2-17-84



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

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# PETITIONERS' REPLY BRIEF

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## PRELIMINARY STATEMENT

Although the actual facts outlined by the Respondents in their Answer Brief are for the most part accurate, their statement of the facts fails to follow the actual chronology of the events as they occurred, refers to proffered testimony not actually presented to the jury and, in many instances, refers to testimony which was objected to and held inadmissible.

It should be noted that the physical confrontation between CROSBY and A. J. COTTON occurred on January 21, 1977, and that COTTON's communications with TAMIAMI before that time concerned only his receiving equal parking treatment at the bus station; such facts being entirely insufficient to establish that TAMIAMI was on notice of any violent or dangerous propensities on the part of CROSBY. In addition, most of the testimony referred to in paragraphs numbered 12 through 16 of the Respondents' Answer Brief were objected to and the objections were sustained. Furthermore, there was never any evidence offered as to who was responsible for the damage done to the transmissions and engines of COTTON's cabs, all of which was done away from the bus station.

Although the chronology of the record is difficult to follow, it does show that the incidents complained of occurred over a relatively short period of time and that TAMIAMI stood by and did not discharge CROSBY, who had, before taking over the station at Fort Walton Beach, worked for it in various capacities over the years and who steadfastly

denied the allegations COTTON made against him. COTTON knew TAMIAMI had told CROSBY to treat all the cabs equally because he saw their letter to that effect. Thereafter, the record shows that COTTON never called TAMIAMI again about his parking problem or CROSBY.

I.

Under Florida law punitive damages cannot be awarded against an employer in a negligent hiring and retention or premises liability case unless the employer is found guilty of willful and wanton misconduct. Compensatory damages, however, can be awarded against an employer for simple negligence in a negligent hiring and retention case when the employee acts within the scope of his employment and in a premises liability case even if the employee acts outside the scope of his employment, if prior notice of his dangerous propensities is given to the employer sufficiently in advance of the employee's dangerous misconduct. Respondents, in their Answer Brief, infer that the Petitioners have asked this Court to overrule these precedents as set out in the landmark cases of MacArthur Jersey Farm Dairy, Inc. v. Burke, 240 So.2d 198 (Fla. 4th DCA, 1970), Mallory v. O'Neill, 69 So.2d 313 (Fla. 1954) and Winn & Lovett Grocery Co. v. Archer, 126 Fla. 308, 171 So.214 (Fla. 1936). Such is not the case at all. Contrary to Respondents' assertions in their Answer Brief, Petitioners are asking for a reversal of the damages awarded against TAMIAMI based on these precedents, and such a reversal in the case at bar would be entirely consistent

with the rulings of the Court in the landmark cases cited.

As Petitioners pointed out in their Initial Brief, the doctrine of respondeat superior and the "some fault" standard of employer liability that follows it as expounded upon in Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981), have no application to the case at bar. The jury found that CROSBY was not acting within the scope of his employment or in an effort to promote or further the business interests of TAMIAMI, but went on to find TAMIAMI liable as they had been instructed they could, according to the law in MacArthur, supra, a premises liability case in which negligent hiring and retention issues were involved.

As did the Appellants in Mallory, supra, the Respondents here have attempted to "infuse (and confuse) the doctrine of respondeat superior", (Id. at 315), into a separate and distinct cause of action. While respondeat superior may have been alleged in the original Complaint, the jury found that it was not proven at trial. Accordingly, the "some fault" standard of liability could not be applied to hold TAMIAMI liable for punitive damages. To be held liable for such, a finding of willful and wanton misconduct on their part would have been required. Mallory continues to be Florida's landmark case on negligent retention and also supports the law of Florida which will not permit an employer to be held liable for punitive damages absent a showing of willful and wanton misconduct on its part. There is no evidence in the record of the case at bar to suggest, nor do the Respondents

contend that TAMIAMI was ever guilty of anything more than simple negligence in failing to control CROSBY. Respondents in their Answer Brief set forth facts that cannot be found in the record as a basis for contending TAMIAMI was liable for punitive damages. For example, Respondents at page 7 of their brief assert that "CROSBY was in total charge of TAMIAMI's bus station" and " was TAMIAMI TRAIL TOURS, INC. in Fort Walton Beach". They then cite Dean Prosser as authority for this. They go on to say that TAMIAMI placed CROSBY in a position to commit heinous acts on its property and failed to control him. Again, there are no citations to the record, obviously because these facts are not contained there and were not proven at trial. The Respondents infer that these assumed facts would provide a basis for holding TAMIAMI liable for punitive damages since the jury could find TAMIAMI "guilty of 'fault' foreseeably contributing to the tort of its agent CROSBY. . ." . This is an entirely novel and unfounded theory of liability obviously concocted by the Respondents and certainly is not supported by the authority they cite of Mercury Motors Express, Inc. v. Smith, supra. See Respondents' Answer Brief, page 7.

Later, at page 8 of their Answer Brief, Respondents assert that TAMIAMI's failure to control its "vicious agent" is ample support for the assessment of punitive damages against them under the Mallory rule. Respondents would have the Court believe CROSBY was proven to be a "vicious agent" when in fact this characterization is a label hung on him by Respondents' counsel to draw attention away from the

absence of facts in the record to support it. Furthermore, Mallory does not support Respondents' contention that an employer is liable for punitive damages for its negligent failure to control its servant acting outside the scope of his employment. Respondeat superior is a vital element required by Mallory as a prerequisite to holding an employer liable for its employee's misconduct.

Respondents are silent as to the fact that no evidence was presented to show that TAMIAMI was notified by anyone of CROSBY's alleged acts, dangerous or otherwise, sufficiently in advance to do anything about them especially with respect to the incident involving A. J. Cotton on January 21, 1977.

Neither Mallory nor Mercury Motors can apply to the case at bar since the jury found CROSBY was acting outside the scope of his authority, and MacArthur cannot be applied to hold TAMIAMI liable since the notice requirement was not met. Even if proper notice had been proven, punitive damages could not be assessed against TAMIAMI since absolutely no outrageous or willful and wanton misconduct on their part was proven.

The Supreme Court of Florida, as Respondents acknowledge in their brief, may in fact be moving toward abolishing employers' vicarious liability for punitive damages altogether. See Respondents' Answer Brief, page 8, citing U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061 (Fla. 1983). Such a move was recently recommended by the Florida Bar's Tort Litigation Review Commission, which on November 19, 1983, embraced

Justice Alderman's dissent in U.S. Concrete, supra.

Even if this Court were not to adopt the recommendations of the Tort Litigation Review Commission, the absence of outrageous misconduct on the part of TAMIAMI in the case at bar would preclude awarding punitive damages against them for those acts of CROSBY found to be outside the scope of his employment. Thus, the punitive damages awarded against TAMIAMI should be set aside.

II.

The Petitioners agree with the Respondents' contention that there should be remedies for "obvious wrongs". A cause of action for tortious interference cannot be stated, however, without alleging and proving that the alleged interference was committed in order to seek an advantage. The allegation that one's business suffered indirectly as a result of a personal feud or some animosity between two individuals is not sufficient to label the wrong "tortious interference with an advantageous business relationship", nor is it sufficient to hold the employer jointly and severally liable for an intentional tort committed by an employee when the employer did not have anything to gain by the employee's misconduct and manifested no intent to harm the plaintiff. CROSBY wanted to help his friend, STOWE, succeed in business and had no intention of gaining anything for himself, much less TAMIAMI.

TAMIAMI concedes that in some cases a remedy may be available for what Respondents term "anti-social" conduct, but the law requires this to at least be pled and some proof of damages to be evidenced in order to warrant a recovery. It is critical in such situations to determine the capacity

in which one is acting at the time the tort is committed and the purpose and intent of all parties from whom damages are sought. In this case, respondeat superior was not proven and TAMIAMI was not shown to have intended to interfere with COTTON at all. Without vicarious liability being proven, specific acts of intentional misconduct by TAMIAMI must be proven to hold them liable for COTTON's damages.

The capacity and intent of the parties was never an issue in the recent Third District case of Gerber v. The Keyes Company, ____So.2d ____Case Nos. 83-141, 83-330, 8 FLW 2936 (Fla. 3rd DCA, December 13, 1983), cited in Respondents' Answer Brief. The Defendant/Counter-Claimant in that case, which in contrast to the case at bar involved an actual contractual relationship, failed to state a cause of action for tortious interference because there was no breach of the contract. There can be no tortious interference in the absence of a breach. Id.

As quoted in Petitioners' Initial Brief at page 16, Mr. Wesley, Respondents' trial counsel, noted the distinction between tortious interference with contracts and with advantageous business relationships when he read Florida Jurisprudence to the court (R 419). The Gerber case clearly deals with tortious interference with a contract and was dismissed due to the contract never having been breached (Id. at p. 2937). Additionally, in that case Keyes asserted in its counterclaim that Halsey tortiously interfered with a business relationship, but the court held that there was no evidence of a breach of a business relationship or the contract. The court never dealt with, nor was it required to deal with, the elements

of knowledge of the relationship on the part of the interferer or the purpose of the interference being to secure an advantage over the plaintiff. There was no need for the court in Gerber to expound upon all of the elements or the purpose required to prove tortious interference with an advantageous business relationship since one of the elements was obviously not proven, i.e., there was no breach of any relationship.

There is a clear distinction between tortious interference with a contract and tortious interference with an advantageous business relationship. When dealing with tortious interference with a contract, no cause of action is stated if the contract was not breached. When dealing with an advantageous business relationship, some type of economic advantage must be shown to have been gained over the plaintiff by the defendant unfairly. The Third District cases cited by the Petitioners in their Initial Brief are well reasoned and certainly represent the better position with respect to the elements and purpose of tortious interference with a business relationship. This Court is urged to adopt this position and make it clear that no cause of action should be allowed to stand based upon this tort unless the plaintiff can show that the defendant sought to unfairly gain an economic advantage over him. To do otherwise would equally unfairly restrain competition in business and permit damages to be assessed for the wrong reasons.

In the case at bar, COTTON never offered any proof that CROSBY or TAMIAMI sought to gain, stood to gain or, in fact,

gained anything as a result of CROSBY's alleged misconduct. There is no evidence whatsoever of either of the Petitioners gaining any economic advantage over COTTON at any time. Thus, no damages should have been assessed against them.

III.

Petitioners' position on proof of lost profits is supported by the authorities cited in their Initial Brief as well as a more recent case wherein the First District Court of Appeal reversed an award of lost profits based upon a series of assumptions about future profits and future business circumstances. See Lucas Truck Service Company v. Hargrove, ____So.2d ____, Case No. AR-432, 8 FLW 2958 (Fla. 1st DCA, December 20, 1983).

Similarly, in the instant case the award of damages to COTTON is based on a series of assumptions about the future profitability of his business as espoused by him in his testimony. These assumptions demonstrate the speculative and inadequate basis upon which this award was predicated. COTTON never introduced evidence of his net profits or operating expenses. His highest gross income was earned during the three months preceding the filing of the lawsuit (R 257). His business did not begin to go downhill until two years after suit was filed (R 248). His only "evidence" of lost profits was that in 1982, two years after his alleged tormentor, CROSBY, retired from the bus station, he was "broke" and unable to feed his family (R 250). This type of speculative evidence, under the law of Florida, will not

support an award of lost profits.

The damages awarded COTTON also included elements of non-economic losses including humiliation and embarrassment which have no place in an action predicated upon alleged interference with a business relationship. Although no Florida case law has been found directly on this point, Petitioners contend that the law allowing recovery of lost profits when they are properly established is sufficient to insure justice in such cases.

Based upon the grounds and points set forth in their Initial Brief, Petitioners request that this Court reverse the compensatory damages award against them and remand this case for a new trial on the issue of damages.

IV.

In Point Four Petitioners argue that the record contains no evidence which would show that, prior to the battery on A. J. COTTON, TAMIAMI had advance notice of any dangerous propensities on the part of CROSBY and that they could have or should have done something to prevent CROSBY from pushing A. J. COTTON. Furthermore, even if this Court were to find that TAMIAMI did have advance notice of dangerous propensities on the part of CROSBY, then it must decide whether the failure of TAMIAMI to stop him from pushing A. J. COTTON, based on the evidence presented, warranted the imposition of punitive damages against them. The standard that must be used, if this determination is reached, is that of willful and wanton misconduct on the part of TAMIAMI.

At trial COTTON testified he began his business in late

1976 (R 186) and began calling TAMIAMI about "parking problems" in 1977. He said he "would use the figure from January of 1977 to the end of 1977" in response to a question as to the exact dates he called TAMIAMI (R 208). CROSBY pushed A. J. COTTON on January 21, 1977 (R 448), and there was no evidence offered of any previous dangerous acts committed by CROSBY or reported to TAMIAMI by COTTON or anyone else prior to January 21, 1977.

COTTON's testimony as to dates indicated his memory was fuzzy, but even when taken in the light most favorable to him, his testimony as to giving "notice" to TAMIAMI did not include telling them about any "dangerous propensities" on the part of CROSBY, as required by the MacArthur rule, and based on the inferences most favorable to COTTON, even the parking problem complaints could have come only a few days, if any at all, prior to the alleged battery on A. J. COTTON. There was no evidence that COTTON advised TAMIAMI of any of CROSBY's "dangerous propensities" prior to the January 21, 1977 incident. TAMIAMI's failure to do anything to correct any acts of misconduct on such short notice, assuming that there was notice, was not negligence on their part as a matter of law and certainly in no way can be considered willful and wanton or outrageous misconduct on their part.

It would be contrary to the purpose of the law of negligence to hold a party accountable for that about which it had absolutely no prior knowledge or opportunity to prevent. The $50,000.00 punitive damages awarded to A. J.

COTTON on Count II against TAMIAMI for CROSBY pushing him clearly should be set aside.

V.

In Point Five the Respondents once again confuse the issues in this case by stating, "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". See Respondents' Answer Brief, page 17. Petitioners would again point out that Mallory v. O'Neill, supra, is not a vicarious liability case.

Respondents' continued tendency in their brief to confuse the principles of the doctrine of respondeat superior and vicarious liability with those of negligent hiring and retention further supports TAMIAMI's assertion that there was a great deal of confusion at trial as to the issues presented and the instructions to be given the jury. This confusion clearly resulted in the denial of due process to the petitioners at trial. This same confusion is replete in the pleadings and persisted throughout the trial, post-trial motion hearing and appellate stages of this action. It continues even in the Respondents' presentation of the issues to this Court. See McDonough Power Equipment, Inc. v. Charles Andrew Brown, ____So.2d ____, Case No. 81-2091, 9 FLW 107 (Fla. 4th DCA, January 13, 1984).

TAMIAMI was exonerated on the charges it was put on notice to defend, i.e., respondeat superior and conspiracy, yet was held accountable for punitive damages based upon negligent retention, a theory about which it first received notice at the charge conference and of which it had no opportunity to defend against at trial. The trial court

obviously misunderstood the law when he stated at the charge conference that TAMIAMI could be held liable for punitive damages even if CROSBY was found to be acting outside the scope of his employment so long as there was negligence found on their part in leaving him in an employment position after they were notified of his violent nature (R 472). The trial court refused to instruct the jury to consider the extent of TAMIAMI's negligence and refused to consider requiring the plaintiff to show the retention of CROSBY by TAMIAMI was equal to willful and wanton misconduct.

Constitutional principles of due process require that TAMIAMI receive a new trial and an opportunity to defend on the charges it is alleged to be accountable for, namely its own willful and wanton misconduct and not just the intentional acts of misconduct CROSBY committed outside of the scope of his employment or off the premises it may have controlled.

TAMIAMI had no way of knowing that the trial court would instruct the jury that it could hold them liable for punitive damages based on CROSBY's misconduct without also being required to find that TAMIAMI itself acted with willful and wanton disregard to the plaintiffs' rights. This error alone requires a new trial in this case.

VI.

TAMIAMI does not, as Respondents suggest, contend that it was entitled as a matter of law to a remittitur following the post-trial hearing. TAMIAMI does, however, assert that it was entitled to the application of the proper standard of review at that proceeding as set out by this Court in Arab

Termite and Pest Control of Florida, Inc. v. Jenkins, 409 So.2d 1039 (Fla. 1982).

While TAMIAMI concedes that a trial judge's decision whether to order remittitur or a new trial is always discretionary, once such relief is requested the trial court must, at the very least, be aware of and understand the scope of its review. The trial court in the case at bar did not understand the standards of review to be applied in evaluating the propriety of a punitive damages award as set out in the Arab Termite decision probably since that decision had been very recently decided at the time the case at bar was tried. Had the proper standards been applied, it is clear that the award would have been set aside or at least substantially reduced.

The standard requiring the court to find that there was willful and wanton misconduct on the part of a defendant against whom punitive damages are awarded was clearly not considered by the trial court here as evidenced by the judge's non-responsive comment that he was not required to consider whether or not punitive damages bear a reasonable relationship to compensatory damages when Petitioners' counsel argued that TAMIAMI's misconduct lacked malice or outrageous disregard (R 130). Each time Petitioners' counsel tried to convince the court that the Arab Termite case required an instruction to be given the jury as to the extent of TAMIAMI's misconduct, the court would cut him off and refuse to consider his argument. The court continued to maintain that even if CROSBY was acting outside the scope of

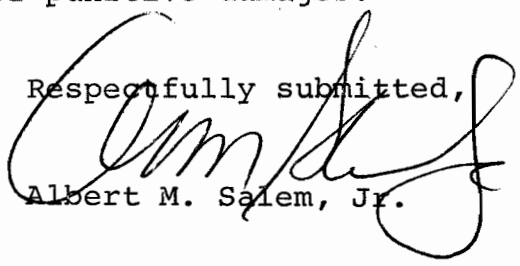
his employment, TAMIAMI could be held liable for punitive damages based on CROSBY's misconduct coupled with their negligent retention of him. This position was again advanced by the court at the post-trial hearing.

As the Petitioners have noted throughout their arguments, the "some fault" standard is not applicable to this case. Thus, the trial court should have considered whether there was sufficient evidence of malicious conduct on the part of TAMIAMI to support any award of punitive damages against it, and, if so, whether the award bore a reasonable relationship to the outrageousness of the conduct of TAMIAMI. Since the applicable standards were not considered, the Petitioners assert that they are entitled to the relief requested.

## CONCLUSION

The Respondents have not presented any case law or facts which would compel this Court to deny the Petitioners the relief sought by this appeal. Numerous errors of interpretation and application have resulted in an unlawful and unjustifiable award being assessed against the Petitioners, and it is up to this Court to not only correct this wrong, but also to establish for all of the courts of Florida the guidelines to be followed with respect to the tort of tortious interference with an advantageous business relationship, the liability of a master for his servant's actions outside the scope of his employment and, perhaps most importantly, the limitations that are to be applied to awards of punitive damages.

Respectfully submitted,



Albert M. Salem, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioners' Reply Brief has been furnished by U. S. Mail this 1st day of January, 1984, to Woodburn S. Wesley, Esquire, 8 Plew Avenue, Shalimar, Florida 32579, and Stanley Bruce Powell, Esquire, PO Box 277, Niceville, Florida 32578, Attorneys for Respondents.

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