SAFEWAY STORES, INC., *v.* ROGERS.

4-2720

Opinion delivered January 23, 1933.

1. LIBEL AND SLANDER—ACTIONABLE STATEMENT.—A false statement of a clerk in a store that a customer had stolen a can of pineapple *held* actionable *per se*.
2. LIBEL AND SLANDER—BURDEN OF PROOF.—Plaintiff in an action of slander must prove the publication by a fair preponderance of the testimony.
3. LIBEL AND SLANDER—PUBLICATION—JURY QUESTION.—Where a slanderous statement was made in a loud voice in the presence of numerous persons, the question of publication of the slander was a question for the jury.
4. LIBEL AND SLANDER—INSTRUCTION.—An instruction that a clerk's statement that a customer had stolen a can of pineapple was made in furtherance of the store's business *held* not error.
5. LIBEL AND SLANDER—DAMAGES.—Compensatory damages may be recovered as matter of law for words slanderous *per se*, without

proof of actual damages, but allowance of special damages must be based on proof.

6. LIBEL AND SLANDER—DAMAGES.—In absence of proof of actual damages, an award of $7,500 damages for a slanderous statement charging larceny *held* excessive; $2,500 being adequate.

Appeal from Ouachita Circuit Court, Second Division; *W. A. Speer,* Judge; remittitur ordered.

STATEMENT BY THE COURT.

This appeal is from a judgment for damages for slanderous statements made by appellants against the appellee.

It appears from the testimony that appellee and one Mrs. Jennings were in Camden doing their Christmas shopping on the day in question, Mrs. Jennings having with her at the time one of her little children, when they went into appellant's store. Mrs. Rogers was helping to take care of Mrs. Jennings' little girl, the other child having been left with some one else at the last store visited. They went through the store, which was operated on the "Piggly Wiggly System," where the customers pass through the store selecting what goods they desire for themselves and return to the front of the store to the cashier's stand where the clerks determine the amount due for the purchases made.

The ladies entered the store on December 22, and Mrs. Jennings selected a rather large order of groceries, and while going through the store Mrs. Rogers took from the shelves, or had Mrs. Jennings to do so, a small can of pineapple, which sold for 10c, and put it on top of her packages which had been purchased elsewhere. The store was rather crowded with customers at the time. After the pineapple was selected and while Mrs. Jennings was at the cashier's stand paying for her purchases, the little girl ran out of the front door on to the sidewalk, and appellee followed the child to the door and called her and she came back. By this time Mrs. Jennings had paid for her purchases and came to the door and told appellee to "Let's go," to which she replied that she had to go back and pay for her purchase.

About that time Mr. Green, the manager of the store, approached and tapped appellee on the shoulder and said, "You have stolen a package; come back here." Mrs. Jennings went on to the car, and appellee went on towards the back of the store with Mr. Green pushing her every little way. There were people standing in that part of the store near the door and all about over the store who could have heard the statement made, it being made in a sufficiently loud tone of voice. Mrs. Jennings said he was speaking as loud as the attorney examining the witness at the time.

When they got back near the rear of the store, she was taken in hand by Jack Bryant, a clerk in the store, and it appears also that Worrell, the meat cutter in the meat shop, took some part in the discussion. They accused Mrs. Rogers of stealing the can of pineapple, threatened her with arrest, and finally told her that, if she would pay $5 and sign a confession that she had stolen the can of pineapple, they would let her go. At this stage of the proceedings Mrs. Jennings returned to the store, evidently to ascertain why Mrs. Rogers had not come on to the car, and found them in the back of the store, whereupon appellee, explaining the delay, said: "What do you think, they have accused me of stealing this pineapple, and they have $2.50 of mine, and that is all the money I have, and they say they are going to put me in jail." The employees demanded that appellee pay $5 for the pineapple, and she borrowed $2.50 from Mrs. Jennings to make up the amount demanded and was released. Appellee was much worried and humiliated and greatly agitated at the time because of the occurrence, so much so as to be made sick thereby. The $5 was put into the cash register by the clerks who had extorted it from appellee with the knowledge of Mr. Green, of course, and they refused to return it upon the demand of the brother of Mrs. Rogers, who came to see about it after his sister had reached home later in the evening. They never made any apology or statement about the incident explanatory thereof, except that two of them

went to the home of the brother of Mrs. Rogers the next day and asked about the matter and said the $5 would be returned, and they claimed they were told by the brother that they would not take it back without a proper apology.

The court instructed the jury, giving certain instructions over appellant's objection, and it returned a verdict in appellee's favor for $7,500 damages, and from the judgment thereon this appeal is prosecuted.

G. R. Haynie, Robinson, House & Moses and *W. H. Holmes,* for appellant.

Gaughan, Sifford, Godwin & Gaughan and *Powell, Smead & Knox,* for appellee.

KIRBY, J., (after stating the facts). It is insisted for reversal that the verdict is not supported by the testimony, there being no proof of publication of the alleged slanderous statements, which it was claimed was semi-privileged, and that the court should have directed a verdict in its favor; that appellant company could not be held liable for the slanderous statements made by its employees without authority; and that the verdict is excessive.

Appellee testified that Mr. Green, who made the first statement, tapped her on the shoulder at the front door and told her to come back to the back thereof, that "she had stolen a can of pineapple," and that the others, who continued the conference or investigation and who were also clerks in the store and whose business it was to collect for goods sold, also accused her of stealing the can of pineapple.

It appears from the connection in which the charge was made, and, under the circumstances attending its utterance, that it was intended and understood to impute the crime of larceny—it so expressly stated it—and must be regarded as actionable *per se. Dean* v. *Black & White Stores, Inc., ante* p. 667; 36 C. J. 1208; § 2396, Crawford & Moses' Digest.

The jury found from substantial testimony that numerous persons were present when the slanderous

statement was made, in a position to hear it, and it will be assumed, unless the contrary is made to appear, that those present both heard and understood the words; and, although the burden is upon the plaintiff to prove the publication by a fair preponderance of the testimony, many persons were shown to have been present when the words were spoken, and it was a question for the jury to say whether such persons did or did not hear them. Only one of the persons present stated she did not hear the statement as first made at the door of the store when appellee was stopped by the manager and requested, "I want to see you in the back, lady you have stolen a can of pineapple." Townshend on Libel and Slander, page 555; Newell on Slander and Libel, page 725.

If the statements were made in the tone of voice as testified to, they could have been heard by a number of the many people in the store at the time, and certainly, when Mrs. Jennings returned to the store for appellee, who had not followed her out, the statement was made by Mrs. Rogers, it is true, explanatory of the delay that they had accused her of stealing a can of pineapple. This statement was made in the presence of the investigators, to whom she was turned over by the manager, and who were insisting that she did steal the can of pineapple and must pay $5 before she would be released from custody, otherwise she should be turned over to the sheriff. Under such circumstances, it cannot be said that the publication of the slander was invited or procured by appellee; and it was also shown that Worrell had charged her at that time with stealing the can of pineapple in the presence of Mrs. Jennings.

The court did not err in giving appellee's requested instruction No. 6, specially objected to as containing the clause, "that these statements were made in furtherance of the company's business." This language was approved as correct in *Waters-Pierce Oil Co.* v. *Bridwell*, 107 Ark. 310, 155 S. W. 126.

There was no testimony warranting the giving of appellant's requested instructions Nos. 10 and 11, and the court did not err in refusing them.

The majority of the court has concluded that the verdict is excessive. It is true that no great amount of actual damages suffered was proved, but appellee was greatly humiliated and embarrassed at the store and suffered from nervous excitement and did not sleep well on the night the incident occurred or for several nights thereafter. The words being actionable *per se* however, appellee was entitled as a matter of law to compensatory damages, and was not required to introduce evidence of actual damages, it being necessary in such cases to prove special damages, which under the circumstances of this case the court has concluded should not be more than $2,500. The damages were probably aggravated by proof of the fact that the employees required the payment by appellee of $5 for a 10-cent can of pineapple, although the jury was instructed to disregard this fact, which the jury evidently believed she had no intention of stealing, and their action in forcing her to make a written statement that she had stolen the can of pineapple during the investigation of the matter when the slanderous statement was made.

If appellee will enter a remittitur reducing the amount of the judgment to said amount of $2,500, it will be affirmed; otherwise it will be reversed and remanded for a new trial. It is so ordered.

HUMPHREYS, J., dissents from modification.