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Mathew Foley v. Leroy Mecham : Brief of Respondent

Utah Supreme Court

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Rulon L. Larsen; Llewellyn O. Thomas; Attorneys for Plaintiff and Respondent;

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In the Supreme Court of the State of Utah

LeROY MECHAM,

Plaintiff and Respondent,

vs.

MATTHEW FOLEY,

Defendant and Appellant, and

DRY GULCH IRRIGATION COM-
PANY, a Utah Corporation,

Defendant.

FILED

MAY 1 - 1951

Clerk, Supreme Court, Utah

Case No. 7637

BRIEF OF RESPONDENT

RULON J. LARSEN

and

LLEWELLYN O. THOMAS

Attorneys for Plaintiff and Respondent

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BRIEF OF RESPONDENT

STATEMENT OF FACTS

While respondent accepts generally the Statement of Facts recited in appellant's brief, it would appear advisable that respondent supplement that statement by briefly indicating that while there was no corroboration from any eye witness there was circumstantial corroboration of respondent's testi-

mony concerning the altercation on May 30 in that five unused Camel cigarettes of the kind used by respondent and carried that day in an open package in the breast pocket of respondent's shirt were picked up by respondent's mother in the corral and yard in a path extending from the place where the respondent testified he was first struck by appellant to the shed near which appellant testified he knocked respondent down several times Tr. 92-96, and plaintiff's exhibit "P" (paper bag and five cigarettes therein). Also, that by defendant's answer he claims he struck plaintiff several times with his fists in self-defense, "which said striking of plaintiff by defendant was with force necessary to be used to prevent great bodily injury to defendant." Tr. 226.

ARGUMENT

In answering appellant's brief, under Argument, respondent will take up the points designated by appellant in the order stated in appellant's brief.

POINT I

RESPONDENT'S ANSWER TO APPELLANT'S POINT ONE, SAID POINT ONE BEING, The Court Erred in Awarding Respondent One Thousand Dollars or Any General Damages, Such Judgment Being Unsupported By the Evidence.

Respondent respectfully says that according to the record in this case no instance was shown that a so-called quarrel or

fight of plaintiff was unjustified nor was it shown that plaintiff was doing anything but simply standing up for his rights. The witness who testified that respondent's reputation was bad appeared to be biased and prejudiced mainly because of the trouble that plaintiff has had with the Dry Gulch Irrigation Company, with whom all but one had been identified in one way or another, in getting water due him for irrigation. Furthermore, if such was respondent's reputation appellant must have been fully aware of this when he went on to plaintiff's premises on May 30, 1950. Appellant stresses that he and his wife testified that respondent struck the first blow, but fails to consider the significance of his own acts in what he terms "self defense." Disregarding entirely respondent's testimony concerning the altercation, the appellant's own testimony shows him to be the aggressor and that he wilfully administered a severe beating to respondent rendering him unconscious and unable to arise from a prostrate condition on the ground.

Appellant testified:

Q. "And what happened?"

A. "Well, at that point, he struck me on the side of the head."

Q. "Then what happened?"

A. "Well, we commenced to fighting there. I don't think that he hit me but very few times, possibly only twice. I knocked Roy down. I'd stand there. Roy would get up on his knees, get up and come running at me like a mad dog. And I'd knock him down again. This continued on until he quit coming back, until he quit coming. I walked over to him. He started to raise

himself upon his elbows, trying to get up again. I took hold of his shoulders, put my hands under his arm pits and set him up. I picked his hat up off the ground and set it on his head." Tr. 153-154.

And on cross-examination appellant testified:

Q. "That's all there was, he just hit you for telling him that he could have some water?"

A. "Yes, sir." Tr. 160.

Also

A. "He'd get up slow. He'd get up very slowly."

Q. "And he did that after you knocked him down the first time?"

A. "Yes, sir."

Q. "And then you stood there and when he got up, you hit him again, is that right?"

A. "When he'd coming running, yes, sir."

Q. "How far away were you?"

A. "He'd usually stagger and fall, oh, possibly 5 or 6 feet away from me, when he'd go down."

Q. "And then he'd come running back 5 or 6 feet?"

A. "Yes, sir."

Q. "And you would let him have another one?"

A. "Yes, sir."

Q. "Five or six?"

A. "Well, several times, yes, sir." Tr. 163.

Concerning the altercation, respondent's testimony shows that he had placed some pigs in a pen adjoining his corral and

wired the gate shut. On pages 38 to 40 of transcript appears the following testimony of respondent:

Q. "Then what happened, Mr. Mecham? Just tell the court what happened to the best of your ability."

A. "I turned around to leave, and as I turned around Mat was standing right behind me, and as I turned, he hit me over the head with something."

Q. "Do you know what he hit you with?"

A. "No, I didn't see it. He hit me just as I turned."

Q. "What if anything did you do?"

A. "I don't know what I done after that. That's where I quit remembering. I don't know what happened."

Q. "Do you know whether Mr. Foley struck you?"

A. "I never seen him make a move. I looked him right in the face. It was just for an instant, as I turned around and that's where I quit remembering was right there."

Q. "Is this Mr. Foley in the courtroom?"

A. "Yes, sir."

Q. "Sitting at the table next to Mr. Henriod?"

A. "Yes, sir."

Q. "Was he the man that stood there?"

A. "Yes, sir."

Q. "Did Mr. Foley say anything to you at that time?"

A. "No, sir."

Q. "Where were you when you next remembered?"

A. "I was at the house."

Q. "Where, what part of the house?"

A. "I was—I was on the porch."

Q. "Is that on the north side of the house, or the south?"

A. "That is on the north side."

Q. "And what if anything took place then, do you remember?"

A. "When I first remember, I thought mother was shaking me, and asking me what had happened."

Q. "And what did you do then, do you remember, Mr. Mecham?"

A. "Well, I remember her questioning me. That's the first I remember, was her shaking me. I thought she was shaking me, and asking me what had happened. And she said, 'Did that ditch rider hit you?' or 'Did that devil hit you?' And I said, 'Who?' And she said, 'The ditch rider was here.' And I said, 'What would he hit me for?' And she said, 'For turning him in.' And I said, 'What did I turn him in for?' She said, 'There is Mr. Milligan, ask him.' So I went down and asked Mr. Milligan what for."

Q. "Do you recall how long you stayed there with him?"

A. "Well, it was only just a few minutes that I stayed. I asked him what we went to Duchesne for, and he said, 'We went up there to see about that water.' And I began to remember then, that that's what we went to see Rulon for. He said, 'We went to see Rulon Larson.' And I began to remember that that was what we had come for. So I went back home." Tr. 38-40.

The finding of the unused Camel cigarettes on the ground by the mother of respondent on the morning following the

altercation, which were the kind used by the respondent, in a path commencing at the place where respondent says he was first struck, is a circumstance corroborating respondent's testimony. Tr. 92-96.

The court had all of these matters presented fully before it and not only heard the testimony of witnesses, but Judge Dunford went on the premises where plaintiff was injured and examined the same and observed all of the conditions obtaining there and then made findings and judgment, sustaining which there appears to be ample evidence. The record shows that no competent evidence presented was not duly considered by the court and no bias nor prejudice of the court has been claimed nor shown by appellant.

In contending that the award is grossly excessive and is not supported by the evidence it would appear that appellant has disregarded entirely the evidence of injury. Respondent stated, and such was not contradicted, that he was knocked unconscious and did not remember anything thereafter until his mother shook him asking him what happened while he was sitting on the porch of their house. Tr. 39-40. He also testified that sometime after he had talked with his neighbor, Mr. Milligan, after receiving the injuries complained of, he looked in the mirror and saw that one eye was shut and that he was all bruised up and that there was blood all over him and that the left side of his head was bruised. Tr. 40. Respondent further testified that his pain was bad, that he had a large lump over his left ear which remained there until August, 1950, that his left eye was blackened and swollen shut, that his nose was sore, and he could not breathe through it for

several weeks, that he had difficulty in eating due to injuries, saying:

A. "... it didn't seem that I could get my jaws opened wide enough to get anything into my mouth. I had to break it with my fingers to get it into my mouth. I couldn't get my mouth wide enough open to even eat a slice of bread."

And further stated that this condition continued for a month or more, "six weeks." Tr. 44.

In this connection, attention is directed to plaintiff's exhibits K and L, admitted in evidence, which are photographs of plaintiff taken on the Friday following the Tuesday when the injuries were inflicted. These photographs show the left eye of plaintiff to be swollen closed and discolored on the day the photographs were taken. Tr. 45-46.

Respondent was concerned about a skull fracture and procured X-ray photographs of his skull to be taken at the hospital at Roosevelt, Utah. Tr. 46-47.

Since receiving the beating administered on May 30, respondent has suffered with headaches and other head pains "up to recently," Tr. 48, and plaintiff further testified:

A. "And sometimes now it isn't exactly a headache, but just a pain goes though my head, and then that's the end of it, just like something shooting through."

Q. "Is that on the left side of your head?"

A. "Yes, sir, and sometimes from the back of my neck, running up through my head this way too."

Q. "Did you suffer with any such headaches prior to this occurrence?"

A. "No, sir."

Respondent has also suffered with a swollen eye lid which continued down to and including the time of trial, with which he had not suffered prior to May 30, 1950. Tr. 48-49.

Respondent further testified that he has had dizzy spells or groggy spells at times since the occurrence on May 30, which he had not experienced prior thereto, Tr. 49, and that prior to May 30 he was in good health and that since the occurrence on May 30 he wakes up at night and "it feels like a muscle in my head just is trembling like that now." And respondent further testified that since the occurrence on May 30 he hasn't been able to work as he usually did prior thereto—"hasn't the energy, tires quickly." Tr. 49-50.

Concerning respondent's injuries *Mrs. Jane Mecham*, plaintiff's mother, testified:

Q. "And did you observe his face and head?"

A. "Yes. I see he was all blood. He was just all blood and . . ."

Q. "Were his clothes covered with blood or had blood on them?"

A. "His clothes had blood on them, yes. And they had dirt on them." Tr. 90.

She also testified that respondent had a lump on the side of his head which was there "until just recently."

Q. "Did you observe his left eye?"

A. "Yes, sir. His left eye was swollen, I think entirely shut. Right clear shut for a few days."

This witness further testified that respondent's left eye was blackened and also his face, "even on the other side" was discolored, which lasted for days and that respondent's left eye bothers him, and that respondent complained of headaches after the occurrence. Tr. 97-98.

This witness was afraid respondent's jaw was broken and testified:

A. "He had a time in eating. Now he had . . . I was afraid his jaw was broken. I told him 'I think your jaw must be broken.' He couldn't get his mouth opened; he couldn't get a spoon in his mouth. He had to break his food up in real little bits and put it in with his fingers."

Q. "How long did that condition obtain, do you remember?"

A. "Well, it seemed to me it must have been a week anyway. And he couldn't breathe. He had to breathe through his mouth. His nose, there was something wrong with it. He couldn't breathe through his nose."

Q. "Did he ever have that trouble prior to this happening on May 30?"

A. "No, sir." Tr. 99.

William Milligan, a neighbor living near plaintiff, testified that he saw respondent on the evening of May 30 and respondent had dry blood running out of his nose, a bruise on the left side of his face and a swelling back on the jaw or temple on the left side. Tr. 102.

This witness testified that respondent "acted like some-

thing had happened,"—and that he did not act as though he knew what he was doing—"he acted just kind of docile, you might say, or just like he was thinking about something else all the time." Tr. 103.

On cross-examination this witness testified as follows:

Q. "Was he out of his head?"

A. "Well, I couldn't say he was. I am . . . not a doctor, and I couldn't say a man is insane, unless I knew it."

Q. "In your opinion was he out of his head?"

A. "Well, he talked that way." Tr. 108.

Arzy Mitchell, sheriff of Duchesne County, testified that he saw respondent on the evening of May 30 at the home of the sheriff in Duchesne and observed a lump on the left side of respondent's head near his temple, that respondent's left eye was black and swollen, that respondent's nose had been bleeding and was swollen, that respondent's face on the side of his head was discolored, and that respondent had the appearance of a man who had been recently beaten. Tr. 113.

Dr. Harry Berman, eye, ear, nose and throat specialist, testified that he examined plaintiff on August 29 and 30, 1950 and observed on these dates that plaintiff's left eye lid was swollen about half-way shut, that in his opinion the drainage channels from respondent's left eye lid were injured by the blow received by respondent on May 30, and that this injury may result in permanent damage to respondent. Tr. 120.

Concerning headache Dr. Berman testified as follows in answer to the following hypothetical question:

Q. "Now, assume that . . . I will give you this hypothetical case, Doctor: Now assume that a person did not have headaches prior to a blow received on the head, and that over a period of three months after that blow he complained of a constant headache, would you have an opinion as to the cause of that headache?"

A. "It would be natural to conclude that the headache was the result of the injury." Tr. 121.

It is conceded that it is difficult to place a money value upon injuries of the type suffered by respondent. However, respondent urges that even \$1,000.00 is far short of adequately compensating him for such injuries. In this regard attention is directed to the case of *Apostolos vs. Chelemes* (Utah), 298 P. 399, decided by this court in April, 1931, 20 years ago, in which this court held that damages awarded to plaintiff consisting of \$1,180.70 general, \$500.00 exemplary and \$319.00 special, for injuries from malicious assault, causing deafness in one ear, were not excessive. While the injuries in that case might be considered greater, still the injuries sustained by respondent would appear to be substantial, and this court can very well take notice of the fact that the value of our money now is far less than its value in the year 1931, possibly less than one-half.

The rule repeatedly announced by this court to the effect that if the findings and judgment of the lower court are supported by competent evidence, then this court may not disturb them, would appear to be applicable in this case.

Ercanbrack vs. Ellison, 103 Utah 138, 134 Pac. 2nd, 177,

Sine vs. Salt Lake Transportation Company, 106 Utah 289,
147 Pac. 2nd 875,

Horsley vs. Robinson et al, 112 Utah 227, 186 Pac. 2nd
592,

Williams vs. Ogden Union Railway and Depot Company,
No. 7471, this court, decided in 1951.

POINT II

RESPONDENT'S ANSWER TO APPELLANT'S POINT TWO, SAID POINT TWO BEING, the Court Erred in Awarding Respondent \$100.00 Punitive Damages, Such Judgment Being Unsupported by the Evidence.

The Lower Court's Finding No. 5 being, "that the afore-said striking by defendant Matthew Foley was malicious, willful, unprovoked and without cause," appears to be amply sustained by the evidence as above pointed out. That being true, punitive damages would be allowable in this case. The "good words for defendant" referred to by appellant in his brief would appear to be of no consequence in the light of the actual conduct of appellant as shown by the testimony of respondent quoted herein and also by the testimony of appellant himself, referred to under Point I herein.

In 123 A.L.R. 1116 there appears the following general statement in connection with an annotation on punitive or exemplary damages for assault:

"The doctrine that exemplary or punitive damages may be allowed for an assault and battery committed wantonly, maliciously, or under circumstances of aggravation, heretofore well established in most jurisdictions, has been affirmed, applied, or at least recognized, in the following recent cases:"

and many cases are cited on Pages 1116, 1117 and 1118, including the two Utah cases of Johanson vs. Huntsman (1922) 60 Ut. 402, 209 Pac. 197 and Apostolos vs. Chelemes (1931) 77 Ut. 587, 298 Pac. 399, in both of which punitive damages were awarded and allowed under circumstances similar to those obtaining in the instant case.

On page 1122 of 123 A.L.R. there appears the following general statement concerning malice, which supplements 16 A.L.R. 808:

"As pointed out in the earlier annotations, the authorities generally hold that to justify exemplary damages for an assault, actual malice need not be expressly proved; that is, there need be no direct proof of ill will, hatred, or an intent to injure, but malice may be inferred."

In 4 American Jurisprudence, Assault and Battery, paragraph 187, page 216, the following statement appears:

"As a general rule, exemplary or punitive damages may be allowed for an assault and battery committed wantonly, maliciously or under circumstances of aggravation."

In *Littledike vs. Wood* (Utah), 255 Pac. 172, on page 174 this court quoted from *Rugg vs. Tolman* (Utah), 117 Pac. 54, saying:

"Exemplary, punitive or vindictive damages are such damages as are in excess of the actual loss, and are allowed where a tort is aggravated by evil motive, actual malice, deliberate violence, oppression or fraud, . . . or where the defendant acted willfully or with such gross negligence as to indicate a wanton disregard of the rights of others."

POINT III

RESPONDENT'S ANSWER TO APPELLANT'S POINT THREE, SAID POINT THREE BEING, The Court Erred in Failing to Award Judgment for the Appellant on His Counter-Claim, the Evidence Indicating That Respondent Was the Aggressor.

As has been heretofore stated, the lower court heard the testimony of the witnesses in this case and in addition thereto went on the premises where the altercation took place and observed all the conditions obtaining and, being the trier of the facts, was entitled to and did accept and adopt the position taken by respondent. It is again urged that this position is amply sustained by the evidence.

Furthermore, it would appear that the evidence most favorable to appellant fails to reveal any damage suffered by him. Appellant testified that the extent of any injury to him was an "abraded or skinned" place on the left side of his face, ". . . just a skinned place there," Tr. 154, and appellant's wife testified that such was the condition and that first aid was not required. Tr. 136.

CONCLUSION

Respondent submits that appellant has presented no basis nor reason what ever for the reversal of the judgment of the lower court and urges that said judgment be affirmed.

Respectfully submitted,

RULON J. LARSEN

and

LLEWELLYN O. THOMAS

Attorneys for Plaintiff and Respondent