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Thomas K. Evans v. A. Frank Gaisford : Brief of Respondent

Utah Supreme Court

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Dallas H. Young, Sr.; Dallas H. Young, Jr.; Allen B. Sorensen;

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IN THE SUPREME COURT
of the
STATE OF UTAH

THOMAS K. EVANS,

Plaintiff and Respondent.

vs.

Case No. 7776

A. FRANK GAISFORD,

Defendant and Appellant.

RESPONDENT'S BRIEF

FILED
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DALLAS H. YOUNG, SR.

DALLAS H. YOUNG, JR.

ALLEN B. SORENSEN

Clerk, Supreme Court, Utah

Attorneys for Plaintiff and Respondent

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THOMAS K. EVANS.

Plaintiff and Respondent.

vs.

A. FRANK GAISFORD.

Defendant and Appellant.

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RESPONDENT'S BRIEF

STATEMENT OF FACTS

This action was brought in the district court of Utah County for assault and battery. After pleading the assault and battery, plaintiff alleged that the acts constituting such tort were done maliciously and wantonly. Defendant made a general denial. Upon the trial he placed in evidence testimony intended to show self defense and provocation. The jury returned a verdict for plaintiff.

awarding him \$500.00 special damages, \$500.00 general damages, and \$1,499.95 punitive damages, (R. 9). The trial court remitted \$100.00 general damages and \$499.95 punitive damages (R. 12) and, upon acceptance thereof by plaintiff (R. 11), denied a motion for a new trial. Defendant thereupon took this appeal. Because the defendant's statement of the facts, are, we believe, inadequate in view of plaintiff's theory, we shall state the facts of the case as found by the jury.

The defendant, Mr. A. Frank Gaisford, has lived at least most of his life in American Fork, and has engaged in the printing and newspaper business there since 1928, and in Lehi city since 1914 (Tr. 63). He occupies a position of prominence and affluence in the community (Tr. 66ff, 47-49). The plaintiff came to American Fork in the latter part of 1947 for his health, and there established a weekly newspaper in competition with defendant's publications (Tr. 3-4). In the course of publishing his newspaper, plaintiff criticized editorially the official conduct of certain public boards and officers in their manner of letting contracts and the like (Defendant's exhibits 1, 2, 3, 4, and 5). Defendant was a member of one of these, the American Fork Municipal Hospital Board (Tr. 67), and the recipient of con-

siderable publishing and printing from the Alpine Board of Education (Tr. 68ff). The defendant was further much irritated because of the competition given him by plaintiff (Tr. 61-62).

From the outset, when the two met, defendant castigated plaintiff (Tr. 8), calling such names as "louse" and, according to defendant's testimony, "worse than that" (Tr. 69). On these occasions plaintiff attempted to keep the meetings at least on a dignified level (Tr. 10-11). (It should here be noted that there is no evidence that plaintiff ever, as stated on page 4 of defendant's brief, "personally" attacked defendant or his family, in or outside his newspaper, harbored ill feelings toward defendant personally, or "had words" with defendant. The evidence shows the words were "had" by the defendant).

On the day of December 1, 1950, plaintiff was proceeding East along the North side of Main Street in American Fork. Defendant was proceeding West along the same side. As they approached each other defendant strode into a drug store and, as plaintiff arrived opposite the entrance, whirled, rushed out, and proceeded to beat and cuff plaintiff on and about the face and head with his fists and open hands, muttering and calling him names at the same time. (Tr. 13-14, 54, 57). Plaintiff's

glasses were knocked off, and he was struck particularly hard on the left ear (Tr. 14). The ear became inflamed (Tr. 40) and plaintiff was bothered with a ringing in that ear following the battery and at the time of the trial (Tr. 40, 25). A crowd, consisting of the mayor, a peace officer, the clerks and customers of the store, gathered as the battery continued. The plaintiff did not strike the defendant (Tr. 16, 45, 57).

The plaintiff, who suffers from high blood pressure, went to his shop, and then to his home, where he called his doctor, who directed him to go to bed, saying he would call later at the home (Tr. 18). When the doctor called, he found the plaintiff in a nervous, excited state, with severe headache and a ringing ear, pacing the floor. Plaintiff's blood pressure was considerably elevated, and he required a sedative (Tr. 36). The doctor testified at the trial that such experience *could* prove fatal to one in the position of plaintiff (Tr. 37). The doctor called on plaintiff in his home five additional times during the next two week period (Tr. 37).

Plaintiff was confined almost entirely to his bed for over a month after the battery (Tr. 19). Plaintiff's newspaper is in fact a working partnership with his brother (Tr. 22). the plaintiff

doing most of the writing and also soliciting the advertising. During the month after the battery, plaintiff was able to do only a small part of the writing, and practically none of the soliciting of advertising (Tr. 19). It was necessary for the partnership to hire help, particularly on the days the paper was printed (Tr. 22). The record shows that the revenue to the paper from advertising in December of 1948 was \$1,349.80, for December, 1949, \$1,145.95, and for December, 1950, the month in which the battery occurred, \$703.10 (Tr. 21-23). At the same time costs increased only slightly. Plaintiff's income from that source remained consistently the same for the month of November, 1948, 1949, and 1950, and January of 1949, 1950, and 1951, and other newspapers had consistently good revenue from advertising in the month of December, 1950 (Tr. 42-43). Plaintiff was still troubled with ringing in his left ear at the time of the trial, April 18, 1951 (Tr. 25).

Defendant, on this appeal, urges error on the part of the trial court on two points: that the damages, after partial remission by the trial court, are excessive and were assessed as the result of passion and prejudice on the part of the jury and the trial judge, and that remote, immaterial, and prejudicial evidence was admitted on the trial

over his objection. Because the evidence objected to has a substantial bearing on the question of damages, we shall answer these points in inverse order.

STATEMENT OF POINTS

I.

UNDER PLAINTIFF'S THEORY OF HIS CASE, THE EVIDENCE OBJECTED TO IS NEITHER REMOTE, IMMATERIAL, NOR PREJUDICIAL, BUT WAS PROPERLY OFFERED AND PROPERLY ADMITTED TO SHOW ATTENDING CIRCUMSTANCES, INCLUDING MALICE.

II.

THE JUDGMENT OF DAMAGES DOES NOT SHOW PASSION AND PREJUDICE AGAINST DEFENDANT ON THE PART OF THE JURY AND THE TRIAL JUDGE.

ARGUMENT

I.

UNDER PLAINTIFF'S THEORY OF HIS CASE, THE EVIDENCE OBJECTED TO IS NEITHER REMOTE, IMMATERIAL, NOR PREJUDICIAL, BUT WAS PROPERLY OFFERED AND PROPERLY ADMITTED TO

SHOW ATTENDING CIRCUMSTANCES, INCLUDING MALICE.

In his brief, defendant asserts that the admission of evidence concerning plaintiff's beginning in the newspaper business in American Fork in late 1947, plaintiff's and defendant's conversations since that time, the financial condition of defendant, the statement of witness Rowe to defendant, and the cross-examination of defendant regarding his membership on the American Fork Municipal Hospital Board, was error in that such evidence was remote, immaterial and prejudicial. In urging that this was error, defendant misconceives plaintiff's theory of his case, adopted by the jury.

Plaintiff brought this action on the theory that defendant, in committing the assault and battery, acted with malice. He so pleaded (R. 4). Mr. Gaisford, the defendant, would have had the jury believe he assaulted the plaintiff, Mr. Evans, because of an editorial attack made by the latter upon the Alpine School District Board of Education (Tr. 69). Under plaintiff's theory, the principal motive for defendant's conduct was that he resented the competition presented by plaintiff's newspaper. Defendant had enjoyed alone a lengthy period of newspaper publishing and print-

ing in the northern portion of the county. Suddenly he was confronted with lively competition which could not but eat into his source of revenue—advertising and printing. Add to this the fact that plaintiff had criticized editorially certain dubious practices of public boards, on one of which defendant was a member, in letting printing contracts without competitive bidding, and there is an abundance of evidence of malice in defendant's conduct. Under this theory that the battery was malicious, the evidence objected to is both immediate and material. It will be remembered that the jury adopted the plaintiff's theory in awarding punitive damages.

The case of *Baker v. Peck*, 36 P 2d 404, 1 Cal App 2d 251, was an action for malicious battery. On appeal the defendant urged as error the admission of certain testimony, claiming it was remote. The Court stated:

Defendant cites as error the admission of evidence of the meeting in San Francisco on October 15th, claiming the same to be immaterial and tended to distract the attention of the jury from the real issues, and resulted in prejudicing the defendant in the eyes of the jury. *The evidence was properly received, as tending to show the attitude and state of mind*

toward plaintiff. One of the issues before the jury was whether the defendant struck plaintiff with malice. *Defendant denied the elements of malice and it was therefore proper for plaintiff to show any act or statement of defendant that might bear upon that issue. (Italics added).*

See also an annotation, "Punitive or Exemplary damages for Assault", 125 ALR 1115, 1155; 4 Am Jur 198, "Assault and Battery", § 152.

Defendant in this case asserts that the admission of evidence of conversations between plaintiff and defendant in early 1948 and subsequently was prejudicial for the same reason. This testimony was offered and admitted to show that defendant harbored ill will toward plaintiff from the time of his arrival in American Fork and entrance into the newspaper and printing business (Tr. 8, 10-11, 69). This testimony shows acts and statements of the defendant that bear directly upon the issue of malice in the battery.

Defendant claims error in the admission of testimony by Mr. Lewis M. Rowe, a business man of American Fork, regarding a conversation he had with defendant Gaisford concerning advertising. According to that testimony, Mr. Gaisford

had solicited advertising with Rowe. Mr. Rowe stated that when he advertised, he would split it fifty-fifty between plaintiff and defendant. Defendant then stated, "That isn't the way for it to be. I am to get all of it, and he (Evans) is to get none of it." (Tr. 62). Relying on *West v. Bentley*, 98 Utah 248, 98 P 2d 361, defendant urges that, because there was no testimony that Rowe told plaintiff of this conversation, it is not connected with the assault and battery, and is therefore remote and prejudicial. Again defendant misconceives plaintiff's theory of his case as adopted by the jury, and also the distinguishing facts in the case of *West v. Bentley*. In that case there was absolutely no showing of malice or ill will on the part of the defendant prior to the assault. The assault itself grew out of an argument over the way in which plaintiff spent her money. The remark complained of, made several years earlier to third persons, was in derogation of the Mormon Church, and no connection or relationship was shown between these remarks and the facts and circumstances surrounding the assault.

In the case before this Court the testimony objected to is amply connected with and related to the facts and circumstances surrounding the assault. Defendant never, upon meeting plaintiff, addressed him civilly (Tr. 69), but harbored ill

feelings toward him from the outset. Add to this the fact that defendant became incensed at plaintiff's editorial criticism of the defendant accepting printing from the American Fork Municipal Hospital Board, of which he is a member (Tr. 67-68) and an editorial criticism for the manner in which the Alpine District Board of Education farmed out its printing, principally to defendant, without advertising for bids. (Tr. 69; defendant's exhibits 2 and 5) and it is not difficult to see that defendant maliciously assaulted plaintiff because he disliked the competition. The testimony of Mr. Rowe was offered and admitted to show this fact. Defendant, in announcing to his customer that he, Gaisford, was to get *all* Mr. Rowe's advertising and plaintiff was to get none of it, showed that he was prompted throughout with a desire to preserve his own source of revenue. On cross-examination, defendant protested that he was prompted in his action December 1, 1950, because of the editorial criticism of his friends on the school board. Plaintiff's theory was that avarice, and not altruistic concern for his friends, motivated the malicious assault. Mr. Rowe's testimony supports that theory, regardless of whether it was communicated to plaintiff, and is therefore most material.

Indeed, the case of *West v. Bentley*, *supra*, is authority for the admission of this evidence. We

quote from the opinion of this Court, page 250 of the Utah Report:

That motive or malice may be shown in an action such as this is elemental. For such purpose prior occurrences, and both prior and subsequent declarations, acts and conduct may be shown and received in evidence if they are related to the assault, or tend to show or are indicative of a feeling of ill will, *or to furnish a motive for the acts of which complaint is made. (Italics added)*

Under the reasoning of this case and the case of *Baker v. Peck*, *supra*, this evidence was properly admitted.

Defendant claims error in the admission, at the beginning of the trial, of plaintiff's testimony regarding his coming to American Fork for his health and setting up his printing shop in a chicken coop. First, we believe that in a case such as this, the matter of plaintiff's health is material on the question of damages. We shall discuss this under our Point II. Second, we do not believe that this testimony "emphasized the poverty and struggle of plaintiff", as asserted by defendant, but, if we were to concede that it did, this is not error.

The general authority, almost without exception, is that where an action for assault and bat-

tery is brought and exemplary damages sought because the tort was done with malice, the financial and social circumstances of the parties may be shown. Annotations, 16 ALR 771, 858; 125 ALR 1115, 1156; 4 Am Jur 202, "Assault and Battery" § 161; 4 Am Jur 203, Assault and Battery" § 162. It is difficult to determine whether defendant raises upon this appeal the question of the right of plaintiff to go into defendant's financial standing (Defendant's brief p. 5) but he has claimed as error the fact that plaintiff testified he came to American Fork in 1947 for reasons of his health, and that he set up his printing establishment in an old chicken coop. We submit that this does not "emphasize the poverty and struggle of plaintiff," but, if it did have any bearing upon the financial circumstances of plaintiff, the admission of this testimony was not error.

The cases cited by defendant on pages 4 and 5 of his brief in support of his objection to this testimony are simply not in point. Three of them involve actions for negligence resulting in personal injuries, and the fourth was an action against an estate for personal services rendered by the plaintiff to deceased. It will be remembered that this action is for assault and battery, committed with malice, which, when proved, entitles the plaintiff to punitive or exemplary damages. We respect-

fully submit that upon sound reason and the authorities the plaintiff may put in evidence the financial and social standing of the parties.

Defendant urges strenuously that the cross examination of defendant about his membership on the American Fork Municipal Hospital Board at the time he contracted with that board for printing was error. We answer this by pointing out to the Court, first, that this was cross examination; second, that the subject matter inquired about is, in fact, a violation of law (Sections 15-6-58 and 39, Utah Code Annotated, 1943); and third, that the testimony thus elicited bears directly upon the question of malice. It tends to prove that plaintiff's editorial criticism of certain public boards threatened a convenient business arrangement of defendant, and thus prompted the battery. Under the authority of cases of *West v. Bentley* and *Baker v. Peck*, *supra*, this evidence is admissible.

We here point out that, according to the record, defendant took no exception to the instructions to the jury, nor did he request any instructions, nor did he move to strike most of the testimony objected to. Apparently at that phase of the trial he did not consider the admission of testimony now objected to as warranting attention not given it by the trial court.

II.

THE JUDGMENT OF DAMAGES DOES NOT SHOW PASSION AND PREJUDICE AGAINST DEFENDANT ON THE PART OF THE JURY AND THE TRIAL JUDGE.

The judgment of damages, after remission by the trial court, is for \$500.00 special damages, \$400.00 general damages, and \$1,000.00 punitive or exemplary damages. Defendant, under Point I of his brief, urges as error that the verdict for general and punitive damages must, as a matter of law, have been determined as the result of passion and prejudice, and that the trial judge, again as a matter of law, was influenced by this verdict in remitting a portion thereof. The authorities he cites in support thereof will not sustain his position.

It will be remembered that plaintiff suffered from high blood pressure and a strained heart (Tr. 19). He was, following the battery, confined to his bed most of the time for the entire month of December, 1950, and even into January, 1951 (Tr. 19, 24). When the doctor called at his home on the day of the battery, he found the plaintiff very nervous, excited, complaining of a severe headache and ringing in his ear, and pacing the

floor. His blood pressure was dangerously high (Tr. 36). The doctor testified that such an experience could be fatal to one in plaintiff's position (Tr. 37, 39). Plaintiff required sedatives and rest in order to reduce his blood pressure. The doctor called upon plaintiff six times during the first two weeks in December (Tr. 37). Plaintiff was still bothered by the ringing in his left ear at the time of the trial (Tr. 25).

In addition to the foregoing, plaintiff must have suffered considerable anxiety, first for his own health, and second, for the welfare of his business during that time when he was not able to care for it. Furthermore, the record shows unequivocally that plaintiff was assaulted and beat on the main street of American Fork, in the presence of a crowd of his fellow townsmen, including a peace officer, the mayor, and clerks and customers of the drug store. This Court has said that all these elements may be considered in a case of malicious assault and battery. *Marble v. Jensen*. 55 Utah 226, 178 Pac. 66. This unprovoked and malicious assault could not but cause plaintiff chagrin, humiliation, and mental anguish. As stated in 1 *Sutherland, Damages* (4th Ed.) p. 559, § 95:

In actions for assault and battery the jury may consider, not only the mental distress

which accompanies and is a part of the bodily pain, but that other condition of the mind of the injured person which is caused by the insult of the blows received.

See also American Law Institute Restatement of Law of Damages, p. 543, § 905. We submit that the verdict of \$400.00 general damages is most reasonable.

The case of Mecham v. Foley, ——— Utah ———, 255 P 2d 497, cited by defendant in support of his position that the general damages were excessive, is not here in point. That case was tried to the court, and there was a marked conflict in the evidence. In reducing the verdict for general damages from \$1,000.00 to \$500.00, this Court stated:

The record shows that plaintiff had been in several prior fracasos of one type or another. He had fought, argued with, or threatened other ditch riders and officers of the Irrigation Company. His reputation for peace and quiet in the community was described as "not so good." * * * In this case it appears that a consideration of these elements would tend to diminish the damages.

In the case before this Court, the plaintiff's reputation is of the best. He attempted always to keep

his personal relations with defendant peaceful and on a dignified level (Tr. 10-11). Defendant's conduct was always somewhat different (Tr. 8, 69). To hold that plaintiff's editorial criticism of public officials and the conduct of public affairs operated to diminish damages to plaintiff on the facts of this case would, indeed, cause alarm.

Defendant further cites the case of *Duffy v. Union Pacific R. Co.*, ——— Utah ———, 218 P 2d 1080, in support of his contention that the general damages were excessive. That case, involving personal injuries, was brought under the Federal Employers' Liability Act, and therefore involved only the question of general damages. On the matter of remission of damages this Court, quoting an earlier case, stated:

But, before the court is justified to do that, it should clearly be made to appear that the jury totally mistook or disregarded the rules of law by which the damages were to be regulated, or wholly misconceived or disregarded all the evidence, and by so doing committed gross and palpable error by rendering a verdict so enormous or outrageous or unjust as to be attributable to neither the charge nor the evidence, but only to passion or prejudice. We respectfully submit that a verdict on the

facts of this case of \$400.00 general damages does not show "gross and palpable error." Nor is the verdict "so enormous or outrageous or unjust as to be attributable to neither the charge nor the evidence, but only to passion or prejudice." Rather, on the law and the evidence, it is modest indeed.

On the matter of punitive damages, precedent is not too helpful in the determination of the amount. As stated in the Annotation, 125 ALR 1115, 1136, the amount depends upon the facts of each case, and is largely a matter within the discretion of the triers of the facts. The cases cited thereunder all state that, while there must be some reasonable relation between the amount of compensatory and punitive damages, unless the amounts are so grossly disproportionate as to shock the sense of justice and to indicate as a matter of law that the punitive damages were assessed as a result of passion and prejudice or corruption, or show a complete disregard by the jury of their lawful obligation to exercise their honest and unbiased judgment, the award will not be upset. We respectfully submit that, on the facts of this case, where the compensatory damages awarded total \$900.00, an award of \$1,000.00 punitive or exemplary damages is not unreasonable.

In this case we are not dealing with the un-

educated or the ordinary ruffian who promiscuously engages in fisticuffs. We are dealing with men who are presumed to be civilized, above the average intelligence, and of the leadership in the community. Yet one makes a malicious, unprovoked assault upon the other on a public street, with resulting compensatory damages of \$900.00.

Defendant cites the case of *Mecham v. Foley*, *supra*, where the compensatory damages were assessed at \$500.00, and punitive damages at \$100.00, in support of his argument that punitive damages in this case are excessive. As stated earlier, this case is not here in point. The plaintiff there did not enjoy a reputation for peace and quiet, but was shown to be belligerent, and inclined to engage in combat on the slightest provocation. Also, the evidence sharply conflicted as to what exactly happened. The only question regarding punitive damages raised by the appeal was whether they should be awarded at all—whether the assault was malicious—and on this point this Court merely affirmed the trial court.

The case of *Falkenberg et al. v. Neff et al.*, 72 Utah 258, 269 Pac 1008, cited by defendant in support of the proposition that there must be a reasonable relationship between compensatory punitive damages, supports, we submit, plaintiff's

position. That case was an action for malicious destruction of a dam. The jury awarded \$362.50 compensatory damages, and \$5,000.00 punitive or exemplary damages. This Court reduced the punitive damages to \$1,500.00, nearly five times the amount of the compensatory award. This hardly supports defendant's statement that a proper ratio should be 1 to 4 or 5!

The cases are numerous that refute defendant's proposition as to the proper ratio for compensatory and punitive damages. Some of these are collected in the Annotation, 123 ALR 1115, at page 1156 and following indeed, that annotation states at page 1159:

Cases in which verdicts have been set aside on the ground that they were based upon passion or prejudice have usually involved inspecial and significant facts appearing from the whole record, indicating the reason influencing the award, and considered improperly emphasized, when regard was had for the actual damages sustained.

We believe one may comb the record in vain for "special and significant facts * * * indicating the reason influencing the award," which this Court may consider was improperly emphasized,

due regard being given to the actual damages sustained by plaintiff.

Little would be served by reviewing the evidence here again. Suffice it to say that where a mature man, of repute and standing in the community, undertakes maliciously and without provocation to thresh another on the streets of the community, causing consequential damages in the amount of \$900.00, then an award of \$1,000.00 as exemplary damages is reasonable. Particularly is this so when the record indicates that the motive was vindictive, because of plaintiff's competition with defendant, including his airing editorially of certain conduct of public officials. The trial judge, as well as the jury, observed the demeanor of the witnesses at the trial, and we respectfully submit that the record supports their determination as to what the damages should be.

We advance an additional argument in support of the award of punitive damages. The legislature, in the case of certain torts done wilfully or maliciously, has created as a remedy what it refers to as "treble" damages, which is in the nature of an award of punitive or exemplary damages of twice the amount for direct compensation (Unlawful detainer, 104-36-10, Ch. 58, L. U. 1951; Waste, 104-38-2, Ch. 58, L. U. 1951; Injury to

trees, 104-58-5, Ch. 58, L. U. 1951). If an award in the nature of exemplary damages in the ratio of 2 to 1 for compensation is considered by the legislature as reasonable when the injury is to property, then, arguing by analogy, it certainly would appear that, on the facts of this case involving malicious assault and battery upon the person, a ratio of approximately 1 to 1 certainly is not unreasonable.

CONCLUSION

All the alleged errors raised on this appeal by defendant are based upon a misconception of the plaintiff's theory of the case and the jury's finding regarding this theory. Defendant's assault and battery upon the plaintiff were committed maliciously, prompted by selfish motives, and in a manner that, in view of the surrounding facts and circumstances, was particularly aggravated. Upon this basis, there was no error in the admission of evidence, and the damages as awarded were neither excessive, nor were they awarded as a result of passion, prejudice, or corruption on the part of the jury and the trial judge.

Respectfully submitted

DALLAS H. YOUNG
ALLEN B. SORENSEN