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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000111-MR

ROBERT E. YOUNG

APPELLANT

v. APPEAL FROM GARRARD CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 03-CI-00236

AGUSTIN ESPINOZA

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: DYCHE AND GUIDUGLI, JUDGE; PAISLEY, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: Robert E. Young appeals from the Garrard Circuit Court's findings of fact, conclusions of law and judgment entered December 12, 2003. The judgment awarded Agustin Espinoza punitive damages in the amount of \$15.00 per day beginning July 3, 2003, until Young returned Espinoza's car,

¹ Senior Judge Lewis G. Paisley, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

which the Court found Young had wrongfully possessed since that date. We affirm.

Young filed suit against Espinoza on August 19, 2003. In his two-count complaint, Young alleged that Espinoza was responsible for damage and utility bills for an apartment Young owned and rented and for storage fees on a 1996 Mustang Espinoza owned that was left at Young's Auto Mart. Young sought damages in excess of \$9,000 in his complaint. Espinoza filed an answer denying Young's claims and a counterclaim alleging Young wrongfully and unlawfully held his Mustang. Espinoza sought immediate return of the car and compensatory and punitive damages for Young's willful and intentional conduct in wrongfully withholding the vehicle. A bench trial was held on December 3, 2003. Several individuals testified on behalf of each party. The testimony was conflicting as to whether Espinoza was a tenant of Young's apartment and whether Espinoza abandoned the Mustang at Young's business property or had taken the car for repairs and Young wrongfully refused to return it and unlawfully claimed storage fees. At the conclusion, the trial judge did not believe Young's testimony was credible. The judge stated that Young had "perjured [himself] in a number of instances today and I want to let you know that I don't appreciate it." Based upon its findings of fact and conclusions of law, the trial court entered a judgment dismissing both of

Young's claims finding Espinoza was not responsible for any damages to the rental property and that Young's claim for storage fees was unfounded. As to Espinoza's counterclaim, the court held that Young wrongfully held Espinoza's Mustang thereby causing damage to him since July 3, 2003, the date Espinoza testified he took the car to Young for repairs. The court then entered judgment for Espinoza "for wrongful possession and for punitive damages in the amount of \$15.00 per day beginning July 3, 2003, until the car is returned, with interest on said amount at the legal interest rate." This appeal followed.

On appeal, Young contends that the court erred in awarding punitive damages when no compensatory damages were proved. He relies on State Farm Mut. Ins. v. Campbell, 538 U.S. 408, 155 L.Ed.2d 585, 123 S.Ct. 1513 (2003), and BMW of North America, Inc. v. Gore, 517 U.S. 559, 134 L.Ed.2d 809, 116 S.Ct. 1589 (1996). In each of these cases the Supreme Court of the United States reduced punitive damage awards as being excessive. While acknowledging that punitive damages may properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition, the Gore Court recognized that a punitive damage award that is "grossly excessive" in relation to those interests (deterrence and punishment) may be arbitrary and in violation of the Due Process Clause of the Fourteenth Amendment. Id. at 134, L.Ed.2d at 822.

The Court then set forth three guideposts that should be considered in determining whether a punitive damage award is grossly excessive. In setting forth these guideposts, the Court stated:

Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose. Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose for adhering to the nondisclosure policy adopted in 1983, lead us to the conclusion that the \$2 million award against BMW is grossly excessive: the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases. We discuss these considerations in turn.

Gore, 134 L.Ed.2d at 826.

In the Campbell case, the Supreme Court, again, addressed an excessive punitive damage award (\$145 million) and used the three guideposts established in Gore. After analyzing the guideposts, the Court determined the damages were excessive and remanded for further proceeding. In reviewing the Gore guidelines, the Campbell Court stated:

"[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." Gore, 517 U.S. at

575, 134 L Ed 2d 809, 116 S Ct 1589. We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortuous conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. *Id.*, at 576-577, 134 L Ed 2d 809, 116 S Ct 1589. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. *Id.*, at 575, 134 L Ed 2d 809, 116 S Ct 1589.

. . .

Turning to the second *Gore* guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. *Gore* 517 U.S. at 582, 134 L Ed 2d 809, 116 S Ct 1589 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award"); *TXO, supra*, at 458, 125 L Ed 2d 366, 113 S Ct 2711. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-

digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.

. . .

Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages." *Ibid*; see also *ibid*. (posting that a higher ratio *might* be necessary where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine"). The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.

. . .

The third guidepost in *Gore* is the disparity between the punitive damages award and the "civil penalties authorized or imposed in comparable cases." *Id.*, at 575, 134 L Ed 2d 809, 116 S Ct 1589. We note that, in the past, we have also looked to criminal penalties that could be imposed. *Id.*, at 583, 134 L Ed 2d 809, 116 S Ct 1589; *Haslip*, 499 US, at 23, 113 L Ed 2d 1, 111 S Ct 1032. The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened

protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.

Campbell, 155 L. Ed.2d at 602, 605-606, 607-608.

Relying on these two cases, Young contends that since the judgment did not award any compensatory damages (and he argues none were proven), that any award of punitive damages is in error. KRS 411.184(1)(f) defines punitive damages to include "exemplary damages and means damages other than compensatory and nominal damages, awarded against a person to punish and to discourage him and others from similar conduct in the future." KRS 411.184(2) permits a party to recover punitive damages "only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice." KRS 411.184 also defines the terms oppression, fraud and malice. KRS 411.186 sets forth the factor to be considered in awarding punitive damages. It states:

- (1) In any civil action where claims for punitive damages are included, the jury or judge if jury trial has been waived, shall determine concurrently with all other issues presented, whether punitive damages may be assessed.
- (2) If the trier of fact determines that punitive damages should be awarded, the

trier of fact shall then assess the sum of punitive damages. In determining the amount of punitive damages to be assessed, the trier of fact should consider the following factors:

- (a) The likelihood at the relevant time that serious harm would arise from the defendant's misconduct;
 - (b) The degree of the defendant's awareness of that likelihood;
 - (c) The profitability of the misconduct to the defendant;
 - (d) The duration of the misconduct and any concealment of it by the defendant; and
 - (e) Any actions by the defendant to remedy the misconduct once it became known to the defendant.
- (3) KRS 411.184 and this section are applicable to all cases in which punitive damages are sought.

Since no actual damages were awarded in this case, Young contends no punitive damages may be assessed. In his reply brief, he cites to Estep v. Werner, 780 S.W.2d 604 (Ky. 1989), for that proposition. However, in Estep, the Court reversed the award of punitive damages because it affirmed the Court of Appeals ruling in favor of Werner (reversing the trial court) on the issue for which he received punitive damages. In fact, the Court citing Lawrence v. Risen, 598 S.W.2d 474, 476 (Ky.App. 1980), stated that, "[t]he rule of law recognized in this state is that, 'if the plaintiff has suffered an injury for

which compensatory damages might be awarded, ... he may in a proper case recover punitive damages.'"

In this case, the trial court found that Young's complaint had no merit and that Young had wrongfully withheld Espinoza's Mustang. While Espinoza did not present specific evidence of a compensatory loss (i.e., the cost to repair the damage Young caused to the vehicle, cost to rent another vehicle, loss of value for the time period the car was withheld, etc.) had he presented such proof he would have been entitled to compensatory damages. Since he was entitled to compensatory damages, he was entitled to punitive damages if he met the statutory threshold set forth in KRS 411.184 and 411.186. This he did. The actions of Young were oppressive, fraudulent and malicious. As Espinoza stated in his brief to this Court,

Wrongfully withholding another's property is inexcusable. Doing so under a compact of trust is reprehensible. Ransoming the property for false and malicious damages claims of over \$7300.00 is despicable. And to do all this from a position of comparatively great power against a vulnerable consumer who speaks no English is unforgivable.

. . .

[Young's] conduct here was intentional, malicious, and willful, in that it involved a deliberate use of bogus civil claims to forcibly and wrongfully withhold the property of a vulnerable customer who had entrusted that property to [Young] for repairs.

Espinoza's appellee brief, pp. 3,5.

We have thoroughly reviewed the record, the videotape of the trial and the applicable statutory and case law and believe the Garrard Circuit Court acted properly in awarding punitive damages in this matter. Further, we see nothing in the amount that would suggest the \$15.00 per day penalty to be "grossly excessive" or violative of the guideposts set out in Gore and Campbell. Espinoza met his burden under KRS 411.184 in proving that Young acted with oppression, fraud and malice and the trial court assessed a reasonable amount of punitive damages after considering the factors set forth in KRS 411.186(2).

For the foregoing reasons, the judgment entered by the Garrard Circuit Court is affirmed.

PAISLEY, SENIOR JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

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