IN THE SUPREME COURT OF THE STATE OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 75,181

WILLIAM F. SCOTT,

Petitioner,

vs.

OTIS ELEVATOR COMPANY,

Respondent.
_____/

FILED
SID J. WHITE
MAR 5 1990
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By _____

BRIEF OF RESPONDENT ON THE MERITS

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CITATIONS OF AUTHORITY

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PREFACE

This case is before this Court on a certified question. Petitioner was the Plaintiff/Employee in the trial court and Respondent was the Defendant/Employer. Herein the parties will be referred to as they stood in the lower court, or by proper name. The following symbol will be used:

(A) - Respondent's Appendix

(R) - Record-on-Appeal

STATEMENT OF THE CASE

Scott sued his Employer, Otis Elevator Company (hereinafter "Otis"), claiming he was wrongfully discharged for filing a workers' compensation claim. Otis claimed that Scott had been rightfully discharged for assaulting a fellow construction worker with a gun (R692,727).

The jury returned a verdict in favor of Scott and against Otis and assessed Scott's past lost wages at $100,000, and his future lost wages at $200,000 (R591-92). At the hearing on Otis' Motion for New Trial, the trial court acknowledged that it disagreed with the jury's verdict on both liability and damages (R653). Notwithstanding, the court denied Otis' post-trial motions (R833-35,853-94,898), and entered judgment against Otis pursuant to the jury verdict (R831).

Otis appealed to the Fourth District Court of Appeal, and Scott cross-appealed. Otis raised ***six*** issues. The Fourth District reversed the judgment against Otis based upon one of those issues, the statute of limitations, finding it unnecessary to reach the other issues raised by Otis on appeal (A1-3). Upon a certified question, this Court found that Scott had timely filed his claim within the four year statute of limitations, which it found applied to wrongful discharge cases. Accordingly, this Court quashed

the Fourth District's decision which had held that the two year statute of limitations applied to Scott's lawsuit, and remanded the case to the Fourth District for consideration of all the other issues raised before that court (A4-5).

The Fourth District subsequently rendered its second decision in this case. The court concluded that Otis was not entitled to a directed verdict on liability notwithstanding Scott's "weak evidence" (A7). However, the court found that a new trial was required because the trial court had erred in excluding the testimony of one of Otis' witnesses, Willie James Ferguson (A8). The court also found that Otis was entitled to a directed verdict as to the $200,000 award for lost future wages because he had failed to establish that that loss was the result of the wrongful discharge. The court declined to grant a directed verdict as to the award for past lost wages because Otis had failed to seek a directed verdict on that basis below (A7).

As to Scott's cross-appeal, the Fourth District held that the trial court had not erred in failing to award Scott prejudgment interest, because he had never requested it of the trial court, even post-trial (A8). Finally, the court ruled that the trial court had not erred in refusing to instruct the jury on mental pain and suffering (A8). The Fourth District subsequently denied Scott's Motions for Rehearing and Rehearing En Banc, but certified the issue to this Court of whether damages for emotional distress are available in a wrongful discharge case brought under §440.205.

STATEMENT OF THE FACTS

Scott had worked for Otis Elevator for 19 1/2 years as an elevator mechanic/foreman (R229). On September 19, 1980, the police were called to Otis' work site (Burdines Galleria) by another workman who said Scott had assaulted him with a gun. Scott denied knowledge of the incident (R387). The police could not find a gun on the premises, but found bullet casings on the floorboard of Scott's truck, and a "clip" in the glove compartment that fit the type weapon the victim had described (R388). The police handcuffed Scott and took him in a patrol car to the police station, where he was arrested (R389). Scott was subsequently prosecuted for the assault (R392). He pled nolo contendere to the charge (R415).

As a result of this incident, the Vice President of Burdines told Otis not to send Scott to work on any of their jobs in the future (R316,369-71). When Scott returned to work the Monday following his arrest, September 22, 1980, his supervisor, Mitchell, discussed the gun incident with Scott, and told him to take a few weeks off without pay (R257,312-14). After investigating the incident, on September 25, 1980, Scott was advised by Mitchell that his employment was being terminated because of the assault incident and because of the complaints of the Burdines' people (R319,321). Scott's personnel file indicated he was terminated because of "customer complaints, absenteeism, tardiness" (R127).

Scott did not file a grievance contesting his discharge under the grievance procedure provided for in the collective bargaining agreement between the union and Otis (R339). In fact, he never complained to Otis about his discharge. The first time Otis knew that Scott was claiming that he had been wrongfully discharged was when Scott sued Otis four years later in September 1984 (R673-75).

In his lawsuit, Scott contended for the first time that he had been fired because he filed a workers' compensation claim. The evidence showed that in fact the workers' compensation claim was filed October 17, **1980,** a month after Scott's employment was terminated (R326). Scott claimed, however, that he had actually injured his knee before he was terminated, on September 12, **1980,** when he had fallen on some debris on the job site (R253-505), and that Otis had been aware of that fact. Yet Scott's own testimony would not support a conclusion that Otis had terminated him because it anticipated he would file a workers' compensation claim. Scott admitted he had not even reported the fall to Otis when it occurred (R273). Rather, he did so the following week when his supervisor, Mitchell, made a routine visit to the job site (R501). Scott happened to mention that he had fallen and "reinjured" his leg (R124,273,253). The evidence showed that ten or so years before, Scott had broken his leg in a non-work related accident, while he was playing baseball (R266). This had resulted in a 25% disability, but it had never prevented Scott from performing his job as a mechanic/foreman. Notwithstanding, over the years Scott had had temporary flare-ups of the old leg injury and Scott's supervisor, Mitchell, was aware of that problem (R125,507).

Mitchell acknowledged that Scott mentioned to him that he had fallen on some debris (R527). But Mitchell testified that Scott simply indicated he had aggravated his old non-work related injury (R527). When Mitchell asked Scott if he wanted to fill out an accident report, Scott had said "no," indicating that this was just a "recurring thing" and that he was going to be all right (R505-06).

Scott admitted that Mitchell asked whether he wanted an accident report filled out (R275), and that he had chosen not to fill one out (R275). He also

admitted that he had not mentioned to Mitchell that he wanted to go to a doctor or that he intended to file a workers' compensation claim (R275). Scott likewise admitted that he had told Mitchell he did not think the fall would prevent him from working (R274), and the matter was dropped. During Scott's final month at work, neither the fall nor any resulting injury was ever mentioned again (R507-08). A month after Scott was terminated by Otis, almost as an afterthought, Scott filed a notice of injury with Otis' workers' compensation carrier (R326-27). He subsequently began receiving workers' compensation benefits, which he was still receiving at the time of trial (R9).

The issue in this lawsuit was whether Otis wrongfully discharged Scott, contrary to 1440.205 Fla. Stat., for filing a workers' compensation claim. Mitchell testified that Scott was terminated because of the Burdines' arrest incident (R367). Mitchell denied that Scott's injury had anything to do with his termination. In fact, by Scott's own testimony, Mitchell had been left with the impression that Scott was all right after the fall. He had no reason to believe that Scott might file a workers' compensation claim (R133,519). And it was undisputed that Otis' District Manager, who was involved with Mitchell in making the decision to terminate Scott, had never even known that Scott had slipped on some debris at the job site (R371).

Scott's own testimony did not support his claim that he was fired because of his injury. He testified that after his arrest, Mitchell told him that Burdines did not want him back on the job site, and that he should take some time off because he needed it (R312-14,316,327-28). Scott testified that he "concluded" that he was "probably" being told this because of his knee injury (R278). When Scott was subsequently informed that he was being terminated, he admitted that Mitchell told him it was because of the arrest

incident and because Burdines did not want him back on the job site (R319,321). Notwithstanding, Scott testified that he felt his accident "had a bearing on it" (R329). Scott had no facts to back up this "feeling", and simply testified he thought it was "implied" (R319,329-30).

The following is in response to specific statements contained in Scott's Statement of the Facts. Scott states that the investigating officer did not find any bullets matching the rifle that he had supposedly used in the assault. In fact, the police found bullet casings on the floor of Scott's vehicle, and a clip in his glove compartment that fit the type weapon the victim had described (R388-89).

Scott states that he tried to contact Mitchell on the day he was injured but Mitchell was out of the office and that he spoke to him about the injury the following week when Mitchell visited the job site. Mitchell's testimony was that this occurred on a routine visit (R505), and not because he was visiting the job site as a result of Scott's injury.

Scott states in his brief that on the day he was terminated he had given Mitchell a form to fill out for disability insurance. Scott implies that this put Otis on notice that he was badly injured, which had resulted in his termination. In fact, Scott's own testimony indicated that he gave the disability form to Mitchell <u>after</u> his termination. This is because Scott testified that his doctor filled the form out for him (R351). It is undisputed that Scott did not see a doctor until <u>after</u> his termination. The form that Scott gave to Mitchell on the day he was terminated was an entirely different form and had nothing to do with disability (R525). Mitchell testified that the form he was presented with on that day was one pertaining to providing Scott with unemployment during the period of time Scott thought that he was going to be out of work for several weeks (R525). After the assault incident, Scott

had been told to take several weeks off without pay (R257,312-14). During that time period, as a result of Otis' investigation of the assault incident, a decision was made to terminate Scott. It was during this period of time when Scott was off work temporarily, prior to being terminated, that he stopped by to see Mitchell and asked him to sign the unemployment form so that he could get assistance in paying his house payment while he was out of work (R525). It was at that point that Mitchell told Scott that a decision had been made to terminate him (R529).

Scott confuses the disability form and the unemployment form as if to make it appear that on the day he was fired he notified Mitchell that he was applying for disability insurance. That is simply not the evidence.

Throughout his Statement of Facts, Scott states that although Otis claimed he was fired because of customer complaints, there was no documentation in his personnel file of customer complaints, only a notation on his termination notice that that was why he was being fired. Mitchell testified that up until 1979 they kept no personnel files on employees whatsoever (R521). In 1980 when Scott was terminated, while personnel files were kept, Otis did not have a personnel office or a designated person in charge of keeping personnel files (R258-29). That responsibility was shared by Mitchell, the district manager and their secretary (R529). However, documentation or no documentation, it was not disputed that Scott was arrested for assaulting a co-employee with a gun on Otis' job site, that he pled nolo contendere to the charges arising out of that incident, and that Burdines had insisted that Scott not be allowed back on the job site.

Scott discusses incidents of tardiness and customer complaints which Mitchell had knowledge of in addition to the gun incident. Scott goes to great lengths to show that those incidents were insufficient to allow Otis to

terminate him. Whether they were or were not is irrelevant. Scott did not sue Otis for firing him for these other incidents, claiming they constituted an insufficient reason to terminate him. If that had been the case, Scott could have filed a grievance contesting his discharge under the grievance procedure provided for in the collective bargaining agreement. Rather, Scott sued Otis claiming that he was fired because he filed a workers' compensation claim.

Scott argues that Mitchell was aware that state law requires every work-related accident, no matter how slight, to be reported to the State within 10 days. However, Mitchell was also aware of the fact that Scott had an old leg injury and that he had had flare-ups with that old leg problem occasionally (R125). This was not the first time that Scott's leg had bothered him over the years (R507). And Scott admitted that Mitchell had asked whether this incident was one that necessitated filling out an accident report, and Scott told him it was not (R275). Nothing else was ever mentioned by Scott about this injury until a month after he was terminated when he filed a workers' compensation claim.

Scott states that over the years Burdines had requested that he work on all their jobs. Regardless, it is undisputed that after this assault incident, Burdines requested that Scott not be sent back to their jobs in the future (R316,369-71).

Scott refers to the fact that after he received medical treatment and was released from the doctor's care to return to work, he called Otis regarding work, but he was told they had no position available. In Scott's brief he makes it appear that this all occurred before his termination. In fact, all of this occurred long after his termination. After being terminated with cause, Otis obviously had no responsibility to rehire Scott once he recuperated from his knee injury.

Scott states that he did not see a doctor or file a compensation claim when he was first injured because he knew Otis' attitude about injuries and "did not want to be a party to it". The evidence showed that this vague statement merely referred to Otis' legitimate attempts as an employer to try to get its workmen to be more careful on the job. While Scott testified that the workmen were "always told to hold the accidents down" (R265), he admitted that it was normal for any employer to want as few accidents as possible (R264). He also admitted that Otis' emphasis was on the fact that they should be careful on the job, work safely and maintain a safe working area (R264).

Scott claimed that at some point (he could not say whether this occurred years earlier) Otis had had a "rash of accidents" (R252), which had resulted in Otis making the workers meet every Friday morning for a safety meeting (R252). That is when Scott claims Mitchell told them that the next workman who got injured was going to lose a week's work. Scott admitted he did not feel Mitchell was saying anything that should not be said by an employer under the circumstances (R264). Scott had no idea when this safety meeting had occurred and admitted that it could have been years before his accident (R265).

Scott had no criticism of Mitchell's wanting to hold down accidents on the job. Importantly, Scott never claimed that Mitchell had told the workmen that if they filed a workers' compensation claim they would be fired. He simply claimed Mitchell said if they got injured they would lose a week's work, obviously in an attempt to try to get the workmen to be more careful. Scott produced no evidence that Otis had, in fact, ever made a workman lose a week's work because of an injury, much less that Otis had terminated a workman as a result. Moreover, Scott did not relate Mitchell's statement

about losing a week's work to his own firing because, of course, Scott was terminated, not laid off for a week, and his termination occurred a month before he filed a workers' compensation claim.

Scott states in his brief that he testified that he "felt" his accident had a bearing on his termination but, of course, he could substantiate this feeling with no evidence of any sort. Scott also refers to his trial testimony that he believed the Otis employee who filled out his accident report was fired. In point of fact, this was simply more of Scott's speculation and conjecture since he prefaced this so-called belief with "I believe, but I'm not sure, I cannot substantiate with fact" (R330).

Scott concludes his Statement of the Facts by once again misstating the evidence as to the different "forms" presented to Mitchell. Contrary to Scott's contention, Mitchell never admitted that on the day Scott was terminated, Scott had presented him with a disability insurance form. In fact, Mitchell testified to the contrary (R525). He testified that Scott presented him with some kind of unemployment form to provide him with house payments while he was out of work for two weeks, not a disability form (R525). Scott's own testimony made it clear that it was only after he was under a doctor's care (which occurred after his termination) that he later obtained a disability form which he asked Mitchell to fill out (R351). It is undisputed that Scott only started seeing a doctor for his knee injury after he filed the workers' compensation claim on October 22, 1980 and that was a month after he was terminated. Accordingly, pursuant to Scott's own testimony, the disability form came about only after his termination, and therefore could not have been the cause of his termination, as he now implies.

Much of what is discussed in Scott's Statement of the Facts simply has no bearing on the issues in this lawsuit. Importantly, Scott does not demonstrate anywhere in his Statement of the Facts that he ever presented any evidence or testimony to support his claim that he was fired because of the injury he sustained in September 1980. He admitted that Mitchell told him he was being fired because of the gun incident. He admitted that at the time he was terminated he had not missed a day of work because of his leg injury, nor had he advised Mitchell that he needed medical care, nor that he intended to file a workers' compensation claim. In fact, he filed a claim one month after his termination, and there was no evidence presented even by Scott that Otis knew that a workers' compensation claim was imminent. In fact, evidence was to the contrary. All the evidence demonstrated Otis had no reason to believe Scott was going to file a claim and, therefore, his termination could not have been in anticipation of such a claim.

Scott's case was nothing more than unsupported, and unjustified speculation on his part. He simply testified that when he was fired he concluded it was "probably" because of his knee injury (R278) and that he "felt" the injury had a bearing on it (R329). Scott has cited to no facts to create an issue in this regard except his sheer speculation and guesswork which did not rise to the level of creating an issue of fact in this regard.

POINTS ON APPEAL

POINT I

(CERTIFIED QUESTION)

WHETHER A PLAINTIFF **IS** ENTITLED TO RECOVER DAMAGES FOR EMOTIONAL DISTRESS IN A WRONGFUL DISCHARGE CASE UNDER §440.205.

POINT II

WHETHER THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF WILLIE FERGUSON.

POINT III

(RAISED BY THE EMPLOYEE)

OTIS WAS ENTITLED TO A DIRECTED VERDICT ON SCOTT'S CLAIM FOR FUTURE LOST WAGES BECAUSE HE FAILED TO PROVE THEY RESULTED FROM THE WRONGFUL DISCHARGE.

POINT IV

(RAISED BY THE EMPLOYEE)

SCOTT WAS NOT ENTITLED TO PREJUDGMENT INTEREST BECAUSE HE NEVER ASKED THE TRIAL COURT TO AWARD IT TO HIM.

POINT V

(RAISED BY THE EMPLOYER)

OTIS WAS ENTITLED TO A DIRECTED VERDICT SINCE THERE WAS NO WRONGFUL DISCHARGE AS A MATTER OF LAW.

POINT VI

(RAISED BY THE EMPLOYER)

OTIS WAS ENTITLED TO A JUDGMENT IN ITS FAVOR ON THE $100,000 AWARD FOR PAST LOST WAGES.

POINT VII

(RAISED BY THE EMPLOYER)

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE ELEMENTS OF WRONGFUL DISCHARGE, THE BURDEN OF PROOF, PROXIMATE CAUSE, MITIGATION OF DAMAGES, ETC.

SUMMARY OF ARGUMENT

This Court should not decide the certified issue because Scott did not plead damages for emotional distress below. In fact, he advised the court that he was pursuing the independent tort of intentional infliction of emotional distress. Accordingly, the Fourth District correctly held that the trial court did not err in allowing this issue to go to the jury. Moreover, as the Fourth District found, Otis' actions were not so outrageous as to state a cause of action for intentional infliction of emotional distress.

The Fourth District was correct in determining that the trial court erroneously excluded the testimony of Otis' witness, Willie Ferguson, where his name had been given to Scott's attorney as a witness two weeks before trial.

The Fourth District was also correct in reversing Scott's award of damages for future lost wages, since Scott failed to prove that the alleged wrongful discharge resulted in the lost wages. The trial court should likewise have made the same ruling in regard to Scott's award of **$100,000** for past lost wages.

The Fourth District was likewise correct in ruling that Scott was not entitled to prejudgment interest since he failed to request the trial court to award him prejudgment interest.

The Fourth District was incorrect in ruling that Otis was not entitled to a directed verdict on the issue of liability, since no wrongful discharge was proven, **as** a matter of law. Otis proved, based upon the undisputed evidence, that it was justified in discharging Scott for being arrested on the jobsite for assaulting a co-employee with a gun. Additionally, Scott's circumstantial evidence was outweighed by Otis' evidence that it had a justifiable reason for discharging Scott. Scott also failed to prove that Otis'

reason for his discharge was pretextual.

The trial court also erred in failing to instruct the jury on the elements of wrongful discharge, the burden of proof, proximate causation and mitigation of damages.

ARGUMENT

POINT I

(CERTIFIED QUESTION)

WHETHER A PLAINTIFF IS ENTITLED TO RECOVER DAMAGES FOR EMOTIONAL DISTRESS IN A WRONGFUL DISCHARGE CASE UNDER 9440.205.

The Fourth District certified this question as one of great public importance. This Court should exercise its discretion to decline to rule on the certified question since a resolution of the issue is not germane to this cause for several reasons. CLEVELAND v. CITY OF MIAMI, 263 So.2d 573 (Fla. 1972). First, Otis was entitled to a directed verdict on liability (Point V, infra) and, therefore, this issue pertaining to damages need not be reached. Second, Scott never pled for damages for mental pain and anguish or emotional distress (R674). The closest Scott's allegations got to this claim was his allegations for "loss of morale, competence and self-esteem, humiliation and loss of reputation among his friends and fellow workers" (R674). These allegations are not sufficient. A wrongfully discharged employee cannot recover damages for injury to his good name, character or reputation. SHAGWAY CITY SCHOOL BOARD v. DAVIS, 543 P.2d 218; PRYLES v. STATE, 380 NY S.2d 429, aff'd, 380 NY S.2d 628.

When the issue regarding emotional distress arose at trial, Scott's counsel advised the court that Scott was seeking damages for emotional distress under the independent tort of intentional infliction of emotional

distress (R216). The court pointed out that not only had Scott not pled mental pain and anguish or emotional distress, but he had surely not pled the separate tort of intentional infliction of emotional distress (R216-18). It is for this very reason that the Fourth District held that the trial court did not err in refusing to instruct the jury on damages for emotional distress (A8):

> Appellee did not sufficiently plead the separate tort of intentional infliction of emotional distress; and it is questionable as a matter of law whether the actions of the employer are so outrageous as to state such a cause of action. See METROPOLITAN LIFE INSURANCE COMPANY v. McCARSON, 467 So.2d 277 (Fla. 1985); McCONNELL v. EASTERN AIRLINES, INC., 499 So.2d 68, 69 (Fla. 3d DCA 1986) (in order to constitute a tort conduct must be extreme and outrageous). Cf. CORDER v. CHAMPION ROAD MACHINERY INTERN. CORP., 283 S.C. 520, 324 S.E.2d 79 (S.C. Ct. App. 1984), cert. denied, 286 S.C. 126, 332 S.E.2d 533 (S.C. 1985) (retaliatory discharge for filing workers compensation claim, without more, does not constitute extreme and outrageous conduct).

Since Scott did not plead damages for mental pain and suffering or emotional distress, nor did he plead the separate tort of intentional infliction of emotional distress, this Court has no need to reach the certified issue. That issue queries whether a plaintiff can recover damages for emotional distress under 1440.205. This Plaintiff cannot, because he did not plead them, and because he advised the court he was seeking something entirely different - the separate tort of intentional infliction of emotional distress, which he also failed to plead. Accordingly, the issue certified should not be addressed by this Court.

On the merits, Scott has cited other state cases which have held that damages for emotional distress are recoverable in wrongful discharge cases. There is another line of cases that must also be considered. The federal courts have uniformly permitted as compensatory damages the plaintiff's wage loss, but the Circuit Courts of Appeal which have addressed this question have refused to allow emotional distress or pain and suffering awards in cases

involving unlawful terminations under the Age Discrimination and Employment Act "ADEA", which has a rather general damage provision in 29 U.S.C. §626(b). VASQUEZ v. EASTERN AIRLINES, 579 F.2d 107 (1st Cir. 1978); ROGERS v. EXXON RESEARCH AND ENGINEERING CO., 550 F.2d 834 (3d Cir. 1977), cert. den., 434 U.S. 1022, 98 S.Ct. 749, 54 L.Ed.2d 770 (1978); SLATIN v. STANFORD RESEARCHES, 590 F.2d 1292 (4th Cir. 1979); DEAN v. AMERICAN SEC. INS., 559 F.2d 1035 (5th Cir. 1977), cert. den., 434 U.S. 1066, 98 S.Ct. 1243, 55 L.Ed.2d 767 (1978).

Damages for emotional distress are also not recoverable under Title VII of the Federal Civil Rights Act, which proscribes employment discrimination based on race, color, religion, sex, or national origin, or under Florida's Human Rights Act. These acts provide an employee with various other remedies which include back pay, reinstatement and punitive damages in certain instances. If the employee wishes to recover for emotional distress, he must proceed under a theory of intentional infliction of emotional distress, which requires proof of extreme or outrageous conduct. MADREPERLA v. WILLEAR CO., 606 F. Supp. 874 (E.D.Penn. 1985). The rationale of these federal cases is that the statutory scheme is to prevent injury through compliance. In the event of non-compliance, reinstatement, back wages, other equitable relief, and liquidated or punitive damages, if necessary, are appropriate, rather than to read into the statute the intent to authorize the recovery of general damages. It is suggested that the rationale of the federal cases should be followed in deciding what damages are recoverable under 1440.205.

POINT II

WHETHER THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF WILLIE FERGUSON.

At trial, Otis called one of its employees, Willie Ferguson, as a witness. Ferguson had worked at the Burdines Galleria job site with Scott (R397). Even though Scott's attorney had been made aware of this witness by Otis' attorney two weeks before trial, Scott's attorney objected to Ferguson's testimony because he was not listed on the parties' pretrial stipulation. The court required Ferguson to be questioned outside the presence of the jury to determine whether Scott would be "prejudiced" if Ferguson were allowed to testify (R397). The following testimony was proffered. Prior to the incident, Ferguson was aware that Scott had been involved in an altercation in a bar with John Veltri (R399). Subsequently, Scott happened to see Veltri, a tile setter, on the Burdines' job site. Ferguson testified (R399-400):

> A few weeks after that [the incident in the bar], Mr. Scott noticed that this guy was a tile setter on the same job. He took me up and pointed the guy out and he told me that, well, he said in essence, he said that one of these days I'm going to catch him off guard and I'm going to pull a gun on him and ask him, how do you like it.

Ferguson testified that on the day in question he had observed the incident involving Scott and the gun (R399). As Ferguson was walking toward the escalator at the job site, his helper told him to look behind him (R400). As he did so, he saw Scott turn away from the tile setter with a gun in his hand and put it in a box (R400). Ferguson saw what happened to the gun thereafter. Ferguson's helper took it, showed it to Ferguson, and then placed it in his own car for Scott so that the police would not find it (R401). When he was subsequently questioned about the incident, Ferguson told his superintendent exactly what he had seen (R401).

After an extended colloquy, the trial court ruled that Ferguson's testimony could not be presented to the jury because he had not been listed on the pretrial stipulation (R417). The court rendered this ruling despite the fact that it recognized that Ferguson's testimony was "extremely relevant" (R420). The Fourth District was correct in concluding that the trial court abused its discretion in excluding Ferguson's testimony.

As has been noted numerous times, the exclusion of a witness is a drastic remedy and should be invoked "only under the most compelling circumstances", LoBUE v. TRAVELERS INSURANCE COMPANY, 388 *So.* 2d 1349, 1351 (Fla. 4th DCA 1980); IN RE ESTATE OF LOCHHEAD, 443 So.2d 283, **284** (Fla. 4th DCA 1983). The court also stated in LoBUE, supra, that:

> The right to present evidence and call witnesses is perhaps the most important due process right of a party litigant.

In BINGER v. KING PEST CONTROL, 401 So.2d 1310 (Fla. 1981), this Court outlined the considerations which a trial court must evaluate in making a decision regarding the exclusion of a witness whose name has not been disclosed in accordance with a pretrial order. While the court noted that the trial court has the discretion to exclude a witness under such circumstances, the court went on to state (401 So.2d at 1314):

> The discretion to do so must not be exercised blindly, however, and should be guided largely by a determination as to whether use of the undisclosed witness will prejudice the objecting party. Prejudice in this sense refers to the surprise in fact of the objecting party, and it is not dependent on the adverse nature of the testimony. Other factors which may enter into the trial court's exercise of discretion are: (i) the objecting party's ability to cure the prejudice or, similarly, his independent knowledge of the existence of the witness; (ii) the calling party's possible intentional, or bad faith, noncompliance with the pretrial order; and (iii) the possible disruption of the order and efficient trial of the case (or other cases). [Footnotes deleted.]

An analysis of the factors noted above clearly demonstrates that the Fourth District was correct in concluding that the trial court abused its discretion in excluding Ferguson's testimony. First, there was no "surprise in fact" to Scott's counsel that Otis intended to call Ferguson as a witness. It was undisputed that Otis' counsel had provided Scott's counsel with verbal notice, two weeks prior to trial, that he intended to call Ferguson as a witness; and he had followed up that verbal notice with a letter setting forth Ferguson's name and address (R405-06,408-09). Scott's counsel, who admitted that he had been aware of Ferguson's existence even prior to that (R411), did not make an attempt to depose him during the two weeks prior to trial. Scott's counsel admitted being given notice two weeks prior to trial that Otis intended to call Ferguson as a witness. He simply attempted to excuse his failure to depose Ferguson by arguing that he was in another trial during that period (R406). Yet, three attorneys were representing Scott in this lawsuit and obviously one of them could have taken Ferguson's deposition. In fact, Ferguson had already been deposed in Scott's criminal case and Scott's lawyer was present at that deposition (R403). While Scott's lawyer in the criminal case was not the same lawyer involved in this case, it is clear that both Scott and his attorney in this case were well aware of Ferguson and his testimony.

Additionally, in Otis' pretrial stipulation filed in this case on March 25, 1985, Otis had listed as item 7 on its exhibit list:

> Police and court records relating to the arrest, conviction and sentencing of Plaintiff arising out of an incident which occurred on September 19, 1980 (R730).

The criminal file included Ferguson's deposition in that case. Scott's counsel admitted that he had taken no steps to review the criminal file until the day before Ferguson was to testify in this trial (R412). For all of these reasons,

Scott was not, in fact, surprised by Otis' attempt to call Ferguson as a witness, nor surprised by the nature of his testimony. In fact, Scott's attorney never denied he was given notice of Ferguson and never claimed "surprise in fact". He could not do so because both Scott and his attorneys had been aware of Ferguson's testimony for years, since Ferguson had been a key witness against Scott in the criminal case.

In light of the advance notice provided Scott's counsel as to Otis' intent to call Ferguson, there was ample opportunity to cure the existence of any prejudice. Although Scott's attorney had two weeks to take Ferguson's deposition, he made no effort to depose Ferguson nor to review the testimony Ferguson had given in the criminal case. Furthermore, Scott himself could not claim surprise because he knew that Ferguson had been his foreman on the Burdines Galleria job site, and was well aware of Ferguson's knowledge regarding the gun incident (R414-15).

Additionally, in a case entitled SCOTT v. FEDERATED DEPARTMENT STORES, where Scott is suing Burdines for personal injuries resulting from the fall on the debris, Ferguson was listed on Burdines' witness list (R403,410). Scott's lawyers in that case were the same lawyers representing him in this case. Therefore, Scott and his lawyers had independent knowledge of the existence of Ferguson as a witness through not one, but two other lawsuits. They cannot, and in fact never did, argue "surprise in fact." Additionally, Scott had ample opportunity to cure any possible prejudice by either taking Ferguson's deposition or by reviewing his testimony in the criminal case. The fact that Scott chose to do nothing cannot result in exclusion of Ferguson's testimony. Scott, rather than Otis, has to suffer the consequences of having chosen to ignore Ferguson, when advised two weeks before trial that Otis intended to call him as a witness.

There is no suggestion in the record that Scott's failure to list the witness on the pretrial stipulation was intentional or in bad faith, another factor referred to in BINGER. The pretrial discovery in this cause was completed in a very brief period of time because the trial court denied Otis' motion for continuance of the trial (R711). The trial court had set aside a default entered against Otis on February 25, 1985 (R707). The trial date had been previously set for April 1, 1985 (R690). On March 5, 1985, Otis moved for a continuance of the trial date noting the brief period of time available for discovery and the fact that as of that date no pretrial discovery had yet occurred (R708-10). Nonetheless, the trial court denied the Motion for Continuance on March 12, 1985 and thereby allowed less than one month for all pretrial discovery to be concluded. Under these circumstances, it is obvious that the failure to learn about and list Ferguson as a witness was the result of the limited period of time allowed for discovery and preparation for trial.

A final consideration noted in BINGER, supra, is the possible disruption of the orderly and efficient trial of the case. There was no contention made below that the calling of Ferguson as a witness would disrupt the trial in any way. At the time the trial court made its ruling, Otis had proffered all of the relevant testimony it intended to elicit from Ferguson, and Scott had had an opportunity to inquire into any areas of testimony that he wished. The trial court did not cite any disruption of the trial as a basis for its exclusion of Ferguson's testimony but simply stated that "I think they [Scott's attorney] should have a chance to check out Mr. Noon" (R417). Mr. Noon was Ferguson's helper who had been with him at the time of the incident and who, Ferguson testified, had disposed of the gun.

This was an improper and irrelevant basis for justifying the exclusion of Ferguson's testimony. Apparently, the trial court concluded that Scott's attorneys should have access to Mr. Noon's testimony in order to test the credibility of Ferguson's testimony. However, BINGER does not hold that a condition precedent to allowing a non-listed witness to testify is that the opposing party must be given an opportunity to depose other witnesses to verify his credibility. Furthermore, Scott had access to Ferguson's deposition in the criminal case, which would be one means of testing his credibility. To simply exclude his testimony because another witness was not available to test his credibility has no basis in logic or case law. It should also be noted that Otis' counsel had previously attempted to locate Mr. Noon but had been unable to find him (R417).

Since none of the factors noted in BINGER were present in this case, the Fourth District was correct in concluding that the trial court abused its discretion in excluding the testimony of Willie Ferguson. There was no surprise in fact when Otis called Ferguson as a witness, because two weeks before the trial Otis had advised Scott that it intended to call Ferguson as a witness. Accordingly, there was no prejudice under the BINGER analysis. The fact that Scott chose to sit idly by and do nothing about Ferguson before trial was Scott's choice.

As the trial court recognized, Ferguson's testimony was highly relevant to this case as it gave an impartial witness' testimony that Scott did, in fact, assault his co-worker with a gun at the Burdines Galleria job site, which Scott had repeatedly denied. As stated, supra, the exclusion of Ferguson's testimony simply because another witness was unavailable is without support and logic or case law. The Fourth District's decision reversing the exclusion of Ferguson's testimony was entirely proper.

POINT III

(RAISED BY THE EMPLOYEE)

OTIS WAS ENTITLED TO A DIRECTED VERDICT ON SCOTT'S CLAIM FOR FUTURE LOST WAGES BECAUSE HE FAILED TO PROVE THEY RESULTED FROM THE WRONGFUL DISCHARGE.

Scott's Future Damages Not Recoverable:

The Fourth District ruled that a directed verdict should have been granted on Scott's claim for future lost wages because (A7):

> Appellee failed to establish with reasonable certainty that his loss of future wages was the result of a wrongful discharge. His brief makes no contention that he attempted to find other work at a similar pay, or that his firing had hindered his ability to do so, and cites no portion of the record indicating he felt reinstatement was not a viable alternative because of the animosity between the parties. [Emphasis added.]

Scott has chosen not to address the real basis for the Fourth District's ruling, i.e., Scott's failure to prove causation. Even under Scott's own evidence, as a matter of law, his lost wages, both past and present,[1] any diminution in income did not result from Scott's alleged wrongful discharge or the inability to find a comparable paying job. Rather, the cause of Scott's reduced income was his knee injury which resulted in a disability preventing him from performing the duties of an elevator mechanic/foreman. Scott's remedy for loss of wage earning capacity was a workers' compensation claim, not a wrongful discharge claim. Scott was, in fact, receiving workers' compensation benefits to compensate him for that loss (R9).

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[1]/The Fourth District declined to consider whether Scott was entitled to a directed verdict as to the $100,000 award for past lost wages since Otis had not raised that argument below. The validity of that ruling is challenged under Point VI, infra.

The following facts dictate the conclusion that lost wages were not recoverable. Ten or more years before this incident, Scott had sustained a leg injury in an accident unconnected with his work (R266). He broke his leg playing baseball which required an operation (R266-67). This resulted in Scott having a 25% disability, but he was able to hold down his job with Otis despite that disability (R396). Scott's job with Otis as an elevator mechanic/foreman required him to actually be out on the job sites performing physical labor (R120-23, 263).

Scott was terminated by Otis on September 25, 1980 (R502). In 1981, he was operated on and an artificial knee prosthetic was implanted in his bad knee (R256, 339-40). Scott subsequently began work for his present employer, Mowry Elevator, in 1981-1982 (R86, 258). Scott's job with his new employer, a non-union job, was restricted because of Scott's knee problem (R343). Scott had been told by his doctors, who inserted the artificial knee, that he could no longer do any heavy lifting, squatting, bending, or excessive walking. Scott testified that that was basically what an elevator mechanic/foreman did every day, and that was what he had been required to do with Otis (R256, 344). Scott admitted he could no longer work as an elevator mechanic/foreman (R344).

As a result of the fall at Burdines, and Scott's subsequent knee replacement, Scott claimed his disability had increased to 30 or 35%. Scott admitted that this had affected his ability to perform the duties of an elevator mechanic/foreman (R344). Scott also admitted that when he was hired by Mowry Elevator, it was understood that he would not be able to function in the capacity of an elevator mechanic/foreman (R343).

The Vice President of Mowry Elevator, Frank Warrenburger, testified that he had hired Scott not as a mechanic/foreman, but as his administrative

assistant (R87). Scott checked the installations in the field and reported to him regarding job conditions, work problems, etc. (R85-87). Scott, who now used a cane most of the time, did not perform physical labor in the field because of his bad knee (R87-89, 91). Warrenburger testified that he was aware of Scott's physical disabilities when he hired him (R86). He agreed to work around Scott's problem and give him time off when needed because of his disability (R86). At first, Scott could not even put in a full week's work (R90-91). According to Warrenburger, Scott had missed work off and on up until the last six or eight months, when he had begun to miss less work (R90-91).

In regard to income differential, at the time of trial, Scott was making $300 a week with Mowry Elevator, plus he was provided with a company vehicle and gas (R89). In contrast, the union rate for a mechanic/foreman in 1980, when Scott was terminated by Otis, was $13.36 an hour (R174). At the time of trial, the union pay was $17.10 an hour for a mechanic, and $19.25 an hour for a foreman (R119). Based upon this evidence, the jury was allowed to award $100,000 for past lost wages, representing the difference between what Scott had made with Otis and what he was making after he started back to work with Mowry Elevator. The award of $200,000 in damages for future lost wages projected that income differential into the future. There was no basis for these awards as a matter of law.

A cause of action for wrongful discharge allows the employee to recover compensation for damages sustained during the period of his unlawful discharge. RYAN v. SUPERINTENDENT OF SCHOOLS OF QUINCY, 373 N.E.2d 1178 (Mass. 1978). In other words, the measure of the employee's damages is for the period of his unemployment. A.J. FOYT CHEVROLET, INC. v. JACOBS, 578 S.W.2d 445 (Tex.Civ.App. 1979). In this case, that

would be from Scott's discharge in September 1980, until his new job with Mowry Elevator in 1981 or 1982. However, the evidence showed that the reason Scott was not working during that period was because of his knee injury, his ensuing knee replacement operation, and recovery period. The fact that Scott did not work from 1980-1981 was not because he could not find a comparable job. Therefore, Otis was obviously not responsible for lost wages during that period in any event, particularly since Scott was receiving monthly workers' compensation benefits during that period because of his inability to work.

Moreover, Scott was not entitled to recoup the difference between the income he had previously received from Otis (as a mechanic/foreman), and the income he was receiving at the time of trial with Mowry Elevator. The income differential was not the result of Scott being unable to find a job providing a comparable income. Rather, Scott was relegated to a different, less remunerative job because of his knee injury. Therefore, the difference in income did not, as a matter of law, result from Otis firing Scott. It was the result of the fact that Scott could no longer physically perform a comparable job. Even if Scott had still been employed by Otis, he would not have been receiving income of $17.10 to $19.25 per hour as an elevator mechanic/foreman, because he would have been unable to work in that position.

The Fourth District was correct in concluding that Scott was not entitled to recover the difference between what he made before with Otis and what he was making at the time of trial. In order to recover that differential, he would had to have demonstrated that he could perform the duties of the job he had before his injury, Cf. SCHRODER v. ARTCO BELL CORP., 579 S.W.2d 534 (Tex.Civ.App. 1979), and could apply the same ability and

devotion in a comparable job, Cf. LINES v. CITY OF TOPEKA, 577 P.2d 42 (Kan. 1978), but was prevented from doing so because a comparable job was not available. In other words, to be recoverable, the income differential must be proximately caused by the alleged wrongful discharge. Here, it was caused by Scott's own physical disability. Certainly, if Scott was entirely disabled as a result of his knee injury, he could not reasonably claim that his recoverable damages would be his entire past yearly income. To allow Scott to recover the difference in income for a job he can no longer physically perform provides a windfall to Scott.

Another argument similar to the proximate cause argument is a mitigation of damages argument. An employee has a duty to mitigate his damages by reasonably seeking other employment of like nature subsequent to a wrongful discharge by his employer. JUVENILE DIABETES RESEARCH FOUNDATION v. RIEVMAN, 370 So.2d 33 (Fla. 3d DCA 1979); FALLS STAMPING & WELDING CO. v. INTERNATIONAL UNION, UNITED AUTO, AIRCRAFT & AGR. IMPLEMENT WORKERS OF AMERICA, 485 F.Supp. 1097 (D.C. Ohio 1980); HADEA v. HERMAN BLUM CONSULTING ENGINEERS, 632 F.2d 1242 (CA Tex. 1980), cert. den., 101 S.Ct. 1983. The penalty for failing to comply with that duty is a reduction in recoverable damages by the amount that could have been earned in comparable employment. JUVENILE DIABETES RESEARCH FOUNDATION v. RIEVMAN, supra.

In the present case, Scott went to work for Mowry Elevator at a job that was not comparable to his former job. The vocational rehabilitation counselor who had placed Scott with Mowry Elevator, testified that he was satisfied with that job and, therefore, there had been no effort to upgrade Scott's job or find him a better paying job (R199). In effect, Scott never looked for a comparable job as a mechanic/foreman because he knew he could not perform

that job any longer because of his artificial knee. Accordingly, Scott has failed to meet his duty to obtain comparable employment. FALLS STAMPING & WELDING CO. v. INTERNATIONAL UNION, AUTO, AIRCRAFT & AGR. IMPLEMENT WORKERS OF AMERICA, supra. It follows that Scott is not entitled to recover for the difference between what he was making with Mowry Elevator, and what he had been making with Otis.

It should be noted that as a result of his fall at Burdines in 1980, Scott had received workers' compensation benefits during the five years prior to trial (R9). He also had a lawsuit pending against Federated Department Stores, which is the parent company of Burdines, seeking to recover personal injury damages for the injury he received to his knee in the fall on the debris (R404). In that lawsuit, Scott is claiming that Burdines caused his damages and here he is arguing that Otis caused his damages. In fact, there was no evidence presented in this case that Scott's damages were proximately caused by his alleged wrongful discharge. Rather, as stated repeatedly, Scott's lost wages were caused by his own disability.

To summarize, Scott was entitled to no lost wages. From his 1980 discharge until he began his job with Mowry Elevator, he was not working because of his leg operation and recuperation. Since beginning his job with Mowry Elevator, Scott had been working at a job with reduced income because of his knee injury and because he could no longer perform the job he had with Otis. His reduced income was not because he could not find a job as an elevator mechanic/foreman, rather it was because he could no longer physically perform that job. Therefore, allowing the jury to award damages for future lost income was error, as a matter of law.

A second, and alternative,[2] reason that Scott was not entitled to recover future lost wages is that future lost wages are not recoverable in a wrongful discharge action, and particularly not in this case. Section 440.205 does not provide the Court with any guidance as to what damages are available for its violation, and there are no Florida cases on point. A federal case on point is JETER v. JIM WALTER HOMES, INC., 414 F. Supp. 791 (W.D. Okla. 1976), where the court held that when employment is not for a specified period, an employee will not be entitled to recover for loss of future wages.

In accord with JETER, Otis submits that the only appropriate damages in a wrongful discharge case would be past lost wages and benefits which resulted from the wrongful discharge. And, if the employee were still unemployed at the time of trial, he would be entitled to reinstatement to his old position if he was still able to perform the duties of his old job. See SCHRADER v. ARTCO BILL CORP., 579 S.W.2d 534 (Tex.Civ.App. 1979). In this case, Scott was unable to perform his old job because of his physical disabilities. Therefore, he would not be entitled to reinstatement to his old job, although perhaps he would be entitled to be reinstated to a position comparable to the one he presently holds with Mowry Elevator, if Scott so elected.

Section 440.205 F.S. is nothing more than an anti-discrimination statute which proscribes retaliation against an employee for attempting to claim benefits under the State's Workers' Compensation Law. See SMITH v. PIEZO TECHNOLOGY, supra, at 184. Other statutory provisions, whether federal or state, which proscribe discrimination for any number of reasons, provide for

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[2]/This is the only reason given by the Fourth District which Scott addresses in his brief.

a remedy that includes reinstatement and back pay, but no future damages. Of course, once an employee is reinstated, he would sustain no future damages because he would be restored to his same wages and placed in the same position as he would have been had he never been discharged in the first place. Therefore, the reinstatement order would completely remedy any future lost wages.

Reinstatement and back pay are the normal remedies under Title VII of the Civil Rights Act of 1964 which protects against discrimination for race, sex, religion, national origin, etc.; under the Age Discrimination in Employment Act, which prohibits discrimination on the basis of age, under the Florida Human Rights Act, Section 760.01, Fla. Stat., which similarly proscribes discrimination on the basis of age, sex, religion, national origin, age, handicap or marital status; and under the Public Employees Relations Act, Section 447.201, Fla. Stat., which proscribes discrimination against an employee on the basis of his union or concerted activities.

The area of discrimination law where the concept of front pay has been considered and discussed is in the area of age discrimination. Some courts have permitted the award of front pay in age cases, but only in very limited circumstances - circumstances which are not present in this case. For example, in WHITTLESEY v. UNION CARBIDE CORP., 742 F.2d 724 (2d Cir. 1984), the court concluded that front pay was an available remedy in appropriate cases brought under the ADEA and found that those circumstances were only where reinstatement was inappropriate. The court further stated that in many cases an employee can be made whole through an award of back pay coupled with an order of reinstatement. The court noted that such remedies involved the least amount of uncertainty because they re-established the prior employment relationship between the parties and, at

the same time, insured employment free of discrimination. WHITTLESEY at 728. In the WHITTLESEY case, the court concluded that front pay for four years was appropriate in view of the fact that the court found the animosity between the employee and the company to be so intense that reinstatement was impossible and, also, because the time period involved was relatively short, approximately four years, and "thus did not involve some of the uncertainties which might surround a pay award to a younger worker."

Similarly, the Third Circuit Court of Appeal in GOSS v. EXXON OFFICE SYSTEMS, 747 F.2d 885 (3d Cir. 1984), found a front pay award in lieu of reinstatement was appropriate, but only where the likelihood of continuing disharmony in a sensitive job, and the difficulty of policing an ongoing relationship, precluded reinstatement. Moreover, the front pay award was for only four months. The court rejected a claim for front pay for six years as requiring excessive speculation.

The Eleventh Circuit Court of Appeal has also concluded that front pay is a permissible remedy under the ADEA [see O'DONNELL v. GEORGIA OSTEOPATHIC HOSPITAL, 748 F.2d 153 (11th Cir. 1984)], but that front pay may be awarded "only after reinstatement was dismissed as a realistic alternative." O'DONNELL at 155.

In the present case, Otis at all times represented to the trial court that if Scott prevailed, he could be reinstated (R293). Therefore, there was no reason to submit the issue of future damages to the jury even under the above cases that have allowed future damages. Permitting Scott to recover future damages in this case was both legally and factually improper.

Scott's Future Damages were Speculative and Not Reasonably Certain:

Even assuming damages for future lost wages were recoverable, which Otis denies, the $200,000 awarded by the jury is clearly based upon sheer speculation and conjecture, rather than sufficient proof. Speculative damages are not recoverable. Florida case law is clear that future damages must be capable of proof to a reasonable certainty and not left to speculation or conjecture. NEW AMSTERDAM CASUALTY CO. v. UTILITY BATTERY MANUFACTURING CO., 166 So. 856, 860 (1935), and KENCO CHEMICAL & MANUFACTURING CO., INC. v. RAILEY, 286 So.2d 272, 274 (Fla. 1st DCA 1973).

Here, the award of $200,000 in future lost wages is totally speculative. It fails to recognize a number of speculative circumstances regarding Scott's 20 years of future employment, which would make that figure an absolute absurdity. For example, one reason Scott is making less than he was making while working for Otis is the fact that he is now working at a non-union elevator job and, therefore, he is not being paid according to the union wage scale. However, there is absolutely no reason Scott cannot in the future obtain a position with a unionized elevator company and start earning an increased income.

There are numerous other variables which may enter the picture over the next 20 years, not the least of which is Scott's own physical state. All the testimony presented at the trial, including that of Scott, was that his biggest handicap workwise, was his knee. It is possible that Scott will be totally prevented from working in the future as a result of his knee condition. The possibility of total disability is not accounted for in the award of future damages. It also does not take into account such things as possible promotions, changes in employment positions, termination for lawful reasons, death or other disability. When the jury heaps inference upon inference in

order to reach its verdict, it is obvious that the award is based on sheer speculation and cannot stand.

To allow an award of damages over the next **20** years for future lost wages clearly requires sheer speculation and conjecture on the part of the jury. This is obvious from the amount of the award itself. Scott's economist testified that his net future earnings loss until age 65 was **$424,230.** The jury essentially just awarded one-half that amount **($200,000),** a figure unrelated to anything. It is clear that the jury simply picked a number out of the air. Such speculative awards cannot be permitted.

POINT IV

(RAISED BY THE EMPLOYEE)

SCOTT WAS NOT ENTITLED TO PREJUDGMENT INTEREST BECAUSE HE NEVER ASKED THE TRIAL COURT TO AWARD IT TO HIM.

Scott claims he was entitled to prejudgment interest on his award for past lost wages. Scott did not plead prejudgment interest and it was not listed on the pretrial stipulation. During the middle of trial, Scott's attorney specifically advised the court that he was **not** seeking prejudgment interest (R150). Post trial, Scott did **not** ask the trial court to award prejudgment interest. The first time Scott ever mentioned anything about prejudgment interest was in his brief before the Fourth District when he claimed that the trial court had erred in failing to award prejudgment interest, even though he had never even asked the trial court to do *so.* Prejudgment interest was sought by Scott for the first time on appeal and, therefore, was waived.

Scott's reliance upon ARGONAUT INSURANCE v. MAY PLUMBING CO., **474** So.2d **212** (Fla. 1985) is misplaced. Not having sought prejudgment interest in the trial court, Scott is not entitled to the benefit of ARGONAUT.

Scott argues that the Fourth District held that he was not entitled to prejudgment interest because he did not demand it in his pleadings. Scott claims that ruling is contrary to other Florida appellate decisions. Without question, the Fourth District never held that prejudgment interest must be pled. Rather, the Fourth District held that "the trial court did not err in failing to award prejudgment interest because the plaintiff never requested it of the trial court" (A8). Even if a plaintiff is not required to plead prejudgment interest, or prove it up at trial, certainly at some point he must at least make a simple request for the trial court to award him prejudgment interest. That is a prerequisite to being allowed to successfully argue on appeal that the trial court erred in not doing so. A trial court is not required to award prejudgment interest, sua sponte, when it has never been asked to do so. That is essentially what Scott is arguing here because he not only never asked the court to award prejudgment interest below, but in fact he told the court he was not seeking prejudgment interest.

It is an age old appellate principle that in order to be entitled to reverse a trial court on appeal for failing to do something below, the complaining party on appeal must have asked the trial court to take the desired action. He cannot make the request for the first time on appeal. ARGONAUT, and the cases flowing therefrom, have not dispensed with this appellate requirement.

Also, ARGONAUT is inapplicable here because ARGONAUT held that where a verdict liquidates damages on a "plaintiff's out-of-pocket pecuniary losses" the plaintiff is entitled as a matter of law to prejudgment interest at the statutory rate from the date of the loss. In this case, Scott's lost wages were not out-of-pocket losses. Scott's contention would mean that

prejudgment interest is awardable on all past lost wages in Florida, which is not the law.

Finally, this issue is moot because the Fourth District provided that if Scott prevails on remand, the trial court can then determine prejudgment interest (A8).

POINT V

(RAISED BY THE EMPLOYER)

OTIS WAS ENTITLED TO A DIRECTED VERDICT SINCE THERE WAS NO WRONGFUL DISCHARGE AS A MATTER OF LAW.

No wrongful discharge, as a matter of law, where Scott was arrested on the job for assaulting a co-employer with a gun:

Section 440.205 Fla. Stat., under which this case was brought, establishes liability for "wrongful discharge" where the employer discharges an employee for seeking workers' compensation benefits. It is Otis' position that under the facts of this case, Scott did not prove a cause of action for wrongful discharge under 1440.205 Fla. Stat., as a matter of law. The Fourth District correctly found that Scott's evidence was "weak," but incorrectly found that it was sufficient to preclude a directed verdict in Otis' favor (A7).

The undisputed evidence demonstrated that the police were called to Otis' work site (Burdines Galleria), by another workman who advised the police that Scott had assaulted him with a gun. The police could not find a gun on the premises and asked to see Scott's vehicle. Scott showed them to a truck in which the police found bullet casings on the floor board, and a "clip" in the glove compartment that would fit the type weapon the victim had described to them (R388). The police placed Scott in handcuffs and took him

in the patrol car to the police station, where he was arrested (R389). Otis adduced evidence that as a result of this incident, the Vice President of Burdines requested that Scott not work on this job (R316, 369-71).

The undisputed evidence also showed that when Scott returned to work the day following the above incident, his supervisor told him to take a few weeks off, without pay (R257, 312-13). After investigating the gun incident, Scott was advised by Otis that his employment was being terminated because of the incident and the complaints of the Burdines' people, who did not want Scott back on the job (R319, 321). Scott was subsequently prosecuted for the assault (R392), and pled nolo contendere to the charge (R415).

Case law holds that undisputed facts may justify discharge on employee, as a matter of law. ROCHESTER CAPITAL LEASING CORP. v. McCRACKEN, 295 N.E.2d 375 (Ind.App. 1973). And whether the facts are such as to warrant an employer discharging an employee is a question of law for the court, not a question of fact. BERRY v. GOODYEAR TIRE & RUBBER CO., 242 S.E.2d 551 (S.C. 1978). LA FONTAINE v. DEVELOPERS & BUILDERS, INC., 156 N.W.2d 651 (Iowa 1960); HAIMAN v. GUNDERSHEIMER, 177 *So.* 199 (Fla. 1937).

In the present case, the undisputed facts were sufficient, as a matter of law, to warrant Otis in terminating Scott. Different inferences cannot be drawn as to whether Otis was justified in terminating Scott. See THOMAS v. BOURDETTE, 608 P.2d 178 (Or.App. 1980). In JOHNSON v. GENERAL MOTORS CORP., 241 S.E.2d 30 (Ga. App. 1977), cert. den., 98 S.Ct. 3092, two employees were arrested and charged with a crime to which they pled nolo contendere. Their employer, General Motors, gave them the option of resigning or being terminated. The employees resigned, and then sued General Motors for wrongful discharge. The trial court granted a summary

judgment in favor of General Motors which was affirmed on appeal, with the court stating:

> ...even without the resignations, which were in fact given, General Motors would have been justified in terms of law to terminate the employment. It was not until three months afterwards that the provisions of the First Offenders Act were invoked. Although the order thereunder eradicated the record of the criminal charges, discharged the appellants without any adjudication of guild, exonerated them of any criminal purpose and intent, and asserted that no civil rights shall be affected, it could not eradicate the facts of arrest and sentencing, and it could not erase their resignations. See MORRIS v. HARTSFIELD, 186 Ga. 171, 197 S.E. 251 (1938).
>
> We find no authority that entry of a plea of nolo contendere to a felony charge cannot be a basis for discharge by a private employer. Generally, a plea of nolo contendere stands upon the same footing as a plea of guilty. MARSHALL v. STATE, 128 Ga.App. 413(1), 197 S.E.2d 161 (1973). Conviction of a crime is accepted as just cause for an employee's discharge as a matter of law. NLRB v. FEDERAL BEARINGS CO., 109 F.2d 945 (2d Cir. 1940). [Emphasis added.]

In the present case, as in JOHNSON, Scott's on-the-job arrest was sufficient to warrant Otis' termination of Scott's employment, as a matter of law.

In S.J. GROVES & SONS v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, 581 F.2d 1241 (4th Cir. 1978), an employee got into a heated verbal argument with his co-workers. He went to his truck and returned with an ax handle and used it to twice hit one of his co-workers. The employee's discharge was held to be warranted, as a matter of law, and summary judgment was entered for the employer:

> The rationale for allowing employers to discharge employees for fighting is that such violence threatens the employer's legitimate concerns in job safety and in employee discipline and morale. We find that where an employee engaged in a heated dispute with another employee on the job site during working hours and repeatedly struck the other employee with a dangerous weapon, once on the back and a second item while the victim was on the ground, the discharge is fully justified.

In SMITH v. DEPT. OF HEALTH & HUMAN RESOURCES, 408 So.2d 411 (La.App. 1981), an argument occurred which resulted in a kitchen employee chasing a co-worker with a knife. The employee denied having a knife and claimed she was wrongfully discharged. The appellate court affirmed the Civil Service Commission's approval of the discharge, finding that "pursuing a fellow employee while armed with a knife would seem to be a most serious offense," and that the fact that the employee "chose to arm herself with a dangerous weapon" supported her termination.

It is anticipated that Scott will argue that he did not, in fact, assault his co-worker with a gun, despite the fact that he was arrested, charged with a crime and pled nolo contendere. Or at least, he will argue, whether he assaulted the co-worker was a fact question. Whether he did or did not assault his co-worker is irrelevant. As a matter of law, Otis clearly was warranted in believing that Scott was guilty as charged. JOHNSON v. GENERAL MOTORS CORP., supra. Even if Scott had not pled nolo contendere, or even if he had been subsequently found innocent, that would have had no bearing on whether Otis was justified in terminating Scott.

Even an employer's erroneous belief cannot be the basis for a wrongful discharge action where, if true, it would have justified the employer in terminating the employee. See for example, ZUNIGA v. SEARS, ROEBUCK & CO., 671 P.2d 662 (NM. App. 1983), where the court held that an employee had no cause of action for wrongful discharge against an employer who terminated him on the belief, apparently erroneous, that the employee had taken an item of merchandise belonging to the store.

It is also anticipated that Scott will argue that despite the fact that Otis would have been warranted in terminating him as a result of his being arrested on the job, in fact he was terminated for an entirely different

reason, i.e., filing a workers' compensation claim. However, case law provides that where an employer establishes sufficient legitimate grounds for dismissing an employee, the alleged motive of the employer for discharging the employee for other non-legitimate reasons is immaterial. BARISA v. CHARLOTTE RESEARCH FOUNDATION, 287 A.2d 679 (Del. Sup. 1972); GASBARRA v. PARK-OHIO INS., 382 F.Supp. 399, aff'd. 529 F.2d 529 (D.C. Ill. 1974); HEYMAN v. KLINE, 344 F.Supp. 1088, aff'd in part and rev'd. in part, 456 F.2d 123, cert. den., 93 S.Ct. 53; LANG v. OREGON NURSES ASSOC., 632 P.2d 472 (Or.App. 1981). In LANG, the court quoted the Oregon Supreme Court case as follows:

> ...The motives which activate the master in discharging the servant are wholly immaterial, for the act is justified if any legal grounds therefor existed at the time....

Where there are legitimate non-discriminatory reasons for an employee's discharge, the employee has the overall burden of showing a retaliatory discharge, BOHM v. L.B. HARTZ WHOLESALE CORP., 370 N.W.2d 901 (Minn.App. 1985); HUBBARD v. UNITED PRESS, 330 N.W.2d 418, 445 (Minn. 1983), which Scott did not do in this case. Scott admitted that his supervisor told him he was terminating him because of the on-the-job arrest incident (R319, 321). Scott presented no evidence to demonstrate otherwise. Accordingly, Scott did not meet his burden of proving a wrongful discharge.

In CHIN v. AMERICAN TEL. & TEL. CO., 410 NY S.2d 737 (NY Sup. 1978), an employee sued his employer for wrongful discharge. The employer took the position that the employee was terminated because he was arrested and charged with driving a van into three police officers during a political demonstration in which he was a participant. The court granted a summary judgment for the employer, finding that the employee had failed to demonstrate a prima facie case:

> Assuming, arguendo, that part of defendant's motion was malicious, plaintiff has failed to establish that the defendant did not act for legitimate purposes or for business considerations. Thus, he has failed to demonstrate the required elements for prima facie tort.

As in the above cases, it is undisputed that in this case, Otis had a legitimate reason warranting the termination of Scott's employment, i.e., the fact that Scott was arrested and charged with a serious crime which occurred on the job site, i.e., the assault of a co-worker with a deadly weapon. For this reason alone, judgment should have been directed in favor of Otis, as a matter of law.

Scott failed to prove a prima facie case:

Scott failed to prove the essential element of his cause of action. In SOUTHLAND DISTRIBUTING CO. v. VERNAL, 497 So.2d 1240 (Fla. 2d DCA 1986), a discharged employee brought an action against his employer alleging that he was discharged because of jury duty. The appellate court reversed a judgment in the employer's favor. The court concluded that the circumstantial evidence of the employee being discharged upon his return from jury duty was insufficient by itself to support a finding that the employee was terminated because of jury duty, where all the other evidence pointed to the fact that the employee was terminated due to a disagreement with his employer that occurred prior to commencement of jury duty. The court relied upon VOELKER v. COMBINED INS. CO. OF AMERICA, 73 So.2d 403 (Fla. 1954), which held that when circumstantial evidence is relied upon in a civil case, any reasonable inference deducible from that circumstantial evidence which would authorize recovery must outweigh each and every contrary reasonable inference if the plaintiff is to prevail. The court concluded:

> ...the inference that Vernal was terminated because of his jury duty cannot survive as a rational inference in

> light of the stronger inferences and other facts established by the evidence.

See also, DeFORD LUMBER CO., INC. v. ROZS, 615 S.W.2d 235 (Tex.Civ.App. 1981), and VOUESWERDIN v. NEW ORLEANS PUBLIC SERVICE, INC., 466 So.2d 804 (La.App. 1985). Both cases held that the circumstantial evidence presented in a wrongful discharge case did not support a finding that the employer discharged the employee for asserting a claim for workers' compensation benefits.

Scott also failed to prove that Otis' reason for his discharge was pretextual:

If an employee meets the burden of establishing a prima facie case of wrongful termination, the burden of going forward with the evidence to demonstrate a legitimate reason for the discharge shifts to the employer. Once the employer demonstrates a legitimate reason for the discharge, it is incumbent upon the employee to then prove by a preponderance of the evidence that the employer's reasons for the discharge are a pretext for what was otherwise an unlawful discharge. The ultimate burden of proving wrongful termination remains with the employee.

The elements of a prima facie case, and the allocation of proof thereof, are contained in McDONNELL DOUGLAS CORP. v. GREEN, 411 U.S. 792, 802-07 (1973), 93 S.Ct. 1981, 1024-26, 36 L.Ed.2d 668, and have been applied to wrongful discharge cases. PUGH v. SUE'S CANDIES, INC., 171 Cal.Rptr. 917, 116 CA 3d 311 (Cal.App. 1981). A recent Florida case adopting the McDONNELL DOUGLAS standard in another type of discrimination case is ANDERSON v. LYKES PASCO PACKING CO., 503 So.2d 1269 (Fla. 2d DCA 1986). In that case, the Second District affirmed a directed verdict against two employees because "the evidence fell short of inferring that age

more likely played a part in their discharge and that the [employer's] proffered explanation was pretextual. The court stated:

> Once a prima facie case is made, the burden shifts to the employer to demonstrate legitimate, nondiscriminating reasons for the discharge. If this is done, the presumption dissipates and in order to succeed the plaintiff must either prove that a discriminating reason more likely motivated the employer or that the employer's proffered explanation is pretextual.

In MITCHELL v. ST. LOUIS COUNTY, 575 S.W.2d 813 (Mo.App. 1978), the trial court granted a directed verdict against the employee in her wrongful discharge case for failure to show that the employer's reason for discharging her was pretextual:

> Plaintiff rests her case on the fact that she was discharged several months after filing a claim for compensation. But the record amply supports the basis for her discharge was excessive absenteeism - a valid and not pretextual motive.

Also, in SWANSON v. AMERICAN MANUFACTURING CO., 511 S.W.2d 561 (Tex.Civ.App. 1974), a suit charging discrimination by reason of a workers' compensation claim was dismissed, as the record established that there was a legitimate reason for the discharge.

As in the above cases, even assuming Scott provided a prima facie case of wrongful discharge, Otis demonstrated without question a legitimate reason for discharging him. At that point, Scott was required to prove that the more likely reason for his termination was the fear that he would file a workers' compensation claim or that Otis' reason for his discharge was pretextual. Scott proved neither.

POINT VI

(RAISED BY THE EMPLOYER)

OTIS WAS ENTITLED TO A JUDGMENT IN ITS FAVOR ON THE $100,000 AWARD FOR PAST LOST WAGES.

Scott was not entitled to an award of past lost wages, as a matter of law, for the same reason he was not entitled to an award of future lost wages. Any diminution in income, past or future, did not result from Scott's alleged wrongful discharge resulting in his inability to find a comparable paying job. Rather, the cause of Scott's reduced income was his knee injury which resulted in a disability preventing him from performing the duties of an elevator mechanic/foreman. Scott's remedy for loss of wage earning capacity was a workers' compensation claim, not a wrongful discharge claim. Scott was, in fact, receiving workers' compensation benefits to compensate him for that loss (R9).

As indicated under Point III, supra, the Fourth District correctly ruled that Scott was not entitled to receive future lost wages because his alleged wrongful discharge did not cause his lost wages, his knee injury did. That rationale was equally applicable to Scott's claim for past lost wages. However, the Fourth District ruled that it could not consider Otis' argument as to this element of damages because Otis had not moved for a directed verdict on Scott's claim for past lost wages in the trial court (A7). The Fourth District was wrong for two reasons.

First, this issue could be raised for the first time on appeal since it constitutes fundamental error. Case law holds that where a verdict is not permissible under the law, a judgment based thereon constitutes fundamental error. Where a jury is allowed to award an element of compensatory damages not authorized by law, the error goes to the very merits of the cause of action and, therefore, is fundamental error because it constitutes taking of

property without due process, requiring reversal even though no objection was made at trial. PALM BEACH COUNTY v. AWADALLAH, 538 So.2d 142 (Fla. 4th DCA 1989); KEYES COMPANY v. SENS, 382 So.2d 1273 (Fla. 3d DCA 1980); MARKS v. DELCASTILLO, 386 So.2d 1259 (Fla. 3d DCA 1980); LAMB v. JONES, 202 So.2d 810 (Fla. 3d DCA 1967).

Second, Otis' Motion for New Trial argued that the jury's award was against the manifest weight of the evidence (R833-35). That argument was sufficient to preserve this issue for review, despite the failure to move for a directed verdict on this claim. RUTH v. SORENSEN, 104 So.2d 10 (Fla. 1958).

For these reasons, the Fourth District erred in not entering judgment against Scott on his claim for past lost wages. Past lost wages were not recoverable, as a matter of law, under the undisputed facts of this case.

POINT VII

(RAISED BY THE EMPLOYER)

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE ELEMENTS OF WRONGFUL DISCHARGE, THE BURDEN OF PROOF, PROXIMATE CAUSE, MITIGATION OF DAMAGES, ETC.

The trial court's instruction on the substantive aspects of this case was simply:

> The issue for your determination on the claim of William Scott against Otis Elevator Company is whether William Scott has shown by the greater weight of the evidence that he was discharged by reason of his claim or pending claim for workmen's compensation benefits and, if so, whether this discharge was the cause of loss or damage to the plaintiff. You need not determine that Mr. Scott's attempt to file compensation was the only reason for his discharge if the evidence shows that the substantial reason, that this was the substantial reason for his discharge.

The above instruction is wholly insufficient and if this case is re-tried, the trial court should be directed to adequately instruct the jury. The instruction given in the prior trial failed to inform the jury of the elements Scott was required to prove in order to establish a prima facie case for wrongful discharge, discussed supra, under Point V. It also failed to inform the jury that Scott was required to prove a casual link between his discharge and filing a workers' compensation claim, after which Otis was required to demonstrate a legitimate reason for the discharge, after which Scott was then required to prove that Otis' reasons for his discharge were merely pretextual (Def's Ex. #11-14).

The jury instruction likewise failed to inform the jury that Otis cannot be held responsible for a wrongful discharge when there exists a legitimate reason for discharge, regardless of the motives, in line with the cases cited under Point V, supra. Accordingly, the Court erred in refusing to instruct the jury that in order for Scott to recover he must prove that "but for" his claim or attempt to claim workers' compensation, he would not have been discharged. Cf. COLUMBIA CITY BOARD OF PUBLIC INSTR., LAKE CITY v. PERC, 353 So.2d 127 (Fla. 1st DCA 1977). Rather, the court instructed the jury to the contrary under the last sentence in the above quoted instruction. The trial court also erred in refusing to instruct the jury that Scott's damages must be proximately caused by his wrongful discharge (Def's Ex. #19), or that Scott had an obligation to mitigate his damages (Def's Ex. #17).

The instructions given the jury was completely inadequate, and failed to instruct the jury on the elements of the cause of action, the burden of proof, proximate cause, mitigation of damages, etc.

CONCLUSION

This Court should direct that judgment be entered in favor of Otis Elevator because Scott failed to prove a cause of action for wrongful discharge.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to CATHY JACKSON LERMAN, ESQ., 3328 N.E. 34th St., Ft. Lauderdale, FL 33308; and EARLE LEE BUTLER, ESQ., 1995 E. Oakland Park Blvd., Ste. 100, Ft. Lauderdale, FL 33306, by mail this ~~28th~~ day of FEBRUARY, 1990.

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