduce the danger its product poses to consumers.¹⁷²

164. Owen, *supra* note 104, at 1362-63.

165. *Id.* at 1364. Owen states that "[m]ost products liability cases articulating such a standard have adopted traditional punitive damages phraseology, such as 'willful and wanton,' 'malice, oppression, or gross negligence,' or 'ill will, . . . actual malice, or . . . under circumstances amounting to fraud or oppression.'" *Id.*

166. *Id.* at 1363.

167. *Racer v. Utterman*, 629 S.W.2d 387, 396-97 (Mo. Ct. App. 1981).

168. *Id.* at 397.

169. See *supra* text accompanying note 134.

170. Owen, *supra* note 104, at 1363.

171. *Id.*

172. *Id.*

The court of appeals addressed both of these issues in *Celotex*. The court acknowledged that Missouri courts do not allow a plaintiff to submit a claim for punitive damages based on a theory that the defendant had "constructive knowledge" of the product defect or danger.¹⁷³ However, the court expanded Missouri law to deal with situations such as Professor Owen's "indifferent manufacturer." The court stated that it did not rule out affirming an award of punitive damages where a plaintiff introduced evidence sufficient to put the defendant on notice of the danger of its product; in other words, the court might uphold a punitive damages award where a plaintiff proves that information was available to the defendant that showed that the defendant's product "was actually known to constitute a health hazard to a given class of individuals and the defendant consciously chose to ignore the available information."¹⁷⁴ The court, however, rejected the application of such a theory in *Celotex*, stating that the evidence was insufficient to have put Philip Carey on such notice.¹⁷⁵

The court also dealt with Professor Owen's proposition that a manufacturer should be held to an expert knowledge standard in its field and be aware of the dangers of its product. The court determined that the evidence produced at trial was insufficient to show that scientific knowledge was available to Philip Carey from which the dangers of asbestos could be learned:

The record here shows that information in regard to the harmful effect of asbestos was still developing, but it does not establish that, at the relevant times herein, there was already information available to show that Philip Carey's finished products were actually known to present a health hazard to insulators. In other words, the record does not reflect that scientific knowledge even existed, at the relevant times herein, to establish legal causation sufficient to submit punitive damages against Celotex for the injuries of William Angotti as a result of his exposure, as an insulator, to Celotex's products. Without even a showing of scientific knowledge sufficient to establish legal causation, Celotex can not be held to have had actual knowledge of the danger to William Angotti on the basis of the record in this case.¹⁷⁶

The court of appeals was willing to hold Philip Carey to a standard of expert knowledge of the dangers of asbestos. However, in holding Philip Carey to this standard, the court required the plaintiffs to prove that "scientific knowledge" was available to Philip Carey at the time of Angotti's exposure.

173. *Celotex*, 812 S.W.2d at 746.

174. *Id.* at 746-47.

175. *Id.*

176. *Id.*

The plaintiffs' failure to meet this burden of proof resulted in the reversal of the punitive damages award.

D. What Might a Post-Celotex Court of Appeals Require for Punitive Damages in a Products Liability Case?

What is the lasting effect of *Celotex*? In a narrow sense, *Celotex* has expanded the scope of the punitive damages claim in a products liability action. By confronting Professor Owen's objection to the "actual knowledge" standard, the court actually tempers M.A.I. 10.04. The Western District of the Missouri Court of Appeals now appears to be willing to accept a level of proof below that of "actual knowledge" to satisfy M.A.I. 10.04. The court indicates that it might affirm a punitive damages award upon proof that the defendant had information which showed the "health hazard" its product posed to a specific group.¹⁷⁷ The information would put the defendant on notice of the dangers of its product.¹⁷⁸ The standard, however, remains a difficult burden for a plaintiff to meet; the information about a product's health hazard must be backed up by "scientific knowledge." Mere forecasts of danger, awareness of potential liability from the product, and incidents of disease or accidents resulting from the product are insufficient to put the defendant on such notice.¹⁷⁹

Therefore, the practical effect of the standard places a great burden of proof on an injured plaintiff. In his dissent, Judge Kennedy recognized this heavy burden, stating that the effect of the *Celotex* opinion is "that defendant's knowledge of the defective product's danger, in order to justify a punitive damages submission, is not merely 'actual' knowledge, but is specific, exact and certain knowledge."¹⁸⁰ Judge Kennedy was willing to infer that Philip Carey had actual knowledge that asbestos was dangerous to insulators because Philip Carey knew of asbestos' hazardous effects.¹⁸¹ The court in *Fischer v. Johns-Manville Corp.* was also willing to make that inference.¹⁸² However, the majority in *Celotex* was unwilling to make such a jump. Instead, the court requires more exacting evidence of a defendant's knowledge.

What "scientific knowledge" could the plaintiff have produced in order to prove that information was available to Philip Carey about health hazards to insulators? Certainly this standard would be satisfied by the type of

177. *Id.* at 746.

178. *Id.*

179. *See supra* notes 66-72.

180. *Celotex*, 812 S.W.2d at 752.

181. *See supra* note 78.

182. *Fischer v. Johns-Manville Corp.*, 472 A.2d 577, 580 (N.J. Super. App. Div. 1984), *aff'd*, 512 A.2d 466 (N.J. 1986).

"smoking gun" that existed in the *Grimshaw* case. But evidence of knowledge and malice of this level is rarely found. Some guidance is provided by *Wolf v. Goodyear Tire & Rubber Co.*¹⁸³ The Western District of the Missouri Court of Appeals upheld the punitive damages award in *Wolf*; the court was persuaded by evidence that proved an affirmative admission by the defendant that its product was dangerous.¹⁸⁴ Therefore, the court of appeals likely would have upheld the punitive damages award if the plaintiffs had produced evidence that proved that Philip Carey acknowledged that asbestos posed a danger to insulators. However, absent evidence of such an affirmative admission, the plaintiff had the burden of proving that "scientific knowledge" existed from which Philip Carey knew or should have known that asbestos was dangerous to insulators. This was a great burden on the plaintiffs—one which they could not meet—yet it represents a retreat from the burden of proving true actual knowledge.

VI. CONCLUSION

The *Celotex* opinion is the result of the conservative standard of M.A.I. 10.04. It shows the reluctance of Missouri courts to recognize punitive damages in a products liability setting. Missouri Approved Instruction 10.04 is an exacting standard; it not only requires a plaintiff to prove a manufacturer "showed complete indifference to or conscious disregard for the safety of others," but also that the manufacturer had knowledge of the product's defect or danger. In this respect, M.A.I. 10.04 presents a more difficult barrier to punitive damages than the more subjective standards of other jurisdictions. What makes the barrier much more difficult to overcome is the conservative approach Missouri courts have taken in interpreting M.A.I. 10.04. One result that is clear, at least in the Western District of Missouri, is that a plaintiff likely cannot recover punitive damages without proving that actual scientific knowledge of the product's danger was available to the defendant. While it remains a difficult burden, the Western District has slightly lowered the barrier separating plaintiffs from a punitive damages award.

CHRISTOPHER P. RACKERS

183. 808 S.W.2d 868 (Mo. Ct. App. 1991).

184. *Id.* at 872-73.

