

For oil giant, a \$500 million recusal?

By FRANK ASKIN

MOST Supreme Court observers would clearly classify Justice Samuel Alito as pro-business. But if you're Exxon, your response would most likely be "with friends like that, who needs enemies!"

Alito just cost Exxon half a billion dollars. That's billion – with a "b."

The case was Exxon Shipping Company v. Baker, which grew out of the Valdez oil spill and was decided by the Supreme Court on June 25.

According to the press, the decision was a huge victory for Exxon. After all, the court, by a vote of 5-3, reduced the punitive damages the jury had awarded against Exxon from \$2.5 billion to just half a billion.

But here's the rub. Because Trenton native Alito owned some shares of Exxon stock, he recused himself from participation in the decision.

And it is almost certain that if Alito had participated, Exxon would have gotten off scot-free!

But to understand that, you must pay careful attention – which is probably why this remarkable result has been over-

looked by the media.

The case was an appeal by Exxon from the 9th Circuit Court of Appeals, which had upheld a verdict of \$2.5 billion against Exxon. There were two issues on appeal.

The first question was whether Exxon was at all responsible under federal maritime law for punitive damages caused by the misconduct of its employee, the Valdez ship captain who was allegedly drunk when it ran aground in Alaskan waters, causing the worst oil spill in history.

The Court of Appeals ruled it was, and then went on to approve the award of \$2.5 billion in punitive damages.

The second issue was whether such a huge punitive damage award was allowable.

Reduced damages

Justice David Souter wrote the majority opinion, which reduced the damages to half a billion, which was roughly the amount of compensatory damages the courts had found. The three dissenters, who felt the amount of punitives should be left to the jury, were Souter's natural allies on the liberal/moderate wing of the court, Justices John Paul Stevens, Ruth Bader Ginsburg

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and Stephen G. Breyer.

In other words, the justices in the conservative wing (John Roberts, Antonin Scalia, Clarence Thomas and Anthony Kennedy, minus their usual ally Alito) joined with Souter to save Exxon \$2 billion. On this part of the case, Alito's participation would have been irrelevant.

But Souter then shifted sides. On the question of whether the law authorized derivative liability against the employer, Souter decided in the affirmative. As a result, the decision upholding Exxon liability by the Ninth Circuit was affirmed by a 4-4 vote.

Now comes a bit of speculation. Since the opinion does not reveal who voted which way on

the issue of derivative liability, it must be assumed that the three dissenters who would have allowed the full punitive award voted in favor of at least limited liability for Exxon. We may also assume that the four conservative justices voted against derivative liability.

Alito's vote

The biggest leap involves how Alito would have voted if he had not abstained from the case because of his ownership of Exxon Mobil stock.

However, it does not seem to be much of a stretch to assume that Alito would have sided with the court's conservative, pro-business bloc, as he has on just about every other decision this year.

That conclusion, by the way, is shared by the plaintiffs' Alaska-based lawyer, who is forever grateful to Justice Alito for saving him and his clients half a billion dollars.