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IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 63, 363

FILED

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BANKERS MULTIPLE LINE INSURANCE COMPANY,

Petitioner,

vs.

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

Respondents.

PETITIONER'S BRIEF ON THE MERITS

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PREFACE

Petitioner will be referred to as Bankers and respondents will be referred to as Farish.

The following symbols will be used:

R - Record.

A - Petitioner's Appendix on Merits.

STATEMENT OF THE CASE

Joseph D. Farish, Jr., a lawyer, sued John D. MacArthur individually for tortious interference with a contingent fee contract in a wrongful death case. He also sued Bankers Multiple Line Insurance Company, alleging that MacArthur was "...acting in his own behalf individually and in the course and scope of his employment..." (A 1).

The case was tried before a jury which found MacArthur not guilty, but found Bankers guilty and liable for $50,000 compensatory damages and $2,000,000 punitive damages.

The trial judge granted a new trial to Bankers on two grounds, the first being that the jury instructions on punitive damages were erroneous and the second being the failure to join indispensable parties (A 7). Farish appealed the order granting the new trial and the final judgment in favor of MacArthur's estate (he died during the

litigation) to the Fourth District. The Fourth District reversed the order granting the new trial with instructions to reinstate the jury verdict against Bankers and affirmed the judgment in favor of MacArthur's estate (A 13).

Bankers sought review in this Court based on conflict and this Court accepted jurisdiction. All of the points on appeal set forth below were asserted as a basis for conflict in Bankers' jurisdictional brief.

POINTS ON APPEAL

POINT I

THE JURY VERDICT EXONERATING MACARTHUR ENTITLES BANKERS TO HAVE THE JUDGMENT AGAINST IT SET ASIDE, BECAUSE THE ONLY TORTIOUS CONDUCT ALLEGED OR PROVED AGAINST BANKERS WAS THAT OF ITS AGENT, MACARTHUR.

POINT II

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

POINT III

THE COURT ERRED IN APPROVING A PUNITIVE DAMAGE INSTRUCTION, WHICH OMITTED THE STANDARD INSTRUCTION AND FAILED TO INFORM THE JURY OF ITS DISCRETION TO NOT AWARD PUNITIVE DAMAGES EVEN IF IT FOUND DEFENDANT ACTED MALICIOUSLY.

POINT IV

THE COURT ERRED IN APPROVING A PUNITIVE DAMAGE INSTRUCTION STATING THAT THE GREATER THE DEFENDANT'S WEALTH, THE GREATER MUST BE THE PUNITIVE DAMAGES ASSESSED.

POINT V

THE COURT ERRED IN REVERSING THE ORDER GRANTING THE NEW TRIAL BASED ON FAILURE TO JOIN INDISPENSABLE PARTIES WHERE FARISH TESTIFIED THERE WERE NO PARTNERS, BUT INCOME TAX RETURNS PRODUCED AFTER TRIAL REFLECTED THE EXISTENCE OF OTHER PARTNERS, ONE OF WHOM HAD TESTIFIED IN FAVOR OF FARISH AS AN EXPERT WITNESS.

STATEMENT OF THE FACTS

Jill Smith Nabinger (hereafter Jill) came to know John D. MacArthur (hereafter MacArthur) while she worked as a waitress at his Colonades Beach Hotel, where he daily transacted his business and personally knew most employees (R 2914, 2916, 2917, 957). Jill grew up in Prairie View, Illinois, where MacArthur had a farm (R 4074). Her mother had worked for Bankers, and MacArthur was very fond of Jill, referring to her as one of the family (R 957, 967).

On March 30, 1973, Jill's husband was killed by a piece of pipe coming off a truck owned by Meredith & Morse, Inc., allegedly insured by Bankers. After the accident, MacArthur told other employees that he was going to do everything he could to help Jill, and sent her a message of sympathy (R 967, 2920, 2921).

The Saturday morning after her husband's death, Jill met with Hubert Lindsey, a partner, at the Law Offices of Farish & Farish (hereafter Farish). She was "in shock" according to Lindsey (R 3389). At the meeting, Jill told Lindsey that she had religious scruples against filing lawsuits. She only wanted to settle the case, not to file suit or go to trial, She was afraid that a trial would bring up unpleasant parts of her and her husband's past. He

had used drugs and had a police record, which she didn't want to come out. Jill also wanted to be kept informed of what was being done (R 2936-2939).

Jill testified that Lindsey assured her that he would not file suit, but would settle the case (R 2938). She signed a contingent fee contract with Farish, providing that the attorneys fees would be 25% if the case was settled prior to suit, 33% after suit if settled before pretrial, and 40% thereafter. Under the contract Jill could not settle unless Farish agreed, but Farish could settle without her approval (Pl. Ex. 1).

After her husband's funeral, Jill, who was pregnant, went to live with her parents in Prairie View, Illinois, near Chicago (R 2913).

Paul Doolen was a 74 year old semi-retired vice chairman of the Board of Directors of Bankers Life and Casualty Company, who worked part-time for them and passed through Prairie View each day on his way to work, which was known to MacArthur (R 4070-4075).

In early April, 1973, MacArthur told Paul Doolen that Jill, a former waitress whom he was fond of, lost her

husband in an accident, was pregnant, and might need help. He asked Doolen to see Jill and to find out if there was anything they could do to help her out. He suggested putting Jill on an insurance policy to cover the upcoming maternity expenses and to help her get a job at Bankers Life and Casualty Company, near Chicago (R 4076-4078).

Doolen stopped to see Jill on his way home from work in April, 1973, and talked with her in the presence of her mother and father, expressing his and MacArthur's sympathy. Doolen related MacArthur's offer to place her on an insurance policy free of charge to cover the upcoming maternity expenses, which she accepted. Jill testified that the offer of the insurance coverage was without obligation. Doolen also offered her a job which she declined (R 4079, 4080, 4088, 2924-2926).

After the Doolen visit, Jill wrote MacArthur thanking him for the insurance coverage (Pl. Ex. 3). In that letter Jill asked MacArthur to say hello to the people she knew including his grandson and wife (R 2928).

Doolen saw or spoke with Jill several times prior to her son's birth (R 4088, 4102). Afterward Doolen would occasionally transmit messages to MacArthur from Jill and

her mother, but that was the end of Doolen's involvement (R 4118-4122). He never discussed the case with Jill, nor did he even know about the facts of the case (R 4086-4115). There was no evidence that Doolen was an officer or employee of Bankers.

Jill developed doubts about whether to continue with Farish because she had heard unfavorable things about him (R 2943-2951). She discussed it with friends, relatives and an attorney neighbor (R 2967-2968). In June she wrote MacArthur that she had heard unfavorable things about the Farish law firm, that she didn't want to file suit for religious reasons, and that she didn't understand what Farish was doing (Pl. Ex. 6).

On June 18, 1973, MacArthur responded by letter. He did not urge her not to sue, but told her she needed "good counsel and should have it". He offered her an airline ticket, and said that the hotel had many vacant rooms in the summer. No conditions were attached to the offer. He said it was unethical, if not illegal, for Farish to high pressure her into signing a contract. He did not attempt to influence her, telling her she was entitled to do exactly as she pleased. He opined that if she felt it was God's will to make a fair settlement with everyone concerned, it could

be done harmoniously, but urged her to see her lawyer friend (Pl. Ex. 7).

There is no evidence of any other written communications between Jill and MacArthur prior to her terminating the Farish contract on August 9, 1973.

Farish filed suit on June 22, 1973, without Jill's authorization (R 2980). When Jill found out Farish filed suit, she called and told him she had not hired him to do that and she wanted to settle the case (R 4114). In that telephone conversation, Farish was arrogant. He told her that how the case was handled was not up to her, since she had signed a contract with him, and "he was just taking over and she really didn't have any say so as to how she wanted to go about things" (R 2956-2959).

After this call with Farish, Jill came to Palm Beach on July 27, 1973, with MacArthur furnishing the airline ticket, and stayed with her sister-in-law (R 2950). She went to see Farish because she had not previously met him, was concerned about the way her case was going, and wasn't sure whether he was allowed to control her case to this extent. She was thinking about discharging him (R 2960).

Jill testified about her meeting with Farish, as follows:

> Q What did you say to him and what did he say to you?
>
> A I expressed again that I did not like the way it was being handled; that I had never intended for him to go directly on the steps, you know, heading toward a suit, for suing Mr. MacArthur, that I had wanted to settle out of court and -- well, that is what I had expressed to him.
>
> Q And what did he say?
>
> A He again expressed that -- he was very mad, very angry and he yelled at me a lot and I ended up crying. He was very angry that I -- I guess that I would dare tell him his business or suggest that he go about it any other way than he had. He kept telling me that I didn't realize what I was doing, that I was going to come out short; that this was the way things had to go. He said there was no way you are going to get anything unless you go about this route. This is about what I can remember.
>
> * * *
>
> Q Do you recall what, if anything, was said regarding Mr. MacArthur in that conversation?
>
> A Yes, he felt that Mr. MacArthur was behind it all and was encouraging me or trying to get me or bribing me to trying to get me not to have him -- have Mr. Farish -- as counsel, and that Mr. MacArthur had wanted me to fire him.
>
> Q Did Farish ask you that as that time?
>
> A Yes, he did.
>
> Q What did you tell him?
>
> A I said that Mr. MacArthur was not the total reason; that he had spoke to me; that I

had spoken to him on occasions. He asked how I had gotten down and I said that Mr. MacArthur paid my way down. But I said that Mr. MacArthur was not my total reason. It was not totally his influences that were making me decide against having Farish as my lawyer.

Q And what were the other influences?

A Well, a small part was the recent article in the newspaper about the fact that Mr. Farish may have done some unethical things. That was a small part, because I didn't want to judge hearsay. I think a large part was just the fact I felt like I had no control over what happened; that none of what I wanted to -- none of the way I wanted to go abut it was being accomplished in that way; and I think a large part was decided there in his office when I -- we just couldn't even talk. We couldn't communicate. I left there just upset and crying because after that I couldn't even say anything to him.

Q And when did you finally make up your mind to fire Mr. Farish?

A I think it was when I was in his office.

Q When he was yelling at you?

A Yes. (R 2960-2966).

Following this conference with Farish, where he yelled at Jill and made her cry, two people from Farish's office, Rosemary Barkett and an investigator, visited Jill at her sister-in-law's home. They said they realized that Farish and Jill didn't get along and that Farish would let one of them represent her, but Jill refused (R 2969-2970).

After visiting Farish, Jill consulted another attorney, John Law, about whether she could fire the Farish firm, because she was unhappy and Law assured her that she could discharge the Farish firm (R 2970, 2975, 924).

Jill sent Farish a letter on August 9, 1973, terminating his services, and asking him to send her a bill for his work to date (Pl. Ex. 4).

Jill then hired attorney Evelyn R. Flack to replace Farish. MacArthur introduced them and Jill liked her. Flack was going to charge an hourly rate. Jill wanted Flack to remove the Farish firm and obtain a settlement without going to court. Flack agreed to keep her informed, and not go against Jill's wishes. Flack kept her word and Jill was happy with Flack's representation (R 2978-2980).

In early 1974 Jill resigned as personal representative. Flack filed a motion to have the probate court appoint a local bank or attorney as the successor/personal representative (Pl. Ex. 54). Flack's father then died and, while she was out of town, Farish had lawyer James Blanton (a friend of Farish's) appointed as successor personal representative (R 233-235, 710).

Farish then wrote Flack that Blanton was the successor personal representative and Flack would no longer be the attorney for the estate. Blanton terminated Flack's representation of the personal representative in the death case and rehired Farish (Pl. Ex. 11-12, R 2917-2919).

Blanton did not consult with Jill, the only adult heir to the estate, about rehiring Farish. Had he done so, she would not have approved (R 2984-2985).

After Jill terminated the contract with Farish on August 9, 1973, MacArthur and Jill corresponded frequently. MacArthur expressed dislike for Farish and communicated this to Jill. He thought Farish was taking advantage of Jill. MacArthur in this correspondence questioned Farish's ethics (Pl. Ex. 39, 41, 44, 22, 40). Many of these communications involved the unfavorable publicity which Farish was receiving, and referred to newspaper articles about him being implicated in the impeachment and disbarment investigation of Judge David McCain and the influencing of cases in appellate courts (Pl. Ex. 44, 45, 51).

The alleged coverage by Bankers for the Meredith & Morse truck was based on an alleged oral agreement between Herbert Meredith and MacArthur, when the truck was used by

Garden Construction Company, an insured of Bankers (Def. Ex. 14) (R 406). No insurance policy naming Meredith & Morse as insured was ever issued by Bankers (R 407).

Bankers denied coverage on the ground Meredith & Morse was using the truck on its own job, not for the insured Garden Construction (R 4138, Def. Ex. 27). The policy limits of the Bankers policy issued to Garden Construction Company were $100,000 (Def. Ex. 14).

The death case had been rescheduled for trial in June, 1976. In April, 1976, Jill consulted a Chicago attorney, who referred the case to Montgomery, Lytal (R 3037, 3038). Lake Lytal, who was handling the case, then made an arrangement with Farish that Lytal would assist Farish at the trial. Lytal and Farish entered into a verbal agreement wherein Lytal's firm would receive one-third of the attorney's fee received in the case (R 630), computed in accordance with the original Jill/Farish contract (Pl. Ex. 1).

At the time of trial Farish verbally demanded $200,000 to settle the entire case (R 4147). Reliance Insurance Company , which insured Meredith & Morse, and Bankers each

offered $75,000, a total of $150,000, which Farish rejected (R 4148).

After two days of trial, plaintiff entered into a Mary Carter agreement with Reliance Insurance Company, and Meredith & Morse, wherein Reliance Insurance Company would have no liability if a verdict of at least $75,000 were rendered against Bankers (R 4149). Bankers then offered its $100,000 policy limits, which was also rejected (R 4149). The jury returned a verdict against Bankers in the amount of $118,500.

After the verdict Lytal and Farish contended that Bankers would be liable for their attorneys fees, which Bankers disputed. Lytal wrote a letter to Jill, advised against an appeal and suggested that they agree to a compromise which had been worked out with Bankers. That compromise was that Bankers would pay $118,500 plus costs. Lytal and Farish would drop the claim for attorneys' fees. Bankers paid the $118,500 plus costs and the judgment was satisfied (Def. Ex. 18, 19). Thus as a result of Montgomery, Lytal becoming involved Farish paid them a fee of $15,800, his only out of pocket expenses (R 630).

Jill had given copies of her MacArthur correspondence to Lytal for use in connection with the death case (R 3035). Lytal turned these documents over to Farish, who instituted this action for tortious interference with his contingent fee contract, against MacArthur and Bankers.

The jury returned a verdict of $50,000 compensatory damages and $2,000,000 punitive damages against Bankers, but found MacArthur, the only individual alleged to have committed a tort, not guilty. The court entered final judgment for MacArthur's estate, and granted a new trial as to Bankers because of error in the punitive damages jury instructions and the failure to join indispensable parties.

ARGUMENT

POINT I

THE JURY VERDICT EXONERATING MACARTHUR ENTITLES BANKERS TO HAVE THE JUDGMENT AGAINST IT SET ASIDE, BECAUSE THE ONLY TORTIOUS CONDUCT ALLEGED OR PROVED AGAINST BANKERS WAS THAT OF ITS AGENT, MACARTHUR.

MacArthur's defense in this case was that he had not acted maliciously and the jury so found, exonerating him from any liability, while holding Bankers liable for compensatory and punitive damages.

It is well-established in Florida and other jurisdictions that where the employer or principal is sued for the tort of its employee or agent, a jury verdict exonerating the employee or agent requires the setting aside of any judgment rendered against the employer or principal. In Williams v. Hines, 80 Fla. 690, 86 So. 695 (1920), the plaintiff sued the engineer and the railroad for the negligence of the engineer. The jury returned a verdict in favor of the engineer, but against the railroad. This Court held that where the only negligence alleged against the railroad was that of the engineer, and the jury found the engineer not guilty, the railroad was entitled to a judgment notwithstanding the verdict.

In Cutchins v. Seaboard, 101 So.2d 857 (Fla. 1958), this Court discussed Williams v. Hines, and 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. This is a universal principle of law, but its application is naturally limited to those instances where the liability of both principal and agent are identical and the defenses which might be interposed the same....

In the amended complaint on which this case went to trial the only allegation of tortious conduct against Bankers was that MacArthur was acting "in the course and scope of his employment with Bankers" (A 1 - R 1200, Count I, Paragraph 4). There was no tortious conduct of Bankers alleged in the complaint, other than that of MacArthur. This was the only theory on which evidence was introduced, on which the case was tried, on which it was argued, and on which the jury was instructed.

At plaintiff's request, the jury was instructed as a matter of law that the acts of the servant, MacArthur, were attributable to the master, Bankers, under respondeat superior (R 3850).

In addition the jury was instructed as follows:

> If you believe from the greater weight of the evidence 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, and all the other necessary elements are proven by the greater weight of the evidence, then liability can only be imposed upon his ancillary estate for such actions. (R 3850).

The meaning of the above instruction (which plaintiffs approved, R 3946), could not be more clear. If MacArthur was not acting on behalf of Bankers, then Bankers could not be liable. That instruction is consistent with the amended complaint and proof that there was no tortious conduct by Bankers other than the alleged conduct of MacArthur himself.

The rule set forth in the above cases, that exoneration of the employee requires exoneration of the employer, is universal.

In 53 Am.Jur.2d, Master & Servant, Section 406, it is stated:

> In a case where the employer's liability depends solely upon the doctrine of respondeat superior, recovery cannot be had against an employer for damages resulting from the alleged wrongful or negligent act of his employee, after the employee has been discharged from personal liability. Thus, where employer and employee are joined as parties defendant in an action for injuries inflicted by the employee, a verdict which exonerates

> the employee from liability for injuries caused solely by the alleged negligence or misfeasance of the employee requires also the exoneration of the employer, and even if the verdict purports to hold the employer liable, it cannot form the basis of a judgment against the employer, but must be set aside. ... The verdict in favor of the employee, determining in effect that he was not guilty of negligence, necessarily amounts to a finding that the employer was free from negligence, and a verdict against the employer after finding in favor of the employee would be inconsistent and illogical....

As a reason for not following the well established principle of law that exoneration of the employee requires exoneration of the employer, the Fourth District stated on page 13 of its opinion:

> Neither party tendered an instruction on respondeat superior, and the judge gave no such instruction. As a result, the instructions gave the jury two options: To find against MacArthur individually, or to find against the corporation on the theory of direct liability. The parties set the stage for this precise result.

As we pointed out in our motion for rehearing (A 26), the Fourth District overlooked that the following jury instruction on respondeat superior was given:

> A corporation is civilly liable to a third person for injury or damage occasioned by the wrongful conduct of its officers. agents or employees when committed within the scope of their duties on behalf of the corporation (R 3849-3850).

The motion for rehearing also pointed out other similar instructions which were tendered (A 26).

Farish had even admitted a respondeat superior instruction was given on page 33 of his reply brief before the Fourth District, wherein it was stated:

> ...the jury was instructed as to Bankers Multiple Line's vicarious liability based upon respondeat superior,...

It is thus clear that the assumption of the Fourth District that no instruction was given on respondeat superior, the only reason given by the Fourth District for affirming the verdict against Bankers notwithstanding the exoneration of MacArthur, was incorrect.

On page 12 the Fourth District stated:

> The court gave no corresponding instruction which would have provided for a verdict against both Bankers and the estate.

The above statement is incorrect. The jury instructions and verdict made it quite clear that the jury could have awarded a verdict against both Bankers and the estate. For example, the court instructed:

> that the plaintiff has sued <u>each of the defendants for damages</u> resulting from an

> alleged tortious interference with a contract.
>
> Jill Smith's failure or refusal was due to intentional and unjustified action by either or both of the defendants,...
>
> The mere fact that termination by Jill Smith of the employment of the Plaintiff law firm resulted from acts or conduct of the defendants does not make the defendants liable to the plaintiff....
>
> In order to make the defendants liable for damages, it is necessary that the plaintiffs prove to your satisfaction that the defendants, or either of them, had a design or purpose to cause...
>
> If you find that punitive damages should be assessed against either or both defendants, you may consider...
>
> You may assess punitive damages against one defendant and not the others or against more than one defendant in different amounts. (R 3844-3850)

During his instructions to the jury the trial court reviewed the form of verdict in detail (R 3853-3856). The verdict form (R 3728) contained questions, the first being whether MacArthur was liable and the second being whether Bankers was liable. The verdict form then states "if you answer question #1 yes (MacArthur liable) you should answer question #4 regarding punitive damages and #5 the amount of punitive damages. The verdict form then states "If you have answered question #2 yes (Bankers liable) you should answer

question #6 regarding punitive damages and #7 the amount of punitive damages.

It is therefore clear that the Fourth District was wrong when it said there was no respondeat superior instruction and that the jury was not instructed that it could render a verdict against both Bankers and MacArthur.

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....

There was no instruction that the corporation could be held directly liable without MacArthur being held liable. Nor could there be, because it is an inaccurate statement of the law.

The above quote, that Bankers alone should be held liable, notwithstanding the exoneration of its officer or agent, does not comport with logic and reason, since corporations can act only through their agents and employees. Contrary to the holding of the Fourth District is 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).

In Ramel v. Chasebrook Construction Company, 135 So.2d 876 (Fla. 2d DCA 1961), 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...

In Adams v. Brickell Townhouse, Inc., 388 So.2d 1279 (Fla. 3d DCA 1980), corporate officers were sued individually and so was the corporation. The lower court dismissed the suit against the officers and the appellate court reversed stating on page 1280:

> One purpose of the corporate fiction is to insulate stockholders from liability for corporate acts; however, officers of a corporation are no less personally responsible for their tortious acts by virtue of those acts having been performed in the corporate name.

The holding of the Fourth District that the corporate employer can be liable for the tort of its officer or agent, where the officer or agent is not liable, is unprecedented.

The opinion should be quashed and the trial court instructed to enter judgment in favor of Bankers.

POINT II

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

Plaintiffs alleged that MacArthur was the only active 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 contrary to 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 the 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.

If MacArthur had been drunk driving a corporate vehicle in the course and scope of his employment, Bankers could not be held liable for punitive damages unless it had reason to know this might happen. This was, of course, the precise issue involved in Mercury Motors, but there is no logical reason for a different result to obtain under the present facts.

POINT III

THE COURT ERRED IN APPROVING A PUNITIVE DAMAGE INSTRUCTION, WHICH OMITTED THE STANDARD INSTRUCTION AND FAILED TO INFORM THE JURY OF ITS DISCRETION TO NOT AWARD PUNITIVE DAMAGES EVEN IF IT FOUND DEFENDANT ACTED MALICIOUSLY.

Following the verdict, on post trial motions, the trial court granted a new trial in this case, because the court erred in failing to give the Florida Standard Jury Instruction on punitive damages and instead gave instructions which did not inform the jury that it had the discretion not to award punitive damages, even if it found that defendants acted with malice, etc. (A 7)

Florida Standard Jury Instruction 6.12 (which defendants requested R 3902), provides:

> 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 deterrent to others. (Emphasis added)

The court did not give this instruction.

On pages 8 and 9 of its opinion, the Fourth District set forth the instructions which were actually given in regard to punitive damages as follows:

> 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 or example to the party, and as a deterrent to others. Exemplary or punitive damages can only be allowed only when it is alleged in the complaint and established at trial that the defendant acted with malice, moral turpitude, wantonness, wilfullness 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.
>
> In determining the amount of punitive damages to be assessed, you should all, you should also consider that punitive damages are punishment of each wrongdoer, by exacting from his pocketbook a sum of money which, according to his financial ability will hurt, but not bankrupt.
>
> 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. (Emphasis by Fourth District.)

The Fourth District said on page 9 there was "...no meaningful difference" between the charges given in the standard charge and stated that the emphasized language above informed the jury of its discretion not to award punitive damages.

With all due respect to the Fourth District, a reading of the instructions given simply does not contain any language informing the jury that if it finds defendant acted with malice, etc., it "may" in its "discretion" assess punitive damages. Thus, even if it found malice the jury in its discretion did not have to award any punitive damages. The key word "discretion" is not in the instructions which

were given. The language emphasized by the Fourth District stated that the jury may assess punitive damages against one or both defendants, but it never informed the jury that it did not have to award punitive damages, even if it found the defendants acted with malice. The only logical interpretation of the instructions given is that the jury could award punitive damages against one defendant without awarding punitive damages against both defendants, which makes sense since MacArthur was the only active alleged wrongdoer.

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)

In Fisher v. The City of Miami, 160 So.2d 57 (Fla. 3d DCA 1964), the court stated at page 58:

> It should also be noted that punitive damages are not recoverable as a matter of right, even in a case where proper, but are awarded in the discretion of the trier of fact.

In 22 Am.Jur.2d, Damages, Section 240, it is stated:

> ...exemplary damages...are not recovered as a matter of right, even though the facts of the case may be such as to make their allowance

> proper, but rather, that their allowance rests in the discretion of the jury. Under this rule, the jury may refuse to award such damages without regard to the evidence, even though fraud or malice is shown, no matter how wanton or reckless the defendant has been, and an instruction is erroneous which directs or requires the jury to award such damages.

The trial judge determined that he had erred by omitting the Standard Jury Instruction and giving the instruction given. Here, plaintiff's counsel took full advantage of the erroneous instruction arguing to the jury:

> ...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.' Punitive damages, <u>if you find one of those elements you have an obligation under the law to impose punitive damages.</u> (R 3632) (Emphasis supplied)

This argument was based on the improper instructions and magnified the error. The trial court, recognizing the error (and in the best position to assess its prejudicial impact), granted a new trial. Without finding an abuse of discretion, the standard of review on such an order, the Fourth District simply reversed.

An almost identical situation arose in <u>Castlewood International Corporation v. LaFleur</u>, 322 So.2d 520 (Fla. 1975), in which the trial judge granted a new trial on the

issue of punitive damages on the basis that he erred in giving a jury instruction involving a definition of gross negligence. The Third District Court of Appeal reversed the order granting the new trial, and this Court quashed the decision of the Third District and reinstated the order granting the new trial, stating on page 521:

> Since at least 1962, it has been the law of Florida that a trial court's discretion to grant a new trial is "of such firmness that it would not be disturbed except on clear showing of abuse . . ." Cloud v. Fallis, 110 So.2d 669, 672 (Fla. 1959). A heavy burden rests on appellants who seek to overturn such a ruling and any abuse of discretion must be patent from the record. See Hendricks v. Dailey, 208 So.2d 101, 103 (Fla. 1968); Russo v. Clark, 147 So.2d 1, 3-4 (Fla. 1962). The required showing is more difficult in this case because, unlike other cases, the prejudicial error which required a new trial was injected into the case by the judge himself. Under these circumstances his view of the need for corrective action should be accorded additional weight.
>
> In this case there is no suggestion of abuse by the district court, and our independent review of the record discloses none. Mere disagreement from an appellate perspective is insufficient as a matter of law to overturn a trial court on the need for a new trial. The trial judge "was in a much better position than an appellate court to pass on the ultimate correctness of the jury's verdict." Pyms v. Meranda, 98 So.2d 341, 343 (Fla. 1957). (Footnotes omitted.)

In Sosa v. Knight-Ridder Newspapers, Inc., 435 So.2d 821 (Fla. 1983), this Court again reversed a district court

of appeal for reversing an order granting a new trial, quoting Castlewood, supra, as follows:

> ...The trial judge 'is on the scene and can actually see, hear, and observe all the participants,' id., and thereby better evaluate the effect of improper actions on the jury. As a result, the general rule is that 'a trial court's discretion to grant a new trial is "of such firmness that it would not be disturbed except on a clear showing of abuse..."'

This is exactly what occurred in the present case. The Fourth District simply disagreed with the trial judge and determined that the instruction given and the failure to give the standard instruction did not leave the jury with the wrong impression, notwithstanding that the trial judge found that it did. Moreover, the Fourth District, in reversing, did not find that the trial judge abused his discretion in granting the new trial, which is the standard for review. This Court expressly noted the same circumstance when it again quashed the opinion of a District Court, which had reversed an order granting a new trial in Baptist Memorial Hospital, Inc. v. Bell, 384 So.2d 145 (Fla. 1980), in which this Court reiterated that there must be an abuse of discretion and "...the District Court did not expressly find that the trial court abused its discretion."

In the present case the trial judge was in a superior vantage point to determine the effect of the instructions given and the omission of the standard instruction. The Fourth District erred in reversing that discretionary ruling, absent an abuse of discretion.

POINT IV

THE COURT ERRED 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, at plaintiff's request, took some language from Lassitter v. International Union of Operating Engineers, 349 So.2d 622 (Fla. 1977), and instructed the jury:

> The greater the Defendants' 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. (R 3849).

A reading of the applicable portion of that decision indicates that the reason for this language was to demonstrate why we do not have a rule that punitive damages must bear some reasonable relationship to compensatory damages. This Court stated on page 626:

> The error in embracing such a rule of law is made apparent in circumstances where the conduct by a very affluent defendant is

> outrageous but the resultant injury or invasion of legal rights to the plaintiff is minimal, although the conduct has the propensity of causing great harm if continued. Subject to the other limitations mentioned in this opinion, the jury is the best judge of the amount necessary to be assessed in order to make an example of such a defendant and thereby deter him and others from such conduct in the future. The more pecunious the defendant the greater must be the punitive damages assessed in order 'to get his attention' regardless of the amount of actual damages awarded the plaintiff. For these reasons we disavow the rule that punitive damages must bear some reasonable relationship to the actual damages awarded by the jury.

It is not an accurate rule of law that the greater a defendants' wealth, the greater must be punitive damages. Although similar language was used in the opinion, it was stated not as a rule of law but as the rationale for the formulation of a different rule of law; i.e., that there need be no relationship between compensatory and punitive damages (the jury was so instructed, R 3849).

The fact that a statement of reasoning may be set forth in a judicial opinion does not mean that it is a proper jury instruction. In Sirmons v. Pittman, 138 So.2d 765 (Fla. 1st DCA 1962), the court stated on page 770:

> ...It follows, as a further general proposition, that the jury should not be charged with abstract rules of law applicable to any case, or with mere statements of law in general terms,...

A careful reading of the Lassitter opinion makes it clear that this Court was not formulating any new jury instructions, it was simply explaining why punitive damages need not bear a reasonable relationship to actual or compensatory damages.

If it were a proper instruction that the wealthier the defendant, the greater the punitive damage award must be, then whenever a jury awarded a modest amount of punitive damages against a wealthy defendant, a new trial would have to be granted. Yet in Rinaldi v. Aaron, 314 So.2d 762 (Fla. 1975), 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.)

Because of the mandatory language of the instruction given in the present case, this jury was actually directed to award a huge punitive damage verdict because Bankers has a net worth of $18,000,000 (R 4017). It must also be remembered that the only active tortfeasor was MacArthur, not Bankers against whom the punitive damage verdict was rendered.

The jury's discretion to determine the amount of punitive damages is one of the broadest recognized in law. This instruction severely limited that discretion.

The instruction also took away the jury's discretion to consider the nature, extent and enormity of the wrong, the intent of the parties and all the circumstances attending the particular incident, other than net worth, directly contrary to Rinaldi. The jury may well have desired to award no punitive damages or a small amount of punitive damages but its hands were tied because of this instruction.

This Court in Lassitter did not intend to abandon the required relationship between the amount of punishment and the nature, extent, and enormity of the wrong and all of the other circumstances in relation to the alleged tort. This is plain from this Court's language at 626:

> ...a punitive award must bear some relationship to the fact of the injury or invasion of legal right and the cause thereof.

In Wackenhut Corporation v. Canty, 359 So.2d 430 (Fla. 1978), this Court quoted approvingly from Winn & Lovett Grocery Co. v. Archer, 126 Fla. 308, 171 So. 214, 221 (1936) as follows on page 436:

> ...the jury has the discretion whether or not to award punitive damages and the amount which

> should be awarded. Punitive damages 'are peculiarly left to the discretion of the jury as the degree of punishment to be inflicted must always be dependent on the circumstances of each case, as well as upon the demonstrated degree of malice, wantonness, oppression, or outrage found by the jury from the evidence.

More recently, in St. Regis Paper Co. v. Watson, 428 So.2d 243 (Fla. 1983), this Court stated on pages 246 and 247:

> ...The jury's major duty in determining the amount of punitive damages is to assess the 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. (Emphasis added)

Contrary to the above statement of this Court that the defendant's net worth is "only one factor" the instruction in this case stated that the greater the defendant's wealth the greater must be the punitive damages assessed. The instruction is irreconcilable with the law.

In an assault and battery case the defendant might have slightly pushed the plaintiff or have beaten him to a pulp, causing serious permanent injuries. If the defendant was wealthy, would the punitive damages have to be substantial in both cases? Of course not. Likewise in the present case it was up to the jury to decide whether Bankers conduct

barely constituted tortious interference, or was outrageous. The statement was particularly prejudicial under the facts presented in this case, where the corporation was only being sued because of the conduct of its officer or agent. The Lassitter statement, given as an instruction, left the jury no discretion but to award enormous punitive damages because of defendant's substantial net worth, and was therefore error.

POINT V

THE COURT ERRED IN REVERSING THE ORDER GRANTING THE NEW TRIAL BASED ON FAILURE TO JOIN INDISPENSABLE PARTIES WHERE FARISH TESTIFIED THERE WERE NO PARTNERS, BUT INCOME TAX RETURNS PRODUCED AFTER TRIAL REFLECTED THE EXISTENCE OF OTHER PARTNERS, ONE OF WHOM HAD TESTIFIED IN FAVOR OF FARISH AS AN EXPERT WITNESS.

Early in the pleading stages, defendants moved to dismiss the original complaint for failure to join indispensable parties, because Farish filed the complaint in his own name. That motion was granted, and the court ordered that an amended complaint include all of the partners in the law firm at the time of the alleged interference with the contract, which was terminated on August 9, 1976 (R 1156). Farish amended, including the names of his father and himself as the only partners (R 1200). Farish testified in deposition that he and his father were the only partners

(R 4313).

Farish's first witness at the trial was attorney Hubert Lindsey who had joined the Farish firm in 1966 but had left the firm shortly prior to the trial (R 3343). The defense objected on the ground that Lindsey had been a partner in the Farish firm, but the court overruled the objection because Lindsey was not at that time employed by the Farish firm (R 3367).

Lindsey then testified as an expert witness that Jill's wrongful death case had a value of from $500,000 to $1,000,000 (R 3368). On cross-examination, for the first time, Lindsey testified that at the time the contingent fee contract was entered into, he was a partner in the Farish firm; that he participated in its earnings; that he participated in the fee earned in the case; and that he was a partner in the firm up to the time that he left in February of 1979 (R 3369-3370). When asked why he was not named as a party plaintiff in this case, he said that he did not know (R 3394).

Farish repeatedly testified before the jury that Lindsey "has no interest in any case left in my office, including this one" (R 681, 640-641).

During the trial defendants again moved to dismiss for failure to join as indispensable parties, Lindsey and other partners in the law firm, Rosemary Barkett, and Ken Slinkman (R 4309). Farish again testified that his firm had had no partners other than himself and his father in 1973 or any other time (R 4314). He testified that none of these alleged partners had a capital account (R 4315).

After the trial and prior to ruling on the post-trial motions, the court permitted the defendants to take the depositions of Lindsey and Rosemary Barkett. In complete contradiction of Farish's testimony at trial, Lindsey produced Partnership Federal Income Tax Returns for the years 1977 and 1978, which listed as partners both of the Farishes, Barkett, Lindsey, Romani and Slinkman. These partnership returns showed that all of the above partners had capital accounts in the partnership, contrary to Farish's testimony. The tax returns for 1977 and 1978 are attached to the deposition of Hubert Lindsey (R 4422).

Lindsey testified on deposition after trial that in June of 1979, he received an oral request from Farish partner Romani to assist in repaying a debt of the partnership from a number of years back (R 4426). He testified that in 1968 Farish called two of them in and told

them "I want to make you partners in the firm and you will be getting a percentage" (R 4427). At that point Farish stopped withholding income tax and social security from Lindsey's pay checks and gave him a draw (R 4428).

There would be additional money due him as his partnership share, at the end of the year, but Farish always requested that they each leave funds in the firm for advanced costs during the coming year on plaintiff's cases (R 4430). Lindsey left as much as $90,000 of his funds in the firm for advanced costs (R 4431). Farish introduced them as partners (R 4431), however he never introduced an associate as a partner (R 44332). When he became a partner he received 11% of the profits, and when he left he was up to 29% (R 4432). Lindsey testified at his post trial deposition that he claimed an interest in the outcome of this case (R 4447).

Defendants then moved to produce Farish income tax returns for years 1973 through 1978. Rather than produce these, Farish stipulated that the firm filed Federal Partnership Income Tax returns for these years which reflected that Lindsey and Barkett were partners (R 4453).

To sum up, Farish testified at trial, in opposition to the motion to dismiss for failure to join indispensable parties, that there have never been any partners except for his father and himself; that no one else had a capital account, and that no one else advanced costs on cases (R 4315, 4320). The tax returns and the unrefuted testimony of Lindsey and Barkett following the trial showed they were both made partners before Jill Smith's case was even initiated.

Lindsey, Barkett and Slinkman attempted to intervene in this case after the trial judge had granted a new trial, and, as the Fourth District noted on the first page of its opinion, appeared as amicus curiae on the appeal, claiming an interest in the proceeds from this case.

The motion to dismiss for failure to join indispensable parties was first filed after the original complaint was filed, which prompted Farish to add his father as an additional plaintiff. The motion was again made at trial, which is timely under Fla.R.Civ.P. 1.140(h). Chapman v. L & N Grove, Inc., 265 So.2d 725 (Fla. 2d DCA 1972). In that case the motion was not filed until after trial and entry of judgment. When it became clear that there had been

an indispensable party, the lower court set aside the judgment.

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.

The present case was tried before a jury which only knew that Farish and his father were partners and therefore

plaintiffs. Contrary to Farish's testimony that there were no other partners, income tax returns were discovered following the verdict showing that expert witness Lindsey and others were partners. This was one of the reasons the trial judge granted a new trial.

On page 7 of the opinion, the Fourth District recognized that Lindsey's interest may have affected the weight the jury gave his testimony, but found "... no merit in Banker's contention that Lindsey's joinder as a party plaintiff would have affected the weight given by the jury to his testimony". The Fourth District went on to quote some statements from Banker's closing arguments in which it was stated that Lindsey and Farish each received money from cases after they split up that they would divide in the future. There is a substantial difference between Farish and Lindsey having a relationship which would continue, because of cases each took with him, and Lindsey having an interest in the outcome of this case which required him to be a party plaintiff.

The Fourth District concluded its discussion of this issue by stating that the record demonstrated that Bankers "...fully apprised the jury of Lindsey's relationship to the firm and possible interest in the outcome of the case sub

judice." (A 20). It was not enough that Bankers was able to argue to the jury that Lindsey had a "possible interest". After the income tax returns were discovered which demonstrated he was a partner, the trial judge ruled that he was an indispensable party and granted a new trial. Bankers was entitled to have Lindsey designated as a party plaintiff, which would have demonstrated his interest in the outcome beyond any doubt.

In his order granting the new trial, the trial judge noted on page 2 that Lindsey "...at the time of his testimony was no longer associated with the Farish firm and ostensibly had no interest in the litigation presently pending before the court". On page 3 the trial judge noted that Lindsey and Barkett "...now claim an interest in the $2,050,000 judgment which this court has entered in this case and the critical evidence in support of this judgment was given by Hubert Lindsey as an uninterested 'expert witness'" (A 8-9). The trial court further noted that without Lindsey's testimony "...plaintiff's case would have collapsed" (A 9).

Again, under the decisions of this Court in Baptist Memorial Hospital and Castlewood, supra, this was the type of ruling which should not be reversed by an appellate court

unless there is an abuse of discretion. It was the trial judge who observed Hubert Lindsey testify as an expert witness, and who observed Farish testify under oath that Lindsey was not a partner, and that his firm never had any partners except for his father and himself.

The Fourth District simply reversed the lower court's order granting the new trial on this point, without acknowledging that there must be a clear abuse of discretion. The court did not appear to even consider the discretionary aspect of an order granting a new trial.

But for Farish's false testimony that there were no partners besides his father and himself, his expert witness would have been a named party plaintiff. The trial judge considered this expert a key witness and without his testimony Farish's case would have "collapsed". The jury was never apprised that Lindsey had an interest in the outcome of this case, although he filed an amicus brief in the Fourth District claiming such an interest. The trial judge did not abuse its discretion in granting a new trial on this basis and the Fourth District erred in reversing, particularly where it did not find an abuse of discretion.

CONCLUSION

The jury found the only individual alleged to have committed the tort not guilty. That verdict was affirmed on appeal by the Fourth District. The exoneration of the individual mandates the setting aside of the verdict against the corporation. The opinion of the Fourth District should be vacated and the trial judge instructed to enter judgment in favor of Bankers. In the alternative, this Court should determine that Bankers cannot be liable for punitive damages under Mercury Motors, supra, or in the second alternative, the Court should determine that the Fourth District erred in reversing the trial judge's order granting a new trial, and the case should be remanded for a new trial on all issues.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy hereof has been furnished, by mail, this 14th day of October, 1983, to:

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