O/a 9-7-84

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.
_____/

ON DISCRETIONARY REVIEW FROM
THE FOURTH DISTRICT COURT OF APPEAL

REPLY BRIEF OF CELESTINE O'LOUGHLIN APPELLEE

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PREFACE

This is an appeal from the Fourth District Court of Appeal in Florida. Como Oil Co. (Appellant here) was the Defendant at trial, and O'Loughlin (Appellee here) was the Plaintiff. Herein the parties will be referred to as 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 factual distinction between gross negligence and negligence that is legally sufficient to support a jury determination as to punitive damages.

Appellee concedes that the next to final paragraph of the opinion uses the term "gross negligence: and that based on the facts the paragraph should have read:

> We find that there was an adequate basis for the jury to determine that Como's driver was guilty of a grossly careless disregard of the safety and welfare of the public and that reckless indifference to the rights of others which are equivalent to an intentional violation of them...

Appellee herein respectfully requests that this court affirm the opinion of the District Court and reform the inadvertent choice of language used in the next to final paragraph.

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 agent in charge) 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 (T 22). One tank was located north of the fish market and the second tank was located south of the fish market (T 28). 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 (T 114). A meter on the truck registered the flow (T 88).

The driver was told by an employee of the marina to place one thousand gallons of gasoline in each tank (T 22). The driver pumped the north tank and then pumped the south tank (T 22).

While the driver pumped the north tank, he was informed that his truck was leaking gasoline in several places near the pump (T 22). An argument apparently ensued (T 184), but the driver nevertheless proceeded to fill the south tank. The driver, it appears, also failed to take a dipstick measure of the south tank and due to inattention and defective equipment caused it to overflow. An explosion and fire occurred totally destroying the fish market and burning several people.

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, could not be found 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 after excluding or ignoring expert testimony that the operation on 3/29/79 of that tank vehicle represent a grossly careless disregard of the safety and welfare of the public, the reckless indifference to the rights of others equivalent to the intentional violation of their rights at the scene at the time of this accident on 3/29/79 (T244-245), granted the motion, holding that there were "not sufficient actions... set forth here in the testimony to constitute punitive damages nor to affect a wanton or wilful 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 is set for September 7, 1984.

I

ARGUMENT

Whether, there was sufficient evidence of aggravated misconduct on behalf of Como or its employee-driver to constitute grossly careless disregard of the safety and welfare of the public or that reckless indifference to the rights of others which is equivalent to an intentional violation of them to withstand a directed verdict.

POINT I

The Appellee here asserts that the District trial Court was correct in reversing the directed verdict on the issue of punitive damages. The record in this case is replete with evidence legally sufficient to support a finding of punitive damages.

In considering the evidence in this case one must bear in mind the axiom of negligence law that care should be commensurate with risk.

The District Court obviously was aware of the Supreme Court definition of the degree of negligence necessary to warrant punitive damage as the Court cited and incorporated by reference Ojus Industries v. Brannam Fla. App. 351 So.2d 1055 which specifically reviews the evolution of the definition:

> Culpable negligence is obviously comething more than negligence. A more recent Supreme Court opinion on punitive damages states:
>
> > The intentional infliction of harm, or a recklessness which is the result of an intentional act, authorize punishment which may deter future harm to the public by the particular party involved and by others acting similarly. Cases in this category may be likened, in general terms, to culpable negligence in criminal proceedings. Ingram v. Pettit, 340 So.2d 922 (Fla. 1976) at 924.

And culpable negligence as a basis for punitive damages has been defined by the Supreme Court:

> The character of negligence necessary to sustain an award of punitive damages must be of "a gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonnesss or recklessness, or a grossly careless disregard of the safety and welfare of the public or that reckless indifference to the rights of others which is equivalent to an intentional violation of them. (Carraway v. Revell, 116 So.2d 16 (Fla. 1959 at 20.)

This definition, boiled down to its simplest elements, is described in the Florida Standard Jury Instructions as involving:

> ...malice, moral turpitude, wantonness, wilfulness or reckless indifference to the rights of others. (Florida Standard Jury Instructions 6.12)

It is obvious that gasoline is an ultra hazardous substance if not properly maintained and controlled. Any breach of the necessary high standard of care is therefore reckless. Any knowing continuing disregard of said breach is, depending on the facts, aggravated misconduct and reckless indifference to the clear present and imminent hazard created to (rights of) others.

Evidence of the employee, as agent in charge for Como (R 327-328) which is imputable to the employer, included pumping gasoline with actively leaking defective equipment (T 33-38, 69, 79, 93, 84-85, 176, 183-185, 215) which violated Federal, State and local law (T 40, 45-56, 68, 79, 93, 231), and despite being warned and arguing over the leaks with marina employees (T 28, 183-185) continued to pump gasoline causing vaporizing spills (T 70, 80, Exhibit 17, etc.) in crowded public marina and fish market.

Further lack of attention and defectively maintained equipment led to the additional spill of 100 to 300 gallons creating a moving lake of gasoline (50 to 75 feet long up to 25 feet wide T-31, 87 Exhibit 17, etc.) resulting in the explosion, fire and injury to Appellee, several others and total destruction of the fish market.

Clearly, this would satisfy the first criterion of the Mercury Motors Express, Inc. v. Smith, 593, So.2d 545 (Fla. 1981) within the parameters of the definition promulgated by the Florida Supreme Court in Carraway supra and approved in U.S. Concrete Pipe v. Bould, 437, So.2d 1061 (Fla. 1983). Action by the employee knowlingly after warning, continuing to use a actively leaking gasoline truck to fill tanks at a crowded marina presents evidence at least warranting of jury determination because it "raise(s) the presumption of a conscious indifference to consequences, or which shows wantonness, or reckless or a grossly careless disregard of the safety and welfare of the public..."Carraway supra.

The record further showed that Como's driver was cited and prosecuted for Culpable Negligence with Injury, F.S. 784.05(2).[1] (T 45; 79; 91; 116).

The record also contains manifold testimony concerning Como'a negligence in training their employee, maintaining their equipment and complying with mandatory industry standard regarding transport and control of hazardous substances. The driver received no formal school or traning program by Como. (R. 337). Bill Call, Como's Vice-President in charge was even unaware of law regulating the delivery and control of gasoline (R 337). There was evidence the Como truck was not maintained safely, being encrusted with flamable grime, no tank dip stick, no locking gromet to secure the fill nozzel, all substantiated by testimonial evidence of Como ex-employee, Steve Tome, (T 133-181) and the expert testimony of Fire Inspectors Hoke, Shelley and Edwards. There was evidence from Fire Marshall Hoke that the vapor from the initial leaks contributed to the ultimate explosion and fire (T-72). This would satisfy the second criterium of Mercury Motors.

Appellee presented the eyewitness expert testimony of a Mr. Robert J. Shelley, who was employed as a Fire Marshal for the City of Pompano Beach and responded to the fire on 3/29/79.

Mr. Shelley testified that the truck leaking as it did on the date of the fire was "a major violation that should't exist." (T 79). Further, expert Shelley testified as follows:

> "I believe that the conditions that caused the overfill and the leaks and everything else that contributed to a haphazard operation that was an accident kind of waiting to happen. And I eluded to that throughout my report." (T.119-120)

Then counsel for the Appellee proffered the following hypothetical to inspector Shelley:

Q. Mr. Allman:

"Inspector Shelley, is the fact that your investigation revealed leaks in the truck, flamable grime in great-- in gross abundance, I think he said on the truck, in violation of the State Fire Marshall's Code in addition to a lake as he described it of gasoline of approximately 35 feet long and up to 12 feet wide, combined with the fact that a negligent--combined with the fact that a nozzle without gromet was found at the scene cause you--strike cause, that caused you part--evidence of reckless indifference or grossly careless disregard for the safety of others?"

ANSWER:

"Yes."

The Appellee objected and the Court sustained the objection on the ground that it was the ultimate question to be decided. (T 94-95). The Appellee repeated the process with Fire Inspector Edwards (T 244-245).

The Appellee argues that a sufficient degree of evidence was submitted to establish a prima facie case for punitive damages and therefore the issue should have gone to the trier of fact. See Gulf Shore Seafood Co. & Inc. vs. City Service Co. 501 Federal 2d 957.

The Appellee further argues that if the admitted evidence as presented to the lower court was not sufficient in and of itself to raise it to the standard for a prima facie case for punitive damages, than the hypotheticals proffered to the expert witnesses as to the ultimate fact in issue, if allowed to be presented before the jury, would most assuredly have been sufficient to avoid the directed verdict against Appellee.

It is Appellee here contention that the Court created reversable error in not permitting the above mentioned proffered testimony in the form of an opinion into evidence simply because it included an ultimate issue to be decided by the trier of fact. Florida Evidence Code Rule 90.703 states:

> "Testimony in the form of an opinion or inference otherwise admissable is not objectionable because it includes an ultimate issue to be decided by the trier of fact."

In the case of Mozer vs. Semenza, 177 So.2d 880 (Fla.3rd DCA 1965) the Third District Court of Appeal affirmed a decision which permitted two fire inspectors to testify as to certain hypothetical questions directed to the ultimate fact and issue which was whether it was negligence for the Appellant to maintain the premises as the facts therein revealed.

It was strenuously argued by O'LOUGHLIN that the trial Court committed reversible error in not permitting the fire experts to testify as to the standard of care in the industry for dealing with such an extremely hazardous product as gasoline and further that Como fell below that standard with an entire want of care of an attention to duty, or great indifference to the persons, property or rights of others as would justify the assessment of punitive damages.

The District Court has agreed and their decision should be affirmed with directions regarding the use of the term "gross negligence in the concluding paragraphs.

It is clear that by continuing to pump the gasoline with the knowledge that the device was leaking was conscious disregard to the clear and present danger of this conduct to the public. As a result of this act, vapor clouds formed and exploded directly causing the Appellee's serious injury. (T 79-80, 121, 124).

The Appellee cites this Court to Ellis v. Golconda Corp. 352 So.2d 1221 (Fla. 1st DCA 1974) as a precedent close in factual content to the present case. That case involved an explosion resulting from the spillage of natural gas caused in part by safety back-up equipment known to be functioning improperly. In reversing the jury's award of punitive damages, the court conditioned their decision by taking notice of the facts that:

> (1) Had Defendant taken the truck out of service on this date, it occurring in the middle of winter, a lot of people would have been out of gas/heat
>
> Id. at 1225

Thus, the Court recognized a policy factor which does not enter into the case sub judice, i.e., the imperative necessity of delivering the heating gas. In Ellis, the Court obviously felt the need to deliver heating gas overrode the possible but not probable danger to the public. However, in the case at bar, no compelling human factor necessitated the ignoring the high standard of safety regulations in delivering the hazardous substance.

The Ellis Court stressed the fact that even though the Defendant knew of the improperly functioning valve, this did not necessarily create a clear, present higher probability of danger rising to the level of wanton, reckless, careless indifference or reckless disregard." Thus the factual distinction between that case, where the safety valve was not functioning properly and , a dangerous leak did not necessarily have to occur until there was a "double" failure of anti leak valves; ...and this case where the known leaking of highly volatile gasoline on hot asphalt in a crowded public area would, after the warning/knowledge of the leak by the company agent, for exceed the parameters of Ellis and creating at the very least, a question of culpability sufficient to warrant a jury determination.

CONCLUSION

The facts by act and inference support the claim to punitive damages and that a jury should have been entitled to assess the issue.

The semantics of one paragraph inadvertently using the generic term "gross negligence" should be reformed to coincide with the factual and legal precepts outlined herein.

Other Authorities Page

Fla. Statute 784.05(2)

Whoever through culpable negligence inflicts actual personal injury on another shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

Florida Standard Jury Instructions 6.12

If you find for Appellant and find also that the Appellee acted with malice, moral turpitude, wantonness, wilfulness or reckless indifference to the rights of others, you may, in your discretion, assess punitive damages against such Appellee as punishment and as a deterrent to others. If you find that punitive damages should be assessed against Appellee, you may consider the financial resources of such Appellee in fixing the amount of such damages.

6.12

PUNITIVE DAMAGES

If you find for (claimant) and find also that [the defendant] [any defendant whom you find to be liable to (claimant)] acted with malice, moral turpitude, wantonness, wilfulness or reckless indifference to the rights of others, you may, in your discretion, assess punitive damages against such defendant as punishment and as a deterrent to others. If you find that punitive damages should be assessed against [the] [any] defendant, you may consider the financial resources of such defendant in fixing the amount of such damages. [You may assess punitive damages against one defendant and not the other[s] or against more than one defendant in different amounts].

COMMENT

Lehman v. Spencer Ladd's, Inc., 182 So. 2d 402 (Fla. 1966).

FOOTNOTE PAGE

Culpable Negligence 784.05(2)

(2) Whoever, through culpable negligence inflicts actual personal injury shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to SAMUEL TYLER HILL, ESQ., 400 S. E. Sixth Street, Fort Lauderdale, FL 33301, this 5th day of June, 1984.

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