

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MARGARET KAWAAUHAU, ET VIR., Petitioners v.
PAUL W. GEIGER
CASE NO: 97-115
PLACE: Washington, D.C.
DATE: Wednesday, January 21, 1998
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Supreme Court U.S.

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MARGARET KAWAAUHAU, :

4 ET VIR., :

5 Petitioners :

6 v. : No. 97-115

7 PAUL W. GEIGER :

8 - - - - -X

9 Washington, D.C.

10 Wednesday, January 21, 1998

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

14 APPEARANCES:

15 NORMAN W. PRESSMAN, ESQ., St. Louis, Missouri; on behalf
16 of the Petitioners.

17 LAURA K. GRANDY, ESQ., Belleville, Illinois; on behalf of
18 the Respondent.

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

2 (11:11 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 97-115, Margaret Kawaauhau v. Paul Geiger.

5 Mr. Pressman, you may proceed whenever you're
6 ready.

7 ORAL ARGUMENT OF NORMAN W. PRESSMAN

8 ON BEHALF OF THE PETITIONERS

9 MR. PRESSMAN: Mr. Chief Justice, and may it
10 please the Court:

11 Section 523 of the Bankruptcy Code excepts
12 willful and malicious injuries from discharge and the
13 bankruptcy court's finding here that Paul Geiger
14 intentionally administered substandard care and that his
15 action shocked even a person lacking formal medical
16 training met this Court's standards set out in Tinker v.
17 Colwell because his actions constituted a willful
18 disregard of his duty.

19 QUESTION: Well, Mr. Pressman, when you say that
20 there was a finding that he intentionally administered
21 substandard care, is that any different than a finding
22 that the -- that his standard, the standard of care which
23 he recognized was negligent?

24 MR. PRESSMAN: The distinction here, Your Honor,
25 is that Dr. Geiger knew the standard of care. He was

1 asked and the record shows that he knew the proper
2 standard of care was the administration of intravenous
3 penicillin and he said, notwithstanding that, I gave
4 Mrs. Kawaauhau oral tetracycline. The distinction here is
5 the intentional administration of something --

6 QUESTION: Well, I'm not sure I follow you,
7 because you could say that about any number of things
8 where you talk about medical malpractice. The standard
9 was to perform surgery, but a -- in a hypothesis, but this
10 particular doctor prescribed medicine instead. He
11 intentionally prescribed medicine and, therefore, his
12 action was not merely negligent but intentional. I think
13 that just blurs the entire dist -- difference between
14 negligence and intent.

15 MR. PRESSMAN: The distinction here, Your Honor,
16 is that this is not a case of a slip of the scalpel. If
17 Dr. Geiger had reached into his bag and pulled out the
18 wrong medicine, or if he had botched a complicated medical
19 procedure, we wouldn't have a case.

20 QUESTION: Well, what if you have a driver who
21 intentionally puts his car in reverse and doesn't look
22 back to see what's behind him and drives over somebody. I
23 mean, under your theory, then that's inten -- it's willful
24 and no bankruptcy provision applicable.

25 QUESTION: Indeed, first degree murder.

1 QUESTION: Yeah, I suppose.

2 MR. PRESSMAN: In that -- I would agree with
3 that -- that --

4 QUESTION: You would agree.

5 MR. PRESSMAN: -- description, Justice
6 O'Connor --

7 QUESTION: Yes.

8 MR. PRESSMAN: -- that if somebody intentionally
9 says, I'm going to put my car in reverse and I'm going to
10 drive back and I don't care who's there, I think that is
11 intentional.

12 I believe an example which shows our point is --

13 QUESTION: You know, I just find it hard to
14 believe that that's what Congress had in mind in writing
15 this provision for exclusion under the bankruptcy law.

16 MR. PRESSMAN: Well, my response to that, Your
17 Honor, would be twofold. First, I think if we go back to
18 the Tinker case --

19 QUESTION: Well, I find Tinker a little hard to
20 understand myself. I mean, maybe we can confine it to
21 what it is, but I think that's a weak read.

22 MR. PRESSMAN: Well, Your Honor, I would compare
23 what happened here -- and let me start by saying, I think
24 what's hard initially to understand about this case is
25 that people assume that a physician would always act

1 according to his duty and would never intentionally
2 disregard it.

3 I think a better example here, an example which
4 illustrates our point, was one used the other day which we
5 considered, the builder who uses substandard steel. He
6 doesn't -- building collapses, it violates a code
7 provision. He doesn't intend to kill anyone.

8 QUESTION: Do you think that there's anything
9 in this record that indicates that the doctor intended
10 that the petitioner lose her leg --

11 MR. PRESSMAN: No.

12 QUESTION: -- or suffer some serious health
13 loss?

14 MR. PRESSMAN: No. We concede that Dr. Geiger
15 did not intend to hurt Mrs. Kawaauhau, but our position,
16 Justice O'Connor, is that -- and Dr. Geiger testified
17 numerous times, he admitted it, that he knew that
18 intravenous tetra -- intravenous penicillin was the
19 correct standard of care and --

20 QUESTION: -- said candidly that you are not
21 contending that he meant to hurt -- that the doctor meant
22 to hurt this woman and yet you say that the Tinker case is
23 helpful to you, and that I don't understand, so -- I
24 thought Tinker was a clear case of intending what in those
25 days was a very grave offense against a man's property.

1 MR. PRESSMAN: Your Honor, let me address that
2 point.

3 In Tinker, when Justice Peckham wrote for the
4 Court, he recognized and he -- recognized that the willful
5 and malicious test had two prongs, willful and malicious.
6 When analyzing whether Mr. Colwell -- Mr. Tinker's action
7 was willful, he said the action is willful, not that the
8 injury was willful. He referred to the action and he said
9 it was willful in the view -- in the idea that it was
10 intentional and deliberate.

11 Dr. Geiger's actions here were intentional.

12 QUESTION: Well, but the trouble in Tinker was
13 that the act which the defendant performed could not, as a
14 matter of law or as a matter of definition, be performed
15 without the necessary consequence of the kind of injury
16 for which the law allowed recovery.

17 That is not the case here. The relationship
18 between any deficiency in the doctor's care and the
19 ultimate loss of the leg was not a relationship as a
20 matter of law or as a matter of definition. It was a
21 contingent factual relationship.

22 It turned out that way, but you can't say, I
23 think, that at any given moment when he decided to use an
24 oral antibiotic as opposed to an injection or what-not,
25 that there was any kind of legal inevitability to the

1 consequence for which the plaintiff is seeking to recover
2 and that, I think, is why you have a problem in relying on
3 Tinker.

4 MR. PRESSMAN: Justice Souter, I believe that
5 Peter Halford, the expert defin -- deposition, the expert
6 who testified both in Hawaii and in the bankruptcy court,
7 testified to that fact. He stated that the intentional
8 administration of substandard care led to the worsening of
9 her condition and the eventual amputation of her leg.

10 QUESTION: There's -- I don't think there's any
11 question in anyone's mind that it did. I don't believe
12 the people on the other side will argue or have suggested
13 that it did. But in fact, the relationship is one of
14 simple factual cause and effect. It is not the kind of
15 necessity relationship that Tinker relied upon.

16 MR. PRESSMAN: And I think the point of your
17 question and Justice Ginsburg's question is, does the term
18 willful apply to the injury or does it apply to the act --

19 QUESTION: Well, how --

20 MR. PRESSMAN: -- and our point is --

21 QUESTION: How can you say that an injury was
22 willful if you're not referring to the act by which it was
23 caused? I mean, injuries don't have intentions of their
24 own.

25 MR. PRESSMAN: Your Honor, the definition of

1 injury is twofold. The word injury can mean either the
2 damage, the cut on my hand, the result of an action, or it
3 can mean the action which causes the harm.

4 QUESTION: How can an injury mean the action
5 which causes the harm? I've never heard of that.

6 MR. PRESSMAN: In the phrase, for instance, his
7 injury to the painting, it is the act and I believe --

8 QUESTION: Well, his --

9 QUESTION: Whoever said that?

10 QUESTION: Whoever said that?

11 QUESTION: Yes.

12 (Laughter.)

13 QUESTION: Send them back to school.

14 MR. PRESSMAN: Your Honor, let me cite the
15 definition from the Merriam-Webster Dictionary. Injury:
16 an act or the result of inflicting something that causes
17 loss or pain. We cannot forgive his injury of the
18 painting, or, his falsehood gave great injury to his
19 brother's reputation.

20 We're saying that the word injury is the act,
21 not the damage, and I believe that's the definition
22 which --

23 QUESTION: What dictionary was that? Let me --

24 MR. PRESSMAN: That is the Merriam-Webster
25 Dictionary and a similar dictionary -- a similar

1 definition, Your Honor, appears in the Oxford Second
2 Edition.

3 QUESTION: If one asks, what injuries did you
4 suffer, well, I broke my collarbone, I dislocated my hip,
5 that's what one thinks of as the injuries.

6 MR. PRESSMAN: And I believe if I were starting
7 with a clean slate in this case and I didn't have the
8 definition that we had in Tinker, I think I'd have to -- I
9 do have to fight that battle.

10 QUESTION: I mean, the problem I think that at
11 least you have is, this is not your -- the tort in your
12 case is not an intentional tort on the Restatement's
13 definition of intentional torts, I take it, and if that is
14 so -- if that is so, and I -- it seems so, then either the
15 word willful means to pick up intentional torts, in which
16 case you'd lose, or somehow willful extends beyond
17 intentional torts in the way you suggest, in which case
18 you might win.

19 But if you're right, it seems to create an
20 irrational distinction among negligence torts. Sometimes
21 what is really the same thing, negligence, would not be
22 dischargeable. Sometimes what is really the same thing,
23 negligence, would be dischargeable, and that irrational
24 distinction, though sometimes it would benefit your
25 clients and sometimes hurt them, you see, doesn't seem one

1 that the statute would like -- be intended to make.

2 Now, I put that to you because I'd like to hear
3 your response, since I think it's important.

4 MR. PRESSMAN: I believe that in order to rule
5 in our favor, one has to look at the term willful as
6 meaning the same thing that this Court held, that willful
7 means voluntary.

8 Dr. Geiger in this case was asked and he knew
9 what he was doing. His action was intentional.
10 Therefore, we meet the standard, the standard this Court
11 set out.

12 I don't believe I've answered your question,
13 though.

14 QUESTION: But then it would work without the
15 special provision for, I knew I got into that car when I
16 imbibed much too much and I happened to kill or maim
17 someone. So I knew what was intentional was, I got drunk.
18 What was not -- but you're transferring that -- that's the
19 act. I put myself in that shape so that I couldn't drive
20 carefully.

21 MR. PRESSMAN: And Your Honor, in 1946 the
22 Eighth Circuit in Harrison v. Walker held that drunk
23 driving was a willful and malicious injury. It was only
24 until after the enactment of the Bankruptcy Code in 1978
25 that there was some uncertainty as to whether that was

1 still the law.

2 QUESTION: Yes, but now we have a specific
3 provision doing that and, if malpractice should work the
4 same way, one would expect a similarly specific provision.

5 MR. PRESSMAN: Our position, Justice Ginsburg,
6 is that the Congress reenacted the identical language in
7 the Bankruptcy Code of 1978 and therefore the same
8 interpretations apply.

9 If you look to the legislative history, which my
10 colleague relies on, it doesn't say that Tinker is
11 overruled.

12 QUESTION: But you run up against that terrible
13 problem that Tinker was a deliberate trespass on another
14 man's property. Those were the facts. This was criminal
15 con -- what do they call it?

16 MR. PRESSMAN: Criminal conversation, Your
17 Honor.

18 QUESTION: Right.

19 MR. PRESSMAN: It was -- nothing that I've seen
20 in either the State court or the Supreme Court, this
21 Court's opinion indicates that Mr. Tinker even knew who
22 Mr. Colwell's wife was. It was an act which was
23 intentional in that he --

24 QUESTION: Mr. Pressman, every act, every --
25 even a negligent act has some willful action connected

1 with it. You will to leave the snow on your sidewalk
2 which somebody slips and falls on, but we don't call that
3 doing willful injury to someone.

4 It seems to me we call it willful only when the
5 intentional act is not one that leads to the injury, but
6 the intentional act is the injuring. That's what I've
7 always thought willful injury meant, not that there's some
8 willful act along the line. There always is.

9 MR. PRESSMAN: Your Honor, if willful modifies
10 injury, I don't think we have a very good position, but in
11 Tinker, Your Honor, Mr. Tinker wasn't intending to hurt
12 Mr. Colwell.

13 QUESTION: He didn't have to intend to hurt
14 Mr. Colwell. He had to intend to do the injury, and he
15 did intend to do the injury, which was criminal
16 conversation.

17 MR. PRESSMAN: I would have to disagree with
18 you, Justice Scalia. I don't --

19 QUESTION: I take Tinker to mean only you don't
20 have to hate the person. You don't have to have some
21 personal desire, maliciousness towards the individual, but
22 that's quite separate from whether you intended to produce
23 the harm, the very harm that you produced, and it seems to
24 me in Tinker the person did.

25 MR. PRESSMAN: I don't see any evidence in the

1 Tinker opinion that Mr. Tinker intended to harm anybody.

2 QUESTION: He knew that he was sleeping with
3 some other man's wife. Did he not know that?

4 MR. PRESSMAN: In the opinions that I have read,
5 that fact is not apparent. It appears that he slept with
6 someone who was not his wife.

7 QUESTION: Well, that --

8 QUESTION: Well --

9 QUESTION: -- you'd have a good case if that
10 were so.

11 QUESTION: I -- no, please. You --

12 QUESTION: I have some language here in the
13 House report which says that Tinker is overruled in -- I
14 mean, when they passed the statute. It says they --
15 willful means deliberate or intentional. To the extent
16 that Tinker v. Colwell held a looser standard, it's
17 overruled.

18 QUESTION: Of course, in enacting the statute
19 they didn't change the language. A little hard to --

20 MR. PRESSMAN: And Justice O'Connor, you're
21 correct, they did not change the language of the statute
22 and this Court has noted that reenacting the same language
23 would be a strange way to change a statute.

24 But even if we get to the legislative history --

25 QUESTION: That's a good answer.

1 MR. PRESSMAN: I've won that argument?

2 (Laughter.)

3 QUESTION: Mr. Pressman, I -- I'd like you to
4 comment on this. One of the questions that I had, and I
5 had it even after reading Tinker, was whether there was
6 redundancy in the statute unless I read it your way, and I
7 decided that there wasn't redundancy in the statute and
8 this is the way I worked it out, and you tell me whether
9 I'm wrong, or whether Tinker is inconsistent with this.

10 It's got to be willful and malicious. We start,
11 I guess, with the definition of malicious as the act whose
12 purpose is to harm the third party. I don't suppose
13 willful adds anything to that sense of malicious. You
14 can't be any worse than that.

15 But there's also a sense of malicious in which,
16 although you do not personally have a purpose or an animus
17 to hurt the victim, what you do inevitably will hurt the
18 victim, and I think that's what was going on in Tinker.

19 In that sense of malicious, the word willful
20 does add something, because if you take willful there to
21 mean, he knows it's going to hurt the other person, he
22 knows the inevitability of it and he does it anyway,
23 knowing that that will be the consequence, that, then, as
24 it were, jacks up the moral reprehensibility, the
25 seriousness of the act.

1 So in the weaker sense of malicious, willful
2 adds something, and I thought that was consistent with
3 Tinker. Am I wrong?

4 MR. PRESSMAN: Your Honor, in terms of the
5 redundancy of the words, I believe it's difficult to come
6 up with an action which is malicious but not willful. I
7 think it's easy to come up with an action that is willful
8 and not malicious.

9 An example of the second action would be if
10 someone came in here to harm one of the justices and
11 Marshall Bosley shot him. His action would be willful but
12 not malicious. He wasn't disregarding his duty.

13 On -- an example of something which is malicious
14 but not willful might be someone who came from a State
15 where carrying a firearm was perfectly okay, but he knew
16 in the City of Washington, D.C. that carrying one was
17 illegal. He carries it through the airport, makes it
18 here, it drops out of his pocket, the bullet hits someone.
19 His action there I think is arguably not willful but it's
20 malicious. He had a duty. He disregarded his duty.

21 I think that's an example of something where you
22 use both of the words willful and malicious.

23 If the words willful and malicious both modify
24 injury, then I think they are redundant, because --

25 QUESTION: Excuse me. What action of his was

1 malicious there, the dropping of the gun, or the carrying
2 of the gun? I agree with you, the carrying of the gun,
3 intentionally violating the law is malicious.

4 MR. PRESSMAN: It was not the dropping of the
5 gun, because that was an accident.

6 QUESTION: Right.

7 MR. PRESSMAN: It was the carrying of the gun --

8 QUESTION: Well, you're --

9 QUESTION: You'd say that was malicious.

10 MR. PRESSMAN: Yes.

11 QUESTION: You're using malicious in the sense
12 of doing any wrongful act without just excuse, right?

13 MR. PRESSMAN: Without just excuse --

14 QUESTION: Yes.

15 MR. PRESSMAN: -- or a willful disregard, or a
16 dis --

17 QUESTION: Do you think that the -- well, I
18 guess you do think that that, maybe third or weakest sense
19 of malice is the sense in which this -- that this statute
20 used it, but if that is the case, then the word willful
21 adds the requirement that the harm that results to
22 whatever the eventual victim is be a harm which is either
23 intended or known by the actor to be the necessary
24 consequence and if that's what willful does in this case,
25 that doesn't fit your case.

1 MR. PRESSMAN: I would agree with that. If the
2 word willful modifies injury, then I don't have a very
3 good case.

4 QUESTION: What else would willful modify
5 besides injury?

6 MR. PRESSMAN: Your Honor, in Tinker, this Court
7 says an act is willful in that -- in the -- in that the
8 act is intentional or voluntary, not that the injury is
9 intentional or voluntary. That's what this Court I
10 believe said in Tinker.

11 QUESTION: So you interpret the statute as
12 saying, for a willful act which results in malicious
13 injury --

14 MR. PRESSMAN: Justice Kennedy, that is the way
15 I interpreted it and that is the way I read Tinker.

16 QUESTION: Well, maybe we'd better clarify
17 Tinker and do it soon if that's your reading of it.

18 I think the language used is somewhat careless,
19 but it did say in Tinker the act is willful in the sense
20 that it is intentional and voluntary and we think it is
21 also malicious. I don't know what the Court meant by
22 that, but perhaps some clarification of that language is
23 in order.

24 MR. PRESSMAN: Your Honor, I'd also point out
25 that in this case the standard that this Court set in

1 Tinker has been a standard which has not -- which has been
2 well-used until the 1978 amendments. The matter came up
3 before the courts in the McIntyre case and it came up
4 before the case in Aetna.

5 In McIntyre the Court found itself with a case
6 of someone who converted some collateral, even though
7 there was no default on the loan. There was no problem
8 with the Court finding that action was intentional and
9 malicious.

10 The amicus in this case on my opponent's side
11 has suggested that they're concerned about consumers being
12 injured by my position and I think that answer is taken
13 care of by the Aetna case, where there were some
14 inadvertent -- there was some inadvertent conversion of
15 collateral.

16 QUESTION: May I ask about a few of the facts
17 here, it is extraordinary that a doctor would have no
18 malpractice insurance, but that was the case here, was it
19 not?

20 MR. PRESSMAN: Yes, it was, Your Honor. There
21 was no malpractice insurance, and --

22 QUESTION: Doesn't Hawaii State law require it?

23 MR. PRESSMAN: I don't believe it does. Some
24 States do require it. Missouri does not require it and I
25 don't believe that Illinois requires it.

1 QUESTION: Explain to me how consumers would not
2 be hurt by your position. Most consumer debt is probably
3 credit card debt. Let's assume a consumer who has a lot
4 of credit card debt seeks a discharge in bankruptcy and
5 the credit card company comes in and says, at a time when
6 you knew you were insolvent you sought additional credit.

7 MR. PRESSMAN: Justice Scalia --

8 QUESTION: That's a willful -- willful act and
9 therefore all of your charges, once you knew you couldn't
10 pay them, are not dischargeable in bankruptcy. Wouldn't
11 that be the consequence? I think it would.

12 MR. PRESSMAN: In that case, yes, but I think
13 the amicus point is that --

14 QUESTION: But that's a lot of cases, and you
15 think that all credit card charges run up after the person
16 is insolvent are not dischargeable in bankruptcy?

17 MR. PRESSMAN: It's a matter of what the facts
18 are before the judge. In that situation, I think it would
19 be.

20 The point I think the amicus made was that in
21 credit card debt in this country, if I buy a refrigerator
22 at Sears, I give a lien on my refrigerator to Sears and
23 the concern is that people will buy a refrigerator and
24 maybe give it to their aunt, or sell it and 2 years later
25 file and then find themselves being charged with

1 committing a willful and malicious conversion, as the act
2 used to mention, and in the Davis case, someone who
3 converted collateral in accordance with an ordinary
4 practice, a custom that was agreed upon with the lender,
5 was found not to have acted willfully and maliciously.

6 In the example given by the amicus, I'd say if
7 someone bought 25 refrigerators from Sears and then filed
8 bankruptcy 3 days later, or a month later, I think that
9 would be willful and malicious, at least if I were the
10 judge hearing that evidence.

11 Mr. Chief Justice, this Court has long held that
12 the discharge is for the honest and unfortunate consumer
13 debtor, and I think the evidence in the record below here
14 shows that Dr. Geiger is none of the above.

15 Justice Murphy in her dissent below said that
16 those words could be better applied to the Kawaauhaus,
17 people, honest consumers who had the unfortun -- the
18 misfortune to land in Dr. Geiger's office.

19 I'd ask to reserve my time if there's no further
20 questions.

21 QUESTION: Very well, Mr. Pressman.

22 Ms. Grandy, we'll hear from you.

23 ORAL ARGUMENT OF LAURA K. GRANDY

24 ON BEHALF OF THE RESPONDENT

25 MS. GRANDY: Mr. Chief Justice, and may it

1 please the Court:

2 The Eighth Circuit held that the debt owed by
3 Dr. Geiger to the petitioner was dischargeable because he
4 had no intent to harm the petitioner. That has been
5 admitted this morning.

6 The Eighth Circuit opinion is supported by the
7 plain meaning of section 523(a)(6), the legislative
8 history of section 523(a)(6), the purposes and policy of
9 the Bankruptcy Code, and the Tinker case itself.

10 The plain meaning of section 523(a)(6) focuses
11 on the language, willful and malicious injury. Willful
12 and malicious both modify injury. You need both a willful
13 injury and you need a malicious injury to comply with
14 section 523(a)(6).

15 Willful was defined in Tinker as meaning
16 intentional and voluntary. In the legislative history the
17 Congress said willful means intentional and deliberate.
18 It wasn't a whole lot different than the Tinker
19 definition.

20 Malice has been defined --

21 QUESTION: Are there some instances in which
22 reckless conduct is so reckless that you can apply the
23 definition of willful and malicious to it?

24 MS. GRANDY: No, Your Honor. Reckless conduct
25 is not intentional conduct and the statute, the

1 congressional history as well as Tinker looked to
2 intentional conduct.

3 Tinker in particular, the examples they gave,
4 Justice Peckham gave an example of, if I negligently drive
5 my car into a busy thoroughfare, injuring someone, that
6 would not be an intentional injury because I didn't intend
7 to injure anyone, as opposed to if I intentionally went
8 into that thoroughfare to injure someone. That would be
9 intentional --

10 QUESTION: And the case where the man throws the
11 firecracker into the gasoline-laden basement and the
12 explosion injures the fellow worker, that's -- is -- how
13 does that come out, in your view?

14 MS. GRANDY: Your Honor, you're referring to the
15 Hartley case, I believe, which --

16 QUESTION: Yes.

17 MS. GRANDY: -- was also decided by the Eighth
18 Circuit, and what the Eighth Circuit said there was, the
19 intent was to cause an injury.

20 The injury was to startle and scare the employee
21 in that case, as opposed to the injury which went further
22 and actually injured the -- caused physical harm to him
23 and the Court in that case said, when you have an intent
24 to injure someone, be it startling or scaring them, we're
25 not going to say the injury was only meant this far, not

1 this far.

2 In this case before you, we have no intent to
3 injure at all.

4 QUESTION: Well then, Ms. Grandy, did I
5 understand you to say that Justice Peckham in 1903 was
6 talking about driving a car into a busy intersection
7 and --

8 MS. GRANDY: He said driving into a crowded
9 thoroughfare. I was assuming he was driving a cart or
10 buggy, Your Honor.

11 QUESTION: Yes.

12 MS. GRANDY: I didn't think he was driving a
13 car.

14 QUESTION: Not a car, okay.

15 (Laughter.)

16 MS. GRANDY: I had to think about that, too.

17 QUESTION: If willful means intending to injure,
18 what's left for malicious? What does that add?

19 MS. GRANDY: What malicious adds is almost an
20 escape clause. You can have an intentional injury that's
21 not necessarily malicious.

22 For instance, the banks of the Mississippi River
23 are swelling and I know if I cut a hole in the levee I may
24 flood out Farmer A, but I'm going to save the village down
25 the river and that's why I'm cutting a hole in the levee.

1 I don't intend necessarily to injure Farmer A,
2 although my actions will and I know they will injure
3 Farmer A, but my just cause or excuse, which comes out of
4 the malicious definition, is that I'm trying to save the
5 village down below, or in the example given earlier, where
6 the deputy or the marshal stops someone from injuring you,
7 he intends to injure that person, but his excuse is, he's
8 trying to save the justices.

9 So that's what malicious adds.

10 QUESTION: May I ask just one question about
11 this famous Tinker case for you?

12 Do you agree -- and I'm inclined to think he's
13 right -- with your opponent that the opinion there did not
14 rely at all on the notion that the defendant or the
15 bankrupt tried to injure the husband of the woman he
16 seduced? It was merely the question of whether she'd
17 given consent and that was not enough to void --

18 MS. GRANDY: In that case, Your Honor, the
19 injury went to the marital right itself.

20 QUESTION: That's right, but --

21 MS. GRANDY: That's what the Court determined.

22 QUESTION: -- my question is whether, is it not
23 correct that the defendant, or the seducer, whichever
24 party it was, it's clear from the record that there's --
25 the Court did not rely at all on the notion that he was

1 trying to injure the husband of the woman he seduced?

2 MS. GRANDY: That's correct, Your Honor.

3 QUESTION: So that basically are you saying
4 Tinker is an unusual fact situation and it was un --
5 overruled by legislative history, or we should overrule it
6 now? What is your position about Tinker?

7 MS. GRANDY: Your Honor, I don't think the
8 legislative history necessarily overruled Tinker. I --
9 the legislative history said that to the extent that other
10 cases have relied on Tinker to hold a reckless disregard
11 standard, they are overruled.

12 QUESTION: Right.

13 MS. GRANDY: Within Tinker itself, one of the
14 real, or one of the main substances that have come out of
15 Tinker is the implied malice standard and I think that's
16 what the Court was referring to there.

17 In an act such as that, it's implied, whether
18 you knew her husband or not, you were damaging his marital
19 rights. You didn't have to know him. It was implied the
20 minute that type of act was done, and there are --

21 QUESTION: Well, why couldn't we by analogy say
22 here there's implied -- an implied intent just as much as
23 was implied there?

24 MS. GRANDY: Because in this case, Your Honor,
25 there's no showing of any intent at all, which is admitted

1 by the other side, to cause any injury.

2 QUESTION: Well, if you could --

3 QUESTION: Well --

4 QUESTION: -- be malicious without being
5 intentional, then what about the act of practicing
6 medicine, not having malpractice insurance and then
7 injuring your patients through negligently failing to look
8 up the right remedies?

9 I mean, if you can have -- what is -- I mean,
10 practicing -- for a doctor to practice medicine, doesn't
11 have malpractice insurance, just goes bankrupt and can't
12 pay the debt, I mean, is that the equivalent today to what
13 criminal conversation was 100 years ago?

14 MS. GRANDY: No, it isn't, Your Honor. The
15 intent not to have malpractices insurance isn't an intent
16 to cause an injury.

17 QUESTION: No, and you'd have to say it's not
18 intentional, but malicious.

19 I mean, the argument he's making from Tinker is
20 that it is -- it is -- it's not intentional, or it is
21 intentional, exactly like here. In Tinker, you could have
22 been found to fall within the statute, though you're --
23 say he was sleeping with a woman. He may have been
24 negligent and not known that she was married, all right.

25 He says, similarly the person here, the doctor,

1 gave a certain remedy not knowing, though he should have
2 known, just like Tinker should have known, what the right
3 remedy was. So he says, that's all of a muchness. I
4 mean, that's the same case, he said.

5 MS. GRANDY: No, it isn't, Your Honor.

6 QUESTION: Because?

7 MS. GRANDY: I believe in Tinker --

8 QUESTION: All right, go ahead.

9 MS. GRANDY: If we go with your facts, Your
10 Honor, if in Tinker the husband did not know she was
11 married at all, I would agree, but --

12 QUESTION: The adulterer -- yes.

13 MS. GRANDY: Yes. Yes, that Mr. -- yes, that he
14 did not believe that she was married, then I think that
15 fact cannot be true. I don't think those are the facts in
16 Tinker.

17 QUESTION: But there's no showing that he did
18 know in Tinker.

19 MS. GRANDY: There's no showing that he didn't
20 know, but I think the conclusions that are set forth by
21 the Court in that case imply that he did know. The Court
22 says this is one of the grossest --

23 QUESTION: Well, it surely doesn't say so. It
24 surely doesn't say so.

25 QUESTION: Well, could it have --

1 MS. GRANDY: I'm sorry --

2 QUESTION: Just as a matter of -- the definition
3 of the offense, could it have been criminal conversation
4 if he didn't know?

5 MS. GRANDY: If he didn't know?

6 QUESTION: I was assuming that it couldn't have
7 been criminal conversation unless he, in fact, knew of the
8 marriage. Am I wrong?

9 QUESTION: I assumed so, too, unless --

10 MS. GRANDY: I --

11 QUESTION: Unless the crime was fornication and
12 not adultery. I thought it was an adultery crime.

13 MS. GRANDY: Yes, Your Honor. In Tinker, in
14 order to prove criminal conversation you had to prove that
15 there was a marriage and that the act was performed, and
16 those two --

17 QUESTION: Well, but do you have to know that
18 the defendant knew that there was a marriage?

19 MS. GRANDY: In --

20 QUESTION: That he knew that the woman he was
21 sleeping with was married?

22 MS. GRANDY: I don't know, Your Honor.

23 QUESTION: In the argument I think they argued
24 that he didn't have to know, and that rather he ran the
25 risk of the woman being married.

1 QUESTION: I think we're going to get back to
2 the 18th Century pretty soon, the Statute of Anne again.

3 (Laughter.)

4 MS. GRANDY: The case doesn't tell us, Your
5 Honor.

6 QUESTION: No, it doesn't. I mean --

7 MS. GRANDY: No.

8 QUESTION: -- you read the opinion, he might not
9 have known anything about the marital status of the woman
10 that he seduced.

11 MS. GRANDY: That's correct, Your Honor, but the
12 examples that are given throughout Tinker refer to
13 intentional conduct. If you look at the examples given by
14 Justice Bailey --

15 QUESTION: Right, but they implied the intent
16 because the facts were so outrageous to the judges at the
17 time and I don't know -- you know, the same kind of
18 reasoning might justify -- I'm not saying it would, but
19 the conclusion of, well, this doctor was sufficiently
20 outrageous in his failure to be careful and so forth and
21 so on, that you'd take the same reasoning the Court used
22 in Tinker, that you imply the intent. That's what they
23 did. They implied the intent.

24 MS. GRANDY: They --

25 QUESTION: Or inferred it, I guess is the proper

1 way to say it.

2 MS. GRANDY: My -- Your Honor, I believe that
3 the implied intent actually grew from the examples they
4 gave of other intentional conduct in that case --

5 QUESTION: Well, the implication of --

6 MS. GRANDY: -- not necessarily from Tinker.

7 QUESTION: The implication of malice was that
8 there was a wrongful act done without any justification or
9 excuse.

10 MS. GRANDY: Well, it was as --

11 QUESTION: And it was intentionally done and so
12 that implied the necessary malice.

13 MS. GRANDY: If he were intentionally doing a
14 wrongful act, he would have had to have known it was wrong
15 to sleep with Mr. Tinker -- Mrs. Colwell, then --

16 QUESTION: No --

17 MS. GRANDY: -- Your Honor, because he knew she
18 was married.

19 QUESTION: No. It was the kind of act which was
20 done without excuse and therefore the Court implied
21 malice. That's the way I read the case.

22 MS. GRANDY: Right, Your Honor. I was just
23 bringing up the language --

24 QUESTION: It was Mr. Justice Peckham's case,
25 not mine.

1 (Laughter.)

2 MS. GRANDY: It is a difficult case to read and
3 I think --

4 QUESTION: No, but however you read it, isn't it
5 fair to say that either he did not have to know of the
6 marriage, but the injury followed as a matter of law
7 whether he knew or not, or that he did have to know of the
8 marriage and therefore we should assume simply by the
9 definition of the offense that he knew in this case, and
10 therefore the injury followed as a matter of law.

11 One -- either way, the injury in that case was
12 inevitable and the injury in this case is not, isn't
13 that --

14 MS. GRANDY: Yes, Your Honor.

15 QUESTION: -- the distinction that you would
16 rely on?

17 MS. GRANDY: Yes. At the time that Dr. Geiger
18 made the choice to do the various procedures that he did
19 throughout this, his intent was never to injure, nor was
20 his choice governed by any intent to injure.

21 QUESTION: Nor was the injury, as it were,
22 logically a necessity of whatever deficiency he may have
23 been guilty of.

24 MS. GRANDY: That's --

25 QUESTION: It happened, but it didn't

1 necessarily happen.

2 MS. GRANDY: That's correct, Your Honor.

3 QUESTION: But as you see the case, then,
4 malpractice actions in general as a category would not
5 come under (a)(6).

6 MS. GRANDY: No, Your Honor, not unless there
7 was some intent on the part of a doctor to injure and I
8 don't believe you find that in malpractice cases.

9 QUESTION: How do you regard defamation actions
10 for (a)(6) purposes?

11 MS. GRANDY: You would have to have an intent to
12 defame the person. If --

13 QUESTION: Well, isn't that an element of the
14 crime of defama -- or the action of defamation itself?

15 MS. GRANDY: I believe it is, Your Honor.

16 QUESTION: I mean -- or can you negligently
17 defame someone? I don't know.

18 QUESTION: I thought you had to say something
19 defamatory knowing of its falsity.

20 MS. GRANDY: That's correct, Your Honor.

21 QUESTION: I don't think it's correct, only if
22 you're defaming a public figure.

23 MS. GRANDY: Okay. There are exceptions.

24 (Laughter.)

25 MS. GRANDY: Your Honor, the Eighth Circuit

1 looked for its definition of intent to the Restatement
2 and, in doing that, it determined that an intentional act
3 is one where the actor desires or believes that the
4 results are going to occur and, looking at that
5 definition, the Court determined that Dr. Geiger did not
6 intend to harm the patient, therefore he had no willful
7 desire, or therefore there was no willful injury.

8 Having reached that point, the Eighth Circuit
9 concluded that section 523(a)(6) did not apply and
10 therefore the debt was dischargeable.

11 QUESTION: Do you know what the practice is in
12 the States with respect to requiring, as a condition of
13 retaining a medical license, malpractice insurance?

14 MS. GRANDY: No, I don't, Your Honor, but as a
15 policy reason, if the State was concerned that this
16 Court's ruling would have some effect to cause doctors to
17 not carry malpractice insurance, they could govern that by
18 licensing it within their own States and requiring
19 insurance, just as in -- most States are now requiring, or
20 several States are requiring insurance in order to have a
21 driver's license.

22 Dr. Geiger, as found by the bankruptcy court,
23 had several reasons for his treatment. He in prescribing
24 various types of medicine at all times 1) believed his
25 patient was getting better, 2) thought he was -- she had

1 the ability to absorb medicine very well through her
2 stomach, which is why he made the various choices he made,
3 thought her infection had burned out, and thought she had
4 developed a superinfection in determining to stop using
5 antibiotics altogether.

6 So even if you were to take the definition of
7 malice as set forth in the Tinker case, Dr. Geiger would
8 have just cause or excuse for having done what he did.

9 The legislative history also supports this by
10 looking at the language to the extent other cases have
11 relied on Tinker to hold a reckless disregard standard.
12 There, the courts once again are focus -- or Congress is
13 focusing on the intent of the injury itself, because a
14 reckless act would be one that would not require intent.

15 Within the section 500 of the Restatement is the
16 definition of recklessness and within that subsection (f)
17 of that definition there's a comparison of intentional
18 misconduct to recklessness and, when you compare the two,
19 recklessness does not require an intent. That's why we
20 feel reckless conduct, which the Eighth Circuit said at
21 the very worst his conduct was reckless, it would be
22 dischargeable because there's -- you don't have the
23 element of intent in a reckless type of act.

24 Tinker we -- I do not believe is in conflict
25 with the decision of the Eighth Circuit, because most of

1 the examples in Tinker appear to require an intent to
2 injure. The implied malice standard is limited to certain
3 facts in certain situations and Tinker certainly does not
4 support a reckless disregard standard, so the legislative
5 history is not overruling Tinker but basically saying,
6 read Tinker correctly.

7 The purposes and policy of the Bankruptcy Code
8 will be furthered by the decision of the Eighth Circuit.
9 This is because the purpose of the Bankruptcy Code overall
10 is to provide a debtor with a fresh start and that is why
11 exceptions to discharge are narrowly reviewed. The --
12 requiring an intent to cause an injury would lead to such
13 a narrow interpretation and enhance the fresh starts.

14 Intentional act, if you only require that which
15 results in injury, would lead to virtually everything
16 being nondischargeable, as pointed out by the Eighth
17 Circuit. If you speed up to a yellow light because you're
18 in a hurry to pick someone up, that would be an
19 intentional act. It would be nondischargeable. If you're
20 driving too fast for conditions, even though you're
21 driving within the speed limit, that would be an
22 intentional act which would be nondischargeable.

23 Buying something on credit because you think you
24 can pay for it, but intentionally buying it and then
25 ultimately losing your job and not being able to pay for

1 it would be an intentional act and be nondischargeable
2 under that theory.

3 Once again, Justice Peckham's example of driving
4 into a crowded thoroughfare would be an intentional act
5 under that definition.

6 We feel the policies and the purpose of the
7 Bankruptcy Code are furthered by this Court deeming that
8 the decision of the Eighth Circuit was correct and
9 affirming that decision.

10 QUESTION: Thank you, Ms. Grandy.

11 Mr. Pressman, you have 5 minutes remaining.

12 REBUTTAL ARGUMENT OF NORMAN W. PRESSMAN

13 ON BEHALF OF THE PETITIONER

14 MR. PRESSMAN: Mr. Chief Justice, unless there
15 are any questions I will --

16 QUESTION: I don't mean to be -- I'm just
17 curious. How do you pronounce your client's name?

18 MR. PRESSMAN: Kawaauhau.

19 QUESTION: Thank you.

20 QUESTION: I thought in Hawaiian every vowel was
21 supposed to be pronounced.

22 MR. PRESSMAN: Mr. Kaw -- I've had trouble
23 pronouncing it. That's -- my understanding is that that's
24 how to pronounce it.

25 QUESTION: Well, you --

1 MR. PRESSMAN: Kawaauhau. Maybe it's Kawaauhau.

2 I --

3 QUESTION: I'm sure you know better than we do.

4 MR. PRESSMAN: I may be using the St. Louis
5 pronunciation.

6 (Laughter.)

7 CHIEF JUSTICE REHNQUIST: Very well. Thank you,
8 Mr. Pressman. The case is submitted.

9 MR. PRESSMAN: Thank you, Your Honor.

10 (Whereupon, at 11:53 a.m., the case in the
11 above-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:

MARGARET KAWAAUHAU, ET VIR., Petitioners v. PAUL W. GEIGER
CASE NO: 97-115

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

BY Don Mari Fedilo
(REPORTER)