

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,139

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

Appellees, Petitioners,

vs.

CELESTINE O'LOUGHLIN,

Appellant, Respondent.

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**FILED**

AUG 29 1983

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Chief Deputy Clerk

ON PETITION FOR DISCRETIONARY REVIEW TO THE  
FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

JURISDICTIONAL BRIEF OF PETITIONERS,  
COMO OIL COMPANY, INC. and FEDERATED MUTUAL INSURANCE CO.

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## STATEMENT OF THE FACTS AND THE CASE

This appeal arises initially out of a negligence action in which Petitioner, COMO OIL COMPANY's, employee truck driver was in the process of delivering gasoline to underground tanks of a marina wherein Respondent, O'LOUGHLIN, was working when an overflow of gasoline exploded and caught fire thus resulting in personal injuries to Respondent.

At the conclusion of Petitioner's presentation of its defense, and after hearing all of the evidence adduced at trial by both parties, the trial court entered a directed verdict on behalf of COMO OIL COMPANY on the issue of punitive damages. The trial court determined that the facts presented at trial were insufficient as a matter of law to give rise to that degree of willful and wanton misconduct to warrant submission of the issue of punitive damages to the jury. Subsequently, the case proceeded to jury on the issues of negligence and compensatory damages. Respondent was awarded a judgment which has been satisfied and from which no appeal has been taken.

Respondent O'LOUGHLIN appealed the trial court's decision to the Fourth District Court of Appeal. The Appellate Court held that testimony given at trial supported Respondent's claim for punitive damages and that the jury should have been entitled to assess the issue. After summarizing the testimony given at trial, the District Court held that:

there was an adequate basis for the jury to determine that Como's driver was guilty of gross negligence. (Apendix, District Court Opinion, Page 4). (Emphasis supplied).

The Court then reversed and remanded, from which decision we petition for review.

### ARGUMENT

THE DECISION OF THE FOURTH DISTRICT CONFLICTS WITH THE SUPREME COURT CASES OF U.S. CONCRETE PIPE COMPANY v. BOULD, 8 Fla.L.W. 228 (Fla. July 7, 1983), AND MERCURY MOTORS EXPRESS, INC. v. SMITH, 393 So.2d 545 (Fla. 1981).

Petitioners invoke the jurisdiction of this Supreme Court of Florida pursuant to Article 5, Section 3(b)(3) of the Florida Constitution. The decision of the Fourth District Court of Appeal is in direct conflict with the recent Florida Supreme Court case of U.S. Concrete Pipe Company v. Bould, 8 Fla.L.W. 228 (Fla. July 7, 1983) and Mercury Motors Express Inc. v. Smith, 393 So.2d 545 (Fla. 1981). This Supreme Court has reiterated the well-settled principle of law that:

Punitive damages cannot be assessed for mere negligent conduct, but must be based on behavior which indicates a wanton disregard for the rights of other...Even gross negligence, by itself, will not support an award of punitive damages. U.S. Concrete Pipe Company, slip op. at 229. (Emphasis supplied).

The Fourth District Court of Appeal's opinion is not in accord with prior holdings of the Supreme Court. In reading the District Court's decision, one would conclude that in order to

permit a jury to deliberate on the issue of punitive damages it is sufficient to present evidence which tends to show mere gross negligence. This is a misstatement of the law and must not stand uncorrected.

The Fourth District Court's opinion is also in conflict with the Second District Court of appeal which set forth the same principle in the cases of Clooney v. Geeting, 352 So.2d 1216, 1219 (Fla.2d DCA 1977) and Florida Power Corporation v. Scudder, 350 So.2d 106, 110 (Fla.2d DCA 1977). The requirement for imposing punitive damages is that there must be willful and wanton disregard for the rights of others. Clooney at 1219. In the earlier Supreme Court decision of Mercury Motors Express Inc. v. Smith, where the cause of action was based on the theory of vicarious liability as is the case sub judice, the Court held that:

the misconduct of the employee, upon which the vicarious liability of the employer for punitive damages is based, must be willful and wanton. Mercury Motors Express, Inc. at 549.

It is this Supreme Court's rulings with which the Fourth District is in direct conflict. This Court has continually held that simple negligence, and even gross negligence, will not support a claim for punitive damages. Neither the trial Court nor the District Court of Appeals felt that the evidence reached a level of anything greater than mere gross negligence, much less that yet higher plateau of willful and wanton misconduct.

Since the District Court did not find evidence tending to support conduct of a willful and wanton nature, but merely stated that there was an adequate bases for the jury to find gross negligence, the Fourth District Court erroneously reversed and remanded the case on the issue of punitive damages.

The Supreme Court case of Carraway v. Revell, 116 So.2d 16 (Fla. 1959) emphasises the distinction between negligence, gross negligence and willful and wanton misconduct, by stating that:

gross negligence...is that kind or degree of negligence which lies in the area between ordinary negligence and willful and wanton misconduct sufficient to support a judgment for exemplary or punitive damages or a conviction for manslaughter Id. at 22.

Thus the Court in Carraway was aware of the necessity to emphasize that willful and wanton misconduct, and not gross negligence, was necessary to impose punitive damages. The Court in Carter v. Lake Wales Hospital Associataion, 213 So.2d 898 (Fla. 2d DCA 1968) relied on Carraway in holding that:

Under Florida law, gross negligence will not justify the imposition of punitive damages. Something more than gross negligence is needed to justify punitive damages. Carter at 900. (Emphasis supplied by Court.)

CONCLUSION

The Fourth District Court of Appeal's opinion in the case below merely states that there was an adequate basis for the jury to determine that the Defendant, COMO OIL, was guilty of gross negligence. The holding is devoid of any reference to willful, wanton, intentional or deliberate acts which would give rise to the imposition of punitive damages. Therefore, the District Court's opinion should be quashed and the Circuit Court's decision granting a directed verdict on the issue of punitive damages on behalf of Appellees, Petitioners should be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to:

LAW OFFICE OF ROY W. ALLMAN, P.A., 208 S.E. Sixth Street, Fort Lauderdale, Florida 33301, Attorneys for Appellant, O'Loughlin

this 23 day of August, 1983.

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