

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

Judicial Meeting Room
Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida
February 22-23, 2002
1:00 p.m. to 5:00 p.m. (Friday)
8:30 a.m. to Noon (Saturday)

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9. PUNITIVE DAMAGES (Tab 7).

Gunn led the discussion.

Gunn reported that the subcommittee had addressed four issues: (i) whether additional instructions or notes on use were needed in the light of BMW v. Gore, 517 U.S. 559 (1996); whether a definition of wilful and wanton conduct is needed; (iii) the creation of an intoxication instruction; and (iv) whether an instruction is needed to deal with Wransky v. Dalfo, 2001 WL 1575721 (Fla. 4th DCA Dec. 12, 2001).

The subcommittee recommended that no additional instructions or notes on use are needed to deal with the Gore decision.

The subcommittee recommended that no definition of wilful and wanton conduct is needed and that the instruction should continue to track the statute.

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As to the Wransky v. Dalfo, 2001 WL 1575721 (Fla. 4th DCA Dec. 12, 2001) decision, Gunn said the subcommittee had discussed whether a standard instruction is needed to instruct the jury that its punitive damages decision cannot bankrupt the defendant. The subcommittee was of the view that an instruction and/or a note on use is needed. The subcommittee provided a proposal at page 7-146 of the materials. Gunn pointed out that the proposed note on use makes clear that the proposed instruction can only be given when the requesting Defendant has submitted evidence of net worth. The proposed note on use also makes clear that this instruction should not supplant the court's function in determining whether a verdict is constitutional.

Wagner suggested that a case discussing the concept of net worth should be added to the footnote. Walbolt suggested that jurors may not understand the term "bankrupt" and that it should be defined. Farmer suggested that any definition of the term "bankrupt" should not be constrained to legal terminology, but instead should make clear that a defendant cannot be charged more than it is able to

pay under any circumstance. Eaton comments that there is older case law that uses the phrase “financial resources of the defendant” in similar circumstances.

Wagner questions why an instruction is needed when only one panel in one district issues a decision. The law may still be developing in this area.

In the end, it was determined that the subcommittee would explore ways to define the concept of bankruptcy, would explore again whether a new instruction and note on use is currently needed, and would report back to the committee at the July 2002 meeting.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

The Breakers
One South County Road
Palm Beach, Florida 33480
July 11-13, 2002
1:00 p.m. to 5:00 p.m. (Thursday)
Subcommittee meetings (Friday)
8:30 a.m. to Noon (Saturday)

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3. PUNITIVE DAMAGES (Tab 7).

Gunn led the discussion. She reported that the subcommittee had two lingering issues. The first was how to deal with the intoxication exception. The second was how to deal with the Wransky v. Dalfo, 801 So. 2d 239 (Fla. 4th DCA 2001) decision.

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Gunn turned the committee’s attention to the Wransky issue. That case says that, when requested, a trial court must give an instruction that the jury cannot award an amount of punitive damages that would bankrupt the defendant.

On page 7-154 of the materials, the subcommittee proposed a revision to the substantive instruction and a note on use to account for the Wransky decision. Gunn explained that the subcommittee added the words “financially destroy” in addition to using the term “bankrupt.”

Farmer said that if you asked a bankruptcy lawyer what “bankrupt” means, he would say “insolvency.” He further pointed to the statute in the fraudulent transfer section that uses a liabilities-exceeding-assets definition. Gunn explained, however, that no Florida case law gave the subcommittee authority to utilize a liabilities-exceeding-assets definition in the instruction.

Altenbernd was concerned that the term “bankrupt” may be too simple. A liabilities-exceeding-assets definition makes many defendants bankrupt. Altenbernd would use “financially destroy” in the instruction.

Pillans believes that trial lawyers would be able to argue their cases if the subcommittee just used the words “financially destroy.” Gunn pointed out that the Wransky court used the term “bankrupt” seven times in its decision. Farmer thought the number of iterations might have meant something. Kahn did not think so, and would include only the words “financially destroy.”

Walsh would leave both “financially destroy” and “bankrupt” in the instruction, but would take out the brackets.

Brown was concerned that instructions about bankruptcy could be very confusing to a jury. Stewart thought that a jury might think that bankruptcy and financial destruction are distinct concepts and, thus, the jury might get confused about what it must find.

Eaton does not think the term “bankrupt” reflects the law in this area because it implies net worth as a cap on punitive damages. He pointed to an old Fourth District decision (Lassiter, 295 So. 2d 634 (Fla. 4th DCA 1974)) by Judge Downey, which stated that net worth is not a cap. Farmer responded that the decision pre-dated the Federal Bankruptcy Code (1978).

Lumish asked if it was really the role of the committee to shy away from the term “bankrupt,” which the Wransky court used repeatedly. Gunn explained that most cases use the term “bankrupt.”

Altenbernd stated that he did not believe the term “bankrupt” is meant to tell the jury to envision a balance sheet.

Lewis suggested an approach which conveys the idea that the jury is supposed to punish, but not destroy. Gerald asked if there might be a compromise word that would work.

Lumish argued for bracketing both “financially destroy” and “bankrupt” because one may be better than the other in certain cases. Kahn suggested that the inclusion of the term “bankrupt” would create a spate of litigation as to whether the law really means a liabilities-exceeding-assets definition or not. On the other hand, Farmer saw the words “financially destroy” as being indeterminate.

The Thursday report on Wransky ended by referring the issue back to the subcommittee.

The subcommittee met on Friday to discuss the issue.

On Saturday, the subcommittee reported again. Gunn drew the committee’s attention to proposed Note on Use 10 on page 7-154. The subcommittee deleted the second sentence, which read, “It appears that this instruction can only be used when the requesting Defendant has submitted evidence of his, her or its net worth.” The subcommittee was not sure this sentence was accurate as a

matter of law.

Gunn then turned back to the substantive instruction on page 7-154. She reported that the subcommittee recommended putting both the words “financially destroy” and “bankrupt” in brackets and letting the lawyers in each individual case argue over what words should be given in the instruction.

Cacciatore was concerned that if both concepts were bracketed, most trial judges would simply read both. Walsh thought the lawyers could argue their view of the law to the jury if that happened, though.

Berman explained that the Wransky court was relying upon the Florida Supreme Court’s decision in Arab Termite And Pest Control v. Jenkins, 409 So. 2d 1039 (Fla. 1982). That decision stated, “Punitive damages should be painful enough to provide some retribution and deterrence, but should not be allowed to destroy the defendant.” Berman thought that the subcommittee should not inject the term “bankrupt” into the proposed instruction.

Gunn suggested that the subcommittee might quote Arab Termite. Stewart agreed with that idea.

Lumish was concerned that the subcommittee’s job was not to change the law, but rather to reflect what the Wransky case says. Brown did not think, though, that the Wransky court was saying that the trial courts have to use the term “bankrupt.” Caldwell believed that the law held there is a determinate cap on punitive damages. But Eaton responded that the idea of a cap set at net worth ignores that net worth is measured at a discrete point in time. Stewart observed that the subcommittee should not read Wransky to overrule Arab Termite, which it could not do.

Walsh observed that Sutter v. Hammond, 545 So. 2d 497 (Fla. 4th DCA 1989) used the term “bankrupt” in its analysis as well.

In the end, it was determined that the subcommittee would continue to work on the instruction and would go back to examine the Arab Termite And Pest Control v. Jenkins, 409 So. 2d 1039 (Fla. 1982) case as a guide. It was further agreed that a flag as to the Wransky decision would be published to alert practitioners while the subcommittee continues its work.

As referenced above in the bad faith section, this subcommittee will also gather the history of the use of the term “warranted” in the punitive damages instruction and will consider whether an overhaul is needed.

Walbolt asked Gunn about possible issues in BMW v. Gore, 517 U.S. 559 (1996), affecting the punitive damages instructions. Gunn stated that the Gore issues generally were not jury issues. Makar is going to check the Eleventh Circuit Pattern Instructions to see if there is anything the subcommittee needs to reconsider in this respect.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

Marriott Waterside
700 South Florida Avenue
Tampa, FL 33602
November 14-15, 2002
1:00 p.m. to 5:00 p.m. (Thursday)
8:30 a.m. to Noon (Friday)

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9. PUNITIVE DAMAGES (Tab 7).

Gunn led the discussion. She reported that the subcommittee had three lingering issues. The first was how to deal with the intoxication exception. The second was how to deal with the Wransky v. Dalfo, 801 So. 2d 239 (Fla. 4th DCA 2001) decision. The third was how/whether to deal with the BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) case and the issue of what factors are relevant when considering the amount of punitive damages.

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Gunn then turned to the Wransky v. Dalfo, 801 So. 2d 239 (Fla. 4th DCA 2001) issue. This discussion was led by Lumish, based on her memorandum found on pages 7-161 through 7-176. Lumish explained that Appendix A (starting on page 7-169) contains excerpts from the various opinions that may bear on the Wransky v. Dalfo issue.

Lumish pointed out that Arab Termite And Pest Control v. Jenkins, 409 So. 2d 1039 (Fla. 1982) never used the term “bankrupt,” but that Lehman v. Spencer Ladd’s Inc., 182 So. 2d 402 (Fla. 1965) did use the following formulation: “a sum of money which, according to [defendant’s] financial ability, will hurt, but not bankrupt.” Indeed, on page 7-163, Lumish provided a summary of the formulations used for this concept by the courts. Lumish recommended using bracketed “[financially destroy][bankrupt]” to provide for flexibility.

Wagner asked whether the cases that use the term “bankrupt” define what it means. In this respect, Walbolt asked if there was anything in the cases to suggest that the courts were using the term “bankrupt” in the current legal sense of the word. Gunn responded that the cases could be read to be treating the terms “bankrupt” and “financially destroy” to mean the same thing.

Gerald asked what attorneys would argue if the term “bankrupt” is given in an instruction.

Waltolt was concerned that using the term “bankrupt” might create a heightened standard.

Brown asked whether “financially destroy” alone would be sufficient if “bankrupt” really means the

same thing. Cobb responded that both options should be available because the instruction should turn on how the expert testimony come in. If all of the testimony is about bankruptcy, the instruction should be given in those terms.

Austin commented that he would only use the term “financially destroy” in the instruction. Pillans likewise would omit the term “bankrupt.”

Mitchell spoke in favor of leaving the two options bracketed. The cases use both terms and it is not the committee’s job to make up law, he said. There are nuances, he noted, that should be left to the arguments of the lawyers. Berman disagreed. He believed that a reasonable interpretation was the courts were not using the term “bankrupt” in a technical sense. In this respect, Wagner noted that some of the decisions using the term “bankrupt” came before the code allowing reorganization. Barton suggested adding a note on use that explains that “financially destroy” includes the concepts of bankrupting, economic castigation, and other terms used by the courts.

Lumish reiterated that numerous cases use the term “bankrupt” and that she thinks it is up to the lawyers to make their arguments about that term when it is appropriate to be instructed. Walbolt commented that the note on use could indicate that nothing in the cases indicate that the term “bankrupt” means the technical usage of the word, but that the court could use either “financially destroy,” “bankrupt,” or both in a given case. Lewis saw no problem with using both terms in a given case. He was not concerned that they might sound redundant.

Brown asked if testimony regarding the Bankruptcy Code was going to be allowed if the instruction included the term “bankrupt.” Walsh suggested using both terms in the instruction, both in brackets, but adding a note of use with respect to the Bankruptcy Code issue.

Stewart said that he was concerned about using the term “bankrupt” if it could lead to improper evidence, especially if the committee is satisfied that “bankrupt” and “financially destroy” are essentially the same. Mitchell reiterated that he does not think the two terms are essentially the same. Graham responded that he believed the two terms were essentially the same and that the committee should only use “financially destroy.”

Eaton observed that a defendant can be bankrupt, but not financially destroyed.

Wagner stated that he disagreed with putting both terms in brackets because the court could then decide to give only “bankrupt” in the instruction, and he does not think the cases endorse the exclusive use of that term. Lumish explained that *St Regis Paper Co. v. Watson*, 428 So. 2d 243 (Fla. 1983) does use the term “bankrupt” exclusively.

Cacciatore raised the concern that if both terms are included in brackets, many courts will use both terms. If the term “bankrupt” is going to be included, there must be a note on use as to that term, Cacciatore believed.

Gunn asked if there ever would be a case where only “bankrupt” would be appropriate and “financially destroy” would be wrong. Lewis pointed out that different people understand the two terms differently.

Wagner observed that punitive damages cannot be discharged in bankruptcy.

Walbolt suggested omitting the term “bankrupt,” but adding a note on use.

The committee agreed to omit the term “bankrupt” from the instruction, but to draft a note on use explaining the concepts encompassed by the term “financially destroy.” The subcommittee will do this and report back in February 2003. In the interim, Gunn will draft a Wransky flag for publication.

Gunn then turned to the factors that might be appropriate for inclusion in note on use 4, which can be found on page 7-162.

It was explained that, when reading the current instruction concerning the amount of punitive damages, some judges actually read the sentence “(3) any other circumstances which may affect the amount of punitive damages,” rather than attempting to list what those circumstances may be. Doing so may allow a jury to consider improper circumstances. Currently, the note on use only lists W.R. Grace & Co. v. Waters, 638 So. 2d 502 (Fla. 1994), as a possible relevant circumstance. Lumish commented, as explained in her memorandum at page 7-162 through 7-167, that the Florida Supreme Court has recognized other relevant circumstances in Owens-Corning Fiberglass v. Ballard, 749 So. 2d 483 (Fla. 1999). She also commented that the case of BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) provides possible factors for consideration.

Wagner suggested adding the word “list” to the instruction “(3) any other circumstances which may affect the amount of punitive damages,” to make clear that the sentence is not to be read verbatim, but rather that other relevant circumstances are to be listed by the court. Gunn suggested putting the new proposed “(3) list any other circumstances which may affect the amount of punitive damages,” in brackets as well. Both Gunn and Wagner thought the note on use should be fixed to, at least, add reference to the Owens-Corning Fiberglass v. Ballard, 749 So. 2d 483 (Fla. 1999) case. Gunn also thought that note on use 4 should be divided into two notes, as it currently addresses two distinct ideas.

The subcommittee will circulate a proposal consistent with the comments by Wagner and Gunn to the committee. The subcommittee will add reference to Owens-Corning Fiberglass v. Ballard, 749 So. 2d 483 (Fla. 1999) to the note on use. The subcommittee will continue to explore whether reference to BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) should be made as well.

Eaton asked the subcommittee to examine the decision in Lassiter, 295 So. 2d 634 (Fla. 4th DCA 1974), as well. Eaton commended Lumish for her work on the memorandum.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

Casa Monica Hotel
95 Cordova
St. Augustine, Florida 32804
February 20-21, 2003
1:00 p.m. to 5:00 p.m. (Thursday)
8:30 a.m. to Noon (Friday)

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11. PUNITIVE DAMAGES (Tab 7).

Gunn led the discussion. She first alerted the committee to the fact that a flag regarding the Wransky v. Dalfo, 801 So. 2d 239 (Fla. 4th DCA 2001) decision has been put in place. That can be seen on page 7-223.

A proposed revision to the actual punitive damages instruction is found starting on page 7-226. After the committee reviewed the proposed note on use 10 [Reporter's note: notes on use 10 and 11, as they appear on pages 7-226 and 7-227, are now reversed in the draft that will be circulated to the committee, in order to correct formatting], it was decided that the sentence that reads, "[t]he Committee assumes that these various terms are synonymous" would be deleted. Further, the word "necessary" in the last sentence would be changed to "appropriate."

Then, on page 7-226, subpart (3), which did read, "list any other circumstances which may affect the amount of punitive damages," was changed to read, "identify any other circumstance that the jury may consider in determining the amount of punitive damages."

The first sentence of note on use 11 on page 7-227 [Reporter's note: as stated above, notes on use 10 and 11, as they appear on pages 7-226 and 7-227, are now reversed in the draft that will be circulated to the committee, in order to correct formatting] has been changed to read, "Subparagraph (3) should be used only after the court has determined that the evidence includes some additional circumstance that may affect the amount of punitive damages."

With these changes and formatting changes, the proposed revisions will be circulated to the committee, and then published for comment.

**SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS
(CIVIL)**

The Breakers
One South County Road
Palm Beach, Florida 33480
July 10-11, 2003

Gunn led the discussion. She directed the committee's attention to pages 7-344 and 7-345 of the materials. There, the June 1, 2003 Florida Bar News publication of the subcommittee's current proposed modification is printed. The subcommittee received one comment. It was from John Pappas and is found on page 7-346 of the materials. The subcommittee believes that note on use 11 already addresses the concern raised by Mr. Pappas and that no further modification is necessary in that regard.

The committee decided that the PD proposal on pages 7-344 through 7-345 should be submitted to the Florida Supreme Court unless the following discussion of *State Farm v. Campbell*, 123 S. Ct. 1513 (2003) creates a reason for not doing so.

. . . (extensive discussion of Campbell followed) . . .

As the current proposal that was published on June 1, 2003 contains changes that the committee believes are important, it was decided that the current proposal (the June 1, 2003 published version) should be submitted to the Florida Supreme Court, but that reference to the Campbell decision in the new comment 10 should be removed. Instead, a cautionary flag highlighting the existence of Campbell should be added (see page 7-293 of the materials) to the instruction until a better Campbell comment can be drafted.

The subcommittee will continue its work on Campbell issues and it will examine whether there is a need to state the burden of proof at the end of the second phase of a bifurcated trial (the burden of proof is currently given only at the beginning of the second phase). It will report at the November 2003 meeting.