O/G 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
JUL 2 1984
CLERK, SUPREME COURT
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ON DISCRETIONARY REVIEW FROM
THE FOURTH DISTRICT COURT OF APPEAL

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

HILL, NEALE AND RILEY
400 S.E. Sixth Street
Ft. Lauderdale, FL 33301
Phone: 462-3623 (Broward)
944-0134 (Dade)
Attorney for Appellants.

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PREFACE

In Appellant's reply brief, the parties will be referred to as they stood at trial, i.e. Como Oil Co. (appellant) was the defendant, and O'Loughlin (appellee) was the plaintiff. Support material will be cited as: trial transcript (T), record on appeal (R), answer brief (P).

STATEMENT OF THE FACTS

Como Oil notes the following inaccuracies in the Statement of Facts in the Answer Brief. The trial transcript at page 22 does not state that the gasoline truck leaked at "several places" (P2). The Plaintiff has failed to cite authority for the allegation that "defective equipment caused" the gasoline tank to overflow (P2). Contrary to Plaintiff's contention, the trial transcript at pages 243 - 246 unequivocally demonstrates that the trial judge did not "ignore" the proffered testimony of the expert witness (P3). Finally, the record does not reflect at pages T45, T79, T91 or T116 that Defendant's driver was prosecuted for culpable negligence under F.S. 784.05(2) as alleged by Plaintiff (P9).

Como Oil herein moves this Court to strike the above-mentioned language on the respective pages due to lack of support in the record.

ARGUMENT

I. THE PLAINTIFF HAS OBSCURED THE ISSUE OF PUNITIVE DAMAGES BY PRESENTING FACTS AND LEGAL PRINCIPLES THAT RELATE TO THE ISSUE OF NEGLIGENCE.

It is fundamental in Florida law that in order to recover compensatory damages, a plaintiff must show that the defendant failed to use care that a reasonably prudent person would have used under like circumstances. In contrast, it is incumbent upon the plaintiff, who seeks punitive damages in a negligence case, to meet a higher standard, i.e. a showing of "intentional infliction of harm, or a recklessness which is the result of an intentional act . . ." Ingram v. Pettit, 340 So.2d 922, 924, (Fla. 1976).

The Plaintiff erroneously equates these separate standards, and applies principles relevant to the negligence issue in an attempt to support grounds for punitive damages. Como Oil asserts that principles of negligence law are not determinative in considering the standard for awarding punitive damages because the higher threshold for punitive damages demands greater evidence of wrongdoing.

For example, Plaintiff draws this Court's attention to the "axiom of negligence law that care should be commensurate with risk". Certainly, this axiom is helpful in determining whether a plaintiff is entitled to compensatory

damages. However, such is misdirected to the law of punitive damages where the focus is whether or not there was an "intentional infliction of harm, or a recklessness which is a result of an intentional act". Ingram supra.

In Russell v. Jacksonville Gas Corporation, 117 So.2d 29 (Fla. 1960), the court utilized this axiom in determining whether or not the trial court had committed error in directing a verdict on the issue of negligence. The court concluded:

> it appears that plaintiff's evidence, and the reasonable inferences which the jury might have drawn therefrom, present an issue of fact as to whether the defendant's employee-repairman knew, or by the exercise of reasonable diligence should have known, that by his act of repairing the control knob, or by his failure to fully investigate and repair it completely, it was likely to cause injury to another. Id. at 32.

The focus of the Russell court's reasoning parallels that of the plaintiff in the case at bar. The plaintiff reasons:

> "(a)ction by the employee knowingly after warning, continuing to use a (sic) actively leaking gasoline truck to fill tanks at a crowded marina presents evidence at least warranting of jury determination . . ." (P. 8).

Importantly, however, the Russell court's reasoning is directed to the issue of negligence while, in contrast, the Plaintiff's reasoning is directed to punitive damages. In light of Russell, it is clear that the Plaintiff's basic argument should properly be directed to the moot question of negligence

and is misapplied to the issue at bar.

Plaintiff's argument that gasoline is "an ultra hazardous substance if not properly maintained and controlled" is similarly misdirected because it is more persuasive on the issue of negligence than on the issue of punitive damages (P. 7.). Plaintiff contends that because gasoline is an ultra hazardous substance, "(a)ny breach of the necessary high standard of care is therefore reckless". (P. 7). This appears to be an attempt to impose strict liability on the negligent use of gasoline as an ultra hazardous substance. Como Oil points out that while Florida courts have held such items such as a crane and blasting to be ultra hazardous, Florida courts have never held that gasoline is the same. Atlantic Coast Development Corporation v. Napoleon Steel Contractors, 385 So.2d 676 (Fla. 3rd DCA 1980) and Morse v. Hendry Corporation, 200 So.2d. 816 (Fla. 2nd DCA 1967) respectively.

Notwithstanding, the mere fact that an inherently dangerous instrumentality results in an injury (or even in death as in Atlantic Coast Development) does not render the wrongdoer strictly liable for punitive damages. Clearly, punitive damages would not be appropriate in cases involving ultra hazardous activities unless there was some additional showing of intentional infliction of harm or recklessness that would result from an intentional act. Thus, assuming arguendo that gasoline were judicially declared ultra hazardous,

it does not follow, as Plaintiff suggests, that "any breach" would necessarily give rise to punitive damages. More importantly, the record is devoid of any intent on part of the Defendant's driver to permit the underground tanks to overflow that would serve as grounds for an inference of an intentional infliction of harm, or a recklessness that would result from an intentional act.

Plaintiff's use of principles of negligence law to establish grounds for punitive damages is also seen in that portion of the Argument regarding admissibility of testimony on the standard of care in the gasoline industry (P. 12). Again, the principle of the standard of care of an industry involves negligence law, and is not helpful in determining whether or not a defendant has engaged in willful and wanton conduct. The fact that Como Oil may have fallen below industry standard is probative of the issue of its negligence in causing the Plaintiff's injuries, but is not probative of the issue of whether or not the defendant's driver acted in a willful and wanton manner. Thus, Plaintiff's attempt to link breach of the standard of care of an industry to justification for finding grounds for punitive damages falls short of the punitive damage threshold.

It is undisputed that the Plaintiff had sufficient facts to establish a case of negligence at trial. Indeed, the jury found the same and awarded the Plaintiff damages to compensate for her injuries. On appeal, however, the

Plaintiff attempts to equate evidence necessary to establish grounds for punitive damages. The Plaintiff has failed to pinpoint additional facts that show that Como Oil's driver acted either to intentionally inflict harm or to act recklessly as the result of an intentional act. Indeed, there is no such evidence of the driver's intent because the record establishes that he did not realize the overflow had occurred (T90). The Plaintiff having failed to meet her burden, it is clear that the trial court made the correct determination that she was not entitled to punitive damages as a matter of law.

II. THERE EXISTS NO EVIDENTIARY PRESUMPTION OF WILLFUL AND WANTON CONDUCT UNDER FLORIDA LAW.

Plaintiff contends that the Defendant's driver's knowing use of a leaking truck raises a "presumption" of grounds for punitive damages. Plaintiff cites Carraway v. Revell, 116 So.2d 16 (Fla. 1959) in support of this proposition. Carraway, however, does not hold that such evidence raises a presumption of willful and wanton conduct. In fact, it appears that there is no legal precedent that establishes any sort of presumption on the issue of punitive damages in Florida law.

In considering whether or not to submit the issue of punitive damages to the jury, the trial court makes this

decision as a matter of law based on the evidence presented by the Plaintiff. Winn and Lovett Grocery Co. v. Archer, 171 So.2d 214 (Fla. 1936).

A presumption is "a rule of law, fixed and relatively definite in its scope and effect, which attaches to certain evidentiary facts and is productive of specific procedural consequences . . ." Greyhound Co. v. Ford, 157 So.2d 427, 431 (Fla. 1963). An inference, on the other hand, is a "permissible deduction" from the evidence. Id. at 431. There can be no presumption of willful and wanton conduct; the proper inquiry is whether there are any inferences that can reasonably be drawn from the evidence to show that the defendant's driver acted in a willful and wanton manner.

Plaintiff argues that "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". (P. 13). Plaintiff supports this statement by citing Ellis v. Golconda, 352 So.2d 1221 (Fla. 1st DCA 1977). To the contrary, the Ellis court stressed the fact that even though the defendants knew of an improperly functioning safety valve, the mere knowledge did not necessarily create a clear, present probability of danger rising to the level of wanton, careless indifference or reckless disregard. Such is the case at bar. Mere knowledge of a leak is not alone grounds for punitive damages.

As in its initial brief, Como Oil asserts that there

are no inferences from the facts from which it can be reasonably deduced that the defendant's driver acted in a malicious manner or with moral turpitude. The defendant's driver had no knowledge of the gas overflow (T90). Indeed, it is unreasonable to contend that the driver acted with any sort of moral turpitude or malice to consciously effect the gasoline explosion because the driver was himself in a position where he was subject to a possible blast, i.e. he was turning off the valve underneath the truck next to the leak (T87). The Plaintiff has produced no evidence to show that the defendant's driver had knowledge of the dangerous overflow condition or that he subsequently chose not to remedy the condition. As such, the Plaintiff has failed to bear her burden of producing evidence from which one could reasonably deduce that the Defendant's driver acted in a willful and wanton manner to cause the gasoline explosion. Accordingly, the trial court was correct in directing a verdict on the issue of punitive damages.

III. THE HOLDING IN ELLIS V. GOLCONDA, 352 So.2d 1221 (Fla. 1st DCA 1977) DID NOT TURN ON ANY PUBLIC POLICY ARGUMENT.

Plaintiff places much import on the Ellis court's mention of the fact that customers in that case would have been without winter heating gas if the defendant's trucks had been taken out of service due to a leaking valve. A closer

reading of that case, however, reveals that the Ellis court merely noted that this factor constituted one of three defenses asserted by the defendant. (See p. 1225). At no point did the Ellis court discuss the lack of heating gas as a public policy consideration. In this respect, it is unreasonable for the Plaintiff to assert a public policy argument based on Ellis as support for establishing grounds for punitive damages.

In fact, it is clear that the Ellis court based its holding on the evidence presented by the plaintiff, and not on the defendant's defenses. This position is supported by the fact that the court answered the question of whether the defendant's acts constituted a lawful basis for the imposition of punitive damages prior to its mention of the defendant's defenses. Indeed, the Ellis court concluded:

> (t)he evidence in this case does not raise to the level of that wanton, reckless, malicious or oppressive character to support the award of punitive or vindictive damages. Id. at 1225 (emphasis added).

Moreover, Ellis is analagous to the case at bar, and is particularly helpful in illustrating facts that will give rise to compensatory damages, but that at the same time fail to give rise to punitive damages. The evidence in Ellis indicated (1) that the defendant's terminal manager was aware of a malfunctioning safety valve but kept the truck in service, (2) that the driver manually overrode

the safety valve, and (3) that the driver ran without turning off the valve when he realized that the gas was escaping. (See p. 125). At bar, there was no evidence to show that Como Oil was aware of the statutory violations of the truck. In addition, the Defendant's driver did not intentionally override any safety feature of the truck's equipment, and was able to shut off the gasoline flow as soon as he realized that an overflow had occurred. (T90). In fact, the driver did not seek refuge until after he heard the explosion and saw the fire. (T21). The facts in Ellis are more egregious than those at bar. Yet, the Ellis court concluded:

> (o)bviously, such acts of negligence were sufficient to support the jury's verdict as to McKenzie's (defendant's) liability for compensatory damages, and such is not here questioned. But, do such acts constitute a lawful basis for the award of punitive damages? We conclude that they do not. Id. at 1225.

The Ellis court's reasoning is helpful in assessing the arguments presented in this appeal. The acts of the driver in this case do warrant the jury's award of compensatory damages, yet simply do not rise "to the level of that wanton, reckless, malicious or oppressive character" necessary to establish grounds for punitive damages. Id. at 1225.

IV. IT IS IMPROPER FOR AN EXPERT WITNESS TO TESTIFY IN FORM OF A LEGAL CONCLUSION.

The Plaintiff asserts that it was error to exclude preferred testimony of the fire inspectors. Plaintiff states:

> (i)t is Appellee (sic) here (sic) contention that the court created reversable (sic) error in not permitting the above mentioned proferred testimony in the form of an opinion into evidence simply because it included an ultimate issue to be decided by the trier of fact. (P. 11).

Although it is unnecessary to examine this issue in reaching disposition of the issue on appeal, it can be noted as a point of interest that the trial court was correct in excluding this proferred evidence because testimony of whether or not conduct reaches the level of willful and wanton, requires a legal conclusion.

Palm Beach County v. Town of Palm Beach, 426 So.2d 1063 (Fla. 4th DCA 1983) is helpful in this analysis. The court in Palm Beach County noted this principle and explained:

> (r)egardless of the expertise of the witness, generally, and his familiarity with legal concepts relating to his specific field of expertise, it is not the function of the expert witness to draw legal conclusions. That determination is reserved to the trial court. It was appropriate for the expert to testify regarding the existence of a benefit but it was for the court to determine, whether that benefit was real and substantial under the statute and case law. Id. at 1070.

At bar, while it was proper for the fire experts to testify as to whether or not code violations existed, it was for the trial judge to determine as a matter of law whether such constituted grounds for punitive damages. Winn and Lovett Grocery supra.

The wisdom of this principle is evinced in the testimony of fire inspector Edwards. When prompted by Plaintiff's counsel, Edwards answered "yes" to the question of whether the operation of Como Oil's truck represented:

> 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 March 29, 1979. (T244).

However, Edwards subsequently stated in his own words, "I personally feel that this accident should not have happened and there was no due care applied here in the operation of the vehicle . . ." (T245). (emphasis added). In short, the witness' confusion on the legal distinction between negligence and willful and wanton conduct exhibits justification for the rule against testimony of a legal conclusion as stated in Palm Beach County.

CONCLUSION

Plaintiff urges that the District Court's error was merely one of usage and requests this Court to edit the District Court's opinion as one would edit a rough draft. Yet, Plaintiff has failed to point to a specific malicious act by Como Oil's driver as grounds for such request. Instead, Plaintiff has relied on that evidence produced at trial as grounds for compensatory damages to establish grounds

for punitive damages on appeal. In short, Plaintiff's only ground is the fact that Como Oil's driver proceeded to pump gasoline after learning that his truck was leaking (P. 8, 13). Indeed, Plaintiff must repeatedly rely on this single fact because the record simply does not reflect that the driver intentionally caused the overflow or that he recklessly disregarded the overflow once he learned of it. In fact, the record establishes exactly the opposite - that the driver unintentionally caused the overflow and that he shut down the pumping as soon as he learned of the overflow.

Inasmuch as the Plaintiff has failed to pinpoint facts that would serve as grounds for punitive damages on appeal, it is clear that Plaintiff was likewise unable to do so at trial. As such, the trial court was correct in directing a verdict on punitive damages. Therefore, the District Court's holding should be reversed and the trial court's ruling should be reinstated.

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 Offices of Roy W. Allman, P.A., Attorneys for Appellee, 208 S.E. Sixth Street, Fort Lauderdale, Florida 33301, this 28 day of June, 1984.

HILL, NEALE AND RILEY
Attorneys for Appellants
400 S.E. Sixth Street
Ft. Lauderdale, FL 33301
Phone: 462-3623 (Broward)
944-0134 (Dade)

By: S. T. Hill
SAMUEL TYLER HILL