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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 REPLY BRIEF ON THE MERITS

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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.

Plaintiff makes numerous statements throughout his brief with no record references, which are not supported by the record, and are irrelevant. We hope this Court will ignore those statements which do not have record references. We shall limit this argument to correcting plaintiff's misstatements which have record references, and which are relevant.

Plaintiff says on pages 1 and 2 that there was a conflict as to whether plaintiff had Winn-Dixie groceries, allegedly from a prior purchase, in the back of his car, citing inconsistencies in the testimony of Wolfe and Williams. We relied on plaintiff's own testimony that this was new Winn-Dixie merchandise which was in the back of his car when bagboy Wolfe helped him load additional merchandise purchased that day (R 81-85, 127).

Plaintiff argues that Wolfe was not really a bagboy as we characterized him, however it is undisputed that Wolfe

was a bagboy for the plaintiff, although he had some other duties, such as being a stock clerk.

The first argument advanced under this point on pages 10 and 11 is that this Court should not review the trial court's denial of defendant's motion for directed verdict made at the close of plaintiff's case and at the close of all the evidence (R 472-497, 565-566). Plaintiff argues that this issue should not be considered because it is not an issue on which there is conflict. When this Court takes jurisdiction on conflict, however, it determines the case on the merits. Tyus v. Apalachicola Northern Railroad Company, 130 So.2d 580 (Fla. 1961).

In response to our argument that plaintiff had what appeared to be a new Winn-Dixie potato peeler hidden in his boot, which the police discovered, plaintiff suggests on page 12 that he gave a very plausible explanation for that. The problem is he did not give the explanation until this lawsuit. There is no evidence in the record that he explained this at the time of his arrest. The arresting officer did not recall any such explanation (R 528-529).

The suspicious behavior of plaintiff, consisting of his having new Winn-Dixie groceries in the back of his car

already and a potato peeler in his boot which appeared to be new and by his own testimony could have come from Winn-Dixie (R 133, 535), constituted probable cause, and defendant was entitled to a directed verdict.

POINT II

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

Plaintiff argues on page 20 that it was either the manager, Williams, or the district supervisor who made the decision to call the police. There is no evidence that it was the district supervisor other than the testimony of the bagboy that he told one or the other. Williams was the assistant store manager (R 214).

Plaintiff called the district supervisor, Mr. Donoto, who was a supervisor of six stores, as a witness, but Mr. Donoto was never asked about this, and there was no evidence that he was in any way involved in the incident. Plaintiff brought out through Mr. Donoto's testimony that he supervised six stores in the Fort Lauderdale area, out of the 1200 stores operated by Winn-Dixie (R 462-467).

Beginning on page 25 plaintiff makes an argument that Winn-Dixie did not disassociate itself from the conduct of its employees. While it is true that Winn-Dixie admitted that its employees acted in the course and scope of their employment at all times, the distinction overlooked by plaintiff and the Fourth District is that Winn-Dixie never admitted responsibility for punitive damages. There is no legal requirement for any particular statement in a pleading, or in a pretrial stipulation, to deny liability for punitive damages under these circumstances. Plaintiff recognizes on page 35 that we moved for a directed verdict on punitive damages and that we argued Mercury Motors as a basis for the motion.

While the Fourth District compared this case to Dorsey v. Honda Motor Company Limited, 670 F.2d 21 (5th Cir. 1982), in the present case Winn-Dixie moved for a directed verdict on the issue of the liability of defendant for punitive damages, citing Mercury Motors. There is a distinction between admitting that employees were in the scope and course of their employment, which would make an employer liable for compensatory damages, and admitting liability for punitive damages. There is nothing in this record to indicate either a waiver of that issue or an admission that Winn-Dixie was liable for punitive damages.

Plaintiff brushes off our reliance on Life Insurance Company of North America v. Del Aguila, 417 So.2d 651 (Fla. 1982), on the basis that that case involved conversion of funds by a life insurance agent who was in the course of his employment with the company. There is no material difference between the tort of conversion and the tort of malicious prosecution, nor has plaintiff suggested any.

It is interesting that plaintiff, on pages 38 and 39 acknowledges that the following statement from the Fourth District is not a correct statement of the law:

> Moreover we conclude that, even accepting appellant's hypothesis, the evidence satisfies 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....

On page 40 Winn-Dixie argues the involvement of the district supervisor (he supervised six out of 1200 stores), however there was no evidence of his involvement in any way.

The real issue under this point is whether a corporation which is not itself guilty of willful and wanton misconduct, should have to pay punitive damages for the willful and wanton misconduct of lower echelon employees. Plaintiff

attempts to twist this into an argument that he should be restricted to suing an employee with no money. Not to be overlooked is that the corporation is liable for compensatory damages for the tort of the employee. Why punish the corporation, however, where the corporation was not guilty of punishable misconduct?

If a corporation knowingly permits an employee who has a propensity to drink, to drive, and is on notice of his drunk driving, then the employer is guilty of willful and wanton misconduct and should be punished. If the employer does not have notice, it should not be punished.

If the bagboy and assistant store manager had previously been involved in prior malicious prosecutions and Winn-Dixie was on notice that they had a propensity to do this, then punitive damages might properly be awarded to teach Winn-Dixie a lesson. There was no evidence in this case of such a propensity or notice to Winn-Dixie of such a situation.

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.

On page 46 plaintiff mentions the statement by the Fourth District on page 5 of its opinion, wherein the Fourth District disapproved the trial court entering both a directed verdict and, in the event of reversal, an order granting a new trial in the alternative. The Fourth District stated in that regard:

> Having found that remittitur was improper, we find that the alternative order granting a new trial also was improper as there were no other grounds justifying a new trial.
>
> 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 result 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....

The Fourth District was clearly wrong when it disapproved the alternative orders. The law as set forth by every other District Court of Appeal in this state is that

it is preferable for the court to rule on the motion for new trial at the same time as it grants defendant's motion for directed verdict. See Navarro v. City of Miami, 402 So.2d 438 (Fla. 3d DCA 1981); Aucompaugh v. City of Ponta Gorda, 181 So.2d 713 (Fla. 2d DCA 1966); Reams v. Vaughn, 435 So.2d 879 (Fla. 5th DCA 1983); King v. Jacksonville Coach Company, 122 So.2d 480 (Fla. 1st DCA 1960).

Such a procedure was noted, but not commented on, by this Court in Ford Motor Company v. Kikis, 401 So.2d 1341 (Fla. 1981).

CONCLUSION

The opinion of the Fourth District should be quashed.

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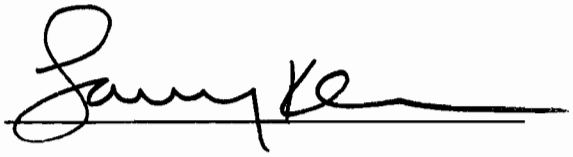
By 

LARRY KLEIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy hereof has been furnished, by mail, this 27th day of December, 1984, to:

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