

PUNITIVE DAMAGES IN ECONOMIC LOSS CASES
By Ted Babbitt

This writer recently reported on the case of Lawnwood Medical Center, Inc. v. Sadow, 35 Fla. L. Weekly D655 (Fla. 4th DCA, Mar. 24, 2010) which distinguished a libel per se case from the U.S. Supreme Court cases of State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003) and BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) which were adopted by the Florida Supreme Court in Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006). The latter cases provided a three part analysis in order to determine whether a punitive damage award was consistent with the due process clause of the United States Constitution. That analysis required review of the degree of reprehensibility of the defendant's misconduct, the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award and the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. The Lawnwood Medical Center case, supra, adopted the principal that the State Farm and BMW analysis was not appropriate in a case involving a personal injury case such as the harm suffered from an intentional slander. The recent case of James Crystal Licenses, LLC v. Infinity Radio Inc., 35 Fla. L. Weekly D1111 (Fla. 4th DCA, May 19, 2010) makes it clear that the federal strictures set forth in the State Farm and BMW cases still apply in an economic loss case.

The James Crystal case has been up and down the appellate ladder numerous times. It arose in Palm Beach County as a result of a local radio celebrity changing employment from one radio station to another with a non-compete agreement in place. The initial suit involved a request for an injunction precluding the disc jockey from continuing to work for a competitive station in violation of her agreement. The trial court refused to enter such an injunction and the Fourth District reversed. The next phase of litigation involved a jury trial which resulted in a \$2.3 million compensatory damage award against the defendant radio station and the disc jockey for violation of the non-compete agreement and a \$13.2 million punitive damage award against the corporate owner of the hiring station. That was reversed for lack of sufficient evidence.

The next permutation of this case involved a second jury trial which resulted in a \$126,511.48 compensatory award and a \$6.9 million punitive award. In reviewing that judgment the appellate court again reversed the compensatory award in its entirety concluding that there was insufficient competent substantial evidence to show that the losses alleged by the plaintiff were directly linked to the defendant's wrongdoing. The appellate court next turned to the issue of the punitive damage award. The Court relied to a great extent on the cases of Morgan Stanley & Co., Inc. v. Coleman Holdings, Inc., 955 So. 2d 1124 (Fla. 4th DCA 2007), and Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1263 (Fla. 2006). Those held that punitive damages for fraud could not stand absent proof of at least nominal damages because fraud required actual loss or injury as a result of action and reliance. The Court also cited Ault v. Lohr, 538 So. 2d 454 (Fla.

1989), which allowed a punitive damage claim without a compensatory damage award. Ault related to an assault and battery. The Lawnwood Medical Center case involved slander per se and also involved a zero compensatory damage award but a rather large punitive damage award which was allowed to stand by the Fourth District. The Court indicates that the present case was based upon tortious interference with a business relationship. That cause of action requires damage to the plaintiff as a result of the malicious interference as one of its primary elements. The Court holds at 1113:

“Like the fraud claim in *Morgan Stanley*, the tortious interference claim here ‘cannot stand where...no legally cognizable damage was shown as a result of the alleged [wrongdoing].’ 955 So. 2d at 1132. Because we reverse the compensatory damage claim, the punitive damages must also fall. *See id.* at 1132-33.’

Nevertheless the Court goes through the three part analysis set forth above in the State Farm and BMW cases and concludes that the conduct of the defendant was not sufficiently reprehensible, there was no cognizable relationship between the amount of the compensatory award even as initially ordered by the jury and the \$6.9 million punitive award and the analysis of a comparable civil penalty does not apply. The Court, in essence, concludes that based upon the three part analysis the punitive damage award would be unsustainable even if it were not disallowed based upon the absence of any compensatory award. In distinguishing the Lawnwood case from the current case, the Court concludes:

“This case provides the perfect juxtaposition

of the punitive damage analysis in the negligence and economic loss cases against the shortened analysis applied in *Lawnwood* for the unique claim of slander per se. Judge Farmer carefully distinguished the conduct in *BMW* and *State Farm* resulting in economic loss from the 'despicable' conduct resulting in the 'malevolent destruction' of a doctor's personal reputation in *Lawnwood*. *Lawnwood*, 2010 WL 1066833 at *18. He also conceded the fraud claim in *Morgan Stanley* was entirely different from the slander per se claim in *Lawnwood* due to the latter's 'conclusive legal presumption of loss or damage' that is intrinsic in a slander per se claim. *Id.* at *16. It is because of the uniqueness of the claim in *Lawnwood* that we easily distinguish it from today's analysis in an economic loss case. Just as Judge Farmer diminished the nature of the harm in *BMW* and *State Farm*, we diminish the nature of the harm in this case.

We thus acknowledge the limited reach of *Lawnwood* and embrace its clear line of demarcation for evaluating negligence and economic loss cases differently than slander per se cases. We adhere to the full three-part analysis for punitive damage awards in economic loss and negligence cases developed in *BMW* and *State Farm*, and adopted by our supreme court in *Engle*. The judgment is reversed and the case remanded for entry of a judgment in favor of the defendants.

The foregoing analysis of the Court seeks to limit the opinion in the Lawnwood case to a much stricter extent than that expressed in the Lawnwood opinion or for that matter consistent with the Supreme Court's holding in Ault, supra. Nevertheless it is clear that the Court makes a substantial distinction between economic loss cases and personal injury cases when it comes to

assessing punitive damages. In the former, the three part analysis mandated by the State Farm and BMW cases clearly applies while in the latter it well may not.

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