IN THE SUPREME COURT OF FLORIDA
CASE NO: 63,363

BANKERS MULTIPLE LINE
INSURANCE COMPANY,

Petitioner,

v.

JOSEPH D. FARISH, JR.,
etc., et al.,

Respondents.

BRIEF OF RESPONDENTS ON JURISDICTION

MONTGOMERY, LYTAL, REITER,
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and
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CITATIONS OF AUTHORITY

STATEMENT OF THE CASE AND FACTS

Jill Smith's husband was killed in an accident involving a truck insured by Bankers Multiple Line(A2). John D. MacArthur was the sole owner of Bankers Life, which was the principal stockholder of Bankers Multiple Line. MacArthur was Chairman of the Board and President of Bankers Multiple Line(A2).

Jill Smith hired the Farish & Farish law firm to represent her in regard to claims arising out of her Husband's death(A2). Thereafter Bankers, through MacArthur and others at his direction, offered Jill, who was pregnant, a job, health insurance, and "anything else she needed"(A2-3,RA1-1a). Even after suit was filed, MacArthur and others working at his direction continued to contact Jill directly offering her help, advising her that Bankers had no coverage for the accident, and suggesting she settle for several thousand dollars(RA2-3).

Farish objected to Bankers' attorney because of MacArthur's direct communications with Jill(A3). Nonetheless, MacArthur and others at his direction, continued to contact Jill(A3). MacArthur's plan was to get Farish out of the picture so he could settle the case with Jill for a pittance(A3). He told Jill that Farish was not out for her benefit and urged her to break her contract with Farish(RA13-18). He promised he would help her obtain other counsel(RA9). MacArthur knew that Jill, who had no money, was desperate to settle the case before her baby was born. He told her there would be no settlement with Bankers unless Farish was fired(RA10-12).

MacArthur paid for Jill's airline ticket to come to Florida to fire Farish(A3). Jill acknowledged that her decision to fire Farish had been influenced by MacArthur(A3). Jill was led to believe that if she fired Farish she could then settle the case with Bankers, through MacArthur(RA4-5). After Farish was fired, MacArthur hired for Jill a female attorney who had no experience in litigation(A3). At that point, MacArthur told others that he had Jill "taken care of", and that he was going to get out of the case by only paying her a nominal amount(RA6-7). While advising Jill that settlements took time, unknown to Jill, MacArthur had Bankers continue the trial four times(RA8). During this period, MacArthur came up with an even better idea than having to settle with Jill for even a nominal amount. MacArthur decided that another defendant involved in the accident should take the "rap"(RA8). MacArthur had that defendant transfer its assets prior to trial so that any judgment Jill received would be uncollectible (A3). MacArthur and Bankers then refused to settle with Jill.

The deceitful and malicious acts of MacArthur and Bankers were shocking and outrageous. They not only interferred with the rights of the law firm of Farish & Farish, and Jill, but they were an affront to our very legal system. The Fourth District found sufficient evidence in the record to support the $2,050,000 jury verdict, and noted that Bankers had never challenged the sufficiency of the evidence to support the award(RA2).

ARGUMENT

On the face of the Fourth District's decision, it is apparent that it was based upon several unique factors present in this case, not present in the cases relied upon by Bankers to demonstrate a conflict.

POINT I

THE DECISION DOES NOT CONFLICT WITH WACKENHUT v. CANTY, 359 So.2d 430 (Fla.1978).

WACKENHUT holds that whether to award punitive damages and the amount which should be awarded is within the discretion of the jury. Bankers contends that the jury instruction did not inform the jury of its discretion to award or not award punitive damages. Bankers' statement is untrue. At pages 8-9 of its decision, the Fourth District quotes the instruction given the jury, which makes it clear that the jury was informed of its discretion to award punitive damages. Not only did the instruction clearly inform the jury, but the jury's discretion was repeatedly brought home to the jury by all parties during voir dire, and opening and closing statements(RA20-41). For example, in closing argument Plaintiff's counsel advised the jury(RA19):

> The fifth issue that you need to decide is whether the Defendants' conduct warrants punitive damages.

In addition, although not mentioned in the Fourth District's decision, Bankers never objected to the jury instruction on punitive damages as failing to advise the jury of its discretion. This argument was raised for the first time post-trial.

POINT II

THERE IS NO DIRECT CONFLICT WITH CASES THAT HOLD THAT THE DEFENDANTS' FINANCIAL POSITION IS ONLY ONE FACTOR TO BE CONSIDERED BY THE JURY IN AWARDING PUNITIVE DAMAGES.

The trial court advised the jury that the punitive damage award did not have to bear a relationship to the amount of compensatory damages awarded:

> . . .[t]he greater the defendant's wealth, the greater must be the punitive damages asserted in order to get his attention regardless of the amount of compensatory damages awarded to the plaintiff. (Emphasis added)

Both the trial court and the Fourth District found no error in giving the above instruction. The above language is taken directly from this Court's decision in LASSITER v. INTERNATIONAL UNION OF OPERATING ENGINEERS, 349 So.2d 622(Fla.1977). In LASSITER, WACKENHUT, supra, and RINALDI v. AARON, 314 So.2d 762(Fla.1975) this Court clearly stated that the financial position of a defendant was a factor to be considered by the jury. Bankers complains that there are other factors that the jury should have been instructed to consider. However, Bankers failed to request that the jury be instructed on those other factors. Accordingly, Bankers cannot now be heard to complain.

It is apparent that the jury considered all factors. Plaintiffs asked the jury to return a punitive damage award of 10% of Bankers' net worth, and Bankers asked the jury to return no punitive damages. The jury arrived at its own $2,000,000 figure considering the particular facts of this case.

POINT III & POINT IV

THE DECISION DOES NOT DIRECTLY CONFLICT WITH CASES HOLDING THAT WHERE AN AGENT IS EXONERATED, THE CORPORATION CANNOT BE HELD VICARIOUSLY LIABLE; OR WHERE AN OFFICER IS EXONERATED, THE CORPORATION CANNOT BE HELD DIRECTLY LIABLE.

Points III and IV will be argued together. Bankers argues that since MacArthur was exonerated, whether as agent or officer of Bankers, Bankers must be exonerated. Once again, the Fourth District's decision on its face indicates that this is not true because of the actions and agreements of the parties in this case during trial(A11-13). As the Fourth District properly points out "we conclude that by their tactical maneuvering, the parties provided for the result the jury reached". (A11). The Fourth District goes on to point out that the parties presented to the jury the claims against MacArthur and the claims against Bankers as separate and distinct claims and the jury was advised that MacArthur could act in two separate capacities, one in an individual capacity, and one in his capacity as officer, agent or employee of Bankers Multiple Line. (A11-13). The jury was informed that if MacArthur was acting as an officer, agent or employee of Bankers, the corporation would be liable rather than MacArthur's estate being liable. As a whole, the instruction gave the jury two options: to find against MacArthur individually, or to find against the corporation on the theory of direct liability(RA13). As the Fourth District stated(RA13):

> . . .The parties set the stage for this precise result. When the Clerk published the verdict, neither party challenged the

> jury's finding because of any purported inconsistency in the result.
>
> We conclude that the jury found that MacArthur acted only in his capacity as president and chairman of the Board of Bankers, that Bankers alone should be held directly liable, and that such a finding was permissible under the instructions which the parties contemplated. . . (emphasis added)

The jury was clearly advised that it could either find against MacArthur individually or against the corporation on a theory of direct liability. These instructions were agreed to and approved by Bankers during trial. Now on appeal, Bankers has taken a contrary position and is arguing that it was entitled to a directed verdict since the jury made a finding which it now claims was legally unsound; but which it expressly agreed during trial the jury could make, by agreeing to or requesting certain jury instructions. Bankers has waived any right to now object. After trying the case on one theory, Bankers has now, at the appellate level, attempted to try the case on another theory. The Fourth District saw through this and found that the jury verdict was permissible under the very instructions that Bankers agreed to and requested.

POINT V

A CORPORATION CAN BE HELD LIABLE FOR PUNITIVE DAMAGES BASED UPON THE ACTS OF ITS OFFICER OR DIRECTOR.

Bankers never argued at trial that it could not be held liable for punitive damages because of a lack of showing of independent fault. This argument first surfaced on appeal.

In MERCURY MOTORS v. SMITH, 393 So.2d 545(Fla.1981) this Court held that an employer cannot be held vicariously

liable for punitive damages resulting from the acts of its employees unless it is guilty of some independent fault. The present case does not concern vicarious liability since the jury found that MacArthur had been acting as an officer of Bankers and therefore Bankers was directly liable (RA13).

Bankers argues that MERCURY MOTORS should be extended to the direct liability of a corporation as well. Such extension would be against public policy. It would allow upper eschelon officers of a corporation to commit outrageous acts and yet insulate the corporation from punitive damages. A corporation can only act through its officers and directors. When they commit acts that result in punitive damages, the corporation is liable.

The proposition that punitive damages against a corporation is direct when the tortious activity involves management or high-level personnel is supported by the First District's decision in ALEXANDER v. ALTERMAN TRANSPORT LINES, INC., 350 So.2d 1128 (Fla.1st DCA 1977), by the Fourth District's decision in HARTFORD ACCID. & INDEM. CO. v. U.S. CONCRETE PIPE, 369 So.2d 451 (Fla.4th DCA 1979) and by COMMERCIAL UNION INSURANCE COMPANY v. REICHARD, 404 F.2d 868(5th Cir.1968).

The Fourth District's decision in U.S. CONCRETE PIPE relies upon the Indiana decision of NORFOLK & WESTERN RY. CO. v. HARTFORD ACCI. & INDEM. CO., 420 F.Supp.92(M.D.Ind.1976) where it is stated:

> There is, accordingly, a distinction to be made in Indiana law between liability for punitive damages directly imposed and such liability when vicariously imposed. The former situation arises

> in cases similar to the First Jeffersonville Railroad case, 28 Indiana 1(1867) in which the corporation itself is found to have acted maliciously or oppressively. The latter situation arises when the corporation, without itself being guilty of wilfull misconduct, is held to respond in damages for the intentional tort of its agent. The distinction is not a novel one: it has been fully considered and adopted by the courts of Florida. . . .
>
> The Florida rule was developed in part from the concept that a corporation is itself capable of wilfull and malicious misconduct, independent of the misconduct of its agents and employees. . . .If a corporation could not act directly for tort purposes but could act only indirectly through its agents, then there would never be direct liability for punitive damages. All liability would be vicarious. But in accepting the concept of direct corporate action, the Florida courts established the groundwork for their present distinction between direct and vicarious liability for the punitive damages. The Indiana courts have laid the similar groundwork. . . .420 F.Supp.at 97

POINT VI

THE DECISION DOES NOT CONFLICT WITH ARONOVITZ v. STEIN PROPERTIES, 322 So.2d 74(Fla.3d DCA 1975).

Attorneys Barkett, Lindsey and Slinkman left the law firm of Farish & Farish. While this lawsuit was pending, they claimed that they had been partners in the law firm. (RA 42-44,47) Farish contended they had not been. During this case Barkett and Lindsey admitted the existing dispute. (RA 45,48) and took the position that they did not intend to institute a separate action against Bankers. (RA 46,49-50). Rather, it was their position that they were partners in Farish & Farish and therefore had a vested interest in the existing judgment that had been obtained by the partnership

against Bankers. They intended to look to Farish & Farish for their proportionate share of the recovery, if they were subsequently found to be partners in the partnership, and agreed to be bound by any judicial determination in that regard (RA 50-52).

The jury was advised of the existing dispute through testimony and by argument. The dispute is yet to be resolved. Since the Fourth District's mandate has issued, Barkett, Lindsey and Slinkman have now been allowed to intervene in this case at the trial level, and whether and to what extent they have an interest in the judgment entered in this case will be determined.

There is no direct conflict with ARONOVITZ v. STEIN PROPERTIES, supra. ARONOVITZ does not apply where a dispute exists as to whether Barkett, Lindsey and Slinkman were partners and the extent of their interest. ARONOVITZ requires a joinder of persons acknowledged as partners. It does not require the joinder of persons who may have an interest in the partnership. As pointed out by the Fourth District, Barkett, Lindsey and Slinkman did not attempt to intervene until four months after the Final Judgment. Six months after the Final Judgment was appealed, another alleged partner, Earl Maxwell, also sought to intervene. The Fourth District stated: "We can not say what other person unknown to this Court may subsequently appear, claiming a partnership interest in the firm of Farish & Farish and a share of the judgment sub judice". The fact that there is an existing dispute as to whether certain non-joined parties are in fact partners cannot prevent a suit brought by acknowledged partners from proceeding. The dispute as to who is and who

is not a partner, and who has an interest in the judgment, has to be decided post-trial in an evidentiary hearing.

Secondly, the very purpose of joining indispensible parties is to protect the defendant from the inconvenience and expense of defending multiple and separate suits and exposing him to multiple and separate judgments. As the Fourth District pointed out, the Statute of Limitations had run on the claims of Barkett, Lindsey and Slinkman against Bankers when the case was tried and when Bankers made its Motion for New Trial. Therefore, the presence of Barkett, Lindsey and Slinkman in the lawsuit was not necessary to a complete determination of the cause. There was no threat of multiple suits or multiple recoveries against Bankers. Barkett, Slinkman, and Lindsey were not indispensible parties under ARONOVITZ.

CONCLUSION

There is no express or direct conflict and therefore this Court has no jurisdiction to hear this case on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: LARRY KLEIN, Suite 201, 501 S. Flagler Drive, West Palm Beach, FL 33401 and to MICHAEL P. MULLEN, ESQ., Suite 1000-303 E. Wacker Drive, Chicago, ILL 60601, this 18th day of APRIL, 1983.

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