

THE SUPREME COURT OF FLORIDA

CASE NO.: 76,004

FILED

SID J. WHITE

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CLERK, SUPREME COURT

By _____
Deputy Clerk

DELORES SMITH and WILBUR SMITH,
her husband,

Petitioner/Appellant.

vs.

JACK ECKERD CORPORATION

Respondent/Appellee.

RESPONDENT JACK ECKERD CORPORATION'S
ANSWER BRIEF ON JURISDICTION

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

Clifford C. Higby

JEPHTHA F. BARBOUR, ESQUIRE
Florida Bar No.: 0347000
CLIFFORD C. HIGBY, ESQUIRE
Florida Bar No.: 0793809
Post Office Box 447
Jacksonville, Florida 32202
(904) 398-0900

Attorneys for Respondent/Appellee

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MISCELLANEOUS

Petitioner's Initial Jurisdictional Brief	("IJB")
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SUMMARY OF ARGUMENT

Petitioners seek review of the District Court's decision in this case based on alleged conflict with the Supreme Court decisions of Winn Dixie Stores, Inc. v. Robinson, 472 So.2d 722 (Fla. 1985), Griffith v. Shamrock Village, Inc., 94 So.2d 854 (Fla. 1957). Petitioners also allege conflict with Tiny's Liquors, Inc. v. Davis, 353 So.2d 168 (Fla. 3d DCA 1977).

In asserting conflict, Petitioners misstate the facts found by the majority, and erroneously rely on the factual interpretations stated in Justice Zehmer's dissenting opinion. As noted in this court's decisions in Jenkins v. State, 385 So.2d 1356 (Fla. 1980), and Reaves v. State, 485 So.2d 829 (Fla. 1986), Article V, §3(b)(3) conflict jurisdiction may not be founded upon factual assertions recited only in a dissenting opinion.

Based on the facts presented in the four corners of the majority opinion, there is no conflict with this court's decisions in Winn Dixie Stores, Inc. v. Robinson and Griffith v. Shamrock Village, Inc. The majority in the instant case found that Eckerd store manager Alfred Lederer conducted a brief investigation before calling law enforcement, and there was no evidence that Lederer was deliberately untruthful (P.9) or evinced a willful and wanton disregard for plaintiff's rights sufficient to sustain an award of punitive damages. (P.8) Unlike the instant case, the case of Tiny's Liquors, Inc. v.

Davis does not even address the issue of what evidence is sufficient to sustain an award of punitive damages.

Any conflict with the above cited cases must be express and direct under Article V, §3(b)(3) of the Florida Constitution. Petitioners cannot "create" conflict by asking this court to disregard the facts as found by the majority, or otherwise accept those factual interpretations found only in Justice Zehmer's dissent.

ARGUMENT

Petitioners Delores and Wilbur Smith bring this action seeking discretionary review of First District Court Case No. 88-2775, Jack Eckerd Corporation v. Delores Smith. Specifically, Petitioners allege that the decision in the case at bar expressly and directly conflicts with the Supreme Court decisions in 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 well as the Third District Court of Appeal case Tiny's Liquors, Inc. v. Davis, 353 So.2d 168 (Fla. 3d DCA 1977). (IJB-1)

In asserting conflict, Petitioners rely principally on Justice Zehmer's dissenting opinion wherein he asserts that "the facts in this case are no less egregious than the facts in Winn Dixie Stores, Inc. v. Robinson, 472 So.2d 722 (Fla. 1985), and Griffith v. Shamrock Village, Inc., 94 So.2d 854 (Fla. 1957)." (P.16) Petitioners further assert that the majority has effectively re-weighed the evidence and the credibility of witnesses on appeal, and that they have taken the facts in a light most favorable to the defendant when the law requires them to do just the opposite. (IJB-7) In short, Petitioners and Justice Zehmer simply disagree with the majority's presentation and interpretation of the facts, which were thoroughly analyzed in the majority opinion.

Article V, Section 3(b)(3) of the Florida Constitution empowers this court to review a decision of the District Court

of Appeal which expressly and directly conflicts with a decision of another District Court of Appeal or of the Supreme Court on the same question of law. Art. V, §3(b)(3), Fla. Const. (1980), see also F.R.A.P. 9.0130(a)(2)(A)(iv). It is fundamental that expressions found in a dissenting or concurring opinion cannot support jurisdiction under §3(b)(3) because they are not the decision of the District Court of Appeal. Jenkins v. State, 385 So.2d 1356 (Fla. 1980). In Jenkins, this court addressed the question of whether or not a per curiam affirmed decision of the District Court of Appeal, with an accompanying dissenting opinion, was a "decision" upon which discretionary review could be granted. This court explained:

"When facts and testimony are set forth in a majority opinion, they are assumed to be an accurate presentation upon which the judgment of the court is based. However, a dissent does not rise to a similar level of dignity and is not considered as precedent; . . . by definition, a dissent contains information, interpretations or legal analysis which has been rejected in whole or part by the majority. . . ." 385 So.2d at 1358. (emphasis added)

The only facts relevant to this court's jurisdictional analysis are those presented in the four corners of the majority opinion. Reaves v. State, 485 So.2d 829 (Fla. 1986). The facts asserted in Judge Zehmer's dissenting opinion and petitioner's argumentative presentation of the facts in its Initial Brief on Jurisdiction are irrelevant to this court's jurisdictional analysis.

A brief review of the Reaves decision reveals that the Petitioners in this case are attempting to "create" conflict by relying on Justice Zehmer's factual interpretations.

In Reaves, the trial court allowed impeachment of a criminal defendant's post Miranda warning admissions, finding that the statements were "voluntary". The defendant was convicted. On appeal, "the District Court reviewed the record, recited the facts it found pertinent, and held that the admissions were voluntary" affirming the trial court's ruling. 485 So.2d at 830. In a dissenting opinion, Judge Hendry "canvassed the record and concluded, contrary to the majority, that the statements were in fact involuntary and could not be used in impeachment." Id. Based on Judge Hendry's interpretation of the facts, the convicted defendant sought review by this court alleging conflict with a prior Supreme Court decision.

In a per curiam opinion, this court held that there was no direct and express conflict, and that "review had been improvisationally granted". Id. at 829. This court stated:

"Petitioners ask that we find conflict with Nowlin. In order to do so, it would be necessary for us either to accept the dissenter's view of the evidence and his conclusion that the statements were involuntary or to review the record itself in order to resolve the disagreement in favor of the dissenter. Neither course of action is available under the jurisdiction granted by Article V, §3(b)(3) of the Florida Constitution. Conflicts between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissent-

ing opinion nor the record itself can be used to establish jurisdiction. See Jenkins v. State, 385 So.2d 1356 (Fla. 1980), where we examined at length the effect of the 1980 constitutional amendment on our conflict jurisdiction. Id. at 830.

The court clarified its holding and denial of the petitioner's application for review in footnote 3:

"This case illustrates a common error made in preparing jurisdictional briefs based on alleged decisional conflict. The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict. As we explain in the text above, we are not permitted to base our conflict jurisdiction on a review of the record or on facts recited only in dissenting opinions. Id. at 830.

The instant appeal represents an example of "the common error" referred to in footnote 3 of the Reaves case. Petitioners have misstated the facts as found by the majority and adopted the factual interpretations of Justice Zehmer in an attempt to "create" conflict with the cited cases. Petitioners allege that the "operative facts" show:

(10) The manager called the police and purposely concealed the only two witnesses to this incident, more particularly, Maurice Hodges and Elizabeth Robinson. Instead the manager tells the police that he is the only witness, a fraudulent statement which was relied upon by the police. (emphasis added) (IJB-4)

(11) The police relying on the fraudulent misrepresentation of the manager did no investigation, a fact which the manager was aware. (emphasis added) (IJB-5)

Similarly, Justice Zehmer alleges in his dissent that:

Mr. Lederer initiated the call to law enforcement authorities and made statements to Officer Green concerning what happened without having investigated the facts. . . . Lederer made no investigation whatsoever before summoning Officer Green to the store. (emphasis added) (P.14)

These factual representations are contrary to the facts presented in the detailed analysis of the majority opinion. A disagreement with the majority's interpretation of the facts is not an adequate legal basis for discretionary conflict jurisdiction in this court.

The majority found that Alfred Lederer witnessed a concealment and spoke with his pharmacist Maurice Hodges who confirmed that Ms. Smith had been instructed to pay for her merchandise at the front of the store. (P.3) Mr. Lederer then made a prompt call to law enforcement so that they could investigate and determine whether or not probable cause existed to arrest Ms. Smith. (P.9) The majority found that the store manager Alfred Lederer "gave Officer Green all of the information he knew and that he called the police so that the police could determine if Smith should be arrested for shoplifting." (P.6) Finally, and most importantly, the majority found that "there was no evidence that Lederer was deliberately untruthful to Officer Green or that he acted with full knowledge of all the exculpatory facts but recklessly or deliberately disregarded them." (P.9) This single finding by the majority

negates any possible inference of fraud, as noted by Justice Zehmer, or Petitioners misrepresentation that Mr. Lederer "purposely concealed" witnesses to the investigating police officer or otherwise made "fraudulent statements". (IJB-4)

Notwithstanding Petitioners' misplaced reliance on Justice Zehmer's interpretation of the facts, the District Court's decision in the instant case clearly does not conflict with this court's decision in Winn Dixie Stores, Inc. v. Robinson, supra. The majority in the instant case found that while there was a showing of lack of probable cause sufficient to sustain a cause of action for malicious prosecution, the evidence presented was legally insufficient to support an award of punitive damages because there was "no showing of 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." (P.8)

Unlike the case at bar, this court upheld a punitive damage award in Robinson, based upon a specific jury finding of "malice, moral turpitude, wantonness, willfulness and reckless indifference to the rights of others." 472 So.2d at 724. Furthermore, the facts in Robinson demonstrate that there was no investigation whatsoever performed by Winn Dixie officials prior to Robinson's arrest. Id. at 723.

In the instant case, the majority found that Mr. Lederer conducted a "brief investigation which established that Smith

was leaving a protected area with concealed merchandise." (P.9) The court further found that there was no evidence that Mr. Lederer was deliberately untruthful to Officer Green or that he acted with full knowledge of all the exculpatory facts but recklessly or deliberately disregarded them. (P.9) This court must disregard the facts as interpreted by the majority to find conflict between the instant case and Robinson. As noted in Reaves, this course of action is not available under the jurisdiction granted by Article V, §3(b)(3) of the Florida Constitution. Supra at 830. The majority's findings were based on a thorough review of the trial record and should not be disturbed absent express and direct conflict. Petitioners cannot demonstrate such a conflict in this case.

Finally, Petitioners allege that the District Court decision conflicts with this court's decision in Griffith v. Shamrock Village, 94 So.2d 854 (Fla. 1957), and the Third District's decision in Tiny's Liquors v. Davis, 353 So.2d 168 (Fla. 3d DCA 1977). Any alleged conflict is implied only, not express or direct. Unlike the court in Griffith, the District court in this case found that there was no evidence to support an award of punitive damages. The case of Tiny's Liquors v. Davis does not address the issue of what evidence is sufficient to sustain an award of punitive damages, but rather addresses what evidence is sufficient to sustain a jury issue on negligent hiring. 353 So.2d at 168.

CONCLUSION

For the reasons cited herein, Petitioners' application for review based on discretionary conflict jurisdiction should be denied.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished to S. PERRY PENLAND, JR., ESQUIRE, Penland & Penland, P.A., 1113 Blackstone Building, Jacksonville, FL 32202, this 6th day of June, 1990.

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

Clifford C. Higby

JEPHTHA F. BARBOUR, ESQUIRE
Florida Bar No.: 0347000
CLIFFORD C. HIGBY, ESQUIRE
Florida Bar No.: 0793809
Post Office Box 447
Jacksonville, Florida 32202
(904) 398-0900

Attorneys for Respondent/Appellee