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 REPLY BRIEF ON THE MERITS

MICHAEL P. MULLEN
BURKE GRIFFIN CHOMICZ & WIENKE
Suite 1000 - Three Illinois Center
303 East Wacker Drive
Chicago, ILL 60601
(312) 861-1300
and
LARRY KLEIN
Suite 201 - Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401
(305) 659-5455

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## STATEMENT OF THE FACTS

Farish has misrepresented evidence, taken things out of context, and neglected to set forth dates on communications between MacArthur and Jill regarding Farish. Because of the page limitation of this brief and because the issues before this Court are questions of law which are not dependent on the facts, we shall only refute portions of Farish's statement of facts. Many of the statements, such as the second full paragraph on page 14, have no record references and are not in the record. The separate law suit, referred to on that page, was dismissed and affirmed on appeal.

Most of the communications between MacArthur and Jill occurred after Jill terminated the Farish contingent fee contract on August 9, 1973. Plaintiff's exhibits 39 and 44 (quoted on pages 7 and 8 of Farish's brief) and plaintiff's exhibits 22, 40, 41, 45 and 51, were made after the termination of the contract (Farish makes no reference to dates). The only written communication between MacArthur and Jill prior to her terminating Farish's contract was on June 18, 1973, wherein MacArthur told her she needed "good counsel and should have it" (Plaintiff's exhibit 7).

Farish suggests he had an excellent relationship with Jill prior to the termination of the contract. In fact, he never had any personal contact with her until she telephoned him in June,

1973, complaining that he filed suit against her express directions which Lindsey had agreed not to do. Farish was arrogant and so she decided to come to Palm Beach to see him. He was abusive to her in his office, and she decided to fire him, notifying him a few days later (R 2960-2966).

There was no competent evidence that Doolen had suggested that Jill settle the case for a few thousand dollars, as Farish states on page 6. Although Jill wrote Farish a letter which contained this statement (plaintiff's exhibit 82), Jill, who did not testify live at trial, was never questioned about this letter on deposition and the court ruled that it was hearsay and so instructed the jury (R 511-514). Thus it could well have been that Jill was mistaken about this statement or may even have fabricated it in order to get Farish's attention. Doolen testified that he and Jill never discussed settlement nor did he ever make a settlement offer (R 4087). Both Jill and Doolen testified there were no conditions to placing Jill on the maternity policy (R 2925, 4092).

Bankers' denial of coverage in the death case was justified because coverage was based solely on an alleged oral agreement between Herbert Meredith and MacArthur (R 406). No insurance policy naming Meredith & Morse as insured was ever issued by Bankers (R 407).

## ARGUMENT

On page 3 of respondents' brief entitled "STANDARD OF REVIEW" there is a statement which is an outright misrepresentation of the law. Respondents state the broad discretion rule does not apply to an order granting a new trial based on legal rulings, but only applies to an order granting a new trial based on manifest weight of evidence, citing National Western Life Insurance Company v. Walters, 216 So.2d 485 (Fla. 3d DCA 1968).

In Castlewood International Corporation v. LaFleur, 322 So.2d 520 (Fla. 1975), the trial judge granted a new trial because he erred in giving a jury instruction involving a definition of gross negligence. The Third District reversed without finding an abuse of discretion and this Court reinstated the trial court's order because there had been no abuse of discretion, citing Cloud v. Fallis, 110 So.2d 669 (Fla. 1959). This Court stated in footnote 3 on page 522 of Castlewood that the jury instructions are:

> . . . the legal heartbeat of the case, being all that the jury has by which to assess the facts. . . It is virtually impossible for an appellate court to know whether a jury was mislead or confused by an admixture of erroneous and proper jury charges.

In another case cited by respondents on page 28, Sears, Roebuck & Company v. Jackson, ___So.2d___, (Fla. 3d DCA, case # 82-1548, opin. filed July 5, 1983) [8 FLW 1813], the Third District stated:

> The discretion which is said to be vested in a trial judge to grant a new trial and to which we give deference stems from his unique ability to determine, upon further reflection, whether, for example, he was correct in overruling or sustaining some objection, denying a mistrial, or giving or refusing to give a requested instruction, and whether, if incorrect, his ruling may have affected the fairness of the trial.

Thus even the Third District no longer adheres to the rule which it may have followed in National Western Life Insurance Company v. Walters, 216 So.2d 485 (Fla. 3d DCA 1968), the only case cited by Farish as authority that the broad discretion rule is inapplicable.

## 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.

Farish's argument under this point, although it runs for 11 pages, contains not one citation of a case. Farish concedes that a jury verdict exonerating the employee or agent requires the setting aside of the judgment rendered against the employer or principal, where the tortious conduct is that of the employee or agent. Having no authority whatsoever to support his position, Farish simply attempts to argue that this case is unique and therefore the well established law in Florida and other jurisdictions is inapplicable.

Farish argues that MacArthur was only acting in his "corporate" capacity and not in an individual capacity. Farish has totally ignored the citations we set forth on pages 22 and 23 to the effect that while a corporation is liable for an act of its officer or agent, the officer or agent is also personally liable even though he acted on behalf of the corporation. Farish takes the position, as he states in his first paragraph on page 16, that everyone agreed that Bankers and MacArthur were sued separately and " . . . the jury could find against one without finding against the other." Like most of the statements in this portion of the argument, there are no record references. Nor was this case tried on any such theory or agreement.

Farish argues that Bankers agreed that the jury could find against Bankers alone, however the record does not support this. Farish makes this argument because the jury verdict, in question #3, provides a blank space for the amount of compensatory damages, following question #1 (MacArthur's liability) or question #2 (Banker's liability). This is the "special interrogatory verdict consistent with the parties agreement, and which provided for . . . damages . . . if the jury found against either defendant" which Farish refers to on page 21, but he failed to disclose that Bankers objected to this verdict form (R 4241). Bankers never agreed that the corporation could be liable unless MacArthur was liable and was also found to be

acting within the scope of his authority. Bankers agreed only that if both MacArthur and Bankers were found liable, the liability for compensatory damages would be the same (R 4232-4245).

Farish argues on pages 16 and 17 that we never raised this issue until after the verdict. Until such time as the jury returned these verdicts there was no reason to even anticipate the problem. That is because it never was an issue until the verdicts were returned by the jury. That is exactly why Farish's argument about the manner in which the case was tried, and the Fourth District's explanation as to why the law does not apply, is incorrect.

Farish emphasizes that it was contemplated that the jury could find against one defendant without finding against both defendants. There was nothing unusual about this, however, because it was possible that the jury could find that MacArthur had an intense personal hatred for Farish (Farish recognizes this on page 24 of his brief) and therefore MacArthur could be held personally liable, but that his conduct was not within the scope of his authority with Bankers. Likewise the jury could have awarded punitive damages against MacArthur, but not against the corporation.

We demonstrated on page 19 of our main brief that the Fourth District erred when it stated in its opinion that no

instructions on respondeat superior were tendered or given. The jury was expressly instructed on the doctrine and other similar instructions were tendered. Farish even admitted it on page 33 of his reply brief before the Fourth District. Farish now concedes that a respondeat superior instruction was given, but claims on page 25 that the instruction was given in reference to others than MacArthur. Since the respondeat superior instruction fails to mention anyone by name, and since there was no other alleged tort-feasor, this argument is without merit.

The Fourth District, on page 12 of the opinion (A 24) said that the lower court did not give a jury instruction authorizing a verdict against both Bankers and MacArthur. Farish concedes on page 25 that the verdict form explained in the court's instructions did authorize the jury to find against both MacArthur and Bankers.

Farish suggests on page 26 that this jury verdict resulted because we were improperly allowed to argue that if the jury awarded punitive damages against MacArthur's estate, it would only harm his heirs. Since punitive damages are to punish, this was a proper argument and Farish cites no authority to the contrary.

Farish, on page 22, mischaracterizes a proper jury instruction differentiating between acts done within and beyond the

scope of MacArthur's duties as apprising the jury that if MacArthur was acting in a corporate capacity, the jury should find against the corporation only. The instruction read:

> If you believe . . . that . . . MacArthur was acting solely in his individual capacity and not as an officer, agent or employee of Bankers . . . then liability can only be imposed upon . . . estate.

This instruction properly differentiates between conduct within and without MacArthur's scope of employment and did not authorize the jury to find against the corporation only, if the conduct was within the employment.

The Fourth District held the jury could have found MacArthur was only acting on behalf of the corporation and not individually. The Fourth District cited no precedent for this decision, nor has Farish. The law in Florida and all other jurisdictions is clear that if a corporate officer commits a tort on behalf of the corporation he is also individually liable, and a jury verdict exonerating the officer requires exoneration of the corporation.

## 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.

Again Farish argues with no record references that we

agreed the jury could find against either Bankers or the estate of MacArthur. There was no such agreement.

Farish also argues, as he did under Point I, with no citations, that MacArthur was only acting on behalf of the corporation. Farish has failed to explain what the misconduct of the corporation was apart from the individual conduct of MacArthur, and accordingly that is precisely why Mercury Motors requires that the punitive damage verdict be set aside.

## 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.

Again Farish begins this argument with an outright misrepresentation, by stating that we 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. The very portions of the record which Farish refers to, particularly pages 3907 and 3909, show that we pointed out to the court that the standard jury instruction, which we requested and which was not given, used "may" while the instruction which the court gave used "must". Moreover the error was also preserved because the court refused the standard instruction, which we requested (R 3902).

In its order granting a new trial on this point, the trial court specifically found it erred in giving Farish's requested instructions relating to punitive damages and in failing to give Standard Instruction 6.12 ". . . which grants to the jury discretion to assess punitive damages in the first instance." (A 9, 10).

Farish agrees with the law that the jury has the discretion to award punitive damages and the jury must be so informed. The Fourth District determined, notwithstanding that the trial judge deemed this to be error, that the other instructions sufficiently informed the jury of its discretion. We have demonstrated in our main brief that this is not so. Farish responds that our voir dire examination of the jury and the closing arguments of counsel (Farish's brief, pages 31-34) inform the jury of its discretion. Farish has cited no authority that voir dire comments of counsel or closing argument can cure error in instructions on the law as given by the court, and subsequently determined by the same court to be erroneous.

Farish concludes this argument by again misrepresenting that an order granting a new trial based on incorrect jury instructions is not subject to the broad discretion rule on appeal. In Castlewood International Corporation v. LaFleur, 322 So.2d 520 (Fla. 1975), this Court specifically held that an order granting a new trial based on incorrect jury instructions

will not be disturbed on appeal except on a clear showing of abuse of discretion. Baptist Memorial Hospital, Inc. v. Bell, 384 So.2d 145 (Fla. 1980), which Farish cites on page 34, cited Castlewood with approval and reiterates the rule.

The Fourth District never found the lower court abused its discretion when it reversed on all three grounds and Farish has failed to demonstrate any such abuse.

## 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.

Farish makes no argument that this is a proper instruction, suggesting that his argument under Point III covers it. Unless the opinion of the Fourth District is reversed on this issue, trial courts will now be authorized to instruct juries that the greater is the defendant's wealth, the greater " . . . must be the punitive damages assessed in order to get his attention regardless of the amount of compensatory damages awarded to the plaintiff." This type of instruction is clearly wrong because it allows the jury no discretion to return a low punitive damage verdict against a high net worth defendant.

## 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.

Farish points out that Lindsey testified at the trial that he had shared in the profits at the Farish firm and had participated in the fee earned in Jill's case. It did not come out during trial, however, that Lindsey was claiming an interest in this judgment. Following the jury verdict Lindsey moved to intervene and participated in the appeal to the Fourth District as amicus curiae.

As we pointed out in our main brief, beginning on page 38, Farish consistently testified that he and his father were the only partners in his law firm (R 4313). Farish testified that Lindsey had no interest in this case (R 681, 640-641). Farish testified that his firm had never had any other partners besides he and his father (R 4314).

Now Farish admits that he lied under oath because he says on page 40:

> . . . the tax returns showed only that they were partners in 1977 and 1978.

The 1977 and 1978 tax returns are in the record (R 4422) and

unequivocally show Lindsey was a partner. We did agree that if the stipulation that previous tax returns were the same as 1977 and 1978 was in error, it could be corrected by filing copies of the tax returns for the earlier years. No legible copies were ever filed, and accordingly the stipulation remains that earlier years tax returns also reflected Lindsey was a partner.

Farish makes a rather technical argument that we were not prejudiced by the fact that Lindsey was not named as an indispensable party. The trial judge, who granted a new trial on this basis, obviously was impressed with the fact that Farish's testimony under oath at trial was directly the opposite of the information contained in his partnership tax returns which he also signed under oath. Then Lindsey testified as the only expert witness on the value of Jill's claim, but it did not become known until after trial that Lindsey claims an interest in the outcome of this case. Again, as with the other two grounds on which the trial judge granted a new trial, the Fourth District simply reversed without finding an abuse of discretion.

## CROSS-ISSUE

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

This argument should be ignored since MacArthur's estate is not a party to this proceeding, the judgment in favor of the

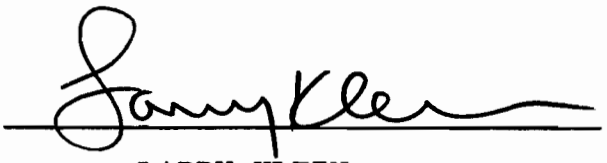
estate having been affirmed by the Fourth District and not having been appealed to this Court.

Also, Farish has cited no authority for the proposition that where punitive damages are claimed against a deceased tort feasor, it cannot be argued that the punitive damage award will not punish the decedent, only his heirs. Since the only purpose of punitive damages is to punish this is a perfectly proper argument.

## CONCLUSION

The opinion of the Fourth District should be reversed.

MICHAEL P. MULLEN
BURKE GRIFFIN CHOMICZ & WIENKE
Suite 1000-Three Illinois Center
303 East Wacker Drive
Chicago, ILL 60601
(312) 861-1300
and
LARRY KLEIN
Suite 201 - Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401
(305) 659-5455

By 

LARRY KLEIN

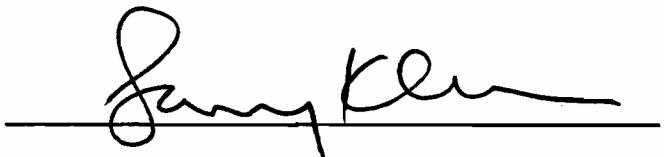
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished, by mail, this 15th day of December, 1983, to:

EDNA CARUSO
Suite 4-B - Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401

MONTGOMERY LYTAL REITER
DENNEY & SEARCY
P. O. Drawer 3626
West Palm Beach, FL 33402

HARVIE S. DUVAL, ESQ.
1680 N.E. 135th Street
North Miami, FL 33161



LARRY KLEIN