STATE OF MICHIGAN

COURT OF APPEALS

ALI S. AHMED,

Plaintiff-Appellee,

v

PRINGLE TRANSIT CO.,

Defendant-Appellant.

UNPUBLISHED
September 27, 1996

No. 186258
LC No. 87-720959-NO

Before: Wahls, P.J., and Fitzgerald and L.P. Borrello,* JJ.

PER CURIAM.

Defendant appeals as of right a jury verdict awarding plaintiff $1,500,000, reduced to $495,000 by plaintiff's comparative negligence, in this personal injury action brought under federal maritime law, 46 USC 688 *et seq*. Defendant also appeals the trial court's denial of defendant's motion for new trial and remittitur. We reverse and remand.

Defendant raises a number of issues, one which we find dispositive of this appeal. Defendant argues that the trial court erred by refusing to instruct the jury that it must consider the effect of income taxes if it awarded damages for loss of future earning capacity. We agree. In *Woodruff v USS Great Lakes Fleet, Inc*, 210 Mich App 255, 257; 533 NW2d 356 (1995), this Court held that the trial court erred in not allowing the defendant to inquire into or argue about the taxability of the plaintiff's future earnings in a negligence action brought under federal admiralty and maritime law. The Court emphasized that the issue whether gross or net income figures are to be used in calculating the wage-loss portion of the verdict is a separate and distinct issue from the issue of the use of an instruction that income taxes should not be considered to adjust the final amount of the verdict after damages had been calculated. *Id.* at 258. The panel concluded that the error was not harmless. *Id.* at 259. On the basis of *Woodruff*, we conclude that the trial court erred in refusing to instruct the jury regarding after-tax income, and that the error was not harmless. We remand for a new trial on the issue of damages.[1]

Because we remand this case for a new trial, we will only address those issues raised by defendant which may arise on retrial. Defendant first contends that the trial court erred in denying its

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* Circuit judge, sitting on the Court of Appeals by assignment.

motion for a mental examination of plaintiff. We agree. The applicable court rule, MCR 2.311(A), requires the moving party to establish that the opposing party's mental condition is in controversy and that there is good cause for ordering the examination. Although claims for past pain and suffering or mental anguish are not sufficient to place a plaintiff's mental condition in controversy, the condition may be in controversy where it is a basis for a defense. *Brewster v Martin Marietta Aluminum Sales, Inc*, 107 Mich App 639, 643-644; 309 NW2d 687 (1981), *Hodges v Keane*, 145 FRD 332, 334-335 (NY, 1993), *Bennett v White Laboratories, Inc*, 841 F Supp 1155, 1158-1159 and n 3 (Fla, 1993). Here, defendant sought a mental examination to defend against plaintiff's claims that his hand was still injured, and defendant presented evidence that some treating doctors believed plaintiff's hand was healed and his complaints were psychological. Defendant satisfied the requirements of the rule and the trial court thus erred.

Defendant also asserts that the trial court erred in instructing the jury that it could consider the effects of inflation when awarding future damages because plaintiff did not present expert testimony. Defendant seeks to rely upon *Jones & Laughlin Steel Corporation v Pfeifer*, 462 US 523; 103 S Ct 2541; 76 L Ed 2d 768 (1983). Contrary to defendant's argument, however, that decision did not hold that a plaintiff in a maritime personal injury action was required to present expert testimony before obtaining an instruction on inflation

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Myron H. Wahls
/s/ E. Thomas Fitzgerald
/s/ Leopold P. Borrello

[1] Defendant concedes liability and is only seeking a new trial with regard to damages.