

WOMACK, LANDIS, PHELPS & McNEILL

A Professional Association
 Attorneys at Law
 Century Center
 301 West Washington
 P.O. Box 3077
 Jonesboro, Arkansas 72403

Tom D. Womack
 David Landis
 John V. Phelps
 Paul McNeill
 Richard Lusby
 Jeffrey W. Puryear
 Mark Mayfield
 J. Rogers McNeil
 Dustin H. Jones
 J. Nicholas Livers
 Raney E. Coleman
 Jared S. Woodard
 Serena T. Green
 Jeffrey Scriber
 Ryan M. Wilson

www.wlpmlaw.com

Chuck Gschwend
Of Counsel

Telephone (870) 932-0900
 Facsimile (870) 932-2553

jphelps@wlpmlaw.com

November 19, 2008

VIA TELECOPIER - (501) 604-5149

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Judge William R. Wilson, Jr.
 D444 Richard Sheppard Arnold U.S. Courthouse
 500 W. Capitol Ave.
 Little Rock, AR 72201-3325

Re: Otto Dental Supply, Inc. v. Kerr Corporation
U. S. District Court, Eastern District of Arkansas,
Western Division No. 4:06cv01610WRW

Dear Judge Wilson:

I appreciate Your Honor's November 18, 2008 letter and the opportunity to better articulate our position with supporting authority.

I. The AFPA

The initial introduction to the Arkansas Franchise Practices Act Jury Instructions at AMI Civ. 207, p. 574, states that the Act:

Provides a comprehensive statutory scheme of civil and criminal liability concerning franchise practices.

Thus, A.C.A. 4-72-207 is the only legislative prohibition for "misleading and fraudulent schemes."

A.C.A. 4-72-208 therefore states that "any franchisee who is harmed by a violation or violations of §4-72-207 shall be entitled to recover treble damages in a civil action."

Therefore, the comprehensive statutory scheme of civil liability does not include a provision for the award of punitive damages and specifically lists in § 407 the prohibited conduct sufficient to justify treble damages and criminal prosecution.

II. Comparable Citations

The first is Stoner v. Houston, 265 Ark. 928, 582 S.W.2d 28 (1979). The plaintiffs sought treble damages for malicious destruction and removal of timber under Ark. Stat. Ann. § 50-105 (1975). The plaintiffs were also awarded punitive damages for the same misconduct and the court ruled:

The statute allows treble damages, which are punitive in nature; and the Houstons sought punitive damages in connection with the trespass. They were awarded both. In this case, under the facts recited, it amounted to a double punitive recovery for the illegal act. The elements of damage were the same and such a recovery is prohibited. 265 Ark. at 933.

Accordingly, on retrial the Houstons were required to elect their remedy, but could not recover under both.

The next case is Coldwell v. Jenkins, 42 Ark. App. 157, 856 S.W.2d 37 (Ark. App. 1993).

The pertinent portion of that decision is the dissent by Judge Mayfield, although the majority opinion is not pertinent to our present case. The dissent dealt with the situation and application of the Federal Motor Vehicle Information and Cost Savings Act which provides for treble damages when an odometer is rolled back, and the relationship of that statute to the third cause of action based on common law fraud. In Judge Mayfield's dissent His Honor quoted from Rice v. Gustavel, 891 F.2d 594 (6th Cir. 1989) and analyzed the decision as follows:

There the appellants recovered treble damages under the Federal Act, but contended they were also entitled to compensatory and punitive damages for common law fraud in addition to the treble damages. The trial court denied the appellants contention. The appellate court affirmed and said, "we find no merit to the Rice's contention that they are entitled to additional compensatory and punitive damages under their common law fraud claim." 856 S.W.2d at 41-42.

Judge Mayfield cites other decisions from other jurisdictions with one of the more succinct quotes from an Illinois decision:

On appeal the court said the plaintiff "may not recover both punitive damages and statutory treble damages, as such a dual

award amounts to double recovery, or double punishment, for the same wrongful behavior.” (Emphasis Added). Id. at 42.

This language is quite appropriate to Your Honor’s concluding paragraph in the November 13, 2008 Order which recognized that plaintiffs’ claims for treble and punitive damages arise out of the same series of conduct. The first issue being whether Kerr made fraudulent representations during a four month period of time as the basis for Otto’s termination and the second issue being whether Kerr knew these same statements were false.

Additional public interest/consumer protection cases corroborate that when a statutory scheme expressly provides for multiple compensatory damages, an award of additional punitive damages is improper. See, Lexton-Ancira Real Estate Fund v. Heller, 826 P.2d 819, 822 (Colo. 1992) (interpreting the Colorado Consumer Protection Act); Eastern Star, Inc. v. Union Bldg. Materials Corp., 712 P.2d 1148, 1159 (1985) (interpreting the Hawaii deceptive trade practice statutes); Ellis v. Northern Star Co., 388 S.E.2d 127, 132 (1990) (interpreting the North Carolina unfair trade statutes); Birchfield v. Texarkana Memorial Hospital, 747 S.W.2d 361, 367 (Tex. 1987) (interpreting the Texas Deceptive Trade Practices Act).

Accordingly, we respectfully submit that all these cases, and their logic apply to the present dispute, and that Otto should not be allowed to seek both treble damages and punitive damages.¹

As Professor Brill has commented, “an award of both punitive damages and statutory penalties is questionable.” Brill, Law of Damages, 5th Ed. §§ 9.5, Note 3.²

III. Treble Damages

The Court’s November 13, 2008 Order referenced plaintiff’s allegations contained at paragraph 42 of the amended complaint wherein plaintiff cited A.C.A. § 4-72-207 as being the basis for its claims of treble damages. In the allegations of paragraph 42, the Court’s Order properly quoted with emphasis plaintiffs’ allegation of “in connection with the termination.” (Court’s Order at p. 2).

¹ These cases are distinguishable from direct action suits against insurance companies which include additional claims for penalty, interest, and attorney fees together with separate claims for bad faith. Those are distinct types of misconduct as opposed to the suit here which is solely one of claimed improper termination. See, e.g., Employers Equitable Life Ins., Co. v. Williams, 282 Ark. 29, 665 S.W.2d 873 (Ark. 1984).

² Even the Arkansas Deceptive Trade Practices Act, A.C.A. 4-88-101 et seq. limits a private person’s recovery to only “actual damages” and attorney fees. A.C.A. 4-88-113(d)(3)(f).

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Respectfully, and despite plaintiff's allegation to the contrary, A.C.A. § 4-72-207 does not include the phrase "in connection with the termination." Thus, there is no statutory cause of action relating to a misleading or fraudulent scheme at termination. Therefore, we respectfully cite the statute itself as negating any right to treble damages for mere termination.

And, this makes good and common sense because absent a discriminatory reason or outrageous misconduct, the reasons for termination are unimportant. It is the termination itself which is the cause of action.

IV. Punitive Damages Generally

Plaintiff has chosen to allege that a franchise agreement or contract existed between these parties. However, Arkansas law has long been that one cannot recover punitive damages when the sole cause of action is based on contract. See, Wheeler Motor Co., Inc., v. Roth, 315 Ark. 318, 867 S.W. 2d 466 (1993).

V. Conclusion

In conclusion, if the Court sustains the plaintiff's right to present a claim for treble damages; then the plaintiff cannot also present a claim for punitive damages which is not authorized by the comprehensive AFPA.

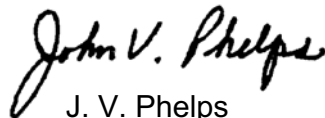
Additionally, the plaintiff's attempt to create a franchise and to allege the breach of that franchise contract, precludes plaintiff from seeking punitive damages.

The issues before the Court should only be whether there was a franchise agreement, whether it was breached, and what compensatory damages Mr. Otto can prove.

We appreciate the Court's courtesy in allowing us this additional response and are providing a copy of this letter both by fax and e-mail to plaintiff's counsel.

Most respectfully yours,

WOMACK, LANDIS, PHELPS & McNEILL



J. V. Phelps

JVP/kq

cc: Tony Wilcox (via e-mail and facsimile)
Brandon Lacy (via e-mail and facsimile)
William Clay Brazil (via e-mail and facsimile)