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Recent Developments: Molzof v. United States: Supreme Court Chooses Traditional Definition for "Punitive Damages" under Federal Torts Claims Act

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the death penalty. *Id.* at 262, 600 A.2d at 425. The court emphasized that this was a capital prosecution, and therefore involved an enhanced punishment. It compared the case at bar to others involving enhanced sentencing for recidivists in which it had required more than identical names to support a presumption of identity of person. *Id.* at 264-5, 600 A.2d at 426.

The court cited as persuasive authority cases from other jurisdictions in which a witness at trial was unable to identify the defendant as the person who had previously confessed to him. *Id.* at 261, 600 A.2d at 424 (citing *York v. State*, 173 N.W.2d 693 (Wis. 1970); *Fisher v. State*, 361 S.W.2d 395 (Tex. Crim. App. 1962)). In those cases testimony concerning the confessions was admitted and the convictions were affirmed on appeal. The appellate courts relied on the fact that other witnesses, who were present but did not hear the confessions, were able to identify the defendants at trial and place them in the company of the witnesses who heard and testified to the confessions.

Thus, the court reasoned that while Spells was able to identify the person who had confessed to him by name, nickname, and the fact that he had a mid-body injury, his failure to identify the petitioner at trial, combined with the lack of any evidence that the two men were together in jail, resulted in an inadequate evidentiary foundation to admit the testimony. *Woodson*, 325 Md. at 263, 600 A.2d at 425. "To admit such evidence," the court stated, "would be, for example, to sanction the testimony of any witness who, without more, claims that a voice on the telephone, which he cannot recognize as the defendant's, identified himself using the name of the defendant, and confessed to the crime." *Id.*

The court acknowledged that there is some authority that "[i]dentical names give rise to a presumption of identity of person." The court reasoned however, "[a]ssuming, arguendo, that the use of Woodson's name alone would raise a rebuttable presumption of identity, the presumption was nullified when Spells testified that the person who confessed to him was not in the courtroom." *Id.* at 264, 600 A.2d at 426. The court held that in the circumstances of the case, Spells' conversation was inadmissible hearsay, and to admit it was reversible error requiring remand for a new trial. *Id.*

It appears from the ruling in *Woodson* that when considering the admissibility of confessions in the context enhanced sentence cases, the Court of Appeals of Maryland will construe the "circumstances of the case" broadly. Such breadth illustrates the court's distinction of the penalty as part and parcel of the circumstances surrounding the confession.

- Chris Marts

Molzof v. United States: SUPREME COURT CHOOSES TRADITIONAL DEFINITION FOR "PUNITIVE DAMAGES" UNDER FEDERAL TORTS CLAIMS ACT.

In the wake of the intense controversy surrounding his appointment to the nation's highest court, Justice Clarence Thomas wrote his first United States Supreme Court opinion for the Court's unanimous decision to follow tradition when defining "punitive damages" under 28 U.S.C. §§ 2671-2680, the Federal Torts Claims Act (FTCA). In *Molzof v. United States*, 112 S. Ct. 711 (1992), the Court undertook an exercise in statutory interpretation by following deeply rooted common law principles requiring proof of a defendant's culpability before a plaintiff can recover punitive damages. As such, punitive damages under the FTCA are a specific category of damages, the recovery of which depends on proof of intentional or flagrant conduct and the purpose of which is to punish a defendant for such conduct.

The guardian *ad litem* of Mr. Robert Molzof brought an action against the U.S. Government after Mr. Molzof sustained irreversable brain damage that left him comatose in a Veterans Administration hospital as a result of the employees' negligence. Mr. Molzof sought damages under the FTCA for supplemental medical care, future medical expenses, and loss of enjoyment of life.

The Government conceded to negligence, and at the conclusion of the bench trial concerning only damages, the Federal District Court ordered the hospital to continue the level of care it had already been providing Molzof in addition to paying for weekly doctor's visits and care beyond that which the hospital could offer. The court refused, however, to award damages reflecting the cost of care already available or damages for loss of enjoyment of life. Mr. Molzof died after final judgement from the district court, at which time Mrs. Shirley Molzof resumed the action as the personal representative of her husband's estate.

Mrs. Molzof took exception to the limitations the district court placed on recovery for Mr. Molzof's demise. The Court of Appeals for the Seventh Circuit nevertheless agreed with the lower court and maintained that any award exceeding compensation, including loss of enjoyment of life, was "punitive in effect" and beyond recovery under the Federal Torts Claim Act. 112 S. Ct. at 714. The United States Supreme Court granted certiorari in order to define "punitive damages" under the FTCA.

The Court began its analysis by examining the history behind the FTCA. Having tolerated a laborious legislative process for compensating those individuals injured by federal employees' negligence, Congress passed the FTCA. The legislation would allow such victims to sue the U.S. Government and recover through a limited waiver of the Government's sovereign immunity. The Court recognized that, although state law must be consulted in order to determine the extent to which the United States can be held liable under the FTCA, "punitive damages" would in no way recov-

erable under the FTCA. *Id.* at 714-15.

In an effort to determine if damages from loss of enjoyment of life and duplicate fees were prohibited as "punitive damages" in the FTCA, the Court considered definitions from both parties. Mrs. Molzof suggested that the Court refer to traditional common law and choose a standard for classifying punitive damages as those intended to punish a defendant for "egregious conduct." Mrs. Molzof asserted that, because her claimed damages did not involve egregious conduct, she should be able to recover. *Id.* at 715. In contrast, the Government suggested defining punitive damages as any award which is not strictly compensatory. This strict definition would disallow recovery of damages which exceeded a plaintiff's actual loss. The Government substantiated its position by suggesting that such extra-compensatory awards are "punitive in effect." *Id.*

After distinguishing "punitive damages" from damages which are "punitive in effect," the Court accepted the Mrs. Molzof's proposed definition. *Id.* The Court explained that "punitive damages" is a term of art which requires no explanation in American legal circles, and that Congress spent 28 years grappling over the details of the FTCA before it became law. *Id.* at 716. In light of these realities, the Court decided it must adopt the widely accepted definition of "punitive damages," i.e., those "awarded to punish defendants for torts committed with fraud, malice, violence, or oppression," in the absence of language to the contrary in the FTCA or its legislative history. *Id.* at 717. By drawing the distinction between "punitive damages" and those damages which are "punitive in effect," the Court quickly disqualified the Government's argument as inconsistent with the statutory language of the FTCA.

The Court opined that the Government premised its argument on the assumption that FTCA's limited waiver of sovereign immunity would not allow damages other than those that are compensatory. The Court viewed such a premise as a distortion of the actual statutory language which clearly indicates that a plaintiff may recover those damages "not legally considered 'punitive damages', but which are for some reason above and beyond ordinary notions of compensation . . . ." *Id.* at 716. A jury's award to a plaintiff beyond that which seems actually compensatory would not automatically fall in the category of "punitive damages." Such an excess would relate only to the amount and not the nature of the damages. The Court explained that they must embody the element of the defendant's culpability before excessive damages would be deemed punitive in nature under the common law. *Id.*

The Court noted three problems with the Government's argument. First, interpreting "punitive damages" as any damages in excess of or not related to actual compensation for loss, as the Government suggested, would make it extremely difficult for a court to tabulate the award and result in outlandish judgments. For example, to avoid double payment from the Government, a court would have to consider the plaintiff's day-to-day savings, such as rent and utilities, which would result from an award of future medical expenses. The Court felt that this effort would be far too meticulous for courts to undertake. Yet, because common law has traditionally considered double and treble damages as a form of punitive damages, such duplicative payments would necessarily have to be nonrecoverable under the Government's proposed meaning of the FTCA. *Id.* at 717.

Secondly, with regard to the spectrum of claims under the FTCA to which liquidated damages or fixed levels of compensation apply, an interpretation of "punitive damages" as offered by the Government would force courts into the business of figuring the actual loss in every case before them. *Id.* It often happens that these types of awards do not correspond to the plaintiff's actual loss. According to the Government's strict proposed definition, such awards would be "punitive damages," and therefore not recoverable, if they exceeded the plaintiff's actual loss.

The third problem the Court found with the Government's argument involved it's reliance on the previous efforts of the Court to depart from traditional common law principles. None of those efforts related to statutory terms that are as deeply rooted as the concept of "punitive damages." Various terms in the FTCA, such as "discretionary function," have few antecedents from which to draw a sound definition. *Id.* Likewise, there is sometimes no basis in the common law of most states from which to draw a meaning. Only then is it necessary for the Court to depart from traditional common law principles. *Id.*

As far as Mrs. Molzof's claims were concerned, the Court concluded that only those damages which are legally defined as "punitive damages" under the common law are not recoverable under the FTCA. According to this definition, damages associated with loss of enjoyment of life and duplicate costs do not fall in this nonrecoverable category of damages, but the lower court would have to examine Wisconsin law and determine exactly which damages Mrs. Molzof could recover. *Id.* at 718.

The Court's conclusion in *Molzof* leaves virtually no question unanswered concerning the classification of "punitive damages." Courts relying on the language and structure of the FTCA to decide the nature of awards sought against the Government now have a workable standard for producing consistent results. The decision in *Molzof* seems to attenuate cynicism regarding the Supreme Court's alleged conservative reputation by deciding against the Government's interests and showing sympathy for plaintiffs. This decision may convey a message that today's Court is striving for consistent adjudication of claims under statutes like the

FTCA by relying on the plain, clear, and established meaning of the terms therein. Such a reliance may simplify the process of determining awards for lower courts in the future.

- Mike Muldowney

Lechmere, Inc. v. NLRB:
NONEMPLOYEE UNION ORGANIZERS MAY BE BARRED FROM AN EMPLOYER'S PROPERTY ABSENT A SHOWING OF INACCESSIBILITY OF EMPLOYEES.

In *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841 (1992), the Supreme Court reaffirmed its earlier interpretation of nonemployee union organizational rights, and specifically rejected a trend recently adopted by the National Labor Relations Board ("Board"). The Court held that an employer may prohibit nonemployee union organizers from entering upon its property, where reasonable access to employees may be had elsewhere. In so doing, the Court explicitly rejected the Board's application of a balancing test to determine the rights of nonemployee union organizers.

In 1987, Local 919 of the United Food and Commercial Workers Union ("Union") began a campaign aimed at organizing the non-represented employees of Lechmere, Inc., a retail store located in Newington, Connecticut. On several occasions, the union organizers entered Lechmere's parking lot without permission and began placing handbills on the cars of Lechmere's employees. On each occasion, Lechmere's manager asked the union organizers to leave company property and then removed the handbills. The union organizers continued their organizational activities and began picketing Lechmere's store from an area adjacent to the company parking lot. Through additional efforts, the Union was able to contact approximately 20% of Lechmere's employees by mail, many of whom lived in the surrounding metropolitan area.

When the Union's organizational attempts failed to yield any success, they filed an unfair labor practice charge with the Board. An administrative law judge ruled in favor of the Union and recommended, in part, that Lechmere be ordered to allow the Union onto its property. The Board affirmed this ruling and adopted the judge's recommendation, applying the analysis of its opinion in *Jean Country*, 291 N.L.R.B. 11 (1988). The United States Court of Appeals for the First Circuit denied Lechmere's petition for review and enforced the Board's order. The Supreme Court granted certiorari, reversed the judgment of the First Circuit, and denied enforcement of the Board's order.

In an opinion by Justice Thomas, the Court began its analysis by looking to the National Labor Relations Act ("Act"). The Court noted that section 7 of the Act gave employees the right to organize or join a labor union. The Court further noted that this right is protected by section 8(a)(1), which makes it an unfair labor practice for an employer to interfere or restrict the exercise of this right by employees. *Lechmere*, 112 S. Ct. at 845. As the Court pointed out, there is a "critical distinction between the organizing activities of employees . . . and nonemployees . . . ." *Id.* The Court held that the Act "confers rights only on employees, not on unions or their nonemployee organizers." *Id.* (emphasis in original). However, the Court did recognize that, under some circumstances, the Act may restrict an employer's right to exclude union organizers who are not employees.

The Court next reviewed relevant case law dealing with this issue and determined as a general rule that "an employer cannot be compelled to allow distribution of union literature by nonemployee organizers on his property." *Id.* at 846 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)). In addition, the Court noted that the exception to this rule was extremely narrow, and that "[t]o gain access, the union has the burden of showing that no reasonable means [of reaching] the employees exists . . ." *Lechmere*, 112 S. Ct. at 847 (quoting *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 205 (1978)).

The Court concluded that the facts in this case did not justify an application of this narrow exception to the general rule that an employer may restrict nonemployee distribution of union literature on company property. *Lechmere*, 112 S. Ct. at 848. The Court held that the Union had reasonable alternative means to reach the employees, and in so finding, specifically rejected the Board's conclusion with repect to this issue. *Id.* at 848-49. The Court explained that nonemployee organizers could only compel an employer to open his property to their organizational efforts where "the location of a plant and the living quarters of the employees place the employees beyond the reach of [the Union]." *Id.* (quoting *Babcock & Wilcox*, 351 U.S. at 113). Although reaching the employees at their homes may have been "cumbersome or less-than-ideally effective," this fact did not bring the Union within the narrow inaccessibility exception enumerated in *Babcock*. *Id.*

The Court explicitly rejected the Board's application of a balancing test to this factual situation. In finding an unfair labor practice, the Board relied upon its holding in *Jean Country* where they determined that an employer's property rights could be infringed in favor of the rights of an organization. *Id.* at 849 (citing *Jean Country*, 291 N.L.R.B. 11 (1988)). This analysis, however, failed to take into consideration the distinction between the rights of employee organizers and those of nonemployee organizers. *Lechmere, 112* S. Ct. at 849. The Court decided, therefore, that the Board's application of a balancing test was inappropriate in that it was inconsistent with the Court's prior decisions. *Id.* The Court also stated that a balancing test was inap-