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Supreme Court of Texas.
Safeshred, Inc.

v.

Louis Martinez, III.
No. 10-0426.

October 4, 2011.

Appearances:

Craig A. Morgan, for Petitioner.

Gregory D. Jordan of the Law Offices of Gregory D. Jordan, for Respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in the first matter, 10-0426 Safeshred, Inc. v. Louis Martinez, III.

MARSHAL: May it please the Court, Mr. Morgan will present argument for Petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF CRAIG A. MORGAN ON BEHALF OF THE PETITIONER

ATTORNEY CRAIG A. MORGAN: Morning, Your Honors. There are three issues we've raised in this appeal that are worthy of the Court's attention. I would like to at least begin with what I believe is the broadest and most troubling and reaches beyond the specifics of this case and that is what we have here is a \$200,000 punitive damage award that has been based on the alleged reprehensibility of conduct that did not harm the Plaintiff or, in fact, did not harm any one else. Our review of the trial record and the lower court's opinion will show that the Plaintiff's punitive damage award has been based not on the alleged wrongfulness or malice in the conduct that hurt him, which was getting fired in the Defendant's alleged malice in conduct that did not hurt anyone, which is putting allegedly unsafe and, therefore, illegal loads on the highways.

JUSTICE EVA M. GUZMAN: What is the public policy behind the cause of action here?

ATTORNEY CRAIG A. MORGAN: Oh, the public policy of a Sabine Pilot cause of action is that there should be only common law cause of action that would, generally speaking, the only reasons you cannot fire someone in Texas are those that are precluded by statute, federal or state. The, a wrongful discharge action can be based

on, however, under Sabine Pilot can be based on someone who is fired for refusing to perform an illegal act.

JUSTICE EVA M. GUZMAN: So how, without the punitive damages being a potential consequence, how do you think that we can effectuate the public policy behind the Sabine action cause of action?

ATTORNEY CRAIG A. MORGAN: Because, well, the threshold question, as all four dissents noted in the McClendon case, is whether this is a new tort being created by the courts or whether it is a recognition of a cause of action for breach of the employment agreement.

JUSTICE DEBRA H. LEHRMANN: Let me ask you, you argued that a Sabine Pilot claim sounds in contract.

ATTORNEY CRAIG A. MORGAN: That's correct.

JUSTICE DEBRA H. LEHRMANN: But at-will employment seems to reject the contractual nature of employment and so how do you reconcile that?

ATTORNEY CRAIG A. MORGAN: Well, that's not entirely true because there's still a contractual relationship. You can, someone can always sue for work that he's already performed under the terms of the existing contract. The contract can be terminated by either party at will, but that doesn't mean there's no contract. Someone who's done the work and is then fired can recover for his performance under the contract.

JUSTICE DEBRA H. LEHRMANN: So are you arguing that there's an implied contract in every at-will case?

ATTORNEY CRAIG A. MORGAN: That's not at, well, that's for sources performed. It's an oral agreement. Once you've tendered performance to the other side, you have a contractual cause of action for the breach of contract if the other side doesn't compensate you for your performance even if the contract itself can then be terminated for any future performance. That's a contractual cause of action.

JUSTICE PHIL JOHNSON: But that's not what he's suing for here. He's suing for future wages.

ATTORNEY CRAIG A. MORGAN: That's correct.

ATTORNEY JUSTICE PHIL JOHNSON: And so how--

ATTORNEY CRAIG A. MORGAN: I wasn't addressing specifically the claim here.

ATTORNEY JUSTICE PHIL JOHNSON: Right.

ATTORNEY CRAIG A. MORGAN: The fact is that it is a, it is, this employment relationship is a consensual, contractual, arrangement. It's not a tort between independent people who just are randomly confronting each other in the course of human events.

JUSTICE PHIL JOHNSON: But part of that relationship is either party can terminate it for no reason, for good reason, for bad reason except not for an illegal reason.

ATTORNEY CRAIG A. MORGAN: That's correct.

JUSTICE PHIL JOHNSON: So how do we breach a contract if the relationship clearly and unquestionably can be terminated by either party without any damages or obligation except when it's illegal, for an illegal reason? I have a hard time understanding how that is a breach of contract.

ATTORNEY CRAIG A. MORGAN: Well, because the damages are measured by the breach of contract. I

mean it's not just, you're not dealing with personal injury or physical property damage. We're dealing with the nonperformance, the noncontinuation and the nonperformance of a contractual relationship, which exists only because the parties have voluntarily consented to be an employment, employee-employer relationship. So the only damages originate from the fact that that relationship is terminated. This is not what one would traditionally regard as a tort. Now the question as the McClendon dissent points out is a fundamental issue is whether this is a new tort, which would impose some kind of duty in fair, of fair dealing in an employment relationship. Or whether it is, whether the Sabine Pilot cause of action permits a recovery, permits a some sort of an applied covenant or a cause of action for breach of contract.

JUSTICE DEBRA H. LEHRMANN: Haven't many courts actually recognized it as such?

ATTORNEY CRAIG A. MORGAN: Sabine Pilot cause of action as a tort? No, there are no cases that actually held that except the Fifth Circuit, which did in denying the recovery of attorney's fees under reasoning that it would just as well preclude the recovery of punitive damages. The same reasoning that the Garcia case used, to hold that you can't, the prevailing plaintiff couldn't recover attorney's fees in a Sabine Pilot cause of action would just as well apply to a nonrecovery of punitive damages because they said that the most glaring thing is that Sabine Pilot did not say attorney's fees would be recovered. Well, it didn't say punitives could be recovered either. And the court also said that while the Texas wrongful discharge statutes sometimes expressly apply for recovery of attorney's fees and that would be pointless if they were inherently recoverable in a wrongful discharge action.

JUSTICE DEBRA H. LEHRMANN: Well didn't the 14th Court, didn't the 14th Appellate Court say that, created this tort to promote the public policy of preventing an employee from being forced to choose between keeping his job and facing criminal liability?

ATTORNEY CRAIG A. MORGAN: Well as I described in our reply brief, every time that term has been used, it has just been dicta. There has been no decision in this state in which the decision turned on whether a Sabine Pilot cause of action was a breach of contract or a tort. None of those decisions turned on that distinction. Some of them may have used the term tort, but that's not the point because they're all dicta and the point is that a relationship between Mr. Martinez and Safeshred was entirely contractual. It was based--

JUSTICE NATHAN L. HECHT: Sometimes when the legislature creates these causes of action and they're sort of, we don't know what to call them exactly, sort of quasi-tort, I guess, the legislature prescribes these kinds of damages, but not these or maybe a full range of damages. Sometimes they allow punitive damages; sometimes they don't. When you recognize the cause of action, if it were a tort under the common law, does the common law court have some sort of authority to limit the damages that would otherwise be recoverable for a tort?

ATTORNEY CRAIG A. MORGAN: Well, I would imagine they would.

JUSTICE NATHAN L. HECHT: Examples you may have?

ATTORNEY CRAIG A. MORGAN: Well, no. I think the fundamental question is whether this is breach of contract or a tort action. It's a more nuanced question.

CHIEF JUSTICE WALLACE B. JEFFERSON: So if we were to say it's a tort action, then you'd lose? Is that what you're saying in this case? If we were to say Sabine Pilot is a tort action, then if you--

ATTORNEY CRAIG A. MORGAN: Well if the Court believes it's a tort action and the public policy would be best served by permitting punitive damages, then I presume that we would lose on that point. However, the most troubling part of this case is not really whether a Sabine Pilot cause of action will permit recovery or punitive damages. It's whether a Sabine Pilot cause of action permits recovery of punitive damages for conduct that did not hurt the Plaintiff. The malice that is supposedly supporting this \$200,000 punitive damage award is not

based upon any malice in firing Louis Martinez, which is--

JUSTICE DEBRA H. LEHRMANN: Well, let me ask you about that. You claim that if finding a malice can't be based on a general danger to the public by putting unsafe loads on the road, but wasn't that the precise type of concern that for public safety that prompted this exception in the first place?

ATTORNEY CRAIG A. MORGAN: No, it's not. The public at Sabine Pilot didn't really involve public safety. It involved a pollution issue, but the fact is that, well alright, the point is that it is not, it is not, it has been a fundamental principle in our system for centuries that you cannot sue someone for conduct that did not hurt you. You cannot sue someone for conduct that did not hurt anyone else. You cannot sue someone for conduct that threatened damage to someone.

JUSTICE DAVID M. MEDINA: How did this conduct not hurt Martinez, the person that was fired?

ATTORNEY CRAIG A. MORGAN: He got fired.

JUSTICE DAVID M. MEDINA: How did--

ATTORNEY CRAIG A. MORGAN: The question is was he fired with malice? The malice, all the evidence in this record that deals with malice is not that they fired him with malice. This was a good-faith disagreement, polite, quiet, business-like disagreement between the employer and Mr. Martinez over whether this load was safely secured. It didn't even raise their voices. There's no defamation. There's no assault. There's no slander. There's no interference with subsequent employment. He was simply let go.

JUSTICE DALE WAINWRIGHT: Then what's the disincentive to fire someone for committing an illegal act if the only recovery is actual damages?

ATTORNEY CRAIG A. MORGAN: Why would that not be sufficient? The fact is that the harm to Mr. Martinez should not be measured by the harm that did not happen to anyone.

JUSTICE DALE WAINWRIGHT: Okay, let's go back to my question. What's the disincentive for firing someone for an illegal, for not performing an illegal action if the only recovery is actual damages?

ATTORNEY CRAIG A. MORGAN: That is a disincentive.

JUSTICE DALE WAINWRIGHT: What's the penalty?

ATTORNEY CRAIG A. MORGAN: That is a disincentive.

JUSTICE DALE WAINWRIGHT: Well, actual damages compensate folks for injury that was caused. What's the penalty?

ATTORNEY CRAIG A. MORGAN: If you're going to define anything that's not actual damages as a penalty, then there is no penalty.

JUSTICE DALE WAINWRIGHT: Well--

ATTORNEY CRAIG A. MORGAN: But the fact that you have to pay actual damages--

JUSTICE DALE WAINWRIGHT: Thank you, my question.

ATTORNEY CRAIG A. MORGAN: There is no reason to believe that this is an epidemic problem in Texas

that we have to stop all these employers ordering people doing illegal things, that this is something that is a serious social problem that requires an extraordinary measure.

JUSTICE DALE WAINWRIGHT: I'm just circling back to Justice Guzman's initial question. On public policy grounds, don't you want a disincentive for firing someone for committing illegal, for not committing illegal actions? And actual damages, there's lots of case law in different areas that talk about how actual damages is not a penalty. Do you, on public policy grounds, what's the argument against having a penalty to provide a disincentive for this type of conduct?

ATTORNEY CRAIG A. MORGAN: It might be appropriate if the malice is in the firing. If the conduct that has to be malicious is the firing, the harm that hurt the plaintiff.

JUSTICE DAVID M. MEDINA: Obviously, a jury disagreed with you and let's say I disagree with you. It seems reading the record there is malice. You don't necessarily, you can have malice content, but being calm, cool and collected and gather your things and get out of here. The result is the same. You don't have to raise your voice; that's not a prerequisite.

ATTORNEY CRAIG A. MORGAN: Your Honor, there has to be some evidence of the malice that harmed him and the evidence below and at trial and the lower court's opinion focused not on the malice in firing him, but the alleged danger it created to the public by these unsafe loads that never hurt anyone.

JUSTICE NATHAN L. HECHT: Well, I don't see that in the Court of Appeals' opinion. They seem to focus on the definition of malice, which included an offense against the rights of a person. They stressed that, the Court of Appeals' majority stressed that several times.

ATTORNEY CRAIG A. MORGAN: Yes, the court -- the Court of Appeals seems to be kind of bizarrely obsessed with the fact that the wrong definition of malice was given in this case. However--

JUSTICE NATHAN L. HECHT: Oh but it, but they're focusing on rights.

ATTORNEY CRAIG A. MORGAN: Right.

JUSTICE NATHAN L. HECHT: In other words, the definition says nevertheless proceeds with conscious indifference to the rights of others.

ATTORNEY CRAIG A. MORGAN: Right.

JUSTICE NATHAN L. HECHT: And if you have a right not to be fired for refusing to perform an illegal act, then if you don't care about that right, you're consciously indifferent under the definition.

ATTORNEY CRAIG A. MORGAN: Well, but the fact, the problem is that the malice that harmed any alleged malice that harmed Martinez. First, let me address this issue about the definition of malice. The Court of Appeals overlooked the fact that the question that went to the jury correctly required that the malice of the defendant be in a conduct that harmed the Plaintiff. The question was do you find by clear and convincing evidence that the harm to Louis Martinez, III resulted from malice? So how malice itself is defined misses the point. The malice has to be in the conduct that harmed Mr. Martinez and the only two things the Court of Appeals mentioned were that malice is, to show this alleged malice in the firing was that Safeshred's managers allegedly knew that they were telling Martinez to commit illegal acts because he told them the loads were unsafe.

JUSTICE EVA M. GUZMAN: What about though this aspect of retaliation. I know that you're arguing that we're an employment at-will state and that it is not particularly egregious to get fired. People get fired every day. But what about this retaliation aspect of it? I don't, I refuse to carry this load because I consider it unsafe

based on my years of hauling loads and because I wouldn't do that, you fired me. That's retaliation. Isn't there some malice in that? Or what aspect of that takes that out of the malice content?

ATTORNEY CRAIG A. MORGAN: Well, if that were the definition, there would be punitive damages in every case of wrongful discharge and that's simply not the law and it shouldn't be. There should be something that goes beyond that, some desire to hurt this Plaintiff in particular.

JUSTICE DEBRA H. LEHRMANN: Well what about the fact he said that he had advance, one of the employers said that he had abandoned his job?

ATTORNEY CRAIG A. MORGAN: No. Well what happened was on their internal records, Safeshred wrote it, on their internal employment records, which were revealed only because there was discovery in this case, the manager had put that he had, that Martinez had abandoned his job, which, first of all, is a semantic quibble and abandoning his job is a perfectly defensible description of Martinez's conduct when he was told to either haul this load that the managers thought were safe or to get in his own truck and go home and he chose to get in his own truck and go home.

JUSTICE DEBRA H. LEHRMANN: But didn't they also say that he was also ineligible for rehire?

ATTORNEY CRAIG A. MORGAN: Safeshred was not going to rehire him, that's true.

JUSTICE DEBRA H. LEHRMANN: Even though he was a very good employee?

ATTORNEY CRAIG A. MORGAN: That's true; now does that show malice?

JUSTICE DEBRA H. LEHRMANN: Does it?

ATTORNEY CRAIG A. MORGAN: No. The fact that someone fires someone and then says well we've had a disagreement and we don't want to hire him back because we disagreed with him, it would be difficult to imagine any circumstance in the Sabine Pilot cause of action where there wasn't malice if that is sufficient. I see my time is up.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Mr. Morgan. The Court is ready to hear argument from the Respondent.

MARSHAL: May it please the Court, Mr. Jordan will present argument for the Respondent.

ORAL ARGUMENT OF GREGORY D. JORDAN ON BEHALF OF THE RESPONDENT

ATTORNEY GREGORY D. JORDAN: May it please the Court, in response to the Petitioner's arguments and the questions from the Court, I'd like to focus really on three areas. I know that I may be pulled around to whichever one the Court chooses to pull me to, but the one's I'd like to focus on, number one, would be showing that this Court should find that a Sabine Pilot violation that is committed with malice should support an award of punitive damages. Number two, that the evidence in this case was legally sufficient to find malice in the firing of my client and, number three, that the amount of punitive damages that the court assessed comport with both the U. S. and the Texas Constitution.

JUSTICE DEBRA H. LEHRMANN: What evidence--

JUSTICE DAVID M. MEDINA: Where would the Court get its authority to expand this motion of punitive damages here?

ATTORNEY GREGORY D. JORDAN: Well the court has the authority, first of all, and I would say not to expand this cause of action, but rather to define the cause of action because this is a court-created public policy exception to the employment at-will doctrine. It was not created by the legislature. It was created over 25 years ago and in this entire time, the legislature has not sought and has not changed the scope of this cause of action, has not fiddled with it whatsoever. The concurring opinion from Justice Kilgarlin clearly set out the types of damages that he believed this cause of action should cover, which included punitive damages. And where the Court has established the cause of action and the legislature has not seen fit to come in and attempt to meddle with this cause of action and I would dare say that it is not only the right, but the obligation of this Court to define what are the scope of damages that are allowed under this cause of action.

JUSTICE DAVID M. MEDINA: Do we have any concern that if you were to prevail that it would create a floodgate of this type of litigation?

ATTORNEY GREGORY D. JORDAN: Absolutely not, Your Honor.

JUSTICE DAVID M. MEDINA: And why is that?

ATTORNEY GREGORY D. JORDAN: Well, I'll give you an example, Your Honor. I think, as the practitioners, I think the assumption has been that punitive damages are labeled. One of the cases cited in my brief, I just looked at it the other day, I didn't even realize it when I was getting ready for oral arguments, the 2010 case *Physio GP, Inc. v. Naifeh* case out of the Houston Court of Appeals just last year. That was a case where punitive damages were awarded in that case. I think the assumption has been that punitive damages would be awarded. Certainly, those folks who were looking at the concurrence of *Sabine Pilot* were assuming that punitive damages would be awarded. And what the concurrence said in *Sabine Pilot* was that a good model for this Court to follow in determining what damages should be allowed is the anti-retaliation statute where you can't fire someone in retaliation for them filing a workers compensation act. And--

JUSTICE PAUL GREEN: Is malice required?

JUSTICE NATHAN L. HECHT: [inaudible] whistleblower. Why wouldn't the Whistleblower Act be a good model?

ATTORNEY GREGORY D. JORDAN: Well a Whistleblower Act would not be a good model because it specifically defines the type of damages that are recoverable. Now--

JUSTICE NATHAN L. HECHT: That's why it might be a good model.

ATTORNEY GREGORY D. JORDAN: Well, well, but here, here's the difference, Your Honor. What the anti-retaliation statute, all it said is that reasonable damages in this retaliatory discharge case are recoverable. That's all it said. Use that term reasonable damages. And I dare say that when this Court is trying to decide what damages should be recoverable in this sort of cause of action what you're trying to decide is what are the reasonable damages that should be recoverable? And what the court said, in the concurrence in *Sabine Pilot*, it said look to what the court did with anti-retaliation statute and then the *Azar Nut* case in the other cases related to it, what this Court decided was that when we're looking at what is a reasonable damage to award when there has been a retaliatory discharge, then we need to have the deterrents of punitive damages.

CHIEF JUSTICE WALLACE B. JEFFERSON: Would there be, under your argument, punitive damages in every case where an employee is fired for refusing to commit an illegal act?

ATTORNEY GREGORY D. JORDAN: Absolutely not.

CHIEF JUSTICE WALLACE B. JEFFERSON: What's the difference? Is it the potential for harm? I mean what

is the Court supposed to look at in determining or a jury, for that matter, in determining whether punitive damages should be awarded?

ATTORNEY GREGORY D. JORDAN: In determining whether punitive damages should be awarded, what needs to be looked at is whether there was malice in the act of firing the individual.

JUSTICE DEBRA H. LEHRMANN: And what--

JUSTICE DAVID M. MEDINA: [Inaudible] malice - I'm sorry. Go ahead.

JUSTICE DEBREA H. LEHRMANN: Go ahead.

CHIEF JUSTICE WALLACE B. JEFFERSON: No, go ahead.

JUSTICE DEBRA H. LEHRMANN: No, go ahead.

CHIEF JUSTICE WALLACE B. JEFFERSON: --so where's the malice in the act of firing the individual?

ATTORNEY GREGORY D. JORDAN: The malice in the act of firing the individual, Your Honor, occurs in at least six different areas in this case and that gets into the legal sufficiency argument that there was malice in the firing.

CHIEF JUSTICE WALLACE B. JEFFERSON: Get through your list because there will be questions in between. So what are the six?

ATTORNEY GREGORY D. JORDAN: I bet there will. Yes. The first area, Your Honor, deals with the fact that there was evidence that Safeshred's, try and say that ten times fast, that Safeshred's managers knew they were trying to force Martinez to commit illegal acts when they terminated him. What the evidence shows, it was flat out admitted in trial, the manager said they knew that it would be illegal to have Martinez drive an unsafe load and then there was a wealth of evidence from which the jury could draw a reasonable, a firm conviction that the managers, in fact, knew that these loads were unsafe.

JUSTICE EVA M. GUZMAN: Of course it would be illegal to force someone to drive an unsafe load, but the fact is there was I guess a dispute here about whether this load was really unsafe and if they did not know it was unsafe at the time they asked him to drive it, then how is that malice?

ATTORNEY GREGORY D. JORDAN: If they had no evidence or no reasonable basis for believing it was unsafe, then I would absolutely agree with you; however, let's look at what the evidence is. Number one, starting from October 1st all the way through October 17th Mr. Martinez went to his managers, sometimes multiple managers per load, and told them what was wrong with these loads. He said look here, you've got this steel stacked up improperly. You don't have anything between these rows of steel that will prevent the steel from falling over.

JUSTICE NATHAN L. HECHT: You don't have an ID number on the cabinet.

ATTORNEY GREGORY D. JORDAN: Now that was one thing. Now that one --

JUSTICE NATHAN L. HECHT: How does that risk safety?

ATTORNEY GREGORY D. JORDAN: That one doesn't affect safety. I absolutely agree with that. Well perhaps.

JUSTICE NATHAN L. HECHT: As I read your brief, you're quite clear, that you say this several times, the conduct that harmed Martinez was his termination.

ATTORNEY GREGORY D. JORDAN: That was, yes that was--

JUSTICE NATHAN L. HECHT: And that's how you say that's why there's so much evidence here of malice because it was aimed at the termination. But then there's kind of an argument on the side well and besides that, his safety was in jeopardy. So it's kind of one foot in, one foot out it seems to me. Are we looking at his safety or just the fact that they terminate him without caring whether his rights are being violated or not?

ATTORNEY GREGORY D. JORDAN: You're looking at both of them, Your Honor, but, respectfully, when you're looking at the issue of whether there was malice in the firing, you're looking purely at the issue of was there malice in the firing. On the other hand--

JUSTICE NATHAN L. HECHT: Regardless of whether his safety was an issue or not.

ATTORNEY GREGORY D. JORDAN: I'm sorry.

JUSTICE NATHAN L. HECHT: Regardless of the safety issue. He could have been as safe as it could be, but if they were trying to fire him for refusing to do an illegal act, that's malice.

ATTORNEY GREGORY D. JORDAN: No, sir, that in and of itself is not malice. There would have to be, well keep in mind that the definition that the court applied in this case did not just involve the specific intent to cause harm. That there was also what was effectively the old gross negligence standard and that's why this Court or this case may not have that wide range of implications because we're dealing with purely what the definition of malice that the court submitted in this case was. So this holding may be very narrow.

JUSTICE NATHAN L. HECHT: If he was perfectly safe, do you lose?

ATTORNEY GREGORY D. JORDAN: No, Your Honor. There was still malice in the firing. We can--

JUSTICE NATHAN L. HECHT: Well isn't the safety issue irrelevant? Seems like to me.

ATTORNEY GREGORY D. JORDAN: The safety issue is not irrelevant because if, number one, it's not irrelevant in the reprehensibility analysis when you get to the amount of punitive damages, which this Court, I believe, has alluded to in the Bennett case as well as which the U.S. Supreme Court has alluded to in Campbell and in Gore and in the TXO case that are cited in my briefs. But with respect getting back to the issue of what is the evidence of malice in firing, some of the other evidence as the Court has already pointed out is that they indicated, falsely indicated that Mr. Martinez abandoned his job even though they admitted that he was an excellent employee.

JUSTICE PAUL W. GREEN: If they wanted to fire him, why didn't they just fire him? I mean is, I'm trying to figure out this malice and the firing question as well. I mean it's like it's not only did they just fire, they fired him in the worst possible way and so that makes it malice. It seems to me that what you're saying is that they were looking for a way to terminate him in a bad way and they didn't have to, did they?

ATTORNEY GREGORY D. JORDAN: It doesn't have to be in a bad way, Your Honor, it just has to show either under the definition the court had in front of it in this case, the trial court had, it either had to be the specific intent to cause harm or it had to be the gross negligence standard, the disregard for his rights.

JUSTICE PAUL W. GREEN: Right, but by the same token, you mentioned the evidence that they didn't put things between the loads and they stacked them too high and so forth. But throughout, it seems to be that part

was disputed, but what was not disputed was the fact that he said the load was too long and what was their reaction? They called the DPS. They said you know we've got this complaint that the load is too long. Here's what it says and the DPS, oh no, that's fine, it's okay and so they satisfy that concern. If that was malice, how could, that sort of evidence would cut the other way wouldn't it?

ATTORNEY GREGORY D. JORDAN: Potentially, potentially it would. However, the other evidence the Court can look at and which the trial court did, the DPS provided a citation, which included the fact that there were cuts on the straps that were used to secure these loads and those straps continued to be used on all these subsequent loads in direct disregard. Even if the employer did not believe Mr. Martinez and thought he didn't know what he was talking about, certainly I would think they would give some weight to what the DPS citation said.

JUSTICE PAUL W. GREEN: On the day of the termination, was there evidence that the straps were cut on that load?

ATTORNEY GREGORY D. JORDAN: Yes, sir. Yes, the straps were the ones that had been cited in the initial, I believe, October, I don't remember the exact date, but one of the earlier loads and those straps continue to be used. On top of that--

CHIEF JUSTICE WALLACE B. JEFFERSON: Was the driver ticketed? Did Martinez get--

ATTORNEY GREGORY D. JORDAN: He did; he received a ticket and when he came back to the office, he gave the ticket to the two managers. I believe it was Mr. Kroll and I don't recall the other.

CHIEF JUSTICE WALLACE B. JEFFERSON: A ticket that he had to pay or that the trucking company?

ATTORNEY GREGORY D. JORDAN: He did not have to pay that ticket. The company did pay that ticket.

JUSTICE PAUL W. GREEN: But that related to the numbers on the cab and the registration and lighting and things of that sort.

ATTORNEY GREGORY D. JORDAN: And the straps.

JUSTICE PAUL W. GREEN: And the straps.

ATTORNEY GREGORY D. JORDAN: Yes, sir.

JUSTICE PAUL W. GREEN: And that happened how long before the termination?

ATTORNEY GREGORY D. JORDAN: I don't recall the exact date. I believe it was around October the 4th or the 5th and the actual termination I think occurred on October 17th. I don't recall the specific days, but they're cited in the brief.

JUSTICE DAVID M. MEDINA: Is there any weight to be given to the fact that some time after, the load did shift and cause some damage to the cab?

ATTORNEY GREGORY D. JORDAN: Absolutely, Your Honor, and I think, in large part, that's going to relate to the amount of exemplary damages that were awarded in this case. Because what the U.S. Supreme Court said in the case in the Gore and the Campbell cases is that, of course, there's no bright-line ratio that the Court is supposed to follow when it's looking at punitive damages, but there has been some guidance that this Court and the U.S. Supreme Court has certainly provided.

JUSTICE DEBRA H. LEHRMANN: And can you expound on that a little bit because in Bennett, we certainly have talked about the 4-to-1 ratio and in this case, it greatly exceeds that number. And so can you talk about that, why we would say that something that's so beyond the 4-to-1 ratio would be okay.

ATTORNEY GREGORY D. JORDAN: Absolutely, and I was afraid that being my third argument, I wouldn't be able to get to it and I appreciate the opportunity to get over to it. The question is what is the ratio you're supposed to look at? Is it the ratio purely of the actual damages to the punitive damages or is it what the U.S. Supreme Court said to look at? I would contend it's what the U.S. Supreme Court said to look at in Gore and Campbell and what they said was that the ratio that's proper to look at is the ratio between the harm or the potential harm to the Plaintiff and the punitive damages award and this gets me back to the Justice's question about well what about the fact that this load of 20-foot long steel beams that when the company got somebody a few days later to drive this load, what about the fact that those 20-foot steel long beams came loose from this improperly secured load and crashed through the front window of the cab? Well the answer, I believe, Your Honor, is that the Court needs to take that into account when looking at the potential harm that the U.S. Supreme Court said the Court should look at in determining what's the proper ratio. Yes, Your Honor.

JUSTICE EVA M. GUZMAN: I was just going to say when you get a minute, I've only written down two things on malice and I think we need to get there before we get there so can you go back to the. You said you had six.

ATTORNEY GREGORY D. JORDAN: Yes, Your Honor. Yes, Your Honor.

JUSTICE NATHAN L. HECHT: The, the uh- do that, just to follow up to Justice Lehrmann's question, was the shifting due to dunnage or the strap?

ATTORNEY GREGORY D. JORDAN: We don't. That's not in the record, but what we do know in the record, there is evidence that there was no dunnage between the rows, which my client said was a violation.

JUSTICE NATHAN L. HECHT: Don't know if that caused the shifting.

ATTORNEY GREGORY D. JORDAN: We don't know whether that caused the shifting, but what we obviously do know from the results is that it was an unsafe load.

JUSTICE NATHAN L. HECHT: Now, now to the list.

ATTORNEY GREGORY D. JORDAN: You all are making this tough on me. The six areas where there was evidence of malice in the firing, Your Honor, number one, there was evidence that the Defendant knew they were trying to force Martinez to commit illegal acts so they fired him.

JUSTICE DALE WAINWRIGHT: Counsel, Counsel, why don't we start at three. We've got one and two. You'll have a higher probability of getting through your list if you begin at three.

ATTORNEY GREGORY D. JORDAN: All right. Sometimes I forget what I've covered. I just turned 50 a couple of weeks ago and my memory is all gone. We've covered the fact they wrote down it was abandoned. We looked, there was evidence of the state of mind of the Defendants in this case when there was testimony that they found that the Plaintiff was insubordinate and obstinate when they were making this decision to fire him. I mean there was clear testimony as to their state of mind. The fourth item was that they made him ineligible for rehire, which we discussed with Justice Lehrmann. The fifth item is that there was a repeated pattern of trying to force Martinez to perform illegal acts that eventually culminated in his termination. There were the events of October 1st when they had him drive an illegal load. There were the events of October 8th when they had him drive an illegal load. There were the events of October 9th when they told him to drive an illegal load, but because the DPS had given him the ticket, he said I'm just not going to do it, but they attempted still to get him to

drive an illegal load. There was the events of October 15th where at least two different managers told him to drive an illegal load and then there were the events of October 17th where he drove the load, realized it was swaying so much that it was dangerous. He only drove it about five miles and said there's no way I'm going to drive this. Came back and told the employer this is dangerous. There's evidence in the record, in fact, that another one of the employees who testified at trial said I saw the load before he left and I saw the load when he came back and you could see a difference in that load.

JUSTICE PHIL JOHNSON: Well let's just go, but he wasn't fired for all the acts that took place prior. As I understand opposing counsel's position, he wasn't fired for those acts. He didn't have any harm or damage from those acts. He was fired and was damaged because of the firing. And so the malice, his position as I understand, the malice has to be shown in regard to the firing. And you're saying all of this, all of the prior acts somehow folded into the firing. I thought the firing was because he came back and said I'm not going to drive the truck and they said drive the truck or leave, I mean your choice.

ATTORNEY GREGORY D. JORDAN: The firing was because he refused to commit the illegal act of driving the unsafe load.

JUSTICE PHIL JOHNSON: That was the harm to him, the firing because he chose not to drive the truck. How was he harmed otherwise?

ATTORNEY GREGORY D. JORDAN: I would say it's not because he chose not to drive the truck. I mean he was, he could have been put in another position. There was evidence --

JUSTICE PHIL JOHNSON: They gave him a choice, drive the truck or leave. So the firing was because he would not drive the truck and the firing was the harm to it and I understand that. So what is your response to the opposing counsel's argument that you shouldn't punish the employer for other acts that did not result in harm to him?

ATTORNEY GREGORY D. JORDAN: In determining whether there is malice in an event, you can't just look at an event in a vacuum. You've got to look at what led to that event; otherwise, how do you know the motive? How do you--

JUSTICE PHIL JOHNSON: So is it your position that all these other factors were contributing to the firing? They contributed to the firing somehow? All these prior incidents I mean.

ATTORNEY GREGORY D. JORDAN: I believe they're all relevant to the firing, Your Honor.

JUSTICE PHIL JOHNSON: Alright, is it your position that any of them contributed to the firing other than his refusal to drive the truck that day?

ATTORNEY GREGORY D. JORDAN: Well, a jury[inaudible] --

JUSTICE PHIL JOHNSON: And is there evidence of that?

ATTORNEY GREGORY D. JORDAN: Yeah a jury certainly could have found that way because Mr. Martinez kept going to them and saying this is illegal. I can't do this and they kept saying, get out there--

JUSTICE PHIL JOHNSON: Okay and a jury could have found that way based on what evidence? What evidence is there to show that any of the prior acts contributed to his firing, which was the harm that you're claiming?

ATTORNEY GREGORY D. JORDAN: Well I believe it would be a reasonable conclusion that the jury could

have considered the other events that occurred in determining what was the state of mind and what was the motivation for the Defendant in firing Mr. Martinez. Does that answer your question, Your Honor?

JUSTICE PHIL JOHNSON: They could infer it I take is what you're saying. There's no direct evidence, but you're saying the jury could infer that the firing was based in part on the prior incidents.

ATTORNEY GREGORY D. JORDAN: I think that is a reasonable inference, yes, Your Honor. And I think it's important to look at the circumstances that surround a firing in order to determine whether there was actually malice in that firing or not. I see that my time has expired. I don't know if I appropriately answered Justice Lehrmann's question previously or if--

CHIEF JUSTICE WALLACE B. JEFFERSON: Justice Lehrmann?

JUSTICE DEBRA H. LEHRMANN: I mean I was really just trying to get, I think you did. I mean part of my question is, you still didn't answer the part about you know we have a 4-to-1 ratio that's been acknowledged and here you're asking for something so much more than that and you know. And so how do you get around Bennett you know where we talked about the total recovery being below this ceiling. I mean are you saying that that could be a factor the fact that it's below the ceiling. I don't want to put words in your mouth, but what are you saying?

ATTORNEY GREGORY D. JORDAN: What I'm saying, Your Honor, is that the ratio to look at in this case is the ratio of punitive damages to the potential harm. The best case I can cite the Court to is the U.S. Supreme Court case of TXO Production v. Alliance Resources Corporation. That's a very interesting case. It's one where the U.S. Supreme Court, and it was favorably cited in Gore. What the U.S. Supreme Court said in that case is a punitive damage award of \$10 million was constitutional when the actual damage award was only \$19,000. It was an oil and gas case that involved slander of title and some fraud claims. And what the court in that case said is that, well, if the defendant had succeeded in what they were trying to do. if they had succeeded, not that they did, but if they did, then the actual damages could have been in the range of maybe \$1 million to up to \$8.3 million and so what the court effectively said in that case is they upheld as constitutional a ratio of 526 to 1 of punitive damages to actual damages when the ratio of punitive damages to potential damages was somewhere in the range of 1.2 to 1 to 10 to 1. And if Mr. Martinez had been in that cab when the steel came crashing through the back of it, certainly his potential damages, death, serious brain injury, would have far exceeded the punitive damages of \$200,000.

CHIEF JUSTICE WALLACE B. JEFFERSON: Justice Wainwright?

JUSTICE DALE WAINWRIGHT: Your sixth point, Counsel.

ATTORNEY GREGORY D. JORDAN: My sixth point, Your Honor, was that Safeshred's managers gave false and misleading testimony at trial to avoid the responsibility of their acts in terminating Mr. Martinez much like what this Court focused on in the Bennett case. For instance, Donald Wallace at trial, he changed his story, he was the president of the company. He changed his story on what Mr. Martinez had said was unsafe on the load versus what he had been saying in his deposition when he changed it. Other examples were Mr. Kroll, a manager there, he at one point in trial said there was no dunnage, but he had previously. I'm sorry he said there was dunnage between the rows, but he had previously admitted there was no dunnage. Mr. Kroll also changed his story about what Mr. Martinez had said was unsafe on the loads. Dalton Wallace, the owner of the company, he changed his story about whether he knew DPS regulations or not and how that affected things. There were a few other examples, but those are some of them.

CHIEF JUSTICE WALLACE B. JEFFERSON: All right, are there any further questions. Thank you, Mr. Jordan.

REBUTTAL ARGUMENT OF CRAIG A. MORGAN ON BEHALF OF PETITIONER

ATTORNEY CRAIG A. MORGAN: An examination of the record will show that none of those alleged false and misleading statements hold up. It's just the sort of cross examination one normally expects of any witness. For example, Donald Wallace testified at trial that the only thing Martinez said was unsafe about the load was the overhang. Plaintiff's counsel tried to get him to agree he had said differently in his deposition. The witness refused to agree he had said differently in his deposition and plaintiff's counsel never read the allegedly conflicting deposition testimony. It's just not in the record. That's the 3RR23-26. Similarly, Linden Kroll testified the two rows of shelving units were pushed together with pallets in the middle. Plaintiff's counsel tried to get him to agree he had said differently in his deposition. The witness refused to agree he had said differently in his deposition and the Plaintiff's counsel never read the allegedly conflicting deposition testimony. It's not in the record.

JUSTICE DALE WAINWRIGHT: Counsel, let me switch your focus, if I may.

ATTORNEY CRAIG A. MORGAN: Yes.

JUSTICE DALE WAINWRIGHT: We're talking about malice. Malice was defined in the charge as consistent with the statute, the specific intent to cause substantial injury to Mr. Martinez or action or omission by the employers, which when viewed objectively and there's more language there, involves an extreme degree of risk considering the probability and magnitude of potential harm to others. There's a risk that the load, the unsafe load could fall off and potentially injure or kill others on the road. Innocent passerbyers or persons in other cars. When we're talking about defining malice in your initial comments focused on harm to Martinez.

ATTORNEY CRAIG A. MORGAN: Correct.

JUSTICE DALE WAINWRIGHT: The charge talked about that or potential harm to others. Why cannot that harm to others be considered here?

ATTORNEY CRAIG A. MORGAN: Because the question, number 3, which is Appendix tab 2, page 6 of our brief actually, question 3 says do you find by clear and convincing evidence that the harm to Louis Martinez, III resulted from malice attributable to Safeshred, Inc. Now if the harm to Mr. Martinez had also created, risked harm to others; for example, if Mr. Martinez had been injured by one of these loads and it risks hurting someone else, but no one else risked being fired here. It was Martinez who was fired. There was no, the harm that supports an award of punitive damages, the harm that supports a finding of malice under the law of this state and under this charge has to be the harm that occurred to the Plaintiff.

JUSTICE DALE WAINWRIGHT: Okay. So is your point that the actual question to the jury narrowed the charge's definition of malice so that it focused solely on harm to Martinez?

ATTORNEY CRAIG A. MORGAN: Well that, yes. That conduct had to be done with malice. What harmed him had to be done with malice.

JUSTICE DAVID M. MEDINA: Was there ever a situation where punitive damages can be awarded in these Sabine Pilot cases?

ATTORNEY CRAIG A. MORGAN: Well if, for example, assume the Court reaches the hurdle that this is tort. If the firing had been a repeated conduct, if they were running illegal goods over the state line and kept firing people who refused to do it and kept sending these illegal loads over the state line, if they were smuggling, for example, drugs and they kept doing that, there might be.

JUSTICE DAVID M. MEDINA: So it's a degree of a --

ATTORNEY CRAIG A. MORGAN: If it was --

JUSTICE DAVID M. MEDINA: You're saying it's a degree --

ATTORNEY CRAIG A. MORGAN: But it has to be --

JUSTICE DAVID M. MEDINA: Excuse me. You're saying --

ATTORNEY CRAIG A. MORGAN: It has to be malice. It has to be repetition in the conduct that hurt the Plaintiff.

JUSTICE DAVID M. MEDINA: You're saying it's the degree of illegality that matters.

ATTORNEY CRAIG A. MORGAN: No, it's not the degree of the illegality. It's the degree of the malice in the firing. If they had harmed him by firing him in a malicious way, for example, if they had slandered him, if they had said his subsequent employers had called and they said he was fired because he was stealing from them.

JUSTICE DAVID M. MEDINA: So you get one free pass and if it's more than that then we look to degree of malice.

ATTORNEY CRAIG A. MORGAN: No, it has to be malice in the act of firing. If they had assaulted him, if they had defamed him, if they had interfered with his actions to get subsequent employment, if they had done something that was malicious in the act of firing him as sometimes that occurs. There are cases in this state, for example [inaudible]--

JUSTICE NATHAN L. HECHT: I don't understand how smuggling hurts him.

ATTORNEY CRAIG A. MORGAN: Well, that was a bad example.

JUSTICE NATHAN L. HECHT: I would think so.

ATTORNEY CRAIG A. MORGAN: That was a bad example. I was talking about if there was a repeated practice of firing people this way, there might be, but you're right, Your Honor, smuggling wouldn't harm him, but if it were malice in the act of firing him that was demonstrable.

JUSTICE DEBRA H. LEHRMANN: Could you give us an example of that?

ATTORNEY CRAIG A. MORGAN: Pardon me?

JUSTICE DEBRA H. LEHRMANN: Could you give us an example of that of what you mean?

ATTORNEY CRAIG A. MORGAN: Well, there are cases, yes, there are cases, I can't remember the citation, I think it's in our brief, where there was a malicious firing that was held up by an independent tort where the person was verbally abused in the course of being fired and told to leave and berated in front of fellow workers and slandered and so forth in the course of firing and that was held to have been an assault, a verbal assault; in fact, there might even have been some physical touching. So that was considered to be an independent tort and that was malice in the firing. So there can be malice in the act of firing. Like this was just a straightforward business transaction where they just said either do what we say or you go home and he chose to go home. I see my time is up. Unless the Court have any further questions?

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The cause is submitted and the Court will take a brief recess.



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MARSHAL: All rise.

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