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Ludwig Ostertag v. Duncan G. Lamont : Brief of Appellants

Utah Supreme Court

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**IN THE SUPREME COURT OF
THE STATE OF UTAH**

LUDWIG OSTERTAG,
Plaintiff and Respondent,

vs.

DUNCAN G. LAMONT
Defendant and Appellant,

DAVID LAMONT, a minor, by
MARJORIE LAMONT, his Guardian
Ad Litem,
Plaintiff and Appellant,

vs.

LUDWIG OSTERTAG,
Defendant and Respondent.

Case No.
8983

FILED

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APPELLANTS' BRIEF

Clerk, Supreme Court, Utah

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LaMont, and defendant,
Duncan G. LaMont, Appel-
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APPELLANTS' BRIEF

FACTS

The minor, David LaMont, in company with two other boys, was walking south on the sidewalk across the street from the home of Mr. Ostertag. Ostertag was in front of his premises and claimed that rocks were thrown across the street at him, whereupon he pursued the boys. Ostertag assaulted the minor. See the court's instruction.

David LaMont. The LaMont boy with blood on his face and with obvious lacerations and contusions was in front of the Ostertag home, when the Coleman boy went to the LaMont home to bring the LaMont boy's father over to the scene. On the way from the LaMont home to the Ostertag premises the Coleman boy told Duncan G. LaMont that his boy had been beaten by Ostertag—T-179-9; 209-10.

When Duncan G. LaMont saw his boy, David, with his face bloody and in such a dazed condition that he couldn't talk, (T-209-20), LaMont asked Ostertag if he had struck the boy. Ostertag said, "Yes," whereupon Duncan G. LaMont struck Ostertag.

Two actions were filed, one by Ostertag against LaMont and the other by the LaMont boy against Ostertag. The two actions were consolidated for trial. In the action of the LaMont boy against Ostertag the jury awarded no damages and in the action of Ostertag against the boy's father, Duncan G. LaMont, the jury awarded \$140.00 actual damages and \$2,000.00 exemplary damages. The court reduced the judgment for \$2,000.00 to \$860.00, or in lieu thereof, granted a new trial. Ostertag accepted the reduction.

FIRST ACTION

LUDWIG OSTERTAG VS. DUNCAN G. LAMONT

STATEMENT OF POINTS

1. \$860.00 EXAMPLARY DAMAGES IS EXCESSIVE UNDER THE CIRCUMSTANCES.

2. VERDICT WAS GIVEN UNDER PASSION AND PREJUDICE.

3. REFUSAL TO INSTRUCT THAT CONSIDERATION BE GIVEN OF CONDUCT OF PLAINTIFF IMMEDIATELY PRIOR TO THE BATTERY.

4. REFUSAL TO INSTRUCT THAT DEFENDANT SEEING HIS MINOR CHILD WITH INJURIES INFLICTED BY PLAINTIFF SHOULD BE CONSIDERED IN MITIGATION OF DAMAGES.

5. REFUSAL TO INSTRUCT THAT EXEMPLARY DAMAGES SHOULD BE AWARDED ONLY FOR AN INTENTIONAL, WILFUL, AND MALICIOUS ATTACK WITHOUT JUST REASON.

SECOND ACTION

DAVID LAMONT VS. LUDWIG OSTERTAG

1. DENIAL OF THE RIGHT OF PLAINTIFF DAVID LAMONT TO GO TO THE JURY ON THE QUESTION OF MEDICAL EXPENSE.

ARGUMENT

Point I

1. \$860.00 EXEMPLARY DAMAGES IS EXCESSIVE UNDER THE CIRCUMSTANCES.

The jury awarded to the plaintiff, Ludwig Ostertag, only \$140.00 actual damages. This award was upon the evidence that an upper denture was broken with the cost

of repair being \$125.00 and a doctor bill of \$15.00. It is significant to note in this connection that no award was made for the claims for loss of wages or any of the other extensive alleged claims asserted by Ostertag.

Some of the jurors, subsequent to the verdict, approached Judge Ellett and voluntarily told the judge that the award of \$2,000.00 exemplary damages was made because the jury felt the defendant Duncan G. LaMont and the parents of the other boys had not properly and sufficiently disciplined their children and the exemplary damages given were based on neglect in this respect. This was disclosed by the judge to the counsel for appellant and respondent and an affidavit filed thereon. T-60.

The defendant, Duncan G. LaMont, attempted to place before the jury the fact that his child had been disciplined because of a prior incident, however, the court refused to permit such evidence to be introduced—T-202. This not only constitutes error on the part of the court, but also gave the jury a misconception of the facts, particularly since this was the very basis and foundation upon which the jury based its entire award of exemplary damages against the defendant, Duncan G. LaMont, as a measure to either teach or encourage defendant to discipline his child. The Court should have granted the Motion for New Trial in this respect as requested.

Moreover, as stated in *Evans v. Gainsford*, 247 P2d 431, 122 U 156, “. . . and that even as reduced by the trial court to \$1,000.00 they bear no reasonable relation to the actual damages awarded. . . .”

The courts have recognized the time-honored reason for exemplary damages in assault and battery cases as

being to discourage *unprovoked* attacks and there is no basis under the law, and particularly under the facts of this case upon which a jury could award exemplary damages since there was provocation.

Point II

2 . VERDICT WAS GIVEN UNDER PASSION AND PREJUDICE.

The plaintiff, Ludwig Ostertag, repeatedly paraded before the jury that he was a foreigner and that he had been vilified and his living made intolerable because of boys ridiculing him, telling him he was a foreigner and "to go home, Nazi," and otherwise distressing him. The jury was incited and prejudiced against the defendant, Duncan G. LaMont, merely because they felt that he and other parents should have disciplined the children and the award as granted was based upon such erroneous consideration.

The jury, because of passion and prejudice, made an award based upon evidence permitted in over objections which was not proper for their consideration and involving boys other than the LaMont boy, see 87-23—objection overruled to 88-7 and 93-28—"They called out, "Heil Hitler, Nazi, Mussolini," then they had rotten fruit and garden products which they threw from the roof at me."

85-30 and 87-1—The above repeated.

85-7—"They threw rocks at me."

87-15—"They tried to knock me out of the tree with large rocks."

See objection overruled—line 23.

92-27—"Two boys called out jeers and cat calls."

Note: Not one instance of the LaMont boy alone.

Point III

3. REFUSAL TO INSTRUCT THAT CONSIDERATION BE GIVEN OF CONDUCT OF PLAINTIFF IMMEDIATELY PRIOR TO THE BATTERY.

Defendant's requested instruction number 4 states in substance that from a preponderance of the evidence immediately prior to the time LaMont struck Ostertag he saw his child obviously injured and in a dazed condition with evidence of injuries which Ostertag admitted he caused. LaMont, by observation, determined that Ostertag had caused the injuries.

The jury should have been instructed to consider as provocation and in the mitigation of any damages these facts. While the court notes of instruction 4 that it was given in substance, it was not in fact given in any form to the jury. This was duly excepted to and the court's attention called to the same T-215-16. The cause of *Meecham vs. Foley*, 235 P2d 497, 120 U 416 was cited to the court in excepting to instruction wherein the court states, "To apply this rule consistently means that the past conduct of the plaintiff, although it does not justify the battery may be taken into consideration in mitigation of damages."

Requested instruction number 3, in the last paragraph, provided "That the jury should deduct from the award such sum as may be determined appropriate in connection with the provocation." No such instruction was given. The jury, as instructed, were not permitted to consider

provocation which should in any manner limit exemplary damages or be considered as mitigating circumstances reducing the award.

Point IV

4. REFUSAL TO INSTRUCT THAT DEFENDANT SEEING HIS MINOR CHILD WITH INJURIES INFLICTED BY PLAINTIFF SHOULD BE CONSIDERED IN MITIGATION OF DAMAGES.

Defendant's requested instruction number 4 was not given even in substance or at all. The facts in this case are peculiar in that the defendant rushed up, and seeing his child in a dazed, battered, and bleeding condition and immediately confronted the man who he had been told caused the injuries and who also admitted that he had struck the child, with no cooling-off period LaMont immediately struck Mr. Ostertag. This might normally occur where a parent becomes outraged at the apparent injuries suffered and sustained by his child when immediately confronted by the wrongdoer. This certainly is provocation to the normal father. Requested instruction 4 very carefully states that while such is not justification for an attack upon Ostertag, it might, nevertheless, be considered in provocation and mitigation of any damages. The court completely ignored this request.

Under the instruction given by the court there was no opportunity for counsel to argue the point under judicial sanction to the jury. The jury was led to believe that regardless of the condition of the child that they could not consider that fact in mitigation or as reducing exemplary

damages, which is, of course, contrary to the law. See Meecham vs. Foley above.

Point V

5. REFUSAL TO INSTRUCT THAT EXEMPLARY DAMAGES SHOULD BE AWARDED ONLY FOR AN INTENTIONAL, WILFUL, AND MALICIOUS ATTACK WITHOUT JUST REASON.

Defendant's requested instruction number 6 provided punitive damages should only be awarded for a malicious, wilful attack made without just reason therefor. Again, this instruction bears the note, "Given in Substance." No instruction can be found which in substance provided that punitive damages are permitted only where the attack was wilful, malicious and intentional. In other words, there is no restriction to such cases. The facts of this case so far differ from Thompson vs. Aldrich, 297 P2d 226, U where without any reason at all, the defendants grabbed the plaintiff and gave him a terrific beating while in the case at bar the defendant, seeing his son severely injured immediately struck the party who injured him. The requested instructions instructed the jury that these facts could be considered in mitigation of damages. The court disregarded the request.

SECOND ACTION

DAVID LAMONT, A MINOR
VS.
LUDWIG OSTERTAG

1. DENIAL OF THE RIGHT OF PLAINTIFF, DAVID LAMONT, TO GO TO THE JURY ON THE QUESTION OF MEDICAL EXPENSES.

ARGUMENT

Point I

Plaintiff introduced into the evidence checks, Exhibit D-2 and D-3, showing that the father Duncan LaMont had paid \$26.00 for medical expenses for the boy, David. The court instructed the jury that they could not consider this an element of damages. This was error. The authorities hold that recovery may be had even if the services are had gratuitously. Ind. *Acme-Evans Company v. Schnepf*, 15 N.E. 2d 742, 105 Ind. App. 475. 17 C. J. p 804-Notes 48, 49.

“Treatment in public hospital. Injured plaintiff was not precluded from recovery of special damages because he was cared for in a public hospital, where such recovery would have been sustained had he been cared for and treated in a private hospital—*Reichle vs. Hazie*, 71 P2d 849, 22 Cal. App. 2d 543.”

Moreover, recovery can be had if payment is made by a third person. See 82 A.L.R. 1320—22 A.L.R. 1554.

Where attention has been accepted from members of plaintiff's own family the court has still held recovery to be had for such expenses. Ind. *Lake & W. R. Co. vs. Johnson*, 133 N.E. 732, 191 Ind. 479. Iowa-*Legler vs. Muscatine Clinic*, 223 N. W. 405, 207 Iowa 720.

Appellant appreciates the fact that it may appear insignificant to appeal an issue on \$26.00. This does, however, become significant when it is made to appear to the jury that the court does not recognize any claim at all by this plaintiff, and that while the plaintiff was permitted to introduce the check into the evidence, the court in taking it away from the jury's consideration leaves in the jury's mind the question that this entire case is a phoney and the court refuses to recognize the medical expenses involved.

This can well account for the fact that no award was made at all to the plaintiff. A new trial should be granted.

Respectfully submitted,

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lants*