

ASTON SMIKLE, PLAINTIFF vs. PATRICK ANTHONY
DAVIS, DEFENDANT, Franklin County Branch, Civil Action-
Law No. A.D. 1995-112

SMIKLE V. DAVIS

Personal injury action; compensatory and punitive damages; post-trial motion for new trial.

1. A new trial should be granted on the ground that the verdict was against the weight of the evidence only where the verdict is so contrary to the evidence as to shock one's sense of justice.
2. A compensatory damages award alleged to be inadequate will not be disturbed merely because the court might have awarded more; the award must merely bear some resemblance to proven damages.
3. Punitive damages may be awarded for outrageous conduct, i.e., conduct which evinces bad motive or reckless indifference to the interests of others.
4. Conduct which is done intentionally, deliberately and with malice aforethought is not equivalent to outrageous conduct, and does not entitle the plaintiff to punitive damages as a matter of law.
5. To determine whether punitive damages are warranted, the jury must hear evidence about the character of the defendant's actions, the nature and extent of the harm which he caused or intended to cause, and his wealth, insofar as it is relevant in fixing the amount which will punish and deter him and others like him from such conduct in the future.
6. Where plaintiff seeks punitive damages for injuries caused by the defendant's admittedly intentional assault, the defendant may offer his version of the incident so that the jury can assess the character of his actions in context.

Judith Koper Morris, Esquire Counsel for Plaintiff
Jennifer C. Deitchman, Esquire, Counsel for Defendant

OPINION AND ORDER

HERMAN, J., October 1, 1996:

Before the court are post-trial motions for a new trial filed by the plaintiff following a jury trial in which he sought compensatory and punitive damages for injuries sustained as a result of being struck in his left eye with a beer bottle by defendant on the night of March 13, 1994. The jury awarded \$5,000.00 for past pain and suffering and \$5,000.00 for future pain and suffering. No punitive damages were awarded. The plaintiff alleges the court committed various errors and that the verdict was against the weight of the evidence.

The granting of a new trial on the grounds that the verdict was against the weight of the evidence is appropriate only where "the injustice of the verdict [stands] forth like a beacon." *Elza v. Chovan*, 396 Pa. 112, 118, 152 A.2d 238, 240 (1959); *Dranzo v. Winterhalter*, 395 Pa. Super. 578, 577 A.2d 1349 (1990). A new trial should be granted only where the verdict is so contrary to the evidence as to shock one's sense of justice. *Butler v. Kiwi*, 412 Pa. Super. 591, 604 A.2d 270 (1992); *Thompson v. City of Philadelphia*, 507 Pa. 493 A.2d 669 (1985).

The granting of a new trial on the ground that the verdict was inadequate is appropriate only where the award bears no reasonable resemblance to proven damages. *Guidry v. Johns-Manville Corp.*, 377 Pa. Super. 308, 547 A.2d 382 (1988). The decision to grant a new trial because of the inadequacy of the verdict is a matter within the sound discretion of the trial court. *Botek v. Mine Safety Appliance Corp.*, 531 Pa. 160, 611 A.2d 1174 (1992). However, a verdict should not be disturbed merely because of the smallness of the damages awarded or because the court would have awarded more. *Mueller v. Brandon*, 282 Pa. Super. 37, 422 A.2d 664 (1980). A summary of the evidence presented at trial is necessary to address the plaintiff's claim regarding the weight of the evidence.

Smikle is a 49-year old man, employed with the same company for the past 18 years as a screw machine operator. He is originally from Jamaica and became a United States citizen five years ago. He had a long-time hobby as a disc jockey and on the evening of March 12 and 13, 1994, was working in that capacity at a party in a restaurant in Chambersburg. He arrived at approximately midnight and, after dancing for a while, assumed his role as disc jockey. He operated a mixer board and spoke into a microphone on a table directly in front of him. Around his neck was a set of earphones attached to the microphone. At approximately 2:30 a.m., Patrick Davis, one of the patrons, approached Smikle to complain about the music Smikle was playing. At trial, Smikle and Davis presented different versions of their encounter. The evidence was undisputed, however, that Davis struck Smikle over the left eye with a beer bottle. Davis immediately left the restaurant and Smikle was taken to

Chambersburg Hospital for emergency treatment. The wound was stitched and he was given a temporary eye patch.

Smikle was examined by ophthalmologist Dr. Catherine Bene who specializes in problems with the retina. She testified that his left eye was swollen and hemorrhaging.¹ Further examination revealed a permanent hole in the macula (the center of the eye) and a complete loss of frontal vision from the left eye. The eye has only peripheral vision and Smikle's depth perception has been impaired. Dr. Bene's examination of the eye a few months before trial revealed no change in Smikle's vision since approximately two weeks after the injury. Dr. Bene testified that the hole is not in itself painful; covering his good eye would not cure depth perception problems. It was her opinion that the assault caused the macular hole. Smikle testified he always had 20-20 vision before the assault. A new surgical procedure is available which could reduce the size of the macular hole, but the retinal material cannot be regenerated and the operation entails some risks, such as the complete loss of the eye and cataracts. Smikle decided not to undergo the surgery because of these risks.

Smikle's job entails repetitive motions which he has mastered during the past 18 years. The loss of vision in his left eye forces him to do some work by feel. He testified that by closing his left eye, he can compensate somewhat for the lack of depth perception. However, his employer recently began installing new equipment and he was anxious about his ability to keep his job.

Smikle testified that his vision problems limit his ability to perform everyday functions such as shaving, brushing his teeth, preparing meals, sewing, reading, and driving at night. His eye waters in the morning and causes him pain when it rains. He experiences numbness and sharp pain over the eye. He testified he was an avid reader before the assault, but does not read much now because it causes eye strain and headaches. His girlfriend Sonia Johnson testified that she must help him with many tasks, such as reading, preparing meals and night driving. Smikle's son also helps in these tasks. Johnson testified that Smikle is less social and more irritable than before the assault. He does not act

¹Dr. Bene testified via video-taped deposition.

as a disc jockey because he cannot focus well enough to place the needle on the records. He testified to feeling depressed about his situation and does not socialize as frequently as before because he feels the scar looks bad and is afraid someone will hurt his good eye.

On cross-examination, Smikle testified he has never discussed wearing an eye patch with Dr. Bene in order to eliminate the depth perception problem. He also conceded that his driving license carries no restrictions for night driving. Although he testified he used to enjoy reading books about cowboys, he was unfamiliar with Louis L'Amour, a prominent author of books about the old West. He recalled having read *The Lost City* and *The Romans* a month before the assault but he could not recall the authors.

Smikle testified he was performing his job as disc jockey when Davis approached him and said the people attending the party did not like the music being played. Davis pointed at the microphone and Smikle told him to leave it alone. Davis pulled the microphone which was attached to the earphones around Smikle's neck. In response to being choked, Smikle pushed Davis and Davis struck Smikle with a beer bottle, causing bleeding and intense pain. On cross-examination, Smikle testified that only disc jockeys use the microphone at parties and that this was also the case on the night in question.

Testifying for Smikle was Errol Reid. Reid has known Smikle for approximately 15 years. He was standing 12-15 feet from the disc jockey table during the incident and essentially corroborated Smikle's version of events. He testified that after grabbing the microphone, Davis threw it down, placed his hands on Smikle's chest and shoved Smikle. Smikle gently pushed Davis away from the table and Davis threw the bottle very hard at Smikle's face when Smikle turned his head to tend the music. Davis immediately left the restaurant and drove away in a friend's car. Reid followed in an attempt to get the vehicle's license plate number.

Reid testified that people attending parties do not generally take the microphone unless it is a private party or someone is celebrating a birthday. He saw no one other than the disc jockeys

using the microphone but also acknowledged he was not inside the restaurant for the entire duration of the party.

Plaintiff's counsel questioned Patrick Davis as on cross concerning his financial situation for the purpose of establishing his ability to pay punitive damages. On March 24, 1995, a few days after the complaint was filed, Davis transferred the deed to a piece of real estate from his name alone to himself and his wife as tenants by the entireties. He testified they no longer owned that property but he could not recall the date it was sold. He and his wife currently own a home on King Street in Chambersburg which is encumbered by a mortgage and rented out at \$480.00 per month. They live temporarily with his mother-in-law in Greencastle who is ill. Davis testified he owns no other real estate.

Davis testified to being employed by the same company for almost seven years as a machine operator. When questioned about his taxable income, he acknowledged he earned approximately \$22,905.11 in 1993, \$26,219.49 in 1994, and \$19,664.51 in 1995.

Charges were filed against Davis as a result of the incident. He pled nolo contendere to charges of simple assault and harassment. He was sentenced to serve three months in prison, eighteen months probation, and pay fines, restitution and the plaintiff's medical bills.² While serving his prison sentence, Davis was on work release, although he did not work because he was temporarily laid off at the time. He paid the fines, restitution and medical bills as ordered and was still on probation at the time of trial. Davis's counsel argued during closing statement that Davis, who now has a permanent criminal record, has paid his debt to society and to Smikle for his role in the March 13, 1994 incident.

On direct examination, Davis described his version of events on the night of March 13, 1994. He arrived at the bar shortly after midnight, had a beer and danced for a while. Davis, also Jamaican, testified that it is customary at Jamaican parties for the

²The defendant was still on probation at the time of trial. (N.T. June 17, 1996, p. 80).

disc jockey to allow people attending the party to sing and speak into the microphone and make musical requests. Davis had seen several other persons approach the preceding disc jockey in that manner of the night in question. Holding a beer bottle in each hand, Davis approached the table where Smikle was operating the musical equipment, and asked to hold the microphone. Smikle, wearing earphones, could not hear Davis and told him to wait. Davis repeated his request, leaned over the table, pointed at the microphone and attempted to take it. Smikle removed the earphones from his head and pushed Davis backward. Smikle then lunged toward Davis with a closed fist. Davis raised the hand holding the bottle in order to block the on-coming punch and the bottle hit Smikle's face. Davis immediately left the restaurant, pursued by Reid and two other individuals. He left in a friend's car.

Davis admitted in his answer to the complaint that he "deliberately, intentionally and with malice aforethought" hit Smikle with a beer bottle above the left eye. However, on cross-examination, Davis testified the bottle accidentally hit Smikle when Davis swung his hands up in front of his face to avoid being punched by Smikle. He conceded he could have chosen to go to trial on the criminal charges, but had instead pled nolo contendere with the advice of counsel.

The jury awarded Smikle \$10,000.00 in compensatory damages. No punitive damages were awarded. Smikle seeks a new trial and we will now address his arguments.

Smikle argues the verdict was against the weight of the evidence because the amount of damages awarded was so low that it shocks the conscience. We agree the evidence was undisputed that Smikle sustained a permanent and total loss of central vision in his left eye after being struck with a beer bottle. The testimony as to depth perception impairment was conflicting, however. Although Dr. Bene testified that covering the left eye will not improve depth perception, Smikle testified that he often closes that eye in order to compensate for the disparity in the vision between his eyes.

Smikle testified he bled profusely and suffered severe pain after being struck with the bottle. He required several stitches

and his eye was swollen for some time after the incident. He testified to suffering numbness, sharp pain and watering of the eye, as well as headaches from eyestrain. The special verdict slip featured separate lines for 1) past pain and suffering, 2) future pain and suffering, 3) embarrassment and humiliation, 4) disfigurement/scarring, and 5) past, present and future loss of ability to enjoy life's pleasures. The jury awarded \$5,000.00 in each of the first two categories for a total award of \$10,000. It is not surprising the jury did not award damages for the fifth category, since it could be viewed as overlapping the categories for past and future pain and suffering. There was testimony about Smikle's fear of losing his job, his embarrassment because of the scar, and how his daily life has been limited because of his vision problems. However, it was for the jury to evaluate the quality of the plaintiff's evidence and determine the appropriate weight to place upon his complaints. Although greater damages certainly could have been awarded, the amount was not so low as to shock the conscience. Consequently, we will not disturb the verdict.

Smikle contends that because Davis admitted in his answer to the complaint he deliberately, intentionally and with malice aforethought struck Smikle, we erred in permitting Davis's attorney to state Smikle had the burden of proving that punitive damages were warranted.³ Smikle argues Davis's admitted conduct was outrageous as a matter of law. We disagree. Outrageous conduct is not the same as conduct which is done deliberately, intentionally, and/or with malice aforethought; the concepts are not identical. It was for the jury to decide whether Davis's conduct rose to the level of outrageous conduct. This same reasoning applies to Smikle's assertion that we erred in refusing to charge the jury that he was entitled to punitive damages as a matter of law because of his admissions.

Smikle filed a motion in limine several days before trial. Davis indicated his intention to introduce evidence of his conduct on the night in question to rebut Smikle's allegation that punitive damages were warranted. We denied Smikle's motion to preclude

³Davis's attorney made this statement in her opening statement to the jury.

this evidence because the law requires the jury to consider the nature and character of the defendant's act and surrounding circumstances in order to appropriately determine the appropriateness of punitive damages. Conduct which is deliberate, intentional and done with malice aforethought is not equivalent to outrageous conduct. Counsel for Smikle made this same objection at trial and it was overruled. (N.T. June 17, 1996, pp. 17-19).

A person's conduct is outrageous when he acts with a bad motive or when he acts with reckless indifference to the interests of others. Pa. SSJI (Civ) 14.00. Once the jury finds that punitive damages are warranted, it must determine the appropriate amount of the award in light of the following factors: 1) the character of the defendant's act, 2) the nature and extent of the harm to the plaintiff which the defendant caused or intended to cause, and 3) the wealth of the defendant because it is relevant in fixing an amount which will punish and deter him and others like him from such conduct in the future. Pa. SSJI (Civ) 14.02. The jury was charged according to these principles. In addition, the jury was instructed that Davis had admitted his actions were intentional. Counsel for Smikle requested that we also charge that Davis acted deliberately and with malice aforethought as part of the punitive damages portion of the charge. (N.T. June 17, 1996, pp. 101-102). We denied this request because that language was not part of the standard instruction on punitive damages, its inclusion was unnecessary and we believed it would only confuse the jury. We see no error in this ruling.

Finally, Smikle maintains he was prejudiced by our refusal to allow his counsel to question Davis about properties he owned at the time of the incident in 1994, but not when the suit was filed one year later. (N.T. June 17, 1996, pp. 65-66). He contends this prevented him from placing Davis's full financial abilities before the jury for the purpose of awarding punitive damages. Again, we disagree. Counsel for Smikle was permitted to question Davis about a piece of real estate he owned with his wife as tenants by the entireties by a deed dated March 24, 1995. The property was originally purchased from a Mr. and Mrs. Eckert and was still owned by the Davises at the time of trial. Davis denied being the current owner of a separate piece of real estate

originally purchased from a Mr. and Mrs. Dressler on March 24, 1995. (N.T. June 17, 1996, p. 67). Davis sold this latter property, but could not recall the date of the sale. (Direct examination, N.T. June 17, 1996, p. 70). Counsel for Smikle did not cross-examine Davis about the amount of money he realized from the sale of that property and did not attempt to elicit more specific information as to when it was sold.⁴ The full range of relevant information about Davis's finances was therefore not presented to the jury. Furthermore, any court error asserted by Smikle regarding financial evidence is moot, in that the jury did not see fit to award any punitive damages.

The plaintiff's motion for a new trial is denied. An appropriate Order of Court will be entered as part of this Opinion.

ORDER OF COURT

NOW, this 1st. day of October, 1996, the plaintiff's post-trial motion for a new trial is hereby DENIED.

⁴Smikle was permitted to introduce evidence of Davis's wages from 1993, 1994 and 1995; he could have also introduced bank statements and other financial records from the date of the incident up to the time of trial, but did not do so. Nor did he offer an appraisal of Davis's home. Such evidence would certainly have shed light on Davis's current financial capabilities.

We are also constrained to note that counsel for Smikle could have emphasized more clearly for the jury's benefit that the deeds to the two properties were recorded only nine days after the complaint was filed on March 15, 1995. Without such emphasis, the jury may have overlooked the significance of the dates involved.

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