IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,139
DCA No. 97-2844

FILED
DEBBIE CAUSSEAUX
SEP 01 1999
CLERK, SUPREME COURT
By

GENERAL MOTOR CORPORATION, a foreign corporation and POTAMKIN CHEVROLET, INCORPORATED, a domestic corporation,

Petitioners,

vs.

BRIAN W. NASH, as Personal Representative of the Estate of MARIA DEL CARMEN NASH, for the benefit of BRIAN W. NASH, surviving spouse of the decedent, and BRIAN W. NASH, as Guardian and next friend of BRIAN W. NASH, JR., and ALEXANDER NASH, surviving minor children of the decedent, and for the benefit of the Estate of MARIA DEL CARMEN NASH, and for the benefit of GUMERCINDO RAMOS and CARMEN RAMOS, the parents of the decedent,

Respondents.
_____/

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

GM requests this Court to exercise its discretionary jurisdiction, claiming that the district court's decision conflicts with decisions of this Court and other Florida courts. GM is wrong. The Third District's decision does nothing more than apply the clear and direct holdings of this Court in Stellas v. Alamo-Rent-a-Car, 702 So.2d 232 (Fla. 1997) and Merrill Crossings Assoc. v. McDonald, 705 So.2d 560 (Fla. 1997).

Maria Nash was killed because her shoulder harness failed to lock up properly when the car she was driving was hit head-on by a drunk driver. Nash sued GM for defective manufacture and design of the shoulder harness. The jury found there was no defect which was a legal cause of her death. Nash appealed.

The district court overturned the jury verdict and granted Nash a new trial. The primary ground for reversal, as is evident from the opinion, was the trial court's failure to excuse a juror for cause. Nash v. General Motors, 734 So.2d 437, 440 (Fla. 3d DCA 1999). GM does not argue that this part of the district court's decision provides a basis for jurisdiction in this Court.

The Third District went on to address the issue of whether the drunk driver was properly placed on the verdict form. This part of the decision was obviously not a basis for the Third District's reversal because the jury, having found GM not at fault, never reached that part of the verdict form, i.e., the apportionment of fault between GM and the drunk driver. The Third District noted that the trial court had properly placed the drunk driver, a non-party intentional tortfeasor, on the verdict form

based on the district's precedent at the time of trial. However, based on this Court's subsequent decisions in Stellas and Merrill Crossings, holding that it is error to apportion fault under Fla.Stat. § 768.81 between a negligent tortfeasor and a non-party intentional tortfeasor, it concluded that the drunk driver should not have been included on the verdict form. Id. at 440-41. This did nothing more than insure that, on retrial, the trial court would not include the drunk driver's name on the verdict form.

SUMMARY OF ARGUMENT

There is no conflict with this Court's decisions in Stellas v. Alamo Rent-A-Car, Inc. and Merrill Crossings Assoc. v. McDonald. Those cases held that Fla.Stat. s 768.81 did not authorize apportionment of fault between a negligent defendant and a nonparty guilty of intentional misconduct. Those decisions did not state or even suggest that their holdings were limited to certain kinds of intentional misconduct; they apply to all intentional misconduct. The Third District properly applied those decisions to a criminally drunk driver, based on this Court's holding in Ingram V. Pettit, 340 So.2d 922, 925 (Fla. 1976) that driving while criminally-intoxicated is an intentional act.

There is also no conflict with the Second District's decision in Ford Motor Co. v. D'Amario, 732 So.2d 1143 (Fla. 2d DCA 1999). The entirety of the Second District's analysis of the issue is in one sentence: "On the facts in this crashworthiness case, the appellant properly raised an apportionment defense." First, there are two different apportionment issues in crashworthiness cases. One involves apportionment of fault between the parties to the

accident and the manufacturer. The other involves apportionment of plaintiff's injuries between those caused by the initial impact and the additional injuries caused by uncrashworthiness. It is impossible to determine from the face of the Second District's decision what apportionment issue it was deciding.

Second, as this Court made clear in Ingram **v.** Pettit, supra, only intoxication within the purview of the criminal statutes gives rise to an intentional criminal act. The Third District here recognized that it was dealing with such criminal conduct. But the Second District's decision is silent on this point. It cannot be determined from the face of the Second District's decision that it was faced with an intentional criminal act.

Third, it is impossible to determine from the face of the Second District's decision whether the parties raised, or the court considered, the issue decided by the Third District -- whether a criminally drunk driver falls within the holdings of Stellas v. Merrill Crossings.

Finally, the Third District's decision does not conflict with Smith v. State, 598 So.2d 1063 (Fla. 1992). The Third District's decision, on its face, contains no holding contrary **to** Smith v. State. The Third District did not hold that Stellas and Merrill Crossings applied to litigants who did not raise the issue in the trial court. To demonstrate conflict, GM improperly resorts to the record in this case. When one looks at the entire record, however, it is clear that the issue was decided because it had to faced in the retrial of this case. The Third District,s resolution of the issue in that context does not create conflict.

ARGUMENT

I. THE DISTRICT COURT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S HOLDINGS IN STELLAS v. ALAMO RENT-A-CAR, INC. *AND* MERRILL CROSSINGS ASSOC. v. MCDONALD.

In Stellas and Merrill Crossings, this Court held that Fla.Stat. § 768.81 did not authorize apportionment of fault between a negligent defendant and a nonparty guilty of intentional misconduct. Neither Stellas nor Merrill Crossings state or even suggest that their holdings are limited to only certain kinds of intentional misconduct on the part of such nonparties; they do not state or even suggest that, some types of nonparty intentional tortfeasors may appropriately be included on the verdict form. Indeed, in Stellas, this Court framed the issue before it as applying to intentional tortfeasors generally:

> We have for review a decision certifying as a question of great public importance the issue of whether it was error to permit a nonparty intentional tortfeasor's name to appear on the verdict form *so* as to permit the jury to apportion fault between the nonparty and the negligent tortfeasor.

702 So.2d at 233. This Court's affirmative answer to this question left no room to distinguish between different kinds of nonparty tortfeasors.

The Third District's decision here merely applied Stellas. The Third District wrote:

> In Stellas the court held that it was error to permit a nonparty intentional tortfeasor's name to appear on the verdict form so as to permit the jury to apportion fault between the nonparty and the negligent tortfeasor. . . .

734 So.2d at 440. It noted that the drunk driver had a blood alcohol content of .15 an hour after the accident; he therefore violated Fla.Stat. § 316.193(1)(b). It recognized this Court's express statement in Insram v. Pettit, 340 So.2d 922, 925 (Fla. 1976), that "[d]riving in an intoxicated condition is an intentional act which creates known risks to the public."[1] It concluded that, under Stellas, the nonparty drunk driver, guilty of an intentional criminal act, should not go on the verdict form.

GM does not argue that there is express conflict with Stellas and Merrill Crossinss. Instead, it argues that there is conflict because the decision below improperly "extended" the holdings in those cases. In making this argument, GM attempts to distinguish between different kinds of intentional criminal conduct by nonparties. But Stellas and Merrill Crossinss neither suggest nor support such an analysis. As detailed above, they apply to all intentional criminal conduct.

Even if one looks behind the holdings in Stellas and Merrill Crossinss to distinguish between different kinds of intentional criminal conduct by nonparties, it is clear that the Third District here did not "extend" those holdings. Those holdings are based on the recognition that the negligent defendant had a duty to protect the plaintiff from the nonparty's intentional acts:

> Thus, it would be irrational to allow a party who negligently fails to provide reasonable security measures to reduce its liability because there is an intervening intentional tort, where the intervening intentional tort

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1/ GM states that there is no basis for the conclusion that a criminally-drunk driver is an intentional tortfeasor. Petitioner's brief at 5, n.3. GM ignores Insram.

> is exactly what the security measures are supposed to protect against.

Merrill Crossings, 705 So.2d 562-63. Here, GM had a duty to make its vehicle crashworthy, not just for accidents caused by negligent drivers, but also for accidents caused by criminally drunk drivers. Thus, as in Merrill Crossinss, the "intervening intentional tort," the drunk driver, "is exactly what [GM is] supposed to protect against."

The Third District did not improperly "extend" Stellas and Merrill Crossinss; it properly applied them. There is no conflict.

11. THE DISTRICT COURT'S DECISION DOES NOT EXPRESSLY *AND* DIRECTLY CONFLICT WITH FORD MOTOR CO. v. D'AMARIO, 732 SO.2D 1143 (FLA. 2D DCA 1999).

GM argues that this Court has jurisdiction because there is express conflict between the Third District's decision and the Second District's decision in Ford Motor Co. v. D'Amario, 732 So.2d 1143 (Fla. 2d DCA 1999). Such jurisdictional conflict must be found, if at all, on the face of the two decisions. Florida Patients Compensation Fund v. St. Paul's Fire and Marine Ins. Co., 559 So.2d 195, 196 (Fla. 1990); Hardee v. State, 534 So.2d 706, 708 fn. (Fla. 1988). Such conflict does not exist here.

The Third District addressed the issue of whether, in light of Stellas and Merrill Crossings, a criminally-intoxicated drunk driver should be excluded from the verdict form because he is an intentional tortfeasor, It cannot be determined from the Second District's decision whether that court was presented with, much less decided, that issue. After briefly stating the facts, the

Second District addressed the issue in one sentence: "On the facts in this crashworthiness case, the appellant properly raised an apportionment defense." 732 So.2d at 1145.

There is no conflict with this decision for a number of reasons. First, the Second District merely held that "an" apportionment defense was properly raised. But it did not describe or explain that defense. In a crashworthiness case, there are two different, and unrelated, apportionment issues. An apportionment issue may arise if a jury can distinguish between the injuries caused by the initial collision and the enhanced injuries caused by the vehicle's uncrashworthy condition; if it can so distinguish, it must apportion damages between the initial and enhanced injury. E.g., General Motors Corx,. v. Farnsworth, 965 P.2d 1209, 1218 (Alaska 1998); Johnson v. General Motors Corp., 438 S.E.2d 28, 33 (W.Va. 1993). A second apportionment issue arises when the manufacturer seeks to reduce its liability by the degree of fault attributable to the drivers involved in the accident. The Third District's decision (and Stellas and Merrill Crossinss) only dealt with the second apportionment issue. Yet it is impossible to tell from the Second District's decision what apportionment issue it was addressing. As a result, there is no direct conflict based on the Second District's amorphous statement that "the appellant properly raised an apportionment defense."

Second, it is impossible to determine whether the Second District was faced with a driver who was criminally intoxicated. As this Court made plain in Ingram v. Pettit, supra, there are degrees of intoxication, and only intoxication within the purview

of the criminal statutes gives rise to an intentional criminal act. 340 So.2d at 924-25. The Third District here recognized that it was dealing with such an intentional tortfeasor, and thus had to address the issue pursuant to this Court's decisions in Stellas and Merrill Crossinss. 734 So.2d at 440, n.2. Because the Second District's decision is silent on this point, there is no way to determine whether it faced the same issue.

Third, it is impossible to determine from the face of the Second District's cryptic decision whether the parties in that case raised, or the court considered, the issue decided by the Third District -- whether a nonparty drunk driver, guilty of intentional, criminal misconduct, falls within the holdings of this Court in Stellas and Merrill Crossinss. The Second District's decision makes no reference whatsoever to those decisions. There is no way to determine whether that issue was raised or considered by that court.[2/] Certainly, no ruling on that issue appears on the face of the Second District's decision.

For these reasons, there is no conflict between the Third District's decision and Ford Motor Co. v. D'Amario, 732 So.2d 1143 (Fla. 2d DCA 1999).

III. THE DISTRICT COURT'S DECISION DOES NOT CONFLICT WITH SMITH v. STATE, 598 SO.2D 1063 (FLA. 1992).

In Smith v. State, 598 So.2d 1063 So.2d (Fla. 1992), this

2/ Stellas and Merrill Crossinss were decided almost a year and a half before the Second District's decision. If the issue before the Second District were the same as that here -- whether a criminally drunk driver should be excluded from the verdict form in light of Stellas and Merrill Crossinss -- the Second District would undoubtedly have made some reference to those decisions.

Court held that to benefit from a change in the law during an appeal, the party must timely object during trial. 598 So.2d at 1066. GM argues that the Third District's decision directly and expressly conflicts with this holding. Again, GM is wrong.

The Third District's decision contains no holding contrary to Smith v. State. The Third District's decision does not state, or even imply, that this Court's holdings in Stellas and Merrill Crossinss apply to litigants who did not raise the issue in the trial court. There is no conflict on the face of the decision.

To create conflict where none properly exists, GM argues that the record in this case shows that the issue was not raised in the trial court; therefore the effect of the Third District's decision is violative of Smith v. State. See Petitioners' Brief at 7, basing argument on the record, not the Third District's opinion. However, conflict is not created by a review of the record; it must exist on the face of the decisions.

> [I]t is neither appropriate nor proper for us to review a record to find conflict or to determine if we agree whether a district court's recitation of facts is correct; the opinion itself must directly and expressly, on its face, conflict with another opinion.

Paddock v. Chacko, 553 So.2d 168 (Fla. 1989)(McDonald, Justice, concurring). See also Hardee v. State, 534 So.2d 706, 708 fn. (Fla. 1988) GM's argument is improper and does not establish conflict jurisdiction.

However, if this Court looks to the record, it should look to the entire record. The primary basis for reversal was the error in jury selection. Respondents also raised the issue of whether the criminally drunk nonparty should be on the verdict form in

light of Stellas and Merrill Crossinss, but did so only in the context of issues which needed to be addressed in the event of a reversal. See Appellant's Brief at 24-25, n.16. And, it is in this context that the Third District decided the issue. As a result, there is no conflict with Smith v. State.[3/]

CONCLUSION

For the foregoing reasons, Nash respectfully requests this Court to deny GM's request that this Court exercise its discretionary jurisdiction to review this case.

[3/] GM includes within its argument an assertion that the issue is one of great public importance. This provides no basis for this Court's jurisdiction since the district court did not certify the issue as one of great public importance. Art. V, § 3(b)(4), Fla. Const.; Allstate Ins. Co. v. Lansston, 655 So.2d 91, 93 n.1 (Fla. 1995). In any event, the issue of great public importance was the one addressed by this Court in Stellas and Merrill Crossings, i.e., whether Fla.Stat. § 768.81 should be interpreted so as to allow the intentional, criminal fault of a nonparty to reduce the liability of a negligent defendant. Once this Court resolved that issue in Stellas and Merrill Crossinss, the task of the district courts was merely to follow those decisions. The Third District did precisely that. By doing so, it did address any new issue of great public importance.

To convince this Court to exercise jurisdiction, GM also argues that the Third District's decision "absolves drunk drivers from personal liability." Petitioner's brief at 10. However, allowing a nonparty drunk driver to be placed on the verdict form does not impose any form of liability, "personal" or otherwise. GM can, if it wishes, impose personal liability by seeking contribution from the drunk driver.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 31st day of August, 1999, to: Frank A. Shepherd, Esq. and Brian Dervishi, Esq., WEISSMAN, DERVISHI, SHEPHERD, BORGO & NORDLUND, Counsel for GM and Potamkin, 2600 International Place, 100 S.E. Second Street, Miami, FL 33131; Halli Cohn, Esq., KING & SPALDING, Co-Counsel for GM, 191 Peachtree Street, Atlanta, GA 30303-1763.

Respectfully submitted,

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