IN THE SUPREME COURT OF FLORIDA
Tallahassee, Florida
CASE NO. 65,360

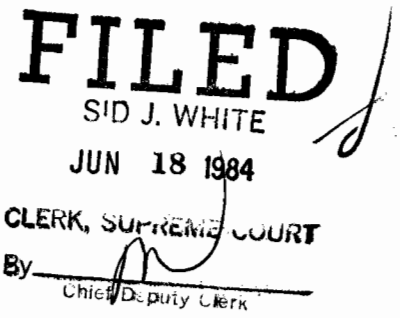
WINN-DIXIE STORES, INC.,

Petitioner,

vs.

GILBERT ROBINSON,

Respondent.



RESPONDENT'S BRIEF ON JURISDICTION

R. STUART HUFF
LAW OFFICES OF R. STUART HUFF
330 Alhambra Circle
Coral Gables, Florida 33134
(305) 448-8000

HAGGARD & KIRKLAND, P.A.
330 Alhambra Circle
Coral Gables, Florida 33134

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STATEMENT OF FACTS AND OF THE CASE

The Petitioner says that it intends to rely on the facts as set forth in the Fourth District's opinion. Some facts, however, are set forth by the Petitioner a little differently than they were found by the District Court. Consistent with the evidence, the District Court found that on the evening before his arrest Mr. Robinson purchased merchandise and stored it in the back seat of his automobile. The Petitioner alters that fact to read that on the evening prior he "purchased goods at a Winn-Dixie store". We think it is not appropriate at this moment to argue why the Petitioner has made that alteration to the factual findings.

Second, the Petitioner says that the charges against Mr. Robinson were "dropped". If that characterization is intended to imply that Winn-Dixie played any role in the termination of the criminal proceedings it is incorrect. The accurate fact as set forth in the District Court's opinion is that " ... a nolle prosequi was subsequently entered on that charge". The State "dropped" the charges.

The Petitioner's Statement of the Case represents that the trial court "set aside the jury verdict on punitive damages because of insufficient evidence, and in the alternative, granted a new trial on the issue of punitive damages because the amount was excessive." Even if it is inadvertent, this is a very distorted explanation of what occurred post-trial.

The trial judge did not "set aside" the jury verdict. The trial court did not grant a new trial on punitive damages.

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Post-trial, the court entered a directed verdict on the issue of punitive damages. He denied a new trial motion and he did not offer the Plaintiff any options. He directed a verdict as to the entire jury award of punitive damages. He let stand the jury award of $200,000 in compensatory damages. The trial judge did not suggest that a new trial was warranted under any circumstances, other than in his unique piggyback order.

The trial judge then signed a second order, which was to become effective only if the directed verdict was reversed on appeal. This second order provided that the Plaintiff would have to accept a remittitur of $500,000 on punitive damages or elect to have a new trial on punitive damages alone.

The important distinction is this: Contrary to the Petitioner's representation that there were alternative orders presented to the Plaintiff, the only alternative was a post-appeal option which was, from our research, unprecedented. The District Court held that the trial court had no authority to issue such backup orders, to "second guess" the appeals court, and held it would have vacated the second order on that ground alone.

ISSUE I

DOES THE FOURTH DISTRICT'S OPINION HOLDING WINN-DIXIE LIABLE FOR PUNITIVE DAMAGES FOR THE CONDUCT OF ITS EMPLOYEE CREATE CONFLICT WITH MERCURY MOTORS EXPRESS, INC. v. SMITH, 393 So.2d 545 (Fla. 1981)?

The answer to this question is "no". First, we note that the Petitioner discusses some type of "waiver" attributed to it by the Fourth District. Neither the word "waiver" nor any analogous legal concept appears in the Fourth District's opinion. Not only is it not to be found in the Fourth District's opinion, but neither the

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word "waiver" nor any analogous legal concept appears in the Mercury Motors decision. So the Petitioner would have it that a concept not expressed in either of two appellate decisions results in conflict between the two.

What the District Court did decide is that when a tort is committed in an outrageous, wilful, wanton and reckless manner by a corporation itself acting, as corporations must, through employees, where that action is not only contemporaneously ratified but is also later ratified through pleadings, pretrial stipulation, and throughout conduct of the trial, then that tort has become a corporate act and ipso facto the Mercury Motors requirement of some fault is obviated. When a corporation rests its case with the jury on the unqualified argument that a criminal prosecution was reasonable, just, and was based upon "probable cause", it cannot post-trial use the Mercury Motors "escape hatch" to recast the case after a loss.

When the District Court agreed with Robinson (second paragraph of page 3) the Court was finding that " ... not one word in approximately 700 pages of trial transcript implies a distinction between the corporate acts and the acts of its employees".

The District Court cited the opinion of the Fifth Circuit in Dorsey v. Honda Motor Co., 670 F.2d 21 (5th Cir.), cert. denied, ____ U.S. _____, 103 S.Ct. 177, 74 L.Ed.2d 144 (1982), as saying,

> The case having been tried as laid out in the pretrial order, it is too late for Honda to say post-trial that there was insufficient evidence of its own fault independent of acts of Honda R & D and its employees to support the judgment against it for punitive damages. Id. at 22.

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The record showed that Winn-Dixie submitted DEFENDANT'S UNILATERAL PRE-TRIAL CATALOG in which it listed the singular issue as being,

> 4. Defendant's issues (sic) are whether or not Defendant had probable cause to seek the arrest and prosecution of Plaintiff.

The District Court did not issue an opinion in conflict with Mercury Motors. It wrote an opinion in which it quoted Mercury Motors at length and held that case inapplicable in instances of direct corporate action.

After distinguishing the theories of corporate liability (vicarious or direct) presented in Mercury Motors and in the case sub judice, the Fourth District then held that on the facts of Robinson's case, even if the Petitioner's hypothesis were accepted, i.e., if Mercury Motors were applicable, there was still evidence of corporate fault sufficient to present a jury question.

While Petitioner isolates and focuses upon the District Court's reference to Winn-Dixie's shoplifting procedures, it fails to demonstrate how that reference conflicts with any other appellate decision. Unable to show conflict, the Petitioner argues that this single sentence from the District Court's opinion means that the publication of policies is, in and of itself, sufficient to justify punitive damages. That is a strained, subjective and unfair interpretation. Taken in the context of the entire opinion, and of the entire record which was before the appellate court, the statement means that Winn-Dixie's knowledge of the potential liability in making shoplifter apprehensions is clearly demonstrated by printing a small flyer which sets forth five rules that employees must follow before having a customer arrested. The District Court finds that

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Winn-Dixie fully recognized the danger when it delegated to its employees the discretion to detain customers, to have them arrested and prosecuted.

The court further knew from the record that those five "musts" were, from the evidence adduced at trial, never implemented, followed, enforced and were rarely even circulated to employees. That is the testimony that was before the District Court. The record showed that the Plaintiff attempted to introduce the written flyer containing the five "musts" into evidence, and to prove that that written policy was never enforced. Winn-Dixie fought against introduction of its guidelines, as is shown by the following colloquy,

> MR. GOODMAN: I believe that the Plaintiffs will be attempting to bring in evidence, or mention what they call the five musts of Winn-Dixie, or something that they have coined a phrase like that, which is a policy that Winn-Dixie has for apprehending shoplifters.
>
> I don't think that the fact of whether or not Winn-Dixie's employees followed Winn-Dixie's own policy, is going to in any way be relevant.
>
> I don't think that a standard set up by a company is indicative of whether or not there was probable cause, whether or not there was any of these elements for the various issues that are before the court.
>
> I would request that the court limit the Plaintiffs from mentioning the individual company's standards set up by Winn-Dixie, because they are more restrictive than those of the law, in general. (R.11, 12)

Had Winn-Dixie published those guidelines with an intention of enforcing them, and had the particular employees who arrested Robinson deviated from those guidelines, Winn-Dixie could have defended the case by showing that the corporation was without any fault. Winn-Dixie did the opposite. It argued against the

introduction of the employee guidelines. It had no intention at trial of attempting to differentiate between the corporate acts and the acts of its employees.

The tort which was committed was foreseeable. The corporation foresaw the problem, and printed the brief flyer on the subject. It then made no issue, no defense, at trial, of the fact that the guidelines were published. It fought against introduction of those guidelines. That is what the District Court referred to when it indicated "some fault" was present.

ISSUE II

> DOES THE CONCLUSION OF THE FOURTH DISTRICT THAT THE TRIAL COURT ERRED IN FINDING THE PUNITIVE DAMAGE AWARD EXCESSIVE CREATE CONFLICT WITH ARAB TERMITE AND PEST CONTROL OF FLORIDA, INC. v. JENKINS, 409 So.2d 1039 (Fla. 1982); CASTLEWOOD INTERNATIONAL CORPORATION v. LaFLEUR, 322 So.2d 520 (Fla. 1975); AND BAPTIST MEMORIAL HOSPITAL, INC. v. BELL, 384 So.2d 145 (Fla. 1980)?

The answer to the question posed is "no". First, the second issue as framed by the Petitioner revolves solely around the entry of the second order by the trial judge. In that order, the trial judge decided that if he were reversed on the directed verdict in favor of the Defendant, only if that were the appellate decision, then the Plaintiff would have to accept a $500,000 remittitur or face a new trial on punitive damages. That second order was itself a nullity. The trial judge was without authority to enter that backup order.

As the District Court stated,

> Our treatment of the alternative orders in this case should not be construed as an implicit approval of this device. On the contrary, it is not the function of the trial court, however well-intentioned, to second guess the appellate process. He must make his findings based upon the evidence

> and apply to it the law as he sees it. The ultimate results should be a final judgment which is consistent with what has gone before. On this basis alone we would have and will in the future vacate an order entered under these circumstances. p.5 (emph. added)

If the trial judge was without authority to enter the second post-appeal order, if it was therefore a nullity, the merits of what is contained in the order are rendered nugatory. There is nothing therein to review. Apparently the Petitioner's able appellate counsel recognizes that this holding, vacating the second post-trial order, is correct. The Petitioner does not allege that this holding is in conflict with any other Florida decision. The Petitioner does not make a public policy argument regarding this holding as it does in ISSUE I. In fact, the Petitioner avoids discussing this holding altogether.

For purposes of reply only we will address the second order as if it were not a nullity.

The District Court's opinion regarding the second order, the entry of remittitur, does not conflict with this court's decision in Arab Termite Pest Control of Florida, Inc. v. Jenkins, ,409 So.2d 1039 (Fla. 1982). On the contrary, the District Court cites Arab Termite, quotes Arab Termite, and reverses the remittitur because the trial judge failed to comport with the mandate set forth in Arab Termite.

Arab Termite requires that, when a remittitur is to be made as to an award of punitive damages rendered by a jury, the basis for the remittitur must be capable of demonstration in the record or the court must find that the jury was influenced by matters outside the record.

Because the trial court's unauthorized second post-trial order was totally devoid of the showing required by Arab Termite, the District Court took an extraordinary step and relinquished control of the record to the trial judge, allowing him sixty days in which to attempt to demonstrate the record references which supported his remittitur. If anything, this unusual step provided a more extensive review, providing Winn-Dixie with a second chance on appeal. Frankly, Plaintiff's counsel were disappointed that the trial court was to have a second opportunity to support the remittitur.

At the end of the sixty days, the trial court was still unable to make any record reference demonstration as required by Arab Termite and other cases. The reversal of the unauthorized second post-trial order is based upon Arab Termite; it is surely not in conflict therewith.

The Petitioner improperly quotes from the trial judge's attempted demonstration in support of the remittitur, but shows no conflict.

The Petitioner quotes Arab Termite for the proposition that it is proper under certain circumstances to issue a remittitur as to punitive damages. The Petitioner carefully excises the portion of the opinion which explains under what circumstances the remittitur may be entered.

It is said, at page 7, that the District Court misapprehends the law because the court was unconvinced by the attempted record reference demonstration provided by the trial judge. Although the Petitioner would make much of the two words "not convinced", they simply mean that the District Court found that the

LAW OFFICES R. STUART HUFF, 330 ALHAMBRA CIRCLE, CORAL GABLES, FLORIDA 33134 · TEL. (305) 448-8000

trial court could not and did not demonstrate by record reference the basis for the remittitur. Had the District Court said "we find that the trial judge was unable to demonstrate a basis to support the remittitur", it would have meant the exact same thing. The great emphasis placed upon two words by the Petitioner demonstrates that there is really nothing before this Court worthy of review.

Finally, the Petitioner would have it that the standard of review in this case should have been whether or not there was a clear abuse of discretion by the trial court when it granted a new trial. That is absolutely wrong. There are two completely separate concepts involved here: (1) granting of a new trial by a court which believed that a fair trial was not had; or (2) entry of a remittitur as to a jury verdict of punitive damages. The granting of a new trial was not under review in this case. The basis of the remittitur itself was the question. The Petitioner knew this at all times and briefed and argued the case on that basis. The "new trial" cases now relied upon by the Petitioner are not to be found in its District Court briefs. Having defended, and having lost the remittitur, the Petitioner switches positions in this Court and tries to show conflict with cases in which a remittitur was not the issue.

In Baptist Memorial Hospital, Inc. v. Bell, 384 So.2d 145 (Fla. 1980), this court reaffirmed the requirement that the trial court demonstrate "express reasons which will support his finding" as required by Wackenhut v. Canty, 359 So.2d 430 (Fla. 1978). This court found that the trial judge did make the Wackenhut demonstration. Sub judice, the District Court expressly found that

the trial judge did not follow the Wackenhut requirements. Where is the conflict?

In Castlewood International v. LaFleur, 322 So.2d 520 (Fla. 1976), the trial court ordered a new trial. He did not offer a remittitur in the alternative. This court found that " ... unlike other cases, the prejudicial error which required a new trial was injected into the case by the judge himself". Id. at 522.

In the present case, the trial judge did not order a new trial. Motion for new trial was denied. He entered a remittitur. The trial judge believed that a fair trial was conducted and if the Plaintiff had chosen to accept the remittitur after appealing the directed verdict, the final judgment would have been $450,000. Given that fact alone, it can hardly be said that the trial judge was not himself outraged at the tort committed by Winn-Dixie in this case. He believed that $450,000 was an appropriate judgment against the Petitioner for what it did to Gilbert Robinson.

CONCLUSION

The Petitioner has shown no conflict with any decision of this or any other Florida court. The Petition should, respectfully, be dismissed for lack of conflict jurisdiction.

Respectfully submitted,

LAW OFFICES OF R. STUART HUFF

By: 

R. STUART HUFF
330 Alhambra Circle
Coral Gables, Florida 33134
(305) 448-8000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on Jurisdiction was furnished by U.S. Mail this 14th day of June 1984, to VERNIS, BOWLING, MONTALTO, BLANK & TRAITZ, 301 Southeast 10th Court, Fort Lauderdale, Florida 33316, and to LARRY KLEIN, ESQUIRE, Suite 503 - Flagler Center, 501 South Flagler Drive, West Palm Beach, Florida 33401.

By: R. Stuart Huff
R. STUART HUFF

LAW OFFICES R. STUART HUFF, 330 ALHAMBRA CIRCLE, CORAL GABLES, FLORIDA 33134 · TEL. (305) 448-8000