[Cite as *Lewandowski v. Penske Auto Group*, 2010-Ohio-6160.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94377

STAR LEWANDOWSKI, ET AL.

PLAINTIFFS-APPELLANTS

vs.

PENSKE AUTO GROUP, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-672882

BEFORE: Gallagher, A.J., Jones, J., and Vukovich, J.*

RELEASED AND JOURNALIZED: December 16, 2010

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SEAN C. GALLAGHER, A.J.:

{¶ 1} Plaintiffs-appellants, Star Lewandowski and Brenda Lewandowski, appeal the judgment of the Cuyahoga County Court of Common Pleas that granted a directed verdict for the defendants-appellees on all claims that proceeded to trial. For the reasons stated herein, we reverse the decision of the trial court and remand the matter for a new trial.

{¶ 2} On October 9, 2008, Star, Brenda, and Joseph Lewandowski filed this action against Penske Auto Group, Inc., Toyota of Bedford, Inc., Doug Schwartz, and Timothy Roussell. In their complaint, the plaintiffs asserted

claims for defamation, invasion of privacy, intentional infliction of emotional distress, and assault and battery. Joseph Lewandowski also filed a claim for loss of consortium.

{¶ 3} The trial court granted summary judgment in favor of Penske Auto Group, Inc., on all of the plaintiffs' claims, and in favor of the remaining defendants on the claims for invasion of privacy and loss of consortium. Summary judgment was also entered against Brenda's claim for battery. The case proceeded to a jury trial on the remaining claims.

{¶ 4} The claims arose from an incident that occurred at Toyota of Bedford ("Toyota") on August 28, 2008. Earlier that month, Star and her mother, Brenda, went to Toyota to purchase a vehicle for Star's benefit and use. They decided to purchase a 2001 Buick Regal, with approximately 130,000 miles, for an agreed price of $8,645.50. The vehicle was being purchased in its "as is" condition. However, appellants claim they were informed by the salesperson, Doug Schwartz, that the vehicle carried a standard 30-day warranty against any unforeseen repairs.

{¶ 5} Because Star had recently started a new job and was unable to obtain financing in her own name, Brenda applied for financing and completed the necessary paperwork. She also provided a $2,000 down payment on the vehicle. Pursuant to a conditional delivery agreement, Brenda was given possession of the vehicle with the qualification that the

sale of the vehicle was contingent on financing approval and that permission to use the vehicle could be revoked by the dealership.

{¶ 6} In the weeks after Brenda acquired the vehicle, Toyota called her and requested a current cell phone bill, which was necessary to complete the financing. Also during this time, Star began experiencing an electrical problem with the vehicle. Star and Brenda returned to the dealership on August 28, 2008, with a current cell phone bill, but refused to turn over the bill because Toyota refused to service the vehicle. Brenda informed Toyota that she wanted her attorney to look at the paperwork.

{¶ 7} Star talked to Timothy Roussell, the general manager, about giving her another 30-day temporary tag, as she only had two days left on the current tag. She then went outside to wait with her mother, with the understanding that she would be issued another temporary tag. Brenda, who has a lung condition, was standing outside of the car and was tethered to her oxygen tank.

{¶ 8} Shortly thereafter, Schwartz pulled another vehicle behind appellants' vehicle, effectively blocking it in. Tim Roussell then ripped off the temporary tag issued to Brenda, and several Toyota employees blocked Star from getting into the vehicle.

{¶ 9} Brenda was scared and began to have trouble breathing and told Star she needed to get to the hospital. Because Toyota's employees were

preventing them from leaving in the vehicle, Star called 911. One of the employees then told Roussell to get out of the way and shoved Roussell aside. Roussell stood in front of the vehicle, which was still blocked from behind, but an employee again moved him out of the way. Star started the vehicle, drove up the sidewalk, and headed for the exit. Roussell yelled at Schwartz to "go after them."

{¶ 10} Schwartz took up the chase and almost sideswiped Star's vehicle. Star swerved to avoid a collision and Schwartz continued the pursuit. Schwartz pulled in front of them, forcing Star to slam on the brakes and brace herself. Schwartz then jumped out of his car, reached into Star's vehicle and tried to pull her out. Star fought him off while Brenda struggled to breathe. Eventually Star was able to pull away and again called 911.

{¶ 11} In the meantime, a Toyota employee flagged down a police officer and reported that a car was stolen off the lot. The police effectuated a stop for grand theft motor vehicle, with multiple police and rescue vehicles responding to the scene. The police initiated the stop, exited their vehicles with their guns drawn, and shouted instructions at the occupants. Star was handcuffed and placed in a police cruiser. Because Brenda was unable to get out of the vehicle, Star shouted to the officers that her mother was on oxygen and not to shoot her mother.

{¶ 12} Once the officers ascertained the situation, they determined that it was a civil matter between the parties. Brenda expressed that she was having trouble breathing; however, she did not wish to be transported to the hospital. The EMS unit observed she was on oxygen, but they did not observe signs of respiratory distress.

{¶ 13} Star and her mother returned to the vehicle and were escorted back to Toyota by the police. Toyota agreed to service the vehicle and provided Brenda and Star with a loaner vehicle to take home.

{¶ 14} Star testified that as a result of the "horrific" incident she had difficulty sleeping and had crying episodes and trouble doing everyday activities without thinking about the incident. She also was very anxious.

{¶ 15} Brenda testified that she gets flashbacks and nightmares from the incident. She also became very depressed. Although she did not proceed to the hospital on the date of the incident because she "didn't really want to go to the hospital" and thought it would get better, she later went to a medical center for treatment.

{¶ 16} Both Star and Brenda sought psychiatric treatment. Dr. Michael Freedman testified that it was a traumatic experience for them both. He diagnosed Brenda with post traumatic stress disorder and depression. He diagnosed Star with post traumatic stress disorder, generalized anxiety disorder, and depression.

{¶ 17} At the end of the plaintiffs' case, the defendants moved for a directed verdict. The trial court granted the motion on all of the issues.

{¶ 18} This appeal timely followed. Appellants raise three assignments of error for our review. Their first assignment of error provides as follows: "The trial court erred in directing a verdict by failing to state the basis for its decision prior to or simultaneous with the entry of judgment pursuant to [Civ.R. 50(E)]."

{¶ 19} This court has repeatedly recognized that "[a]lthough Civ.R. 50(E) provides that the trial court shall state the basis for its decision to direct a verdict, the party against whom the motion is granted waives his right to protest the absence of this requirement by failing to timely raise the error to the trial court." E.g., *Snavely Dev. Co. v. Acacia Country Club*, Cuyahoga App. No. 86475, 2006-Ohio-1563, ¶ 25; *Sullins v. Univ. Hosps. of Cleveland*, Cuyahoga App. No. 80444, 2003-Ohio-398.

{¶ 20} In this case, the issues concerning the directed verdict were argued by the parties on the record. After hearing arguments from counsel, the trial court directed a verdict on "all of the issues." If further explanation was required, it was incumbent upon appellants to request it. Because appellants did not object to the ruling, and we have an adequate record upon which to review the trial court's decision, we find appellants waived any right

to protest the absence of a stated basis for the decision. Appellants' first assignment of error is overruled.

{¶ 21} Appellants' second assignment of error provides as follows: "The trial court erred in directing a verdict against the plaintiffs pursuant to [Civ.R. 50(A)(4)]."

{¶ 22} We review de novo a trial court's decision to grant a directed verdict. See *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, ¶ 3. Civ.R. 50(A)(4) provides that a trial court shall sustain a properly made motion for directed verdict when "after construing the evidence most strongly in favor of the party against whom the motion is directed, [the trial court] finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party." In making this determination, the court is to discern only whether there exists any evidence of substantive probative value that favors the position of the nonmoving party. *Goodyear*, 95 Ohio St.3d 512, ¶ 3.

{¶ 23} A motion for directed verdict presents a question of law, and the court must neither consider the weight of the evidence nor the credibility of the witnesses in disposing the motion. *Cater v. City of Cleveland*, 83 Ohio St.3d 24, 33, 1998-Ohio-421, 697 N.E.2d 610. "The motion for directed verdict must be denied 'if there is substantial competent evidence to support

the party against whom the motion is made, upon which evidence reasonable minds might reach different conclusions.'" Id., quoting *Hawkins v. Ivy* (1977), 50 Ohio St.2d 114, 115, 363 N.E.2d 367.

{¶ 24} Appellants argue that the evidence presented, when construed in their favor, was such that reasonable minds could find in their favor on their claims for defamation, intentional infliction of emotional distress, and assault. We agree.

{¶ 25} "[D]efamation occurs when a publication contains a false statement made with some degree of fault, reflecting injuriously on a person's reputation[.]" (Internal citation and quotations omitted.) *Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, 883 N.E.2d 1060, ¶ 9. A statement is defamatory per se if it consists of words that import an indictable criminal offense involving moral turpitude. *Kanjuka v. MetroHealth Med. Ctr.*, 151 Ohio App.3d 183, 2002-Ohio-6803, 783 N.E.2d 920, ¶ 16. Unless published on a privileged occasion, words that are defamatory per se normally carry a presumption of falsity, damages, and malice. *Wampler v. Higgins*, 93 Ohio St.3d 111, 127, 2001-Ohio-1293, 752 N.E.2d 962, fn. 8.

{¶ 26} "Any communications made by private citizens to law enforcement personnel for the prevention or detection of crime are qualifiedly privileged and may not serve as the basis for a defamation action unless it is

shown that the speaker was motivated by actual malice." *Oswald v. Action Auto Body & Frame, Inc.* (Apr. 24, 1997), Cuyahoga App. No. 71089, citing *Hartung-Teter v. McKnight* (June 26, 1991), Defiance App. No. 4-91-2. In the context of a qualified privilege, "actual malice" is defined as "acting with knowledge that the statements are false or acting with reckless disregard as to their truth or falsity."

{¶ 27} Appellants' claim of defamation is based on their assertion that Toyota falsely notified the police that appellants had stolen a car from the dealership, knowing that it was untrue. This is a claim for defamation per se.

{¶ 28} While appellees claim there is no evidence that appellees ever accused appellants of stealing the vehicle, appellants presented evidence showing otherwise. A responding officer testified that a Toyota employee flagged down the police and reported that a vehicle was stolen off the lot. There also was evidence that police dispatch reported the car had just been stolen from Toyota and that the police effected a felony traffic stop for grand theft motor vehicle on appellants' vehicle with their guns drawn. Further, there was evidence showing that this was a traumatic event for both Brenda and Star and that they suffered resulting injuries.

{¶ 29} Insofar as appellees assert a qualified immunity defense, appellants presented evidence that could support a finding that appellees

acted with actual malice, that is, a high degree of awareness of the probable falsity of their statement. Appellants presented evidence showing that they paid $2,000 toward the purchase of the vehicle, that they were issued temporary registration papers and license tags, and that they were given possession of the vehicle. There was also evidence that the police determined the matter was a civil matter between the parties and no criminal charges were ever brought.

{¶ 30} Much of appellees' argument focuses on evidence elicited in cross-examination that reflects on the credibility of witnesses and requires a weighing of the evidence. These are improper considerations in considering a directed verdict. Upon our review, we find evidence of substantive probative value that favors appellants' claim for defamation.

{¶ 31} Next, appellants brought a claim for intentional infliction of emotional distress. To establish this claim, appellants are required to show "(1) that the defendant intended to cause the plaintiff serious emotional distress, (2) that the defendant's conduct was extreme and outrageous, and (3) that the defendant's conduct was the proximate cause of plaintiff's serious emotional distress." See *Phung v. Waste Mgt., Inc.*, 71 Ohio St.3d 408, 1994-Ohio-389, 644 N.E.2d 286.

{¶ 32} At trial, Brenda and Star testified to a course of conduct and behavior on the part of Roussell, Schwartz, and Toyota that entailed

blockading appellants' vehicle, preventing appellants from leaving to obtain medical assistance for Brenda's respiratory distress, chasing down the vehicle in a reckless manner, engaging in a physical altercation with the driver of the vehicle, and subjecting appellants to a grand theft auto stop. Star testified that as a result of the incident, she had flashbacks and difficulty sleeping. Brenda testified she suffered from flashbacks and nightmares and became very depressed. A treating psychologist testified that both Brenda and Star suffered from post traumatic stress disorder and other conditions as a result of the traumatic incident. Reviewing the evidence in a light most favorable to appellants, we find appellants produced evidence of substantive probative value on each of the elements of this claim.

{¶ 33} Appellants' final claim is for assault. The tort of assault is defined as "the willful threat or attempt to harm or touch another offensively, which threat or attempt reasonably places the other in fear of such contact." *Stafford v. Columbus Bonding Ctr.*, 177 Ohio App.3d 799, 2008-Ohio-3948, 896 N.E.2d 191, ¶ 15, citing *Smith v. John Deere Co.* (1993), 83 Ohio App.3d 398, 406, 614 N.E.2d 1148. Here, appellants testified that Schwartz, an employee of Toyota, at the direction of the general manager to "go after them," pursued the appellants' vehicle. During the pursuit, Schwartz nearly sideswiped appellants' vehicle and cut them off in a manner requiring Star to slam on the brakes to prevent a collision. Their testimony further indicated

that Schwartz reached into the vehicle and attempted to remove Star from the vehicle. Both occupants were terrified and feared for their safety. Here again, we find the evidence was sufficient to defeat a directed verdict and the claim should have been submitted to the jury. We further find the evidence was sufficient to establish that Schwartz's conduct was committed within the course and scope of his employment for purposes of Toyota's liability under the doctrine of respondeat superior.

{¶ 34} Appellants are also seeking punitive damages. Punitive damages may be awarded for an intentional tort where malice is shown. *Harbin v. Ohi-Tec Mfg., Inc.*, Clark App. No. 2001 CA 70, 2002-Ohio-2923. "Actual malice, necessary for an award of punitive damages, is (1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." *Preston v. Murty* (1987), 32 Ohio St.3d 334, 336, 512 N.E.2d 1174. We find the evidence was such that a rational trier of fact could find appellees acted with a conscious disregard for the rights and safety of appellants and that their actions had a great probability of causing substantial harm. Therefore, we find any allowance for punitive damages rests with the trier of fact.

{¶ 35} Because we find substantial, competent evidence upon which reasonable minds could differ as to the claims and issues presented, we find

the trial court erred in granting a directed verdict. We make no determination as to the ultimate outcome in this matter. Appellants' second assignment of error is sustained.

{¶ 36} Appellants' third assignment of error provides as follows: "The trial court lacked jurisdiction to entertain a motion for directed verdict by the defendants against the plaintiffs until the close of all of the evidence after the defendants commenced their case in chief by conducting a direct examination of their first witness."

{¶ 37} Appellants argue that because the defense called a witness out of order during plaintiffs' case in chief, that a motion for directed verdict could not be made or considered until the close of all the evidence. We find that the trial court had jurisdiction to consider the motion as it was timely made at the close of the plaintiffs' evidence. As found in a similar case: "Civ.R. 50(A)(1) provides that a motion for directed verdict may only be made at three specific times during a trial: upon the opponent's opening statement; at the close of the opponent's evidence; or at the close of all the evidence. Here, the record is clear that Appellee made a timely motion at the close of Appellant's case. Appellee did not begin his case-in-chief prior to making the motion; the [defense] witness was called out of order for the sake of convenience." *White v. Goodman*, Marion App. No. 9-2000-63, 2001-Ohio-2100.

{¶ 38} Appellants' third assignment of error is overruled.

{¶ 39} Having found that the trial court erred in directing a verdict against the plaintiffs-appellants, we reverse the judgment of the trial court and remand the matter for a new trial.

Judgment reversed, case remanded.

It is ordered that appellants recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

LARRY A. JONES, J., and
JOSEPH J. VUKOVICH, J.,* CONCUR

*(Sitting by assignment: Judge Joseph J. Vukovich of the Seventh District Court of Appeals.)