2019 WL 10301263 (Fla.Cir.Ct.) (Trial Order)
Circuit Court of Florida,
Eleventh Judicial Circuit.
Miami-Dade County

Christopher E. NEALY, Plaintiff,
v.
COSMIC CORP., Defendant.

No. 2014-016863 CA 01.
May 21, 2019.

Omnibus Order on Post-Trial Motions

Miguel M. de la O, Circuit Judge.

***1 THIS MATTER** came before the Court on the Defendant, Cosmic Corp.'s, Motion for Judgment Notwithstanding the Verdict/Directed Verdict, Motion for New Trial, Motion for Remittitur, and Motion to Strike. The Court has reviewed the various motions, the responses to the motions, heard argument of Counsel, presided over the trial upon which the jury's verdict was rendered, and is fully advised in the premises.

MOTION FOR DIRECTED VERDICT AND NEW TRIAL ON LIABILITY

The jury found that Cosmic Corp.'s negligence was the legal cause of Plaintiff, Christopher Nealy's ("Nealy"), loss, injury or damage. Cosmic Corp. moves this Court to either enter judgment notwithstanding the verdict, or to grant a directed verdict, because it asserts Nealy "did not carry his burden to prove that Defendant breached its duty to him and its other patrons to provide reasonable security based upon its knowledge of prior similar incidents."

"[T]o succeed on a claim of negligence, a plaintiff must establish the four elements of duty, breach, proximate causation and damages." *Limones v. School Dist.,* 161 So. 3d 384, 389 (Fla. 2015). "Generally, the proprietor of a place of public entertainment owes an invitee a duty to use due care to maintain the premises in a reasonably safe condition commensurate with the activities conducted thereon." *Holiday Inns, Inc. v. Shelburne*, 576 So. 2d 322, 325 (Fla. 4th DCA 1991), *disapproved on other grounds, Angrand v. Key,* 657 So. 2d 1146 (Fla. 1995). As a result, a proprietor has a duty to protect patrons from violent acts by other customers. "Although not an insurer of a patron's safety, the proprietor of a bar or saloon is bound to use every reasonable effort to maintain order among the patrons, employees, or those who come upon the premises and are likely to produce disorder to the injury or inconvenience of patrons lawfully in the place of business." *Id.*

This duty extends to protect against violent acts occurring both on and off of the defendant's business premises. "A duty of reasonable care may be extended beyond the business premises when it is reasonable for invitees to believe that the invitor controls premises adjacent to his own or where the invitor knows that his invitees use such adjacent premises in connection with the invitation." *Id.* at 329 (affirming denial of directed verdict for proprietor of bar arising out of "altercation between two groups of individuals who had been drinking at the Rodeo Bar … [where] the evidence shows that appellants knew their patrons customarily used adjacent premises for parking in order to patronize the Rodeo Bar.") *Id.* at 324-29.

To establish that a defendant has breached its duty, the plaintiff in a premises case arising out of a violent act committed by another patron must establish the existence of a dangerous condition. A "dangerous condition may be indicated if, according to past experience (i.e., reputation of the tavern), there is a likelihood of disorderly conduct by third persons in general which might endanger the safety of patrons or if security staffing is inadequate. These indicia are not exhaustive." *Hall v. Billy Jack's, Inc.*, 458 So. 2d 760, 762 (Fla. 1984). Nealy produced evidence of both the likelihood of disorderly conduct by third persons and insufficient security staffing.

***2** Nealy introduced evidence of prior violent altercations on and around the premises, evidence that patrons were allowed to enter the premises armed with weapons if they paid personnel working the front door, and other evidence that supports a finding that Cosmic Corp. d/b/a Coco's Nightclub fostered a culture of rowdiness and violence.

There also was evidence to support the jury's finding of a dangerous condition based on inadequate security staffing. For example, in response to interrogatory #22, published to the jury, Cosmic Corp. responded "None" to the following question: "Provide the name and contact information of anyone or any entity engage by Defendant to work as security during the hours of operation of the club within the last five (5) years."

Although Defendant contended at trial that it had in place a security plan, Nealy, who had been at the club on other occasions when violent acts occurred, rebutted Cosmic Corp.'s assertion. Another witness also testified that Cosmic Corp. did not follow its alleged security plan. Moreover, the jury was able to view video of the events in the club and determine for itself whether Cosmic Corp.'s executed its security plan, and whether it was reasonable and sufficient.

There also was evidence from which the jury could conclude that Cosmic Corp.'s breach of its duty of care was the proximate cause of Nealy being shot. Whether or not proximate causation exists is a question of fact, which depends on whether the defendant's breach of duty foreseeably and substantially contributed to the plaintiff's injuries. *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 502 (Fla. 1992). The Florida Supreme Court has held that a plaintiff must meet "the more likely than not standard of causation" as Florida courts "require proof that the negligence probably caused the plaintiff's injury." *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1018 (Fla. 1984). In a negligent security case arising out of a criminal attack, "[i]n order for a court to remove the case from the trier of fact and grant a directed verdict, there must only be one reasonable inference from the plaintiff's evidence." *Sanders v. ERP Operating Ltd. P'ship,* 157 So. 3d 273, 277 (Fla. 2015).

Where evidence is conflicting and "reasonable persons could differ as to whether the facts establish proximate causation—i.e., whether the specific injury was genuinely foreseeable or merely an improbable freak—then the resolution of the issue must be left to the fact finder. The judge is free to take the matter from the fact-finder only where the facts are unequivocal, such as where the evidence supports no more than a single reasonable inference." *50 State Sec. Serv. v. Giangrandi*, 132 So. 3d 1128, 1136 (Fla. 3d DCA 2013) (quoting *McCain v. Florida Power Corp.*, 593 So. 2d 500, 504 (Fla. 1992)).

The damage element of the negligence inquiry has been established by the fact that the Nealy sustained multiple gunshot wounds which would have been prevented, but for Cosmic Corp.'s failure to provide adequate security.

In light of the evidence presented to the jury, the Court finds that the Plaintiff's evidence established actionable negligence on the part of Cosmic Corp. Defendant's Motion for Judgment Notwithstanding the Verdict/Directed Verdict, and Motion for New Trial on liability, are both **DENIED**.

MOTION FOR DIRECTED VERDICT OR REMITTITUR ON ECONOMIC DAMAGES

***3** Cosmic Corp. also seeks a directed verdict or remittitur on Nealy's claims for economic damages for loss of earnings, loss of earning capacity, and future medical expenses.

A. FUTURE MEDICAL EXPENSES.

Florida law restricts recovery of future medical expenses to those expenses "reasonably certain" to be incurred. *Loftin v. Wilson*, 67 So. 2d 185, 188 (Fla. 1953). Therefore, "[i]t follows that a recovery of future medical expenses cannot be grounded on the mere 'possibility' that certain treatment 'might' be obtained in the future." *White v. Westlund*, 624 So. 2d 1148, 1150 (Fla. 4th DCA 1993). The evidence presented at trial was insufficient upon which to base the jury's award of future medical expenses, a point Nealy concedes.

The Defendant's motion for remittitur is **GRANTED** in the amount of $2,870,000, which constitutes the entire amount the jury awarded for future medical expenses.

B. PAST EARNINGS.

The jury's award of $1,000,000 for past lost earnings was supported by Nealy's trial testimony. The Court recognizes that Nealy's testimony was unsupported by any documentary evidence. Indeed, the Court was inclined to grant Cosmic Corp.'s motion for remittitur due to the wholesale absence of any corroboration of Nealy's financial testimony. However, the Court is constrained and bound by the Third District Court of Appeal's decision in *Maggolc, Inc. v. Roberson*, 116 So. 3d 556 (Fla. 3d DCA 2013).

> The question is whether the evidence described above, uncorroborated by any income tax returns (because he had filed none), bank records, receipt books, credit card slips, Social Security earnings history, client lists, appointment records, expenses, or other documents, is collectively sufficient to prove past lost earnings and loss of earning capacity with "reasonable certainty." *Auto-Owners Ins. Co. v. Tompkins,* 651 So.2d 89, 91 (Fla. 1995). Florida law has long specified that reasonable certainty as to the facts of injury and causation is more critical than reasonable certainty as to the computation of the resultant losses. *Twyman v. Roell,* 123 Fla. 2, 166 So. 215 (1936). Plainly[,] there was competent substantial evidence regarding the fact of Mr. Roberson's injury and the causal connection between the injury and its adverse effect on his vocation as a personal trainer.
>
> No Florida court has determined that a claim for an individual's lost past earnings must be supported by documentary evidence, or that the failure to file income tax returns for those earnings (at an annual level that clearly requires a return) precludes recovery. These issues are, as they were here, for the jury to weigh in their assessment of Mr. Roberson's credibility.

Maggolc, Inc. v. Roberson, 116 So. 3d 556, 558 (Fla. 3d DCA 2013).

Because the jury's award of $1 million for 359 weeks equates to a loss of $2,786 per week, which is supported by Nealy's testimony of his lost past earnings, Defendant's Motion for Judgment Notwithstanding the Verdict/Directed Verdict, Motion for New Trial, and Motion for Remittitur, insofar as directed to the lost past earnings claim, are all **DENIED**.

C. FUTURE EARNINGS AND REDUCTION TO PRESENT VALUE

Cosmic Corp. argues that the jury's award of future loss of earning capacity to Nealy should be vacated or a new trial granted because (1) there is no evidence to support the jury's award, and (2) the jury did not reduce the award to present money value as required by Florida law. The Court agrees.

***4** "Under Florida law, the only future damages available relative to income are damages for loss of earning capacity." *W.R. Grace & Co.-Conn. v. Pyke*, 661 So. 2d 1301, 1304 (Fla. 3d DCA 1995). Therefore, Nealy's argument that the jury's verdict is supported by the evidence regarding Nealy's past lost earnings is plainly wrong. As Florida courts have repeatedly held, "[t]he jury is not to be concerned with actual future loss of earnings, but with the loss of the power to earn." *Id. See Fla. Greyhound Lines, Inc. v. Jones*, 60 So. 2d 396, 398 (Fla. 1952); *Rasinski v. McCoy*, 227 So. 3d 201, 204 (Fla. 5th DCA 2017); *Truelove v. Blount*, 954 So. 2d 1284, 1288 (Fla. 2d DCA 2007); *Eagle Atl. Corp. v. Maglio*, 704 So. 2d 1104, 1105 (Fla. 4th DCA 1997) ("purpose in awarding damages for loss of any future earning capacity is to compensate a plaintiff for loss of capacity to earn income as opposed to actual loss of future earnings").

Nealy failed to introduce any testimony as to loss of earning capacity. His testimony that he could no longer work as a rapper is insufficient. Again, "Florida law does not recognize a claim for future loss of earnings." *Pyke*, at 1303-04.

Nealy's failure to introduce such testimony is fatal to his claim for future loss of earning capacity.

> In order to be awarded damages for loss of future earning capacity, a plaintiff must demonstrate a reasonable certainty of injury and "present evidence which will allow a jury to reasonably calculate lost earning capacity." [*Pyke*, at 1302]. Here, Maglio has failed to present any evidence upon which a jury would be able to reasonably calculate lost earning capacity. While there was evidence she was currently employed as a judicial assistant, there was no evidence as to how much money she made.

Eagle Atl Corp. v. Maglio, 704 So. 2d 1104, 1105 (Fla. 4th DCA 1997) (reversing jury award and remanding for remittitur or new trial). *See Volusia County v. Joynt*, 179 So. 3d 448, 451 (Fla. 5th DCA 2015) ("We find there was absolutely no testimony presented to indicate Joynt was completely disabled from further gainful employment as the result of her injuries or was unable to work to the same age she would have otherwise.").

Moreover, the close proximity of the amount of the future earnings award to the past lost earnings, makes it obvious that the jury did not reduce the award to present value.

> The trial court properly instructed the jury that an award of future loss of earning capacity damages must be reduced to present value. Section 768.77, Florida Statutes (1993). However, plaintiff failed to present evidence to guide the jury in reducing future damages to present money value; there was no testimony on any method to be used for reducing such future damages to present value. *See Walt Disney World v. Blalock*, 640 So. 2d 1156 (Fla. 5th DCA 1994). It is apparent from the amount of the award that the jury failed to follow the court's instructions.

Pyke, 661 So. 2d at 1304.

Nealy's reliance on *Delta Air Lines v. Ageloff*, 552 So. 2d 1089, 1092-93 (Fla. 1989), is misplaced, *Ageloff* concerned the proper calculation of net accumulations in a wrongful death case, not the calculation of the loss of future earning capacity.

Defendant's Motion for Remittitur as to loss of future earnings capacity is **GRANTED**. The award for loss of future earning capacity is reduced to zero.

REMITTITUR OF NON-ECONOMIC DAMAGES.

Juries have wide latitude in determining an award of non-economic damages in tort cases.... The party claiming an excessive verdict bears the burden to prove that the amount is not supported by the evidence or that the jury was influenced by matters beyond the bounds of the record." *Subaqueous Servs. v. Corbin*, 25 So. 3d 1260, 1268 (Fla. 1st DCA 2010).

***5** In light of the serious injuries Nealy suffered, the long period of rehabilitation, and the recurring medical issues which afflict him, the jury's award for non-economic damages does not shock the conscience of the Court, nor is it otherwise subject to remittitur. Defendant's Motion for Remittitur as to Noneconomic damages is **DENIED**.

MOTION TO STRIKE

Defendant's Motion to Strike is **DENIED**.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 05/30/19.

<<signature>>

MIGUEL M. DE LA O

CIRCUIT JUDGE

I No Further Judicial Action Required on THIS MOTION

CLERK TO RECLOSE CASE IF POST JUDGMENT

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed original order sent electronically to the Clerk of Courts for filing in the Court file.

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