IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX AT CHRISTIANSTED

ROSE FOY, AS NEXT FRIEND AND GUARDIAN OF ADDIMAE BARNES, Plaintiffs, v. EMIENTINA ETIENNE AND BANK OF NOVA SCOTIA, Defendants.	CIVIL NO. 673/1980 ACTION FOR DAMAGES

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PETERSEN, Judge

MEMORANDUM OPINION
July 7, 1983

A. INTRODUCTION

This is an action to recover compensatory and punitive damages for slander and emotional distress. The plaintiff sued on her own behalf as well as her daughter's.

After this Court dismissed the individual action of the mother and the claim for punitive damages, the jury awarded the plaintiff Thirty Thousand ($30,000.00) Dollars in damages. Defendants have now moved for a judgment notwithstanding the verdict or, in the alternative, for a new trial. The questions to be addressed relate to the sufficiency of the evidence as to damages, the propriety of the jury instructions, and the excessiveness of the verdict. After careful consideration it is the judgment of this Court that the Defendants' motion must be denied.

B. FACTS

On June 12, 1980, Plaintiff Addie Mae Barnes went to the Bank of Nova Scotia at the request of Pat Thomas, a co-worker, to withdraw certain monies from Thomas's savings account. She had in her possession Thomas's passbook and drivers license. Filling out Thomas's savings withdrawal slip in the amount of Two Hundred Dollars, Barnes signed her own name to it and proceeded to withdraw the money. As it was a Government pay day the Bank was very busy. Etienne, the Bank of Nova Scotia teller who processed Barnes's withdrawal, cashed the withdrawal slip without checking the signature cards.

The mistake went undetected for a week at which time, during a routine check by a bank supervisor, the discrepancy in the signatures surfaced. Etienne, having been apprised of the situation, took the matter into her own hands. She first called Barnes on the telephone, but because of a bad connection was unable to communicate with Barnes. Etienne then went directly to Barnes's office and confronted her with the improper signature. Etienne told Barnes that they had both made a mistake and that Barnes would have to return the Two Hundred Dollars. Denying that she had made a mistake, Barnes explained that she had given the money to Thomas. Etienne, becoming more vociferous, told Barnes that what she had done was "what we call forgery." It was further established at trial that this exchange took place in the presence of Yvonne Toussaint, one of Barnes's co-workers.

Noticing that Barnes was crying, Toussaint explained to Etienne that Barnes had acted per Thomas's instructions and had given her, Thomas, the money. Etienne, not satisfied by the explanation, took Thomas's passbook and refused to return it to Barnes until the money was paid back.

At that time, David Canegata, another of Barnes's co-workers, became aware of the confrontation and told Barnes that since he had Thomas's power of attorney he would accompany Barnes to the bank to retrieve the passbook. Barnes agreed. They went to the bank of Nova Scotia where Canegata was able to secure the return of the passbook.

When her mother called, Barnes, still unsettled by the events which had transpired, recounted the incident as it had occurred. Rose Foy, Barnes's mother, picked up her daughter and went to the Bank of Nova Scotia in an effort to obtain an apology from Etienne. They waited to see the bank manager but as he was unavailable, they spoke with the assistant bank manager, Cook, who apologized on behalf of the Bank but stated that she could not make Etienne apologize.

C. DISCUSSION

I. Sufficiency of the evidence

The Restatement of Torts, Second, provides that:

> one who publishes a slander that imputes to another conduct constituting a criminal offense is subject to liability to the other without proof of special harm if the offense imputed is of a type which, if committed in the place of publication, would be (a) punishable by imprisonment in a State or Federal institution, or (b) regarded by public opinion as involving moral turpitude.

Restatement (Second) Torts, Section 571 (1977). The Supreme Court further refined the standards to be applied in defamation actions by private individuals in Gertz v. Robert

Welch, Inc., 418 U.S. 323 (1974). Balancing the interests in freedom of speech and press against the interest of private persons to be free from defamatory falsehoods injurious to their reputation, the court held that a cause of action for defamation could be maintained on a negligence theory. See also Restatement (Second) of Torts, Section 580B, comment c (1977) (citing Gertz, supra). The Gertz Court further held that, where a plaintiff fails to prove that the defendant acted with knowledge of falsity or with reckless disregard for truth, [1/] recovery is limited to compensation for "actual injury," Gertz at 349, and stated:

> We need not define "actual injury", as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the

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1/ Pursuant to Defendants' motion and having found that the plaintiff had failed to establish that the statement was published with knowledge of its falsity or with reckless disregard for the truth, the Court dismissed plaintiff's claim for punitive damages. See Gertz at 349.

> injury, although there need be no evidence which assigns an actual dollar value to the injury.

Gertz at 350.

Defendants assert that, even proceeding under the negligence theory, plaintiff has not met her burden of proving "actual injury". The Court cannot agree. The accusation of forgery in this case constituted slander *per se*, that is, by its very nature it tended to injure Plaintiff's reputation. Title 14 of the Virgin Islands Code, Section 791, makes forgery a crime punishable by a fine of not more than Two Thousand ($2,000.00) Dollars or imprisonment for not more than ten (10) years, or both. It is irrelevant for the purposes of the *Restatement (Second) of Torts*, Section 571(a), that the facts of this case did not indeed constitute the crime of forgery. Comment c of Section 571 states, "It is not necessary that the charge be made in technical language. It is enough that the language used imputes to the other the criminal offense." Furthermore, ample testimony was given regarding plaintiff's emotional state subsequent to the confrontation with Etienne. Barnes testified that she was embarrassed in front of her co-workers and described the incident as one that "she could not forget". Moreover, several other witnesses testified that Barnes was crying and very upset by the accusation. The Court is unable to conclude as a matter of law that reasonable persons exercising their impartial judgment could not have reached the same verdict. Thus, it is the holding of this Court that there was sufficient evidence to sustain the jury verdict.

Defendants take further exception to the jury's finding that Barnes suffered emotional distress as a result of the incident. At the heart of this objection is the testimony concerning the number of work days Barnes missed due to this episode. Defendants point to the fact that Barnes's testimony at trial on this subject conflicted with her deposition testimony and claim, therefore, that she has failed to establish with sufficient certainty the issue of emotional distress.

In O'Neill v. Reading Company, 306 F.2d 204 (3d Cir. 1962), the court stated, "It is settled law that when a witness gives contradictory testimony it is the function of the jury, and not the court, to resolve the conflict." Id. at 205. The jury, hearing the testimony and judging the demeanor of the witnesses, found the in-court testimony of Barnes to be the most credible. The question for this Court, which it answers in the affirmative, becomes one of determining whether reasonable persons in the impartial exercise of their judgment could have reached the same conclusion. Standard Alliance Ind. v. Black Clawson Co., 587 F.2d 813 (6th Cir. 1977), cert.

denied, 441 U.S. 923 (1979).

II. Propriety of Jury Instructions

A. Instruction number 17 advised the jury as to the elements which must be established in order to maintain an action for defamation. In particular, the Defendant takes issue with the third element of the instruction which provides that, in order for the plaintiff to meet her burden, she must prove that the defamatory communication "tended to injure the reputation of the person". Defendant claims this instruction was misleading and insufficient. As stated previously, the accusation in this case constituted slander *per se*. See *Cohen* v. *Raedler*, Civil No. 1340/1978 at p.6, Territorial Court of the Virgin Islands, filed May 13, 1980. Although absent proof of actual injury plaintiff may not recover, actual injury is not limited to harm to plaintiff's reputation.

Emotional distress is among the types of harm which, if proved, will permit recovery by the plaintiff. The Restatement of Torts, Second, explains that "[t]he constitution does not require proof of impairment to reputation before damages for emotional distress can be recovered". *Restatement (Second) Torts*, Section 621, comment (b) (1977).

Moreover, even assuming, arguendo, that Defendants' contentions are correct, they would still not be entitled to the relief sought. As long as liability without fault was not imposed, the restriction imposed on courts in defamation actions by the Gertz Court, any error would be harmless.

Further instructions were given defining "actual injury" and explaining the quantum of proof necessary to establish such injury. The jury was advised to consider the instructions as a whole and not to single out any one instruction and disregard others. Thus, the taint, if any, of prior error was purged by these further instructions.

B. Defendants also claim that instruction number 25 was improper in that it submitted to the jury an issue, i.e. an accusation by Etienne that Barnes stole the money, on which there was no evidence. After reviewing the trial transcript the Court is satisfied that the evidence presented was sufficient, as a matter of law, to support this instruction. The record quite clearly reflects that the import of the communication was that the plaintiff had stolen the money. Barnes repeatedly testified that she had been accused of forgery and stealing. Thus, both the direct testimony and the import of the defamatory statement show that Etienne accused Barnes of stealing. This inference permeated the entire trial. Contrary to the Defendants' contention, this is not a case where no evidence was introduced regarding the accusation made.

III. Excessiveness of the verdict

Considering Defendants' next contention that the jury award was excessive, shocking and contrary to the weight of the evidence, the court begins from the premise that it must "indulge all presumptions in favor of validity of a verdict". Ragnar Benson, Inc. v. Kassab, 325 F.2d 591, 594 (3d Cir. 1963). The court can not agree with defendants that the award in this case was so excessive as to be unconscionable.

Ample testimony was given as to the emotional distress, anguish and embarrassment suffered by Barnes. This testimony raised an issue of credibility which the jury resolved in favor of the Plaintiff. Where, as here, the jury was required to judge the veracity of the witnesses and where the issues raised were "simple and easily comprehended by any intelligent layman", the court may not substitute its judgment for that of the jury. Lind v. Schenly Industries, Inc., 278 F.2d 79, 91 (3d Cir. 1960).

Where a new trial is sought on the grounds that the jury verdict was excessive, the motion will be granted only when the award is "monstrous". See Affolder v. N.Y.C. & St.

L.R. Co. 339 U.S. 96, 101 (1950). Plaintiff was able to introduce sufficient testimony regarding the emotional stress suffered by her upon which the jury could rely in making this award. Hence, where , as here, the jury's award is not "so inordinately large as obviously to exceed the maximum limit of reasonable range within which the jury may properly operate," the court will not set aside the considered judgment of the jury. Taylor v. Washington Terminal Company, 409 F.2d 145, 149 (D.C. Cir. 1969).

It is therefore the judgment of this Court that defendants' motion for judgment notwithstanding the verdict of in the alternative for a new trial must be DENIED.

DATED: July 7 , 1983.

Eileen R. Petersen
EILEEN R. PETERSEN
Judge