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PETER CALDER, PLAINTIFF-RESPONDENT, v. TODD KOEHLER DEFENDANT-APPELLANT

A-108 September Term 1993

Supreme Court of Green

March 14, 1994, Argued

July 6, 1994, Decided

PRIOR HISTORY: [***1]

COUNSEL: W. Stephen Leary argued the cause for appellant.

Raymond T. Roche argued the cause for respondent

OPINIONBY: HANDLER

OPINION:

On May 21, 1987, Todd Koehler (hereinafter defendant), who was operating a car struck the rear end of a disabled vehicle at or near the shoulder of the Pulaski Skyway. The disabled car had stalled in the right lane of the roadway and its owner, Deloris Haynes, had left the car to seek help. Plaintiff, Peter Calder, who remained in the disabled vehicle, was injured by the impact. Calder, who was thirty-five-years-old at the time of the accident, was examined and treated over the years by various doctors and hospitals. For almost a year after the May 1987 accident, Calder continued treatment with Dr. Sherman, a board-certified internist, who initially treated Calder for a spasm, tenderness, and a reduced range of motion in his back. Despite Calder's treatment, he remained in pain. Eventually, Dr. Sherman suspected the "possibility of tuberculosis of the spine." Dr. Sherman testified that in his opinion "the accident unmasked or reactivated latent tuberculosis" because he could find no other provoking factors, and medical literature indicated that "significant auto trauma can be a provoking factor."

Later, Calder began treatment with Dr. Lee, an orthopedic surgeon. In late 1990, Dr. Lee admitted Calder to the hospital because Calder was still experiencing back pain and his "right leg was still getting numb every now and then." Calder testified that Dr. Lee told him he had tuberculosis of the spine. Dr. Lee's discharge summary indicated the final diagnosis as post-traumatic lumbosacral sprain with spasms, psoas abscess with multiple lumbar abscesses, suspected tuberculosis, and osteomyelitis with destruction of certain vertebrae. Apparently, Dr. Lee's antibiotic treatment of Calder ended the progress of the disease. No

evidence suggested that further destruction of spinal bone or other increase in disability had occurred or would occur in the future.

Calder testified that his back pain was "sharp," he was "in constant pain every day," and "everything became a problem," including tying his shoes, walking, and driving. Calder denied ever having had any back pain before the accident.

Before the accident, plaintiff had been employed for two to three years as a general laborer by a construction company that repaired bridges and tunnels. At the time of the accident, Calder earned \$25.65 per hour and worked forty or forty-five hours per week, although his hours varied, seemingly due to the seasonal nature of the work. After the accident Calder missed three months of work.

Calder testified that at the construction company he earned an average gross weekly income of about \$ 1,000. His testimony suggested that his pre-accident annual salary before taxes had been about \$ 44,000. Calder stated that in 1987, the year of the accident in which he missed three months of work, he had earned \$ 33,000. However, Calder estimated that his gross wages for the previous year in his work for the same company were only "twenty something" thousand.

After the accident and the three-month absence, Calder continued working for the company, with lighter work assignments but at the same salary, until July 1990, more than three years after the accident. In July 1990, the company discharged Calder. Calder testified that he had been fired because he could no longer "do the strenuous work that it would take to do . . . the lifting, and other things like that." Calder also stated that "[b]eing terminated with a construction company means you can be fired one day and back at work the next day just because, you know . . . [t]here's quite a few they would fire one week, hire back the next week. So I was just one of them." That was the first time the company fired Calder. He did not seek to be rehired. Calder remained unemployed for a period of eighteen or nineteen months. In February or March 1992, he found work driving a senior citizens' van twenty hours a week at \$ 5.50 per hour. At the time of trial, Calder was earning a little over \$ 6,000 per year. He said he was capable of driving a full week, but the job offered only twenty hours. Thus, in addition to the initial three-month absence from work, Calder missed eighteen or nineteen months between the construction and the driving job. Then, he worked part-time during a five- or six-month period during which he had the twenty-hour-per-week driving job.

Ultimately, the jury found defendant Todd Koehler 100% liable and awarded Calder a total of \$1,550,000: \$ 50,000 for past lost wages and \$ 1.5 million for future lost wages.

On appeal, defendant-appellant sought an order for a new trial on the computation of future lost wages.

II.

In assessing whether the quantum of damages assessed by the jury is excessive, a trial court must consider the evidence in the light most favorable to the prevailing party in the verdict. *Taweel v. Starn's Shoprite Supermarket*, 276 A.2d 861 (1971). Therefore, a trial court should not interfere with a jury verdict unless the verdict is clearly against the weight of the evidence. *Horn v. Village Supermarkets, Inc.*, 615 A.2d 663 (App. Div.1992). The verdict must shock the judicial conscience. *Carey v. Lovett*, 622 A.2d 1279 (1993).

III.

The principal goal of damages in personal-injury actions is to compensate fairly the injured party. *Deemer v. Silk City Textile Mach. Co.*, 475 A.2d 648 (App.Div.1984). Fair compensatory damages resulting from the tortious infliction of injury encompass no more than the amount that will make the plaintiff whole, that is, the actual loss. *Ruff v. Weintraub*, 519 A.2d 1384 (1987). "The purpose, then, of personal injury compensation is neither to reward the plaintiff, nor to punish the defendant, but to replace plaintiff's losses." *Domeracki v. Humble Oil & Ref. Co.*, 443 F.2d 1245, 1250 (3d Cir.), (1971).

A.

An injured party has the right to be compensated for diminished earning capacity. *Smith v. Red Top Taxicab Corp.*, 168 A. 796 (E. & A.1933). The measure of damages for tort recovery encompassing diminished earning capacity can be based on the wages lost as a result of the defendant's wrongdoing. *Ibid.* That measure includes the value of the decrease in the plaintiff's future earning capacity. *Coll v. Sherry*, 176, 148 A.2d 481 (1959). When the effects of injury will extend into the future, "the plaintiff is entitled to further compensation -- for [the] capacity to earn in the future has been taken from the plaintiff, either in whole or in part." Robert J. Nordstrom, *Income Taxes and Personal Injury Awards*, 19 Ohio St.L.J. 213, 217 (1958).

However, the evaluation of such a decrease in future earning capacity is necessarily complicated by the uncertainties of the future. Although generally objectionable for the reason that their estimation is conjectural and speculative, loss of future income dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability. Case precedent recognize and apply the general principle that damages for the loss of future income are recoverable where the evidence makes reasonably certain their occurrence and extent. The award of damages for loss of future income depends upon whether there is a satisfactory basis for estimating what the probable earnings would have been had there been no tort. A satisfactory basis for an existing basis may include reliance on specific economic or statistical models based on past earnings record. See *Tenore v. Nu Car Carriers, Inc.*, 67 N.J. 466, 494, 341 A.2d 613 (1975). The "proper measure of damages for lost future income in personal-injury cases is net income after taxes." *Ruff*, supra, 105 N.J. at 238, 519 A.2d 1384.

The net-income rule embodies the principle that "damages in personal-injury actions should reflect, as closely as possible, the plaintiff's actual loss." *Ibid.*; see Tenore, *supra*, 67 N.J. at 477, 341 A.2d 613. Hence, "If plaintiff gets, in tax-free damages, an amount on which he would have had to pay taxes if he had gotten it as wages, then plaintiff is getting more than he lost." 4 Fowler V. Harper et al., *The Law of Torts* § 25.12 (2d ed. 1986); see Ruff, *supra*, 105 N.J. at 238, 519 A.2d 1384. The measurement of aftertax income is the "more accurate, and therefore proper, measure of damages," Ruff, *supra*, 105

N.J. at 241, 519 A.2d 1384, because personal-injury damage awards are subject to neither federal nor state taxes. 26 U.S.C. § 104(a)(2); N.J.S.A. 54A: 6-6. See generally Annotation, John E. Theuman, Propriety of Taking Income Tax into Consideration in Fixing Damages in Personal Injury or Death Action, 16 A.L.R.4th 589, 611 (1982 & Supp.1993).

Evidence of loss of future income must be discounted to present value, a procedure that recognizes that the injured party would have had his income spread out over the remaining years of his working life. Tenore, *supra*, 67 N.J. at 474, 341 A.2d 613.

In this case, the jury apparently based its future-lost-income award of \$ 1.5 million only on Calder's gross income, given that neither plaintiff nor defendant presented any evidence of net income. The jury probably had calculated the future lost wages award by multiplying the gross income figure of \$ 1,000 per week by the number of weeks of Calder's life expectancy. The jury may have reasonably concluded that plaintiff used to make \$ 1,000 per week but, despite his demonstrated desire to work steadily and hard, he was now doomed to jobs paying no more than his current earnings of \$ 120 per week for the rest of his life.

Despite the absence of evidence of plaintiff's net income, the trial court instructed the jury to use net income as the measure of lost wages. Nevertheless, the jury seemingly did not attempt to ascertain or apply net income in its computation of the award. See *Lesniak v. County of Bergen*, 117 N.J. 12, 28-29, 563 A.2d 795 (1989).

In this case, neither party presented the jury with evidence of plaintiff's net income. The deficiencies in the evidence led the jury to reach exaggerated awards for future income. The verdict obviously was distorted by evidence that was limited to gross income. In a fifty-week year, Calder would lose gross earnings of \$ 880 per week or \$ 44,000 per year. We may surmise that the jury had multiplied Calder's life expectancy of 34.55 years by the \$ 44,000 in lost gross earnings to arrive at \$ 1,520,000, which was rounded down to \$ 1,500,000. That award contemplated plaintiff working for 2,083 straight weeks without vacation, or over forty years until the age of eighty, again based on defendant's gross, not net, income.

A verdict based on evidence of net income would clearly have brought the jury to a different result. Assuming the Appellate Division's hypothesis was correct, the jury simply multiplied Calder's gross income by his life expectancy to reach an award of \$ 1.5 million. Accepting Calder's testimony that he had earned \$ 1,000 in gross weekly income, and assuming federal and state tax liability to be 28%, his after-tax income would have been \$

720. Plaintiff was forty-years-old at the date of the verdict. If the net income figure were multiplied by Calder's life expectancy of 34.55 years, even assuming plaintiff worked all fifty-two weeks a year, at most the verdict would approximate \$ 1,290,000.

Furthermore, if the jury had based its calculations using work-life expectancy, twenty-five years, again assuming plaintiff worked fifty-two weeks a year, his future lost wages based on net income would equal \$ 936,000 (\$ 37,440 net annual income multiplied by twenty-five years). Moreover, the income award would have been reduced even further based on plaintiff's earnings as a van driver. Lastly, the income award would have been reduced even more had the jury calculated the present value of the computed award.

We conclude that the damages award based on lost future income, was clearly excessive and must be set aside. It was excessive since it used gross income figures, and not net income figures. Also, it was excessive because it failed to base the award on the work life expectancy of the plaintiff. Lastly, it was excessive since the award was not based on the present value of the future lost income. We therefore remand for a retrial of those damages.

RAY TURNER ET AL. v. PINTO C. DeBLANKET ET AL.

No. 10782

Court of Appeal of Green, First Circuit

COUNSEL: Walton J. Barnes, Baton Rouge, for Appellants.

Gordon R. Crawford, Gonzales, for Appellees.

JUDGES: Landry, Covington and Ponder, JJ.

OPINION: Plaintiffs Ray and Bernice Turner, husband and wife (Appellants), appeal from judgment dismissing their suit for damages for the alleged false imprisonment of Mrs. Turner by defendant Pinto DeBlanket (DeBlanket), employee of defendant Pinto C. DeBlanket (Owner), principal shareholder of an establishment known as Janice DeBlanket's Style Shop (Shop), for suspected shoplifting. We affirm.

Although the testimony of the numerous witnesses called at the trial is conflicting in some respects, the trial court has favored us with excellent oral findings of fact dictated into the record. We are in agreement with these findings which are substantially as follows:

Early in the afternoon of July 11, 1993, Mrs. Turner and her children, Joyce, aged 16, Donald, aged 15, and Ray aged 11, were shopping at the Gonzales Mall, in which the Shop is located. They entered the Shop, an establishment dealing primarily in women's apparel, to purchase clothing for Joyce who was contemplating a school trip. The daughter tried on and ultimately purchased three pairs of pants and one top or blouse, which items were admittedly paid for and delivered to the purchaser in one of the Shop's distinctive pink bags by Shop employees. It appears that the other members of the family entertained themselves during the shopping episode, either by looking at the merchandise in the store or assisting Miss Turner in making her selections.

When the Turner family entered the Shop, Mrs. Janice DeBlanket, Owner's wife, and an employee, Irene Gregoire were having lunch in the Shop office situated at the rear of the establishment. The evidence preponderates to the effect that when the Turners came into the Shop, there were no customers in the establishment. It is also shown that in addition to Mrs. DeBlanket and Mrs. Gregoire, two other employees were present. The office was equipped with a two-way mirror through which its occupants could view the interior of the establishment. Mrs. DeBlanket and Mrs. Gregoire observed the Turners enter the store together and immediately separate, in which circumstance they were trained to suspect a possible shoplifting incident, especially since Mrs. Turner was carrying a large purse. Through the mirror they observed as Mrs. Turner looked through a rack of swimsuits located near the front entrance while at the same time opening her purse. At this same time, one of the Turner boys passed between his mother and the mirror, apparently while

Mrs. Turner was either opening or fingering her purse, which circumstance caused Mrs. DeBlanket and Mrs. Gregoire to believe they saw Mrs. Turner place a swimsuit in her purse. Either Mrs. DeBlanket or some other personnel of the store immediately checked the swimsuit rack and found an empty hanger where Mrs. Turner had been looking at the swimsuits.

In accordance with Owner's standing instructions, Mrs. DeBlanket telephoned Pinto DeBlanket, who was employed in another of Owner's shops located across the mall of the shopping center, and requested that he come to the shop immediately. DeBlanket arrived while the Turners were still in the store. He immediately telephoned and requested the police to send someone to investigate the incident. He kept the Turners under observation until the Turners left the store approximately five minutes after DeBlanket phoned for the police. He watched as the Turners exited the Shop and crossed the mall to a fabric store situated directly across from the Shop. The Turners remained in the fabric shop for 5 to 10 minutes and re-crossed the mall to visit a card and novelty store next to the Shop.

After completing her visit to the card shop, Mrs. Turner, accompanied by the children, proceeded to leave the mall in the direction of the parking lot. En route to the parking lot, Mrs. Turner again passed the Shop, at which point DeBlanket realized she would leave the premises before the police arrived. As Mrs. Turner neared the front door of the Shop, DeBlanket approached Mrs. Turner and requested that she return to the shop so that the ladies there could look into her purse because they suspected her of shoplifting. Mrs. Turner reacted with surprise and disbelief because she at first did not think DeBlanket was addressing her. DeBlanket then repeated his request whereupon Mrs. Turner protested her innocence and refused to re-enter the Shop. Upon the urging of her children, particularly the daughter who suggested that her mother should prove her innocence, Mrs. Turner voluntarily re-entered the Shop.

It is conceded that DeBlanket did not threaten, coerce or attempt to intimidate Mrs. Turner in any manner whatsoever. It is also admitted that he used no abusive language and did not threaten Mrs. Turner with arrest.

Mrs. Turner was understandably upset over the accusation. DeBlanket opened the door of the Shop for Mrs. Turner who proceeded immediately to the check out counter where, without further request from Shop personnel, she removed several large items from her purse, placed them on the counter, and emptied the remaining contents onto the counter. Mrs. DeBlanket or some other Shop personnel examined the purse but found nothing incriminating, either in the purse or on the counter. Mrs. DeBlanket apologized for the inconvenience caused Mrs. Turner. Mrs. Turner then asked Mrs. DeBlanket to identify herself, and upon learning Mrs. DeBlanket's name, Mrs. Turner told Mrs. DeBlanket she would hear from Mrs. Turner's attorney. With that, Mrs. Turner left the establishment. At no time did the police appear at the scene. The record establishes conclusively that except perhaps for the Turner children, Mrs. Turner was the only person other than Shop personnel in the shop when she entered the store at DeBlanket's request. The evidence is conflicting whether the Turner children followed their mother into the establishment. Mrs. Turner and the children testified that

the children did accompany their mother when she re-entered the Shop. Mrs. DeBlanket, DeBlanket, Mrs. Gregoire and one or two other employees testified that Mrs. Turner entered the Shop alone.

The trial court concluded that DeBlanket was authorized by Owner to detain and question suspected shoplifters and that the detention in question was privileged because DeBlanket acted with reasonable cause and exercised reasonable measures under the circumstances.

Appellants contend that the trial court erred in the following determinations: (1) holding that reasonable cause existed when the detention was made by a party without personal knowledge of the events upon which the detention was based; (2) holding that the search was reasonable notwithstanding that it was conducted in a public area of the Shop instead of in the privacy of the office or some other non-public area of the Shop; and (3) holding that the detention was privileged even though it was not made on the premises but in a public area of the shopping center.

Defendants invoke the privilege extended shopkeepers pursuant to Green Code Crim.Pro.Art. 215 which pertinently provides:

"Art. 215. Detention and arrest of shoplifters

A peace officer, merchant, or a specifically authorized employee of a merchant, may use reasonable force to detain a person for questioning on the merchant's premises, for a reasonable length of time, when he has reasonable cause to believe that the person has committed theft of goods held for sale by the merchant, regardless of the actual value of the goods. The detention shall not constitute false imprisonment."

To meet the requirements of an authorized detention, as defined in Article 215, above, it must be shown: (1) The person effecting the detention must be a peace officer, a merchant or a specifically authorized employee of a merchant; (2) The party making the detention must have reasonable cause to believe that the detained person has committed theft. Reasonable cause requires that the detaining officer have articulable knowledge of particular facts sufficiently reasonably to suspect the detained person of shoplifting. To have articulable knowledge, the merchant must conduct preliminary investigation of his suspicions, if time permits.; (3) the detention was conducted in a reasonable manner. In determining whether detention was conducted in a reasonable manner, courts examine the following factors: (a) whether the merchant threatened the customer with arrest; (b) whether the merchant coerced the customer; (c) whether the merchant attempted to intimidate the customer; (d) whether the merchant used abuse language towards the customer; (e) whether the merchant used force against the customer; (f) whether the merchant promptly informed the customer of the reasons for the detention; and (g) whether the detention took place in public next to others. (4) The detention must occur on the merchant's premises; and (5) The detention may not last longer than for a reasonable period of time.

The testimony supports the trial court's finding that DeBlanket was authorized by Owner to detain customers suspected of shoplifting. Mrs. DeBlanket and Mrs. Gregoire testified they were under standing orders from Owner to call Mr. DeBlanket, who worked in another of Owner's shops across the mall, whenever the employees of the Shop suspected an incident of shoplifting. The testimony also shows that these ladies had in fact called Mr. DeBlanket for such purpose on many prior occasions, all of which testimony was fully corroborated both by Owner and DeBlanket.

As did the trial court, we find DeBlanket had reasonable cause to believe that a theft had occurred. Considering the circumstances, including the facts that Mrs. Turner was carrying a very large purse, that she was observed handling the bathing suits, that the Shop employees saw what they considered a suspicious move by Mrs. Turner and that an empty hanger was seen on the rack after Mrs. Turner left the area where the bathing suits were displayed, we find it reasonable that the employees suspected a theft had occurred.

We find that DeBlanket acted reasonably in the manner in which he detained Mrs. Turner. It is conceded he never touched or threatened Mrs. Turner but that he politely requested her to return to the Shop and advised her that the reason for his request was that she was suspected of shoplifting. On Mrs. Turner's refusal, DeBlanket made no further request and Mrs. Turner's decision to re-enter the establishment was made upon the urging of her children that she establish her innocence of the charge. It is also shown that Mrs. Turner hastily entered the store ahead of DeBlanket who held the door open for her. She proceeded directly to the check-out counter where she immediately emptied her purse before anything was said by DeBlanket or any other employee of the establishment. There were no other customers in the Shop, save the possible exception of the Turner children. That the incident occurred in a public portion of the shop under these circumstances, does not constitute unreasonableness on the part of the employees involved.

Finally, the fact that the detention occurred in front of the Shop and not within the store does not defeat the merchant's statutory privilege. The record establishes that the detention occurred on a sidewalk or walkway within a few feet of the door of the Shop. Sidewalks immediately in front of a merchandising establishment are considered part of the premises for purposes of application of Green Code Crim.Pro.Art. 215. *Durand v. United Dollar Store of Hammond, Inc.*, above; *Eason v. J. Weingarten, Inc.*, La.App., 219 So.2d 516; *Simmons v. J. C. Penney Company*, La.App., 186 So.2d. 358.

The judgment of the trial court is affirmed, all costs of these proceedings to be paid by Appellants.

Affirmed.