COURT OF APPEALS
DECISION
DATED AND FILED

April 18, 2000

Cornelia G. Clark
Clerk of Court of Appeals
of Wisconsin

No. 99-2711-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

FRANKLIN J. SMITH AND PATRICIA ANN SMITH,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

V.

PHILLIPS GETSCHOW CO.,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Oconto County: LARRY JESKE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Phillips Getschow Co. (PGC) appeals from a judgment awarding Franklin and Patricia Smith $6,000 in compensatory damages and

$130,000 in punitive damages[1] for their intentional tort claim against PGC.[2] PGC argues that the trial court erred by allowing the punitive damages issue to go to the jury. In the alternative, PGC contends that although the trial court correctly determined that the jury's punitive damages award was excessive, the court nevertheless erred by offering the Smiths the option of remittitur and, further, failed to apply the appropriate criteria in remitting the punitive damages.

¶2 The Smiths cross-appeal from that part of the judgment remitting their punitive damages award. The Smiths argue that the jury's punitive damages award was not excessive as a matter of law and that the trial court therefore erred by requiring a remittitur. In the alternative, the Smiths contend that the trial court erroneously exercised its discretion when it failed to apply the appropriate criteria in determining the amount of the remittitur. We reject both parties' arguments and affirm the judgment.

BACKGROUND

¶3 This case arises from a claim alleging that Kurt Getschow, PGC's chief executive officer, intentionally battered Franklin Smith, a former PGC employee.[3] At trial, Franklin testified that in October of 1995, Getschow told Franklin that he had worked in a circus guessing people's weight and that during a work break, he would guess Franklin's weight. Franklin followed Getschow to

[1] The judgment awarded $136,000 in punitive and compensatory damages together with $7,715.08 in costs for a total judgment of $143,715.08.

[2] This is an expedited appeal under WIS. STAT. RULE 809.17. All statutory references are to the 1997-98 edition.

[3] Although Kurt Getschow was initially a named defendant, he was voluntarily dismissed as a party, leaving only the Phillips Getschow Company as a defendant.

PGC's shop area for the "weighing in ceremony." As several employees watched, Getschow, carrying a four-foot-long carpenter's level, circled Franklin as if to measure him. Getschow then asked another employee, Vincent Hanson, to stand in front of Franklin with his back toward him. Getschow instructed Franklin to place his hands over Hanson's shoulders, at which point Hanson grabbed Franklin's hands and bent forward, thus draping Franklin over his back.

¶4 Franklin testified that when he was lifted off the ground, he feared that Getschow was going to pull his pants down, but as he looked back over his shoulder, he saw Getschow draw back the carpenter's level as if to hit a baseball. Franklin stated: "I closed my eyes. He hit me. I tightened up and I felt him hit me again, and then I just waited for it to be over." Franklin further stated that it felt like Getschow had hit him a dozen times, though he had not kept count after the first two hits.

¶5 Sandy Garland, a former switchboard operator at PGC, testified that she saw the "weighing in ceremony" and heard a crack as Getschow struck Franklin. Garland stated that she left after seeing only one strike. Brian Donlevy, a former job coordinator at PGC, also testified that he saw the "weighing in ceremony." He observed Getschow strike Franklin twice and heard a loud crack both times. He testified that although the employees who had gathered to watch were laughing, Franklin had a grimace on his face.

¶6 Franklin testified that when Hanson eventually released him, Getschow laughed, put the carpenter's level down, put his arm around Franklin and said, "now you're one of us." Franklin claimed that as a result of being struck, his buttocks were tender and it was uncomfortable for him to sit. Franklin's wife, Patricia, a registered nurse, testified that when Franklin arrived

home on the evening of the "weighing in ceremony," he had "four or five marks on his buttocks that were purple in the center with red rings around them." Franklin testified that the pain lasted at least two days, and the bruising remained for seven to ten days.

¶7 Getschow testified that the "weighing in ceremony" was a "ritual right of passing" at PGC, and that he had been on the receiving end of this "ceremony" when he was sixteen years old. Getschow stated, however, that the ceremony had not happened in years. He repeatedly denied striking Franklin or even being present at any "weighing in ceremony" involving Franklin.

¶8 Dale Leifker, PGC's chief financial officer, testified that he was not present at a "weighing in ceremony" involving Franklin. He noted, however, that he had heard generally about these ceremonies and, sometime prior to the alleged incident with Franklin, Leifker had advised Getschow that the ceremonies should stop. Leifker additionally testified that PGC's net worth was $5,578,015.

¶9 After hearing the evidence, the jury returned a verdict finding that PGC, through Getschow, had committed a battery on Franklin and that the battery was a cause of his damages. It awarded Franklin $5,000 in compensable damages for his past pain and suffering and awarded Patricia $1,000 for her loss of consortium. The jury further awarded the Smiths $1,000,000 in punitive damages.

¶10 On motions after verdict, the trial court determined, pursuant to WIS. STAT. § 805.15(6), that the jury's punitive damages award was excessive and offered the option of remittitur to the Smiths. They opted to accept the remitted amount of $130,000 over having a new trial on punitive damages. The trial court denied PGC's motion for reconsideration. This appeal and cross-appeal followed.

ANALYSIS

¶11 PGC argues that the trial court erred by allowing the punitive damages issue to go to the jury. Punitive damages are designed to punish and deter conduct that is malicious or "wanton, willful and in reckless disregard of the plaintiff's rights." ***Sharp ex rel. Gordon v. Case Corp.***, 227 Wis. 2d 1, 21, 595 N.W.2d 380 (1999); *see also* WIS. STAT. § 895.85.[4] Our supreme court has used the shorthand designation "outrageous" to describe this type of conduct. *See* ***id***. Before a punitive damages question may be submitted to a jury, the trial court must determine, as a matter of law, "that evidence was presented at trial that would support an award of punitive damages." ***Id***. at 20-21. The issue of punitive damages should not be submitted to a jury "in the absence of evidence warranting a conclusion to a reasonable certainty that the party against whom punitive damages may be awarded acted with the requisite 'outrageous' conduct." ***Id***. at 21.

¶12 When determining whether, as a matter of law, the question of punitive damages should have been submitted to the jury, an appellate court independently reviews the record. *See* ***id***. at 21-22. PGC argues that the evidence established that the "weighing in ceremony" was light-hearted and that Getschow did not intend to harm Franklin. However, a person's conduct is wanton, willful and in reckless disregard of the plaintiff's rights "when it demonstrates an indifference on the person's part to the consequences of his or her actions, *even though he or she may not intend insult or injury*." ***Id***. at 21 (emphasis added).

[4] WISCONSIN STAT. § 895.85(3) provides that a "plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff."

Our review of the record convinces us that there was clear and convincing evidence that Getschow effectively tricked Franklin into participating in the "weighing in ceremony" and battered him in front of a number of laughing co-workers—this after Leifker advised him that these ceremonies should stop. There was also evidence that Getschow's conduct resulted in Franklin's injuries. Accordingly, we agree with the trial court's conclusion that the evidence was sufficient to submit the question of punitive damages to the jury.

¶13 In the alternative, PGC contends that although the trial court properly concluded that the jury's $1,000,000 punitive damages award was excessive, it erred by offering the Smiths remittitur under WIS. STAT. § 805.15(6). The statute provides, in pertinent part:

> If a trial court determines that a verdict is excessive or inadequate, *not due to perversity or prejudice* or as a result of error during trial (other than an error as to damages), the court shall determine the amount which as a matter of law is reasonable, and shall order a new trial on the issue of damages, unless within 10 days the party to whom the option is offered elects to accept judgment in the changed amount.

Id. (emphasis added). PGC argues that the trial court found the excessive punitive damages award was due to jury prejudice, and that the court was therefore precluded from offering the Smiths the remittitur option. *See* ***Redepenning v. Dore***, 56 Wis. 2d 129, 133-34, 201 N.W.2d 580 (1972) ("[W]here the verdict is the result of perversity or prejudice or is the result of prejudicial error, the court does not fix the reasonable amount of the damages but orders a new trial for the defendant."). At the hearing on motions after verdict, the trial court determined that the punitive damages award was excessive and stated:

> How did the jury come up with this million-dollar figure? I think what happened is that when Kurt Getschow came into court and denied that it happened, the jury just didn't believe him. They felt he was a liar, and I believe that what they did is they said you did it, you lied, now we'll show you who's boss. I believe that when it came to the award of the … punitive damages, *I do believe that there was prejudice. They just did not like Kurt Getschow*. They knew that he was the major stockholder of that corporation, they knew he was the CEO or president over this continuing period of time, and they were really going to give it to him, but to take a million dollars from a corporation that took over a hundred years to get to its present financial status just is not right. (Emphasis added.)

Given the trial court's implication of prejudice, PGC contends that the court was precluded from offering a remittitur option to the Smiths. At the hearing on PGC's motion for reconsideration, the trial court clarified its earlier comments:

> Well, I have read those briefs, I've reconsidered in my mind the whole case and how it laid out and the decisions that I have made, and I would say this. There are two kinds of prejudice. One is where you've got a preconceived and usually unfavorable idea going in on the front end of a trial where you have notions or positions that are held before the trial ever starts, and maybe it's a different definition than other people use, but the other kind of prejudice that I see and what I feel happened here is that it is a prejudice where there is a formation of beliefs or attitudes toward the parties based on the evidence that was presented at trial.
>
> Now, the way I look at it, with every question that's asked by the lawyers[,] those lawyers are attempting to prejudice or sway the jury, and if you aren't, you aren't doing your job. Now, that's what I think happened. I think that this jury coming in was a clean slate, there were no challenges for cause, and for a good reason. I think that the jurors came in with neutral positions and it was the evidence that swayed that jury to the plaintiff's side. You can call it prejudice or empathy or that they just didn't like [Getschow] and I don't think they liked the controller of the corporation either, and the jury just liked the plaintiffs, they didn't like the agents of the corporation, and a corporation in and of itself cannot act, the only way it can act is through its agents and representatives, and the jury was, I think, unhappy with them. I don't know if you call that prejudice, but they just didn't like him.

¶14 Contrary to PGC's assertions, the trial court did not "find" that the jury's punitive damages award was based on prejudice. Rather, the court, while using the term "prejudice," merely opined that the jury just did not like Getschow because it believed he lied.[5] The court explained that it did not use the term "prejudice" as contemplated by WIS. STAT. § 805.15(6). We conclude that the jury received a proper instruction on punitive damages, *see* WIS JI—CIVIL 1707.1, and that there was sufficient evidence to sustain an award for punitive damages under those instructions. Accordingly, we conclude that the jury's punitive damages award was not based on prejudice within the meaning of § 805.15(6) and that the trial court, therefore, was not precluded from offering the option of remittitur to the Smiths.

¶15 On cross-appeal, the Smiths argue that the jury's punitive damages award was not excessive as a matter of law, and that the trial court therefore erred by requiring a remittitur.[6] With respect to the amount of the remittitur, both PGC

[5] PGC additionally argues, based on the trial court's comments, that the jury improperly based the punitive damages award on Getschow's in-court behavior. PGC, citing ***Lievrouw v. Roth***, 157 Wis. 2d 332, 347, 459 N.W.2d 850 (Ct. App. 1990), contends that a new trial on damages must be ordered because there is no causal connection between Getschow's in-court behavior and Smith's injuries. In ***Lievrouw***, however, this court stated "[p]unitive damages may not be awarded … unless the 'outrageous' conduct has caused or contributed to the plaintiff's damages." ***Id***. at 345. Here, the jury found that Getschow's battery of Franklin was a cause of Franklin's damages. It further concluded that this conduct was outrageous (i.e., malicious or in intentional disregard of Franklin's rights). We therefore conclude that the causal connection between the conduct and the damages, as contemplated by ***Lievrouw***, has been established.

[6] In ***Plesko v. City of Milwaukee***, 19 Wis. 2d 210, 220-21, 120 N.W.2d 130 (1963), our supreme court recognized that where a plaintiff is given an option to accept either a remittitur or a new trial limited to damages, the plaintiff's acceptance of the reduced damages precludes his or her seeking review of the trial court's determination of the damages issue on direct appeal. The court further held, however, that where, as here, an opposing party appeals, the party who has accepted remittitur may nevertheless seek review of the trial court's determination of the damages issue. *See* ***id***.

and the Smiths contend that the trial court did not apply the appropriate criteria in remitting the punitive damages award to $130,000. We disagree.

¶16 Where a trial court "states its reasons for finding the jury's award of damages excessive and for reducing the award, we will reverse the trial court's determination only if we conclude there has been an abuse of discretion." ***Fahrenberg v. Tengel***, 96 Wis. 2d 211, 229-30, 291 N.W.2d 516 (1980). Under this standard, there are two questions on review: "Was the trial court's determination that the jury award was excessive an abuse of discretion and was the trial court's fixing of a reduced amount an abuse of discretion?" ***Id***. at 230. An appellate court will not find an erroneous exercise of discretion "if the record shows that discretion was in fact exercised and there exists a reasonable basis for the [trial] court's determination after resolving any direct conflicts in the testimony in favor of the prevailing party, even if the reviewing court would have reached a different conclusion than the [trial] court." ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 191, 557 N.W.2d 67 (1996).

¶17 However, where a trial court "fails to analyze the evidence or set forth the reasons supporting its decision, the reviewing court should give no deference to the [trial] court's decision." ***Id***. In making its determination, "the reviewing court must view the evidence in the light most favorable to the jury verdict." ***Id***. at 192. In addition to the factors noted above, "a reviewing court must consider the reasonableness of punitive damages on a case-by-case basis, considering the relevant circumstances in each particular case." ***Id***. at 194.

¶18 In ***Management Computer***, our supreme court held:

> [I]n determining whether an award of punitive damages is excessive, courts should consider the grievousness of the acts, the degree of malicious intent, whether the award bears a reasonable relationship to the award of compensatory damages, the potential damage that might have been caused by the acts, the ratio of the award to civil or criminal penalties that could be imposed for comparable misconduct, and the wealth of the wrongdoer.

Id. at 194. The court added that "if an award is determined to be excessive, courts should consider these factors in determining the proper amount to be awarded as punitive damages." ***Id***.

¶19 Here, the trial court found that the jury's $1,000,000 punitive damages award was excessive. This court has recognized that "the test of excessiveness [of punitive damages] does not necessarily depend upon some arbitrary proportion [and a] [p]unitive damage [award] ought to serve its purpose." ***Fahrenberg***, 96 Wis. 2d at 233. "An award which is more than necessary to serve its purposes (punishment and deterrence) or which inflicts a penalty or burden on the defendant which is disproportionate to the wrongdoing is excessive and is contrary to public policy." ***Id***. at 234.

¶20 In finding the punitive damages award excessive, the trial court stated: "I find that it inflicts a burden on the defendant that is disproportionate to the wrong that it did, and what I am doing is following [WIS. STAT. § 805.15(6)]." The court recognized that although PGC had net assets of $5.7 million, not all assets were readily convertible into cash to pay a judgment and further noted that "to take a million dollars from a corporation that took over a hundred years to get to its present financial status just is not right." Because the trial court set forth

evidence and rational reasons supporting its finding of excessiveness, we conclude it properly exercised its discretion.

¶21 Both PGC and the Smiths nevertheless contend that the trial court did not apply the appropriate criteria in remitting the punitive damages award to $130,000. Specifically, the parties assert that the trial court was required to address all of the factors delineated by ***Management Computer***. We disagree. Although the ***Management Computer*** court listed various factors that a court "should" look at in determining both whether a punitive damages award is excessive and what a proper amount should be, the court did not indicate that a court's discussion of each factor is mandatory. ***Management Computer***, 206 Wis. 2d at 194.

¶22 Here, the trial court found the $1,000,000 punitive damages award to be excessive and offered the Smiths the option of accepting an award remitted to $130,000. The court stated:

> Now, why do I come to the determination that I did of $130,000? If these same acts had been charged criminally, the maximum fine would have been $10,000. That would have been top dollar that could have been assessed against that corporation. $130,000 is approximately the same cost as the yearly salary for a top company executive of the defendant, so the company obviously determines that $130,000 is a substantial chunk of money. That is the amount that they believe is a fair compensation for one of their top executives.

As mentioned above, the court also considered that not all of PGC's $5.7 million in net assets were readily convertible into cash to pay a judgment. The court consequently recognized that "[r]equiring the defendant to come up with $130,000 cash is a punishment, but it is not so much as to be confiscatory." The trial court here, consistent with ***Management Computer***, considered the ratio of the award to

criminal penalties that could be imposed for comparable misconduct and the wealth of the wrongdoer. *See* ***id***. Both PGC and the Smiths argue that the trial court improperly considered an executive's salary in remitting the punitive damages award. We disagree. "Punitive damages are properly denominated 'smart money' and are designed to hurt in order to punish and to deter." ***Fahrenberg***, 96 Wis. 2d at 234. The trial court concluded that $130,000—the salary of one of PGC's top executives—constituted a substantial amount of money to PGC and determined the amount of the remittitur accordingly.[7] Because the trial court set forth evidence and rational reasons supporting its determination, we conclude it properly exercised its discretion in remitting the punitive damages award to $130,000.

By the Court.—Judgment affirmed. Costs denied to both parties.

Not recommended for publication in the official reports.

[7] PGC contends that under Wisconsin law, the highest allowable ratio between punitive damages and compensatory damages has been 15:1. Our supreme court has recognized "that a reasonable relationship between the amount of compensatory damages, and criminal penalties, and the proper amount of punitive damages is required." ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 194, 557 N.W.2d 67 (1996). However, the court has consistently rejected "the notion that courts can use a multiplier, or fixed ratio of compensatory-to-punitive damages or criminal fines-to-punitive damages, to calculate the amount of reasonable punitive damages." ***Id***.