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

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,

FILED

MAR 18 1959

Supreme Court, Utah

Case No. 8983

RESPONDENT'S BRIEF

CHILD, SPAFFORD & YOUNG,
Attorneys for plaintiff, and respondent

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RESPONDENT'S BRIEF

F A C T S

Counsel for Respondent feels the facts are not correctly
stated by Appellants, and that an enlargement on said facts
is in order.

On May 19, 1958, at about the hour of 9:30 P.M., Respondent Ludwig Ostertag was in his front yard at 1470 South 3rd East, in Salt Lake City, watering his lawn. It was dark, but Respondent noticed four boys proceeding South on third East on the West side of the street, on the same side as Respondent's home. Before the boys, one of whom was Appellant, David LaMont, reached Respondent's premises, they crossed over to the East side of the street, and when directly opposite Ludwig Ostertag, one or more of the boys (T-156, 158) threw rocks at Respondent, one of which hit him in the back of the neck and the other at his feet (T-90). Now there had been a long series of abuses and attacks upon Respondent and his property by Appellant, David LaMont and other boys in company with David, (T-85, 86, 87, 88, 89, 92, 148-28, 158-17, 206). Respondent, therefore put down his hose and walked after the boys, who had again crossed back to the West Side of the street after they had proceeded past the Ostertag home. Two of the boys began to run, but Respondent was able to approach David LaMont, and in broken English inquired why these boys wanted to make trouble. David LaMont conveniently says he doesn't remember anything that happened at that point (T-205), but the facts quite clearly point up that Mr. Ostertag made an attempt to reach out and apprehend the boy, (T-93, 154-5). but David LaMont, in trying to turn and run away, slipped and fell and then as he quickly got up to run again, he stumbled head first into a ditch where he scratched and cut his face (T-154-30, 155-8, 203-9). The LaMont boy and the others ran West on Kensington Avenue and decided to go about a half mile out of their way to one of the other boy's homes, since David LaMont was fearful about going

into his own house because of the trouble he had been in before with the Ostertags, (T-155-20, 184).

Later that same night, after the boys had spread the story among some of their parents that Respondent had brutally attacked and beaten David LaMont, the boys, together with one Veston Coleman, returned to the Ostertag premises, the police were called, and Appellant, Duncan LaMont, the father of David LaMont was summoned. When Duncan LaMont arrived in his car, he jumped out, ran onto Respondent's property, and without inquiring into the facts, assaulted and battered Respondent in a malicious and revengeful manner, (T-99, 114, 209-6, 212-21). Respondent received a fractured rib, lacerations of the face, body bruises, loosened front teeth, a broken dental plate, and other considerable pain and suffering, (T-99, 100, 159, 161). He also was prevented from working for a time, and suffered about \$650.00 loss in wages as a result, (T-102, 103).

Respondent then brought an action against Appellant, Duncan LaMont, claiming general and exemplary damages. Subsequently, David LaMont brought action against Respondent claiming general and exemplary damages. These two actions were later consolidated, although counsel for Respondent had opposed Appellant's motion for the consolidation, (T-12, 14). Judgment was found in favor of Respondent and damages awarded, from which award appellants have taken this appeal.

FIRST ACTION

LUDWIG OSTERTAG vs. DUNCAN LaMONT

STATEMENT OF POINTS

1. THE EXEMPLARY DAMAGES AWARDED ARE NOT EXCESSIVE.
2. THE VERDICT WAS NOT A RESULT OF PASSION AND PREJUDICE.
3. THE COURT'S INSTRUCTIONS TO THE JURY WERE PROPER.

SECOND ACTION

DAVID LaMONT vs. LUDWIG OSTERTAG

STATEMENT OF POINTS

1. DAVID LaMONT WAS NOT DENIED ANY RIGHT ON THE QUESTION OF MEDICAL EXPENSE.

ARGUMENT

Point I

THE EXEMPLARY DAMAGES AWARDED ARE NOT EXCESSIVE.

Counsel for Appellants has tried to make a point of hearsay comments of a couple of jury members in arguing

that \$860.00 exemplary damages is excessive. Counsel for Respondent submits that such argument is not proper nor is it material to this Appeal. There is much weighty evidence in this case for the jury to make a substantial award in exemplary damages. Defendant Duncan LaMont's own testimony at the trial showed his extremely revengeful and malicious attitude in this terrible act. One apparent reason that the Jury chose to award greater exemplary damages rather than obviously deserved compensatory damages was the vindictive attitude of Appellant in his testimony and the use of exemplary damages as a deterrent to such actions as instructed by the Court (T-61). Counsel's question to Duncan LaMont on cross examination was: "Mr. LaMont, did you go and strike Mr. Ostertag for revenge?" His answer came back quickly, angrily and vindictively, "*I sure did! I sure did!*" (T-209-6).

Contrary to Appellant's argument that the Court refused to allow defendant Duncan LaMont to show the jury that his child, David, had been punished because of his prior abuses toward Respondent, the testimony shows that David LaMont was definitely punished by his father for his previous acts, (T-202-10). Further, if there was any misconception of the facts, we submit that it was Appellant's own doing by insisting that the two actions be consolidated and tried as one, and in view of the very apparent inconsistencies of Appellant's own witnesses, the four boys, as they testified.

The jury chose to believe, and rightly so from the evidence, that Respondent had not brutally beaten David LaMont, as was claimed, and that there was *not* sufficient provocation for the defendant, Duncan LaMont, to mercilessly beat up Respondent and thus be exempt from punitive damages.

It is true that the actual damages awarded by the jury were considerably less than the exemplary damage award. This does not mean, however, that there was not actually more damage in the compensatory class *sustained* by Respondent. In fact, the evidence quite clearly points this out (T-99, 100, 159, 161). Consequently there *is* a reasonable relation between the actual and the exemplary damages.

Counsel for Appellant has cited *Evans v. Gaisford* in support of his argument, but a study of that case will show it supports Respondent's position, and the quotation rendered is not the Court's finding or conclusion at all.

Our Supreme Court has set down no definite measure in this regard, but has pointed out a general rule or two which counsel feels fully justifies this Court now in affirming the trial Court. In *Falkenberg vs. Neff*, 269 P. 1008, the court, in upholding a punitive award of \$1,500.00 where the actual damages were only \$362.50 said:

"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."

In the case at bar, there is no doubt that there were more actual damages sustained than was awarded by the jury. In the case of *Finney vs. Lockhart* (Calif.) 217 P2nd 19, where \$2,000.00 exemplary damages was not considered excessive and where only one dollar general damages was awarded, the court said:

"That the verdict implied a finding that the plaintiff had sustained actual damages, and that the fact

that only nominal damages were awarded in the compensatory class did not necessarily imply a finding that no more actual damages were sustained.”

We submit, therefore, that the jury’s verdict of even \$2,000.00 exemplary damages in this case was not excessive under the circumstances, so especially in view of the trial court’s reduction of said damages to \$860.00, the award is not excessive.

Further, we suggest that the amount of punitive damages should be left to the sound discretion of the jury and trial Court, as further pointed out in the Neff case above cited, and in 35 ALR 2nd 310, Section 2.

See also, in support of Respondent’s position the following cases: Evans vs. Gaisford, 247 P2nd 431; Calkins vs. Engle, 300 S.W. 997 (cited in the Gaisford case); Thompson vs. Aldrich, et al, 297 P2nd 226.

Point II

THE VERDICT WAS NOT A RESULT OF PASSION AND PREJUDICE.

Counsel for Appellants argues that Respondent paraded before the jury that life had been made intolerable for him and his family by Appellant, David LaMont, and other boys. Counsel is hardly in a position to have insisted on the two actions being tried together, knowing that Ludwig Ostertag would have to defend by showing the abuses against him by David LaMont and other boys in company and consort with him, and then, because the jury found in favor of

Respondent, claim there was passion and prejudice by reason of the actions of the very boy who had sued Ostertag.

Further, counsel for Appellants, in his own cross examination of Ludwig Ostertag brought out the fact that Ostertags had lost everything, and had no money, and found it necessary to return back to Germany to be free from their troubles here, (T-110-7).

A careful examination of the transcript involving Mr. Ostertag's testimony will disclose a difficult time was had because of the language barrier, and Mr. Ostertag's inability to understand and speak the English language, and even though an interpreter was found to be necessary by the Court, every phrase and word, which would normally not be a problem, could present some difficulty in the translation and communication. Yet, it is pointed out, that even though the word "they" was sometimes used in the translation, it was quite clear that David LaMont *was* involved in each of the disrespectful and delinquent acts testified to, although he never seemed to do these things alone. This however, had nothing to do with the jury's determination of the issues against Duncan LaMont, but only as it affected the boy, David LaMont's, case and his right to punitive damages.

We submit, therefore, that the jury duly deliberated in this matter and was not moved upon by passion and prejudice, but properly, in accordance with the Court's instructions (T-48) and because of the extremely malicious and revengeful act and attitude of defendant, Duncan LaMont, awarded exemplary damages against him.

Point III

THE COURT'S INSTRUCTIONS TO THE JURY
WERE PROPER.

Respondent will argue Appellant's Points III, IV, and V in one point.

The question of punitive damages and how it should be treated by the jury in connection with both plaintiffs in this trial was clearly and adequately expressed to the jury by the trial court's instruction 9 through 12 (T-47, 48, 49).

The Court said in instruction 9, (T-47):

"Such acts as you find from a preponderance of the evidence to have been committed may be considered in determining whether or not punitive damages should be awarded, and, if so, the amount thereof."

Again in instruction 10 (T-48) the Court said:

"However, the jury is not obligated to award punitive damages in any case, and they should be awarded only if you feel that an award of actual damages sustained by Mr. Ostertag against Mr. LaMont is not a sufficient deterrent to prevent a repetition of such an assault or is not a sufficient warning to other people who might be tempted to do the same thing. In no event can punitive damages be awarded unless the act was done in a wanton, reckless, or vicious and uncalled for manner."

We submit, therefore, that defendant's requested instruction numbers 4, 5, and 6, were given in substance, and that to have given the instructions verbatim as counsel argues should have been done, would have been improper. Respondent at no time admitted injuring David LaMont (T-93-9), and the evidence shows rather conclusively that any injuries received by David LaMont were from his fall in the gutter face down (T-203-9), and from his own doing. It was

also very dark when Duncan LaMont came upon the property of the Ostertags and, without any hesitation at all, he commenced his attack upon Respondent, (T-114-11, 98-29).

In defendant's requested instruction number 4 (T-36), he states:

"... while such is not justification for an attack upon the plaintiff Ludwig Ostertag, you may, nevertheless, consider such as provocation in the mitigation of any damages, if any, that were sustained by the plaintiff, Ludwig Ostertag . . ."

In 4 American Jurisprudence, Page 204, Section 165, it states:

"The better rule and weight of authority, however, are in favor of the proposition that actual or compensatory damages are not subject to mitigation by proof of mere provocation or malice."

Again in Section 166 of the same citation:

"If the assault is made after time for reflection and under circumstances leading to the presumption that it was for *revenge*, the assailant stands in the position of an original trespasser, and the conduct of the other party will not serve as an extenuation or in mitigation of damages."

The evidence is conclusive that Duncan LaMont acted *for revenge* (T-209-6). The Court, therefore, did properly instruct the jury in this matter, and even had defendant requested an instruction on mitigation of punitive damages, which he did not, the Court's instructions to the jury would still have been proper under the circumstances.

SECOND ACTION

DAVID LaMONT vs. LUDWIG OSTERTAG

DAVID LaMONT WAS NOT DENIED ANY RIGHT
ON THE QUESTION OF MEDICAL EXPENSE.

The introduction in evidence of the medical expenses of David LaMont were received, without objection from counsel for Respondent and duly considered by the jury, (T-208). The jury was also properly instructed as to damages as shown in the Court's instruction number 12. Appellant's contention that the Court instructed the jury that they could not consider this an element of damages is not supported by the record and is untrue.

The fact that although the jury found that a battery had been committed by Ostertag in the touching of David LaMont, but awarded no damages for said battery, would indicate that the jury felt the boy's injuries were not the proximate result of said battery, therefore, no damages or medical expenses would be awarded. Moreover, it is Respondent's contention that there has been no violation nor infringement of Appellant's rights in this matter that could justify a new trial.

CONCLUSION

Certainly it is a black mark on this community and America when such a family as Ostertags must find it necessary to return back to their homeland, Germany, to free

themselves of such experiences of persecution in this free land, and while we do not wish to imply that the Court should not consider every facet in this case as to justice and fairness, we do wish to comment that justice ends with this Court on this Appeal as far as Respondent is concerned.

Surely, therefore, from a careful analysis of this case, this Honorable Court will find that the parties hereto have had their day in court, and we strongly urge that every consideration should be given to upholding the trial Court and jury in their deliberations and judgment in this cause, and thus rectify, at least in some measure, the terrible wrong done to Respondent and his family.

Counsel for Respondent respectfully requests this Court to affirm the decision of the trial Court with costs to Respondent.

Respectfully submitted,

CHILD, SPAFFORD & YOUNG

Salt Lake City, Utah

Attorneys for Respondent