IN THE MISSOURI SUPREME COURT

No. SC92871

LILLIAN LEWELLEN,
Appellant/Cross-Respondent,

v.

CHAD FRANKLIN NATIONAL AUTO SALES NORTH, LLC,
and CHAD FRANKLIN,
Respondents/Cross-Appellants.

Appeal from the
Circuit Court of Clay, Missouri
Division 4

The Honorable Larry D. Harman, Circuit Judge

REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS CHAD FRANKLIN NATIONAL AUTO SALES NORTH, LLC, AND CHAD FRANKLIN

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REPLY ARGUMENT REGARDING RESPONDENTS/CROSS-APPELLANTS' ISSUES ON APPEAL

I. THE TRIAL COURT ERRED IN ITS ORDER GRANTING LEWELLEN'S MOTION FOR SANCTIONS AGAINST FRANKLIN AND NATIONAL BY FAILING TO CLEARLY SPECIFY THE DISCOVERY SANCTIONS THAT THE COURT WAS IMPOSING ON RESPONDENTS/CROSS-APPELLANTS WITH REGARD TO PRESENTATION OF EVIDENCE AND ARGUMENT AT TRIAL AND BY DENYING RESPONDENTS/CROSS-APPELLANTS' SUBSEQUENT MOTION SEEKING A NEW TRIAL ON THAT BASIS, BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO PROVIDE ADEQUATE NOTICE OF THOSE DISCOVERY SANCTIONS RESULTING IN PREJUDICE TO RESPONDENTS/CROSS-APPELLANTS, IN THAT THE AMBIGUITY OF THE SANCTIONS ORDER WITH REGARD TO THE RESTRICTIONS ON RESPONDENTS/CROSS-APPELLANTS' ABILITY TO PRESENT EVIDENCE, OBJECTIONS, AND ARGUMENT AT TRIAL, MADE IT IMPOSSIBLE FOR THEIR COUNSEL TO ADEQUATELY PREPARE FOR TRIAL

As a preliminary matter, Lewellen discusses a discrepancy with regard to the original date of the judgment in this matter. While the judgment was file-stamped June 12, 2012, the date the judge signed the judgment, as handwritten by the judge twice on that judgment, was June 13, 2013. Lewellen directs the court's attention to *Coffer v. Wasson-Hunt*, 281 S.W.3d 308, 310 (Mo. banc 2009), which resolved a different discrepancy between the date a judgment was signed and the date the judgment was ultimately filed-stamped by the clerk. Franklin and National concur that the date the judgment was signed by the judge, June 13, 2012, constitutes the date of the judgment. As Franklin and National's post-trial motion was timely filed thirty days later, on July 13, 2012, it was timely filed under Supreme Court Rule 78.04.[1]

[1] However, it should also be noted that the June 13, 2012, judgment was not a final judgment. To constitute a final judgment, the judgment must resolve all claims against all of the parties. On May 21, 2012, the claims against Franklin and National were severed from those asserted against Defendant BMO Harris Bank for separate trials. Legal File at LF 20. When the June 13, 2012, judgment was entered, the claims against Harris Bank were still pending, and therefore the June 13, 2012, judgment was not a final judgment. *See Smith v. State*, 63 S.W.3d 218, 219 (Mo. banc 2001). Thus, the trial court would have retained jurisdiction over that judgment even after the expiration of thirty days. For the same reason, the Amended Judgment entered on September 18, 2012, was not a final judgment. The claims against BMO Harris Bank were ultimately dismissed by

Returning, then, to the substance of the first point on cross-appeal, Lewellen first argues that there was sufficient ground for the trial court to impose sanctions on National and Franklin, due to Franklin's failure to appear for deposition. National and Franklin do not contend, however, that the trial court erred by imposing sanctions in the first instance. Rather, their first point on cross-appeal is directed to the issue of whether the trial court abused its discretion by imposing sanctions that were unclear and which deprived their counsel of the opportunity to adequately prepare for trial.

However, it is beyond dispute that in the twelve days between the date the Court announced its intention to assess sanctions against Franklin and National and the date of the final pretrial conference on May 21, 2012, the trial court failed to issue the promised written order setting forth the precise sanctions that the court was imposing. While Lewellen argues that Franklin and National were not prejudiced because their trial counsel was nevertheless able to mount a defense during trial despite the specific sanctions imposed and their lack of clarity. This, however, does not eliminate the prejudice sustained by National and Franklin in that their trial counsel was left with inadequate guidance as to the specific sanctions that would be imposed, which, in turn,

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Plaintiff on November 8, 2012, at which point the Amended Judgment against Franklin and National became final. Legal File at LF 23.

impaired trial counsel's ability to prepare for trial in a manner that was unfairly prejudicial to National and Franklin.

While the trial court acted within its discretion to impose sanctions upon National and Franklin due to Franklin's failure to appear for deposition, it ultimately abused that discretion by issuing sanctions that were indistinct and unclear with regard to the manner in which National and Franklin would be able to participate at trial. Even in circumstances where a defendant's pleadings have been stricken, when a trial court indicates that the defendant will be allowed to participate at trial under certain limitations, those limitations should be made clear, so that the defendant can have a full and fair opportunity to prepare for and participate at trial within those limitations. As National and Franklin were not provided that opportunity, this Court should conclude that the trial court abused its discretion, and reverse and remand this matter for a new trial.

II. THE TRIAL COURT ERRED BY DENYING RESPONDENTS/CROSS-APPELLANTS' MOTION TO AMEND THE JUDGMENT TO REDUCE THE PUNITIVE DAMAGES AWARDED AGAINST THEM PURSUANT TO THE DOCTRINE OF *STATE FARM V. CAMPBELL*, BECAUSE THE PUNITIVE DAMAGES ASSESSED AGAINST THEM VIOLATED RESPONDENTS/CROSS-APPELLANTS' RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10, OF THE MISSOURI CONSTITUTION, IN THAT THE EVIDENCE ADDUCED AT TRIAL DID NOT SUPPORT AWARDS OF PUNITIVE DAMAGES IN EXCESS OF A SINGLE-DIGIT RATIO OF THE ACTUAL DAMAGES FOUND BY THE JURY PURSUANT TO THE *STATE FARM* DOCTRINE, THEREBY RENDERING THE AWARDS OF PUNITIVE DAMAGES EXCESSIVE AS A MATTER OF LAW. .

While Lewllen argues punitive damages award need not be reasonable in order to satisfy the due process clause, the authority she cites is derived from concurring and dissenting opinions, rather than a holding that has been adopted by the U.S. Supreme Court in its punitive damages jurisprudence. Looking to the language of the Supreme Court's principal opinions with regard to punitive damages questions, while the primary purpose of punitive damages is to punish and deter, it is clear that a punitive damage award must nevertheless bear a reasonable relationship to the actual damages awarded to

a prevailing plaintiff. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) ("courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered"). Thus, awards of punitive damages cannot be arbitrary. *See id.* at 416. Instead, they must be proportionate to the nature of the underlying misconduct and the harm caused by that conduct. The amount of punitive damages assessed should also bear a rational relationship to the civil penalties that the legislature has implemented for similar conduct, as those civil penalties embody what the legislature has concluded represent appropriate levels of punishment for similar wrongdoing, and such public policy determinations should be given due weight. *See BMW of North America v. Gore*, 517 U.S. 559 (1996)

Based upon these principals, the U.S. Supreme Court formulated the guideposts of reprehensibility, ratio, and comparable civil penalties to evaluate the constitutional propriety of punitive damages awards. *See BMW*, 517 U.S. at 575. Of these guideposts, Lewellen looks principally to the guidepost of reprehensibility in support of the punitive damage awards entered in this matter. However, looking to the guideposts as a whole yields the conclusion that the punitive damages awards, here, exceed the amount permissible under the due process clause.

Lewellen seeks to avoid the ratio guide post by leaning upon the reasoning in *BMW v. Gore* that punitive damages awards may exceed a single-digit ratio where

particularly egregious conduct has resulted in a small amount[2] of economic damages. As discussed in National and Franklin's opening brief, this principal is not automatically triggered whenever the misconduct at issue would qualify for imposition of punitive damages. *Bennett v. Reynolds*, 315 S.W.3d 867, 879 (Tex. 2010). This Court has also acknowledged that awarding punitive damages beyond a single-digit ratio requires a demonstration of "particular circumstances" and is not automatically available when the actual damages are small. *See Estate of Overbey v. Chad Franklin Nat'l Auto Sales North, LLC*, 361 S.W.3d 364, 374 (Mo. banc 2012) (*cert. denied*, 133 S. Ct. 39, 183 L. Ed. 2d 679 (2012)). Nor has the U.S. Supreme Court ever held that deviation from a single-digit ratio is automatically available when the actual damages are small.

Rather, the controlling precedent clearly requires a higher threshold of misconduct (over and above that which is required to obtain an award of punitive damages in the first instance), in combination with a small actual damages award, to trigger this exception to a single-digit ratio. As such, it should be the unusual or exceptional punitive damages case that would involve imposition of damages in excess of a single-digit multiple of the actual damages awarded. This case presents an opportunity for this Court to clarify what constitutes "particularly egregious" conduct for the purpose of this rule, and what factors drive that determination. National and Franklin respectfully submit that to qualify as

[2] Lewellen appears to assume that the actual damages of $25,000, here, are "small." It remains the position of National and Franklin that the actual damages were substantial, and that this exception to the single-digit ratio is therefore inapplicable.

"particularly egregious" conduct, there must be a showing of a substantially higher degree of reprehensibility beyond that necessary to sustain an award of punitive damages in the first instance.

Turning, then, to the reprehensibility guidepost, several factors are employed in evaluating the reprehensibility of a defendant's conduct. Lewellen, in her response, contends that the factors of repeated conduct, financial vulnerability, and trickery/deceit push this case into the realm of particularly egregious conduct that would allow departure from a single-digit ratio. It should be noted, however, that she does not raises no argument that the conduct at issue here presented any physical harm or any risk to health or safety. Thus, she implicitly concedes that this factor of the reprehensibility analysis is absent, here. This weighs heavily against a conclusion that the misconduct at issue qualifies as "particularly egregious" conduct that would merit a departure from a single-digit ratio.

Lewellen also argues that the factor of recidivism weighs in favor of a finding of elevated reprehensibility merely because many customers of National had raised similar complaints as her. However, even the authority quoted by her in her brief confirms that merely *repeated* conduct is not sufficient to trigger this reprehensibility factor. Instead, that authority contemplates a demonstration that the defendant had continued to engage in the misconduct despite "knowing or suspecting that it was unlawful." *BMW*, 517 U.S. 576-77. Lewellen's response brief does not argue that any of the evidence adduced at

trial demonstrated that National or Franklin knew or suspected that their conduct was unlawful at the time of Lewellen's transaction. Instead, she argues only that there were merely other consumers who had raised similar complaints against National or Franklin. While she hypothesizes that the conduct at issue was "a business strategy," she has failed to show that this was a strategy that National or Franklin knew was unlawful, rather than merely a course of business that was fundamentally flawed and misconceived.

Hewing to the principle of recidivism as a requirement for finding an increased degree of reprehensibility under this factor still preserves the opportunity for increased punishment for a wrongdoer who has engaged in repeated misconduct that might not qualify as recidivism. In short, a party who has injured multiple persons through separate acts of misconduct would be exposed to multiple separate claims for punitive damages. As Lewellen points out in her response brief, there have been multiple suits against Franklin and/or National which have resulted in punitive damages awards. *See, e.g.*, *Heckadon v. CFS Enterprises, Inc.*, WD74288, 2013 WL 1110690 (Mo. App. Mar. 19, 2013); *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC*, 361 S.W.3d 364, 372 (Mo. banc 2012). Under Lewellen's arguments, however, Franklin and National would face duplicative punishment, by being punished in those other cases for their misconduct with relation to those other plaintiffs, and increased punishment in this matter merely because Franklin and National's misconduct had harmed multiple people.

Viewed in that manner, it is clear that the purposes of punitive damages are not served by a rule which allows merely "repeated" conduct to qualify for punitive damages that deviate from a single-digit multiplier of the actual damages assessed. Where a defendant has engaged in repeated misconduct, he will likely face the penalty of multiple punitive damages awards (or in applicable circumstances, aggregation of multiple punitive damages claims via the class action mechanism). This provides an adequate vehicle for providing proportionate punishment for merely repeated misconduct. However, where actual recidivism is involved, and the defendant has continued to engage in the misconduct in the face of knowledge (or notice) that the conduct is unlawful, justifies a finding of greater reprehensibility that would potentially support such a departure from a single-digit ratio.

However, given that such recidivism has not been demonstrated in this matter, there is no basis from which this Court could find that this test has been met. In turn, this Court should conclude that the factor of "repeated conduct" does not lend support to a finding that National and Franklin have engaged in conduct that rises the level of "particularly egregious" misconduct which would allow the punitive damages award to exceed a single-digit multiple of the actual damages assessed by the jury.

This leaves the factors of financial vulnerability and trickery/deceit. As to the first of those factors, National and Franklin do not dispute that Lewellen presented evidence that she had a limited income, or that a collection action was brought against Lewellen by

the creditor who was the holder of the retail installment contract for the subject vehicle. While there was no evidence that the sales promotion at issue was targeted specifically at those who were financially vulnerable, the evidence adduced would arguably support a finding that Lewellen was financially vulnerable. As to the next factor, Lewellen points to evidence that employees of National had made misrepresentations to outside lenders with regard to Lewellen's income and that she did not receive sufficient funds from National to reduce all of her first-year's payments to $49/month, and such evidence would arguably support a finding that the misconduct involved deceit.

However, even if these latter two factors support a finding of reprehensibility, the Court must evaluate the reprehensibility factors as a whole, to assess the degree of reprehensibility present in this matter. Moreover, each of those factors must be taken into account in assessing whether the conduct of National and Franklin rises to the level of "particularly egregious" misconduct that would allow imposition of punitive damages awards that exceed a single-digit multiple of the actual damages that Lewellen sustained as a result of that conduct. National and Franklin respectfully submit that this threshold is not met in the case at bar, and that the punitive damages awards against them should be reduced to a single-digit multiple of the actual damages awarded to Lewellen.

By way of comparison, the case at bar bears certain parallels to the matter of *Turner v. Firstar Bank, N.A.*, 363 Ill. App. 3d 1150 (2006). *Turner* involved claims of conversion against a creditor on a vehicle loan arising from the wrongful repossession of

the debtor's vehicle. *See id.* at 1154. Despite systemically inaccurate records and notice that the vehicle loan had been paid in full, the creditor proceeded to repossess the debtor's vehicle. *See generally*, *id.* at 1154-1158. The debtor ultimately prevailed on her conversion claims, resulting in an award of actual damages in the amount of $25,000, and an assessment of punitive damages against the creditor in the amount of $500,000. *See id.* at 1164. On appeal, the appellate court reduced the punitive damages award to $225,000, concluding that the original $500,000 award violated the principles of *State Farm*. *See id.* at 1165-1166.

Here, as the Illinois appellate courts faced in *Turner*, this Court is confronted with a constellation of facts involving a claim that involves purely economic losses with no injury, property damage, or risk to health or safety, together with a similarly disproportionate ratio of actual to punitive damages. This Court should therefore follow *Turner* and conclude that the punitive damages assessed by the trial court in its amended judgment exceed the limits imposed by the due process clause of the U.S. Constitution, as in accordance with the guidance of *BMW* and *State* Farm. Thus, the amended judgment in this matter should be reversed as to the punitive damages awards against Franklin and National, and the matter remanded for entry of reduced punitive damages awards against them, which are not to exceed a single-digit multiple of the $25,000 actual damages awarded to Lewellen.

As to the last of the *BMW* and *State Farm* guideposts, comparison to civil penalties, it is beyond dispute that the comparable civil penalties available in state actions under the Missouri Merchandising Practices Act (which range from $1,000 to $5,000), are far less than the punitive damages at issue here (by at least a factor of 100). While Lewellen discusses the criminal penalties available under the MMPA to urge this Court to conclude that the punitive damages assessed here confirm to due process, *State Farm* makes it clear that criminal penalties are not a proper benchmark for determining the constitutional propriety of a punitive damages award because criminal penalties involve a process with much higher protections to the defending party and a much higher burden of proof, protections that are not present in a civil action seeking punitive damages. *See State Farm*, 538 U.S. at 428. Moreover, "[p]unitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award." *Id.*

Lewellen also relies upon the non-final[3] decision in *Heckadon v. CFS*, *supra*, for the proposition that merely being aware that punitive damages are available is adequate notice that the punitive damages could exceed the comparable civil penalties. The analysis of within the *Heckadon* decision is deeply flawed and should not be followed by this Court. In the *Heckadon* opinion, the Court of Appeals begins with the premise that

[3] An Application For Transfer was filed with this Court in the *Heckadon* matter (Case No. SC93380) on May 15, 2013, and that application remains pending as of the date this Reply was filed.

the Missouri Merchandising Practices Act typically provides for civil penalties of not more than $1,000 per violation in actions brought by the Attorney General. *See Heckadon*, 2013 WL 1110690 at *10. However, the opinion reasons that because the MMPA also allows for private civil actions in which punitive damages are available, the defendants were placed on notice that the potential punitive damages could far exceed $1,000 for any particular act of wrongdoing. *See id.* In essence, the *Heckadon* opinion surmises that merely because punitive damages are available to private litigants, in parallel to civil penalties available in MMPA actions brought by the Attorney General, the maximum amount of available civil penalties in actions brought by the State are immaterial for purposes of determining whether the punitive damages awarded to a private litigant are constitutionally excessive. This approach is irreconcilably inconsistent with the analysis that *BMW v. Gore* requires a court to undertake under this guidepost.

The *BMW* analysis requires the court to consider whether the punitive damages awarded to the private litigant exceed the civil penalties that the State could impose for comparable misconduct. Under this guidepost, a punitive damages award should be considered excessive if it exceeds the civil penalties that could be assessed for comparable misconduct. *See BMW*, 517 U.S. at 583. Thus, this guidepost entails a direct comparison between the punitive damages that may be awarded to the private litigant and the civil penalties that the State could impose for the same misconduct. The purpose of this guidepost is to "'accord "substantial deference" to legislative judgments concerning

appropriate sanctions for the conduct at issue.'" *BMW*, 517 U.S. at 583 (quoting *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989)). In contrast, the approach taken by the Court of Appeals in the *Heckadon* decision renders moot those legislative judgment by rendering civil penalties immaterial and irrelevant to the issue of reprehensibility. As *BMW* is the controlling precedent, this Court should not follow the analysis of *Heckadon* with regard to the analysis of the "comparable civil penalties" guidepost of the *State Farm* analysis.

For the reasons discussed above, this Court should conclude that the punitive damages assessed against National and Franklin exceed the amounts permitted under the due process clause of the Fourteenth Amendment to the U.S. Constitution. Accordingly, the judgment below should be reversed and remanded with regard to those punitive damages awards and the case should be reversed and remanded for entry of reduced punitive damages awards, not to exceed a single-digit ratio, in accordance with *State Farm* and *BMW*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Missouri Supreme Court Rule 84.06(c), counsel for Respondent states that this Brief is in compliance with the limitations of Rule 84.06(b), is in Microsoft Word format using Times New Roman 13 point font and contains 3,855 words, exclusive of the cover, Certificate of Compliance, Certificate of Service, and signature block. The electronic copy of this document electronically filed with the Court has been scanned for viruses using Symantec Endpoint Protection, which reported that said electronic copy is virus free.

/s/ Patric S. Linden
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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of May, 2013, I electronically filed the foregoing Brief with the Clerk of the Supreme Court using the Court's E-Filing system, which sent notification of such filing via electronic mail to the following counsel of record:

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