STATEMENT OF ARMIS E. HAWKINS

My name is Armis E. Hawkins. I have been asked by the Washington, D.C. law firm of Jones, Day, Reavis & Pogue to give an opinion concerning the case of *Jeremiah J. O'Keefe, Jr. et al. v. The Loewen Group, Inc. et al.* ("the *O'Keefe* case"), tried in the Circuit Court of Hinds County, Mississippi in late 1995, and the subject of certain proceedings in the Mississippi Supreme Court occurring shortly after my retirement from that Court. I understand my opinion will be submitted solely to a Tribunal of three arbitrators appointed to hear a claim being brought by The Loewen Group, Inc. and Raymond L. Loewen under the North American Free Trade Agreement (NAFTA). My remarks are directed to the Members of that Tribunal.

In connection with my opinion, I reviewed the trial transcript of the *O'Keefe* case, and pleadings and other papers filed in connection with it in both the Hinds County Circuit Court and the Mississippi Supreme Court. I have also reviewed the Memorial of The Loewen Group, Inc. and the Counter-Memorial of the United States of America, filed in the NAFTA case referenced above.

Based upon my experience as a practicing lawyer and former Chief Justice of the Mississippi Supreme Court, and my review of the above materials, my views and opinion follow:

a. I have no question or mental reservation but that justice was denied to The Loewen Group and the other defendants in the *O'Keefe* case. The conduct and result of the trial shock my conscience; the evidence and argument submitted by the plaintiffs and allowed by the trial judge was a tissue of prejudicial, irrelevant and inflammatory materials; and the amount of damages awarded so great it is difficult to believe it really happened.

I have read the statements of Messrs. Robert Jennings and Richard Neely and will try to avoid repetition of their observations with which I concur, and which they have stated far better than I can. Chief Justice Neely's analysis of state courts in the United States, especially Mississippi, is right on the mark. It should be required reading in every law school.[1] I do give random samplings from what to me is the worst trial record I ever encountered. The description either I, these gentlemen, or anyone else attempts to make of this record, however, can never suffice. This record must be read to be believed.

b. The injustice of the jury trial was compounded by the circuit court's mishandling of the jury verdict, refusal to declare a mistrial, and denial of post-judgment motions. Further injustice ensued by the circuit court's, and later

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[1] In this regard, I note that recently, the cost of the four recent elections for seats on the Mississippi Supreme Court has been on the order of $1 million each, a fact of life that inevitably affects the attitudes of at least some members of the Court.

the Mississippi Supreme Court's, refusal to impose a reasonable supersedeas bond. This failure was particularly unfortunate in this case, for I see no set of circumstances under which a responsible Supreme Court would have affirmed this judgment. Upon a review of the record it is difficult for me to see any possible tort committed against O'Keefe or his family. I also see no antitrust violation, and certainly no case for *any* punitive damages, let alone the $400 million awarded. At most, there may have been a breach of contract, no more.

c. While the lawyers representing The Loewen Group, Inc. might have objected more frequently in the admission of trial testimony, I can state with certainty that there was nothing about any such "failure" which would have impeded appellate review or inclined a responsible appellate court to hold the errors in this case had been waived.

A. Introduction

I am 80 years old. I finished law school in 1947, and for the following thirty plus years made a living as a solo lawyer in a small Mississippi town (3,000-4,000 population) where my wife and I reared our three children. For eight of those years I was a state prosecuting attorney for a seven county district. My practice was general, with clients from some eight or ten counties, covering every area of affairs which might arise in a Mississippi community: business, social, criminal. I was regularly retained as attorney for the county board of supervisors, the hospital,

the school district, as well as several industries in our county. In tort litigation, however, I invariably represented the plaintiff. I was one of the charter members of the American Trial Lawyers Association (ATLA) in our State.

In 1980 the citizens of 31 counties comprising the northern District honored me by electing me to the Mississippi Supreme Court, where I served until I retired at the end of November, 1995, my last three years as Chief Justice.

I am a product of a small town. My father, maternal grandfather, and my maternal and paternal uncles were independent businessmen in small towns in Northeast Mississippi. None had any use for J. C. Penney, Montgomery-Ward or Sears Roebuck & Co. My father, and all except one of my uncles, had to close their stores in the Great Depression. (The one who escaped this fate may have been helped by the fact that he started the first funeral home in his town.)

This is not all. As a mature adult I have observed over the last twenty-five years the erosion of small town businessmen throughout our State. Our town is typical. Both banks, our newspaper, the hospital, industries, all of which were owned locally when I started practicing law in 1947, are now owned by nonresidents and foreign corporations. Some 15 thriving grocery, hardware, dry goods, building supply stores are now all gone, their business taken over by chains. I have thought, and continue to view this as unhealthy for our State and Nation.

This information is relevant only to indicate my probable sympathy had I been called as a juror in this case.

B. The Background of this Case

The O'Keefe family in Biloxi and the Riemann family in Gulfport were prominent families on the Mississippi Gulf Coast which over decades had been engaged in the funeral home business. Both were successful, and both were competitors.

I doubt if either was particularly fond of the other.

In 1990 The Loewen Group, Inc., a Canadian corporation which owned a chain of several hundred funeral homes in the United States and Canada, purchased through its U. S. subsidiary Loewen Group International, Inc., 90 percent of the shares in the Riemann corporation.

Any independent businessman confronted with a giant corporation buying his competitor in the same business can only view that development with trepidation. This appears to have been the reaction of Mr. Jerry O'Keefe.

Also in 1990 Loewen, through its newly acquired subsidiary Riemann Holdings, purchased Wright and Ferguson, the major funeral home in Jackson, our capital city. The purchase of this funeral home would not have been particularly significant to O'Keefe, Jackson being some 180 miles from the Coast. To make matters worse for O'Keefe, however, Wright and Ferguson had been serviced by

burial insurance contracts with Gulf National Investment Company, owned by the O'Keefe family, but following its acquisition of Wright and Ferguson, Loewen did business with competing insurance companies it owned.

Let us now revert to 1974. Wright and Ferguson, located in Hinds County, performed funeral services for residents of neighboring Rankin and Madison Counties as well. For the consideration of $1 million paid to Wright and Ferguson, it was agreed that O'Keefe through Gulf National Life Insurance Company (later Gulf National Investment Company), owned by the O'Keefes, would be the exclusive burial insurance provider for all Wright and Ferguson funerals in these three counties. The type of burial insurance then in effect was a service contract under which the insured, for a small monthly premium, paid for a bare-minimum funeral.

A few years later a new and different type of insurance for burials came into being, called "pre-need" life insurance. This type of coverage does not specify the items to be included in the funeral, but pays to the insured's beneficiaries a dollar amount expected to cover the anticipated (and generally much more expensive) funeral and burial costs. The premium is frequently one up-front, lump-sum premium of several thousand dollars. Pre-need insurance replaced the type of service envisioned by the former burial insurance. On September 11, 1987, Wright and Ferguson and Gulf entered into a contract for this service. This contract did

not specify it was exclusive, however, and contained a provision that either party could terminate the contract upon 90 days notice.

Evidence was offered at trial that subsequent to this date (but before Loewen came into the picture) Wright and Ferguson did in fact secure pre-need insurance policies from Monumental Life Insurance Company, not connected with the O'Keefe family. O'Keefe was aware of Wright and Ferguson's actions, but never objected to them.

After Loewen acquired Riemann, and although he was publicly excoriating Loewen for being foreign-owned and foreign-financed, O'Keefe began negotiations in 1990 for Loewen to purchase funeral homes and funeral life insurance companies owned by the O'Keefe family.

On April 2, 1991, O'Keefe also filed a lawsuit against Loewen in the Hinds County circuit court for breach of Wright and Ferguson's previous contracts with Gulf National, *Gulf National Life Insurance Co. vs. The Loewen Group, Inc., and Wright and Ferguson, Inc.,* Civil Action No. N 91-67,423.

Nevertheless, the negotiations between Loewen and O'Keefe continued. O'Keefe's attorney was present at their meetings. Thereafter, on August 19, 1991, the parties executed an "Agreement." Put in simple terms the purpose of this Agreement was:

(1) for O'Keefe to purchase from Riemann Holdings the Family Guaranty Life Insurance Company, Inc., and Family Care (burial life insurance companies which had been owned by the Riemanns when they sold their business to Loewen);

(2) for Loewen to purchase from O'Keefe the James F. Webb Funeral Homes, Inc., which owned funeral homes in Meridian and Newton, Mississippi; and

(3) for both parties to settle the pending lawsuit.

In all negotiations O'Keefe was represented by distinguished and able counsel, Mr. Michael S. Allred and the law firm of Thomas, Price, Alston, Jones & Davis. Loewen was represented by equally distinguished counsel, Mr. James Overstreet and the law firm of Butler, Snow, O'Mara, Stevens & Cannada.

The 1991 Agreement contains 38 pages of single space type. Considering the background to this Agreement – Loewen was defendant in a lawsuit in which O'Keefe, represented by aggressive counsel with a well-deserved reputation as a formidable adversary, was seeking $16 million in damages; he and the others charged with making this agreement were presumably intelligent businessmen; and all were represented by capable attorneys – it is difficult for me to conceive anything on the part of Mr. Loewen and Mr. O'Keefe other than extreme caution concerning precisely what they obligated themselves to do, and both with a self-interested desire to scrupulously adhere to each obligation they did undertake. If

there ever was an arms' length and guarded transaction between two parties, this was one. Neither owed the other any obligation except to abide by the written obligation each undertook.

The manifest care given to the wording in this meticulously detailed Agreement leaves little doubt but that *both* parties stood to benefit from its consummation, or at the very least *thought* this to be the case.

While I cannot pretend to know what actually was in the head of either of the parties to this Agreement, my modest knowledge of human nature leads me to believe that in all likelihood when these parties executed this Agreement both fully expected to consummate the purchase and sale of the businesses covered in it. Illustrative, however, of the tactics of O'Keefe's counsel, the following is from their opening statement characterizing Mr. Loewen's *intent* when his company executed the agreement in August 1991:

> Mr. Allred: "The truth is Ray Loewen never intended to perform the contract he made with O'Keefe." (Tr. 32.)
>
> And, Mr. Gary: "Because he [presumably Mr. Loewen] had lied to the Riemanns when he made this deal, he never intended to live up to it, but he just hadn't told the Riemanns." (Tr. 77.)

C. The *O'Keefe* Lawsuit

The purchase and sale was not consummated, however, and the lawsuit metastasized, embracing not simply the first claim, but breach of the 1991 Agreement as well.

As stated, my sympathy as a juror probably would have been in Mr. O'Keefe's favor. Yet when this case is sifted down, all that was lawfully involved in the dispute between these parties was whether there had been a breach of the Wright and Ferguson contracts with Gulf National Life and Gulf Investment, and whether Loewen had breached the Agreement entered into August 19, 1991.

As to the first point, there may have been a factual issue on whether the Wright and Ferguson contracts with Gulf Investment were violated by Wright and Ferguson, following its purchase by Riemann Holdings, doing business with other insurance companies than O'Keefe's. There can be no argument, however, but that an arguable basis exists for either position. No bad faith can be attributed to Loewen in taking the legal position it did, which in my view at least was the better legal argument.

As to the second, one must look to see whether O'Keefe fulfilled every obligation on his part as a condition precedent to obligating Loewen to sell Family Guaranty Life Insurance Co. I have much more difficulty finding a jury issue on whether the Agreement was breached by Loewen because of the absence of

O'Keefe's fulfilling his obligations. Yet conceding the unlikely event, to me, that there was a breach, the sum total of what Loewen did to O'Keefe was back out of the trade. Again, the most O'Keefe could lawfully claim was monetary damages – actual business losses – suffered from a breach of contract. Nothing about any of Loewen's conduct *toward O'Keefe* implicated anti-trust law, or "mental anguish" or punitive damages.

How much were these actual business losses? $1 million? $2 million? Or take the net worth of both businesses, $5 or $6 million?

Let's even go further. Let's take *five times this:* the inflated $26 million which O'Keefe's counsel alleged just before the trial as his sum total in damages.

How could this get multiplied *four times* to $100 million in compensatory damages? It is difficult for the mind to comprehend that this verdict in actual fact was rendered by the jury.

Add to this punitive damages in the amount of $400 million, but no relevant evidence whatever to support a nickel in punitive damages.

If this was not a manifestly unjust judgment rendered by the circuit court, what does it take to constitute one?

Did this jury simply go amok, wanting to destroy Loewen as a business for no reason at all? Or, was there a reason?

D. The Trial

I should note at the outset that the trial described by the United States in the Counter-Memorial it filed in the NAFTA case bears little resemblance to the trial record I reviewed. I am confident this Tribunal will read *this* record cover to cover, and make its own assessment of the accuracy of my view.

One would presume in giving an opening statement in a lawsuit that is first and foremost one for breach of contract, counsel for the plaintiff would describe precisely what each party undertook. He would point out and quote to the jury from the written terms of the agreement precisely what each party obligated himself to do, and then with the same precision inform the jury how the defendant failed to fulfill his bargain. He would name the witnesses who will testify to each of these particulars, and set forth the major points of what they will say. He wouldn't leave any guess work. Thus informed, the jury would know just what the contract said, and just how the defendant allegedly failed to do what he had promised to do, and expect to hear from the witnesses under oath supporting what was told them in opening statement.

In reading the opening statements made by counsel for Mr. O'Keefe, one can look in vain for any such particularity or relevancy. There are, at most, generalized statements from Mr. Gary that the Loewen Group failed to live up to the agreement. Yet both Mr. Gary and Mr. Allred had no difficulty in specifically

informing the jury what a marvelous person Mr. O'Keefe is, how patriotic and heroic he was in World War II, and how horribly Mr. Loewen had treated a lot of people, and what a bad person he is, and that he is from Canada. Counsel thereby corrupted their opening statements (in which the attorney is supposed to objectively state the facts his client expects to prove) into a closing argument of inflammatory irrelevant alleged facts and reckless charges. This was palpable error.

This tactic continued unbroken with the first witness. Mr. O'Keefe's daughter, who illuminated the jury as to what a good father, devout Catholic, good citizen, and patriot Mr. O'Keefe was, even upon counsel's insistence giving anecdotal samples. Where did this evidence have any relevance in this trial, most certainly prior to evidence of a breach of contract? This was a breach of contract lawsuit, and whether it was something more depended *on the predicate laid in proving the breach.*

What we had here was about like a lawsuit on open account in which the lawyer tells the judge, "Judge, this is a suit on open account, but first of all I want to tell this jury what a wonderful, honest, God-fearing person my client is, and what a sorry deadbeat rascal the defendant is."

Something clearly aroused the jury's anger and no objective reading can fail to grasp what did it: the pernicious, inflammatory conduct and testimony elicited

by the lawyers representing O'Keefe, but mostly Mr. Gary, aided and abetted by the action, or inaction, of the circuit court. When it stands out so plainly on a cold typewritten transcript, one can wonder what the tactics really looked like at trial. This was a case engendered to indoctrinate the jurors not only to distrust, but to hate those who were different from the jurors – foreigners, wealthy CEOs, big corporations, and so on. Perhaps, somewhere deep down, all of us are subject to similar instincts, viewing with suspicion those who look, speak, or live differently than we do, but – and this is most important – for that very reason, courts have erected safeguards against them, and those prejudices are not countenanced by any court steeped in Anglo-Saxon jurisprudence.

I neither accept nor understand the United States government taking the position that any of this prejudicial testimony and argument was relevant. It creates no difficulty to understand from any reading of this record that the "Jerry O'Keefe, Pearl Harbor war hero" versus "Ray Loewen and his group from Canada" theme played by plaintiffs' counsel was blatant stoking of the worst instincts of the jurors. But even if I conceded – which I certainly do not – that some modicum of evidence about wealth, nationality and race was somehow appropriate, the obscene volume of those sorts of references can neither be plausibly endorsed nor legitimately rationalized.

It appears that Loewen responded to the O'Keefe lawyers' tactics in at least two ways during trial: First, by showing the jury (through evidence and argument) that the sort of us-versus-them, locals-versus-Canadians, David-versus-Goliath, etc. attitudes that O'Keefe exhibited toward Loewen, and that O'Keefe's lawyers were using during trial, were wrong, and that the better and more forward-thinking attitude was to treat foreign investors and investments fairly. As we now know, that particular jury was going to have none of that, but that does not make it Loewen's fault.

Second, defendants requested the judge instruct the jury *not* to be influenced by the specific types of prejudice that O'Keefe and Gary had made the center of their case:

> The law is a respecter of no persons. All are equal in the eyes of the law without regard to race, ethnicity, national origin, wealth or social status.
>
> In deciding the issues presented in this case, you must not be swayed by bias or prejudice or favor or any other improper motive. The parties, the court and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the court, and reach a just verdict based on these two things alone, regardless of the consequences.
>
> This case should be considered and decided by you as a matter between parties of equal standing in the community, between persons or businesses of equal standing and holding the same or similar stations in life. A corporation or other business entity is entitled to the same fair trial at your hands as a private individual.

> The Loewen Group, Inc. is a corporation organized and having its principal place of business in Vancouver, British Columbia, Canada. Loewen Group International, Inc. is a corporation having its principal place of business in Covington, Kentucky, just across the Ohio River from Cincinnati. These parties are entitled to the same fair trial at your hands as are other parties who are residents of Mississippi such as the O'Keefes and the eight separate O'Keefe corporations that are Plaintiffs in this case. All persons and parties stand equal before the law and are to be dealt with as equals in this court of justice.

Let me be clear here. In the first place, this instruction would have been proper, and it would have been error to refuse it had there not been a single inflammatory word of testimony about Loewen or its employees. This is an instruction that the Court should have given the jury simply because of the situation of the parties. One would certainly expect that in any normal case it would have been.

Inexplicably, the judge adopted the plaintiffs' argument that it was "cumulative." Cumulative to what? In a three-page boilerplate court instruction given by the courts in all jury trials, and covering all facets of the trial: evidence, court instructions, duty to follow the law, etc.,[2] somewhere in the body are the following ten words:

> You should not be influenced by bias, sympathy or prejudice.

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[2] This three-page boilerplate instruction ("C-1") has been reprinted in full in The Loewen Group, Inc.'s Memorial, at pages 36-37.

Not one word about nationality. How could anybody imagine that these ten words, in the body of this multi-subject instruction, adequately addressed the multiple inflammatory errors in this trial? It is difficult for me to read and believe that the United States and at least one of its experts seek to defend the circuit judge's refusal of this instruction on the ground it was *cumulative*!

Why would the judge refuse to give the jury guidance against falling prey to Mr. Gary's strategy of prejudice and deprive the jurors of the one instruction from the court that might have kept them from going off the deep end in their deliberations, particularly when the circuit judge repeatedly stated that he was well aware of Mr. Gary's strategies? This one error alone is staggering.

I should also comment on the suggestion that Loewen *waived* objection on the instructions by saying "Do not" in response to the judge when he asked if Loewen had an objection to his one-sentence, *pro forma* instruction. The entirety of the exchange between Loewen's counsel and the judge belies any claim of waiver. Indeed, the record shows that Loewen vigorously resisted any effort to limit the bias instruction to *only* the court's perfunctory instruction.

One does not have to study why O'Keefe's counsel opposed this requested instruction. It probably would not have been enough, but it was the only antidote to their poison.

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From the multitude of prejudicial errors, had Loewen not been prevented from appealing the merits of the judgment, I am certain that as a member of the Court, I would have felt compelled to vote to reverse and render, or reverse for a new trial on a simple breach of contract. Indeed, my opinion is that no appellate court acting in good conscience could have affirmed the *O'Keefe* verdict. I would not have wanted to associate myself, as a judge, with allowing such a travesty of justice, and it is difficult for me to imagine that any majority of Mississippi Supreme Court Justices would have disagreed with that evaluation.

As noted, on the question of a breach of the Wright & Ferguson/O'Keefe contract, the record shows that Wright & Ferguson had been dealing with Monumental Life Insurance Company – in what would have been a violation of any claimed exclusivity provision – long before Loewen entered the scene, but O'Keefe never did anything about it. Why?

As to the 1991 Settlement Agreement, where was the written obligation? How could there be binding obligations formed by that agreement with so many outstanding terms? Despite its length, it seems at best an agreement to agree, when and if major points of disagreement could be resolved, *and in which in all probability both parties expected to be resolved.* But even assuming there *was* a breach, you have got three to five million dollars in damages involved *at the most.* The most counsel's fertile imagination could come up with just before trial was

$26 million. Yet, beyond counsel's wildest imagination, the jury's *initial verdict was ten times* greater: $260 million.

No evidence supporting punitive damages should have been admitted until proof had been made of the breach. Then, and only then, should the court have examined whether the breach itself, or conduct beyond the actual breach, was somehow relevant and competent to submit a punitive damages issue to a jury.

Unfortunately, and as has been so well pointed out by Sir Robert Jennings and Chief Justice Richard Neely, this irrelevant evidence was such as to, and no doubt did, infuriate this jury.

Not only was this damage award ridiculously high, it is also apparent from the face of the verdict form that, contrary to the instructions the court *did give* and in violation of their duties as jurors, the jury made no attempt to separately assign and value items of damage and then add up the total. Rather, the jury did the opposite: they began with a number suggested by Mr. Gary, added the amount of "punitive" damages that they had on their own – and without and beyond any court instruction – decided to award, and then divided the damages into pieces to fit the verdict form. That too was an outrage crying for correction by the circuit judge.

Even more outlandish, *indeed bizarre*, was the judge's decision to "reform" this compensatory verdict after the jury foreman made him aware that the jury had included a $160 million punitive award in its original $260 million verdict. The

jury had received no instruction whatever as to punitive damages. That this jury was enraged at Loewen and had decided to render a staggering, punishing blow to Loewen is shown by its *sua sponte* $160 million punitive addition to the $100 million in compensatory damages. What better evidence of this state of mind can be envisioned?

The circuit judge had to see this was an out of control jury, and should have sustained Loewen's motion and declared a mistrial. Instead, he decided to "accept" the jury's absurd $100 million compensatory award, and send them back to deliberate further on the issue of punitive damages. He thereby encouraged the jury to consider whether the $160 million in punitive damages was enough. In my professional career, I've never seen anything nearly like this.

The jury's final punitive damages award obviously started from the premise that $160 million in punitive damages was just not enough. All that O'Keefe proved – if anything – was that Loewen backed out of a contract. Even if it did, what were the $400 million in punitive damages for? Because Ray Loewen – who wasn't even a named defendant – was a decidedly unlikable person from Canada? Since when do you get a punitive award in any amount when all you can claim the other party *did to you* was renege on a contract?

The net worth of Loewen was approximately $700 million. How could the court or jury expect the corporation to survive the additional $400 million punitive

damage award? From this verdict it would not be surprising if some of the jurors in fact did intend it to inflict a mortal financial blow.

I must say it is the worst trial record I have ever encountered.

E. The Post-Trial Motions

The miscarriage of justice was exacerbated by the trial judge's refusal to employ any of the procedural tools available to him which would have corrected the outrageous conduct of the jury. At a minimum the judge should have vacated the jury's verdict and granted Loewen's motion for a new trial.

The trial judge would have been well within his discretion to go even further and grant Loewen's post-trial motion for judgment notwithstanding the verdict, thereby rendering judgment in the defendants' favor in whole or in substantial part.

This would have been particularly appropriate with regard to the spurious "antitrust" and "oppression" claims. O'Keefe's "antitrust" claim was based on price-raising, which would not have given O'Keefe an antitrust claim, since he was not a consumer of Loewen's goods or services, and would not have been injured by higher prices. And I have never heard of the "tort" of "oppression."

Incredibly, the trial judge denied all of these motions in a dismissive, off-hand fashion.[3]

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[3] James L. Robertson, counsel for the defendants, and himself a former Justice on the Court, filed a motion for JNOV or in the alternative a new trial

F. The Supersedeas Bond

Further compounding the denial of simple justice, both the trial court and the Mississippi Supreme Court refused to impose a reasonable appeal bond in an amount less than the presumptive $625 million set by Miss. R. App. P. 8(a).

In *Bankers Life & Cas. Co. vs. Crenshaw,* 483 So.2d 254 (Miss. 1985) I had something to say about punitive damages. I wrote part of the majority opinion, and dissented on failure of the Court to reduce the punitive damages award. From the dissent (expressing the same view as Chief Justice Neely):

> In my view the wisdom of punitive damages, the rare instances when they should be awarded, and factors to consider in the amount have evolved through two centuries of human experience. If we suddenly warp and distort these principles by ignoring some, and stretching others out of proportion, salutary punitive damages awards will not simply be rare, as they now are (and should be); they will be replaced. This case will be Exhibit A in the argument of all those who wish to do away with punitive damages altogether, reduce them to some meaningless penalty, or create an impossible standard to make any punitive damage award. (at 281)

(continued...)

and/or a remittur. This motion is over 80 pages in length and lists 160 separate assignments of error supporting a judgment notwithstanding the verdict, or in the alternative a new trial. In my view there was substantial merit to these assignments, but his oral argument was limited to fifteen minutes, and there was a perfunctory disposition by the circuit judge.

Astonishingly, Mr. Allred made a motion for an *additur*, asking the judge to award an additional *$600 million* to the punitive damage award.

Punitive damages are not to compensate the plaintiff, but punish the defendant. The plaintiff already has been fully compensated by the award of actual damages, by definition. Punitive damages are a loose cannon in the law on damages, not confined by the same certainty in loss as compensatory damages. Because of this trial courts are extremely cautious in authorizing the submission of any punitive damage issue to the jury, and appellate courts have a duty to look upon punitive damage awards with extra care if not suspicion.

Loewen did post a supersedeas bond in the amount required for all compensatory damages: $125 million. It only asked some concession on the punitive damage award.

The Mississippi Supreme Court, which initially issued a temporary stay upon the posting of a $125 million bond by Loewen, was undoubtedly aware that this interim bond was capable of securing all of the actual damages. Moreover, because Loewen had already posted such a bond, it was clear that the company had every intention of appealing this verdict and judgment.

The Supreme Court's hands were surely not tied with regard to reducing the bond amount. It had the discretion *sua sponte* to impose a bond in a lower amount upon a showing of "good cause." The fact that the *O'Keefe* verdict was far and away the largest ever awarded in Mississippi was certainly a blood red flag to the Court that this judgment should be carefully examined. $500 million was about

five-sevenths the net worth of Loewen. Clearly, this jeopardized the solvency of The Loewen Group, Inc., and all its subsidiaries – not simply a paper corporation, but shareholders, several thousand employees throughout the United States and Canada, suppliers owed millions, banks which had extended credit. This should have been factored into the equation. The Court is not removed from human affairs. Moreover, the brief and submissions filed by Loewen established the improper and prejudicial conduct of the trial, making abundantly clear that this was likely a case bound for reversal. Loewen's papers also established objectively and without contradiction all the harms that would have befallen the company were a $625 million bond been imposed. The most careful and painstaking attention should have been given to all this, and the Court should have sought some way, some possible way, to accommodate both sides.

Had I still been on the Court at that time, I would have asked myself – and my fellow Justices – what would the people of Mississippi hope for a Mississippi corporation hit with a similar verdict in another State? And what would they have done if the defendant facing such an astronomical judgment, and threatened with the loss of its ability to mount an effective appeal as a result of Rule 8(a)'s bond requirement, was a Mississippi corporation? Moreover, how would they hope a Mississippi corporation would be treated by the courts of Canada and Mexico? Surely we would hope for at least some accommodation, when several hundred or

several thousand Mississippi citizens might lose their jobs. Had the Justices asked themselves these questions, I believe their decision on the bond requirement would have been dramatically different.

The Mississippi Rules of Appellate Procedure, as all rules of civil procedure in our State, were promulgated by the Mississippi Supreme Court under its assertion of inherent power to do so, aside from any statute. Our Court declared in *Hall vs. State,* 539 So.2d 1338 (Miss. 1989) that any attempt by the Legislature to interfere with this authority violated the Mississippi Constitution. These Rules are not statutes, nor do they depend upon any statutory authority for promulgation, repealing or amendment. Any Court-adopted rule, therefore, is subject to immediate change at any time the Court deems it necessary in the interest of justice to do so. *H&W Transfer & Cartage Serv.* vs. *Grjffin*, 534 So.2d 216, 217-218 (Miss. 1988). Had there been no specific provision authorizing reduction, because this reduction only involved the punitive damages, I believe the Court had the lawful authority and duty in the interests of justice to change the Rule so as to make some accommodation.

But, the Rule as then written *did* authorize a reduction. Unquestionably, it was discretionary with the Court. (MRAP 8 (b), (c), (d)). It is inescapable to me that this was an abuse of discretion in denying the defendants' motion. The Supreme Court's November 30, 1995, Order did make an interim reduction. The

January 24, 1996, Order of the Court, however, without giving any reason for doing so, found that the circuit court had not abused its discretion in refusing to reduce the bond, dissolved its previous November 30 and December 20, 1995, Orders and denied a stay. The defendants were thus left with the necessity to post, within one week, a $625 million supersedeas bond or face execution.

Indeed, it appears that the Mississippi Supreme Court has begun to ask itself precisely the types of questions just raised, for they have recently altered the bonding requirements of Rule 8(a) – on their own motion – to cap the amount of the bond at $100 million in cases of punitive damages. (I wonder if this case was not Exhibit A in the Court's decision to change the rule.) The Court could easily have taken a similar action to reduce the bonding requirement in Loewen's case; unfortunately it chose not to, despite its knowledge that its denial of a reduction in the bond would force Loewen to either settle the case or incur the devastation of bankruptcy. In my respectful view, a manifestly profound injustice was done these defendants in the Court's refusal to reduce this bond.

Finally, I feel compelled to note that the question before this Tribunal is not what Loewen might have been able to do in hindsight, particularly with regard to filing for bankruptcy. Rather, the question is what the people running the company had to do at the time in order to fulfill their corporate duties as reasonable and responsible managers. "Maybe they could have done this," and "maybe they could

have done that" becomes irrelevant. The only question is whether the Loewen management was reasonably put into a position where settling the *O'Keefe* case had to be done in order to preserve the company. Our Mississippi Supreme Court put Loewen into that position, down that well. Based on the record before the Supreme Court, the conclusion is inescapable – albeit regrettable – that the Court should have known it was a corporate disaster to require Loewen to post a $625 million bond, particularly in the seven days the Court permitted it. For the Supreme Court, the better evidence was in Loewen's sworn statements of its financial officer and its financial advisors – which in the event, proved true.

Especially insulting is the unwarranted statement by the United States that because of some "fraud on the court" the supersedeas bond was not reduced. Really? Just how does the United States acquire such knowledge? The January 24, 1996, Order is completely silent as to any reason. Can it possibly be imagined that if those Justices had any plausible reason – any *remotely* plausible reason whatever – in their minds for this devastating decision they would have omitted it from their Order? That reason would be the last thing in the world they would wish to keep secret. As a former Justice I do note that, to their eternal credit, two Justices dissented.

From its Monday-morning quarterback position, the United States asserts alternatives to the steps Loewen did take for its financial stability which might

have avoided or prevented the disastrous consequences which followed the Supreme Court denial. Of course, the United States government can only speculate whether the alternatives it now suggests would have been an improvement on the action taken by The Loewen Group. It is also in rather poor grace, after putting Loewen in this hole, to suggest that with improved judgment it might have avoided catastrophe. This is about like beating a man senseless, throwing him out to the side of a road to die, and then saying, "Well, if he had hollered, somebody might have helped him, or there was a house about 50 yards down the road he could have crawled to." Those for whom the United States is responsible put Loewen in this hole.

G. The Certainty of Reversal

The injustice of the Mississippi Supreme Court's failure to allow Loewen to appeal by setting reasonable bond terms becomes manifest when one can see no set of circumstances under which a responsible Court could possibly have affirmed the $500 million judgment of the trial court. This vindictive verdict was a disgrace to our court system.

As I have detailed above, the only possible allegation by O'Keefe that could even plausibly have been sustained – and it is doubtful – is simple breach of contract on the O'Keefe/Wright & Ferguson contact.

H. The Judicial Duty

On appeal, the judicial duty would have required a reversal, regardless of whether the trial counsel for Loewen objected to the prejudicial evidence elicited or the prejudicial comments made with sufficient frequency. I am certain, based on all my years of experience as a jurist, that no such "failure to object" would have prevented the Mississippi Supreme Court from reversing *this* judgment had they reached the merits. No such "failure" could have required that a verdict so obnoxious to law and natural justice be affirmed. As most jurisdictions, Mississippi has a plain error doctrine that requires judges to act even if the defense lawyers do *nothing*. In this case the judicial duty was plain; the appeals to bias and prejudice were too patent.

The assertion of the United States that under the doctrine of "invited error" Loewen's lawyers were themselves responsible for this outrageous miscarriage of justice is nonsense.

There has to be some point in any trial in which counsel are engaging in such wrongful conduct as to shock the conscience, the trial judge has an obligation, regardless of failure to interpose an objection, to stop it. The judge is not a potted plant or an ornament of the courtroom. Trial records are full of instances of trial judges interrupting counsel when they are embarked upon some erroneous or prejudicial course when no objection from opposing counsel was interposed.

Indeed, this transcript shows the circuit court had no such hesitancy in this case reprimanding counsel on his own when he saw fit to do so.

Moreover, as to any claim that the trial court errors were waived, did counsel waive the introduction of inflammatory irrelevant testimony in making motions for summary judgment to keep all of these claims out? Did counsel waive this prejudicial treatment in requesting the cautionary instruction at the conclusion of the trial? Then, when the inevitable verdict came to pass, the jury awarded $160 million in punitive damages without being asked, and a motion for a mistrial was made, did counsel waive this treatment? When counsel moved post-trial for a judgment notwithstanding the verdict, or for a new trial, or for remittur of the damage award, did counsel waive its clients' rights there, too? Of course not.

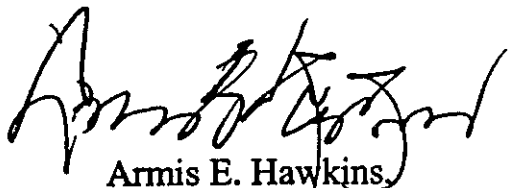
I. Conclusion

Was a grave, manifest injustice done to the defendants in this case? Read this record; it answers it all. As Patrick Henry proclaimed to the Virginia House of Delegates in considering whether we should declare our independence from our British cousins: "It is vain, sir, to extenuate the matter."

As was true with many United States citizens, I was not in favor of our entry into NAFTA, but again, as I am sure is true with nearly every U.S. citizen, I very much want it to succeed in what is best for the citizens of Mexico, Canada and the United States.

While I do not purport to be an expert on international law, it seems inescapable that this case must come under the prohibitions of NAFTA. The United States has an honorable history of doing what is right and decent, and it would be consistent with that history that treatment of the type rendered to Loewen be condemned. As a former member of the Mississippi Supreme Court, it gives me no pleasure to have to render such opinions against our Mississippi court system. And as a United States taxpayer, it gives me no pleasure to state that our government should be held responsible to Loewen. In the end, not only is this right, but I believe it is in our interest, as U.S. citizens, that this be the result. We will certainly want this treaty enforced if a United States citizen is on the receiving end of this kind of treatment from another country's courts.

Respectfully,



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