OA 2-17-84 017

IN THE SUPREME COURT OF THE STATE OF FLORIDA

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

Petitioners

vs.

J. C. COTTON and AUBREY
JESSE COTTON,

Respondents

CASE NO. 63,946

DCA - AN-109



ON DISCRETIONARY REVIEW OF THE DECISION
OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT

# PETITIONERS' INITIAL BRIEF ON THE MERITS

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## 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 Petitioners 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 Plaintiffs (Respondents herein) COTTON and A. J. COTTON, filed their original two count Complaint on June 22, 1977 [R 1-4] and their Amended Complaint on March 22, 1979 [R 28-31]. The Amended Complaint generally expanded upon specific acts of misconduct primarily in connection with the Defendant STOWE who was discharged at trial upon a directed verdict. Count I was brought by J. C. COTTON only and alleged tortious interference and conspiracy to tortiously interfere with his business relationship in the early part of 1977. This Count was brought against all three original Defendants, CROSBY, STOWE and TAMIAMI. TAMIAMI was joined in Count I on the basis of an alleged agency relationship purportedly existing between TAMIAMI and CROSBY. Count II was brought by the other Plaintiff, A. J. COTTON, against CROSBY only and alleged an assault and battery on A. J. COTTON by CROSBY on January 21, 1977.

In Count I, COTTON alleged that CROSBY and TAMIAMI, "by and through their agent", engaged in a campaign and conspired with STOWE to damage COTTON's business with the intent to benefit STOWE's City Cab Company, another cab company in Ft. Walton Beach. Count II related only to the battery of A. J. COTTON by CROSBY.

The issues presented by the Complaint and in the pretrial memoranda of the Defendants and the Plaintiffs [R 663-667] were as follows:

(1) Whether CROSBY and TAMIAMI, by and through their agent CROSBY, interfered with an advantageous business relationship of COTTON; (2) whether CROSBY, TAMIAMI, by and through their agent CROSBY, and STOWE conspired to interfere with COTTON's business in order to gain preferential treatment for STOWE's City Cab Company; and (3) whether CROSBY, individually, committed an assault and battery on A. J. COTTON [R 22-24].

The case was tried before a jury in Okaloosa County beginning on June 7, 1982, and lasted two (2) days. STOWE was granted a directed verdict at the close of Plaintiff's case, the Court finding that there was insufficient evidence of tortious interference or conspiracy to tortiously interfere to go to the jury on the issue of STOWE's liability to COTTON. CROSBY's and TAMIAMI's motions for directed verdict on these issues were denied as was TAMIAMI's motion for directed verdict with respect to their liability for punitive damages [R 420-424].

The Plaintiffs never asserted any claim against TAMIAMI for anything other than the acts of CROSBY acting as their agent. Nevertheless, the Court, over objection [R 461-464], instructed the jury that it could hold TAMIAMI liable for misconduct of an employee acting outside the scope of his employment on a theory of possessor liability [R 637], although sketchy evidence, if any, on ownership and possession

of the premises had been presented. In addition, the jury was instructed that TAMIAMI could be held liable for the battery of A. J. COTTON despite the fact that TAMIAMI had never been named as a party or put on notice that damages were being sought against them on this Count [R 28-31].

The special verdict form submitted to the jury over objection of the Defendants instructed them to find whether CROSBY was acting within the scope of his employment and also provided a place for them to place the assessment of punitive damages against TAMIAMI. It did not, however, require the jury to determine whether TAMIAMI's acts as the owner of the premises were willful and wanton as opposed to merely negligent [R 648-650]. The verdict form was the first notice to TAMIAMI that punitive damages were being sought from them directly for CROSBY's acts committed outside the scope of his employment [R 468].

The jury returned a verdict finding that CROSBY wrongfully interfered with an advantageous business relationship of COTTON and assessed compensatory damages of $27,000 against both CROSBY and TAMIAMI. They further found that CROSBY had acted outside the scope of his employment and assessed punitive damages of $10,000 against him and $250,000 in punitive damages against TAMIAMI [R 648-650].

On Count II the jury returned a verdict in favor of A. J. COTTON and assessed compensatory damages of $25.00 against both CROSBY and TAMIAMI. The jury, again, found that

CROSBY had at all times acted outside the scope of his employment and after assessing punitive damages of $1,000 against CROSBY, went on to assess an additional $50,000 against TAMIAMI.

Petitioners' Motions for New Trial, Judgment in Accordance with their Motion for Directed Verdict, Remittitur, and to Interview Jurors were denied [R 85], and an appeal to the First District Court of Appeal followed. In affirming the trial court, the First District Court of Appeal noted that an express and direct conflict exists between its decision in the instant case and the law of the Third District Court of Appeal with respect to the elements of proof required to prove a prima facie case for tortious interference with an advantageous business relationship. See Appendix. Rehearing was denied on June 10, 1983.

Petitioners filed their Notice to Invoke Discretionary Jurisdiction of the Supreme Court on July 5, 1983, and this Court accepted jurisdiction on the merits on October 28, 1983.

## STATEMENT OF THE FACTS

J. C. COTTON, with the help of his wife and son, A. J. COTTON, started a taxi-cab business in Ft. Walton Beach in late 1976 [R 186,187]. According to COTTON's testimony, his initial efforts to solicit business at the bus station were met with no cooperation from CROSBY, who threw COTTON's cards into the trash can and told COTTON he would not help him because he had "good friends" at another cab company in Ft. Walton Beach, owned by the Defendant STOWE.

COTTON further testified that a number of acts of malicious mischief caused damage to his cab later in 1977, including numerous flat tires. COTTON said he saw STOWE and his employees tearing down his advertising [R 228] and saw CROSBY cutting the phone lines at COTTON's cab stand. COTTON alleged all of these acts were part of a conspiracy to destroy his business and give a preference to STOWE's cab company [R 28-31].

COTTON testified he called TAMIAMI sometime in early 1977 (the exact first date was never established) and informed Otis Sanders of his initial problems in parking. This, according to COTTON, prompted Sanders to call CROSBY and write a letter [R 51] on March 14, 1977, directing that all cabs would be treated equally at the bus station premises. The damage to COTTON's cab allegedly continued, and COTTON filed suit in June, 1977.

COTTON's business flourished in the early and middle part of 1977, during the time the alleged acts of tortious interference were to have taken place. He testified his business began to go downhill two years later in late 1979 [R 248-250]. CROSBY retired from the bus station in Ft. Walton Beach in June, 1980.

COTTON did not specify his actual losses and did not offer records or provide any direct evidence of operating expenses or net earnings. He did testify he was doing around $2,500 to $3,000 in monthly gross earnings during the first few months after he got started in mid-1977. His business started to go downhill in late 1979 and continued to drop to around $400 by the time of trial in 1982, two years after CROSBY retired. At the time of trial he testified he was broke and unable to feed his family, but was unable to "put a figure" on his lost profits [R 250].

No testimony was offered to establish that TAMIAMI authorized or ratified CROSBY's acts or that TAMIAMI sought to gain any advantage over COTTON by the preference of one cab company over another. A great deal of the testimony concerned STOWE and several of his employees and their alleged tortious activities directed toward COTTON. The testimony established that most of the malicious acts were apparently committed by STOWE or his employees and continued after CROSBY's retirement. STOWE was the only Defendant who was shown to have gained any advantage over COTTON,

however, STOWE was granted a directed verdict at the close of the Plaintiff's case.

There was also testimony that COTTON lost the business he had with the local hospital delivering blood as an indirect result of his personal feud with CROSBY. It was never shown who, if anyone, began delivering the blood on any regular basis thereafter.

In Count II, A. J. COTTON testified that CROSBY hit him on January 21, 1977. This is the first date on which any violence or threat of violence by CROSBY is alleged to have occurred. Although COTTON testified he called TAMIAMI sometime in early 1977, there is no evidence that he called them before January 21, 1977, or that TAMIAMI was ever notified of this type of problem or any dangerous propensities on CROSBY's part prior to the battery on January 21, 1977. A. J. COTTON testified that he required no medical attention, incurred no medical bills and had no other losses following and as a result of the battery [R 332].

## ARGUMENT

### I.

THE JUDGMENT AWARDING PUNITIVE DAMAGES AGAINST TAMIAMI WAS IMPROPERLY BASED UPON EVIDENCE OF WILLFUL AND WANTON MISCONDUCT BY CROSBY ACTING OUTSIDE THE SCOPE OF HIS EMPLOYMENT RATHER THAN ANY WILLFUL AND WANTON MISCONDUCT ON THE PART OF TAMIAMI AND MUST THEREFORE BE REVERSED AS BEING CONTRARY TO THE LAW OF FLORIDA

Florida law does not allow an employer to be held liable for punitive damages merely upon proof of willful and wanton misconduct on the part of an employee acting outside the scope of his employment. Where liability is vicarious, however, as when the employee is found to have acted for the advantage of his employer and within the scope of that employment, the claimant must only prove that some fault existed on the part of the employer. Mercury Motors Express, Inc. v. Smith, 303 So.2d 545 (Fla. 1981). Where, as in the case at bar, a person is found to have acted for his own purposes and outside the scope of his employment, liability for punitive damages, to be imposed upon an employer, must be based upon the employer's own willful and wanton misconduct in order to permit such an award against the employer. See Petrik v. New Hampshire Insurance Co., 379 So.2d 1287 (Fla. 1st DCA 1979). Even considering the evidence in the case at bar in that light most favorable to the Plaintiff, nowhere can there be found any showing of willful and wanton misconduct on the part of TAMIAMI. Thus, there is no basis for

an award of punitive damages against them and that part of the judgment of the trial court should be reversed.

In the recent case of U.S. Concrete Pipe Company v. Bould, ___ So.2d ____ (Fla. 1983), 8 FLW 228 (S.Ct. July 27, 1983), this Court dealt with the issue of whether an employer was entitled to insurance coverage for the punitive damages which were assessed against it as a result of the willful and wanton misconduct of its employee committed within the scope of his employment. Since this Court noted that public policy forbids insuring against willful, wanton and malicious misconduct, it was critical for insurance coverage purposes to determine if the company was being held accountable for its own active negligence as opposed to being held vicariously liable by reason of the relationship of master and servant. Similar issues are before the Court in this case and neither willful and wanton misconduct of an employer in connection with the acts of its servant acting within the scope of his employment nor vicarious liability on the part of TAMIAMI can be found in the record. Accordingly, the award of punitive damages against TAMIAMI can in no way be legally justified under the facts of this case.

The jury found that CROSBY was acting outside of the scope of his employment. The acts which COTTON alleged were committed by CROSBY were unrelated to any advantage favoring or any business purpose of TAMIAMI and in large part took

place off the bus station premises. As this Court has ruled previously, any award against an employer for damages where an employee is acting outside the scope of his employment must rest solely upon the employer's own active negligence in retaining the employee and in order to justify punitive damages, upon the employer's own willful and wanton misconduct, not merely upon vicarious liability, Mallory v. O'Neill, 69 So.2d 313 (Fla. 1954). Even if we assume arguendo in the case at bar that TAMIAMI employed CROSBY, there was absolutely no showing of willful and wanton misconduct on TAMIAMI's part which would, by their retaining CROSBY, support an award of punitive damages against them based on the standards established by this Court in prior cases.

The First District Court of Appeal apparently did not consider the requirement of willful and wanton misconduct when it affirmed the judgment against TAMIAMI, citing evidence that TAMIAMI failed to adequately investigate and correct the situation at the bus station. That court called TAMIAMI's letter to CROSBY on cab parking policy a "tepid directive" on their part. See Appendix. Even accepting this characterization of TAMIAMI's conduct, such conduct cannot be deemed to be the kind of misconduct which satisfies the requisite willful and wanton disregard for the rights of others which is required

as a basis for any award of punitive damages. TAMIAMI's letter, even if accurately characterized as a "tepid directive", indicates at least some genuine concern and affirmative action to alleviate and correct the situation, and this action, as a matter of law, would overcome any inference of willful, wanton and malicious misconduct on their part. The punitive damages award is clearly unsupported by and contrary to the manifest weight of the evidence presented. No active negligence, much less malice or willful misconduct, on the part of TAMIAMI was ever shown by any competent evidence.

It is well settled that punitive damages cannot be assessed for mere negligent conduct and that even gross negligence will not support an award of punitive damages. U.S. Concrete Pipe Company v. Bould, supra. Even if the evidence presented by COTTON were to suggest that TAMIAMI could have or should have done more to control or stop CROSBY's misconduct, then at most, TAMIAMI could be held liable for no more than simple negligence and resulting compensatory damages. Taking all inferences reasonably capable of being drawn from the evidence in favor of COTTON, the evidence presented is non-existent or at best legally insufficient to sustain the award of punitive damages against TAMIAMI. There simply was no showing by the Plaintiffs of any malice or wanton, willful or outrageous conduct

on the part of TAMIAMI. See Clooney v. Geeting, 352 So.2d 1216, (Fla. 2nd DCA 1977).

Moreover, once the jury found that CROSBY was acting outside the scope of his employment, it was the mandatory and exclusive duty of the trial court to determine if the evidence showed a legal basis for awarding punitive damages against TAMIAMI, i.e., whether the Plaintiff had proven active negligence tantamount to willful and wanton misconduct on the part of TAMIAMI. See Winn & Lovett Grocery Co. v. Archer, 171 So. 214 (Fla. 1936). The trial court failed to make this determination after the jury rendered its verdict. Had the trial court understood and carried out its exclusive duty after the verdict was rendered, a judgment notwithstanding the verdict would have been entered in favor of TAMIAMI. This error was compounded rather than corrected at the post-trial motion hearing where the trial court agreed with COTTON's counsel's contention that there was sufficient evidence of "some fault" on the part of TAMIAMI which he asserted was sufficient to allow the jury to consider an award of punitive damages against TAMIAMI [R 102]. Clearly this was not the correct principle of law to be applied. Since it had already been determined by the jury that CROSBY was not acting within the scope of his employment, the law required the Court, not the jury, make the decision as to whether or not TAMIAMI's misconduct toward

COTTON, if any, was proven and was willful and wanton.

If an employee is found not to have been acting within the scope of his employment when his misconduct occurred and the employer is not guilty of willful and wanton misconduct of its own toward the claimant, there are no public policy or legal reasons for awarding punitive damages against the employer. Such a finding would be entirely inconsistent with the long standing decisions of this Court in which the reasons for awarding punitive damages have been clearly and consistently stated as being to the contrary. See Winn & Lovett, supra.

In the case at bar, the jury found that CROSBY was acting outside the scope of any employment with TAMIAMI. This finding virtually insulates TAMIAMI from vicarious liability, and the standard of "some fault" as espoused by the decision in Mercury Motors, supra, is, therefore, clearly inapplicable to the facts and circumstances of this case. The liability of TAMIAMI for punitive damages for CROSBY's acts must be based upon TAMIAMI's own willful and wanton misconduct, without regard to the acts of CROSBY committed outside the scope of his alleged employment. It was the mandatory and exclusive duty of the trial Judge to decide if the facts proven were sufficient to hold TAMIAMI liable for punitive damages based upon its own willful and wanton misconduct. Accordingly, for the trial court to allow an award of punitive damages against TAMIAMI in this case it

would have had to determine after the verdict was in that there was sufficient evidence of willful and wanton misconduct on the part of TAMIAMI, not just "some fault". The trial court never considered making this determination and was obviously not aware of its duty.

TAMIAMI would assert that a careful examination of the record shows that the trial court failed to apply the correct standard when considering TAMIAMI's motion for a judgment notwithstanding the verdict and that it erred, as a matter of law, in failing to either set aside the verdict or enter judgment in favor of TAMIAMI on the issue of punitive damages. The judgment awarding punitive damages against TAMIAMI should, therefore, now be reversed and entered in favor of TAMIAMI.

II.

THE TRIAL COURT ERRED IN FAILING TO DIRECT A VERDICT FOR CROSBY AND TAMIAMI ON COUNT I WHEN COTTON FAILED TO PROVE THAT THE DEFENDANTS SOUGHT TO SECURE ANY ADVANTAGE OVER HIM

In the case at bar, the First District Court of Appeal affirmed the judgment of the trial court awarding damages against the Appellants for tortious interference with an advantageous business relationship, despite the Appellees' failure to prove that the Appellants sought to secure an advantage directly over the Appellees by their course of conduct. See Appendix. This decision of the First District

Court of Appeal expressly and directly conflicts with the decisions of the Third District Court of Appeal in Hales v. Ashland Oil, Inc., 342 So.2d 984 (Fla. 3rd DCA 1977) cert. den. 359 So.2d 1214 (Fla. 1977), John B. Reid & Associates v. Jiminez, 181 So.2d 575 (Fla. 3rd DCA 1965), and Berenson v. World Jai-Alai, Inc. 374 So.2d 35 (Fla. 3rd DCA 1979).

An examination of the evidence and the decisions of the Third District Court of Appeal with respect to this tort establishes that seeking an advantage over the claimant is an essential element of a prima facie case and, in the case at bar, this was never presented or proven at trial. Further, the trial court, sub judice, erred in failing to direct a verdict for the Defendants when proof of this essential element was not presented by the Plaintiffs.

Following the close of the Plaintiffs' case and again following the close of the Defendants' case, TAMIAMI and CROSBY moved for directed verdicts with respect to COTTON's claim for tortious interference with an advantageous business relationship [R 462]. In response, COTTON's counsel, Mr. Wesley, read to the Court from 32 Florida Jurisprudence 2d, Interference, §5 (1981), and the following exchange took place:

> Wesley: Your Honor, it sounds like there were two arguments. . . Florida Jur II in a new book called "Interference" has even separate sections -- one being interference with contracts and another whole topic on interference with advantageous

business relationships, and they set out a four-pronged test which is part of the requested jury instruction that I gave you. . . Those tests are, one, that you must show the existence of a business relationship under which the plaintiff has certain rights, not necessarily evidenced by an enforceable contract; two, knowledge of the relationship on the part of the interferor (sic); three, an intentional and unjustified interference with that relationship by the defendant; and four, damage to the plaintiff as a result of the breach of the relationship. Your honor, I think we have proved each and every one of these allegations -- put on substantial proof as to each of these allegations, and I don't think the Court should entertain a directed verdict . . . Do you want to see my case, Judge?

Court: I'm going to assume you gave me a correct recitation.

Wesley: Yes, sir.

[R 419-421]

The trial court obviously relied upon the recitation by the Appellees' counsel for the elements of a prima facie case and on that basis denied CROSBY's and TAMIAMI's motions for directed verdicts. COTTON's counsel, however, did not give a correct recitation of the law with respect to this cause of action as the trial court erroneously assumed he had. The section of Florida Jurisprudence setting forth the elements of the tort and partially read to the Court with the omitted portion underlined below reads as follows:

> 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 an 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 with the business relationship must be to secure an advantage over the Plaintiff. 32 Florida Jurisprudence 2d, Interference §5 (1981).
> [Emphasis added]

The purpose in the section underlined above is an essential element of the tort of tortious interference under the decisions of the Third District Court of Appeal. It was not disclosed to the trial court and Appellants' counsel by counsel for COTTON and was, thus, never considered by the trial court in ruling on the Defendants' motions during or after trial. The First District Court of Appeal, in affirming the judgment of the trial court, recognized the fact that this element was never considered by the trial court or proven by COTTON but held that "liability will depend not on a single definitive rule, but largely on factors and circumstances unique to each case". See Appendix, page 8.

The "factors and circumstances" unique to the case at bar require a reversal of the judgment entered and entry of a judgment in favor of CROSBY and TAMIAMI, since the allegations made by COTTON and the evidence offered by him only indicate that CROSBY's acts at most were the result of a personal feud between CROSBY and COTTON and not motivated by any specific intent to gain a direct business advantage

over COTTON for either himself or TAMIAMI. Of course, COTTON never alleged TAMIAMI was trying to gain any advantage over him, nor did he prove it. He did allege CROSBY wanted to profit from establishing his own relationship with General Hospital, but he did not offer any proof of it. CROSBY's purpose and capacity is extremely important, since the mere fact that COTTON's business had diminished after filing suit, without more, is legally insufficient to establish tortious interference against both Petitioners under Florida law. See Berenson v. World Jai-Alai, supra.

The requirement that a party must be shown to be seeking an advantage directly over the Plaintiff is a well-reasoned rule. This rule requires a finding that both CROSBY and TAMIAMI were seeking to secure a business advantage directly over COTTON and intended to commit this particular tort. The cause of action sued upon here clearly differs from other torts which would require different and less stringent legal standards with respect to the liability of the master and the servant, the capacity of the servant and the measure and apportionment of damages as to each.

Without a requirement that the tortfeasors be shown to be seeking a business advantage directly over the claimant, as noted in Hales, supra, any number of claims could be brought against a defendant or his employer for damages which are indirectly caused to one's business through another's actions though unrelated to the business activities

of the alleged tortfeasors. It would be unreasonable under any construction of the evidence here to find that TAMIAMI had anything at all to gain by the favoring of one cab company over another at Ft. Walton Beach. Indeed, the only person who would have stood to gain anything from the interfering with COTTON's cab company was the Defendant STOWE, who was discharged from the case on a motion for directed verdict at the close of Plaintiffs' case.

The reasons for requiring a claimant to comply with the "seeking an advantage" requirement become even more evident when dealing with a case involving a master-servant relationship. While it may not always be critical to insure justice to mandate proof that an individual sought an advantage over another before imposing personal liability on him for tortious interference, in order to impose vicarious liability upon an employer it is critical and absolutely essential that proof be presented to show that the employee performed his duties within the scope of his employment and in a representative capacity. Failure to require such proof would allow, as occurred in the case at bar, an award of compensatory damages out of proportion to any actual damages proven as well as the unjust imposition of punitive damages upon an employer where the facts and circumstances clearly would not otherwise warrant such. This, of course, assumes an employer-employee relationship exists and the employee is acting within the scope of his employment. In the case at

bar, the jury found CROSBY was not acting within the scope of his employment and the jury was not asked to decide upon his business relationship with TAMIAMI.

Vicarious liability in and of itself is a very strictly construed doctrine and does not allow or require that an employer be held responsible for the criminal or tortious misconduct of an employee acting outside the scope of his employment. Holding an employer liable for an employee's misconduct outside the scope of his employment is rarely permitted, but it is generally prohibited when the employer's interests are not being advanced by the employee's acts and the employer has not authorized or ratified them. An award of punitive damages against an employer in such instances is always prohibited. In the case at bar, no proof was offered to show TAMIAMI gained or could have gained anything by CROSBY's misconduct. Thus, an essential element of the Plaintiffs' cause of action remained unproven and, therefore, there is no basis for allowing the damages awarded against TAMIAMI to stand. Consequently, those awards must be reversed and set aside.

## III.

## THE COMPENSATORY DAMAGE AWARD WAS UNSUPPORTED BY COMPETENT EVIDENCE OF ACTUAL LOST PROFITS AND IMPROPERLY INCLUDED DAMAGES FOR EMBARRASSMENT, INCONVENIENCE AND HUMILIATION

At the trial, COTTON testified that his problems with CROSBY and STOWE began in late 1976 or early 1977 - about the time he started his cab business [R 193]. His company had no record of earnings before the alleged tortious

interference by CROSBY took place; however, on the issue of the extent of his lost profits, COTTON did testify that his business flourished for a period of time, but in late 1979, over two years after the filing of suit in May, 1977, where he alleged lost profits, it began to go downhill [R 248]. At the trial in June of 1982, COTTON testified that because of CROSBY's acts he was "broke" and unable to feed his family, [R 250], despite the fact that his business didn't decline until late 1979 and CROSBY had been retired from the bus station for over two years before the trial.

It is well-settled in Florida jurisprudence that anticipated profits of a commercial business are too remote, speculative and dependent upon changing circumstances to warrant a judgment for their loss. Alderson v. Miami Beach Kennel Club, Inc., 336 So.2d 477 (Fla. 3rd DCA 1976). When a business is in its inception at the time, such as was COTTON's in the case at bar, and the party cannot establish past profits based on proof of operating expenses and net income for a reasonable period of time, then an award of compensatory damages would be based on insufficient and speculative evidence and must be reversed. American Motorcycle Institute, Inc. v. Mitchell, 380 So.2d 452 (Fla. 5th DCA 1980), A&P Bakery Supply v. Hawatmeh, 388 So.2d 1971 (Fla. 3rd DCA 1980).

On the issue of damages, COTTON did testify that he suffered some physical damage to his cabs as well as verbal

abuse from CROSBY; however, he never produced any evidence of net income or operating expenses either before or after the alleged tortious interference. Taking all of the evidence in the light most favorable to COTTON, it was simply never established that COTTON lost profits within the legally required degree of certainty. See Tennant v. Vazquez, 389 So.2d 1183 (Fla. 2nd DCA 1980). In fact, COTTON's testimony established that his gross profits were greatest in the months immediately preceding the filing of the law suit when all the alleged tortious activity was taking place and didn't begin to go downhill until over two years later [R 248].

It would be unreasonable under any construction of the evidence to award compensatory damages of $27,000.00 on Count I for the loss of net profits in a business which was only in existence for approximately six months at the time suit was filed, never had gross earnings of more than $3,000.00, and never established any track record of net profits at all. COTTON testified that because of CROSBY's actions he "lost trips" [R 194]; however, he never even estimated how many trips he lost or their approximate value. His testimony that he was "broke" at the time of the trial some five (5) years after his action for tortious interference was filed is irrelevant and speculative. In addition, since the compensatory damages award has no legal support, the punitive damages award must also fall. See

Tennant v. Vazquez, supra.

It is apparent that the amount of the jury award was the result of factors other than lost profits. In an action for interference with property rights, there is no authority for the proposition that a party is entitled to "intangible" damages for embarrassment, inconvenience and humiliation, See North American Van Lines, Inc. v. Roper, 429 So.2d 750 (Fla. 1st DCA 1983). Here, the jury was improperly allowed over objection to consider such elements of damage [R 638]. The effect of allowing the jury to consider these intangible factors in assessing compensatory damages, especially in view of the amount of the award, was to create confusion as to the distinction between compensatory damages and punitive damages. Here, the compensatory damage award was unsupported by the kind of specific evidence required and also erroneously included elements of damage not allowed under Florida law in this kind of an action. Accordingly, this Court should reverse that portion of the final judgment awarding compensatory damages to COTTON on Count I and remand the case for a new trial to determine what compensatory and punitive damages, if any, should be awarded to COTTON and against whom on this Count based on evidence of actual net profits lost as a direct result of the actions of the Petitioners.

IV.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED THE JURY TO CONSIDER THE ISSUE OF TAMIAMI'S LIABILITY ON COUNT II IN THE ABSENCE OF ANY EVIDENCE THAT TAMIAMI KNEW OF ANY DANGEROUS CONDUCT OF CROSBY PRIOR TO THE BATTERY OF A. J. COTTON

The record in the case discloses that no evidence was presented to indicate, infer or prove that CROSBY had engaged in any conduct dangerous to anyone including the "general public", or that TAMIAMI had any knowledge that CROSBY had any propensity to engage in any dangerous conduct prior to the alleged battery of A. J. COTTON on January 21, 1977. Without such evidence, the instruction given by the court which permitted the jury to consider the issue of liability of TAMIAMI on Count II constituted reversible error. While the record does contain some testimony that at some time in early 1977 COTTON notified TAMIAMI of problems in parking at the bus station, there is no evidence in the record of any contact whatsoever by COTTON with TAMIAMI until after the battery complained of in Count II. TAMIAMI cannot, therefore, be held liable for damages on Count II for a criminal act committed by CROSBY while acting outside the scope of his employment. See Cardounel v. Shell Oil Company, 397 So.2d 328 (Fla. 3rd DCA 1981), Wayne v. Unigard Mutual Insurance Company, 316 So.2d 581 (Fla. 3rd DCA 1975), and DeJesus v. Jefferson Stores, Inc., 383 So.2d 1313 (Fla. 3rd DCA 1980).

The record establishes that any notice that TAMIAMI may

have received of CROSBY's alleged dangerous propensities came too late for them to do anything about it and was insufficient as a matter of law to hold them liable on Count II to A. J. COTTON for damages, especially for punitive damages in the amount of $50,000 which were clearly excessive and unfounded. See 35 AM JUR Master and Servant, §567. In Dincher v. Great Atlantic and Pacific Tea Company, 356 Pa. 151, 21 A2d 710 (Pa. 1947), one of the cases relied on by the Fourth District Court in MacArthur v. Burke, 240 So.2d 198 (Fla. 4th DCA 1980), the Supreme Court of Pennsylvania held that even where an employer had actual knowledge that an employee had temper flare-ups prior to a battery of an invitee, this was wholly insufficient to put the employer on notice. Id at 715. Furthermore, here the alleged battery occurred in January of 1977, and there is nothing in the record to show that COTTON actually notified TAMIAMI or complained of any threats or other fear of violence from CROSBY prior to this time. The battery was certainly unforeseeable by TAMIAMI and for this reason alone, they should not be held liable to A. J. COTTON at all.

The record obviously requires a reversal of the punitive damages award against TAMIAMI on Count II. The chronology of events simply does not support any inference that TAMIAMI had the type of notice legally sufficient to impose a duty on it to have terminated or otherwise controlled CROSBY prior to the battery in January of 1977. Certainly if such a duty did arise, TAMIAMI's breach was not

willful and wanton. COTTON's problems and phone calls to TAMIAMI regarding CROSBY occurred after the battery, not before.

The trial court committed error in instructing the jury that TAMIAMI could be held liable on Count II where there was insufficient evidence of prior notice, and the jury verdict imposing compensatory and punitive damages against TAMIAMI on this Count was against the manifest weight of the evidence and should be reversed and the judgment set aside.

V.

TAMIAMI WAS DENIED FOURTEENTH AMENDMENT DUE PROCESS WHEN THE TRIAL COURT SUBMITTED A VERDICT TO THE JURY WHICH ALLOWED IT TO AWARD DAMAGES BASED UPON A FACTUAL AND LEGAL THEORY OF LIABILITY NEVER ASSERTED IN THE PLEADINGS AND UPON A COUNT IN WHICH IT WAS NEVER MADE A PARTY IN THE PLEADINGS OR BY CONSENT

Due process requires that a party be given adequate notice of the claims asserted against him and an opportunity to defend against those claims. In the instant case the Plaintiffs initially proceeded against TAMIAMI on a cause of action based upon an alleged conspiracy committed by and through "their agent CROSBY". This theory of respondeat superior continued all through the trial, even after the claim against STOWE was dismissed at the close of the Plaintiffs' case.

Upon the pleadings, TAMIAMI could reasonably have expected to, and did, defend against Count I on the basis that CROSBY's alleged acts, even if proven, were not committed within the scope of his employment or for the purpose

of seeking any advantage for TAMIAMI. No fault on the part of TAMIAMI was ever alleged in either Count as required by Mercury Motors, supra. As pointed out above, it is well-settled that even an employer cannot be held to be vicariously liable when his employee is acting outside the scope of his employment. Therefore, in the case at bar, the jury's finding effectively barred a verdict against TAMIAMI based upon vicarious liability. MR&R Trucking v. Griffin, 198 So.2d 879 (Fla. 1st DCA 1967).

In Count II, TAMIAMI was never named as a party in the pleadings or in any amendment to the pleadings. No facts were ever alleged in the pleadings that would have put TAMIAMI on notice that it would be required to answer or defend against this claim. Despite these shortcomings in the pleadings, this cause proceeded through trial and the jury rendered a verdict against TAMIAMI awarding compensatory as well as punitive damages based upon a theory of liability about which TAMIAMI neither had adequate and proper notice nor the opportunity to defend against.

Florida law is liberal with respect to amendments to pleadings to conform to the evidence. Here, however, the pleadings were never amended to reflect that COTTON had decided to sue TAMIAMI directly on the theories advanced in Count I or that TAMIAMI was added as a Defendant in Count II. Even if COTTON had requested leave to amend the pleadings during the trial, such an amendment would have been improper

and prejudicial since the amendment would have materially changed the issues, created surprise and prejudice and substantially increased TAMIAMI's liability. Martinez v. Clark Equipment Co., 382 So.2d 878 (Fla. 3rd DCA), Mansell v. Foss, 343 So.2d 910 (Fla. 3rd DCA, 1977).

Based upon the pleadings, TAMIAMI never had adequate notice that it would be called upon to defend against allegations that it was directly responsible for COTTON's business losses, nor was it apprised that it would be a defendant in Count II and required to defend itself against charges that it knowingly kept a "dangerous servant" in its employment. The evidence in support of TAMIAMI's liability on COUNT II was minimal, if not non-existent; however, TAMIAMI never had an opportunity to even defend against it at all. Had the issue of TAMIAMI's liability based upon the allegations of Count II been properly noticed by the pleadings as due process requires, TAMIAMI could have and would have raised valid defenses to this Count.

The liability of an employer for an assault by a servant is not absolute and the duty of the employer to check the background of an employee for dangerous propensities is relative to the job he performs. See Williams v. Feather Sound, Inc., 386 So.2d 1238 (Fla. 2nd DCA 1980). Therefore, the duty, liability and defenses of TAMIAMI, even if an employer, are necessarily distinct with respect to the nature of the misconduct as well as the capacity of the

employee during the time he acts. The First District Court was of the opinion that there was no prejudice involved in allowing the eleventh hour joining of TAMIAMI on the separate and distinct tort charged in Count II. We disagree and maintain that it was highly prejudicial.

A similar denial of due process occurred on Count I when COTTON's theory of liability was changed at the end of trial from that of respondeat superior or vicarious liability to that of negligent hiring or possessor liability. The duties, liabilities and defenses presented by these two theories clearly involve distinct and different types of pleading and proof. Had COTTON presented the issues he sought to prove in his pleadings, as required by law, TAMIAMI could have met those issues and allegations with proof of their own and a fair trial would have been had. As it turned out, however, the compounding of error upon error and joining TAMIAMI on both Counts effectively prevented TAMIAMI from preparing any defense to these assertions, confused the jury, the court and the parties and resulted in extreme prejudice to TAMIAMI as well as the denial of due process of law to them.

VI.

THE TRIAL COURT APPLIED AN ERRONEOUS STANDARD OF REVIEW WHEN IT FAILED TO EVEN CONSIDER THE DEGREE OF TAMIAMI'S MISCONDUCT RELATIVE TO THE AMOUNT OF THE PUNITIVE DAMAGE AWARD IN RULING ON TAMIAMI'S MOTION FOR NEW TRIAL OR REMITTITUR

TAMIAMI filed its Motion for New Trial or Remittitur and argument was heard on June 14, 1982. TAMIAMI argued that, under prior decisions of this Court, it was error to

allow the assessment of punitive damages due to the absence of any evidence of willful and wanton or malicious misconduct on their part. Furthermore, TAMIAMI argued that, even if there was a basis for punitive damages, the award assessed against them was totally out of proportion to the degree of their misconduct proven at trial, citing as support this Court's decision in Arab Termite and Pest Control of Florida, Inc. v. Jenkins, 409 So.2d 1039 (Fla. 1982) [R 130].

TAMIAMI's motion was denied, the trial court being of the opinion that in reviewing the award of punitive damages against TAMIAMI he was limited in his review to whether there was evidence that the jury was influenced by matters outside the record or that the award would result in economic castigation to the Defendant [R 131]. The trial court's interpretation of the law and his duty with regard to the scope of this review was erroneous and improper in light of Arab Termite, supra, and this error resulted in an unjust result in the case at bar considering the amount of the award which was extremely excessive in relationship to the extent of TAMIAMI's alleged misconduct. The trial court should have ordered a new trial or remittitur since the manifest weight of the evidence conclusively proved that the amount of punitive damages assessed was out of all reasonable proportion to any malice, outrage or wantonness of the alleged tortious conduct of TAMIAMI. At most, COTTON

presented evidence of non-feasance on the part of TAMIAMI in an unconvincing fashion.

A review of the transcript of the post-trial motion hearing shows that the trial court did not consider the degree of TAMIAMI's own willful and wanton misconduct in ruling on their motion for new trial or remittitur as to both Counts as required by the Arab Termite decision. In light of no evidence being offered on the issue of whether TAMIAMI had notice of CROSBY's dangerous propensities prior to the battery of A. J. COTTON, a new trial or remittitur on Count II surely should have been granted as to TAMIAMI.

Had the trial court considered the evidence at the time of the post-trial motion hearing with a view toward deciding whether or not COTTON had proved any willful and wanton misconduct on the part of TAMIAMI, it is likely that he would have been compelled to order a new trial or remittitur on Count I. The trial court, however, was under the mistaken belief during the trial as well as afterward that only "some fault" on the part of TAMIAMI was required to impose liability for punitive damages on them under either a theory of negligent hiring or possessor liability [R 424]. "Some fault" was not the proper standard to apply to hold TAMIAMI liable once the jury found CROSBY had acted outside the scope of his employment. This error on the part of the trial court continued through the post-trial hearings and

led to further error in reviewing the liability and measure of damages at that proceeding. A careful review of the trial court's remarks to counsel at the post-trial motion hearing establishes that the court was still using a "mere negligence" and "some fault" standard of review and never considered whether there was sufficient evidence of willful and wanton or intentional and malicious misconduct on TAMIAMI's part to support an award against TAMIAMI for punitive damages [R 104]. The court's failure to enter a judgment in favor of TAMIAMI, notwithstanding the verdict against it, resulted from the application of the wrong legal standards.

It was clearly within the trial court's discretion to determine whether the amount of the punitive damages verdict was against the manifest weight of the evidence, and his failure to realize that he even had the right and authority to consider the extent of TAMIAMI's misconduct effectively denied TAMIAMI the scope of review to which it was legally entitled under the decisions of this Court. Accordingly, this court should determine whether there was sufficient evidence presented at trial to impose liability for $300,000 in punitive damages against TAMIAMI, and, if there wasn't as TAMIAMI contends is the case, this Court should set aside the judgment entered against TAMIAMI and order that a judgment be entered in its favor or for a lesser amount.

## CONCLUSION

The trial court erred in not directing a verdict for both TAMIAMI and CROSBY at the end of the Plaintiffs' case on Count I as no proof was offered to show that either of them sought an advantage over COTTON. At the close of the evidence, the court should have instructed the jury that in order to find either of the Defendants liable on Count I, they would have to find that the Defendant to be held liable sought to gain an advantage over COTTON. The court should have directed a verdict as to punitive damages in favor of TAMIAMI since there was insufficient evidence, if any, of willful and wanton misconduct on their part toward CROSBY.

As to Count II, the court should have instructed the jury that they would have to find TAMIAMI controlled the property and had adequate notice that CROSBY had violent propensities before he struck A. J. COTTON in order to hold TAMIAMI liable for compensatory damages to A. J. COTTON and should have directed a verdict in favor of TAMIAMI as to punitive damages since there was no evidence of willful and wanton misconduct on their part toward A. J. COTTON. The trial court did none of this.

Finally, the trial court should have entered judgment in favor of TAMIAMI notwithstanding the verdict on both Counts after the jury found CROSBY was acting outside the scope of his employment. Also, since there was no showing that CROSBY ever sought an advantage over COTTON, judgment notwithstanding the verdict should have been entered in favor of CROSBY on Count I.

The First District Court of Appeal refused to correct the errors made in the trial court which this Court should now correct by entering judgment in favor of TAMIAMI on both Counts and in favor of CROSBY on Count I.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioners' Initial Brief has been furnished to Woodburn S. Wesley, Esquire, 3 Plew Avenue, Shalimar, Florida 32579, and Stanley Bruce Powell, Esquire, PO Box 277, Niceville, Florida, 32578, Attorneys for Respondents, by United States Mail, this 17 day of November, 1983.

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