ORAL ARGUMENT — 9-15-99
98-0429
LOUISIANA PACIFIC V. ANDRADE

MITCHELL: The primary issue in this case is the legal sufficiency of the evidence to support a finding of gross negligence against a corporation for an omission that caused injury to the plaintiff. The particular omission in this case was the failure to effectively lock-out the power source to the exposed rails of an overhead crane.

This case isn't about ordinary or simple negligence. That aspect of the case has been settled and the plaintiff has received compensation for his injuries. Rather this case is about drawing the line between simple negligence and gross negligence; between cases that call for compensation of an injured plaintiff and those extraordinary, those exceptional cases that call for punishment of a defendant. Because this truly is the purpose of exemplary damages as this court has said many times, and that is, to punish morally culpable behavior.

I think this distinction is particularly important in this case and cases like this where the gross negligence that's alleged is not an affirmative act, it's an omission. And in fact, this court has previously said that when a mere act of omission or nonfeasance to be punishable by exemplary damages should reach the borderline of quasi criminal behavior. This is a very high threshold and the evidence in this case simply doesn't reach that threshold.

The law in Texas is now clear that there are two components of gross negligence. There is an objective and a subjective component. The objective component of extreme degree of risk is not an issue in this appeal except insofar as it relates to the subjective component. And the subjective component requires that a defendant have actual knowledge, actual awareness of that extreme degree of risk but nevertheless proceed with conscious indifference.

So in short what distinguishes ordinary negligence from gross negligence is this mental attitude of the defendant. The defendant's knowledge and its actions in the face of that knowledge.

An additional consideration in this case is that the defendant is a corporation. And it's also clear in Texas that a corporate defendant can be held liable for exemplary damages only if the gross negligence can be attributable to the corporation itself. In this particular case the focus is even more narrow because the jury was specifically instructed that to find Kirby grossly negligent it would have to find that the gross negligence was authorized, ratified, approved or performed by a vice principal of Kirby.

I would like to talk a little bit about the standard and the scope of review in this legal sufficiency challenge. Generally appellate courts are admonished when conducting legal

sufficiency review to look only at the evidence that supports the verdict. But in certain circumstances there is a threshold issue. There's a threshold determination that the court needs to make. And that is in essence to determine what is evidence, what can be given probative value, and what is a legal effect of certain evidence.

As an example, this court has rejected the contention that it is confined only to evidence supporting the verdict in the context of reviewing legal sufficiency where there's a rebuttable presumption involved.

In *Robertson Tank Lines v. VanCleve*, the court realized that it needs to look at the entire record and the entire circumstances of the case to determine if the presumption was rebutted. This impacts the legal sufficiency review because if the presumption was rebutted, then it disappears. It has no legal effect. So in order to determine what the evidence was that's subject to the insufficiency review, the court first had to look at the entire record and the entire circumstances.

Now I submit that a similar analysis is warranted in this type of case where really what you are reviewing there is no direct evidence of the defendant's mental attitude. And in fact this court has held obviously that you don't need direct evidence, but circumstantial evidence given rise to an inference and an inference of a defendant's mental attitude. And I submit in order to judge that evidence the court needs to look at the entire circumstance and the entire record...

HANKINSON: Are you asking us to change the standard of review or is there a legal sufficiency of the evidence on a gross negligence finding?

MITCHELL: No. Not at all. What I am submitting is that much like the rebuttable presumption scenario a jury is entitled to draw inferences from the evidence. But the jury is entitled only to draw reasonable and logical inferences from the evidence. Also if the evidence is such that it could give rise to a number of different inferences no one of which is more probable than the others, then essentially the jury may not pick one of those inferences and a party may not pick one of those and say, This supports the verdict.

O'NEILL: If there was evidence that other companies within the industry had lock-out procedures and in fact it was an industry standard to have lock-out procedures for this type of dangerous equipment, and the testimony was that this company did not have lock-out procedures, why could the jury not infer from that conscious indifference?

MITCHELL: I have two answers to that. First, I would say that there obviously is evidence that other companies had lock-out/tag-up procedures and we do not contest that other companies had significantly more stringent lock-out/tag-out procedures than Kirby did at this time. I would contest phrasing this in terms of a standard in the industry, because that connotes that this was well known. And it may have been well known amongst those companies. I would submit that there is no

evidence in this case as to Kirby's knowledge of those other types of procedures. In contrast in *Mobil Oil v. Ellender*, there was evidence that Mobil Oil belonged to certain industry groups, safety council groups that sent out studies, information about the particular risks that was apparent. And that was the benzine exposure. So that showed that Mobil was aware of what was going on in other places.

Now the second aspect of my answer is that Kirby did have a lock-out procedure.

O'NEILL: But wasn't the evidence conflicting on that point, and if so, don't we have to assume that there was no lock-out procedure if there was evidence to support the inference that there was not?

MITCHELL: I don't believe that the evidence conflicted as to whether or not there was a procedure. What the evidence shows and this may be what you have in mind, there was testimony from Ronald Paul, who was the President of Kirby, and his testimony was in effect that there was no company-wide lock-out procedure. However, at the plant level, at the local level it was delegated to those persons who were in charge of each of the facilities. So the testimony here is that at the local level, at this Silsby facility there was a procedure. Now it was not a written procedure. But there was an oral policy that equipment would be locked-out. There is evidence that various means were used to effectuate this. In some cases there was a padlock.

O'NEILL: But wasn't there testimony specifically from employees that said they were not aware of any sort of lock-out procedure?

MITCHELL: They were not aware of any written procedure.

O'NEILL: Did they make that specification?

MITCHELL: I believe that they did.

ABBOTT: Did they say they were aware of any oral procedures?

MITCHELL: My recollection of the record is that they were aware of oral procedures.

ABBOTT: Those same employees whom you said were not aware of any written procedures?

MITCHELL: Yes. And in fact, Mr. Edward Kelly had at one point been asked to go lock-out this very piece of equipment, and he did so by placing a hask on the switch and placing a lock through that.

O'NEILL: But the fact that they knew how to lock-out the equipment doesn't necessarily

mean that they were aware of a standard for the company for a lock-out procedure. And I was under the impression that employees of the company had testified that they were aware of no particular lock-out procedure written or oral.

MITCHELL: I have a different recollection of the record. And that is simply that there were not safety meetings, that there was not a formal written procedure. And again, there is no question that there were deficiencies in this procedure. And that is why negligence was no longer an issue. But there was a procedure. And in fact, if you look at some of the evidence that Andrade himself points out, and he will point to pictures., and he says, Look there are wires all through these switchers, that there's an occasional lock. In fact, in a sense, those pictures support Kirby's position that even with its deficiencies this policy generally worked.

O'NEILL: Again, let's talk about the policy. What policy was there in the record in terms of not how to switch the equipment off physically, but in terms of what happened to the key that would control the power on and off?

MITCHELL: I would have to agree that there was not a key control policy, that that was somewhat ad hoc. And in this particular case what happened, Mike Gregory testified that he locked-out the equipment. Ollie Pike testified he saw him lock-out the equipment. Gregory gave the key to Pike and Pike gave the key to Keith Rogers, who unfortunately subsequently died. And no one knows what happened to that key. And that is a problem in the procedure that was followed in this case. And again, there is that testimony that this is what happened in this very case, that it was locked-out and then subsequently became unlocked.

ENOCH: Do you agree with the proposition that an equipment risk could be so great that merely the absence of a policy on how to turn it off can be gross negligence?

MITCHELL: I would imagine that in certain circumstances that that could be true. In the circumstances of this case I would say that that's not true.

ENOCH: What would be the difference?

MITCHELL: One of the significant aspects of this case and one of the reasons I think we have to focus closely on what happened at this particular time in this particular case is that at this time there was no reason for anyone to switch that machine on. This is a different situation than if you have a working facility where functions are going on and one particular piece of machinery is being shut down for repair or someone has to work in that vicinity. What happened in this case was that that facility was shut down for asbestos removal. At the time that this accident occurred, the facility was closed to Kirby personnel. The only people that were supposed to be in that building at all were the asbestosis removal people. So in this particular circumstance, turning off the equipment was not unreasonable, there was not a knowledge that there would be any likelihood of that presenting an extreme risk of danger because there was no one in that building that had any

reason to turn it back on. And that's essentially the mystery in this case. And what the plaintiff didn't prove is how it was turned back on, why it was turned back on, by whom it was turned back on.

O'NEILL: But doesn't the mystery in and of itself indicate the problem's caused by lack of a procedure fr keeping track of the key? Isn't that in itself evidence of how dangerous not having such a policy can be?

MITCHELL: I think perhaps in hindsight. But as the court is well aware, this needs to be viewed at the time of the defendant's conduct. And up until that point there is no evidence in this record that there had been any other accident arising from this kind of lockout policy, even any near call, any mishap. So up until this point that this admittedly tragic accident occurred, there was not that actual subjective knowledge and any evidence of actual conscience indifference.

ABBOTT: Wouldn't this be one where you want us to look at all the evidence in the case, consider the mysteries and the nuances, and when considering that evidence conclude that it does not amount to gross negligence? The consequence being this and that is, that you want us to render a decision in this case based upon the facts of this case that apply only to this case without us announcing any meaningful legal principle in this case that applies to all cases in the State of Texas.

MITCHELL: I don't know that that's necessarily true. And first, I think there is an additional step to what I am asking the court to do in terms of looking at the entire record. Because I am not really asking the court to change the standard of review...

BAKER: That was going to be my question. You said look at the entire record, but what is your view on how an appellate panel would review the entire record? What is the panel supposed to be looking for under your viewpoint of using the statement but look at the entire record?

MITCHELL: What I would be asking an appellate panel to look at is in view of the entire record and the entire circumstances what are the reasonable inferences that can be drawn? And I think particularly because of - and this I think perhaps is where this case has somewhat more widespread impact than just these facts. Because you're dealing with an inference of a mental attitude.

BAKER: Does that lead to a problem for a court of last resort, such as ours, that you're processes you are going through now basically lends itself to a weighing of all those factors to conclude what inferences the fact finder is going to rely on to reach a conclusion in the fact that we are prohibited from making those kind of judgments?

MITCHELL: I understand that this court is not authorized to weigh the evidence to conduct a factual sufficiency review if you will. But, by the same token it's a legal principle that a jury cannot base its verdict on an unreasonable inference.

BAKER: The no evidence situation is something that a trial judge looks at too doesn't he or she?

MITCHELL: Yes.

BAKER: To determine, Well should I send this case to the jury or not. And so isn't the function of the no evidence review by an appellate court to see whether there is something in the record of more than a scintilla that would allow that judge to send the case to the jury for the jury to make those factual determination, and not whether our function is to view the entire record with the effort to conclude what inferences are proper or not proper from the entire record, and that's where our dilemma is on what I sense you are asking the court to do here?

MITCHELL: Again, it goes back to one of my earlier statements that I do think that it's the obligation of the TC's, the CA's, and this court to determine, as you say if what you need is a scintilla of evidence, it must be evidence, it must be something that can be given legal effect. An unreasonable inference cannot be given legal effect. If there are equally probable inferences, you cannot choose one and give it legal effect. And essentially if that is the state of the record, then there is no evidence to support the jury's verdict.

BAKER: If you look at the record to determine whether the evidence that supports a jury finding has legal effect or not, that's a little different review than is there something there that supports sending it to the jury? That's another facet of a no evidence review. Truly if there's something in the record but you can't consider it for a legal reason it's obviously no evidence. But if there is something in the record that supports the jury's fact finding and it's properly admitted, then where are we?

MITCHELL: I think this is - perhaps we're not understanding each other. And it's my position that if the evidence doesn't support the inference, if there's a logical leak or if there is another inference to be drawn, then you don't have evidence from which the jury could reach its verdict, from which a reasonable and fair minded jury could reach that particular verdict.

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RESPONDENT

QUINN: Luis Andrade is asking this court to affirm the decision of the CA below in all respects. This accident happened on Valentines Day, 1990, when Luis Andrade, his first day on the job, was at the Kirby facility in Silsby, Texas as a business invitee. That morning he was instructed by his employer to climb up a high ladder to some windows about as high as the top of this courtroom to put some plastic over these windows. Mr. Andrade's employer had been informed that there were some electrical rails there, the employer had been informed by Kirby that the rails would be made safe, the energy would be turned off, and it would be safe to work. Unfortunately, that wasn't the state of the facts. Mr. Andrade suffered injuries, a depressed skull fracture that has

left him with lifetime of needing care and other life altering orthopaedic injuries.

ENOCH: In this case it appears to me to be your point that this accident occurred, that there was not a formal policy to lock it out and that equals gross negligence?

QUINN: That's just part of it. The evidence does show here from Mr. Gregory who at one time was the manager of this power plant, from a David Jones who was a former employee, but was a foreman in this very plant, that there was never any lock-out/tag-out safety procedures at this power plant that they had seen in the 10 years they had been there.

ENOCH: The lock-out is a way of making sure that it can't be turned back on. That has nothing to do with the fact that it's turned off.

QUINN: That's right. It's a safety procedure to keep this type of accident from happening. It is well recognized back before 1950 under the facts in this record.

ENOCH: And the question is, that it was in fact on, that there was not a policy of locking it to prevent it from being on, and that equals gross negligence?

QUINN: I don't think the court has to go that far to decide this case. But I think that the court in analyzing this case and other cases could look at the corporate policy or the absence of the corporate policy, and if there is no policy, then the facts of the case could warrant under certain circumstances a finding of gross negligence. I think it depends on the degree of the potential danger and the hazard.

ENOCH: Would the danger be from the injury that occurred here, or would the danger be that there was a propensity for the machinery to be turned on?

QUINN: Well industries learned over hundreds of years from its mistakes. And there have been thousands of reported cases where the machine being turned back on has injured and killed people, and that's the reason and the need for the policy. For safety policies, this court has recognized long ago and actually before *Ft. Worth Elevators v. Russell*, 1934, that corporations can be found guilty of gross negligence for not providing the proper regulations and rules and policies to provide safety.

GONZALES: Would you also look at what else in this case Kirby did to provide warning of the danger?

QUINN: I think in a legal sufficiency review as Justice Baker was asking about, I think that you would look at all the evidence. But you would have to take the inferences in the light favorable to the plaintiff. But this court has instructed us in *Moriel* and later in *Ellender*, and in other cases, that we do have to look at all of the evidence. But I don't think that evidence of some

care by Kirby in this case would relieve them of responsibility for gross negligence.

OWEN: But you agree there has to be actual subjective intent in this particular case? Actual subjective awareness of the extreme risk of harm and conscious indifference ____?

QUINN: That's what the court has told us in *Ellender, Moriel* and *Sanchez*.

OWEN: What evidence is there is the record of that actual subjective intent?

QUINN: First of all, the direct evidence of the president that they didn't have any corporate safety policies in 1990 on anything. That was Ron Paul the president of the corporation's testimony. I've never seen that in any other case. He said, In spite of long, well-settled law about duties of premises owners, he says that Kirby - it was their corporate policy that they had no obligations to contractors coming on its premises. That safety was solely the duty of the contractors. So that's direct evidence.

HANKINSON: And he was contradicted by the other employees who were on sight?

QUINN: He was contradicted by one employee, Mr. Pike, who was the manager of the facility at the time. He says, Well, yeah, we did have one. But he was contradicted by other employees saying there wasn't a lock-out/tag-out procedure.

HANKINSON: Is your position then, that it's the absence of the corporate policy attributable to the corporation itself or to the president of the company as you say that shows the actual subjective element under *Moriel*?

QUINN: That's one point of evidence.

HANKINSON: What else?

QUINN: The other points would be that - there's a mystery here about what happened with these keys because of the lack of a policy. Well, the jury in this case and they admit was either to believe that maybe the crane was never locked out. Well Mr. Ollie Pike who is the manager of that facility said, That it needed to be locked out. Mr. Gregory who was the manager of just the power plant as opposed to the whole facility like Mr. Pike says, It was an obvious safety hazard for this crane to be turned on. Well if Mr. Pike and Mr. Gregory didn't lock-out the crane, they were aware of it.

HANKINSON: But Mr. Gregory and Mr. Pike say that the crane was locked out. One locked it out and one says he saw him lock it out.

QUINN: That was their explanation.

HANKINSON: Can you in any way looking at that piece of evidence about these gentlemen who were managers on site, who took responsibility for locking it out, is there anyway that that evidence becomes part of your gross negligence evidence?

QUINN: If they locked it out, and the jury was free to believe they didn't, the only other inference is, either they locked it or they didn't. If they did lock it out, Mr. Pike, the vice principal has the key. And if it got unlocked, the vice principal got it unlocked and didn't get it locked back, knowing full well that the asbestosis workers like Mr. Andrade were going to be working in that very area.

HANKINSON: So you disagree with that piece of the dissenting opinion the CA, which says that because the managers on site testified that the equipment was locked-out, and had walked through the contractor's people and showed them everything, and because this site was not a working site at that point in time, it was getting prepared for the asbestosis removal process, that you disagree and say that that in fact is some evidence because the jury didn't have to believe it?

QUINN: Right. If a witness gets up and lies, neither the jury nor the appellate court is bound by their testimony. They could all get up and lie and say, I didn't know it wasn't locked out. And there is no way to disprove that other than circumstantial evidence.

HANKINSON: Isn't your point though the fact that this gentleman touched the electrified rail and fell and hurt himself, that that is what is evidence of gross negligence because that means something must have happened before that caused the equipment to be on?

QUINN: The fact of the accident itself isn't enough evidence to support gross negligence.

HANKINSON: So then, what is the evidence of gross negligence?

QUINN: The fact that there was no corporate policy...

HANKINSON: We've talked about the corporate policy, and I was trying to clarify what you say is evidence, which is why I am focusing on the conduct of the defendant's employees at the location. And I'm trying to understand your theory as to that evidence. As I understand it, you say the jury was free to disbelieve those who testified that the equipment was locked out, and that coupled with the fact that the rail was electrified when your client touched it is enough to be gross negligence?

QUINN: That along with the testimony that the corporate people knew that if the power was on, that it was dangerous and likely to cause a serious injury. And that it was an obvious hazard.

HANKINSON: So disbelieving the only testimony at trial then becomes some evidence. Is that what you are saying?

QUINN: In this case judge, the logic tree only has two branches. Either they never locked it out, or they locked it out and it got unlocked. Under our position in this case, the jury's finding of gross negligence is supported by either branch of that tree.

HANKINSON: Why isn't that negligence as opposed to gross negligence? What is in there that takes it to the level of meeting the second prong of *Moriel*? It sounds like everyone agrees that that was negligence and there were deficiencies. What takes it to the next one?

GONZALES: Why couldn't this have been a momentary lapse of judgment?

QUINN: I think the test in *Ellender* really what the court did was look at the corporate policies and the actions surrounding the very event that *Ft. Worth Elevators* and *Ellender* say, We aren't isolated just to look at specific instances, we need to look at all the circumstances.

HECHT: But in *Ellender* people were using Benzine and everybody knew it. And they knew it was bad. Here, is there any evidence that when the plaintiff crawled up there anybody knew that those rails were on, because if they had sent him up there to work next to rails that they knew were on, of course, that would be conscious indifference?

QUINN: There was no confession by Kirby people. There is no direct evidence of that in the record.

HECHT: But even any circumstantial evidence that they knew or somehow should have been aware that the rails had become activated?

QUINN: There's one piece of evidence in the record that was unobjected to hearsay that the night before this accident, Kirby for some reason unlocked it to move a piece of equipment to the second floor. And that that was hearsay that the plaintiff's employer, the foreman heard the morning of the accident. But Mr. Pike according to this hearsay told the man to be quiet and got him away. The man who was explaining the situation. Nobody every admitted to that. But that's the only evidence in the record.

PHILLIPS: And it was unobjected to?

QUINN: It was unobjected to.

HECHT: But that still looks like evidence of negligence and not sending a guy up there to work in what you know is a dangerous condition?

QUINN: Sometimes some risks are so great that without a policy, you know that eventually you are going to have someone get injured or killed. This is one of those rare occasions where the risk is so great that the care needs to be greater.

O'NEILL: Would you concede that absent the corporate policy piece, this would be _____ evidence?

QUINN: If the evidence - with the inference in the record that Mr. Ollie Pike, the vice principal, knew it was unlocked, I think that that inference...

O'NEILL: So you would have to concede it. But getting back to the corporate policy issue. How do you respond to present counsel's statement that even if it was indifference not to have a policy, it was not conscious because there is no evidence that the company knew what was going on in the industry?

QUINN: They admitted - they wouldn't admit that they knew what was going on in the industry. There is no direct evidence in the record of that. The evidence is that these types of safety policies date back at least into the 1955 edition of the National Safety Council Book. Every industry in Southeast Texas, the poultry industry, the timber industry, the paper industry, the oil and the chemical industry, there is evidence that they all had very detailed, written detailed lock-out/tag-out procedures.

GONZALES: So you disagree with petitioner, there is a standard industry procedure?

QUINN: Under the evidence in this record, that's uncontested. Kirby never put in any evidence to the contrary.

O'NEILL: But there's no direct evidence - again I was curious about counsel's statement that there was no evidence that Kirby was aware of it. And to have conscious indifference you've got to show that Kirby was aware that written lock-out procedures were the industry standard or some type of lock-out procedure was the industry standard.

QUINN: Mr. Pike tried to testify that they had a lock-out procedure. But they couldn't find it.

ENOCH: It seems to me you mentioned this earlier. There's been a lot of discussion about the mental process here. Am I not correct that the position you take as the principle that govern's this case, is that there are some risks that are just so great that the mere absence of a policy on how to address that risk amounts to gross negligence?

QUINN: I would like to see the court adopt such a standard, but I don't think that the evidence in this case necessarily turns on that standard.

OWEN: Logically, I'm trying to follow through your argument on the policy. Let's suppose they had a written policy that said, Somebody has to lock it out, put a hask through it, take a lock and do the key. They didn't have the other procedures that some industries have: tagging, all that. They had a written policy that was the same as what they say their oral policy was. And then we have the same evidence we have here. What evidence would there be of gross negligence?

QUINN: Just the evidence of Mr, Pike, the vice principal, knowing that it's unlocked. If you believe the jury's inferences from the evidence.

OWEN: The fact that he didn't follow the policy?

QUINN: Yes.

OWEN: So it's not really whether it's written or oral, it's the fact that he didn't follow whatever the policy was?

QUINN: And they didn't have a policy in this case. But I would propose to the court that in the absence of a policy to direct people when there's known, obvious severe hazards, that there is an inverse relationship between the amount of care that is needed to defeat a gross negligence finding. In other words, if there's no policy, you don't need as much evidence as if you have a good safety policy and they just didn't follow it. That's probably ordinary negligence. I will concede that.

BAKER: You view this as a premises liability circumstance?

QUINN: It was tried as a premise liability case.

BAKER: Where are we with knowledge of the dangerous condition, but warnings given to the people who are going to be exposed to it? Isn't that one of the questions then of a premises liability situation to a business invitee?

QUINN: Yes.

BAKER: And isn't there evidence in the record to show that was done? Can we look at that evidence to determine whether there is no evidence to support gross negligence?

QUINN: The jury was asked in this case the *Keech* factors. Did the owner have actual or subjective knowledge, and the jury found that they did.

BAKER: But it was a dangerous condition?

QUINN: Yes.

BAKER: Or that they didn't warn?

QUINN: It was submitted under a general negligence theory, and under *Keech*, because the TC and all the lawyers weren't really clear what *Keech* meant yet. But we've come up basically on the *Keech* findings as a premises liability, since that's the more stringent standard.

PHILLIPS: Even if everything you say is right, did the CA perform its required function by reviewing these findings both for no evidence and for insufficient?

QUINN: I wished the CA had used some different language, but since *Moriel* there's been some confusion in the courts as to what *Moriel* actually meant. The CA in *Ellender* and in this case essentially conducted a legal sufficiency and a factual sufficiency review together in determining whether there was evidence to satisfy the two *Moriel* prongs. And the court felt like in *Ellender* and in this case, that a separate factual sufficiency review was only warranted if the amount of damages was being challenged. I wish they would have used different language. As I read their opinion, they actually did what Professors Powers and Ratcliff call a zone 1 and a zone 2 review when they looked at just the gross negligence issues to satisfy the prong 1 and prong 2. In fact they actually cited one of the cases cited by the court, is a factual sufficiency review case.

PHILLIPS: Which was?

QUINN: *Fredonia State Bank*. Also the argument on that issue by petitioner that you need to correct this court so that they can get it right. The most recent writing by that court on a gross negligence case is *Sears & Roebuck v. Kunze*. And in that case they said that they did a factual and legal sufficiency review.

On behalf of Luis Andrade, we would pray that this court look at the record as a whole, as instructed by *Ellender* and by *Ft. Worth Elevators*. Look at all the corporate acts and determine that they satisfied the subjective prong of gross negligence and determine that the factual sufficiency point was in artfully reviewed by the CA. If the court feels that the CA made a mistake in that, we would ask you to decide the legal sufficiency point anyway before sending it back to the CA for a factual sufficiency review.

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REBUTTAL

MITCHELL: First, I would like to contest counsel's statement that there was any evidence that could even raise an inference that Ollie Pike knew that the crane was unlocked. What he referred to was some statement after the accident that "Oh, I think somebody used the crane the day before to lift some of the asbestos worker's equipment up to the second level." There's nothing in the evidence to show that any one at Kirby or in particular anybody's principal at Kirby had any knowledge prior to the accident that the crane was unlocked.

O'NEILL: I realize you don't agree it applies in this case. But do you agree with the proposition that there are some risks that are so great that failure to adopt a safety policy can equal gross negligence? Do you agree with that proposition in general?

MITCHELL: I would have to imagine that there could be some risks that are that great. Again in those kinds of cases I think you would also to follow that through and then you get into a question of causal connection, because there may be a lack of a policy but people elsewhere in the chain and perhaps in this case made attempts to protect against this very risk. So I don't know that you can stop with, Is there a policy? Is there not a policy? That's such a global concept. I think still at some point you have to take that concept and apply it to what happened in this particular circumstance, and how does the policy, the lack of a policy, the deficiency in a policy, how does all of that causally relate?

I would like to comment on the concept that a jury's disbelief of defense evidence can somehow be considered to be affirmative evidence to support a plaintiff's case. I don't believe that there is any such principle in the law, and certainly in the circumstances that we're talking about in a gross negligence case, which this court has likened to quasi criminal liability. But in essence, you can be convicted because the jury didn't believe your version of the events. I think a concept like that has extreme danger in any gross negligence case because essentially every defendant who tries to defend himself against this kind of allegation is subject to a jury simply saying, "Well you told us you have a policy and you followed your policy, but we just simply don't believe it."

I think it might be helpful in this case to compare the circumstances of this case with *Ellender*, with a case where there was gross negligence. And in *Ellender*, you had other evidence that would support that inference of conscious indifference. What you had was a company that knew of the dangers of exposure to benzine, had literature on those dangers, but most telling its own actions showed that it knew exactly what the dangers were, because Mobil Oil in that case protected its own employees. It had procedures and policies, it monitored its own employees' benzine levels. It gave them warnings that protected them. Then on the other hand, it had a policy and the conscious decision that these same measures would not be taken on behalf of independent contractors. Now that clearly shows that Mobil understood what the danger was and consciously decided not to protect a given group of people.

Now in this case, this policy, this means of locking out, turning off, protecting the people in this facility was the same across the board. If this had been a Kirby employee crawling around near those crane rails, the same policy would have been in effect, the same actions would have been taken. There's no evidence that Kirby knew, Well we better protect against these people. Kirby simply thought that this was adequate, that this was an appropriate safety measure.