IN THE

COURT OF APPEALS OF MARYLAND

NO. 17

September Term, 2015

TIMOTHY EVERETT BEALL,

Petitioner/Cross-Respondent,

v.

CONNIE HOLLOWAY-JOHNSON,

Respondent/Cross-Petitioner.

On Writ of Certiorari to the Court of Special Appeals of Maryland
(Appeal from the Circuit Court for Baltimore City,
The Honorable Marcus Z. Shar, Judge)

BRIEF OF *AMICUS CURIAE* MARYLAND DEFENSE COUNSEL, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Other Authorities

STATEMENT OF THE CASE

Amicus curiae, Maryland Defense Counsel, Inc., ("MDC") is a statewide voluntary organization of defense lawyers that promotes the efficiency of our legal system and fair and equal treatment for all under the law. As concerns the interest of MDC in this matter, the court below held that the trial court erred by granting judgment to the defendant on the plaintiff's claim for punitive damages, while MDC asserts that the trial court committed no error regarding punitive damages and that the opinion below seriously misapprehends this Court's precedent on the subject.[1] On March 27, 2015 this Court granted certiorari on the following question, among others: "Did Court of Special Appeals err when it held that the 'malice implicit' in Petitioner's actions could support an award of punitive damages, contrary to the long-established law that actual, not implied, malice is needed for an award of punitive damages?"

QUESTION PRESENTED

Did Court of Special Appeals err when it held that the "malice implicit" in Petitioner's actions could support an award of punitive damages, contrary to the long-established law that actual, not implied, malice is needed for an award of punitive damages?

STATEMENT OF FACTS

MDC incorporates by reference the Statement of Facts in Appellant's Brief.

[1] Only the counsel submitting this brief made a contribution, monetary or otherwise, to this brief.

ARGUMENT

1. A Brief History of Punitive Damages in Maryland

Prior to 1972 Maryland required proof of fraud, malice or evil intent to impose an award of punitive damages. *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 601 A.2d 633 (1992) (*Zenobia*), *citing Philadelphia, W. & B.R. Co. v. Hoeflich*, 62 Md. 300, 307 (1884); *Davis v. Gordon*, 183 Md. 129, 133, 36 A.2d 699, 701, (1944); *Heinze v. Murphy*, 180 Md. 423, 429-431, 24 A.2d 917, 921 (1942). In 1972 this Court deviated from this standard for what was intended to be the limited purpose of auto torts. *Zenobia*, 325 Md. at 456-457, 601 A.2d at 650, *citing Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 167, 297 A.2d 721, 731 (1972) (*Gray Concrete Pipe*). *Gray Concrete Pipe* adopted a standard of "gross negligence," defined as a "wanton or reckless disregard for human life" for the imposition of punitive damages in auto tort cases. Although that case expressly limited this new standard to auto cases, the standard was then "freely applied" to other non-intentional torts. *Zenobia*, 325 Md. at 457, 601 A.2d at 651, *citing Exxon Corp. v. Yarema*, 69 Md. App. 124, 516 A.2d 990 (1986) (environmental contamination); *Medina v. Meilhammer*, 62 Md. App. 239, 489 A.2d 35 (1985) (premises liability); *American Laundry Mach. v. Horan*, 45 Md. App. 97, 412 A.2d 407 (1980) (product liability); *Liscombe v. Potomac Edison Co.*, 303 Md. 619, 637, 495 A.2d 838, 847 (1985) (electrical supply).

In the mid-1970s this Court also fashioned the *Testerman-Wedeman* rule for the application of punitive damages in breach of contract cases. *See H & R Block v. Testerman*, 275 Md. 36, 338 A.2d 48 (1975) (*Testerman*), and *Wedeman v. City*

Chevrolet, 278 Md. 524, 366 A.2d 7 (1976) (*Wedeman*). *Testerman* held that punitive damages are only available for breach of a contract if the traditional requirements of fraud, malice or evil intent were proved, not the *Gray Concrete Pipe* standard. 275 Md. at 46-47, 338 A.2d at 54. *Wedeman*, however, involved a misrepresentation of fact inducing contract formation, followed by outrageous conduct on behalf of the defendant after the misrepresentation was discovered. 278 Md. 524, 366 A.2d 7. The Court never identified the intent element of fraud[2] in the facts of the case, but held that "implied malice" combined with "fraud" justified an award of punitive damages, without citing to *Gray Concrete Pipe* which just three years earlier had established some precedent for that standard, albeit in cases involving auto torts. 278 Md. at 530-532, 366 A.2d at 11-13.

Over the next fifteen years the Court of Special Appeals expanded the types of cases to which the *Gray Concrete Pipe* standard applied, as noted above. Three judges of this Court, meanwhile, argued:

> The *Testerman*-*Wedeman* rule was not supported by the Maryland cases relied upon in the *Testerman* and *Wedeman* opinions and is not supported by the decisions in any other jurisdiction. The rule has utterly no relationship to the purposes of punitive damages, leads to irrational results, and has been arbitrarily and inconsistently applied.

Schaefer v. Miller, 322 Md. 297, 312-332, 587 A.2d 491 (1991) (Eldridge, J., concurring). The stage was thus set for *Zenobia*, where the precise question was raised by this Court in its certiorari order:

> In light of the concurring opinion of Judges Eldridge, Chasanow, and Cole in *Schaefer v. Miller*, 322 Md. 297, 312-332, 587 A.2d 491 (1991), what

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[2] *See Ellerin v. Fairfax Savings, F.S.B.*, 337 Md. 216, 652 A.2d 1117 (1995) (*Ellerin*).

> should be the correct standard under Maryland law for the allowance of punitive damages in negligence and products liability cases, i.e., gross negligence, actual malice, or some other standard. *See, e.g., Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 297 A.2d 721 (1972); *Davis v. Gordon*, 183 Md. 129, 36 A.2d 699 (1944).

From 1972 until *Zenobia* , the Maryland courts' treatment of punitive damages was characterized by turmoil, uncertainty, and arbitrariness. *Zenobia* brought that to an end. MDC submits this amicus brief with the goal of preserving the ongoing principled application of the *Zenobia* standard.

2. *Zenobia* Substituted Principle for Arbitrariness and Uncertainty

Germane to this appeal, *Zenobia* and following cases reinstated what is in effect a unified theory of punitive damages, and required proof of punishable misconduct by clear and convincing evidence. It began by jettisoning the *Testerman-Wedeman* rule in favor of one standard for punitive damages in civil cases, regardless of whether the facts involved a contract. 325 Md. 453-455, 601 A.2d at 649-650.

The main point, though, was that the single standard applicable to all punitive damages claims was "actual malice," that is, evil motive, intent to injure, ill will or fraud. *Id*. at 460, 601 A.2d at 652. The Court explained, "We recognize that the term 'actual malice' has meant different things in the law, that its popular connotation may not always be the same as its legal meaning, and that its use has been criticized. Nevertheless, we simply use the term in this opinion as a shorthand method of referring to conduct characterized by evil motive, intent to injure, ill will, or fraud." *Id*., at 601 A.2d at 652, n. 20 (citations omitted). MDC respectfully suggests that the time has come to discard

"actual malice" in the punitive damages context, and to shorthand "evil motive, intent to injure, ill will, or fraud" collectively as "intent to injure." That is the usage throughout this brief. Common law fraud has an element of intent to harm[3], and it is hard to find much space between evil motive or ill will and intent to injure when any of these states of mind are central to the commission of a tort. More importantly, however, than whether to apply a label or which one to use, is to reason from the principle animating punitive damages rather than from whatever shorthand label might be used to describe that principle.

Zenobia's unifying principle does away with a standard which had "led to inconsistent results and frustration of the purposes of punitive damages in non-intentional tort cases." *Id*, at 456, 601 A.2d at 651. This Court had previously identified "the danger of a test which may be so flexible that it can become virtually unlimited in its application." *Id., quoting Gray Concrete Pipe*, 267 Md. at 166, 297 A.2d at 731. The implied malice standard rejected by *Zenobia* had been "overbroad in its application and has resulted in inconsistent jury verdicts involving similar facts. It provides little guidance for individuals and companies to enable them to predict behavior that will either trigger or avoid punitive damages liability, and it undermines the deterrent effect of these awards." *Id.* at 459, 601 A.2d at 652. *Zenobia's* intent to injure standard draws a

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[3] *See Ellerin*, 337 Md. 216, 652 A.2d 1117. *Ellerin* held that common law fraud is not necessarily congruent with punishable conduct. It noted that fraud always has an intent to harm element, but that a reckless disregard for the truth of the misrepresentation might satisfy the elements of fraud without fulfilling the scienter required for punitive damages. On the linguistic point, *Ellerin* describes the *Zenobia* requirement as "knowing and deliberate wrongdoing," which is a more descriptive label than "actual malice." *Id.* at 229, 652 A.2d at 1123.

meaningful demarcation between conduct motivated by a mistaken understanding, which deserves compensation, and conduct motivated by evil motive, intent to injure, ill will, or fraud, which justifies punishment in addition to compensation. This is a salutary purpose which is blurred by the decision below.

3. The Court Below Honored *Zenobia* in the Breach

Zenobia's punitive damages holding was expressly limited by the context of the case to non-intentional torts. This Court, however, soon extended the power of the unified theory of punitive damages to intentional torts. "[I]n *Adams v. Coates*, 331 Md. 1, 13, 626 A.2d 36, 42 (1993) [*Adams*], the Court stated that the policy explained in *Zenobia* generally 'should govern any award of punitive damages,' including punitive damages arising from intentional torts." *Ellerin*, 337 Md. at 228, 652 A.2d at 1123. Thus, the *Zenobia* principle requiring an intent to injure as a predicate for punitive damages applies to intentional tort cases, but that does not mean that every tort which might be called "intentional" necessarily fulfills the predicate. *Ellerin* makes that point forcefully by holding that fraud might not involve an intent to injure, if the misrepresentation was made with reckless disregard rather than knowing falsity, and that this species of fraud does not justify punitive damages. *See also Bowden v. Caldor, Inc.*, 350 Md. 4, 710 A.2d 267 (1998) (*citing* cases holding that the intentional torts of defamation, fraud and malicious prosecution do not permit punitive damages without evidence of intent to harm).

The decision below, however, deviates from and thus undermines *Zenobia*, the precedents that case rests on, and this Court's subsequent decisions in *Adams* and *Ellerin*.

That opinion finds that, by definition, both battery and use of excessive force allow imposition of punitive damages: "They would both, if found to have occurred, be torts committed with malice, that is, intentional torts as contrasted with accidental or negligent torts." *Holloway-Johnson v. Beall,* 220 Md. App. 195, 227, 103 A.3d 720, 739 (2014). This statement misapprehends the intent to injure standard of punitive damages, and the elements of the torts under consideration. It certainly is wrong that every intentional tort has all the elements of a punitive claim; *Ellerin* provides an example that fraud does not necessarily include the required intent for punishment. The battery claim in *Holloway-Johnson* is another example where intent to do something does not always equal an intent to injure. The excessive force claim is a third example of what may be an intentional tort which does not require proof of intent to injure in order to be compensable.

a. Intent to Injure is not an Essential Element of Battery

Intent to injure is not an essential element of civil battery. A battery occurs when one intends a harmful or offensive contact with another without that person's consent. *See, e.g., Nelson v. Carroll,* 355 Md. 593, 735 A.2d 1096 (1999) (*Nelson*). This Court examined the intent required for a civil battery in *Nelson*, where the defendant threatened and struck plaintiff on the side of his head with a handgun. The gun went off and plaintiff was shot. *Nelson,* 355 Md. at 596, 735 A.2d at 1097. Defendant claimed as his defense to the battery claim for the gunshot wound that the gun was fired accidentally. *Id.* This Court held that it was not essential that defendant intended to shoot plaintiff, because the uncontested facts demonstrated that defendant intended to invade plaintiff's legally

protected interests in not being physically harmed or assaulted. *Id.* at 609, 735 A.2d at 1104.

Thus, *Nelson* confirmed that the intent to injure is not a required element of civil battery. While "it is universally understood that some form of intent is required for battery," *see Nelson at* 601, 735 A.2d at 1100 and citations therein, the intent "requires not a specific desire to bring about a certain result, but rather a general intent to unlawfully invade another's physical well-being through a harmful or offensive contact or an apprehension of such a contact." *Id.* at 602-603, 735 A.2d at 1101. The Court noted: "The intent with which tort liability is concerned is *not necessarily a hostile intent*, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law forbids." *Id.* at 593, 602 n.3, 735 A.2d 1096, 1100 n.3 (1999) (quoting PROSSER & KEETON, THE LAW OF TORTS § 8, at 36 (5th ed. 1984) (footnote omitted))(emphasis added).

Therefore, the court below erred when it held that "malice" could be inferred, in the absence of any other evidence, from the presentation of a *prima facie* case of civil battery. Without evidence of intent to injure, there is no punitive damages claim for civil battery.

b. Intent to injure is not an Essential Element of a Constitutional Excessive Force Claim

The standard for claims of excessive force is the same under both the Fourth Amendment of the United States Constitution and Articles 24 and 26 of the Maryland Declaration of Rights. *Branch v. McGeeney*, 123 Md. App. 330, 348, 718 A.2d 631, 640

(1998) (citing *Williams v. Prince George's County*, 112 Md. App. 526, 547, 685 A.2d 884 (1996)) (*Branch*). The test for whether police officers have used excessive force is "whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them." *Hines v. French*, 157 Md. App. 536, 575, 852 A.2d 1047, 1069 (2004) (*quoting Branch*, 123 Md. App. at 348, 718 A.2d at 640 (*quoting Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443 (1989)) (*Graham*).

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight .... [w]ith respect to a claim of excessive force, the same standard of reasonableness at the moment applies: Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

Okwa v. Harper, 360 Md. 161, 200, 757 A.2d 118, 139 (2000) (quoting *Graham*, 490 U.S. at 396–97).

Maryland law does not require intent to injure to prove that a police officer acted unreasonably in a situation in which excessive force is alleged. To address intent in claims of excessive force, Maryland courts have frequently cited the Supreme Court's decision in *Graham*: "The Supreme Court has explained that intent is not relevant to this test: 'An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an

objectively unreasonable use of force constitutional.'" *Branch*, 123 Md. App. 348-49, 718 A.2d at 640 (quoting *Graham*, 490 U.S. at 397)); *see also Tavakoli-Nouri v. State*, 139 Md. App. 716, 734-35, 779 A.2d 992, 1002-1003 (2001) (holding, in the context of claims of qualified immunity to Maryland constitutional torts by Maryland State Police officers, that "a police officer acting without malice may be liable for using excessive force in an arrest, in violation of Article 24 of the Maryland Declaration of Rights. Put conversely, there is not a 'lack of malice' defense to a 'constitutional tort' claim alleging a violation of Article 24."). In *Graham*, the Supreme Court specifically rejected the test set test forth in *Johnson v. Glick*, 481 F.2d 1028 (2nd Cir. 1973), that focused on the intent of an officer, opining:

> Because petitioner's excessive force claim is one arising under the Fourth Amendment, the Court of Appeals erred in analyzing it under the four-part *Johnson v. Glick* test. That test, which requires consideration of whether the individual officers acted in "good faith" or "maliciously and sadistically for the very purpose of causing harm," is incompatible with a proper Fourth Amendment analysis. . . . The Fourth Amendment inquiry is one of "objective reasonableness" under the circumstances, and subjective concepts like "malice" and "sadism" have no proper place in that inquiry.

Graham, 490 U.S. at 398-99.

The holding below that a finding of excessive force equates to a finding of "malice" on the part of an officer contradicts both established Maryland law and binding precedent set by the Supreme Court of the United States that specifically rejects intent to injure as a necessary element of excessive force claims.

4. The Court Must Affirm the Defendant's Judgment on Punitive Damages to Maintain the Integrity of its Precedents

The court below held, in effect, that a verdict in favor of a plaintiff on any intentional tort permits the imposition of punitive damages, without proof of intent to injure. That holding runs afoul of the precedent that an intent to injure is a necessary element of any punitive damages award, whether the tort is intentional or non-intentional. This Court should reverse that holding and reassert the primacy of the intent to injure as a necessary element of a punitive claim. Otherwise, the Court will start slipping back down the *Gray Concrete Pipe* slope with exceptions to the unified theory of punitive damages, leading Maryland law back into a morass which this Court pulled out of almost a quarter-century ago.

Conclusion

For the foregoing reasons this Court should hold that the court below erred when it held that the "malice implicit" in Petitioner's actions could support an award of punitive damages, contrary to the long-established law that actual, not implied, malice is needed for an award of punitive damages.