COMMONWEALTH OF MASSACHUSETTS

Hampden, ss.

Superior Court
C.A.No. 83-175

MICHAEL MURATORE, et al

v.

SPRINGFIELD SUGAR AND PRODUCTS COMPANY, et al

MEMORANDUM OF DECISION DENYING DEFENDANT'S MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND FOR A NEW TRIAL, ALLOWING DEFENDANT'S MOTION TO REDUCE THE VERDICT, AND DENYING DEFENDANT'S MOTION TO AMEND ITS ANSWER

This matter is presently before the Court on the motions of Springfield Sugar and Products Company (hereinafter "Sweet Life") for judgment notwithstanding the verdict pursuant to Mass. R. Civ. P. 50(b), for a new trial pursuant to Mass. R. Civ. P. 59; and for a reduction of the verdict. The case, alleging that Sweet Life was negligent in its failure to maintain its premises, located at 110 Avocado Street in Springfield, Massachusetts, in a reasonably safe condition for its patrons was tried before a jury. The jury returned its verdict for the plaintiffs on March 7, 1988. Sweet Life filed its motions under Mass. R. Civ. P. 50(b) and 59 on March 9, 1988. The motion to reduce the verdict was filed on the first day of the trial, February 29, 1988.

The jury could have found the following facts.

The Accident Site

The plaintiff Michael Muratore was injured as he attempted to enter a building owned and occupied by Sweet Life. The build-

ing, a single-story structure, was built in the 1970s and was surrounded by an asphalt-topped parking lot also owned by Sweet Life. The defendant is a large, wholesale grocery distributor doing business under the trade name of Sweet Life. At the time of the accident, September 9, 1982, the building at 110 Avocado Street, a combination warehouse/wholesale facility, was open to retailers on a cash-and-carry basis. The facility was open to retailers whose sales volume did not warrant direct trade deliveries from Sweet Life's warehouse.

Entrance to and exit from the building was by two doors in the front of the facility which faced the customer parking lot on Avocado Street. There was a nine-foot wide concrete walkway along the front of the building. The walkway was covered by a canopy extending from the building which was supported by steel girders spaced roughly twenty feet apart. The girders stood on the walkway approximately seven and one-half feet from the building. When built, each girder was protected by two bollards, concrete filled steel posts four to six inches in diameter, which were sunk into the ground and which were on either side and in front of each girder. By the date of the accident, many of these bollards apparently had been struck numerous times by vehicles in the parking rows closest to the building. The damage done to the bollards was sufficient to warrant the removal of the injured bollards as safety hazards by the store manager. Several of the bollards had been pushed backwards into the walkway. The removed

bollards were not replaced, and there was evidence that some of the girders themselves were struck by cars.

As stated, the customer parking area was covered with asphalt, and there were roughly eleven spaces in the front row abutting the walkway. Due to the nature of the business conducted at this facility, it was customary for patrons to back their vehicles into those marked spaces in order to load them with their purchases. The vehicles used tended to be vans, light trucks, station wagons and large passenger vehicles. While it was customary for drivers to back their vehicles up to the walkway, it was not uncommon for these vehicles to back slightly farther in, with their rear bumpers in line with the girders discussed earlier.

Other than the original bollards, there were no devices installed to prevent the encroachment of vehicles into the walkway. There were no wheel blocks or curbs along the walkway or parking lot.

The Accident

On September 9, 1982, as the plaintiff was on the walkway, he was struck by a vehicle operated by James G. Couchiaftis. Couchiaftis was 88 years of age at the time of the accident and was a long-time Sweet Life customer. The Couchiaftis vehicle accelerated in reverse from a stopped position. The rear bumper, prior to acceleration, had been in line with other vehicles parked in the front row. Muratore was struck by the vehicle and

pinned against the wall when he was approximately eighteen inches from an exit or entrance door. Muratore was pinned for some time while Couchiaftis continued to accelerate backwards. When Couchiaftis finally was able to get his car in a forward gear, he accelerated forward, striking several vehicles as he exited Sweet Life's parking lot, crossed a tree belt and went over a curb on the far side of the street.

Muratore's injuries were severe, necessitating the amputation of his right leg below the knee. However, due to the severe crushing injuries to his left leg, his right leg, on which he wears a prosthetic device, is considered his good leg. As a result of these injuries, Muratore has been unable to return to work and has sold his business--a convenience and "package" store which originally was owned by his mother but which he was in the process of purchasing.

Had Sweet Life installed wheel blocks and/or bollards and/or curbing, Muratore's injuries could have been prevented. The cost of installing such safety devices would have been less than five thousand dollars. Sweet Life should have foreseen the risk of an accident of this type and thereby acted to prevent its occurrence. Actually, Sweet Life had such devices at its executive parking lot in Suffield, Connecticut, less than twenty miles away.

The Jury Verdict

The jury returned a verdict for the plaintiffs, determining

that $5,000,000 would fairly compensate Michael Muratore. The jury also awarded $4000 to Lisa Muratore and $6000 to Laura Muratore, daughters of Michael Muratore, for loss of consortium.

Sweet Life's Motion for Judgment Notwithstanding the Verdict

In ruling on a motion for judgment notwithstanding the verdict, the standard to be applied is the same as that on a motion for directed verdict; that is, "[d]oes the evidence, construed against the moving party, justify a verdict against him?" D'Annolfo v. Stoneham Housing Authority, 375 Mass. 650,657 (1978) (citations omitted). "The weight of the evidence standard is not involved." Id.; see also, O'Shaughnessy v. Besse, 7 Mass. App. Ct. 727, 728-29 (1979).

Sweet Life first argues that the risk of harm to pedestrians in its walkway caused by encroaching vehicles was not foreseeable, and therefore it owed no duty to Mr. Muratore. In support of this argument, Sweet Life cites Glick v. Prince Italian Foods of Saugus, Inc., 25 Mass. App. Ct. 901 (1987), and Nicholson v. MGM Corp., 555 P2d 39 (Alaska 1976). "It is important to remember, however, that the precise manner in which the harm occurs does not have to be foreseen." Solimene v. B.Gravel & Co. K.G., 399 Mass. 790, 798 (1987). It is sufficient that the "general danger to which the plaintiff was exposed" was foreseeable. Young v. Atlantic Richfield, 400 Mass. 837 (1987). While it is arguably true that the severity of Muratore's injuries and the exact nature of his accident might be remote, the general propo-

sition that a pedestrian might be struck by an encroaching vehicle seems to be to be quite foreseeable.

The cases cited by Sweet Life support this position. In Glick, the plaintiff was injured when an out-of-control automobile left a highway, crossed the defendant's parking lot, and crashed through an exterior wall of the defendant's restaurant. On those facts, the court stated that "the defendant had no obligation or duty to construct an impenetrable barrier surrounding its restaurant to prevent errant automobiles from entering the building." Glick v. Prince Italian Foods of Saugus, Inc., 25 Mass. App. Ct. at 901-02. Clearly, the incident in Glick was not foreseeable. The chain of events in Nicholson v. MGM Corporation is similarly far-fetched. 555 P2d 39 (Alaska 1976). In that case the operator of a vehicle stopped at an intersection, claimed that his gas pedal stuck causing his truck to accelerate across a street into a parking lot. Once in the parking lot, the truck hit a parked car, in turn causing the car to hit the plaintiff who was on a sidewalk in front of the defendant's grocery store. Id. at 39-40. On these facts the Alaska Supreme Court denied liability. Both Glick and Nicholson are distinctly different from the present case. The general type of injury suffered by Muratore was clearly foreseeable.

Sweet Life next argues that no competent testimony was adduced at trial to establish that its failure to install wheelblocks caused Muratore's injuries. However, plaintiffs' experts

did testify to the effect that if appropriate barriers had been in place, Muratore would not have been struck by the Couchiaftis vehicle. Accordingly, it cannot be said, when construing the evidence in Muratore's favor, that the evidence did not justify a plaintiffs' verdict.

Sweet Life argues that Muratore failed to sustain his burden of proving Sweet Life's negligence, stating, first, that it did not design the facility. It is well settled that a landowner has a duty to maintain its "property in a reasonably safe condition in view of all of the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk." Morinsey v. Ellard, 363 Mass. 693, 708 (1973). This duty encompasses the duty to act reasonably to prevent harm caused by a third person. Mullins v. Pine Manor College, 398 Mass. 47, 54 (1983). As detailed earlier, the jury could have found that the type of accident that occurred was foreseeable. Accordingly, Sweet Life, pursuant to Morinsey v. Ellard, had a duty to protect Muratore from such accidents.

Sweet Life alternatively argues that it should be immune from liability stemming from negligent design of its facility pursuant to M.G.L. c.260, §2B, and for the first time moves to amend its answer to raise a defense based on that statute of repose. Without addressing the merits of Sweet Life's argument, I note that Sweet Life did not raise this assertion in its motion for a directed verdict. For that reason Sweet Life would not be

entitled to a judgment notwithstanding the verdict on this ground. [1] J.W. Smith & H.B. Zobel, Rules Practice, §50.14, at 210; see also, Deerskin Trading Post, Inc. v. Spencer Press, Inc., 398 Mass. 118, 125 (1986).

Sweet Life also argues that the evidence was insufficient as a matter of law to support the verdict because the accident was not foreseeable. As noted earlier, there was testimony that the girders and their protective bollards had been struck. There also was evidence to establish that bumpers of parking vehicles often encroached on the walkway. As implied earlier, this evidence combined with the nature of the business conducted at the facility supports the jury's finding of foreseeability. Sweet Life's argument is not persuasive. [2]

Based on the foregoing, Sweet Life's motion for judgment notwithstanding the verdict is denied.

Sweet Life's Motion For a New Trial

Sweet Life claims that a comment improperly made by plaintiffs' counsel in his closing argument caused the jurors to "depart from their roles as impartial fact finders." At the defendants' request, I gave a curative instruction which comprehensively admonished the jurors to decide the case objectively

---

[1] Because the amendment sought is both futile and untimely, the motion to amend must be and is denied.

[2] Sweet Life's last argument, regarding the minor plaintiffs' claims for loss of consortium, need not be reached in light of stipulations entered into regarding Sweet Life's motion to reduce the verdict. See discussion at page 12, infra.

and not to be swayed by emotionalism, bias or prejudice. In short, the jurors were told not to be subjective in their deliberation of this case. In light of the curative instruction, Sweet Life is not entitled to a new trial on the basis of plaintiffs' counsel's comments during closing argument. See Leone v. Doran, 363 Mass. 1 (1973).

Sweet Life next maintains that plaintiffs' cross-examination of a defendant's expert "unduly prejudiced the jury against that expert's testimony and against Sweet Life." The actions of plaintiffs' counsel did not go beyond the bounds of proper cross-examination and do not warrant the granting of Sweet Life's motion for a new trial.

Sweet Life next contends that it was prejudiced by the plaintiffs' late designation of expert witnesses. Sweet Life brought a pretrial motion to exclude the testimony of experts designated on the "eve of trial." That motion was denied. The defendant had notice that the plaintiffs had retained one expert on December 23, 1987, a full two months prior to trial. Additionally, given the nature of the allegations, the type of testimony to be elicited from an expert witness should have come as no surprise to the defendant. For the same reason, it should have been incumbent upon the defendant to have hired experts well in advance of trial. If it made an economic decision not to so do, it cannot now complain. Last, the expert testimony elicited at trial was not so complex that it could not be readily understood

by defense counsel, thereby enabling him to conduct a proper cross-examination. Defense counsel on order from the court was given the opportunity to interview the experts before each took the stand.

Sweet Life finally argues that the verdict was tainted and requires a new trial, arguing that the amount awarded, $5,000,000, was excessive, disproportionate, shocking to the conscience, and the result of bias and prejudice on the jury's part.

The issues presented in a motion for a new trial based on the ground of excessive damages was addressed by the Supreme Judicial Court in Bartley v. Phillips, 317 Mass. 35 (1944). In that case the Court stated that "[i]n principle, excessive or inadequate damages constitute one form of a verdict contrary to the weight of the evidence." Id. at 40. The Court went on to state that "a judge has no right to set aside a verdict merely because he himself would have assessed the damages in a different amount." Id.(citing cases). The Bartley Court set out what it termed a "fundamental test," stating that a motion, such as the one presently before the Court, "ought not to be granted unless on a survey of the whole case it appears to the judicial conscience and judgment that otherwise a miscarriage of justice will result." Id. at 41 (citations omitted).

The injuries to Muratore, in the present case, were severe. As a result of those injuries, he incurred medical expenses in excess of $100,000. His future medical expenses will be substan-

tial based on believable testimony. The amputation of his leg by no means marked the end of his need for medical treatment. He underwent a long and obviously arduous course of medical treatment before being able to be fitted with an artificial limb. Continued use of the artificial limb will necessitate further medical treatment. Additionally, he will have to be fitted with a new prosthetic device every two to three years for the remainder of his life. Such devices cost approximately $5500 presently, but their cost can be expected to increase over the coming years. Additionally, his amputated leg is now his good leg.

At the time of the accident, Muratore was working two jobs. His primary employment was in a family-owned convenience store which he expected to own when his mother reached the age of 65. He also worked part time in the construction industry. There was no evidence adduced at trial to establish that Muratore is currently able to work. In fact, his testimony was that he could not.

While the sum awarded to Muratore is arguably a high one, I am satisfied that the "jury could have reached, honestly and fairly, the award that they did based on the plaintiff's continuing pain and disability, [his further medical expenses] and the impairment of [his] earning capacity." Solimene v. B. Gravel & Co. K.G., 399 Mass. 790, 803 (1987). [3] Additionally, I note that

---

[3] "Special damages" (medicals past and future and lost earning capacity for a 35-year-old male) totaling $950,000 are not

the verdicts awarded to the minor plaintiffs on their loss of consortium claims were modest. Thus, it cannot be said that the jury acted out of bias or prejudice. The jury faced up to the evidence presented.

For these reasons, I decline to exercise my discretion and order either remittitur or a new trial. [4] Accordingly, Sweet Life's motion for a new trial is denied.

Sweet Life's Motion to Reduce the Verdict

Prior to trial Sweet Life moved to reduce the verdict by the amounts received by the plaintiffs from co-defendant Couchiaftis. Muratore received $20,000 from Couchiaftis' insurance coverage and each of his daughters received $10,000. Muratore also received $40,000 from his underinsured coverage. The parties have stipulated to a reduction of the verdicts awarded to each plaintiff respectively. Accordingly, the defendant's motion to reduce the verdict is allowed to the extent of the money received from Mr. Couchiaftis, not by his underinsured coverage. The verdict awarded to Michael Muratore shall be reduced by $20,000. The verdict awarded to Lisa Muratore shall be reduced by $4000.00. and the verdict awarded to Laura Muratore shall be reduced by $6000, each having received more than that amount.

---

difficult to reach.

[4] Since, in my view, the verdict awarded is "within the range of verdicts supported by the evidence," remittitur is not necessary. D'Annolfo v. Stoneham Housing Authority, 375 Mass.650,662 (1978).

ORDER

In view of the above, it is ordered that the DEFENDANT'S motions for judgment notwithstanding the verdict and for a new trial are DENIED. The DEFENDANT'S motion to reduce the verdict is allowed to the following extents:

The verdict in favor of Michael Muratore is reduced by $20,000.00.

The verdict in favor of Lisa Muratore is ordered reduced by $4000.00.

The verdict in favor of Laura Muratore is reduced by $6000.00.

The DEFENDANT'S motion to amend its answer is DENIED.

George C. Keady, Jr.
Justice of the Superior Court

Entered: April 11, 1988.