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Thomas K. Evans v. A. Frank Gaisford : Brief of Defendant and Appellant

Utah Supreme Court

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7776

Civil No. 7776

BEFORE THE SUPREME COURT
of the
STATE OF UTAH

THOMAS K. EVANS,
Plaintiff and
Respondent,

vs.

A. FRANK GAISFORD,
Defendant and
Appellant.

7776

FILED

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Clerk, Supreme Court, Utah

BRIEF OF
DEFENDANT AND APPELLANT

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**BRIEF OF
APPELLANT**

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DEFENDANT AND APPELLANT

STATEMENT OF FACTS

This is an action for assault and battery. The record discloses that the plaintiff and the defendant both reside in American Fork, Utah and are both engaged in the newspaper business in that city. On the 1st day of December,

1950 the plaintiff, while walking east on the main street of American Fork, encountered the defendant at a point near the intersection of Main and Center Streets. The evidence as to what happened is in dispute. The plaintiff testified that the defendant called him some names and struck him several times on the ear, knocking his glasses off. He further testified that he was struck with a closed fist. He was not knocked to the ground. The defendant testified that he met the plaintiff at the place described and that the plaintiff had a linotype belt in his hand and that he made a motion as if to strike defendant with it. That defendant cuffed plaintiff with his open hand to keep him off balance and that he cuffed him three or four times.

The plaintiff testified he went to his car which was near the place of the altercation, proceeded to drive his car to his printing plant to deliver the belt, and that he then went home, called the doctor and went to bed. The doctor came sometime later. The doctor's examination revealed a redness in the area of the left ear. There were no bruises or swellings. The doctor testified that plaintiff's blood pressure was up and that he prescribed a sedative and told Mr. Evans to go to bed for a few days. The doctor further testified that the blood pressure remained elevated for a period of about two weeks but that the plaintiff was not confined to his bed all this time. The plaintiff himself testified that he was able to do some work. The plaintiff further testified that he still had a ringing in his ear.

In the course of the argument we will cite other testimony as to the ill feeling between the two parties.

The jury returned a verdict for the plaintiff for \$500.00

general damages, \$500.00 special damages and \$1,499.95 punitive damages. The trial judge on a motion for a new trial reduced the damages to \$400.00 general damages and the punitive damages to \$1,000.00.

STATEMENT OF POINTS RELIED UPON
BY THE DEFENDANT

1. That the damages awarded by the jury and as reduced by the judge are excessive and were assessed as the result of passion and prejudice.

2. That the court erred in admitting testimony objected to which was too remote and which was immaterial.

ARGUMENT

1. **That the damages awarded by the jury and as reduced by the judge are excessive and were assessed as the result of passion and prejudice.**

The evidence in this case discloses that the defendant did not strike the plaintiff with sufficient force to knock him down or to cause any swelling or bruise on his face, but only with sufficient force to cause a redding around the ear (Tr. p. 40). The plaintiff was able to drive his car from the scene of the altercation, to deliver the linotype belt and to continue on home. The only medication necessary was the administration of a sedative and instructions to go to bed for a few days (Tr. p 36). He testified that during the period he was confined to his home he was able to do some work (Tr. p. 24). The doctor testified that after two weeks his blood pressure was down (Tr. p. 38).

This is all of the evidence introduced to sustain the award for general damages.

There is evidence in the record that the plaintiff had published articles in his newspaper personally attacking the defendant and his family (Exhibits 1, 2, 3, 4 and 5). There is further evidence that plaintiff and defendant had had words at various times. If the story of the plaintiff were true, certainly the altercation was not without considerable provocation.

The plaintiff was allowed to recite his history from the time he arrived in American Fork until the date of the altercation. All of the testimony of these early years emphasized the poverty and struggle of the plaintiff. This testimony was all objected to. The plaintiff testified he set up his shop in a chicken coop (Tr. p. 7). That he was in the last World War (Tr. p. 3). Then there is the testimony of the witness Rowe which is entirely irrelevant. This testimony is only to the effect that defendant and plaintiff were strong competitors and the conversations testified to had nothing to do with the assault.

The evidence that the shop of the plaintiff was in an old chicken coop could only be elicited to show the poverty of the plaintiff. It has been almost universally held that the poverty of the plaintiff is not admissible.

Packard v. Moore (Calif.), 71 Pac. (2d) 922

Zaferis v. Bradley (Calif. App.), 82 Pac. (2nd) 70

Downey v. Union Trust of Springfield (Mass.), 45 N. E. (2nd) 373

Hodge v. Weinstock Lumber Co. (Calif. App.), 293 Pac. 80

It is the position of the defendant that though one of the matters complained of may not have created passion and prejudice on the part of the jury, the combination of all of them, together with the testimony relative to the financial standing of the defendant, did prejudice the jury. We believe that the award for punitive damages as rendered by the jury in itself shows such passion and prejudice.

This Court in the very recent case of **Mecham v. Foley**, 235 Pac. (2nd) 497 had the question of excessive damages before it in an assault and battery case. In that case the plaintiff was hit with an object which he thought was a blackjack and was rendered unconscious. The testimony was to the effect that his nose was bloody, his left eye swelled shut, there was a welt on the side of his head and his jaw ached. The special damages for medical bills and drugs showed an expenditure of \$52.15. (In the case before the Court there is no testimony as to medical expense. The doctor testified he saw the plaintiff three or four times). The court in that case awarded \$1,000.00 general damages and \$100.00 punitive damages. The Court, in reducing the amount of general damages, applied the rule laid down in **Duffy v. Union Pacific R. Co.** 218 Pac. (2d) 1080.

It will be noted that the Court, in discussing the damages, said the following.

“In the instant case, the defendant has been punished by the judgment for punitive damages for making an unprovoked attack upon the plaintiff, maliciously and wilfully. Under the circumstances, we believe that

the verdict is gross and excessive.”

The jury awarded the sum of \$500.00 general damages which the trial judge reduced to \$400.00, and yet assessed the sum of \$1,499.95 as punitive damages which was reduced to \$1,000.00 by the trial judge. Surely if this Court felt that \$100.00 was sufficient punishment in the **Mecham v. Foley** case, supra, there can be no justification for the assessment of \$1,000.000 punitive damages in the case before the Court.

All of the testimony is that the defendant has been a long time resident of American Fork. He and his family published a newspaper in Lehi since 1914 and in American Fork since 1928 (Tr. p. 63). He is a property owner in American Fork and a member of the Hospital Board for that city. There is no testimony, except for some name calling, that he is quarrelsome or a belligerent person. The plaintiff, as shown by the testimony, “badgered” the defendant and so provoked the incident in question.

Under the facts in this case we can see no justification for the punishment meted out to him by awarding \$1,000.00 punitive damages.

This Court in the case of **Falkenberg et al v: Neff**, 269 Pac. 1008, 72 Utah 251 said the following relative to the assessment of punitive damages:

“Exemplary damages are awarded as punishment. There is no definite basis upon which the amount can be computed, but there must necessarily be a limit to the amount which may be awarded. It is the general rule that the award should not be disproportionate to

the actual damage sustained, or should bear some relation to the injury complained of and the cause thereof."

This Court had the question of damages, general and punitive, before it in the case of **Apostolos v. Chelemes**, 298 Pac. 399, 77 Utah 587. In that case the injuries inflicted were very severe and aggravated. Hospitalization was required and the medical and hospital bills amounted to \$319.13. The jury awarded \$1,180.70 general damages and \$500.00 exemplary damages. The contention was made on appeal that the award was excessive. The Court upheld the award for damages but gave no indication that they thought the damages were inadequate. Under the facts in this case the award of \$1,180.70 general damages and \$500.00 punitive we believe establishes a reasonable relationship between general and punitive damages. We have no such an aggravated assault in the case now before the Court.

We submit that the award of punitive damages as made could have been only as the result of passion and prejudice and that the court in remitting only \$499.95 of the punitive damages was unduly influenced by the jury verdict.

In an annotation in 16 A. L. R 2nd page 55 there are compiled cases dealing with the question of damages in assault cases. The ratio of exemplary damages to general damages in practically all of the cases is 1 to 5 or 1 to 4.

2. **That the court erred in admitting testimony objected to which was too remote, immaterial and prejudicial to the defendant.**

We have cited under our argument on the first point

some of the evidence which we believe was too remote, immaterial and prejudicial to defendant.

The testimony that he came to American Fork for reasons of health four years before the occurrence of the assault (Tr. p. 4). The fact that he put his press in a chicken coop (Tr. p. 7). Conversations in March or April of 1948 as being too remote to have any bearing on the case (Tr. p. 9). The testimony that unpleasant conversation took place over a two and one-half year period (Tr. p. 11).

The testimony of Louis M. Rowe is in no way material nor does it have any connection with the assault. Its only purpose would be to prejudice the jury against the defendant. The testimony objected to was as follows:

“A. Mr. Gaisford solicited me for advertising and I told him that when I would start to advertise, that I would advertise fifty-fifty with both papers, each of them would get half. Mr. Gaisford said, ‘That isn’t the way for it to be.’ I said, ‘How is it to be?’ He said, ‘I am to get all of it, and he is to get none of it.’ (Tr. p. 55).

This testimony was cumulative, together with other testimony objected to. We believe it was highly prejudicial to the defendant.

This Court in the case of **West v. Bentley**, 98 Pac. (2d) 361, 98 Utah 248, had the same question before it. The Court said this relative to statements made to a third person which were in no way connected with the assault.

“Over defendant’s objection plaintiff was permitted

to put in evidence statements allegedly made by defendant at times prior to the assault, to other persons than plaintiff, derogatory in the extreme to the Mormon Church and to the Savior of the world. No attempt was made to establish any connection between such statements and the assault, or between such statements and the plaintiff. They were not made to plaintiff or in her hearing and were in no way brought into the chain of circumstances that resulted in the assault. They were foreign to any issue in the case and could serve no purpose except to prejudice and antagonize the jury toward the defendant. The admission in evidence of such testimony was error and clearly prejudicial. (citing cases)”

There was no attempt to connect the testimony of Rowe with the alleged assault. There is no testimony that Rowe even told the plaintiff of the conversation.

We especially cite as prejudicial the cross examination of the defendant relative to his membership on the Hospital Board in American Fork and the innuendo that he violated the law by accepting printing contracts from the Hospital. The matters specifically objected to are as follows (Tr. p. 67):

“Q. You get publishing from it (Hospital), don’t you?

“A. No, I get some printing; I don’t get the publishing..

“Q. That has been going on for years, hasn’t it?

“A. Well, there are other city institutions. I get printing from all city institutions.

“Q. You are a member of the board that awards that

contract?

"A. Yes, sir.

"Q. You know that is contrary to the law, don't you?

"A. No, sir, it is not contrary to the law.

"Q. Yes, that is.

"Mr. Warnock: If the Court please, I move that the question and answer be stricken, and that the jury be admonished—

"Mr. Young: (interrupting) I am wondering if counsel contends that a member of a board—

"The Court: (interrupting) Motion is denied; you may proceed.

"Q. You contend, Mr. Gaisford, that as a member of that board, it is legal for you to sit on that and order a contract for yourself?

"Mr. Warnock: Well, if the Court please, I object to the question; it is assuming something that isn't in the evidence. That hospital—

"The Court: (interrupting) I think the question is objectionable.

"Mr. Young. Very Well.

"Mr. Warnock: And I would like to have the jury admonished, if I may, to disregard that line of testimony. I think it is unfair if the court please. The hospital is not organized under the laws of this state.

“The Court: There is nothing before the Court.”

It is our contention that the tactics of counsel for the plaintiff were highly prejudicial. That counsel for the defendant should have been allowed to finish his first objection and that the whole matter is not material to the issues of this case and that the jury should have been admonished to disregard the testimony of plaintiff's counsel relative to any violation of the law.

The cumulative error in admitting all of the testimony which we have recited was highly prejudicial and we believe warrants a reversal of the judgment. **West v. Bently**, supra.

CONCLUSION

We submit that the relationship of the general damages to the exemplary damages awarded in this case is entirely disproportionate. That where an award of \$400.00 general damages is found that the exemplary damages should not exceed one-fifth of that amount. The verdict of the jury was the result of passion and prejudice.

This case should be remanded for new trial because of the errors committed by the trial judge in admitting an accumulation of remote and immaterial evidence which prejudiced the jury and precluded this defendant from having a fair trial.

Respectfully submitted
Critchlow, Watson & Warnock