

No. 1012112

IN THE SUPREME COURT OF ALABAMA

SHIV-RAM, INC. d/b/a RAMADA INN OF ANNISTON

Appellant,

v.

LINDA McCALEB,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF CALHOUN COUNTY, ALABAMA
CIVIL ACTION NO. CV-1998-820

AMICI CURIAE BRIEF
OF BUSINESS COUNCIL OF ALABAMA, ALABAMA BANKERS
ASSOCIATION, ALABAMA CIVIL JUSTICE REFORM COMMITTEE,
AND AUTOMOBILE DEALERS ASSOCIATION OF ALABAMA, INC.
IN SUPPORT OF APPELLANT'S APPLICATION FOR REHEARING

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SUMMARY OF THE ARGUMENT

By implying that a standard due diligence clause in a business purchase contract creates a duty in tort to completely inspect all business premises and records prior to closing, the majority opinion departs from Alabama law and jeopardizes traditional business purchases and sales throughout Alabama. The Court should clarify that this implication was not part of its holding as it was not raised, argued, or briefed on appeal.

Under Alabama law, the reservation of a right in contract to inspect does not give rise to a duty in tort. See, e.g., Gilley v. Barnett, 624 So. 2d 572 (Ala. 1993). While the purchaser in this case had a duty in tort to provide the plaintiff with a safe motel room, the purchaser had no duty in tort to fully inspect the motel and all of its records prior to closing. The majority opinion charges the purchaser with knowledge of pre-closing incidents that allegedly made a post-closing injury likely or probable. Traditional contractual due diligence rights should not give rise to tort liability or provide justification for the imposition of punitive damages.

Moreover, the facts set out in the opinion fail to demonstrate "clear and convincing" evidence of wantonness. Shiv-Ram had no actual knowledge of the prior bed-frame incidents, and the plaintiff's injury occurred only one day after Shiv-Ram became the owner of the motel. The retroactive imputation of constructive knowledge of prior bed-frame incidents is not "clear and convincing" evidence that the plaintiff's injury was likely or probable. The punitive damages award should not have been affirmed.

In the alternative, under BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), and its progeny, including State Farm Mutual Automobile Insurance Co. v. Campbell, 123 S. Ct. 1513 (2003), the Court should reduce the punitive award to a ratio no greater than 1:1 given the substantial compensatory award and the lack of reprehensibility in this case.

ARGUMENT

I. THE COURT SHOULD CLARIFY THAT IT DID NOT HOLD THAT THERE IS A RETROACTIVE DUTY TO INSPECT THE MOTEL'S RECORDS AND PREMISES PRIOR TO CLOSING.

On February 25, 1997, Shiv-Ram, Inc. d/b/a Ramada Inn of Anniston ("Shiv-Ram") entered into an agreement to purchase the motel "as is." Shiv-Ram, Inc. v. McCaleb, No. 1012112 at Ms. 4 (Ala. Dec. 30, 2003). The purchase agreement, like many purchase agreements, gave the purchaser the contractual right to inspect the premises and records prior to the closing -- to perform "due diligence." Id. at 5, 7. Shiv-Ram's franchisor, Ramada Franchise Systems, Inc., conducted a limited pre-closing inspection, but Shiv-Ram did not inspect the premises, as it had a contractual right to do prior to the June 13, 1997, closing. Id. at 8.

Plaintiff, Linda McCaleb, injured her ankle on a bed frame one day after the closing. Id. at 3, 5.

The majority opinion affirmed a judgment on the claim of wantonness against Shiv-Ram based on the pre-closing bed-frame incidents. Shiv-Ram, at Ms. 30 - 31.¹ Wantonness is one of the gateways to punitive damages under Alabama

¹ This is not a successor liability case.

Code section 6-11-20(a). "[T]o establish wantonness, the plaintiff must 'prove that the defendant caused harm by the conscious doing of some act or the conscious omission of some duty, while knowing of the existing conditions and being conscious that, from doing or omitting to do an act, injury would likely or probably result.'" Id. at 29 (quoting Kmart Corp. v. Peak, 757 So. 2d 1138, 1144 (Ala. 1999)) (emphases added).

The opinion appears to have found sufficient evidence of the likelihood of the plaintiff's injury from the fact that the purchaser could have discovered pre-closing bed-frame incidents if it had performed a more complete exercise of its contractual due diligence rights. Shiv-Ram, at Ms. 30 (stating, "We conclude that there was substantial evidence of wantonness" - that Shiv-Ram omitted performing a duty that under the circumstances made the injury likely or probable). The Court based its likelihood analysis on pre-closing events that were not known, but could have been discovered. Id. at 30-31.²

² Shiv-Ram did not own the motel until June 13, 1997, yet the Court focused almost exclusively on Shiv-Ram's pre-ownership "opportunity" to inspect. See, e.g., Shiv-Ram, at Ms. 5, 6, 7, 10, 11, 27-28, 30, 31, 35 & 41.

The contractual right to inspect property subject to a purchase agreement is a right of the purchaser and not a duty or obligation of the purchaser. A complete inspection of the property, a review of all records, and an interview of all employees simply are not requirements of normal purchase transactions. The purchaser may exercise its inspection rights fully or in a limited fashion. The imposition of a duty -- enforceable via punitive damages -- to do what is contrary to standard business practice, is and should be contrary to law.

The majority opinion, as written, poses a dangerous precedent for several reasons. First, to the extent the opinion bases Shiv-Ram's duty on its contractual right, it defies settled law. Alabama law is replete with statements that the right to inspect, standing alone, does not constitute a duty to inspect. See, e.g., Gilley v. Barnett, 624 So. 2d 572, 574 (Ala. 1993) (holding that, although HUD "reserved the right to inspect the owner's premises," the plaintiff failed to present substantial evidence that HUD "had a duty to inspect"); Hurst v. Wallace Constr. Co., Inc., 603 So. 2d 985, 987 (Ala. 1992) (holding "[t]he defendant's contractual right to enforce safety if a

violation is observed does not, alone, constitute a voluntary assumption of the duty to inspect for safety. . . "); Thomas v. Pepper Southern Constr., Inc., 585 So. 2d 882, 884 (Ala. 1991) (same).

Second, the contractual right to inspect in a purchase agreement is for the financial protection of the purchaser, not for the benefit of future third-party claimants. There is no contractual duty to inspect. While a business owner might be charged with responsibility for the premises and transactions after the purchase of the business, bootstrapping a tort duty to a contractual right in this context to create a retroactive liability is not envisioned by contract law.

What is the impact of the majority opinion's reasoning on a transaction where the purchaser requires warranties of merchantability, suitability, or fitness for a particular purpose? Would the purchaser, who obtains standard pre-closing due diligence rights, be liable for wanton conduct and punitive damages for a post-closing injury because he relied on the seller's warranties? Must a purchaser delete pre-closing due diligence rights from the purchase contract

and buy "blind" based on the seller's representations? This would be unrealistic.

Amici understand that Shiv-Ram did not, in this appeal, raise, argue, or brief the underlying retroactive duty issue for wantonness and thus, none of these issues were (or could have been) addressed by the Court. See Shiv-Ram Reply Br. at 1 ("[W]hether or not Shiv-Ram was negligent or wanton in failing to inspect the motel in question is simply not at issue on this appeal"). *Amici* are not asking that the Court address issues not properly preserved. *Amici* ask only that the Court clarify that the issue of whether contractual due diligence rights gave rise to a duty in tort was not challenged on appeal and thus, the Court did not hold that such a duty exists.

II. THERE WAS NO "CLEAR AND CONVINCING" EVIDENCE OF WANTONNESS TO SUPPORT AN AWARD OF PUNITIVE DAMAGES.

Alabama Code section 6-11-20 requires "clear and convincing" evidence of wantonness to support an award of punitive damages. The evidence set forth in the majority opinion does not meet this standard.

This Court repeatedly has held that "knowledge of the defendant is 'the *sine qua non* of wantonness.'" Ammons ex rel. Wausau Ins. Co. v. Tesker Mfg. Corp., 2002 WL

31888156, *2 (Ala. Dec. 20, 2002) (quoting Norris v. City of Montgomery, 821 So. 2d 149, 156 n.9 (Ala. 2001), and Ricketts v. Norfolk Southern Ry., 686 So. 2d 1100, 1106 (Ala. 1996)).³ It is undisputed that Shiv-Ram did not have actual knowledge of the pre-closing bed-frame incidents. Thus, a conclusion that the plaintiff's injury was likely could only have been based on the constructive knowledge arising from the implied duty to inspect.

The omission of a duty to inspect, even after closing, should not imply constructive knowledge of bed-frame incidents that rises to the level of "clear and convincing" evidence of Shiv-Ram's knowledge of the likelihood of the plaintiff's injury. Even more attenuated is the proposition that the omission of a retroactive duty to inspect before closing rises to a level of "clear and convincing" evidence of Shiv-Ram's knowledge of the likelihood of the plaintiff's post-closing injury.

³ This Court has held that "wantonness is not merely a higher degree of negligence; instead, it is a qualitatively different tort concept of actionable culpability" -- knowledge of likelihood of injury is required. Cessna Aircraft Co. v. Trzcinski, 682 So. 2d 17, 19 (Ala. 1996) (quoting Lynn Strickland Sales & Serv., Inc. v. Aero-Lane Fabricators, Inc., 510 So. 2d 142 (Ala. 1987)).

While the evidence of pre-closing incidents (e.g., four bed-frame incident reports) arguably might rise to the level of "substantial evidence" to support a claim of negligence, it is not sufficient evidence of wantonness under a "clear and convincing" standard. Simply put, the pre-closing incidents, connected to Shiv-Ram only by constructive knowledge and by a retroactive implied duty to inspect, do not satisfy the "clear and convincing" evidentiary standard.

III. IF THE COURT DOES NOT REVERSE AND RENDER WITH RESPECT TO THE "CLEAR AND CONVINCING" ISSUE, THE COURT STILL SHOULD REDUCE THE PUNITIVE AWARD UNDER BMW AND CAMPBELL.

Even assuming "clear and convincing" evidence of wantonness, the facts of this case justify a punitive damages ratio of no more than 1:1. *Amici* will not belabor each factor of the analysis set forth in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989), and Hammond v. City of Gadsden, 493 So. 2d 1374 (1986). Instead, *Amici* address only the "ratio" factor in light of the BMW progeny and the lack of reprehensibility of Shiv-Ram's conduct.

In State Farm Mutual Automobile Insurance Co. v. Campbell, 123 S. Ct. 1513, 1524 (2003), the Supreme Court of the United States, applying the BMW test, stated:

Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages." . . . (positing that a higher ratio might be necessary where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine"). The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.

(Emphasis added) (citations omitted).

In this case, the compensatory damages awarded to plaintiff were substantial - \$176,572.82. Beyond that, there was a punitive award of \$500,000 that yielded a 2.83:1 ratio. Nothing in the opinion or the parties' briefs indicates what portion, if any, of the \$176,572.82 compensatory damages award was for non-economic damages (i.e., mental anguish or pain and suffering). As the amount of "soft" damages in a compensatory award increases, so too should the permissible ratio decrease. To apply any

other rule would invite inflated compensatory awards, and render meaningless the restriction on punitive damages. The injury, though apparently quite uncomfortable and inconvenient, is not death, dismemberment, or permanent disfigurement. The mere fact that the ratio falls within 3:1 should not be a safe-haven for an otherwise erroneous judgment. An analytical review of the award demands more.

An analysis of the reprehensibility of Shiv-Ram's conduct supports little, if any, punitive award. The "reprehensibility" factor is "the most important indicium of the reasonableness of a punitive damages award." See Orkin Exterminating Co. v. Jeter, 832 So. 2d 25, 39 (Ala. 2001) (quoting BMW, 517 U.S. at 575). This is not a case involving intentional misconduct. This is not a case involving lies, cheating, or stealing. At worst, this case involves neglect of a duty which, if performed, might have prevented plaintiff's injury. This factor weighs heavily in favor of a low punitive damages award a low ratio.

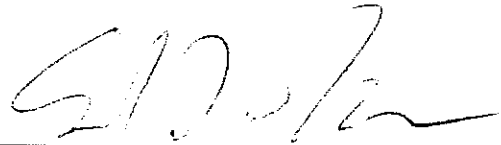
Reducing the reprehensibility of Shiv-Ram's conduct further is the fact that the conduct at issue is based largely, if not entirely, on the failure to exercise a right contained in the purchase agreement between Shiv-Ram

and the seller of the motel. The liability imposed against Shiv-Ram was based upon the questionable conversion of a contractual right into a tort law duty. Under the totality of circumstances, the punitive damages assessed against Shiv-Ram should not exceed a 1:1 ratio.

CONCLUSION

Amici respectfully request that the Court grant rehearing on the issues addressed in this brief. Upon rehearing, *Amici* request that the Court clarify that it expresses no view on the underlying duty because that issue was not before the Court. *Amici* also request that the Court reverse the trial court's judgment with respect to the "clear and convincing" evidence issue, and render judgment in favor of Shiv-Ram on plaintiff's punitive damages claim. In the alternative, *Amici* request that the Court reverse the \$500,000 punitive damages award, and remand for remittitur to an amount yielding a ratio no greater than 1:1.⁴

⁴ By declining to address the issue of whether Henderson v. Alabama Power Co., 627 So. 2d 878 (Ala. 1993), should be overruled, and, if so, whether the "old" Alabama Code section 6-11-21 applies to this case, *Amici* do not endorse the majority opinion on this issue.



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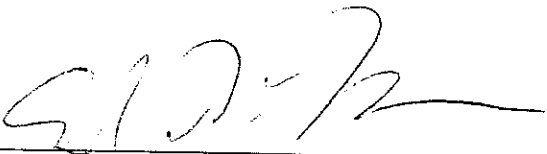
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by United States mail, properly addressed and postage prepaid, on this the 13th day of January, 2004.

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