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Case 107
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SUPREME COURT OF FLORIDA

DELORES SMITH, ET VIR.,

Petitioners,

vs.

JACK ECKERD CORPORATION,

Respondent.

CASE NO. 76,004

DISTRICT COURT OF APPEAL,
1ST DISTRICT - NO. 88-02775

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

In this Initial Brief, the plaintiff below, appellee at the District Court level, and petitioner here, Delores Smith, will be referred to as "Smith". The defendant below, appellant at the District Court level, and respondent here, Jack Eckerd Corporation, will be referred to as "Eckerd". The trial transcript will be referred to as "T". The record on appeal will be referred as "R".

THE CASE

This is an appeal from a decision of the First District Court of Appeal dated March 9, 1990, reported at 558 So. 2d 1060. Eckerd had previously appealed to the First District Court of Appeal the denial of its Motion for Directed Verdict, or in the Alternative Motion for New Trial, or in the Alternative Motion for Remittitur. (R. 28 - 30). That motion had been denied by the trial judge by order dated September 29, 1988 (R. 42) and Eckerd timely filed its Notice of Appeal to the First District Court of Appeal. (R. 44). The First District by a two to one vote, with Justice Zehmer dissenting with opinion, reversed the jury's award of punitive damages but affirmed the judgment in all other respects. Smith appeals to this court the reversal of the punitive damage award.

This lawsuit originally arose with the filing of the plaintiff's initial Complaint on October 6, 1987. (R. 1). Smith claimed to have sustained injuries and damages during her detention and arrest at Eckerd's drug store, 5415 Norwood Avenue, Jacksonville, Florida, on February 15, 1986. Smith proceeded to trial on theories of false imprisonment and malicious prosecution

claiming both compensatory and punitive damages. (R. 1-4).

Eckerd filed an Amended Answer denying the allegations of Smith's Complaint. (R. 11). The case came on to trial on Smith's initial Complaint and a jury trial commenced on August 22, 1988. (R. 12). The jury returned a verdict in favor of Smith awarding her \$25,000.00 in compensatory damages and \$100,000.00 in punitive damages. (R. 23 - 24). Eckerd then filed its Motion for Directed Verdict or in the Alternative, Motion for New Trial, or in the Alternative, Motion for Remittitur (R. 28-30), which was denied by the trial judge. An appeal followed to the First District Court of Appeal who affirmed the compensatory damage award but reversed the award of punitive damages.

Smith then petitioned this court for certiorari jurisdiction. This court, by its Order Accepting Jurisdiction and Setting Oral Argument, dated October 29, 1990, accepted jurisdiction of this case.

THE FACTS

On February 15, 1986, Smith went to the Eckerd drug store located at 5415 Norwood Avenue, Jacksonville, Florida, to pick up some prescription medication for her nerves. (T. 224, 242). Upon entering the store, Smith proceeded to the back of the store to pick up her two prescriptions. She was enrolled on a Travelers Insurance plan and her prescriptions cost only the deductible amount of \$1.00 each because of this plan. (T. 224-225).

At the pharmacy, Smith spoke to Maurice Hodges, a clerk on duty, who delivered to Smith her prescriptions. Smith attempted to pay him with a \$20.00 bill for the prescriptions, but he informed Smith that the cash register at the rear of the store in the pharmacy was closed and she would have to pay for the prescriptions at one of the registers at the front of the store. (T. 228). Smith picked up some household items on the way to one of the cash registers in the front of the store.

Smith testified she placed the prescriptions and the household items on the counter of Elizabeth Robinson, Eckerd's cashier. Elizabeth Robinson rang up the household items, but failed to ring up the prescriptions. The household items totalled \$11.18. Smith gave the cashier a \$20.00 bill and received \$8.82 in change. (T. 229 - 231).

Smith proceeded to exit the store. An anti-shoplifting checkpoint alarm system at the exit door was activated. (T. 231). The checkpoint alarm system in the store is activated by a tag on merchandise which is normally detuned and deactivated upon receipt

of payment. (T. 297, 315). After hearing the checkpoint alarm, Smith voluntarily returned to Elizabeth Robinson's counter where she had made her initial purchases. (T. 232). Eckerd's assistant manager, Alfred Lederer approached Smith as she and Elizabeth Robinson, the cashier, were discussing what had set off the alarm. Smith testified that she took the prescription medication out of her purse and suggested to Lederer and Robinson that perhaps the prescriptions had set off the alarm. Lederer examined Smith's receipt and determined that the prescriptions had not been rung up. Lederer then went to the pharmacy in the rear of the store and spoke with Maurice Hodges, the clerk at the pharmacy. (T. 234-236).

Maurice Hodges informed the assistant manager that Smith had attempted to pay him for the prescriptions and that he had instructed her to pay for the prescription at one of the cash registers in the front of the store. (T. 316 - 317).

Smith testified that she later paid Elizabeth Robinson, the cashier, for the prescriptions and that this was done in the presence of Lederer, the assistant manager. (T. 237 - 238). The receipt showing the \$2.00 prescription purchase was entered into evidence at trial, as plaintiff's exhibit number 2. Lederer later took the prescriptions back from Smith and refused to return them claiming that they were "evidence" (T. 243), even though Smith pleaded with him to give her back the nerve medication because of her state of upset. (R. 242).

The assistant manager failed to bother to even ask Elizabeth

Robinson, the cashier, what had happened when she rang up Smith's purchases shortly before the checkpoint alarm being activated. (T. 303; 309 - 310). He further testified of his failure to question his cashier whatsoever before calling the police, despite his knowledge that he must make a thorough investigation of the facts before making such a serious accusation. (T. 308). He also testified that since he was in charge of the store at that time, he would be responsible to make a thorough investigation of the facts before calling the police. (T. 308).

The assistant manager then called the Jacksonville Sheriff's Office to the store. (T. 197). Officer Green responded to the call. Officer Green testified that he relied on the assistant manager to truthfully relay the facts to him so that he could determine whether there was probable cause for police action. (T. 215). Officer Green further testified that Lederer did not inform him of the existence of any other witnesses and that he relied upon Lederer to provide him with such information. (T. 216). Officer Green was also never informed that Smith actually paid for the prescriptions prior to his arrival. (T. 321 - 322).

Officer Green issued a citation to Smith charging her with petit theft. (T. 211).

Smith entered a plea of not guilty to the petit theft charges and demanded a trial by jury. She was represented by defense attorney, David Douglas, at the misdemeanor petit theft trial. Prior to the trial, Douglas had deposed Maurice Hodges, the clerk, and Elizabeth Robinson, the cashier. Elizabeth Robinson's

testimony greatly favored Smith and her innocence. Douglas had a great deal of trouble locating Elizabeth Robinson for the trial in the criminal case. (T. 155 - 157). After the selection of the jury, and shortly before the jury was to be sworn and opening statements were to commence, Elizabeth Robinson suddenly appeared at the rear of the courtroom. The State Attorney, Geoffrey Welsh, asked for a recess. He verified the identity of Elizabeth Robinson and then nol prossed all charges against Smith. (T. 158 - 164).

At the civil trial, it was stipulated that Eckerd had a net worth of \$1,184,368,713.00. (T. 367).

SUMMARY OF ARGUMENT

As to Issue I, the facts in the case at bar are no less egregious than the facts in Winn-Dixie Stores, Inc. v. Robinson and Griffith v. Shamrock Village, Inc. Both of those cases involved claims for punitive damages which were affirmed. The lack of investigation in Robinson is comparable to that experienced by Smith, except the assistant manager in the case at bar went a step further when concealing witnesses and the fact that payment had been made for the prescriptions in question prior to the arrival of the police. The degree of gross negligence exhibited in the Griffith case by the defendant failing to relay a telephone message to the plaintiff concerning the change in location of his brother's wedding is comparable to the degree of conduct exhibited by Eckerd. As a result, the case at bar is controlled by Winn-Dixie Stores, Inc. v. Robinson and Griffith v. Shamrock Village, Inc. and the jury's award of punitive damages should be reinstated.

As to Issue II, fraudulent misrepresentations were made by Eckerd's assistant manager when he first called the police then concealed witnesses, concealed the fact that payment had been made for the prescriptions in question, and represented that a complete investigation had been made when one had not been made. The assistant manager was aware that the alleged shoplifting incident originated at the cash register of Elizabeth Robinson. He was also aware that Smith had picked up the prescriptions in question from Maurice Hodges, and that Smith had also attempted to pay him for the prescriptions. He was also aware that payment had been made by

Smith for the prescription, and that she had a receipt. The assistant manager had failed to even ask Elizabeth Robinson, the cashier, what had happened when she rang up Smith's other purchases shortly before the checkpoint alarm sounded. Instead, he represented to the police that he was the only witness and that a complete investigation had been made pointing to the alleged guilt of Smith. These misrepresentations and concealments rise to a level of fraud that would support an award of punitive damages.

As to Issue III, with respect to Eckerd's Motion for Directed Verdict on the issue of punitive damages, the District Court majority failed to consider the facts and their inferences in the light most favorable to Smith, the non-moving party. Instead, the majority considered the facts and their inferences in the light most favorable to the wrong party when reversing the jury's award of punitive damages. That reversal should not be allowed to stand based on their erroneous application of the law to the facts.

ARGUMENT - ISSUE I

ISSUE - DOES WINN-DIXIE STORES, INC. V. ROBINSON, 472 SO. 2D 722 (FLA. 1985) AND GRIFFITH V. SHAMROCK VILLAGE, INC., 94 SO. 2D 854 (FLA. 1957) CONTROL AS TO THE CASE AT BAR IN THAT THOSE TWO CASES INVOLVED COMPARABLE DEGREES OF EGREGIOUS CONDUCT WHICH SUPPORTED AWARDS OF PUNITIVE DAMAGES.

ANSWER - The case at bar is controlled by Winn-Dixie v. Robinson and Griffith v. Shamrock Village, Inc. in that both cases involve facts which supported awards of punitive damages comparable to the facts in the case at bar.

The case at bar involves claims by Delores Smith, and her husband, Wilbur Smith for causes of action involving malicious prosecution and false imprisonment. The jury found for the plaintiff, Delores Smith and awarded her \$25,000.00 in compensatory damages and \$100,000.00 in punitive damages. The First District Court of Appeal affirmed the award of compensatory damages but reversed the award of punitive damages finding that the evidence failed to show a "willful 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". (Page 1064 of the opinion). The court further went on to hold that "As in Gazelle, the evidence shows the initiation of prosecution without sufficient investigation or probable cause, but does not demonstrate willful or wanton misconduct". (Page 1064 of the opinion).

The dissent of Justice Zehmer interpreted the facts differently. Justice Zehmer stated,

"The facts in this case are no less egregious than the facts in Winn-Dixie Stores, Inc. v. Robinson (cite omitted) and Griffith v. Shamrock Village, Inc. (cite omitted). The majority ruling in this case that the lack of investigation by the Defendant was 'an honest albeit mistaken effort' leaves this decision in conflict with the Supreme Court's decision in Robinson. It is an error to take the punitive damage issue from the jury. I would affirm the judgment in all respect." (Page 1066 of the opinion).

In evaluating Eckerd's Motion for Directed Verdict on the claim for punitive damages, all evidence must be viewed in the light most favorable to Smith, the non-moving party. Urling v. Helms Exterminators, Inc., 468 So. 2d 451 (Fla. 1st DCA 1985); American Automobile Association, Inc. v. Tehrani, 508 So. 2d 365 (Fla. 1st DCA 1987); Teare v. Local Union No. 295, 98 So. 2d 79 (Fla. 1957), and; Hardware Mut. Cas. Co. v. Tampa Electric Co., 60 So. 2d 179 (Fla. 1952), and; Tiny's Liquors, Inc. v. Davis, 353 So. 2d 168 (Fla. 3rd DCA 1978). The operative facts viewed in the light most favorable to Smith which would support the jury's punitive damage verdict are as follows:

1. Delores Smith, late at night, went to a 24 hour Eckerd Drug Store and attempted to pay for her prescriptions at the pharmacy at the back of the store with a \$20.00 bill. Her two prescriptions, because of her insurance plan, only cost the deductible of \$1.00 per prescription for a total of \$2.00. She was told by Maurice Hodges, a clerk in the rear of the store, that the register at the pharmacy

was closed and to pay up front.

2. On the way to the front cash register, Smith picked up various household items.

3. Smith presented the prescriptions, as well as the household items for payment.

4. Elizabeth Robinson, the cashier, failed to ring up the prescriptions, but did ring up the household items. Smith paid her charges of \$11.12 with a \$20.00 bill and received back \$8.82 in change.

5. Upon exiting the store, a check point alarm went off and then Smith voluntarily returned to Elizabeth Robinson's counter. In an attempt to figure out what set off the alarm, it was Smith herself, who suggested the prescriptions might have been the cause.

6. The assistant manager, Alfred Lederer, heard the alarm go off and went to Elizabeth Robinson's counter. He then talked to the clerk, Maurice Hodges, in the back of the store and learned that Smith attempted to pay for the prescriptions in the back of the store.

7. The assistant manager never even asked Elizabeth Robinson if Smith had attempted to pay for the prescriptions in question. Later,

Smith did pay for the prescriptions in question in the presence of the assistant manager, and the receipt was introduced into evidence at trial.

8. The assistant manager called the police and purposely concealed the only two witnesses to this incident, more particularly, Maurice Hodges and Elizabeth Robinson, as well as the fact that Smith had already paid for the prescriptions. Instead, the assistant manager told the police that he was the only witness, a fraudulent statement which was relied upon by the police.

9. The police officer relying on the fraudulent misrepresentation of the assistant manager did no investigation. The assistant manager was aware of this. The police officer proceeded to cite Smith for the crime of shoplifting and the prosecution began.

The operative facts in the Winn-Dixie Stores, Inc. v. Robinson are as follows:

1. Robinson was from the Bahamas. He went to the Winn-Dixie Store to purchase various goods for resale in the Bahamas.
2. Robinson had purchased items from Winn-Dixie on a prior day and returned to the Winn-

Dixie Store on a later day to purchase more items.

3. After making the subsequent purchases, Robinson was helped to his vehicle by a Winn-Dixie employee who saw the previous day's purchases in the vehicle and concluded that Robinson was a shoplifter.

4. Robinson returned to the Winn-Dixie Store and was arrested and prosecuted for shoplifting.

This court approved an award of punitive damages based upon those operative facts.

The operative facts in the case of Griffith v. Shamrock Village, Inc. are as follows:

1. The plaintiff, Rufus A. Griffith was a tenant of the defendant, Shamrock Village, Inc.

2. Griffith did not have a telephone in his room, but there was a telephone in the office.

3. One of Griffith's family members attempted to call Griffith by calling the office and left Griffith a message. The message concerned the fact that the location of Griffith's brother's wedding had been moved.

4. The defendant never gave the message to Griffith and Griffith travelled to the wrong

location and missed his brother's wedding in which he was to be the best man.

This court held that those facts should have been submitted to the jury to consider the issue of punitive damages.

In the case at bar, Delores Smith suffered an equivalent degree of indignation when compared to the ordeal experienced by Robinson. Smith's experiences are even more extreme than those experienced by Griffith as a result of the gross negligence of Shamrock Village, Inc. These three sets of facts are certainly comparable in terms of the gravity of conduct inflicted upon the plaintiffs.

The majority in the opinion below relies primarily upon the cases of Winn & Lovett Grocery Co. v. Archer, 717 So. 214, (Fla. 1936), and Winn-Dixie Stores, Inc. v. Gazelle, 523 So. 2d 648 (Fla. 1st DCA 1988). As pointed out by Justice Zehmer in his dissent, the facts in the Winn & Lovett Grocery Co. v. Archer case are much different than the facts in the case at bar. Mary Archer was never arrested or charged with any crime, unlike Smith. Mary Archer was briefly detained while store personnel and a policeman questioned her about some goods in her possession that had been purchased from another store. Once they confirmed that these goods had, in fact, been purchased from another store, Archer was allowed to leave and the matter was dropped. This court, based upon those operative facts, affirmed an award of compensatory damages but not an award of punitive damages. The ordeal experienced by Archer is much different than the ordeal experienced by Delores Smith.

The operative facts in the case of Winn-Dixie Stores, Inc. v. Gazelle are as follows:

1. Gregory Gazelle and his wife, Lorena Mae Gazelle had a joint checking account.
2. Mr. Gazelle was in the Navy. While away on duty, Mrs. Gazelle forged nine checks by signing her husband's name.
3. Winn-Dixie wrote to the Gazelle's address four times, once by registered mail, to notify Mr. Gazelle of the bad checks.
4. Winn-Dixie complied with the notice requirement of Florida Statute §832.07, the prerequisite for bad check criminal prosecution.
5. Upon returning from duty, Mr. Gazelle was arrested for the checks and those charges were later dropped upon discovering the forgery.

The First District Court of Appeal in that case held the facts sufficient to sustain an award of compensatory damages for malicious prosecution but insufficient to sustain an award of punitive damages.

When comparing the conduct of Winn-Dixie to the conduct of Eckerd, it is readily apparent that Eckerd acted with a degree of reckless indifference to the rights of Smith which is totally absent in the conduct of Winn-Dixie. Winn-Dixie never concealed eyewitnesses, nor concealed that payment had been made for items

allegedly stolen, nor affirmatively misrepresent the extent of its investigation before initiating criminal proceedings.

The District Court majority in the opinion below invites comparison in the case at bar to the cases of Cardenas v. Miami-Dade Yellow Cab Company, 538 So. 2d 491 (Fla. 3rd DCA 1989) and K-Mart Corporation v. Sellars, 387 So. 2d 552 (Fla. 1st DCA 1980). The Cardenas v. Miami-Dade Yellow Cab Company case arose when a security guard at a condominium mistakenly thought that the plaintiff had taken one of the condominium's pool chairs in a taxi as he left the condominium. The security guard then called the cab company who radioed the cab driver to return with the plaintiff to the condominium. The cab driver verified that the plaintiff did not have one of the condominium's pool chairs, but in fact, had a stroller which was used by the plaintiff's son who suffered from muscular dystrophy. In spite of this verification, the cab driver obeyed his dispatcher and returned the plaintiff to the condominium.

The Third District Court of Appeal held that the issue of punitive damages should have been submitted to the jury concerning claims against the cab driver and the dispatcher.

In the K-Mart Corporation v. Sellars case, the First District Court of Appeal affirmed an award of punitive damages where K-Mart, based upon an admittedly inaccurate inventory, had the plaintiff prosecuted for petit theft. The plaintiff was a delivery truck driver and was believed to be shorting his bread deliveries to the defendant's store.

When comparing the conduct of Eckerd and taking the facts and inferences in the light most favorable to Smith, it is clear that Smith was the victim of a reckless disregard for her rights by Eckerd. The facts in the case at bar are far more egregious than the facts in Winn-Dixie Stores, Inc. v. Gazelle or Winn & Lovett Grocery Co. v. Archer. The question of punitive damages will be increasingly confused if the opinion of the District Court is not reversed in that the facts in the case at bar are comparable to the facts in Winn-Dixie Stores, Inc. v. Robinson and Griffith v. Shamrock Village, Inc., as well as the District Court cases of Cardenas v. Miami-Dade Yellow Cab Company and K-Mart Corporation v. Sellars.

As stated by this court in St. Regis Paper Company v. Watson, 428 So. 2d 243 (Fla. 1983),

"Once the plaintiff has introduced evidence to establish a basis for recover, the jury, acting on behalf of the public, has a responsibility to determine whether to award punitive damages and, if so, what amount would best serve the public policy of punishment and deterrence."

In the case at bar, Smith established a basis for the recovery of punitive damages as found by the trial judge below, during the trial. At that point, it was up to the jury to decide whether punitive damages were appropriate and the amount. The jury found that \$100,000.00 would be an appropriate amount of punitive damages based upon the facts of our case and the net worth of Eckerd which was stipulated to be in excess of one billion dollars. The issue of punitive damages was properly submitted to the jury and the

award should be reinstated based upon the above cited cases.

ARGUMENT - ISSUE II

ISSUE - DID ECKERD, THROUGH ITS ASSISTANT MANAGER, MAKE FRAUDULENT MISREPRESENTATIONS BY MAKING STATEMENTS TO THE POLICE OFFICER WHO WAS CALLED TO THE SCENE WHEN THE ASSISTANT MANAGER CONCEALED FACTS AND HAD INSUFFICIENT KNOWLEDGE TO KNOW THAT HIS STATEMENTS WERE FALSE, THUS SUBJECTING ECKERD TO A CLAIM FOR PUNITIVE DAMAGES.

ANSWER - Eckerd through its assistant manager made fraudulent misrepresentations to the police officer called to the scene by concealing the two witnesses to the occurrence by concealing that payment had been made for the prescriptions, and by representing to the officer that a complete investigation had been made when, in fact, a complete investigation was never made.

A fraudulent misrepresentation is made when one makes a representation without actual knowledge of its falsity or without knowledge either of its truth or falsity or under circumstances which the person ought to have known, if he did not know, of its falsity. Joiner v. McCullers, 28 So. 2d 823 (Fla. 1947). The case at bar involves precisely this principle of law. The assistant manager represented to Officer Green, the officer that had been called to the scene, that he, the assistant manager, was the only witness to the alleged shoplifting incident. This is a patently false representation. Two other witnesses existed as to the incident in question. One was the cashier, Elizabeth Robinson. The other was the store clerk, Maurice Hodges, who was on duty in the back of the store, and who Smith had attempted to pay. The fact that Smith had actually paid for the prescriptions and had a receipt was also concealed. The falseness of these representations

by the assistant manager to the police officer were further compounded when it was falsely represented that a complete investigation of all the facts had been made, which allegedly pointed to the guilt of Smith. The assistant manager knew the police officer would rely upon his investigation and the assistant manager was further aware that the police officer did not do any investigation before citing Smith for the crime of shoplifting. The charges were eventually nol prossed.

The case of Walsh v. Alfidi, 448 So. 2d 1084 (Fla. 1st DCA 1984) involves this principle of law. Justice Zehmer in that case stated:

"Similarly, in this case the trial judge found that Walsh had presented sufficient evidence to warrant submission of her fraud claim to the jury and instructed the jury that defendants could be found guilty of fraud if the false statements were 'made by one knowing that the representation is false' or 'if he did not know, ought to have known of its falsity.' Such acts of fraud form the legal basis for an award of punitive damages; therefore, it was for the jury, not the trial judge, to determine whether punitive damages should be awarded."

That case involved claims that Alfidi, the seller of a restaurant, misrepresented to Walsh, the buyer of the restaurant, that the restaurant was a "mom and pop style family restaurant", when in fact the restaurant catered to prostitutes and drug users. Based upon those facts, it was held that an issue as to punitive damages was raised. The case at bar involves a similar degree of egregious conduct and a similar type of a misrepresentation. Just as Alfidi misrepresented the nature of the restaurant, Eckerd's assistant

manager misrepresented the extent of his investigation and further concealed witnesses and evidence of payment for the allegedly stolen goods from the police.

This principle of law is also present in this court's case of Winn-Dixie Store, Inc. v. Robinson. In Robinson, the Winn-Dixie employee made a remarkably incomplete investigation into the issue of whether or not the suspected goods were, in fact, stolen or paid for by Robinson. Instead, the employee called the police to the scene, who then arrested Robinson for shoplifting. The charges were eventually dropped. The assistant manager of Eckerd also misrepresented the extent of his investigation and even went a step further to conceal witnesses and evidence of payment from the police, valid inferences from the evidence when viewing the facts in the light most favorable to Smith, which we are required to do in determining the appropriateness of the punitive damage verdict.

The case of Harris v. Lewis State Bank, 482 So. 2d 1378 (Fla. 1st DCA 1986) deals with similar misrepresentations. That case involves claims of false imprisonment, malicious prosecution, negligence and fraud against the Lewis State Bank. Factually, the plaintiff received her bank statement from the Lewis State Bank. It showed that a gentlemen by the name of John Lewis had deposited money in her account. The bank informed her that it was permissible for her to withdraw the money even though she stated to the bank that she did not know the identity of John Lewis. On a number of occasions, she was allowed to withdraw money from this account, in spite of the plaintiff having no knowledge of the

identity of John Lewis. Later, John Lewis inquired of the bank why these withdrawals had been made from his account. Apparently, the bank had confused the plaintiff's and John Lewis' accounts. The bank concealed the fact that they had allowed the plaintiff to withdraw money from the account and led Mr. Lewis to believe that someone had forged the name of his daughter, who was also on the account. When the plaintiff next returned to the bank, she was detained by bank employees and delivered into the custody of the sheriff's office. In that case, the court stated:

"Where it would appear to a 'cautious man' that further investigation is justified before instituting a proceeding, liability may attach for failure to do so, especially where the information is readily obtainable, or where the accused points out the sources of the information. . . Appellant has alleged that the bank, through its employees, knew or should have known that appellant had been authorized or even encouraged by the bank to treat the money in John Lewis' account as her own at the time it led Lewis to believe a forgery had occurred, and that it withheld this information from the police and prosecutor. . . Where there is evidence of excessive and reckless disregard of plaintiff's rights, the question of punitive damages should be submitted to the jury. . . To sustain an award of punitive damages for a negligent act, the act or omission complained of must occur in a manner which evinces a willful or wanton disregard of consequences, which presupposes the defendant's knowledge or awareness of the risk to the plaintiff's rights. . . The appellant realleged separate acts of the bank in each of her counts. If the allegations are taken as true, as they must on review of a motion to dismiss, and the fact that the bank's employee's knowledge can be imputed to the bank is taken into account, the complaint sufficiently alleges a willful disregard by the bank of the consequences to appellant of its misrepresentations and failures to disclose pertinent information to

appellant, John Lewis, the sheriff's investigator, and the prosecutor. Therefore, the request for punitive damages in each count should not have been dismissed."

In comparing those facts and principles of law to the case at bar, it is readily apparent that Smith also was the victim of misrepresentations and concealments of pertinent information as was Harris. Obviously, Eckerd's assistant manager was aware that a criminal prosecution of Smith could result when he summoned the police to the store and then concealed witnesses and evidence from them and represented that a complete investigation had been made when one had not been made.

The issue of the excessive and reckless disregard of Smith's rights through these misrepresentations and concealments were litigated before the jury and the jury returned a verdict for her based upon the evidence as they interpreted it. This was a proper jury issue and the verdict as returned was based upon substantial evidence when viewing the evidence in the light most favorable to Smith.

ARGUMENT - ISSUE III

ISSUE - DID THE DISTRICT COURT OF APPEAL FAIL TO VIEW EVIDENCE IN THE LIGHT MOST FAVORABLE TO SMITH WHEN CONSIDERING THE APPROPRIATENESS OF THE JURY'S AWARD OF PUNITIVE DAMAGES.

ANSWER - The District Court of Appeal majority failed to view the facts and their inferences in the light most favorable to Smith in deciding whether Eckerd's Motion for Directed Verdict on the claim for punitive damages should have been granted.

It is well established that when considering a directed verdict, the court must indulge every reasonable inference from the evidence which is in favor of the non-moving party. Teare v. Local Union No. 295, 98 So. 2d 79 (Fla. 1957); Hardware Mut. Cas. Co. v. Tampa Electric Co., 60 So. 2d 179 (Fla. 1952), and Tiny's Liquors, Inc. v. Davis, 353 So. 2d 168 (Fla. 3rd DCA 1978). This was not done in the case at bar. The District Court of Appeal in their opinion at page 1064 states:

"Smith complains that Eckerd should have conducted a more thorough investigation before calling a law enforcement officer and that the failure to do so justifies the award of punitive damages. It is our view, however, that the brief investigation which established that Smith was leaving a protected area with concealed merchandise which had activated a control device and the prompt call to law enforcement together with the turning over of the investigation, without recommendation or rancor, to Officer Green, someone trained and authorized to conduct it, was an honest albeit mistaken effort to comply with the spirit of section 812.015(3), Florida Statutes (1985), which gives a merchant immunity from prosecution for false imprisonment if he acts with probable cause and calls law enforcement immediately after taking a shoplifting suspect into custody."

The District Court went on to state that:

"There was not evidence that Lederer was deliberately untruthful to Officer Green or that he acted with full knowledge of all the exculpatory facts but recklessly and deliberately disregarded them."

The District Court majority does just the opposite of what is required by the law. When they state "It is our view" that "an honest albeit mistaken effort" was made by Eckerd's assistant manager, and further that "There was no evidence that Lederer (the assistant manager) was deliberately untruthful to Officer Green or that he acted with full knowledge of all the exculpatory facts, but recklessly or deliberately disregarded them", the Court has interpreted every inference from the previously cited facts in favor of the wrong party. If there is any evidence to support a possible verdict for the non-moving party, directed verdict is improper. Urling v. Helms Exterminators, Inc., 468 So. 2d 451 (Fla. 1st DCA 1985). Further, "A trial judge should direct a verdict on a complaint or affirmative defense only if after viewing all of the evidence in the light most favorable to the non-moving party, he determines reasonable men could not arrive at a contrary determination". American Automobile Association, Inc. v. Tehrani, 508 So. 2d 365 (Fla. 1st DCA 1987). In the case at bar, there is substantial evidence to support the jury's verdict for punitive damages based upon the concealment of witnesses, concealment of evidence of payment of the goods, and the substandard investigation of the incident. Reasonable men could certainly differ on the interpretation of the facts of our case, but the jury returned a

verdict for Smith on the issue of punitive damages and that verdict should stand. It would be an absolute miscarriage of justice to allow reversal of that jury verdict based upon the District Court majority taking all facts and inferences in the light most favorable to the wrong party, in direct violation in the long established principles concerning directed verdicts as reflected in Teare v. Local Union No. 295; Hardware Mut. Cas. Co. v. Tampa Electric Company and Tiny's Liquors, Inc. v. Davis.

CONCLUSION

The facts in the case at bar establish an issue of punitive damages that was properly submitted to the jury. The District Court majority erred in their holding that Eckerd's Motion for Directed Verdict on the issue of punitive damage should have been granted. The facts and their inferences taken in the light most favorable to Smith show a willful and wanton disregard of her rights by Eckerd. The facts in the case at bar are no less egregious than the facts found in Winn-Dixie Stores, Inc. v. Robinson, Griffith v. Shamrock Village, Inc., Harris v. Lewis State Bank, Cardenas v. Miami-Dade Yellow Cab Company, or K-Mart Corporation v. Sellars. The type of fraudulent misrepresentations and concealments made by the assistant manager to the police officer he had summoned to the scene rise to a level of conduct for which punitive damages are appropriate. The District Court majority in their evaluation of whether or not Eckerd's Motion for Directed Verdict on the issue of punitive damages should have been granted, considered all facts and their inferences in the light most favorable to Eckerd the moving party. The law requires just the opposite and it would be a miscarriage of justice for the decision of the District Court majority to stand when based upon this erroneous application of the law to the facts.

AMENDED CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Jeptha F. Barbour, Esquire, P. O. Box 447, Jacksonville, Florida, 32201, by U.S. Mail, this 16th day of November, 1990.

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