

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

File No. CT 98-12425

Khadar A. Wazwaz,

Plaintiff,

**ORDER AND
MEMORANDUM**

vs.

Firstar Bank, N.A.,

Defendant.

The above-entitled matter came on for hearing before the Honorable Bruce Hartigan, one of the judges of this Court, on February 29, 2000.

Thomas J. Lyons, Jr., Esq., appeared on behalf of the Plaintiff. Jennifer Berquist, Esq., appeared on behalf of the Defendant.

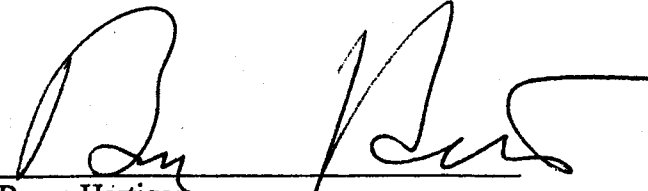
Upon all of the files, memoranda and proceedings herein, the argument of counsel and the Court being fully advised in the premises,

IT IS HEREBY ORDERED THAT:

1. The Plaintiff's motion to add a claim for punitive damages is GRANTED.
2. The attached Memorandum shall be made a part of this Order.

BY THE COURT,

Dated: 3/27/00



Bruce Hartigan
Judge of the District Court

MEMORANDUM

Plaintiff Khadar A. Wazwaz ("Wazwaz") brings claims for relief stemming from the taking of his 1992 Mercedes Automobile by Defendant Firststar Bank, N.A. ("Firststar"). At present, Wazwaz moves to amend his complaint to add a claim for punitive damages.

A plaintiff cannot be given leave to add a claim for punitive damages unless he can show the Defendant acted with a deliberate disregard for the rights or safety of others. Minn. Stat. § 549.191. "Deliberate disregard" is defined as follows:

A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:

(1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or

(2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Minn. Stat. § 549.20, Subd. 1. Ultimately, a plaintiff cannot recover punitive damages unless he proves the existence of "deliberate disregard" by clear and convincing evidence. Swanlund v. Shimano Indus. Corp., Ltd., 459 N.W.2d 151 (Minn. App. 1990). That is, the motion to add a claim for punitive damages must be viewed through the prism of the clear and convincing evidence standard of proof. Id. The motion to amend must be granted if the plaintiff's evidence in support of the motion would support a clear and convincing finding of a deliberate disregard for the rights and safety of others. Id.

The evidence presented by Wazwaz demonstrates that he purchased a 1992 Mercedes 500 SEL automobile from a dealer on June 5, 1998 for \$33,500.00. Wazwaz made a \$15,000.00 downpayment and financed the remainder of the purchase price with

a loan from Firststar. The loan agreement called for monthly payments and stated that Wazwaz would not be charged a late fee unless his payment was made more than 10 days after it was due. Affidavit of Thomas J. Lyons, Jr., Exhibit H. Wazwaz made his first payment (of \$800.00) on July 30, 1998, the ninth day of the grace period for that month. Firststar nevertheless repossessed the vehicle on August 3, 1998, four days after Wazwaz made his payment. According to a document obtained during discovery, Firststar elected to repossess in part because a Firststar employee had dealt with various members of the Wazwaz family and believed "they are all frauds." Lyons Affidavit, Exhibit K.

Notwithstanding this belief, the facts presented by Wazwaz show that he made a timely payment (*i.e.*, within the 10-day grace period) in accord with his loan agreement with Firststar. Firststar hence had no basis under the contract to repossess the vehicle. One could infer from this with reasonable certainty that Firststar elected to act with a deliberate disregard for Wazwaz's contractual rights in light of its anticipatory concern about future fraudulent acts by Wazwaz. There was, however, no evidence that Wazwaz actually committed fraud. Wazwaz miswrote his social security number on his loan application (it was off by one digit). Firststar was aware of this mistake before it approved the loan, calling it a minor "non-event" that merited no further investigation. Lyons Affidavit, Exhibit K.

In Molenar v. United Cattle Co., 553 N.W.2d 424 (Minn. App. 1996), the Minnesota Supreme Court upheld an award of punitive damages for the unlawful conversion of personal property. Molenar, 553 N.W.2d at 428. Here, the plaintiff has come forth with clear and convincing evidence that his vehicle was taken by Firststar with

a deliberate disregard for his rights under the Firststar loan agreement. Consequently, the plaintiff's motion to amend must be granted.

B.H.