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COURT OF APPEALS

STATE OF NEW YORK

VILLAGE OF ILION,

Appellant,

-against-

No. 80

COUNTY OF HERKIMER,

Respondent.

20 Eagle Street
Albany, New York 12207
March 27, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 80, Village of
2 Ilion v. County of Herkimer.

3 Counselor, do you want any rebuttal time?

4 MS. BERRY: Yes, Your Honor. Two minutes,
5 please.

6 CHIEF JUDGE LIPPMAN: Two minutes. Sure,
7 go ahead.

8 MS. BERRY: Thank you. May it please the
9 court, good afternoon, my name is Martha Berry,
10 attorney for the plaintiff-appellant Village of
11 Herkimer.

12 We have challenged the Fourth Department's
13 decision in this case and the trial court's ruling on
14 three grounds. The underlying issue here is the
15 Village of Herkimer's responsibility for its
16 equitable share of the liabilities - - -

17 CHIEF JUDGE LIPPMAN: What is the equitable
18 share in your - - - in - - - once you decide to get
19 out of this arrangement, what's your equitable share?

20 MS. BERRY: Well, the equitable share - - -
21 Your Honor, our position is the equitable share is
22 the amount that is set forth in the reserve analysis.
23 We've accepted the jury's verdict at the 1,617,528
24 dollars. We have not appealed that.

25 However, the equitable share needs to be

1 something that doesn't overcompensate the county.

2 JUDGE SMITH: Well, you say it should be -
3 - - you say it should be present valued.

4 MS. BERRY: That - - - but - - - yes, Your
5 Honor. Between the time of the withdrawal - - - the
6 abandonment of the plan and the reserve analysis that
7 was subsequently done, and the date of the trial, and
8 the date of the verdict, there were payments made
9 under this - - - Workers' Compensation payments made.

10 There also - - - and so the - - -

11 JUDGE SMITH: But also - - - does it also -
12 - - I mean, I would think that in any - - - in any
13 plan there are payments who are stretching out a long
14 time into the future.

15 MS. BERRY: Yes, Your Honor. Exactly.

16 JUDGE SMITH: Which - - - which the expert
17 estimated?

18 MS. BERRY: Exactly, Your Honor. So - - -

19 JUDGE SMITH: Is it - - - I mean, I wasn't
20 quite clear on this. But is the million-six number
21 that the jury came in with, is that based on a - - -
22 just adding up the dollars that are paid in 2006,
23 2007, on out to 2035, or whatever, without any
24 discount?

25 MS. BERRY: The million-617 is the amount

1 that was set forth in the county's reserve analysis
2 which - - -

3 JUDGE SMITH: Okay.

4 MS. BERRY: - - - the total undiscounted
5 liability was 18.4 million.

6 JUDGE SMITH: Okay. I guess what I'm
7 really asking is, is that - - - am I right in
8 understanding that that reserve analysis simply
9 estimated the amounts that would be paid on future
10 dates like, you're going to pay 1,000 dollars in
11 2022, and then you just put it into his calculation
12 of 1,000 dollars, you didn't discount it?

13 MS. BERRY: Correct, Your Honor.

14 So there were future payments, payments
15 still to be made, that - - - that are future
16 payments. And for those - - - those future amounts,
17 from the date of the verdict forward, it's our
18 position that - - -

19 JUDGE GRAFFEO: Which is how much?

20 MS. BERRY: Well - - -

21 JUDGE GRAFFEO: Do we know, or is that what
22 - - -

23 MS. BERRY: Well - - -

24 JUDGE GRAFFEO: - - - who's going to
25 determine that allocation?

1 MS. BERRY: We - - - it's our position that
2 that's for the jury to determine on - - -

3 JUDGE GRAFFEO: You're not asking - - -

4 MS. BERRY: - - - remand.

5 JUDGE GRAFFEO: - - - you're not asking us
6 to do that? Do we send it back to another court to
7 do that?

8 MS. BERRY: Well, it's our position that it
9 should be remanded. There is - - -

10 JUDGE READ: For another trial?

11 JUDGE GRAFFEO: There's to be another
12 trial?

13 MS. BERRY: On the issue of an appropriate
14 discount rate and the equitable share - - -

15 JUDGE SMITH: There were the - - -

16 JUDGE GRAFFEO: Let me preface my next
17 question by just saying I think it's kind of sad that
18 these two governmental units can't settle this case
19 and save the tax payers money all the way around.
20 But that being said, what are you asking us
21 specifically to do?

22 MS. BERRY: We're asking that payments to
23 be made in the future be discounted. I believe
24 there's evidence in the record - - -

25 JUDGE SMITH: You're not asking us to do

1 that. What are you asking us to do?

2 MS. BERRY: No.

3 JUDGE GRAFFEO: Do we - - -

4 MS. BERRY: To remand - - -

5 JUDGE GRAFFEO: - - - do you want us to
6 select the discount rate?

7 MS. BERRY: I think it's appropriate to
8 remand it for a determination of an appropriate
9 discount rate, either by the court or by a jury, and
10 then to determine the equitable share of the village
11 of Herkimer's future payments.

12 JUDGE SMITH: What's - - - what's your
13 position on who does it, the court or the jury?

14 MS. BERRY: It's our position that the jury
15 does it in absence of a statute directing the court
16 to do it, Your Honor.

17 JUDGE SMITH: But here - - - here, your
18 real complaint is nobody did it. You've got - - -
19 you've got the gross number without any - - - without
20 any reduction?

21 MS. BERRY: Correct.

22 JUDGE SMITH: The expert, the reserve
23 analysis that this was all based on, does have some
24 discounted numbers in his report, right?

25 MS. BERRY: He does, Your Honor. Three

1 percent, four percent. There was testimony that the
2 State Insurance Fund uses a five - - -

3 JUDGE SMITH: So - - -

4 MS. BERRY: percent - - -

5 JUDGE SMITH: - - - so what you - - - as I
6 understand, what you wanted to do was say to the
7 jury, hey look at these discounted numbers in this
8 report. Why don't you pick this one, and he'd say
9 why don't you pick that one, and the jury would
10 decide?

11 MS. BERRY: Yes, Your Honor. Let the jury
12 - - -

13 JUDGE RIVERA: So if - - - if you had - - -
14 when you had decided to withdraw, paid at that time,
15 what - - - what's that amount? Isn't that a lump sum
16 you would have paid at that time?

17 MS. BERRY: Yeah, there were two options.

18 JUDGE RIVERA: Um-hum.

19 MS. BERRY: You could either pay a lump - -
20 - the villages, municipalities, could either pay a
21 lump sum or they could make payments over time.

22 JUDGE RIVERA: Um-hum.

23 MS. BERRY: And the lump sum payments that
24 were made were basically seventy-five percent of the
25 total withdrawal liability that was assessed against

1 each of the withdrawing municipalities.

2 JUDGE ABDUS-SALAAM: How were they
3 calculated? Were they calculated the same way as the
4 - - - the amount that arrived at the 1.67 million?

5 MS. BERRY: And then discounted - - -
6 seventy-five percent of - - - yes, they - - - there
7 was a total amount that was calculated, and then
8 there was a perc - - - they were paid - - -

9 JUDGE ABDUS-SALAAM: So they were
10 discounted?

11 MS. BERRY: They were discounted.

12 JUDGE ABDUS-SALAAM: They were discounted.

13 JUDGE RIVERA: And they were discounted,
14 why? Because people were willing to get out at that
15 time and avoid the litigation? So why should you
16 escape that now?

17 MS. BERRY: We're not asking for the
18 settlement amount. We're asking the principles of
19 discounting - - -

20 CHIEF JUDGE LIPPMAN: But you chose to do
21 neither, right? You chose not to pay or to pay out
22 into the future, right?

23 MS. BERRY: Well - - -

24 CHIEF JUDGE LIPPMAN: You took neither of
25 the two choices that you laid out?

1 MS. BERRY: That's correct, Your Honor.
2 The Village - - -

3 CHIEF JUDGE LIPPMAN: And why did you do
4 that?

5 MS. BERRY: The Village commenced an action
6 claiming there were - - - there were allegations of
7 plan mismanagement, and that's what went to
8 litigation.

9 The Fourth Department found that there was
10 a question of fact on those issues of plan
11 mismanagement.

12 JUDGE SMITH: But you - - - but you're not
13 - - -

14 MS. BERRY: So - - -

15 JUDGE SMITH: - - - you're not challenging
16 liability today, right?

17 MS. BERRY: No.

18 JUDGE SMITH: Because you - - - you've lost
19 the case and you admit you've lost the case, it's
20 just a question of what you - - - how much damages
21 you pay?

22 MS. BERRY: Correct. And a question of
23 interest as well, as to whether the trial court
24 awarded interest on the whole amount of liability - -
25 -

1 CHIEF JUDGE LIPPMAN: You want interest on
2 a discounted amount?

3 MS. BERRY: And - - -

4 JUDGE RIVERA: Time period.

5 MS. BERRY: - - - not on future - - -

6 CHIEF JUDGE LIPPMAN: Right.

7 MS. BERRY: - - - future payments.

8 JUDGE SMITH: Well - - - well, if it's
9 discounted, I mean, doesn't the discounting problem
10 take care - - - I mean, whatever date it's discounted
11 to, interest should start running from that date,
12 right?

13 JUDGE PIGOTT: Right.

14 JUDGE RIVERA: Right.

15 JUDGE PIGOTT: So do you have a number in
16 mind? I mean, you must have decided what you think
17 the appropriate discount rate is and how much you
18 should be paying instead of 1.67.

19 MS. BERRY: Well, I don't think it's for -
20 - - for me to determine that, Your Honor. I think
21 it's for a fact - - - trier of - - - finder of fact
22 to - - -

23 JUDGE PIGOTT: Well, when you - - -

24 MS. BERRY: - - - determine that - - -

25 JUDGE PIGOTT: - - - all right, so when you

1 sum up to the - - -

2 MS. BERRY: - - - but - - -

3 JUDGE PIGOTT: - - - when you sum up to the
4 jury, assuming that you get a chance to, what number
5 are you going to be asking for?

6 MS. BERRY: I think the - - - in terms of a
7 discount rate?

8 JUDGE PIGOTT: Yeah.

9 MS. BERRY: I think a four percent discount
10 rate.

11 JUDGE PIGOTT: And what does that - - -
12 what does that - - -

13 MS. BERRY: In the middle of three, four,
14 and five for the - - -

15 JUDGE PIGOTT: What does that do to 1.67?

16 MS. BERRY: I'm not the mathematician. I
17 would have to - - - take me some time to figure that
18 one out.

19 CHIEF JUDGE LIPPMAN: Okay, anything else,
20 counselor?

21 MS. BERRY: No, thank you.

22 CHIEF JUDGE LIPPMAN: Okay - - -

23 MS. BERRY: Oh, only with the exception of
24 the time from which interest should be awarded, it's
25 our position that the County did not demand payment

1 under either a breach - - - this is - - - they're
2 claiming it's a breach of contract case. I don't
3 disagree with that. Absent a provision in a contract
4 that demand for payment does not - - - that liability
5 for payment does not accrue until a demand has been
6 made. The demand - - -

7 JUDGE SMITH: So you - - - you're - - -
8 under the regulations, your payment was due, what,
9 December 31 of '05?

10 MS. BERRY: That was when the plan was
11 abandoned. But it didn't even come out with a
12 reserve analysis until June of 2006.

13 JUDGE PIGOTT: Well, what did you do in the
14 meantime - - -

15 JUDGE SMITH: But - - - but the regulation
16 would say that you pay as of the date of abandonment?

17 MS. BERRY: It says that it's the equi - -
18 - the equi - - - I believe that the equitable share
19 is determ - - - it's ascertained as the date of the
20 withdrawal.

21 JUDGE SMITH: As of the - - - as of the
22 date of withdrawal. You're saying, essentially, that
23 because they didn't make a demand, there's some
24 period of time from the date of withdrawal until
25 their demand, that you get it interest free?

1 MS. BERRY: Yes.

2 JUDGE PIGOTT: Do you - - -

3 JUDGE SMITH: And how long - - - how long
4 is that period of time?

5 MS. BERRY: It's our position that it would
6 have been the filing of the amended answer in January
7 of 2008, at which time they demanded the - - -

8 JUDGE SMITH: So - - - so a couple - - -
9 two years?

10 MS. BERRY: Yes.

11 JUDGE PIGOTT: But figured in that, I mean,
12 I assume there was an offset, because somebody must
13 have been paying Workers' Comp after you abandoned
14 the plan?

15 MS. BERRY: And that would be what the
16 interest on the pre - - -

17 JUDGE PIGOTT: No, but I mean, you got
18 injured workers out there, I assume?

19 MS. BERRY: Correct.

20 JUDGE PIGOTT: You're - - - who's paying?

21 MS. BERRY: Correct. My understanding is
22 that the County - - -

23 JUDGE PIGOTT: They continued to pay it?

24 MS. BERRY: They continued to pay.

25 JUDGE PIGOTT: Oh.

1 MS. BERRY: And so that our - - - that's
2 what the interest would be on the pre-verdict - - -
3 pre-judgment items would compensate for.

4 JUDGE ABDUS-SALAAM: But you - - - you
5 stopped paying December 2005, right?

6 MS. BERRY: Yes.

7 JUDGE ABDUS-SALAAM: So you're saying that
8 the County - - - you shouldn't get interest
9 calculated back to December 2005, only to 2008,
10 because they didn't demand payment until 2008?

11 MS. BERRY: That's - - - yes. Correct.
12 That's one of our arguments.

13 CHIEF JUDGE LIPPMAN: Okay, counsel.

14 MS. BERRY: Thank you.

15 CHIEF JUDGE LIPPMAN: Thanks, counsel.
16 You'll have rebuttal.

17 Counselor?

18 MR. MILLUS: Good afternoon, Your Honors.
19 Al Millus from Hinman, Howard & Katel in Binghamton.

20 You know, really, I think to me this case
21 comes down to whether it's distinguishable from
22 Milbank (sic) and Toledo and similar cases that
23 discount future - - -

24 JUDGE READ: But those were all 50(a) or
25 50(b) cases, weren't they?

1 MR. MILLUS: Correct, Your Honor.

2 JUDGE READ: Doesn't that make a diff - - -
3 why doesn't that make a difference?

4 MR. MILLUS: It - - -

5 JUDGE READ: This is a contract action?

6 MR. MILLUS: Yes. And I think it does make
7 a big difference. Because in those - - - those cases
8 and the other types of cases where they discount
9 future damages to present value, they are liquidated
10 amounts of damages that have been awarded.
11 Presumably, the person can take what they need now,
12 invest it, and make the same amount of money over
13 time.

14 JUDGE SMITH: Are you - - - are you really
15 arguing that for his - - - for her aliquot share of a
16 thousand-dollar payment that might be due twenty
17 years from now, you calculate the full thousand
18 dollars, and don't discount it at all?

19 MR. MILLUS: Yes. And the - - - the reason
20 for that - - -

21 JUDGE SMITH: How does that make sense?

22 MR. MILLUS: Your Honor, it comes back down
23 to the purposes for discounting the present value.
24 And if you look at the Milbank (sic) case, the Toledo
25 case, the purpose of the discount is because - - - is

1 to provide fair and equitable compensation to the
2 victim for their loss - - -

3 JUDGE SMITH: What's - - - what's fair
4 about paying - - - about you paying 1,000 dollars now
5 for an obligation you're not going to have - - - for
6 a thousand-dollar obligation you're going to have
7 twenty years from now?

8 MR. MILLUS: That gets down to the fact
9 that this is not future damages that are being
10 awarded here. This is - - -

11 JUDGE SMITH: But my question is, what's
12 fair about it?

13 MR. MILLUS: What's fair about it is that
14 it may be completely inadequate to pay these claims
15 as they go on forever. These - - - there's - - -

16 JUDGE SMITH: Yeah, but that's what you
17 paid that expert to figure out is what the - - - what
18 the adequate amount is.

19 MR. MILLUS: Yes, and he - - - he qualified
20 that, and it's quoted in our brief, to say that this
21 is just an estimate. It's based on many variable
22 factors.

23 JUDGE SMITH: It could be - - - it could be
24 low but it could be high, too, right?

25 MR. MILLUS: Right, it could be. And - - -

1 JUDGE SMITH: But why - - - why is it fair
2 to pay the - - - to pay the undiscounted number. I
3 mean, it could be high; it could be low, but it's the
4 best estimate your guy had.

5 MR. MILLUS: Well, Your Honor, but we have
6 subsequent history. The estimate as of - - -
7 undiscounted estimate as of December 31, 2005, the
8 date of withdrawal, was 18.4 million dollars. Three
9 years later, they did another - - -

10 JUDGE SMITH: Yeah, but that 18.4 was the
11 sum of - - - of dollars that he estimated would be
12 paid in the future, right?

13 MR. MILLUS: Yes, and if you would read his
14 actuarial reports, it's - - - it's a lot more
15 complicated than that. I - - - I don't claim to
16 understand how they did it. But it's - - - it's a
17 very inexact science. For example, if - - - you
18 could have an employee who has a huge claim every
19 year, and he gets hit by a car, and the claim goes
20 away. That might complete - - - very much diminish
21 the future liabilities. Or you might have somebody
22 that lives well beyond their life expectancy and adds
23 to it.

24 But bear in mind, this plan was abandoned
25 in 2000-and - - - December 2005, with an 18.4-

1 million-dollar reserve analysis. Three years later,
2 they did another analysis, they had three years of
3 paying out claims, three years of retiring a number
4 of claims with lump sum payouts, and another - - -
5 the new actuarial analysis has increased by almost a
6 million dollars to 19 - - -

7 JUDGE GRAFFEO: So you want how much - - -
8 you want how much interest to run from what date?

9 MR. MILLUS: I want nine percent interest
10 to run from December 31, 2005.

11 JUDGE READ: So on the discount - - -

12 JUDGE GRAFFEO: So in this ballpark, what's
13 the difference between your demand and what will - -
14 - I don't know if they've offered anything - - - but
15 if they were to offer something, what - - - what are
16 we looking at here?

17 MR. MILLUS: I don't have a sense for that,
18 Your Honor. I haven't crunched any numbers in that
19 respect.

20 JUDGE RIVERA: Why are these not - - - you
21 said these are not future damages.

22 MR. MILLUS: They're not. This is an
23 estimate of future plan liabilities. The County's
24 not going to keep this money and invest it and use it
25 for its living expenses. We're just going - - - this

1 is taking the participants' money to make sure that
2 these - - - these claims - - -

3 JUDGE ABDUS-SALAAM: And that's why you say
4 it's - - -

5 MR. MILLUS: - - - are paid until they're
6 all - - -

7 JUDGE ABDUS-SALAAM: - - - present damages,
8 not future damages, because you can't take this
9 million-six and make it grow or take something less
10 than that and make it grow to what you need it to
11 grow to?

12 MR. MILLUS: And I - - - presumably, they -
13 - - there's already some interest on - - -

14 JUDGE SMITH: Well, why - - - why can't
15 you?

16 JUDGE RIVERA: Yeah, why - - - why - - -

17 JUDGE SMITH: I mean, if you don't have to
18 pay it for X years, why can't you put it in the bank
19 for X years?

20 MR. MILLUS: Presumably you can pay some
21 interest - - - you can earn some interest. But you -
22 - - you need this money to - - - to pay the claims as
23 they - - -

24 JUDGE RIVERA: Because you have no more
25 money?

1 MR. MILLUS: Yes. There's no more money -
2 - - well, other than people - - -

3 JUDGE RIVERA: There's very little money.

4 JUDGE SMITH: But you don't have - - -

5 MR. MILLUS: In the abandonment claim.

6 JUDGE SMITH: - - - but you don't have to
7 pay the claims until they're due?

8 MR. MILLUS: Um - - -

9 JUDGE SMITH: I mean, that's her whole
10 point. I mean, she - - - she's saying I'll give you
11 the money - - - I'll give you the sum of money that
12 will give you exactly the number you say you need on
13 January 1st, 2020 or whenever it is. What's unfair
14 about that?

15 MR. MILLUS: My point is that that number
16 is so inexact that it's - - - that the prudent thing
17 to do in - - -

18 JUDGE SMITH: So if it's all that inexact,
19 you probably - - - maybe your damages are too
20 speculative. You ought to get nothing?

21 MR. MILLUS: Well, the accepted means of
22 calculating damages in these types of cases is
23 actuarial analysis.

24 JUDGE READ: Well, you did offer a
25 discounted amount. Are you just saying that was - -

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MR. MILLUS: Your Honor - - -

JUDGE READ: - - - discount for settling?

MR. MILLUS: - - - at the time that was done, the plan was bankrupt; the County had to lend it money to continue to pay the claims. And they did that for the sole purpose of getting money into the plan so they could put it back in a footing of solvency.

JUDGE ABDUS-SALAAM: Was that the seventy-five percent?

MR. MILLUS: Yes. That was a settlement. It was not a discount by the administrative - - - recognizing principles of discounting. It was - - -

JUDGE SMITH: But there - - - but the - - - your expert does have discounted numbers in his report?

MR. MILLUS: He does. And he says in the next breath that, you know, I put these in there for informational purposes only, but you don't necessarily use them because of all the uncertainties involved in the - - -

JUDGE SMITH: But why - - - why are they - - - why are the discount numbers any less uncertain than the gross numbers?

1 MR. MILLUS: Your Honor, I think, the point
2 is, the purpose is to have money to pay the future
3 claims. And you should err on the side of
4 conservatism. Who knows where healthcare costs are
5 going to go in the future.

6 JUDGE SMITH: Well - - - well, I mean, on
7 that theory, you ought to just double your damages or
8 triple them. Why not? Err on the side - - - I mean,
9 shouldn't the jury be trying - - - I understand it's
10 impossible to get it right, but shouldn't they be
11 trying to get as close to right as they can, rather -
12 - - I mean, why should - - - we don't usually tell
13 juries err on the - - - err on the high side?

14 MR. MILLUS: Well, I think the point here
15 is not erring on either side, it's to - - - you know,
16 the - - - a plan administrator used his discretion to
17 say we're entitled to full, undiscounted - - - a
18 full, undiscounted amount, and it was their
19 rationalization - - -

20 JUDGE SMITH: Who - - - whose discretion?

21 MR. MILLUS: The plan administrator's
22 discretion.

23 JUDGE SMITH: Well, the - - - the plan
24 administrator, is - - - will use his discretion to
25 get himself as much money as he can, I assume.

1 That's what I'd do too. It's his discretion how much
2 money he wants?

3 MR. MILLUS: Well, Your Honor, again, the
4 goal here is not to compensate the plan administrator
5 so he can, you know, retire.

6 JUDGE SMITH: I understand - - - I
7 understand he's - - - I understand he's doing it for
8 the best of motives and he's not taking a dime for
9 himself. But you're saying it's his discretion how
10 much money the plan - - - this village should pay
11 him?

12 MR. MILLUS: You know, Your Honor, the - -
13 - the plan itself says that you're - - - you're
14 required to pay your equitable - - - well, the
15 statute says, your equitable share of the plan
16 liabilities as of the date of the abandonment or the
17 date of - - -

18 JUDGE ABDUS-SALAAM: And what is the plan?
19 Is the plan a contract?

20 MR. MILLUS: It's a local law. And as I
21 argue in my brief, we - - - it's a contract - - -
22 applied contract, basically.

23 JUDGE PIGOTT: Self insured.

24 MR. MILLUS: Pardon me?

25 JUDGE PIGOTT: You're self insured?

1 MR. MILLUS: It was a completely self-
2 insured plan.

3 JUDGE PIGOTT: But you know, usually when
4 you - - -

5 JUDGE GRAFFEO: Was there an MOU?

6 MR. MILLUS: Pardon?

7 JUDGE GRAFFEO: Was there an MOU that would
8 substitute for a contract, a memorandum of
9 understanding?

10 MR. MILLUS: No, there was a local law in
11 1956 that actually - - - this plan had been in
12 existence for long before that. It was just codified
13 in 1956 when Article 5 of the Workers' Compensation -
14 - -

15 JUDGE PIGOTT: Usually, when you go to the
16 jury, one of the things you point out is that you can
17 only go once. And that's why, you know, you get into
18 discount rates and stuff like that, because whatever
19 number they come up with is it. You know, you can't
20 go back and ask the jury, and say, we made a mistake,
21 we over-estimated or under-estimated.

22 And that's why you have discount rates and
23 that's why you have somebody estimate that, you know,
24 it's going to cost us 1,000 dollars ten years from
25 now, and when you decide to give them that, you got

1 to - - - you've got to move it back and say 900
2 dollars today is 1,000 dollars twenty years from now.

3 MR. MILLUS: Right. But I'll - - - as a
4 purely technical matter, there was no evidence or
5 testimony as to what an appropriate discount rate
6 would be. There was no economist called.

7 JUDGE SMITH: What - - - what about your
8 expert's report?

9 MR. MILLUS: He gave several alternatives.
10 But picking a discount rate is a matter for an
11 economist to - - - to look at interest rates - - -

12 JUDGE SMITH: But did - - -

13 JUDGE READ: Why isn't it a matter for the
14 jury here?

15 MR. MILLUS: Well, they - - - this is not
16 something that the jury would have the competence to
17 determine an appropriate discount - - -

18 JUDGE SMITH: Whose - - -

19 MR. MILLUS: - - - rate, I think, given - -
20 -

21 JUDGE SMITH: - - - whose burden is it to
22 prove the right amount of damages?

23 MR. MILLUS: Ours. And I think we did.

24 JUDGE SMITH: So if you - - - if you did
25 not - - - if there's no appropriate discount rate

1 before the jury, is there a failure of proof?

2 MR. MILLUS: We don't think there should
3 have been discounted. We think - - - if the
4 plaintiff wanted to - - - well, the plaintiffs were,
5 in effect, the defendants - - -

6 JUDGE SMITH: Well, didn't - - - yeah.
7 Didn't they - - - didn't they try to - - - well, they
8 did - - - they wanted the jury to pick a discount
9 rate, didn't they, and the judge wouldn't let them?

10 MR. MILLUS: Correct. But there was no
11 competent testimony as to what an appropriate
12 discount rate would have been. The only testimony
13 was from Neal Conolly, the former head of the State
14 Insurance Fund who said the State Insurance Fund uses
15 five percent. But who knows if that was going to be
16 appropriate - - -

17 JUDGE SMITH: Well, but you - - - but you
18 also had your expert putting in two, three, four
19 percent. What's - - - I mean, I under - - - in a
20 world where nothing's perfect, what's wrong with her
21 theory of well, why shouldn't the jury take the
22 middle one?

23 MR. MILLUS: Your Honor, I think that would
24 be improper to do that.

25 JUDGE SMITH: But why - - -

1 JUDGE PIGOTT: But the only - - - the only
2 testimony - - -

3 JUDGE SMITH: - - - why - - - I see the
4 flaws in it, but why is it more improper than picking
5 - - - than picking the gross undiscounted number?

6 MR. MILLUS: I - - - Your Honor, you can
7 pick from a variety of alternatives here, and the
8 question is what's fair?

9 JUDGE PIGOTT: But nobody said no. I mean,
10 your expert said there ought to be a - - - that here
11 are discount rates. And they had this one that they
12 picked from the State Insurance Fund. Nobody was
13 saying there shouldn't be any, I guess - - -

14 MR. MILLUS: Well, no. Our expert does not
15 say that there should be discounted. In the very
16 next breath after he sets forth the - - - he and she;
17 they were male and female - - - in the very next
18 breath he says - - - he and she say - - -

19 JUDGE ABDUS-SALAAM: Counsel, when other -
20 - -

21 MR. MILLUS: - - - discounting may or may
22 not be appropriate.

23 JUDGE ABDUS-SALAAM: - - - when other
24 municipalities withdrew from this plan, did they get
25 their withdrawal payments discounted to future value?

1 MR. MILLUS: Not initially - - -

2 JUDGE ABDUS-SALAAM: I mean, for future - -

3 -

4 MR. MILLUS: - - - it was only when - - -

5 JUDGE ABDUS-SALAAM: - - - for present

6 value.

7 MR. MILLUS: - - - we settled it. What

8 happened was - - -

9 JUDGE ABDUS-SALAAM: Right. So the ones
10 who withdrew regularly had to pay whatever their
11 equitable share was undiscounted, correct?

12 MR. MILLUS: They would have, if we hadn't
13 settled it. And that rea - - - the only reason the
14 County settled it was because the plan was bankrupt
15 and we had to get some cash into the plan.

16 CHIEF JUDGE LIPPMAN: Okay.

17 MR. MILLUS: Thank you very much.

18 CHIEF JUDGE LIPPMAN: Thanks, counsel.

19 MR. MILLUS: It's nice being back here
20 after twenty-eight years.

21 CHIEF JUDGE LIPPMAN: Thank you, counsel.
22 Counselor, rebuttal?

23 MS. BERRY: Yes, thank you. Just briefly,
24 Your Honors.

25 I think the overriding theme of this

1 court's cases dealing with damages that are - - -
2 represent amounts that are to be paid or will accrue
3 in the future is to make sure there's an award that
4 neither overcompensates the plaintiff nor unduly
5 penalizes the defendant.

6 JUDGE ABDUS-SALAAM: Well, counsel, in the
7 withdrawal - - - if the withdrawal amount had to be
8 paid at the time you withdrew, how is that a future
9 payment that has to be discounted to the present?

10 If you had actually withdrawn in 2005 - - -

11 MS. BERRY: Correct.

12 JUDGE ABDUS-SALAAM: - - - instead of not
13 doing anything, you would have had to pay an amount
14 that would represent, essentially, present damages,
15 not something that would be discounted to the future
16 - - - from the future to the present, right?

17 MS. BERRY: Well, yes, Your Honor. And
18 it's our position that the equitable share of that
19 withdrawal amount would have to take into account the
20 fact that payments would be - - -

21 JUDGE SMITH: You say - - -

22 MS. BERRY: - - - made over time.

23 JUDGE SMITH: - - - you say the number that
24 was due in 2005 was a discounted number?

25 MS. BERRY: There was no - - - we weren't -

1 - - the village - - - right. But - - -

2 JUDGE SMITH: Well, if - - - I mean, it
3 hadn't been figured out, but the right amount, the
4 theoretical amount that you owed as of December 31,
5 2005, was a number discounted from all those future
6 payments?

7 MS. BERRY: Should have been. Yes - - -
8 yes, Your Honor. That's our position. Yes.

9 CHIEF JUDGE LIPPMAN: But you chose not to
10 pay it?

11 MS. BERRY: Well, we didn't have a number
12 in 2005. We didn't have a number until they did
13 their reserve analysis. And the Village did - - -
14 yes, the Village - - - the Village did commence the
15 declaratory judgment action.

16 CHIEF JUDGE LIPPMAN: And the - - - and
17 again, the jury can do this even though you presented
18 no evidence as to what the discount rate should be?

19 MS. BERRY: Well, they - - -

20 CHIEF JUDGE LIPPMAN: How do they do that?

21 MS. BERRY: It was the position of trial
22 counsel that there was evidence in the record of
23 three percent, four percent, five percent. They
24 requested - - -

25 CHIEF JUDGE LIPPMAN: So you feel there is

1 enough that the jury could - - -

2 JUDGE ABDUS-SALAAM: But usually - - -
3 usually, doesn't the judge discount - - - do the
4 discounting?

5 MS. BERRY: And in wrongful death cases,
6 yes, that's what the CPLR says. There isn't a
7 statute here governing that. So I - - - it may be an
8 open question as to who should have done - - - who
9 should have or who could have done the discounting.

10 CHIEF JUDGE LIPPMAN: Okay, thank you.

11 MS. BERRY: Thank you very much.

12 CHIEF JUDGE LIPPMAN: Thank you both.
13 Appreciate it.

14 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Village of Ilion v. County of Herkimer, No. 80 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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