IN THE COURT OF APPEALS OF IOWA

FILED
APR - 8 1983

Filed April 8, 1983

MARY HANZLIK,

Plaintiff-Appellee,

vs.

TERRY FOUTS,

Defendant-Appellant.

2-443
2-67807

Appeal from Linn District Court, Paul J. Kilburg, Judge.

The plaintiff recovered a judgment against the defendant for invasion of privacy and intentional infliction of emotional distress; the plaintiff had alleged that the defendant had surreptitiously photographed her while she changed clothes in a bathroom of the defendant's house during a photographic portrait session. AFFIRMED IN PART; REVERSED IN PART.

Tom Riley and T. Todd Becker of the Tom Riley Law Firm, Cedar Rapids, for the defendant-appellant.

Michael H. Irvine and Thomas M. Gillespie of Irvine, Currell and Gillespie, Cedar Rapids, for plaintiff-appellee.

Heard en banc.

OXBERGER, C.J.

The plaintiff recovered a judgment against the defendant for invasion of privacy and intentional infliction of emotional distress; the plaintiff had alleged that the defendant had surreptitiously photographed her while she changed clothes in a bathroom of the defendant's house during a photographic portrait session.

The defendant has appealed from the judgment, contending that the damage award of $20,000 in compensatory damages and $75,000 in punitive damages is excessive and should be set aside as a product of the jury's passion and prejudice. We affirm in part and reverse in part.

The jury found in favor of the plaintiff on both counts of her petition. The jury awarded her compensatory damages totaling $25,000 and punitive damages totaling $125,000. The defendant moved for a new trial, alleging that the damage award was excessive and duplicative. The trial court rejected the claim of excessiveness but agreed that a duplicative recovery had occurred; the court ordered a new trial unless the plaintiff agreed to remit the damages awarded under the emotional distress count of her petition. The plaintiff agreed to such a remittitur, thereby reducing her total award to $20,000 in compensatory damages and $75,000 in punitive damages.

The question to which we must address ourselves is whether the verdict must be set aside as the product of passion and prejudice.

Terry Fouts, who runs a photographic business, arranged for Mary Hanzlik to go to his home for a photographic session. After taking some pictures of Mary in his basement studio, Fouts escorted her to an upstairs bathroom and suggested that she remove her bra, as the straps might show in the photographs he was planning to take. One wall of the bathroom was completely covered with mirrored

ties. As Mary began to remove her bra, she heard what sounded like the clicks of a camera shutter from the other side of the mirrored wall. After another photographic session, she returned to the bathroom for another change of clotning, and each time she raised her dress above the level of her breasts, she heard a camera click. Mary testified that she was terrified, but was not sure what to do. When she returned to the basement studio, Fouts attempted to "warm up" her breasts by rubbing on them. Mary slapped his hand away and left as soon as possible.

Subsequently, Mary demanded that Fouts turn over to her any negatives or prints of photographs he might have taken of her while she was in the bathroom. Fouts eventually delivered to her prints and negatives of photographs that had been taken in the studio. Mary did not retrieve any photographs that had allegedly been made while she was dressing or undressing.

This incident seems to have had severe repercussions on Mary. There was testimony to the effect that it resulted in arguments between Mary and her husband, in a serious disruption of their sex life, insomnia, nightmares, and otner forms of emotional suffering. Her distress was so severe that she lost control and feeling in her extremities, trembled, lost her power of concentration, and showed otner symptoms of depression and anxiety.

There was evidence that other women who had been invited to Fouts's home for what they had thought were to be legitimate photographic sessions had experiences similar to those recounted by Mary.

The jury's verdict found for plaintiff on Count I, intentional infliction of emotional distress, in the amount of $5,000 actual damages and $50,000 exemplary damages. They found for the plaintiff on Count II, invasion of privacy, in the amount of $20,000 actual damages and $75,000 exemplary damages. After hearing

and submission of briefs by both parties following a motion for new trial by the defendant on the ground that the verdict was excessive and included a duplicative recovery, the court ruled that a duplicative recovery had occurred. The court concluded that substantial justice could be effectuated by allowing the defendant to remit the overlapping damages recovered under Count I instead of facing a new trial. Plaintiff agreed to this remission of damages, and the court ordered the original judgment stricken and directed the clerk to enter judgment against defendant in the amount of $20,000 compensatory damages and $75,000 punitive damages. At the same time, the court ruled that these amended awards, although substantial and generous, were not excessive.

Fouts argues that this verdict must be set aside as the product of passion and prejudice.

It is true that jury verdicts are not to be overturned lightly and must be set aside only on a showing of manifest impropriety by the jury. Schmitt v. Jenkins Truck Lines, Inc., 170 N.W.2d 632, 659 (Iowa 1969). The court in Schmitt said that a verdict would not be set aside or altered unless it was: "(1) flagrantly excessive or inadequate; or (2) so out of reason as to shock the conscience or sense of justice; or (3) raises a presumption it is the result of passion, prejudice or other ulterior motive; or (4) is lacking in evidential support." The court has often reiterated the principle enunciated in Saunders v. Mullin, 66 Iowa 728, 24 N.W. 529, (1885): "a Court, and especially an appellate tribunal, should not interfere in such cases [i.e., those involving allegedly excessive punitive damage awards], unless the conclusion is irresistible that the amount allowed is so great as to evince prejudice on the part of the jury."

Punitive damages are designed to punish, not to destroy a defendant.

It is not at all uncommon for courts to allow juries to consider the financial assets of a defendant where punitive damages are at issue. This rests on sound principles of public policy, for the purpose of punitive damages is, as the phrase suggests, punishment of the defendant. In this respect, punitive damage awards differ significantly from those for compensatory damages, which are designed to make the plaintiff whole, without reference to the defendant's ability to pay. Punitive damages, on the other hand, are designed to punish the defendant without reference to the plaintiff's injury. See Miller v. Schnitzer, 371 P. 2d 824, 830, n.1 (Nev. 1962). We agree with the Nevada court that "one may be punished without being destroyed. The public interest is not served by the [defendant's] financial annihilation." Id. at 829. See generally Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980). Evidence concerning a defendant's wealth or lack thereof is important in determining the amount of punitive damages to award the plaintiff. Since the purpose of punitive damages is punishment and deterrence, the sum assessed, if it is to be effective at all, must be sufficiently large to have an impact upon him, or, as the older cases put it, to make him smart. See Rinaldi v. Aaron, 315 So. 2d 762, 79 A.L.R. 3d 1132 (Fla. 1975). In determining the amount of punitive damages,

> [t]he wealth of the defendant is also relevant, since the purposes of exemplary damages are to punish for a past event and to prevent future offenses, and the degree of punishment or deterrence resulting from a judgment is to some extent in proportion to the means of the guilty person.

Restatement of Torts (second) § 908, Comment e, p. 466 (1977).

In the instant case, the uncontroverted evidence showed that the defendant earned $31,500 annually and had accumulated a net worth of $40,000. There can be no doubt that if punitive damages are to be effective in accomplishing their

purpose, they must be large enough to hurt the defendant. Northrup v. Miles Homes, Inc., of Iowa, 204 N.W.2d 850, 861 (Iowa 1973). However, nothing in our precedents suggests that punitive damages awards may be so large as to destroy a defendant's financial well-being. An award of punitive damages of nearly twice the defendant's net worth and more than twice his annual income is excessive.

The punitive damage judgment of $75,000 is set aside and the plaintiff is granted a new trial on the sole issue of punitive damages. The award of compensatory damages is affirmed.

AFFIRMED IN PART, REVERSED IN PART.

All judges concur except Donielson and Johnson, JJ., who dissent.

DONIELSON, J. (dissenting)

I respectfully dissent.

I would affirm both the compensatory and punitive damage awards. The award has already been reduced as plaintiff agreed to remit the $55,000 award on Count I of her petition. The principles governing a punitive damage award were before the jury. I believe it is within the province of the jury to apply those principles and decide upon a figure which would punish the defendant without destroying him. The judgment against defendant need not be paid immediately; the judgment stands for nine years and may be extended for good cause shown. See Iowa Code § 614.3 (1981). Thus defendant's payment period could be set over a period of years. I agree with the trial court that the $75,000 punitive damages award is not so grossly excessive that it must have been the result of passion or prejudice requiring it be set aside. I would affirm the judgment.

Johnson, J., joins this dissent.