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In the Supreme Court of the State of Utah

ARTIE MISSIE BANKS,
Plaintiff and Appellant,

vs.

ROY SHIVERS,
Defendant and Respondent.

Case No. 10854

RESPONDENT'S BRIEF

Appeal from the Judgment of the 1st District Court for Cache County

Honorable Lewis Jones, District Judge

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ARTIE MISSIE BANKS,
Plaintiff and Appellant,

vs.

ROY SHIVERS,
Defendant and Respondent.

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RESPONDENT'S BRIEF

STATEMENT OF KIND OF CASE

This is an action for compensatory and punitive damages by Appellant for an alleged assault and battery committed upon Appellant by Respondent. Respondent filed herein a Counterclaim for damages alleging assault and battery by Appellant upon Respondent.

DISPOSITION IN LOWER COURT

The case was tried to the Court sitting with a jury. The Court submitted the issue to the jury for a general verdict, and the jury returned a verdict of no cause of action against Appellant on her Complaint and no cause of action for Respondent on his Counterclaim. The Appellant timely moved the Court for a new trial, which motion the Trial Court denied.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment of the jury and the Trial Court's order denying Appellant's Motion for a New Trial.

STATEMENT OF FACTS

Appellant's statement of the facts is incomplete and in part incorrect. It is axiomatic that, in view of the jury's finding against Appellant, this Court will view the evidence in light most favorable to such findings. Accordingly, the Court's attention is invited to the facts from the record in the following particulars.

The evening of April 19, 1967, Respondent, in company with one Henry King, came to the apartment of Appellant and one Mary Graham for the purpose of having Miss Graham cook some chicken for them. (Tr. 43 and 44) When Messrs. Shivers and King arrived, they were invited into the apartment of Miss Graham and Miss Banks. (Tr. 14 lns 11-15) Only the four persons named were present at this time, and they were later joined by one Lou Ann Martinez. (Tr. 15 ln 22)

The room where the incident in question occurred has a kitchen in one end divided from the rest of the room by a divider approximately three feet high. (Ex. P-1 and Tr. 32, lns 17-22) After exchanging greetings, King and Graham went to the kitchen area to begin preparing the chicken; and Appellant and Respondent

remained in the living and dining area. (Tr. 15) When Martinez entered the apartment, she went to the kitchen area. (Tr. 29, lns 16-30)

Initially, Respondent had been seated on the couch in the living area studying. He stood up and walked to the said divider and began playing with a stack of cards there. He asked who they belonged to, and Appellant replied they were hers and directed Respondent to put them down, which he did. (Tr. 30, lns 13-30) Appellant thereupon got up from her seat at the table (See Ex. P-1), removed the cards from the room, and returned. (Tr. 31) A conversation then ensued which triggered the events giving rise to Appellant's claim, the substance and demeanor of which the record reveals some conflict concerning.

Appellant, in her Brief, pages 3 and 4, cites her own testimony that Respondent said to her, "I ought to knock you up side of your nappy head," (Tr. 16, lns 24 & 25) whereupon Respondent moved toward Appellant in a rapid manner and clapped his hands near her face. (Tr. 17) Omitted from Appellant's Statement of the Facts was the testimony of Mr. King on cross-examination by Mr. Van Sciver when he testified as follows:

Q. And what did he say?

A. And he say, "What if I don't," like that.

Q. Did he say, "What if I hit you?"

A. Yeah, he said, "What if I hit you?" like that.

Q. Did he say this in a loud manner?

A. No. *He was smiling while he was saying this.*

Q. Now "What if I hit you?"

A. Yes.

Q. All right, now, was Miss Banks facing the table at this time?

A. Yes, she was facing this way, yes.

Q. She didn't see the manner in which Mr. Shivers tendered this statement; is that correct;

A. *She was watching him while he said it.*

Q. Well, now, can you describe the smile that was on his face?

A. Well, like he smiles all the time. You know. Just like one does. That's the way he talks.

Q. Was it said in a manner—

A. *It was in a playful manner.* That's what it was. In a playful manner.

Q. But the comment wasn't playful. He said, "What if I hit you?"

A. Well, that was a playful manner.
(Emphasis Added) (Tr. 57 lns. 4-26)

Also omitted from Appellant's Statement of the

Facts was Appellant's statement in her deposition, when, under questioning by Mr. Hoggan, she testified as follows:

> Q. Okay. Let me just go back over this with you for a minute. Now when he said: "I ought to hit you beside your nappy head," did that generate fear in you?
>
> A. *I fear no one.*
>
> Q. I see.
>
> A. Because I feel that all anyone can do is kill me, and if it's instant it doesn't bother me at all.
>
> Q. So you weren't afraid by what he said?
>
> A. *No, I wasn't afraid.*

(Emphasis added) (Desposition of Appellant, page 18, lines 10-18)

After Respondent had clapped his hands, he then moved away from Appellant toward the door; whereupon, Appellant jumped up and ran toward Respondent. Respondent turned to face Appellant. (Tr. 58, lns 3-16) Appellant, at page 4 of her Brief, states that Respondent then leaned his chest against Appellant. Appellant so testified. (Tr. 18, lns 15-17) However, Mr. King testified that "as soon as he (Respondent) turned around, she (Appellant) was there with her chest all up in his face . . . ." (Tr. 58, lns 20 and 21; see also Tr. 47, lns 15-19; and Tr. 58 and 59)

Appellant then began hitting Respondent in the stomach and face. (Tr. 47 and 48; Tr. 18, ln 20; Tr. 33; Tr. 73, lns 25-30; and Tr. 74, lns 1-3) Respondent pushed Appellant away, and she fell backward onto the floor. (Tr. 33, lns 26-30; Tr. 48, lns 10-26) Appellant contends in her statement of facts that Respondent came toward Appellant as she was on the floor. (Brief p. 4) However, both Martinez and King testified that Shivers was heading toward the couch where his hat was; and when he came near Appellant, she kicked him. Respondent then turned to face Appellant, and she kicked him in the groin (Tr. 48 and 49; Tr. 35, lns 18-30; and Tr. 36)

Respondent then held Appellant's hands and struck her once with an open hand to restrain her. (Tr. 35, lns 7-10 and Tr. 49, lns 9 and 10) At this point, Mr. King restrained Respondent and Appellant got up. Respondent sensed blood coming from his mouth and, in the heat of the sequence of events, reached out and took Appellant by the neck, pushing her against the wall. (Tr. 49, 50, and 51) Again, Mr. King restrained Respondent; and King, Martinez, and Respondent left the apartment.

On this state of the record, the jury returned a verdict against Appellant on her Complaint, no cause of action. Appellant moved for a new trial, which motion was denied and hense, this appeal.

ARGUMENT

POINT I

THE COURT IN ITS INSTRUCTION TO THE JURY CORRECTLY DEFINED AN ASSAULT AND, IN ANY EVENT, AND UNDER ANY DEFINITION OF ASSAULT, THE JURY CORRECTLY FOUND NO ASSAULT HAD BEEN COMMITTED BY RESPONDENT UPON APPELLANT.

The Court instructed the Jury on assault as follows:

> "An assault is an unlawful attempt coupled with a present ability to commit an injury on the person of another."

Appellant excepted to this instruction (Tr. 89) and cites to this Court in support of her contention that the Honorable Trial Court's definition was erroneous, the Restatement of Torts and Prosser. While both are eminent authorities, neither could be considered paramount to the authority of the Utah Supreme Court which, in the case of Ganaway v. Salt Lake Dramatic Association, 17 Ut. 37, 53 P. 830, held the only thing wrong with the following definition of assault:

> "An assault is an attempt, coupled with an ability, to commit a *violent* injury upon the person of another." (emphasis added)

was inclusion of the word "violent."

It will be observed that if the word "violent" is omitted from the definition in the Ganaway case, it be-

comes practically word for word the same as the Trial Court's definition in the instant case. The Trial Court's definition of assault comports with the definition of assault given by this Court.

Nor is this Court alone in so defining an assault. In the relatively recent case of Cook v. Kinzua Pine Mills Co., 207 Ore. 34, 293 P2d 717, the Oregon Supreme Court defined a civil assault as:

> "... an attempt with force or violence to do corporal injury to another from malice or wantonness or is *an intentional attempt to do violence to another's person coupled with present ability to carry intention into effect.*" (emphasis added)

But, assuming, without admitting, for the purpose of argument, that the Restatement of Torts definition quoted from Section 21, Subsection 1 at page 7 of Appellant's Brief is the law, the result of the case would have been the same for the reasons:

First, that the act of Respondent did not put Appellant " . . . in apprehension of immediate and harmful or offensive contact . . ." In her deposition, Appellant stated that Respondent's words did not make her afraid. (Appellant's deposition, page 18)

Second, that the apprehension mentioned in the Restatement is apprehension that would be caused in the mind of a reasonable person. (Prosser on Torts, 2nd Edition, page 35) Mr. King testified when being cross-examined by Appellant's Attorney that Respondent and

Appellant were facing each other when Respondent said he would hit her and clapped his hands in front of her face and that Respondent was smiling and acting in a playful manner. (Tr. 57) Such action, under any circumstances, would not create apprehension in the mind of a reasonable person.

Third, that "... apprehension is not justified ... where they (words) indicate that the defendant is offering a blow in jest ..." (Prosser on Torts, 2nd Edition, page 36) The testimony of Mr. King cited above gives evidence from which a jury could conclude that the words and gestures of Respondent were in jest.

Fourth, that Respondent did not intend to "... inflict a harmful or offensive contact ..." on Appellant. (Restatement of Torts, Sec. 21, Subsection 1) After clapping his hands, Respondent walked away from Appellant. (Tr. 57, lns 26-30) The record is void of any showing of belligerence on Respondent's part to this point. Respondent testified he didn't intend to touch Appellant when he clapped his hands and that had he so intended he would have touched her. (Tr. 78, lns 16-30)

As to the other action triggered by the hand clap, it is Respondent's contention that if anyone was assaulted, it was Respondent. The sequence of events outlined in detail in Respondent's statement of facts shows that Appellant first pushed her chest against Respondent and then struck Respondent in the stomach and mouth; that

in self defense, Respondent pushed Appellant to the floor; that Appellant then kicked Respondent on the side and in the groin; that in response to this action and provocation, Respondent hit Appellant once with an open hand and grabbed her by the throat and pushed her against the wall. No where in this sequence of events is there a fact which would alter the jury's decision against Appellant under any definition of a civil assault.

POINT II

THE COURT CORRECTLY DENIED APPELLANT'S MOTION FOR A NEW TRIAL AS THE JURY ON DISPUTED EVIDENCE RESOLVED THE FACTS AGAINST APPELLANT ON HER COMPLAINT, AND THE JURY'S FINDINGS WERE BOTTOMED ON COMPETENT EVIDENCE.

Appellant contends that: (1) Respondent used excessive force against Appellant in repulsing an attack on him; (2) Respondent cannot justify his action on the ground of self defense; and (3) Respondent had a duty to withdraw. (Appellant's Brief, pages 10 and 11)

With reference to the first contention, the Court in instruction number three to the jury stated:

> "One who is assaulted, with or without provocation, may use reasonable force to repel the attack without being liable for an assault and battery. *But one may not use excessive force in repelling the attack*, but only that amount of force which may reasonably appear to the (sic)

person attacked to be necessary to repel his adversary at the time . . ." (R. 33)

Appellant did not except to this instruction (Tr. 89 and 90) and under rules needing no citation of authority when the jury found under this instruction against Appellant on disputed evidence, its finding will not be disturbed unless unfounded on competent evidence. In this case, the evidence of the degree of force used by Appellant was disputed and certainly there was competent evidence upon which the jury bottomed its findings and decision that, in effect, no excessive force had been used by Appellant. The jury's finding need not and should not be disturbed.

Contentions (2) and (3) will be considered together.

The first time Appellant told Respondent to leave was when Respondent clapped his hands and walked away from her. She immediately jumped up and shouted "Get out of here." (See testimony of Martinez, Tr. 31, lns 22-30) When Respondent turned around, Appellant was jumping against him and immediately began hitting him. Assuming for argument, without admitting, that Respondent had a duty to retreat, Respondent had no chance to retreat but was given only two alternatives: stand and take it or defend himself. He chose the latter and, after repelling Appellant's attack, started to get his hat. (Tr. 48, lns 16-26 and Tr. 49, lns 5-10)

At this point, Appellant again kicked him on the

side and in the groin. (Tr. 36, lns 3-12 and Tr. 49, lns 5-10)

One is led to the question, "What could a reasonable person have done under the circumstances that Respondent didn't do?" and to conclude with the jury that Respondent acted in self defense as his only realistic alternative inasmuch as the swift and continuous attack of Appellant made retreat under the circumstances impossible.

Finally, it should be observed that Lou Ann Marinez, who was Appellant's witness, gives a most revealing and frank account of the incident. One cannot read her entire testimony without being left with the feeling and led to the conclusion that the jury correctly decided the facts of this case against Plaintiff on her Complaint.

CONCLUSION

The jury was properly instructed and on conflicting but competent evidence found against Appellant on her Complaint. The Trial Court correctly overruled Appellant's Motion for a New Trial. The decision of the jury and the Trial Court should be affirmed by this Court.

Respectfully submitted,
OLSON & HOGGAN
L. Brent Hoggan
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