

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-410

TITLE MEMPHIS COMMUNITY SCHOOL DISTRICT, ET AL., Petitioners
V. EDWARD J. STACHURA

PLACE Washington, D. C.

DATE April 2, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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MEMPHIS COMMUNITY SCHOOL	:	
DISTRICT, ET AL.,	:	
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Petitioners	:	
	:	
v.	:	No. 85-410
	:	
EDWARD J. STACHURA	:	
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Washington, D.C,
Wednesday, April 2, 1986

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 1:39 p.m.

APPEARNCES:

PATRICK J. BERARDO, ESQ., Lansing, Michigan, on
behalf of the Petitioners.

JEFFREY A. HELDT, ESQ., Southfield, Michigan, on
behalf of the Respondent.

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1 emotional distress damages are recoverable as an element
2 of actual damages in any 1983 case for any constitutional
3 deprivation.

4 QUESTION: Including this one?

5 MR. BERARDO: Including this one.

6 QUESTION: Oh, I misread your brief.

7 QUESTION: And, including a case like Carey
8 against Piphus?

9 MR. BERARDO: Including a case like Carey against
10 Piphus --

11 QUESTION: If the denial --

12 MR. BERARDO: If proofs had been made that the
13 actions taken in that case had caused the litigants emotional
14 distress.

15 1983 and we think Carey allow the Court to
16 instruct the jury that actual damages may be awarded and
17 that if actual damages are found that punitive damages
18 may also be awarded.

19 Likewise, if there are no actual damages and
20 a jury finds that nominal damages may be awarded to a
21 litigant in a 1983 action, then punitive damages may also
22 be awarded.

23 In addition, of course, a matter that is not
24 before a jury, attorney's fees may be available to the
25 litigant under Section 1988.

1 QUESTION: Mr. Berardo, did you say that punitive
2 damages would be available in a case like this against
3 the School District?

4 MR. BERARDO: Justice Rehnquist, our position
5 throughout, and I think the instructions of the court
6 in this case, were that punitive damages could not be
7 awarded against the School District.

8 QUESTION: Because of the City of Newport?

9 MR. BERARDO: Because of the City of Newport.

10 However, it is our position that the instructions
11 given, which was the basis for this Court's grant of
12 certiorari, in effect allows the jury to award a punitive
13 award agasint the School District in violation of Carey,
14 Newport, and other precedents.

15 QUESTION: Say that again. Our action does
16 what?

17 MR. BERARDO: The instruction involved here
18 allowed the jury to consider the intrinsic value of the
19 constitutional rights that were defied.

20 Your Honor, my next point in my argument was
21 to get to the sequence of the instructions.

22 QUESTION: You go ahead. You do it your way.

23 MR. BERARDO: And that will explain your question.

24 QUESTION: You do it your way.

25 MR. BERARDO: First, the jury was authorized

1 to award actual damages, being admonished not to consider
2 speculative damages.

3 Then the jury was authorized, if they found
4 no actual damages, to award nominal damages and in both
5 cases to award punitive damages.

6 After having been instructed on damages in that
7 manner, the jury was then instructed that it could award
8 damages for the intrinsic value of the constitutional
9 rights, taking into account the importance of the right
10 in the history of our country and the importance of the
11 right in the context of the activities in which the
12 Plaintiff was involved at the time of the deprivation.

13 Sequentially, and because the jury has already
14 been admonished not to award punitive damages against
15 a municipal corporation prior to receiving the intrinsic
16 value instruction, it is then permitted to look at the
17 intrinsic value and award damages against the Board of
18 Education for the intrinsic value of the right in the
19 absence of any proof that there were damages that flowed
20 from what the Board of Education did or that the intrinsic
21 value is involved at all.

22 I think in that way, by viewing the instructions
23 as a whole and looking at the sequence, it can be seen
24 that the instruction is extremely prejudicial, first of
25 all, to the Board of Education, but, secondly, to the

1 rest of the defendants in the case. The reason it is
2 so prejudicial is because as to the rest of the defendants,
3 they have already been considered in light of the punitive
4 damages instruction and the additional inherent value
5 instruction allows a multiplier effect after punitive
6 damages have already been considered.

7 The objection to the instruction that was given
8 and the instruction again is -- the complaint of instruction
9 is the intrinsic value instruction is that it violated
10 the rule of Carey versus Piphus.

11 Secondly, that it allowed the jury to speculate
12 as to damages which is a violation of Carey and other
13 precedents.

14 The speculation is I think most troublesome
15 to the defendants and petitioners in this case. How can
16 one measure the value of the First Amendment or any
17 procedural due process right?

18 It invites the jury to order or prioritize or
19 find a value for really a priceless right.

20 The instruction to the jury itself indicated
21 that damages for the intrinsic value of those rights are
22 very difficult to measure, but, in effect, that instruction
23 told the jury that the value of those rights are great.
24 They were presumed by the court to have great value because
25 of the context of the deprivation.

1 As a result, in terms at least of the objection
2 that was made to the court, it was quite clear, not only
3 to the court but to plaintiffs and defendants at trial,
4 what the nature of the objection to the instruction was.

5 The court responded on the motion for judgment
6 notwithstanding the verdict to further objection concerning
7 the instruction, saying that counsel had not requested
8 the court to segregate the damages between procedural
9 and substantive deprivation.

10 We would urge the Court to consider that it
11 would have made no difference that procedural and substantive
12 deprivations were segregated for purposes of determining
13 if the award was proper.

14 The real distinction is whether intrinsic value
15 damages could be segregated from actual damages for the
16 deprivation of a right.

17 There are several unwarranted consequences of
18 the instruction. First, the intrinsic value instruction
19 conflicts with the availability of nominal damages. There
20 is just no reason to give a nominal damage instruction
21 if you can, in the absence of nominal damages or in the
22 absence of actual damages, give damages for the intrinsic
23 value of these rights.

24 It allows speculation by the jury and it encourages
25 plaintiffs to look at the value of a constitutional right

1 involved before they file litigation. It encourages some
2 ordering of constitutional rights by value.

3 Secondly, it permits a multiplier in the context
4 of -- at least in the context of which --

5 QUESTION: May I interrupt you for a minute
6 because I must confess from the beginning I am having
7 a little bit of difficulty.

8 Are you contending that the instructions told
9 the jury that they could award damages even if there were
10 no injury to the plaintiffs of any kind?

11 MR. BERARDO: Yes, Your Honor. I think if you
12 read the instructions --

13 QUESTION: I am reading from page 93. "If you
14 find that the plaintiff is entitled to a verdict, you
15 may award him only such damages as will reasonably com-
16 pensate him for such injury and damage you find from a
17 preponderance of the evidence." Don't they in so many
18 words say there has to be an injury?

19 MR. BERARDO: Justice Stevens, even though the
20 instructions seem to indicate that there has to be an
21 injury, if you will look on page 96 of the instructions,
22 after nominal damages have been discussed -- I am assuming
23 that a jury which has these instructions with them in
24 the jury room deliberating is going through each paragraph,
25 paragraph by paragraph, to determine what they are going

1 to do with these instructions. They have gone through
2 actual damages, they have gone through nominal damages,
3 they have gone through punitive damages, and then they
4 find an instruction that says if you find plaintiff has
5 been deprived of a constitutional right.

6 And, in this particular instruction, the second
7 full paragraph on page 96 --

8 QUESTION: It says, "damages for type of injury
9 are more difficult to measure." Doesn't that assume there
10 has got to be an injury?

11 MR. BERARDO: That presumes an injury, Your
12 Honor. We think that violates Carey.

13 QUESTION: The injury is the deprivation of
14 the constitutional right.

15 MR. BERARDO: Excuse me, Your Honor.

16 QUESTION: Isn't the injury the deprivation
17 of the constitutional right?

18 MR. BERARDO: I think not. I think that traditional
19 tort recovery concepts require an injury to be something
20 other than an abstract deprivation of a right. It is
21 not the deprivation of the right to --

22 QUESTION: I would think you would say the court
23 was implying or saying that it is enough to find injury
24 in a sense of the deprivation of a constitutional right.

25 MR. BERARDO: Then, Your Honor, I think Carey

1 would require that nominal damages be awarded.

2 QUESTION: Very well. I would think you would
3 say that is exactly what the court meant.

4 MR. BERARDO: However, damages as opposed to
5 injury flow from the expectation that the plaintiff might
6 have had to exercise certain rights, including First
7 Amendment rights.

8 QUESTION: Under Tennessee law may you recover
9 in an automobile accident case for the abstract violation
10 of a constitutional right not to be run down by an auto-
11 mobile?

12 MR. BERARDO: I think --

13 QUESTION: Or do you just recovery the injury?

14 MR. BERARDO: Mr. Chief Justice, I think that
15 there would be no damages permitted for that kind of injury,
16 but there would be damages permitted for pain and suffering
17 and emotional stress under Michigan law if a constitutional
18 or statutory right were, of course, involved.

19 QUESTION: Loss of employment, permanent dis-
20 ability, all that sort of thing? In that respect are
21 we to take it that Tennessee law is no different from
22 common law generally?

23 MR. BERARDO: That is correct. Michigan law,
24 Your Honor -- In Memphis School District -- This is a
25 rather confusing case. It is located in the eastern district

1 of Michigan as opposed to Tennessee, but in any event,
2 the law in Michigan is very simple on the issue of tort
3 liability. It is standard tort liability concepts that
4 are applied across the country, and, in fact, those same
5 tort liability concepts that prevailed at the time Section
6 1983 was drafted.

7 Another factor that flows from the giving of
8 this instruction is that damages for procedural deprivations
9 might be awarded where there is no proof of actual damages.
10 This violates both Carey and common sense.

11 Damages additionally would be allowed without
12 regard to any objective standards for determining what
13 those damages are. There is no objective standard of
14 which I am aware to measure the value of a First Amendment
15 right or any procedural due process right and I think
16 this Court has clearly stated in Carey and in other cases
17 that --

18 QUESTION: Let me ask you a hypothetical question.
19 Supposing you had a community that wouldn't -- that didn't
20 like one particular religion, say they didn't like Catholics,
21 and there was a priest in town that wanted to go to mass
22 and the police just wouldn't let him go to mass and he
23 brought a 1983 and he couldn't prove any damages, he just
24 was not allowed to exercise his right to go to church,
25 damages or no damages?

1 MR. BERARDO: I think, Justice Stevens, the
2 answer to that question depends on the proofs that are
3 put in by the plaintiff. Assuming that the expectation
4 of his right to exercise freedom of religion was such
5 that it caused him humiliation in front of his friends
6 in the community or that it caused him emotional distress
7 that would be observable by a third party --

8 QUESTION: Suppose it didn't cause him anything,
9 he just couldn't go to church and he very deeply wanted
10 to go to church.

11 MR. BERARDO: Then he is entitled to nominal
12 damages.

13 QUESTION: Mr. Berardo, you don't question,
14 do you, that a jury properly instructed in your view of
15 the law of the case could have returned this amount of
16 damages for the plaintiff or do you question that?

17 MR. BERARDO: Justice Rehnquist, we don't know
18 what the jury considered in this case. We don't know
19 how deeply this award was tainted by the instruction.

20 QUESTION: No, that is why I asked you the
21 question. Assuming that the jury had not received this
22 instruction that you claim was wrong and had been properly
23 instructed in your view of the law, do you think it could
24 nonetheless -- Could you claim that a verdict by this
25 was excessive?

1 MR. BERARDO: I think you might claim that this
2 verdict was excessive, Your Honor, because it was more
3 than double what plaintiff's attorney asked for in his
4 final argument.

5 QUESTION: Well, that isn't an invariable.

6 MR. BERARDO: No.

7 QUESTION: It wouldn't be unconstitutional.

8 MR. BERARDO: I agree, but in view of defendant's
9 counsel it is certainly an indication that this award
10 included factors other than what plaintiff's counsel at
11 least argued to the jury at the conclusion of the trial.

12 I think it is just as likely, perhaps even more
13 likely that in light of this particular instruction that
14 this damage award did exceed what would have been given
15 for actual damages.

16 In this case, for example, the plaintiff was
17 suspended with pay and never lost a day's pay throughout
18 the pendency of the case. In fact, is still employed
19 by the School District.

20 That particular fact which was, indeed, before
21 the jury, that he had continued to be paid throughout
22 the period of the dispute, was apparently ignored in
23 calculating the damages.

24 QUESTION: But, he got some very bad publicity,
25 didn't he, of the same sort that a liable plaintiff is

1 apt to get?

2 MR. BERARDO: Justice Rehnquist, he did get
3 very bad publicity the same as a liable plaintiff might
4 be expected to get, but this wasn't a liable for a deformation
5 case. It wasn't tried as one and it wasn't presented
6 to the jury as one so that those kinds of per se damages
7 that might be available in that case weren't available
8 and weren't presented to the jury.

9 QUESTION: Could there be a recovery for liable
10 against a school board as such?

11 MR. BERARDO: I --

12 QUESTION: As distinguished from individuals.

13 MR. BERARDO: As a state law case, I think not.
14 I think they are entitled to immunity under state statute.

15 QUESTION: Mr. Berardo, if we were to agree
16 with you on the single question of proper instructions
17 for damages for intrinsic value of a constitutional right,
18 is there any need to do more than to remand it for a new
19 trial on damages alone as opposed to liability?

20 MR. BERARDO: I think not, Justice O'Connor,
21 for the reason that this Court in granting certiorari
22 failed to grant certiorari as to Issue No. 2 in our petition
23 which was more factually oriented, therefore, I presume
24 from the Court's action on our petition that the facts
25 in this case are settled and we are only talking now about

1 damages and the proper calculation of damages.

2 At this juncture then it would be appropriate
3 for me to say that we think that should be requested
4 because of this tainted award is that this case should
5 be remanded to the Sixth Circuit -- Excuse me, remanded
6 for retrial and that the decision of the Sixth Circuit
7 be overruled.

8 Thank you.

9 CHIEF JUSTICE BURGER: Mr. Heldt?

10 ORAL ARGUMENT OF JEFFREY A. HELDT, ESQ.

11 ON BEHALF OF THE RESPONDENT

12 MR. HELDT: Mr. Chief Justice, and may it please
13 the Court:

14 Mr. Berardo and I have been trying two different
15 cases since at least 1982 when this case went to trial.
16 I guess it does my heart good we still are.

17 The issue here as we see it is not as it has
18 been defined by the petition or by the petitioners. The
19 issue is rather does Carey versus Phipus require a jury
20 to ignore the historical and contextual significance of
21 the constitutional rights it finds were violated when
22 it reaches the point in its deliberations that it must
23 assess damages and assign a monetary value.

24 We think the answer is obviously no. We don't
25 expect a jury should be compelled to ignore both our history

1 and the context of the activities in which the plaintiff
2 was engaged in at the time his rights were violated.

3 QUESTION: You think they could consider it
4 wholly apart from any instruction?

5 MR. HELDT: Wholly apart from any instruction?

6 QUESTION: Suppose Judge Harvey had not given
7 the instruction of which complaint is made here. You
8 feel the jury could and might well consider the nature
9 of the rights infringed in the jury room.

10 MR. HELDT: They certainly could. I think that
11 a plaintiff is entitled to an instruction assuring the
12 jury that they may and that is all we are talking about
13 here. They may consider all sorts of things in the jury
14 room that we generally never know about because we simply
15 don't try and ask them afterwards in any legal way what
16 did you do and how did you reach your results?

17 QUESTION: And, hence, I take it, you would
18 say it would be quite proper for the judge to say now
19 as a matter of damages I am instructing you that there
20 has been no evidence presented of any actual injury in
21 the sense of monetary loss or pain or suffering or humilia-
22 tion or anything like that.

23 But, there is a constitutional right involved
24 and was violated and the jury may consider what that is
25 worth and return a judgment for whatever damages they

1 think it is worth. I take it that is what you think the
2 jury should be permitted to do.

3 MR. HELDT: Well, I don't think that issue is
4 presented in this case and I am loathe to speak on behalf
5 of --

6 QUESTION: I think it might well is presented
7 in this case. So what is your answer to it?

8 MR. HELDT: My answer is that that would be
9 permissible depending on the nature of the constitutional
10 right which was violated.

11 QUESTION: Right.

12 MR. HELDT: As Justice Stevens said, if you
13 are not allowed to go to church, perhaps that is a case --

14 QUESTION: Then you have problems with Carey
15 against Piphus. You have got to limit that to procedural due
16 process.

17 MR. HELDT: No, I don't think that is true.
18 I don't think that Carey requires that you must either
19 establish some separate quantum of proof of damage or
20 be precluded from any at all. Carey expressly reserves
21 the question to a later day depending exactly what
22 constitutional right has been violated. In Carey we dealt
23 only with the right of procedural due process. And, indeed,
24 there was substantial evidence in a stipulated record
25 that the student was guilty of smoking a marijuana

1 cigarette on school grounds during school hours.

2 QUESTION: But then you have to say that the
3 holding of Carey against Piphus as to procedural due process
4 violation damages would not be carried over into the First
5 Amendment area.

6 MR. HELDT: I think that is clearly correct.
7 I think that is unmistakable from the analysis of the
8 opinion and I wouldn't seek to do otherwise.

9 QUESTION: Counsel, can you explain to me the
10 elements of \$233,750?

11 MR. HELDT: I am not sure I can, but I don't
12 think that any plaintiff can.

13 QUESTION: You can't even get close to explaining
14 this, can you?

15 MR. HELDT: I don't think any plaintiff can.
16 We simply do not in our legal system require the jury
17 to set forth a calculus.

18 QUESTION: How about \$35,350 compensatory?

19 MR. HELDT: They broke those awards out by party.
20 Frankly, it surprised me. No one objected to that formu-
21 lation of the special interrogatory. I would have expected
22 them to put the same numbers for each individual, but
23 the jury did not.

24 QUESTION: You don't think they drew lots for
25 something like that, do you?

1 MR. HELDT: Not that I am aware of.

2 QUESTION: I mean, drew it out of a hat or some-
3 thing.

4 QUESTION: Sometimes juries are required to
5 explain their verdict by special verdicts, is that not
6 true?

7 MR. HELDT: Well, there is a special verdict
8 forum here, but when it came to the question of what value
9 do you place on the damages that you find are appropriate,
10 we don't ask them how did you do it, did you accept the
11 plaintiff's lawyer's calculus and multiply these numbers
12 together to come up with your verdict? Did you compromise
13 between what the defendant insisted and what the plaintiff
14 insisted? Did you adopt some third theory? We don't
15 ask them to tell us. We don't put them on the witness
16 stand as it were after they return their verdict and decide
17 whether we agree with the number.

18 The traditional, legal and judicial remedy as
19 you look at that number taken as a whole against the facts
20 of the case and if it is sufficiently monstrous, there
21 is authority to, either by remittur or new trial, start
22 over again. But, that has been rejected twice in this
23 case by the trial judge himself as well as by the Sixth
24 Circuit.

25 I would submit three propositions to suggest

1 that our formulation that Carey certainly doesn't preclude
2 the jury to take these items into consideration control
3 here.

4 One is Carey itself. The second is the facts
5 of this case and especially the conduct of the trial itself
6 justified a challenged instruction.

7 And, thirdly, the principal arguments that are
8 raised here are raised for the first time. You can read
9 those Sixth Circuit briefs, you can read the motions for
10 a new trial in the district court, and you simply will
11 not find arguments about ambiguities of causation. You
12 will find no proposed and rejected instructions on causation
13 or any different form of verdict as proposed by the
14 defendants who now on brief suggest that the damages need
15 to be segregated among plaintiff's theories, and as I
16 understand Mr. Berardo's oral argument this afternoon,
17 to suggest, well, no, I think that is useless.

18 It was never asked for below. I don't think
19 they are entitled to complain about it now.

20 I think I have already described the salient
21 points with respect to our view of Carey. It was a case
22 on stipulated facts without any substantive underlying
23 contest. At least Mr. Piphus certainly didn't have a
24 very good one on the stipulated facts. The principal
25 caught him in the school yard with a cigarette that got

1 thrown in the bushes. There was a strong smell of marijuana
2 and he was suspended. It really doesn't raise any substantive
3 issues about was he guilty or not and how elaborate a
4 hearing do we need to decide whether he was guilty or
5 innocent.

6 QUESTION: Of course, he was -- It was held
7 he was denied procedural due process.

8 MR. HELDT: That is correct.

9 QUESTION: Then that denial is regardless of
10 whether or not after a hearing he would have been found
11 guilty.

12 MR. HELDT: But, what the Court in Carey says
13 is that that creates an ambiguity of causation. We don't
14 know. There is no proof that Mr. Piphus suffered any
15 anguish, lost anything as a result of being suspended
16 from school for 20 days, but even if he presented proofs,
17 we don't know whether he was anguished because he was
18 caught guilty in the school yard or is anguished because
19 he didn't get a chance to plead for mercy before he was
20 punished.

21 QUESTION: At least that -- The Carey opinion
22 suggests that you don't get anything in the way of sub-
23 stantive damages by reason of the fact you were denied
24 the constitutional right to procedural due process. You
25 have to show something, emotional distress, some traditional

1 element of damage.

2 MR. HELDT: Carey, I think, clearly reflects
3 that. It says we will not presume it. It is not too
4 much to ask a plaintiff if they contend that their injury
5 arises from the nature of the wrong, to get on the witness
6 stand and try and explain it, try and quantify it in some
7 way that the jury can deal with it, or the factfinder.
8 I believe Carey was non-jury case.

9 QUESTION: How about my example where the judge
10 says there is no evidence of any other damages except
11 the denial of this constitutional right and he said, of
12 course, the plaintiff hasn't gotten on the stand and claimed
13 that it really hurt him any, but members of the jury,
14 you are entitled to give damages for the violation of
15 this right, whatever you think it is worth.

16 MR. HELDT: I don't believe that Carey would
17 permit that. Carey certainly doesn't --

18 QUESTION: No matter what the constitutional
19 right is involved.

20 MR. HELDT: That is what I was going to say.
21 Carey clearly does not permit that if the only claim before
22 the jury is the denial of procedural due process.

23 QUESTION: What about other constitutional rights?

24 MR. HELDT: It leaves that open and it says
25 expressly it depends on what right you are talking about.

1 Are you talking about a First Amendment right to go to
2 church, are you talking about a right to be secure in
3 your home from --

4 QUESTION: It might be too much to make a plaintiff
5 get up on the stand and attempt to say how he really has
6 been injured if some other kind of constitutional right
7 is involved like freedom of speech or --

8 MR. HELDT: I don't think it is ever too much
9 to expect a plaintiff to try and articulate that, but
10 the question as a legal matter I don't see as being before
11 the Court in this case because the plaintiff took the
12 stand and he testified at length about the consequences
13 of these deprivations on him. His wife testified. We
14 brought in expert testimony with respect to the stigmatization
15 issue.

16 QUESTION: So, it is just really a question
17 of whether or not -- what chance there is that the jury
18 pay too much attention to the last part of his instruction.

19 MR. HELDT: I don't --

20 QUESTION: Because that instruction -- You know,
21 maybe he read it in the context that it isn't all that
22 harmful, but that part of the instruction embodies the
23 idea that the denial of the right itself entitles you
24 to substantial damages without, as you say, your plaintiff
25 getting on the stand proving anything.

1 MR. HELDT: I don't think that is true and I
2 think it is belied by the balance of the instructions.

3 QUESTION: Well, perhaps it is belied by the
4 balance of the instructions, but do you feel that even
5 the particular instruction that the petition brings here
6 doesn't permit that?

7 MR. HELDT: I don't think it permits it in the
8 context of this case because it was never argued that
9 way.

10 If you go back to my closing argument, I didn't
11 ask for emotional damages and then say to the jury, now,
12 give me some more, give me an award for the intrinsic
13 value of a constitutional right. I didn't argue that
14 at all.

15 I said to the jury, my client has suffered 1,144
16 days of human misery waiting to get to this courtroom
17 to vindicate himself and I think he is entitled to compensa-
18 tion for that and I then said to the jury, there are other
19 ways to approach damages. You don't have to do that.
20 You can approach damages, this court will tell you, I
21 said to the jury, on the basis of the constitutional rights
22 that you find violated and I had discussed those extensively
23 in closing argument with respect to establishing the elements
24 of my case that plaintiff had been denied of liberty
25 interests, he had been denied a right of privacy, he had

1 been denied a right of academic freedom, and he had also
2 been denied a right to due process, an opportunity to
3 be heard and to vindicate himself.

4 And, I discussed those at length and I said,
5 you can evaluate those rights and you can make an award
6 on that basis, and then I said, in either event, it really
7 boils down to what Ed Stachura has been through, what
8 has it made him live through in his own mind and in the
9 public eye. That is right in the transcript, exactly
10 what I argued to this jury.

11 I didn't ask for things that perhaps I might
12 have asked for if I interpreted the instruction the way --

13 QUESTION: Are you the one who requested the
14 instruction the judge gave about constitutional rights?

15 MR. HELDT: Yes.

16 QUESTION: And, I suppose in the record here
17 that that request is contained somewhere. It is not
18 contained in the printed record.

19 MR. HELDT: It is not contained in the printed
20 record. It would be contained in --

21 QUESTION: In the transcript.

22 MR. HELDT: No, it would be contained in the
23 series of proposed written instructions which were presented
24 to the court before trial.

25 QUESTION: Well, isn't that in the record?

1 MR. HELDT: Yes, but not in the transcript.

2 QUESTION: But, it is in the record that has
3 been lodged here?

4 MR. HELDT: Yes, yes, it is. It was not asked
5 for so we could ask for two measures of recovery, one
6 for Mr. Stachura's mental anguish and a second measure
7 of recovery for some intrinsic or inherent value of a
8 constitutional right. And, I think that is well demonstrated
9 by the closing argument. We simply didn't ask for that.
10 We said you can do it in one of two ways.

11 In either event, the teaching of Carey that
12 there must be proof of actual damage before the jury is
13 allowed to cogitate on what monetary value to place on
14 those damages I think is unmistakable.

15 QUESTION: You are saying as long as you get
16 on the stand and prove up a major injury by the way of
17 emotional distress, if it so happens you have been denied
18 the right to go to church and that is a denial of an important
19 constitutional right, the jury should maybe double the
20 damages it otherwise would have awarded just because of
21 the nature of the constitutional right that is involved.

22 MR. HELDT: If you are asking me do I think
23 that is a permissible argument for plaintiff to make --

24 QUESTION: I thought that was the argument you
25 were making.

1 MR. HELDT: No. I am saying that they are entitled
2 to consider the significance of the conduct in which my
3 client was engaged and the significance of the rights
4 which are violated in deciding whether his mental anguish
5 is genuine, in deciding how big it is, how severe it is.

6 QUESTION: That is what I say. You would say
7 the jury should be able to give more damages for mental
8 anguish. If the constitutional right is not being able
9 to go to church, then perhaps say the denial of a procedural
10 due process.

11 MR. HELDT: No, I would formulate it differently.
12 I would say there is a world of difference between a
13 plaintiff who suffers mental anguish because a tornado
14 came out of the midwestern skies and killed his family.
15 He suffers all the mental anguish in the world, but it
16 comes from something that is unpredictable and uncontrollable
17 and that is just a part of life.

18 That is not the same as the plaintiff who instead
19 of being struck down by a tornado is struck down by his
20 professional colleagues in a scheme to scapegoat him to
21 protect their own skin.

22 QUESTION: Counsel, do you practice in this
23 county regularly?

24 MR. HELDT: Do I practice in Memphis or in Port
25 Huron when the court sits?

1 QUESTION: In Michigan

2 MR. HELDT: I practice with some regularity
3 in that state and in those counties, yes.

4 QUESTION: What is the average death value in
5 a civil action in your practice?

6 MR. HELDT: As I understand it -- I have never
7 tried a wrongful death case.

8 QUESTION: Have you heard of any?

9 MR. HELDT: As I understand it, in Wayne County,
10 the county in which Detroit resides, it is probably in
11 excess of seven figures. I understand in Port Huron,
12 Michigan, 50 miles to the northeast, it is probably less
13 than six figures.

14 QUESTION: Less than this, so this is more than
15 he would get if he was killed.

16 MR. HELDT: I don't think that is true. You
17 asked what average range of verdicts are in two counties
18 in cases that I have never tried. I am not responsible
19 for justifying those. I am sure there is an overlap in
20 both cases.

21 I think there is more in damage to this case
22 than simply mental anguish. As I indicated, I think my
23 client's privacy interests were violated. He became a
24 public figure. The question is is that shown by evidence?
25 I mean, we are not speculating about it. It is shown

1 by the myriad of harrassing phone calls. I think it is
2 shown by the refuge dumped on his porch. The man became
3 an involuntary public figure. I don't think you can just
4 call that mental anguish and say that takes care of the
5 recovery.

6 He lost his zest for teaching. He couldn't
7 be a zealous advocate of his own students. He testified
8 to that. He said going back to school in the fall of
9 1979 under court order was the hardest thing he ever did
10 in his life. At the time of trial he said there is no
11 zeal any more, there is no fun. I tried to do a job and
12 look what has happened to me without ever the opportunity
13 to defend myself.

14 I think that is a loss that is something other
15 than measured by mental anguish. We are not asking the
16 jury to speculate about it. There is testimony in the
17 record that that is a real live, living and breathing
18 loss.

19 We offered expert testimony unrebutted in this
20 record that Mr. Stachura was foreclosed from a definite
21 range of employment opportunities. His professional career
22 was dead. That is a loss. It doesn't translate itself
23 into mental anguish.

24 QUESTION: Well, supposing this had been a diversity
25 case that was being tried before Judge Harvey in Port

1 Huron and the defendant was someone -- the school board
2 had done exactly these same things to the plaintiff except
3 there was no claim that there was a federal constitutional
4 violation, it was a claim that it was a violation of Michigan
5 state law. The plaintiff suffered all the exact same
6 damages that you say your client did.

7 Now, is your client entitled to an extra measure
8 of damages over the hypothetical case I proposed simply
9 because his identical damages stem from a violation of
10 a First Amendment rather than state law?

11 MR. HELDT: No, I don't think so and I don't
12 think this instruction says that. It is not different
13 than if the state court in your hypothetical instructed
14 that you may take into consideration that the plaintiff
15 has suffered damages because the defendant violated state
16 law. They weren't just merely negligent.

17 QUESTION: Well, isn't the real question we
18 have whether these instructions then permitted the jury
19 to base their award of damages in part or in whole on
20 the jury's estimate of the intrinsic value of the
21 constitutional right as opposed to all those things you
22 have been telling us about?

23 MR. HELDT: Well, that is the issue as framed
24 by the petitioner and to that we say, first of all, that
25 all the language of the instruction says is you may take

1 into consideration the roots of these rights and their
2 application in the context of Mr. Stachura's conduct at
3 the time those rights were violated in deciding what quantum
4 of damages should be awarded and that we did not argue --
5 We simply did not ask the jury to award some extra element,
6 award something over and above the reasonable value that
7 they placed on his suffering. That they placed it on
8 a higher plane that I did -- I mean, there is simply no
9 controlling precedent or law to suggest that there is
10 something wrong with that.

11 Indeed, not only the district court but the
12 Sixth Circuit said these numbers are justifiable. They
13 did not shock Judge Harvey's judicial conscience. He
14 sits up there and tries cases every day. They did not
15 shock the conscience of the Sixth Circuit and I don't
16 think in the light of the kinds of verdicts that are returned
17 today, I just -- I think I read about one in the New York
18 Times in the last 24 hours, \$13 million for somebody who
19 was killed in a AMC Jeep. I don't think \$300,000 in this
20 case is at all unreasonable in modern society. If it
21 was maybe \$2 million I might gulp when I make that argument,
22 but I just don't think that is the problem here.

23 QUESTION: But that isn't the allegation, is
24 it? We are not being asked to do something based on the
25 size of the verdict.

1 MR. HELDT: That seems to be Mr. Berardo's
2 argument here today. He says I don't know how much the
3 jury awarded for this, but after all, it was more than .
4 Mr. Heldt asked for and it must mean, therefore, that
5 the jury was misled by this instruction.

6 You have to remember that I think he has misread
7 the whole text and tenor of the court's instructions.
8 The court, three different times in laying out the elements
9 of my case, things that I must prove by a preponderance
10 of the evidence, said one of the things I must prove is
11 that the defendants by their conduct proximately caused
12 the damage to Mr. Stachura.

13 QUESTION: But you weren't satisfied with those
14 instructions. You asked for the additional instructions.

15 MR. HELDT: I asked only for an instruction
16 which said if you find there is damage, and there is clearly
17 damage in this record, you may take into consideration
18 in deciding what amount of money to place on that damage,
19 the fact that these are constitutional rights and that
20 they are important rights that the teacher was entitled
21 to engage in --

22 QUESTION: In short, if except for the fact
23 that there were constitutional rights involved, you would
24 have found \$50,000 worth of damage, because of constitutional
25 rights you are entitled to return \$200,000.

1 MR. HELDT: I don't think that is what the
2 instruction says.

3 QUESTION: Or one million. Did it put any limits?

4 MR. HELDT: The only limit was imposed by the
5 plaintiff's complaint which, as I understand it, was con-
6 siderably higher than the amount returned by the verdict.
7 I did not draft the complaint and I did not select the
8 numbers in it. But, as I recall, the complaint raised
9 the issues of some larger amount.

10 What I want to continue saying, because I think
11 it is important to understand the distinction in a way
12 the jury instructions are drafted, plaintiff is obligated
13 to prove under these instructions every element of his
14 case, including the conduct of the defendants prior
15 proximately caused damage to the plaintiff.

16 That is generally a threshold legal question.
17 It is tested as it was here by motions for directed verdict
18 at the close of my proofs. Did the plaintiff prove suf-
19 ficient damage that a jury could find that element has
20 been met?

21 And, of course, the district court said, yes,
22 there is sufficient evidence in this record to find some
23 damage and I am going to allow the case to go to the jury.

24 Every single time this court instructed -- He
25 actually did it four times, the district court actually

1 did it four times, three times on Mr. Stachura's claims
2 and a fourth time on the student plaintiff, James David
3 McDonald's claim, as well.

4 And, the court said, even in the student plaintiff's
5 case, although the student plaintiff only asks for nominal
6 damages and nothing more, one of the elements that James
7 David McDonald must prove is that he suffered damages as
8 a result of -- as a proximate result of the conduct of
9 the defendants.

10 And, it is not hard to understand in this record
11 why the jury no-caused Mr. McDonald because Mr. McDonald
12 didn't take the stand and he didn't try and testify that
13 he suffered some damage and there was no expert testimony
14 of damage. There was no testimony that James David McDonald
15 had been damaged at all.

16 What Mr. Berardo suggests is that the damage
17 instructions have to be merged. And, in fact, the opposite
18 is the case.

19 I started to say that once the court is satisfied
20 that a plaintiff has met that element of proof, has
21 established some quantum of damage, the case goes to the
22 jury and the instructions on damages are merely a guide
23 to assessing and weighing the damages that the jury is
24 obligated to find in order to satisfy those elements of
25 proof.

1 It tells the jury what things it may take into
2 consideration, what things it ought not to take into con-
3 sideration, it posits a test, you ought to try and put
4 the plaintiff in the same position as he had been in if
5 his rights had not been violated.

6 The instructions are not how to award damages
7 but how to assess damages if you find there are any at
8 all. There are no four categories of damages in the special
9 interrogatory form as Mr. Berardo would suggest. That
10 special interrogatory form doesn't say how much damages
11 do you award to compensate Mr. Stachura, and if none, what
12 nominal damages do you award, and if you award either,
13 do you award punitive and then create a fourth category
14 and say, oh, yes, now what damage is the award for the
15 value of constitutional rights? At all times there were
16 only three categories.

17 And, indeed, the word compensate or compensation
18 appears twice in the very instruction that is before this
19 Court.

20 It is not non-compensatory damages, it is merely
21 a part of the calculus by which one places a value on things
22 that are generally intangible. What is the value of a
23 loss of a leg? You can't decide that without some notion
24 of what it is like to live life with two legs and what
25 it might be like to live life with only one.

1 I submit that there is no basis in this case
2 for a reversal of the Sixth Circuit.

3 The jury may certainly consider the significance
4 of the rights before it as a part of the process of
5 evaluating what damages to award. No inherent value was
6 sought or argued. And Rule 51 certainly doesn't count.
7 It is the raising of such things as improper causation
8 instructions for the first time in this Court.

9 I don't think there is any meaningful prejudice
10 or probability of prejudice that necessitates a remand
11 for any purposes and I would ask the Sixth Circuit be
12 affirmed.

13 Thank you.

14 ORAL ARGUMENT OF PATRICK J. BERARDO

15 ON BEHALF OF THE PETITIONERS -- REBUTTAL

16 MR. BERARDO: Mr. Chief Justice, and may it please
17 the Court:

18 Just a couple of very brief points. First of
19 all, to say the principal arguments here are raised for
20 the first time belies the fact that the arguments to the
21 jury and the entire presentation of this case to the trial
22 court from defendants' side was aimed at attempting to
23 limit the damages to those that were caused by the action
24 of the defendants.

25 Causation has been an issue throughout this case

1 and continues to be the issue today. The instruction,
2 we submit, does not adequately reflect the fact that
3 causation is the elementary principle of damages that over-
4 rides the entire system of tort compensation.

5 QUESTION: Does your objection go to causation?

6 MR. BERARDO: Justice O'Connor, I think so.

7 QUESTION: As I looked at it, your objection
8 to the instruction was that they allowed the jury to
9 speculate on the value of a constitutional right citing
10 Carey.

11 MR. BERARDO: To say speculate to me means to
12 permit the jury to determine damages without relation to
13 objective factors and without relation to what caused the
14 damages.

15 In fact, the instruction itself defined a violation
16 of constitutional rights or a deprivation of constitutional
17 rights as the injury, then went on to allow damages to
18 be awarded without regard to either causation or determina-
19 tion of actual injury.

20 I think if you read that instruction, you will
21 get that flavor.

22 Notwithstanding the rest of the precautionary
23 instructions, the fact that it is given last in that context
24 would allow the jury to award damages without regard to
25 actual injury.

1 Secondly, to say that Carey versus Piphus is
2 not the substantive due process case is not entirely
3 accurate because Briscoe in a companion case had a free
4 speech claim concerning his earring and that, I submit,
5 was before the Court at the time that was decided. The
6 Court at that time declined to say that the rule didn't
7 apply in substantive due process cases but left the question
8 opened to be determined in each individual circumstance
9 depending upon the right involved.

10 I think additionally it is inconsistent for counsel
11 to argue that after asking for an award -- Excuse me, after
12 asking for an instruction on damages that he can then take
13 the position, either before the jury or before this Court,
14 that the instruction is harmless when, in fact, the intent
15 of the instruction was to permit damages to be awarded
16 and to permit the jury to assess factors in assessing the
17 damages against the defendants that otherwise would not
18 have been assessed.

19 Finally, proof of actual damages in this case
20 does not cure the error of this overbroad instruction.
21 It only exacerbates the error.

22 Thank you.

23 CHIEF JUSTICE BURGER: Thank you, gentlemen.

24 The case is submitted.

25 (Whereupon, at 2:26 p.m., the case in the above-

1 entitled matter was submitted.)

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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:

#85-410 - MEMPHIS COMMUNITY SCHOOL DISTRICT, ET AL., Petitioners V.

EDWARD J. STACHURA

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

BY Paul A. Richardson

(REPORTER)

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