

CENTERPIECE

\$1,261,000 jury verdict for a police officer injured by a drunk driver against the convenience store that sold beer to the intoxicated driver.

Gail v. Western Convenience Stores, Iowa, Linn County District Court, No. 10497, Sept. 23, 1985.

This is the story of a dream that was shattered and of a man's right to choose how he will rebuild his own life. It was the dream of a boy, a minister's son, growing up in Iowa. To be a police officer. From the time he was old enough to race his bicycle through the neighborhood, following the sound of a siren, Rick Gail never wanted to be anything else. His elation when the department accepted him as an officer can only be fully appreciated by one who has realized a lifelong dream. He was a good cop. Tall, strikingly handsome, he could have stepped out of the Our Friendly Policeman poster in the Cedar Rapids grade schools. In a few short years, he won numerous commendations and honors, including the Medal of Valor for his courage in the face of a robber's gunfire. He was about to face an even greater test.

Drinking and Dragging

On Sept. 12, 1981, at about 10 p.m., a 19-year-old tough named Ronald Clark walked into a Western Convenience store. Witnesses said that he was loud and staggering and slurring. He wanted a 12-pack of Pabst Blue Ribbon. The man at the counter sold it to him. Clark and three friends were up for an evening of "cruising the Avenue," driving up and down 1st Avenue in Cedar Rapids, in Clark's souped-up red Dodge pick-up. Later, he bought another 12-pack at a 7-Eleven.

At 3:30 a.m., two officers in a patrol car saw Clark and another vehicle drag racing and ordered them to stop. Clark decided to outrun them, leading the police on a high-speed chase through residential neighborhoods. Rick Gail was on duty that night. He heard of the chase on his squad car radio and turned on his emergency lights. As he was pulling into an intersection, the red pick-up came roaring out of the darkness at 100 mph, through the stop sign, and crashed broadside into the driver's side of Gail's squad car. One hour after the accident, Clark's blood alcohol was .129 mcg/ml.

Miraculously, both Gail and Clark survived. Gail suffered a concussion and numerous broken ribs which punctured his lungs. He was hospitalized for five weeks. He returned to police work in June, 1982. But he had suffered an infection and pulmonary emboli which would cause progressive deterioration of his lungs.

Dram Shop Liability for Convenience Stores

Rick Gail and his wife retained ATLA Member Roxanne Barton Conlin of the Des Moines firm James & Galligan. Conlin brought an action against Clark, who had available policy limits of \$60,000. She also filed against 7-Eleven and Western Convenience under the Iowa Dram Shop Act, Iowa Code §123.92. The Act expressly provides a right of action against a licensee who sells beer or liquor to an intoxicated person who thereafter causes injury. The Act does not require knowledge by the seller of the purchaser's intoxication. While convenience stores have been held liable for illegal sales to minors, Conlin found no prior cases holding such stores liable for sales to intoxicated adults.

The Fireman's Rule

While Gail's case was pending, the Iowa Supreme Court handed down its decision in *Pottebaum v. Hinds*, 347 N.W.2d 642 (Iowa 1984). Two policemen called to quell a disturbance at a tavern were injured by an intoxicated patron. The court held that the Fireman's Rule precluded their dram shop action against the tavern. 7-Eleven and Western moved for summary judgment. Conlin's colleague, ATLA Member Dwight James, argued that *Pottebaum* had decided, for public policy reasons, to extend the protection of the Fireman's Rule to those who seek police assistance. In this case, the convenience stores had no connection to the high-speed chase that injured Rick Gail. The trial judge agreed and denied the defense motions.

Settlement

Prior to trial, Clark's carrier agreed to settle for \$60,000. 7-Eleven entered into a structured settlement with Gail with a present value of \$250,000. Western Convenience, however, offered no more than \$25,000. Plaintiff proceeded to trial against Western alone.

Clinging to the Wreckage

After the crash, Rick Gail remained as devoted to police work as ever. Through sheer force of will, he minimized the symptoms of his deteriorating pulmonary condition that would force him to relinquish his dream. Dr. James Boddicker, a pulmonary specialist, cleared him for returning to work in 1982. It was Conlin who uncovered the extent of Gail's disability. During interviews, fellow officers expressed concern for Gail's health

and their own safety when working with him. In March 1985, she sent Gail to Dr. Boddicker for new tests. He found that Gail had lost over 22% of his pulmonary capacity during the prior two years. Though he appeared healthy, Rick could lift no more than 10 pounds and walk no faster than 1.5 mph. Talking rendered him short of breath. Boddicker ordered Rick removed from the force immediately, concluding that he was permanently disabled and probably had been so for some time.

Liability: Clark's Turnabout

Both liability and damages were hotly contested at trial. Establishing that Clark was intoxicated at the time he purchased beer at Western was a major hurdle. Western's employees denied selling beer to Clark or to any intoxicated person on the night in question. The statements of Clark's passengers were not terribly persuasive. Clark himself had testified in deposition the he was not drunk at any time that night. Conlin met with Clark after the deposition and suggested that, by telling the truth, he might provide a measure of justice to the man he had so grievously injured. Despite defense counsel's threats that he would be charged with perjury, Clark gave brief, but dramatic, testimony at trial admitting that he was drunk when he went into Western Convenience. He admitted that this contradicted his deposition, but told the jury that, after living for four years with what he had done to Gail, he wanted to set the record straight.

Damages: The Right to Rebuild Your Own Life

Plaintiff established Gail's past medical expenses of \$39,654 and past lost income of \$11,180. The major elements of damage requested by Conlin consisted of Gail's mental anguish due to the loss of his chosen profession and the loss of his earning capacity.

Dr. Boddicker testified as to plaintiff's pulmonary disability. Dr. Donald Zavala, an expert in physiology from the University of Iowa who had never given testimony before, gave a superb demonstration to the jury of the progressive debilitating impact of Gail's lung deterioration. A treating psychiatrist gave a moving description of Gail's depression and tremendous sense of loss at being removed from police work.

Rick Gail has now decided to follow in his father's footsteps and become a minister of the Open Bible Church. His father was able to testify that this would

require four years of study and that, if he is fortunate enough to be "called" by a parish, he would earn only \$10,000 to \$15,000 a year. Gail had earned \$20,856 as a police officer.

The Defense

The client loves to see that his attorney is a fighter, never giving an inch to the other side. But trial lawyers who are consistently successful emphasize that a personal injury suit is not won on debating points, but by persuading the jury to believe in your client's cause. In this case, defense counsel Ray Stefani disputed each and every issue. Some contentions, such as that Western had not sold beer at all to Clark, appeared so untenable as to risk losing credibility with the jury for the entire case.

It was on the issue of future earning capacity that the defense may have lost its own case. Stefani's primary witness was a vocational rehabilitation specialist who had administered the GATB test to Gail. Her report suggested a variety of jobs that Rick could perform, including police detective or investigator. She included the 1982 doctor's report which indicated Gail was capable of returning to the police force.

Conlin's cross-examination highlighted not only the lack of preparation by defense counsel and the witness on this issue, but also their insensitivity to the effect this type of testimony would have on the jurors. The witness acknowledged that she did not include the ministry in her list, even though that was the profession Gail himself desired. She admitted she was not aware that one must be a certified police officer to compete for the positions of police detective or investigator. She admitted that she had deliberately omitted Dr. Boddicker's March, 1985 report on Gail's disability. The witness implied to the jury that Gail was a malingerer who could probably remain a police officer if he so desired. This must have grated on the sensibilities of the jurors, who had heard of Gail's desperate attempts to remain on the force even after his incapacity had become a danger to himself and others. Conlin placed the issue squarely before the jury in her closing argument: Rick Gail was injured and deprived of the work he loved best by defendants. Must he also give up the right to choose his new life's work because it does not minimize defendant's damages? The jury returned a verdict for plaintiff. In a jury poll, they told counsel that they wanted Rick Gail to be able to make that choice.

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