IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 63, 363

BANKERS MULTIPLE LINE INSURANCE COMPANY,

Petitioner,

vs.

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

Respondents.
_____/

PETITIONER'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

We rely solely on the facts set forth in the opinion of the Fourth District Court (A 1), which we shall not reiterate in full here.

Joseph D. Farish, Jr. and his law partnership sued John D. MacArthur and Bankers Multiple Line Insurance Company for tortious interference with a contingent fee contract between the Farish firm and Jill Smith, whose husband was killed in an accident involving a vehicle insured by Bankers. MacArthur was chairman of the board and president of Bankers.

MacArthur died and his estate was substituted as a defendant. The jury found MacArthur not guilty of any tort and Bankers guilty, assessing compensatory damages of $50,000 and punitive damages of $2,000,000 against Bankers.

Following the verdict the trial court granted a new trial citing two different reasons. One reason was his refusal to give the standard jury instruction on punitive damages. Instead the trial court gave an instruction requested by Farish under which the jury was never informed of its discretion not to award punitive damages even if it found that the defendant acted maliciously, etc.

The other reason a new trial was granted was for failure to join indispensable parties. Early in the litigation the trial court granted defendant's motion to dismiss for failure to join indispensable parties, requiring all partners of the Farish firm to be named as individual parties. Joseph D. Farish, Jr. amended the complaint naming himself and his deceased father as the only partners. During the trial defendants again moved to dismiss the

complaint for failure to join indispensable parties when it appeared that other persons, including expert witness Hubert Lindsey, were partners in the Farish firm in 1973. The trial court reserved ruling and then following the verdict cited the failure to join indispensable parties as one of the grounds for the new trial.

Farish appealed the order granting the new trial and defendant Bankers cross-appealed arguing, among other issues, that the exoneration of MacArthur individually by the jury required exoneration of Bankers. MacArthur was the only person alleged to have committed the tort. Defendants also cross-appealed a punitive damage instruction wherein the court instructed the jury that the greater the defendants wealth, the greater must be the punitive damages assessed.

The Fourth District reversed the order granting the new trial, rejected defendants points on cross-appeal, and remanded with instructions to reinstate the jury verdict. Bankers invokes this Court's conflict jurisdiction.

ARGUMENT

POINT I

THE COURT CREATED CONFLICT IN APPROVING PUNITIVE DAMAGE INSTRUCTIONS WHICH OMITTED THE STANDARD INSTRUCTION AND FAILED TO INFORM THE JURY OF ITS DISCRETION TO NOT AWARD PUNITIVE DAMAGES EVEN IF IT FOUND DEFENDANTS ACTED MALICIOUSLY, ETC.

The Fourth District set forth the punitive damages instructions given on pages 8 and 9, acknowledged the trial court had refused to give Standard Jury Instruction 6.12, but found "no

meaningful difference between the charges given and the Standard Jury Instruction". (A 8-9)

It is clear from the opinion that the punitive damage instruction given did not inform the jury of its broad discretion not to award punitive damages even if it found malice, as does Florida Standard Jury Instruction 6.12, which defendant requested:

> If you find for the plaintiff law firm and find also that any defendant whom you find to be liable to the Plaintiff law firm acted with malice, moral turpitude, wantonness, wilfullness, or reckless indifference to the rights of others, you may, in your discretion, assess punitive damages against such defendant as punishment and as a deterent to others. (Emphasis added)

In Wackenhut Corporation v. Canty, 359 So.2d 430 (Fla. 1978), this Court stated on page 436:

> ...Once the court permits the issue of punitive damages to go to the jury, the jury has the discretion whether or not to award punitive damages and the amount which should be awarded....(Emphasis added)

Notwithstanding the Fourth District's statement that it found no meaningful difference, it is very obvious from a reading of the instructions given that this jury was never informed of its discretion not to award punitive damages, if it found defendants acted with malice, as is required by Wackenhut and the standard instruction.

POINT II

THE COURT CREATED CONFLICT 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 compounded the above error by also

instructing the jury "...that the greater the defendants wealth, the greater it must be, the punitive damages assessed in order to get his attention...". On page 10 the Fourth District even recognized that taken out of context it would appear that this charge mandated the jury to consider only the relative wealth of the defendant in assessing punitive damages.

This instruction is in direct conflict with St. Regis Paper Company v. Watson, ___So.2d___ (Fla. 1983) Case No. 61,873, opinion filed March 3, 1983 [8 FLW 99], in which this Court most recently stated:

> The jury's major duty in determining the amount of punitive damages is to assess the appropriate degree of punishment to be imposed on the defendant commensurate with the enormity of the offense; the defendant's financial position is only one factor to be considered by the jury. Rinaldi v. Aaron, 314 So.2d 762 (Fla. 1975); Lehman v. Spencer Ladd's, Inc., 182 So.2d 402 (Fla. 1965); Fla.Std. Jury Inst. (Civ.) 6.12. Other factors which the jury may consider include "the nature, extent, and enormity of the wrong, the intent of the party committing it and all circumstances attending the particular incident, as well as any mitigating circumstances." Rinaldi, 314 So.2d at 763. (Emphasis added)

This instruction is also in direct conflict with Wackenhut, supra, and with Rinaldi v. Aaron, 314 So.2d 762 (Fla. 1975), wherein this Court stated on page 763:

> We agree...that in determining the amount of punitive damages, the jury may consider the nature, extent and enormity of the wrong, the intent of the party committing it and all circumstances attending the particular incident, as well as any mitigating circumstances, which may operate to reduce without wholly defeating such damages, including financial position of defendant,... (Emphasis added)

The jury was not informed of the above. The instruction emphasized defendant's wealth while omitting the nature, extent

and enormity of the wrong and any mitigating circumstances. The jury was told only that the greater the defendant's wealth, the greater must be the punitive damages assessed. The use of the mandatory language invaded the jury's broad discretion in determining the amount of punishment. The jury had no alternative but to award a huge punitive damage verdict by this departure from our standard instruction, and it awarded $2,000,000 (forty times compensatory damages of $50,000) against a corporation where the only alleged active tortfeasor, MacArthur was exonerated.

The trial judge recognized his own error in the manner in which the punitive damage instructions were given. By reversing and approving the failure to give the standard instruction and the statment emphasizing defendant's wealth and that the punitive damages must correspond thereto, the Fourth District has not only created conflict. It has also created a new body of law on punitive damage instructions which will result in great confusion.

POINT III

THE COURT CREATED CONFLICT IN HOLDING THAT A JURY VERDICT FINDING THE CORPORATION LIABLE FOR THE TORTIOUS CONDUCT OF MACARTHUR SHOULD BE REINSTATED, WHERE THE JURY COMPLETELY EXONERATED THE CORPORATION'S AGENT, MACARTHUR.

Plaintiffs had sued MacArthur individually and his corporate employer, Bankers, of which he was an officer. No tortious conduct of Bankers was alleged other than MacArthur's. The jury found MacArthur individually not guilty, but found Bankers liable for $50,000 compensatory damages and $2,000,000 punitive damages. In Cutchins v. Seaboard Air Line Railroad Company, 101 So.2d 857 (Fla. 1958), this Court stated on page 863:

> ...in an action against a principal or master and his agent or servant for damages resulting solely from the negligence of the agent or servant acting as such, a verdict of the jury exonerating the agent or servant exonerates the principal or master....

Cutchins, supra, was based on the earlier decision of this Court, Williams v. Hines, 86 So. 695, 80 Fla. 690, in which this Court held that where the sole negligence alleged against the railroad was that of the engineer, a jury verdict finding the railroad negligent had to be set aside where the jury found the engineer himself not guilty of negligence.

In the present case MacArthur, while acting on behalf of the corporation, was found individually not guilty, and yet the corporation was held liable for his actions, just as occurred in Cutchins and Hines.

POINT IV

THE COURT CREATED CONFLICT IN HOLDING THAT A CORPORATION IS DIRECTLY LIABLE FOR THE TORTIOUS ACTS OF ITS OFFICER WHEN THE OFFICER WAS EXONERATED.

The Fourth District held the corporation directly liable for the acts of its officer when the officer was exonerated. This holding is without precedent. On page 13 the Fourth District stated:

> 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 instructions which the parties contemplated....

Corporations can act only through agents and employees. Corporate liability can only be premised on the act of its agent under respondeat-superior or principal-agent law.

The holding that the corporation can be directly liable without the individual being liable creates conflict with Dade Roofing and Insulation Corp. v. Torres, 369 So.2d 98 (Fla. 3d DCA 1979), wherein it is stated on page 99:

> ...Individual officers and agents of a corporation are personally liable to any third person even if such acts are performed within the scope of their employment or as corporation officers or agents. Odell v. Signer, 169 So.2d 851 (Fla. 3d DCA 1964); CIC Leasing Corp. v. Dade Linen and Furniture Co., 279 So.2d 73 (Fla. 3d DCA 1973).

The holding also creates conflict with Ramel v. Chasebrook Construction Company, 135 So.2d 876 (Fla. 2d DCA 1961), wherein the court stated on page 883:

> ...It is generally held that a corporation is vicariously liable for fraud and misrepresentations practiced by its directors or agents within the scope of their employment. A corollary to this rule is that said directors and agents are also liable individually...

MacArthur was exonerated by the jury. The exonerated agent's actions cannot support direct corporate liability.

POINT V

THE COURT CREATED CONFLICT IN HOLDING THE CORPORATION LIABLE FOR PUNITIVE DAMAGES IN ABSENCE OF SOME PROOF OF FAULT OF THE CORPORATION OTHER THAN THE MISCONDUCT OF ITS EXONERATED EMPLOYEE.

Plaintiffs only alleged that MacArthur was the individual wrongdoer, and sued Bankers as being vicariously liable. The Fourth District stated on page 13:

> 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...

There was no evidence of fault on the part of Bankers independent of MacArthur's conduct nor any evidence that his actions were foreseeable.

The holding that Bankers can be liable for punitive damages without some independent fault beyond MacArthur's alleged misconduct is in direct conflict with this court's decision in Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981), wherein this Court stated on page 547:

> ...We...hold that, in the absence of some fault on the part of the corporate employer, it is not punitively liable for the willful and wanton misconduct of its employees.

Mercury Motors analogized the situation with that in Waldron v. Kirkland, 281 So.2d 70 (Fla. 2d DCA 1973), wherein this Court held that the reckless misconduct of the driver of a motor vehicle would not expose the owner to liability for punitive damages in the absence of knowledge or fault on behalf of the owner. In Kirkland the court stated on page 71:

> ...Public policy is not served by also imposing liability upon owners without fault in the area of punitive damages....Here, punitive damages assessed against [owner], who is without fault, will in no way punish [driver] the active tortfeasor.

Likewise, the punishment of Bankers will in no way punish MacArthur, the alleged active tortfeasor. See also Life Insurance Company of North America v. Del Aguila, 417 So.2d 651 (Fla. 1982).

The Fourth District opinion attempts to distinguish Mercury Motors stating at page 13:

> ...Mercury Motors did not consider the question of direct liability of a corporation which acts through an officer.

This is not a proper distinction. It makes no difference whether the employee is an officer. Mercury Motors is premised on the public policy that the active tortfeasor cannot subject his employer to liability for punitive damages unless there is also some fault on the part of the employer. In the present case no one other than MacArthur was alleged to have committed a tort.

POINT VI

THE COURT CREATED CONFLICT IN HOLDING THAT THE OTHER PARTNERS IN THE FARISH FIRM WERE NOT INDISPENSABLE PARTIES.

On page 5 the Fourth District acknowledged that the trial court determined that certain individuals were partners and indispensable parties, relying upon a stipulation (following depositions after the verdict) to the effect that the firm filed federal partnership income tax returns showing that they were partners. The Fourth District also noted that one of these partners, Hubert Lindsey, testified as an expert witness, but was not a named party. The Fourth District decided that since some partners were named and the other partners' claims have been extinguished by the passage of time, the law established in Aronovitz v. Stein Properties, 322 So.2d 74 (Fla. 3d DCA 1975), would not be followed. In that case the court stated on page 75:

> Since the common law does not recognize a partnership as a legal entity distinct from and independent of the persons composing it, a partnership cannot, as such without statutory authority, sue in its firm name. All actions by a partnership must be brought in the names of its individual members....each partner was an indispensable party to the complaint seeking its enforcement. Therefore, the trial court should have granted appellant's motion to dismiss for failure to join an indispensable party.

In this case defendants amended their original complaint after dismissal disclosing only Joseph Farish, Jr. and his father as partners. Joseph Farish, Jr. testified there were no other partners, but following the verdict income tax returns were discovered reflecting that other lawyers, including expert witness Lindsey, were partners. Based on this the trial judge granted a new trial under the principle established in Aronovitz v. Stein Properties, supra. The Fourth Districts' holding that indispensable parties need not be joined where their claims ultimately become time barred creates clear conflict.

CONCLUSION

The opinion of the Fourth District creates direct and express conflict and this Court should review this case on the merits.

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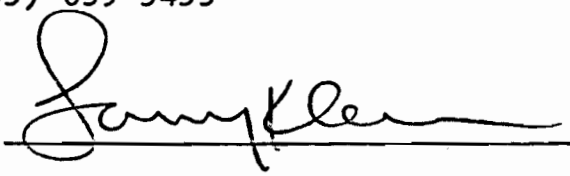
By 

LARRY KLEIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy hereof has been furnished, by mail, this 17th day of March, 1983, to:

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