No. 22093 -- Misty Hines, Diane Cline, Eleanor McQuain and Betty Boord v. Hills Department Stores, Inc., and Brian Park

Cleckley, Justice, concurring:

Normally, I would dissent in cases where this Court, in its appellate role, overrules a jury verdict. One of the risks of trial is an unpleasant verdict. In this case, after scanning the record closely, I am forced to concur with the majority's decision because after reviewing the evidence in the light most favorable to the plaintiffs, I believe no "reasonable trier of fact [could] have reached the decision below." Syllabus Point 1, in part, Mildred L.M. v. John O.F., ___ W. Va. ___, ___ S.E.2d ___ (No. 22037 12/8/94). However, there are two areas I would like to expand upon; and, for that reason, I write separately.

First, in light of the evidence that the plaintiffs admitted "conspiring" to purchase several of the tricycles knowing the scanner was incorrectly charging only $3.00 for the merchandise instead of the correct price of $19.97, it is surprising the plaintiffs did not consider themselves fortunate when the criminal charges were dismissed in magistrate court. Instead, they chose to pursue this civil claim against their employer. Frustra legis

auxilium quaerit qui in legem committit. (He vainly seeks the aid of the law who transgresses the law.)

Second, I emphatically disagree with the tendency of this Court in the past to take the issue of whether certain conduct is in fact outrageous from the jury. See Dzinglski v. Weirton Steel Corp. 191 W. Va. 278, 445 S.E.2d 219 (1994); Keyes v. Keyes, 182 W. Va. 802, 392 S.E.2d 693 (1990): Kanawha Valley Power Co. v. Justice, 181 W. Va. 509, 383 S.E.2d 313 (1989). The role of both the trial court and appellate court is limited to determining whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. See Courtney v. Courtney v. Courtney, 186 W. Va. 597, 413 S.E.2d 418 (1991), rev'd on other grounds, Courtney v. Courtney, 190 W. Va. 126, 437 S.E.2d 436 (1993). If reasonable persons could differ on the issue, the question is one for the jury. What, too often, is overlooked by many of this Court's opinions in this area is the distinct difference between determining whether conduct may reasonably be considered outrageous, a legal question, and whether conduct is in fact outrageous, a question for jury determination.

The trial court must first determine whether Hills Department Store's actions were so extreme and outrageous to allow

recovery. I recognize that the plaintiffs have a difficult burden both as to the law and as to the facts. The majority correctly recognizes that the tort of intentional infliction of emotional distress, which is based on "outrageous conduct," requires a strong showing of behavior that goes "beyond all possible bounds of decency[.]" Restatement (Second) of Torts § 46 at 71-73 (1965). Thus, the claim of "outrage" is raised only by such "obnoxious conduct utterly intolerable in a civilized society." See Bell v. Dixie Furniture Co. Inc., 285 S.C. 263, 329 S.E.2d 431, 433 (1985).

The four elements of the tort can be summarized as: (1) conduct by the defendant which is atrocious, utterly intolerable in a civilized community, and so extreme and outrageous as to exceed all possible bounds of decency; (2) the defendant acted with intent to inflict emotional distress or acted recklessly when it was certain or substantially certain such distress would result from his conduct; (3) the actions of the defendant caused the plaintiff to suffer emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

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[1]Section 46 of the Restatement (Second) Of Torts suggests limiting the scope of the tort based on the following factors: (1) an emphasis on extreme, outrageous, atrocious, and utterly intolerable conduct; (2) abusive conduct by a defendant in actual or apparent authority over a plaintiff or with power to affect the plaintiff's interest; and (3) conduct by a defendant with knowledge

Most courts have focused on three common factors that are generally present when the tort has been found: (1) a preexisting legal relationship between the parties, including an employer-employee relationship; (2) conduct by the defendant involving excessive self-help in asserting a legal right or avoiding a legal obligation flowing out of the relationship or coercive and oppressive abuse of an employee by the employer; and (3) when the defendant calculatedly inflicted suffering or heedlessly and contemporaneously disregarded the plaintiff's present emotional suffering either to force the plaintiff to accede to the defendant's wishes or to punish the plaintiff for prior failure to comply.

Under this standard, mere disappointment or wounded feelings do not meet the threshold. It is especially important in employment termination situations, such as we have here, that there be some evidence of hostile or abusive encounters or coercive or oppressive abuse with respect to the termination of an employment relationship. Clearly, not all conduct involving personal interaction and causing emotional distress in employment termination cases may serve as the basis for an action alleging intentional

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that a plaintiff is peculiarly susceptible to emotional distress.

infliction of emotional distress. See Barber v. Whirlpool Corporation, 34 F.3d 1268 (4th Cir. 1994).

It was neither extreme nor outrageous that Hills Department Store terminated the plaintiffs' employment for "ripping off" their employer. The plaintiffs allege no violent acts, no yelling, no loud voices, and no public humiliation during the termination. In sum, the plaintiffs' allegations simply do not meet the initial threshold. Had there been conflicting evidence on this point below, I would not vote to disturb the jury's resolution of the issue. As the majority notes, however, there was no evidence the employer behaved any differently than most employers, given the actions of the plaintiffs. Thus, I concur.