O.A. 2-6-91

FILED
SID J. WHITE
DEC 20 1990
CLERK, SUPREME COURT
By _____ Deputy Clerk

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

REPLY BRIEF

PENLAND & PENLAND, P.A.

S. PERRY PENLAND, JR., ESQUIRE
Florida Bar #320201
Attorney for Petitioners
1113 Blackstone Building
Jacksonville, FL 32202
(904) 632-2100

TABLE OF CONTENTS

	PAGE
Table of Citations	ii
Argument	1
Certificate of Service	16

TABLE OF CITATIONS

	PAGE
Atlantic National Bank of Florida v. Vest, 480 So. 2d 1328 (Fla. 2d DCA 1985)	13
Cardenas v. Miami-Dade Yellow Cab Co., 538 So. 2d 491 (Fla. 3d DCA 1989)	9
Como Oil Co. v. O'Loughlin, 466 So. 2d 1061 (Fla. 1985)	7
Farish v. Smoot, 58 So. 2d 534 (Fla. 1952)	15
First Interstate Development Corp. v. Ablanedo, 511 So. 2d 536 (Fla. 1987)	11, 12
Griffith v. Shamrock Village, Inc., 94 So. 2d 854 (Fla. 1957)	6, 7, 8
Hardware Mut. Cas. Co. v. Tampa Electric Company, 60 So. 2d 179 (Fla. 1952)	8, 14
John Brown Automation, Inc. v. Nobles, 537 So. 2d 614 (Fla. 2d DCA 1988)	12
Joiner v. McClullers, 28 So. 2d 823 (Fla. 1947)	12
K-Mart Corp. v. Sellars, 387 So. 2d 552 (Fla. 1st DCA 1980)	9
MMH Venture v. Masterpiece Products, Inc., 559 So. 2d 314 (Fla. 3d DCA 1990)	12
Nicholas v. Miami Burglar Alarm Co., 339 So. 2d 175 (Fla. 1976)	7
Patterson v. Deeb, 472 So. 2d 1210 (Fla. 1st DCA 1985)	6
Robinson v. Winn-Dixie Stores, Inc., 477 So. 2d 1003 (Fla. 4th DCA 1984)	7
Southern Bell Tel. & Tel. Co. v. Hanft, 436 So. 2d 40 (Fla. 1983)	7
Teare v. Local Union No. 295, 98 So. 2d 79 (Fla. 1957)	8, 14
Tiny's Liquors, Inc. v. Davis, 353 So. 2d 168 (Fla. 3d DCA 1978)	8, 14

TABLE OF CITATIONS (CON'T.)

	PAGE
Walsh v. Alfidi, 488 So. 2d 1084 (Fla. 1st DCA 1984)	13
White Construction Co., Inc. v. DuPont, 455 So. 2d 1026 (Fla. 1984)	7
Winn-Dixie Stores, Inc. v. Robinson, 472 So. 2d 722 (Fla. 1985)	6, 7
Winn & Lovett Grocery Co. v. Archer, 171 So. 2d 214 (Fla. 1936)	13
Young v. Johnson, 538 So. 2d 1387 (Fla. 2d DCA 1989)	13

Petitioner, Delores Smith, ("Smith") would respond to the Answer Brief of the Respondent, Jack Eckerd Corporation's ("Eckerd") as follows:

Smith would urge that some of the facts as recited by Eckerd have been distorted or are misleading in their present referenced form.

At page 2 of their Answer Brief, Eckerd states that Maurice Hodges informed Delores Smith that she would have to pay for her prescriptions at the front of the store. [T. 228]. Eckerd omits to cite for the court that after Smith received her prescriptions from Hodges, Smith attempted to pay Hodges for the prescription with a $20.00 bill and was then told that the pharmacy was closed and to pay at the front of the store. [T. 227-228]. Further, according to the testimony of Lederer, Hodges never told him that Smith was attempting to steal the prescriptions from the pharmacy. [T. 306].

At page 3 of their Answer Brief, Eckerd states that, "After hearing the checkpoint alarm, Smith returned to the cashier where she had made her initial purchase." [T. 232]. Eckerd ignores the fact that Smith voluntarily returned to the counter. As Smith stated in her testimony, [T. 232]:

"A. I voluntarily returned on my own."

Not only does Smith return voluntarily, but it was Smith, herself, who suggested to Elizabeth Robinson, the cashier, to get the manager in order to determine the alarm activation. [T. 233].

At page 3 of their Answer Brief, Eckerd states, "Mr. Lederer determined that the cashier had not rung up or detuned Mrs. Smith's prescription . . ." Eckerd distorts the fact that it is unrefuted,

even from Mr. Lederer, that Smith, herself, suggested that it was the prescriptions that possibly had caused the alarm to activate. [Smith testimony, T. 236; Lederer testimony, T. 317].

At page 4 of their Answer Brief, Eckerd states ". . .neither Mrs. Smith nor Eckerd's cashier, Elizabeth Robinson offered an explanation for the alarm activation." [T. 314-315, 317]. Eckerd once again ignore the testimony of Delores Smith, who stated, [T. 235, Line 5 through T. 236, Line 12]:

> "Q. What does the manager say to you or what do you say to the manager?
>
> A. When the manager came over to the counter, he looked at at the register. It's a little tape register that he looked at and then he also looked at the items that had previously been taken out of the bag. And he stated he couldn't find out what it was.
>
> In the meantime, I had my bag in my hand. So, I taken my medication out, which was already sealed up, you know, stapled. So he opened it up. When he opened it up he looked at the bottle or whatever and then he says, 'No wonder, she didn't ring it up.'
>
> Q. What did you say to that?
>
> A. I said, 'Sir, Id walked into this store and went to the back, the man told me that I could not pay for this prescription at the back I would have to pay for it in the front.'

> I bought some other items in the store. I brought my items at the register. I didn't have no way of knowing what -- at that time, I did not know this girl Elizabeth. At this time I do. I did not know what Elizabeth had rung up. When she rang up my items, I paid for them and was going about my business.

It is clear from Smith's testimony that she explained to Lederer that she had, in fact, attempted to pay for all items, including the prescriptions when she paid Elizabeth Robinson, the cashier. She also suggested the prescriptions as the possible cause of the alarm activation. [Smith testimony, T. 236; Lederer T. 314-315, 317].

As to the cashier, Elizabeth Robinson, offering an explanation, such is impossible if Mr. Lederer never bothered to ask her what had happened. Lederer acknowledged that he had a duty to conduct a thorough investigation and that it would be a good practice to talk to the cashier and suspect involved. He also admitted that he never talked to the cashier about the incident, or even asked her if this whole incident was her own mistake. [T. 309 - 310].

At page 4 of their Answer Brief, Eckerd claims, "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]. Once again, looking at the testimony of Smith, such is not the case. As stated by Smith [T. 284, Line 10 through Line 20]:

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. (Emphasis added.)

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

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

Concerning his conversation with Smith, Officer Green stated as follows [T. 209, Line 1 through Line 9]:

Q. I believe you stated that you never, you don't recall whether or not you spoke to Mrs. Smith about the incident prior to making the decision to arrest her?

A. I don't recall what was said. I spoke to her, but she was crying. I can't remember whether I could understand what she was saying.

Q. Is there any reason why you decided not to entertain her explanation of the facts?

A. I don't recall why, no."

At page 5 of Eckerd's Answer Brief, as well as page 30, Eckerd claims "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]. The facts that were related to Officer Green, according to his testimony, were as follows [T. 198, Line 25 through T. 199, Line 6]:

> "Q. Okay. What were the facts that were related to you by Mr. Lederer?
>
> A. He said that the burglar, I mean the shoplifting 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 prescription medicine on her person and he told me that she hadn't paid for those."

It is a false statement that Lederer "stopped" Smith. According to Lederer, Smith was heading back to the cashier, Elizabeth Robinson, when he first saw her. [T. 298 - 299]. It is also false that he "found two bottles of prescription medicine on her person and he told me that she hadn't paid for those". First of all, the two prescriptions were not "found" by Lederer. His testimony [T. 314-315, 317] and the testimony of Smith [T. 235-236] establishes that Smith, herself, volunteered the prescriptions as a possible cause of the alarm activation. Secondly, Smith had paid for the prescriptions in the presence of Lederer, according to the testimony of Smith. [T. 237]. Even Lederer, in his testimony, acknowledges that Smith had paid for the prescriptions, but he denies that it was in his presence. In his testimony, he states as follows [T. 310, Line 13 through Line 17]:

> "Q. Correct me if I'm wrong, but Mrs. Smith

before the police came that evening, Mrs. Smith paid for the prescription?

A. She paid for it while I went to the back to check with the pharmacy clerk."

As to Issue I, Eckerd claims Winn-Dixie Stores, Inc. v. Robinson, 472 So. 2d 722 (Fla. 1985) is not controlling as to the case at bar, since the precise issue in that case did not deal with the sufficiency of evidence to support an award of punitive damages. This court in Winn-Dixie Stores, Inc. v. Robinson held that the District Court properly reversed the trial court's order granting a directed verdict on punitive damages for Winn Dixie, that the District Court erred in reversing the trial court's order granting remittur or new trial on the issue of punitive damage, and that the District Court erred in disapproving the trial court's entering alternative orders, i.e., a directed verdict, and in the event of reversal, an order granting new trial or remittur. In order to even reach these punitive damages issues, it is inherent that there must be sufficient facts to support an award of punitive damages. Winn-Dixie v. Robinson certainly stands for the proposition that the facts as cited are sufficient to reach these issues.

Eckerd goes on to claim that Griffith v. Shamrock Village, Inc., 94 So. 2d 854 (Fla. 1957) is no longer good law. In making such a bold allegation, Eckerd ignores the case of Patterson v. Deeb, 472 So. 2d 1210 (Fla. 1st DCA 1985) rev. den. 484 So. 2d 8 (Fla. 1986) wherein Justice Zehmer, at page 1221 of the opinion, after extensively quoting from Griffith v. Shamrock Village, Inc.

stated that:

> "The rule as stated in Griffith v. Shamrock Village remains viable. E.g., Southern Bell Tel. & Tel. Co. v. Hanft, 436 So. 2d 40 (Fla. 1983); Nicholas v. Miami Burglar Alarm Co., 339 So. 2d 175 (Fla. 1976). We find nothing in Como Oil Co. v. O'Loughlin, 466 So. 2d 1061 (Fla. 1985), and White Construction Co., Inc. v. DuPont, 455 So. 2d 1026 (Fla. 1984), which suggest that the Supreme Court has overruled or otherwise limited the rule in Shamrock Village."

In viewing the facts in the light most favorable to Smith, as cited in Smith's Initial Brief, the standard for the award of punitive damages would be met even under Eckerd's view of the law. Lederer's behavior could be found to be intentional with reference to his misleading recital of the facts to Officer Green [T. 198-199] and his concealing of witnesses and concealing of payment of the prescription in question from Officer Green.

Eckerd, at page 15 of their Answer Brief, next claims that the investigation, or lack of, by Lederer is dissimilar to Winn-Dixie's conduct in Winn-Dixie v. Robinson. At page 18 of their Answer Brief, they stated that "In Robinson there was no investigation whatsoever by Winn-Dixie employees and the assistant store manager". At a close reading of the Fourth DCA's opinion in Robinson v. Winn-Dixie Stores, Inc., 447 So. 2d 1003 (Fla. 4th DCA 1984), states, "After consultation with the assistant manager of the store the authorities were called, whereupon Robinson was placed under arrest and his person and vehicle were searched." (Emphasis added). Apparently some type of consultation or investigation was done in Robinson before the police were called. Obviously this consultation or investigation was less than

enlightening as to the true facts, as is the situation in the case at bar. Eckerd's claim that there was "no investigation whatsoever" is therefore suspect at best based upon the above quoted language.

Eckerd next claims that the facts in Griffith v. Shamrock Village are more egregious than the case at bar because the defendant in Griffith "intentionally lied and was deceitful" (page 19 of Eckerd's Answer Brief). When viewing the facts and their inferences in the light most favorable to Smith, Lederer intentionally lied and was deceitful to Officer Green. He misrepresented facts, concealed payment of the prescriptions, and concealed two witnesses to the occurrence when these matters were well known to him upon Officer Green's arrival. Eckerd attempts to justify the conduct of Lederer by viewing all of Lederer's actions in the light most favorable to Lederer and Eckerd. This is not the correct standard for review. All facts and their inferences should be taken in the light most favorable to Smith. Teare v. Local Union No. 295, 98 So. 2d 79 (Fla. 1957); Hardware Mut. Cas. Co. v. Tampa Electric Company, 60 So. 2d 179 (Fla. 1952); and, Tiny's Liquors, Inc. v. Davis, 353 So. 2d 168 (Fla. 3d DCA 1978).

Eckerd next claims that public policy considerations are relevant to the issue of whether sufficient evidence was presented at trial to support the jury's award of punitive damages. Smith would urge to this court that it should be against the public policy of this state to condone the conduct of a manager of a retail store when he conceals evidence and witnesses from the police and misleads, if not lies, to the police resulting in the

prosecution of innocent citizens.

Concerning their public policy argument, Eckerd cites Cardenas v. Miami-Dade Yellow Cab Co., 538 So. 2d 491 (Fla. 3d DCA 1989), as well as the case of K-Mart Corp. v. Sellars, 387 So. 2d 552 (Fla. 1st DCA 1980). Eckerd cites that those cases involve knowing and intentional disregard of plaintiffs' rights. Smith would agree with Eckerd and further point out that the evidence when viewed in the light most favorable to Smith shows on behalf of Lederer a knowing and intentional disregard of Smith's rights when Officer Green was grossly mislead, if not lied to, as to the circumstances surrounding the incident in question.

As to Issue II, Eckerd urges that Smith's claims of concealment of witnesses and payment, and that a complete investigation had been made, when a complete investigation had not been made, are not supported by the record. Smith would point the court to the following portions of the testimony of Officer Green, more particularly, Officer Green states that he was dispatched to Eckerd for a routine shoplifting investigation [T. 197]. He talked with the manager at that time, Alfred Lederer [T. 197]. He did not talk with Elizabeth Robinson or Maurice Hodges or any other employee of Eckerd [T. 198]. Green was not given the names of any other witnesses other than Lederer, by Lederer [T. 198]. The decision to charge Smith with petit theft would have been based upon what Lederer told him [T. 198]. He also testified, [Starting at T. 199, Line 13] as follows:

> Q. Would that be relevant? Let me ask you this, officer: If the facts -- if these were

the facts, if you had known that Mrs. Smith had paid for other items at the Eckerd's that evening and if the cashier had mistakenly forgot to ring up the prescriptions, and if Mrs. Smith then started out of the door and set off the alarm, then came back in the store and even paid for the prescriptions before you got there, if those facts were known to you at the time you got to the store, would you have have arrested or given Mrs. Smith a citation for shoplifting?

(Overruled objection omitted.)

A. No, sir, I wouldn't have.

Smith was crying when Green observed her. [T. 200]. Smith never admitted that she was trying to steal the prescriptions in question. [T. 200]. Green was never shown any receipts concerning the prescription in question. [T. 202]. Concerning why he did not interview any other witnesses, Officer Green stated as follows [T. 208, Line 20 through Line 25]:

Q. And I believe you stated that you don't recall ever interviewing any other witnesses?

A. Not that I remember, no.

Q. I guess there isn't any reason why you didn't?

A. Based on the information he [Lederer] gave me, I didn't see there was any need to.

Green next stated had he been shown the receipts concerning the

goods and prescriptions, he would have checked into this matter. [T. 212]. Green was relying on Mr. Lederer to be truthful about the facts as he knew them. [T. 215]. Concerning if Green had have been told all of the facts, he testified as follows [T. 216, Line 13 through T. 217, Line 9]:

> Q. If Mr. Lederer had told you about Elizabeth Robinson the cashier, and if Mr. Lederer had told you that the cashier says that she forgot to ring up a purchase, and that after Mrs. Smith exited the store the alarm goes off that the person paid for the purchase before you got there, would you have prosecuted, would you have arrested Mrs. Smith?
>
> (Overruled objection omitted.)
>
> A. Under those circumstances I wouldn't have arrested her.
>
> Q. Under that set of circumstances, Officer, do you feel Mr. Lederer would have been truthful in his relating to you the facts of this investigation?
>
> A. If he had knowledge that that was the way it occurred and he didn't tell it to me the way it happened, then I would say he was untruthful. (Emphasis added).

Eckerd next urges that Smith had not pleaded and proved fraud and cites three commercial cases, First Interstate Development

Corp. v. Ablanedo, 511 So. 2d 536 (Fla. 1987); 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). Two of those cases involve breach of contract actions where plaintiffs attempted to make claims of fraud over and above the breach of contract action. This is not the type of cause of action nor the precise issue as compared to the case at bar. In the case at bar, Smith had sued Eckerd for malicious prosecution and false imprisonment. Malice demonstrated by Eckerd can be shown by the fraudulent conduct of misrepresentation and concealment committed by Lederer in his dealings with Officer Green.

The case of Joiner v. McClullers, 28 So. 2d 823 (Fla. 1947), is more applicable to the case at bar. As stated in Joiner:

> "The knowledge, by the maker of the representation, of its falsity, or, in technical phrase, the scienter, can be established by either one of the three following phases of proof: (1) That the representation was made with actual knowledge of its falsity; (2) without knowledge either of its truth or falsity; (3) under circumstances in which the person making it ought to have known, if he did not know, of its falsity."

This court in Joiner concerning the issue of concealment, went on to state:

> "The concealment becomes a fraud where it is effected by misleading and deceptive talk, acts of conduct, or is accompanied by misrepresentations, or where in addition to a party's silence there is any statement, word or act on his part which tends affirmatively to a suppression of the truth, or to a covering up or disguising of the truth, or to a withdrawal or distraction of a party's attention from the real facts; then the line is overstepped and the concealment becomes a fraud."

The principles of Joiner have been recently followed by the Second District Court of Appeal in Atlantic National Bank of Florida v. Vest, 480 So. 2d 1328 (Fla. 2d DCA 1985), and Young v. Johnson, 538 So. 2d 1387 (Fla. 2d DCA 1989). Such fraudulent conduct is sufficient to make out a jury issue on punitive damages. Winn & Lovett Grocery Co. v. Archer, 171 So. 2d 214 (Fla. 1936) and Walsh v. Alfidi, 448 So. 2d 1084 (Fla. 1st DCA 1984). Such conduct was committed by Lederer when he told Officer Green [T. 198-199] that he "stopped" Smith, that he "found" the two prescriptions, and that Smith "hadn't paid" for them. These misrepresentations by Lederer's own admission are false.

At page 32 of their Answer Brief, Eckerd claims that Lederer never concealed from Officer Green that Smith had paid for the prescriptions prior to his arrival. Eckerd goes on to make the unusual claim that it is "irrelevant" that Smith had paid for the prescriptions prior to Green's arrival. Knowledge of the fact of payment of the prescriptions by Smith would certainly have been of interest to Green who stated that if he had have known that the prescriptions were paid for, and that it was the mistake of Robinson in ringing up the prescriptions that caused the alarm to activate, that he would not have arrested Smith. [T. 216-217]. It is an elementary principle of law that if one purchases goods from another, and payment is completed, then the purchaser owns the goods. The purchaser of goods cannot be guilty of stealing when complete payment has been made and accepted by the seller. It is interesting that Lederer acknowledges that he had a duty to conduct a complete investigation [T. 309], and further, it is apparently

Eckerd's position that their only duty is to turn over all information to the investigating officer. Eckerd somehow excuses its own conduct of failing to tell a Officer Green that a lady he is charging with shoplifting has, in fact, paid for the items, by declaring this fact "irrelevant".

As to Issue III, Eckerd claims that the District Court viewed all the facts and their inferences in the light most favorable to Smith. Such is not the case as cited previously in Smith's Initial Brief, such is certainly not the case in terms of the facts as cited and presented in Eckerd's Answer Brief. The overall approach of Eckerd's Answer Brief is to extensively quote from Lederer's own testimony and then urge favorable inferences from that testimony viewing things in the light most favorable to Eckerd. This is precisely the type analysis that should not be done but was done at the District Court level. There are certainly two sides to this case. If one were to take all facts and their inferences in the light most favorable to Lederer and Eckerd, there is no question but that an award of punitive damages should not stand. More importantly though, the jury in this case awarded punitive damages and that verdict should now be weighed in the light of all facts and inference in the light most favorable to the prevailing party, Smith. Teare v. Local Union No. 295; Hardware Mut. Cas. Co. v. Tampa Electric Company, and Tiny's Liquors, Inc. v. Davis. When viewing the facts and their inference in the light most favorable to Smith, it is clear that Lederer mislead, if not lied to, Officer Green and concealed a wealth of information which would have pointed to the innocence of Smith.

Eckerd closes its Answer Brief on page 37 by pointing to the calmness of Lederer. The attitude of Lederer is completely irrelevant to the question of malice as stated by this court in Farish v. Smoot, 58 So. 2d 534 (Fla. 1952) which states:

> "The answer to this contention is that malice, as used in cases which allow recovery for exemplary damages were the imprisonment is actuated by malice, does not necessarily mean anger or a malevolent or vindictive feeling toward the plaintiff. A wrongful act without reasonable excuse is malicious within the legal meaning of the term. (Cites omitted). Under this rule, there was not error in instructing the jury on the law relative to punitive damages; and, if such damages were included in the verdict rendered by the jury, the finding was warranted by the evidence."

It was never necessary in this case for Smith to prove the anger of Lederer. It was necessary for Smith to prove the willful and wanton disregard of her rights by Lederer which was proved to the satisfaction of the jury, the trial judge and to Justice Zehmer as reflected in his dissent.

In conclusion, Smith would urge to this court that when taking the facts in the light most favorable to her, there has been such a degree of conduct to support the jury's verdict of punitive damages and Smith would urge this court to reinstate that verdict for the reasons cited above.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Jeptha F. Barbour, Esquire, Post Office Box 447, Jacksonville, Florida, 32201, by U. S. Mail, this 18th day of December, 1990.

ATTORNEY