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# Right to Punitive Damages in Minnesota in the Absence of a Personal Injury

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## RIGHT TO PUNITIVE DAMAGES IN MINNESOTA IN THE ABSENCE OF A PERSONAL INJURY

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### I. INTRODUCTION

This fall, the Minnesota Supreme Court heard oral arguments in the most important punitive damages case in recent memory, and when it ultimately decides the appeal of *Jensen v. Walsh*,<sup>1</sup> it has the opportunity to reverse the Minnesota Court of Appeals erroneous interpretation of Minnesota punitive damages law. The Court of Appeals' conclusion in *Jensen* that punitive damages are *barred* in *all* cases that do not involve personal injuries is simply contrary to longstanding Minnesota law, including case law of all essential elements of this case law in 1978.

Minnesota's history of allowing punitive damages in *every* type of case, whether involving a personal injury or some other type of

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1. 609 N.W.2d 251 (Minn. Ct. App. 2000), *rev. granted* (June 27, 2000).

harm, dates back nearly to Minnesota's statehood. In fact, the *first* case in Minnesota to uphold an award of punitive damages did not even involve a personal injury. In *Lynd v. Pickett*,<sup>2</sup> decided just four years after Minnesota became a state, the claim was for conversion.

Over one hundred years later, when the Minnesota Legislature codified Minnesota punitive damages law in 1978, it established a standard that by its plain language applies to *all* wrongful conduct regardless of whether that conduct causes personal injury or some other type of harm. As originally enacted, the statute provided, "[p]unitive damages shall be allowed in civil actions only upon clear and convincing evidence that the *acts of the defendant* show willful indifference for the *rights or safety* of others."<sup>3</sup>

While "safety" obviously incorporates personal injuries, the term "rights" unquestionably has a far broader reach, its plain meaning covering *every* type of claim where the person's rights were violated, regardless of whether a personal injury is involved.

With this background in mind, this article will examine the series of five decisions over the past two decades that have led to the unfortunate current state of punitive damages law in Minnesota, namely confused, inconsistent, and in some cases (including the *Jensen* case currently before the Minnesota Supreme Court), just plain wrong. This article will examine these five decisions (two from the Minnesota Supreme Court and three from the Minnesota Court of Appeals) not only to analyze the "why" but the "how" of their going astray.

Recognizing that the Minnesota Supreme Court has an inherent role in determining the scope and reach of punitive damages, one must first attempt to reconcile its two decisions (which prohibit punitive damages only where *property* damage was caused by a *product*) with the above longstanding case law and its codification in Minnesota Statutes section 549.20. While it could be persuasively argued that the first of these two cases<sup>4</sup>, dating back to 1982, was wrongly decided, the case can probably best be understood as reflecting the state of *products liability law* as it existed in 1982. The second Minnesota Supreme Court case, decided in 1994,<sup>5</sup> may

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2. 7 Minn. 184 (1862).

3. MINN. STAT. § 549.20 (2000) (emphasis added).

4. *Eisert v. Greenberg Roofing & Sheet Metal Co.*, 314 N.W.2d 226 (Minn. 1982).

5. *Indep. Sch. Dist. No. 622 v. Keene Corp.*, 511 N.W.2d 728 (Minn. 1994).

again be justified as the supreme court's exercise of its supervisory authority over punitive damages, but in reality, the court based its decision solely on precedent from its first case and failed entirely to examine how dramatically the landscape of products liability law had changed in the intervening 12 years, changes that directly bore on the underlying rationale in the first case.

In contrast to these supreme court decisions, which at least have some logical basis, the two court of appeals decisions (including *Jensen*) that have prohibited punitive damages in *all* non-personal injury cases, not just products cases, cannot remotely be justified under *any* rationale. Unfortunately, the Minnesota Court of Appeals twice relied on the bare language of a Supreme Court decision on punitive damages without fully analyzing the *context* of that language, and without *any* examination of either the long history of punitive damages in Minnesota (including their purpose and benefit to the public) or the current governing statute. These two Court of Appeals cases are exhibits "A" and "B" of how taking language out of context and without analysis and then relying on it as binding precedent can wreak havoc on the law, and cause confusion and uncertainty that can take years to correct.

## II. MINNESOTA SUPREME COURT DECISIONS

The two Minnesota Supreme Court decisions bearing on this issue were decided a dozen years apart, first *Eisert v. Greenberg Roofing & Sheet Metal Co.*,<sup>6</sup> followed by *Independent School District No. 622 v. Keene Corp.*<sup>7</sup> In *Eisert*, a fire in the auto body shop of a school killed two high school students and also caused property damage to the school district's building. The decedents' heirs and the school sued various defendants that had manufactured, sold, or applied urethane spray foam installation and intumescent paint. This insulation and paint were allegedly the source of the toxic smoke that killed the two students and the fuel that sustained the fire. Both the students' heirs and the school sought punitive damages. The heirs' claim was denied because Minnesota law as it then existed prohibited punitive damages in wrongful death claims.<sup>8</sup> The school

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6. 314 N.W.2d 226 (Minn. 1982).

7. 511 N.W.2d 728 (Minn. 1994).

8. The Minnesota Legislature cured this unfair gap in the law when it amended Minnesota Statutes section 573.02 in 1983 and specifically provided that "Punitive damages may be awarded as provided in section 549.20." MINN. STAT. §

district's punitive damages claim, based solely on property damage, was denied on an entirely different basis, namely that its denial more accurately reflected the underlying principles of Minnesota punitive damages law. Because the reasoning used to deny the school district's claim is so important to understanding this issue, and because it is so brief, it is worthwhile to review it here in its entirety:

The school district's appeal is from an order denying its motion to amend its complaint to include a claim for punitive damages against the defendant manufacturers. The disposition of this motion necessarily raises the issue of the allowability of punitive damages in *strict products liability* property damage actions, for, if such damages were allowable, leave to amend should have been granted pursuant to Minnesota Rules of Civil Procedure section 15.01.

We hold, however, that punitive damages are not recoverable under a *strict products liability* theory for property damage and accordingly affirm the trial court's denial of the motion to amend. We first awarded punitive damages in a *strict liability* action in *Gryc v. Dayton-Hudson Corp.* In that case, involving injuries to a child caused by flammable sleepwear, we said that the 'punitive damages remedy concerns the vital state interest of protecting persons against personal injury.' The interests implicated in *strict liability* actions for injury solely to property are not so great as to warrant extension of this controversial remedy to those actions. 'The very power of the remedy demands that judges exercise close control over the imposition and assessment of punitive damages.' Although the nature of the plaintiff's injury is not always listed as a factor in determining how to assess punitive damages, it may reasonably be taken into account in deciding where punitive damages will be allowed. Where that injury is limited to property damage, the public interest in punishment and deterrence is largely satisfied by the plaintiff's recovery of compensatory damages. Punitive damages represent an extraordinary measure of deterrence. Denying their imposition in this case, after allowing punitive damages in *strict liability* actions for personal injury, reflects the higher value our society places on the safety of persons than it

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573.02, subd. 1 (2000).

does on the security of property.<sup>9</sup>

Two key points must be kept in mind when analyzing the above reasoning: (1) it had been only *two years* since the supreme court had decided for the very first time, in the landmark *Gryc* case involving severe burns to a child from extraordinarily dangerous sleepwear, that punitive damages could be recovered under a cause of action, “strict liability,” that was theoretically premised upon the notion of liability without fault (although, in reality, the manufacturer’s conduct was egregious in the extreme, an internal memo even stated that the defendant knew it was sitting on a “powder keg” because the fabric was so dangerous)<sup>10</sup> and (2) it would be *two more years* before the supreme court would issue the decisions that would, for the most part, lay rest to this notion that “strict liability” was in fact liability “without fault.” Two years after *Eisert*, the supreme court decided a series of cases that held that “design defect” and “failure to warn” claims were fundamentally the same regardless of whether based on “strict liability” or “negligence,” and that, with the exception of “manufacturing defect” cases, “products liability” cases were ultimately based on some sort of wrongful conduct.<sup>11</sup>

Twelve years after *Eisert*, and ten years after these landmark products liability cases of *Bilotta v. Kelley Co.* and *Hauenstein v. Loctite Corp.*, the Supreme Court decided *Independent School District No. 622 v. Keene Corp.*,<sup>12</sup> where the only harm was property damage. A school district sued various defendants (the construction company, the architect, the contractor, and the manufacturer of the asbestos) for the cost of removing asbestos from Tartan High School. After a nineteen-day trial, the jury awarded both compensatory and punitive damages. The Minnesota Court of Appeals reduced the punitive damages award but otherwise affirmed. However, on review, the Minnesota Supreme Court, based *solely* on *Eisert*, rejected the award of punitive damages in its entirety.

Again, because the Court’s reasoning and analysis is so sparse,

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9. *Eisert*, 314 N.W.2d at 228-29 (emphasis added).

10. 297 N.W. 2d at 740.

11. *Bilotta v. Kelley Co.*, 346 N.W.2d 616 (Minn. 1984); *Hauenstein v. Loctite Corp.*, 347 N.W.2d 272 (Minn. 1984). For an extended discussion of this critical concept, see generally Mike Steenson, *A Comparative Analysis of Minnesota Products Liability Law and the Restatement (Third) of Torts: Products Liability*, 24 WM. MITCHELL L. REV. 1 (1998).

12. 511 N.W.2d 728 (Minn. 1994).

it is worthwhile to review it in its entirety:

Keene next challenges the award of punitive damages to the school district. In *Eisert v. Greenberg Roofing & Sheet Metal Co.*, 314 N.W.2d 226, 228 (Minn. 1992), we held that punitive damages could not be recovered in a strict products liability action where the plaintiff only suffers property damage. Keene argues that the policy concerns underlying *Eisert* apply in this case, and therefore the school district's recovery of punitive damages should be barred.<sup>13</sup>

The school district argues that *Eisert* only applies to strict liability claims, and, therefore does not apply to this case because the school district brought claims under liability theories beyond strict products liability. We do not find this to be a sufficient distinguishing factor to limit the application of our reasoning in *Eisert*. As in *Eisert*, the school district here only suffered property damage. The remedy of punitive damages concerns the 'vital state interest of protecting persons against personal injury,' *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn.), cert. denied sub. nom. *Riegel Textile Corp. v. Gryc*, 449 U.S. 921, 101 S. Ct. 320, 66 L. Ed. 2d 149 (1980). We believe now as we did in *Eisert* that denying punitive damages where a plaintiff only suffers property damage reflects the greater importance society places on protecting people. We reverse the award of punitive damages in its entirety.

Although this reasoning will be examined further on the question of whether the Minnesota Court of Appeals correctly interpreted it as extending to *all* cases not involving personal injuries, and not just products liability cases, it is very useful at this point to examine the above language from both *Eisert* and *Keene* to note what these analyses do not contain:

(1) Neither decision engaged in any analysis or review of long-standing Minnesota case law which (a) had *always* provided for punitive damages in every type of case involving intentional harm or egregious conduct, such as conversion, fraud, libel, wrongful repossessions, wrongful polygraph testing prohibited by statute, and (b) had *never* required a personal injury.<sup>14</sup>

(2) Neither decision analyzed Minnesota Statutes section

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13. *Id.* at 732.

14. *Molenaar v. United Cattle Co.*, 553 N.W.2d 424, 427 (Minn. Ct. App. 1996).

549.20, which not only codified Minnesota punitive damages law, but which also specifically permitted punitive damages when the “acts of the defendant” demonstrated “willful indifference” (later changed to “deliberate disregard”) for the “rights or safety of others.”<sup>15</sup>

Ultimately, the Minnesota Supreme Court’s analysis in *Eisert* (which then became the sole basis for its decision in *Keene*, and which emphasized again and again the “strict liability” cause of action before it) was limited to its reference to *Cryc* and its conclusion that the “interests implicated in *strict liability* actions for injury solely to property are not so great as to warrant *extension* of this controversial remedy to those actions.”<sup>16</sup>

To put it another way, the supreme court in *Eisert* viewed the punitive claim before it as one that required an “extension” of the law that would permit punitive damages in a claim that was not even based on “fault.” Because Minnesota products liability law now essentially recognizes “fault” as the governing principle in most products liability cases regardless of whether plead as “strict liability” or “negligence,” this reasoning is no longer valid.

Consequently, while the following analysis will focus on why the supreme court will likely reverse *Jensen*, the court may also revisit its reasoning in *Eisert* and *Keene* in light of the major changes in products liability law since *Eisert* was decided. Ultimately, the supreme court would likely agree that neither case accurately reflects the long history of punitive damages law in Minnesota and the intent of the legislature when it codified this law in 1978, *all* of which focused on the egregiousness of the conduct and the rights being violated, and *none* of which turned on the nature of the harm caused. Indeed, both decisions should now be overruled.

### III. COURT OF APPEALS’ DECISIONS

Since 1994, the Minnesota Court of Appeals has issued three decisions on the issue at hand (none of which involved injuries from a product), ruling in two of them, *Soucek v. Banham*<sup>17</sup> and *Jen-*

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15. *Lewis v. Equitable Life Assurance Soc’y* 389 N.W.2d 876, 891 (Minn. 1986) (emphasis added).

16. *Eisert*, 314 N.W.2d at 229 (emphasis added).

17. 524 N.W.2d 478 (Minn. Ct. App. 1994) *rev. denied* (Jan. 25, 1995) (two to one decision).



*sen v. Walsh*,<sup>18</sup> that punitive damages were not permitted in *any* case absent a personal injury. In the third decision, *Molenaar v. United Cattle Co.*,<sup>19</sup> it rejected this conclusion and instead ruled that the damages *are permitted* in non-injury cases.

These decisions thus produced three opinions applying *Eisert* and *Keene* to non-personal injury, non-products cases, (1) the initial majority opinion in *Soucek* in 1994, (2) the dissenting opinion in *Molenaar* in 1996, and (3) the unanimous court of appeals decision in *Jensen* in 2000 that is now being reviewed by the Minnesota Supreme court. Two opinions were written which reject this approach, (1) the dissenting opinion in *Soucek* and (2) the majority opinion in *Molenaar*.

Because the three opinions rejecting punitive damages, and the two opinions that would permit it, all take essentially the same approach, it is worthwhile examining them together. Again, exactly as with the supreme court's decisions in *Eisert* and *Keene*, what is most striking about these decisions rejecting punitive damages is their complete failure to analyze not only longstanding case law, but Minnesota's punitive damages statute itself, which directly governed all of these cases. The majority in *Soucek*, the dissent in *Molenaar* and the unanimous court in *Jensen*, all focused solely on *Eisert* and *Keene*, which also never engaged in *any* analysis of why the statute would specifically *include* the terms "rights" in addition to "safety" if the Minnesota Legislature, when it enacted Minnesota Statutes section 549.20, meant to instead *reject and abandon* the long history in Minnesota of permitting punitive damages in myriad non-injury types of claims.

In contrast, the dissenting opinion in *Soucek*, and the majority opinion in *Molenaar*, can be credited with properly analyzing not just the two products liability cases of *Eisert* and *Keene*, but the full scope of Minnesota law on punitive damages, including (1) their long history, (2) the scope of cases in which punitive damages were permitted, the (3) the history and scope of Minnesota's punitive damages statute, particularly the *Molenaar* court's comprehensive examination of the legislative treatment (in Minnesota and elsewhere) of the scope and intended effect of punitive damages. After the *Molenaar* court's thorough and scholarly examination of punitive damages law throughout the country, it stated simply its key

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18. 609 N.W.2d 251 (Minn. Ct. App. 2000) *rev. granted* (June 27, 2000).

19. 553 N.W.2d 424 (Minn. Ct. App. 1996) (two to one decision).

## finding:

Some states have restricted or otherwise restructured punitive damages, but we are aware of *no state* that has abolished punitive damages for injuries to property while allowing punitive damages for personal injury.<sup>20</sup>

In light of the vast differences in their approaches, as well as their conclusions, it is important to examine these three decisions in detail.

## A. Soucek v. Banham

In *Soucek*, Minneapolis police had chased, shot and killed Mr. Banham's pet dog. (Indeed, the police did not merely kill the dog, claiming that they thought it was a wolf, but allegedly took pictures of themselves in "hunting poses," holding up his dead pet almost as a trophy.)<sup>21</sup> In Minnesota, animals are considered personal property, and the issue presented was whether the destruction of personal property would warrant punitive damages. While the Minnesota Supreme Court had squarely addressed this precise question and held that a municipality *could* be liable for punitive damages for unlawfully killing an animal in *Wilson v. City of Eagan*,<sup>22</sup> the Court of Appeals in *Soucek* found a conflict between the 1980 *Wilson* and the 1994 *Keene* decision. Recognizing that *Wilson* squarely permitted the punitive damages sought in *Soucek*, the Court of Appeals examined *Keene* and found that "allowing punitive damages when the plaintiff suffers only property damage was later *expressly prohibited* by *Keene*."<sup>23</sup>

Rejecting the dissenting opinion's approach, which properly analyzed longstanding case law and Minnesota Statutes section 549.20, and which consequently limited *Keene's* holding to cases involving injuries from products, the majority opinion instead merely quoted from *Keene* where the supreme court concluded:

[t]hat denying punitive damages where a plaintiff only suffers property damage reflects the greater importance society places on protecting people. Given the Supreme

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20. *Id.* at 429 (emphasis added).

21. STAR TRIB., April 23, 1993, at 1B.

22. 297 N.W.2d 146, 147-51 (Minn. 1980) (the animal warden killed a pet cat immediately after impounding it in contravention of a municipal ordinance that mandated it be held for five days before destruction).

23. *Soucek v. Banham*, 524 N.W.2d 478, 479 (Minn. Ct. App. 1994) (emphasis added).

Court's rationale in *Keene*, we see no basis for distinguishing tortious conduct in the production or distribution of a product from other tortious conduct. It is frequently only fortuitous that a product causes property damage without also causing personal injury. It is not apparent why a tortfeasor whose product fortuitously causes only property damage should avoid punitive damages when a tortfeasor whose conduct is not associated with a product, but causes only property damage, should not.

If punitive damages could not be recovered in *Keene* when a defective product [asbestos] had to be replaced solely because it created a health hazard for humans, we see no basis for permitting punitive damages when tortious conduct damages property without creating a risk of personal injury. Permitting punitive damages under these circumstances would not serve the deterrent purpose of protecting persons against personal injury.<sup>24</sup>

The dissent acknowledged the court's language in *Keene* could be "broadly read to support" the majority holding, but correctly recognized that this reading was not "the logical interpretation." Instead, the dissent found that the language from *Keene* must be read in context, and had four very specific reasons why the majority was wrong.

1. The dissent pointed to the court's syllabus in *Keene* and, noting that the supreme court author also wrote the syllabus, pointed out that this syllabus specifically referred to "products" as part of its holding. The syllabus stated, "absent personal injury, a party injured by a product may not recover punitive damages."<sup>25</sup>

2. The dissent pointed out how *Keene* had not even addressed or analyzed the plain language of Minnesota Statutes section 549.20, referring to the "rights and safety of others," and noted that while the supreme court may have the power to limit a "judicially-created remedy," this limitation could not be done without an analysis of the statute itself, "particularly since the elimination of an entire category of punitive damages would be a restriction of common law remedies available at the time the statute codified punitive damages."<sup>26</sup>

3. The dissent explained how the majority opinion failed to

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24. *Id.* at 480-81.

25. *Id.* at 481.

26. *Id.* at 481-82.

analyze or refer to the long line of Minnesota decisions allowing punitive damages for intentional property damage, and that while the *product related* limitation on punitive damages may be consistent with developments in other states, the limitation in these other states of punitive damages was never based on a division based solely on “whether the injury is to person or property.”<sup>27</sup>

4. Finally, the dissent discussed how the majority’s distinction between injury to person or property was inconsistent with the philosophy of punitive damages, namely punishment and deterrence, stating “to rest the availability of punitive damages solely on the type of injury contradicts the underlying philosophy because it focuses on the consequences of the action rather than on the actual conduct.”<sup>28</sup>

#### B. *Molenaar v. United Cattle Co.*

In *Molenaar*, the injury was again to property, not person, and in this case, the defendant wrongfully (*very* wrongfully) converted cattle belonging to plaintiff *Molenaar*. The defendant then relied on *Soucek*, *Keene* and *Eisert* in claiming that it could not be liable for punitive damages. The majority opinion in *Molenaar* engaged in an analysis far broader than the dissent in *Soucek* and examined not only the history of Minnesota punitive damages law and Minnesota’s statute, but also punitive damages law from *throughout the nation*. Ultimately, the court of appeals limited *Keene*’s holding to product-related injuries, finding that this approach:

reestablishes consistency between case law and statutory law. The statute governing punitive damages, enacted in 1978, provides that ‘punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.’ The statute codified existing law. Punitive damages for property injury continued to be available after enactment of the statute.

In addition to authorizing punitive damages in civil actions, the statute specifically permits punitive damages for ‘deliberate disregard for the rights or safety of others.’ Violations of rights do not necessarily involve personal injuries. Conversion, for instance, generally violates prop-

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27. *Id.*

28. *Id.*

erty rights without personal harm to the owner. By including *disregard of rights* as well as disregard of safety, the statute permits punitive damages for both property damage and personal injury. Any court decision that *abolished* punitive damages for disregarding the *rights of others* would *eviscerate* the statute.<sup>29</sup>

Finally, the majority opinion in *Molenaar* recognized that without this economic deterrence of those who had violated the rights of others, insufficient sanctions existed to deter this conduct.

Absent punitive damages, one who intentionally and wrongfully takes another's property has little to fear. The worst civil consequence is that the converted property must be returned to its proper owner. Even this remedy may be discounted by the possibility that the owner will not seek legal recovery or will not prevail. Universal abolition of punitive damages for property damage dramatically improves the profitability of theft and diminishes society's reinforcement of personal accountability. Some states have restricted or otherwise restructured punitive damages, but we are aware of no state that has abolished punitive damages for injuries to property while allowing punitive damages for personal injury.<sup>30</sup>

### C. *Jensen v. Walsh*

In its most recent decision in *Jensen*, the court of appeals dealt with a case that involved a mixture of injury and property claims. An ongoing dispute between two neighboring families led to claims of both intentional infliction of emotional distress and intentional damage to property. On the personal injury claims, both the trial court and the court of appeals found insufficient evidence of their emotional distress. On the issue of whether the associated property damage claims would permit a punitive damages claim, the court noted the two different interpretations of *Keene* by the *Soucek* and *Molenaar* panels, and after very briefly noting their holdings, the court of appeals went no further than did the *Soucek* court itself. The *Jensen* court never itself engaged in *any* analysis or comparison of the reasoning outlined in the *Soucek* dissent and *Molenaar* major-

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29. *Molenaar v. United Cattle Co.*, 553 N.W.2d 424, 428-29 (Minn. Ct. App. 1996) (citations omitted).

30. *Id.* at 429.

ity opinion. Exactly as did the *Soucek* majority, the *Jensen* Court went no further than quoting the language of *Keene* (taken from the *Gryc* flammable pajamas case where a child suffered severe burn injuries, and *non-injury* punitive damages *were never at issue*), which emphasized the “vital state interest of protecting persons against personal injury.”

Finally, the *Jensen* court rejected the argument that *Keene* was overturned by a subsequent human rights act case, *Feltz v. Commonwealth Land Title Insurance Co.*,<sup>31</sup> concluding instead that since *Keene* was not even mentioned in *Feltz*, and since *Feltz* dealt only with the issue of whether punitive damages were properly recoverable under a Minnesota Human Rights Act case where the statute provided for double of actual damages, *Keene* was still good law.<sup>32</sup> Ultimately, the court of appeals in *Soucek* and *Jensen* is wrong for the most simple and basic of reasons, it has improperly stripped longstanding rights from Minnesota citizens without a clear and compelling basis to support its actions. Indeed, it is difficult to think of another circumstance where courts have so unjustly taken away such longstanding rights from citizens without *ever* examining the history of those rights or the legislation that was intended to codify those rights.

#### IV. THE MINNESOTA LAW THAT SHOULD HAVE BEEN ANALYZED BY THE COURT OF APPEALS

##### A. *The Common Law And Minnesota Statutes Section 549.20*

Prior to the statutory enactment of Minnesota Statutes section 549.20 in 1978, punitive damages in Minnesota were governed by common law. Both *before* and *after* the enactment of this statute, punitive damages were found to be recoverable in a *wide variety of actions*, some involving injuries and death, and some not,<sup>33</sup> including intentional torts,<sup>34</sup> products liability,<sup>35</sup> civil rights,<sup>36</sup> wrongful

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31. 537 N.W.2d 271 (Minn. 1995).

32. *Jensen*, 609 N.W.2d at 255.

33. Parents could not recover punitive damages for the sexual abuse of their minor child. *Father A v. Moran*, 469 N.W.2d 503 (Minn. Ct. App. 1991). Punitive damages are also not recoverable in an action on contract. *Hanks v. Hubbard Broad., Inc.*, 493 N.W.2d 302 (Minn. Ct. App. 1992).

34. *E.g.*, *Melina v. Chaplin*, 327 N.W.2d 19 (Minn. 1982).

35. *E.g.*, *Kociemba v. G.D. Searle & Co.*, 707 F. Supp. 1517 (D. Minn. 1989); *Gryc v. Dayton Hudson Corp.*, 297 N.W. 2d 27 (Minn. 1980).

death,<sup>37</sup> injuries and death caused by drunk drivers,<sup>38</sup> sexual abuse by clergy,<sup>39</sup> forcing employees to take lie detector tests in violation of state statute,<sup>40</sup> an attorney's breach of fiduciary duty to clients,<sup>41</sup> employment discrimination,<sup>42</sup> defamation,<sup>43</sup> and breaches of fiduciary duty between shareholders.<sup>44</sup>

Before *Eisert*, while many issues concerning punitive damages came before the courts and the legislature, whether punitive damages should be barred in non-personal injury cases was not among them, an omission most conspicuous because of the scope and breadth of the subject covered by the common law and the statute. The legislature's enactment of Minnesota Statutes section 549.20 in 1978<sup>45</sup> was not only a recognition of the validity and appropriateness of punitive damages in Minnesota, but even more important to the issue at hand, it was an attempt to provide the broad outlines of the conduct and circumstances where societal interests were served by punitive damages as well as meaningful standards for their use.<sup>46</sup>

36. *E.g.*, State Dept. of Human Rights v. Douglas County Auditor, 347 N.W.2d 541 (Minn. Ct. App. 1984).

37. *E.g.*, *Nachtshiem v. Wartnick*, 411 N.W.2d 882 (Minn. 1987).

38. *E.g.*, *Hawkins v. Geyer*, 352 N.W.2d 784 (Minn. Ct. App. 1984); *Anderson v. Amundson*, 354 N.W.2d 895 (Minn. Ct. App. 1984).

39. *E.g.*, *Mrozka v. Archdiocese of St. Paul and Minneapolis*, 482 N.W.2d 806 (Minn. Ct. App. 1992).

40. *Bucko v. First Minn. Savings Bank*, 471 N.W.2d 95 (Minn. 1991). *But see* *Becker v. Alloy Hardfacing and Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987) (punitive damages may be awarded in cases of defamation *per se*, even absent proof of actual damages).

41. *E.g.*, *Fieldler v. Adams*, 466 N.W.2d 39 (Minn. Ct. App. 1991).

42. *E.g.*, *State by Cooper v. Moorhead State Univ.*, 455 N.W.2d 79 (Minn. Ct. App. 1990).

43. While the application of punitive damages is not different for defamation claims, there are some unusual rules of availability. For example, punitive damages may be awarded in cases of defamation *per se*, even absent proof of actual damages. *Becker*, 401 N.W.2d at 661. This is contrary to the general rule, and provides a liberal basis for making such awards in defamation claims. *Bucko*, 471 N.W.2d at 98. However, in *Lewis v. Equitable Life Ins. Assoc.*, 389 N.W.2d 876, 892 (Minn. 1986), the supreme court reversed an award of punitive damages in a defamation action involving so-called compelled self-publication, and stated that punitive damages should not be recognized in this newly recognized cause of action; *see also* *Bradley v. Hubbard Broad., Inc.*, 471 N.W.2d 670, 678-79 (Minn. Ct. App. 1991).

44. *Evans v. Blesi*, 345 N.W.2d 775, 779-80 (Minn. Ct. App. 1984).

45. Act of Apr. 5, 1978, Ch. 738. 1978 Minn. Laws 838-39; *see also* Diane C. Heins, *Statutory Changes in Minnesota Tort Law-1978*, HENNEPIN COUNTY LAWYER, 6, Sept-Oct, 1978 at 48.

46. These statutory standards further insure that an award of punitive dam-

It is also important to note that while the Minnesota legislature has expressly permitted the award of punitive damages under certain other statutes, such as workers compensation,<sup>47</sup> violations of the trade secrets act,<sup>48</sup> and employment discrimination,<sup>49</sup> Section 549.20 was the first (and only) legislation to deal broadly with the application of punitive damages to *all* civil cases.

Section 549.20 was designed to govern four separate aspects of punitive damages (*none* of which excluded any type or category of case). With the exception of the standards for the type of conduct that justifies an award of punitive damages, these four aspects are not going to be discussed in detail here, for their importance lies in what they do *not* do, i.e. separate out non-personal injury cases.

These four aspects governing punitive damages are:

- (a) The standard of proof required by a plaintiff<sup>50</sup>;
- (b) The standards of conduct in which the defendant must engage to be liable for punitive damages;
- (c) The factors that bear on the amount of punitive damages,<sup>51</sup>

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ages does not violate due process. *GN Danavox, Inc. v. Starkey Labs., Inc.*, 476 N.W.2d 172, 177 (Minn. Ct. App. 1991) (citing *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, (1991)).

47. MINN. STAT. § 176.183(1) of The Worker's Compensation Act provides for punitive damages by the state treasurer against a non-insured employer, in an amount not to exceed 50 percent of all monies paid out.

48. *Zawels v. Edutronics, Inc.*, 520 N.W.2d 520, 523 (Minn. Ct. App. 1994).

49. *Ulrich v. City of Crosby*, 848 F. Supp. 861, 876 (D. Minn. 1994).

50. Under the statute, a plaintiff can recover punitive damages only upon a showing of "clear and convincing evidence." The failure to instruct a jury that clear and convincing evidence is required under the statutory standard is reversible error. *Becker v. Alloy Hardfacing and Eng'g Co.*, 402 N.W.2d 655, 659 (Minn. 1987). The common law standard required only a preponderance of the evidence, the same as for other forms of civil litigation. The statute's heightened burden is a recognition of the quasi-criminal or "punitive" nature of punitive damages. Indeed, the Senate author of Minnesota Statutes section 549.20, Senator Davies, noted the quasi-criminal nature of punitive damages when discussing the higher standard. See tape of meeting on H.F. 338 before the Minnesota Senate Judiciary Committee (Feb. 22, 1978). By using a standard of proof that lies between the "beyond a reasonable doubt" standard for criminal cases, and the "preponderance of the evidence" standard for most other forms of civil litigation, the legislature attempted to provide additional safeguards surrounding an award of punitive damages.

51. Once a jury is properly instructed on the standard of conduct and proof for an award of punitive damages, the amount of the award is for the finder of fact. The draft version of Minnesota Statute section 549.20 followed the common law in allowing the trier of fact to determine *whether* punitive damages should be awarded. However, the draft version had the court, rather than the jury, determine the *amount* of the damage award. As enacted, Minnesota Statute section



and

(d) A principal's liability for the acts of its agent.

### B. *Statutory Standard Of Defendant's Conduct*

Under the common law, the courts defined the conduct necessary as "willful," "wanton," "malicious disregard for the rights of others," "willful and reckless," "willful, wanton or maliciously," and "willful, wanton and reckless."<sup>52</sup> Indeed, the attempt to concisely

549.20 was changed from its draft version so that the amount remained with the trier of fact, whether it was the court or jury. The rationale underlying having the court decide the amount was stated as follows by an influential law professor: First, it would reduce the probability that punitive damage awards might be unduly influenced by emotion, as most judges are presumably more detached in their deliberation and therefore more likely to render an objective damage assessment. Further, evidence of the defendant's wealth that could prejudice the jury on the issue of liability could then be excluded from jury consideration. Finally, trial judges usually have a more sophisticated appreciation than jurors of the often far-reaching effects that punitive awards may have on the operations of a particular corporate defendant. David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1320 (1976).

The factors to be used for making such an award are:

- (1) the seriousness of the hazard to the public arising from the defendant's misconduct;
- (2) the profitability of the misconduct by the defendant;
- (3) the duration of the misconduct and any concealment of it;
- (4) the degree of the defendant's awareness of the hazard and of its excessiveness;
- (5) the attitude and conduct of the defendant upon discovery of the misconduct;
- (6) the number and level of employees involved with the misconduct;
- (7) the financial condition of the defendant;
- (8) the total effect of other punishment likely to be suffered by the defendant as a result of the misconduct, including compensatory and other damage awards to the plaintiff and other similarly situated persons; and
- (9) the severity of any criminal penalty to which the defendant may be subject.

*Id.* at 1319.

There is no specified weight to be given to any of these factors, nor is there an upper limit in Minnesota on the amount of punitive damages. The Minnesota Supreme Court does not disturb an award of punitive damages unless that award is so excessive as to be unreasonable. *Stuempges v. Parke-Davis & Co.*, 297 N.W.2d 252, 259 (Minn. 1980). Though the court has, on its own, reduced awards of punitive damages where it concluded that justice was best served by reducing the award rather than by granting a new trial. *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 837 (Minn. 1988).

52. While the terms "willful," "wanton," "malicious" and "reckless" are the most common, the Supreme Court has on occasion used a multitude of descriptions for conduct justifying punitive damage awards. In *Anderson v. International*

define the conduct required for an award of penalty-type damages began with *Lynd v. Picket*.<sup>53</sup> There, the Minnesota Supreme Court said a certain level of malice was required, defined by the court as:

Whatever is done...willfully and purposefully, if it be at the same time wrong and unlawful, and that known to the party, is in legal contemplation malicious. That which is done contrary to one's own conviction of duty, or with a willful disregard for the rights of others, whether it be to encompass some unlawful end, or some lawful ends by some unlawful means, or, in the language of the charge, to do a wrong or unlawful act, knowing it to be such, constitutes legal malice.<sup>54</sup>

Since *Lynd*, Minnesota courts have struggled to determine the level of animus or state of mind necessary to justify such an award. Possibly because the standard seemed elusive, the Minnesota Legislature attempted to define the standard (and also, as noted above, provide guidance on numerous aspects of punitive damages claims to help determine when the imposition of punitive damages was appropriate). Minnesota Statutes section 549.20 in 1978 replaced the varied common law standards (i.e., malice, willful, reckless, wanton) with a single standard, that the defendant's act(s) showed a "willful indifference to the rights and safety of others." In 1990, "willful indifference" was changed to a "deliberate disregard" standard, and the legislature also attempted to now define the standard, providing in subsection (b) that:

A defendant has acted with deliberate disregard for the rights and safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:

- (1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury of the rights or safety of others; or
- (2) deliberately proceeds to act with indifference to the

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*Harvester Co.*, 116 N.W. 101, 102 (1908), the court stated the standards as "wanton, malicious, fraudulent, or oppressive, and such as to show a reckless disregard for the rights of the plaintiff," and additionally stated that "punitive damage recovery is generally permitted when the tort is committed with cruelty, oppression, insult, or such gross negligence as to justify the interference of malice as a matter of law."

53. 1862 WL 1259 (Minn. July Term 1862).

54. *Id.* at \*13.

high probability of injury to the rights or safety of others.<sup>55</sup>

The obvious question when examining these standards in light of the issue at hand is a simple one, namely, did the Legislature, when carefully considering and enacting these standards, ever intended to *bar* or *limit in any way* punitive damages in non-personal injury cases? To put it another way, can *any* reading of this statutory language reach this result, and if the answer is “no” (and no reasonable person could conclude otherwise), what does this say about the Legislature’s intent? The *only* answer that can be discerned from the plain language of the standard and the focus of the cases interpreting the standard is that the type of harm caused by the wrongful conduct is not the proper focus, but instead, it is the *defendant’s conduct* that must be the subject of the inquiry.

In two of the leading cases defining the 1978 and 1990 standards, neither plaintiff had suffered a personal injury. In *Wirig v. Kinney Shoe Corp.*,<sup>56</sup> the employee had publicly been wrongly accused of theft. *Bucko v. First Minnesota Savings Bank*,<sup>57</sup> concerned violations of the Minnesota polygraph statute, and the bank defendant argued that it could not be liable for punitive damages because it did not “actually know of the polygraph statute when they violated it.”<sup>58</sup> The court of appeals determined that because the bank had no actual knowledge of the statute prior to two of the employees’ tests, the bank could not be liable for punitive damages to those two employees.<sup>59</sup>

At the supreme court, this determination—that specific knowledge of the law was required for an award of punitive damages—was reversed. The court ruled: “This court has never concluded that a defendant must have actual knowledge of the law in order to be willfully indifferent to the rights of others and thereby

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55. MINN. STAT. § 549.20 (1990). The fact that these provisions are written in the alternative, that is, “either or” is sufficient to justify an award, does little to clarify the standard for punitive damages. The first seems to require action which is deliberate or in conscious or intentional disregard, the second requires only that the action be with “indifference” to the high probability of injury.

56. 461 N.W.2d 374, 381 (Minn. 1990).

57. 471 N.W.2d 95, 97-98 (Minn. 1991).

58. *Id.* at 97.

59. *Bucko v. First Minn. Savings Bank*, 452 N.W.2d 244, 249 (Minn. Ct. App. 1990). The court of appeals also determined that the third employee could recover punitive damages even though she did not recover any compensatory damages. *Id.* This specific ruling was reversed on appeal to the supreme court. *Bucko*, 471 N.W.2d at 97.

liable for punitive damages. We are not persuaded that we should do so now."<sup>60</sup>

While the scope of the standard was at issue in both *Wirig* and *Bucko*, what was not at issue in either case was the threshold question of whether a defendant who has not caused a personal injury could be even liable for punitive damages. So settled was the law on this subject that it was not an issue for the defendants or the court.

## V. CONCLUSION

In retrospect and with hindsight, one can see how the Minnesota Supreme Court started down the wrong road in *Eisert*, and by the time it decided *Keene* twelve years later, it was too far past the fork in the road to see that it had made a wrong turn. However, the court of appeals cannot rely on that same justification, because in none of the cases in which it barred punitive damages had the damage been caused by a product as in *Eisert* and *Keene*. The extension of these decisions to bar the types of punitive damage claims that had been upheld for nearly as long as Minnesota has been a state was completely unwarranted. Fortunately, the Minnesota Supreme Court is now in a position to remedy the situation, and when it takes a close look at the long history of punitive damages in Minnesota, the intent of the Legislature in enacting section 549.20, and most important, the benefit to the public that punitive damages provide in deterring wrongful conduct by punishing wrongdoers, the court not only has the opportunity to reverse *Jensen v. Walsh*, but to also consider overruling *Eisert* and *Keene*.

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60. *Bucko*, 471 N.W.2d at 98.

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