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John G. Powers v. Marvin S. Taylor : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

JOHN G. POWERS,
Plaintiff and Respondent,

vs.

MARVIN S. TAYLOR,
Defendant and Appellant,

vs.

EMMA STILLMAN,
Plaintiff and Respondent,

vs.

MARVIN S. TAYLOR,
Defendant and Appellant,

Case No.
9694

APPELLANT'S BRIEF

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INDEX

	Page
Statement of Facts	1
Statement of Points Relied Upon	2
Argument	3
Conclusion	9
Texts: Jury Instructions for Utah	4
Cases Cited:	
Anderson vs. Jensen, 265 P 745	5
Jones vs. Blythe, 93 P 994	5
Kendall vs. McIntire, 203 P 653	5
Mower vs. Olsen, 164 P 482	5
Naylor vs. Floor, 170 P 971	5
Thomas vs. Blythe, 137 P 396	5
Livingston vs. Utah Colorado Land & Livestock, 103 P 2d 684	7
Livingston vs. Thornley, 280 P 1042	6
Nelson vs. Tanner, 194 P2d 468	6
Winters vs. Turner, 278 P 816	6
28 ALR 1076	7

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APPELLANT'S BRIEF

STATEMENT OF FACTS

In this case the Plaintiffs and Respondents brought separate actions against the Defendant and Appellant, seeking to recover damages caused by trespass of Defendant's and Appellant's horses on the real property of the Plaintiffs and Respondents.

The actions were consolidated for the purposes of this trial.

The cases were tried before a jury and it was not disputed that the horses trespassed upon the property of the Respondents a number of times during the past three years. The exact number of times was never ascertained.

The amount of damages sustained by reason of the trespass was nil, according to the testimony of all of the witnesses. Neither of the Respondents paid any money to repair any damages they might have sustained by reason of the trespasses.

The jury found in favor of the Respondents and against the Appellant and in the case of John J. Powers vs. Marvin S. Taylor, they awarded \$1,000.00 actual damage; \$2,500.00 punitive damages and in the matter of Emma Stillman vs. Marvin S. Taylor, they awarded \$350.00 actual damages. Upon the Appellant's motion for a new trial the Court ordered the amount of the judgment in the case of John J. Powers vs. Marvin S. Taylor to be reduced and a remittitur in the amount of \$1,000.00 of the exemplary damages be made. It is from these judgments that the Defendant and Appellant now appeals.

STATEMENT OF POINTS RELIED UPON

1. The Court erred in permitting the Plaintiff and Respondents to present evidence to the jury that was

incompetent and not in any way related to the trespass and in point of time was not within the time encompassed by the pleadings.

2. The Court erred in its instruction to the jury as to the standard for measuring the amount of damages.

3. The Court erred in instructing the jury that it could find punitive or exemplary damages.

ARGUMENT

1. The Court erred in permitting the Plaintiffs and Respondents to present evidence to the jury that was incompetent and not in any way related to the trespass and in point of time was not within the time encompassed by the pleadings. The record is replete with the testimony that was permitted by the Court over the objection of Counsel:

Record: p 12, L 10; p 13, L 16; p 13, L 27; p 14, L 19; p 15, L 19; p 16, L 30; p 17, L 4; P 17, L 10; p 22, L 17; p 23, L 3; p 30, L 12-24; p 45, L 22; p 46, L 5; p 57, L 20; p 60, L 12; p 61, L 13-30; p 62, L 1-30; p 63, L 1-17; p 64, L 15-30; p 65, L 1-30; p 66, L 1-5; p 67, L 4-12; p 71, L 30; p 74, L 11; p 75, L 1-30; p 76, L 1-17; p 98, L 13-23; p 147, L 9; p 152, L 2; p 154, L 13-24; p 160, L 7-9; p 196, L 21; p 196, L 24; p 197, L 1-30.

And while it is true that the Court at the conclusion of Respondent's testimony and evidence instructed the

jury that they were not to regard this testimony, nevertheless its frequent repetitions and the fact that it had been presented to the jury, the mere telling the jury to disregard it does not erase it from their minds and memories. And the only purpose of this testimony was to inflame the passions of the jurors so that they would not think clearly in their deliberations as to the amount of damages that had been done.

2. The Court erred in its instruction to the jury as to the standard for measuring the amount of damages.

In both of these cases the damage sustained was neither permanent or irreparable and there was no evidence that the Respondents or either of them expended any money whatsoever in repairing any damage that might have been caused by reason of the trespasses. It would be a fair statement to say that the only damages sustained by the Respondents, or either of them, was damage to the plants, none of which were destroyed and all of which recovered from any damage and continued to grow and develop. Apparently, all of the plants complained of were annuals, and most of the trespasses occurred during the season of the year when these plants were neither blooming nor growing. The correct and proper instruction to the jury for damages is found in Jury Instructions for Utah, number 90.40, Damages to Property which recites in effect, "in awarding such damages, you should award such sum as will reasonably compensate Plaintiff for damage to his property as a proximate result of the

injury by the Defendant. That sum is equal to the difference in the fair market value of the property immediately before and immediately after the injury. If the property has been repaired or is capable of repair, so as to restore its fair market value as it existed immediately before the injury at an expense less than the difference in value, then the measure of damage is the expenses of such repair rather than the difference in value," or instruction number 90.42, "in awarding such damage, you may award such sum as will reasonably compensate the Plaintiff for his pecuniary loss suffered by him through the loss of use of the property during the time reasonably necessary to repair the damage resulting from the injury. The sum is ordinarily the reasonable rental value of the property for the period of time above mentioned. The Utah cases and the other cases involving damages as a result of trespass by animals follow the criterion or standard in the above instructions awarding or arriving at the amount or measure of damages.

Utah cases involving trespass by animals which were examined by Counsel are: *Anderson vs. Jensen*, 265 Pac. 745; *Jones vs. Blythe*, 93 Pac. 994; *Kendell vs. McIntire*, 203 Pac. 653; *Mower vs. Olsen*, 164 Pac. 482; *Naylor vs. Floor*, 170 Pac. 971; *Thomas vs. Blythe*, 137 Pac. 396.

In each of these cases, the amount of damages awarded and sustained by the Court bore a direct relationship to the cost of replacing Plaintiff's property

to its condition before the trespass. Even though some of the cases involved wilfull trespass where the owner drive his animals upon Plaintiff's land, and some involved repeated trespasses, no mention was made of exemplary damages.

The earlier cases of trespass apparently held that unless acts of Defendant were wilfull in causing or permitting the trespass that no recovery could be had. The more recent cases seemed to have changed that rule and the Defendant is held liable for damages for accidental trespass as much as for wilfull or intentional trespass.

Livingston vs. Thornley, 280 Pac. 1042; Nelson vs. Tanner, 194 Pac. 2nd 468; Winters vs. Turner, 178 Pac. 816.

3. The Court erred in instructing the jury that it could find punitive or exemplary damages.

The cases hold that to recover punitive or exemplary damages in cases of trespass of animals there must be three conditions, namely:

1. The trespass must be wilfull.
2. The trespass must have been caused as the result of malice.
3. There must have been some significant mental or emotional disturbance on the part of the Plaintiff.

In any event, only if there is actual damage should the Court permit a consideration of exemplary damages.

Livingston vs. Utah-Colorado Land & Livestock Company, (Colorado), 103 Pac. 2nd 684.

28 ALR 2nd 1076—SHOCK—WITNESSING PROPERTY DAMAGE. Although the Anglo-American Courts have freely approved verdicts including awards for compensation for mental suffering where this element of injury was accompanied or preceded by a discernible, physical, personal injury. They have been extremely reluctant to authorize recovery for mental disturbances standing alone or, to a somewhat lesser degree, for physical injuries caused solely by such a mental disturbance unaccompanied by a contemporaneous physical injury. Without going into an extended discussion on the reasons relied upon by the Courts in denying recovery from mental disturbance unaccompanied by physical injury, it may be said that the rule has been justified in various cases and at various times on the grounds:

1. That the Plaintiff's right to freedom from mental disturbance is not one which the law undertakes to protect, so that one who works a purely mental injury has breached no duty and committed no wrong.

2. That in most cases such injuries are so remote from the normal foreseeable consequences of the wrong involved that they cannot be said to have been a proximate cause and

3. That such damages are so subjective that they are beyond the capacity of the legal process to investi-

gate and evaluate, so that to entertain claims based thereon would open the door to fraud and greatly swell the burden of litigation.

However, it has been quite generally recognized that where the Defendant is charged with a wilfull tort rather than merely a negligent injury, and especially where the tort is committed under circumstances of positive malice or ill-will which might reasonably be expected to lead to considerable disturbances to the Plaintiff, compensatory damages for such mental disturbance or its physical consequences may properly be awarded, even where aside from the property tort, no cause of action would have arisen.

Although there are a few cases allowing such damages, the Courts in general appear to be extremely reluctant to allow recovery for mental disturbance occasioned by a merely negligent injury to chattels.

Page 1089, **MENTAL DISTURBANCE CAUSED SOLELY BY CONCERN FOR PROPERTY.** Even where there is no element of personal danger or physical discomfort involved and the mental disturbance complained of arises solely from the Plaintiff's distress at the injury to his property interests, recovery for such mental anguish has been allowed in a number of cases where it appeared that the Defendant's act amounted to a wilfull and malicious trespass and that the mental anguish was a proximate result of this wrongful act. So, mental anguish has been held

an element of compensatory damages for wilfully coming on the Plaintiff's land and cutting trees.

In other cases of trespass or injury to real property where the mental disturbance complained of arose solely as an incident of property damage and the elements of malice or wilfulness did not appear, the Courts have appeared reluctant to allow such damages.

CONCLUSION

From the foregoing it is apparent that the Court erred:

1. In permitting the Plaintiffs and Respondent to present evidence to the jury which was incompetent and the only purpose to be served was to arouse the actions and prejudices of the jury against the Defendant.
2. The Court erred in its instructions to the jury as to the standards for the measuring of the amount of damages sustained by the Plaintiffs and Respondent.
3. That the Court erred in instructing the jury that it could find punitive or exemplary damages.

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