

Nos. 06-11311-DD, 06-11312-DD

**United States Court of Appeals
For the Eleventh Circuit**

ACTION MARINE, INC. et al.,

Plaintiffs-Appellees,

v.

CONTINENTAL CARBON INC. et al.,

Defendants-Appellants.

Appeal from the United States District Court for the
Middle District of Alabama, Eastern Division, C.A. No. 3:01-CV-994-MEF
Hon. Mark E. Fuller, Chief United States District Judge

**REPLY BRIEF OF DEFENDANTS-APPELLANTS
CONTINENTAL CARBON COMPANY AND
CHINA SYNTHETIC RUBBER CORPORATION**

CLIFFORD C. BRADY
Brady, Radcliff & Brown
61 St. Joseph Street
Mobile, Alabama 36602
(251) 405-0045 (phone)
(251) 405-0076 (fax)

H. THOMAS WELLS, JR.
PETER S. FRUIN
Maynard, Cooper & Gale, P.C.
1901 Sixth Avenue North
2400 AmSouth/Harbert Plaza
Birmingham, Alabama 35203
(205) 254-1000 (phone)

EVAN M. TAGER
NICKOLAI G. LEVIN
Mayer, Brown, Rowe & Maw LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000 (phone)
(202) 263-3300 (fax)

J. BRETT BUSBY
Mayer, Brown, Rowe & Maw LLP
700 Louisiana Street, Ste. 3400
Houston, Texas 77002
(713) 238-2606 (phone)
(713) 238-4606 (fax)

*Attorneys for Continental Carbon Company
and China Synthetic Rubber Corporation*

**SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

The following individuals have an interest in the outcome of this case but were not listed in the prior certificate of interested persons and corporate disclosure statement:

1. P. Thomas Dazzio
2. Lee Patterson

/s/Evan M. Tager
Evan M. Tager
An Attorney for Defendants-Appellants
Continental Carbon Company and China
Synthetic Rubber Corporation

Dated: August 9, 2006

TABLE OF CONTENTS

	Page
INDEX OF AUTHORITIES.....	iii
ARGUMENT	1
I. DEFENDANTS ARE ENTITLED TO JUDGMENT AND/OR A NEW TRIAL ON ALL OF PLAINTIFFS’ CLAIMS	1
A. Wantonness	1
1. Plaintiffs did not prove that Defendants’ conduct created a substantial risk of physical harm.....	1
2. Plaintiffs did not prove that Defendants acted with an entire absence of care	2
B. Trespass	5
C. Causation And Substantial Damage.....	7
D. Remedy.....	10
II. THE COMPENSATORY AWARDS ARE UNSUSTAINABLE	11
A. Action Marine.....	11
B. Tharpe.....	12
C. All Plaintiffs	14
III. THE PUNITIVE AWARD CANNOT STAND.....	15
A. Punitive Liability	15
B. The Cap	18
C. Excessiveness	22
1. Reprehensibility	23
2. Ratio	25
3. Fines for comparable conduct.....	26

TABLE OF CONTENTS
(continued)

	Page
4. The disgorgement rationale.....	28
CERTIFICATE OF COMPLIANCE.....	31
CERTIFICATE OF SERVICE	32

INDEX OF AUTHORITIES

Page(s)

Cases

<i>Alaska Dep't of Env'tl. Conserv. v. EPA</i> , 540 U.S. 461, 124 S.Ct. 983 (2004)	4
<i>Alta Anesthesia Assocs., P.C. v. Gibbons</i> , 537 S.E.2d 388 (Ga. App. 2000)	21
<i>Atlanta Obstetrics & Gynecology Group v. Coleman</i> , 398 S.E.2d 16 (Ga. 1990)	7
<i>BMW of N. Am., Inc. v. Gore</i> , 517 U.S. 559, 116 S.Ct. 1589 (1996)	26
<i>Boyle v. United Techs. Corp.</i> , 487 U.S. 500, 108 S.Ct. 2510 (1988)	21, 22
<i>Chrysler Corp. v. Batten</i> , 450 S.E.2d 208 (Ga. 1994)	5
<i>City of St. Louis v. Praprotnik</i> , 485 U.S. 112, 108 S.Ct. 915 (1988)	22
<i>Clements v. ACE Cash Express, Inc.</i> , 2005 WL 140005 (D.D.C. June 23, 2005)	19
<i>Cooper Indus., Inc. v. Leatherman Tool Group, Inc.</i> , 532 U.S. 424, 121 S.Ct. 1678 (2001)	16, 26
<i>CSX Transp. v. West</i> , 523 S.E.2d 63 (Ga. App. 1999)	18
<i>Eckles v. Atlanta Tech. Group, Inc.</i> , 485 S.E.2d 22 (Ga. 1997)	12
<i>Engle v. Liggett Group, Inc.</i> , 2006 WL 1843363 (Fla. July 6, 2006)	10

INDEX OF AUTHORITIES

(continued)

Page(s)

<i>Erie R.R. v. Tompkins</i> , 304 U.S. 64, 58 S.Ct. 817 (1938)	22
<i>Gay v. Piggly Wiggly S., Inc.</i> , 358 S.E.2d 468 (Ga. App. 1987)	14
<i>Geldermann, Inc. v. Fin. Mgmt. Consultants, Inc.</i> , 27 F.3d 307 (7th Cir. 1994)	21
<i>Georgia Ne. R.R. v. Lusk</i> , 587 S.E.2d 643 (Ga. 2003)	11
<i>Gibson v. State</i> , 593 S.E.2d 861 (Ga. App. 2004)	5
<i>Gilson v. Mitchell</i> , 205 S.E.2d 421 (Ga. App. 1974), <i>aff'd</i> , 211 S.E.2d 744 (Ga. 1975)	14
<i>Hang v. Wages & Sons Funeral Home, Inc.</i> , 585 S.E.2d 118 (Ga. App. 2003)	14
<i>Hudgins & Co. v. J & M Tank Lines, Inc.</i> , 450 S.E.2d 221 (Ga. App. 1994)	16, 17
<i>In re Simon II Litig.</i> , 407 F.3d 125 (2d Cir. 2005)	10
<i>J.B. Hunt Transp., Inc. v. Bentley</i> , 427 S.E.2d 499 (Ga. App. 1992)	21
<i>Johansen v. Combustion Eng'g, Inc.</i> , 170 F.3d 1320 (11th Cir. 1999)	20, 25, 26, 27
<i>Kemp v. AT&T Co.</i> , 393 F.3d 1354 (11th Cir. 2004)	23, 24, 27
<i>Korea Supply Co. v. Lockheed Martin Corp.</i> , 63 P.3d 937 (Cal. 2003)	19

INDEX OF AUTHORITIES

(continued)

Page(s)

<i>Lee v. Lott</i> , 177 S.E. 92 (Ga. App. 1934)	1
<i>Mason v. Ford Motor Co.</i> , 307 F.3d 1271 (11th Cir. 2002)	21
<i>Mitchell v. Austin</i> , 583 S.E.2d 249 (Ga. App. 2003)	9
<i>Parker v. Brush Wellman, Inc.</i> , 377 F. Supp. 2d 1290 (N.D. Ga. 2005)	14
<i>Philip Morris USA v. Williams</i> , No. 05-1256, cert. granted, 126 S.Ct. 2329 (2006)	29
<i>Ponce de Leon Condominiums v. DiGirolamo</i> , 232 S.E.2d 62 (Ga. 1977)	16, 17
<i>Quantum Trading Corp. v. Forum Realty Corp.</i> , 629 S.E.2d 420 (Ga. App. 2006)	10
<i>Richards v. Michelin Tire Corp.</i> , 21 F.3d 1049 (11th Cir. 1994)	10
<i>Ryckelely v. Callaway</i> , 412 S.E.2d 826 (Ga. 1992)	13
<i>State Farm Mut. Auto. Ins. Co. v. Campbell</i> , 538 U.S. 408, 123 S.Ct. 1513 (2003)	<i>passim</i>
<i>Styles v. Mobil Oil Corp.</i> , 459 S.E.2d 578 (Ga. App. 1995)	10
<i>Tyler v. Lincoln</i> , 527 S.E.2d 180 (Ga. 2000)	6, 17, 18

INDEX OF AUTHORITIES

(continued)

Page(s)

<i>United States v. Bailey</i> , 444 U.S. 394, 100 S.Ct. 624 (1980)	19
<i>Vallandigham v. Clover Park Sch. Dist. No. 400</i> , 109 P.3d 805 (Wash. 2005)	19
<i>Vaughn v. Burnette</i> , 84 S.E.2d 568 (Ga. 1954)	15
<i>Viau v. Fred Dean, Inc.</i> , 418 S.E.2d 604 (Ga. App. 1992)	5, 19, 21
<i>Young v. Faulkner</i> , 492 S.E.2d 331 (Ga. App. 1997)	6
<i>Youren v. Tintic Sch. Dist.</i> , 343 F.3d 1296 (10th Cir. 2003)	15

Statutes

O.C.G.A. § 15-12-50.....	7
O.C.G.A. § 10-7-1.....	13
O.C.G.A. § 10-7-44.....	13
O.C.G.A. § 51-12-5.1(b).....	17

ARGUMENT

I. DEFENDANTS ARE ENTITLED TO JUDGMENT AND/OR A NEW TRIAL ON ALL CLAIMS.

A. Wantonness

1. Plaintiffs did not prove that Defendants' conduct created a substantial risk of physical harm.

Plaintiffs deny that risk of physical harm is a required element of Georgia's common-law wantonness tort, reasoning that in Georgia "punitive damages are available in cases of wanton or willful trespass to property or nuisance where there are no allegations of personal injury." Pl. Br. 16. The short answer is that the freestanding *tort* of wantonness is defined differently from the statutory wantonness basis for *punitive damages*. Plaintiffs cite no case upholding liability for the wantonness tort where a risk of physical harm was absent. Nor do they offer any response to the Georgia cases and Restatement section we cite (at 12), which unambiguously say that the wantonness tort requires proof of a substantial and unreasonable risk of physical harm.

Contrary to Plaintiffs' assertion, *Lee v. Lott*, 177 S.E. 92 (Ga. App. 1934), does not hold that a risk of harm to property is sufficient to support liability for wantonness. In *Lee*, an automobile passenger sued the driver for personal injuries under a guest statute requiring proof of reckless disregard. In dicta, the court quoted a definition of wantonness from Corpus Juris that mentions property, but it

then proceeded to give the Georgia definition limiting wantonness to cases “where human life or limb [is] involved.” *Id.* at 96.

In this property-damage case, Plaintiffs point to no evidence that at-large, atmospheric exposure to the amounts of carbon black found on their properties posed a substantial risk of physical harm to them. Instead, they rely solely on the district court’s unexplicated statement that Defendants were indifferent to health or safety because carbon black can pose serious health risks. That statement is unsupported. *See* CCC Br. 41-42; pp. 23-24, *infra*. Because no reasonable jury could find that Defendants’ conduct created a substantial risk of physical harm to Plaintiffs, Defendants are entitled to judgment on the wantonness claim.

2. Plaintiffs did not prove that Defendants acted with an entire absence of care.

Plaintiffs do not contest that wantonness also requires proof of an *entire* absence of care. CCC Br. 13. Our opening brief pointed to uncontroverted evidence that Defendants exercised some care, citing various steps Defendants took to prevent or curtail carbon black emissions. *Id.* Plaintiffs do not dispute that Defendants took these steps. Instead, they argue (at 17-21) that Defendants’ ongoing efforts to fix the Unit 2 bagfilters took too long, that some of Defendants’ steps were comparatively small or began too late, that leaks still occurred, and that Defendants did not authorize additional improvements. These arguments do

nothing, however, to negate the undisputed fact that Defendants took *some* steps to block emissions from both units.

In denigrating Defendants' efforts, Plaintiffs distort the record. For example, Plaintiffs' brief (at 4-9) focuses principally on the Unit 2 bagfilter failures. When CCC learned in 1999 that the bags were failing prematurely and releasing carbon black, it began replacing them every 6 months (instead of the usual 12) and started "a continuing process of trying to find solutions to improv[e] the operation of the bagfilter." R75; *see also* R73-74. After a period of trial and error, CCC determined that the filter bags failed because they were rubbing against each other. It installed metal skirts around each compartment to distribute the air flow and stop the rubbing, which improved bag life by several months. R571-72. After evaluating this result, CCC built two additional bagfilter compartments for Unit 2 to achieve even longer bag life. R573. Although Plaintiffs state (at 18) that problems still existed after the compartments were added, the pages of the record they cite do not say that. In fact, their own witness, Randy Wangle, testified that everything was fine with Unit 2 after the compartments were added. R1361.

In addition, CCC installed a thermal oxidizer in 1998 to incinerate any particles (including carbon black) not captured by either unit's bagfilters, as well as Triboguards to sound an alarm when particles were vented into the environment. CCC Br. 4; R91, 579; Pan Depo. 65. State regulators recommended the

Triboguards to CCC and determined that the thermal oxidizer was the best available pollution-control technology. R221, 347.¹ Plaintiffs disparage this regulatory determination (at 19-20) by pointing to the district court's injunctive order, which required Defendants to complete repair and replacement work that they had already started on the Unit 1 bagfilters. Dkt. 295, at 3-4. But the court's statement that more improvements were needed does not establish that none were made previously.²

Finally, the 110 pages of Plaintiffs' Exhibit 17 catalogue the steps CCC took *from 1995* through 2004 to identify and remedy the causes of carbon black emissions. Thus, Plaintiffs are wrong in asserting (at 57) that the efforts at "remediation made by Defendant only came as a result of this [2001] lawsuit and the requirements of the Court's [2005] injunctive relief order."

In short, Plaintiffs' own evidence affirmatively proves that Defendants did not act with an *entire* absence of care. For this additional reason, Plaintiffs' wantonness claim fails.

¹ Under the Clean Air Act, state agencies—not industry—determine the best available pollution-control technology. *See Alaska Dep't of Env'tl. Conserv. v. EPA*, 540 U.S. 461, 468-69, 124 S.Ct. 983, 990-91 (2004).

² In fact, although Plaintiffs criticize CSRC (at 9, 18-19) for rejecting a 1999 plan to replace Unit 1 entirely, CSRC did authorize repairs and implement a plan to replace Unit 1 in phases. R173, 384-85, 493, 1365.

B. Trespass

Plaintiffs do not contest that they were required to prove “*willfulness*” to recover for trespass to *personal* property such as Action Marine’s boats. CCC Br. 14-15. The district court order on which Plaintiffs rely, however, states only that Defendants’ acts were “intentional.” Pl. Br. 21.³ “Willful” and “intentional” are different states of mind. “‘Willful’ is defined as ‘[b]eing in accordance with one’s will; deliberate’ (*Gibson v. State*, 593 S.E.2d 861, 865 (Ga. App. 2004) (emphasis in original)), and willful conduct “is based on an actual intention to do harm or inflict injury” (*Chrysler Corp. v. Batten*, 450 S.E.2d 208, 212 (Ga. 1994)). Plaintiffs have never argued that Defendants deliberately harmed them.

On the other hand, a trespass can be *intentional*—the state-of-mind requirement for trespass to *real* property—even if the harm is not deliberate, as long as the actor believes that harm is substantially certain to occur. *See Viau v. Fred Dean, Inc.*, 418 S.E.2d 604, 608 (Ga. App. 1992).⁴ Plaintiffs’ proof also falls short of this threshold. As Plaintiffs themselves acknowledge (at 22-23), the evidence showed at most that Defendants knew that carbon black leaks could impact other properties but did not make additional repairs. Yet evidence of

³ Plaintiffs misleadingly suggest that the district court made this statement in upholding trespass liability; in fact, the statement is in the punitive damages portion of the opinion. *See* Dkt. 323, at 13.

⁴ Deliberateness, however, is required to prove *specific* intent. *See* pp. 18-20, *infra*. As an intentional tort, trespass requires proof only of general intent. CCC Br. 35-36.

knowledge or reckless disregard is insufficient to prove intentionality. CCC Br. 16. Moreover, Plaintiffs never showed that harm to their properties was substantially certain—a fact confirmed by the absence of carbon black on many properties. CCC Br. 17; p. 7, *infra*. Thus, Plaintiffs failed to prove an intentional—much less willful—trespass.⁵

Plaintiffs’ reliance on *Tyler v. Lincoln*, 527 S.E.2d 180 (Ga. 2000), is misplaced. In *Tyler*, the underlying trespass claim did not involve personal property and thus did not require proof of willful damage. Moreover, the Georgia Supreme Court’s opinion addressed punitive liability, not the elements of trespass. *Id.* at 182-83. The plaintiffs argued that the defendant failed “to take *any* action to remedy the situation and the ongoing damage” (*id.* at 183 (emphasis added); *see* CCC Br. 30)—a theory sounding in wantonness. Though the *Tyler* court did state that “a wilful repetition of a trespass will authorize a claim for punitive damages” (527 S.E.2d at 183), it never hinted that a plaintiff could recover punitive damages on that basis absent proof that any trespasses were in fact deliberate.

Plaintiffs cite *Young v. Faulkner*, 492 S.E.2d 331 (Ga. App. 1997), for the proposition that a defendant has the burden to prove that his trespass was not willful. Pl. Br. 21-22. Yet *Young* and the cases it cites concern a Georgia statute

⁵ Plaintiffs falsely assert (at 22) that Defendants admitted that they willfully and intentionally trespassed. Plaintiffs merely asked lay witnesses for a legal opinion about whether depositing carbon black on other property created liability; their questions did not mention a particular mental state.

(O.C.G.A. § 15-12-50) that prescribes different measures of damages for cutting another's timber depending on whether the trespass was willful or unintentional. They have no application outside the timber-cutting context.

Finally, Plaintiffs insinuate (at 21) that the district court's injunctive orders have some sort of estoppel effect because they were not appealed. Not so. The parties agreed that the injunction is not an admission of liability on the claims submitted to the jury and "in no way precludes an appeal" of "any issue respecting the jury's liability . . . awards." Dkt. 295, at 7.

C. Causation And Substantial Damage

To recover on any of their claims, Plaintiffs had to show that Defendants' carbon black (i) was present on their properties, and (ii) was the cause in fact of discoloration that damaged those properties.⁶ As to the first requirement, Plaintiffs concede (at 24) that carbon black can be positively identified only with a microscope, and they do not dispute that even their own expert, Dr. Freeman, found no carbon black on the City properties listed in our opening brief (at 17 n.2). Plaintiffs attempt to bridge this evidentiary gap by asserting (at 29-30) that their wind studies showed that carbon black was routinely deposited on all of their properties. In fact, the wind studies say nothing about how much carbon black (if

⁶ Because cause in fact and proximate cause are distinct requirements (*Atlanta Obstetrics & Gynecology Group v. Coleman*, 398 S.E.2d 16, 17 (Ga. 1990)), the proximate cause cases cited by Plaintiffs (at 23) are inapposite.

any) was carried toward Plaintiffs' properties. CCC Br. 18. Thus, the studies do nothing to remedy Plaintiffs' failure to prove that carbon black was present on many properties for which the City received damages.

Moreover, Plaintiffs' expert merely investigated the first requirement: the "presence" of molecules of carbon black. Pl. Br. 24-26; CCC Br. 18 n.3. Defendants' expert Skip Palenik was the only witness who addressed the second requirement, microscopically examining Plaintiffs' own samples that had tested positive for the presence of carbon black to determine what caused them to appear black to the naked eye. Palenik concluded that other dark substances such as soot and mold—not the small amount of carbon black present—were responsible for discoloring all of the samples except one taken from an Action Marine boat. CCC Br. 19.

Plaintiffs' statement (at 24) that "discoloration caused by" carbon black is "readily visible" begs the causation question. Given that many substances cause black specking (CCC Br. 18), finding visible discoloration does not establish that carbon black caused it. Plaintiffs also argue (at 26-27) that Palenik did not use the right equipment and methods to detect the *presence* of carbon black (the first requirement discussed above) and that *Defendants'* samples were flawed. Yet Plaintiffs do not dispute that Palenik used the correct equipment in determining that the small amount of carbon black present in *Plaintiffs'* samples had *not*

caused discoloration (the second requirement). CCC Br. 19. Finally, Plaintiffs speculate (at 28) that soot and mold could not have caused the discoloration because they wash off easily, but they cite no supporting evidence, and common experience teaches otherwise.⁷

Under Georgia law, “[t]he plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to grant [] judgment for the defendant.” *Mitchell v. Austin*, 583 S.E.2d 249, 251 (Ga. App. 2003). Because the City, Tharpe, and Ditchfield offered insufficient evidence that the small amount of carbon black found on some of their properties was the cause in fact of any visible discoloration damage, Defendants are entitled to judgment on their claims. Moreover, because Action Marine failed to prove that the larger amount of carbon black found on one of its boats caused substantial damage to its business, Defendants are entitled to judgment on its trespass and nuisance claims. CCC Br. 20.

⁷ Plaintiffs also take inconsistent positions about whether carbon black washes off easily. *Compare* Pl. Br. 2, 24 (stating that carbon black adheres like velcro and is often impossible to remove), *with id.* at 19 (stating that detection devices were wiped clean of carbon black), *and id.* at 27 (suggesting that carbon black washed off in a storm).

D. Remedy

Plaintiffs argue that, if this Court grants Defendants judgment or a new trial on the claims of one or more Plaintiffs, the awards of punitive damages and attorneys' fees should remain intact. They cite no authority for this proposition, which is contrary to *Richards v. Michelin Tire Corp.*, 21 F.3d 1049 (11th Cir. 1994). There, the Court held that both compensatory and punitive awards must be vacated and a new trial held when insufficient evidence supports one or more claims that are part of a general verdict. *Id.* at 1055-56.

Moreover, under Georgia law, no plaintiff can recover punitive damages or attorneys' fees absent a finding of liability. See *Quantum Trading Corp. v. Forum Realty Corp.*, 629 S.E.2d 420, 424 (Ga. App. 2006); *Styles v. Mobil Oil Corp.*, 459 S.E.2d 578, 580 (Ga. App. 1995). In addition, due process requires that the amount of compensatory damages be determined before the amount of punitive damages. *Engle v. Liggett Group, Inc.*, 2006 WL 1843363, at *11 (Fla. July 6, 2006); *In re Simon II Litig.*, 407 F.3d 125, 138 (2d Cir. 2005). Under these principles, if this Court grants Defendants judgment or a new trial as to any Plaintiff, the global awards of punitive damages and attorneys' fees must be retried as to all Plaintiffs. Otherwise, Plaintiffs could improperly recover a disproportionate punitive award as well as attorneys' fees for pursuing a claim that they could lose at retrial.

II. THE COMPENSATORY AWARDS ARE UNSUSTAINABLE.

A. Action Marine

Plaintiffs do not deny that Action Marine cannot recover damages for ordinary business debts without proof that they were caused by Defendants' conduct; nor do they dispute that the \$1,200,000 damage award included \$795,243 to pay off all of Action Marine's debts. CCC Br. 22-23. Instead, Plaintiffs try to show a causal link between those debts and Defendants' conduct by citing vague testimony from their expert Edward Sauls that Action Marine's debts "*increase[d]*" because of lost profits he attributed to carbon black deposits. Pl. Br. 32-34; R1109. This evidence is manifestly insufficient to require Defendants to pay *all* of Action Marine's ordinary debts, as the jury did.

Moreover, Plaintiffs ignore that the damages advocated by Sauls and awarded by the jury *already included* \$644,770 in lost profits, which Sauls used to calculate what Action Marine should have been worth absent Defendants' conduct. R1107-10, 1112-13, 1116; PX79, at 11. He recognized the direct relationship between these lost profits and Action Marine's debts, testifying that the debts increased "because of th[e] lost profits" (R1109) and that the "lost profits . . . would have been there to pay those debts." R1113. Accordingly, Action Marine would have been fully compensated for this portion of its damages by recovering *either* its lost profits or the amount of the resulting debts. Georgia law precludes it from recovering both. *Georgia Ne. R.R. v. Lusk*, 587 S.E.2d 643, 644 (Ga. 2003)

(“Georgia, as part of its common law and public policy, has always prohibited a plaintiff from a double recovery of damages.”).

Plaintiffs respond (at 34-36) that Defendants did not offer their own evidence rebutting Sauls’ analysis, but Defendants were not required to do so. It was Plaintiffs’ burden to prove a causal connection between the damages sought and Defendants’ conduct. CCC Br. 22. Because Plaintiffs failed to carry that burden with respect to Action Marine’s debts, the Court should reduce the award by \$795,243. *Id.* at 24.

B. Tharpe

Plaintiffs do not deny that a stockholder cannot recover damages for injuries to his corporation.⁸ Instead, they argue that Tharpe suffered various forms of direct injury.

For example, Plaintiffs argue that Tharpe can recover in trespass and nuisance because he actually possessed Action Marine’s boats and had property rights in them as a guarantor of the loans that financed their purchase. But Plaintiffs offer no evidence that Tharpe took the boats for himself—a violation of the loan agreements—instead of merely possessing them as Action Marine’s agent. *Eckles v. Atlanta Tech. Group, Inc.*, 485 S.E.2d 22, 24-25 (Ga. 1997) (corporation

⁸ Plaintiffs assert that we have never questioned Tharpe’s negligence claim, but our opening brief explained (at 26) that this principle bars all of Tharpe’s claims.

can act only through agents); *see* PX75, at 33-34, 60, 76 (requiring that Action Marine keep collateral and not transfer it). Furthermore, Georgia law does not automatically give a guarantor rights in the debtor's collateral, and the loan and guaranty agreements demonstrate that Tharpe had no such rights. *Cf.* O.C.G.A. §§ 10-7-1, 10-7-44; PX75, at 48, 79 (waiver by Tharpe of subrogation or other rights against collateral); PX75, at 33, 60, 76 (agreement by Action Marine not to permit other interests in collateral). Accordingly, Tharpe's claims of trespass and nuisance are merely derivative of Action Marine's.

Plaintiffs also argue that Tharpe's negligence and wantonness claims support recovery of emotional-distress damages. Yet Plaintiffs concede (at 37) that Tharpe can recover such damages only by showing either (1) pecuniary loss as a result of injury to his *own* reputation, or (2) distress as a result of willful or wanton conduct directed at him *personally*. *Ryckelely v. Callaway*, 412 S.E.2d 826, 827 (Ga. 1992) (“[E]ven malicious, wilful or wanton conduct will not warrant a recovery for the infliction of emotional distress if the conduct was not directed toward the plaintiff.”). As our opening brief explained (at 25-26), the only evidence of reputational injury concerned *Action Marine*, and Tharpe testified that his distress was the result of harm to *Action Marine*.⁹ If Tharpe can recover on these facts,

⁹ Plaintiffs also state (at 38) that Tharpe worried about the supposedly carcinogenic nature of carbon black, but they have disavowed any argument that carbon black caused his prostate cancer. R1062. Because Tharpe offered no

any stockholder could obtain indirect emotional-distress damages for injury to his company—a result inconsistent with Georgia’s traditional limits on the availability of such damages. *Parker*, 377 F. Supp. 2d at 1300-01; *Hang v. Wages & Sons Funeral Home, Inc.*, 585 S.E.2d 118, 121 (Ga. App. 2003).

C. All Plaintiffs

Plaintiffs argue (at 39) that, even though carbon black amounted to less than 1% of the total dark particulate matter on most of their properties, Defendants must pay for all of the damages they allegedly sustained because Defendants were joint tortfeasors. True, joint tortfeasors may be held jointly and severally liable for their concurring negligence. When there is no concert of action and the defendants’ concurrent acts result in a divisible injury, however, they are not joint tortfeasors, and each is liable only for the damage caused by its own acts. *Gay v. Piggly Wiggly S., Inc.*, 358 S.E.2d 468, 471-73 (Ga. App. 1987); *Gilson v. Mitchell*, 205 S.E.2d 421, 423-27 (Ga. App. 1974), *aff’d*, 211 S.E.2d 744 (Ga. 1975). Thus, when apportionment of damages is possible, a plaintiff may not recover all of his damages from a defendant that is only partly responsible for them. *Gay*, 358 S.E.2d at 472.

evidence of physical injury from exposure to carbon black, he cannot recover for worries that such exposure could lead to cancer in the future. *Parker v. Brush Wellman, Inc.*, 377 F. Supp. 2d 1290, 1299-1301 (N.D. Ga. 2005).

As our opening brief explained (at 27-28), the Georgia Supreme Court has held that harm to land caused by airborne particles is divisible. Thus, Defendants are liable “only for such proportion of the harm caused to the land . . . as [their] contribution to the harm bears to the total harm.” *Vaughn v. Burnette*, 84 S.E.2d 568, 569 (Ga. 1954). The district court violated this rule, requiring Defendants to pay for all of the harm to Plaintiffs’ land even though the amount of carbon black present was minuscule compared to other dark particles and had no visible effect. CCC Br. 17, 19.

III. THE PUNITIVE AWARD CANNOT STAND.

A. Punitive Liability

Plaintiffs do not dispute that Georgia’s standard for awarding punitive damages is very demanding, requiring clear and convincing proof of conduct so egregious as to be “of a criminal or quasi-criminal nature.” CCC Br. 28-29. Nor do they dispute that Defendants spent several million dollars to remediate specific problems with Unit 1 and Unit 2 prior to the judgment in this case. *Id.* at 13, 31; *see also* pp. 2-4, *supra*. Instead, they argue that a “clear error” standard applies on appeal and that punitive damages may be awarded simply because Defendants did not do more, earlier, to fix the problem. Pl. Br. 40-41. Both contentions are wrong.

First, whether there is insufficient evidence of punitive liability is a question of law to be reviewed *de novo*. CCC Br. 7; *see also Youren v. Tintic Sch. Dist.*,

343 F.3d 1296, 1307 (10th Cir. 2003). For the punitive verdict to stand, this Court must conclude that a reasonable jury could find that the evidence positively, unequivocally, and clearly showed that Defendants exhibited one of the enumerated “criminal or quasi-criminal” mental states. CCC Br. 28-29. The clear error standard applies only at the excessiveness stage. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 n.14, 121 S.Ct. 1678, 1688 n.14 (2001).

Second, punitive damages may not be awarded merely for a failure to do more. CCC Br. 30-31. Rather, Georgia courts have consistently limited punitive liability for inaction to situations in which defendants consciously refused to do **anything** to solve the problem. *Id.* Plaintiffs cite *Ponce de Leon Condominiums v. DiGirolamo*, 232 S.E.2d 62 (Ga. 1977), and *Hudgins & Co. v. J & M Tank Lines, Inc.*, 450 S.E.2d 221 (Ga. App. 1994), for the proposition that punitive damages may be awarded despite some efforts at remediation (at 41), but neither case says that. Indeed, in both, the defendants took no action to address the cause of the damage.

In *DiGirolamo*, a landowner sued a developer, claiming that the developer’s activities caused his property to receive large quantities of surface water. The Georgia Supreme Court affirmed the punitive award, stating that, although the developer made “some effort to alleviate [water runoff] by installing sedimentation

ponds,” “at no time did the [defendants] make *any effort* to lessen the quantity of water being discharged onto appellee’s property” or in particular “to correct a drainage system which was causing damage to appellee.” 232 S.E.2d at 64 (emphasis added).

Similarly, in *Hudgins* the court affirmed a punitive award because the defendant’s alleged efforts to diminish contamination on the plaintiff’s land were not in the appellate record and, moreover, the defendant did “not assert that it took *any* remedial actions” after receiving notice of the contamination. 450 S.E.2d at 222 (emphasis added). Here, by contrast, there is undisputed evidence that Defendants made repairs to both Unit 1 and Unit 2—the specific source of the alleged problem—after being notified of complaints. CCC Br. 13; pp. 2-4, *supra*.

Citing *Tyler*, Plaintiffs also assert (at 40) that punitive damages may be awarded for “a willful repetition of a trespass” or a “continuing nuisance.” But this argument ignores the lack of proof that any trespass was “willful.” *See* pp. 5-6, *supra*. It also fails to recognize that a continuing nuisance will support punitive damages only if accompanied by clear and convincing evidence of the culpable mental state required by O.C.G.A. § 51-12-5.1(b). *See Tyler*, 527 S.E.2d at 183

(citing *CSX Transp. v. West*, 523 S.E.2d 63, 66 (Ga. App. 1999)).¹⁰ Plaintiffs never made that showing. CCC Br. 31.

B. The Cap

Plaintiffs do not contest that they had to prove that Defendants acted with a *specific intent to cause harm* to recover more than \$250,000 per plaintiff. As our opening brief and the Chamber of Commerce’s amicus brief explain, “specific intent” is a well-defined term with a long criminal-law pedigree that Georgia courts have followed consistently when interpreting the cap statute. CCC Br. 32-37; Am. Br. 7-13. The cap applies here because Plaintiffs offered no evidence that Defendants actually wanted to harm them. Rather, the most the evidence conceivably shows is that Defendants refrained from making certain repairs *in order to make more money*—*i.e.*, to benefit themselves, not to injure someone else. CCC Br. 34-35.¹¹ That is not enough.

Plaintiffs attempt to lower the cap-lifting standard, citing several sources for the proposition that an “intent” to cause harm may be established under the Restatement (Second) of Torts by proof that Defendants knew that harm was

¹⁰ Though *Tyler* never says it explicitly, the need for the nuisance to be accompanied by a sufficiently culpable mental state is implicit in the court’s citation to *West*, which held that “the jury was authorized to find that [defendant] acted with conscious indifference to [plaintiff’s] plight” where the evidence showed that the defendant “had knowledge of [plaintiff’s] flooding problems and took no action.” 523 S.E.2d at 66-67.

¹¹ Notably, Plaintiffs’ long list of bullet points (at 46-51) is bereft of a single reference to a desire to injure.

substantially certain to result from their actions. Pl. Br. 41-43, 53.¹² But “intent” encompasses both *general* intent and *specific* intent. CCC Br. 35-36. Specific intent is a much more demanding requirement than general intent and requires a higher level of culpability. *See, e.g., United States v. Bailey*, 444 U.S. 394, 405, 100 S.Ct. 624, 632 (1980) (“‘purpose’ corresponds loosely with the common-law concept of specific intent, while ‘knowledge’ corresponds loosely with the concept of general intent”; courts have routinely differentiated the culpability of “a person who knows that another person will be killed as the result of his conduct and a person who acts with the specific purpose of taking another’s life”).

Numerous cases confirm that, although a belief that injury is substantially certain to result may prove a general intent to injure, it does *not*, by itself, prove a specific intent to injure. *See, e.g., Clements v. ACE Cash Express, Inc.*, 2005 WL 140005, at *1 n.3 (D.D.C. June 23, 2005) (“An employer’s knowledge to a substantial certainty that an injury will result from an act does not constitute specific intent.”); *Vallandigham v. Clover Park Sch. Dist. No. 400*, 109 P.3d 805, 810 (Wash. 2005) (“an act that had only *substantial* certainty of producing injury” “does not constitute specific intent to injure”); *cf. Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 951 (Cal. 2003) (“[S]pecific intent is not a required

¹² Plaintiffs’ claim (at 53) that we “[c]onspicuously omitted” text from *Viau*, 418 S.E.2d at 608, is belied by the fact that we cited the allegedly omitted lines at 35 n.12.

element of the tort of interference with prospective economic advantage. While a plaintiff may satisfy the intent requirement by pleading specific intent, *i.e.*, that the defendant desired to interfere with the plaintiff's prospective economic advantage, a plaintiff may alternately plead that the defendant knew that the interference was certain or substantially certain to occur as a result of its action.”); Am. Br. 11 (citing criminal cases). Rather, to prove a specific intent to cause harm, a plaintiff must prove that the defendant wanted to cause injury. CCC Br. 36; Am. Br. 7-13. If the Georgia Legislature concludes that “substantial certainty” should suffice to lift the cap, it can amend the statute.

Plaintiffs claim (at 51-52) that no appellate court has ever reversed a decision to lift the cap “where the jury was properly charged and then made a factual finding of specific intent to cause harm.” They cannot deny, however, that at least two trial courts reduced punitive awards to the cap in environmental cases similar to this one. *See* CCC Br. 36-37. Nor can they point to a single appellate case upholding a trial court's refusal to apply the cap notwithstanding the absence of evidence that the defendant desired to harm the plaintiff.¹³ In any event, *the jury was not properly charged here*. It was permitted to find specific intent on the

¹³ As our opening brief explains (at 33-34 n.10), Plaintiffs' reliance on *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1999), is misplaced.

mere basis of substantial certainty that harm would result; it was not required, as it should have been, to find that Defendants desired to cause harm. *See* R2026-27.¹⁴

Plaintiffs' assertion that Defendants waived any argument relating to the instruction by not objecting below (at 44) is beside the point. Defendants are challenging the sufficiency of Plaintiffs' evidence, not the correctness of the instruction.¹⁵ Regardless of whether an objection was made, this Court must apply the correct legal standard to evaluate Defendants' contention that the evidence was insufficient to lift the cap. *See, e.g., Boyle v. United Techs. Corp.*, 487 U.S. 500, 513-14, 108 S.Ct. 2510, 2519 (1988) ("If the evidence presented in the first trial would not suffice, as a matter of law, to support a jury verdict under the properly formulated defense, judgment could properly be entered for the respondent . . . even though . . . [it] failed to object to jury instructions that expressed the defense differently, and in a fashion that would support the verdict."); *Geldermann, Inc. v. Fin. Mgmt. Consultants, Inc.*, 27 F.3d 307, 312-13 (7th Cir. 1994) (holding that,

¹⁴ Plaintiffs' contention (at 43) that the instruction follows *J.B. Hunt Transport, Inc. v. Bentley*, 427 S.E.2d 499 (Ga. App. 1992), is incorrect. Unlike the instruction, *Bentley* does not equate substantial certainty and "*specific intent*." *Bentley* merely quoted *Viau* for the proposition that substantial certainty may be used to prove "*intent*" generally. 427 S.E.2d at 504.

¹⁵ Accordingly, *Alta Anesthesia Associates, P.C. v. Gibbons*, 537 S.E.2d 388 (Ga. App. 2000) (cited at Pl. Br. 45), is inapposite. So too is *Mason v. Ford Motor Co.*, 307 F.3d 1271 (11th Cir. 2002) (cited at Pl. Br. 44), which holds merely that a defendant waives the right to object to inconsistent general verdicts by not doing so before the jury is discharged.

“where the reviewing court is determining whether a trial court has erred in denying a . . . j.n.o.v. motion, it is the law which properly applies and not the law that the trial court announces to be appropriate in its jury instructions that governs” even though there was no objection to the instruction during trial) (citing *Boyle* and *City of St. Louis v. Praprotnik*, 485 U.S. 112, 120, 108 S.Ct. 915, 922 (1988)). Under the correct legal standard, there can be no serious question that the cap applies.

Finally, Plaintiffs offer no response to our argument that prior cases gave Defendants constitutionally inadequate notice that the cap could be lifted without evidence of a desire to injure. CCC Br. 38-39. Nor do they have any answer to the Chamber’s showing that lifting the cap is inconsistent with *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), and the principle of lenity. Am. Br. 13-23.

C. Excessiveness

As our opening brief explains, the \$17,500,000 punitive award is unconstitutionally excessive under *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003), because (i) none of the five *Campbell* reprehensibility factors weighs in favor of a large punitive award (CCC Br. 40-44); (ii) there are mitigating factors (*id.* at 45-47); (iii) the compensatory damages are “substantial,” imparting significant deterrence (*id.* at 48-50, 52); (iv)

the whopping \$1,294,000 attorneys' fees award and the millions spent to comply with the injunction also provide deterrence (*id.* at 52); and (v) the most comparable legislative penalty is only \$250,000 (*id.* at 53-55). Although Plaintiffs disagree, they cite only a single case applying *Campbell: Kemp v. AT&T Co.*, 393 F.3d 1354 (11th Cir. 2004). Pl. Br. 60. In *Kemp*, however, this Court reduced a \$1,000,000 punitive award to \$250,000 for a highly reprehensible fraud that targeted financially vulnerable victims. CCC Br. 43, 45, 51. *Kemp* certainly does not support the \$17,500,000 punishment here.

1. Reprehensibility

Although Plaintiffs assert (at 55) that Defendants' misconduct was "exceptionally reprehensible," they implicitly concede that two of the five reprehensibility factors identified in *Campbell* (physical harm and a financially vulnerable victim) are not implicated here. Their arguments as to the remaining three factors do little more than mimic the district court's conclusory findings and are no more sustainable.

First, Plaintiffs claim (at 56) that Defendants recklessly disregarded health and safety because the Material Safety Data Sheets ("MSDSs") prove that "carbon black is a possible human carcinogen and inhalation of carbon black can pose serious health risks." That is false. In fact, as our opening brief explained:

- The U.S. National Toxicology Program, the U.S. Occupational Safety and Health Administration, and the European Union have *not* designated carbon

black as a carcinogen. CCC Br. 41. While one agency has concluded that carbon black has possible carcinogenic effects based on rat inhalation studies, even it acknowledged that “[t]here is *inadequate evidence in humans for the carcinogenicity of carbon black.*” *Id.* (emphasis added).

- Carbon black is not an especially hazardous substance. *Id.* at 42 n.14.
- Plaintiffs adduced no evidence that either humans or animals could suffer serious health effects *based on at-large, atmospheric exposure to the amount of carbon black allegedly released here.* *Id.* at 42.

Second, Plaintiffs suggest (at 56) that the repeated misconduct factor was implicated here because “defendants caused the substance to continuously fall” onto their properties and “[i]gnor[ed] repeated requests to remedy” the problem. As already explained (CCC Br. 43-44), however, this does not support a finding of heightened reprehensibility under *Campbell* because the emissions were part of a single course of conduct.

Third, Plaintiffs suggest (at 56) that the deceit factor is present because Defendants “lied to the Plaintiffs in response to repeated complaints.” But they never claim that the alleged lies caused their injury, as *Campbell* requires. CCC Br. 44. Nor do they dispute that the deceit alleged here pales in comparison with the frauds in cases like *Kemp*, in which courts nonetheless found multimillion-dollar punitive awards excessive. *Id.* at 44-45.

On the other side of the ledger, Plaintiffs offer no response to our contention that the fact that the tort occurred during the performance of a socially valuable activity mitigates its reprehensibility. CCC Br. 45-46. And they are simply wrong

in asserting that Defendants' remedial efforts began only after this suit was filed. *See* p. 4, *supra*. In any event, they ignore the cases that have recognized that even post-verdict remedial actions warrant consideration in the analysis. *Id.* at 46-47.

The reprehensibility guidepost thus weighs heavily against the \$17,500,000 punitive award.

2. Ratio

As our opening brief explains (at 47-53), *Campbell* makes clear that the maximum ratio of punitive to compensatory damages is 1:1 or lower in this case given the substantial compensatory damages (\$1,915,000) and other costs incurred by Defendant that also impart significant deterrence. Plaintiffs respond (at 59) that, in *Campbell*, “the Supreme Court made it clear that punitive damage awards are not limited to single-digit multipliers, much less 1:1 ratios.” Yet they make no mention of *Campbell*'s statement that “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee” (538 U.S. at 425, 123 S.Ct. at 1524) and no attempt to distinguish the cases following this guidance and reducing punitive awards to a 1:1 ratio (CCC Br. 49-50).

Plaintiffs also claim (at 58-59) that the 9:1 ratio in this case can be justified under *Johansen*. But they offer no response to our contentions that *Johansen* is distinguishable because the compensatory damages there were “quite small”

(\$47,000) and the defendant was “extremely wealthy” (CCC Br. 50-51) and that, in any event, *Johansen* is of questionable precedential value after *Campbell* (*id.* at 52-53). Plaintiffs do argue (at 58-59) that the State has a strong interest in deterring pollution, but they make no attempt to explain why the deterrence imparted by the substantial compensatory damages and other costs (CCC Br. 52) is insufficient. The Supreme Court has expressly held that a “multimillion dollar penalty” may not be upheld on deterrence grounds when “a lesser deterrent” would suffice. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 584, 116 S.Ct. 1589, 1603 (1996); *see also* CCC Br. 51 (citing cases reducing awards on this ground).

Finally, Plaintiffs note (at 60) that the district court thought “an even higher multiplier” would be acceptable. But its comment was based on *Johansen*, which does not support the punitive award here for the reasons explained above. Besides, no deference is owed to the district court’s choice of ratio. *Cooper Indus.*, 532 U.S. at 440, 121 S.Ct. at 1688 (*de novo* review applies; “[t]rial courts and appellate courts seem equally capable of analyzing the second [guidepost]”).

3. Fines for comparable conduct

Plaintiffs do not dispute that the maximum possible administrative fine for carbon black releases is \$250,000. CCC Br. 53. Rather, they argue (at 60-61) that this fine provides “fair notice” of the \$17,500,000 punishment here (which is 70 times higher) because *Johansen* upheld a punitive award that was over 400 times

the actual fine in that case. Again, however, Plaintiffs make no attempt to distinguish the numerous post-*Campbell* cases holding that a large disparity between the punitive award and maximum fine is a strong indicator of excessiveness. CCC Br. 54. In addition, Plaintiffs disregard that the maximum fine (which was in the millions) was not imposed in *Johansen* and that this Court expressly cautioned *against* using the maximum fine as the comparator. *Id.* at 54-55 & n.17. Plaintiffs offered no evidence that ADEM has ever imposed the maximum fine for any environmental violation, much less the passive failure to do more involved here.

Plaintiffs also claim (at 61) that Defendants had fair notice of a substantial punitive award because an employee e-mail recognized that potential liability was in the “millions.” Of course, the e-mail is not a comparable penalty. Moreover, Plaintiffs’ argument disregards that the third guidepost is not just about notice; it also helps ensure appropriate deference to the legislative judgment that the *most egregious* environmental violations warrant at most a \$250,000 penalty. CCC Br. 55. In short, while the third guidepost may be accorded “less weight” than the other two (*Kemp*, 393 F.3d at 1364), it too indicates that a \$17,500,000 punishment is grossly excessive.

4. The disgorgement rationale

At trial, Plaintiffs tried to justify a large punitive award on the basis of an aggregate disgorgement theory. Our opening brief explained that this theory was based on “bad math” because Plaintiffs provided no evidence of Defendants’ “profit” from forgoing repairs. In addition, Plaintiffs’ disgorgement theory raises constitutional difficulties by creating a risk of multiple punishment for the same conduct (as other property owners are not bound by the judgment and could attempt to recover punitive damages on the same theory) and causing a violation of the ratio guidepost (because the amount sought was not tethered to Plaintiffs’ harm). CCC Br. 56-57.

Plaintiffs do not dispute that (i) the \$22,500,000 they sought as disgorgement represents a profit Defendants *did not make*, not money that Defendants actually saved (CCC Br. 55-57; Pl. Br. 61-62); or (ii) that there is no evidence showing how much Defendants actually saved (CCC Br. 56 & n.19). Instead, Plaintiffs argue (at 61-62) that we are precluded from challenging their disgorgement theory on appeal because we did not raise these flaws at trial. But we are not arguing that the underlying evidence should be disbelieved, only that Plaintiffs are wrong that the evidence justifies what is obviously an otherwise unconstitutional award. In this respect, this case is just like *Campbell*, in which the Supreme Court considered and rejected the plaintiffs’ various efforts to justify the

disproportionate award of punitive damages, without considering whether the defendant affirmatively challenged those arguments at trial. *See* 538 U.S. at 426-27, 123 S.Ct. at 1525.

Plaintiffs brush off our constitutional arguments with the observation that “Defendants vigorously opposed class certification.” Pl. Br. 62. But if the case couldn’t be tried as a class action, the punitive award surely cannot be justified as if the case were a class action. Because no property owner other than Plaintiffs is bound by the judgment in this case, adopting Plaintiffs’ disgorgement theory would create a grave and impermissible risk of duplicative and excessive punishment. CCC Br. 57.¹⁶

Finally, Plaintiffs argue (at 61-62) that the amount of punitive damages should be left to the jury’s discretion. To the contrary, *Campbell* recognizes that “[e]xacting [*de novo*] appellate review [is required to] ensure[] that an award of punitive damages is based upon an ‘application of law rather than a decisionmaker’s caprice.’” 538 U.S. at 418, 123 S.Ct. at 1520-21 (citation omitted).

For these reasons and others (CCC Br. 58-59), the punitive award in this case cannot be justified on an aggregate disgorgement rationale and must be reduced substantially.

¹⁶ The Supreme Court is expected to address a related issue in *Philip Morris USA v. Williams*, No. 05-1256, *cert. granted*, 126 S.Ct. 2329 (2006).

Respectfully submitted,

CLIFFORD C. BRADY
Brady, Radcliff & Brown
61 St. Joseph Street
Mobile, Alabama 36602
(251) 405-0045 (phone)
(251) 405-0076 (fax)

H. THOMAS WELLS, JR.
PETER S. FRUIN
Maynard, Cooper & Gale, P.C.
1901 Sixth Avenue North
2400 AmSouth/Harbert Plaza
Birmingham, Alabama 35203
(205) 254-1000 (phone)

/s/ Evan M. Tager
EVAN M. TAGER
NICKOLAI G. LEVIN
Mayer, Brown, Rowe & Maw LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000 (phone)
(202) 263-3300 (fax)

J. BRETT BUSBY
Mayer, Brown, Rowe & Maw LLP
700 Louisiana Street, Ste. 3400
Houston, Texas 77002
(713) 238-2606 (phone)
(713) 238-4606 (fax)

*Attorneys for Defendants-Appellants Continental Carbon Company
and China Synthetic Rubber Corporation*

Dated: August 9, 2006

**CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7) AND
ELEVENTH CIRCUIT RULE 28-1**

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7) and Eleventh Circuit Rule 28-1 for a brief produced with a proportionally spaced font. This brief was prepared using Microsoft Word 2002 in Times New Roman 14 point font. The length of this brief is 6,999 words.

/s/ Evan M. Tager
Evan M. Tager

Dated: August 9, 2006

CERTIFICATE OF SERVICE

I hereby certify that, on August 9, 2006, I served one copy of the foregoing Reply Brief Of Defendants-Appellants Continental Carbon Company And China Synthetic Rubber Corporation by United States Postal Service Express Mail, postage prepaid, on each of the following:

Jere L. Beasley Rhon E. Jones David B. Byrne III Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. Post Office Box 4160 Montgomery, AL 36103-4160	Jeff Friedman Friedman, Leak & Bloom, P.C. Post Office Box 43219 Birmingham, AL 35243-3219
Edward R. Jackson Tweedy, Jackson & Beech Post Office Box 748 Jasper, AL 35502-0748	

/s/ Evan M. Tager
Evan M. Tager