

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWIN SIMMONS

v.

JACQUES GALIN

:
:
:
:
:
:
:

Civ No. 97-6151

O'NEILL, J.

JANUARY , 2002

MEMORANDUM

This civil action concerns the injuries that defendant, Jacques Galin, admittedly inflicted upon plaintiff, Edwin Simmons, during an automobile repossession that unfortunately escalated into a gun battle in a Philadelphia gas station during the early morning hours of October 4, 1995.¹ Plaintiff sues for battery and intentional infliction of emotional distress.² In accordance with Federal Rule of Civil Procedure 52(a), the following opinion will constitute my findings of fact and conclusions of law. I conclude that defendant is liable for battery but not liable for intentional infliction of emotional distress.

¹ Defendant twice has been tried in state court by bench trial and convicted for aggravated assault, two counts of simple assault, and two counts of reckless endangerment. Defendant's first conviction was overturned. After being retried he was sentenced to 11.5 to 23 months in prison.

² Plaintiff also alleges the intentional tort of assault and negligence on the part of defendant. Pennsylvania authority suggests that defendant would not have been justified in committing an assault to retake his property. See Commonwealth v. Concordia, 42 Berks 119, 121 (1949) (concluding that one is not justified in committing an assault to prevent the taking of personal property). However, because I find defendant liable for the intentional tort of battery and award compensatory damages, I need not consider the claims of assault or negligence.

I. BACKGROUND

In 1991, defendant's former fiancée, Rosita Conroy,³ purchased an automobile with a Mellon Bank⁴ loan co-signed by her mother, Maria Conroy,⁵ and secured by the car as collateral. In September, 1995, Maria learned Rosita had fallen behind on one or two payments and contacted Mellon to find out how much was due on the loan. On or before October 3, she told Rosita she had paid off the loan by check mailed September 28. Rosita had informed defendant that Maria had paid the overdue balance on the car loan. In fact, Maria did not send the check until the afternoon of October 4. In the meantime, in late September Mellon Bank asked plaintiff's employer D & D Adjustment, a repossession company, to repossess Rosita's car. See 13 Pa. Cons. Stat. Ann. § 9503(a) (West 1984) (giving creditor right to self-help in repossessing collateral upon default). On October 3, Mellon Bank supplied information to D & D which allowed it to make a duplicate key to the car.

At or about 4 am on the morning of October 4, 1995, plaintiff and his supervisor, David

³ Defendant and Rosita Conroy were living together on October 4, 1995. The couple never married and are now separated.

⁴ Mellon Bank Corporation and Mellon Bank, N.A. originally were co-defendants in this suit. Plaintiff asserted negligence, negligent misrepresentation, vicarious liability-peculiar risk, and vicarious liability- unreasonable risk of harm claims against them. On September 7, 2001, I granted Mellon's motion for summary judgment. See Simmons v. Galin, Civ. No. 97-6151, 2001 WL 1044904 (E.D. Pa. Sept. 7, 2001).

⁵ Rosita and Maria Conroy were also co-defendants in this suit. On August 23, 1999, I granted Maria Conroy's motion for judgment on the pleadings and dismissed her from this action. See Simmons v. Galin, Civ. No. 97-6151, 1999 WL 639843 (E.D.Pa. Aug. 23, 1999).

Hermes, attempted to repossess Rosita's car.⁶ Both plaintiff and Hermes were armed with licensed handguns. Plaintiff arrived at defendant's premises with Hermes in a truck. Hermes parked the truck and waited in a nearby gas station while plaintiff proceeded down an alley where the car was parked. Plaintiff used the newly minted key to enter the car, proceeded to back it out of the dead-end alley that was located behind defendant's premises, and pulled into the parking lot of the gas station near the alley.

At this time, defendant was in bed with his fiancée. He suddenly awoke to the sounds of a neighbor's barking dog. Defendant exited the bed and proceeded to a bathroom window to investigate what was causing the dog to bark. At this point, he saw the taillights of Rosita's car. Defendant retrieved his loaded handgun, which he was licensed to possess, from his dresser drawer. Without dressing, defendant quickly exited the building in the hopes of foiling what he thought was the theft of his fiancée's car. In his underwear, defendant raced around the block to find plaintiff in Rosita's car in the gas station and Hermes' truck in the road.

Defendant stood in front of Rosita's car, gun-in-hand, and shouted to plaintiff seated behind the wheel to exit the vehicle. Meanwhile, Hermes exited his truck armed with the repossession paperwork and his gun. Hermes shouted that the vehicle was being repossessed. When defendant turned around with gun-in-hand, Hermes took cover behind a large metal storage container in the gas station's parking lot.

⁶ In addition to considering the testimony of plaintiff and defendant at trial, upon agreement of the parties, I have considered the testimony of five other witnesses recorded at defendant's criminal trial: 1) David Hermes, Owner of D & D Adjustment and eye-witness to the events of October 4, 1995; 2) Mary Tiscornia, eye-witness to the events of October 4, 1995; 3) William Trenwith, investigating police officer; 4) Joseph Nicoletti, detective in the Philadelphia Police Department; 5) Karen Auerweck, Mobile Crime Technician.

After Hermes retreated behind the container, it is unclear precisely how the following events occurred.⁷ Plaintiff claims that defendant turned back toward the car and proceeded to fire a single shot through the windshield, striking the plaintiff in the hand and face. After being shot, plaintiff attempted to return fire but his gun jammed. Thereafter, plaintiff slumped down behind the dashboard to avoid being shot again. Still in gear, Rosita's car began to move forward, striking defendant. While lying face-down on the hood of the moving car, defendant continued to discharge his weapon downward through the shattered windshield and into plaintiff's body. Subsequently, Hermes emerged from behind the storage container and shot the defendant in the head, thereby incapacitating him. Hermes proceeded to enter the gas station and call 911.

Defendant claims that plaintiff rammed him with the car. While lying face-down on the hood of the moving car, defendant contends that he saw the muzzle of a gun aimed at through the windshield. Next, defendant was shot in the back of the head (presumably by Mr. Hermes). Fearing for his life, defendant then decided to fire his weapon through the windshield and into the plaintiff, still seated behind the wheel of the vehicle.

Miraculously, both plaintiff and defendant survived. Plaintiff sustained multiple gunshot wounds to his face, shoulder, chest, abdomen, and hand. Plaintiff has accrued over \$242,000 in medical bills stemming from the emergency services he received in October of 1995 and subsequent follow-up care and reconstructive surgeries he received in 1997 and 2000. In addition, plaintiff has suffered permanent disfigurement and now suffers from a gravelly voice as a result of the injuries defendant inflicted upon him.

⁷ The testimony of two eye-witnesses, Hermes and Tiscornia, support plaintiff's version of the facts.

Although it is disputed who fired first and exactly what happened after plaintiff and defendant faced-off in the gas station parking lot, defendant admits two facts critical to the legal analysis herein: 1) defendant pursued plaintiff after plaintiff had retreated from the ally behind defendant's premises; and 2) defendant was the first individual to introduce a deadly weapon into the confrontation by arriving on the scene gun-in-hand.

II. DISCUSSION

Galín, who represented himself at trial,⁸ implicitly invoked two possible justifications in defending against Simmons' claim of battery, defense of property and defense of self.

In exercising jurisdiction, I am obliged to apply the substantive law of Pennsylvania. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). If the Supreme Court of Pennsylvania has not addressed a precise issue I am required to predict how the Supreme Court would decide the issue, taking into consideration "relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand." Nationwide Mut. Ins. Co. v. Buffetta, 230 F.3d 634, 637 (3d. Cir. 2000) (citation omitted). "The opinions of intermediate state courts are 'not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court in the state would decide otherwise.'" Id. at 637, citing West v. AT&T Co., 311 U.S. 223, 227 (1940).

⁸ Mr. Galín testified with commendable candor about the events of October 4. Courteous to the Court, plaintiff, and plaintiff's counsel, he expressed great regret that the incident had occurred.

A. Battery

Defendant Galin is liable for battery. The Supreme Court of Pennsylvania defines battery as “harmful or offensive contact.” Dalrymple v. Brown, 701 A.2d 164, 170 (Pa. 1997); see also Levenson v. Souser, 557 A.2d 1081, 1088 (Pa. Super. 1989), recognizing that the elements of battery are 1) a harmful or offensive contact with a person, 2) resulting from an act intended to cause the plaintiff or a third person to suffer such a contact. Here, by deliberately aiming a gun at plaintiff and subsequently shooting him multiple times at close range, defendant’s actions clearly constituted a battery. The question remaining is whether defendant’s actions were justified.

1. Self-defense

Plaintiff asserts that he was justified in shooting Simmons because he was acting in self-defense. Pennsylvania has codified when and how deadly force may be used in the context of self-defense. See 18 Pa. Cons. Stat. Ann § 505(b)(2).⁹ “Under Pennsylvania law, a private citizen not in his dwelling or place of work may not use deadly force if he ‘knows he can avoid the necessity of using such force with complete safety by retreating.’” Lewis v. Mazurkiewicz, 915 F.2d 106, 112 n.3 (3d Cir. 1990), quoting 18 Pa. Cons. Stat. Ann § 505(b)(2)(ii). Moreover, the Supreme Court of Pennsylvania has recognized that the justification of self-defense is unavailable when the defendant was the party who first introduced a weapon into a confrontation. See Commonwealth v. Blackman, 285 A.2d 521, 523 (Pa. 1971) (“By appellant’s own account, he brought his gun into the affray before the victim had even shown a knife. Consequently, his

⁹ Although this statute establishes the right to self-defense in the criminal context, the Superior Court of Pennsylvania has recognized that “the law governing the right of self-defense in civil cases is much the same.” Kitay v. Halpern, 158 A.2d 309, 310 (Pa. Super. 1932).

testimony does not make out a valid claim of self-defense”).

Defendant admits that he pursued plaintiff leaving the area where the car had been parked and was the first to introduce a firearm into the confrontation. Defendant cannot justify the use of deadly force in self-defense because he pursued plaintiff and was the first to introduce a weapon by arriving on the scene with gun-in-hand.

2. Defense of Property

Defendant also asserts that he is not liable for the battery because he shot plaintiff in defense of property. Under Pennsylvania law, an individual can be justified in using force to protect his or her property. See 18 Pa. Cons. Stat. Ann. § 507(a)(West 1998).¹⁰ The severity of the force applied, however, is limited. See 18 Pa. Cons. Stat. Ann. § 507(c)(4) (West 1998). Section 507(c)(4) provides that the use of deadly force for the protection of property is limited to instances where 1) plaintiff has entered the defendant’s dwelling, 2) the defendant has no reason to believe that the entry was lawful, and 3) the defendant does not have reason to believe that anything less than deadly force would be adequate to terminate the entry.

¹⁰ Here also, a statute applicable in the criminal context is instructive in this civil trial. See Kitay, 158 A.2d at 310. Section 507(a) provides the following:

Use of force justifiable for the protection of property.- The use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary:

(1) to prevent or terminate an unlawful entry or other trespass upon land or a trespass against or the unlawful carrying away of tangible movable property, if such land or movable property is, or is believed by the actor to be, in his possession or in the possession of another person for whose protection he acts

Similarly, a dispossessed individual can use force upon and pursue an individual who has already taken his property as long as 1) the dispossessed individual believes that his property was unlawfully taken; and 2) the use of force is immediate or on fresh pursuit after dispossession. See 18 Pa. Cons. Stat. Ann. § 507(a)(2).

In a civil case, Hughs v. Babcock, 37 A.2d 551 (Pa 1944), overruled on other grounds by Kirkbride v. Lisbon Contractors, Inc., 555 A.2d 800 (1989), the Supreme Court of Pennsylvania recognized that under certain circumstances non-lethal force may be justified to evict an interloper from land and chattels.

The intentional infliction upon another of a harmful or offensive contact or other bodily harm by a means not intended to cause death or serious bodily harm is privileged for the purpose of preventing or terminating another's intrusion upon the actor's possession of land or chattels, if (a) the other's intrusion (i) is not privileged, or (ii) though privileged, the other intentionally or negligently causes the actor to believe his intrusion to be unprivileged, and (b) the actor reasonably believes that the other's intrusion can be prevented or terminated only by the immediate infliction of the harmful or offensive bodily contact, or other bodily harm, and (c) the means which the actor uses to prevent or terminate the intrusion are reasonable, and (d) the actor has first requested the other to desist from the intrusion and the other has disregarded the request

Hughs, 37 A.2d at 553, quoting Restatement of Torts, § 77. And in Commonwealth v. Emmons, 43 A.2d 568 (Pa. Super. 1945), the Superior Court of Pennsylvania held that an individual who in good faith believes his or her automobile is being stolen may not shoot the supposed thief in order to prevent the supposed larceny. Id. at 569. In Emmons, the Court concluded that the owner, who was behind on her car payments, was not justified in shooting a man lawfully repossessing her parked automobile. Id.

In the present case, defendant's use of deadly force was not justified. As set forth in 18 Pa. Cons. Stat. Ann. § 507(c)(4), the use of deadly force in protection of property is only justified when attempting to remove a trespasser from one's dwelling. Here, plaintiff never entered Galin's dwelling and was attempting to leave the scene when defendant pursued with his gun. Similarly, the Hughs decision authorizes only non-lethal force for the protection of property. Clearly defendant's firing of a gun does not meet this criterion. Finally, the factual circumstances

of this case mirror those of Emmons, where the Superior Court held that a good-faith belief that one's car is being stolen does not justify shooting at the supposed thief.

B. Intentional Infliction of Emotional Distress

Although Pennsylvania has not expressly recognized a cause of action for intentional infliction of emotional distress and, thus, has never formally adopted section 46 of the Restatement (Second) of Torts,¹¹ the Supreme Court has cited section 46 as setting forth the minimum elements necessary to sustain such a claim. Taylor v. Albert Einstein Med. Ctr., 754 A.2d 650, 652 (Pa. 2000). However, Pennsylvania law requires that the existence of alleged emotional distress must be supported by competent medical evidence. Kazatsky v. King David Mem'l. Park, 527 A.2d 988, 995 (Pa. 1987). In this action, plaintiff did not submit any expert medical testimony. Accordingly, he cannot prevail.

C. Damages

Having determined that defendant is liable for the intentional tort of battery, I must determine plaintiff's damages. I find that plaintiff should receive \$242,805.10 in compensation for the medical bills he incurred as a result of the defendant's actions. Additionally, I conclude that the plaintiff is entitled to \$1,000,000 in compensation for his past and future pain and

¹¹ Section 46 of the Restatement (Second) of Torts provide the following:

OUTRAGEOUS CONDUCT CAUSING SEVERE EMOTIONAL DISTRESS

- (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

suffering, and disfigurement.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWIN SIMMONS

v.

JACQUES GALIN

:
:
:
:
:
:
:
:
:

Civ No. 97-6151

ORDER

AND NOW, this day of January, 2002, upon consideration of plaintiff's and defendant's briefs, and the evidence adduced at trial and for the reasons set forth in the accompanying memorandum it is hereby ORDERED that judgment is entered in favor of plaintiff Edwin Simmons and against defendant Jacques Galin in the amount of \$1,242,805.10.

The complaint against Rosita Conroy is DISMISSED without prejudice.

Defendant is informed that he may take an appeal from the Order if he chooses to do so by filing a notice of appeal with the Clerk of the District Court (on a form provided by the Clerk) within 30 days from the date of this Order. If defendant cannot afford the filing fee he may request leave to proceed in forma pauperis. The Clerk's office is located on the second floor of the United States Courthouse.

THOMAS N. O'NEILL, JR., J.