IN THE SUPREME COURT
STATE OF FLORIDA

KEN AULT,

Petitioner/Defendant,

vs. CASE NO: 71,817

ROY LOHR,

Respondent/Plaintiff,

ON CERTIFICATION FROM THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO: 87-5122

REPLY BRIEF OF PETITIONER

Keith C. Tischler, Esquire
Parker, Skelding, McVoy
& Labasky
Post Office Box 669
Tallahassee, Florida 32302
(904) 222-3730

Attorney for Petitioner/
Defendant

TABLE OF CONTENTS

TABLE OF CITATIONS

INTRODUCTION

Petitioner, Ken Ault, will be referred to herein as "Defendant," "Petitioner" or by his proper name.

Respondent, Roy Lohr, will be referred to herein as "Plaintiff," "Respondent" or by his proper name.

References to the Record will be made in accordance with the index of the record compiled by the United States District Court, Southern District of Florida, as filed with the United States Court of Appeals for the Eleventh Circuit.

ARGUMENT

UNDER FLORIDA LAW, AN AWARD OF PUNITIVE DAMAGES TO A PLAINTIFF IS ERRONEOUS ABSENT AN AWARD OF NOMINAL OR COMPENSATORY DAMAGES

Respondent contends in his Answer Brief that Appellant has misstated the current status of the law on the issue of punitive damages without compensatory damages, relying primarily upon Lassiter v. International Union of Operating Engineers, 349 S.2d 622 (Fla. 1976), and asserting the well-settled nature of the law in his favor. What is evident from the cases cited by Petitioner in his initial brief and cited by Respondent in their answer brief is that Lassiter did not resolve the question of when punitive damages are awardable and that a significant dispute remains among the District Courts of Appeal in the state of Florida, the majority of which continue to follow the position urged by Petitioner.

In quoting from Lassiter, Respondent contends that the establishment of liability for a breach of duty will support an award of punitive damages even in the absence of compensatory damages. However, Respondent overlooks the context in which this Court stated this rule, it being a case in which nominal damages were awarded. Such is not the case herein.

Respondent also overlooks the primary basis for the Lassiter decision. The Lassiter opinion, in resolving a conflict among the Florida District Courts, held that an

award of punitive damages need not bear reasonable relationship to the amount of actual damages awarded, and thus an award of nominal damages was held sufficient to justify a punitive damage award. Although this language has admittedly been subject to differing interpretations, it is clear that the Lassiter holding did not overrule the long established precedent of McClain v. Pensacola Coach Corporation, 13 So.2d 221 (Fla. 1943). Further, when interpreted in light of the facts of the Lassiter case, this language suggests that this Court envisioned that punitive damages would still require support by an award of nominal damages. In no way does the Lassiter opinion specifically overrule the long-standing requirement that some damages, either nominal or compensatory, must first be awarded.

The District Court of Appeal cases cited to by Respondent are distinguishable as well.

The first case cited to by Respondent is Eglin Federal Credit Union v. Curfman, 386 S.2d 860 (Fla. 1st DCA 1980). In affirming a lower court judgment awarding only punitive damages, the court, in reading Lassiter in the most literal sense, stated: "The special verdict form returned by the jury contained its express finding that 'Eglin Federal Credit Union committed conversion of Joseph E. Curfman's property.' We are of the opinion that this finding satisfies the requirements of Lassiter v.

International Union of Operating Engineers, 349 So.2d 622 (Fla. 1976), 386 So.2d 860, at 862. This literal interpretation of the Lassiter opinion is clearly a minority rule, and it ignores the fact that liability had also been established in all of the previous cases applying the majority rule. Compare, Sonson v. Nelson, 357 So.2d 747 (Fla. 3rd DCA 1978); Flood v. Ware, 363 So.2d 1101 (Fla. 2nd DCA 1978); Raffa v. Dania Bank, 372 So.2d 1173 (Fla. 4th DCA 1979); Hauser Motor Company, Inc. v. Byrd, 377 So.2d 773 (Fla. 4th DCA 1979); American Motorcycle Institute, Inc. v. Mitchell, 380 So.2d 452 (Fla. 5th DCA 1980).

Further, the First District appeared to retreat from its strict reading of Lassiter in Stinson v. Feminist Women's Health Center, Inc., 416 So.2d 1183 (Fla. 1st DCA 1982) where the court restated the established general rule on this issue. In upholding the trial court's award of punitive damages, the court stated "As a foundation for punitive damages, the judge properly computed compensatory damages. . . " 416 So.2d 1183, at 1185, and noting that "Under Florida law, punitive damages are recoverable only where actual damages are shown." Id. (emphasis supplied). This holding illustrates that Eglin Federal Credit Union v. Curfman is a case of limited applicability, which is unrepresentative of the general rule in Florida.

The Eglin decision was applied in Nales v. State Farm Mutual Automobile Insurance Company, 398 So.2d 455 (Fla. 2nd DCA 1981). The court applied the Eglin decision's interpretation of Lassiter, and upheld the award of punitive damages, despite the lack of a compensatory damage award. This case must be distinguished, however, as the plaintiff, who was held to be partially responsible for the auto accident in question, was barred by the Florida no-fault threshold requirements, and was thus not entitled to an award of compensatory damages. Although the jury determined that the plaintiff had suffered a compensatable injury, a compensatory damage award was precluded by the no-fault statute. On appeal, the punitive damage award was upheld pursuant to this narrow legal issue. As evidence of the limited scope of this holding, the court stated:

> We are aware of our statement in Flood v. Ware, 363 So.2d 1101 (Fla. 2nd DCA 1978), that a jury may not order a defendant to pay punitive damages if it does not find him liable for either a compensatory or nominal damages. Where a jury specifically finds that the plaintiff suffered an injury as a result of an automobile accident and denies an award of compensatory damages only because of the defendant's tort immunity under no-fault, we believe the requirement expressed in the Flood case has been met.

398 So.2d 455, at 457.

In Nales v. State Farm Mutual Automobile Insurance

Company, the jury did not award compensatory damages because it was precluded from doing so. In such a limited instance, the breach of duty language expressed in Lassiter and Eglin was the only remedy available to the plaintiff.

Since the Eglin and State Farm decisions, the Florida District Courts have consistently and properly followed the general rules set out in McClain and Lassiter. See Stinson v. Feminist Women's Health Center, Inc., 416 So.2d 1183 (Fla. 1st DCA 1982); Adler v. Seligman, 438 So.2d 1063 (4th DCA 1983) (compensatory damages include actual and nominal damages, and either is sufficient to sustain an award of punitive damages).

In all of the cases applying this interpretation to the Lassiter decision, the underlying breach of duty, and the establishment of liability thereon had already been found by the respective juries. Yet the District Courts, in properly applying the Lassiter decision, held that the punitive damage awards were indeed improper. When these decisions are compared to the facts of the instant case, it becomes clear that the jury verdict awarding punitive damages to Respondent cannot stand. Although the jury specifically found that a breach of duty had been established, the general rule derived from Lassiter and its progeny clearly requires that more than the bare establishment of liability is necessary to support an

award of punitive damages. Despite the entry of a "special verdict" against Petitioner, the law on this point is undeniably clear. In a situation where neither compensatory nor nominal damages are awarded to a plaintiff, any award of punitive damages is improper.

In response to this well-settled law, Respondent argues that the jury instructions given support his proposition and that Petitioner is placing form over substance. In response, it should be noted that a nominal damage instruction was not sought by Plaintiff or given by the trial court, although such an instruction may be appropriate in such circumstances. Plaintiff cannot now seek to overcome this waiver by asserting that the finding of an assault satisfies the requirement of nominal damages. See, Park v. Belford Trucking Co., 165 So.2d 819 (Fla. 3rd DCA 1964).

As to "form over substances," the crucial point is the absence of any substance to Respondent's claim for damages, as evidenced by the jury's findings. The jury had before it the same testimony upon which it awarded the co-Plaintiff $10,000 in actual damages for rather minor physical injuries, yet chose not to award Respondent damages in any amount. The only explanation is the jury's finding of absolutely no injury or damage. The purpose of the rule set forth in Lassiter is the reluctance to compensate persons where no injury has occurred. Even

nominal damages reflect a recognition of some injury, yet here we have none. To allow the jury award in this case to stand will serve to abrogate the substance and purpose of the rule of law set forth in McClain, Lassiter, and the numerous district court decisions rendered subsequently.

CONCLUSION

As the foregoing discussion and legal authority illustrates, the award of punitive damages to Plaintiff, Roy Lohr, cannot stand absent an award of nominal or compensatory damages.

Respectfully submitted this 10 day of March, 1988.

KEITH C. TISCHLER, ESQUIRE
Parker, Skelding, McVoy
& Labasky
318 North Monroe Street
Post Office Box 669
Tallahassee, Florida 32301
(904) 222-3730

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent by U.S. Mail to EVAN FETTERMAN, ESQUIRE, 630 U.S. Highway One, Second Floor, North Palm Beach, Florida 33408, this 10 day of March, 1988.

KEITH C. TISCHLER