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physically fit, and have unimpeachable integrity and judgment." *Id.* at 561-62, 565 A.2d at 680 (quoting *Von Raab*, 109 S. Ct. at 1393). Likewise, drug use by employees required to carry firearms would jeopardize public safety. *Id.* The court of appeals compared the work of the customs' officers with that of police and fire fighters and found the City to have similar governmental interests. *Id.* at 562-63, 565 A.2d at 681. The court noted that the police are also involved in front-line drug interdiction within their jurisdiction and are permitted to carry firearms whether on duty or off. *Id.* In addition, fire fighters are "charged with duties to repond quickly and effectively at a moment's notice," and their actions have implications on the life and property of others. *Id.* Thus, the court of appeals held that the City's interest in the safety of personnel, co-workers, and the public outweighed the privacy interests of the police and fire fighters. *Id.* at 566, 565 A.2d at 683.

Finally, the court of appeals held that since there was not a great privacy expectation in the drug analysis of an employee's urine produced in regular examinations, requiring a warrant would add little protection to the individual's privacy. *Id.* at 563-64, 565 A.2d at 681. The purpose of a warrant is to protect the privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of the government. *Id.* The court of appeals concluded that the warrant purposes were not jeopardized in *United Food* because the City's program required suspicionless drug testing in the context of an employee's physical examination. *Id.* at 564, 565 A.2d at 682. Consequently, the City did not exercise discretion in determining when an employee would be tested for drugs. *Id.*

By its decision in *United Food*, the court of appeals has adopted the prevailing law set forth by the Supreme Court in its decisions in *Skinner* and *Von Raab.* Moreover, the court has broadened the suspicionless search exception to the fourth amendment to include drug testing of police and fire fighters when conducted during annual physical examinations.

—Ellen W. Cohill

St. Luke Evangelical Lutheran Church, Inc. v. Smith: REASONABLE ATTORNEY'S FEES MAY BE CONSIDERED BY THE JURY WHEN AWARDING PUNITIVE DAMAGES

The Court of Appeals of Maryland in a 4-3 decision held that attorney's fees of a prevailing party may now be considered by a jury in determining an award of punitive damages. *St. Luke Evangelical Lutheran Church, Inc. v. Smith,* 318 Md. 337, 568 A.2d 35 (1990). The court's holding represents a departure from the American rule requiring each party to a lawsuit provide for his or her own costs of litigation.

Ginny Ann Smith sought compensatory and punitive damages from David Buchenroth, a pastor at St. Luke Evangelical Lutheran Church (St. Luke's). She alleged he defamed her character and invaded her privacy when he knowingly, or with reckless disregard for the truth, communicated false statements to church members about her sexual involvement with a married church official. Ms. Smith joined St. Luke's as a defendant on the theory that by dismissing her from her job it had ratified the injurious statements of its agent, Pastor Buchenroth.

At trial, the Circuit Court for Montgomery County permitted Ms. Smith to present evidence of the amount of her attorney's fees on the issue of punitive damages. The jury found in her favor and awarded her compensatory and punitive damages against both Pastor Buchenroth and St. Luke's.

The court of special appeals reversed, holding that during jury selection Ms. Smith was erroneously allowed twice the number of peremptory strikes permitted. Ms. Smith sought review of the decision in the court of appeals. St. Luke's cross-petitioned, contending that the trial court erred in allowing the jury to consider Ms. Smith's attorney's fees in its award of punitive damages. Both petitions were granted.

The peremptory strike ruling was overturned by the court which held that even if error had been committed the error was harmless. It then focused on the principal issue of the case – whether attorney's fees may be considered in determining punitive damages.

To begin its analysis, the court reviewed the English rule which awards the costs of litigation to the prevailing party. *St. Luke Church,* 318 Md. at 344, 568 A.2d at 38. The rule pre-dates the time of King Henry VIII and continues to be applied in English courts today. *Id.* at 344-45, 568 A.2d at 38 (citing C. McCormick, *Handbook on the Law of Damages* 234, 235 (1935)).

Following its declaration of independence, America began a move away from the English rule. Statutes fixing the amount of attorney's fees recoverable by a successful party gave way to attorney fee schedules established by a free market. In the American system of jurisprudence the notion that each litigant to a dispute should provide for his or her own costs of litigation evolved. There have been some exceptions; as where parties to a contract agree, in the event of litigation, the loser will bear all legal expenses, or where a statute allows an aggrieved party to recover attorney's fees. *Id.* at 345-47, 568 A.2d at 39.

After examining Maryland Rule 1-341, wherein attorney's fees are imposed upon a party acting in bad faith, the court stated, "[i]t is reasonable, therefore, to conclude that in this state, an award of attorney's fees serves, in general, as a legislative tool for punishing wrongful conduct." *Id.* at 347, 568 A.2d at 39. The court drew a nexus between attorney's fees imposed by statute and an award of punitive damages in a court proceeding. Both, the court observed, have as a main goal the punishment of wrongful conduct. *Id.* at 347, 568 A.2d at 40.

Despite the court's espousal of the American rule in *Empire Realty Co. v. Fleisher,* 269 Md. 278, 305 A.2d 144 (1973), the court distinguished the case explaining that punitive damages were not at issue and thus it had declined to decide whether fee shifting was appropriate in a punitive damages case. *St. Luke Church,* 318 Md. at 348, 568 A.2d at 40. The court, however, did agree with the prevailing view that attorney's fees not be considered when awarding compensatory damages in an attempt to make the successful claimant whole. The court said that where a party's wrongful conduct warrants the imposition of punitive damages, the remedy is appropriate. It found support for the premise in the Restatement (Second) of Torts § 914 and comment a (1979). *St. Luke Church*, 318 Md. at 350, 568 A.2d at 41.

The court next noted, of the seventeen states having considered the issue, nine have adopted the view that in cases where punitive damages are properly at issue, the costs of litigation may be considered in the measurement of an award. *Id.* at 349-50, 568 A.2d at 41. States declining to follow this view contend that this form of remedy is entirely compensatory in nature, and not a valid means of computing punitive damages. They also contend that it improperly impinges upon the jury's discretionary power to fix the amount of punitive damages. *Id.* at 350, 568 A.2d at 41.

In response, the court of appeals stated:

> It is true that an award of attorney's fees reimburses a plaintiff for his out-of-pocket legal expenses. When viewed solely in this light such fees may seem to be wholly compensatory in function. Yet, when viewed in the context of the long-standing prohibition against awarding attorney's fees, and the fact that

> when they are awarded, they most often serve as a statutorily-imposed punitive measure, the need to include them in compensatory damages diminishes. Under this view, attorney's fees would seem to be an appropriate consideration in measuring an award of punitive damages.
>
> *Id.* at 350-51, 568 A.2d at 41.

The court was equally unimpressed by the argument that jury discretion would be affected. To the contrary, the court saw it as an opportunity to provide needed guidance to the jury. Citing *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257 (1989), it pointed to the Supreme Court's concern over the lack of direction provided to juries in measuring the amount of punitive damages. *St. Luke Church,* 318 Md. at 351-52, 568 A.2d at 42. The amount of a prevailing party's legal fees would furnish a degree of guidance to the jury not previously provided. *Id.*

The court looked at the approaches taken by certain states which allow consideration of attorney's fees in the award of punitive damages. It rejected the Connecticut approach which limits the award of punitive damages to the amount of attorney's fees incurred by the prevailing party. *Id.* at 352-53, 568 A.2d at 42-43. Rather, the court agreed with the Kansas approach where the amount of attorney's fees is merely one objective factor for the jury to consider. *Id.*

Thus, the court of appeals reversed the court of special appeals and reinstated the jury's punitive damage award. The decision satisfied two of the court's goals. By presenting the jury with evidence of a prevailing claimant's attorney's fees, the jury is provided with helpful guidance in measuring an award of punitive damages as well as a meaningful way to punish the wrongdoer for flagrant misconduct.

—John A. Nolet

F.T.C. v. Superior Court Trial Lawyers Ass'n: A BOYCOTT BY A GROUP OF LAWYERS CONSTITUTED AN AGREEMENT TO FIX PRICES IN VIOLATION OF THE ANTITRUST STATUTES

In *F.T.C. v. Superior Court Trial Lawyers Association*, 110 S. Ct. 768 (1990), the Supreme Court held that an agreement among a group of trial lawyers to refuse representation of indigent criminal defendants until the government increased their compensation amounted to price-fixing. The Court reasoned that the expressive component of such a boycott was not protected by the first amendment and did not create an exception to the antitrust statutes. As a result, the price-fixing agreement was held to be a per se violation of section 1 of the Sherman Act and section 5 of the Federal Trade Commission Act.

Pursuant to the District of Columbia's Criminal Justice Act (CJA), lawyers in private practice were appointed and compensated to represent indigent defendants in various criminal cases. With the majority of appointments going to a group of about 100 lawyers referred to as "CJA regulars." These cases represented approximately 85% of the total caseload in the District. "After 1970, the Criminal Justice Act set fees at $30 per hour for court time and $20 per hour for out-of-court time, and despite a 147 percent increase in the consumer price index, compensation remained at those levels until the boycott" occurred. *Id.* at 786 (Brennan, J., dissenting).

In 1982, the respondents, Superior Court Trial Lawyers Association (SCTLA), unsuccessfully attempted to persuade the District to raise rates. As a result, in 1983, the SCTLA members met and agreed not to accept any new cases after September 6, 1983, unless legislation was passed providing for an increase in rates. When the legislation was not passed, 90% of the SCTLA members refused to accept new assignments.

The boycott had a severe impact on the District's criminal justice system. Within days, the District's government offered the SCTLA a temporary increase to $35 per hour with a permanent increase to $45 per hour for out-of-court time and $55 per hour for court time. The SCTLA accepted the offer and ended the boycott.

The Federal Trade Commission (FTC), however, filed a complaint against the SCTLA alleging that the agreement was a restraint of trade and characterized the SCTLA's conduct as a conspiracy to fix prices. The complaint was heard before an administrative law judge (ALJ) who recognized the violation of the antitrust laws, but dismissed the complaint because the increased fees would have a beneficial effect. The increased fees would attract new CJA lawyers and allow the current CJA lawyers to reduce their caseload in order to provide better representation. *Id.* at 773.

The FTC disagreed, asserting that as a result of the boycott, the city would spend an additional 4 to 5 million dollars a year for the same legal services. *Id.* Accordingly, the FTC filed a cease-and-desist order to prevent the SCTLA from initiating a similar boycott in the future. *Id.*

The court of appeals found that the SCTLA boycott contained elements of expression warranting first amendment protection. Therefore, a restriction on this form of expression could not be justified unless the restriction was no greater than what was necessary to protect an important governmental right. *Id.* at 774 (citing *United States v. O'Brien*, 391 U.S. 367 (1968)). The court concluded that the *O'Brien* test could not be satisfied by the application of an otherwise appropriate per se rule of antitrust law, but instead required the enforcement agency to prove, rather than presume, that the Sherman Act was violated. *Id.* (citing *Superior Court Trial Lawyers Ass'n v. F.T.C.*, 856 F.2d 226, 248-50 (D.C. Cir. 1988)). The court of appeals, therefore, vacated the cease-and-desist order and remanded the case for a determination of whether the SCTLA actually possessed "significant market power," which would justify the restriction of their first amendment rights.

The Supreme Court reversed, concluding that the SCTLA's boycott was per se violative of section 1 of the Sherman Act and section 5 of the Federal Trade Commission Act. *F.T.C.*, 110 S. Ct. at 774. As the FTC, the ALJ, and the court of appeals all agreed, the SCTLA's boycott constituted a classic restraint of trade within the meaning of section 1 of the Sherman Act. *Id.* The Court rejected the boycott's social justifications, as well the SCTLA's objective in bringing about favorable legislation. *Id.* at 776. In addition, the Court reasoned that because the SCTLA's objective was to gain an economic advantage for those participating in the boycott, the conduct was not protected by the first amendment. *Id.* at 778. The Court pointed out that constitutional protection does not apply "to a boycott conducted by business competitors who stand to profit financially from a lessening of competition in the boycotted market." *Id.* at 777 (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492, 508 (1988)).

The Court then considered whether the court of appeals was correct in creating a new exception to the per se rules of antitrust liability. The court of appeals relied on *United States v. O'Brien*, 391 U.S. 367 (1968). O'Brien violated a federal statute when he burned his Selective Service registration certificate on the steps of a Boston courthouse. In affirming his conviction, the Court concluded that the statute's incidental restriction on O'Brien's freedom of expression was no greater than necessary to further the government's interest in requiring registrants to have valid certificates continually available. *F.T.C.*, 110 S. Ct. at 778. In light of *O'Brien*, the court of appeals held that the expressive component of the SCTLA's boycott compelled the "courts