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Casenotes: Civil Rights — 42 U.S.C. § 1983 — Punitive Damages Are Available under Section 1983 When the Defendant's Conduct Involves Reckless or Callous Indifference of the Plaintiff's Federally Protected Rights. *Smith v. Wade*, 103 S. Ct. 1625 (1983)

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CIVIL RIGHTS — 42 U.S.C. § 1983 — PUNITIVE DAMAGES ARE AVAILABLE UNDER SECTION 1983 WHEN THE DEFENDANT'S CONDUCT INVOLVES RECKLESS OR CALLOUS INDIFFERENCE OF THE PLAINTIFF'S FEDERALLY PROTECTED RIGHTS. *Smith v. Wade*, 103 S. Ct. 1625 (1983).

An inmate in a Missouri reformatory for youthful first offenders was beaten, harassed, and sexually assaulted by his two cellmates.¹ The inmate, who had voluntarily placed himself in protective custody because of prior incidents of violence against him, alleged that reformatory officials knew or should have known that an assault against him was likely.² The inmate brought suit under 42 U.S.C. § 1983³ against a guard and other corrections officials, alleging that his eighth amendment rights had been violated⁴ by his placement in a cell with two other inmates from the general reformatory population. The trial court entered judgment on a jury verdict, finding the guard liable⁵ and awarding the inmate \$25,000 in compensatory damages and \$5,000 in punitive damages.⁶ The United States Court of Appeals for the Eighth Circuit affirmed.⁷ In a close decision, the Supreme Court affirmed the Eighth Circuit.⁸ The Court, writing through Justice Brennan, held that

1. *Smith v. Wade*, 103 S. Ct. 1625, 1627 (1983).

2. *Id.* The inmate, Wade, had previously placed himself in a special treatment unit which housed inmates who were especially susceptible to being physically abused by other inmates. At the time of the assault, Wade had been transferred out of protective custody and reassigned to another unit. A corrections official placed Wade in a cell with another inmate from the general reformatory population. When the guard, Smith, came on duty, he placed a third inmate, who had a history of being involved in fights, in Wade's cell. The two inmates subsequently assaulted Wade. Smith made no effort to ascertain whether another cell was available in which to house Wade. In addition, the guard was aware that another inmate had recently been beaten to death by his cellmates in the same dormitory while Smith was on duty. *Wade v. Haynes*, 663 F.2d 778, 780-81 (8th Cir. 1981), *aff'd sub nom. Smith v. Wade*, 103 S. Ct. 1625 (1983).

3. 42 U.S.C. § 1983 (1979). Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

4. *Smith v. Wade*, 103 S. Ct. 1625, 1627 (1983). The eighth amendment to the United States Constitution prohibits the infliction of cruel and unusual punishment. U.S. CONST. amend. VIII.

5. *Smith v. Wade*, 103 S. Ct. 1625, 1628 (1983). Of the five defendants in this case, Smith was the only one found liable. *Id.*

6. *Id.* The trial court charged the jury that it could award punitive damages in addition to compensatory damages, "if the conduct of one or more of the defendants is shown to be a *reckless or callous disregard of, or indifference to, the rights or safety of others*. . . ." *Id.* (emphasis supplied by Supreme Court).

7. *Wade v. Haynes*, 663 F.2d 778, 786 (8th Cir. 1981), *aff'd sub nom. Smith v. Wade*, 103 S. Ct. 1625 (1983).

8. *Smith v. Wade*, 103 S. Ct. 1625, 1640 (1983) (5-4 decision).

punitive damages are available under section 1983 when the defendant's conduct involves a reckless or callous indifference to the plaintiff's federally protected rights, as well as when the defendant's conduct involves an evil motive or intent.⁹

Section 1983 is derived from the Civil Rights Act of 1871.¹⁰ The decisional law regarding section 1983 was relatively sparse until the 1960's.¹¹ Until that time, section 1983 was used primarily as a vehicle to secure voting rights for blacks.¹² In 1961, the Supreme Court effectively broadened the scope of section 1983¹³ by its decision in *Monroe v. Pape*.¹⁴ *Monroe* involved a suit against thirteen Chicago police officers who allegedly violated the plaintiff's fourteenth amendment rights. The defendants argued that they were not liable under section 1983 because their acts were illegal under state law and, therefore, they did not fit within the section 1983 requirement that state officials act under color of state law.¹⁵ The Court disagreed that holding the officers liable under section 1983 would produce the undesirable result of duplicating in federal law what was already an offense under state law.¹⁶ The *Monroe* Court concluded that the federal remedy was supplemental to the state remedy and that state laws providing redress for violations of constitutional rights by state officials would not preclude a section 1983 claim.¹⁷ The Court's broad reading of section 1983 precipitated a substantial increase in the volume of federal civil rights litigation.¹⁸

Section 1983 provides a means of redress when state officials have violated an individual's civil rights. The Act itself does not indicate, however, the appropriate measure of recovery under section 1983.¹⁹ The *Monroe* decision is noteworthy in this context because it implies in dictum that damages under section 1983 should be awarded with refer-

9. *Id.* The Court further held that this reckless indifference standard applies even when the underlying standard of liability for compensatory damages is also one of recklessness. *Id.*

10. The Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (current version at 42 U.S.C. § 1983 (1979)); see *supra* note 3.

11. See Note, *Damage Awards for Constitutional Torts: A Reconsideration After Carey v. Phipus*, 93 HARV. L. REV. 966, 974 (1980).

12. Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 282-83 (1965). The Act, originally referred to as the Ku Klux Klan Act of 1871, was used to redress violations of the voting rights of blacks by means of civil actions against election officials. *Id.*; see Myers v. Anderson, 238 U.S. 368 (1915).

13. McClellan & Northcross, *Remedies and Damages for Violation of Constitutional Rights*, 18 DUQ. L. REV. 409, 409-10 (1980).

14. 365 U.S. 167 (1961), *overruled in part*, Monell v. Department of Social Servs., 436 U.S. 658 (1978).

15. *Monroe v. Pape*, 365 U.S. 167, 172, 184 (1961); see *supra* note 3.

16. *Monroe*, 365 U.S. at 183.

17. *Id.*

18. Shapo, *supra* note 12, at 278.

19. See *supra* note 3.

ence to the common law of torts.²⁰ Generally, under the common law of torts, the objective in awarding damages is to compensate the victim for consequential injuries.²¹

The Supreme Court, in *Carey v. Piphus*,²² expressly adopted the *Monroe* dictum that damages under section 1983 should be awarded according to traditional tort principles. In *Carey*, several elementary and high school students were suspended from classes without being afforded any type of hearing. The students filed suit under section 1983, seeking redress from an alleged violation of their right to procedural due process.²³ In holding for the students, the *Carey* Court stated that compensation for injuries should be the cardinal principle by which to award section 1983 damages.²⁴ The Court noted that the starting point for damage inquiries under section 1983 is provided by reference to the common law tort principle that damages are awarded as compensation for injuries suffered.²⁵ Therefore, the Court refused to presume damages for violations of constitutional rights, holding that, under the facts of *Carey*, only a nominal award not to exceed one dollar could be granted, absent a showing of actual injury.²⁶ The *Carey* decision did not address the issue of whether punitive damages could be awarded in a section 1983 action, although the Court stated that it was not foreclosing the possibility that punitive damages could be awarded in a proper case under section 1983.²⁷ Since the Court presumed that actual malice was the standard for awarding punitive damages under section 1983, it stated that punitive damages were improper in *Carey* because of the absence of actual malice.²⁸

In 1980, in *Carlson v. Green*,²⁹ the Court indicated for the first time that punitive damages were available under section 1983. In *Carlson*, the estate of a deceased federal prisoner sued federal prison officials for violations of the deceased's constitutional rights and sought both com-

20. *Monroe*, 365 U.S. at 187.

21. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 1, at 6 (4th ed. 1971); see Seavy, *Principles of Tort*, 56 HARV. L. REV. 72, 72 (1942); cf. Nahmod, *Section 1983 and the Background of Tort Liability*, 50 IND. L.J. 5, 9-10 (1974); Note, *supra* note 11, at 966-67.

22. 435 U.S. 247 (1978).

23. *Id.* at 249-50.

24. *Id.* at 254-55 (quoting 2 F. HARPER & F. JAMES, LAW OF TORTS § 25.1, at 1299 (1956)).

25. *Carey*, 435 U.S. at 258. The Court recognized that the common law of torts might not provide the complete solution to the damage issue under section 1983. In some cases, the constitutional right may have no analogue at common law. As a result, a court may have to adapt common law rules of damages to the constitutional right at issue to fulfill the purposes of section 1983. *Id.* at 258-59.

26. *Id.* at 267. Generally, nominal damages are awarded when a person has suffered a wrong, but no actual injury can be proven. C. MCCORMICK, HANDBOOK OF THE LAW OF DAMAGES § 20 (1935).

27. *Carey v. Piphus*, 435 U.S. 247, 257 n.11 (1978).

28. *Id.*

29. 446 U.S. 14 (1980).

pensatory and punitive damages.³⁰ Although *Carlson* was a *Bivens*-type suit³¹ brought directly under the Constitution against federal officials, this principle is equally applicable to suits brought under section 1983 against state officials.³² The *Carlson* Court noted that section 1983 serves the same compensatory and deterrence purposes as the *Bivens* remedy.³³ The Court held that a *Bivens* remedy was available although an alternative remedy existed under the Federal Tort Claims Act (FTCA).³⁴ The opinion in *Carlson* further recognized that the *Bivens* remedy was available in addition to the FTCA remedy because the former is a more effective deterrent of unconstitutional behavior than the latter.³⁵ Unlike the FTCA remedy, punitive damages are available under *Bivens*, and a *Bivens* suit is brought against the official rather than the government.³⁶ In addition, the Court went so far as to cite *Carey v. Phipus* for the proposition that punitive damages are available in a proper section 1983 action.³⁷

In *City of Newport v. Fact Concerts, Inc.*,³⁸ the Supreme Court again acknowledged that punitive damages might be awarded in a proper section 1983 action.³⁹ In *Newport*, a concert promoter and concert promotion organization sued the city of Newport and several of its officials, alleging that the cancellation of a license to present musical concerts violated the promoters' constitutional rights.⁴⁰ After finding for the promoters, the *Newport* Court considered whether punitive damages could be awarded as a remedy against the municipality. The Court concluded that when the original version of section 1983 was enacted, municipal corporations were immune from punitive damages

30. *Id.* at 16.

31. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), recognized a cause of action implicit in the Constitution. Although analogous to a section 1983 action, a *Bivens* action is brought against federal, rather than state, officials. See Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CALIF. L. REV. 1242, 1242 (1979).

32. See, e.g., *Butz v. Economou*, 438 U.S. 478, 504 (1978) (granting federal employees qualified immunity in a *Bivens*-type suit based on section 1983 law); *Carey v. Phipus*, 435 U.S. 247, 255 (1978) (relying on a *Bivens*-type suit to interpret a section 1983 action; see also Note, *supra* note 11, at 973 (section 1983 law applies with equal force to *Bivens*-type suits).

33. *Carlson v. Green*, 446 U.S. 14, 21 n.6 (1980).

34. *Id.* at 23. The FTCA is codified throughout the United States Code. E.g., 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401 (1976 & Supp. V 1981).

35. *Carlson*, 446 U.S. at 21.

36. *Id.*

37. *Id.* at 22 (dictum) (citing *Carey v. Phipus*, 435 U.S. 247, 257 n.11 (1978)). The Court erred in concluding that *Carey* stood for the proposition that punitive damages are available under section 1983. The Court in *Carey* specifically declined to approve or disapprove any of the cases that have awarded punitive damages in section 1983 actions. *Id.* at 257 n.11; see also *Carlson v. Green*, 446 U.S. 14, 47 (Rehnquist, J., dissenting).

38. 453 U.S. 247 (1981).

39. *Id.* at 267-68 (dictum).

40. *Id.* at 252. The promoters alleged a violation of their constitutional right to due process and freedom of expression. *Id.*

under the common law.⁴¹ Finding that the deterrence rationale behind section 1983 did not warrant a departure from the common law rule, the *Newport* Court held that the city could not be held liable for an award of punitive damages.⁴² The Court reasoned that deterrence, the primary purpose of section 1983, would not be achieved by subjecting a municipality to punitive damages, since taxpayers would ultimately bear the cost of that award, rather than the offending public official.⁴³ Furthermore, deterrence is achieved more effectively by assessing punitive damages against the offending public official, based on his personal financial resources.⁴⁴ The *Newport* Court thus implicitly recognized that punitive damages may be awarded under section 1983.

Although it had generally been established by lower court decisions that punitive damages could be awarded in a section 1983 action,⁴⁵ the lower courts disagreed as to the applicable standard in determining such an award.⁴⁶ While language used by the Supreme Court in *Carey*, *Carlson*, and *Newport* indicated that some sort of malicious intent was necessary,⁴⁷ a majority of lower federal courts applied a reckless disregard standard in determining when punitive damages could be imposed under section 1983.⁴⁸ The reckless disregard test was delineated by Justice Brennan in his concurring and dissenting opinion

41. *Id.* at 259-60.

42. *Id.* at 268.

43. *Id.* at 268-69.

44. *Id.* at 269. Other purposes of punitive damages include punishing the defendant, preserving the peace, inducing private law enforcement, compensating victims for otherwise uncompensable losses, and paying the plaintiff's attorney's fees. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 SO. CAL. L. REV. 1, 1 (1982).

45. *E.g.*, *Cook v. Miami*, 464 F. Supp. 737, 739 (S.D. Fla. 1979); *Bradley v. School Board of Richmond*, 324 F. Supp. 401, 402 (E.D. Va. 1971); *see* Annot., 14 A.L.R. FED. 608, 616 (1973); Note, *Punitive Damages in Constitutional Tort Actions*, 57 NOTRE DAME LAW. 530, 534 (1982); *see also* *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267-68 (1981); *Carlson v. Green*, 446 U.S. 14, 22 (1980).

46. *See, e.g.*, *Cochetti v. Desmond*, 572 F.2d 102, 106 (3d Cir. 1978) (plaintiff may recover punitive damages under section 1983 when defendant has acted in reckless disregard of plaintiff's rights); *accord* *Simpson v. Weeks*, 570 F.2d 240, 243 (8th Cir. 1978), *cert. denied*, 443 U.S. 911 (1979); *O'Connor v. Keller*, 510 F. Supp. 1359, 1375 (D. Md. 1981); *Campise v. Hamilton*, 382 F. Supp. 172, 186 (S.D. Tex. 1974). *But see* *Hannah v. Drobnick*, 514 F.2d 393, 399 (6th Cir. 1975) (plaintiff may recover punitive damages under section 1983 when defendant acted with malicious intention to deprive plaintiff of his rights); *accord* *O'Connor v. Several Unknown Correctional Officers*, 523 F. Supp. 1345, 1349 (E.D. Va. 1981); *Coleman v. Siedel*, 533 F. Supp. 593, 599 (D. Conn. 1980).

47. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981) (punitive damages are intended "to punish the tortfeasor whose wrongful action was intentional or malicious"); *Carlson v. Green*, 446 U.S. 14, 22 n.9 (1980) ("after *Carey* punitive damages may be the only significant remedy available in some § 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury"); *Carey v. Phipps*, 435 U.S. 247, 257 n.11 (1978) (no punitive damages awarded because "petitioners did not act with a malicious intention to deprive respondents of their rights").

48. *See supra* note 46.

in *Adickes v. Kress & Co.*⁴⁹ Justice Brennan indicated that punitive damages could be recovered in a section 1983 action when a defendant acted with either actual knowledge that he was violating another's constitutional rights or with reckless disregard of those rights.⁵⁰

In *Smith v. Wade*,⁵¹ the Supreme Court held that punitive damages are available under section 1983 when a defendant's conduct is shown to be prompted by an evil motive or intent, or when his conduct involves a reckless or callous indifference to the federally protected rights of others.⁵² To support this finding, the Court applied the traditional analysis of section 1983 cases that was first set forth in *Carey v. Phipus*. Under this analysis, a court refers to the common law of torts with such modifications or adaptations as might be necessary to effectuate the purpose and policy of the statute.⁵³

The majority found that the prevailing standard used in the nineteenth century for awarding punitive damages in a tort case required something less than a showing of ill will, spite, or malice.⁵⁴ The *Smith* Court, however, recognized that significant variations existed among jurisdictions in the latter half of the nineteenth century on the standard to be applied in awarding punitive damages.⁵⁵ This disagreement among the jurisdictions concerned whether malicious intent was required to impose punitive damages, and was attributable in part to the ambiguity surrounding the definition of malice.⁵⁶ The majority viewed this disagreement as simply being over the degree of recklessness that had to be established before an award of punitive damages could be made.⁵⁷ The Court then buttressed its position with an exhaustive survey of punitive damage awards in tort cases occurring before and shortly after 1871 to demonstrate that Congress intended that the reckless disregard standard apply in actions brought under the Civil Rights Act.⁵⁸ Finally, the Court noted that punitive damages are awarded in

49. 398 U.S. 144, 232-33 (1970) (Brennan, J., concurring and dissenting).

50. *Id.*

51. 103 S. Ct. 1625 (1983).

52. *Id.* at 1640.

53. *Carey v. Phipus*, 435 U.S. 247, 258 (1978); *see supra* note 25.

54. *Smith v. Wade*, 103 S. Ct. 1625, 1631-32 (1983); *see, e.g.* *Philadelphia, W. & B.R. Co. v. Quigley*, 62 U.S. (21 How.) 202 (1858) (reckless disregard standard); *Barry v. Edwards*, 116 U.S. 550 (1886) (same); *accord* *Milwaukee & St. Paul R.R. Co. v. Arms*, 91 U.S. 489 (1875).

55. *Smith v. Wade*, 103 S. Ct. 1625, 1631 (1983).

56. *Id.* In some instances, "malice" meant actual ill will, spite, or intent to injure. In tort law, however, it was sometimes used to mean "implied malice," which was presumed whenever a tort resulted from a voluntary act. "Malice" had additional meanings as well, including that form of malice when the defendant acted in reckless indifference to another's rights. *Id.* at n.8.

57. *Id.* at 1632.

58. *Id.* at 1632-36. Under a rule of statutory construction commonly used by the Court in interpreting section 1983, if Congress is silent on an issue, a presumption arises that Congress intended to adopt the common law existing at the time of enactment. *Id.* at 1659 (O'Connor, J., dissenting) (citing *City of Newport v. Fact*

modern tort actions upon a finding of reckless disregard of the rights of others.⁵⁹

The Court rejected the argument that policy considerations required a departure from the common law rule.⁶⁰ The guard in *Smith* argued that an actual malicious intent standard was preferable to the reckless disregard standard. He asserted that the reckless disregard standard was too vague and uncertain to deter public officials from acting unlawfully since it would be unclear what conduct would subject them to the imposition of punitive damages.⁶¹ The majority, however, concluded that a reckless disregard standard was not too vague because it is applied without difficulty in ordinary tort cases and in first amendment defamation cases.⁶² Because punitive damages are a discretionary award, the Court summarily rejected the contention that the standard for punitive damages should always be higher than the standard for compensatory damages.⁶³

The *Smith* Court used the analysis established in *Carey v. Phipus* that an award of damages under section 1983 should be made with reference to common law tort principles.⁶⁴ This method of analysis proved less than satisfactory in *Smith* due to the considerable confusion that existed in tort law in 1871 regarding the computation of punitive damages.⁶⁵ The confusion over whether malicious intent or recklessness was required at common law to award punitive damages is evidenced by Justice Rehnquist's dissenting opinion in *Smith*.⁶⁶ Although Justice Rehnquist surveyed the same body of tort common law as the majority, he concluded that a showing of malice was required to award punitive damages.⁶⁷ Justice O'Connor, in a separate dissenting opinion,⁶⁸ concluded that when, as in *Smith*, a significant split of au-

Concerts, Inc., 453 U.S. 247, 258 (1981); *Carey v. Phipus*, 435 U.S. 247, 255 (1978)).

59. *Id.* at 1635. See generally RESTATEMENT (SECOND) OF TORTS § 908(2) (1977).

60. *Smith v. Wade*, 103 S. Ct. 1625, 1636 (1983).

61. *Id.* at 1636-37.

62. *Id.* at 1637. On the standard of punitive damages applied in tort law, see *supra* text accompanying note 57; see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974) (punitive damages in defamation cases under the first amendment are awarded on the showing of knowledge of falsity or reckless disregard for the truth).

63. *Smith v. Wade*, 103 S. Ct. 1625, 1638-39 (1983).

64. *Carey v. Phipus*, 435 U.S. 247, 254-55 (1978); see *supra* text accompanying notes 22-25.

65. See *supra* notes 55-57 and accompanying text.

66. *Smith v. Wade*, 103 S. Ct. 1625, 1640 (1983) (Rehnquist, J., dissenting).

67. *Id.* Justice Rehnquist would require an actual malicious intent standard for punitive damages under section 1983. In addition to finding that malice was the standard for punitive damages at common law, Justice Rehnquist stated that the policies behind section 1983 support the adoption of the actual malice standard. *Id.* at 1656-58.

68. *Id.* at 1658-59 (O'Connor, J., dissenting). Justice O'Connor joined in that part of Justice Rehnquist's dissent which stated that the policies and purposes behind section 1983 dictate the adoption of a malicious intent standard for awarding pu-

thority existed at the time of enactment, it is unilluminating to resort to common law to determine congressional intent regarding the correct standard to be applied in awarding punitive damages in section 1983 actions. She further noted that this conclusion is particularly compelling since the language used by the courts in that period was vague and contradictory.⁶⁹

The *Carey* analysis that was applied in *Smith v. Wade* has been criticized generally for not distinguishing between ordinary tort cases and constitutional tort cases.⁷⁰ Under *Carey*, compensatory damages for a deprivation of constitutional rights was measured in the same way as damages for a deprivation of ordinary rights; recovery was limited to the amount of actual injury proven. *Carey* thus failed to recognize that constitutional rights have an intrinsic value apart from the injuries to persons or property that may accompany their violation.⁷¹ The better approach is to recognize a distinction between ordinary torts and constitutional torts and to allow recovery for a deprivation of a constitutional right regardless of the actual injury suffered.

The *Carey* method of analysis was difficult to apply in *Smith* because tort common law was unsettled on the issue of how to compute punitive damages. The result in *Smith*, however, is commendable, especially since *Carey* fails to compensate deprivations of constitutional rights for other than actual injury. In many cases where no actual injury can be shown, punitive damages are the only substantial damage award that can be made for a deprivation of a constitutional right.⁷² Because recklessness is much easier to prove than actual malice, the *Smith* Court's adoption of the recklessness standard indicates a greater concern for providing a means of redress for violations of constitutional rights under section 1983.

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nitive damages under section 1983. Justice O'Connor stated that awards of compensatory damages, coupled with attorney's fees under section 1988, already provide adequate deterrence for violations of section 1983. *Id.*

69. *Id.* at 1640.

70. McClellan & Northcross, *supra* note 13, at 465; see Note, *supra* note 11, at 967; Note, *supra* note 45, at 542-43.

71. Note, *supra* note 11, at 978.

72. See *Carlson v. Green*, 446 U.S. 14, 22 n.9 (1980). In *Carey*, because the plaintiffs could not prove actual damages, they were limited to a nominal damage award of one dollar for deprivation of their procedural due process rights. *Carey v. Phipps*, 435 U.S. 247, 248 (1978).