2-17-84 047

IN THE SUPREME COURT OF THE STATE OF FLORIDA

TAMIAMI TRAIL TOURS, INC.,
a Florida corporation, and
D. D. CROSBY,

Petitioners,

vs. CASE NO. 63,946

J. C. COTTON and AUBREY
JESSE COTTON,

Respondents.
_______________________________/

FILED
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STATEMENT OF THE CASE

Petitioners, Tamiami Trail Tours, Inc., and D. D. Crosby, were the defendants in the trial court; the respondents, J. C. Cotton and Aubrey Jesse Cotton, the plaintiffs.

This is an appeal from a final judgment entered on a jury verdict. The case was affirmed on appeal by a unanimous District Court of Appeal, First District.

The issues presented to the jury were tried by express and implied consent of the petitioners; and the jury was properly charged without any objections raising the points sought to be argued in this court.

There was no objection to the form of verdict, contrary to petitioners' unsupported statement on page 4 of their brief, either when it was agreed upon or when it was returned by the jury. (R:492,650,651)

STATEMENT OF THE FACTS

The overwhelming weight of evidence presented by Cotton and other plaintiff witnesses was contested only by the testimony of defendant Crosby. The defendants called three witnesses. The testimony of two of these witnesses had virtually no probative value and Crosby simply denied the facts testified to by plaintiffs' witnesses.

Crosby was Tamiami's agent. (R:351,352) No other Tamiami agents or employees testified. Crosby simply denied everything, and his direct examination takes up two of the 500+ pages of trial transcript. (R:453-455)

Defendant Tamiami was the owner and possessor of the Trailways bus station in Fort Walton Beach, Florida. (R:195, 373) Crosby was its agent in charge and was paid a commission. (R:362,432,448)

Crosby exhibited vicious and violent propensities in his management of Tamiami's bus station. The evidence at trial showed he committed the following acts against plaintiff J.C. Cotton--a man with a third-grade education who had a wife and seven children and who was trying to start a taxi business with his life savings of $8,000: (R:186)

> 1. Defendant Crosby told Mr. Cotton he had other friends in the cab business "that I'm helping". Crosby threw Cotton's card in the trash can and told him none of his advertising was welcome on the premises [Trailways Bus Station]. (R:193)
>
> 2. Crosby didn't want Cotton's cabs on the premises of the bus station. (R:193)

3. Crosby told Cotton's prospective fares: "I wouldn't ride with that son of a bitch. He'll probably take you off and rob you." (R:194)

4. Crosby would lose or delay Cotton's fare's baggage arriving at the bus station. (R:194)

5. Crosby "ran Cotton off" from parking where City Cab, a competitor, was allowed to park at the bus station saying: "Get your ass off this bus station property." (R:194,195)

All of this was reported by Cotton to Tamiami's home office in Houston, Texas. (R:195) The Houston office referred Cotton to Otis Sanders in Tallahassee, Crosby's immediate supervisor. (R:214)

Cotton began calling Tallahassee "two or three times a week". (R:196) Sanders promised several times there would be an investigation. (R:215) There was no investigation.

Cotton told Tamiami there were other witnesses to the incidents as well as himself. (R:216)

Crosby not only continued his course of conduct but it got worse: (R:217)

6. Crosby told prospective fares that Cotton was a "thief", and the fares would get out of Cotton's cab. (R:217)

7. Cotton rented property across from Tamiami's bus station and installed a hot-line telephone in an effort to avoid further trouble with Crosby. (R:218)

8. Crosby's destructive activities persisted. He told Cotton's prospective fares who had arrived on the bus and while he was picking up their baggage, that Cotton would "take them off and rob them". (R:219)

9. Crosby tore Cotton's advertisement from the telephone book at the bus station with Cotton watching. (R:219)

10. Crosby cut the hot-line phone wires with pliers with Cotton watching. (R:219)

11. Crosby kept calling the bus station property his. "I don't want your ass on my property", he would say. Cotton pleaded, "Mr. Crosby, this is the bus station." (R:220)

Unknown to Cotton at the time, Tamiami supervisor Sanders had previously written one letter (plaintiffs' Exhibit No. 1) directing that Crosby treat the taxis equally at the bus station. (R:51,435)

12. Crosby offered Cotton's landlord double or triple the rent to get Cotton off the adjoining property. Cotton's drivers quit. (R:221)

13. Crosby told bus passengers Cotton was "a sorry son of a bitch", and they took other cabs. (R:222)

14. Cotton found sand in the transmissions of his cabs, sugar in the gas tanks and acid on the seats. (R:223)

15. Cotton had roofing tacks thrown under his cabs and averaged three or four flat tires a week. (R:223)

16. All the foregoing incidents took place prior to May 1977. (R:227)

17. An independent witness saw Crosby throwing something like chicken feed in the wee hours of the morning and then discovered it was roofing tacks. (R:294-298)

18. Cotton saw Crosby tear down his advertisement at the bus station. (R:228)

Cotton established an arrangement with General Hospital to pick up blood arriving by bus at any hour and deliver it for $4 per trip. (R:229,230) The blood often arrived in the pre-dawn hours when the bus station was closed. (R:377) The blood was needed by the hospital immediately. Cotton was there. (R:231) Prior to this arrangement the bus went on to

Panama City with the needed blood if no one was there to meet it. (R:231,378)

19. Crosby stopped Cotton from picking up the blood (R:233), had his own employee take it, and charged the hospital twice as much for the delivery. (R:380)

20. Mrs. Angela Veal, a hospital representative, complained by telephone about the charge and was cursed by Crosby. (R:381) She then went down Tamiami's bus station and was explicitly cursed by Crosby. (R:235,384)

21. Mrs. Veal called "Trailways" in Tallahassee and told them. Trailways did nothing. (R:385)

22. The hospital quit using Cotton as a result of Crosby's actions. (R:385,386,397)

23. Crosby threatened to kill Cotton's son if he came to the bus station. (R:236)

Following the filing of the lawsuit, Crosby continued: "If you drag me through court on this shit, you are a dead man". (R:243) He assaulted and battered plaintiff A. J. Cotton at the bus station and said: "I told you to keep this son of a bitch away from here." (R:244)

Cotton called Tamiami's Otis Sanders in Tallahassee who said: "We are getting a lot of complaints on that man. We are going to get an investigation up there and get it checked out. (R:244,245) Nothing was done. (R:248) There were several other witnesses to this incident. None were interviewed by Tamiami; and

24. Crosby pointed a gun at Cotton. (R:251)

ARGUMENT

POINT I

THE JUDGMENT AWARDING PUNITIVE DAMAGES AGAINST TAMIAMI IS SUPPORTED BY THE RECORD AND IS NOT CONTRARY TO THE LAW OF FLORIDA.

Tamiami contends that it must be guilty of willful and wanton misconduct in order to be liable for its agent's wanton acts committed on its property.

This argument is fallacious. See, McArthur Jersey Farm Dairy, Inc. v. Burke, 240 So.2d 198 (Fla. 4th DCA 1970).

In this case, Tamiami's corporate agent, who had been placed in physical charge of Tamiami's bus station property, was guilty of particularly egregious conduct over a prolonged period of time.

Petrik v. New Hampshire Ins. Co., 379 So.2d 1287 (Fla. 1st DCA 1979), cited by Tamiami, is factually distinguishable from this case.

In Petrik, Superior Dairies and its employee Charles were sued by Petrik for injuries resulting from the negligent operation of a Superior Dairies' vehicle. The negligence of Charles was simple negligence. However, since Charles had been involved in previous accidents and had received several tickets, Petrik attempted to sue Superior Dairies for punitive damages. The First District Court held that the employer's knowledge of the previous accidents, presumably also involving

simple negligence, did not provide a basis for assessment of punitive damages against Superior Dairies.

Here, Crosby was in total charge of Tamiami's bus station, having both actual and apparent authority to act for Tamiami as far as the public was concerned. Tamiami's agent and employee, Crosby, was Tamiami Trail Tours, Inc., in Fort Walton Beach. See, Second Restatement of Agency, §257; W. Prosser, Law of Torts, 467 (4th ed. 1971).

Tamiami had placed Crosby in a position to commit heinous acts on Tamiami's property while apparently acting within his authority and thereafter failed to control him.

The trial court charged the jury on the duty of a master to control his servant while acting outside the course of his employment on the premises of the master in accordance with the McArthur decision, supra, and this court's holding in Mallory v. O'Neil, 69 So.2d 313 (Fla. 1954). (R:636)

It was on this basis that the jury found Tamiami negligent and, therefore, guilty of "fault" foreseeably contributing to the tort of its agent Crosby and assessed punitive damages accordingly. See, Mercury Motors Exp., Inc. v. Smith, 393 So.2d 545 (Fla. 1981).

Tamiami's only objection to the charge by the court was that the evidence did not support the giving of the charge. (R:470,471) This objection was properly overruled.

The record amply supports the jury's assessment of punitive damages against Tamiami due to its negligent failure to control its vicious agent under the rule laid down in Mallory, supra.

Some members of this court have inferred in U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061 (1983), that they may judicially immunize corporations from vicarious liability for punitive damages thereby casting aside the wisdom of well-reasoned precedent in effect for almost 50 years. See, Winn & Lovett Grocery Co. v. Archer, 171 So. 214 (Fla. 1936); See also, Smith v. Wade, 103 S.Ct. 1625 (1983).

Such a deviation from settled precedent would be ill-advised for a corporation is only a fictional legal entity, incapable of any action at all except through its agents and employees.

The salutary effect of punitive damages is, as predicted by this court in Winn, supra; Campbell v. Government Employees Insurance Co., 306 So.2d 525 (Fla. 1975), and other decisions, causing positive, responsible changes in the marketplace which benefit all citizens.

A victim's remedy would be hollow and in most cases illusory, were it otherwise.

Even now Tamiami seeks to throw its agent Crosby to the lions in order to benefit Tamiami. Through its argument Tamiami seeks to place the entire liability on the shoulders of Crosby, its since-retired agent.

Tamiami argues for adoption of a rule that would allow and encourage corporate employers who gain knowledge of vicious and incompetent employees to do nothing because, they argue, the worse the conduct of the employee, the clearer the case of corporate immunity.

The rule of _Mallory_, _supra_, is a "sound" rule just as this court unanimously held in 1954. The rationale of _Winn & Lovett Grocery Co._, _supra_, is also sound and it should be steadfastly protected by this Court.

Petitioners' Point I is without merit.

POINT II

THE TRIAL COURT CORRECTLY CHARGED THE JURY ON THE ELEMENTS OF INTENTIONAL INTERFERENCE WITH A BUSINESS RELATIONSHIP.

Petitioners contend that intentional and unjustified interference with an advantageous business relationship resulting in damage to the relationship is not actionable absent proof that the wrongful conduct was done to gain an advantage over the victim.

Again, Tamiami is incorrect as pointed out in the instant opinion by the District Court of Appeal, First District, and numerous authorities cited in its opinion.

Dean Prosser also points out that a defendant in such cases will be held liable "if the reason underlying his interference is _purely_ a malevolent one and a desire to do harm to the plaintiff _for its own sake_." W. Prosser, _Law of Torts_, 953 (4th ed. 1971) [emphasis supplied]

The soundness of the rule is manifest. Otherwise, there would be no remedy for an obvious wrong and such conduct would actually be encouraged by the law rather than deterred as logic and reason dictate it should be.

To adopt the Third District's apparent requirement that a victim of anti-social, reprehensible conduct be unable to recover damages if the conduct is based solely on malice and motivated only by a "desire to do harm to plaintiff for its own

sake" (as Prosser states) would be illogical, ill-conceived and unjust.

Moreover, the Third District Court of Appeal may be receding from its clearly incorrect position. In Gerber v. The Keyes Company, Case Nos. 83-141, 83-330 (Fla. 3d DCA December 13, 1983) [8 FLW 2936], the requirement that intentional interference must be for the purpose of gaining an advantage over the victim is conspiciously omitted when the court recites the elements of the tort.

This court should adopt the rule as stated by Dean Prosser and reject the reasoning of the District Court of Appeal, Third District.

POINT III

THE VERDICT FOR COMPENSATORY DAMAGES ON COUNT I WAS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

Petitioners contend J. C. Cotton's verdict on Count I should be reversed because of the alleged lack of evidence of lost profits and an erroneous jury charge.

They assume and then argue that damages for humiliation, embarrassment and inconvenience are not recoverable elements of damage on an action for tortious interference as a matter of law.

This is incorrect and it should be noted that a citation of legal authority supporting petitioner's position is glaringly absent from their brief.

Petitioners' reliance on Northamerican Van Lines, Inc. v. Roper, 429 So.2d 750 (Fla. 1st DCA 1983), is misplaced because it involved the measure of damages for loss of, or interference with the use of a chattel.

Although there are no Florida cases dealing directly with this point, the more well-reasoned authorities allow recovery for such elements of damage in a suit for tortious interference. In discussing the damages recoverable in tortious interference cases, Dean Prosser says:

> A third [line of cases], perhaps the most numerous, has treated the tort as an intentional one, and has allowed recovery for unforeseen expenses, as well as for mental suffering, damage to reputation, and punitive damages, by

> analogy to the cases of intentional injury to person or property. In the light of the intent and the lack of justification necessary to the tort, this seems the most consistent result. W. Prosser, Law of Torts, 949 (4th ed. 1971)

Logic and reason dictate this is the proper result. Otherwise, Mr. Cotton and others similarly situated would be suffering a terrible wrong without an adequate legal remedy.

Also, petitioners did not make a specific objection to the jury charge (R:522) and, therefore, this point was not even properly preserved for appeal. See, Lollie v. General Motors Corp., 407 So.2d 613 (Fla. 1st DCA 1982).

As to the lost profits argument, the jury returned a general verdict on damages and petitioners made no objection to the form of verdict being used. (R:490-492) They cannot now contend that the compensatory damages awarded constitutes lost profits alone. It may not include any lost profits at all.

Petitioners could have requested the damages be separately assessed by the jury. See, Colonial Stores, Inc. v. Scarborough, 355 So.2d 1181 (Fla. 1978), but chose not to do so.

Moreover, a person trying to start a business would be unable to show lost profit with a high degree of certainty because he lacks a data base on profit. Therefore, if petitioner's argument prevailed such a person could recover only nominal damages--a hollow remedy.

It is for this reason the weight of authority is against such a position. As Dean Prosser points out, the tort requires specific intent and a lack of justification.

Therefore, all damages proximately caused by the wrongful act should be recoverable including not only lost profit, but also the obvious humiliation and embarrassment shown by the egregious facts of this case.

The general verdict form was not objected to (R:492) and no legally sufficient objection to the jury charge was made for Tamiami's trial counsel simply said:

> SIMPSON: I think the damages, if he sustained any, are his business loss and loss of earnings. I don't think he supported the allegation for humiliation or embarrassment. (R:521)

Petitioner's Point III is without merit because not only does the record show lost profit resulted from the tort but also because the point petitioners argue was not properly preserved for appellate review.

POINT IV

THE LIABILITY OF TAMIAMI ON COUNT II WAS PROPERLY SUBMITTED TO THE JURY.

Petitioner Tamiami contends in its fourth point that the jury should not have been allowed to consider its liability for the battery of A. J. Cotton (Count II).

This question is again controlled by and disposed of by the rule of law from Mallory, supra, and McArthur, supra.

Accordingly, Tamiami had a duty to exercise reasonable care so to control its servant Crosby to prevent him from harassing those on its premises even though he was acting outside the course of his employment on the premises.

There was substantial evidence that Tamiami had been notified several times prior to the battery and that Crosby was acting in a manner which, (as McArthur stated) "may cause danger to members of the general public". (R:195,196,214-216).

This evidence was entirely undisputed and uncontradicted for only Crosby testified at trial for the petitioners and he simply denied committing the tortious acts.

The jury found Tamiami failed to excercise reasonable care to prevent the battery and had more than ample time within which to act. Again the arguments advanced by petitioners attempt to exonerate the corporation, but not Crosby, the supposed co-petitioner.

There is not a single argument in the entire brief on behalf of petitioner Crosby. His lawyers even call his acts "criminal" on page 25 of their brief.

POINT V

TAMIAMI TRIED ALL ISSUES BY BOTH EXPRESS AND IMPLIED CONSENT.

Tamiami argues its constitutional right of due process was infringed because of alleged defects in the pleadings. In making this argument there is not a single reference to the record on appeal.

Reference to the record shows that all claims were tried by both the express and implied consent of the parties to the case without any objection being made by Tamiami or Crosby. (R:424-425).

The record shows the issue of Tamiami's vicarious liability under the _Mallory_ rule, _supra_ was tried by the express and implied consent of the parties under Fla. R. Civ. P. 1.190(b).

The rule provides that issues tried by consent, express or implied, ". . . shall be treated in all respects as if they had been raised in the pleadings. . . ." and failure to amend the pleadings "shall not" affect the result of the trial of these issues.

Tamiami's trial counsel said at the close of plaintiffs' case:

> SIMPSON: And as to assault and battery, I move for a directed verdict on behalf of Mr. Crosby. _I guess Tamiami was added to that too on Count 2_, but there is no evidence to sustain that. (emphasis supplied)
>
> COURT: Motion is denied. (R:424-425)

Likewise, petitioners fail to point to any objection that vicarious liability of Tamiami on Count I was not within the issues framed by the pleadings.

The record shows that Tamiami never attempted to find out whether J. C. Cotton's claim that Tamiami was liable for Crosby's acts was grounded upon either the theory of respondeat superior or possessor liability or both. Tamiami simply filed a general denial and proceeded to trial.

Additionally, the record also shows Tamiami's trial counsel was not surprised at all.

His argument against the giving of the jury charge on possessor liability (R:636) was based upon the theory that the one and only way Tamiami could be held liable for Crosby's acts was if they were committed in the course and scope of Crosby's employment. (R:483,491,504,505) That argument was, of course, incorrect. *See*, *Mallory*, *supra*, and *McArthur*, *supra*.

Otherwise, a corporation like Tamiami could simply sit back and watch a malicious and vicious employee menace the public and be totally insulated from liability.

The law should not sanction such anti-social conduct on behalf of corporations such as Tamiami.

POINT VI

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING A REMITTITUR.

The position taken by the petitioners in Point VI of their brief is totally unsupported by the record.

The trial court applied the criteria of Arab Termite and Pest Control v. Jenkins, 409 So.2d 1039 (Fla. 1982), in denying the motion for remittitur of the punitive damages award. Arab Termite was cited by both counsel in argument on the post-trial motion filed by Tamiami. The trial court properly denied the motion after hearing the argument:

> MR. POWELL: Now, post Wackenhut the court has likewise made it very clear that the trial court is limited when reviewing punitive damages for alleged excessiveness to two things. . . . Number two, is where in viewing the record as a whole the court determines that based on the conduct and the misconduct of the defendant that the punitive damage award is excessive as against the manifest weight of the evidence. (R:137,138)
>
> Mr. Simpson, Tamiami's trial counsel, later responded:
>
> MR. SIMPSON: . . . I think the court is aware of the standard which it could apply, and I think I've pointed that out and so has Mr. Powell. The court has to look at it [the amount] in light of the whole circumstances involved and the actions of both defendants. . . . (R:140)
>
> JUDGE: The motion for a remittitur will be denied. The jury's verdict will stand. . . . (R. 140)

Tamiami is apparently now arguing it is entitled to a remittitur as a matter of law and that Arab Termite and Pest Control of Florida, Inc., v. Jenkins, 409 So.2d 1039 (Fla.

1982), requires the trial court to make finding of fact on the corporate defendant's degree of misconduct. This is manifestly wrong. Arab Termite holds that:

> . . . the trial court may consider the degree of the defendant's misconduct in determining whether the amount of punitive damages is against the manifest weight of the evidence. Id. at 1043. (emphasis supplied)

As in Wackenhut Corp. v. Canty, 359 So.2d 430 (Fla. 1978), there is no basis appearing in this record for concluding the jury's punitive damage award against Tamiami was excessive. See, Arab Termite at 1042.

Tamiami is legally responsible for Crosby's conduct under Florida law because it negligently failed to control his conduct on their property, and Crosby's conduct was particularly egregious.

The burden of proving inability to pay punitive damages was on Tamiami. Rinaldi v. Aaron, 314 So.2d 762 (Fla. 1975). Tamiami presented no proof of its financial resources whatsoever.

As in all cases of corporate punitive liability, only "some fault" of the master is required to be shown. It is not necessary that the master's conduct also be willful and wanton in order for it to be liable for punitive damages in a situation where it is otherwise liable for compensatory damages under existing rules of law.

CONCLUSION

No reversible error having occurred below, this case should be affirmed.

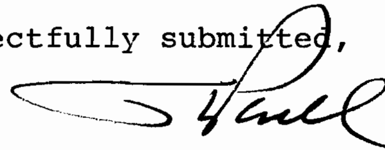
In rendering its unanimous decision affirming the judgment, the District Court applied the law to the facts.

There is ample competent, substantial evidence to support the jury's verdict; and the trial court did not abuse its discretion in its handling of the case. Had Tamiami taken the steps to relieve Crosby that a reasonable employer would have taken, the entire situation would never have occurred.

This court should adopt the majority view that intentional and unjustified interference is actionable when committed with only malice as a motive.

There is no logical requirement that intentional and unjustified interference be done for the purpose of gaining an advantage over the victim.

Respectfully submitted,



STANLEY BRUCE POWELL

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished Albert M. Salem, Jr., 4600 West Kennedy Boulevard, Tampa, Florida 33609, by U.S. Mail, this 9th day of January, 1984.

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