OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. No. 84-1601

TITLE AETNA LIFE INSURANCE CO., Appellant, v.
MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.

PLACE Washington, D. C.

DATE Wednesday, December 4, 1985

PAGES 1 thru 52

ALDERSON REPORTING

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - -x

AETNA LIFE INSURANCE CO., :

Appellant, :

v. : No. 84-1601

MARGARET W. LAVCIE AND :

ROGER J. LAVOIE, SR. :

- - - - - - - - - - - - - - - - - - - -x

Washington, D.C.

Wednesday, December 4, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:50 o'clock p.m.

APPEARANCES:

THEODORE B. OLSON, ESQ., Washington, D. C.; on behalf of the Appellant.

JACK N. GOODMAN, ESQ., Washington, D. C.; on behalf of the Appellees.

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Olson, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF THEODORE B. OLSON, ESQ.,

ON BEHALF OF THE APPELLANT

MR. OLSON: Thank you, Mr. Chief Justice, and may it please the Court:

This is an appeal under 28 U.S.C. Section 1257(2) from a judgment of the Alabama Supreme Court upholding the constitutionality of an Alabama law which imposes a 10 percent penalty on an unsuccessful money judgment.

Underneath the dispute with respect to jurisdiction, there is a well-established Alabama practice which we believe and we have discussed in the briefs resolves the questions which have been raised about jurisdiction both with respect to the 10 percent appeal penalty under the Alabama law, and with respect to the other issues which are brought to this court with this appeal. There is a well-established Alabama practice of considering issues which have been raised on rehearing or in other postjudgment motions. We cited to the Court 17 cases in our briefs in which Section 12-22-72 of the Alabama Code was raised in a postjudgment petition for rehearing context.

QUESTION: The Respondent points out its view for differing with you on a number of those cases and suggests thew few remaining ones don't establish a practice.

MR. OLSON: We respectfully, of course, disagree, Mr. Justice Rehnquist. Those, the cases -- the Appellees have attempted to narrow down those cases, but in their efforts to narrow down them present a distinction without a difference.

The fact is that questions of construction or the questions of the application of that particular statute have been raised in that postjudgment rehearing context. In addition, as we set out in our brief, we presented over two dozen cases, and in fact, we pointed out to the fact that a number of the cases raised by Appellees themselves involve situations where the courts of Alabama discussed a rule but then went on to rule on the merits.

The fact is that to the extent that there is an articulation from time to time of a rule that issues cannot be raised at that posture of the proceeding, the court has gone on to do so in a regular basis. There is no strict or regularly followed rule which would preclude raising the issues at the time that they were raised in this case.

Before moving on to some of the issues in this case, I would like to briefly just emphasize, and because the facts are somewhat complicated, I will not have an opportunity with the time available to discuss all of the facts, we accept as we must the facts which are set forth in the record before this Court and as aeticulated by the Alabama Supreme Court. I simply wanted, unless the Court would prefer a longer discussion of the facts, to recite or call to the Court's attention two particular aspects of the facts as set forth in the Alabama Supreme Court.

First of all, those facts as set forth by the Alabama Supreme Court opinion were edited, selected and set to music, as it were, by Justice Embry, the Justice of the Alabama Supreme Court whose conduct is called into question here so that while we do not dispute, as we cannot, the facts in that case, the emphasis, the characterization of the facts, is due to the fact or must be considered in light of the circumstances that was written by Justice Embry.

QUESTION: Well, of course, other people joined his opinion.

MR. OLSON: That is correct, and we are not disputing the fact that other people joined his opinion with respect to the holding of the Alabama Supreme

Court, but that the characterization of those facts in that case must be understood in the context that they were written by the Justice who, as we have demonstrated, had a very strong interest in the outcome of the case.

QUESTION: Well, you don't really know. He may have -- he may have started out with a completely different opinion and other people said please change it and we'll join it.

MR. OLSON: Well, as a matter of fact, Justice White, he testified at his deposition, which is a part of the material before the Court --

QUESTION: That that didn't happen.

MR. OLSON: That -- well, he started out to write a dissenting opinion.

QUESTION: I know.

MR. OLSON: And then sometime shortly before the final decision, that opinion became the majority opinion of the Court.

QUESTION: Well, it may have because he changed it.

MR. OLSON: I suppose that inference is possible. The inference which is quite strong from reading that transcript of the deposition is that that is not what happened. Another aspect of that facts --

QUESTION: In any event, it was five to four, wasn't it?

MR. OISON: The decision was five to four, yes, Justice Blackmun.

The other aspect of the facts of the case which it seems to me are important for the Court to understand as it considers this case is that while the Alabama Supreme Court, the jury in Alabama and the Alabama Supreme Court reached a conclusion that there had been a bad faith failure to pay an insurance claim in this case, it was not the policies of Appellant that brought about that conclusion; it was deviation, unauthorized deviations from those policies that led to the conclusion that there had been bad faith failure to pay an insurance claim.

I would like to speak --

QUESTION: Well, was this the first case in which the Alabama Supreme Court had laid down the principle it followed here?

MR. OISON: Well, that question is complicated because there are several principles that are articulated here, Justice Brennan The Alabama Supreme Court had first accepted the doctrine that there could be a tort claim and a claim for punitive damages for bad faith in 1981. We stress in our brief, and we stress in

our argument that that was four years after the conduct here. The decision in this case follows the precedents established in 1981 in Alabama, but there were changes in the law, we contend, and we have discussed those in detail in our briefs, in the decision of the Alabama Supreme Court in this case.

As the Court is aware, the major issue in this case is the question of punitive damages and the extent to which this Court under the Constitution of the United States has the power to limit under the Eighth Amendment particularly, and also under the due process clause of the Fourteenth Amendment the power to limit punitive damages. Before I discuss the constitutional application particularly in the context of the Eighth Amendment to punitive damage, I would like to go over some of the characteristics of punitive damages which have been pointed out and, I believe, agreed to by this Court in various opinions of this Court virtually without dissent.

One of the characteristics of punitive damages which is most important to this discussion is that -- and this is in the words of Justice Marshall in dissenting in the Rosenbloom v. Metromedia case, but the same language has been picked up by other -- in other opinions of this Court, particularly in the Gertz case

and in the Faust case, punitive damages serve the same function as criminal penalties and are in effect private fines. That phrase "private fines" particularly has been approved by this Court in several different ways in several opinions of this Court. There is really no question that the purpose for punitive damages are to -- is to punish and deter. The purpose again of punitive damage is to prevent or deter or punish perceived antisocial behavior through fines.

Secondly, punitive damages are windfalls. They are entirely extracompensatory. In a sense, they are like a lottery.

Three, punitive damages are awarded virtually without standards. This again -- these are propositions which have been articulated by this Court. There are no legislative guidelines, or virtually seldom are legislative guidelines. There are no restraints built into the system on the passion or prejudice of the jury. In fact, as this Court has noted, punitive damages may be used to punish unpopular defendants. It is the one area of the law in which passion and prejudice seems almost to be encouraged by the process.

QUESTION: Doesn't the very term carry that with it?

MR. OLSON: It certainly does, and as we have

seen, the fact that the punitive damages themselves are for the purpose of punishment and deterrence, and that the juries are instructed that they virtually have no discretion, if the jury is angry at the defendant, or if the jury is angry at the defendant irrespective of the conduct that may have occurred in the case, this is an opportunity for them to punish the jury -- punish that defendant.

QUESTION: Well, was that the substance of the charge to the jury in this case?

MR. OLSON: The substance of the charge to the jury in this case -- and there's a reference in our reply brief to the page at which that appears in the record -- is that punitive damages were for the purpose of punishment and deterrence. The trial court went on to say that punitive damages are primarily in the discretion of the jury and then concluded that very brief statement by saying it is up to the jury to reach a judgment with respect to how much the punitive damages ought to be, bearing in mind the consideration of punishment and deterrence.

QUESTION: Was there any analytical treatment or discussion in connection with the efforts to reduce the punitive damage in the trial court?

MR. OLSON: There was an application to reduce

the punitive damages in the trial court. The trial court, of course, already had been of the view that punitive damages were primarily in the discretion of the jury.

Again when the subject came up in the Alabama Supreme Court, the subject was quite fleeting and reflected, it seems to me, the very point that I made and that has been made by this Court. There are very few, if any, stadards. Those standards, if they exist, are totally discretionary.

Another characteristic of punitive damages which has been mentioned by this Court is that while they serve the criminal law function, they are awarded in amounts generally far higher than crimes for comparable criminal conduct, and I might add that the English courts have particularly made this point and focused on it as well that while we decide that certain conduct is sufficiently reprehensible that it must be subject to standards adopted by the legislature and punishments adopted by the legislature, in the area of punitive damages without the benefit of legislative standards and without the benefit of clear standards with respect to the amount of the award, the punitive damages, and for less reprehensible conduct, at least inferentially because the legislature hasn't decided to

punish that conduct, the awards themselves are much higher and we award punitive damages without any of the protections which we afford to the more reprehensible crimes that we treat in our courts.

The fifth characteristic -- I've mentioned four that are generally applicable to punitive damages across the board. The fifth characteristic is that here there is peculiar to this case, although not necessarily exclusive to this case, it is here that the punitive damages were awarded for violating a standard not created until four years after the conduct which was being judged by the punitive damages. It is contrary to the traditional notions of due process to punish conduct which does not violate a known standard, and yet in this case punitive damages were awarded for a standard which was not known at the time of the conduct engaged in.

QUESTION: Mr. Olson, none of these arguments were made before the petitions for rehearing, is that right?

MR. OLSON: That is correct, with respect to the discussion generally of the characteristic of punitive damages and discussion of the quality of excessiveness in this case, of course, were. We are -- and these arguments are not so much in the form of arguments but statements of the characteristic of

punitive damages which have been accepted and adopted by this Court. The argument that we are making that they are governed by the limitations of the Eighth Amendment was not made prior to the petition for rehearing

QUESTION: And of course, we do have to look at what this Court said in Exxon Corporation v. Eagerton about the general rule of the Alabama courts.

MR. OLSON: I think that that can be -- yes, of course. I think that that footnote in that Exxon case can be explained by the fact that the preemption issue, which was the issue which was being considered in connection with that footnote, was something which had not been briefed and fully developed in the record in the Alabama courts below, so there is a separate prudential reason for this Court not to consider it.

And we looked through the briefs in that case to see whether the litigants had actually briefed the Alabama practice prior to the decision in that case that generated that footnote, and we found that they had not. We have brought to this Court's attention somewhere between 35 and 40 cases which establish a difference in the Alabama practice which is not fully reflected in that footnote.

QUESTION: Are you relying significantly on the disqualification aspect?

MR. OLSON: With respect to --

QUESTION: Of Justice Embry?

MR. OLSON. Before this Court, we certainly are.

QUESTION: Well, you haven't, you haven't gone into that yet.

MR. OLSON: I haven't addressed that.

I would like to address the question of the application of the Eighth Amendment to punitive damages, but I certainly --

QUESTION: Now, also tell us how we reach that sort of a question in a state court.

MR. OLSON: The Eighth Amendment question, Mr. Chief Justice, --

QUESTION: Well --

MR. OLSON: -- or the application of the disqualification?

QUESTION: Judge Embry's participation. This is -- if this were a federal district judge or a Court of Appeals judge, we would have quite a different question, wouldn't we?

MR. OISON: Yes, except that I think that under the circumstances here, the Court has the same power that it might have in the federal courts. We think that --

QUESTION: Supervisory power?

MR. OISON: No, that this -- under the due process clause of the Fourteenth Amendment, as this Court has pointed out, the justice, the appearance of justice is absolutely necessary to justice itself. We have a situation here which regrettably involves conduct which is far beyond the staniards that this Court can tolerate, and due process requires a fair hearing before a fair tribunal. Appellant in this case did not have a fair hearing before a fair tribunal because one of the justices in the tribunal which judged him, in fact a very influential justice because he was the one that wrote the Court's opinion below, and it was a five to four opinion, was at the same time, this case was under submission before the Court and being argued before the Court, bringing his own personal action for bad faith punitive damages against another -- a group insurance company in Alabama. Furthermore, he was a fiduciary, it was a class action. He was bringing that action on behalf of all public employees covered by the Blue Cross progam in Alabama, and in fact, as it turns out, as we suspected, we don't know all of the facts; we presume that the other Justices in the Alabama Supreme Court were members of the putative class. All we know is that two members, including the Chief Justice of the Alabama

Supreme Court, as soon as this fact was brought to its attention, the Chief Justice of the Alabama Supreme Court and one other Justice immediately indicated that they would withdraw from the putative class.

QUESTION: Well what precisely is your claim that Judge Embry should have disqualified himself, not under Alabama law but under some constitutional principle?

MR. OLSON: Yes. The constitutional principle that a litigant is entitled to a fair hearing in a fair tribunal, that the appearance of justice is essential to the provision of justice itself.

QUESTION: Well, okay, but what was unfair about Justice Embry's participation in this case?

MR. OLSON: Well, he had a direct interest in another case in which the same legal issues were being raised, for one. Number two, he was bringing a class action based upon the same cause of action in the Alabama courts where he was representing other public employees, including --

QUESTION: And your theory is that because he was a Justice of the Supreme Court of Alabama, which has a lot to say about different branches of the law in Alabama, he shouldn't have sat in any case involving an area of the law in which he himself had a lawsuit

pending?

MR. OLSON: Well, particular -- well, I don't know whether I would go quite that far, Justice Rehnquist, but this --

QUESTION: If that's the principle, no state supreme court justice can ever file a suit on his own behalf.

MR. OLSON: This was a case involving important and new and obviously hotly contested legal issues in the Alabama Supreme Court. The prior -- the highest prior affirmed judgment in a bad faith insurance context case in Alabama was $100,000. This case changed the stakes in Alabama by a factor of 35 times. He was not just a litigant; he was a class action litigant. He was representing all public employees of the State of Alabama, including his colleagues on the Court. He had a direct stake in the legal issues that were being decided by the Alabama Court, and the amount of the judgment which he was affirming, plus, as indicted by his deposition -- and you can't, cannot read his deposition, I submit, without seeing an overwhelming sense of hostility and bad -- bias towards insurance companies and bad faith --

QUESTION: I just don't read that deposition that way. Certainly he expressed tremendous

dissatisfaction with Blue Cross in his own case, but it seems to me the deposition gives the impression that he was going to treat insurance companies on the basis of how they treated him, that he would be, you know, as a claimant, if the company treated him well, he wasn't a litigant, litigation prone person.

MR. OLSON: Well, he filed two bad faith actions in -- while the Lavoie case was pending before him, he field two actions, one of which was a class action. He had indicated in his deposition that several other times he had considered or threatened suing insurance companies, and it seems to me that irrespective of your -- you may read that deposition differently than I do. It seems to me that it's very clear that he had very strong feelings about insurance companies, but even if he didn't, even read another way --

QUESTION: Now, certainly the fact that a Justice of a state Supreme Court has strong feelings about insurance companies cannot possibly disqualify him from sitting in insurance cases in the Supreme Court, can it?

MR. OISON: No, I think that they were -- I would not go that far, Justice Rehnquist.

QUESTION: I would hope you wouldn't.

MR. OLSON: These opinions were much more clearly focused on bad faith claims, punitive damages --

QUESTION: Well, Mr. Olson, wasn't Judge Embry in a position where his decision here was going to have a bearing on whether he got money in his pocket in the cases that he had brought?

MR. OLSON: Absolutely, Justice Brennan. His decision in this --

QUESTION: Incidentally, Monroeville was a state court, wasn't it?

MR. OLSON: It was Jefferson --

QUESTION: What --

MR. OLSON: It was Jefferson County where his class --

QUESTION: No, no, I am talking about our decision on Ward v. Monroeville. Didn't that involve a state judge?

MR. OLSON: I believe it did, I believe it did.

QUESTION: And wasn't that -- didn't that go off on a due process analysis?

MR. OISON: Oh, yes it did. This is a very unfortunate situation because, as I say, the decision in this case affirmed a $3.5 million punitive damage

judgment. The highest previous award had been $100,000. that does, if -- for anyone who has handled class action cases, it changes the takes enormously.

Furthermore, the complaint in his Blue Cross case was -- involved the same issue of whether partial payment would be a defense, which was a hotly contested issue in the Alabama Supreme Court in the Lavoie case. It also involved questions of delays in payment and whether that alone would cause -- create bad faith.

The due process standard --

QUESTION: Well, were these issues on which the Supreme Court of Alabama divided in this particular case? Did the dissenting Justices disagree with Judge Embry's interpretation of Alabama law?

MR. OLSON: The -- yes and no. The issues that divided the Court both covered that and didn't cover -- did not cover that. The issues are somewhat refined, and it's very difficult to extract that since they weren't focusing on specifically tying it in with his case.

I submit that the test has been, as articulated by Justice Black in the Murchison case, whether the appearance of justice is being served, and that is what we have to talk about in connection with the due process issue, and the test there is whether an

objective person, aware of all the facts, would have legitimate doubts, serious doubts, significant doubts about whether or not the litigant before that tribunal would have a fair hearing. I submit that there really can't be any doubt in this case.

I would like to return to the issue of the Eighth Amendment. It is not an issue that has been --

QUESTION: Before you leave the due process issue, assume we found merit in that and nothing else, just to get my question on the table. What would the appropriate relief be?

MR. OLSON: The appropriate relief would be to remand this case to the Alabama court system with an instruc --

QUESTION: Well, which part of the Alabama court system?

MR. OLSON: It would have to go back to the Alabama Supreme Court, I submit. There is a statute in Alabama which would allow the Governor to replace members of the Alabama Supreme Court, and it is a statute which has been used before, Justice Stevens, to replace -- when there's been disqualifications, the statute specifically refers to the question of disqualification to allow the Governor to replace members of the Alabama Supreme Court, to bring the

number up to seven.

We are challenging not just Justice Embry, who is not any longer a member of the Alabama Supreme Court, but the other justices who did not do what the Alabama Chief Justice did while the case was pending before them, and when they found out that they were apparently members of a class, did not act to withdraw themselves from the class. While they went on to decide the issues in this case, we think that the due process issue requires a court which is not so stigmatized.

QUESTION: But does the -- is your conclusion on the due process issue that the judgment of the Alabama Supreme Court is void?

MR. OLSON: Yes.

QUESTION: Then is not the effect of that to allow the district court judgment to stand, which would affirm?

MR. OLSON: It wasn't -- there was not a district court judgment -- well, there was a trial court judgment.

QUESTION: A trial court judgment, yes.

MR. OLSON: No, I think that Alabama law entitles these litigants to an appeal, and --

QUESTION: Does federal law entitle you to an appeal?

MR. OLSON: The Alabama law entitles --

QUESTION: I'm saying does federal law? Do we have any power to command that you be given a right of appeal?

MR. OISON: I'm not sure that I can answer that, but the state law does provide an avenue for appeal. The appeal process which afforded to the Appellant was tainted here. The appeal process is still available, and there is a statute which would allow the Court to be recomposed in a way which would not have the problems presented by the due process clause as they exist today.

QUESTION: Do we have any authority to enforce that statute?

MR. OLSON: You can remand the case to the Alabama Supreme Court --

QUESTION: You're willing to take your risk if you get the judgment vacated.

MR. OLSON: Well, we feel very strongly that the Court should go on and decide the other constitutional issues which are here and are properly before the Court. The Eighth Amendment issue particularly is extremely important. We have demonstrated in our briefs that punitive damages --

QUESTION: But should we decide those issues

before they've been decided by a properly constituted Alabama Supreme Court?

MR. OLSON: We believe that in this -- in this circumstance, as we discussed at some length in our brief, this is an appropriate case in which to do that, particularly --

QUESTION: On an appeal from a void judgment.

It seems to me you -- we either have a judgment that we can review or we don't, and your suggestion on the due process argument is that there really is nothing worthy of review.

MR. OLSON: There's a, there's a, there's an appropriate, there's an appeal because the tribunal which the Appellant was before did not provide the Appellant with the proper due process to which the Appellant is entitled, and therefore, the decision of that court must be reversed. I do not think that that means that the other issues that come with the appeal are -- all of a sudden disappear. They are appropriately here before this Court.

QUESTION: Well, the court didn't give you a fair hearing on those other issues?

MR. OLSON: Yes, those are -- these are --

QUESTION: Those are the only other issues there are.

MR. OLSON: I -- we concur with that. On the other hand, these are appropriate issues, and the prudential considerations which --

QUESTION: Well, then, it shouldn't -- if you want to submit them, you shouldn't have brought your due process question here.

MR. OLSON: It was -- it was extremely important, of course, Justice White, for us to present all of these issues to this Court because they all involved a denial to this, especially in the cumulative effect, a denial to this Appellant over not fair opportunity not only to be heard by the Court, but the substantive denial of federal constitutional rights in connection with the Eighth Amendment area and the contract clause area particularly.

QUESTION: Plus, we didn't limit our note either, did we?

MR. OLSON: No, you didn't.

QUESTION: Mr. Olson, is there any evidence in the record that any of the other Justices knew about the class action before issuing the opinion on the merits in this case?

MR. OLSON: There is no evidence.

QUESTION: They had to know about it.

MR. OLSON: The only -- we can only draw

inference from the fact that we brought this issue to the attention of the Alabama Supreme Court --

QUESTION: After the opinion issued.

MR. OLSON: After the initial opinion because --

QUESTION: Yes.

MR. OLSON: -- my client, the Appellant, didn't know it either. When we did bring that to the Alabama Supreme Court's attention, two of the Justices in the opinion which is before you indicated an intention to withdraw from Justice Embry's class. The other six Justices did not. I do not know -- I would think it would be unfair to draw any inferences. I think that some factual investigation would have to be undertaken.

We pointed out in our briefs that the language of the Eighth Amendment does not preclude its application in a case such as this. This Court has itself referred many times, as I have stated, to punitive damages as private fines. The legislative history, as we pointed out, indicates that the Eighth Amendment was discussed and debated immediately after the Fifth Amendment where concern over the possible application of the self-incrimination provision of the Fifth Amendment was raised and in order to limit it to

criminal cases, the word "criminal" was put in the Fifth Amendment for that purpose.

We have demonstrated, because of the underlying purposes of punitive damages, that by any purposive analysis, the Eighth Amendment ought to apply to punitive damages, and we have demonstrated historically that under -- there is almost a direct lineal tracing of the Eighth Amendment excessive fine clause back to Magna Carta, the English Bill of Rights, the Virginia Declaration of Rights, and that Blackstone in his discussion of these -- of punitive double and treble damage cases talked about both the civil fines and the criminal fines in similar contexts.

I think it is important to me, before I stop, to discuss what we think is an important consideration, what standard the Court would have to apply in terms of determining proportion -- what was excessive. The Eighth Amendment speaks in terms of excessive fines. That word, as this Court has suggested, and I think is obvious, connotes proportionality, particularly when we are talking about the excessive fine provision as opposed to the language used in the cruel and unusual punishment provision, the word excessive obviously connotes proportionality. We submit, and as I mentioned before, the English courts have considered this, that

there must be -- our whole entire criminal system is based upon the supposition that the punishment must fit the crime. That which we use to punish must be in some way proportional to the damage which is done. So it is a fundamental consideration that in determining what is excessive, that the amount of the damage be done, be considered. The common law and legislative standards of treble damages and double damages is of long standing. Here we have something that is 700 times greater than treble damages. We submit that is completely out of proportion.

To the extent that it is appropriate, as we think it is, in determining what might be excessive, to look at the criminal law -- criminal law analogue in Alabama or in other states, if there is no analogue in Alabama, the punishment for the conduct here would have been $3000. And finally, and most importantly, in 1981, in the same year that the Alabama Supreme Court was recognizing the bad faith punitive damage cause of action, the Alabama legislature itself passed a statute which is mentioned in our briefs and discussed which recognizes the right of an individual to recover against an insurance company one and one half percent per month for failure to pay an insurance claim.

Those three standards, double and treble

damages under the common law and under legislation in Alabama and elsewhere, the criminal law analogue, and the actual Alabama legislative judgment in this case that one and one half per month is an appropriate penalty we submit is a proper standard for excessiveness.

If it please the Court, I would like to reserve the balance of my time for rebuttal.

CHIEF JUSTICE BURGER: Mr. Goodman.

ORAL ARGUMENT OF JACK N. GOODMAN, ESQ.

ON BEHALF OF THE APPELLEES

MR. GOODMAN: Mr. Chief Justice, may it please the Court:

What I believe is particularly important in understanding this case and which Appellant generally ignores are the egregious facts on which it is based. The record does not disclose a mere failure to honor a claim by a lower level person at the Aetna office in Alabama, but instead shows a pattern of misconduct not only the officials in its Alabama office, but also senior officials in its home office and its medical department, and this misconduct continued on for years and extended not only through the period before this suit was filed, but also continued on and resulted in the filing by Aetna of several affidavits which proved

to be false in an effort to obtain summary judgment from the Alabama trial court.

And Aetna recognizes, this Court must accept all those findings as fact, and indeed, in response to a question, no Justice disputed the characterization of the majority opinion of the Alabama Supreme Court, and in fact, Chief Justice Torbert's dissenting opinion specifically agreed with the characterization of the facts in the majority opinion.

The Alabama courts gave very long and very careful consideration of the issues that arise here, both in this case and in earlier cases, and as this Court held in Martinez v. California, the interest of states in defining their own tort law is paramount and is not a matter of constitutional dimension.

This suit was filed in 1978, and over the next six years reached the Supreme Court of Alabama three times. At no time during that period was there ever a mention of any federal issue. The first mention of any federal issue came at the very end of the Alabama litigation, and even then it was not timely raised, for Aetna's application for rehearing raised no constitutional issue, and the first constitutional issues were raised only a week later in a brief supposedly in support of that application.

And while Aetna now claims that it need not have a brief which hews to that application in Alabama, it did file, attempt to file an amendment to its application to raise the issues. Further, when it did raise them, it did not raise them in compliance with Alabama procedure, for the Alabama courts have long held that they will not consider allegations, particularly constitutional arguments, which are not supported by case authority, and an examination of the brief of Aetna in support of their applications for rehearing will show that absolutely no cases were asserted, that it was a mere generalized allegation that the punitive damages award and the Alabama affirmant statute were unconstitutional.

QUESTION: What if your claim is so novel there aren't any cases to support it? How do you comply with that rule?

MR. GOODMAN: Well, in this case, Justice Rehnquist, they seem, at this level, in this Court, to have found a number of cases which they claim support it, so you might -- in a completely novel argument in which there were no relevant cases, you might have an argument, but it appears that that would not apply here.

QUESTION: Has there ever been a case in any court in the United States, state or federal, presenting

this kind of disparity between the actual injury and the punitive damage award?

MR. GOODMAN: Chief Justice Burger, we do not agree with the characterization of the disparity between the punitive damages award --

QUESTION: Isn't there a disparity between these two figures?

MR. GOODMAN: That is only if you accept the $1650 a the sole damages in the case, but you have to remember this was a tort case, and tort damages are not limited by contract amount, and there are other damages which are included, and they are for mental anguish and economic dislocation, and those, as the Alabama Supreme Court found in the Gulf Life, case are included within the general punitive damages amount, and indeed, the charge here which was not accepted to by the --

QUESTION: And your position is that --

MR. GOODMAN: By the appellate --

QUESTION: Your position is there can be no limit on that kind of a punitive award, thouigh.

MR. GOODMAN: There is no direct constitutional limit which sets a particular number one way or another

QUESTION: What if it was $30 million instead of $3 million?

MR. GOODMAN: Chief Justice Burger, if there were a case in which there was an absolute absence of protections below, in other words, of there seemed a -- if the evidence showed that all the trial courts in the state and the Supreme Court in the state were bent on destruction of a company and the amount was completely out of line with amounts for any similar action anywhere in the United States, presumably due process would apply. But none of that is true here. This amount is not entirely unusual, given the size of awards in other courts for the sort of conduct that has occurred, and you also have to remember the particularly egregious conduct.

The Alabama Court has only found, has only affirmed a judgment of bad faith in four cases of the almost 40 that they have considered since this Court --

QUESTION: Any of them anywhere near like this one?

MR. GOODMAN: The next largest one I believe was $1 1/4 million. None were quite this high, but as even several of the Justices indicated, none has had quite this level of misconduct.

To return briefly to the jurisdiction issue, as Justice O'Connor mentioned, in Exxon v. Eagerton, the Court recognized that the Alabama practice is not to

consider issues first raised on a rehearing. And the cases which Appellant cites do not show a different practice.

To take one example, in Kirkland v. Kirkland, which we cited for the proposition that Alabama courts will not consider arguments first raised on appeal, that is precisely what the Court said there. Now, they did go on to consider the issue, and found, and would have found in favor, indicated that their judgment would have been in favor of the applicant for rehearing but did not apply it in that case. It was mere dicta, and suggested if the case came up again, that would be the view the Court held.

Similarly, in Lovett v. -- in Stover, I'm sorry, th Court also said that it was their very clear policy that they would not hear cases that -- hear issues that were first raised on rehearing, and while no doubt there are some cases in which they have done so, that is certainly appropriate that it is within the Alabama Court's power to hear the case, to hear an issue first raised on hearing, based on their general power to amend their judgments sua sponte during the term of Court in which they are issued, but that does not indicate an obligation on their part to hear issues which are untimely raised, nor does it indicate that

these few cases exist in the absence of established practice, which is what they sat they have, to not hear cases raised.

In fact, in the Orr case this Court recognized specifically that while the Alabama Court had considered an untimely argument there, the Court was free in another case to not consider that argument, and the Court strongly suggested there that that would preclude this Court's jurisdiction.

It has been held consistently by this Court for almost 200 years that failure to timely raise a federal issue in state proceedings precludes this Court's jurisdiction. And that conclusion should be applied here, and we submit that this case should be dismissed.

Turning to the arguments concerning Justice Embry, the practice of this Court, which is the same practice as has been endorsed by the ABA for appellate courts in the states, is to generally entrust the decisions on disqualification of a judge in an appellate court to that judge, and that is the practice which the Alabama court followed here, so that the Court itself did not consider that federal issues were raised.

QUESTION: Yes, but there must be a limit to that. There certainly is on the federal side in the

canons of federal judges.

MR. GOODMAN: Well, there are canons, and the canons -- the canons of judicial conduct do apply in Alabama, but the ADA, Justice Blackmun, in considering the proper procedure, concluded that the best practice, particularly given the controls that were available from the fact that they were collegial courts and there were other justices or other judges, would be to leave the matter to the individual judge. I would suppose, and we would not disagree, that there may be a case of a complete abuse of discretion where this Court could step in and apply constitutional standards and indicate that there had been a complete absence of the exercise of discretion.

QUESTION: Of course the opposition will say that this is that case.

MR. GOODMAN: Well, we would argue that it is not because --

QUESTION: Did Justice Embry accept payment in settlement of his cases?

MR. GOODMAN: It appears now, Your Honor, that he did, that there was a payment of $30,000 which Blue Cross indicated their belief was to compensate him for his legal fees in bringing the case.

QUESTION: So that he did not personally, you

say, realize a penny.

MR. GOODMAN: The record is unclear, intelligence.

QUESTION: Well, what is the fact? What is the fact, do you know?

MR. GOODMAN: The fact is he received $30,000. The facts are that Blue Cross -- the internal Blue Cross documents indicate that they believe that payment was in compensation for his legal expenses. Whether that was so or not, I don't know, Your Honor, and I believe the record indicates.

QUESTION: When was it settled?

MR. GOODMAN: The case was settled in late April of this year.

QUESTION: So that at the time this case was litigated, at least he was asking for more.

MR. GOODMAN: Yes, that's correct. He was -- he was asking on behalf of a class for considerably more money.

QUESTION: Is Justice Embry still sitting as a member of the Court?

MR. GOODMAN: No, Your Honor, he is not. He is retired, and I understand that was for health reasons.

QUESTION: Do you know his age?

MR. GOODMAN: I believe he's in his mid to late 60s, Your Honor.

As counsel for Appellant stated, the interest that Justice Embry had here was not an interest in this case, but --

QUESTION: Before you go on, let me interrupt you to ask another question.

You indicated, I thought, that at some point, a reaction on a punitive damage might get to the point where it would, whether shock the conscience or what.

What point would that be in something over $3 1/2 million here?

MR. GOODMAN: Your Honor, we would not suggest that it is a question of the amount of the damages, but --

QUESTION: Well, I thought you had.

MR. GOODMAN: No, I believe, Your Honor, it was a question of if the characterization of the entire procedure below was such that it was an absence of due process, that it seemed a campaign of harassment or destruction, we would agree that an egregious amount would -- an amount, say, for example, which would destroy a company or destroy an individual, might raise a due process issue. But we have nothing like that either in terms of the absence of careful procedure here

or in terms of the size of the judgment given the size of the defendant in the case.

QUESTION: Well, was there any evidence introduced in this case showing what would be the impact on the insurer here?

MR. GOODMAN: I don't believe there was, Your Honor.

QUESTION: Well, then, that isn't really a factor, is it?

MR. GOODMAN: No, Your Honor, but I believe it would be a question for this Court in order for it to determine that there had been, we would suggest this sort of campaign of harassment.

QUESTION: Let me test, let me test that out, if I may.

Suppose this award had been not $3 1/2 million or $30 million but $350 million. Does that get to the point where some shock factor comes in and a federal court could intervene when it couldn't at a lower figure?

MR. GOODMAN: We would again argue that the mere dollar size in itself could not be enough, but we would also suggest that an amount that was that high would indicate that there were -- there was an absence of other procedures, an absence of the sort of care and

consideration which properly was given.

QUESTION: An absence of rationality.

MR. GOODMAN: That's correct, and in that case, even in Martinez, although the Court suggested in Martinez that the state's interest in its tort law is paramount, and we hold to that very carefully, it indicated that in a case where there was a completely irrational judgment, invading the rights of a person, that the Court might step in. But that would be a very limited instance.

And this case did not present such an instance.

The point about Justice Embry is that he was not sitting in his own case. He -- the federal disqualification statute which need be considered stricter than the federal --

QUESTION: Well, tell me, Mr. Goodman, you say he was not sitting in his own case. Did not the principle he laid down in this case help the suits he had brought against Blue Cross?

MR. GOODMAN: No, Justice Brennan, it did not because he laid down no principle in this case. In this case the opinion of the Court is replete with statements that he is relying on the unique facts of this case and saying in this case, the two particular aspects which --

QUESTION: Well, what about, what about -- I thought that -- I think it's been suggested that the first time this tort was recognized by the Alabama Supreme Court, at least, was in 1981?

MR. GOODMAN: That is correct.

QUESTION: But that was applied here.

MR. GOODMAN: That is correct.

QUESTION: But by a vote of five to four.

MR. GOODMAN: That is also correct.

QUESTION: And would that not help his own suit against the --

MR. GOODMAN: Not in any direct sense.

QUESTION: Direct or indirect, wouldn't it help it?

MR. GOODMAN: I don't know, Your Honor. It, the mere fact that there was a judgment in one case on one set of facts which particularly rests on those unique facts and the unique pattern of misconduct has no direct bearing on the question in another case of whether there will be a judgment.

QUESTION: Well, if it did help his case to the extent of putting money in his pocket, then did he not have a personal interest in this case?

MR. GOODMAN: The general holding on disqualification cases has been that the mere

establishment of a pattern of law, in other words, the setting up of the law which might later benefit the judge in another case is not disqualifying, but the judge's interest must be direct and immediate in the case at bar and not in some other case, and not in the development of a law in a way which might ultimately benefit him.

QUESTION: I have -- go ahead and finish.

MR. GOODMAN: For example, in the Department of -- in the case in the Temporary Emergency Court of Appeals, DOE v. Bremmer, which we argue in our brief, there the evidence was very clear that the judge in question owned stock in oil companies which had investments identical to the ones in front of him, and that his decision would affect the value of those companies one way or the other, and the Court held, applying federal statutory standards again, that that was an interest that was too remote and too speculative, and that the interest under the federal statute, and again, a stricter standard than the Constitution applies, had to be direct and in the case at bar.

QUESTION: You referred to -- at least I got the impression you said that there was no principle laid down by the Court in establishing or affirming this $3 1/2 million penalty.

What principle would you say that the proposition rests on?

MR. GOODMAN: Your Honor --

QUESTION: What is the principal basis of the Court's holding?

MR. GOODMAN: Chief Justice Burger, the Court applied the principle it had established in the Chavers case and thereafter which indicated that a bad faith denial of claims by an insurance company will give rise to a tort action which may result in punitive damages. The two issues this Aetna has argued were -- in which Alabama law were changed were a statement in earlier cases that as a general matter, a partial payment of an insurance claim would preclude a finding of bad faith, and second, that in order for bad faith to be shown, the plaintiff must establish that on the contract claim he would be entitled to a directed verdict.

And in both of -- and in both of those instances, the Court previously had not established an absolute rule but merely a general presumption, rebuttable on showing of specific facts, and that characterization of the previous cases is not one only of the majority opinion, but was the unanimous holding of the Court here for both dissents agreed with the majority opinion on both those issues which were the two

ones which Aetna has argued would have benefitted Justice Embry in his case.

QUESTION: Now, in criminal cases I suppose you would agree in Alabama, judges must instruct particularly on a capital case on the factors which must be taken into account, that this Court has laid down, is that not true?

MR. GOODMAN: Yes.

QUESTION: Was there any limiting principle given by way of instruction here?

MR. GOODMAN: In the Court's opinion or in the trial --

QUESTION: In the trial court.

MR. GOODMAN: In the trial court.

As far as the punitive damages, they were charged, in addition to the matters in which Mr. Olson described, they were also charged with respect to the Gulf Life standard, which indicated that they should take into consideration the economic dislocation and the mental anguish which the Lavoies had suffered. There was substantial evidence in the record that the Lavoies had been pursued rather mercilessly by the hospital in order to make this payment and were unable to do so.

Finally, with respect to Justice Embry, his voting record in other bad faith cases shows that he was

not acting out of his own interest for in the vast majority of cases that he sat on during the time when his suit was being prosecuted, he voted in favor of the insurer, including three times on the identical directed verdict standard which the Appellant argues he had set out to change.

And so there is little reason to believe on this very scanty record that he had any interest and he was doing anything improper. But where, but to the contrary, where Blue Cross was a party before him, i.e., the party against whom he was suing, he very carefully recused himself, and that occurred only two weeks after the decision in the case at bar.

QUESTION: In any of the three cases in which he voted against the insurance company, would his vote have made a difference?

MR. GOODMAN: I'm not certain, Justice Stevens.

QUESTION: But in this case he did throw his weight around.

MR. GOODMAN: Well, he did write --

QUESTION: He started out with a dissenting opinion and ended up with a majority.

MR. GOODMAN: That is correct.

QUESTION: That shows some movement.

MR. GOODMAN: Well, that's true, but of course, it also shows that he convinced four other justices, and as I have said, Justice Marshall, the dissenting justices did not -- two of the dissenting justices did not disagree with the characterization of the case at all, and the other two -- and that remains only two, and they basically indicated that they had a dispute as to the weight of the facts. But the legal judgments that he reached were not disputed by any of the justices of the Alabama Supreme Court.

So that is -- that simply did not occur.

Turning to the Eighth Amendment and the punitive damages issue, the Eighth Amendment argument which Appellant raises is squarely rejected by this Court's holding in Ingraham, and in that case the Court carefully mined the history of the Eighth Amendment and found, for example, that the English Bill of Rights, which Appellant relies on, that it was clearly intended to apply only to criminal cases and that the conjunction of fines, excessive bail and cruel and unusual punishment indicated an intent to restrict the applicability of the amendment to criminal cases.

And this Court has held that in the absence of the criminal process and the indicia of the criminal process, there is no application of the Eighth

Amendment, and there is no such indicia here. This caes was a purely civil case and handled in a purely civil manner.

It is clear, therefore, that all punishments are not within the scope of the amendment, and this punishment is not one of them.

Nor did this award offend due process in any manner. Contrary to Aetna's argument that it had no notice of the substantive conduct which it was expected to adhere to, Alabama has held for many, many years that insurers have a fiduciary duty with respect to their insured, so that substantive conduct, good faith towards towards the insured was already a duty. The only thing that was added in 1981 was a tort action to recover for breach of that duty, that the Court had long held that a -- that insurer's did have that fiduciary duty, and there is no construction of Alabama law which would have supported the type of misconduct which fills the record in this case, the repeated lying to claimants and failure to follow internal company procedures.

Aetna's arguments here were head by the trial judge on motions for new trial and remittitur, and by the Supreme Court of Alabama, and that is the court which is most able to and properly should under our constitutional scheme determine what the standard for

violation of its law should be and what the amount of damages for its law should be.

Several of the amici, for example, have raised, pointed to various statutes which limit punitive damages, and we have no dispute that there could be a statute. If the Alabama legislature concluded that the awards were too high, the Alabama legislature would be free to make such a law and change the common law.

The development of the common law in Alabama is a matter for the Alabama Supreme Court, and its conclusion that its laws were violated and this amount was not excessive, given the egregiousness of the misconduct, the desire to deter future misconduct, and the desire to provide an incentive for persons to sue insurance companies who have mistreated them is not an inappropriate decision and is one which this Court should respect.

QUESTION: Mr. Goodman, I know the Chief Justice asked you this earlier, but I lost it in my notes.

What is the next largest award on a case of this kind?

MR. GOODMAN: Justice Stevens, I believe in Alabama it is $1 1/4 million, but as I have said, there have only been four awards.

QUESTION: Wasn't that the one in which there was a big remittatur of $1 million?

MR. GOODMAN: There was a previous award which was reduced from, I believe, $1 million to $100,000, but there has been one of, I believe, $1 1/4 million.

QUESTION: Since this case.

QUESTION: Since this one, is that what it is?

MR. GOODMAN: Since this case, I believe -- well, I believe that decision came out shortly after this case.

QUESTION: But at the time of this decision there had been none over $100,000?

MR. GOODMAN: None which the Court had affirmed for over $100,000, that's correct.

Of course, in other states there have been awards not substantially different from this, and of course, many of these awards are reduced in appropriate circumstances by remittitur or on appeal, and that is the protection which is generally afforded to litigants.

The rule proposed by Aetna would essentially vitiate the development of the common law process in the states because it would suggest that there could be no new common law duty attached except prospectively, which would essentially preclude anyone from seeking a new

remedy because it could not benefit them.

It would also, the rule that they propose which would allow this Court to freely consider the amount of punitive damages as a constitutional matter, would flood this Court with new litigation, for there is, and Aetna has suggested none, no federal standard which is different from the excessiveness standard which is already applied by every state court.

So we believe that this case should be -- the issues in this case were properly handled by the Supreme Court of Alabama, and they are properly left to the discretion of the state courts.

If there are no further questions, thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Olson?

ARGUMENT OF THEODORE B. OLSON, ESQ.

ON BEHALF OF THE APPELLANT -- Rebuttal

MR. OLSON: Just a couple of brief points, if I have the time, if it please the Court.

In the first place, Mr. Goodman suggested that the jury was instructed differently than the jury was instruted. The instructions on punitive damages begin on R-588 and go over to R-599. There is an instruction available in Alabama for compensatory damages, aggravation, humiliation, whatever it might have been.

This jury was instructed that punitive damages were for the purpose of punishment and deterrence. That was the instruction given the appellant. Justice Embry called these punitive damages. He refers to the amount of $3.5 million as punitive damages, not compensatory damages, in the first page of his opinion for the Court. The Appellees in their brief refer on the very first page of their brief to $1650 in compensatory damages and $3.5 million in punitive damages. So there should not be any question with respect to whether this is a punitive damage award. It is a punitive damage award. As this Court has noted, and as even reflected in the Justice Embry opinion, the damages were for punishment and deterrence and not for compensation.

With respect to the $30,000 which was paid to settle Justice Embry's case, it is in the record that we have provided with and cited to this Court. It is also in the record in the Nationwide case v. Clay, which is also before this Court, that that check was given to Justice Embry's attorney, and Justice Embry's attorney deposited that $30,000 check in a trustee account and then remitted that $30,000 to Justice Embry.

84-1942

We have been -- it's been suggested that the Appellant did not comply with Alabama procedure. That is not what was found by the Alabama courts. The Alabama

Courts, in response to the petition for rehearing, uttered the word "overruled," a phrase which is uses when it has in fact addressed the issues.

I have nothing further to add except to say that the denial of due process in this case, Mr. Chief Justice and this Court, was rather massive. A standard was set after the conduct; punitive damages in a higher amount ever, 35 times greater than ever awarded, was imposed upon conduct which, for which the standard was set retroactively. There was a tribunal in which one Justice had a very strong interest in the case, and then on top of everything else, there's a 10 percent appeal penalty, a penalty upon punitive damages in this case for having filed an appeal and having lost, notwithstanding the fact that no one could conceivably argue that this was a frivolous appeal.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:45 p.m., the case in the above-entitled matter was submitted.)

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:

#84-1601 - AETNA LIFE INSURANCE CO., Apppellant, v. MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.

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

BY Paul A. Richardson

(REPORTER)