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

WINN-DIXIE STORES, INC.,

Petitioner,

vs.

GILBERT ROBINSON,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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POINTS ON APPEAL

POINT I

DEFENDANT, AS A MATTER OF LAW, HAD PROBABLE CAUSE TO HAVE PLAINTIFF ARRESTED AND THE TRIAL COURT SHOULD HAVE GRANTED DEFENDANT'S MOTION FOR DIRECTED VERDICT.

POINT II

THERE WAS NO EVIDENCE OF MISCONDUCT BY THE CORPORATE EMPLOYER SUFFICIENT TO SUSTAIN AN AWARD OF PUNITIVE DAMAGES.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RULING THAT THE PUNITIVE DAMAGE AWARD WAS EXCESSIVE, AND THE FOURTH DISTRICT ERRED IN REVERSING THE TRIAL COURT'S ORDER GRANTING A NEW TRIAL.

STATEMENT OF THE FACTS

Plaintiff is a Bahamian who has a small store in the islands. He comes to the United States, from time to time, to purchase things for his store (R 66). On the evening before the defendant had him arrested for shoplifting, plaintiff had purchased merchandise at K-Mart, Jeffersons and another Winn-Dixie store (R 81-85). Plaintiff had all of these goods in the back seat of his automobile (R 88). On the morning of the incident, bagboy Chris Wolfe helped him put these additional purchases from Winn-Dixie in the back seat of the car next to the goods he had purchased the

previous evening (R 127). Plaintiff then got into the back seat of his car and rearranged things (R 128).

After observing the previously purchased new merchandise in the back seat of plaintiff's vehicle, bagboy Wolfe came back to the store and told the assistant manager, Michael Williams, that plaintiff had Winn-Dixie merchandise in his car, which he did not previously have while he was in the store (R 245). They observed the plaintiff in the back seat of his car, and it appeared as if plaintiff was unloading things which had been stuffed in his pants (R 240, 244).

Plaintiff then returned to the store and requested from the assistant manager, Williams, a refund for two defective items which he had allegedly purchased on a prior occasion (R 96, 353). Bagboy Wolfe then began to observe the plaintiff through a one-way mirror, because of his suspicious behavior. He testified that he saw the plaintiff take a potato peeler off the shelf, tear it out of the package, and put it in his boot (R 349-351). He informed the assistant manager of this and they called the police (R 352-353).

Plaintiff was charged with theft but ultimately the prosecution was dropped. Plaintiff then sued defendant for malicious prosecution, false imprisonment and conversion.

At the trial the police officer, who was called and came to arrest plaintiff, testified that when they had the plaintiff lift up the cuffs of his pants he had a potato peeler in his boot (R 525). Plaintiff admitted he had this potato peeler in his boot, and plaintiff further admitted that this potato peeler could have come from Winn-Dixie (R 133). The police officer testified that the potato peeler which they found in plaintiff's boot "looked like it was new" (R 535). Wolfe testified it still had some tape on it (R 398).

Plaintiff's explanation at trial was that he had been carrying this potato peeler in his boot for months prior to this incident, to use as a weapon (R 91). Plaintiff did not give this explanation, as to the potato peeler, at the time of his arrest.

One of plaintiff's witnesses was John Sands, his cousin with whom he is very close (R 153). Plaintiff stays with Sands when he comes to Florida to purchase goods for his store approximately two to three times per month and has

been doing so over a period of many years (R 154-155). He had never known plaintiff to carry a potato peeler in his boot, but he had seen him carry a comb in his boot (R 172-173).

Plaintiff had been treated for severe heart disease since at least 1974. In June of 1978, six months prior to this incident, his physicians did not think he could live more than six months to one year without a heart transplant (R 433, 533). Plaintiff of course has substantially outlived his physician's estimates of his life expectancy. He was examined in June of 1981 and his heart was worse due to natural causes (R 560). There was no evidence of any substantial physical injury resulting from this incident.

The jury awarded $200,000 in compensatory damages, exactly the amount suggested by his lawyer in closing argument (R 625), and $750,000 in punitive damages. The lower court set aside the punitive damage verdict on post trial renewed motion for directed verdict, and in the alternative found the punitive damage verdict excessive and ordered a new trial, if plaintiff did not agree to a remittitur of $500,000 (R 1004-1008).

Plaintiff did not agree to the remittitur and appealed to the Fourth District Court of Appeal. Plaintiff cross-appealed, arguing that the lower court should have entered a directed verdict on liability because there was probable cause to have plaintiff arrested.

The Fourth District reversed the trial court's directed verdict on punitive damages and reinstated the jury verdict for compensatory damages and punitive damages.

ARGUMENT

POINT I

DEFENDANT, AS A MATTER OF LAW, HAD PROBABLE CAUSE TO HAVE PLAINTIFF ARRESTED AND THE TRIAL COURT SHOULD HAVE GRANTED DEFENDANT'S MOTION FOR DIRECTED VERDICT.

The following evidence regarding probable cause is undisputed. Plaintiff was in defendant's store more than once on the morning of the incident. The night before the incident plaintiff had purchased merchandise at three different stores, one of which was another of defendant's stores (R 81-85). There was new Winn-Dixie merchandise in the back of plaintiff's automobile, when bagboy Wolfe helped him load additional merchandise into the back of the automobile (R 127).

The police officer who was called to arrest plaintiff testified that when they had the plaintiff lift up the cuffs of his pants he had a potato peeler in his boot (R 525). Plaintiff admitted at trial that the potato peeler may have been Winn-Dixie merchandise (R 133). The police officer testified that it appeared to be new (R 535). While plaintiff's explanation at trial was that he carried this potato peeler as a weapon, he never gave this explanation at the time of his arrest (R 91).

One of the elements of malicious prosecution is want of probable cause for the prosecution. The burden of proof is on the plaintiff to establish that. Glass v. Parrish, 51 So.2d 717 (Fla. 1951).

Where the facts involving probable cause are undisputed, the issue is a question of law to be determined by the court. City of Pensacola v. Owens, 369 So.2d 328 (Fla. 1979).

The facts on which we rely to establish probable cause, as set forth in our statement of facts and as summarized under this point are undisputed. Those facts do establish probable cause as a matter of law and it was therefore error for the trial court to deny defendant's motion for directed verdict.

POINT II

THERE WAS NO EVIDENCE OF MISCONDUCT BY THE CORPORATE EMPLOYER SUFFICIENT TO SUSTAIN AN AWARD OF PUNITIVE DAMAGES.

The trial court, after the return of the jury verdict, granted defendant's motion for directed verdict on the issue of punitive damages, determining that there was insufficient

proof to inflict punitive damages on the corporate defendant.

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 is contrary to 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.

Reviewing the facts in the present case in a light most favorable to plaintiff, it is undisputed that he had new merchandise in the back of his car which he had purchased from another Winn-Dixie store the night before, which bagboy Wolfe observed on the day of the incident. It is further undisputed that following this, plaintiff got himself into the back seat of his car and began rearranging things while being observed by Wolfe and the assistant manager from the store. It is further undisputed that when the police came, plaintiff had a potato peeler, which appeared to be new,

stuck in his boot which he admitted could have been Winn-Dixie merchandise.

The employee of defendant primarily involved in the incident was a bagboy. Acting on information given him by the bagboy, the assistant store manager telephoned the police who, when they arrived, discovered the potato peeler in plaintiff's boot. Based on these facts and the additional suspicious behavior of plaintiff preceding that, the store brought charges.

If any individual is guilty of misconduct which would support a claim for punitive damages, it could only be the bagboy. Certainly he is not high enough up on the corporate ladder to expose the company to punitive damages. The assistant store manager was only peripherally involved, since he was relying on the information given him by the bagboy. It is respectfully submitted that even if the assistant store manager had been more actively involved, this would not have been sufficient to impose punitive damages against the corporation.

The closest Florida case, and one which is practically on all fours, is Life Insurance Company of North America v. Del Aguila, 417 So.2d 651 (Fla. 1982), in which a general

agent for a life insurance company made fraudulent misrepresentations to the plaintiff resulting in her being damaged. Suit was brought and the jury awarded compensatory and punitive damages against the company. The Fifth District affirmed both at 389 So.2d 303, but this Court reversed the punitive damage award stating on page 652:

> In Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981), which was decided after the district court's decision in the instant case, we held that in order for an employer to be held vicariously liable in punitive damages for the tort of an employee under the doctrine of respondeat superior, there must be proof of some fault on the part of the principal. In view of our decision in Mercury Motors, it is clear that the district court, insofar as it held punitive damages recoverable against Life Insurance Company of North America without regard to proof of fault, was in error.
>
> There was in this case an allegation that Life Insurance Company of North America knew or should have known that its agents' dealing with Mrs. del Aguila were irregular, but we find, as did the district court, that there was insufficient proof of such actual or constructive knowledge.

It is respectfully submitted that even if the actions of the assistant manager could constitute a tort, and we strongly maintain they did not, he was no different than a general agent for a life insurance company, and so long as the corporate defendant had no actual or constructive knowledge that this would occur, the punitive damage award was properly set aside by the trial court.

In Doralee Estates v. Cities Service Oil Co., 569 F.2d 716 (2d Cir. 1977), the issue was whether the oil company could be held liable for punitive damages in a pollution case. The evidence showed that the knowledge that the pollution was taking place was known to the general counsel in the home office of the corporation, and this was sufficiently high up enough to impose punitive damages. The Court of Appeals, applying New York law, enunciated a test on page 722:

> A crucial factor is whether 'the case called for institutional correction not likely to be forthcoming without a punitive damage award.'

The Court also expressed the query as to whether someone in a position of authority could have prevented this, and concluded under these facts that it could have been prevented, since it was known to general counsel in the home office.

In contrast, what occurred in the present case was known to no one higher up than the assistant manager of one supermarket operated by a large chain. In Doralee the Second Circuit quoted from the Restatement (2d) Torts, Section 909. Although the Restatement does not expressly cover this specific factual situation, illustration number 3 set forth in the Restatement seems to indicate that the conduct of an assistant manager of a single store in a large

chain would not subject a company to liability for punitive damages. The examples appear to require that the misconduct be at least at the level above the supervision of an individual store.

In U.S. Concrete Pipe Company v. Bould, 437 So.2d 1061 (Fla. 1983), it appears from the concurring and dissenting opinions that some of the members of this Court questioned the propriety of inflicting punitive damages against a corporation where the only one guilty of willful misconduct is an employee. Since the corporation is not guilty of willful misconduct, liability insurance may cover the punitive damage award, as it did in that case. That punitive damage award punished no one except the insurer, which did nothing wrong, and which will simply raise the premiums charged the public.

If the corporation does not have insurance, then the corporation must pay the punitive damages, even though the corporation itself is not guilty of willful misconduct. Again, the guilty party (the employee) escapes punishment, while a party not guilty of reckless misconduct (the corporation) is punished.

If anyone is guilty of misconduct in the present case it is one or two lower echelon employees, however plaintiff has no interest in punishing them because they have no money. They were not even sued. The only logical rule is what was suggested by Justice McDonald in his dissenting opinion in U.S. Concrete Pipe, which is that an employer should not be held liable for punitive damages except where the employer itself is guilty of flagrant misconduct. Punitive damages are to punish. It makes no sense to punish the corporation where it is not guilty of willful misconduct.

This Court can take judicial notice that shoplifting is a serious problem in supermarkets. If an arrest, under the facts of this case, can subject the supermarket chain to a $750,000 punitive damage verdict, this will have a chilling effect, to say the least, on the curtailment of shoplifting.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RULING THAT THE PUNITIVE DAMAGE AWARD WAS EXCESSIVE, AND THE FOURTH DISTRICT ERRED IN REVERSING THE TRIAL COURT'S ORDER GRANTING A NEW TRIAL.

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, after oral argument, 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 set 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". 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. 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)

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. It is the employer who has to pay the punitive damages. As in Castlewood and Baptist, supra, in which this Court reversed the District Courts of Appeal, the Fourth District did not find any clear abuse of discretion by the lower court on this issue, and there was none.

CONCLUSION

The opinion of the Fourth District should be reversed and judgment entered for defendant.

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By 
LARRY KLEIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy hereof has been furnished, by mail, this 14th day of November, 1984, to:

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