STATE OF MICHIGAN

COURT OF APPEALS

JO-DAN, LTD., INC. and JOE E. MCLEMORE, Plaintiffs-Appellees,	UNPUBLISHED July 14, 2000
v	No. 201406 Wayne Circuit Court
DETROIT BOARD OF EDUCATION, Defendant-Appellant.	LC No. 95-509281-NZ

Before: Bandstra, C.J., and Whitbeck and Talbot, JJ.

TALBOT, J. (*concurring in part, dissenting in part*).

I concur in several aspects of the majority's opinion, except I would affirm the judgment with respect to plaintiff Jo-Dan, Ltd., Inc. and reverse the judgment with respect to plaintiff Joe McLemore.

Although the behavior of the Board in its investigation and treatment of plaintiff Joe McLemore was outrageous and clearly violated the plaintiffs' rights under the fair and just treatment clause of the Constitution, I cannot affirm on this basis. While the theory was repeatedly argued by plaintiffs during the course of the trial and the Board may have implicitly consented to having this theory tried despite plaintiffs' failure to specifically allege this claim in their complaint, the trial court never instructed the jury on the elements of this claim. Instead, the trial court only gave an instruction on plaintiffs' theory of the case, which referred in general to plaintiffs' rights to due process of law under the Constitution. In fact, the trial court refused to give the special instructions requested by plaintiffs, one of which related specifically to the fair and just treatment claim.

Unfortunately, plaintiffs have not followed the appropriate steps to allow us to address this error made by the trial court. Although plaintiffs formally filed a cross appeal in accordance with MCR 7.207, their brief only provides a "Counter-statement of Questions for Review," and further fails to set forth any questions apart from the Board's or otherwise advance any argument that the trial court erred in failing to give the special instructions.

Nevertheless, the Board likewise has failed to articulate on appeal a sufficient basis to reverse the judgment as to Jo-Dan in their statement of the issues presented and in their arguments.

First, the Board argues that the trial court erred in denying its motion for JNOV because it had no liability as a matter of law based upon a theory of respondeat superior where the injury was caused by the criminal act of Murdock and Hall and further, because it is immune from liability under the governmental immunity act. I concur with the majority's resolution of this issue on appeal. Significantly, the Board does not challenge the underlying constitutional claim upon which the jury found the Board liable.

Second, the Board argues that the trial court erred in denying its motion for JNOV because the undisputed evidence at trial established that plaintiff McLemore did not have standing or a cognizable legal claim for damages independent of the plaintiff Jo-Dan corporation. The Board relies upon our Court's decision in *Environair v Steelcase, Inc.*, 190 Mich App 289, 292; 475 NW2d 366 (1991), where it was stated that "[g]enerally, a suit to enforce corporate rights or to redress or prevent injury to the corporation, whether arising out of contract or tort, must be brought in the name of the corporation and not that of a stockholder, officer, or employee." If the trial court sufficiently instructed the jury on the elements of the fair and just treatment clause, I would reject this argument since it is clear from the record, as explained in the majority's opinion, that the Board violated his individual rights under this clause. However, apart from this claim, I cannot discern any evidence that indicates McLemore had an individual claim against the Board separate from the corporation or that he suffered any damages other than the lost profits of the corporation. Thus, contrary to plaintiffs' response on appeal, the "joint" award was improper. Again, the Board fails to challenge the underlying constitutional claim with respect to Jo-Dan upon which the jury's award was based.

The next three issues raised by the Board challenge the damage award rendered by the jury. Defendant specifically challenged the award through motions for remittitur, new trial, and judgment notwithstanding the verdict (JNOV). A trial court reviews a motion for remittitur to determine whether a jury's award is supported by the evidence. *McPeak v McPeak (On Remand)*, 233 Mich App 483, 489; 593 NW2d 180 (1999). A trial court's decision to deny such a motion as well as a motion for a new trial is reviewed for an abuse of discretion. *Id.* at 489-490. A motion for JNOV should be granted only where there was insufficient evidence presented to create an issue for the jury. *Id.* at 490. The trial court, when reviewing such a motion, must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether facts presented preclude judgment for the nonmoving party as a matter of law. *Id.* If reasonable minds could differ regarding the evidence, the question is for the jury and JNOV is improper. *Id.*

As noted by the majority opinion, we are hindered in our ability to determine the basis for the jury's award because both the jury instructions and verdict form prepared by the Board failed to give the jury any specific direction with respect to measuring actual and future damages. However, Jo-Dan was under consideration for a contract worth approximately two million dollars at the time the investigation began and was forced out of business for a few years after the scandal and is currently not doing any business. An accountant testified that he expected Jo-Dan to follow a plan for growth estimated at ten percent a year, and counsel for plaintiffs argued to the jury that his calculations based on a net profit running through the year 2017 would have been about "seven and a half or $8,000,000 if

you started at 2.7 million . . . ."[1] Given the fact there was evidence in the record to support the award, I likewise entrust the calculation of damages to the sound judgment of the trier of fact as the majority has done. On this record, I cannot conclude that there was insufficient evidence to create an issue for the jury to warrant JNOV. Similarly, while I may have granted a new trial, and certainly remittitur, I cannot say that the trial court's conclusion was so palpably and grossly violative of fact and logic that it evidenced perversity of will or the exercise of passion and bias rather than the exercise of discretion. *Schoensee v Bennett*, 228 Mich App 305, 314-315; 577 NW2d 915 (1998).

Finally, the Board argues that the trial court erred in denying its motion for a new trial based on the erroneous rulings made by the court during the course of trial. I concur in the majority's resolution of this issue as well.

Notably, resolution of the issues raised by the Board leaves the judgment of liability intact with respect to the claim asserted by plaintiff Jo-Dan as well as the award of damages. The Board fails to challenge the underlying finding of liability with respect to the due process claim as to Jo-Dan, and I do not feel compelled to reverse on this ground where the Board does not seek relief from the judgment on this basis. Accordingly, I would affirm the judgment with respect to Jo-Dan, but reverse the judgment with respect to McLemore.

/s/ Michael J. Talbot

[1] It is worth noting as well that the Board failed to object to the apparent inclusion of net profits expected from the loss of future milk contracts in these figures.