O/a 9-7-84

047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64-139

COMO OIL COMPANY, INC. and
FEDERATED MUTUAL INSURANCE
COMPANY,

Defendants/Appellants,

vs.

CELESTINE O'LOUGHLIN,

Plaintiff/Appellee.

_____/

FILED
SID J. WHITE
MAY 14 1984
CLERK, SUPREME COURT.
By _____ Chief Deputy Clerk

ON DISCRETIONARY REVIEW FROM
THE FOURTH DISTRICT COURT OF APPEAL

INITIAL BRIEF OF APPELLANTS, COMO OIL COMPANY, INC. AND FEDERATED MUTUAL INSURANCE CO.

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PREFACE

This is an appeal from the Fourth District Court of Appeal in Florida. Como Oil Co. (appellant) was the defendant at trial, and O'Loughlin (appellee) was the plaintiff. Herein the parties will be referred to as they stood at trial. References are to the record on appeal (R) or to the trial transcript (T) which is in volume one and two of the record.

This appeal involves the distinction between gross negligence and willful and wanton negligence viewed in a punitive damage context. The appellant respectfully submits that the District Court has erroneously "equated" the two concepts in conflict with Florida Supreme Court decisions. Glaab v. Caudill, 236 So.2d 180 (Fla. 2nd DCA 1970).

STATEMENT OF THE CASE AND FACTS

On March 29, 1979, the plaintiff was working at a fish market located on the premises of the Sands Harbor Marina in Pompano Beach, Florida. A gasoline truck, driven by Vincent Spiteri (driver) and owned by the Como Oil Company (Como Oil), the defendant, came to the marina to fill an order for gasoline.

The marina ordered two thousand gallons of gasoline

which were to be stored in two underground tanks (T22). One tank was located north of the fish market and the second tank was located south of the fish market (T28). Gasoline was pumped from the truck to each tank through a fill cap located at ground level. The gasoline was pumped at the rate of four to five gallons per second (T114). A meter on the truck registered the flow (T88).

The driver was told by an employee of the marina to place one thousand gallons of gasoline in each tank (T22). The driver pumped the north tank and then pumped the south tank (T22).

While the driver pumped the north tank, he was informed that his truck was dripping gasoline near the pump (T22). He nevertheless proceeded to fill the south tank. The driver, it appears, also failed to take a dipstick measure of the south tank and caused it to overflow as he watched for the meter to reach exactly two thousand gallons (T97) (T90). The driver whose view of the nozzle and fill cap was blocked by his truck and whose attention was fixed to the meter, did not realize that the second tank had begun to overflow (T87) (T90). An explosion and fire occurred at the marina which injured the Plaintiff. The truck meter indicated that exactly two thousand gallons of gasoline had been pumped (T88).

The Plaintiff subsequently brought a personal injury

action against the driver of the truck; his employer, Como Oil Company; and the insurance carrier for Como Oil. The complaint sought both compensatory and punitive damages, the allegations claiming that the acts of negligence were committed in a wanton and reckless manner (R281 - 287). The driver, who had moved to New York, was never served and was voluntarily dismissed as a defendant prior to trial.

The case proceeded to jury trial. At the close of the Plaintiff's case, the Defendants moved for a directed verdict on the issue of punitive damages (T270 - 272). The Court granted the motion, concluding that by viewing the evidence in the best light for the Plaintiff, that there were "not sufficient actions . . . set forth here in the testimony to constitute punitive damages nor to affect a wanton or willful disregard (T279)." The Plaintiff obtained a verdict for compensatory damages.

The Plaintiff appealed from the trial court, and the Fourth District Court of Appeal reversed the trial court's directed verdict on the issue of punitive damages. O'Loughlin v. Como Oil Co., 434 So.2d 367 (Fla. 4th DCA 1983), citing American Motors v. Ellis, 403 So.2d 459 (Fla. 5th DCA 1981). Como Oil subsequently filed the present appeal and was granted discretionary jurisdiction on April 24, 1984. Oral argument was set for September 7, 1984.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT MERE GROSS NEGLIGENCE IS SUFFICIENT TO MAINTAIN AN ACTION FOR PUNITIVE DAMAGES IN OPPOSITION TO THE SUPREME COURT'S TWO PRONG TEST AS SET FORTH IN MERCURY MOTORS EXPRESS, INC. v. SMITH, 393 So.2d 545, (Fla. 1981).

This Court set forth a two prong test in Mercury Motors for submission of the issue of punitive damages to the jury in vicarious liability cases. Before an employer can be held liable for punitive damages for the acts of the employee, the plaintiff must first produce evidence to show "willful, wanton, or outrageous conduct on the part of the employee." Id. at 548. If this burden can be met, the plaintiff next must show "negligence on the part of the employer which contributed to the plaintiff's injury." Id. at 548.

Regarding the first prong, the District Court in the present case held "that there was an adequate basis for the jury to determine that Como's driver was guilty of gross negligence . . ." O'Loughlin v. Como Oil Co., Inc., 434 So.2d 367, 369 (Fla. 4th DCA 1983) (emphasis added). However, the District Court's reliance on a mere gross negligence standard in establishing this first prong is in direct conflict with the mandate in Mercury Motors that "the misconduct of the employee, upon which the vicarious

liability of the employer for punitive damages is based, must be willful and wanton . . . Id. at 549 (emphasis added).

This Court has recently reaffirmed this principle in U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061, 1064 (Fla. 1983) wherein the Court stated that "(e)ven gross negligence, by itself, will not support an award of punitive damages." The Court in U.S. Concrete further explained, "[G]ross negligence is not enough to give rise to punitive damages - there must be a wilful and wanton disregard for the rights of others." Id. at 1064, citing Clooney v. Geeting, 352 So.2d 1216, 1219 (Fla. 2nd DCA 1977). Thus, the District Court at bar erred in failing to distinguish the level of proof necessary to establish wanton negligence from that necessary to establish mere gross negligence, and accordingly passed on to the second prong of the Mercury Motors test while the threshold of the first prong remained unmet.

The Supreme Court avouched this long-recognized principle in Carraway v. Revell, 116 So.2d 16 (Fla. 1959) in the context of the former automobile guest statute. The Court in Carraway compared gross negligence with culpable negligence and stated:

> In the many cases re-examined we have never held that culpable negligence and gross negligncе were synonymous. We have repeatedly pointed out the distinction . . . Moreover, we have distinctly held that gross negligence

> will not justify the imposition of punitive damages. Id. at 21.

While the automobile guest statute is no longer applicable, it is helpful to examine the Carraway Court's distinction among "ordinary negligence," "gross negligence," and "willful negligence." The Court stated:

> We hold that a guest under the statute may not lawfully recover from an owner or operator of a vehicle for simple or ordinary negligence; that he may recover for gross neglience which is that kind or degree of negligence which lies in the area between ordinary negligence and wilful and wanton misconduct sufficient to support a judgment for exemplary or punitive damages or a conviction for manslaughter. Id. at 22 (emphasis added).

Thus, it is clear that the District Court failed to make the long-standing distinction in Florida law between gross negligence and wanton negligence in its holding in the case at bar. In so doing, the District Court misapplied the first prong of the Mercury Motors test which requires a showing of more than mere gross negligence, i.e. a showing of willful and wanton negligence. Furthermore, it is fundamental that the Mercury Motors test for punitive damages was not met absent the threshold consideration of a showing of wanton negligence, and that the District Court has committed reversible error in its opinion in this case.

II. THE TRIAL EVIDENCE DOES NOT SUPPORT ANY REASONABLE INFERENCE THAT THE DRIVER'S ACTS RISE TO THAT LEVEL OF WILLFUL AND WANTON NEGLIGENCE THAT IS NECESSARY TO DISTINGUISH HIS ACTS FROM MERE GROSS NEGLIGENCE, AND TO ENTITLE THE PLAINTIFF TO PUNITIVE DAMAGES AS IS REQUIRED IN MERCURY MOTORS EXPRESS, INC. v. SMITH, 393 So.2d 545, (Fla. 1981).

By way of introduction, it has been noted that "(w)here the evidence does not warrant punitive or exemplary damages in an action for tort, the court should not give charges on that subject, and should on motion withdraw that matter from the jury."[1] St. Johns Electric Co. v. Lawler, 90 Fla. 188, 105 So. 818 (Fla. 1925). As one commentator has stated:

> Courts generally agree that punitive damages are not a favorite in law and are to be allowed only with caution and within narrow limits . . . Courts must supervise punitive damage awards closely to insure that they are imposed only when justified. Mallor, Punitive Damages: Toward A Principled Approach, 31 Hastings L.J. 639, 740-741 (1979) (citations omitted).

The standard that the trial court must follow in determining whether or not to submit the issue of punitive damages to a jury was stated by the Florida Supreme Court in Winn and Lovett Grocery Co. v. Archer, 171 So. 214 (Fla. 1936). The Court in Winn and Lovett stated,

> The province of the court in all cases of claims for punitive or exemplary damages is to decide at the close of the evidence, as a matter of law, the preliminary question whether or not there is any legal basis for recovery of such

> damages shown by any interpretation of the evidence favorable to the Plaintiff and relied upon by him to support his claim therefor. Id. at 222.

Examination of the facts presented by the Plaintiff in the light most favorable to the Plaintiff reveals:

(1) That Como's truck was in violation of the State Fire Code (T92, 93);

(2) That the driver was instructed to put a thousand gallons into each underground tank, but did not "stick" the south tank to determine if it could hold that amount (T22, 97).

(3) That the driver had his attention fixed on the meter and did not observe the overflow (T90).

(4) That vapors from the gasoline overflow were ignited by an unidentifiable source, and that this combustion resulted in the Plaintiff's injuries (T255).

Nothwithstanding the aforegoing facts and reasonable inferences, the Plaintiff's showing fails to meet the willful and wanton requirement of the first prong of the Mercury Motors test for punitive damages. The trial court, which was in the better position to evaluate the facts, made this very determination although it did not express a distinction between negligence and gross negligence. While the trial court's judgment comes to the appellate court "clothed with a presumption of correctness," it appears that the District Court made a separate evaluation of the

evidence presented. Imperial Lumber Co. v. James Knowles, Inc., 267 So.2d 53 (Fla. 2nd DCA 1972). However, the District Court, in effect, drew the same determination as the trial judge, and merely pointed out that the evidence was sufficient to support an inference of gross negligence. In short, both courts found the evidence not to be of that character necessary to satisfy the first prong of the Mercury Motors test.

It is helpful to examine the driver's conduct in contrast to factual situations in Florida case law in which the threshold showing of willful and wanton negligence has been met. The District Court in the case at bar relied on American Motors Corporation v. Ellis, 403 So.2d 459 (Fla. 5th DCA 1981), which involved punitive damages in a product liability case. The evidence in American Motors showed that the Defendant had knowledge "of the catastrophic results of fuel tank fires in its vehicles from its own crash tests, and that AMC (Defendant) chose not to implement the recommendation of its engineers to relocate the fuel tank in order to maximize profits." Id. at 467. Significantly, the record at bar is entirely devoid of any evidence to show that the Defendant's driver had knowledge of the dangerous overflow condition, or that he then subsequently chose not to remedy the condition. In fact, the record indicates that the driver had no knowledge of the dangerous overflow condition:

> (H)is attention was focused directly on that meter and it wasn't on the other end of the operation. And he didn't realize what had happened (T90).

No reasonable inference can be drawn that the Defendant's driver had knowledge of the dangerous overflow condition from which he subsequently chose not to remedy the condition as was required in American Motors as relied on by the District Court. While the driver's conduct may be characterized as negligent, it cannot reasonably be considered as willful and wanton within the meaning of American Motors.

Likewise, the aforegoing analysis can be applied to Lloyd v. DeFerrari, 314 So.2d 244 (Fla. 3rd DCA 1975). In Lloyd it was held that punitive damages were appropriate where "the defendants sold the boat knowing it was stolen property, by representing it to be otherwise." Id. at 225. (emphasis added). By analogy, the record in the case at bar clearly shows that there was no such similar knowledge and tortious disregard demonstrated by the Defendant's driver.

Sauer v. Sauer, 128 So.2d 761 (Fla. 2nd DCA 1961) is another case in which the Plaintiff made the proper showing of tortious conduct by the Defendant to warrant punitive damages. The willful and wanton conduct by the Defendant in Sauer was an intentional act in which he instructed his young sister to strike the Plaintiff with

an automobile and then to flee without assisting the injured Plaintiff. The court stated that a showing of such intentional conduct was "a proper predicate for an award of punitive damages." Id. at 765.

There is no evidence in the record in the present case from which to infer that the driver's acts were intentional. Thus, there can be no inference from the evidence presented by the Plaintiff in the present case that the Defendant's driver acted with either knowledge and tortious disregard of the dangerous overflow, or that he acted with intent to injure the Plaintiff.

It is also helpful to view the driver's conduct in contrast to those Florida cases where the defendant's acts, although negligent, have been held not to reach the level of willful and wanton negligence as is required in the Mercury Motors test. The Defendant in St. Petersburg Sheraton v. Stuart, 242 So.2d 185 (Fla. 2nd DCA 1970) was a waiter who burned the Plaintiff while preparing cherries jubilee. Although the cherries had been ignited, the Defendant added Flambe', which contained flammable alcohol, and this act sent "a stream of flaming Flambe' onto Mrs. Stuart from which she received first degree burns." Id. at 187.

It was noted that the Defendant "thought the flame was out, but apparently there was a 'little bit of flame that caught the liquid coming out of the bottle.'" Id.

at 188. By analogy, the Defendant's driver, at bar, apparently thought that the second tank would hold the allotted one thousand gallons of gasoline; his mistake resulted in the Plaintiff's injury. However, the Court in St. Petersburg Sheraton held "there was no showing of negligence of so gross a character as to warrant the infliction of punitive damages, and therefore the Court erred in submitting that question to the jury." Id. at 189.

McDonald v. Moore, 323 So.2d 635 (Fla. 3rd DCA 1975) is another personal injury case in which the Plaintiff failed to sustain the burden of showing willful and wanton conduct on the part of the Defendant as is required for punitive damages. The Plaintiff's shoulder was dislocated and fractured by negligently administered shock treatments from the Defendant doctor. Negligence was found in the doctor's failure to warn the Plaintiff of the danger of a shoulder fracture, as well as in his failure to apply a muscle relaxant prior to the shock treatment.

The facts in that case are analogous to the facts in the case at bar. In McDonald the Defendant doctor had actual notice that the Plaintiff was experiencing extreme pain in his shoulder after the initial treatments, but continued to administer subsequent shock treatments. At bar, the driver had notice that his truck was leaking but continued to fill the tanks. In McDonald, the doctor failed to administer the muscle relaxant; in the case at bar the

driver failed to stick the tanks to ascertain whether or not any gasoline was stored in the tanks. It is unreasonable to contend that the driver's acts constituted more wanton disregard for the Plaintiff's rights than did the doctor's acts in McDonald. Yet, the McDonald Court upheld the striking of the punitive damages claim by the trial court and stated,

> The record presented in the instant case fails to demonstrate wanton disregard for the plaintiff's rights or an entire want of care raising a presumption of conscious indifference to the consequences. Id. at 636.

Genesis Publications, Inc. v. Goss, 437 So.2d 169 (Fla. 3rd DCA 1983) should be considered for the proposition that a Plaintiff must show more than a violation of a statute to receive punitive damages. The Defendant in Genesis Publications intentionally refused to obtain the Plaintiff's permission to publish her nude photograph as required by statute.

The conduct in Genesis Publications is analogous to the conduct in the case at bar. The Defendant in Genesis Publications assumed that the Plaintiff's permission had been obtained; similarly, the driver apparently assumed that the second tank would hold the thousand gallons of gasoline that he was instructed to add. In both cases, it appears that no injury would have occurred if the Defen-

dants had confirmed what they had assumed. However, the Genesis Publications Court made it clear that such negligent assumptions are not sufficient to warrant grounds for punitive damages,

> The terms 'recklessness, wantonness and willfulness,' when used to justify punitive damages implies a knowledge and present consciousness not simply that a statute or right will be violatd but that injury will result. Id. at 171.

The Plaintiff at bar has made no showing of any tortious consciousness of impending injury on the part of the Defendant's driver. Although Plaintiff attempted to rely on violations of the State Fire Code as grounds for punitives, such evidence without an additional showing of tortious consciousness of resulting injury will not satisfy the burden as evinced in Genesis Pulbications.

Como Oil submits that the trial court correctly applied the standards to the evidence before it in the case at bar. There was no showing of the driver's knowledge of the dangerous overflow condition accompanied by a conscious decision not to remedy the condition as in American Motors. There was no showing that the driver intended to create the dangerous overflow condition. There was no showing of wantonness, malice or deliberation as in Sauer. Indeed, the facts before the trial court - that the driver's view was fixed on the truck's flow meter, and that he shut off

issue an order reversing the District Court's holding and reinstating the trial court's ruling on the issue of punitive damages.

the pump at exactly two thousand gallons - negate any possibility of drawing a reasonable inference that the driver demonstrated any wanton conduct. Accordingly, the first prong of the Mercury Motors test was not met. Moreover, the trial court, finding that the Plaintiff failed to meet his burden of producing any evidence from which a jury could reasonably infer willful and wanton negligence by the Defendant's driver, correctly directed a verdict on the issue of punitive damages.

CONCLUSION

We remind the Court that punitive damages are not favored in law and that such are to be awarded as a punishment for wanton conduct, but only when the Plaintiff has produced some evidence from which one can reasonably infer that the wrongdoer acted with that degree of negligence, distinguished from mere gross negligence, that is properly termed "willful and wanton negligence." Como Oil submits that the plaintiff did not make this requisite showing at trial, and that the trial court noted this deficiency and correctly directed a verdict. Further, the District Court, in effect, made the same determination as the trial court, but incorrectly accepted this showing as meeting the willful and wanton standard required under Mercury Motors. Accordingly, Como Oil requests that this Court

FOOTNOTE PAGE

[1]This language appears in the syllabus prepared by the Court; however, it comports with the holding in the body proper. Id. at 819.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to ROY W. ALLMAN, ESQ., Law Office of Roy W. Allman, P.A., Attorneys for Appellee, 208 S.E. Sixth Street, Fort Lauderdale, Florida 33301, this 11th day of May, 1984.

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