

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: SHIRLEY M. MOLZOF, PERSONAL
REPRESENTATIVE OF THE ESTATE
OF ROBERT E. MOLZOF, Petitioner
v. UNITED STATES

CASE NO: 90-838

PLACE: Washington, D.C.

DATE: November 4, 1991

PAGES: 1 - 45

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----X
3 SHIRLEY M. MOLZOF, PERSONAL :
4 REPRESENTATIVE OF THE ESTATE :
5 OF ROBERT E. MOLZOF, :
6 Petitioner :
7 v. : No. 90-838
8 UNITED STATES :
9 -----X

10 Washington, D.C.

11 Monday, November 4, 1991

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:05 a.m.

15 APPEARANCES:

16 DANIEL A. ROTTIER, ESQ., Madison, Wisconsin, on behalf of
17 the Petitioner.

18 CHRISTOPHER J. WRIGHT, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.; on
20 behalf of the Respondent.

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	DANIEL A. ROTTIER, ESQ.	
4	On behalf of the Petitioner	3
5	CHRISTOPHER J. WRIGHT, ESQ.	
6	On behalf of the Respondent	22
7	REBUTTAL ARGUMENT OF	
8	DANIEL A. ROTTIER, ESQ.	
9	On behalf of the Petitioner	41
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in number 90-838, Shirley M. Molzof v. The United
5 States. You may proceed whenever you're ready.

6 ORAL ARGUMENT OF DANIEL A. ROTTIER

7 ON BEHALF OF THE PETITIONER

8 MR. ROTTIER: Mr. Chief Justice, and may it
9 please the Court:

10 The case before the Court today in this case
11 relates to the definition of punitive damages as that term
12 is used in the Federal Tort Claim Act. The basic
13 structure of the Federal Tort Claim Act is premised on
14 three features.

15 The first is that in these cases the United
16 States is to be treated as would a private individual if
17 it were a defendant in a tort claim. The second feature
18 is that the law of the State where the tort occurred is to
19 be applied, and the third feature is that certain
20 exceptions are engrafted in the law. One of those
21 exceptions, namely the punitive damage exception, is the
22 one that the Court is concerned with today.

23 It is our position that if the Government's
24 definition of punitive damages is to be accepted as it was
25 by the Seventh Circuit and the Fourth Circuit, it would

1 emasculate the objectives of the Federal Tort Claim Act,
2 because it would result in the Government not being
3 treated as would an individual citizen if the individual
4 citizen were the defendant, and that's the --

5 QUESTION: Mr. Rottier, do you think that this
6 punitive damages exception to governmental liability under
7 the act is a question of Federal law, which requires
8 uniformity?

9 MR. ROTTIER: I believe the definition of
10 punitive damages as used in the exclusionary clause is a
11 matter of Federal law.

12 QUESTION: So that does not depend, then, on the
13 law of the particular State which would otherwise govern
14 tort liability?

15 MR. ROTTIER: That's correct, but I -- but I
16 believe the Federal interpretation should bear in mind the
17 other objectives of the act, one of which is to treat the
18 Government as an individual citizen would be treated if it
19 were a defendant.

20 QUESTION: Well, except -- except it doesn't. I
21 mean, you treat the Government as an individual citizen
22 except with respect to punitive damages. I mean, it seems
23 to me you're sort of begging the question when you say you
24 have to treat the Government the same way you treat
25 everybody else. You don't with respect to punitive

1 damages.

2 MR. ROTTIER: The approach I would suggest is
3 the one used by the this Court in the Neustadt case, where
4 the issue was how to define misrepresentation, since that
5 is also an excluded basis of liability for the Government,
6 and there what the Court did was to look at the commonly
7 accepted definition of misrepresentation as it existed at
8 the time the Federal Tort Claim Act was enacted.

9 I would suggest that this Court should do the
10 same thing with respect to punitive damages. And what I
11 believe the Court would find is there was general
12 consensus among the writers and among the courts as to
13 what punitive damages are, and the definition, for
14 example, that was used by this Court in the Milwaukee
15 railroad case going back to 1875 focuses on the nature of
16 the conduct of the defendant as opposed to the effect of
17 the receipt of the damages by the plaintiff.

18 I think that's where the Flannery court and the
19 Molzof court deviated from an appropriate approach to this
20 problem. They focused on the effect of the receipt of the
21 award on the plaintiff, as opposed to focusing on the
22 basis of imposing the award.

23 In this case, one might ask this question:
24 would Mr. Molzof have been entitled to future medical
25 expenses if the defendant were a private hospital instead

1 of a veterans' hospital? The answer is absolutely clear,
2 under Wisconsin law, that, yes, he would have been. And
3 then, to remain in keeping with the -- one of the
4 objectives of the act, the Government should be treated
5 the same, unless -- unless the basis for awarding these is
6 the basis on which punitive damages are normally awarded.

7 QUESTION: What principle of Wisconsin law is it
8 that leads you to answer that question the way you did?

9 MR. ROTTIER: Under traditional Wisconsin common
10 law in tort cases, if a plaintiff can show that the
11 negligence of a defendant was a substantial factor
12 contributing to the need for future medical expenses,
13 those are awardable. In some instances, they're
14 subrogated to someone who has paid them. That much is
15 true.

16 In this case, for example, this entire problem
17 that's presented could easily be remedied by Congress. If
18 Congress had approached the Federal Tort Claims Act as
19 strictly a compensation act and defined what elements of
20 compensation were to be included, it would be much more
21 easily applied. Or, if it wanted to avoid this type of
22 situation, it could have enacted a set-off procedure, just
23 as it did for disability benefits under 38 U.S.C. 351 --
24 and the Court I am sure is familiar with that.

25 If, for example, a veteran is malpracticed upon

1 and it causes an increase in disability benefits, the
2 Government, pursuant to section 351, suspends payment of
3 the previously enacted and previously ordered disability
4 payments so that a double payment does not result. That
5 is what two of the circuits have recommended to Congress
6 over the years, in the Feeley case in 1964 and in the
7 Ulrich case.

8 In both of those instances -- those are the only
9 two circuit cases before Molzof where this particular
10 issue was presented -- both of those circuits said that
11 they were uncomfortable with the potential of a double
12 recovery, but that the resolution of that problem was for
13 Congress, not for the courts.

14 QUESTION: Mr. Rottier, I suppose you're just
15 arguing that this is governed by State law, right, and if
16 a State chose not to allow double recovery, then there
17 wouldn't be. Is that so, or not?

18 MR. ROTTIER: That's correct. If, for
19 example -- and I think it is -- this problem can be dealt
20 with through State law, if for example a -- under State
21 law a particular type of compensatory damage is deemed to
22 be excessive, then it can be -- then it is certainly not
23 awarded.

24 In -- if we took Flannery, for example, which
25 gave rise to this discussion generally, where you had a

1 comatose individual, where \$1.3 million was awarded for
2 that, the Federal court could merely have addressed that
3 issue on the basis of excessiveness. If it thought -- if
4 the circuit court, the court of appeals, felt that under
5 the State law such damages were awardable, it could have
6 diminished them on the basis of excessiveness.

7 QUESTION: Well, did Judge Shabaz actually award
8 damages here, or did he say these are what you would be
9 entitled to accept for the punitive damages exception? He
10 was affirmed by the court of appeals, wasn't he?

11 MR. ROTTIER: That's -- you're correct on both
12 points. The judge did not award damages. The judge made
13 a finding as to what they would be were they not
14 prohibited and did they not fall within the exclusion as
15 being punitive damages, and that was affirmed by the
16 Seventh Circuit.

17 QUESTION: May I ask you a question, Mr.
18 Rottier? You said, if this individual had been in a
19 private hospital rather than a Government hospital, it's
20 perfectly clear that under Wisconsin law there would have
21 been a recovery for the lost medical expenses, the large
22 amount in dispute. But it's not equally clear, is it, as
23 a matter of Wisconsin law, that if this were -- case were
24 tried in a Wisconsin court on the present facts, that a
25 Wisconsin court would have awarded this kind of potential

1 double recovery?

2 MR. ROTTIER: To the contrary. I think it is
3 clear that the finder of fact in such a situation, which
4 would have been a jury, would have had to address the very
5 same questions of duration of Mr. Molzof's life, and the
6 reasonable amount of the future medical expenses, but they
7 would have been awarded.

8 QUESTION: But might they not have given credit
9 for the full amount of the care that the Federal
10 Government is going to give to this individual?

11 MR. ROTTIER: Under Wisconsin law, that would
12 have been viewed as a collateral source, and that would
13 not have been factored in with respect to the award of
14 future damages.

15 QUESTION: Well, how can you be so sure it would
16 have been viewed as a collateral source? This is not an
17 insurance case.

18 MR. ROTTIER: In Wisconsin, and partly from
19 experience, in Wisconsin governmental benefits are viewed
20 as a collateral source. However, with respect to both
21 State-of-Wisconsin-paid benefits as well as certain
22 Federal benefits there is subrogation for past
23 expenditures, but there is no statutory subrogation for
24 Wisconsin-paid benefits for in the future.

25 QUESTION: Well, is there a set-off? The

1 Government really argues this is a set-off, doesn't it?
2 Is there set-off under Wisconsin law?

3 MR. ROTTIER: It does affect eligibility under
4 Wisconsin law.

5 QUESTION: Well, suppose the Wisconsin defendant
6 was a hospital, and that hospital had entered into a
7 contract after the injury to give lifetime care. Would
8 that have been a set-off under Wisconsin law?

9 MR. ROTTIER: I know of no such arrangements. I
10 do not believe it would have been, because it would
11 compel --

12 QUESTION: Because it -- because it -- it seems
13 to me that's quite different from a collateral source.

14 MR. ROTTIER: The way the set-off provisions
15 work in Wisconsin with respect to State-paid benefits is
16 that the receipt of an award for future medical expense
17 affects eligibility.

18 QUESTION: Yes, but this is not just a State-
19 paid benefit, I think that's the point that's being made.
20 It is State-paid, and yes, that's a collateral source, but
21 this is a defendant-paid benefit, as well. That's the
22 distinctive thing, and you don't know of any defendant-
23 paid cases.

24 MR. ROTTIER: None that have been reported.
25 There's a -- there's an issue that's starting to arise

1 relating to health maintenance organizations and attempts
2 to subrogate them for future medical expenses, but those
3 have not been reported.

4 The point I was trying to make, members of the
5 Court, is that this is a problem which is very easily
6 remedied by congressional action or, in fact, by action by
7 the Veterans Administration, because all that needs to be
8 done is that eligibility for future veterans' benefits is
9 affected by receipt of an award for future medical
10 expense, just as they did with section 351 by affecting
11 eligibility for future disability payments once a veteran
12 has received an award pursuant to the Federal Tort Claims
13 Act.

14 QUESTION: Well, if the suggestions made by my
15 colleagues here are correct, perhaps whatever problem
16 exists could be remedied simply by the fact-finder, the
17 awarder of damages in the Federal Tort Claims Act case, if
18 in fact the collateral source doctrine as applied in
19 Wisconsin doesn't squarely cover this subject.

20 MR. ROTTIER: I think the deficiency in that
21 approach, Mr. Chief Justice, is that it will require
22 Federal courts to evaluate each and every element of
23 compensatory damages and address the effect of their
24 receipt on the plaintiff, instead of focusing on what I
25 think is the more appropriate question, which is, on what

1 basis is an award being made.

2 Is it on the basis of negligence which is
3 compensable, or is it on the basis of more egregious
4 conduct which rises to the level of that which would
5 support punitive damages? It's an award based on that
6 type of conduct which is prohibited.

7 QUESTION: Well, what I'm suggesting is not that
8 this comes within the punitive damages exception, but that
9 perhaps the district judge sitting in Madison might
10 conclude that although Wisconsin law follows the
11 collateral source doctrine, this is not, strictly
12 speaking, a collateral source question, so perhaps, even
13 without any action from Congress, the plaintiff is not
14 entitled to double recovery.

15 MR. ROTTIER: Some courts in fact have used that
16 approach with respect to medical expenses paid by the
17 Government prior to trial. Indeed, in this case, no claim
18 was made for past medical expenses incurred prior to trial
19 because of the concern raised in those Federal courts,
20 including the Seventh Circuit in the Green case.

21 However, the problem with that is that you force
22 the fact-finder -- by finding that this is the only source
23 of medical care the plaintiff will use for the balance of
24 his or her life, you essentially force the fact-finder to
25 make that plaintiff a life-long prisoner of that health

1 care provider, whoever it may be.

2 If we stepped outside of the Veterans
3 Administration for the moment and said this were a private
4 hospital --

5 QUESTION: That would be a very bad thing for
6 Wisconsin to do, let's agree with you. But if it's -- if
7 it's -- I mean, if it's State law, it's State law. You're
8 -- you're talking to the wrong -- to the wrong --

9 MR. ROTTIER: Well, I very much agree with you.
10 If it's State law, it's State law, and that's what I'm
11 asking be applied here. State law in Wisconsin would
12 allow an award of future medical expense, irrespective of
13 any future obligation on the part of a private insurance
14 company or the Government to make payment for those
15 medical expenses.

16 QUESTION: Well, you don't have a case that says
17 that, though. You don't have a case in which the
18 defendant in the particular case has, before the verdict
19 come in, committed itself to provide all of the -- provide
20 the -- what would otherwise be paid for --

21 MR. ROTTIER: I have no such case --

22 QUESTION: And it's certainly not beyond the
23 realm of possibility that the Wisconsin court would say,
24 this is a double recovery, it's a set-off. I mean, it
25 seems to me all you should be asking for is to have us

1 send the case back to decide that question as a matter of
2 Wisconsin law. It has not yet been decided, as I
3 understand the record in this case.

4 MR. ROTTIER: I know of no case, Your Honor,
5 that -- where a defendant -- a private defendant has come
6 in --

7 QUESTION: And the district judge certainly
8 didn't decide it in this case.

9 MR. ROTTIER: Nor does the Government know of
10 any such case, at least as reflected by its brief, and it
11 would strike me --

12 QUESTION: But it's certainly not a frivolous
13 position, when the family seems happy with the Government
14 service it's getting in the future to say the Government
15 shouldn't have to pay for it twice. I mean, it's -- maybe
16 you're right, as a matter of Wisconsin law, but it
17 certainly is an arguable point, isn't it?

18 MR. ROTTIER: I'm not contending it's a
19 frivolous position. What I am contending is that this
20 very issue, as serious as it is, was raised in the Feeley
21 and the Ulrich courts, and both of them said, this is a
22 serious problem, Congress should remedy it. Congress has
23 chosen not to remedy it, even though it took care of the
24 double payment potential with respect to disability
25 benefits, and it took care of it very simply in 38 U.S.C.

1 351.

2 QUESTION: But it's only a serious problem in
3 those -- States that choose to make it a serious problem.
4 I mean, it is a serious problem where a State would allow
5 the double recovery, and that's what we don't know is the
6 situation here. It may not be a problem in Wisconsin.
7 What were those other -- those other cases, did they
8 involve Wisconsin law, or the law of other States?

9 MR. ROTTIER: It was the law of other States.
10 One was Pennsylvania and the other New York, and then
11 there are lower court decisions in Connecticut and the
12 Eastern District of Pennsylvania, which followed the same
13 principle.

14 QUESTION: Well, you seem to have -- if you get
15 you want, you seem to concede that there would be a double
16 recovery.

17 MR. ROTTIER: I don't necessarily concede that,
18 but what it would do -- I concede it creates the
19 potential.

20 QUESTION: Well, you'd be -- you'd be being paid
21 for something that you're not out of pocket for.

22 MR. ROTTIER: I concede there is that potential.

23 QUESTION: Is that right?

24 MR. ROTTIER: I concede there is that potential,
25 Your Honor. However --

1 QUESTION: And yet -- and yet you say that
2 every -- every dollar you want, you would categorize as
3 compensatory?

4 MR. ROTTIER: Every dollar we're requesting I
5 would categorize as nonpunitive, and if it is nonpunitive,
6 it falls outside the exclusion.

7 QUESTION: Well, what is it if it isn't
8 compensatory or punitive?

9 MR. ROTTIER: Well, as the Court knows --

10 QUESTION: What do you call that?

11 MR. ROTTIER: As the Court knows, there's been
12 much written about those two components and whether
13 they're totally mutually exclusive or not.

14 If you look at them from the perspective of the
15 basis on which they're awarded --

16 QUESTION: So I suppose you would lose if we
17 concluded that anything that is not compensatory is
18 punitive?

19 MR. ROTTIER: Yes, but I respectfully disagree
20 with the approach. I think the approach would be from the
21 perspective of what is the basis on which the damages are
22 being awarded, because that was how punitive damages were
23 defined traditionally at the time the Federal Tort Claims
24 Act was imposed. It's those damages which were imposed
25 because of the egregious conduct of the defendant. It

1 was --

2 QUESTION: Would you say that actual damages
3 imposed in a State which follows the collateral source
4 doctrine were compensatory?

5 MR. ROTTIER: They are compensatory even in
6 circumstances where they're --

7 QUESTION: Where there's a double --

8 MR. ROTTIER: -- where they're duplicative.

9 QUESTION: Yeah, okay.

10 MR. ROTTIER: They remain compensatory because
11 the basis on which they were awarded was simple
12 negligence, as opposed to some higher level of egregious
13 conduct.

14 QUESTION: Well isn't the definition of punitive
15 damages a question of Federal law?

16 MR. ROTTIER: It is --

17 QUESTION: I mean, what punitive damages means
18 under the Federal Tort Claims Act?

19 MR. ROTTIER: I agree with that, Your Honor.

20 QUESTION: And if the Federal law is that
21 anything that isn't compensatory is punitive --

22 MR. ROTTIER: I lose.

23 QUESTION: Yeah. Yeah. And so we get back to
24 whether or not what you want is compensatory?

25 MR. ROTTIER: I'd like to just take a half-step

1 back, if I may, Your Honor. That's why it's so important
2 that the Court, in deciding the definition of punitive
3 damages, look to the traditional common law definition,
4 and it hinged, as far as I know, on the nature of the
5 defendant's conduct. That's a --

6 QUESTION: We aren't -- we aren't -- we aren't
7 required to follow State law in defining punitive damages?

8 MR. ROTTIER: Not with respect to the Federal
9 Tort Claims Act.

10 QUESTION: Yes.

11 MR. ROTTIER: But I think the precedents of this
12 Court are clear as to what punitive damages are both in
13 the context of the Federal Tort Claim Act as well as in
14 the broader context, going back to the 1800's. It's based
15 on -- it has not been defined -- punitive damages have not
16 been defined by this Court as those which are not
17 compensatory.

18 It was defined as those which are to be awarded
19 to punish and deter egregious conduct of the defendant.
20 And those damages were never sought in this case, and they
21 would not have been available under Wisconsin law even if
22 the punitive damage exclusion provision were not in the
23 Federal Tort Claim Act.

24 The other problem with the approach taken by
25 Judge Shabaz in the Seventh Circuit is that it resulted in

1 an unworkable situation. Essentially, Judge Shabaz -- and
2 you may recall at the end of his decision from the bench,
3 I asked him if he were giving -- granting the equivalent
4 of a permanent injunction against the Veterans
5 Administration to provide the same level of care, and he
6 said that the Court would retain jurisdiction and would
7 monitor the situation and be available for interim relief.

8 The Court went on, however, to find that there
9 were deficiencies in the Veterans Administration care and
10 awarded \$25,000 a year so that the family could bring in
11 an outside physician, outside physical therapists, outside
12 respiratory therapists, and supplement the care in the
13 respects in which it was deficient.

14 That is an unworkable situation. Essentially
15 what he said is, all future damages for medical care,
16 other than \$25,000 a year, are noncompensatory and thus
17 punitive, but he conceded that at least to the extent of
18 \$25,000, compensatory damages were justifiable.

19 QUESTION: Mr. Rottier, suppose we were to agree
20 with you on the punitive damages point but -- but disagree
21 with you on the -- on the duplicative damages point, or at
22 least not know what the answer to that is because we think
23 it's a matter of Wisconsin law, what ought our judgment to
24 be?

25 In other words, suppose we agree that even

1 though it's noncompensatory it is recoverable so long as
2 it is not punitive damages in the -- in the generally
3 understood common law sense, okay? But suppose we further
4 say we don't know what the -- what the Wisconsin law is as
5 far as recovering judgment from the same defendant for
6 damages that he's already paying in some other capacity.
7 What should we do with the case, if that's how we come
8 out? You lose, or -- I mean, or what? What happens?

9 MR. ROTTIER: I don't lose until a decision is
10 made, but one option is to -- I assume, to certify it to
11 the Wisconsin Supreme Court to answer that question, if
12 you're uncomfortable with the status of Wisconsin law on
13 that issue.

14 I'm of the belief that Wisconsin law would allow
15 such recovery, albeit that no such specific case has been
16 presented in Wisconsin.

17 QUESTION: Well, is there -- is there the same
18 doubt -- you have another claim for a different type of
19 damages, the loss of life enjoyment?

20 MR. ROTTIER: Yes. A claim was brought --

21 QUESTION: Is that -- is there doubt about that
22 under Wisconsin law?

23 MR. ROTTIER: There is doubt about that under
24 Wisconsin law.

25 QUESTION: I see. You don't have any case

1 allowing loss of enjoyment of life where the patient is
2 comatose and likely never to recover?

3 MR. ROTTIER: That is correct. There is a
4 series of cases of longstanding that allows compensation
5 for loss of enjoyment of life, but none of those fact
6 situations focused on a situation where the plaintiff
7 was -- was comatose, and totally unaware of his or her
8 condition. That is an undecided issue under Wisconsin
9 law.

10 QUESTION: Well, I --

11 MR. ROTTIER: There have been trial court
12 decisions, but --

13 QUESTION: I suppose if someone loses an arm, he
14 can recover damages for having lost an arm even, though he
15 never well have the chance of using that arm at all?

16 MR. ROTTIER: Well, the -- obviously the side of
17 the argument that I prefer is the one that no awareness of
18 a loss is needed if an objective analysis can be made that
19 a loss did occur and that some reasonable value can be
20 affixed to it.

21 On the other hand, perhaps the best discussion
22 of the need for some conscious awareness is in the
23 McDougald case out of New York State, which actually
24 followed Rufino, and in that case -- and I may be arguing
25 the Government's point here -- in that case there was a

1 threshold requirement that there be some minimal awareness
2 of the loss of enjoyment of life, and once that threshold
3 requirement was met, then damages for that component were
4 awardable.

5 Your Honors, in summary, before I sit down and
6 reserve the balance for rebuttal, what I'm asking is that
7 the Court look at the statute itself. The statute is very
8 clear in the sense of wanting to apply State-by-State law.
9 Yes, that results in a sometimes awkward situation because
10 of variances from State to State, but that is the intended
11 structure of the act. And to follow the Government's
12 reasoning in this case will reduce the effect of that
13 provision and fly in the face of the intent of Congress
14 with respect to that provision.

15 I reserve the balance. Thank you.

16 QUESTION: Thank you, Mr. Rottier.

17 Mr. Wright, we'll hear from you.

18 ORAL ARGUMENT OF CHRISTOPHER J. WRIGHT

19 ON BEHALF OF THE RESPONDENT

20 MR. WRIGHT: Mr. Chief Justice, and may it
21 please the Court:

22 I'd like first to discuss some general
23 principles applicable to both claims in this case, and
24 then turn to petitioner's claim for \$1.3 million for
25 future medical care, and finally to the claim for loss of

1 enjoyment of life.

2 The Government's basic submission in this case
3 is that there are only two kinds of tort damages, a matter
4 that's already come up -- punitive and compensatory. We
5 agree with the court below that there is no third category
6 of tort damages that are both noncompensatory --

7 QUESTION: You don't think there is under any
8 State law that you know of?

9 MR. WRIGHT: I know of no State that defines it,
10 that has a third category, and frankly I don't think
11 opposing counsel was able to come up with a third category
12 today. We think that there are basically only two.

13 We admit that it is sometimes difficult to
14 calculate tort damages, and we do not contend that
15 compensatory damages need to be made with a sort of a
16 scientific precision that is impractical.

17 QUESTION: Mr. Wright, could you step a little
18 closer to the microphone? I'm having a little difficulty
19 hearing you.

20 MR. WRIGHT: Sorry.

21 QUESTION: Mr. Wright (inaudible). Wouldn't it
22 make the analysis easier if you'd said there are three
23 categories of damages: there are punitive damages, there
24 are damages for pecuniary loss, and then there are damages
25 for nonpecuniary loss? Aren't we fighting -- we're

1 fighting over at least part of the third category here.

2 You're saying there's no pecuniary loss for a
3 variety of reasons, but doesn't the -- doesn't the
4 argument at least, or doesn't the position that the
5 circuit took rest on -- on -- on sort of this, I think
6 improper inference that because punitive damages do not
7 compensate the pecuniary loss, any damages which do not
8 compensate the pecuniary loss are punitive?

9 And if we reject that inference, which is an
10 improper inference, then we're -- we're simply thrown back
11 on the definition of punitive damage that your brother
12 came up with, and he says the way to solve the problem of
13 what to do with nonpecuniary loss is simply determine the
14 basis upon which the damage is awarded. Is it punishment
15 for egregious conduct, or isn't it? I guess my question
16 is, did the lower court make the improper inference that I
17 have just imputed to it?

18 MR. WRIGHT: I don't think so, Your Honor. Let
19 me make a number of points in response. Pecuniary and
20 nonpecuniary losses are normally thought of as
21 subcategories of compensatory losses. We do not argue,
22 and I don't believe the lower court thought, that
23 nonpecuniary losses are always noncompensatory.

24 Let me add that a future medical expense award
25 is, of course, a pecuniary sort of loss. This concern I

1 think goes more simply to the loss of enjoyment of life
2 award, and let me say in response to your question,
3 finally in response to that, we do not -- we think this is
4 a very special category of case with respect to the loss
5 of enjoyment of life issue.

6 QUESTION: What's the difference between loss of
7 enjoyment of life and pain and suffering?

8 MR. WRIGHT: Many -- courts, States, think of it
9 as a subcategory further of pain and suffering. Some
10 courts say that it is a different sort of nonpecuniary but
11 compensatory loss. We do not --

12 QUESTION: Well, you wouldn't claim that pain
13 and suffering damages are punitive.

14 MR. WRIGHT: We would not contend that pain and
15 suffering damages are punitive.

16 QUESTION: All right. Why -- why, then, are --
17 is the category of loss of enjoyment punitive?

18 MR. WRIGHT: Only under the circumstances of
19 this case, where Mr. Molzof was never aware of a loss of
20 enjoyment of life.

21 QUESTION: But isn't that a question that goes
22 to the definition of what can be compensated for loss of
23 enjoyment of life, as opposed to what goes to what is
24 punitive and nonpunitive?

25 You're saying, you shouldn't award him loss

1 for -- damages for loss of enjoyment because he'll never
2 know. And that seems to me to be a question about the
3 basis in State law on which those damages may be awarded,
4 but it does not seem to me obviously to go to what is or
5 is not, or whether they are or are not punitive unless you
6 expand the standard definition of punitive damages.

7 MR. WRIGHT: Well, Your Honor, we have a
8 different view of punitive damages than does petitioner.
9 As -- as I've said, they think -- we all agree that
10 something is punitive only if it is on top of
11 compensation. They would contend that it not only has to
12 be on top of compensation but it has to be calculated
13 according to the egregiousness of the conduct at issue,
14 and let me -- let me say in response to that that we think
15 the following hypothetical shows that this is wrong.

16 If this were a case where there was undisputed
17 evidence that a person, an employee at the VA hospital,
18 had maliciously disconnected the respirator, it would be
19 perfectly clear -- everyone would agree -- that the United
20 States could not be subjected to punitive damages for that
21 reason. We think it odd to argue that because there is no
22 such finding, a noncompensatory award may be added on top
23 of the compensatory damages.

24 QUESTION: Well, but the --

25 QUESTION: The manner in which you are assuming

1 that anything which is not compensatory either in a
2 pecuniary fashion or for an element of damage which the
3 patient could appreciate is necessarily punitive. I mean,
4 your whole argument rests on that identification.

5 MR. WRIGHT: With respect to loss of enjoyment
6 of life, our entire argument is that because Mr. Molzof,
7 under these unusual circumstances, never had any
8 appreciation of loss of enjoyment of life, an award for
9 that item is necessarily noncompensable and hence
10 punitive. But let me stress that there were nonpecuniary
11 damages awarded in this case, and we don't challenge them.

12 Mrs. Molzof received \$150,000 for loss of
13 consortium. We certainly do not contend that that --

14 QUESTION: And you wouldn't be challenging this,
15 if -- except that the -- if the patient weren't in a
16 vegetative state.

17 MR. WRIGHT: Yes, Your Honor. It's a seemingly
18 paradoxical situation, of course. Typically, the more
19 severely you are damaged, the greater your loss of
20 enjoyment of life is, and the greater an award is
21 appropriate.

22 QUESTION: Mr. Wright, suppose you have a State
23 statute that says, for all trespasses the trespasser shall
24 be liable for the owner of the property for five -- for
25 \$5,000, and the Government somehow is -- is sued under the

1 Tort Claims Act on a trespass. What result? That's
2 punitive damages, in your estimation?

3 MR. WRIGHT: I think not, the way you say it,
4 because I assume that something like the following would
5 be proposed as a rationale. This is a sort of liquidated
6 damages, if you will, that the State has decided that it's
7 very hard to approximate exactly what compensation is --

8 QUESTION: So whatever the State thinks is
9 compensation is good enough?

10 MR. WRIGHT: We think that as a general matter,
11 that's so. We think that there are certain circumstances
12 where it is so clear that a particular award is not
13 compensatory, and we have two of those situations here,
14 that that --

15 QUESTION: Maybe the State here thinks that, you
16 know, that this is -- for loss of enjoyment of life they
17 might deem it compensatory. I mean, I don't know -- it
18 seems to me it clearly isn't compensatory. If you say
19 \$5,000, just a spot number -- \$5,000 for everything, you
20 could recover on that but you can't recover here?

21 MR. WRIGHT: Certainly not -- you could recover
22 here certainly if a State said that for the reasons I
23 outlined that it needs to be compensatory. If a State
24 said, I think that we're deterring a trespasser, so even
25 if there's no damage we're going to award \$5,000, that, in

1 our view, would be -- would be punitive.

2 QUESTION: What if -- what if you have a State
3 that follows the normal collateral source doctrine and you
4 subscribe to Blue Cross, the Blue Cross covers your
5 hospital, your hospital bill is \$5,000, you're entitled to
6 recover that amount, I believe, from the tort-feasor. Is
7 that, in your view, punitive damages?

8 MR. WRIGHT: No, Your Honor, and you could say
9 that the key difference there is that in that situation
10 the tort-feasor is not required to pay twice for the same
11 injury. In this situation -- and we're turning now to the
12 \$1.3 million for future medical care -- the question is
13 whether the Federal Government will both pay employees at
14 the VA hospital to provide care and award \$1.3 million on
15 top of that to provide care.

16 QUESTION: So double recovery does not mean it's
17 punitive. Double payment would?

18 MR. WRIGHT: Yes, Your Honor. Let me add, as
19 well, that in your situation double recovery would not
20 occur either. Blue Cross has a very strong subrogation
21 policy that it would enforce.

22 QUESTION: I thought some States don't allow
23 that. I thought some States have laws that if you recover
24 you can -- you can get your insurance and the recovery
25 both. That would --

1 MR. WRIGHT: It is possible that subrogation
2 does not always work in some circumstances.

3 QUESTION: Right, and in that case, would you
4 consider those punitive damages?

5 MR. WRIGHT: No. In that case --

6 QUESTION: Why not?

7 MR. WRIGHT: -- we would say -- well, it's a
8 timing problem, really. The tort-feasor is only required
9 to pay once. The tort-feasor has harmed the victim in a
10 way that compensation is required, and --

11 QUESTION: Well, but that -- that bears no
12 relationship to whether it's compensatory or not. Whether
13 one person pays once or twice doesn't make it compensatory
14 or noncompensatory. Compensation is determined from the
15 point of view of the recipient, not the donor, and you've
16 accepted a case where the donor is clearly getting the
17 money twice and yet you say that is not punitive. That is
18 not a punitive award, but somehow in this case it is. It
19 seems to me quite illogical.

20 MR. WRIGHT: It -- it seems clear to us that the
21 first payment is compensatory and the second payment is
22 punitive. As between the tort-feasor and the victim we
23 think that State law has reasonably determined, and we
24 would not challenge, that we will just look at the
25 relationship of the tort-feasor and the victim and require

1 the tort-feasor to pay for the damage to the victim.

2 QUESTION: Well, I agree that punitive is looked
3 at from the -- from the standpoint of the person that
4 pays, but you say everything is punitive that is not
5 compensatory, and yet you accept the Chief Justice's
6 example of something that is clearly not compensatory, and
7 for some reason you say that that is not punitive. And I
8 don't see why.

9 MR. WRIGHT: Well, a first payment isn't. The
10 question is what to do with the third party, with whom,
11 typically, there's a separate contract. You've
12 contracted, typically, both for an award -- in case you
13 are damaged you not only get compensation but you get the
14 benefit you've contracted for as well. That's the
15 situation in that case.

16 Let me -- let me pose a hypothetical, if I may,
17 in the double damage issue. If a State decided, perhaps
18 in cases where serious injuries such as occurred here
19 result, that it will award double damages in all cases,
20 not measured by egregiousness or maliciousness or any sort
21 of traditional punitive damage or -- just double damages
22 in all case, it seems to us under petitioner's theory that
23 is not a punitive damage award under section 2674.

24 We think, to the contrary, such an award, which
25 would be plainly deterrent in purpose and effect and is

1 really no different than the future medical award in this
2 case, we think that that sort of -- that sort of damage
3 award clearly has to be struck down under --

4 QUESTION: Why do you say that? The statute
5 says, to the same extent as a private individual under
6 like circumstances, but shall not be liable for interest
7 prior to judgment or for punitive damages. The only
8 exclusion is punitive damages, and you have described a
9 case in which there are no punitive damages under common
10 law -- under your common law hypothesis, right?

11 MR. WRIGHT: Under petitioner's view that
12 punitive damages --

13 QUESTION: I mean, if we assume Congress meant
14 to adopt the common law version of punitive damages, the
15 Government would have to pay just like any private party
16 would in that situation, wouldn't they, if you just read
17 the statute literally, and if you interpret punitive
18 damages in the common law sense?

19 MR. WRIGHT: If you interpret punitive damages
20 to mean what petitioner says.

21 Now, in the common law sense, I'd like to say
22 that, first, an element of --

23 QUESTION: Well, you don't agree with his --

24 MR. WRIGHT: Right.

25 QUESTION: -- understanding of the common law.

1 MR. WRIGHT: An element of agreement has
2 actually occurred during the course of the briefing of
3 this case. We now all agree, and it was stated today,
4 that punitive damages is defined according to Federal law.
5 The question is, what did Congress mean in 1946 when it --
6 when it enacted the Federal Tort Claims Act?

7 At that time, of course, it was well understood,
8 as it is today, that the purpose of tort damages, the
9 primary purpose, is compensatory. Opposing counsel was
10 kind enough to reference the New York Court of Appeals
11 McDougald case. I would like to further recommend that
12 case. It -- the court explains in some detail that we
13 always start in tort cases with the principle that
14 compensation is the goal, not punishment.

15 QUESTION: Yes, but it is true, is it not, that
16 at least in this paragraph of the statute the word
17 "compensatory" doesn't appear?

18 MR. WRIGHT: That's right, Your Honor.

19 QUESTION: It only appears in the death action
20 section.

21 MR. WRIGHT: I think that Congress in 1946
22 understood that there was one exception to the rule that
23 punitive damages -- I mean, I'm sorry -- that compensatory
24 damages are the purpose for awarding damages in tort. And
25 that exception was, and with relatively few exceptions

1 continues to be, that the occasion for departing from the
2 rule is when the behavior of the tort-feasor is
3 particularly egregious.

4 In 1946, I think Congress could -- would -- must
5 have thought courts would award compensatory damages and
6 they would award noncompensatory damages only in the
7 circumstances where there was a judgment of maliciousness.

8 QUESTION: Supposing you had a situation instead
9 of your double recovery where you had a no-fault program
10 in the State system and they awarded -- they set precise
11 recoveries for different kinds of injuries like you do
12 under workman's compensation, and they were demonstrably
13 30 percent higher than the actual compensation required.
14 Would you have to shave off the excess under your theory?

15 MR. WRIGHT: I'm sorry, a workers compensation
16 award?

17 QUESTION: Say you have a no-fault tort program
18 in which the amount of damages for different kinds of
19 injuries are set by statute, as they are in the workman's
20 compensation program, and those amounts were deliberately
21 set by the legislature at maybe 25 or 30 percent above
22 what they would calculate to be actual damages, to add a
23 little deterrence and to -- and to take care of possible
24 inflation, one thing and another. They just fixed them a
25 little high at the start.

1 What would happen under such a statute under
2 your view? Would part of that be punitive?

3 MR. WRIGHT: I would think in the general case,
4 no, our position is not that compensation can be and must
5 be awarded exactly, and I can well imagine a State
6 situation that we would not challenge where a damage was
7 an approximately, as most nonpecuniary damage awards are.

8 I was troubled when you added to your
9 hypothetical situation where a State intentionally said
10 we're going to add 25 percent on top for deterrent effect.
11 It seems to me quite clear that in that situation, yes,
12 the add-on for deterrence could only be understood as
13 being punitive.

14 QUESTION: Mr. Wright, what about this case? A
15 State decides that it wants to cut down the amount of
16 sympathy and sort of cry-baby damages the juries award, so
17 they adopt a scheme whereby in place of the old common-
18 law rule all damages for personal injury will be assessed
19 on the basis of what the reasonable person would
20 experience as damages (inaudible) pain and suffering
21 damages, that it is the claim of a reasonable person which
22 is going to be the measure of damages.

23 And in a given case a Government driver runs
24 over my foot, and the claim is made were for pain, and yet
25 you could prove that because of an abnormality in my

1 nerves I have no sensation down there. Would the
2 (inaudible) of the damages be punitive for the pain in my
3 foot?

4 MR. WRIGHT: In the unusual case that you
5 suggest, I think so. I would --

6 QUESTION: (Inaudible).

7 MR. WRIGHT: Until you got to the point where
8 you said that it's clear that you suffer absolutely no
9 sensation for pain, I was prepared to say, oh, that sounds
10 like the sort of approximation that, frankly --

11 QUESTION: (Inaudible) my question (inaudible) a
12 little bit. I mean, I just winced.

13 (Laughter.)

14 QUESTION: (inaudible) all I did was wince and
15 walk (inaudible). Would you have to shave it down
16 (inaudible).

17 MR. WRIGHT: No. I think that under our view
18 we're really arguing for a narrow position today that if
19 you suffered some pain and there is a statutory award that
20 is a reasonable compensatory approximation of a normal
21 person's pain, I don't think we would challenge that.
22 If --

23 QUESTION: The narrower it gets the less logical
24 it gets. That's the only --

25 MR. WRIGHT: If you suffered no pain whatever,

1 as Mr. Molzof suffered no cognition of loss of enjoyment
2 of life, we would say yes, it can only be punitive. It's
3 not at all compensatory.

4 QUESTION: You didn't realize how stoic these
5 New England Yankees are.

6 QUESTION: (Inaudible).

7 QUESTION: On what basis did the court below
8 refuse damages for loss of life enjoyment or for the
9 double recovery?

10 MR. WRIGHT: In both circumstances, the court
11 went past the question of Wisconsin law and held as a
12 matter of Federal law that punitive -- that such awards
13 would be punitive under 2674, in the one case, because it
14 would require the United States to pay twice.

15 QUESTION: So that was essentially a
16 construction of the Federal Tort Claims Act, but that
17 means that the Government shouldn't be held to the
18 definition of punitive damages of common law?

19 MR. WRIGHT: Yes, Your Honor.

20 Let me add in this respect that of course
21 there's no State law question before the Court. It did
22 come up while the petitioner was presenting his views.

23 QUESTION: Well, but it certainly would be left
24 over if we didn't agree with you on the reach of punitive
25 damages.

1 MR. WRIGHT: It would be left over.

2 Let me just note briefly, though, that there are
3 very few circumstances in which the States have authorized
4 damages awards that we would challenge as punitive. And
5 here, for instance, there is no authority that Wisconsin
6 would allow a double recovery in a situation where the
7 tort-feasor has to pay twice, and there is no Wisconsin
8 authority for damages for loss of enjoyment of life by a
9 person in a permanently comatose state.

10 QUESTION: Well, Mr. Wright, it's not really --
11 I don't think it's really paying twice.

12 I -- suppose, you know, the Government comes up
13 and says, we'll -- you'll sign a medical contract with us
14 and we'll give you your medical services at 80 percent of
15 cost, but you have to go to a Government hospital and take
16 our doctors. Now, I'm not sure you'd accept that. I'm
17 not sure I would. I like to go to what doctor I want and
18 buy services where I want.

19 What you're saying is, because you have
20 volunteered -- the Government has volunteered -- to
21 provide to this individual services in a Veterans
22 Administration hospital, he's going to have to get the
23 services there, whether he likes it there or not. Isn't
24 that right?

25 MR. WRIGHT: No, Justice Scalia, our position is

1 narrower. I hope you won't think it's --

2 QUESTION: Okay.

3 MR. WRIGHT: -- less logical in this respect.

4 We contend that it is -- it was Mrs. Molzof's choice where
5 Mr. Molzof would be treated. If she had intended to move
6 him elsewhere, she then would have been entitled to an
7 award for future medical damages. In that situation, the
8 Government would not have been required to pay twice. It
9 would not have been required to pay Federal employees to
10 care for Mr. Molzof as well as to pay the tort damage
11 award.

12 In that situation, also, Mrs. Molzof would not
13 have been recompensed twice. She would have taken the
14 money and paid a private hospital to care for Mr. Molzof.

15 QUESTION: So you're really -- you're really not
16 objecting to paying the money, you're objecting to
17 providing the VA services, or, I mean, one or the other?

18 MR. WRIGHT: We're objecting to paying the money
19 on top of the VA services. And those courts of appeals
20 that have said that the Ulrich and Feeley cases where the
21 courts have said that it is the choice of the victim's
22 family as to where he is treated, we agree absolutely that
23 it is the victim's choice.

24 Here, however, it was clear that there was no
25 other hospital in the vicinity that could provide

1 comparable care, and it was clear that, indeed,
2 Mrs. Molzof did not intend to move Mr. Molzof, and in fact
3 he was cared for in the VA hospital until he died.

4 QUESTION: Mr. Wright, in the New York regime,
5 where I take it there's no payment for loss of enjoyment
6 when the person becomes comatose, is that person's
7 recovery the same as in a wrongful death action, or does
8 that person get less than if there had been a wrongful
9 death?

10 MR. WRIGHT: I think -- I think he gets the
11 same. I think --

12 QUESTION: It would be a lost earnings --

13 MR. WRIGHT: Oh, yes. Whatever -- whatever the
14 normal -- lost earnings, or any losses --

15 QUESTION: In other words, those cases
16 approximate the recovery to what a wrongful death recovery
17 would be?

18 MR. WRIGHT: Yes. Any pain and suffering.
19 Under a survival statute you would get any pain and
20 suffering he suffered before entering the personal
21 comatose state. And again, we're not challenging any of
22 those sorts of awards here today.

23 Again, let me stress that we -- we recognize
24 that sometimes it's difficult to approximate particularly
25 nonpecuniary damage awards, but in two situations we think

1 that it's very clear that damages are noncompensatory and
2 punitive, and those circumstances are where the tort-
3 feator has to pay twice, and where the tort-feator is
4 required to make a payment for an inherently
5 noncompensable loss.

6 If there are no further questions, thank you.

7 QUESTION: Thank you, Mr. Wright.

8 Mr. Rottier, you have 5 minutes remaining.

9 REBUTTAL ARGUMENT OF DANIEL A. ROTTIER

10 ON BEHALF OF THE PETITIONER

11 MR. ROTTIER: Mr. Chief Justice and the Court,
12 there was proof at the trial level that three other
13 hospitals, including the hospital in the home town of
14 Mrs. Molzof -- Boscobel, Wisconsin -- would take this --
15 the injured veteran.

16 Moreover, the suggestion that Mrs. Molzof should
17 have taken him from the Veterans Hospital before the case
18 was tried to evidence her intent overlooks the fact the
19 cost of care is approximately \$400,000 per year, and there
20 was testimony she had limited resources. So that should
21 not be the determinative factor here.

22 To respond to a couple of the issues raised with
23 Justice Kennedy, I think under the New York regime the
24 only difference between damages for a fully comatose
25 individual versus someone who had died would be the future

1 cost of care, which obviously wouldn't be necessary. The
2 impairment of future earning capacity would likely be the
3 same, I would expect, under the McDougald approach.

4 The attorney for the Government came very close
5 to agreeing that they were not objecting to paying the
6 money, but they were objecting to the continuation of free
7 medical care under Mr. Molzof's entitlement as a disabled
8 veteran. I suggest there is a very easy solution to that,
9 and this is the wrong branch of Government for it.

10 It merely -- it can come from the Veterans
11 Administration; it can come from Congress. They merely
12 suspend eligibility for the underlying benefits and
13 require the veteran to expend the dollars which have been
14 awarded at his or her choice, whether in a private
15 facility or whether in a Government facility. But in
16 either case they will be expended, and the purpose of the
17 act will be complied with, and that is the much cleaner
18 approach.

19 Each time you try to focus on whether the effect
20 of receipt of compensatory damages is punitive or not, you
21 get deeper and deeper in the quagmire. It's much easier
22 to step back and say, what is the justification for
23 punitive damages? If the justification is to punish, and
24 it's based on the nature of the conduct, then it is not
25 awardable because it falls within the prohibition of the

1 Federal Tort Claims Act.

2 I might mention in response to Justice Souter's
3 questions about conscious pain and suffering and such, the
4 state of the law in Wisconsin is that conscious pain and
5 suffering is compensable, but not -- there is no such
6 entity as unconscious pain and suffering. Loss of
7 enjoyment of life is viewed as a component of pain and
8 suffering.

9 The narrow issue that's undecided in Wisconsin
10 is whether a comatose individual who cannot exhibit an
11 awareness of loss of enjoyment of life should be
12 compensated for that component. There was no effort made
13 in this case to seek an award for conscious pain and
14 suffering. We took the position that we did not have the
15 evidence to support that, and it was not available under
16 Wisconsin law, even though some States might in fact have
17 allowed that.

18 QUESTION: Excuse me, was the Government's
19 objection to the -- to the award of damages on that point
20 not only based upon its theory of what is punitive but
21 also on State law? Did it say Wisconsin law doesn't allow
22 for this anyway?

23 MR. ROTTIER: The Government didn't go so far as
24 to say Wisconsin law did not allow it. They did take a
25 position Wisconsin law was silent on it and that the

1 primary argument was that it would be punitive.

2 QUESTION: And the court of appeals agreed with
3 that?

4 MR. ROTTIER: That's correct.

5 QUESTION: I agree with the Government's counsel
6 that the basic approach of both the trial judge and the
7 Seventh Circuit was that both of these components of
8 damages resulted in the punitive effect and therefore was
9 prohibited by the Federal Tort Claims Act.

10 In closing, I would draw your attention to the
11 Massachusetts Bonding case which did relate to the Federal
12 Tort Claims Act and did require the Supreme Court to look
13 at the definition of punitive damages. That involved a
14 Massachusetts wrongful death statute which said that if
15 someone was killed their survivors could make a claim for
16 wrongful death, but it had to fall within a certain
17 minimum and maximum irrespective of what pecuniary damages
18 had been sought.

19 QUESTION: What's the name of the case,
20 Mr. Rottier?

21 MR. ROTTIER: Massachusetts Bonding. It's a
22 1956 case.

23 QUESTION: Citation?

24 MR. ROTTIER: 352 U.S. 128, and in that case the
25 Supreme Court of the United States held that it would be

1 inappropriate to follow these minimum and maximums because
2 they were really punitive in nature, because -- and
3 Massachusetts had viewed them as punitive in nature, and
4 the Supreme Court said, and I quote, "By definition,
5 punitive damages are based upon the degree of the
6 defendant's culpability." That's what we're asking this
7 Court to reaffirm in the context of the Federal Tort
8 Claims Act, just as this Court did in Massachusetts
9 Bonding.

10 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
11 Rottier.

12 The case is submitted.

13 (Whereupon, at 12:05 p.m., the case in the
14 above-entitled matter was submitted.)

15
16
17
18
19
20
21
22
23
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents and accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NO. 90-838 - SHIRLEY M. MOLZOF, PERSONAL REPRESENTATIVE
OF THE ESTATE OF ROBERT E. MOZOF, Petitioner v. UNITED STATES

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

BY alan friedman

(REPORTER)

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

91 NOV 12 P3:41