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IN THE SUPREME COURT OF THE UNITED STATES

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DOMINO'S PIZZA, INC., ET AL., :

Petitioners :

v. : No. 04-593

JOHN MCDONALD. :

- - - - -X

Washington, D.C.

Tuesday, December 6, 2005

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:07 a.m.

APPEARANCES:

MAUREEN E. MAHONEY, ESQ., Washington, D.C.; on behalf
of the Petitioners.

ALLEN LICHTENSTEIN, ESQ., Las Vegas, Nevada; on behalf
of the Respondent.

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

2 (11:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Domino's Pizza v. McDonald.

5 Ms. Mahoney.

6 ORAL ARGUMENT OF MAUREEN E. MAHONEY

7 ON BEHALF OF THE PETITIONERS

8 MS. MAHONEY: Mr. Chief Justice, and may it
9 please the Court:

10 The complaint in this case actually alleges
11 that Domino's breached its obligations under a contract
12 with JWM. It does not allege that any of the terms of
13 McDonald's own contracts were violated.

14 The Ninth Circuit, nevertheless, held that
15 Mr. McDonald could recover damages so long as he could
16 show that he had suffered some distinct injury arising
17 out of the violation of the contract between his
18 company and Domino's.

19 We -- we ask this Court to reverse that
20 holding for two principal reasons.

21 First, Mr. McDonald did not hold any rights
22 under the contracts between his company JWM and
23 Domino's, and that's disqualifying under section 1981.

24 Second, the injuries that he alleges are
25 simply too indirect to be cognizable under an implied

1 right of action. This Court, even in the context of
2 express rights of action, whether RICO or the Clayton
3 Act, has looked to the background principles of the
4 common law to define the scope of a damage recovery.
5 And these kinds of injuries, which are really the
6 classic form of derivative injury, have never been
7 recoverable.

8 JUSTICE KENNEDY: Can -- can you tell me, Ms.
9 Mahoney, just in -- in a case where the person is
10 directly implicated -- he was the one discriminated
11 against. He obtains in a suit the damages for the loss
12 of the profits in the contract. What are the other
13 damages? Does he get emotional distress?

14 MS. MAHONEY: If -- if he's -- yes, you can
15 get emotional distressed under section 1981, and --

16 JUSTICE O'CONNOR: If -- if you're
17 contracting for yourself --

18 MS. MAHONEY: That's correct.

19 JUSTICE O'CONNOR: -- in your own behalf.

20 MS. MAHONEY: Absolutely. There is no
21 standalone cause of action under Federal law simply for
22 emotional distress that is suffered as a result of
23 racially discriminatory conduct. Presumably Congress,
24 you know, might do that some day, but it has not done
25 so. And in fact, even under title VII, racially

1 disparaging comments can cause distress to a worker and
2 they're still not actionable unless it rises to the
3 level of a hostile work environment.

4 JUSTICE KENNEDY: And what was the
5 plaintiff's -- it wasn't here. What kind of damages
6 was he asking for?

7 MS. MAHONEY: He is asking -- it's -- it's --
8 the complaint is a little unclear, but he's asking for
9 losses that arise out of the company's failure to have
10 revenues that would have passed through the company to
11 him in either his capacity as a shareholder or possibly
12 as an employee. In fact, it's important to stress how
13 indirect these injuries really are. The gravamen --

14 JUSTICE SOUTER: Well, I thought they were --
15 they were essentially, as I guess you said a moment
16 ago, emotional distress kinds of injuries because
17 otherwise he'd be claiming a double recovery. So he
18 doesn't do that because they -- they settled the
19 contract case with the corporation for what? \$46,000?

20 MS. MAHONEY: \$45,000, Your Honor.

21 JUSTICE SOUTER: So -- so that the only thing
22 he -- he's not claiming an economic injury, as I
23 understand it, or am I wrong?

24 MS. MAHONEY: I think you're wrong, Your
25 Honor. He actually in his complaint asked for economic

1 damages. He doesn't specify them, but in an affidavit
2 that he submitted to the district court, he said that
3 his net worth had declined 8 million dollars and he is
4 saying that he --

5 JUSTICE SOUTER: But I -- I guess that's
6 where I went wrong. I thought those were the reasons
7 that he was claiming that he had been distressed
8 emotionally.

9 MS. MAHONEY: I don't think so, Your Honor.

10 JUSTICE SOUTER: But you're -- you're saying
11 he wants the --

12 MS. MAHONEY: But either way, the outcome
13 should be the same because emotional distress is not a
14 standalone claim. He has to establish that he had
15 rights to make and enforce a contract that were
16 violated, and even if he did that, he still has to show
17 that the damages that -- that were caused by Domino's
18 were sufficiently direct to be cognizable.

19 CHIEF JUSTICE ROBERTS: What if you have a --

20 JUSTICE GINSBURG: What -- what he's saying
21 is treat me as a sole proprietor. Yes, I created this
22 corporation so I can be insulated from liability, but
23 this is a one-person show and so I am bringing a 1981
24 claim and say forget the corporation. I'm the only
25 human that's involved in this activity.

1 MS. MAHONEY: Your Honor, I think there's a
2 couple of problems with that. I mean, first of all,
3 these were contracts where Domino's had rights under
4 these contracts as well, and if it had sued Mr.
5 McDonald under the terms of the contract for failing to
6 perform, he would have rightly said, that's not my
7 contract.

8 And I don't think that we can think that
9 Congress intended this Court to simply disregard those
10 principles that have always governed where you -- if
11 you take the benefits of avoiding liability, you can't
12 turn around and say, well, now that it's time to
13 recover against Domino's, it is my contract. That's
14 not the way the law works. He can't disown the -- the
15 force of the law when he's taken the benefits of the
16 law.

17 And now, the burden here is really a moderate
18 one. It's one that says that the recovery that is owed
19 will come through the corporate entity. He will get
20 whatever his share of that is through the -- the
21 corporate processes, and he won't be able to have an
22 independent claim for emotional distress. But --

23 CHIEF JUSTICE ROBERTS: Counsel, what if you
24 have a case where a company says we are not going to
25 deal with any companies that have an African American

1 as the CEO? Couldn't that CEO, the individual, claim
2 that that policy interferes with his ability to make
3 contracts with his company to be the CEO?

4 MS. MAHONEY: Well --

5 CHIEF JUSTICE ROBERTS: And shouldn't he then
6 have a right to bring a claim under section 1981?

7 MS. MAHONEY: Your Honor, if his company
8 fired him because he couldn't make contracts -- in
9 other words, they said, we -- we don't want you to be
10 our CEO. We don't want a black CEO because, after all,
11 we're going to lose business with these other companies
12 -- then I think under an interference theory, that he
13 probably could sue under 1981, sue both his company and
14 also the third party that induced the interference.

15 If we look to common law principles, the
16 common law of tortious interference established various
17 rules that were designed to provide recovery for
18 interference when the causation was sufficiently
19 direct, and the common law says -- this is section 766
20 of the Restatement and cases that follow that -- that,
21 in essence, if the third party -- or if the defendant
22 induces the breach, essentially, you know, tells them,
23 this is how we want it done, we want you to fire so and
24 so if you want our business, if they induce the breach
25 or induce the violation, then they can be liable as

1 well.

2 JUSTICE KENNEDY: Suppose that McDonald had
3 had a contract with the corporation that he gets 80
4 percent of the gross from every contract. Could he
5 then sue?

6 MS. MAHONEY: No, Your Honor. There are two
7 different things. I mean, one -- one part of it is
8 that here his -- he doesn't say that his contract
9 wasn't performed, but he also would have to show that
10 Domino's was the direct cause of his loss. And the
11 common law, under section 766, for instance, says,
12 look, if a -- if a third party or if the defendant just
13 made it more difficult for your employer to perform or
14 for your company to meet its obligations, its
15 contractual obligations, by causing it to have less
16 money, that doesn't count. That's not inducing a
17 breach.

18 JUSTICE KENNEDY: Well, but -- but in this
19 case, it's pretty obvious they didn't care about the
20 corporation. They cared about him. He was the target.

21 MS. MAHONEY: Well, he may have been the
22 reason for the discrimination, but the target, in terms
23 of the direct victim of the conduct that is alleged,
24 was clearly JWM. It's JWM whose contracts were
25 supposedly breached.

1 And -- and the point is, Your Honor, the --
2 the law has made it clear that simply breaching a
3 contract in a manner that makes it more difficult for
4 somebody else to perform is not a sufficiently direct
5 cause of the -- of the failure to perform all of the
6 succeeding downstream contracts. Otherwise, the -- the
7 rules of privity would simply be eroded. And so instead,
8 it's a very narrow category of cases where a breach of
9 contract can be viewed as the direct cause of another
10 party's failure to perform a separate contract with the
11 plaintiff.

12 And let me give you an example, just to -- to
13 show what it's talking about. If, for instance, there
14 is a contract where I am the defendant and I have the
15 right to approve an assignment, and the plaintiff has a
16 contract with a third party and I refuse to approve
17 that assignment. Then I have retained the legal
18 control under the terms of my contract as to whether
19 the plaintiff's contract can be performed or not. And
20 in that circumstance, if -- if I deny approval on the
21 basis of race, I have made it literally impossible for
22 the other parties to perform.

23 And that's the -- the narrow exception. It's
24 either inducing the breach, inducing the breach of a
25 contract, or it's making it literally impossible, but

1 not simply making it more expensive or more difficult.

2 And -- and I think it's important to
3 emphasize why these rules were developed under the
4 common law this way. In -- in part, it is to protect
5 the very reasonable and legitimate interests of -- of
6 innocent third parties. In -- in -- take the corporate
7 context. If General Motors has a dispute with a major
8 customer, and imagine that there is some sense that
9 that -- that the customer may have breached its
10 contracts because it -- it thought GM's work force had
11 too many black faces, GM has got to figure out what to
12 do about that. It's not going to capitulate and fire
13 its work force, but it has to decide whether it wants
14 to settle, whether it wants to litigate. It may
15 litigate and then want to settle. But that's its
16 claim, its contract claim, and it has to have the
17 freedom to figure out how it ought to be settled.

18 If every black employee at GM could file an
19 action under section 1981 for emotional distress or for
20 wage increases that they might not have gotten because
21 GM lost this big piece of business, then GM would lose
22 the ability to control the settlement of its own claim.

23 And so -- and it's an innocent party in this fact
24 pattern.

25 So the law has been designed under -- under

1 the common law to make sure that everybody's interests
2 are sufficiently protected.

3 And what the Ninth Circuit's, you know,
4 ruling does here and what the plaintiffs are really
5 asking for is to just blow through all of those rules
6 that -- that have been designed to -- to make sense out
7 of contracts -- contract laws and still allow some room
8 for tortious interference sorts of principles. And
9 under -- under the Court's cases, I don't think there
10 is any basis to think that Congress intended the Court
11 to create an implied right of action that is completely
12 divorced from the common law principles that would have
13 foreclosed these kinds of remedies.

14 JUSTICE KENNEDY: Are there any --

15 JUSTICE GINSBURG: Did you say there is or --

16 JUSTICE KENNEDY: -- are there any cases
17 where we pierced the corporate veil in order to help
18 the shareholder?

19 MS. MAHONEY: Not that I know of, Your Honor.

20 And I --

21 JUSTICE KENNEDY: This is kind of an inverse
22 --

23 MS. MAHONEY: Yes, inverse -- reverse
24 piercing.

25 JUSTICE KENNEDY: -- corporate veil piercing.

1 MS. MAHONEY: Not that I know of, and I don't
2 -- and I -- I think if you did that, would you do it
3 for employees too? Can all the employees sue? I mean,
4 where -- where does it stop? Can -- if Domino's
5 violated a term of a contract because it was -- it
6 wanted to cause economic loss to the employee of a
7 subcontractor, can -- can he then sue?

8 I mean, looking at the theory of damage in
9 this case shows just how indirect it is. If you look
10 at paragraphs 24 through 27 of the complaint, the sole
11 theory of harm here is that Domino's had an obligation
12 to provide a letter to -- to JWM, certifying that JWM
13 wasn't in breach of any terms of the lease, and that it
14 refused to provide that letter, and when it did so, the
15 bank denied some financing on a project, and then that
16 caused JWM not to have money to invest in other
17 projects. And so then it didn't have enough money to
18 pay its creditors, and so then it went into -- had to
19 declare Chapter XI bankruptcy. And then McDonald
20 didn't get as much money from the corporation as he
21 otherwise would have.

22 JUSTICE BREYER: There are two separate
23 arguments here, and I'm trying to separate them. I
24 guess that many States have a doctrine in two areas of
25 law. Third party beneficiaries can sometimes recover;

1 sometimes they can't. Victims of efforts to interfere
2 with a contract sometimes recover; sometimes they
3 can't. And one question is whether this particular
4 individual fits within those doctrines. And you have
5 to be an expert on contract law to know.

6 But in respect to the civil rights law, I
7 guess your position is -- and this is what I want to
8 know -- that whatever those doctrines are, they have to
9 be the same for white people as for black people.

10 MS. MAHONEY: I think the language of the
11 statute says that it's protecting the -- the right of
12 all -- the same right to make and enforce --

13 JUSTICE BREYER: Right. So -- so it might apply.
14 And one thing you couldn't do if you're a State is have a
15 different rule for black people that treated them worse
16 than white people.

17 MS. MAHONEY: I think that's correct, Your
18 Honor, but --

19 JUSTICE BREYER: All right. And has there
20 ever been a case in respect, whether it's affirmative
21 action or some other thing, that interprets that --
22 that -- this particular civil rights statute to say
23 that for whatever historical reasons, et cetera, black
24 people are entitled to more protection under contract
25 law than white?

1 MS. MAHONEY: Not that I can think of, Your
2 Honor. And I think the language of this statute,
3 though -- I mean, certainly though -- of course, the
4 Court in McDonald did interpret this statute to -- to
5 also protect white person -- white -- white people,
6 people of all color, despite the language that says,
7 you know, rights the same as -- as whites. But --

8 JUSTICE GINSBURG: Do corporations have a
9 color?

10 MS. MAHONEY: No, they don't, Your Honor, but
11 all of the courts of appeals have, in effect, imputed
12 race to corporations under circumstances where their --
13 their contractual rights have been violated because of
14 the race of their shareholders or employees. And that
15 has been well-settled, at least in the courts of
16 appeals.

17 JUSTICE BREYER: So how do we deal with this?
18 That is to say, do I have to become an expert on
19 contract law, or do I say to the Ninth Circuit or the
20 circuit, look, the -- the question here is not what the
21 contract law is except insofar as it's relevant to
22 whether there's a differential in treatment?

23 MS. MAHONEY: Well, Your Honor, I -- I don't
24 think you have to be an expert on contract law. I
25 think that this Court already held in Patterson, for

1 instance, that section 1981 was designed to have its
2 own Federal content, but that when we look at the term,
3 the right to make and enforce contracts, certainly we
4 have to interpret that in light of common law rules.
5 And under the common law of contracts, only parties and
6 third party beneficiaries have -- hold rights under
7 those contracts.

8 Under section 302 of the Restatement, it
9 defines who a third party beneficiary is, and I think
10 that's a good starting place. It shows us that
11 children, you know, as in this Court's case in Runyon,
12 are third party beneficiaries. Union members are third
13 party beneficiaries of collective bargaining agreements
14 under that -- under the comments in the Restatement.
15 But the plaintiff acknowledges that the shareholders
16 and employees are not intended third party
17 beneficiaries of the contract.

18 CHIEF JUSTICE ROBERTS: Well, maybe not --
19 maybe not shareholders in general, but what if you have
20 a situation, like here, where you're dealing with sole
21 shareholders? Why is that a real stretch to say that
22 that person is a third party beneficiary of the
23 contracts of his corporation?

24 MS. MAHONEY: Well, the -- for two reasons.
25 First, the contract has to actually identify third

1 party beneficiaries. In other words, parties need to
2 agree on who the third -- on who the beneficiaries are
3 supposed to be. And here, of course, there's nothing
4 in the contracts. They haven't alleged there's
5 anything in the contracts to identify him as that.

6 And also, if -- if --

7 CHIEF JUSTICE ROBERTS: There was nothing in
8 these contracts requiring anything in the way of
9 personal guarantees or anything of that sort?

10 MS. MAHONEY: I don't believe so, Your Honor.

11 It's certainly not alleged in the complaint that there
12 is a personal guarantee. And -- and I don't think so
13 because when Domino's sued JWM, it did not sue Mr.
14 McDonald. And -- and as I say, if -- if they had, I'm
15 sure Mr. McDonald would have put up his hand and said,
16 no, thank you, that's not my contract.

17 And I -- so I don't -- I think that really
18 what we are asking the Court to do is just to look at
19 the language and -- and read it in light of these well-
20 established principles because that's what Congress
21 would have intended the Court to do, and that he is not
22 a third party beneficiary. He is not a party. And so
23 the Ninth -- the rationale of the Ninth Circuit would
24 need to be reversed because that's all it relied upon.

25 And then the alternative theory --

1 JUSTICE BREYER: Well, but that's exactly
2 what I'm asking. If -- if you win, this case is
3 reversed, sent back. I mean, what do -- would I tell
4 them? And why not tell them, instead of having to
5 delve into this, is, look, it's plausible here that
6 third party beneficiary doctrine might cover this
7 person? It's also plausible not. We're not experts.
8 We don't know. You figure out what the normal rule is
9 and apply that normal rule.

10 MS. MAHONEY: Well, I don't think we need to
11 do that because there's been a concession in this case
12 that Mr. McDonald is not a third party beneficiary
13 under the normal rules and is asking, instead, that the
14 Court create new rules, rights greater than third --

15 JUSTICE BREYER: Well, what about the other
16 part of it, which is the -- the interference with the
17 contract? Could we say the same thing there? We send
18 it back, say, look, we're not experts on this, it's a
19 matter of State law typically, and be absolutely sure,
20 please, that whatever doctrine you normally apply is
21 applied to this case too because it's plausible. He's
22 the sole shareholder. He's the sole beneficiary.

23 MS. MAHONEY: Your Honor, I -- I -- we would
24 ask that this Court not do that for two reasons, that
25 the alternative theory of tortious interference was

1 never pled. It was never argued, and the district
2 court dismissed this complaint with prejudice because
3 there was no alternative theory. They did not move for
4 leave to amend.

5 So I think this Court should say one of two
6 things about the alternative theory. Either, number
7 one, it is waived, or number two, based on the
8 arguments that have been advanced and the allegations
9 of the complaint, it could not possibly be cognizable.

10 And I -- I don't think you have to be an expert on
11 interference law in order to reach that conclusion
12 because --

13 JUSTICE GINSBURG: Are you saying this is a
14 matter of Federal contract law, common law, Federal
15 common law, are -- or are you saying you go State by
16 State, in which case 1981 in some places it will be
17 third party beneficiary, some it won't?

18 MS. MAHONEY: I -- I think, Your Honor, that
19 in -- in the prior cases, in Patterson in particular,
20 that the Court rejected the idea that it ought to be
21 the State -- the law of each State that governs the
22 scope of the rights. That argument, I believe, was
23 advanced by the Solicitor General, and this Court said,
24 no, they didn't think that was correct.

25 And similarly, in Haddle v. Garrison, which

1 is a section 1985 case, this Court looked to common
2 law. But it -- it said that it's really Federal common
3 law that controls these issues.

4 So I think it's looking just to -- to State
5 law principles to inform what Congress may have had in
6 mind when it -- it allowed for persons to recover for
7 violations of the rights to make and enforce contracts.
8 Here --

9 CHIEF JUSTICE ROBERTS: But is it State law
10 today or State law back when section 1981 was passed?

11 MS. MAHONEY: This Court has looked to both,
12 but in Associated General -- Associated General
13 Contractors, for instance, this Court said that it's
14 not bound by the terms of common law that existed at
15 the time that the statute was adopted, and -- but
16 rather, that common law evolves, and so it's
17 appropriate to -- to look beyond that.

18 I think it bears emphasis, though, that the
19 common law of tortious interference at the time that
20 this statute was adopted in 1866 was narrower than it
21 is today. But even under the broader views of tortious
22 interference, the plaintiffs concede that they would
23 not be able to recover under those theories, and
24 instead, have said to this Court 1981 should be -- go
25 well beyond the terms of common law interference

1 principles.

2 JUSTICE KENNEDY: Well, in a -- in a sense
3 this is stronger than some tortious interference claims
4 because here the target is this -- this party.

5 MS. MAHONEY: That's always true in tortious
6 interference claims, Your Honor, and --

7 JUSTICE KENNEDY: You mean that -- that the
8 injured party has to be the target?

9 MS. MAHONEY: Absolutely. The injured party
10 has to allege that the defendant knew about the
11 contract and specifically intended to interfere with
12 the performance of the plaintiff's contract. But,
13 nevertheless, we know of no --

14 JUSTICE KENNEDY: To interfere but not
15 necessarily to injure him.

16 MS. MAHONEY: And to injure. Well, to injure
17 him, to prevent his performance for -- for purposes of
18 injury, yes.

19 And, nevertheless, we are aware of no case
20 that has ever found that an employee of a company or a
21 shareholder of a company could recover under common law
22 tortious interference theory simply because it suffered
23 losses arising out of a breach of contract with its own
24 corporation that made it more difficult or more
25 expensive for the corporation to recover.

1 And I think it -- it is -- also bears
2 emphasis of where this theory would take the Court if
3 it were to recognize this. It would go far afield from
4 the core requirement that there not be discrimination
5 in the terms of an employment contract because this --
6 the tortious interference theory, of course, is based
7 solely on the concept that he may have had some sort of
8 implied employment agreement with JWM.

9 What this would mean then is that if -- in
10 the case of GM, if a major customer cancels a contract
11 and GM doesn't give raises to its work force, all of
12 the black workers would have causes of action because
13 of the injuries that were intended because the contract
14 was canceled on the basis of race, but their similarly
15 situated white coworkers would not. They would have
16 suffered exactly the same injury, but they would have
17 completely different rights. And that shows why this
18 derivative injury theory just doesn't fit section 1981
19 because at its core, it has to be about preventing
20 discrimination in the terms of the actual contract.

21 And here, there is no allegation that JWM
22 subjected McDonald to any discriminatory terms of
23 employment, and therefore, it is not -- or that it -- a
24 breach was induced. And therefore, it isn't the
25 paradigm case, and it would create problems down the

1 road to recognize this -- this kind of theory.

2 So I don't -- I don't think that we are
3 asking the Court to do anything radical, and I think
4 the whole issue of tortious interference can be
5 avoided, if the Court would prefer, because the -- the
6 theory was unquestionably waived.

7 There are 14 paragraphs of facts in this
8 complaint laying out the factual allegations.
9 Paragraph 11 says that Mr. McDonald is the president,
10 sole shareholder, and operator of the company. Nowhere
11 in those 14 paragraphs does it say that he had an
12 employment contract with JWM.

13 Similarly, the cause of action paragraphs --
14 I believe there are 15 of them -- repeatedly identify
15 the contract between Domino's and JWM as the contract
16 at issue, the contract that was breached, the terms
17 that were violated. Nowhere does it refer to an
18 employment contract.

19 This complaint, as the district court
20 recognized, only pled one theory, and that was the
21 theory that Mr. McDonald was entitled to enforce the
22 rights of JWM. It does not plead any theory about
23 violations of his own employment contract. And as I
24 said, that -- even if -- even if you could infer it,
25 you would still have to find that it's not a cognizable

1 theory because he doesn't allege that the terms of that
2 contract were actually violated. And in fact, at page
3 45 of his brief -- or 44, he concedes that JWM did
4 perform the terms of the contract. And second, even if
5 there had been a failure of performance, he cannot show
6 that Domino's was a sufficiently direct cause of that
7 failure of performance.

8 Just -- just to give, you know, yet another
9 example, I mean, if I -- if my employer has a -- a bad
10 year this year because somebody breached a contract
11 with the employer and I don't get a bonus, I -- you
12 know, I may say I've suffered some -- some loss. The
13 value of my contract, my employment contract, may be
14 reduced, but my rights under that contract have not
15 been impaired or abrogated. I have the same rights.
16 They're just worth something less.

17 And all that this statute does is to protect
18 rights, the same rights as white people have. It
19 doesn't say that you are protected from any kind of
20 discriminatory conduct in the economy that may, in some
21 sense, make your rights less valuable.

22 I'd like to save the remainder of my time for
23 rebuttal.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Lichtenstein.

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ORAL ARGUMENT OF ALLEN LICHTENSTEIN
ON BEHALF OF THE RESPONDENT

MR. LICHTENSTEIN: Mr. Chief Justice, and may it please the Court:

The issue here is whether, by choosing to operate as a solely owned corporation, John McDonald forfeited his 1981 protection.

Rather than federalizing State contract law, section 1981 imposes a nonnegotiable nondiscrimination duty that is neither a contractual provision nor governed by contract law. Intentional racial discrimination is not merely a breach of contract terms. As this Court has already noticed -- noted, it is more akin to a tort.

Domino's question presented asks that both plaintiff and defendant had to be parties to the contract. Yet, Domino's notes that non-parties without privity of contract are also protected, citing third party beneficiaries and the fact there were employers, such as supervisory employees or prime contractors. Thus, even Domino's concedes that the answer to the question presented is no. Section 1981 protection is not limited to parties to the contract.

There's still, however, the remaining question of whether John McDonald fits within the

1 statute's protection. Clearly, if he had been a sole
2 proprietor, there would be no question of stating a
3 cause of action. We contend that he's still protected
4 based on three grounds: one, the intended language of
5 section 1981; two, John McDonald's relationship with
6 Domino's; and three, John McDonald's relationship with
7 JWM.

8 CHIEF JUSTICE ROBERTS: Well, let's take that
9 last one first, if you don't mind, since the argument
10 is that you've waived that argument by not -- not
11 raising it below.

12 MR. LICHTENSTEIN: Well, we believe that it
13 has been sufficiently raised below. 1981 does not have
14 any special or enhanced pleading requirements. This is
15 notice --

16 JUSTICE O'CONNOR: Where in the complaint
17 does it allege a tortious interference claim?

18 MR. LICHTENSTEIN: It doesn't allege a
19 tortious interference claim, and this really isn't a
20 tortious interference claim as petitioners suggest.
21 This is a 1981 discrimination claim, and very clearly
22 that was alleged.

23 In terms of the requirement for wages, back
24 wages and front wages, that is on -- I believe it's
25 page 17.

1 CHIEF JUSTICE ROBERTS: No. The --

2 JUSTICE SCALIA: Excuse me.

3 CHIEF JUSTICE ROBERTS: -- the allegation I'm
4 looking for -- and I -- I guess you probably didn't --
5 you didn't have to raise it below, given the state of
6 the Ninth Circuit law I would suppose. But in your
7 brief in opposition, where is it raised that this
8 interferes with the contract between you and -- between
9 McDonald and JWM?

10 MR. LICHTENSTEIN: I don't think it does
11 appear there specifically. But again, the -- the
12 question was a fairly narrow one, which is what is
13 Ninth Circuit law? Does Gomez apply? And it went up
14 to the Ninth Circuit on that particular level.

15 CHIEF JUSTICE ROBERTS: But coming here, I
16 would have thought our rules say that if you're going
17 to rely on this as a ground for affirmance here, we
18 should see it in the brief in opposition.

19 MR. LICHTENSTEIN: The brief in opposition at
20 the Ninth Circuit you're referring to or --

21 CHIEF JUSTICE ROBERTS: Here.

22 MR. LICHTENSTEIN: -- this brief? The
23 allegations concerning our argument about --

24 JUSTICE SCALIA: Brief in opposition to the
25 petition for certiorari. You -- you did not raise

1 this.

2 MR. LICHTENSTEIN: They did not raise that --
3 that does not appear there.

4 JUSTICE SCALIA: So -- it's -- it's brand new
5 to us. We -- we didn't think this was in the case at
6 all.

7 MR. LICHTENSTEIN: Well, again, I think that
8 if the issue is whether it was raised below or should
9 be, then perhaps a remand back to flesh out that
10 particular argument would be the appropriate response.

11 I think that in terms of --

12 JUSTICE GINSBURG: It wouldn't just be an
13 argument. You'd have to amend your complaint because
14 it wasn't set out in the complaint.

15 MR. LICHTENSTEIN: If the Court believes that
16 it more specifically needs to be set out in the
17 complaint, then clearly that would be one of the
18 remedies. We don't really believe that that is
19 necessary in a sense when dealing with the question
20 presented. Both of our arguments are really sort of
21 formulations of the same argument. The question is did
22 Domino's actions aim at John McDonald? Was he the
23 precise target? That was clearly set out, and --

24 JUSTICE BREYER: Is targeted enough? I mean,
25 I'm thinking here not necessarily your case, but in

1 general. Is a claim of discrimination -- I don't know
2 the state of the law, but maybe if a minority
3 shareholder -- a minority person is the sole
4 shareholder of a corporation, maybe that corporation
5 could assert protection, or maybe it couldn't.

6 But here, I take it that the corporation JWM
7 brought an action and won or settled for \$45,000. So
8 they're out of it.

9 Now we're just thinking about the sole
10 shareholder, and the sole shareholder says there's
11 another action here. And as to the two most plausible
12 ones that I would like to assert an action as a third
13 party beneficiary, we've heard the other side say that
14 you've conceded you have no right there. And as to the
15 other one, which might be protected in many cases, that
16 the -- knowing that what was going to happen, they
17 deliberately interfered with the contractual relation
18 between me and the corporation. That's what we're
19 asking about now. And you say, well, I didn't raise
20 that.

21 Now, is there a reason you should be given an
22 opportunity to raise it?

23 MR. LICHTENSTEIN: I believe that the
24 opportunity to raise that is part of the -- the same
25 argument. This isn't really a question of third party

1 beneficiary. This is an issue of --

2 JUSTICE BREYER: You conceded that out.

3 MR. LICHTENSTEIN: -- discrimination and this
4 was claimed in terms of discrimination. If in fleshing
5 this out, it was not specified in the various ways that
6 this discrimination was affected, that oversight
7 shouldn't preclude the basic argument that is really
8 the same --

9 JUSTICE BREYER: Because?

10 MR. LICHTENSTEIN: Because it still is
11 responsive to the question presented, which is, is the
12 privity issue one that precludes recovery from John
13 McDonald? And that seems to be the same issue,
14 regardless -- regardless of how it's formulated. And
15 the answer to that question I think is -- is clearly no
16 in terms of the tort -- tortious behavior by the -- by
17 Domino's in terms of the discrimination. It is not --
18 also, the damages that are --

19 JUSTICE SCALIA: Excuse me. I -- I thought
20 the question presented -- I didn't think. I'm reading
21 it from the petition for writ of certiorari. In the
22 absence of a contractual relationship with the
23 defendant, are allegations of personal injuries alone
24 sufficient to confer standing on a plaintiff pursuant
25 to 42 U.S.C., section 1981? So, I mean, the question

1 presented was -- was precisely if your client did not
2 have a contractual relationship, would the mere
3 allegation of personal injury, which you're now
4 alleging, be enough to confer standing?

5 MR. LICHTENSTEIN: Well, it's -- the
6 allegation of both -- well, discrimination is a
7 personal injury. In Goodman, this Court has said that
8 violation of section 1981 is a personal injury. It's
9 not a contract injury. So the question presented --

10 JUSTICE SCALIA: Well, the question is -- I
11 mean, that begs the question, whether there has been a
12 violation of section 1981, and the argument here is
13 that there's no violation of section 1981 unless you're
14 interfering with a contract of the plaintiff.

15 MR. LICHTENSTEIN: And the response of the --
16 of the respondent is it is not simply your own contract
17 or your contract with the defendant that is subject to
18 1981 protection. There are several instances -- and
19 we've cited them in our brief -- such as Shaare Tefila
20 and Runyon -- where the actual target of the
21 discrimination is not in contractual privity with the
22 defendant. And --

23 JUSTICE KENNEDY: Are you referring to
24 Runyon, for instance? The parents always had a special
25 relation to the child. It's something of a stretch to

1 say that the corporation has that same relation with
2 its own shareholder.

3 MR. LICHTENSTEIN: I think in this particular
4 case it isn't a stretch. The discrimination was aimed
5 at John McDonald. It was not --

6 JUSTICE BREYER: That might --

7 JUSTICE KENNEDY: There's no doubt he's the
8 target. That's the --

9 MR. LICHTENSTEIN: But, I mean, the --
10 Domino's itself viewed JWM as John McDonald. The
11 statement, we don't want to do business with you people
12 -- you people isn't anyone else other than John
13 McDonald. And the allegations go further than simply
14 back wages and even the dignitary damages which are
15 available under section 1981 but not under contract law
16 is also alleged that by going after his credit and
17 going after the banks that he had relationships with
18 and given guarantees to and going after him personally,
19 that this wasn't simply derivative of JWM's damages,
20 that he had his own separate damages that, in fact,
21 could not have been recovered by JWM had JWM filed a
22 1981 action.

23 JUSTICE GINSBURG: Was there any overlap?
24 The -- what damages could the corporation JWM have
25 collected under -- had it brought a 1981 suit?

1 MR. LICHTENSTEIN: It had -- it could bring
2 the -- a suit for the damages of the lost revenue that
3 it could have gotten from its contract. We believe,
4 looking at State law, because we think it is a matter
5 of State law, that here JWM would get its net profits.

6 The wages that would be paid out would be recoverable
7 by John McDonald. Different States may look at this
8 differently, but that really wasn't the issue that this
9 case had been --

10 JUSTICE BREYER: Then the argument for
11 sending it back, if I understand it, is this, that when
12 you look at the question presented, no one could
13 possibly file a lawsuit -- and you didn't -- on the
14 theory, well, I'm hurt, so somebody should pay me.
15 That isn't a legal theory.

16 MR. LICHTENSTEIN: That is correct.

17 JUSTICE BREYER: Rather, the legal theory
18 here was that this contract-related section of the law
19 is violated. And you want to say the simple fact that
20 the contract wasn't between McDonald and JWM, that's a
21 separate matter. That doesn't bar you from bringing
22 your claim. So, on the one hand, you argue that I can
23 bring my claim as long as I'm a target and the motive
24 as to why they breached some other contract, the one
25 between the two corporations.

1 And we seem to have it conceded that even if
2 that's too broad, there are at least some circumstances
3 where you could bring your claim. One is if you were a
4 third party beneficiary. That's not present here. And
5 the second is if you are a target such that their
6 action violates and interferes with a contract between
7 you and your own corporation. At least you have that
8 going for you. So you say, well, if I was wrong about
9 the broader theory, give me a chance to allege the
10 narrower.

11 MR. LICHTENSTEIN: Well, I don't --

12 JUSTICE BREYER: Is that right?

13 MR. LICHTENSTEIN: Well, I don't really think
14 --

15 JUSTICE BREYER: I'm trying to be helpful in
16 this respect.

17 (Laughter.)

18 MR. LICHTENSTEIN: I understand, and I do
19 appreciate it.

20 I don't think the broader theory, number one,
21 was if I was a target, that's all there is.

22 JUSTICE BREYER: No. You have to say there's
23 certain kind of target. The kind of target is that
24 they --

25 MR. LICHTENSTEIN: Also --

1 JUSTICE BREYER: -- were discriminatory,
2 aiming at me, et cetera.

3 MR. LICHTENSTEIN: Yes. I think that there
4 are circumstances, in terms of alleging particular
5 injuries and interference with the making, enforcing,
6 or performance of contract. I don't --

7 JUSTICE SCALIA: Which you didn't allege and
8 didn't even raise in the brief in opposition here.

9 MR. LICHTENSTEIN: I -- I think we alleged
10 that in terms of the ability of Mr. McDonald to perform
11 on the contract, even though it was --

12 JUSTICE GINSBURG: But those contracts --

13 JUSTICE SCALIA: His contract with -- with
14 the corporation?

15 MR. LICHTENSTEIN: The --

16 JUSTICE SCALIA: No.

17 MR. LICHTENSTEIN: The statute doesn't say
18 that it has to be his own contract with the defendant.

19 JUSTICE SCALIA: That's exactly the issue.

20 And --

21 MR. LICHTENSTEIN: And that's --

22 JUSTICE SCALIA: -- and that's how I
23 understood this case -- case came up here. The
24 contract you're relying on is the contract between the
25 corporation -- between the corporation and Domino's.

1 And can you -- can you sustain a lawsuit for the
2 violation of that contract? There was no mention of
3 any other contract. I don't know why we should send it
4 back down so you can mention a contract that you
5 haven't even thought of even when you filed the brief
6 in opposition.

7 So that's the issue, whether the violation of
8 the contract between McDonald -- between Domino's and
9 your client's corporation will allow your client to get
10 -- to get some damages inasmuch as he was the target.
11 That's how I understood the lawsuit.

12 MR. LICHTENSTEIN: Well, that is clearly the
13 main thrust of -- of our position.

14 JUSTICE SCALIA: Now, could you tell me when
15 -- the -- the claim was settled when your client's
16 corporation was in bankruptcy. Right?

17 MR. LICHTENSTEIN: Yes.

18 JUSTICE SCALIA: And I assume your client had
19 no -- nothing to say about -- about whether the
20 settlement would be -- would be accepted by the trustee
21 or not.

22 MR. LICHTENSTEIN: Absolutely. He -- it was
23 out of his hands.

24 JUSTICE SCALIA: It was out of his hands,
25 which means that, you know, you're -- you're sort of

1 pleading the advantage of a corporation, limited
2 liability and all of that, and went through bankruptcy
3 taking that advantage, one of the consequences of which
4 was that you left it to the corporation to settle this
5 claim.

6 And now you want to disclaim the advantage of
7 a corporation and say, oh, although the -- you know,
8 the corporation settled it out -- you know, I was no
9 longer in control of it because of the bankruptcy -- I
10 want to bring the claim on my own. I mean, I can
11 understand why it would be nice for you to get that,
12 but it doesn't seem to me that you should be able to
13 play dog in the manger that way. You either -- you
14 either accept the corporate form or you don't.

15 MR. LICHTENSTEIN: The corporate form gives
16 certain protections, largely from personal
17 responsibility for corporate debt has some tax
18 advantages. It certainly is not going to protect any
19 corporate officer or shareholder from their own, for
20 example, tortious behavior.

21 JUSTICE GINSBURG: But you'd have to concede
22 at a minimum that now that the corporation has settled
23 the breach of contract claim, that to the extent that
24 the corporation could have recovered under 1981, that's
25 gone too because those two claims were intimately

1 related, and you would be precluded from bringing such
2 a claim. So to the extent that there's an overlap, you
3 face a res judicata bar.

4 MR. LICHTENSTEIN: Your Honor, even if that
5 claim had not been precluded by bankruptcy -- and there
6 were two plaintiffs in this case, JWM and McDonald --
7 there certainly couldn't be double recovery. Anything
8 that would be recoverable in any form by JWM clearly
9 cannot be recovered by John McDonald as an individual.

10 And the Ninth Circuit said that. They were talking
11 about his own separate and distinct injuries. So
12 double recovery would never be possible.

13 JUSTICE GINSBURG: So they -- the Ninth
14 Circuit's view is there are two potential plaintiffs in
15 this situation. Both can sue and one gets -- the
16 damages are not identical. That's --

17 MR. LICHTENSTEIN: I'm sorry.

18 JUSTICE GINSBURG: The shareholder can sue.
19 The sole shareholder can sue. The corporation can sue.
20 Both have 1981 claims. It's not either/or.

21 MR. LICHTENSTEIN: Correct.

22 JUSTICE GINSBURG: They both have 1981
23 claims, but the damages are different in the case of
24 the individual than in the case of the corporation.

25 MR. LICHTENSTEIN: Absolutely.

1 JUSTICE STEVENS: May I ask just -- did the
2 individual plaintiff assert the 1981 claim at any time
3 before the settlement of the corporate claim?

4 MR. LICHTENSTEIN: Yes, I believe that the --
5 and I would have to check on the timing of this, but I
6 believe that the suit was filed prior to the settlement
7 of the 1981 claim -- of the bankruptcy --

8 JUSTICE STEVENS: I would have assumed --

9 MR. LICHTENSTEIN: I'm sorry. Of the
10 bankruptcy claim.

11 JUSTICE STEVENS: -- there wouldn't have been
12 a settlement first without taking care of the second,
13 if they had known both were on the table. But you say
14 the first had been -- both of them had been --

15 MR. LICHTENSTEIN: That is my understanding.
16 I -- I would have to really check on that, but that is
17 my understanding.

18 And again, we are looking at this particular
19 situation. We keep talking about actual target. The
20 petitioner keeps talking about derivative, incidental
21 claims. This isn't a derivative, incidental claim.
22 There is no one who has a race in this case that is
23 relevant other than John McDonald. JWM, John W.
24 McDonald, didn't get its financing, didn't get its
25 credit based on the fact that it was just created as a

1 corporation. It was John McDonald.

2 Here, you have a situation where -- and
3 it's kind of a unique one -- where there's a claim that
4 John McDonald, the actual person who was being
5 discriminated against, can't recover but some other
6 entity can. That sort of turns section 1981 on its
7 head.

8 JUSTICE SCALIA: Well, it was his -- it was
9 his corporation, and until he went bankrupt, any
10 recovery by that corporation would have been a recovery
11 by -- by John McDonald. What -- what created your
12 problem is the fact that -- that the corporation went
13 bankrupt.

14 MR. LICHTENSTEIN: Your Honor, I don't think
15 that's the --

16 JUSTICE SCALIA: But, you know, that's --
17 that's one of the -- one of the consequences of taking
18 advantage of the corporate form.

19 MR. LICHTENSTEIN: Your Honor, I don't think
20 that's the case because if there was, for example, this
21 two-party suit, JWM could not recover for dignitary
22 damages. Only an individual can do that.

23 JUSTICE SOUTER: Well, can you -- can you do
24 that under a general contract theory?

25 MR. LICHTENSTEIN: I don't believe you can do

1 it under a general contract --

2 JUSTICE SOUTER: So you're reporting not
3 merely the -- the tort of tortious interference, but
4 some general, broader concept of tort law as being
5 subsumed with -- under 1981. Aren't you?

6 MR. LICHTENSTEIN: Yes, and I think the --
7 the case law indicates that, that this is not simply
8 just federalization of State law. This -- looking at
9 the history of section 1981, this was designed to
10 combat not tortious interference claims in common law,
11 but the black codes during Reconstruction that
12 prohibited black individuals, individuals just like
13 John McDonald, from being able to pursue their trades,
14 operate --

15 JUSTICE SOUTER: Right, but the -- the
16 focus of it is, as -- as I understand it, and the --
17 the kernel of it is -- is the capacity to contract.
18 And we can certainly understand, I guess, how tortious
19 interference with contracts might come under that
20 umbrella, but you're going further and you're saying, I
21 take it, any tort that would give a recovery --
22 recognize a recovery for -- for dignitary injury would
23 be subsumed with -- within the concept of what 1981 was
24 intended to -- to cover, which is a broader
25 proposition.

1 MR. LICHTENSTEIN: I think that what we are
2 saying I think is what the Court has said -- is that
3 this is a personal injury, and that dignitary claims
4 are subsumed under 1981. I don't think it's expand --
5 I don't think --

6 JUSTICE SOUTER: Well, contract -- I -- you
7 -- you pointed out the -- the terminology which
8 includes contract damages or -- or contract harm as
9 personal harm, but it doesn't necessarily follow from
10 that that every harm or every injury that is personal
11 falls under -- conceptually under the 1981 umbrella.

12 MR. LICHTENSTEIN: No. Discrimination is a
13 personal injury. This Court said that in Burke and I
14 believe in Goodman also. So we're talking about
15 personal injury here, not just contract harm.

16 JUSTICE SCALIA: But it doesn't -- it doesn't
17 talk about personal injury that -- that broadly. It
18 talks about the right to make and enforce contracts.
19 That's the portion of it you have to be relying upon.
20 It doesn't talk about --

21 MR. LICHTENSTEIN: Well, it's --

22 JUSTICE SCALIA: -- personal injury. It's
23 not a --

24 MR. LICHTENSTEIN: -- it's --

25 JUSTICE SCALIA: -- it's not a more

1 generalized tort. If want to call it a tort, it is a
2 tort that goes to your ability to make and enforce
3 contracts. I don't see anything --

4 MR. LICHTENSTEIN: I believe, Your Honor --

5 JUSTICE SCALIA: -- dignitary about that.

6 MR. LICHTENSTEIN: -- that it goes to your
7 right to not suffer discrimination within the realm of
8 making, performing, and enforcing contracts. The focus
9 is on discrimination, which is a personal injury and a
10 personal harm, and the --

11 JUSTICE SCALIA: And you're saying it means
12 discrimination that relates to the making and enforcing
13 of a contract with somebody else. And you're saying
14 that since the discrimination was targeted at you, even
15 though the contract was with -- was with somebody else,
16 you have a claim under this language of 1981.

17 MR. LICHTENSTEIN: Yes, in this circumstance
18 where the contract with someone else was the mechanism
19 that was used to target an individual. And, again,
20 when you're dealing with --

21 JUSTICE SOUTER: Yes, but there's no way to
22 confine it to the individual, is it? I mean, the -- on
23 your -- on your target theory, a -- a general
24 discriminatory animus as a basis for breaching a
25 contract with General Motors would give a right of

1 action to -- to every minority employee of General
2 Motors. Isn't that correct?

3 MR. LICHTENSTEIN: If there is a
4 circumstance, as I understand the hypothetical, where
5 there is blatant and intentional discrimination, racial
6 discrimination, by a multinational corporation like
7 General Motors, who say we're not going to do business
8 with any company that hires black people -- and clearly
9 there's an uphill battle for any kind of proof, but
10 you'd have to show that there was actual targeting,
11 that it really did interfere with the ability to
12 perform contracts, and that there were specified
13 individual damages. But if that were the case and
14 could be proven, that would be pretty egregious and
15 probably something that 1981 should cover.

16 JUSTICE SCALIA: But -- but when you say
17 damages that can be proven, the only damages you -- you
18 insist upon proving is the fact that you were a target
19 and that it -- it insulted you. It -- it was -- you
20 know. That's the only damage you require. So you're
21 saying that every -- every minority employee of all of
22 the companies with whom GM, or whoever it is didn't do
23 business, would automatically have a cause of action.

24 MR. LICHTENSTEIN: No, Your Honor, I don't
25 believe we're saying that because --

1 JUSTICE SCALIA: No. Okay. Well, then --
2 then what do they have to show? They have to show that
3 -- that their salaries were -- were reduced? But --
4 but you haven't shown that here. You didn't plead that
5 here. They have to show -- show that a contract with
6 them was breached? But you didn't plead that here and
7 you didn't show it here. So the -- the only thing that
8 -- that you -- you can answer is they would all have
9 causes of action if their -- their honorific values
10 were somehow impugned.

11 MR. LICHTENSTEIN: I don't believe so, and I
12 think that what was pled and what we believe is not just
13 the wages that were not paid, but also the dignitary
14 damages and also the damages specifically aimed at John
15 McDonald in terms of ruining his credit, going to the
16 banks, and in a sense slandering him, and those kinds
17 of damages that were not recoverable by JWM but were
18 specifically John McDonald.

19 JUSTICE SCALIA: That was -- that was the
20 consequence of the bankruptcy of his corporation. I
21 mean, that didn't -- didn't --

22 MR. LICHTENSTEIN: No, sir. There were
23 actually allegations of statements we are going to ruin
24 you personally and actions that went to ruin him
25 personally. This was not just simply derivative from

1 the corporation.

2 JUSTICE SOUTER: But none of the ruin
3 occurred, as I understand it, until the corporation
4 went bankrupt. In other words, there was no direct --
5 the bank, for example, didn't say we're not doing any
6 more business with -- with you, McDonald. As I
7 understand it, all the -- all the -- leaving dignitary
8 harm aside, all the actual loss was -- was as a
9 consequence of the loss to the corporation. His stock
10 fell, you know, whatever. But it -- it seems all
11 derivative from the corporate loss.

12 MR. LICHTENSTEIN: I don't believe so, sir.
13 And the opposition to the motion to dismiss talked very
14 specifically about the statements to the banks that
15 were specific to John McDonald that hurt John McDonald
16 individually that really was not derivative from the
17 bankruptcy --

18 JUSTICE BREYER: Do you have an action --

19 JUSTICE SOUTER: Well, can you give me an
20 example?

21 JUSTICE BREYER: -- on that in California?
22 Wouldn't you have an action in the State if somebody
23 goes and deliberately interferes with your credit and
24 so forth?

25 MR. LICHTENSTEIN: Well, I think the action

1 that Mr. McDonald took was just this, the 1981 action,
2 saying that there was a Federal violation, that this
3 was done to discriminate against him, and this seems to
4 fit in with the 1981 cause of action and the purpose of
5 1981, which is why this case was filed.

6 JUSTICE GINSBURG: If it fits, it's because
7 of some cases. So -- because this whole area, 1981,
8 didn't take off until Runyon against McCrary. So we're
9 starting with what? 1976. So to -- to flesh out what
10 that claim is, you must be relying on some decisions of
11 this Court when you talk about dignitary damages.

12 MR. LICHTENSTEIN: Well, again, we -- I think
13 we could look at Shaare Tefila as -- as a good example
14 of the kinds of damages. This was the Nazi swastika on
15 a synagogue.

16 JUSTICE GINSBURG: But I thought that didn't
17 go into anything. That was a two-page per curiam, and
18 it was just was there a claim. And it didn't --

19 MR. LICHTENSTEIN: Well, the claim was still
20 -- it was certainly not because of any kind of -- of
21 privity. It was damages based on --

22 JUSTICE GINSBURG: I thought that that was
23 about does the -- does the act cover religion or -- or
24 does it cover that situation, or is it limited to race,
25 or does anti-semitism count as race. I thought that's

1 what was all that was decided.

2 MR. LICHTENSTEIN: Well, at that time, that
3 -- it said that anti-semitism counted as race, but
4 certainly they were able to recover once that threshold
5 was met because of the dignitary harms.

6 JUSTICE GINSBURG: Well, I don't see anything
7 in the opinion about -- I just see the issue before the
8 Court was does this come under the heading race.

9 MR. LICHTENSTEIN: My reading of that was --
10 was a bit broader I think.

11 Also, you could look at cases such as
12 Sullivan where the right not to be discriminated
13 against was compensable for the black family that was
14 not allowed into the club. So the cases that we have
15 cited --

16 CHIEF JUSTICE ROBERTS: Both Sullivan and
17 Shaare Tefila, of course, though, were 1982 cases.
18 Right?

19 MR. LICHTENSTEIN: Correct.

20 CHIEF JUSTICE ROBERTS: Not 1981 cases.

21 MR. LICHTENSTEIN: Right. But this Court has
22 said that the language is so similar that they should,
23 for these purposes, be viewed as having the same rules.
24 And clearly, it would make no sense to have -- have
25 different ones. So they were 1982 claims, but the idea

1 that discrimination in terms of housing should have
2 dignitary claims while discrimination in terms of
3 contract should not is something this Court has never
4 said.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 MR. LICHTENSTEIN: Thank you.

7 CHIEF JUSTICE ROBERTS: Ms. Mahoney, you have
8 4 minutes remaining.

9 REBUTTAL ARGUMENT OF MAUREEN E. MAHONEY

10 ON BEHALF OF THE PETITIONERS

11 MS. MAHONEY: Thank you, Your Honor.

12 I'd like to focus on the issue of whether
13 there is any need for a remand.

14 The district court dismissed the complaint
15 with prejudice, and I think that it's fair to say that
16 at that point, the plaintiff was under an obligation to
17 seek leave to amend if it had any other alternative
18 theory that it wanted to advance in this case.
19 Otherwise, we're left with the situation where they can
20 see that dismissal with prejudice, litigate up to the
21 Ninth Circuit, and then we litigate here. We go back
22 down and we keep doing this seriatim. It would make no
23 sense. The dismissal with prejudice was proper, and
24 certainly in a 1981 case, despite liberal rules of
25 pleading, you have to identify the contract that was

1 supposedly violated, as well as, you know, the other
2 elements.

3 Second, I think that if this were a harder
4 case about tortious interference principles, even if it
5 hadn't been waived, I might understand the Court's
6 reluctance to get into it. But we know from the
7 briefing that the plaintiff has conceded that his claim
8 would not be cognizable under the common law of
9 contract, third party beneficiary, or tortious
10 interference, and that is very plain from the brief at
11 pages, I think, 43 through 46 where they acknowledge
12 that under section 76 of the Restatement, they would
13 not be able to -- to recover. And they say, so what.
14 This isn't a federalized version of common law of
15 interference.

16 So given that concession, I think all this
17 Court would have to say is that the alternative theory
18 that wasn't even pled can't possibly state a claim
19 because it -- it asks us to go far beyond what the
20 common law did.

21 JUSTICE STEVENS: Ms. Mahoney, may -- may I
22 ask you one brief question that I should have asked on
23 direct? I hope you have time for it.

24 But supposing a fact situation in which a
25 wholly owned -- a -- a corporation wholly owned by an

1 African American starts to negotiate with your client,
2 and your client says, we have a policy of not dealing
3 with companies owned by African Americans. Would the
4 corporation or the individual have a lawsuit under
5 section 1981?

6 MS. MAHONEY: I think the corporation would,
7 Your Honor.

8 JUSTICE STEVENS: You think the corporation
9 would.

10 MS. MAHONEY: Absolutely because they -- a
11 refusal to deal -- it covers rights to make and enforce
12 contracts, and if -- if the defendant said, I will not
13 deal with this company, then I think that they have a
14 right.

15 And in this case, there was a claim that was
16 brought by the company for -- based on -- for breach of
17 contract.

18 JUSTICE STEVENS: But not under 1981.

19 MS. MAHONEY: No, Your Honor, but the trustee
20 makes a finding that the -- the causation -- or reports
21 to the court that causation principles could not be
22 established, and so there was no point in bringing a
23 1981 claim because he actually found in -- in materials
24 that are in the record of the bankruptcy proceeding --

25 JUSTICE STEVENS: But -- but in your view, to

1 the extent that racial discrimination might have
2 affected negotiations, that would be an element of the
3 corporation's claim under 1981 rather than an
4 individual claim.

5 MS. MAHONEY: Yes, Your Honor.

6 JUSTICE STEVENS: Yes.

7 MS. MAHONEY: Because if the -- if they were
8 negotiating on behalf of the company, that is the
9 company's right to contract. It is not the
10 individual's right.

11 CHIEF JUSTICE ROBERTS: And you attribute the
12 shareholder's race to the corporation?

13 MS. MAHONEY: That's what the courts of
14 appeals all do. Judge Friendly in Hudson Valley
15 Freedom Theater looked at this issue and said that it
16 was the best way to approach this issue, that -- that
17 -- and explained that it doesn't make sense to impute
18 the corporation's contract rights to somebody else,
19 give them power to enforce their contract rights. And
20 it wasn't a 1981 case, but it was analogous, and that
21 it made sense to, under those circumstances, impute
22 race, in effect.

23 And I think that the way that courts have
24 done it is also a link to the word discrimination,
25 which appears in 1981(c). In -- in Jackson v.

1 Birmingham for the -- for instance, this Court did find
2 that a -- a male coach had been subjected to
3 discrimination on the basis of sex, even though he's
4 obviously not a woman, because it's a form of
5 discrimination. And I think the courts have looked at
6 that as well.

7 But this -- the -- the -- all of the exact
8 same issues that are alleged in this complaint were
9 already raised and litigated through depositions and
10 discovery in the bankruptcy court. And this presents
11 all of the problems that this Court addressed in
12 Associated General Contractors about why there's such a
13 strong presumption against derivative claims because
14 here you can't trace the losses. You have no idea
15 whether or not the monies that JWM would have recovered
16 from Domino's would have been used to pay other
17 creditors or used to do new projects or perhaps given
18 to -- to McDonald.

19 Thank you, Your Honor.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 The case is submitted.

22 (Whereupon, at 12:07 p.m., the case in the
23 above-entitled matter was submitted.)

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