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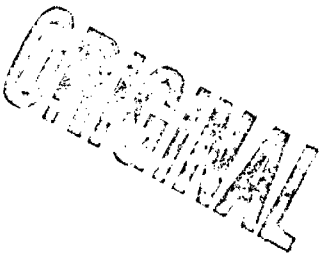
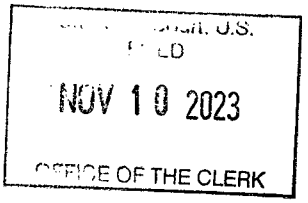


In The

Supreme Court of the United States



ROMAN MELIKOV,

Petitioner,

v.

GHILOTTI BROS., INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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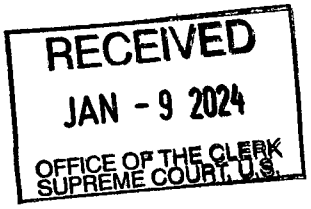

QUESTIONS PRESENTED FOR REVIEW

1) Does the Federal-Aid Highway Act of 1956, 23 U.S.C. § 101-179, grant an express or implied private cause of action for an automobile accident at any time if a highway was once constructed and/or renovated with Federal-aid highway funds?

2) Does the Federal-Aid Highway Act of 1956, 23 U.S.C. § 101-179, grant an express or implied private cause of action for an automobile accident on a highway in limited circumstances, such as, when an accident occurs at the time such a highway is being constructed or renovated by a contractor, such as Ghilotti Bros., Inc., under a contract utilizing Federal-aid highway funds?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

Roman Melikov: Petitioner (Appellant, Plaintiff in the lower courts)

Ghilotti Bros., Inc.: Respondent (Appellee, Defendant in the lower courts)

DIRECTLY RELATED CASES

- *Melikov v. Ghilotti Bros., Inc.*, No. 21-cv-04074, U.S. District Court for the Northern District of California. Judgment entered May 16, 2022.
- *Roman Melikov v. Ghilotti Bros., Inc.*, No. 22-15901, U.S. Court of Appeals for the Ninth Circuit. Opinion entered August 1, 2023. Petition for Panel Rehearing denied August 15, 2023.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

STATUTES

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Petitioner Roman Melikov respectfully requests this Court to review the judgment of the Ninth Circuit Court of Appeals.

OPINIONS BELOW

The opinion by the U.S. Court of Appeals for the Ninth Circuit is reported as *Roman Melikov v. Ghilotti Bros., Inc.*, No. 22-15901 (9th Cir. 2023), and is attached at Appendix A, App. pp. 1-3. The judgment by the U.S. District Court for the Northern District of California is reported as *Melikov v. Ghilotti Bros., Inc.*, No. 21-cv-04074-JSW (N.D. Cal. 2022), and is attached at Appendix B, App. pp. 4-15. The order by the U.S. Court of Appeals for the Ninth Circuit denying Appellant Roman Melikov's Petition for Panel Rehearing is attached at Appendix C, App. p. 16.

JURISDICTION

This Petition for Writ of Certiorari has been filed within ninety days of the denial for Appellant Roman Melikov's Petition for Panel Rehearing. The U.S. Court of Appeals for the Ninth Circuit issued its judgment on August 1, 2023. The U.S. Court of Appeals for the Ninth Circuit denied Appellant Roman Melikov's Petition for Panel Rehearing on August 15, 2023. (See Appendix C, p. 39-40) App. p. 16

CONSTITUTIONAL AND/OR STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are 23 U.S.C. § 101-179, including 23 U.S.C. § 109(e)(2), 23 U.S.C. § 401-408, and 23 CFR § 655.603, including 23 CFR § 655.603(b)(3).

STATEMENT OF THE CASE

This case will always come back to the federal circuit because new construction of a highway or maintenance work on an existing highway is always going to occur in some shape or form and federal funds administered through the Federal-Aid Highway Act of 1956, 23 U.S.C. § 101-179, will be providing the bulk, if not the entirety, of such construction work.

This case began not with Plaintiff Roman Melikov, but with another case going all the way back to the year 1984. In *Morris v. United States*, 585 F. Supp. 1543 (W.D. Mo. 1984), the court found that no private cause of action existed under the Federal-Aid Highway Act of 1956. However, the numerous reasonings to find such a conclusion were incorrectly ascertained.

Since that decision, despite the numerous other cases with similarities to the original case, no federal judge has ever attempted to explore the reasonings behind the initial decision. This trend has continued for this case as well. The Honorable Judge Jeffrey S. White never analyzed the original reasonings found in *Morris*

v. United States repeated by other similar cases since that decision and only cited the conclusion as a reason for denial. Similarly, appellate judges from the Ninth Circuit, Honorable Judges John B. Owens, Kenneth K. Lee, and Patrick J. Bumatay, all avoided any exploration into the original reasonings behind the conclusion as well, even going so far as to not cite the case from where their conclusion arrived.

There is nothing necessarily legally complex in this case or its origins. Rather, this case and its origins are more related to the childhood game of telephone played in elementary school. The court in *Morris v. United States* made huge mistakes in analyzing whether the Federal-Aid Highway Act of 1956, 23 U.S.C. § 101-179, provided a private cause of action. And these mistakes have been passed down from court to court across the federal circuit without ever correcting the initial conclusion. Plaintiff Roman Melikov will now briefly delve into these mistakes to showcase why the questions presented above should finally be given proper adjudication.

First, the court in *Morris v. United States* became fixated on the issue of alcoholism, and such a fixation prevented the court from following the guidelines that Congress had intended the courts to follow under such circumstances relating to the death of Mr. David Allen Morris.

The court in *Morris v. United States* initially concluded that:

> The defendant discharged its alternative duty by appropriately warning all invitees of any condition created by the placement of the berm by its posting of the "Road Closed" sign and by its placement of the reflectorized markers on top of the berm. We further find and conclude that whatever danger may have been created by the closing of the road or by placement of the berm was, in fact, a condition which would be obvious and apparent to any invitee who was acting in the exercise of ordinary care. The undisputed evidence in this case establishes that the decedent was not exercising ordinary care in that he was driving his vehicle while intoxicated at a speed of 50-55 miles per hour after passing the "Road Closed" sign.

(See *Morris v. United States*, 585 F. Supp. 1543, 1550 (W.D. Mo. 1984))

The court then again further expanded on the issue of alcoholism, stating that:

> We further find and conclude that plaintiffs cannot recover for still another reason; plaintiffs failed to adduce any credible evidence that could be said to support a finding that defendant's actions, rather than those of the plaintiffs' decedent, were the proximate cause of the decedent's death. We find that the undisputed factual circumstances clearly establish that decedent's state of intoxication was the proximate cause of his death. We therefore conclude that judgment must be entered for

> the defendant under that alternative finding of fact.

(See *Morris v. United States*, 585 F. Supp. 1543, 1551 (W.D. Mo. 1984))

Sec. 109(e)(2) of Title 23, U.S.C., requires that the court compare the circumstances of the accident involving temporary traffic control devices against the parameters required within the National Manual on Uniform Traffic Control Devices (MUTCD) when there is an accident on a Federal-aid highway while it is under construction with Federal-aid highway funds. Sec. 109(e)(2) of Title 23, U.S.C., states that:

> (2) Temporary traffic control devices. – No funds shall be approved for expenditure on any Federal-aid highway, or highway affected under chapter 2, unless proper temporary traffic control devices to improve safety in work zones will be installed and maintained during construction, utility, and maintenance operations on that portion of the highway with respect to which such expenditures are to be made. Installation and maintenance of the devices shall be in accordance with the Manual on Uniform Traffic Control Devices.

The court in *Morris v. United States* should have evaluated all of the plaintiffs' allegations against the National MUTCD. However, the court only acknowledged that the "Road Closed" traffic sign did in fact match the requirement in the National MUTCD, while ignoring the other allegations and focusing on the presence of alcohol. The court in *Morris v. United States* viewed that a contractor's failure to adhere to

Sec. 109(e)(2) of Title 23, U.S.C., was not illegal or a violation of the law. This legal train of thought is precisely opposite of the intentions of Congress that were spelled out under Sec. 109(e)(2) of Title 23, U.S.C., and is one of the fundamental issues of this case against Defendant Ghilotti Bros., Inc.

Second, the court in *Morris v. United States* was also influenced by the decision of the court in *Miller v. U.S.*, 710 F.2d 656 (10th Cir. 1983). The court in *Miller v. U.S.* found that the Highway Safety Act of 1966 did not provide a private cause of action. However, the Highway Safety Act of 1966 is located in a vastly different section of Title 23, U.S.C. (Chapter 4), and has nothing to do with the Federal-Aid Highway Act of 1956 (Chapter 1). Somehow, the court in *Morris v. United States* took the conclusions of the court in *Miller v. U.S.* regarding the Highway Safety Act of 1966, 23 U.S.C. § 401-408, and applied them to the Federal-Aid Highway Act of 1956, 23 U.S.C. § 101-179.

Third, cases concerning whether the Federal-Aid Highway Act of 1956, 23 U.S.C. § 101-179, has a private cause of action varies by one major distinction between them. Most of the cases involve circumstances where an automobile accident occurs on a Federal-aid highway that had received Federal-aid highway funds in the past. However, this case against Defendant Ghilotti Bros., Inc., much like *Morris v. United States*, involves an accident that occurs at the time the contractor is under an active contract for the construction or maintenance of a Federal-aid highway involving Federal-aid highway funds. This is a critical distinction

for two reasons. The chief reason is that one could assume that based on the wording in Sec. 109(e)(2) of Title 23, U.S.C., Congress only intended a private cause of action to exist when an active contract was present and a Federal-aid highway was under construction or maintenance. This would dramatically limit the liability a contractor and/or the United States government could face since accidents on Federal-aid highways, due to the fault of the contractor, which occur at the time of construction or maintenance of such a highway, are rare when compared to the total number of automobile accidents across the United States of America per year.

Furthermore, the second reason that such a distinction regarding the presence of an active contract may be necessary, is that many lawsuits involving individuals who had crashed on a Federal-aid highway that was previously constructed or renovated using Federal-aid highway funds have created legal confusion regarding whether a private cause of action does truly exist because their cases did not involve an active contract at the time of their accidents, yet no legal distinction was made regarding such a critical difference by the federal judges who had adjudicated their cases.

Miller v. U.S., 710 F.2d 656 (10th Cir. 1983), is a case that further illustrates such a situation. Not only was *Miller v. U.S.* applied to the wrong section of Title 23, U.S.C., as previously noted, but it also involved an accident that had no contractor working on the Federal-aid highway at the time of the accident. Yet *Miller v. U.S.* can be cited by federal judges to deny a private

cause of action for the Federal-Aid Highway Act of 1956, 23 U.S.C. § 101-179 for litigants who do have an accident while a contractor is presently working on the Federal-aid highway. This is a situation that this Court should clarify because it involves two vastly different scenarios.

The Honorable Judge Jeffrey S. White cited *Ramos Pinero v. Puerto Rico*, 359 F. Supp. 2d 56 (D.P.R. 2005), aff'd, 453 F.3d 48 (1st Cir. 2006), when denying Plaintiff Roman Melikov a private cause of action under the Federal-Aid Highway Act of 1956, 23 U.S.C. § 101-179. However, *Ramos Pinero v. Puerto Rico* is very similar to *Miller v. U.S.*, because the accident in that case also occurred when no contractor was actively working on a Federal-aid highway at the time of the accident. This situation is again a good example of how a vastly different underlining situation is adjudicated equally in the federal circuit. Plaintiff Roman Melikov believes that such an equal adjudication of vastly different underlining situations may not be legally correct when considering if the Federal-Aid Highway Act of 1956, 23 U.S.C. § 101-179, has a private cause of action.

The Honorable Judges of the Ninth Circuit, Judges Owens, Lee, and Bumatay, stated that "Ghilotti's **federally funded** contract with Caltrans also does not confer federal question jurisdiction because the contract does not implicate a federal cause of action for willful and wanton misconduct." (See App. A, App. p. 2) Nonetheless, this statement seems to be an oxymoron because it goes against the wishes of Congress. Under Sec. 109(e)(2) of Title 23, U.S.C., Congress specifically

outlined the responsibility of a contractor working on a Federal-aid funded highway as highlighted above, notably concluding that the contractor must follow the guidelines of the National MUTCD. The National MUTCD takes the legal guesswork out of the courtroom and provides judicial efficiency because it can specifically highlight the operational mistakes of a contractor, such as Defendant Ghilotti Bros., Inc., upon comparison against the work done on the actual construction site.

Furthermore, Defendant Ghilotti Bros., Inc. also engaged in interstate commerce in the execution and fulfillment of their contract with Caltrans because their concrete came from Oregon. (See App. D, App. p. 27) Under the first broad category that the U.S. Congress can regulate under the Commerce Clause is the use of the channels of interstate commerce. (See *United States v. Lopez*, 514 U.S. 549, 558 (1995)) Furthermore, it is important to note that no effect on interstate commerce needs to be shown or proven under this first broad category of the Commerce Clause.

Hence, the contract plays an important role because it places Defendant Ghilotti Bros., Inc. under federal regulation twice. The presence of the contract enables federal courts to hold Defendant Ghilotti Bros., Inc. accountable to the National MUTCD under the interpretation of Sec. 109(e)(2) of Title 23, U.S.C., and also again places them under federal regulation due to their engagement in interstate commerce.

The case of *Gorman v. Earhart*, 876 S.W.2d 832 (Tenn. 1994), found that the standards set forth in the MUTCD apply only to public authorities engaged in or concerned with construction, operation, or maintenance work on public roads and highways and those persons or other legal entities having a **contractual relationship** with public authorities. (See *Gorman v. Earhart*, 876 S.W.2d 832, 836 (Tenn. 1994)) While *Gorman v. Earhart* refers to a state specific MUTCD since the case is in state court, such a state specific MUTCD must be in substantial conformance with the National MUTCD within 2 years of any changes issued in the National MUTCD. (See 23 CFR § 655.603(b)(3)) The case of *Gorman v. Earhart* thus suggests that Congress had intended a private cause of action under the Federal-Aid Highway Act of 1956, 23 U.S.C. § 101-179. In summary, since *Gorman v. Earhart* allows a contractor to be held to a right or a wrong standard based on a state specific MUTCD, and because a state specific MUTCD must substantially conform to the National MUTCD, the case of *Gorman v. Earhart* suggests that the National MUTCD can also hold a contractor, such as Defendant Ghilotti Bros., Inc., to a right or a wrong standard. This further suggests, from working in reverse from the decision in *Gorman v. Earhart*, that because Congress had intended, under Sec. 109(e)(2) of Title 23, U.S.C., that the installation and maintenance of temporary traffic control devices be regulated in accordance with the National MUTCD, that Congress had intended an express or implied private cause of action from the Federal-Aid Highway Act of 1956, 23 U.S.C. § 101-179. Lastly, the case of *Gorman v. Earhart*

also highlights the significance of a presence of a contract between a contractor and a governmental entity, highlighting that a contract can indeed have a cause of action for 'Willful and Wanton Misconduct', or its federally equivalent or interchangeable standard of 'Reckless Disregard' following the logic above. Hence, from the reading of the decision in *Gorman v. Earhart*, not only did Congress intend on an express or implied private cause of action from the Federal-Aid Highway Act of 1956, 23 U.S.C. § 101-179, but further did so in limited circumstances when concerning legal entities, such as Defendant Ghilotti Bros., Inc., who were in a contractual relationship with a governmental entity. (See *Gorman v. Earhart*, 876 S.W.2d 832, 835-836 (Tenn. 1994))

Defendant Ghilotti Bros., Inc. committed a series of mistakes that caused Plaintiff Roman Melikov to crash into their construction site. Federal courts have held that a series of negligent acts or omissions may constitute recklessness or willful misconduct under the Clean Water Act, see *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010*, 21 F. Supp. 3d 657, 742-43 (E.D. La. 2014), the Oil Pollution Act, see *Water Quality Ins. Syndicate v. United States*, 522 F. Supp. 2d 220, 229-30 (D.D.C. 2007), and the Warsaw Convention, see *In re Air Crash Disaster*, 86 F.3d 498, 545-46 (6th Cir. 1996).

In addition, the Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit states that punitive damages may be awarded if the defendant's conduct that harmed the plaintiff was

"malicious, oppressive or in reckless disregard of the plaintiff's rights." (2017 Edition, 83)

Moreover, the Restatement (Third) of Torts § 2 (2010) defines recklessness as:

"(a) The person knows of the risk of harm created by the conduct, or knows facts that make the risk obvious to another in the person's situation, and (b) The precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the actor's indifference to the risk." This third version removes the intentional standard, which previously held that the risk-taker desires to cause the consequence of his act, or that he believes that the consequences are substantially certain to result from it, and also removes the requirement that the risk-taker know that his conduct exceeds the legal threshold for negligence.

Lastly, "reckless conduct is the equivalent of willful and wanton conduct." *Williams v. City of Minneola*, 619 So.2d 983, 986 (Fla. 5th DCA 1993). In *Dyals v. Hodges*, 659 So.2d 482, 484 (Fla. 1st DCA 1995), the first district court equated 'Willful and Wanton Misconduct' with reckless conduct as described in section 500 of the Restatement (Second) of Torts. The Ninth Circuit judges did not correct Plaintiff Roman Melikov regarding the series of mistakes argument, showing that Defendant Ghilotti Bros., Inc. did in fact make numerous mistakes that resulted in Plaintiff Roman Melikov's accident.

As this Court can see, all of the necessary legal elements are present to remand this case for trial on Count II if this Court finds that the Federal-Aid Highway Act of 1956, 23 U.S.C. § 101-179, provides an express or implied private cause of action.

REASONS FOR GRANTING THE WRIT

The U.S. Court of Appeals for the Ninth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court. Furthermore, the U.S. Court of Appeals for the Ninth Circuit has also decided an important federal question in a way that conflicts with a decision by a state court of last resort. (See *Gorman v. Earhart*, 876 S.W.2d 832 (Tenn. 1994))

This case is essential to the American driving public because it offers a chance at financial recovery against an unforeseen accident caused by a contractor on a Federal-aid highway that is currently under construction or renovation with Federal-aid highway funds or has been in the past. Every year, millions of people unknowingly traverse such highways. A state's standard for punitive damages is often impossible to meet because doing so requires intentional behavior on the part of a contractor. Only the federal standard for 'Reckless Disregard', which does not require the showing of intentional behavior, allows for a lawsuit involving punitive damages to move forward.

A devastating accident or a related individual's automobile accident death leaves financial devastation in its wake, and negligence payouts alone are often insufficient to cover the real costs of financial recovery for the injured individual or the loss of their loved ones. It is therefore up to this Court to provide a chance for financial recovery against terrifying contractors like Defendant Ghilotti Bros., Inc., who had eyeballed the entire construction site and never once consulted an engineering survey or any other standardized parameters as required in the National MUTCD as intended by Congress.

The courts who had adjudicated this case against Defendant Ghilotti Bros., Inc., in addition to the numerous courts who had adjudicated these issues in the past, all got it wrong for the reasons highlighted above.

CONCLUSION

In conclusion, Plaintiff Roman Melikov hopes that this Court will resolve the questions presented in this case against Defendant Ghilotti Bros., Inc. once and for all for the sake of the American driving public.

Originally filed: November 7, 2023
Re-filed: January 5, 2023

Respectfully submitted,

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