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SUZANNE G. KOPERSKI and DONALD J. KOPERSKI
PLAINTIFFS VS. FOOD LION, INC., DEFENDANT, Franklin
County Branch, Civil Action-Law No. A.D. 1994-460

DEMURRER - PUNITIVE DAMAGES

In tort action, plaintiff sued defendant grocery store for injuries sustained as a result of plaintiff falling on a wet floor. Defendant's demurrer to the plaintiffs' claim for punitive damages was granted by the court. The court held that there were insufficient averments of fact in the complaint to provide a basis for punitive damages.

1. A demurrer should be sustained where, considering all well-pleaded material and relevant facts and every inference deducible from those facts, it is clear that no recovery is possible under any theory of law.
2. Punitive damages may not be awarded for misconduct which constitutes ordinary negligence.
3. Plaintiff must show that a failure to act was reckless in order to provide a basis for a claim for punitive damages.

Robert E. Graham, Jr., Esquire, Counsel for Plaintiffs
John Flounlacker, Esquire, Counsel for Defendant

OPINION

DOUGLAS W. HERMAN, J., October 17, 1995

This action was commenced by Writ of Summons on November 18, 1994. On June 19, 1995, plaintiffs Suzanne G. Koperski and her husband, Donald J. Koperski filed a complaint against Food Lion, Inc. ("Food Lion") for injuries Mrs. Koperski allegedly sustained upon falling on a wet floor at defendant's grocery store. Mr. Koperski makes a claim for loss of consortium. The plaintiffs demand judgment in an amount exceeding \$25,000.00, punitive damages, costs of suit and other appropriate relief as to both counts. Food Lion filed preliminary objections on August 10, 1995. Counsel submitted briefs and oral argument was held on October 5, 1995. This case is ready for decision.

The complaint avers that Mrs. Koperski proceeded just past a "Wet Floor" sign near the front of defendant's store and slipped in a puddle of water and fell, sustaining various injuries. The complaint also alleges that after the fall, employees in the vicinity stood by and watched Mrs. Koperski struggling to get up. They did not offer any assistance and did not inquire whether she was hurt.

Plaintiffs state that "Defendant's conduct as set forth above was reckless, malicious, outrageous and in wanton disregard for the safety of Plaintiff and other customers." (Paragraph 19 of the Complaint). Plaintiffs' claim for punitive damages is based on two propositions: that Food Lion failed to place the "Wet Floor" sign in the appropriate location, and that its employees did nothing to assist Mrs. Koperski in her struggle to rise from the floor and never asked her if she was injured. Food Lion demurs to the claims for punitive damages.

A demurrer should be sustained where, considering all well-pleaded material and relevant facts and every inference fairly deducible from those facts, it is clear that no recovery is possible under any theory of law. *Rutherford v. Presbyterian-University Hospital*, 417 Pa. Super. 316, 612 A.2d 500 (1992). Any doubt as to whether the demurrer should be sustained should be resolved in favor of refusing to grant it. *Commonwealth Department of Environmental Resources v. Peggs Run Coal Company*, 55 Pa. Commw. 312, 423 A.2d 765 (1980).

A claim for punitive damages must aver facts which demonstrate outrageous conduct on the part of the defendant. Restatement (Second) of Torts, Section 908(2) provides:

Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

The purpose of punitive damages is to deter and punish extreme or egregious behavior. *Martin v. Johns-Marville Corporation*, 508 Pa. 154, 494 A.2d 1088 (1985). In deciding whether punitive damages are appropriate, several factors should be taken into account, including the nature of the tortfeasor's act, his motive, the relationship between the parties and any other relative circumstances. *Feld v. Merriam*, 506 Pa. 383, 485 A.2d 742 (1984); Restatement of Torts (Second) Section 908, Comment (e). Punitive damages may not be awarded for misconduct which constitutes ordinary negligence, such as inadvertence, mistake and errors of judgment. *Martin*; Restatement of Torts (Second) Section 908, Comment (b).

To determine whether the actor behaved with "reckless indifference to the rights of others", the complaint must show "that the actor actually knew or had reason to know of facts which created a high risk of physical harm to plaintiff. Further, the defendant must have proceeded to act in conscious disregard of or indifference to that risk." *Field v. Philadelphia Electric Company*, 388 Pa. Super. 400, 425, 565 A.2d 1170 (1989); *Martin v. Johns-Marville Corporation*, supra. The actor must have fully appreciated the high degree of risk involved and if he did not possess that awareness or mental state, his actions are not a basis for punitive damages. *Field*; *Martin*. The actor's state of mind is therefore critical in determining whether punitive damages are justified. These damages are not justified where the defendant's conduct does not extend beyond gross negligence. *Martin*.

The instant complaint is devoid of any averments as to why Food Lion's conduct was outrageous or egregious. In this respect, Mr. and Mrs. Koperski are in a similar situation to that of the plaintiff in *Smith v. Brown*, 283 Pa. Super. 116, 423 A.2d 743 (1980), whose daughter was injured as a pedestrian due to the defendant's negligent driving. *Smith*'s complaint failed to plead facts showing that defendant's misconduct went beyond negligence, and the trial court struck her claim for punitive damages under Pa.R.C.P. 1019(a).¹ The Koperskis' complaint provides the following information as to how the accident occurred:

5. Upon entry, [into the defendant's store] Plaintiff turned to the right, and proceeded past the cash register aisles.
6. Adjacent to the last register was a greeting card display.
7. Approximately three feet beyond the greeting card display were three rectangular tables perpendicular to the card display, with a "Wet Floor" sign at the approximate mid-point of the table closest to the front of the store.
8. Upon seeing the "Wet Floor" sign, Plaintiff proceeded into the aisle between the card display and the tables.

¹That Rule provides that "the material facts on which a cause of action or defense is based shall be stated in a concise and summary form."

9. As Plaintiff was passing the second table, she slipped in a puddle of water.

10. Plaintiff fell to the right against the table and landed on the wet floor. . .

13. Defendant was negligent:

a) By placing the "Wet Floor" sign in a location which misled Plaintiff into believing the path which she chose, as described above, was safe.

b) By allowing the floor in said area to be wet and unsafe for travel.

We are constrained to conclude that these averments do not provide a sufficient basis for punitive damages. They do present a question of whether defendant was negligent, but these facts taken alone do not describe conduct which could be considered outrageous or egregious under the authorities discussed above.

Plaintiffs' complaint states that Mrs. Koperski proceeded past the "Wet Floor" sign and then fell. In their brief and at oral argument, however, plaintiffs' counsel argued that Mrs. Koperski attempted to avoid the area near the "Wet Floor" sign by taking a different route in the store, then fell in an area which did not have a sign but was nevertheless wet. Even though Mrs. Koperski did attempt to avoid the marked area by taking a different route which, as it turned out, was also wet yet unmarked, our conclusion is the same, namely, that those facts alone do not provide a basis for an award of punitive damages. Plaintiffs may indeed be able to show that the defendant failed to place a "Wet Floor" sign in every area which was in fact wet.

However, they have not shown that such misconduct rises above the level of negligence.

Plaintiffs also contend that a basis for an award of punitive damages exists in light of the fact that none of the defendant's employees offered her any assistance after she fell and was attempting to arise from the floor, but simply stood by and never asked her if she had been injured in the fall (Paragraphs 14 and 15). Plaintiffs have failed to plead facts sufficient to show that such conduct on the part of defendant's employees was outrageous, egregious, or evidence of an evil motive or a reckless indifference to the rights of others.

Martin; Field. While we agree that such conduct may have been negligent for failing to act with due regard, the evidence must show that the failure to act was reckless. That is, the defendant's employees appreciated the risk to the defendant by not coming to her aid and with bad motive ignored such risk. Consequently, plaintiffs' claims for punitive damages will be dismissed.

For the reasons stated herein an appropriate Order of Court will be entered as part of this Opinion.

ORDER OF COURT

NOW this 17 th day of October, 1995, the defendant's demurrer to the plaintiffs' claims for punitive damages is GRANTED.