

1 COURT OF APPEALS
2 STATE OF NEW YORK

3 -----

4 PAUL MARINACCIO, SR.,
5 Respondent,

6 -against-

No. 31

7 TOWN OF CLARENCE, et al.

8 Appellants.
9

20 Eagle Street
Albany, New York 12207
February 5, 2013

10
11
12 Before:

13 CHIEF JUDGE JONATHAN LIPPMAN
14 ASSOCIATE JUDGE VICTORIA A. GRAFFEO
15 ASSOCIATE JUDGE SUSAN PHILLIPS READ
16 ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

17 Appearances:

18 MICHAEL B. POWERS, ESQ.
19 PHILLIPS LYTTLE, LLP
Attorneys for Appellant KEI
3400 HSBC Center
Buffalo, NY 14203

20 JOSEPH J. MANNA, ESQ.
21 KENNETH E. WEBSTER, ESQ.
LIPSITZ GREEN SCIME CAMBRIA, LLP
22 Attorneys for Respondent
42 Delaware Avenue
23 Suite 120
Buffalo, NY 14202

24 Sharona Shapiro
25 Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 31, Marinaccio v. Town of
2 Clarence.

3 Counselors?

4 MR. POWERS: Good afternoon, Your Honors.
5 Michael Powers for the appellant, Bernard Kieffer of
6 Kieffer Enterprises.

7 I'd like to reserve four minutes for
8 rebuttal, please.

9 CHIEF JUDGE LIPPMAN: Sure, go ahead,
10 counselor.

11 MR. POWERS: Okay. Your Honor, first of
12 all, there are essentially five issues here, the
13 correct determination of which would require
14 reversal.

15 The first issue, of course, is the
16 sufficiency of the evidence to find that Mr. Kieffer
17 engaged in such conduct that amounted to willful,
18 wanton, intentional, criminal indifference to civil
19 obligation.

20 CHIEF JUDGE LIPPMAN: Didn't they know that - -
21 - didn't he know that - - - that it was going to flood the
22 property, the water? Isn't that quite clear that there's
23 going to be some flooding?

24 MR. POWERS: Absolutely not, Your Honor.
25 As a matter - - -

1 CHIEF JUDGE LIPPMAN: There's no - - - no, it
2 was not clear that there would be some flooding, that the
3 evidence shows that - - - that you thought that nothing -
4 - - no overflow onto the land?

5 MR. POWERS: There would be - - - that's
6 different, Your Honor. Certainly, they knew that the
7 water was going to go through the drainage ditch, where it
8 had gone for the past fifty years, but there is not a
9 sliver of evidence in the record to suggest that Mr.
10 Kieffer ever thought that that was going to flood the
11 land. As a matter of fact, the proof is all contrary to
12 that, where he testified: I thought I had the right to do
13 this, I hired engineers, I hired a wetland consultant, and
14 they all said that this will provide water to that ditch
15 at no greater level than it has during the past ten years.

16 JUDGE GRAFFEO: Didn't this end up with
17 thirty-something acres flooded?

18 MR. POWERS: It varied - - -

19 JUDGE GRAFFEO: So that - - -

20 MR. POWERS: - - - Your - - -

21 JUDGE GRAFFEO: - - - that had to happen
22 gradually. Didn't - - - didn't anyone notice that
23 the - - -

24 MR. POWERS: Well, the truth - - -

25 JUDGE GRAFFEO: - - - that the property

1 here was - - - a substantial number of acres were
2 going under water?

3 MR. POWERS: The - - - the truth was, Your
4 Honor, that there were wetlands on this property in
5 1978, according to plaintiff's own expert.

6 JUDGE GRAFFEO: Only about three acres, I -
7 - - am I - - -

8 MR. POWERS: I think there - - -

9 JUDGE GRAFFEO: Am I recalling correctly
10 from the record? It's around four acres were
11 designated wetlands, and then they end up with over
12 thirty?

13 MR. POWERS: Well, the whole area is a
14 designated federal wetland, the entire property. But
15 you're talking about the actual wet wetlands that
16 were - - - that eventually evolved. And what
17 happened there, the testimony was that sometimes
18 there was more, sometimes there was less. Some - - -
19 in places where the ditch was actually maintained,
20 the land dried out so the wetlands shrank. So it
21 wasn't just a continual, gradual filling up like a
22 bathtub.

23 JUDGE GRAFFEO: I thought the record talks
24 about two pipes that were a foot into the plaintiff's
25 property here.

1 MR. POWERS: Yeah, they're - - - actually,
2 the pipes were not on the plaintiff's property, but
3 regardless of that, those were the pipes that were
4 put in after approval by the Army Corps of Engineer,
5 after approval by the state DEC, after compliance
6 with all SEQR, all SPDES requirements, compliance
7 with the Erie, Niagara, the drain water.

8 JUDGE SMITH: As I understand it, you're
9 just challenging the punitives, is that right?

10 MR. POWERS: That's correct, Your Honor.

11 JUDGE SMITH: So you - - - for the purposes
12 of this - - - of this appeal, we can assume that your
13 client committed a tort.

14 MR. POWERS: Yes, we can assume that for
15 purposes of this appeal.

16 JUDGE SMITH: An intentional tort?

17 MR. POWERS: Not necessarily.

18 CHIEF JUDGE LIPPMAN: But even if it was,
19 it's not enough, right?

20 MR. POWERS: It's not enough, Your Honor.

21 And Judge Graffeo, to get back to - - - to
22 your question, what was done here was done in
23 complete compliance with all of the federal, state
24 and local town regulations, and all of the manuals
25 that are the holy grail for doing this type of thing.

1 And it was done in accordance - - -

2 CHIEF JUDGE LIPPMAN: Is that, in itself,
3 enough, that they complied with all the statutes or
4 the manuals or whatever? Couldn't it still be
5 malicious or - - -

6 MR. POWERS: No - - - I submit no, Your
7 Honor.

8 CHIEF JUDGE LIPPMAN: If you comply, that's
9 it, you're off the hook?

10 MR. POWERS: And that's really the key to -
11 - -

12 CHIEF JUDGE LIPPMAN: Isn't that yes?

13 MR. POWERS: Pardon me?

14 CHIEF JUDGE LIPPMAN: And that's yes, that
15 if you comply with the manuals - - -

16 MR. POWERS: Yes.

17 CHIEF JUDGE LIPPMAN: - - - or whatever,
18 you can't be malicious and have punitives?

19 MR. POWERS: It's not just the manuals,
20 Your Honor, but that really goes to the heart of this
21 particular point. In the Colombini case, which was a
22 First - - - Second Department case from 2005, as well
23 as the Longo case we cited in the brief - - - and
24 there's lots of other cases talking about standards
25 and product liability. But in those cases, what they

1 said in Colombini was since General Electric, that
2 manufactured the MRI machine there, since even though
3 there was - - - there was negligence and there was a
4 tort, that because they had complied and done
5 everything they were supposed to do with respect to
6 regulations, rules, policies - - -

7 JUDGE SMITH: You're supposed to get an
8 easement before you put water on your neighbor's
9 land. That's something they were supposed to do that
10 they didn't do, right?

11 MR. POWERS: Well, actually, Your Honor,
12 there was an easement on that land.

13 JUDGE SMITH: Well, okay, but let's assume
14 that that issue's resolved against you. I mean, the
15 - - - the case was tried on - - - you say the
16 evidence was wrongly precluded, but the case was
17 tried on the theory that there was no easement.

18 MR. POWERS: That's - - - well, it - - -
19 they were forced to try the case - - -

20 JUDGE SMITH: I understand.

21 MR. POWERS: - - - on that theory.

22 JUDGE SMITH: I understand. And you say
23 that's error. But let's suppose for - - - assume for
24 the sake of argument it's not, and assume there's no
25 easement, then your client did do something - - -

1 there's one rule he didn't follow, right?

2 MR. POWERS: Absolutely not, Your Honor,
3 and I'll tell you why, because it was not my client's
4 job to get the easement. That was the town's
5 requirement - - -

6 CHIEF JUDGE LIPPMAN: Yeah, but he should
7 have - - - but shouldn't he have pursued the town to
8 make sure that the - - - followed up to make sure
9 that the town did that?

10 MR. POWERS: He went to five or six
11 meetings where the town repeatedly assured him, on
12 the record, publicly, that we will get that easement
13 - - -

14 JUDGE SMITH: Okay. Listen - - -

15 MR. POWERS: - - - that we will get that
16 easement - - -

17 JUDGE SMITH: - - - suppose I want to live
18 in your house and somebody else says, oh, don't
19 worry, I'll get a lease from him, and I go - - - am I
20 now free to go live in your house, even though I
21 haven't seen a lease, because somebody else told me
22 he was going to get it?

23 MR. POWERS: No, and Your Honor, that's why
24 there is a compensatory award for trespass. But
25 we're talking punitive damages. There has to be

1 willfulness, wanton. Mr. Kieffer had to - - - there
2 had to be proof that he wanted to hurt Mr.
3 Marinaccio. There's no proof in the record of that
4 at all, and in fact, he did everything possible;
5 maybe he was a little careless and he should have
6 followed up a little more, Chief Judge Lipmann.

7 JUDGE GRAFFEO: Well, I took it they
8 weren't - - -

9 MR. POWERS: Maybe he should have, but
10 that's not - - -

11 JUDGE GRAFFEO: I took it they weren't
12 monitoring this drainage area too well, or once they
13 saw that there's a fair amount of water accumulating,
14 perhaps they should have done something.

15 MR. POWERS: They couldn't see that, Your
16 Honor, because the town repeatedly asked Mr.
17 Marinaccio for permission to come in and clean the
18 ditch and inspect, and he threw the Highway
19 Department off the property, he threw the town
20 engineer off the property.

21 JUDGE SMITH: When did he start
22 complaining? When did Marinaccio start complaining,
23 hey, I'm drowning over here?

24 MR. POWERS: It was - - - it was years
25 after the water was - - - was draining there. And it

1 was after, I believe, he tried to dig the ditch out a
2 little bit, and although there's no evidence in the
3 record who created that berm, the only evidence is
4 that he dug that ditch out to a foot. That's when it
5 started flooding because the water wasn't draining
6 off the land into the ditch - - - except where there
7 were breaks in that berm, the land was dry.

8 JUDGE SMITH: Could it - - -

9 MR. POWERS: But - - -

10 JUDGE SMITH: Could it be found from this
11 record that after Marinaccio complained they
12 continued - - - your guy continued to pour water on
13 his land?

14 MR. POWERS: The water continued to go
15 there because there was no place else for it to go.

16 JUDGE SMITH: He'd already - - - at that
17 point he'd already built the ditches and the pipes
18 and everything, so all he - - - what he did was he
19 didn't change what he was doing before or after
20 Marinaccio complained?

21 MR. POWERS: Right, the ditch was already
22 there, Your Honor; that had been there for years.
23 And that's the way it works in that part of the town
24 with the wetlands, because you have to have these
25 ditches all over the town, otherwise everything's

1 going to flood.

2 JUDGE PIGOTT: Do you disagree with the
3 standard that the dissent uses? I mean, they
4 obviously agreed with you that it was not punitive,
5 but the standard that they measured it by, do you
6 agree with that reasoning?

7 MR. POWERS: Yes, I agree with the standard
8 that was used by the dissent. It was essentially the
9 same standard that was articulated by the majority.
10 They used different words but they talked about
11 intentional, conscious disregard.

12 JUDGE PIGOTT: No, they went farther; they
13 said outrageous or oppressive, intentional misconduct
14 and maliciousness or vindictiveness.

15 MR. POWERS: And those terms have been
16 used, in different decisions, to describe the overall
17 standard, which is basically willful, wanton,
18 conscious disregard and indifference.

19 JUDGE PIGOTT: That seems milder to me;
20 that's why I asked.

21 MR. POWERS: Criminal indifference to civil
22 obligations is really what we're talking about, Your
23 Honor. And if we step back and take a - - -

24 JUDGE SMITH: Near - - - near criminal, I
25 think they said.

1 MR. POWERS: Near criminal.

2 JUDGE SMITH: Near - - -

3 MR. POWERS: Well, some say criminal, but -
4 - - but regardless, when you look at an individual
5 who has complied and spent tens of thousands of
6 dollars on experts and engineers, submitted all his
7 plans, all of his specifications, he's relying on his
8 engineers, they're telling him that this is not going
9 to put any more water on there than has typically
10 been on there in the last ten years. The town says
11 we'll get any easement that we need for this, we
12 approve all your plans, the Army Corps approves them
13 all, the state approves them all; what more is there
14 for Mr. Kieffer to do? Perhaps follow up and say,
15 gee, did you get this easement? But that's not - - -

16 JUDGE PIGOTT: So you disagree with - - -

17 MR. POWERS: - - - that's not punitive
18 damages.

19 JUDGE PIGOTT: They say, at one point, that
20 you failed to comply with the approved drainage plan
21 and that you gained approval of Phase III based on
22 misrepresentations and then failed to - - - failed to
23 apply - - -

24 MR. POWERS: Not a sliver of proof in the
25 record to support that. That was counsel's argument.

1 There's no proof in the record to support any of
2 that.

3 CHIEF JUDGE LIPPMAN: So what's on the
4 record could support punitive damages if there was
5 more evidence. I mean, the water came on and he
6 didn't follow up on the easement. After he
7 complained, you know, he didn't really do anything.
8 If there were additional evidence, this could be
9 punitive damages, malicious, vindictive, outrageous -
10 - - whatever test you want to give, right? You're
11 just saying there was no showing that what happened
12 was because he maliciously wanted it to happen.

13 MR. POWERS: That's correct, Your Honor.
14 We - - - we concede, for the purposes of this
15 argument, that a tort was committed.

16 CHIEF JUDGE LIPPMAN: Okay.

17 MR. POWERS: But if every tort - - -

18 CHIEF JUDGE LIPPMAN: But that's not
19 enough. Okay.

20 MR. POWERS: If every tort turns into
21 punitive damages, we will have turned the law of this
22 state upside down.

23 CHIEF JUDGE LIPPMAN: Okay.

24 JUDGE GRAFFEO: How was - - -

25 CHIEF JUDGE LIPPMAN: Judge Graffeo?

1 JUDGE GRAFFEO: How was the extent of
2 compensatory damages determined?

3 MR. POWERS: That is a very good question,
4 Judge Graffeo, because you had thirty-eight acres of
5 land. Assuming it was completely destroyed, there
6 was proof here that was submitted by the plaintiff's
7 expert, unrefuted because - - - and that's another
8 error that was committed, that Mr. Kieffer's expert
9 was not allowed to testify to damages, and they put a
10 value of 50,000 dollars per acre on this land. I
11 wish - - - I live in that town - - - I wish the land
12 was worth 50,000. The assessed value is 5,000. The
13 - - - Mr. Klauk, if he had been allowed to testify,
14 would have said absolute max, 15,000. He ended up
15 with a verdict of 1.6 million.

16 JUDGE GRAFFEO: Now your - - - your appeal
17 is not challenging that. We're here on the punitive
18 aspect.

19 MR. POWERS: That's correct, Your Honor.
20 But I think in terms of overall justice, which is an
21 element that has to be considered in punitive damages
22 and ought to be considered by this court when
23 deciding whether or not punitive damages were
24 appropriate in this case, when someone's already
25 recovered four times the value of their property and

1 still owns the land, by the way, to then say that a
2 man who did everything he could to make sure that he
3 was doing what he was supposed to do should pay an
4 additional quarter of a million dollars is just not
5 right.

6 CHIEF JUDGE LIPPMAN: Okay, counselor.

7 Thanks.

8 Counselor?

9 MR. MANNA: May it please the court. My
10 name is Joseph Manna. This is my co-counsel, Kenneth
11 Webster. We represent the plaintiff.

12 CHIEF JUDGE LIPPMAN: Counsel, what's
13 malicious, vindictive, outrageous, criminal in - - -
14 almost criminal indifference, the civil obligation;
15 where is it? Where is it in the record?

16 MR. MANNA: Well, Judge, it's - - - this is
17 what I'll say to you, Judge. Criminal conduct under
18 what was charged, or near criminal conduct under what
19 was the agreed charge is certainly not required on
20 the law of this case.

21 CHIEF JUDGE LIPPMAN: What's required and
22 where is it in the record?

23 MR. MANNA: Let me get to your criminal
24 conduct - - -

25 CHIEF JUDGE LIPPMAN: Okay. Go ahead.

1 MR. MANNA: - - - because I do want to
2 address it, Judge.

3 CHIEF JUDGE LIPPMAN: Sure.

4 MR. MANNA: Because if you take a look at
5 the record - - - and this is pages 725 to 726 and
6 then 773 to 775 - - - the defense - - - the defense
7 elicited testimony in this case that this was near
8 criminal conduct. There was questioning of Mr.
9 Marinaccio about his belief that Mr. Kieffer bribed
10 town officials. There was testimony that someone - -
11 -

12 JUDGE SMITH: You say the jury found here
13 that there was bribery?

14 MR. MANNA: I'm not saying that, Judge; I'm
15 saying that there was some evidence that was
16 submitted by the defense, of claims - - -

17 JUDGE SMITH: Well, well, well - - -

18 MR. MANNA: - - - and allegations - - -

19 JUDGE SMITH: - - - does - - - I mean,
20 should we just - - - were the punitive - - - do - - -
21 can we uphold the punitives on the ground that there
22 was bribery proved?

23 MR. MANNA: No, Judge, it's just some of
24 the facts that the jury heard.

25 JUDGE SMITH: Well, what can we uphold?

1 What is the basis for it?

2 MR. MANNA: Okay.

3 JUDGE SMITH: What can we uphold that - - -

4 MR. MANNA: The basis, number one, Your
5 Honor asked earlier when did Mr. Marinaccio first
6 complain. The answer to that question is in 2006
7 when he was trying to develop this property and make
8 it into a subdivision. At first - - - one of the
9 first things he did was he called Mr. Kieffer. And
10 this is going to be found, Your Honors, on pages 623
11 of the record. He calls Mr. Kieffer and he says I've
12 got a lot of water on my property that you're putting
13 there; get the water off of my property. And Mr.
14 Kieffer tells him, in 2006, it's not my problem, it's
15 your problem.

16 CHIEF JUDGE LIPPMAN: Why is that - - -

17 MR. MANNA: Following that - - -

18 CHIEF JUDGE LIPPMAN: Why is that - - -

19 MR. MANNA: Where is it, Your Honor?

20 CHIEF JUDGE LIPPMAN: - - - malicious - - -

21 no, why is that malicious, vindictive - - -

22 MR. MANNA: Because - - -

23 CHIEF JUDGE LIPPMAN: - - - criminal

24 conduct - - -

25 MR. MANNA: - - - the standard requires,

1 Judge, that there's got to be a conscious
2 indifference to someone's property rights.

3 CHIEF JUDGE LIPPMAN: Yeah, but a tort is
4 not enough, you agree, right?

5 MR. MANNA: It's got to be a heightened
6 tort, Judge, the type of heightened tort that we have
7 here.

8 JUDGE SMITH: We've said that even ordinary
9 fraud isn't enough; it's got to be a especially gross
10 kind of fraud, almost a quasi-criminal enterprise.

11 MR. MANNA: This is pretty egregious
12 conduct, Your Honor. This is one developer - - -

13 JUDGE SMITH: What's - - - okay, go ahead.

14 MR. MANNA: - - - one developer trying to
15 make money at the expense of somebody else where he -
16 - -

17 JUDGE SMITH: If that's punitive damages,
18 there are going to be a lot of punitives awarded in
19 this state.

20 MR. MANNA: Judge, there's a letter that's
21 sent to Mr. Kieffer in 2006, following the telephone
22 call, where he's made aware of these claims of
23 substantial damage to the property. He does nothing
24 other than call his lawyer. We have, in this record,
25 contrary to what my co - - - my adversary said, in

1 this record there is testimony from the town engineer
2 who says that at the time they were trying to get
3 approval to do this subdivision that Mr. Kieffer
4 misrepresented the location of this ditch and that at
5 the time there was approval, the town engineer, who
6 did the approval, thought that the water was going to
7 drain into a ditch on Mr. Kieffer's land. There is
8 proof in this record that based upon the drainage
9 plan that was submitted, some of the water was going
10 to go to the west and some of the water was going to
11 go to the east near this pond abutting Mr.
12 Marinaccio's property. They did not follow the
13 approved drainage plan. So we don't - - - we have
14 not only someone who is refusing to help, but someone
15 who has submitted false information to a municipality
16 in seeking to gain approval in order to get a
17 subdivision built.

18 JUDGE READ: Now, the jury found the town
19 was liable too, right?

20 MR. MANNA: That's right, Your Honor.

21 JUDGE READ: To the tune of 1.3 million;
22 was that it?

23 MR. MANNA: 1.6, Your Honor.

24 JUDGE READ: 1.6.

25 MR. MANNA: 1.6 million. We also have

1 testimony in this case that Kieffer came in and built
2 this berm. During trial number 1 - - - and he was
3 impeached in trial number 2 - - - he admitted that
4 his subcontractor built this berm, took out water - -
5 - or I'm sorry, took out soil, dropped it on the east
6 side of this ditch, and that this berm was 5 to 600
7 feet long and 4 or 5 feet high. And he said in the
8 trial number 1 that his subcontractor, quote, "dug
9 out that ditch". In trial number 2, he refused to
10 acknowledge that, and he was impeached. He claimed
11 that yeah, there was a backhoe there, but the backhoe
12 was used to just knock down weeds back and forth. We
13 didn't actually do any digging. And the jury got to
14 see, under cross-examination, this gentleman being
15 impeached - - -

16 JUDGE SMITH: Okay, but - - -

17 MR. MANNA: - - - with prior testimony.

18 JUDGE SMITH: - - - the fact - - - the jury
19 can't give punitives just because it thinks a guy
20 didn't testify credibly or because it didn't like the
21 way he testified at trial. He's got to have done
22 something that's worse than the ordinary tort.

23 MR. MANNA: Well, Judge, if you look at all
24 of these things that I'm talking about together - - -
25 and I would submit to you, Your Honor, that the

1 refusing to help Mr. Marinaccio in 2006, when
2 contacted twice, that shows a conscious indifference
3 to Mr. Marinaccio's property rights. And under the
4 charge that was given - - -

5 CHIEF JUDGE LIPPMAN: That's the test, in
6 your mind, conscious indifference - - -

7 MR. MANNA: Conscious indifference.

8 CHIEF JUDGE LIPPMAN: - - - to the property
9 rights?

10 MR. MANNA: Con - - - for wanton and
11 reckless, Judge, as I've read the case law, it's a
12 conscious indifference and utter disregard for an
13 act's effects upon the health, safety and rights of
14 others.

15 JUDGE GRAFFEO: How is that diff - - -

16 JUDGE PIGOTT: You see - - -

17 JUDGE GRAFFEO: How is that different from
18 what he had to - - - your client had to prove to get
19 the intentional tort?

20 MR. MANNA: Well, with the intentional
21 tort, Your Honor, all you had to prove was that there
22 was an intent to route the water. And you didn't
23 have to show that part about the conscious
24 indifference to the property rights. So we clearly
25 showed an intent to route the water on to Mr.

1 Marinaccio's property. So this isn't an ordinary
2 tort case, a car accident case; this is an
3 intentional tort case.

4 JUDGE SMITH: There's no claim of any
5 motive, other than the one you mentioned earlier,
6 which is he wanted to do a development and make
7 money, right?

8 MR. MANNA: He wanted to make money.

9 JUDGE SMITH: He wasn't trying to buy
10 Marinaccio's land cheap by flooding it or anything
11 like that?

12 MR. MANNA: Well, I don't know that, Judge,
13 but I will say that he was trying to make money here,
14 and in Phase II he recognized that he had a problem,
15 that in 2000 the town said to him, if you want to
16 develop 2000 - - - Phase III, you have to fix the
17 water problem that's in Phase II. And the town made
18 him do certain things to, quote, unquote, "fix that
19 water problem". And what he really did was he moved
20 it; he moved the water problem that he had in Phase
21 II, which was, by the way, on his land that he was
22 selling off, and he made sure that it wasn't created
23 on Phase III, which was where he was going to do it -
24 - -

25 JUDGE PIGOTT: Mr. Manna - - -

1 MR. MANNA: - - - and he put it on my
2 client's land.

3 JUDGE PIGOTT: - - - the defense talks
4 about - - - or excuse me, the dissent talks about
5 outrageous or oppressive intentional misconduct and
6 maliciousness or vindictiveness. That's what they
7 say the standard is; you say it's wanton and
8 reckless.

9 MR. MANNA: I say that the majority, Judge
10 - - -

11 JUDGE PIGOTT: Okay.

12 MR. MANNA: - - - they're right, because on
13 the law of this case, when we did jury instructions
14 in this case, we agreed, and there was no objection
15 to what the jury charge was. And it was read right
16 out of the PJI, Judge.

17 JUDGE PIGOTT: So if - - -

18 MR. MANNA: It wasn't some new decision.

19 JUDGE PIGOTT: But they came back a couple
20 of times wanting definitions, right, of - - -

21 MR. MANNA: Yes.

22 JUDGE PIGOTT: - - - reckless and wanton.
23 So is the defendant then bound by the fact that - - -
24 that he agreed with that charge, and therefore stuck
25 with it?

1 MR. MANNA: Absolutely, Judge. I mean, you
2 have an obligation right there, at the charge, to
3 object or not object to the jury charge. And in this
4 instance, not only did the defense not object to the
5 jury charge, but then when the jury had questions - -
6 - because they did wrestle with this issue - - - when
7 they came out and said we have questions about what
8 wanton means and what reckless means, we had a
9 conference and the judge charged what he did, and
10 there was agreement at that time, and no objection,
11 at that time, as to what this jury was going to hear.

12 JUDGE SMITH: But what's the answer to the
13 question? What does "wanton and reckless" mean?

14 MR. MANNA: Well, Judge, my - - -

15 JUDGE SMITH: What did the judge tell them?

16 MR. MANNA: I think - - - he told them that
17 - - - I believe, Judge, that we read - - - and I
18 don't want to quote it, because I'm not certain of
19 what it is, but it's in the record. We read it out
20 of, I believe - - - I want to say it was the Black's
21 Law Dictionary, and there was an agreement as to
22 that. So - - - and I would submit to this Court that
23 this conduct, when you take a look at it all
24 collectively, and particularly in 2006 when he's
25 approached and said you've caused a problem on my

1 land, and his reaction to that is, that's not my
2 problem, that's your problem, that's a conscious
3 indifference. That also could be shown to show - - -
4 or that also could be used to show that what he did,
5 at the time he did it, was deliberate disregard of
6 Mr. Marinaccio's property rights.

7 I mean, you folks have been in the
8 trenches; there's not a lot of Perry Mason moments
9 out there. You can't get a defendant to say yes, I
10 did it and I knew these were going to be the
11 consequences. So you have to look at all of the
12 facts, all of the circumstances, and see if you can
13 reasonably infer from those whether or not punitive
14 damages are appropriate here. And in this instance,
15 this jury heard the charge, wasn't quite sure about
16 what they heard, they asked a question, they got it
17 read to them again. Then I believe they had a second
18 question; this was all on just punitives. They asked
19 a second question, it was explained to them again,
20 agreement of all counsel as to what was going to be
21 said to this jury. Defendants did not object, and
22 this is - - - we're just talking about punitive
23 damages. They went back and they deliberated, and
24 they found that under the charge that was given to
25 them, the agreed charge, that the conduct was

1 egregious enough to warrant punitive damages.

2 JUDGE GRAFFEO: If your adversary is
3 correct that his client had all of the appropriate
4 approvals and certificates and permits, does that
5 play into this equation at all as to whether it was
6 malicious and wanton?

7 MR. MANNA: What I'll say to that, Your
8 Honor, is first, the answer is shortly - - - in a
9 short order is no, he did not have what he needed to
10 have. Standard engineering practice does not give
11 someone the right to flood someone else out. So if
12 you've complied with standard engineering practice -
13 - - and there was lots of testimony here that they
14 did not - - - that that's not enough - - -

15 JUDGE READ: Well, what about the permits?
16 So the question is, did they have all of the
17 applicable permits and approvals from the government?

18 MR. MANNA: They did, Your Honor, but - - -

19 JUDGE READ: They did not?

20 MR. MANNA: They - - - they did have.

21 JUDGE READ: They did have?

22 MR. MANNA: They did have the permits that
23 the town issued, based upon the information, some of
24 which was false, that was provided to them. But Your
25 Honor, if you and I live next door to one another,

1 and I go to town hall and I say I'd like to drain my
2 pool and I'd like to drain it on Your Honor's land -
3 - -

4 JUDGE READ: Well, I can see the false
5 information part of it. It would seem to me that,
6 logically, if I had the government's permission to do
7 that, that certainly can't - - - can't be - - - there
8 aren't any - - - that's sort of inconsistent with the
9 idea of punitive damages, isn't it?

10 MR. MANNA: No, it's not, Your Honor.

11 JUDGE READ: It's not?

12 MR. MANNA: It's - - -

13 JUDGE READ: So I can have all government
14 approvals and I could still be assessed punitive
15 damages?

16 MR. MANNA: Thankfully, Judge, in this
17 state and in this country, the government cannot
18 consent to one property owner injuring another
19 property owner. So at the - - - and that's exactly
20 what happened here. So at the time this is being
21 contemplated - - -

22 CHIEF JUDGE LIPPMAN: It doesn't factor
23 into the equation that the government approved all
24 the permits, because your contention is - - -

25 JUDGE READ: I'm not - - - yeah, we're not

1 talking about compensatory damages or - - -

2 CHIEF JUDGE LIPPMAN: Exactly.

3 JUDGE READ: - - - we're talking about
4 punitive damages.

5 MR. MANNA: Under these circumstances, I
6 would submit to you that the answer is no, that
7 everybody - - -

8 CHIEF JUDGE LIPPMAN: It doesn't factor in
9 at all that they get all the permits and the
10 government says this looks okay; it doesn't go
11 towards this issue of whether it could possibly be -
12 - -

13 MR. MANNA: No, Judge - - -

14 CHIEF JUDGE LIPPMAN: - - - be a criminal
15 or malicious or however you want to - - -

16 MR. MANNA: No, and here is why.

17 CHIEF JUDGE LIPPMAN: - - - phrase it?

18 MR. MANNA: The government's looking at I'm
19 going to - - - we're going to build this subdivision
20 over here, okay? And they don't - - - they're not
21 looking at: and we're going to route the water onto
22 your neighbor's land, but - - -

23 JUDGE SMITH: The government had no
24 responsibility for stopping him from flooding his
25 neighbor?

1 MR. MANNA: Well, the government - - - the
2 government, in this instance, said that they wanted
3 an easement, and so everybody knew that an easement
4 was the key. And we have testimony that the - - -

5 JUDGE SMITH: But then, I guess - - -

6 MR. MANNA: - - - easement was never
7 obtained.

8 JUDGE SMITH: - - - I'm not talking about -
9 - - I'm talking about all the permits he got; did
10 those permits consider the question of whether the
11 neighbor's land was being - - - the neighbor's
12 property rights were being respected?

13 MR. MANNA: I don't believe so, Judge.
14 That's - - -

15 JUDGE READ: Well, what about - - -

16 MR. MANNA: - - - at the core - - -

17 JUDGE READ: What about the SEQR review?

18 MR. MANNA: The SEQR review looks at
19 whether there's going to be an economic - - - or I'm
20 sorry, an environmental impact, a negative
21 environmental impact, in general, in that area. This
22 is on Mr. Marinaccio's land, and the SEQR review does
23 not look at that issue. And - - -

24 CHIEF JUDGE LIPPMAN: Okay. Well, how
25 could all of those different processes not be looking

1 at all whether you're going to destroy or flood your
2 neighbor's property? I mean - - -

3 MR. MANNA: Well, Judge, unfortunately, in
4 this instance they didn't; they didn't. There was -
5 - - there was documented proof that everybody knew
6 that they needed an easement and that they didn't get
7 the easement.

8 JUDGE SMITH: Did you get punitives from
9 the town?

10 MR. MANNA: No, Judge. I believe only
11 because you couldn't.

12 JUDGE READ: Yeah.

13 JUDGE SMITH: Okay.

14 JUDGE READ: Yeah, Sharapata- - -

15 MR. MANNA: Okay. You couldn't.

16 JUDGE SMITH: That little detail.

17 JUDGE READ: Yeah, that's the Sharapata case.

18 CHIEF JUDGE LIPPMAN: Yeah.

19 JUDGE READ: Okay.

20 CHIEF JUDGE LIPPMAN: Okay.

21 MR. MANNA: Thank you.

22 CHIEF JUDGE LIPPMAN: Thanks.

23 MR. MANNA: Thank you.

24 CHIEF JUDGE LIPPMAN: Counselor, rebuttal.

25 MR. POWERS: Your Honor, let me start with

1 the last comment that counsel made. The SEQOR review,
2 the SPDES review, the Army Corps review, and the - -
3 -

4 JUDGE READ: [Spy-deez] - - - you mean
5 [Spee-deez], S-P-D-E-S?

6 MR. POWERS: Yes.

7 JUDGE READ: Yes, okay.

8 MR. POWERS: Yep.

9 JUDGE READ: SPDES - - - water permit,
10 right?

11 MR. POWERS: Yeah, I guess I've been
12 watching too many superheroes or something.

13 But all of those processes and all of those
14 permits have, as part of it, what will be the
15 environmental impact not just to the land in
16 question, but to the other land. So when counsel
17 says that those per - - -

18 JUDGE SMITH: Was there any governmental
19 body that had the responsibility of saying you can't
20 do this because it's not - - - because you're
21 interfering with Marinaccio's rights?

22 MR. POWERS: Yes.

23 JUDGE SMITH: Which one?

24 MR. POWERS: The Army Corps and the DEC and
25 the family.

1 JUDGE SMITH: I thought they were
2 protecting the public, protecting the environment.

3 MR. POWERS: Oh, no. No, Your Honor, the
4 Army Corps process looks to see whether or not this
5 is going to alter the water table and whether it's
6 going to flood - - -

7 JUDGE SMITH: Okay, but - - -

8 MR. POWERS: - - - any adjoining - - -

9 JUDGE SMITH: - - - but they don't look to
10 whether there's a trespass. They don't care whether
11 - - - they don't care who owns the land on which the
12 water table is altered, do they?

13 MR. POWERS: Yes, they do. Yes, they do.
14 As part of the permitting process, they look at what
15 the impact is going to be to the adjoining properties
16 - - -

17 JUDGE READ: Are those - - -

18 MR. POWERS: - - - as does the SEQR - - -

19 JUDGE READ: - - - documents in the record,
20 Mr. Powers?

21 MR. POWERS: Pardon me?

22 JUDGE READ: Excuse me, are those documents
23 in the record? The SEQR reviews or the - - -

24 MR. POWERS: SPDES.

25 JUDGE READ: - - - SPDES reviews or

1 anything like that?

2 MR. POWERS: No, Your Honor. It was - - -
3 it was - - - the proof was elicited at the trial to
4 show that all of those were, in fact, satisfied.

5 JUDGE GRAFFEO: Who issued the
6 determination that an easement was necessary?

7 MR. POWERS: The town actually said at town
8 board meetings that we will get any necessary
9 easements. There was no regulation that - - -

10 JUDGE GRAFFEO: Is that in the Army Corps
11 of Engineer report or the DEC permit? Was it a
12 condition of the permit?

13 MR. POWERS: Not - - -

14 JUDGE GRAFFEO: It was just of the town's
15 derivation?

16 MR. POWERS: This was only a responsibility
17 that was shouldered by the town.

18 JUDGE PIGOTT: How do they do that? Do
19 they go buy it or do they condemn it or - - -

20 MR. POWERS: They could do it a number of
21 ways. They go and either ask permission, or they
22 could actually condemn it or use eminent domain over
23 that particular piece of property. And what you had
24 here, of course, was a fifty-year course of dealing,
25 if you will.

1 JUDGE PIGOTT: What do you do about the
2 fact, as Mr. Manna points out, that everybody agreed
3 with this charge? Everybody said this is an issue
4 that should go to the jury, and this is the standard
5 by which they should make their determination.

6 MR. POWERS: Well, malice was part of the
7 charge, and malice requires intentional, evil motive,
8 which has been construed by the courts to mean a
9 conscious - - - criminal indifference, mere criminal
10 indifference to civil obligation.

11 JUDGE PIGOTT: Do you object to the charge?

12 MR. POWERS: Pardon?

13 JUDGE PIGOTT: Do you object - - - do you
14 think the charge was wrong?

15 MR. POWERS: No.

16 JUDGE PIGOTT: All right. Then - - -

17 MR. POWERS: No, there was no objection to
18 the charge, but - - -

19 JUDGE PIGOTT: The decision they made,
20 based on that charge, was what?

21 MR. POWERS: The decision they made based
22 on that charge was wrong. The decision - - - the
23 charge required malice, which - - -

24 JUDGE PIGOTT: How do we go by - - - how do
25 you go - - - I mean, if you say this charge is all

1 right; like it, cool, send it to the jury, and then
2 they come out and ask questions and stuff and then
3 they make a determination on it, how do you go back
4 into the jury room and say it could not have been
5 based on malice because they ruled against me?

6 MR. POWERS: No. No, the point is, Your
7 Honor, that there's just no proof in the record of
8 any - - -

9 JUDGE READ: Well, then why didn't you - -
10 -

11 MR. MANNA: - - - malice - - -

12 JUDGE READ: - - - object to the charge
13 being given?

14 MR. POWERS: Pardon me?

15 JUDGE READ: Why didn't you object to the
16 charge being given?

17 MR. POWERS: The - - - the counsel at the
18 time - - - I was not trial counsel - - - at the time
19 had moved to dismiss the punitive damage claim
20 entirely - - -

21 JUDGE READ: Yes.

22 MR. POWERS: - - - which is what preserved
23 this issue - - -

24 JUDGE READ: Yes.

25 MR. POWERS: - - - for review. The charge

1 itself, the judge had already decided this is going
2 to the jury - - -

3 JUDGE READ: Okay. So - - -

4 MR. POWERS: - - - so the next question was
5 - - -

6 JUDGE READ: - - - he had decided that?
7 All right.

8 MR. POWERS: He had already decided that.
9 He said it's going to the jury; now let's talk about
10 what charge the jury's going to get.

11 JUDGE SMITH: And as far as you're
12 concerned, the charge, you'll say today, is correct?

13 MR. POWERS: The charge - - - well, the
14 charge is what the charge is, Your Honor. There is
15 no objection to it and it is - - -

16 JUDGE SMITH: What's the answer? Is it a
17 correct charge?

18 MR. POWERS: Is - - - yes, it is, because
19 it required malice, and as Mr. Manna just said, he
20 thinks the standard is conscious indifference to
21 property rights. That's an intentional tort, and
22 that's the problem. And the fact of the matter is
23 that the entire argument of my opponent, not one
24 place in the record did he cite to anything that
25 could be construed as malice.

1 CHIEF JUDGE LIPPMAN: Okay, counselor.

2 JUDGE PIGOTT: Well - - -

3 MR. POWERS: And the misrepresentation,
4 Your Honor - - -

5 JUDGE PIGOTT: - - - he points out at 683,
6 I think, where you're told that you're doing this and
7 he says it's not my problem.

8 MR. POWERS: So - - -

9 JUDGE PIGOTT: So it sounds pretty
10 malicious.

11 MR. POWERS: What he did is he turned that
12 over - - - because the town had said they will get
13 the easement.

14 JUDGE PIGOTT: But - - -

15 MR. POWERS: Again, he's relying - - -

16 JUDGE PIGOTT: Well, he said that - - -

17 MR. POWERS: - - - on government - - -

18 JUDGE PIGOTT: I mean, if you said, my God,
19 I didn't realize that, let me get the town to do what
20 they were supposed to do and we'll get this thing
21 solved for you, Joe, or whatever his first name is -
22 - -

23 MR. POWERS: Well, at - - -

24 JUDGE PIGOTT: - - - but he didn't.

25 MR. POWERS: At that point, Your Honor,

1 there had been a lot of threatening activity, which
2 is in the record, and a lot of things where - - - the
3 last thing Mr. Kieffer - - - he's an eighty-two year
4 old little guy - - - is going to do is confront Mr.
5 Marinaccio. So he turned it over to his lawyer, he
6 talked to the town, the town said we're going to get
7 an easement, and - - -

8 CHIEF JUDGE LIPPMAN: Okay, counselor.

9 MR. POWERS: - - - he relied on that.

10 CHIEF JUDGE LIPPMAN: Thank you. Thank you
11 both.

12 MR. POWERS: Thank you, Your Honor.

13 CHIEF JUDGE LIPPMAN: Appreciate it.

14 (Court is adjourned)

15
16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Paul Marinaccio, Sr. v. Town of Clarence, et al., No. 31 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: February 12, 2013