O/a 1-13-84

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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 63,363

BANKERS MULTIPLE LINE INSURANCE COMPANY,

Petitioner,

v.

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

Respondents.

BRIEF OF RESPONDENTS ON THE MERITS

MONTGOMERY, LYTAL, REITER,
DENNEY & SEARCY, P.A.
P. O. Drawer 3626
West Palm Beach, FL 33402
and
HARVIE S. DUVAL, ESQ.
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and
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CROSS-ISSUE

CITATIONS OF AUTHORITY

STATEMENT OF THE CASE

Joseph D. Farish, Jr., and the Estate of his deceased father, d/b/a Farish & Farish, a partnership, sued John D. MacArthur ("MacArthur")[1] and Bankers Multiple Line Insurance Company ("Bankers") for tortious interference with contract (R1101-06,1200-05). The Farish & Farish law firm alleged that it had entered into a contingency fee contract with Jill Smith regarding the wrongful death of her husband. Farish & Farish sued MacArthur, individually, and in the course and scope of his employment with Bankers, as its principal stockholder, for tortious interference resulting in Farish & Farish being fired as Jill's attorney (R1101-06).

The jury returned a verdict in favor of Plaintiff and against MacArthur's insurance company, Bankers, for $50,000 in compensatory damages and $2,000,000 in punitive damages (R3728-29). The jury found in favor of MacArthur's Estate (R3728).

The trial court denied Bankers' post-trial Motion that judgment be entered in its favor as a result of the jury finding in favor of MacArthur's Estate (R3732-77,A11). The trial court granted Bankers' Motion for New Trial on three grounds: failure to join indispensable parties; failure to instruct the jury of the discretionary nature of punitive damages: and allowing Attorney Lindsey, an alleged partner in Farish & Farish, to testify as to the value of the

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1/ During the lawsuit, MacArthur died and his Estate was substituted as a party-defendant.

case (R4454-59). The trial court denied Plaintiff's Motion for New Trial as to MacArthur's Estate.

Plaintiff appealed to the Fourth District Court of Appeal which reversed the trial court's order granting new trial. The Fourth District found that Lindsey's testimony was properly admitted into evidence, that there was not a failure to join indispensable parties and that the punitive damage instruction had informed the jury of its discretion to award punitive damages.

The Fourth District rejected Bankers' argument on cross-appeal, as the trial court had done, that a new trial was also warranted because the jury was instructed that the greater the Defendant's wealth the greater the punitive damages must be; and further rejected Bankers' argument on cross-appeal, as the trial court had done (R3732-77,A11); that it was entitled to have judgment entered in its favor because the jury had found in favor of MacArthur's Estate (A22-25).

This Court has accepted jurisdiction based upon an alleged direct and express conflict with other Florida appellate decisions.

JURISDICTION

It is suggested that upon complete review, this Court should determine that the Fourth District's decision does not expressly and directly conflict with other Florida appellate decisions. This case is unique unto itself, to a great extent because of the agreed-to, and/or not objected

to, jury instructions (A24) and the fact that "by their tactical maneuvering, the parties provided for the result the jury reached", as aptly pointed out by the Fourth District (A23). Accordingly, this Court should conclude, as it did in QUEVEDO v. STATE, Case No. 62,092, decision filed July 28, 1983, 8 FLW 300, that "the petition for review should not have been accepted".

STANDARD OF REVIEW

The trial court did not set aside the verdict as being against the manifest weight of the evidence. The trial court gave three legal rulings as the basis for granting a new trial. Therefore, the "broad discretion rule" does not apply. The issue is the legal sufficiency of the grounds or reasons give. NATIONAL WESTERN LIFE INS. CO. v. WALTERS, 216 So.2d 485 (Fla. 3d DCA 1968).

STATEMENT OF THE FACTS

Bankers has stated the facts in a light most favorable to it, ignoring the facts and inferences allowing the jury to reach the verdict that it did. Since the trial court did not find that the verdict was against the manifest weight of the evidence, this Court must accept the jury's resolution of the disputes and conflicts in favor of Plaintiffs. NUNBERG v. BRODSKY, 224 So.2d 727 (Fla. 3d DCA 1969). The facts must be looked at in a light most favorable to Plaintiffs.

Jill Smith worked for three months as a waitress in the coffee shop at the Colonnades Hotel, which MacArthur owned

and in which he resided (R2914). MacArthur conducted his business out of the hotel coffee shop (R2916).

On March 30, 1973, Jill, who was only 20 years old and pregnant, was walking along a road with her husband. An improperly loaded truck owned by Meredith & Morse swerved, and a pipe fell off killing Jill's husband (R576,401,44,457). Meredith & Morse, who stored its equipment on MacArthur's property, allowed MacArthur's company, Garden Construction, to use the equipment (R473-74). In return, Meredith & Morse was carried as an insured on Garden Construction's insurance policy with Bankers (R406). Meredith & Morse was issued an insurance card by Bankers so indicating (R373-74,382).

Jill signed a contingency fee contract with the Farish firm (R3347). Jill claimed that she told Hugh Lindsey, an attorney in the Farish firm, that she did not want to go to trial, but wanted to settle for religious reasons (R2931,2936-38). Lindsey denied this (R3359).

After a New York funeral, Jill did not return to Florida to live, but went to live with her parents in Illinois (R2921). Approximately three weeks later, Paul Doolen, who was Chairman of the Board of Bankers Life[2] in Illinois, was directed by MacArthur to visit Jill to see if

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2/ Bankers Life is a parent company that has 19 subsidiaries (R4017-18,4008). MacArthur was the sole owner of Bankers Life which was the principal stockholder of Bankers Multiple Line. By owning Bankers Life, MacArthur owned Bankers Multiple Line (R4014).

they could do anything for her (R4076). Doolen was to offer her "anything" (R4076). Doolen offered Jill a job, which she rejected (R4080). Jill was broke and did not have money to pay for medical treatment (R2926-27,4105). She did, therefore, accept Doolen's offer to place her on a group insurance policy, at no expense to her, so that she would have maternity benefits (R4087-88).

Doolen admitted that group policies require an insured to be an employee, which Jill was not, but he explained "MacArthur said what he wanted done and we did it" (R4106).

Jill wrote MacArthur to thank him for his kindness. During the ensuing months, MacArthur communicated with Jill and vice versa through letters and telephone calls (Pltf's. Ex. #1-52). MacArthur advised Jill "I want you to feel free to make your wants known to me or to Mr. Paul Doolen" (Pltf's. Ex. #38). He told her to let him know if she needed "help or any material thing" (R3094). MacArthur paid Jill's bills (Pltf's. Ex.#18). Interwoven with all the offers of assistance, MacArthur assured Jill that Meredith & Morse was responsible for the accident, and that he and Bankers were not liable. He also repeatedly assured her that he would help her obtain a fair settlement with Meredith & Morse (R2996,3079).

Farish had originally felt that the case had great potential (R476). In the beginning, Jill was cooperative (R498-99), and their relationship was excellent (R547-48). In May 1973, Farish received a letter from Jill informing

him of Doolen's visit (R548). Jill explained that Doolen had suggested she settle for a couple thousand dollars "which MacArthur is supposedly considering giving me out of the goodness of his heart" (R550). Farish advised Jill not to talk to Doolen, not to take the job offered her (R554,557), and not to have any contact with MacArthur. Farish wrote MacArthur's counsel regarding MacArthur's improper conduct in contacting Jill and attempting to influence her and/or settle with her directly (R562-63).

On June 22, 1973, Jill's wrongful death suit was filed by Farish against Meredith & Morse, the truck driver McClure, and Meredith & Morse's insurer, Bankers (R4138,3178). Bankers denied coverage (R4140), while Meredith & Morse claimed coverage relying upon the insurance card issued it by Bankers (R4142).

When Jill was told that suit had been filed,she told Farish she wanted to settle the case. Farish explained that Bankers had denied coverage and no settlement was forthcoming (R574). Jill wanted to dismiss the lawsuit but Farish explained to her that this would be tantamount to her and the baby receiving nothing (R3068-69,3071). Farish advised her to leave these decisions up to him, and explained that the lawsuit had to be filed. (R2952,2956).

Farish also advised Jill not to have anything to do with MacArthur because he was an adverse party (R3087). Farish could already see the effect of MacArthur's influence on Jill (R620-21). She became evasive about her association

with MacArthur, Doolen and others (R573). Farish explained that it was in her best interest to let him handle all dealings and negotiations with MacArthur (R672).

Over the following months, MacArthur continued to contact Jill by letter, telephone, through Doolen and in person (R4102-03,4121). Doolen admitted that his contacts with Jill were at MacArthur's directions (R4102-03, 4121,4115) and that MacArthur had begun giving him directions regarding Jill "early in the game" (R4118-19).

Jill was impressed that MacArthur showed such concern for her. She believed that MacArthur and Doolen were just concerned for her welfare and well-being (R3054,3056). Because of MacArthur's continued communications, Jill began to look to him for advice (R3003,3024):

> Our conversations are very much concerned with how you can help me. . . which is great; because it is at a time when I really needed it. So I extremely appreciate the kindness and advice you've taken the time to show me. And you have offered me many things. It's like having a fairy godfather!
> . . . One of the few things in this world I put value on -- wisdom. You have been around a considerably longer time than I have and I have gained a lot of knowledge.
> . . . If I were your own daughter, what would you tell me?

MacArthur began to counsel young Jill. He told her that Farish was not out for her benefit, but only for his own financial benefit (R3085). He advised her that she needed "good counsel rather than Farish" (R2948) and:

> As you know, as things now stand, Farish & Farish will receive 40% plus their

> expenses which they claim were lavish. It would be much to your advantage to break the contract you signed with Farish & Farish (Pltf's. Ex.#39).

MacArthur advised Jill she would not get a fair settlement with Farish because he would take 90% of any settlement, whereas Meredith & Morse would work out a settlement which would allow her to receive all the proceeds (R3120, Pltf's. Ex. #41):

> I definitely believe that unless Mr. Farish is maneuvered out of the picture, his "expenses", plus the contract you signed, will take most of the money recovered from Meredith & Morse. . . I have been anxious to somehow nullify both contracts you signed with Mr. Farish's law firm (Pltf's. Ex. #44).

MacArthur offered to help Jill obtain any other counsel of her choice (R2966). He agreed to help get the lawsuit settled if any other lawyer represented her, but refused to do so if Farish was involved. Knowing that Jill was desperate to settle the case before her baby was born, MacArthur advised her that the case would not be settled until Farish was out of the picture (R3090-91).

MacArthur reassured Jill that he was doing everything he could to effect a quick settlement (Pltf's. Ex. #41); that he was on top of her problems (Pltf's. Ex. #22), but that the "wheels of justice turn slowly" (Pltf's. Ex. #40). MacArthur failed to disclose that Farish had motioned the case for trial on four occasions and each time the Defendants had opposed the motions and/or had obtained continuances (R588,4157-58).

MacArthur led Jill to believe that the case did not have to be tried, and that a judge could just award her a fair amount (R43084). He told her that if she kept Farish as her lawyer, the case would have to be tried and that this would take a long time. If she wanted things taken care of soon, advised MacArthur, Farish would have to be out of the picture; she would have to get rid of him (R3091).

Jill admitted that MacArthur had influenced her to fire Farish (R3084,2693-94,3120). She simply could not understand why a settlement could not be made without a lawsuit (R3068). She testified that she thought that if she fired Farish the lawsuit would end (R3066). She thereafter trusted MacArthur to follow through on his promise that he would bring about a settlement (R3122).

On July 27, 1973, MacArthur paid for Jill's trip to West Palm Beach to fire Farish (R2949,3081). Doolen met Jill at the Chicago airport to deliver her plane ticket (R3081-82). MacArthur met Jill's plane in West Palm Beach and she stayed in one of his apartments (R3082-83,3085, 3087). When Jill went to see Farish to fire him, she explained that she wanted to settle the case (R2960-61, 2693). Farish explained that MacArthur would not settle; that his insurance company had denied coverage; and that the only thing left to do was sue (R2965,2960-61,666-68).

After Jill fired Farish, MacArthur introduced Jill to another attorney, Evelyn Flack, to represent her (R3072-73). Mrs. Flack had no experience in trial practice, personal

injury or wrongful death cases (R1040-43). She had never handled a jury trial (R144). Jill signed a contract with Mrs. Flack for an hourly rate (R3076). MacArthur sent Mrs. Flack a $500 check, which Mrs. Flack claimed was not payment for representing Jill (R211-12,214-15).

MacArthur told Jill that as administrator of the estate, she would be responsible for claims for child support by her late husband's child by a former marriage (R207). Mrs. Flack was aware that this was not true (R216-17), but nonetheless had Jill file a Petition to Resign as Personal Representative of her husband's estate (R2983). Attorney James Blanton was appointed personal representative of the estate, and he hired Farish as the attorney for the estate (R2984).

Mrs. Flack purported to represent Jill individually, but she did nothing (R165,171-72). She subsequently joined the law firm representing Meredith & Morse (R173). She continued to represent Jill, even though there was an obvious conflict of interest (R2989,4143-44).

When Mrs. Flack moved to North Florida, MacArthur advised Jill that Mrs. Flack would remain her attorney and return to West Palm Beach if needed (R3095-96). "This will not affect your representation" (R3096). MacArthur also advised Jill that Mrs. Flack had made two trips to West Palm Beach on her behalf, which Mrs. Flack testified was untrue (R209). MacArthur wrote Jill that he would compensate Mrs. Flack for work on her behalf, and that he had given Mrs.

Flack $500 (Pltf's. Ex. #50). Even after Mrs. Flack was appointed a county court judge, MacArthur advised Jill that Mrs. Flack would return to Palm Beach County to handle her case when necessary (Pltf's. Ex. #34,36).

Mrs. Flack testified that she would condemn MacArthur's actions if he wrote letters to Jill and discussed the case with her. She admitted that this would have been improper since MacArthur's company was a defendant in the lawsuit (R199-200).

Jill testified that she had believed that MacArthur was genuinely interested in her welfare and had placed her trust in him to have the case settled once she fired Farish. To Jill's disappointment, after she fired Farish MacArthur never came through with a settlement. She was finally forced to go to trial (R3108).

Jill went to a Chicago lawyer, who referred her to the law firm of Montgomery, Lytal, Reiter, Denney & Searcy, P.A., where attorney Lake Lytal began representing her (R3037). She asked Lytal to be her lawyer, instead of Farish, but he advised her he needed Farish's assistance since the trial was coming up shortly (R3039). Jill would have nothing to do with Farish (R622) and completely refused to cooperate in the lawsuit (R724). Their attorney/client relationship had been completely destroyed and Lytal had to bridge that gap (R760). Lytal attempted to elicit Jill's cooperation (R723). He had to convince her to even come to Florida for the trial (R724).

Farish testified that the value of the case at the time of trial, in light of Jill's attitude towards him and her lack of cooperation, had greatly diminished (R858). The jury returned a verdict of $118,500 and found that Bankers had coverage (R730). The attorney's fee was approximately $47,000, with Lytal receiving one-third (R725,736), and Farish & Farish receiving two-thirds.

It was subsequently determined that while MacArthur was offering Jill gifts and getting her to fire Farish so that he could ostensibly settle her case with Meredith & Morse for her, he was actually working behind Jill's back to prevent her from recovering anything. Meredith testified that MacArthur was initially very upset that Farish was representing Jill (R386,468,470). When Meredith next saw MacArthur, MacArthur told him he thought he was going to be able to straighten things out through the widow, and that he had instituted getting a different attorney for her (R391). He later told Meredith that he was getting rid of that "F___ S.O.B. ambulance chaser, Farish" (R397); that he had Jill "taken care of"; that he had gotten a different attorney for Jill, a lady attorney; and that Farish was no longer on the case (R394-95). MacArthur said he was going to be able to get out of the case for a minimum of $7,000 (R394-95). He assured Meredith that "things were going to come out all right" (R395).

According to Meredith, in case they did have to go to trial, MacArthur instructed him that Meredith & Morse should

take the "rap" for the accident (R393,41) and instructed him to get rid of Meredith & Morse's assets before trial (R393). Meredith sold all the assets of Meredith & Morse (R396). In retrospect it became apparent that had coverage not been established at trial, because of MacArthur's scheme Jill would have been left with a paper judgment.

Jack Ackerman, the attorney for Meredith & Morse, substantiated Meredith's testimony. He testified that MacArthur professed intense hatred towards Farish (R93). MacArthur planned for Meredith & Morse to take responsibility for the accident so they got rid of its assets prior to trial (R94-97). MacArthur said this would be his way of "getting even" with Farish (R96).

According to Ackerman, MacArthur had said he could control Jill (R97), and explained how he had his representative in Chicago in constant contact with her (R101). Ackerman said MacArthur was attempting to get Jill to fire Farish, and then MacArthur was going to settle the case with Jill himself (R100-01) for a nominal amount.

Petitioners state that MacArthur was very fond of Jill as if to imply that he acted out of kindness. MacArthur's communications with Jill were not acts of sympathy, nor kindness, but were for the sole purpose of getting control over Jill, and having her fire Farish so that MacArthur would settle the case for a nominal sum. There is no question that MacArthur had his own interest at heart and

had ulterior motives in contacting and communicating with Jill.

Petitioners state that there was no evidence of written communications between Jill and MacArthur prior to her terminating Farish, except for a June 18, 1973 letter. This overlooks all the oral and personal communications that occurred. Doolen was in constant contact with Jill. Even Doolen testified that MacArthur had come to Chicago to visit with Jill (R4117). There is no question that there were communications, both written and oral, prior to Jill's termination of Farish, either by MacArthur directly or through others. Even Jill acknowledged that MacArthur influenced her to fire Farish (R2693).

In addition, Bankers stripped its insurance claims file relating to Jill's wrongful death action before it produced the file in response to a request to produce in this case, thus eliminating much of the existing correspondence. When this fraud was discovered post trial, a separate lawsuit for the fraud was instituted.

Bankers argues that Jill did not authorize Farish to file the lawsuit. First, she authorized it by signing the contingency fee contract. Secondly, Bankers refused to settle the case and therefore there was no alternative but to file the lawsuit in the best interest of Jill and her unborn child.

Bankers states that MacArthur merely introduced Jill to Attorney Flack. From the very beginning MacArthur's purpose

had been to get Jill to fire Farish and to hire Flack, who had no experience in personal injury/wrongful death litigation. MacArthur told Meredith that he had gotten a different attorney for Jill, a lady attorney, and accordingly had Jill "taken care of" (R394-95).

Bankers states the Farish had Blanton appointed as the successor personal representative. That statement is untrue. Judge Douglas appointed Blanton as personal representative (R710). Petitioners also state that Blanton was a friend of Farish's. Farish's testimony was actually that Blanton was not a close friend of his, but that he considered all members of the Bar his friends (R710).

Bankers implies that Bankers rightfully denied coverage. Meredith & Morse was to be an insured on Garden Construction's insurance policy with Bankers (R406). Meredith was given an insurance card by Bankers which indicated his company was covered (R373-74,381-82). Meredith verified the coverage with Garden Construction (R460-61,476). Notwithstanding these facts, Bankers defended the wrongful death claim on the basis of no coverage.

POINT I

THE JURY VERDICT EXONERATING MacARTHUR DOES NOT ENTITLE BANKERS TO HAVE THE JUDGMENT AGAINST IT SET ASIDE WHERE BANKERS AGREED THAT IF THE JURY FOUND THAT MacARTHUR WAS ACTING IN HIS CORPORATE CAPACITY, BANKERS WAS LIABLE, BUT IF THE JURY FOUND HE WAS ACTING IN HIS INDIVIDUAL CAPACITY, MacARTHUR WAS LIABLE INDIVIDUALLY.

Bankers' is attempting to try on appeal a different case than was tried in the trial court. Bankers now claims that what it agreed to, had the jury instructed upon and argued to the jury is legally impossible. The trial court and counsel for all parties agreed at trial that Bankers and MacArthur were sued separately and that the jury could find against one without finding against the other. Finding against Bankers and not against the Estate resulted from finding that MacArthur was acting in his corporate, rather than individual, capacity. That is the way the case was tried, and the manner in which the jury was apprised by argument and jury instructions. Bankers cannot be allowed to take a totally inconsistent position on appeal than it assumed in the trial court. It is estopped to do so. 22 Fla. Jur.2d Estoppel & Waiver, §48-49.

The trial court refused to enter a post-trial judgment in favor of Bankers based upon Bankers' argument that exoneration of MacArthur's Estate exonerated Bankers. The trial court fully realized that Bankers and the Estate had tried this case on the basis that the jury could find against either Bankers or the Estate. It was only after the

verdict was rendered that Bankers for the first time argued that a finding in favor of the Estate exonerated it also.

The Fourth District likewise understood that Bankers was now advancing an argument on appeal that was directly contrary to the position it had taken at trial:

> We conclude that by their tactical maneuvering, the parties provided for the result the jury reached:
>
> > Appellants' amended complaint alleged that:
> >
> > > John D. MacArthur, acting in his own behalf individually and in the course and scope of his employment with Bankers Multiple Insurance Company and as owner and principle stock holder having dominant control of the defendant. . . set about a course of conduct. . .to interfere with [appellants'] contract of employment with Jill Smith as aforesaid.
>
> MacArthur was the president and chairman of the Board of Bankers and the sole stockholder of Bankers Life which owned the stock of Bankers. The record contains an abundance of evidence from which the jury could find, and by its verdict did find, that Bankers acted through its officer, MacArthur. As Doolen testified, "MacArthur said what he wanted done and we did it". The trial court's instruction to the jury separated the claim against Bankers from the claim against the estate and provided a basis for the jury to find against one defendant and not the other.
>
> > In your deliberations you are to consider two distinct claims. The first claim is against Bankers Multiple Line Insurance Co. The second claim is against . . . the Estate of John D. MacArthur, deceased.
>
> The court also instructed the jury that MacArthur could act in two separate capacities.

> The court instructs you as a matter of law that any acts by John D. MacArthur in his capacity as a corporate officer of Bankers Multiple Line Insurance Company were the acts of Bankers Multiple Line Insurance Company. Any knowledge possessed by John D. MacArthur in any state of mind entertained by him while acting in his capacity as a corporate officer are likewise attributable to Bankers Multiple Line Insurance Company.
>
> If you believe from the greater weight of the evidence that John D. MacArthur was acting solely in his individually capacity and not as an officer, agent or employee of Bankers Multiple Line Insurance Company, and all the necessary elements are proven by the greater weight of the evidence then liability can only be imposed upon his ancillary estate for such actions.

. . .During the charge conference, appellees' [Bankers'] counsel tendered the following proposed instruction:

> If you believe from a greater weight of the evidence that John D. MacArthur was acting in his individual capacity and all the other necessary elements are proven by the greater weight of the evidence, then liability can be imposed only upon his ancillary estate for such actions.

Appellant's [Plaintiffs'] counsel objected on the ground that the instruction does not take into account the fact that MacArthur might act simultaneously both in his individual capacity and in his representative capacity. The judge revised the instruction to read "that John D. MacArthur was acting solely in his individual capacity and not as an officer, agent or employee of Bankers Multiple Line Insurance Company. . . ." All parties agreed to this instruction. . . .

> 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.

No one disputes the law cited by Bankers that where an employer is sued solely upon the theory of respondeat superior, and a jury exonerates the employee, the employer must be exonerated. However, that law is inapplicable here. Under the issues presented to the jury Bankers' liability was not derivative or dependent upon the liability of MacArthur individually.

2 Fla.Jur. 2d Agency & Employment, §208 states:

> . . .[i]f the liability of a master is not predicated solely on the negligence of the employee but also that of the employer himself, a verdict against the employer is permissible. In other words, if the liability is that of joint tortfeasors, then a judgment may be entered in favor of the employee and against the employer. . . . (emphasis added)

53 Am. Jur. 2d, Master & Servant, §406 states:

> . . . If the liability of the master is not predicated solely upon the negligence or wrongful act of the employee in whose favor a verdict has been found, but upon the negligence or other breach of duty of another employee or of that of the employer himself, a verdict against the employer is not inconsistent.

Plaintiffs' Amended Complaint alleged that MacArthur had acted in his own behalf individually, and as the owner and principal stockholder having dominant control of Bankers (R1202,Par.4j). In the parties' pretrial statement, Paragraphs 8-10, it was stipulated that the jury could find against either or both defendants (R2421-2429):

> 8. Whether the breach of contract between Jill Smith and the Plaintiff was proximately caused by the conduct of the now deceased individual defendant, John D. MacArthur, and/or the original and continuing corporate defendant herein, Bankers Multiple Line Insurance Company.
>
> 9. The amount of compensatory damages, if any, to which the Plaintiff is entitled as either or both of the Defendants.
>
> 10. The amount of punitive damages or exemplary damages, if any, to which the Plaintiff is entitled as to either or both of the Defendants. (Emphasis supplied)

At the charge conference, Plaintiff presented a verdict form which allowed the jury to find against Bankers and MacArthur jointly (R4234). The trial court stated that the verdict form should be broken down as to each Defendant individually (R4234). Counsel for Plaintiff agreed stating that since the parties were joint tortfeasors, the jury could find in favor of one and not the other (R4234). The court and the parties agreed that if the jury found both Bankers and the Estate liable, they would be jointly liable for the compensatory damage award (R4234-35); whereas if the jury found against only one of the Defendants, that Defendant would be liable for the compensatory damage award

(R4234-35). Counsel for Bankers voiced no objection (R4234-35). The jury was allowed to assess punitive damages separately as to each Defendant.

The jury was given a special interrogatory verdict consistent with the parties' agreement, and which provided for an award of compensatory damages to Plaintiff if the jury found against either Defendant (R3728-29).

Clearly it was agreed that the if the jury found against only one Defendant, the compensatory damage award would apply to that Defendant. Bankers is now attacking what it stipulated to at trial, and the very basis upon which this lawsuit was tried. Bankers cannot take a contrary position post-trial. This would be extremely prejudicial to Plaintiff. Had Plaintiff known that Bankers was later going to claim that the jury could not legally find against Bankers only, Plaintiff would have taken the necessary measures to protect itself by asking for other jury instructions and/or making the jury aware during closing argument that in order to find against Bankers the jury must necessarily find against the Estate. The jury was never informed that if it let the Estate out, Bankers would go scot free, because that was not the basis upon which this lawsuit was tried.

The jury instructions were fashioned upon the agreement between the court and counsel that the jury could find against one Defendant, and not the other. In fact, counsel

for Bankers expressed concern that the jury instructions did not clearly inform the jury of this (R3918):

> MR. MULLEN: . . . [a]s I read these instructions, there's no clear instruction in terms of his employment as distinguishable from his individual capacity, which of course is a very big issue in this case, going to be asking for separate verdicts and trying to delineate this focal liability, if any, between these two parties.

The fact that Bankers agreed to the distinction between MacArthur's corporate and individual liability is evidenced by the jury instructions it submitted. Bankers' jury instruction No. 19A told the jury that if MacArthur was acting in his individual capacity, and not as an officer, agent or employee of Bankers, the estate only was liable (R3850). Bankers proposed instruction No. 12, which was denied since it was covered by the other instructions, was to the effect that unless MacArthur was acting for Bankers, rather than in his individual capacity, only the Estate could be liable (R3677-3700). The special verdict form submitted by Bankers asked the jury to determine whether Plaintiff had proven that MacArthur was acting in the course of his duties for Bankers rather than acting in his individual capacity (R3677-3700).

In accordance with the distinction agreed upon regarding MacArthur's actions in a corporate capacity versus those in his individual capacity, the jury was instructed that it was to consider two distinct claims, one against

Bankers and one against the Estate (R3842); that Defendants "or either of them" could be liable (R3845); that in order for Plaintiff to recover the jury must find that either the conduct of MacArthur or the conduct of Bankers amounted to tortious interference (R3846); that MacArthur's acts as a corporate officer were acts of Bankers (R3850); but if the jury believed MacArthur was acting solely in his individual capacity, and not as an officer of Bankers, then liability could only be imposed upon his estate (R3850-51).[3] These instructions were totally in line with the parties' agreement that the jury could find against either Defendant.

Even Defendants' counsel emphasized to the jury that it could find against one Defendant without finding against the other:

> MR. MULLEN: And, Mr. Mosley, would you have any trouble with awarding damages only against the party who you felt deserved it, but only if you felt that the evidence warranted it?
> MR. MOSLEY: No.
> MR. MULLEN: And you, Mr. McIntire, if you felt that the evidence award, the evidence supported an award against one party because of something a party did, you wouldn't award the damages against a second party, would you, sir, even though they might be connected? (SR167-68).

In closing argument, counsel for Plaintiff made the following argument and Defendants did not object, evidencing their agreement (R3638-40):

3/Counsel for Bankers drafted this instruction as a method of "separating Mr. MacArthur's individual acts with [sic "from"]the scope of his employment" (R3944).

> . . .The court's instructions are gonna be very clear, and just let me read one of them to you, which I think will put the whole issue to rest. It's instruction number nineteen, and it says, "The Court instructs you as a matter of law that any acts by John D. MacArthur in his capacity as a corporate officer of Bankers Multiple Line Insurance Company where the acts of Bankers Multiple Line Insurance Company's," anything that he does while he's chairman of the board and president and sole owner is the act of the corporation. The only way the corporation can act is through its agents, servants and employees. It doesn't have a living, breathing existence, although it has a legal existence apart form the individuals. Whatever it does, it does through its agents. So, what Mr. MacArthur does, the corporation does. Any knowledge possessed by John D. MacArthur and any state of mind entertained by him while acting in his capacity as a corporate officer are likewise attributable to Bankers Multiple Line Insurance Company, as the principal person in charge of the direction of this entire lawsuit, meaning the wrongful death case, what he thinks, what he intends, what he does, the malice in his heart, the intense hatred that he has for Joseph Farish is the hatred of the corporation, the acts of the corporation, the thoughts and deeds of the corporation. Well, that's what the issues are.

It is clear that the jury was apprised that if it found that MacArthur was acting in a corporate capacity, the jury should find against the corporation only; if he was acting in an individual capacity, the jury should find against the Estate. Bankers argues that MacArthur cannot be liable in his capacity as a corporate officer without also being personally liable; and that the Fourth District's holding to the contrary is unprecedented. However, the Fourth District

held that the jury could find that MacArthur was acting solely in his corporate capacity based upon the issues presented to it by the parties.

Bankers argues that the Fourth District incorrectly found that the jury was given no instruction that would have allowed it to find against both Defendants. The jury instructions impressed upon the jury that a dichotomy was drawn between MacArthur's acts individually, for which the Estate would be liable and MacArthur's acts in a corporate capacity, for which Bankers would be liable. Therefore, the Fourth District's comment was correct as far as it went. However, the verdict form went further and did conceivably allow the jury to find against MacArthur, individually, and/or against Bankers, for the acts of MacArthur in his corporate capacity. However, this was unlikely in light of the instructions given which drew a distinction between MacArthur's acts in his corporate and individual capacity.

Bankers next argues that the Fourth District incorrectly held that the jury was not instructed on respondeat superior. The so-called respondeat superior instruction was given in reference to others than MacArthur, such as Doolen, whose wrongful acts Plaintiff also argued imposed liability upon Bankers. The instruction was not given as to MacArthur. The jury instructions as to MacArthur were clear. If he was acting in his corporate capacity Bankers was liable. If he was acting in his individual capacity, the Estate was liable (R3850-51).

Another fallacy in Bankers' argument is its statement that MacArthur was "exonerated" by the jury. In the interrogatory by which the jury found in favor of the Estate, the jury was simply asked to determine whether MacArthur's estate was "liable to the Plaintiff" (R3728-29). By answering "No" the jury did not find that MacArthur had not tortiously interfered with Farish & Farish's contract. Rather, the jury merely found that MacArthur was not acting in his individual capacity, but was acting directly for the corporation. A finding that the corporation was liable for MacArthur's acts, whereas the Estate was not, is not at all inconsistent in light of the jury instructions and verdict form.

Moreover, the jury returned the verdict that it did because Bankers was improperly allowed to argue that if the jury found against the Estate this would only harm MacArthur's heirs (Widow, children and grandchildren) (R3557-60,3562,3565,3576-77). Any attempt to insulate the heirs from the effect of a judgment entered in this case, was apparently why the Estate and Bankers were agreeable during trial to separating the liability of the Estate and Bankers based upon MacArthur's acts individually versus his acts in a corporate capacity. Having been successful in doing this, Bankers should not now be allowed to refuse to recognize the "individual" versus "corporate capacity" dicotomy, which it agreed to at trial, and use it to exonerate itself. The trial court was quite aware of the

inconsistent position being taken by Bankers post-trial and accordingly denied its Motion for entry of judgment in its favor.

POINT II

BANKERS AGREED THAT IT WAS LIABLE FOR PUNITIVE DAMAGES DIRECTLY IF THE JURY FOUND THAT MacARTHUR'S ACTS WERE IN A CORPORATE CAPACITY, RATHER THAN AN INDIVIDUAL CAPACITY.

The trial court did not grant a new trial on this point. This is an issue raised by Bankers for the first time post-trial.

Petitioners argue that this case was tried solely upon the theory of vicarious liability and that since MacArthur was exonerated the corporation must be exonerated. As stated, supra, this argument is faulty. The jury found, under the issues presented it, that the Estate was not liable for the acts of MacArthur since he was not acting individually, but was acting as an officer of the corporation, thus making Bankers liable for punitive damages directly. Accordingly, MERCURY MOTORS v. SMITH, 393 So.2d 545 (Fla. 1981) is inapplicable. It is confined to situations where employer is held vicariously liable for punitive damages of its employees through the doctrine of respondeat superior.

The same argument set forth under Point I applies here. Bankers agreed that the jury could find against either Bankers or the Estate. The liability of Bankers was not vicarious liability for the act of an employee, but was for MacArthur's acts as president and chairman of the board

acting on behalf of the corporation. The jury instructions, to which Bankers did not object provided (R3850):

> The Court instructs you as a matter of law that any acts by John D. MacArthur in his capacity as a corporate officer of Bankers Multiple Line Insurance Company were the acts of Bankers Multiple Line Insurance Company.

Therefore, how can Bankers now contend that it cannot be held directly liable for punitive damages for MacArthur's acts?

POINT III

THE PUNITIVE DAMAGE INSTRUCTION AND SPECIAL INTERROGATORY VERDICT INFORMED THE JURY OF ITS DISCRETION TO NOT AWARD PUNITIVE DAMAGES.

Bankers never objected to the punitive damage instruction on the ground that it did not inform the jury of its discretion not to award punitive damages (R3902-09).[4] This issue was raised for the first time post-trial.

As held in SEARS, ROEBUCK & COMPANY v. JACKSON, 3d DCA, Case No. 82-1548, dec. filed July 5, 1983, 7/15/83 FLW 1813 the trial court's discretion in granting a new trial can be exercised only with respect to preserved errors:

> . . .[w]here the trial judge grants a new trial on the ground of an unpreserved error, he is not operating within the area of his discretion, and his ruling will be upheld only if the error is, as a matter of law, fundamental.

4/ Bankers objected to the punitive damage instruction on an entirely different ground, (i.e.), the fact that the jury was instructed that the greater the wealth the greater the award must be in order to punish (discussed under Point IV, infra).

Plaintiff has no quarrel with the law cited by Bankers to the effect that the jury has the discretion whether to award punitive damages. In this case, however, the Fourth District correctly ruled that the jury instructions did in fact apprise the jury of the discretionary nature of punitive damages (R3848):

> You are instructed that in Count III of the Complaint there is a claim for exemplary or punitive damages; and by this is meant damages which are awarded, if at all, by way of punishment or example to the party as a deterrent to others. Exemplary or punitive damages can only be allowed when it is alleged in the Complaint and established at the trial that the Defendant acted with malice, moral turpitude, wantonness, willfulness or reckless indifference to the rights of the Plaintiff.
>
> If you find that punitive damages should be assessed against either or both defendants, you may consider the financial resources of such defendant in fixing the amount of such damages. In considering the financial resources of any defendant for the purpose of imposing punitive damages, you may not consider reputed financial resources. Your consideration may extend only to the net worth of the defendant. You may assess punitive damages against one defendant and not the others, or against more than one defendant in different amounts.
>
> Let me read that sentence over again. You may assess punitive damages against one defendant and not the other, or against more than one defendant in different amounts. (Emphasis added)

The above instruction is essentially Standard Jury Instruction 6.12 which advises the jury that it may, in its discretion, award punitive damages. The instruction allowed

the jury discretion in regard to whether to award punitive damages, and the amount.

This Court has only to review the language of the special interrogatory verdict to determine that the jury was unequivocally informed that it was discretionary as to whether to award punitive damages, as indicated by the following underlined portion of the instruction (R3728-29):

> 4. Do you find that the Defendant, FIRST MARINE BANK & TRUST COMPANY OF THE PALM BEACHES as Ancillary Personal Representative of the Estate of JOHN D. MacARTHUR, is required to pay punitive damages?
>
> YES_____ NO_____
>
> If the answer to Question Number 4 is NO, then you need not concern yourselves with Question Number 5.
>
> If your Answer to Question 4 is YES, then proceed to answer Question Number 5.
>
> 5. Punitive damages against the Defendant, FIRST MARINE BANK & TRUST COMPANY OF THE PALM BEACHES, as Ancillary Personal Representative of the Estate of JOHN D. MacARTHUR, are. . . $_____.
>
> * * * *
>
> 6. Do you find that the Defendant, BANKERS MULTIPLE LINE INSURANCE COMPANY, is required to pay punitive damages?
>
> YES_____ NO_____
>
> If the answer to Question Number 6 is NO, then you need not concern yourselves with Question Number 7.
>
> If the answer Question Number 6 is YES, then proceed to Question Number 7.
>
> 7. Punitive damages against the Defendant, BANKERS MULTIPLE LINE INSURANCE COMPANY, are ..... $_____. (Emphasis added)

The above verdict form required the jury to determine whether punitive damages should be awarded, and if so how much. From the outset of the trial, the jury was repeatedly

informed, by counsel for both sides that punitive damages were entirely discretionary (SR44-45,48-51,62-63,68,83,92, 128-29,137,138,156, 167-68,178-79, 198-204,207, 259,282,298, 305,310); See Appendix filed with the Fourth District, pp. 1-20).

Counsel for Bankers unequivocally explained the discretionary nature of punitive damages to the jury on voir dire:

> MR. MULLEN: And do you understand that normal damages, called compensatory damages, are a matter of right, the person if he lost something, he's entitled to have it replaced?. . .
>
> And that punitive damages are not a matter of right, but rather are a windfall profit, something that's not deserved, the party who would get it, you understand that? (SR204).
>
> * * *
>
> . . . Now, you understand, sir, that punitive damage claimed here would be awardable only if the evidence showed that the actions of Mr. MacArthur or anybody else, that the plaintiff's estate entitled him to recovery are done by what's called malice, malicious activity, something other than normal conduct, normal intentions or motivation of a party. Do you understand that, sir? . . .
>
> . . .And if the Judge were to instruct you that you had to find malice, maliciousness on the part of anybody's actions before you could award any punitive damages, would you be able to follow that instructions, sir?. . .(SR282).
>
> * * *
>
> . . . And if you decided that based on the evidence in this case, sir, that you should not take money away from any of the parties as punishment and not give it to the plaintiff, would you have any hesitancy in returning a verdict to that effect?(SR138). . .

> . . . And as far as punitive damages are concerned, Mr. Stubbs, you understand that they are awarded only if the evidence shows that there's such an aggrevous(sic) case that under the law as The Judge gives it to you, they should be considered? . . .
>
> . . . And that the purpose is punishment, in fact that's why they call it punitive damages, punishment, and that if The Judge instructed you that the purpose of punitive damages were punishment, you'd be able to follow that instruction? . . .
>
> . . . And you would, too, ma'am, be able to follow an instruction that you award punitive damages only if the evidence in the case indicates that they should be considered, and then only to accomplish its purpose of punishment? (SR310). . .
>
> * * *
>
> . . . And of course, would all of the jurors here be able to render a verdict of no punitive damages if they felt that the evidence in this case did not require punishment or punitive damages? (SR292).
>
> * * *
>
> . . .And or course in considering the evidence in this case, if you felt that no damages at all had been incurred, either compensatory or that no punitive damages were called for, would you have any hesitancy in returning a verdict of no award regardless of the amount that the plaintiff had been seeking? Would you have any hesitancy on that? . . .
>
> . . . In other words, you would be able to disregard plaintiff's claim for very large sums of money, if in fact you felt that the evidence warranted no award at all; is that correct? (SR259)

Counsel for Bankers made the discretionary nature of punitive damages even clearer by explaining to the jury that damages could be awarded against one of the Defendants without awarding them against the other (R167-68,202).

Closing argument also conveyed to the jury that its duty in awarding punitive damages was discretionary. Counsel for Bankers extensively argued that this was not a case in which the jury should exercise its discretion and award punitive damages (R3555-60):

> Let's talk what this case is really about. This case is really about punishment, punishment, that's what this case is about, punitive damage award. Punitive means punishment. That's the purpose and The Court will instruct you on that. And they want you to say, well, this is the purpose of punitive damages, is to deter others, and that's correct, correct statement of the law. But absolutely has not application to this case. (Emphasis added)

Defense counsel then proceeded for four pages of closing argument to explain why punitive damages were not applicable (R3555-60). Counsel for Plaintiffs also explained to the jury that punitive damages were discretionary (R3487-88):

> Exemplary or punitive damages, the Judge is gonna tell you can only be allowed when it is alleged in the Complaint, which we did and establish it at trial. That the Defendant did what? acted with malice. That means it was bad, moral turpitude, complete absolute total lack of moral turpitude, wantonness. That means he didn't care; deliberately, willfulness, or any of these things, malice, moral turpitude, wantonness, willfulness or reckless indifference to the rights of others. "If you find that punitive damages should be assessed against either or both Defendants, you may consider the financial resources of such Defendant in fixing the amount of damages.

At page 30 of its brief Bankers quotes a portion of Plaintiff's closing argument out of context, contending that it was argued that the jury was required to return a punitive damage award. Bankers omits the argument by counsel for Plaintiff immediately prior thereto which apprised the jury that an award of punitive damages was not required (R3632):

> MR. SCAROLA: . . .[t]he fifth issue that you need to decide is whether the Defendants' conduct warrants punitive damages. How do you make that decision? Instruction number fourteen. Not from me, from The Court. "You are instructed that in Count II of the Complaint there is a claim for exemplary or punitive damages, and by this is meant damages which are awarded, if at all, by way of punishment for example to the party, and as a deterrent to others. Exemplary or punitive damages can only be allowed when it is alleged in the Complaint and established at the trial that the Defendant acted with malice, moral turpitude, wantonness, willfulness or reckless indifference to the rights of others." (Emphasis added)

Bankers relies upon cases where this Court has reinstated a trial court's order granting a new trial when the District Court has reversed it. This is not a case where the trial court has granted a new trial finding that the verdict is against the manifest weight of the evidence thus bringing BAPTIST MEMORIAL HOSPITAL, INC. v. BELL, 384 So.2d 145 (Fla. 1980) into play. Rather, here the trial judge made three legal rulings which served as the basis for granting a new trial, and they are legally incorrect. Therefore, the "broad discretion" rule does not apply. The

issue is the legal sufficiency of the trial court's rulings that formed the basis for granting the new trial. NATIONAL WESTERN LIFE INS. CO. v. WALTERS, supra.

Bankers' reliance upon CASTLEWOOD CORP. v. LaFLEUR, 322 So.2d 520 (Fla. 1975) and SOSA v. KNIGHT-RIDDER NEWSPAPERS, INC., 435 So.2d 821 (Fla. 1983) is misplaced. In SOSA, this Court held that the trial court properly granted a new trial where the record supported a conclusion that the jurors were influenced by statements of defense counsel which were not supported by the evidence, and where the trial court should have resolved the issue of employment status as a matter of law rather than submitting the issues to the jury.

In CASTLEWOOD, this Court held that the trial court correctly granted a new trial where the court instructed the jury on gross negligence although that issue was not an element of the case.

In the present case, unlike CASTLEWOOD and SOSA, the trial court was incorrect in the three rulings that formed the basis for its granting the new trial. Therefore, the Fourth District did not err in reversing the new trial order.

POINT IV

THE COURT DID NOT ERR IN APPROVING A PUNITIVE DAMAGE INSTRUCTION STATING THAT THE GREATER THE DEFENDANT'S WEALTH, THE GREATER MUST BE THE PUNITIVE DAMAGES ASSESSED.

The trial court did not grant a new trial based upon this ground. This ground was argued to the trial court in

support of Bankers' Motion for New Trial and rejected. Both the trial court and the Fourth District found that this instruction was not error in light of the entire jury charge.

The jury was instructed in regard to punitive damages:

> You may consider the financial resources of such Defendant in fixing the amount of such damages.

The instruction stating that the greater the wealth the greater the punitive damages was a paraphrase of language set forth by this Court in LASSITER v. INTERNATIONAL UNION OF OPERATING ENGINEERS, 349 So.2d 622 (Fla. 1977). As stated by the Fourth District, when read in context, the instruction merely explained and emphasized that punitive damages need not bear any relationship to the amount of compensatory damages. The instruction in context was (R3849):

> An award of punitive damages need not bear any particular relation to the compensatory damages awarded. The greater the Defendant's wealth, the greater it must be, the punitive damages assessed in order to get his attention regardless of the amount of compensatory damages awarded to the Plaintiff.

Bankers argues that the jury was not allowed to consider the nature, extent and enormity of the wrong in determining the amount of punitive damages. The jury may have desired to award no punitive damages or a small amount of punitive damages, argues Bankers, but felt their hands were tied. This has been demonstrated to be untrue under

Point III. The jury was fully apprised of its discretion in deciding whether to award punitive damages and the amount.

The trial court correctly determined that this jury instruction did not prejudice Bankers particularly in light of the competent substantial evidence supporting the punitive damage award.

POINT V

THERE WERE NO INDISPENSABLE PARTIES NOT JOINED IN THE LAWSUIT AND ATTORNEY LINDSEY WAS CORRECTLY ALLOWED TO TESTIFY AS TO HIS VALUE OF THE CASE.

This point involves the second and third incorrect rulings that the trial court made, which formed the basis for his granting a new trial.

INDISPENSABLE PARTIES

The original Complaint was filed by Joseph D. Farish, Jr. (R1101-1106). A Motion to Dismiss for failure to join indispensable parties was granted (R1111-14) and an Amended Complaint was filed in the names of the only partners that Joseph D. Farish, Jr., claimed were actually partners in the partnership (i.e.), he and his father (R1200-05). Thereafter, Rosemary Barkett, Ken Slinkman, and Hubert Lindsey, attorneys in the Farish & Farish law firm left that firm and opened their own offices.

During trial, Defendants again moved to dismiss for failure to join Barkett, Slinkman and Lindsey (R4309). Farish's testimony was proffered and was to the effect that Lindsey, Barkett and Slinkman had been paid a salary and at the end of the year they were distributed a portion of the

profits in the form of a bonus (R4319-20). That was the extent of their interest in the firm (R4315). They had no control over management of the firm (R4314); their names were not on firm loans (R4314,4327); they were not responsible for firm costs (R4314); they had no capital account in the firm and made no contribution to capital (R4315,4319); they could not sign firm checks (R4315); they did not contribute money toward purchase of the firm's assets and had no interest in the assets (R4319).

Contrary to Farish's testimony, during trial Hugh Lindsey testified unequivocally before the jury that he had been a partner in Farish & Farish (R3392-93,3369), sharing in the profits (R3392-93), and had participated in the fee earned in Jill's case (R3369). When he left Farish & Farish he had taken some cases with him and left some cases with the firm. He and Farish & Farish had not yet reached an agreement as to how they would share the fees on the cases he took, or vice versa (R3370-71).

Rosemary Barkett's testimony was proffered during trial. She also unequivocally testified that she had been a partner in Farish & Farish until she left the firm in 1978 (R3814-15). She explained that the matters pertaining to the partnership's dissolution had not been resolved (R3825). She testified that she was claiming an interest in whatever monies might be recovered in this lawsuit (R3825-26).

The trial court reserved ruling during trial on the Motion to Dismiss (R4328). The trial court allowed the

depositions of Rosemary Barkett and Hugh Lindsey to be taken again post-trial. Their testimony post-trial was the same as during trial, as found by the trial court in its order granting new trial: "The testimony of Hugh Lindsey and Rosemary Barkett remains the same"(R4456). In the post-trial depositions, Miss Barkett recognized that there was an existing dispute between her and Farish & Farish in regard to whether she had been a partner in the firm (R4413). Barkett, Lindsey and Slinkman agreed on the record that they did not intend to institute a separate action against Bankers (R4416). Rather, it was their position that they were partners in the Farish & Farish law firm and had a vested interest in the existing judgment (R4415).

Hugh Lindsey testified on his post-trial deposition that there was an existing dispute between him and Farish as to whether he was a partner (R4441). Lindsey said he took the same position as he had taken at trial (i.e.), that he was a partner since 1968 (R4441). However, he admitted that that matter remained unresolved (R4441). It was not his intention to file a separate lawsuit against the Defendants (R4442-43). His intention was to look to Farish & Farish for his appropriate share of the recovery if he was subsequently found to be a partner (R4444). The question of whether he was a partner in Farish & Farish would ultimately be resolved and he intended to be bound by that resolution either by settlement or judicial decision (R4447).

Post-trial, counsel for Defendants filed a Request to Produce the 1973-1978 tax returns of Farish & Farish(R4397). Counsel for Plaintiff signed a stipulation that the tax returns for Farish & Farish would reflect that Barkett and Lindsey were partners in the law firm for 1973-1978 (R4453). In fact, counsel for Plaintiff was mistaken and the tax returns showed only that they were partners in 1977 and 1978. The attorneys thereafter agreed that the stipulation could be withdrawn if it was in error. It was further agreed that the record could be supplemented to accurately portray the correct income tax return information (R4621).

In Plaintiff's Motion for Rehearing, the affidavit of the CPA for Farish & Farish indicated that it had been his suggestion in 1977 and 1978 to include Barkett, Lindsey and Slinkman on the partnership tax returns. According to him, the tax returns were not indicative of the fact that they were partners except to share in year end profits (R4460-67). The CPA's affidavit was in line with case law holding that the filing of federal partnership tax returns has little bearing on the existence of a partnership under state law. SCHILPP v. SCHILPP, 380 So.2d 573 (Fla. 1st DCA 1980).

Regardless of whether the tax returns indicate Barkett, Lindsey and Slinkman were full partners rather than participating partners in 1977 and 1978, without dispute they demonstrate that they were not partners (if at all) <u>until</u> 1977. This was subsequent to the time the cause of

action arose for the tortious interference case which would have been in 1973 when Jill fired Farish. Therefore, Barkett, Lindsey and Slinkman were not indispensable parties.

Barkett, Lindsey and Slinkman have been allowed to intervene in the trial court and their status as partners and thus their entitlement, if any, to a percentage of the judgment against Bankers is being litigated and is yet to be determined. Plaintiff has been required to escrow that portion of the judgment which the Intervenors claim is theirs.

Cases such as ARONOVITZ v. STEIN PROPERTIES, 322 So.2d 74 (Fla. 3d DCA 1975) holding that an action should be dismissed where there is failure to join the partners of a partnership concern cases where admitted or acknowledged partners were not joined. There is no Florida case law holding that where there is a dispute as to whether certain non-joined parties are in fact partners, that the suit brought by acknowledged partners cannot proceed, until that dispute is decided. Rather, the dispute is a matter to be decided post-trial in an evidentiary hearing as is being done in this case.

In regard to the comparable federal rule regarding indispensable parties, Wright & Miller, §1609 provides:

> Although a challenge based on the absence of a Rule 19(b) party [indispensable party] may be raised subsequent to trial, a suggestion. . . that the lack of an indispensable party is a jurisdictional defect and therefore

> the court is duty bound to vacate any judgment rendered in the absence of such a party is unsound and has been rejected by the majority of federal courts. . . Once the trial on the merits has been concluded, these considerations weigh heavily in favor of preserving the judgment of the trial court or modifying it to protect the interest of the absentee and against dismissal unless there has been real prejudice to those not before the court. . . .

Case law holds that a judgment should be modified to protect the interest of the non-joined indispensable parties, rather than vacating the judgment where a trial is already had. PROVIDENT TRADESMENS BANK & TRUST CO. v. PATTERSON, 88 S.Ct. 733, 390 U.S. 102, 19 L.Ed.2d 935 (1968). In the present case, the trial court is protecting the rights of Barkett, Lindsey and Slinkman by allowing them to intervene and litigate their claimed interest in the judgment.

Rule 1.210(a) provides that "Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the court". GARNER v. WARD, 251 So.2d 252 (Fla.1971). In JEFFERSON REALTY OF FORT LAUDERDALE, INC. v. U.S. RUBBERT CO., 222 So.2d 738 (Fla. 1969) the court held that permitting joinder of a party plaintiff was proper although it was not done until the last day of the testimony at the trial.

The addition of new parties may be allowed even after entry of the final decree. PEOPLE'S BANK v. VIRGINIA BRIDGE & IRON CO., 94 Fla. 474, 113 So. 680 (Fla. 1927); TALLENTIRE

v. BURKHART, 150 Fla. 137, 7 So.2d 326 (Fla. 1942); WAGS TRANSP. SYSTEM v. MIAMI BEACH, 88 So.2d 751 (Fla. 1956).

Where every person who could prosecute an action is subsequently made a part of the action and the defendant is thereafter not exposed to any further liability, the defendant is not prejudiced by the fact that all plaintiffs were not originally joined in the action. LEWIS v. HALL, 271 S.W.2d 447 (Tex.Civ.App.1954). Since Barkett, Lindsey and Slinkman have intervened there is no possibility that Bankers will be subject to double recovery. A new trial is not required since joinder of indispensable parties is mainly to protect the defendant from double recovery. In YORKSHIRE INS. v. UNITED STATES, 171 F.2d 347 (C.A. 3d 1949) the court stated that the only reason preventing suit without joining an indispensable party is to preclude the inconvenience and expense to a defendant who might be required to defend a number of separate suits arising out of the single claim if the rule were otherwise. The court stated that it was clear that the rule requiring the joinder of an indispensable party in one lawsuit was for the benefit of the defendant. In the present case, there is no threat of double recovery. The intervenors are joined in this law suit and seek to recover from Farish & Farish, not Bankers.

The trial court also erred in finding Barkett, Lindsey and Slinkman indispensable parties because the Statute of Limitations has run as to their claim against Bankers. In TYRONE v. KELLY, 507 P.2d 65, 106, Cal. Rptr., 761, 9 Cal.3d

1 (Cal. 1973) it was held that a defendant is not prejudiced by the plaintiff's failure to join his partners as party-plaintiffs, where the statute of limitations on bringing suit by the plaintiff's unnamed partners has run. In the present case, the Statute of Limitations has run on the claim of Barkett, Lindsey and Slinkman against Bankers. Since they could no longer sue Bankers, they are not indispensable parties. They cannot proceed against Bankers but can only litigate their entitlement to a portion of the judgment already entered against Bankers.

3A Moore's Federal Practice, §19.19 states that defects in the failure to join indispensable parties may be cured. Since the reason for requiring joinder of indispensable parties is to protect a defendant from multiple litigation and double recovery, and since Barkett, Lindsey and Slinkman have agreed that they would not seek to sue Bankers in another lawsuit arising out of this same cause of action, Bankers is completely protected. There is no potential of multiple recovery and thus Bankers is not prejudiced. Barkett, Lindsey and Slinkman agree that the dispute is between them and Farish, not them and Bankers.

Finally, during trial Farish stipulated that he would agree to indemnify and hold harmless Bankers from any litigation arising out of any dispute between Farish & Farish and Barkett, Lindsey and Slinkman (R913). Once again, the very reason for dismissing a case for failure to

join indispensable parties disappears. There is no threat of double recovery.

Case law is without dispute that if the defendants or plaintiffs are not prejudiced, there will be no reversal for failure to join indispensable parties. In HILLING v. LUKE, 104 Cal. Rptr., 789, 28 CA 3d 434 (Call.App. 1972), it was held that the requirement of joinder is not jurisdictional, but procedural, and, therefore, a judgment will not be reversed because of insufficient joinder where the appellant is not prejudiced. It is only when the rights of the person not made a party, or the rights of the defendant, would be prejudiced by a decision in their absence that the Court should reverse a case for failure to properly join parties-plaintiff. BALLENGER v. TILLMAN, 133 Mont 369, 324 P.2d 1045 (1958).

Neither Farish, Barkett, Lindsey or Slinkman wish a new trial. All they wish is to have determined everyone's vested interest, if any, in the existing judgment against Bankers. Bankers seeks to use to its own advantage the dispute existing between Farish and Farish and Barkett, Lindsey and Slinkman to escape its own liability.

LINDSEY'S TESTIMONY

Bankers incorrectly states that the jury was only apprised that Farish and his father were partners. Lindsey testified before the jury that he was a partner in Farish & Farish and that there was no agreement yet arrived in regard

to how he would share in the fees on the cases he took and those he left behind (R3392-93,3370-71).

Counsel for Defendants recognized the interest of Lindsey in the outcome of the lawsuit (R3366):

> MR. BURNS: May I add one other thought, Your Honor, please? That man now comports to act as an expert witness. This is a self-serving declaration. He was a partner in the Farish law firm at the time all this went on. He cannot now testify as an expert on this subject, too self-serving.
>
> MR. SCAROLA: Your Honor, Mr. Lindsey is subject to cross examination so that the Defendants can examine the basis for his opinion. They can examine any motive he may have with regard to pecuniary gain that he himself may obtain through his testimony, but all those things are matters of impeachment and not matters of admissibility. . . .

During closing argument, Bankers argued that Lindsey had an interest in the outcome of the case (R3522):

> Where is there any other evidence? Well, we've got Mr. Farish. It's his ex-partner, Lindsey. They just broke up a partnership a few months ago. Lindsey, you will recall, said that they've got a pot of money from cases that they, Lindsey and Farish, are gonna split up at a later point in time. Lindsey it appears, was a partner of Mr. Farish at the time that this suit was filed. The lawsuit was filed, Farish & Farish, the law firm, is suing for this money. Mr. Lindsey, I would submit, has an interest in the outcome of this case, because of that arrangement. Now, that reason, and that reason only is enough to just disregard his testimony.

The trial court incorrectly ruled that had he known Lindsey was claiming an interest in the outcome of the lawsuit, he would not have allowed Lindsey to testify as to

the value of Jill's case. Regardless of Lindsey's interest in the outcome of this litigation, he could not be precluded from testifying as to his opinion of the value of the case. His interest in this lawsuit goes to the weight of his testimony and not its admissibility. The common law rule of incompetency as witnesses of all persons having a direct and pecuniary interest in litigation has been abolished by §90.05 F.S. "No person. . . shall be excluded from testifying as a witness by reason of his interest. . .". §90.05 F.S. has been replaced by §90.601 of the Florida Evidence Code making all witnesses competent to testify unless prohibited by statute. It is sufficient that the witnesses' interest, financial or otherwise, can be shown for the purpose of affecting his credibility, PITTMAN v. STATE, 51 Fla. 94, 41 So. 385 (1906), and is brought out on cross-examination, rather than on direct examination. DAVIS v. IVEY, 93 Fla. 387, 112 So. 264 (1927), PANDULA v. FONSECA, 145 Fla. 395, 199 So. 358 (1940); 35 Fla. Jur. Witnesses, §§221-224.

Another mistake was the judge's finding that Lindsey's testimony was the only testimony presented during Plaintiff's case as to the value of Jill's case, and that if he had not testified, "the plaintiffs' case would have collapsed . . . for the insufficiency of evidence". Farish testified to an evaluation of Jill's case at $1,350,000 (R818). It is apparent that the jury accepted neither

Farish nor Lindsey's testimony since it returned a compensatory damage award of $50,000.

Moreover, even apart from the testimony relating to the value of Jill's wrongful death case, there was undisputed testimony regarding the loss suffered by Farish & Farish in the form of that portion of the contingency fee required to be paid Lake Lytal (R736). Thus, Plaintiff's case would not have collapsed but could have gone to the jury on this evidence alone.

Bankers argues that Lindsey should have been designated as a party Plaintiff. He was not entitled to be a party Plaintiff until his interest in the partnership was established. It has not yet been established but is currently being litigated in the post-trial proceeding. Secondly, he was not entitled to be added as a party Plaintiff since the Statute of Limitations had run against Bankers.

CROSS-ISSUE

THE TRIAL COURT ERRED IN ALLOWING BANKERS TO ARGUE THAT MacARTHUR'S HEIRS SHOULD NOT SUFFER FOR HIS MISTAKE.

The trial court erred in allowing counsel for the Estate of MacArthur to argue in closing argument that MacArthur's heirs should not suffer for his misdeeds. When the Estate first made the argument (SR131-33,139) the trial court sustained an objection and struck that argument (R3538). Thereafter, however, the court overruled Plaintiffs' objection (R3557) and allowed Bankers to

repeatedly argue that the heirs (MacArthur's widow, children and grandchildren) were the ones who would feel the impact of a verdict against the Estate (R3557-60,3562,3565,3576-77). This argument was designed to play upon the sympathy of the jury, had no basis in law and no place in this lawsuit. It improperly influenced the jury not to award damages against the Estate, either compensatory or punitive, and resulted in the verdict that Bankers now claims is inconsistent (invited error at best).

It is error for argument of counsel to furnish an improper motive for the jury in making their damage awards. SCHOOL BOARD OF PALM BEACH COUNTY, INC. v. TAYLOR, 365 So.2d 1044 (Fla. 4th DCA 1978). In the present case, Bankers provided the jury, over objection, with an improper motive for not finding against the Estate and for not awarding any damages against the Estate (i.e.), sympathy for MacArthur's widow, children, and grandchildren. Therefore, if a new trial is required, which Plaintiff strongly denies, a new trial should be granted as to MacArthur's Estate also.

CONCLUSION

There is no direct and express conflict between the Fourth District's decisions and other Florida Appellate decisions. This Court should discharge its writ as improvidently granted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: LARRY A. KLEIN, ESQ., Suite 201, 501 South Flagler Drive, West Palm Beach, FL 33401, and to MICHAEL P. MULLEN, Suite 1000, Three Illinois Center, 303 Wacker Drive, Chicago, ILL 60601, this 17th day of NOVEMBER, 1983.

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