PRE-TRIAL DISCOVERY OF NET WORTH INFORMATION: DO NOT BACK DOWN

As we are all aware, Miss. Code Ann. §11-1-65 provides that the fact-finder *shall* consider, among other factors, "the defendant's financial condition and net worth" when determining the amount of a punitive damage award. Many of us, consistent with this statutory mandate, propound interrogatories or requests for production which are calculated to elicit the financial condition and net worth of a defendant. Invariably, written discovery requests of this nature are met with objections. The purpose of this brief article is to provide ammunition to fight these wrong-headed objections.

For over one hundred years, Mississippi jurisprudence has acknowledged that pre-trial discovery of financial information is not contingent on whether such information will be admissible at trial.[1] Pre-trial discovery of financial information is instead solely contingent upon whether the plaintiff has made a claim for punitive damages.[2]

This jurisprudential rule is entirely consistent with the guiding principle of the Mississippi Rules of Civil Procedure, which is the "just, speedy and inexpensive determination of every action,"[3] as well as the more specific dictate of Rule 26 that "[a]ny matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party" is discoverable.[4] Moreover, this rule is logically consistent with Miss. Code Ann. § 11-1-65(1)(c)'s mandate that the

---

1 *Pullman Palace Car. Co. v. Lawrence*, 74 Miss. 782, 22 So. 53 (1896); *Fowler v. King*, 254 Miss. 61, 179 So.2d 800 (1965).
2 *Id.*
3 Miss. R. Civ. P. 1 ("These rules shall be construed to secure the just, speedy, and inexpensive determination of every action.").
4 Miss. R. Civ. P. 26(b)(1).

punitive damages phase commence “promptly” after the compensatory phase and before the same trier of fact.

1. Mississippi law requires pre-trial disclosure of financial information

The Mississippi Supreme Court first addressed this issue in *Pullman Palace Car Co. v. Lawrence*.[5] In that case, a railroad company employee assaulted a passenger who ultimately sued the company and sought punitive damages. As part of his pre-trial discovery, the passenger propounded six interrogatories “with the view of showing the [company’s] financial condition….”[6] The Company objected on grounds that the requested information “involved exposure of the defendant’s dealings with its stockholders….”[7] The circuit court refused to suppress the interrogatories and the defendant appealed. The Supreme Court, in ruling against the Company, stated:

> True, the plaintiff might have asked the proper officers of the company what its actual condition was, but we see no objection to have this shown in another, and perhaps for the plaintiff’s purpose, a safer mode of bringing the financial condition of the defendant to the jury’s attention. We are at a loss to conjecture how it was impertinent and incompetent to ask defendant: 1. The entire paid-up capital stock of the company; 2. What its liabilities were; 3. What are the assets of the company? 4. What was the surplus of the company over and above liabilities? 5. What dividends have been paid stockholders for five years past, and how they were paid. The result of these few questions was to see what the real pecuniary condition of the company was, and the course taken to that end was both simple and natural, and was, as it occurs to us, unobjectionable.[8]

5 74 Miss. 782, 22 So. 53 (1896).
6 *Id.* at 808.
7 *Id.*
8 *Id.*

The continued validity of *Lawrence* was noted by the Court in *Fowler v. King*,[9] in which it is stated:

> The final assignment of error, that the court erred in suppressing the interrogatories with reference to the financial condition of the defendants, is well taken. In *Pullman Place Car Co. v. Lawrence*, this Court refused to suppress interrogatories propounded with the view of showing the financial condition of the defendant, the reason being that punitive damages were sought. The plaintiff seeks punitive damages in the case at bar. Therefore, the interrogatories should not have been suppressed as their admissibility into evidence would depend upon whether or not the issue of punitive damages was sufficiently established to the jury.[10]

These cases illustrate that the Mississippi Supreme Court has long acknowledged that pre-trial discovery of the financial condition of a defendant is appropriate and solely contingent upon whether the plaintiff is seeking punitive damages – not whether such information may ever become admissible at trial.

2. The vast majority of state and federal courts allow pre-trial discovery of financial information when the plaintiff asserts a punitive damage claim

Mississippi state courts are not alone in their recognition of the value of pre-trial discovery of the financial condition of a defendant. The vast majority of state and federal courts allow pre-trial discovery of financial information when the plaintiff has asserted a punitive damage claim.[11]

Of course, many defendants argue that these findings should be ignored, suggesting that pre-trial discovery of financial information is premature before the

---

9 254 Miss. 61, 179 So.2d 800 (1965).

10 *Id.* at 71 (internal citation omitted).

11 *United States v. Matusoff Rental Co.*, 204 F.R.D. 396, 399 ("The overwhelming majority of federal courts to have considered the question have concluded that a plaintiff seeking punitive damages is entitled to discover information relating to the defendant's financial condition in advance of trial and without making a prima facie showing that he is entitled to recover such damages."); D.E. Evans, Annotation, *Pretrial Discovery of Defendant's Financial Worth on Issue of Damages*, 27 A.L.R. 3d 1375, 1377 (1969) (stating that most states permit pre-trial discovery of net worth information in punitive damage cases).

court has determined whether it will allow the submission of a punitive damage instruction to the jury.[12] Objections of this nature are routinely rejected. Perhaps the federal district court in Hawaii put it best when it explained:

> Defendant further maintains that plaintiff has no need for the information at the present time. It is claimed that plaintiff must first prevail on the issue of liability and the issue of whether defendant's conduct justified punitive damages in this case before the amount of damages would be even arguably relevant. It is sufficient at this stage to state that plaintiff has shown that his claim for punitive damages is not spurious, and that the question of liability is a threshold issue in almost every action in which money damages are claimed. The existence of these issues does not mean that plaintiff should be precluded from preparing his case as to damages. Defendant's attorney well knows that both the issue of liability and the amount of damages normally go to the jury together. It must be assumed at this point that the jury will receive proper instructions as to how and when to decide the issue of punitive damages. Therefore, it is not premature for plaintiff to demand discovery on any financial information relevant to the question of punitive damages.[13]

Simply put, a demand for pre-trial discovery of financial information is ripe and appropriate when a punitive damages claim is made by the plaintiff in his complaint.

3. Pre-trial discovery of financial information is efficient

As part of the punitive damages phase, a plaintiff is entitled to present the jury with "all proof of assets, liabilities, income, [and] accounting procedures that tend to diminish or expand any of those figures."[14] A plaintiff may choose to

---

12 *See*, Request No. 7, Response ("Further, the request for information related to Defendant's net worth requested in subpart c is premature.").

13 *Vollert v. Summa Corp.*, 389 F.Supp. 1348, 1351 (D. Hawaii 1975); see also, *CEH, Inc. v. FV "Seafarer"*, 148 F.R.D. 469, 471 (D. R.I. 1993) ("There has been no decision cited to me by either party or discovered by me in research that would require a departure from the majority rule. Plaintiffs are entitled to pre-trial discovery of each defendant's financial status. Whether or not plaintiffs may use the financial information at trial does not affect its discoverability. Discovery is based on relevance, not admissibility.").

14 *Beta Beta Chapter of Beta Theta Pi Fraternity v. May*, 611 So.2d 889, 897 (Miss. 1992).

designate an expert witness to present testimony of this nature. Of course, an expert witness needs access to documents and information to develop opinions with respect to these matters.

Should a plaintiff be forced to wait until the conclusion of the liability phase of trial before they may gain access to the defendant's financial information, the plaintiff's expert will not be afforded any opportunity to question or examine the validity of the figures provided without requesting a continuance. Yet, a continuance would run contrary to Miss. Code Ann. § 11-1-65(1)(c)'s mandate that the punitive damages phase commence "promptly" after the compensatory phase and before the same jury.

By contrast, pre-trial discovery simultaneously eliminates the defendant's opportunity to provide only self-serving information, and encourages the plaintiffs to gather and assimilate all relevant information prior to trial to ensure prompt commencement of the punitive damages phase.

4. Pre-trial discovery of net worth information may facilitate settlement

Several courts have recognized that pre-trial discovery of net worth information "may be of infinite value to counsel for both sides in making a realistic appraisal of the case."[15] Moreover, courts have noted that a "[p]laintiff's knowledge of defendant's net worth may lead to settlement and avoid protracted litigation."[16]

---

15 *Holliman v. Redman Dev. Corp.*, 61 F.R.D. 488, 491 (D. S.C. 1973).

16 *Id.*; see also, *Mid Continent Cabinetry, Inc. v. George Koch Sons, Inc.*, 130 F.R.D. at 152 ("First, knowledge of defendant's net worth will be of value to both sides in making a realistic appraisal of the case, and may lead to settlement and avoid protracted litigation."); *State of Wisconsin Investment Bd. v. Plantation Square Assoc.*, 761 F.Supp. 1569, 1578 n.10 (S.D. Fla. 1991) ("It has been said that net worth discovery also encourages settlement by encourage both parties to more accurately evaluate the case.").

Thus, we have yet another policy reason to allow pre-trial discovery of financial information: Pre-trial discovery of a defendant's financial condition may assist the plaintiffs in making a realistic evaluation of the viability of their punitive damage claims against a defendant, and may perhaps focus a defendant's attention more keenly on the risks it faces in the litigation.

Conclusion

Fight back any time you face an objection to your attempt to obtain pre-trial discovery of a defendant's net worth or financial condition. The law of this State and the majority of courts across the country is on your side.