

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CITY OF MILWAUKEE, Petitioner v. CEMENT
DIVISION, NATIONAL GYPSUM COMPANY, ET AL.
CASE NO: No. 94-788
PLACE: Washington, D.C.
DATE: Monday, April 24, 1995
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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CITY OF MILWAUKEE :

4 Petitioner :

5 v. : No. 94-788

6 CEMENT DIVISION, NATIONAL :

7 GYPSUM COMPANY, ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Monday, April 24, 1995

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 2:01 p.m.

14 APPEARANCES:

15 DAVID A. STRAUSS, ESQ., Chicago, Illinois; on behalf of
16 the Petitioner.

17 HARNEY B. STOVER, JR., ESQ., Milwaukee, Wisconsin; on
18 behalf of the Respondents.

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1 PROCEEDINGS

2 (2:01 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 94-788, the City of Milwaukee v. Cement
5 Division, National Gypsum Company.

6 Mr. Strauss.

7 ORAL ARGUMENT OF DAVID A. STRAUSS

8 ON BEHALF OF THE PETITIONER

9 MR. STRAUSS: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 The question in this case is whether a district
12 court in an admiralty collision case may in the exercise
13 of its discretion withhold prejudgment interests on the
14 ground that the plaintiff was the party predominantly at
15 fault, and that the defendant, throughout much of the
16 litigation, had reason to believe it would not be held
17 liable at all.

18 The collision involved in this case occurred on
19 Christmas Eve, 1979, when a storm blew up in Lake Michigan
20 near Milwaukee. A ship called the EM FORD, loaded with
21 cement, broke away from its mooring, crashed into its
22 berth, took on water, and sunk. The respondents are the
23 owners and insurers of the ship, and they sued in
24 admiralty for \$6.5 million. They claim that the city was
25 negligent in not warning of the danger of storms.

1 The city denied negligence and said that the
2 accident had been caused by the negligence of the ship's
3 master in leaving the ship essentially unattended in its
4 berth, without any means to monitor the weather or to call
5 for help. The city also counterclaimed for a quarter of a
6 million dollars in damage to its dock.

7 The suit didn't come to trial until 1986, at
8 which point the issue of liability was tried. The
9 district court decided the liability issue in 1989, and it
10 ruled at that point that the respondents were almost
11 entirely at fault. Specifically, the city was liable for
12 only 4 percent of the damages.

13 That ruling of the district court, 10 years
14 after the accident, was reversed by the Seventh Circuit a
15 year later. The Seventh Circuit held that the district
16 court had inadequately explained its apportionment of
17 liability. Instead of remanding, however, the Seventh
18 Circuit itself reapportioned the liability, still
19 assigning the bulk of the share to respondents, two-thirds
20 to respondents, one-third to the city.

21 At that point, the parties entered into a
22 settlement agreement on the liability issue. The city
23 agreed to pay \$1.67 million, compared to the \$6.5 million
24 initially sought, to the respondents. The parties further
25 agreed in this settlement that the district court would

1 determine whether prejudgment interest was to be awarded,
2 and if so, in what amount.

3 The district court then denied the respondents'
4 request for \$5.3 million in prejudgment interest. The
5 district court recognized, and it is common ground here,
6 that in admiralty the presumption is in favor of awarding
7 prejudgment interest, but the district court denied
8 prejudgment interest in this case on the ground that the
9 plaintiff was far more at fault than the city, and that
10 throughout most of the litigation, nearly all of the
11 litigation, there was a good chance that the city would
12 not be held liable in any way.

13 The Seventh Circuit again reversed, holding that
14 the district court may never exercise discretion to
15 withhold prejudgment interest on the grounds that the
16 plaintiff was at fault, and this Court then granted
17 certiorari.

18 Now, there is no general Federal prejudgment
19 interest statute. Instead, judge-made rules govern
20 prejudgment interest in Federal courts in admiralty, and
21 in cases arising under Federal statutes that are silent on
22 the matter of prejudgment interest.

23 The one constant in these --

24 QUESTION: Are you saying there's no Federal
25 statute governing prejudgment interest, period, or

1 prejudgment interest in admiralty cases?

2 MR. STRAUSS: There is no Federal statute
3 governing prejudgment interest in admiralty cases.
4 There's also no umbrella Federal statute, as there is for
5 postjudgment interest. There are prejudgment interest
6 provisions in certain specific Federal programmatic
7 statutes.

8 In the judge-made cases that govern admiralty
9 and also the Federal statutes that are silent on
10 prejudgment interests, the one constant has been that an
11 award of prejudgment interest is by no means automatic, as
12 this Court said in its most recent such case. Rather, the
13 trial court has discretion in deciding whether to award
14 prejudgment interest.

15 Here, the district court exercised its
16 discretion, and withheld prejudgment interest because two
17 factors coalesced. First, for the first 11 years of the
18 13-year litigation, the city had every reason to think
19 that it would be subject to no significant liability.

20 The suit was initially brought by a ship that
21 had broken loose from its mooring. The city did not moor
22 the ship. The claim was only negligent failure to warn.
23 When the district court decided the liability issue, the
24 district court reapportioned the liability on a 96 to 4
25 basis, holding the city only 4 percent at fault.

1 Even after the court of appeals reversed, the
2 plaintiffs were still the party predominantly at fault by
3 a ratio of 2 to 1, and that was the second factor that
4 influenced the district court's exercise of its
5 discretion.

6 QUESTION: Well, of course, that line -- how far
7 along in that 11-year period did the 96-4 percent judgment
8 come? I mean, that's not the whole 11 years.

9 MR. STRAUSS: That was 11 years after the
10 accident, Justice Scalia.

11 QUESTION: The first decision was 11 years --

12 MR. STRAUSS: The first -- the decision was
13 10 years after the accident. The court of appeals did not
14 reverse it until 11 years after the accident.

15 QUESTION: So at most 10 years. At most, 1 year
16 they thought they were not very much responsible.

17 MR. STRAUSS: Well, the district court, which
18 was --

19 QUESTION: You leap to the conclusion from the
20 fact that the district court gave a 96-4 break that all
21 during the period up until then the city thought it would
22 have negligible liability. I don't know why that follows.

23 Certainly it's reasonable to say that from the
24 time of the district court decision until the time of the
25 court of appeals decision the city thought, what the heck,

1 I'm not -- the interest won't amount to anything. It's
2 only for that 1 year. That's not such a big deal.

3 MR. STRAUSS: Well, Justice Scalia, I think
4 that's quintessentially the kind of issue that the
5 district court is in a position to resolve, and were the
6 district court to say, in the exercise of its discretion,
7 you should have known all along that you might be held
8 substantially liable, the district court could exercise
9 its discretion and award prejudgment interest in some
10 amount.

11 But the district court here reached the opposite
12 conclusion, and all we're contending for is that the
13 district court should be able to exercise its discretion
14 in that regard.

15 QUESTION: Then what --

16 QUESTION: How did this award get -- excuse me.
17 How did this award get to be \$5 million of
18 interest on a \$1 million award?

19 MR. STRAUSS: The accident occurred on Christmas
20 Eve, 1979, Justice Kennedy, and the interest was
21 accumulating all that time.

22 QUESTION: What was the base sum on which the
23 interest was accumulating?

24 MR. STRAUSS: 1.677 million. That's the claim,
25 is for \$5.3 million. That's the claim that the

1 respondents are making.

2 As I said, the other factor that influenced the
3 district court and that has been prominent in the --

4 QUESTION: I'm still somewhat astounded that it
5 can be almost two-and-a-half times the amount of the
6 principal.

7 MR. STRAUSS: And needless to say, Justice
8 Kennedy, we'd be delighted if it were a lower amount, but
9 that's the amount the respondents are asking for, I assume
10 calculating it at prime rate, which is of course a serious
11 question whether that should be the rate, when it's a
12 municipal government that's being asked for the interest,
13 but respondents make that calculation.

14 QUESTION: Did you challenge that as well?

15 MR. STRAUSS: Well, we, in -- the district court
16 denied all prejudgment interest. The Seventh Circuit
17 reversed that and remanded for a calculation of the -- of
18 interest.

19 QUESTION: So in the district court you were
20 just arguing straight up interest or no interest, not any
21 question if interest, then the rate.

22 MR. STRAUSS: We also argued about the rate in
23 the district court, Justice Ginsburg, and it's our
24 position that prime rate is completely inappropriate for a
25 municipal government that can, after all, borrow in the

1 market at less than half of prime rate, and that would
2 continue to be our position.

3 QUESTION: That issue would still be open to you
4 if you --

5 MR. STRAUSS: That --

6 QUESTION: If the Seventh Circuit were to be
7 affirmed --

8 MR. STRAUSS: If the Seventh Circuit were to be
9 affirmed, the issue of rate would still be open, that's
10 right, Justice Ginsburg, although the Seventh Circuit did
11 seem to say that prime rate -- the choice should be
12 between prime rate and the short term borrowing rate of
13 the city, so it made some remarks about the rate, but the
14 issue of rate would, subject to those limits placed on it
15 by the Seventh Circuit, be open on remand, that's right.

16 QUESTION: I guess I don't know why the amount
17 should depend on what the city could borrow for as opposed
18 to what the person to whom the city should have paid the
19 money sooner would have been able to get for the money.

20 MR. STRAUSS: Well, there again, Justice Scalia,
21 that points to a problem that I think the district court
22 is in a position to resolve, although I should say that
23 our contention is the district -- what we're asking this
24 Court to do is simply to announce the principle that in a
25 case where the plaintiff is predominantly at fault and the

1 defendant had a reason to think it wasn't liable, the
2 district court can exercise its discretion.

3 The other factor, as I said, that influenced the
4 district court was just, as this Court has said in its
5 prejudgment cases, the relative equities of the parties, a
6 factor that this Court has frequently said should play a
7 role in deciding the award of prejudgment interest, and
8 the district court was influenced by the fact that the
9 plaintiffs were not only at fault but predominantly at
10 fault.

11 After all, in a regime of contributory
12 negligence, which to be sure admiralty has never had, in a
13 regime of contributory negligence, a party who is even
14 somewhat at fault receives nothing.

15 QUESTION: How does it work out in the Jones
16 Act? For example, a sailor is found to be two-thirds at
17 fault and the ship one third, would that person, even
18 though he was two-thirds at fault, get prejudgment
19 interest?

20 MR. STRAUSS: I -- under the Jones Act, I
21 believe, Justice Ginsburg, prejudgment interest is not
22 available, I believe. Here's why. The Jones Act remedial
23 provisions are aligned with those of the FELA, and this
24 Court decided in Monessen that there's no prejudgment
25 interest available under the FELA, so that while I can't

1 say that it's a settled issue, I believe prejudgment
2 interest is simply unavailable under the Jones Act.

3 QUESTION: Is there any other comparative
4 negligence analogy in the realm of admiralty where this
5 question comes up, other than collision?

6 MR. STRAUSS: In personal injury cases as well,
7 other than Jones Act cases, such as a personal injury
8 arising out of a collision, the issue would come up. I
9 don't know of any other context in which it comes up.

10 QUESTION: And how would it be resolved in that
11 context?

12 MR. STRAUSS: I think that's the same question
13 as the Court is faced with here. That's a question that's
14 open. Traditionally, the cases have said the district
15 court has discretion. The presumption is in favor, which
16 we don't contest, but the district court has discretion,
17 and the position that we contend for and that many courts
18 of appeals have endorsed is that when there's a dispute
19 about the existence of any liability, and the plaintiff is
20 at fault, the district court may -- need not, but may
21 exercise its discretion to deny prejudgment interest.

22 QUESTION: What are the cases in which the
23 presumption is operative?

24 MR. STRAUSS: I believe all admiralty -- all
25 admiralty cases, I believe, Justice Ginsburg. All

1 admiralty collision cases. I don't know if the
2 presumption is operative in general average cases, for
3 example. I don't know the answer to that.

4 QUESTION: Did the plaintiff recover damages
5 from any other defendant in this case other than the City
6 of Milwaukee?

7 MR. STRAUSS: I believe not. Is that -- I
8 believe not, Your Honor, but I'll have an answer to that
9 for you on rebuttal.

10 QUESTION: Mr. Strauss, I guess I'm just missing
11 the basic logic of the position.

12 If we reject the contributory negligence concept
13 in which the -- you know, the tortfeasor is not going to
14 get a nickel, so that we do not have a per se rule that
15 those who commit torts or are in some way responsible for
16 their own damages get nothing, and in fact we do, as here,
17 have a rule in which the only thing you are paying for is
18 the share with respect to which you are at fault, why
19 should you be treated any differently from any other
20 tortfeasor who is at fault, whether in fact there was
21 negligence on the part of the other party or not? Why
22 shouldn't you pay for the time value of the damage that
23 you caused?

24 MR. STRAUSS: Well, Justice Souter, we're not
25 asking to be treated any differently from any tortfeasor.

1 The common law rule was that you don't recover prejudgment
2 interest in torts. You recover it only in contract cases,
3 or in cases where the damages were ascertainable, which I
4 think meant liquidated.

5 QUESTION: And that -- now, you correct me. I
6 assume that did not survive the rejection of the old
7 contributory negligence concept, did it?

8 MR. STRAUSS: That's an independent rule,
9 Justice Souter, even in cases not involving contributory
10 negligence.

11 QUESTION: But wasn't that the difference
12 between admiralty and common law?

13 MR. STRAUSS: Yes.

14 QUESTION: At admiralty it was, you just had the
15 opposite rule.

16 MR. STRAUSS: At admiralty you had the
17 presumption in favor, that's right. The common law was
18 much more hostile to prejudgment interest than admiralty,
19 which was not hostile to it, but --

20 QUESTION: So let's take, then, in the admiralty
21 setting, Justice Souter's question. Why, when you're just
22 paying on your percentage of the fault, and the main rule
23 in admiralty is interest, prejudgment interest, why
24 doesn't the -- why shouldn't that rule apply?

25 MR. STRAUSS: Well, I think the answer, Justice

1 Ginsburg, is that prejudgment interest has had a separate
2 status in our system. Prejudgment interest hasn't been
3 seen as something that automatically went along in order
4 to make the plaintiff whole. This is --

5 QUESTION: Yes, but maybe the point of the
6 question is, why should it? In other words, there -- I
7 suppose we're simply invoking a concept of equity or
8 fairness. If you are not being forced to pay for anything
9 more than your own negligence, why shouldn't you pay the
10 time value of the -- for the period of recovery?

11 MR. STRAUSS: Justice Souter, I mean, I think
12 the -- if the sole objective of the system were to provide
13 a plaintiff with full compensation, there would be no
14 answer to your question.

15 QUESTION: All right. What's the countervailing
16 objective that justifies a different result?

17 MR. STRAUSS: Well, there are two things really,
18 Justice Souter. The first is not -- I don't know if it's
19 an objective, but it's the traditional treatment of
20 prejudgment interest. Prejudgment interest --

21 QUESTION: No, but that's just -- if I'm selling
22 you short, don't let me do it, but it seems to me you're
23 saying, well, we just haven't done it.

24 MR. STRAUSS: Well, what it would mean in this
25 case, saying that prejudgment interest must be awarded not

1 as a matter of discretion but must be awarded, period --

2 QUESTION: Not to be awarded without a good
3 reason, and I'm saying what are the good reasons, and your
4 first answer is, well, it's been treated differently,
5 which is I think the equivalent of saying we just haven't.

6 MR. STRAUSS: Well, there really -- okay,
7 Justice Souter there are two questions, and I think I may
8 have been confused over which you were asking. If the
9 question is, why should there be any discretion at all,
10 then my principal and only answer is to say that -- is
11 that to say there's no discretion would be to overrule
12 over 100 years of precedent with which Congress has
13 apparently been satisfied.

14 QUESTION: Okay.

15 MR. STRAUSS: If the question is, given that
16 there's discretion, why should it be exercised in a case
17 like this, then there really are two points to be made.
18 The first is that awarding prejudgment interest puts
19 pressure on a defendant to settle. There may be cases in
20 which, the district court apparently thought this was one,
21 that it would be unfair to put so much pressure on a
22 defendant to settle.

23 When prejudgment interest is going to be
24 awarded, defendant, the city in this case, is in the
25 position of saying to itself, if we don't settle on

1 whatever terms the plaintiff is offering, we are in effect
2 going into the market and borrowing money from them and
3 guaranteeing them a return at possibly prime rate for the
4 duration of the litigation, 13 years. That's a major
5 decision for a city. It's a nice thing for a plaintiff to
6 have, a guaranteed investment at that rate.

7 QUESTION: But it's a major decision for any
8 party in litigation in which there may be discretion
9 exercised to award such interest. I mean, the little
10 angel on the other shoulder of the city can say, if we
11 don't settle, and it takes a long time to pay -- to
12 litigate, then it's going to -- and we lose to some
13 degree, then they are going to be a long time without the
14 value which we ultimately will be adjudicated to have
15 taken from them.

16 MR. STRAUSS: Yes, that's right, Justice Souter,
17 and it's why we don't contend for anything more than a
18 degree of discretion in the district court when it
19 decides, as it evidently did here, that the defendants
20 have acted in a reasonable fashion, it can then withhold
21 the award of prejudgment interest.

22 QUESTION: Now, what's the -- you had a second
23 reason.

24 MR. STRAUSS: Well, the second reason is this
25 history of using prejudgment interest to respond to

1 equity-like considerations, the relative equities of the
2 parties, considerations of fundamental fairness, which I
3 think is best interpreted as reflecting the kinds of
4 concerns that underlay both contributory negligence and
5 different kinds of comparative fault rules.

6 There are, after all, comparative fault regimes
7 in which a plaintiff that is 50-percent at fault doesn't
8 recover at all, and the best interpretation, I think, of
9 the Court's repeated references to fundamental fairness,
10 considerations of the equities, is to say that a district
11 court can say, well in this case the plaintiff was so much
12 more at fault that we're going to deny not its recovery,
13 it gets its recovery, but we're going to deny it
14 prejudgment interest.

15 QUESTION: Do you think historically the reason
16 was the divided damages rule?

17 MR. STRAUSS: No, I don't --

18 QUESTION: Because it -- interest -- to the
19 extent the divided damages rule produced an inequity, an
20 economic inequity, prejudgment interest can distort that
21 even further, but you don't think that's the reason for
22 the solicitude over the years?

23 MR. STRAUSS: No, not at all, Justice Souter. I
24 mean, there are many reasons to believe the contrary, one
25 of which is the body of cases Justice Ginsburg alluded to.

1 In personal injury actions in admiralty the rule
2 has always been comparative fault, yet courts applied the
3 principle there as well.

4 QUESTION: I thought that they applied that, the
5 exception only if a defendant had protracted the
6 litigation, some notion of litigation misconduct, but not
7 in this situation.

8 MR. STRAUSS: No, I think this principle that --
9 mutual fault with a good faith dispute is the way they put
10 it, meaning, I think, that the defendant had reason to
11 think it would not be held liable at all, they've applied
12 that principle as well. That's a separate principle from
13 the plaintiff's prolonging its -- prolonging the
14 litigation.

15 QUESTION: Do you have cases to that effect
16 outside when it was the old 50-50 rule?

17 MR. STRAUSS: Well, we have cases to that effect
18 involving personal injury which was never subject to the
19 50-50 rule cited in our brief, a case called Ceja from the
20 Fifth Circuit, another case called Pluyer from the Fifth
21 Circuit, which was cited in our brief.

22 But there are other reasons for this as well.
23 This -- I mean, if what you were -- when courts --

24 QUESTION: That's not a very long tradition that
25 you're referring to. I mean, two cases?

1 MR. STRAUSS: The tradition, Justice Scalia --
2 the tradition is a tradition of discretion in the awarding
3 of prejudgment interest, of not regarding prejudgment
4 interest simply as an element of the plaintiff's
5 compensation.

6 QUESTION: Yes, but I -- but what's important to
7 me is why should the discretion be exercised in this case?
8 You assert that the prejudgment interest is sort of a
9 penalty upon the losing party for not settling sooner. I
10 don't know why one has to look at it that way. One can
11 look at it as simply natural justice.

12 The person who's been injured has been deprived
13 of the value of what was taken from the time it was taken,
14 not from the time the judgment occurred. Why isn't that
15 an equally valid way to look at it, and if you look at it
16 that way, I see no reason to reduce the amount simply
17 because the city had no reason to think it was going to
18 lose.

19 The fact is, the city was at fault to a certain
20 amount, and it should pay up and do justice. What's wrong
21 with that?

22 MR. STRAUSS: If the -- Justice Scalia, if the
23 sole objective were to provide the plaintiff with full
24 compensation, it would be very difficult to explain why
25 prejudgment interest at some rate shouldn't be awarded.

1 The rate would be highly controversial.

2 But prejudgment interest, like attorney's fees,
3 is one of the elements of our system, or like indirect
4 economic costs, or like approximate causation, these are
5 elements of our system in which compensation of the
6 plaintiffs has not been the sole objectives.

7 Plaintiffs aren't fully compensated when they
8 have to pay their own fees. Nonetheless, in our system
9 they have to pay their own fees. They're not fully
10 compensated when they don't get prejudgment interest, but
11 the tradition in our system for over 100 years, which
12 Congress not only hasn't changed, but when Congress
13 thought about enacting a general Federal law, it left
14 discretion alone --

15 QUESTION: The only substantial series of cases
16 that you show where this discretion was exercised are
17 cases where it was exercised in order to again move in the
18 direction of greater fairness, not taking account of the
19 fact that the city couldn't settle. Certainly, the
20 majority of cases where it was exercised, it was exercised
21 to mitigate the old rule that no matter how minimally
22 negligent you were, you ended up paying 50 percent.

23 MR. STRAUSS: Justice Scalia, I don't want to
24 deny that some courts of appeal used the rule that way,
25 but it's not the case that discretion was only exercised

1 to mitigate unfairness. In fact, one of --

2 QUESTION: What else was it used for?

3 MR. STRAUSS: Well, one of the cases we cite
4 from this Court, The Scotland, Justice Bradley's opinion
5 from 1884 or '5, upheld a denial of prejudgment interest,
6 and Justice Bradley, explaining why he was upholding the
7 denial, talked about how reasonable it was for the
8 defendant in this case to pursue the position it was
9 pursuing in the case. He didn't --

10 QUESTION: Was that a case of 50 percent?

11 MR. STRAUSS: It was not, Justice Ginsburg. I
12 think it was a case of undivided damages. Now, the
13 Court --

14 QUESTION: How is it in this case that it took
15 10 years to get to trial, to get a trial court decision?

16 MR. STRAUSS: I'm sorry, Justice O'Connor.

17 QUESTION: How is it that it took 10 years in
18 this case to get a trial court decision?

19 MR. STRAUSS: There are no findings on this
20 point, Justice O'Connor, but so far as one can infer from
21 the record, there were really, well, three things going
22 on.

23 One was there was some collateral litigation
24 about a plaintiff, disqualification of plaintiff's
25 counsel. Plaintiff's original lead counsel was

1 disqualified for a conflict of interest, and there was a
2 trip to the court of appeals about that.

3 The second was the case was transferred from the
4 docket of one district judge to another, and the third was
5 that the district judge took 3 years from the date of the
6 submission of the case to the date of rendering the
7 judgment, so those three factors, combined with the usual
8 delays of discovery, so far as I can tell from the record.
9 As I say, there are no findings on the question of --

10 QUESTION: Mr. Strauss, may I just go back and
11 ask you another question about the case that you referred
12 to in answering Justice Ginsburg? You said that was a
13 case of undivided damages. Would it have been a divided
14 damages case if there had been fault on the other side?

15 MR. STRAUSS: Yes, it would. It was a -- this
16 is the Scotland, the case from this Court?

17 QUESTION: Yes.

18 MR. STRAUSS: Yes, it would.

19 QUESTION: Okay.

20 MR. STRAUSS: It was I believe a limitation of
21 liability case.

22 As I said in answer to Justice Souter's question
23 about the one reason that the district court -- that the
24 court of appeals gave for denying all discretion in these
25 cases, the court of appeals said that that discretion had

1 been used to offset the harsh effects of the divided
2 damages rule.

3 We lay out many reasons in our brief, including
4 the one I mentioned to Justice Souter, the cases that were
5 cited, that we cited in our brief that the divided damages
6 rule wasn't in play and nonetheless this mutual fault
7 approach to prejudgment interest was applied, but I
8 suppose the best way to explain the weakness of the court
9 of appeals reasoning is that this -- denying prejudgment
10 interest is a very crude way of dealing with the supposed
11 inequities of the divided damages rule.

12 When lower courts wanted to deal with those --
13 with the perceived harshness of that rule, what they did
14 was to design rules to deal with it, the so-called major-
15 minor fault rule, that when a party was only somewhat at
16 fault they would not divide damages, and the so-called in
17 extremis rule, which operated to somewhat the same effect.

18 QUESTION: What amount of discretion did the
19 Seventh Circuit's opinion in this case leave to district
20 courts in the future to deny prejudgment interest?

21 MR. STRAUSS: None on the grounds of the
22 plaintiff being predominantly at fault, or the defendant
23 having a reasonable litigation position throughout the
24 litigation. None on that ground.

25 The -- I believe they left open the possibility

1 that prejudgment interest could be denied if the plaintiff
2 delayed in litigating, although, of course, Justice
3 Scalia's line of questions could be asked about that, too,
4 even if the plaintiff's delaying, the defendant still has
5 the money, the plaintiff still doesn't have the money, why
6 not award the interest.

7 If the Court has no further questions, I'll
8 reserve the balance of my time.

9 QUESTION: Very well, Mr. Strauss.

10 Mr. Stover.

11 ORAL ARGUMENT OF HARNEY B. STOVER, JR.

12 ON BEHALF OF THE RESPONDENTS

13 MR. STOVER: Mr. Chief Justice, and may it
14 please the Court:

15 I'd like to go directly to a couple of questions
16 asked here, because I've lived with this case since that
17 ship went down and I saw it the next morning, and I know
18 some of the answers and I don't think Mr. Strauss does.

19 First of all, in personal injury cases as well
20 as in all admiralty cases, prejudgment interest is the
21 rule. As a matter of fact, Anderson v. Whittaker, which
22 is cited in our brief, out of the Sixth Circuit, which
23 disagrees with the Fifth Circuit, holds that prejudgment
24 interest in a personal injury case is the rule.

25 All admiralty courts in all circuits, including

1 the Fifth and the Eleventh, hold that prejudgment interest
2 is to be awarded. Now, whether you want to talk about it
3 in terms of a court has the discretion to award it, or it
4 is the rule and the court has discretion to deny an award
5 of prejudgment interest, the measure is still the same.
6 Did the court abuse its discretion by denying prejudgment
7 interest?

8 The reason we're here is because the Ninth,
9 Sixth, and Seventh Circuits hold that the exception to
10 awarding prejudgment interest is special circumstances,
11 and all courts agree on that.

12 The Ninth, Sixth, and Seventh Circuits hold that
13 mutual fault, or if you want to call it magnitude of
14 fault, or if you want to call it genuine dispute in a
15 mutual fault situation, they are not special
16 circumstances, and they do not justify by themselves a
17 denial of prejudgment interest.

18 The Third and Eighth Circuits have not ruled on
19 the question, but have given indication in cases that
20 they probably are going to go along with the Sixth,
21 Seventh, and Ninth in that line of reasoning.

22 District courts in the First, Second, Third,
23 Fourth, and Eighth Circuits have held that mutual fault is
24 not a special circumstance.

25 The Fifth Circuit and the Eleventh Circuit,

1 which generally goes along with it, have held that it is a
2 special circumstance, and a judge may exercise his
3 discretion to deny prejudgment interest if he wants to
4 because of mutual fault, and that's why we're here.

5 There's a split in the circuits on this, and the majority
6 rule is what I'm espousing, and the minority rule is what
7 Mr. Strauss is espousing.

8 It seems to me that this is a relatively simple
9 thing, although nothing is ever simple, I guess, in life,
10 but the underlying philosophy for the award of a
11 prejudgment interest is that it is a part of damages. It
12 is compensation. It serves to compensate for the loss of
13 the use of money as damages from the time of the -- when
14 the cause of action arose until the time of judgment.

15 In admiralty, which is a separate body of law,
16 and I think this Court recognizes that because in *Miles v.*
17 *Apex Marine*, where the Court spoke through Justice
18 O'Connor, it very clearly talked about admiralty as a
19 separate regime. It has some statutory things that apply
20 to it, but by and large it is a judge-made law, and has
21 been since the beginning of this country.

22 Certainly, there are the Death on the High Seas
23 Act, the Longshore & Harbor Workers Compensation Act, the
24 Jones Act, the rules of the road and those kind of things,
25 but by and large the law in admiralty in this country has

1 been case law.

2 QUESTION: Mr. Stover, if you're not accepting
3 that, and assuming that we've got some policy choices to
4 make, can you tell us what percentage of cases as a
5 general rule in admiralty involve mutual fault, so that if
6 we were to rule, for example, that mutual fault was a
7 reason to deny them, what percentage of cases would we be
8 excluding from the general rule if we did that?

9 MR. STOVER: Well, Justice Souter, I can't --
10 you have to look at it two ways, I would think. One is in
11 what percentages of cases is fault ascribed by each party
12 to the other, and that would probably --

13 QUESTION: How about the cases in which fault is
14 ascribed to each party by the ultimate fact-finder?

15 MR. STOVER: I would think well over 50 percent
16 of collision cases involve mutual fault.

17 QUESTION: In -- that is, they are finally
18 resolved.

19 MR. STOVER: They are finally resolved as --

20 QUESTION: So that we would be excluding, on
21 your view, more than half the cases from the operation of
22 the rule, of the interest rule.

23 MR. STOVER: Not under my view.

24 QUESTION: No, no, no --

25 MR. STOVER: I want interest awarded.

1 QUESTION: If we went Mr. Strauss' way, we would
2 be excluding more than half the cases from the possibility
3 of --

4 MR. STOVER: I would think so, oh yes,
5 definitely --

6 QUESTION: Yes.

7 MR. STOVER: -- and as a matter of fact you
8 would be doing even more, because you'd be sending signals
9 and doing all sorts of things which I'll get to a little
10 later, but I -- the majority of collision cases, if we're
11 going to restrict this to collision cases, the majority of
12 collision cases involve mutual fault, just as I think
13 almost a rule of thumb in the insurance industry, when
14 you're talking about intersection accidents with
15 automobiles, I think they think that virtually all of them
16 have dual fault on them, and they approach them on a 90-
17 10 basis even when it's a rear end accident, but --

18 QUESTION: This wasn't that sort of a collision.
19 This wasn't two vessels.

20 MR. STOVER: No, this wasn't. This was a
21 collision of a vessel moored at a dock in Milwaukee in the
22 outer harbor, and a violent storm occurred and the ship
23 sank in the slip, an unusual circumstance, a little bit
24 like looking at the Andrea -- the Ile de France burning at
25 the dock in New York.

1 But in admiralty, prejudgment interest has
2 always been awarded. You can go all the way back to the
3 beginning of this country, and in the earliest cases, and
4 these are cited in, I think, the briefs of both parties,
5 there's a case, Del Col v. Arnold, way back in 3 Dallas,
6 before they ever even were doing anything but summarizing
7 cases.

8 And the Anna Maria, and the Amiable Nancy, both
9 of which were decided by Chief Justice Marshall, were
10 prize cases, and the rule developed from that that in the
11 prize cases, where they were dealing with privateers who
12 had seized vessels and seized cargo illegally, the rule
13 was to have them pay back to the owner the value of the
14 vessel or the value of the cargo plus interest to the date
15 of judgment, and admiralty has always awarded prejudgment
16 interest, except these exceptions.

17 QUESTION: But there's always been a
18 discretionary exception, hasn't there?

19 MR. STOVER: There has been a discretionary
20 exception, but other than in the Fifth and Eleventh
21 Circuits, where they exercise it to include mutual fault,
22 it has never in any of the other circuits included mutual
23 fault.

24 QUESTION: How about The Scotland?

25 MR. STOVER: The Scotland I believe was the

1 forerunner -- I'm -- if that steam navigation company
2 case, they talked about prejudgment interest in it and
3 said that it was to be awarded, but The Scotland and
4 another case that's cited by the city, the Maggie Smith,
5 involved limitation of liability and stipulations for
6 value, or value bonds, which in those days were not
7 required to contain interest and didn't, and so they said,
8 you don't have to award it in these -- under these
9 circumstances.

10 QUESTION: Well, but they do contain statements
11 by the authors of the opinion that the award of
12 prejudgment interest in admiralty is discretionary.

13 MR. STOVER: But no courts have denied
14 prejudgment interest except -- or not awarded it except
15 where their -- except in the Fifth Circuit and the
16 Eleventh Circuit, except under -- where there are special
17 or peculiar circumstances, and the special or peculiar
18 circumstances, except in those two circuits, have always
19 been postcasualty or postaccident circumstances such as
20 laches or even less than laches, delay in starting the
21 lawsuit, delay in prosecuting a claim, exaggerated or
22 fraudulent claims, postaccident fraud, frivolous claims,
23 bad faith estimate of damages, no damages sustained.

24 QUESTION: Mr. Stover, what about -- this one
25 case keeps running through my mind. I don't know whether

1 it makes a difference or not as to whether it's a special
2 or unusual circumstance as you use the term, had the
3 ultimate outcome been the same as at the end of the first
4 trial, 96 percent fault on the part of the plaintiff and 4
5 percent fault on the part of the defendant, but this
6 tremendous disparity, tremendous amount of damage makes
7 this 4 percent -- could make even the 4 percent a very
8 significant item. Would even a 96, 97 percent fault be
9 a -- possibly be an unusual circumstance that would
10 justify denial of prejudgment interest?

11 MR. STOVER: I don't think so, Your Honor, but
12 one of the basic reasons that that particular finding of
13 the trial court was overturned was because
14 96 percent/4 percent is the exact ratio of the claimed
15 damages, \$6.5 million and a quarter of a million dollars,
16 and that obviously is no grounds for apportioning fault
17 under a true comparative negligence regime, and that's one
18 of the reasons why it was turned over.

19 QUESTION: No, but conceivably there could be a
20 valid reason for that kind of an apportionment, and
21 instead of it coming out even, it might have been the
22 city's damages were just half of that amount, and then
23 you'd have a lot of money involved.

24 MR. STOVER: Justice Stevens, to my way of
25 thinking, and I think the correct way of thinking, is that

1 prejudgment -- is that mutual fault either is a reason or
2 it is not a reason, but there's no halfway between.

3 QUESTION: Well, logically what you say makes a
4 lot of sense, but somehow or other it seems sort of
5 strange to me to say somebody's 96 percent -- assuming
6 such a case, 96 or 99 percent fault, and they end up
7 collecting a huge sum of money and getting prejudgment
8 interest.

9 Somehow it doesn't seem to make sense.
10 Logically it, does, I --

11 MR. STOVER: But that's the true comparative
12 negligence regime.

13 QUESTION: Yes.

14 MR. STOVER: You take into account the equities
15 between the parties, their stance, their fault, whatever,
16 down to the point of accident, when you apportioned your
17 negligence. That's true comparative negligence.

18 Prejudgment interest shouldn't have anything to
19 do with the negligence. It's an element of damages. It
20 has to do with compensation. It's awarded to make the
21 recovery, whatever the recovery is, the recovery today,
22 not the recovery 5 years, 10 years ago, in this case
23 13 years before, because that isn't a just recovery.

24 The reason it isn't a just recovery is because
25 the party that's getting it isn't getting -- isn't being

1 put in the place today that it would have been in had the
2 accident not occurred, whereas the -- and that's the
3 object, I think, of tort liability. That's the object of
4 tort litigation, is to get the parties today where they
5 would --

6 QUESTION: But it doesn't work very well when
7 there is such a long delay in getting the issue resolved.
8 I'm not sure which party ought to have to bear the burden
9 of the fact that the court didn't get around to it for
10 10 years.

11 MR. STOVER: Well, I can only quote, Justice
12 O'Connor -- not quote, but state what the Seventh Circuit
13 said in the Amoco Cadiz decision, which is that delay
14 isn't a reason not to award it. Delay is a reason to
15 award it. In this particular case, the court questioned
16 why the delay.

17 The only abnormal parts of this litigation were
18 a 1-year delay due to the trial court changing, and there
19 was a pending motion on disqualification of counsel, and
20 the court that got it was burdened and didn't have time to
21 do it, and took a year to decide. The other is that the
22 trial court took 3 years and 3 months to render a decision
23 following the conclusion of submission of briefs. I can't
24 speak to that.

25 QUESTION: Who was the judge, just out of

1 curiosity?

2 MR. STOVER: Judge Curran.

3 QUESTION: Was it?

4 MR. STOVER: Judge Thomas Curran in Milwaukee.

5 But I would like to speak to a couple of things,
6 because I think it bears on what the Court would be
7 interested in in this, and that is what would happen -- I
8 said before that to my way of thinking the underlying
9 policy -- and I think this is to this Court's way of
10 thinking, too. I think it was espoused very clearly in
11 the West Virginia case.

12 The underlying policy or objective is not to put
13 the parties in the same position they would have been in
14 back at the time of casualty, but to put them in the same
15 position today that they would have been in had the
16 casualty not occurred, and the only way to do that is to
17 award interest during the intervening period.

18 In a case of mutual fault and mutual damage like
19 this, it doesn't make any difference in dollars and cents
20 whether you assess the true comparative negligence and
21 then take the damages and assess prejudgment interest on
22 the city's damages and assess prejudgment interest on the
23 ship's damages and then offset them, or whether you just
24 offset the damages and assess prejudgment interest on the
25 difference. The dollars and cents comes out identically.

1 But what is important is that prejudgment
2 interest achieves the objective of placing the parties
3 today where they would have been today had the accident
4 not occurred.

5 If this Court were to adopt a rule awarding
6 prejudgment interest in mutual fault cases, or making
7 it -- well, awarding prejudgment interest in mutual fault
8 cases, which is what I wanted to do, what would be the
9 result? It would only change the law in the Fifth and
10 Eleventh Circuits, and strangely enough, the Eleventh
11 Circuit, I don't quite understand what happened in the
12 Eleventh Circuit, but --

13 QUESTION: Both the Fifth and the Eleventh
14 Circuits have a very substantial amount of admiralty
15 business.

16 MR. STOVER: Yes, they do, Your Honor, but I
17 would -- Mr. Chief Justice, but I would think that if
18 someone claimed that the Fifth Circuit overshadowed the
19 Second Circuit today in the admiralty field that would
20 cause consternation in the ranks.

21 QUESTION: Well, they do in numbers of cases
22 decided --

23 MR. STOVER: They probably do.

24 QUESTION: -- I'm told.

25 MR. STOVER: They may now. I don't think,

1 Justice O'Connor, that anyone in New York would ever
2 concede that they overshadow New York in history or in
3 importance.

4 But if this Court were to adopt the rule that
5 the Seventh Circuit and the Sixth Circuit and the Ninth
6 Circuit follow, it would only change the law in the Fifth
7 and Eleventh Circuits.

8 I started to say, strangely enough, Judge Nangle
9 in a case, it's not cited in anyone's brief, but Judge
10 Nangle of the Southern District of Georgia in June,
11 June 29 of last year, decided a case, a Death on the High
12 Seas Act case, and talked about this very thing, and said,
13 I have already assessed the -- taken into account the
14 fault of the parties when I apportioned negligence, and I
15 will not do it again.

16 QUESTION: He came from the Eighth Circuit. He
17 used to sit in St. Louis.

18 MR. STOVER: Oh, did he? I don't think that
19 explains -- well, maybe it does explain it, but he then
20 awarded prejudgment interest to a plaintiff who was -- in
21 that case, this was a personal injury case, wrongful
22 death, plaintiff decedent, awarded prejudgment interest to
23 one who was 33-1/3 percent negligent.

24 QUESTION: Other than saying that the law of the
25 two circuits would be displaced, as opposed to a

1 substantial number of others, would there be any other
2 adverse effects from the rule that the petitioner --

3 MR. STOVER: Adverse effects from a rule that
4 they want?

5 MR. ARROW: -- is espousing?

6 MR. STOVER: I would believe there would be if
7 the rule that they want were adopted by this Court, which
8 is that the Court has discretion to deny prejudgment
9 interest or not to award prejudgment interest in mutual
10 fault cases if it wants to. It would change the law
11 everywhere except the Fifth and Eleventh Circuits. It
12 would increase uncertainty in a mutual fault admiralty
13 collision case, and there would be no uniformity.

14 And as a matter of fact, if that were the rule
15 adopted, I don't know what would be the standard of
16 review. It would certainly be almost undiscernible as to
17 when a court would abuse its discretion.

18 QUESTION: I take it the district court under
19 the proposed rule would have, of course, more discretion
20 than the court of appeals on the same subject.

21 MR. STOVER: I would think so, yes, but how
22 would you measure an abuse of discretion? I can't see a
23 way to do it.

24 QUESTION: It would be hard to figure out what
25 to settle for, if you didn't -- a lot would depend on

1 whether the district judge chose to give prejudgment
2 interest or not.

3 MR. STOVER: Yes, sir. I think it would
4 preclude settlements, or slow them down because of the
5 uncertainty, the lack of uniformity --

6 QUESTION: Presumably a settlement itself would
7 make the litigation itself and the amount payable become
8 due much earlier, so that prejudgment interest would be a
9 smaller factor than if you tried to assess it after trial
10 and appeal.

11 MR. STOVER: By the same token, Mr. Chief
12 Justice, I think that leaving open the question as to
13 prejudgment interest, leaving it up to the discretion of
14 the trial judge, would encourage a party, particularly a
15 party which had incurred lesser damages, to gamble, to
16 roll the dice.

17 What have we got to lose? If they decide
18 against us, we just pay what we would have to pay anyway,
19 but in the meantime, we have had -- we gamble that we have
20 had this interest free, because the judge in a mutual
21 fault decision will deny prejudgment interest, whereas if
22 the rule is to award it, there is certainty.

23 And in fact I think that a rule that would award
24 prejudgment interest in mutual fault cases would encourage
25 participation in such things as, certainly in bifurcation,

1 because you know that when you get done with the initial
2 trial on liability, you're going to have certainty. It
3 isn't going to come back and face you again when it comes
4 to damages.

5 I think it would encourage the use of mini
6 trials and summary trials again because of certainty. You
7 know that when you get a decision there it's going to be a
8 reading on what is going to finally occur. It may not be
9 the exact reading, and half the time it doesn't agree with
10 what you think it's going to be, but it's a reading, an
11 educated reading on the case.

12 QUESTION: The rule does -- that the city
13 advocates does give the district court some insulation
14 against the shock produced by the court of appeals
15 reallocating the fault that he assessed.

16 MR. STOVER: Well, Justice Kennedy, I don't
17 think the Seventh Circuit is the only one that has ever
18 stepped in and reassessed a fault and even said what it is
19 instead of sending it back, and off-hand I can't cite you
20 the authority, but I remember going through this at the
21 time of the appeal, and they weren't the first who ever
22 did that, but they followed the clearly erroneous rule,
23 and on the face of it the 96-4 apportionment, which was in
24 exact proportion to the damage occurred, claimed to be
25 incurred by the parties, was not exactly cricket for that

1 sort of thing.

2 QUESTION: I was wondering how they got that
3 percentage. That's how it was, just the basis of how much
4 each one had incurred.

5 MR. STOVER: Well, there was --

6 QUESTION: So in other words, a pox on both of
7 you, go bear your own loss, essentially.

8 MR. STOVER: Yes, Justice Scalia. They didn't
9 exactly come out and say that, but --

10 QUESTION: It's a sophisticated application of
11 the old divided damage rule.

12 (Laughter.)

13 MR. STOVER: Well, it seems to me that this
14 Court has before it a true comparative negligence regime,
15 and if you are considering true comparative negligence,
16 then when you compare the negligence and reach a final
17 conclusion as to it, it should be final, and however the
18 outcome after that in damages one party probably is going
19 to recover something from the other.

20 It may be a lot, it may be a little, but they're
21 going to recover something. If you want to look at it as
22 each party recovering from the other, each party being a
23 winner and a victim, and each party recovering something
24 from the other, prejudgment interest should be awarded on
25 each recovery, and then you offset them. What we did here

1 is just bypass that and offset them to begin with, and
2 there was a net recovery.

3 But the party entitled to the net recovery is
4 entitled to that recovery as if its value today, not its
5 value in this case 13 years previously. Unfortunately,
6 litigation does take time once in a while.

7 QUESTION: Would it be, in your view, a
8 permissible special circumstance if the trial -- finder of
9 fact thought that the prevailing party for its share of
10 the responsibility was guilty of wilful and wanton
11 misconduct that in other contexts were adjusted by
12 punitive damages?

13 MR. STOVER: Well, Justice Stevens, I think if
14 one party is guilty of wanton and wilful misconduct in
15 your comparison of negligence you take that into account.

16 QUESTION: But even though what they did only
17 contributed -- was only the causal factor for half of the
18 damages? I mean, the malicious or wilful character of the
19 conduct might not affect the division between whether it's
20 75-25, or 35-65, but it would just be a factor that would
21 normally justify punitive damages.

22 MR. STOVER: Well, if that's your hypothetical,
23 Justice Stevens, I would say that it should not be
24 considered, but I don't think that would be a proper
25 hypothetical, because I can't imagine a trial court faced

1 with wanton and wilful misconduct on the part of one party
2 and ordinary negligence on the part of the other party not
3 taking that into account in apportioning the fault. I
4 would think every court would do that.

5 I would like to say one thing. If this Court
6 should see fit to uphold the Seventh Circuit and to uphold
7 the underlying policy and all, I believe that it would be
8 within the scope of the consideration and within the scope
9 of this case if the Court could lay down some parameters
10 for the awarding of prejudgment interest.

11 I don't mean talking about prime rate, or
12 Government bonds, or U.S. Treasury bills, or anything like
13 that, because that is within the discretion of the trial
14 court, but fixing some parameters so that it is clear that
15 prejudgment interest is to be awarded as compensation, as
16 damages.

17 The purpose of it is to place the party that's
18 getting -- that's recovering the money in the position
19 that it would have been today had the accident not
20 occurred, and the way to do that is to assess interest
21 during the intervening period at a reasonable -- let's say
22 to assess a reasonable or just interest during the
23 intervening point -- period from the point of view of the
24 plaintiff to make the plaintiff receive -- not the
25 plaintiff, the recovering party, to make the recovering

1 party receive just compensation.

2 QUESTION: Mr. Stover, how does that differ from
3 the holding of the Seventh Circuit that mutual fault of
4 the parties in a collision case does not constitute a
5 circumstance justifying denial of prejudgment interest.
6 What more do you want this Court to say, other than that's
7 right or wrong?

8 MR. STOVER: Well, personally, if the Court will
9 say that, and says I'm right, the Seventh Circuit is
10 right, I wouldn't want any more, but I would just think
11 that as a matter of policy, since this Court is
12 considering prejudgment interest in a mutual fault case
13 and this Court has a history of developing a philosophy to
14 award prejudgment interest unless it's precluded by
15 something in admiralty, by special or peculiar
16 circumstances, of course where there's a statutory
17 prohibition against it, where there's a longstanding legal
18 principle against it, but in other cases this Court has
19 been developing a history of awarding prejudgment
20 interest, so this might be a likely case to fix some
21 parameters, not specific or anything, but some general
22 parameters for the award.

23 Thank you, Mr. Chief Justice.

24 QUESTION: Thank you, Mr. Stover.

25 Mr. Strauss, you have 3 minutes remaining.

1 REBUTTAL ARGUMENT OF DAVID A. STRAUSS

2 ON BEHALF OF THE PETITIONER

3 MR. STRAUSS: Thank you, Mr. Chief Justice.

4 Two clarifications, and then just one point.

5 I'm told that one party to the case did settle at the very
6 beginning of the trial, but no effort was made to
7 integrate that settlement with the settlement with the
8 city.

9 Secondly, Justice Scalia, the passage in The
10 Scotland I was thinking of is at 118 U.S. 519, at 519, the
11 beginning of that page, and let me be clear about what my
12 submission is. The Scotland is not a mutual fault case,
13 so the claim cannot be made that the prejudgment interest
14 is being used to adjust the -- to compensate for the
15 divided damages rule.

16 What Justice Bradley did there, it seems to me,
17 is to take into account the reasonableness of the
18 defendant's posture in the litigation, and say that
19 justified the exercise of discretion to deny prejudgment
20 interest.

21 QUESTION: Well, as I read what he says, the
22 posture was that the defendant tried to put up the money
23 into the court, and the court wouldn't have it.

24 MR. STRAUSS: The issue was limitation of
25 liability, and the defendants -- what Justice Bradley is

1 saying, I think, is that the defendant tried to pursue
2 this in good faith.

3 QUESTION: Proffer the money and the court
4 wouldn't allow it.

5 MR. STRAUSS: Right.

6 QUESTION: Well, I can see a possible reason
7 for -- and the plaintiff refused it.

8 MR. STRAUSS: There is a certain coherence to
9 the idea that we should have a nondiscretionary regime in
10 which prejudgment interest is simply awarded as a matter
11 of course no matter what, in order to make the plaintiff
12 whole and take away any windfall from the defendant.
13 There's a certain coherence to that regime. Of course,
14 that regime would require upsetting literally a century of
15 precedent.

16 If we are not going to have that regime, if we
17 are going to have a discretionary regime, then our
18 submission is that a case in which one party pursued the
19 litigation in a reasonable fashion, or at least so the
20 district court apparently thought, and that party was much
21 less at fault than the other, is an appropriate one in
22 which to exercise discretion.

23 We're not saying that in all such cases
24 prejudgment interest must be denied. We're not saying
25 that remotely. What we are saying is that in those cases

1 where the defendant is much less at fault than the
2 plaintiff, and the defendant had reason to think it would
3 not be liable at all, the district court, if there is to
4 be discretion -- if there is to be discretion -- that is
5 an appropriate case in which the district court should be
6 allowed discretion.

7 Thank you very much.

8 CHIEF JUSTICE REHNQUIST: Thank you,
9 Mr. Strauss.

10 The case is submitted.

11 (Whereupon, at 2:59 p.m., the case in the above-
12 entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

*CITY OF MILWAUKEE, Petitioner v. CEMENT DIVISION,
NATIONAL GYPSUM COMPANY, ET AL.*

CASE NO. :94-788

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Don Mari Federico*

(REPORTER)

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