

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL IN AND FOR MIAMI-DADE
COUNTY, FLORIDA

ANDRE MILES and PATRICIA EMERY,
on behalf of their son, ANDRE K. EMERY,

CASE NO: 14-19008 CA

Plaintiffs,

v.

MIAMI POSTAL SERVICE CREDIT UNION,

Defendant.

**ORDER GRANTING PLAINTIFF'S MOTION TO AMEND AND
FOR LEAVE TO ADD CLAIM FOR PUNITIVE DAMAGES**

THIS MATTER, having come to be heard on Plaintiff's Motion for Leave to Add Claim for Punitive Damages, and the Court having heard from the parties and being otherwise advised on the premises, it is hereupon ORDERED AND ADJUDGED:

1. Plaintiff's Motion for Leave to Add Claim for Punitive Damages and to file a Second Amended Complaint is hereby GRANTED.

2. The Second Amended Complaint filed January 27, 2015 is deemed the controlling complaint to which the Defendant shall file a response within 10 days from rendition of this Order.

In support of this Order, the Court finds the following:

The Legal Standard for Assertion of Punitive Damages

3. The legal standard for punitive damages for gross negligence and corporate liability thereon under Florida Statutes § 768.72(2) is that a defendant may be liable for punitive damages if the defendant was guilty of gross negligence or intentional misconduct. § 768.72(2), Fla. Stat. (2014). To claim for punitive damages, a plaintiff must obtain leave from the Court to amend his complaint after making an evidentiary proffer that would provide a reasonable basis

for recovery of punitive damages under a gross negligence or intentional misconduct theory. § 768.72(1), Fla. Stat. (2014); Fla. R. Civ. P. 1.190(f). The five-step procedure of § 768.72 requires: (1) before asserting punitive damages, plaintiff seeks leave to amend his complaint; (2) the trial court conducts a hearing; (3) the plaintiff makes an evidentiary proffer justifying the assertion of punitive damages; (4) all parties are given an opportunity to fully argue the merits of the motion; and (5) the Court grants the motion to amend.

4. A proffer of evidence supporting a punitive damages claim is merely a representation of what evidence the Plaintiff proposes to present and is not actual evidence. *Id.* at 642. An evidentiary hearing where witnesses testify and evidence is offered and scrutinized under the pertinent evidentiary rules, as in a trial, is improper in the determination whether a reasonable basis has been established to plead punitive damages. *Estate of Despain v. Avante Group, Inc.*, 900 So. 2d 637, 640 (Fla. 5th DCA 2005).

Plaintiff's Proffer

5. Plaintiff has made the following Proffer regarding Defendant's corporate representative, acting with actual or apparent agency:

- a. Failed to contact Mr. Emery after Mrs. Small's death in 2007;
- b. Failed to send account statements to Mr. Emery from 2007–present;
- c. Denied the existence of the Account to Mr. Emery and his guardians in 2007, despite direct and repeated in-person inquiries;
- d. Denied access to the Account's records to Mr. Emery and his parents in 2007;
- e. Failed to contact Mr. Emery or his parents after promising to do so in person in 2007;

- f. Misrepresenting that Defendant was giving Mr. Emery and his parents free legal advice for the family's benefit in 2007;
- g. Failed to protect the Account and confidential information thereon from breach and theft by third parties in 2010;
- h. Failed to notify Mr. Emery of suspicious account access and removal of all account assets in 2010;
- i. Failed to attempt to communicate with Mr. Emery or inquire on his whereabouts upon contact from the Estate of Mrs. Small in 2011;
- j. Failed to communicate that the Account had been accessed and emptied by a third party upon later contact from the Estate of Mrs. Small in 2011;
- k. Failed to log, investigate, or act on a 2011 written notice from the Estate of Mrs. Small that the Account was improperly accessed and money removed;
- l. Misrepresented to the Estate of Mrs. Small that Mr. Emery was the sole owner of the Account in 2011 despite having provided joint ownership to a third party beforehand and listed a third party as a joint owner in Defendant's records;
- m. Denied access to information and account statements to the Estate of Mrs. Small in 2011 (within the statutory record retention period) on the basis that the Estate had not right to Mrs. Small's records, destroyed the Account's records, and then claimed that it could not provide statements in 2013 because Defendant had not kept the records;
- n. Misrepresented to the Estate of Mrs. Small in 2013 that it had not kept records for the Account from before May 2007, but then misrepresented to Mr. Emery and his parents in 2014 that it was providing Mr. Emery with the allegedly destroyed statements from 2003–2006;

- o. Failed to investigate the repeated third-party attempts and successes to access the Account;
- p. Failed to preserve evidence on the Account in light of this suspicious activity;
- q. Destroyed account statements and evidence of account history despite repeated inquiries of suspicious activity from Mr. Emery, Mr. Emery's parents, and the Estate of Mrs. Small;
- r. Failed to immediately provide all records relating to the Account upon Mr. Emery's renewed demand in 2014;
- s. Failed to be immediately forthcoming as to the history of the Account, its unauthorized access, its status, and Defendant's continued relationship with unauthorized account thief and third party Renee Dawson Pierre in 2014; and
- t. Created statements on the Account for 2003–2006 using information from separate account of Richard Jackson, no. 28769, and conveyed them to Mr. Emery in 2014.

Application of Florida Law to the Proffer

6. Given the above Florida law and its application to the Proffer filed by Plaintiff, Andre K. Emery, Plaintiff has followed the above procedure and made a proper and sufficient showing at hearing to allow it leave to add a claim for punitive damages under Florida Rule of Civil Procedure 1.190(f) and Florida Statutes § 768.72. Accordingly, the Court has GRANTED this Motion.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 06/11/15.



BRONWYN C. MILLER
CIRCUIT COURT JUDGE

**No Further Judicial Action Required on THIS
MOTION
CLERK TO RECLOSE CASE IF POST
JUDGMENT**

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed original order sent electronically to the Clerk of Courts for filing in the Court file.
cc:

Andrew J. Bernhard, Esq., BERNHARD LAW FIRM PLLC, Counsel for Plaintiffs, 333 SE 2nd Avenue, Suite 2000, Miami, Florida 33131, abernhard@bernhardlawfirm.com

Welbaum Guernsey, 901 Ponce De Leon Blvd., PH, Miami, FL 33134,
bhingston@welbaum.com, lboyd@welbaum.com