

1962

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

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.

EMMA STILLMAN,
Plaintiff and Respondent,

vs.

MARVIN S. TAYLOR,
Defendant and Appellant.

NOV 7 - 1962

Supreme Court, Utah

No. 9694

BRIEF OF RESPONDENTS

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STATEMENT OF FACTS

STATEMENT OF THE KIND OF CASE

Respondents brought separate actions in the Lower Court to enjoin the appellant from allowing his horses to trespass and roam at will upon their residential yards in the mouth of Mill Creek, Salt Lake County and for damages to their property caused by the horses. Respondent Powers also sought punitive damages from the appellant. The Lower Court consolidated the cases for trial.

DISPOSITION IN LOWER COURT

The case was tried to the Court sitting with a jury, the Honorable Merrill C. Faux presiding. The jury found in favor of the respondents and against the appellant and granted judgment thereon. Respondent Stillman was awarded \$350.00, actual damages, and Respondent Powers was awarded \$1,000.00, actual damages, and \$2,500.00, punitive damages. Powers consented to a remittitur of punitive damages in the sum of \$1,000.00.

STATEMENT OF FACTS

Respondent Powers and the appellant are neighbors in a residential area. They live next door to each other (Tr. 6). Respondent Stillman and the appellant are also neighbors, Mrs. Stillman living directly across the street from the Respondent Powers (Tr. 7). In the year 1954, the appellant began having difficulties with Respondent Powers in regard to Taylor's horse grazing on this respondent's property (Tr. 61). Powers is an elderly gentleman past 70 years of age (Tr. 53), the defendant being in his middle forties. (Tr. 5 and 6.) The appellant struck Powers and threatened bodily injury to him over a dispute about the horse coming onto Powers' property (Tr. 12, 15, 22, 64, 65). From the year 1954 to the time the actions were filed, Taylor's horses were frequently running loose on the properties of both respondents (Tr. 65, 66 and 98).

Since 1954 there have been as high as ten (10)

horses stabled on the appellant's property during the years of trespass (Tr. 9, 60). From the year 1954 until the time of trial, the appellant's horses have continually been allowed to wander off the property of the appellant and onto the lawns and flower beds of both respondents (Tr. 65, 66 and 98). Although the respondents made repeated demands upon the appellant to restrain his horses to prevent further damage to their lawns, shrubbery and flowers, their requests fell on deaf ears. During the years of 1958, 1959 and 1960, the appellant's horses made numerous trips to the respondents' property and while there grazed and trampled upon the lush foliage and flowers, and in the process of doing so, severely damaged their flower beds, evergreens, flowering trees, and lawns of both respondents (Tr. 33, 44 to 51, 70, 99 to 104, 127).

When Mrs. Stillman requested the appellant to please restrain his horses, he responded by saying, "If you don't want my animals on your place, put up a fence." (Tr. 98.) To further antagonize the Respondent Powers, appellant permitted and actually instructed his young son to fire a rifle across and into Powers' premises after having been requested not to do so. To further demonstrate Taylor's utter disregard for the rights of the respondents and his malicious frame of mind, he threatened to beat Powers until he could not walk if he ever found him out on the street (Tr. 74 and 75).

Both respondents produced ample evidence of

malice and damage to their property upon which the jury based its verdict.

POINTS URGED FOR AFFIRMANCE

POINT NO. I

THE COURT DID NOT ERR IN PERMITTING RESPONDENT POWERS TO PRESENT EVIDENCE OF THE APPELLANT'S MALICE AND WANTON MISCONDUCT PRIOR TO THE YEARS OF 1958, 1959 AND 1960.

POINT NO. II

THE COURT'S INSTRUCTION TO THE JURY ON DAMAGES WAS NOT PREJUDICIAL TO THE APPELLANT AND THERE IS NO REASONABLE LIKELIHOOD THAT A DIFFERENT RESULT WOULD HAVE OCCURRED UNDER OTHER INSTRUCTIONS.

POINT NO. III

THE COURT DID NOT ERR IN INSTRUCTING THE JURY THAT IT COULD FIND PUNITIVE OR EXEMPLARY DAMAGES.

ARGUMENT

POINT NO. I

THE COURT DID NOT ERR IN PERMITTING RESPONDENT POWERS TO PRESENT EVIDENCE OF THE APPELLANT'S MALICE AND WANTON MISCONDUCT PRIOR TO THE YEARS OF 1958, 1959 AND 1960.

The testimony of Mr. Powers as well as the testimony of his wife and other neighbors in the immediate area clearly demonstrates the malicious and uncooperative attitude of Taylor (Tr. 152). The record is clear that the evidence concerning Taylor's malice and utter disregard for the rights of both respondents occurred prior to the years in question and continued up to the time of suit. The evidence offered by counsel for the respondents was to show the state of mind of the appellant as well as for the purpose of impeachment inasmuch as Taylor flatly denied ever having struck Powers or ever having been charged with and convicted of this assault and battery. The Court fully instructed the jury that they were not to consider the testimony as having any bearing on damages prior to the years in dispute. The antagonistic attitude of Taylor commenced prior to 1954 and continued to the time of trial. This is amply demonstrated by the evidence produced by the respondents and was clearly admissible to show a malicious state of mind on the part of the appellant. See 20 Am. Jur., Evidence, P. 322, Sec. 346, wherein it is stated:

“Where malice is an essential factor in a case and is not to be presumed from the doing of the act charged, the courts adhere to a liberal view in permitting a relatively wide range of evidence which tends to show the state of mind and to show or rebut malice. Proof of previous ill-will or feeling of personal hostility is often allowed as proof of the existence of malice at a particular time.”

The author then states in Section 347:

“Threats made after an assault against the person are admissible upon the question of malice.”

Evidence of malice and ill-will on the part of the appellant being an essential element of proof in the Powers case, it was clearly admissible and proper for the trial Court to allow such evidence to show a pattern of conduct carried on by the appellant. See 20 Am. Jur., Evidence, P. 281, Sec. 303, wherein the author states:

“The law in civil cases, as well as in criminal cases permits proof of acts other than the one charged which are so related in character, time, and place of commission as to tend to support the conclusion that they were part of a plan or system or as to tend to show the existence of such a plan or system. Thus, when one’s motive, malice, or ill-will or his intention or good or bad faith in doing or omitting to do certain acts becomes an issue, his acts, statements, and conduct on other occasions which have a bearing upon his motive or intention upon the occasion in question are competent evidence.”

The evidence demonstrated that Taylor had bullied

and threatened Powers, an elderly man, with bodily injury because he had objected to Taylor's horses invading his property and severely damaging his lawn and gardens.

Ill-will is also indicated by his attitude toward Respondent Stillman, his aunt, wherein he told her in so many words that if she did not desire his horses roaming and trampling upon her property and eating her flowers, she could build her own fence to keep them out. The evidence of his actions from the time he obtained his horses up to the time of suit, and the continuing conflict, shows his utter disregard for his neighbors' property. This evidence was properly admitted to show malice or ill-will.

POINT NO. II

THE COURT'S INSTRUCTION TO THE JURY ON DAMAGES WAS NOT PREJUDICIAL TO THE APPELLANT AND THERE IS NO REASONABLE LIKELIHOOD THAT A DIFFERENT RESULT WOULD HAVE OCCURRED UNDER OTHER INSTRUCTIONS.

The appellant complains of the instruction given by the Court concerning the actual damages. It should be noted that at no time did counsel for the appellant request an instruction to be given by the Court on this point. In fact, appellant requested no instructions whatsoever. The awards made by the jury clearly demon-

strate that they were not confused or misled by the Court's instructions. Had the jury awarded damages to either of the respondents in excess of the evidence concerning the difference in value of the homes before and after the damage, it perhaps could be argued that they were misled by the Court's instruction. The awards made to the respondents for the actual damage to their yards and shrubbery were considerably less than the evidence would have supported.

Appellant states at Page 4 of his Brief that, "It would be a fair statement to say that the only damage sustained by the respondents, or either of them, was damage to the plants, none of which were destroyed . . ." He admits that there was damage. He then states again at Page 4, "Apparently, all 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 record is clear that the trespasses commenced in the spring and continued until fall. The record also shows that aside from annual plants, there were many evergreens, rose bushes, and flowering shrubs as well as the lawns of both respondents that were damaged or destroyed. It would have been useless for respondents to have replaced shrubs and repaired their lawns and flower beds while the horses were not being restrained.

Nowhere in Point II of appellant's brief does he complain that the amount of actual damage awarded to either respondent was excessive. Neither has the

appellant maintained that had the Court given the instruction as outlined in his brief, the actual damages awarded by the jury would have been less. In all probability, they would have been the same or perhaps even more. This Court has clearly recognized the almost impossible task of conducting a jury trial without the possibility of some error creeping into the record. The fact that there may have been error committed standing alone is insufficient to justify the over-turning of a jury verdict. As was stated in the case of *Hales v. Peterson*, 11 Utah 2d 411, 360 P.2d 822, at Page 415,

“We have heretofore recognized the importance of safeguarding the right of trial by jury. A necessary corollary to it is that there must be some solidarity in the result so that it can be relied upon. To the extent the verdict can easily be set aside by the court, the right to trial by jury is weakened. In order to give substance to the right, once the trial has been had and a verdict rendered, it should not be regarded lightly, nor over-turned because of errors or irregularities unless they are of sufficient consequence to have affected the result.

“Anyone acquainted with the practical operation of a trial by jury and the human factors that must be a part therein is aware that it would be almost impossible to complete a trial of any length without some things occurring with which counsel, after the case is lost, can find fault and, in zeal for his cause, all quite in good faith, magnify into error which to him and the losing parties seem blamable for their failure to prevail. However, from the standpoint of administering even-handed justice, the court must dispassion-

ately survey such claims against the over-all picture of the trial, and if the parties have been afforded an opportunity to fully and fairly present their evidence and arguments upon the issues, and the jury has made its determination thereon, the objective of the proceeding has been accomplished. *And the judgment should not be disturbed unless it is shown that there is error which is substantial and prejudicial in the sense that it appears that there is a reasonable likelihood that the result would have been different in the absence of such error. . . .*" (Italics ours.)

Appellant does not, and cannot reasonably maintain that the actual damages sustained by the respondents and the jury's award thereon would have been in a lesser amount had the Court given the instruction he suggests in his brief, but which he, at no time, requested.

POINT NO. III

THE COURT DID NOT ERR IN INSTRUCTING THE JURY THAT IT COULD FIND PUNITIVE OR EXEMPLARY DAMAGES.

The evidence presented by Respondent Powers as to being struck by the appellant at an earlier time as well as threats that were made to him clearly demonstrates that there was a malicious, utter disregard by the appellant for this respondent's rights. For a man in his middle forties to strike and then later on threaten bodily harm to another in his seventies can only reflect but one state of mind, that of ill-will and malice. Repeated

requests by both respondents that Taylor please keep his horses on his own property brought nothing but threats and insults from him.

The testimony of neighbors, not parties to this action, was to the effect that Taylor had a reputation of being hard to get along with in the community and was totally uncooperative when it came to restraining his horses from damaging his neighbors' property (Tr. 121, 124, 125, 143, 152).

The evidence clearly demonstrated to the jury and the trial Court that Taylor was an inconsiderate, hot-tempered bully in the treatment of those around him and made no effort whatsoever to respect their rights (Tr. 197).

Appellant's Brief includes an annotation cited at 28 A.L.R. 2d, Page 1076, considering the element of damages for shock and mental strain. Respondent Powers will not further burden this Court with a discussion of the law cited therein as the annotation clearly deals with compensatory damages and not with exemplary or punitive damages. It is in no way applicable to the instant case.

The jury in the instant case awarded punitive damages to Powers, not as compensation for mental suffering, but as punishment to the appellant and as a warning to him to mend his ways. Respondent Powers respectfully submits that the abuse and ill-will shown him by Taylor clearly justifies the jury's award of puni-

tive damages. See 15 Am. Jur. Damages, P. 710, Sec. 274.

CONCLUSION

It is respectfully submitted by both respondents that the issues of fact and reasonable inferences therefrom should be construed in their favor by this Court. Appellant has not asked for any affirmative relief in his Brief nor can he demonstrate where the damages awarded are excessive or that the awards would have been different had the Court given the instruction he suggested in his Brief, although he did not request the same at the time of trial. The jury's findings and awards should be affirmed as a lesson to the appellant for his inexcusable conduct.

Respectfully submitted,

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and Respondents.*