

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

SYLVESTER LOGAN,

Plaintiff-Appellee,

Vs.

HOWARD RICHARDS,

Defendant-Appellant,

FROM THE CIRCUIT COURT
OF SHELBY COUNTY, No. 38395
THE HONORABLE D' ARMY
BAILEY, JUDGE
C.A. No. 02A01-9510-CV-00217
MODIFIED

Jimmie McIntyre of Memphis
Richard F. Vaughn of Memphis
For Appellant

R. Linley Richter of Memphis
For Appellee

MEMORANDUM OPINION¹

CRAWFORD, J.

Defendant, Howard Richards, appeals from the judgment of the trial court, sitting without a jury, that awarded damages to plaintiff, Sylvester Logan.

On the morning of April 29, 1990, plaintiff was inside the Westwood Lounge located at 4460 South Third Street in Memphis, Tennessee. Plaintiff owned and operated the lounge on property he leased from defendant. On this particular Sunday morning, patrons of a nearby flea market were using parking spaces in the parking lot adjacent to the lounge. From inside the lounge, plaintiff noticed someone drive into the parking lot and park in a "no parking" zone. Plaintiff requested that the person move the car to another area of the parking lot. Defendant, the owner of this property, was apparently upset that the plaintiff requested that the person move the car, and an argument ensued between the two. The parties' versions of the facts differ at this point.

Plaintiff testified that following the argument, he turned around and began to walk back into the lounge when he heard gunfire. The plaintiff testified that he began running in a "zig-zag" fashion toward the door of the lounge and that when he entered the lounge, he discovered that he had been shot in the leg.

¹Rule 10 (Court of Appeals). Memorandum Opinion. -- (b) The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in a subsequent unrelated case.

FILED

September 13, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

Defendant on the other hand, testified that following the argument, the plaintiff knocked him to the ground, hit him, and threatened to kill him. Defendant asserted that he shot plaintiff in self-defense after plaintiff attempted to draw his (plaintiff's) gun from his shoulder holster. Plaintiff, however, denied that he was carrying a gun at the time he was shot. Plaintiff admitted that he owned a gun and routinely carried the gun to the lounge, but he contended that the gun was in the lounge at the time of the shooting.

Following the shooting, defendant drove to the police station and informed the police of the shooting. Plaintiff remained at the lounge until paramedics arrived. The paramedics treated the plaintiff by wrapping gauze around his leg. Later that day, the plaintiff went to Methodist Hospital at which time the gauze was removed, the leg was cleaned and x-rayed, and the plaintiff was given a tetanus shot and a prescription. On May 7, 1990, the plaintiff was examined by Dr. Max Foner, a private physician. Dr. Foner examined the plaintiff's leg and found that the plaintiff's movement in his foot and his "neurological . . . workup" was normal and the movement of his knee was "almost normal." There was no bone or nerve damage, because the bullet entered and exited the soft tissue in the plaintiff's leg. After examining the plaintiff, Dr. Foner referred plaintiff to an orthopedist. Thereafter, the plaintiff was examined on two occasions by an orthopedic surgeon at the Office of Bone and Joint Surgery. The only treatment plaintiff received was three physical therapy sessions for his leg. The plaintiff's total medical expenses were \$718.63.

On April 29, 1991, plaintiff filed a complaint against defendant in the Circuit Court for Shelby County, alleging that defendant was liable for intentional assault and battery and intentional infliction of emotional distress. The complaint sought both compensatory and punitive damages. On September 6, 1991, defendant filed an answer in which he denied the material allegations of the complaint and asserted that he shot plaintiff in self-defense. At the conclusion of a non-jury trial held on November 21, 1994, the trial court ruled that plaintiff was entitled to \$40,000 compensatory damages, but no punitive damages. On May 9, 1995, the trial court entered judgment for plaintiff against defendant for \$40,000 compensatory damages. Defendant has appealed, and the only issue for review is whether the judgement is excessive.

Since this case was tried by the court sitting without a jury, we review the case *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court.

Unless the evidence preponderates against the findings, we must affirm, absent error of law. T.R.A.P. 13(d). In *Smith v. Bullington*, 499 S.W.2d 649 (Tenn. App. 1973), this Court noted that the review by this Court of the amount of a non-jury judgment for damages was governed by then T.C.A. § 27-303, which has been supplanted by T.R.A.P. 13(d).

The record establishes that plaintiff's medical expenses total \$718.63, and there is no other proof in the record of any monetary losses occasioned by his injury. Plaintiff's injury was not serious enough at the time of the incident to be taken to the hospital by the ambulance personnel, but he went to the emergency room some hours later where he was treated with a tetanus shot and dressing of his wound. Subsequently, he went to his regular physician, Dr. Foner, and saw him only on two occasions where little or no treatment was rendered. He was referred for examination to an orthopedic surgeon, and the only treatment received in that office was three physical therapy sessions. There is no medical proof that plaintiff sustained any permanent injury, and the only testimony concerning the residual effect of his injury was plaintiff's testimony that he sometimes experiences pain and discomfort in his leg and occasionally has difficulty getting on his knees when he works as a brick mason. Plaintiff alluded to emotional distress that manifests itself primarily by a fear of being shot. He testified that he gave up his nightclub because of this fear but offered no proof of any economic loss related to the nightclub. There is simply no proof that plaintiff lost any time from his employment or had any decrease in earning capacity, nor is there any proof from any other lay witness to substantiate any pain, suffering, or discomfort occasioned by the injuries. The plaintiff suffered minimal injuries from the gun shot, and his injuries had substantially healed approximately eight days after the shooting. Moreover, although plaintiff testified that he had some emotional distress, it was quite significant that at trial plaintiff could not remember which leg was hurt. When asked to exhibit the scar, plaintiff pointed out a place on his right leg when in fact the injury was to his left leg. Considering the very meager testimony concerning plaintiff's injury and the residual effect thereof, we believe that the \$40,000 compensatory damage award is excessive. We consider the upper range of recovery for the injury, physical and emotional, sustained in this case to be \$25,000.

Accordingly, the judgment of the trial court is modified to award compensatory damages to plaintiff in the amount of \$25,000. Costs of the appeal are assessed one-half against appellant

and one-half against appellee.

**W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.**

CONCUR:

ALAN E. HIGHERS, JUDGE

HOLLY KIRBY LILLARD, JUDGE