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

WINN-DIXIE STORES, INC.,

Petitioner,

vs.

GILBERT ROBINSON,

Resppndent.
_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

VERNIS, BOWLING, MONTALTO,
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PREFACE

Petitioner was the defendant in the trial court and the appellee in the Fourth District. Respondent was the plaintiff in the trial court and appellant in the Fourth District. The parties will be referred to as plaintiff and defendant. The opinion of the Fourth District is reported at 447 So.2d 1003.

The following symbol will be used:

A - Petitioner's Appendix

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)?

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)?

STATEMENT OF THE CASE AND FACTS

For purposes of jurisdiction we rely on the facts set forth in the opinion of the Fourth District. Plaintiff

operates a small store in the Bahamas and purchases merchandise in the United States for resale. On the night before this incident he had purchased goods at a Winn-Dixie store and left them in the back of his automobile. The next morning he again came to Winn-Dixie and their employee, who helped him take his merchandise out to his car, observed the other merchandise in the back seat and concluded that plaintiff had shoplifted them.

Charges were filed and subsequently dropped. Plaintiff sued for false imprisonment, malicious prosecution and conversion. The jury awarded plaintiff $200,000 compensatory damages and $750,000 punitive damages against defendant, Winn-Dixie.

On post-trial motions 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.

The Fourth District, after oral argument, relinquished jurisdiction to the trial court so that the trial court could set forth in more detail the basis for the remittitur of the punitive damage verdict. The trial court entered a 13 page order (A 10).

The Fourth District reversed the order setting aside the jury verdict and granting the defendant a directed verdict on punitive damages. The court further reversed the trial court's finding that the punitive damage verdict was excessive and remanded with instructions to reinstate the verdict and enter judgment for plaintiff (A 1).

ARGUMENT

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)?

In Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981), this court held that an employer cannot be vicariously liable for punitive damages unless there is some fault by the employer independent of the conduct of employee.

In the present case the Fourth District discussed this issue on pages 3 and 4. On page 3 the Fourth District seemed to indicate that notwithstanding defendant properly moved for directed verdict at all stages there had been some

type of waiver on this issue, citing Farish v. Bankers Multiple Line Insurance Company, 425 So.2d 12 (Fla. 4th DCA 1983). This Court has granted conflict jurisdiction in Farish, one of the issues being whether Farish conflicts with Mercury Motors, supra.

The Fourth District then went on to state:

> Moreover we conclude that, even accepting appellant's hypothesis, the evidence satisfied the 'some fault' requirement of Mercury Motors thereby justifying punitive damages. Winn-Dixie's own fault is evidenced by its publication and implementation of policies governing the conduct of employees who observe shoplifting. Thus it was error for the trial court to grant the motion directing out punitive damages. Accordingly, we reverse that order.

It thus appears from the opinion of the Fourth District in the present case that if an employer publishes and implements guidelines or policies governing conduct of its employees, this, in and of itself, is sufficient to justify punitive damages. This holding is in direct conflict with this court's statement on page 549 of Mercury Motors:

> ...It is sufficient that the plaintiff allege and prove some fault on the part of the employer which foreseeably contributed to the plaintiff's injury to make him vicariously liable for punitive damages. (Emphasis added)

The decision in the present case encourages employers not to have guidelines or policies, since having them would make them more susceptible to liability for punitive damages.

There is nothing in the opinion of the Fourth District which indicates foreseeability by the defendant of the conduct of its bagboy, nor was there anything in the record to that effect. The opinion of the Fourth District is in direct conflict with Mercury Motors and creates confusion in this area of the law.

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 trial court determined that the punitive damage award of $750,000 was excessive and ordered that it be reduced by remittitur to $250,000, or in the alternative a new trial was granted.

The Fourth District remanded the case to the trial court for entry of a more detailed order setting forth the

reasons why the trial court determined the punitive damage verdict was excessive. This order (A 10) sets forth the facts regarding the suspicious behavior of the plaintiff in the store, particularly the fact that when the officers came to arrest him it was discovered that he had a potato peeler stuck in his boot which ". . . looked very new, still had some tape on it" (A 16). The arresting officer testified that the plaintiff gave no explanation as to how this potato peeler got into his boot and that it appeared to be new and had not been used (A 19). The trial court stated:

> The court finds that the above summary of the record, which the court attempted to confine only to the contents of the order relinquishing jurisdiction, affirmatively reflects that the verdict as to punitive damages was greatly excessive and as such shocked the conscience of the court; that the manifest weight of the evidence showed that the amount of punitive damages assess was out of all reasonable proportion to the malice, outrage, or wantonness of the tortious conduct. (Emphasis added) (A 20)

The Fourth District treated that conclusion on page 4 of its opinion, stating:

> ...The remaining question, then, is whether the remittitur is appropriate in light of the manifest weight of the evidence. We provided the trial court with an opportunity to demonstrate, by record reference, those factors which influenced his decision to order a remittitur. We commend his painstaking effort to comply with that request. Notwithstanding, we are not convinced that the amount of punitive damages assessed by the jury was unreasonable, keeping in mind that "[p]unitive

> damages 'are peculiarly left to the discretion of the jury as the degree of punishment to be inflicted must always be dependent on the circumstances of each case, as well as upon the demonstrated degree of malice, wantonness, oppression, or outrage found by the jury from the evidence.'... (Emphasis in original)

In Arab Termite and Pest Control of Florida, Inc. v. Jenkins, 409 So.2d 1039 (Fla. 1982), this Court stated on page 1043:

> It is still proper, however, (even post-Wackenhut), to issue an order for new trial or remittitur when the manifest weight of the evidence shows that the amount of punitive damages assessed is out of all reasonable proportion to the malice, outrage, or wantonness of the tortious conduct....

The Fourth District did not find that the trial court had abused its discretion in granting a new trial based on the excessiveness of the verdict, simply stating that it was "not convinced" that the amount of punitive damages was unreasonable.

This statement shows a misapprehension of the law. Where a trial judge grants a new trial, the standard of review before the appellate court is not whether that court thinks ". . . the amount of punitive damages assessed by the jury was unreasonable." It is whether there was a clear abuse of discretion by the trial court in granting a new

trial. In Baptist Memorial Hospital, Inc. v. Bell, 384 So.2d 145 (Fla. 1980), the trial court held a jury verdict to be excessive and granted a new trial. The First District reversed and this Court reversed the First District, reinstating the order granting the new trial, stating on page 146:

> In reviewing this type of discretionary act of the trial court, the appellate court should apply the reasonableness test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. Canakaris v, Canakaris, 382 So.2d 1197 (Fla. 1980). As we stated in Cloud, the ruling should not be disturbed in the absence of a clear showing that it has been abused, and there has been no such showing in the instant case. From this record the action of the trial judge was reasonable although reasonable men may differ. (Emphasis in original).

In Castlewood International Corporation v. LaFleur, 322 So.2d 520 (Fla. 1975), the trial judge granted a new trial, the Third District Court of Appeal reversed, and this Court reinstated the order granting the new trial, stating on page 522:

> Since at least 1962, it has been the law of Florida that a trial court's discretion to grant a new trial is "of such firmness that it would not be disturbed except on clear showing of abuse . . ." Cloud v. Fallis, 110 So.2d 669, 672 (Fla. 1959).

* * *

> In this case there is no suggestion of abuse by the district court, and our independent review of the record discloses none. Mere disagreement from an appellate perspective is insufficient as a matter of law to overturn a trial court on the need for a new trial. The trial judge "was in a much better position than an appellate court to pass on the ultimate correctness of the jury's verdict." Pyms v. Meranda, 98 So.2d 341, 343 (Fla. 1957). (Footnotes omitted.)

The trial court determined, based on the facts, that a punitive damage award of $750,000 was out of all proportion to the tortious conduct. It is important to remember that the employee actively involved in the commission of the tort was not a defendant, only the employer. As in Castlewood and Baptist, supra, in which this Court reversed the District Courts of Appeal, the Fourth District did not suggest any clear abuse of discretion by the lower court on this issue, and indeed there is none. This summary type of reversal creates conflict and confusion.

CONCLUSION

The opinion creates direct and express conflict and this case should be reviewed on the merits.

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By _____
LARRY KLEIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy hereof has been furnished, by mail, this 4th day of June, 1984, to:

R. STUART HUFF
330 Alhambra Circle
Coral Gables, FL 33134

HAGGARD & KIRKLAND, P.A.
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By _____
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