

Appellate Practice Pointer
Whitby v. Infinity Radio Inc.

In Whitby v. Infinity Radio Inc., Case No. 4D05-3888 (4th DCA Jan. 24, 2007) (not final), the court held that the trial court erred in permitting the jury to consider an expert's testimony calculating the plaintiff's claim for compensatory damages. In the underlying dispute involving an alleged breach of a former employee's non-compete covenant and her subsequent employer's alleged tortious interference with that covenant, the expert had testified that the defendants' conduct had caused the plaintiff's radio station to suffer significant lost profits for five years.

The court noted over seventy factors that could have affected the station's revenues that were not considered by the expert. Further, the court pointed out that the expert could provide no rationale for the duration of the claimed five year period of damages. Based upon the "speculative and conjectural nature" of the expert's methodology and the expert's failure to consider "critical variables," the court held that the expert's testimony failed to establish that the lost profits were the direct result of the defendants' actions or that the amount of lost profits was ascertainable with reasonable certainty.

The court also determined that the trial court erred by allowing the jury to make duplicative awards for damages caused by the employee's breach of contract and the defendant station's tortious interference. The court explained that such damages were unavailable unless the plaintiff presented evidence "to establish that it sustained damages from the alleged tortious interference independent from the damages it sustained as a result of the alleged breach of the non-compete covenant."

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