Mitchell v. Simkins, Discovery Commissioner Opinion #5 (March, 1989)

DISCOVERY OF A DEFENDANT'S WEALTH WHEN PUNITIVE DAMAGES ARE ALLEGED

FINDINGS

This case involves a suit for personal injuries, allegedly sustained by Plaintiff when he was sprayed by an ammonia phosphate fire extinguisher held and activated by the Defendant. As a result of being sprayed with the fire extinguisher, Plaintiff has claimed problems with his eyes. In his Complaint the Plaintiff alleges a cause of action for negligence and a cause of action for battery, claiming the Defendant intention- ally sprayed the Plaintiff with the fire extinguisher. Along with the claim of intentional tort, the Plaintiff seeks punitive damages.

There was one eye witness to the incident, a Mr. Christopher Celeste, whose deposition was taken. Although Mr. Celeste's testimony was ambiguous in many instances, there is no question that at the time of the incident, Mr. Celeste believed the Defendant's act of spraying the Plaintiff was intentional. (e.g. Celeste depo p. 50, l. 3-4)

Plaintiff has sought financial discovery from the Defendant, including Defendant's income tax returns for the previous five years and a complete accounting of all assets owned by the Defendant, plus balance sheets and income statements for the last five years for all businesses owned by

the Defendant or of which the Defendant possessed more than 5% partnership or corporate interest. The Defendant has objected to the production of such information, asserting that Plaintiff must make out a prima facie case for liability before he is entitled to discover evidence of Defendant's financial condition, and that Plaintiff has not done so in this case. Secondly, the Defendant asserts that even if Plaintiff makes out a prima facie case, the requested information is much too broad and constitutes unnecessary harassment of the Defendant.

N.R.C.P. 26(b)(1) permits broad discovery and provides in part as follows:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the parties seeking discovery or to the claim or defense of any other party, . . . It is not ground for objection that the information sought will be inadmissable at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded. City of Newport v. Fact Concerts, Inc., 453 U.S. 270, 101 S.Ct. 2748, 69 L.Ed. 2d 616 (1981); Restatement (Second) of Torts section 908 (1978). The Nevada Supreme Court has held on a number of occasions that it is proper, where evidence supports the theory of punitive damages, to allow the introduction of the financial position of the Defendant. e.g. Southern Pacific Co. v. Watkins, 83 Nev. 471, 435 P.2d 498

(1967); Nevada Cement Co. v. Lemler, 89 Nev. 447, 514 P.2d 1180 (1973). The financial position of the Defendant is relevant to the determination of the amount of the punitive damages award and, as the jury is instructed, such evidence must only be considered on the question of assessing punitive damages and not in the connection with any assessment of compensatory damages. Ainsworth v. Combined Insurance Co., 104 Nev. Adv. Op. 92 (Oct. 1988); Southern Pacific Co. v. Watkins, supra; Nev. Pattern J.I. 10.20.

This opinion addresses two issues:

A. When may Plaintiff obtain discovery of Defendant's financial condition in a case where Plaintiff seeks punitive damages?

B. To what extent may Plaintiff delve into the financial affairs of the Defendant once the right to such discovery is established?

Courts have split on both questions and the solutions run the gamut from permitting unhampered discovery, e.g. State ex rel. Thesman v. Dooley, 526 P.2d 563 (Ore. 1974), to making the Plaintiff prove a prima facie case of a legal right to punitive damages before permitting discovery. Curtis v. Partain, 614 S.W.2d 671 (Ark. 1981). The amount of the disclosure of the financial condition of the Defendant has been limited to as little as a sworn statement of net worth, Chenoweth v. Schaaf, 98 F.R.D. 587 (W.D.Pa. 1983), to allowing the Plaintiff to have

reasonable latitude to ask questions about the disposition of individual assets and liabilities mentioned in the net worth statement and income tax returns produced by the Defendant. Tennant v. Charlton, 377 S.2d 1169 (Fla. 1979). Neither of the issues has been conclusively decided by the Nevada Supreme Court.

WHEN SHOULD DISCOVERY OF DEFENDANT'S FINANCIAL CONDITION BE ALLOWED

As previously noted, the Courts are in some disarray as to if and when discovery of the Plaintiff's financial condition should be allowed in a case where the Plaintiff alleges punitive damages. To be sure, there are extreme views wherein the court states that when a punitive claim is made, discovery is appropriate. Renshaw v. Ravert, 82 F.R.D. 361 (D.Ct. Pa. 1979), and at the other extreme one court indicated financial worth was not a proper subject for pretrial discovery, especially where a claim was founded on mere allegations and was conclusionary. Cox v. Theus, 569 P.2d 447 (Okla. 1977). While these two views would have the benefit of simplifying the discovery process, neither extreme offers a workable solution which both sides could accept.

Many Courts see a conflict between the concept of liberal discovery and the Defendant's right to privacy and protection from harassment by intrusion into his financial affairs. Perhaps the best exposition of this conflict and presentation of one solution to the problem may be found in Leidholt v.

District Court, 619 P.2d 768 (Colo. 1980). The Colorado court was of the opinion that a mere allegation by a Plaintiff of a punitive damage claim should not support an Order for discovery of a Defendant's financial condition. The Colorado court held that prima facie proof of a triable issue on liability as to punitive damage was necessary before there could be discovery relating to the Defendant's financial status. The existence of a triable issue on liability for punitive damages would be established by the showing of a "reasonable likelihood" that the issue would ultimately be submitted to the jury for resolution. The Court further held that the existence of a triable issue on punitive damages could be established through discovery, by evidentiary means, or by an offer of proof. Leidholt v. District Court, supra.

By imposing on the Plaintiff the burden of establishing a prima facie right to punitive damages, the Liedholt Court, in effect, introduced a mini-trial into the pretrial procedure. The same kind of procedure has been used and approved by other courts including Rupert v. Sellers, 368 N.Y.S.2d 904 (1975); Gierman v. Toman, 185 A.2d 241 (N.J.Super. 1962); Campen v. Stone, 635 P.2d. 1121 (Wyo. 1981); Larriva v. Montiel, 691 P.2d. 735 (Ariz.App. 1984); Bryan v. Thos. Best and Sons, Inc., 453 A.2d. 107 (Del.Super.1982); also see Woodbury, "Limiting Discovery of a Defendant's Wealth When Punitive Damages Are Allowed," 23 Duquense L.Rev. 349 (1985) and Cal. Civil Code §

3295 (West 1986).

Other courts and judges, however, have taken the position that no prima facie showing is required to justify discovery, and that the problems such discovery may cause for the Defendant should be dealt with by protective orders issued by the court and geared to the circumstances of the individual case. Lunsford v. Morris, 746 S.W.2d 471 (Tex. 1988); Hughes v. Groves, 47 F.R.D. 52 (D.Ct. Mont. 1969); Thesman v. Dooley, 526 P.2d 563 (Ore. 1974); State ex rel. Kubatzky v. Holt, 483 S.W.2d 799 (Mo.App. 1972); Vollert v. Summa Corp., 389 F.Supp. 1348 (D.Ct. Haw. 1975); Holliman v. Redman Development Corp., 61 F.R.D. 488 (D.Ct. S.C. 1973); also see dissent in Leidholt v. District Court, supra.

Given Nevada's history of liberal discovery practice and tolerance for reasonable punitive damage claims, the rule which would force Plaintiff to prove a prima facie case in a "mini-trial" prior to obtaining discovery of financial information from the Defendant, would pose unreasonable restrictions on Plaintiff's ability to prepare the damage portion of his case. While the simple filing of a lawsuit should not give a litigant carte blanche to investigate the opponent's private affairs, disclosure of relevant private information should be allowed within the discretion of the court. see generally, Schlatter v. Eighth Judicial District Court ex rel. County of Clark, 93 Nev. 189, 561 P.2d 1342 (1977).

There are many reasons this opinion does not adopt the rationale of some courts which require proof of a prima facie case in order to justify simple discovery of a Defendant's financial condition. First, there is no agreement as to what constitutes a prima facie case among the courts who recommend such procedure. In many instances the burden of proof in establishing the prima facie case is quite significant, and no discovery of Defendant's financial condition is allowed until a jury has decided punitive damages are appropriate. e.g., Rupert v. Sellers, supra.

The Leidholt court indicated that making a prima facie case would include showing there was a "triable issue" which meant making a showing of a "reasonable likelihood" the issue would ultimately be submitted to the jury for resolution. Leidholt v. District Court, 619 P.2d at 771 n.3 (Colo. 1980); similar statements were found in Bryan v. Thos. Best and Sons, Inc., supra; and Campen v. Stone, supra, wherein the Court not only required proof of a prima facie case before discovery, but also incorporated a two tier system for presenting the case in court; also see Chenoweth v. Schaaf, 98 F.R.D. 587 (W.D. Pa. 1983).

Finally, other Courts obviously uncomfortable with the prima facie case procedure, have only required the showing of "some factual basis" for the punitive damage claim in order to obtain discovery. Breault v. Friedli, 610 S.W.2d 134 (Tenn.

1980); Tennant v. Charlton, 377 S.2d 1169 (Fla. 1979); Vollert v. Summa Corp., supra.

As long as Plaintiff's claim is shown to not be spurious, there would appear to be little value in establishing an evidentiary threshold for Plaintiff to overcome, simply to conduct discovery in a punitive damage case. The question of liability is a threshold issue in almost every action where money damages are claimed. The existence of such an issue does not mean Plaintiff should be precluded from preparing his case as to damages. Vollert v. Summa, Supra. The common sense of the trial judge should not be replaced by an artificial set of requirements which need to be met in order to conduct discovery. Such an attitude would run counter to the grain of liberal discovery which parties are entitled to in the State of Nevada. The learned Justice, Benjamin Cardozo, had some meaningful insights into the subject of discovery and expressed them in an early Supreme Court decision:

> The remedy of discovery is as appropriate for proof of a Plaintiff's damages as it is for proof of other facts essential to his case.
>
> Help for the solution of problems of this order is not to be looked for in restrictive formulas. Procedure must have the capacity of flexible adjustment to changing groups of facts. The law of discovery has been invested at times with unnecessary mystery. There are few fields where considerations of practical convenience should play a larger role. . . . today the remedy survives, chiefly, if not wholly, to give facility to proof. It is not to say the remedy will be granted as a matter of course, or that protection will not be given against impertinent intrusions. It is all a matter of discretion.

> [Sinclair Refining Co. v. Jenkins Petroleum, 289 U.S. 689, 693, 53 S.Ct. Rptr. 736, 737, 77 L.Ed. 1449 (1933)]

Under N.R.C.P. 26(c) and (d) a trial court can devise procedures appropriate to each individual case in order to protect the Defendant by limiting the extent and timing of discovery, as well as preventing dissemination of confidential or embarrassing information. However, under the Rules the burden of showing good cause should be upon the party who opposes discovery and is seeking a protective order. It is the party from whom discovery is sought who must establish that protective provisions are appropriate because the information sought is either confidential, unduly burdensome to provide, prematurely requested or in some other way deserving of protection. Dissenting Justice Lohr said in the Leidholt opinion as follows:

> In my view, utilization of the authority of the trial courts to issue protective orders under our rules of civil procedure will best enable the appropriate balance to be struck between a party's interest in confidentiality and freedom from unnecessarily burdensome discovery, and the interest of the opposing party in obtaining discovery of relevant information. [Leidholt v. District Court, 619 P.2d at p.773 (1980)]

A Judge can determine if a discovery request involves unnecessary harassment or an invasion of a personal or property right of a Defendant. Lunsford v. Morris, supra. The discretionary powers of the trial court allow it to protect the Defendant in a variety of ways. For example, the court may

order the records sealed, may delay the discovery of financial information until late in the discovery period and may restrict the dissemination of the financial information to the parties or even to counsel alone. Hughes v. Groves, supra; Richards v. Superior Court, 150 Cal.Rptr. 77 (Cal.App. 1977); Breault v. Freidli, supra; Vollert v. Summa Corp, supra; Luria Bros. & Co. v. Allen, 469 F.Supp. 575 (W.D. Pa. 1979); Kubatzky v. Holt, supra. The general policy of the Discovery Commissioner in this area will be to allow full discovery as to Defendant's financial condition, but to delay that inquiry upon application by the Defendant to a later time in the discovery period. This provides Plaintiff the opportunity to show there is evidence to support his theory of punitive damages in addition to the mere allegations of the complaint. Appropriate orders will be recommended in cases where confidentiality or other protection is reasonable.

It must be remembered that discovery does not equal admissibility and the trial judge can always prohibit admission of evidence regarding Defendant's financial condition until the jury has been furnished with enough proof to justify an award of punitive damages. Ruiz v. So. Pac. Transp. Co., 638 P.2d 406 (N.M. 1981); Southern Pac. v. Watkins, supra.

TO WHAT EXTENT SHOULD DISCOVERY OF DEFENDANT'S FINANCIAL CONDITION BE ALLOWED

The permissible scope of discovery should include only material evidence of the Defendant's financial condition. Once

again, courts have ranged far and wide in regard to the extent of such discovery. From a statement of net worth only, Gierman v. Toman, 185 A.2d 245 (N.J.Super. 1962) to disclosure of personal and corporate assets, income tax records and balance sheet of the corporation, Thesman v. Dooley, 526 P.2d. 563 (Ore. 1974), the opinions have differed. One court suggests that it would be the height of naiveté to suggest that a mere sworn statement of one's net worth must be accepted as the final word. Tennant v. Charlton, 377 S.2d 1169 (Fla. 1979). After allowing the Plaintiffs to discover the net worth of Defendants and the income of each Defendant for the previous three years, the Tennessee court said as follows:

> In addition, Plaintiffs are entitled to ask questions concerning individual assets and liabilities to the extent that the trial judge may determine that this is necessary to verify or impeach the general accuracy of the reported income and net worth of the Defendants. [Breault v. Friedli, 610 S.W.2d at 140 (Tenn. 1980)]

Once again the trial court has discretion to protect the Defendant from unduly burdensome or harassing discovery.

The Nevada Supreme Court has given some indications in various cases as to the extent of discovery to be allowed. One case allowed the "introduction of the financial position of the Defendant." Southern Pacific v. Watkins, 83 Nev. 471, 435 P.2d. 498 (1967). A recent case allowed evidence of the Defendant insurance company's net operating gain for the year prior to trial. Ainsworth v. Combined Insurance Co., 104

Nevada Advance Opinion 92 (October, 1988). Still another used annual profits as part of the determination of Defendant's worth. Hale v. Riverboat Casino, Inc., 100 Nev. 299, 682 P.2d. 190 (1984). The other most recent case talked of the "proven net worth" of the Defendant. Ace Truck and Equipment Rentals v. Kahn, 103 Nev. 503, 746 P.2d. 132 (1987). It would appear clear from the decisions of the Nevada Supreme Court that a simple statement of net worth provided by the Defendant would be insufficient, if objected to by the Plaintiff. The discovery, of course, must be tailored to the needs of the case in regard to the particular individual or corporate Defendant.

III.

RECOMMENDATIONS

Based upon the Commissioner's finding that Plaintiff in the instant case has offered evidence in support of his theory of punitive damages,

IT IS HEREBY RECOMMENDED that Defendant produce a current financial statement on or before February 10, 1989, and in addition thereto Defendant shall produce his tax returns for the years 1986 - 1988;

IT IS FURTHER RECOMMENDED that such information be provided to counsel for the Plaintiff and restricted to counsel's use alone in the preparation for trial and that such information not be disseminated to the Plaintiff nor to anyone

else until the trial judge determines such information be admitted into evidence at the time of trial.