2336.1106

IN THE SUPREME COURT OF THE
STATE OF FLORIDA

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

Appellants,

vs.

J. C. COTTON and AUBREY
JESSE COTTON,

Appellees.

_____/

CASE NO. 63,946

DCA - AN-109

JURISDICTIONAL BRIEF IN SUPPORT OF APPELLANTS' NOTICE INVOKING DISCRETIONARY JURISDICTION OF THE SUPREME COURT

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CITATION OF AUTHORITIES

PRELIMINARY STATEMENT

To aid and assist in identifying the several parties involved in this action and to abbreviate and clarify references to each of them, the Appellants will refer throughout this brief to the Plaintiffs, J. C. COTTON and AUBREY JESSE COTTON, as "COTTON" and "A. J. COTTON", respectively.

The Defendant D. D. CROSBY will be referred to as "CROSBY"; the Defendant WILLIAM STOWE will be referred to as "STOWE"; and Defendant TAMIAMI TRAIL TOURS, INC., will be referred to as "TAMIAMI".

STATEMENT OF THE CASE

The Appellees, Plaintiffs below, COTTON and A. J. COTTON, filed their original two count Complaint on June 22, 1977.

Count I was brought by COTTON only and alleged tortious interference by the Appellants and STOWE, another Defendant, and conspiracy to tortiously interfere with the business relationships of COTTON. Appellant, TAMIAMI, was joined in Count I on the basis of an alleged agency relationship with the other Appellant, CROSBY. Count I alleged that CROSBY, TAMIAMI and STOWE conspired to damage COTTON's newly formed cab company in order to benefit STOWE's City Cab Company, which was the only other cab company in Ft. Walton Beach at that time (R 14). The Appellee, A. J. COTTON, was not named in Count I.

Count II named CROSBY as the only Defendant and was brought solely by and on behalf of the Plaintiff A. J. COTTON for assault and battery.

The case was tried before a jury in Okaloosa County beginning on June 7, 1982, and lasted two (2) days. At the close of the Plaintiff's case, STOWE was discharged on a directed verdict, the Court finding that there was insufficient evidence to support a conspiracy against any two of the three Defendants and that STOWE had not intentionally interfered with COTTON's business (R 423).

CROSBY and TAMIAMI's motions for directed verdicts on

Count I were denied, as was CROSBY's motion for a directed verdict on Count II.

The special verdict form submitted to the jury provided for and allowed the assessment of punitive damages against TAMIAMI on both counts of the Amended Complaint. TAMIAMI was never named as a Defendant in Count II and no motion was ever made to amend the pleadings to include TAMIAMI on Count II. At most, the counsel for the Defendants below "guessed" that TAMIAMI had been added to Count II, but stated there was no evidence to sustain it (R 425).

The jury, finding that CROSBY was acting outside the scope of his employment as to both counts, assessed compensatory damages totalling $27,000.00 on Count I and $25.00 on Count II, jointly and severally, against both CROSBY and TAMIAMI, and clearly excessive punitive damages of $250,000.00 on Count I and $50,000.00 on Count II against TAMIAMI and $10,000.00 on Count I and $1,000.00 on Count II against CROSBY.

Appellants' motions for New Trial, Judgment in Accordance with Motion for Directed Verdict, Remittitur and to Interview Jurors were denied, and an appeal to the First District Court of Appeal followed. The Judgment was affirmed by the First District Court of Appeal noting, however, that its decision was in direct conflict with the established case law of the Third District Court of Appeal.

STATEMENT OF THE FACTS

Plaintiff-Appellee, J. C. COTTON, started a taxicab business in Ft. Walton Beach in late 1976, "because there was only one other cab business in town" (R 186, 187). He testified at trial that Appellant CROSBY told him he, CROSBY, would not help COTTON because he had "good friends" at City Cab. COTTON testified he had problems with his business as a result of the conduct of CROSBY, STOWE and several of STOWE's employees, which he asserted was designed to hurt his business and help STOWE's City Cab Company.

COTTON testified he called TAMIAMI's office in Tallahassee concerning the situation and was told that all cabs should be treated equally and park in the same area at the bus station. A letter to this effect followed (R 51). COTTON never presented any evidence that TAMIAMI did anything to interfere with his business, but blamed his plight on STOWE and CROSBY. He testified that he personally saw STOWE and his employees tear down his advertising and that CROSBY on occasion would discourage people from using his cabs. COTTON further testified that STOWE utilized a radio monitor to interrupt his calls from passengers, (R 234-238), and that CROSBY committed other acts of malicious mischief off the bus station premises.

COTTON alleged that as a result of these acts and the failure of TAMIAMI to intercede further, his business suffered. Although he could never estimate just how much he lost and never presented any evidence of his actual expenses

and net earnings before or after the alleged tortious interference, he contended his income was reduced during the second two or three months he was in business by, at most, three or four thousand dollars. COTTON also testified that the acts continued after he called TAMIAMI in Tallahassee and after the letter referred to above was sent by TAMIAMI to CROSBY.

The record is inconclusive as to whether TAMIAMI ever received any notice of CROSBY's acts or alleged propensities for violence prior to the assault and battery on A. J. COTTON which is the subject of Count II. The jury found that CROSBY at all times was acting outside the scope of his employment on both Counts, but was allowed to assess punitive damages against TAMIAMI despite objections from counsel that TAMIAMI had never sought any advantage over COTTON and could not be liable for CROSBY's acts committed outside the scope of his employment in the absence of evidence of willful and wanton misconduct by TAMIAMI.

ISSUE

DOES THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THE CASE SUB JUDICE DIRECTLY AND EXPRESSLY CONFLICT WITH THE DECISIONS OF THE THIRD DISTRICT COURT OF APPEAL IN HALES v. ASHLAND OIL, INC., 342 So.2d 984 (Fla. 3rd DCA 1977), and JOHN B. REID & ASSOCIATES, INC., v. JIMINEZ, 181 So.2d 575 (Fla. 3rd DCA 1965)?

ARGUMENT

In the case at bar, the First District Court of Appeal affirmed the judgment of the trial court assessing damages against the Appellants for tortious interference with an

advantageous business relationship, despite the Plaintiffs' failure to prove that the Appellants sought to secure a business advantage directly over the Plaintiffs by their course of conduct. The Court of Appeal accepted the Appellants' argument that the Plaintiffs had failed to prove this element of the tort, but held that this element was not an essential element required to be proved, expressly noting that its decision was in conflict with the decisions of the Third District Court of Appeal in Hales v. Ashland Oil, Inc., supra, and John B. Reid & Associates v. Jiminez, supra. Thus, under current Florida law, depending upon where the action is brought, there now exist different standards for determining whether a Plaintiff has established a prima facie case of tortious interference with an advantageous business relationship.

The lower court and trial counsel for the Defendants were obviously misled by counsel for the Plaintiffs as to the elements required to prove a prima facie case for tortious interference when counsel for the Plaintiff gave an incomplete recitation of the law during the charge conference. In support of his argument against Appellants' motion for directed verdict, counsel for Plaintiff read the following section of Florida Jurisprudence, but omitted the underlined portion which defines the purpose of the tort required to be proven:

> The elements necessary to establish the tort of interference with a business relationship are: (1) the existence of a business relationship under which the plaintiff has legal rights,

> not necessarily evidenced by the enforceable contract; (2) knowledge of the relationship on the part of the interferer; (3) an intentional and unjustified interference with that relationship by the defendant, and (4) damage to the plaintiff as a result of the breach of the relationship. The purpose of the interference must be to secure an advantage over the plaintiff. 32 Florida Jurisprudence 2d Interference §5 (1981) (R 419-421) (Emphasis added)

Since the purpose required to be proven underlined above was concealed from the court by Plaintiffs' counsel, the trial court's ruling that COTTON had established a prima facie case could not have taken into consideration whether or not the purpose of the tortious interference had been proven. Further, the trial court was never apprised of the conflict between District Courts of Appeal as to this requirement. The trial court judge stated that he assumed Plaintiffs' counsel gave him a correct recitation of the law (R 421), but, in fact, counsel did not.

The First District Court of Appeal, notwithstanding its acceptance of the Appellants' contention that COTTON had failed to establish the additional element of securing a business advantage over the Plaintiff as required by the Third District cases and as set out in 32 Florida Jurisprudence 2d Interference §5 (1981), affirmed the decision of the trial court. The Court held that the Plaintiffs presented evidence at trial which established the four elements of tortious interference as set out in Florida Jurisprudence, however, it specifically declined to follow the rule established by the Third District Court of Appeal which requires the purpose of the interference be proven, i.e. that there was an intention by the tortfeasors to secure a business

advantage directly over the claimant. The Third District has repeatedly stated that such proof is required. See Berenson v. World Jai-Alai, Inc., 374 So.2d 35 (Fla. 3rd DCA 1979). Last, in spite of the Court being apprised by the Appellants of the error made by the trial court in not considering the purpose of the tort in determining whether the Plaintiffs had established a prima facie case, due to the fact that Plaintiffs' counsel misled the trial court and Defendants' counsel, it still let the judgment, including punitive damages, stand.

At the outset of these proceedings below, the Plaintiffs sought to establish that the Appellants and another Defendant, STOWE, conspired to destroy COTTON's newly formed cab company in order to maintain all the taxi cab business for STOWE's City Cab Company (R 14). Plaintiffs failed to prove this and STOWE's motion to dismiss was granted at the end of the Plaintiffs' case (R 423). Clearly, STOWE, as owner and operator of the only other cab company in the town of Ft. Walton Beach, was the only defendant who could possibly stand to gain any type of business advantage from any interference with the operation of COTTON's cab company. Accordingly, under the authority of Hales v. Ashland Oil, Inc., supra, there was no legal basis for maintaining an action for tortious interference against the remaining defendants after STOWE was dismissed. Based on the evidence presented against them and any reasonable inferences that could be drawn from it, neither of the Appellants, one a large corporation based

in Dallas, Texas and the other, a bus station operator, could have been expected to secure any business advantage directly over the Plaintiff who was in a different business entirely.

The Appellants note that the First District did not choose to follow her sister court and expressly dissented from the Third District's and Florida Jurisprudence's analysis and construction of the law. The Appellants submit, however, that the rule of the Third District is the better reasoned one. By requiring a finding that the tortfeasor sought to secure a business advantage directly over the claimant, the intent to commit this particular tort is required to be proven. The cause of action sued upon is thereby defined and distinguished from some other tort which would require different legal standards be met to establish liability and the measure and apportionment of damages, both compensatory and punitive.

As the court noted in Hales, supra, without a requirement that the tortfeasor be shown to be seeking a business advantage directly over the claimant, any number of claims could be brought against a defendant or his employer for damage indirectly caused to one's business. Furthermore, such a requirement protects a party such as TAMIAMI here from the injustice of being held liable for compensatory and punitive damages for the acts of agents and others which are not committed within the scope of their agency, not requested or ratified, and which do not increase its business or further its purposes. In the case at bar, the jury found CROSBY was

acting outside the scope of his employment on both counts, yet the court still allowed them to assess punitive damages against the employer, TAMIAMI.

Notwithstanding the merits of either position, the decision of the Court in the instant case leaves the established law of Florida in doubt with respect to the elements required to establish a prima facie case of tortious interference. To allow this conflict to persist will undoubtedly create grave public difficulty and leave our society in a state of uncertainty as to the law applicable to this tort. Accordingly, this Court should take jurisdiction of this case so that the conflict of the decisions of the appellate courts as to this serious and substantial issue might be resolved and, as importantly, for the purpose of providing guidance to the courts and litigants of this state in dealing with similar situations.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished to Woodburn S. Wesley, Esquire, 3 Plew Avenue, Shalimar, Florida 32579 and to Stanley Bruce Powell, Esquire, PO Box 277, Niceville, Florida 32578, by U. S. Mail this 19th day of July, 1983.

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