OA 2-6-91

SUPREME COURT OF FLORIDA



DELORES SMITH, et vir.,

Petitioners,

vs.

JACK ECKERD CORPORATION,

Respondent.

CASE NO.: 76,004

DISTRICT COURT OF APPEAL
FIRST DISTRICT - NO. 88-02775

# RESPONDENT'S ANSWER BRIEF

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## STATEMENT OF THE CASE AND FACTS

In this Answer Brief, plaintiff/petitioner will be referred to as "petitioner" and defendant/respondent will be referred to as "respondent". The trial transcript will be referred to as "T" and the record on appeal will be referred to as "R". The opinion of the District Court will be referred to using corresponding pages from the Southern Reporter, **Jack Eckerd Corporation v. Delores Smith**, 558 So.2d 1060 (Fla. 1st DCA 1990). Petitioner's Initial Brief will be referred to as "I.B." Emphasis added has been included by counsel unless otherwise noted.

## THE CASE

Respondent adds the following to Petitioner's statement of the case [I.B. 1-2] to clarify the nature of this case as it stands before this court.

Following the district court order reversing the trial court's award of punitive damages, petitioner filed timely Motions for Rehearing and Clarification and Rehearing En Banc on March 26, 1990. The First District Court of Appeal, by order dated April 19, 1990, denied Smith's Motion for Rehearing and Clarification and Motion for Rehearing En Banc. Petitioner timely applied for jurisdiction to this Court on May 14, 1990. Petitioner alleged jurisdiction based on conflict with **Winn Dixie Stores, Inc. v. Robinson**, 472 So.2d 722 (Fla. 1985), and **Griffith v. Shamrock Village, Inc.**, 94 So.2d 854 (Fla. 1957). Respondent Jack Eckerd Corporation timely filed its Answer Brief on Jurisdiction June 8, 1990, arguing that Petitioner

erroneously asserted conflict based on factual interpretations stated in Justice Zehmer's dissenting opinion. By vote of four to three, Justices Overton, McDonald, and Grimes dissenting, this Court granted jurisdiction to review the opinion of the First District Court of Appeal.

## THE FACTS

Respondent adds the following facts to those provided by Petitioner to clarify the trial record under consideration in this appeal.

Eckerd's pharmacist Maurice Hodges informed Delores Smith that she would have to pay for her prescriptions at the front of the store [T. 228]. Hodges later related this fact to assistant store manager Alfred Lederer [T. 306, 316].

Upon reaching the cashier at the front of the store, Delores Smith testified that she placed her household items and prescription medication on the counter to be checked out by the cashier, Elizabeth Robinson. Robinson rang up the items for a total of $11.18 [T. 229]. Mrs. Smith gave the cashier a $20 bill and received $8.82 in change [T. 230]. Mrs. Smith testified that the cashier placed her household items in a brown paper bag, and that she placed her prescription bag in her purse [T. 231]. As Mrs. Smith exited the store, the anti-shoplifting check point alarm system at the exit door was activated [T. 231].

The check point alarm system is activated by a tag on merchandise which is normally detuned and deactivated upon

receipt of payment [T. 297, 315]. After hearing the check point alarm, Mrs. Smith returned to the cashier where she had made her initial purchase [T. 232]. Initially, Mrs. Smith and Eckerd's cashier Elizabeth Robinson attempted to determine why the check point alarm system had been activated without the assistance of store manager Alfred Lederer [T. 234]. Mrs. Smith acknowledged that Lederer was not privy to her and Robinson's initial effort to solve the problem:

> Q Had the manager -- I mean he's pretty close by, had he been talking to you or Elizabeth Robinson while you're going through the brown paper bag and trying to figure what set off the alarm?
>
> A I don't think he was even paying any attention to exactly what was going on, because he wasn't even there even when I opened the bag and we was trying to find out what the problem was. She was trying to take care of the problem without calling him.
>
> [T. 234].

It was not until after Lederer arrived at the counter that Delores Smith removed her prescription medication, which had not been paid for, from her purse [T. 235, 268]. Upon examining the prescription package, Mr. Lederer determined that the cashier had not rung or detuned Mrs. Smith's prescription because it was in her purse [T. 236, 302]. At this point, Mr. Lederer further investigated the matter by speaking with

Maurice Hodges in the pharmacy [T. 316]. Mr. Lederer testified:

> Q When you approached Mrs. Smith and she's holding her bag up, tell us what happened next.
>
> A I asked her to wait at the counter. And I went to the back to ask the clerk what had he told her about the prescription and he said he told her that it had to be paid for up front.
>
> Q So, he basically stated that Mrs. Smith knew that that particular prescription hadn't been paid for yet, correct?
>
> A Right.
>
> [T. 316-317].

During the time of Lederer's investigation, neither Mrs. Smith nor Eckerd's cashier Elizabeth Robinson offered an explanation for the alarm activation [T. 317]. Alfred Lederer was not advised and had no knowledge whatsoever that a mistake may have been made, if in fact one occurred [T. 317]. Neither Smith nor Robinson ever offered the original receipt as an explanation for a possible mistake by the cashier. [T. 320].

Once the police arrived, Mrs. Smith still made no effort to explain that a mistake may have been made by the cashier Elizabeth Robinson [T. 284]. Mrs. Smith explained that she failed to give the officer any explanation because she was "totally out of it" [T. 286]. She further stated that she didn't remember having any receipts to help her explain until she got home [T. 286].

Delores Smith testified that during the time she was detained, arrested, and charged, at no time was Mr. Lederer "nasty" and that he was very calm [T. 244-245]. Mrs. Smith testified:

> Q Let me ask you that one thing: what was Mr. Lederer, the assistant manager of Eckerd's -- what was Mr. Lederer's attitude like when he was dealing with you?
>
> A He was very calm. He didn't act nasty with me at all. He just told me to come up in his office and he got the papers and he wasn't nasty or anything. He just, like he said, he did what he had to do. That's what he said to me.

[T. 244-245].

Lederer testified about his intent in calling the police and stated that it was not his intention to have Mrs. Smith arrested. Rather, he called to have the police investigate to determine whether they needed to arrest Mrs. Smith [T. 307-308].

Lederer left the police officer to conduct his own investigation, and he did not interfere with or encourage the officer's investigation. The facts Lederer provided to Officer Green were true, and he did not withhold information which he knew would exonerate Mrs. Smith [T. 324-326]. Green testified:

> Q Okay. What were the facts that were related to you by Mr. Lederer?
>
> A He said that the burglar, I mean the shop lifting alarm, went off as she was leaving the store. He stopped her to see what set the alarm off and he said he found two bottles of pres-

> cription medicine on her person and he told me that she hadn't paid for those.
>
> [T. 198-199].

Officer Green confirmed that no pressure was exerted on him to arrest Delores Smith and that Lederer simply provided him with the information he knew [T. 209]. Green further stated that Lederer left it to his discretion whether or not to charge Delores Smith with petit theft [T. 209]. Green didn't recall why he failed to interview or otherwise entertain Mrs. Smith's explanation of the facts, but he was certain Lederer had not encouraged Mrs. Smith's arrest [T. 209]. Officer Green had investigated over 100 petit theft calls at the time of this incident [T. 206], and Mr. Lederer was relying on Officer Green to determine whether or not Mrs. Smith should be arrested or charged with the crime of petit theft [T. 308, 324].

Based on the facts cited herein, the District Court of Appeal found that:

> While there was a showing of lack of probable cause sufficient to sustain a cause of action for malicious prosecution and false imprisonment and sustain an award of compensatory damages, this was an unaccompanied by a showing of wilful and wanton disregard of plaintiff's rights, excessive or reckless disregard of plaintiff's rights, or any other outrageous conduct sufficient to support an award of punitive damages. See **Hospital Corp. of Lake Worth v. Romaguera**, 511 So.2d 559, 565 (Fla. 4th DCA 1986). (Emphasis added).

558 So.2d at 1064.

In conclusion, the First District Court of Appeal held:

> There was no evidence that Lederer was deliberately untruthful to Officer Green or that he acted with full knowledge of all the exculpating facts but recklessly or deliberately disregarded them.

558 So.2d at 1064.

## SUMMARY OF ARGUMENT

This Court's cases of Winn Dixie Stores, Inc. v. Robinson, 472 So.2d 772 (Fla. 1985) and Griffith v. Shamrock Village, 94 So.2d 854 (Fla. 1957) are not controlling as they are legally and factually dissimilar from the case at bar. Unlike the case at bar, the sufficiency of the evidence to support an award of punitive damages was not an issue in Winn Dixie Stores, Inc. v. Robinson. The "gross negligence" standard for the imposition of punitive damages set forth in Griffith v. Shamrock Village, Inc., has been eliminated by subsequent decisions of this Court.

Winn Dixie Stores, Inc v. Robinson., is factually distinguishable from the case at bar in that there was no investigation whatsoever by the Winn Dixie employees and they falsely concluded the merchandise had not been paid for. Griffith v. Shamrock Village is factually distinguishable from the case at bar in that the defendant's conduct involved an intentional misrepresentation.

The instant case should be controlled by this Court's decision of Winn & Lovett Grocery Co. v. Archer, 126 Fla. 308, 171 So. 214 (Fla. 1936). The conduct displayed by defendant's employees in Winn & Lovett was much more egregious than the conduct of the Eckerd assistant manager in the case at bar, yet this Court found that punitive damages were not justified in Winn & Lovett.

Public policy requires that merchants be able to investigate where shoplifting is reasonably suspected and contact law enforcement officials if necessary. A dangerous precedent would be set should this court hold that a negligent investigation or negligent misrepresentations will subject a merchant to punitive damages.

Petitioner's contention that fraudulent misrepresentations can support an award of punitive damages in this case is not well founded. Fraud nor misrepresentation were alleged or proven at trial. There is no evidence in the record of "intentional misconduct", a necessary element of fraud. While proof of fraud necessarily renders punitive damages a jury question, punitive damages are not necessarily or automatically a jury question in a malicious prosecution, false imprisonment case, such as the instant case.

There is no evidence that the Eckerd's assistant manager intentionally concealed two witnesses to the incident nor that he "knew" those witnesses had exculpatory information. That the prescription in question was paid for after the assistant manager's investigation began is not relevant. There is no evidence that the Eckerd's assistant manager intentionally concealed this fact. There is no support in the record for the contention that the assistant manager represented to the investigating officer that a "complete investigation" had been made. It is not reasonable to conclude that the assistant manager "knew" that the investigating officer would not

investigate the matter himself when the assistant manager called the officer to the scene to investigate and determine whether an arrest was called for.

The district court of appeal viewed the evidence in a light most favorable to the plaintiff and properly concluded that there was no evidence the assistant manager had been deliberately untruthful or that he recklessly or deliberately disregarded exculpating facts. The district court's ruling was based on a lack of evidence, not an improper re-weighing of the evidence.

## ARGUMENT

**ISSUE I. WINN DIXIE STORES, INC. V. ROBINSON, 472 So.2d 722 (Fla. 1985), AND GRIFFITH V. SHAMROCK VILLAGE, INC., 94 So.2d 854 (Fla. 1957), ARE LEGALLY AND FACTUALLY DISSIMILAR AND SHOULD NOT CONTROL THE CASE AT BAR.**

Petitioner cites the cases of Winn Dixie Stores, Inc. v. Robinson, 472 So.2d 722 (Fla. 1985), and Griffith v. Shamrock Village, Inc., 94 So.2d 854 (Fla. 1957), as controlling law on the issue of whether or not there was sufficient evidence in the trial record to support an award of punitive damages. Petitioner further quotes from Justice Zehmer's dissent, "the facts in this case are no less egregious than the facts in Winn Dixie Stores, Inc. v. Robinson and Griffith v. Shamrock Village." [Opinion at 1066] The legal and factual issues involved in Winn Dixie Stores, Inc. v. Robinson and Griffith v. Shamrock Village are dissimilar from those in the instant case. Furthermore, the legal standard applied by this Court in Griffith v. Shamrock Village has been significantly modified by recent decisions of this Court and is not applicable here.

### A. The sufficiency of the evidence to support an award of punitive damages was not at issue in Winn Dixie Stores, Inc. v. Robinson, 472 So.2d 722 (Fla. 1985).

The Winn Dixie v. Robinson case has been cited by petitioner for the proposition that this Court held that the conduct of the Winn Dixie employees in failing to do an investigation for shoplifting was sufficient to justify an award of punitive damages. However, whether the evidence was

sufficient to support an award of punitive damages based upon the employees' conduct was not an issue on appeal in **Winn Dixie v. Robinson**. The issue on appeal regarding punitive damages was whether the trial court erred in granting Winn Dixie's post trial motion for directed verdict as to punitive damages on the basis that the plaintiff, Robinson, had not alleged nor proved some "fault" on the part of Winn Dixie so as to make it vicariously liable for punitive damages under the case of **Mercury Motors Express, Inc. v. Smith**, 393 So.2d 545 (Fla. 1981). The district court reversed the directed verdict because it determined that **Mercury Motors** did not apply since vicarious liability was not an issue at trial and because there was evidence of some "fault", satisfying the requirement of **Mercury Motors**. This Court approved of the district court's decision reversing the directed verdict on punitive damages. Thus, contrary to petitioners assertion, the sufficiency of the evidence as to the conduct of the Winn Dixie employees was not an issue in **Robinson** and it is therefore distinguishable from the case at bar.

### B. Griffith v. Shamrock Village, Inc., 94 So.2d 854 (Fla. 1957) does not control the case at bar as it does not set forth the applicable standard for the imposition of punitive damages.

In Griffith v. Shamrock Village, Inc., this Court reversed a trial court order directing a verdict on the issue of punitive damages. 94 So.2d at 855. Plaintiff sought compensatory and punitive damages due to the alleged gross

negligence of the defendant in failing to deliver an important telephone message to the plaintiff. The court found:

> Since the trial judge allowed the claim for punitive damages to remain in the complaint until after all evidence had been submitted at the trial, it seems to us that he reasoned as we have here that punitive damages can be recovered in actions such as this and that malice may be imputed to defendant from gross negligence, i.e., a want of slight care. (Emphasis added).

94 So.2d at 858.

Since the Court's decision in **Griffith v. Shamrock Village, Inc.**, in 1957, this Court has rendered decisions which have changed and eliminated the "gross negligence" standard for imposing punitive damages adhered to in the **Griffith** case. **U.S. Concrete Pipe Co. v. Bould**, 437 So.2d 1061 (Fla. 1983); **White Construction Co. v. Dupont**, 455 So.2d 1026 (Fla. 1984); **Como Oil Company, Inc. v. O'Loughlin**, 466 So.2d 1061 (Fla. 1985); **American Cyanamid v. Roy**, 498 So.2d 859 (Fla. 1986); and **Chrysler Corporation v. Wolmer**, 499 So.2d 823 (Fla. 1986).

In **White Construction Co. v. Dupont**, this Court addressed the evidentiary standard necessary to sustain an award of punitive damages and reaffirmed that "the character of negligence necessary to sustain a conviction for manslaughter is the same as that required to sustain a recovery for punitive damages." 455 So.2d at 1028, quoting **Carraway v. Revell**, 116 So.2d 16 (Fla. 1959). In **White Construction Co.**, this Court specifically found that "something more than gross negligence is needed to justify the imposition of punitive damages". 455

So.2d at 1028. In American Cyanamid Co. v. Roy, this Court reaffirmed the standards set forth in White Construction Co. and urged "restraint upon the courts to ensure that the defendant's behavior represents more than even gross negligence prior to allowing the imposition of punitive damages." 498 So.2d at 861. The standard of "gross negligence" which was sufficient basis for the imposition of punitive damages in Griffith v. Shamrock, is clearly no longer sufficient for the imposition of punitive damages under this Court's decisions since Griffith.

In Hospital Corp. of Lake Worth v. Romaguera, 511 So.2d 559 (Fla. 4th DCA 1986), cited by the district court below in its opinion at page 1064, the Fourth District Court of Appeal addressed the issue of sufficiency of the evidence to sustain an award of punitive damages for tortious interference with a business relationship. On rehearing solely on the issue of punitive damages, the Fourth District cited many of this Court's decisions on punitive damages and stated:

> There appears to be little doubt that the Florida Supreme Court has severely limited the availability of punitive damages in products liability cases and those involving employer negligence. Fisher v. Shenandoah General Construction Co., 498 So.2d 882 (Fla. 1986); American Cyanamid Co. v. Roy, 498 So.2d 859 (Fla. 1986); Wackenhut Corp. v. Canty; Chrysler Corp. v. Wolmer, 499 So.2d 823 (Fla. 1986). As we read these decisions, the culpable behavior required to "express society's collective outrage," American Cyanamid Co., 498 So.2d at 861, consists of a "reckless disregard for human life equivalent to manslaughter." Chrysler Corp., 499 So.2d at 825. See

> also, Celotex Corp. v. Pickett, 490 So.2d 35 (Fla. 1986). . . . However, as the court noted in American Cyanamid Co. v. Roy, punitive damages are only tenable for "[t]ruly culpable behavior . . . to express society's collective outrage . . . ." As the Supreme Court has also expressed it, in order to sustain a claim for punitive damages, the tort must be committed in "an outrageous manner or with fraud, malice, wantonness or oppression." Winn & Lovett Grocery Co. v. Archer.

Through a long line of decisions, this Court has attempted to "mark the line at which point behavior becomes sufficiently culpable to merit societal sanctions" through the imposition of punitive damages. American Cyanamid Co. v. Roy, 498 So.2d 859, 861 (Fla. 1986). The message from these cases has been clear, and it would be contrary to the reasoning of these cases to hold that a negligent investigation and subsequent call to police, "without recommendation or rancor" [Opinion at p.1064] would subject a store merchant to punitive damages. The evidentiary standard of gross negligence applied by this Court in Griffith is no longer applicable, and the district court properly ruled that the question of punitive damages should not have been decided by the jury.

### C. The conduct of the Eckerd assistant store manager is dissimilar in nature and extent from the conduct in Winn Dixie v. Robinson and Griffith v. Shamrock Village.

Whether the facts of a particular case bring the case within the rule allowing punitive damages is a question of law for the court, and only when there is evidence that punitive damages can properly be awarded may the issue be sent to the

jury. Winn & Lovett Grocery Store Co. v. Archer, 126 Fla. 306, 171 So. 214 (Fla. 1936); Dr. P. Phillips & Sons v. Kilgore, 152 Fla. 578, 12 So.2d 465 (Fla. 1943); White Construction Co., Inc. v. Dupont, 455 So.2d 1026 So.2d (Fla. 1984); Taylor v. Gunter Trucking Company, 520 So.2d 624 (Fla. 1st DCA 1988), rev. den. 531 So.2d 169 (Fla. 1988). The record in the instant case is void of any evidence suggesting that Eckerd's store manager, Alfred Lederer, acted with malice, moral turpitude, wantonness, willfulness or reckless indifference to the rights of Delores Smith.

At most, the evidence in the instant case shows a negligent investigation on the part of Alfred Lederer before he called the police to determine whether Delores Smith should be charged with the crime of shoplifting. Mr. Lederer was aware that the Eckerd anti-shoplifting device had been activated as Delores Smith exited the store [T. 314]. Mr. Lederer determined that there had been a concealment of merchandise in Delores Smith's purse which had not been paid for [T. 332]. He then went to the back of the store to speak with pharmacy clerk Maurice Hodges to investigate the matter further [T. 316]. Lederer testified:

> Q When you approached Ms. Smith and she's holding her bag up, tell us what happened next.
>
> A I asked her to wait at the counter. And I went to the back to ask the clerk what had he told her about the prescription and he said he told her that it had to be paid for up front.

Q So, he basically stated that Ms. Smith knew that that particular prescription hadn't been paid for yet, correct?

A Right.

Q In other words, Ms. Smith knew that it still had to be paid for?

A Right.

[T. 317].

In speaking with Hodges, Mr. Lederer learned that Ms. Smith had been instructed to pay for her prescriptions at the front cashier. [T. 316]. Based on the information he had received from Hodges, the fact the check point alarm system had been activated [T. 314] and the lack of any explanation from cashier Elizabeth Robinson or Ms. Smith [T. 319], Mr. Lederer decided to call the police to determine whether Ms. Smith should be charged with the offense of petit theft. [T. 324].

Mr. Lederer's conduct, if assumed to be negligent, or even grossly negligent, is not the sort of conscious, intentional, reckless, outrageous, wanton behavior that has been required by this Court to sustain an award of punitive damages. Petitioner contends that the "gravity of conduct inflicted upon the plaintiffs" in Griffith v. Shamrock Village, Winn Dixie v. Robinson, and the instant case are "comparable". [I.B. 14]. The impact of a defendant's conduct on an individual plaintiff is not relevant to the question of whether punitive damages are properly an issue for the jury. The evidentiary focus for the issue of punitive damages should be on the conduct of Alfred

Lederer and the intent of his actions, not the effect of his conduct on Ms. Smith. It is equally inappropriate to consider the effects of the defendant's conduct in **Griffith v. Shamrock Village** and **Winn Dixie v. Robinson**.

The conduct of Alfred Lederer is dissimilar from the conduct which was the basis for punitive damages in **Winn Dixie v. Robinson**. In **Robinson**, an employee of Winn Dixie assisted the plaintiff in taking store purchases to his car. The employee saw merchandise in the back of plaintiff's car which he erroneously assumed had been shoplifted when they had actually been purchased by the plaintiff the day before. The Winn Dixie employee returned to the store and consulted with the assistant store manager whereupon, without any investigation or inquiry, the authorities were called and the plaintiff was placed under arrest and his person and vehicle were searched. **Robinson v. Winn Dixie Stores, Inc.**, 447 So.2d 1003 (Fla. 4th DCA 1984).

In **Robinson**, there was no investigation whatsoever by the Winn Dixie employee and the assistant store manager. Further, the Winn Dixie employees falsely concluded that the merchandise in the plaintiff's car had not been paid for. In contrast to the facts in **Robinson**, the evidence in the instant case shows that Alfred Lederer did conduct an investigation which established that Delores Smith was leaving the store with concealed merchandise, which had in fact not been paid for. These facts are wholly different from those in **Robinson**, where

the defendants relied solely upon an unsubstantiated suspicion, and called the police without making an investigation or inquiry at all.

The facts in Griffith v. Shamrock Village are also dissimilar from the case at bar. In Griffith the plaintiff's brother attempted to call him at his rental unit to inform him that the location of another brother's wedding, in which he was to be best man, had been changed. The clerk who answered the telephone call was asked to get the plaintiff on the line and replied he would see if the plaintiff was in. After a few minutes the operator was informed that the plaintiff had checked out and left no forwarding address when in fact the plaintiff actually lived there for another two weeks. No message was placed in the plaintiff's box and he missed the wedding. Two days before the incident, plaintiff and his room-mates advised the office their mail had been returned to senders marked "moved, left no address" and they were informed that the mistake would not happen again. 94 So.2d at 855-856.

The facts in Griffith show that the defendant, through its clerk, intentionally lied and was deceitful. This evidence is clearly more egregious and outrageous than any view of the evidence in the case at bar.

Because the facts in the case at bar are distinguishable from the facts in both Robinson v. Winn Dixie and Griffith v. Shamrock Village, this Court should discharge jurisdiction. Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983).

D. **The conduct of the Eckerd assistant manager, Alfred Lederer, was not malicious nor sufficiently egregious or outrageous so as to justify an award of punitive damages.**

This case should be controlled by this Court's decision in **Winn & Lovett Grocery Co. v. Archer**, 126 Fla. 308, 171 So. 214 (Fla. 1936). Petitioner maintains that "the ordeal experienced by **Archer** is much different than the ordeal experienced by Delores Smith." [I.B.14]. Indeed, the conduct of the employees of Winn & Lovett was much more egregious than that of Alfred Lederer.

In **Winn & Lovett**, the facts showed the following:

1. The plaintiff was a 63 year old lady who had never stolen anything in her life. She purchased a bag of groceries at Setzers Grocery Store and went to the Winn & Lovett Groceteria for additional purchases.

2. She paid for all of her purchases and was "checked out" by the check clerk in front of the store whose duty it was to keep patrons packages that had been purchased elsewhere.

3. After paying, she was stopped in the street by a delivery boy who was sent by the check clerk to bring her back into the store. The delivery boy publicly accused her several times, inside and outside of the store, of stealing a bar of soap.

4. The delivery boy and check clerk escorted the plaintiff to the back of the store, took her by her arm and pushed her into a small dark room.

5. The plaintiff was kept against her will in the small dark room for 20 minutes where she was accused of stealing soap and spoken to abusively until a policeman came who had been summoned by the store clerk.

6. Plaintiff was then taken by the policeman to Setzers to see if she had purchased the things she claimed and was humiliated before a large crowd of Saturday shoppers. Plaintiff was greatly upset by this episode, became ill, and was bedridden for two days.

171 So. 218-219.

The facts in **Winn & Lovett**, show a negligent investigation and intentional, unreasonable and abusive behavior toward the plaintiff which is clearly more egregious and outrageous than any view of Alfred Lederer's conduct.

This Court in **Winn & Lovett** held that the facts were not sufficiently egregious to warrant an award of punitive damages and reversed a jury award of punitive damages. This Court found that:

> [T]he wrong done was the result of an honest, but mistaken suspicion on the part of defendants' servants that plaintiff was guilty of a theft from defendant's store. . . . It is not shown to have been deliberately done on account of any actual malicious intent on the part of defendant's servants to unduly or inordinately add to plaintiff's suffering and indignity as a means of coercing her future conduct or as an instrument of revenge for past conduct. (Emphasis added).

171 So. at 223

More significantly, this Court described the kind of evidence that may have been sufficient to sustain an award of punitive damages:

> Had the defendant's servants stripped the plaintiff of her clothing in an effort to find articles supposed to have been stolen, or beat her in an effort to make her

> confess her alleged guilt, or perpetrated some other similar atrocious and excessive act of violence toward plaintiff, the situation would have been different and a finding of malicious and wanton wrong doing might have been sustained, whether done under a mistaken view of right or not on defendant's part. But in this case the force and attention employed was no greater than would have been the case had plaintiff's guilt of theft been established.

171 So.2d at 223.

Certainly, the conduct of Alfred Lederer in the instant case is in no way comparable to the kind of conduct described by this Court in **Winn & Lovett** as necessary for the imposition of punitive damages. The conduct of Mr. Lederer was best described by the plaintiff herself:

> Q Okay, let me ask you that one thing: What was Mr. Lederer, the assistant manager of Eckerd's-- what was Mr. Lederer's attitude like when he was dealing with you?
>
> A He was very calm. He didn't act nasty with me at all. He just told me to come up in his office and he got the papers and he wasn't nasty or anything. He just, like he said, he did what he had to do. That's what he said to me.
>
> [T. 244-245].

**E. Public policy requires that merchants be able to investigate and contact law enforcement officials where shoplifting is reasonably suspected.**

The legislature has recognized that there are necessary evils in our society that must be utilized to combat societal problems, such as shoplifting. In order to protect rights of merchants, the legislature enacted Section 812.015, Florida

Statutes, (1985)[1]. Recognizing that some detentions of suspected shoplifters may be erroneous, the legislature has specifically authorized a reasonable detention and call to police upon the activation of an anti-shoplifting or inventory control device, as occurred in this case.

Alfred Lederer may have been negligent or even grossly negligent in his investigation; however, this Court will be setting a dangerous precedent if it holds that the type of conduct involved in the instant case renders a merchant liable for punitive damages. To say that every inadequate or negligent shoplifting investigation by store employees, even where the police are called to render an independent investigation, can subject a store owner to punitive damages is contrary to the intent and purpose of Section 812.015 and contrary to the public policy of preventing shoplifting.

This concept of a "necessary evil" created by statute to prevent crime was addressed by the First District Court of

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[1] The pertinent portions of Section 812.015, Florida Statutes, (1985) are as follows:

> (3)(b). The activation of an anti-shoplifting or inventory control device as a result of a person exiting an establishment or a protected area within an establishment shall constitute reasonable cause for the detention of the person so exiting by the owner or operator of the establishment or by an agent or employee of the owner or operator, provided sufficient notice has been posted to advise the patrons that such a device is being utilized. Each such detention shall be made only in a reasonable manner and for a reasonable period of time sufficient for any inquiry into the circumstances surrounding the activation of the device.

Appeal in **Winn Dixie Stores, Inc. v. Gazelle**, 523 So.2d 648 (Fla. 1st DCA 1988). In Gazelle, the plaintiff was improperly arrested for writing bad checks which were actually forged by his wife. Plaintiff spent one week in jail before the State Attorney's Office dropped all charges. Winn Dixie attempted to contact the plaintiff by mail, pursuant to Section 832.07, Florida Statutes, on four occasions before reporting the incident to the State Attorney's Office. The State Attorney undertook prosecution of the case based on the information provided by Winn Dixie. 523 So.2d at 649.

The First District Court of Appeal acknowledged the standard for punitive damages set forth in **Carraway v. Revell**, 116 So.2d 16 (Fla. 1959), and reaffirmed in **White Construction Company, Inc. v. Dupont**, and held that:

> There is a total lack of evidence of any acts on the part of Winn Dixie which indicate a willful and wanton disregard for the rights of others or of any of the other actions set forth by the Court in **Carraway** as a sufficient basis for the award of punitive damages. (Emphasis added).

523 So.2d at 651.

Similarly, the district Court below held that there was "no evidence" that Alfred Lederer had been deliberately untruthful or that he had acted with knowledge of exculpating facts but recklessly or deliberately disregarded them. (Opinion at 1064).

The district court below distinguished the facts in the instant case from **Cardenas v. Miami-Dade Yellow Cab Co.**, 538

So.2d 491, 494 (Fla. 3d DCA 1989), and **K-Mart Corp. v. Sellars**, 387 So.2d 552 (Fla. 1st DCA 1980). In **Cardenas**, a false imprisonment case, a taxicab driver was ordered by the company dispatcher to return to a condominium with the plaintiffs due to the suspicion that a condominium pool chair had been stolen by plaintiffs. Prior to returning, the taxi driver confirmed that there had been no theft but, nonetheless, returned the plaintiffs to the condominium. The Third District Court of Appeal held that the issue of punitive damages should have been submitted to the jury.

In **K-Mart Corporation v. Sellars**, a K-Mart assistant manager and security officer had a delivery truck driver arrested and prosecuted through trial for shorting his bread deliveries to the defendant's store. The evidence showed the assistant manager knew that the inventories relied upon for the criminal proceeding were inaccurate and that he had lied about the same during his deposition in the criminal proceedings. The First District Court of Appeal found that there was "evidence that K-Mart's agent used 'fraud or other improper means'" to prosecute the plaintiff and sustained the jury's award of punitive damages. 387 So.2d at 554.

The **Cardenas** and **K-Mart** cases are distinguishable from the case at bar in that in each case there was a knowing and intentional disregard of the plaintiff's rights. In the case at bar there was, at most, a negligent infringement of the plaintiff's rights, but under no view of the evidence was there

a knowing or intentional violation of plaintiffs rights.

**ISSUE II. ECKERD'S ASSISTANT MANAGER, ALFRED LEDERER, DID NOT MAKE FRAUDULENT MISREPRESENTATIONS TO THE INVESTIGATING POLICE OFFICER CALLED TO THE SCENE TO INVESTIGATE THE MATTER.**

Petitioner contends that Eckerd's assistant manager, Alfred Lederer, made fraudulent misrepresentations to Officer Green called to the scene to investigate the incident by:

1. Concealing two witnesses to the incident;

2. Concealing that payment had been made for the prescriptions; and

3. By representing to the officer that a complete investigation had been made when a complete investigation was never made.

[I.B. 19].

Petitioner's fail to support their conclusions with any citations to the record. Petitioners contentions are also contrary to the specific finding of the district court that Mr. Lederer's conduct was "an honest albeit mistaken effort to comply with the spirit of section 812.015(3), Florida Statutes (1985)" and that "[t]here was no evidence that Lederer was deliberately untruthful to Officer Green or that he acted with full knowledge of all the exculpating facts but recklessly or deliberately disregarded them." [Opinion at 1064].

**A. Fraudulent misrepresentations were not pled or proven at the trial and evidence of misrepresentation, without evidence of intent to deceive, is insufficient to support an award of punitive damages.**

It is an important distinguishing fact that neither fraud nor misrepresentation were alleged in the petitioner's complaint (R. 1-4) nor were those issues submitted to the jury at trial. [T. 527-541]. This Court has held that proof of a fraud claim sufficient to support compensatory damages creates a jury issue as to punitive damages. First Interstate Development Corp. v. Ablanedo, 511 So.2d 536 (Fla. 1987). However, the instant case is not a "fraud" case.

The elements for actionable fraud were set forth by this Court in Lance v. Wade, 457 So.2d 1008 (Fla. 1984) as:

> (1) a false statement concerning a material fact; (2) knowledge by the person making the statement that the representation is false; (3) the intent by the person making the statement that the representation will induce another to act on it; and (4) reliance on the representation to the injury of the other party (Emphasis added).

"Intentional misconduct" is a necessary element of fraud and where there is no evidence of an intention to deceive the issues of fraud and punitive damages should not be submitted to the jury. First Insterstate Development Corp. v. Ablanedo, supra; MMH Venture v. Masterpiece Products, Inc., 559 So.2d 314 (Fla. 3d DCA 1990) and John Brown Automation, Inc. v. Nobles, 537 So.2d 614 (Fla. 2d DCA 1988).

In Nobles the Second District Court of Appeal reversed an award of punitive damages as the court found no evidence of fraudulent intent. The court distinguished First Interstate Development Corp. v. Ablanedo stating:

> The appellees rely heavily upon **First Interstate Development Corp v. Ablanedo**, 511 So.2d 536 (Fla. 1987), primarily because of the statement that "[t]he overwhelming weight of authority in this state makes it clear that proof of fraud sufficient to support compensatory damages necessarily is sufficient to create a jury question regarding punitive damages." 511 So.2d at 539. **Ablanedo** will not stretch as far as the appellees desire. The foregoing language is succeeded in the very next paragraph by an equally succinct and clear explanation: "This is so because intentional misconduct is a necessary element of fraud. Indeed, to prove fraud, a plaintiff must establish that the defendant made a deliberate and knowing misrepresentation designed to cause, and actually causing, detrimental reliance by the plaintiff." (Emphasis supplied).

537 So.2d at 618.

As in **Nobles**, any representations made, even if viewed to be misrepresentations, were negligent misrepresentations only, insufficient to support an award of punitive damages, as there is no evidence nor reasonable inference from the evidence that Alfred Lederer intentionally made false or misleading statements.

Punitive damages based upon "intentional misconduct" in a case of fraud differ substantially from punitive damages in a malicious prosecution, false imprisonment case, such as the case at bar. In a malicious prosecution case, the legal malice which may be implied from an absence of probable cause is not the equivalent of actual malice. Punitive damages in a malicious prosecution case are not proper without a showing of moral turpitude or willful and wanton disregard of the plaintiffs rights [Opinion at 1063]. See also: **Adams v. Whitfield**,

290 So.2d 49 (Fla. 1974); **Winn Dixie Stores, Inc. v. Gazelle**, 523 So.2d 648 (Fla. 1st DCA 1988); and **Harris v. Lewis State Bank**, 482 So.2d 1378 (Fla. 1st DCA 1986). Thus, while a finding of fraud necessarily renders punitive damages a jury question, a finding of legal malice in a malicious prosecution case does not necessarily or automatically render punitive damages a jury question.

**B. All of Alfred Lederer's representations to Officer Green were true.**

The record establishes that the representations by Alfred Lederer to Officer Green were in fact true. Everything that Mr. Lederer told Officer Green and everything that Officer Green acknowledged being told is an undisputed fact. [T. 198-199]. Lederer told Officer Green, and he acknowledged being told that:

1. The anti-shoplifting device was activated as Ms. Smith exited the store;

2. Two bottles of prescription medication were concealed in Delores Smith's purse;

3. The medication had not been paid for when Ms. Smith attempted to exit the store.

[T. 199].

All of the above facts and representations are indisputably true.

**C. Eckerd's assistant manager did not intentionally conceal two witnesses to the incident.**

The trial record does not support petitioner's contention that Alfred Lederer "purposely concealed the only two witnesses

to this incident". [I.B. 12]. Hodges and Robinson were not the "only" two witnesses as Lederer himself was a witness. Elizabeth Robinson never offered any explanation whatsoever for the events at the front counter or the activation of the anti-shoplifting device. Although Mr. Lederer never specifically questioned Elizabeth Robinson [T. 303], he had no reason to submit Robinson's name as a witness given her lack of an explanation for the situation. Most importantly, there is no evidence that Lederer lied about the existence of other witnesses; failed to give the names of Hodges and Robinson after inquiry from the officer; or misled the officer in any way. Lederer testified:

> Q So the only knowledge, the only fact that you had, was Mr. Hodges had advised Mrs. Smith that she had to pay for the prescription up front and that Mrs. Smith had attempted to leave the store with the prescription package inside her purse without having paid for it; is that correct?
>
> A Yes.
>
> Q You had no other information and no one provided you any other information other than that; is that correct?
>
> A Right.
>
> [T. 319].

Although it is argued by petitioner that Robinson had information tending to exculpate Delores Smith, certainly Maurice Hodges had no exculpatory information. Rather, Hodges could confirm that he told Smith she had to pay for the prescription at the front counter. [T. 306]. Thus, the implication that Lederer intentionally "concealed" Robinson and

Hodges makes no sense as Hodges' information tended to confirm her guilt.

### D. Eckerd's assistant manager did not intentionally conceal that payment had been made for the prescriptions.

Petitioner contends that Lederer "concealed" the fact that Smith paid for the prescriptions after the activation of the anti-shoplifting device. [I.B. 19]. That Mrs. Smith may have paid the cashier, Elizabeth Robinson, in Lederer's presence or while Lederer was in back of the store is irrelevant. It is undisputed that the alleged payment took place after Lederer had witnessed a concealment and after the anti-shoplifting device had been activated. [T. 237, 322]. The alleged payment had no bearing on the issue of whether Lederer had probable cause to detain Smith and call law enforcement authorities to undertake an independent investigation. A kidnapper who returns his victim has still committed the crime of kidnapping. A bank robber who returns his loot has still committed the crime of bank robbery.

Similarly, Lederer's failure to report this fact to Officer Green was of no significance. There is no evidence that Green inquired about the payment, or that Smith attempted to explain that she had paid for the merchandise in question. [T. 284]. Mrs. Smith testified:

> Q Did at any time you attempt to show them these two receipts so that they could kind of make some sense out of the whole incident?
>
> A No, sir.

Q Why is that ma'am?

A Sir, when these two police officers came in there and told me that I was called in on shoplifting, I wasn't thinking about receipts or nothing. I was totally -- I was out of it. I couldn't believe that it was really happening and the only thing I can remember was telling them to give me my medicine, that I had not stole anything and I had paid for it and that was it.

Q Did you explain to them that the clerk had made a mistake.

A They didn't want to talk to me, sir.

Q Ma'am, you are really not being responsive. My question was, did you ever explain to the officer when he was filling out that notice to appear (citation) that a mistake had been made by the cashier and that the cashier --

A No, no. I didn't say nothing about no cashier or nothing. Just like I said before, I was totally out of it. I didn't even know I had the receipts until I got home.

[T. 284].

**E. Eckerd's assistant manager did not represent to Officer Green that a "complete investigation" had been made.**

There is no evidence in the record to support petitioner's contention that Lederer represented to Officer Green that he had made a "complete investigation". [I.B. 19-20]. Lederer gave Officer Green only those facts which he had been told. [T. 325]. Lederer never represented to Officer Green that he had spoken to all witnesses, or that Mrs. Smith was guilty of the crime of shoplifting. Lederer further stated that he left the decision of whether to charge Smith to the discretion of

the police officer. [T. 326]. Officer Green acknowledged that Lederer gave him only the information "as he knew it", and that the decision whether to charge Smith was left to his discretion. Green testified:

> Q Did Mr. Lederer at any time ever exert any pressure on you to arrest this person?
>
> A No.
>
> Q He just basically provided you with the information as he knew it and left it up to your discretion as to whether or not you were going to charge her with petit theft; is that correct?
>
> A Yes, sir, I guess so.
>
> [T. 209].

Petitioner's assertion that Lederer "knew" that the police officer would rely upon his investigation and do no investigation of his own is contrary to the evidence, and any reasonable inferences that can be drawn from the evidence. Lederer testified unequivocally that he called the police so that they could investigate and determine whether a crime had been committed. [T. 307-308]. It is not reasonable to conclude or infer from the evidence that Mr. Lederer "knew" that Officer Green would not investigate the matter himself, or that he would immediately arrest Mrs. Smith. Lederer testified:

> Q And you called the police for the purpose of having them come out to arrest Mrs. Smith for shoplifting; did you not?
>
> A No.
>
> Q Why did you call the police?
>
> A I called to have them determine if there was a possibility that they needed to arrest her.

[T. 307-308].

Q Is it the responsibility of Eckerds to prosecute people if accidentally they don't pay for an item and walk outside the door?

A Our policy was to let the State Attorney and the police officers decide if there is a case.

[T. 330].

Petitioner and Justice Zehmer, in his dissent, urge that the case of **Harris v. Lewis State Bank**, 482 So.2d 1378 (Fla. 1st DCA 1986), addresses misrepresentations similar to the instant case. The case is distinguishable for several reasons. First, the **Harris** decision addressed the issue of whether facts had been sufficiently pled to withstand a motion to dismiss on the issue of punitive damages. The court held that where plaintiff alleged facts demonstrating fraud and wilful and wanton disregard of the plaintiff's rights, it was improper to grant a motion to dismiss. The issue before the trial court in the instant case was whether there was evidence in the record, not whether facts had been pled.

Second, the plaintiff in **Harris** alleged that defendant knowingly withheld key information from investigators which it knew would exonerate the plaintiff. 482 So.2d at 1385. In the case at bar, there was no evidence that Lederer knew Smith was innocent; there was no evidence that Lederer knew Robinson had made a mistake; and there was no evidence that Lederer knew that Robinson, through her testimony, could exonerate the plaintiff.

ISSUE III. **THE DISTRICT COURT OF APPEAL VIEWED THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE PLAINTIFF AND PROPERLY CONCLUDED THAT THERE WAS NO EVIDENCE TO JUSTIFY THE JURY'S AWARD OF PUNITIVE DAMAGES.**

A review of the trial record shows that the District Court's viewed the facts in a light most favorable to the petitioner, and there was no evidence to support the jury's verdict for punitive damages. The Court found that there was no evidence that store manager Alfred Lederer was "deliberately untruthful" or that he "recklessly or deliberately disregarded" exculpating facts. [Opinion at 1064]. The court's ruling was based on a lack of evidence, not an improper re-weighing of the evidence.

In reviewing a directed verdict on appeal, it is a well-established rule that the appellate court must view the evidence in the light most favorable to the nonmovant and draw every reasonable inference in favor of the nonmovant. **Teare v. Local Union No. 295**, 98 So.2d 79 (Fla. 1979); **Red Top Cab & Baggage Co. v. Dorner**, 32 So.2d 321 (Fla. 1947). The district court's opinion reveals that the evidence and all reasonable inferences that could be drawn from the evidence were considered. Any inference or supposition, no matter how remote, can be drawn from evidence, but only reasonable inferences supported by the record should be considered. Petitioner's contention that Alfred Lederer made fraudulent misrepresentations is not a logical, reasonable inference that can be drawn from the evidence. This is especially so in light of the lack of any evidence establishing intent, malice, ill will, bad

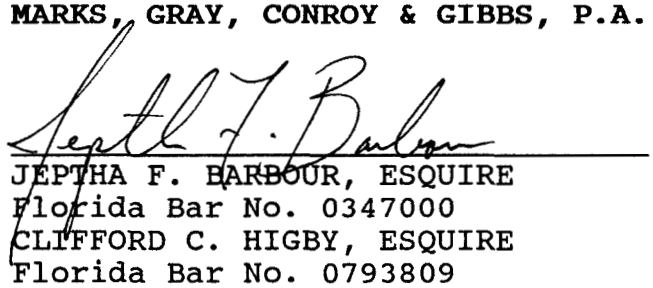
motive, or desire on Alfred Lederer's part to inflict harm upon Delores Smith. To the contrary, Ms. Smith herself testified that Mr. Lederer was calm, polite, and was simply doing his job. [T. 244-245].

## CONCLUSION

For the reasons cited herein, the opinion of the District Court below should be affirmed.

**Respectfully submitted,**

**MARKS, GRAY, CONROY & GIBBS, P.A.**



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