

June 22, 1981

Mr. Justice:

Re: No. 80-396, Fact Concerts--new footnote.

Now that JPS has joined the dissent, I thought it might be advisable to add the following clarifying footnote, near the bottom of p.7:

10A/ The District Judge, after observing that the city had failed to object in timely fashion to the punitive damages instruction, stated: "Despite [petitioner's] tardiness, a careful resolution of this novel question is critical to a just verdict in this case." App. to Pet. for Cert. B-7. This statement makes clear that ^{that court} the District Court did not reach the merits merely as an alternative ground for decision or out of an abundance of caution. The dissent's suggestion to the contrary, post, at 2, 6, is simply mistaken.

JJB

10A/ - See attached.

626 F. 2d, at 1067. Citing its own prior holdings to the effect that punitive damages are available against § 1983 defendants, and this Court's recent determination in *Monell* that a municipality is a "person" within the meaning of § 1983, the court identified the "distinct possibility that municipalities, like all other persons subject to suit under § 1983, may be liable for punitive damages in the proper circumstances." 626 F. 2d, at 1067.

Because of the importance of the issue, we granted certiorari. — U. S. — (1980).

II

At the outset, respondent asserts that the punitive damages issue was not properly preserved for review before this Court. Brief for Respondent 7-9. In light of Rule 51's uncompromising language⁹ and the policies of fairness and judicial efficiency incorporated therein, respondent claims that petitioner's failure to object to the charge at trial should foreclose any further challenge to that instruction. The problem with respondent's argument is that the District Court in the first instance declined to accept it. Although the punitive damages question perhaps could have been avoided simply by a reliance, under Rule 51, upon petitioner's procedural default,¹⁰ the judge concluded that the interests of justice required careful consideration of this "novel question" of federal law. Because the District Court reached and fully adjudicated the merits, and the Court of Appeals did not disagree with that

⁹ Rule 51 reads in pertinent part:

"No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection."

¹⁰ See J. Moore & J. Lucas, 5A Moore's Federal Practice ¶ 51.04, n. 3 (1980); C. Wright & A. Miller, Federal Practice and Procedure § 2553 (1971).

(10A) - See attached.