

IN THE SUPREME COURT
STATE OF FLORIDA

KEN AULT,

Petitioner/Defendant,

vs.

CASE NO: 71,817

ROY LOHR,

Respondent/Plaintiff,

FILED

SID J. WHITE

FEB 15 1988

CLERK, SUPREME COURT

By

ON CERTIFICATION FROM THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO: 87-5122

BRIEF OF PETITIONER

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QUESTION OF LAW TO BE ANSWERED

In Florida, must a compensatory damages award underlie a punitive damages award in a case in which the jury has made express findings against a Defendant?

INTRODUCTION

Petitioner, Ken Ault, will be referred to herein as "Defendant," "Petitioner" or by his proper name.

Respondent, Roy Lohr, will be referred to herein as "Plaintiff," "Respondent" or by his proper name.

References to the Record will be made in accordance with the index of the record compiled by the United States District Court, Southern District of Florida, as filed with the United States Court of Appeals for the Eleventh Circuit.

STATEMENT OF THE CASE

In the instant case claims were brought by the original Plaintiffs, Roy Lohr and Larry Randolph, against multiple Defendants. Because this appeal involves facts and proceedings applicable to but one of those Plaintiffs, Roy Lohr, and but two of those Defendants, JAMES HOLT and KEN AULT, Defendants will omit reference to those pleadings and proceedings applicable to Defendants not concerned with this appeal, except where necessary, but Plaintiffs will be referred to jointly.

This action was commenced by the filing of Plaintiffs' Complaint seeking damages, costs and attorney's fees on or about December 27, 1985. (R1-1). Defendants responded to Plaintiffs' Complaint on January 28, 1986, by submitting an Answer to Plaintiffs' Complaint, except Count III to which Defendants submitted a Motion to Dismiss. (R1-18, 20). The Motion of the Defendants was duly responded to by the Plaintiffs (R1-24) and ultimately denied by Order of the District Court dated December 19, 1986 (R3-137) affirming the recommendation of the United States Magistrate (R3-126).

This matter proceeded through discovery, in accordance with the scheduling orders of the District Court (R1-55, 72). Within the time frames set by the District Court for submitting pretrial motions, the Defendants submitted numerous motions including a Motion

for a Separate Trial (R2-80), a Motion for Pretrial Conference (R2-81), a Motion in Limine (R2-85, 86), and a Motion for Partial Summary Judgment on behalf of James D. Holt, with accompanying affidavits, depositions, interrogatories, statement of material facts and memorandum of law. (R2-87-93). These Motions were responded to in due course by the Plaintiffs (R2-100-102).

The Motion for Partial Summary Judgment submitted by Defendant James D. Holt, demanded judgment upon Plaintiffs' claims of Holt's alleged failure to adequately supervise, train, discipline or evaluate co-Defendant, Deputy Ken Ault. Defendants' Motion in Limine related to the inadmissability of certain evidence pertaining to a prior incident of misconduct engaged in by Defendant Ken Ault. The response of the Plaintiffs asserted the absence of adequate policies with regards to the training and use of canines and a failure to discipline Ault subsequent to the incident in question. No evidence in the form of depositions or affidavits was submitted in response to Defendant's Motion.

On October 30, 1986, the United States Magistrate entered her Report and Recommendations upon the various pretrial motions, recommending denial of Defendants' Motion for Summary Judgment and Motion in Limine. (R3-126). Objections to the Report and Recommendation were duly submitted by the parties (R3-127, 133, 134).

Although on the eve of trial the District Court entered an Order pertaining to the Report and Recommendation of the Magistrate, it was not until December 19, 1986, that the Court entered its written Order affirming in part and disaffirming in part the Magistrate's Report and Recommendation. (R3-137). In both that oral Order and in the ultimate written Order, the trial court denied the pretrial motions of the Defendants referred to herein.

Trial of this cause was held in West Palm Beach, Florida, on November 18 and 19, 1986. At the close of Plaintiffs' case, Defendant James D. Holt moved for and was granted a directed verdict pursuant to Rule 41, Federal Rules of Civil Procedure, with the resulting final Order and Judgment pertaining to that claim entered on December 19, 1986 (R3-138). At the conclusion of trial of the remaining issues, all of which pertained to Defendant Ken Ault, the jury entered its verdict finding that Ken Ault committed an assault and battery upon Plaintiff Roy Lohr, and awarded \$5,000 in punitive damages without an award of compensatory damages. No violation of Lohr's civil rights was found by the jury. The jury further found that Defendant Ken Ault assaulted, battered and violated the civil rights of Plaintiff Larry Randolph and awarded to Plaintiff Randolph the sum of \$10,000 as compensatory damages and the sum of \$30,000 as punitive damages. Judgment upon this verdict was entered by the

District Court on December 19, 1986 (R3-139).

Subsequent to the entry of this judgment, Defendant Ken Ault submitted a timely Motion for New Trial and/or Remittitur (R3-140), which was responded to by the Plaintiffs (R4-143). By Order dated January 13, 1987, the District Court denied Defendant's Motion for New Trial and/or Remittitur (R4-145).

Appeal by Defendant Ken Ault was taken to the United States Court of Appeals, Eleventh Circuit, including an appeal of the pendent state claims raised by Plaintiff Roy Lohr, addressing the question of whether the award of punitive damages by the jury could stand absent an award of compensatory damages. The case was briefed before the Court of Appeals for the Eleventh Circuit and on January 22, 1988, the Eleventh Circuit rendered its opinion. In that opinion, as to Roy Lohr, the United States Court of Appeals for the Eleventh Circuit certified to this Court a question of law to be answered: In Florida, must a compensatory damages award underlie a punitive damages award in a case in which the jury has made express findings against a defendant?

The certified question from the Court of Appeals was received by this Court on January 26, 1988, and pursuant to Rule 9.150, Florida Rules of Appellate Procedure, Petitioner submits herewith his initial brief.

STATEMENT OF THE FACTS

In March, 1984, Plaintiffs Roy Lohr and Larry Randolph were inmates in the custody of the Department of Corrections at the Martin Vocational Center located in Martin County, Florida. (R1-1-4, 5, 8). At that time both Plaintiffs were incarcerated based upon felony convictions. (R5-164, 28, 100).

In the early afternoon hours of March 7, 1984, the Plaintiffs fled the grounds of the Martin Vocational Center, without permission or authority, based upon an asserted fear for their lives at the hands of correctional officers at the Martin Vocational Center. (R1-1-8). Plaintiffs do not assert that Defendants Holt and Ault possessed any knowledge of this alleged fear. (R1-164-48, 106). After escaping, the Plaintiffs wandered through the pastures and marshes of western Martin County throughout the remainder of that afternoon and into the evening. (R5-164-35). During the course of the evening, the Plaintiffs avoided and eluded capture and ignored opportunities to surrender, including at least one opportunity to surrender to a deputy with the Sheriff's Office (R5-164-36, 103, 108). Finally, at approximately 10:30 p.m., well after dark and some nine to ten hours after their initial escape, the Plaintiffs were recaptured by Defendant Ken Ault and his canine, Bear. (R5-164-38).

Ken Ault had been employed with the Martin County

Sheriff for approximately four years at the time of trial and previously had been employed with the Lee County Sheriff's Office. While employed with the Lee County Sheriff, Ault had received canine training and was certified as a canine officer. Both Ault and his canine, Bear, had received extensive training in accordance with the state regulations and regulations adopted by national organizations governing the use of canines. (R6-165-125-128). While an officer with the Martin County Sheriff's Office, Ken Ault had been involved in one prior incident whereby he was reprimanded by the Sheriff for using poor judgment in slapping a youth in his custody subsequent to being provoked. This particular incident did not involve the use of a canine and was the only prior incident involving Ken Ault and alleged misconduct. (R5-164-72, 73, 76; R6-165-146).

The Martin County Sheriff's Office has had in use a canine unit for a number of years prior to the incident in question. In creating the canine unit, the Sheriff, through his subordinates, adopted specific policies and procedures to handle the training and use of canines. Additionally, pursuant to these policies and procedures, extensive records are kept with regards to the training of the canines and their use, including preparation of reports on the occasion of an incident involving a bite and the photographing of any injury resulting from the

bite. (R5-164-74, 75, 76; R6-165-143; R2-93-13, 14, 24, 25).

Shortly after the escape by the Plaintiffs, on March 7, 1984, the Martin Vocational Institute contacted the Martin County Sheriff's Office to advise of the escape and to request assistance in tracking and apprehending the Plaintiffs. (R5-164-67). To assist in this tracking operation deputy sheriff Ken Ault and his canine, Bear, were called to assist. (R6-165-128). After preparing Bear and locating a scent, Ault commenced the tracking process which ultimately lead him through miles of the marshes, pastures and woods of western Martin County over a period of many hours. (R6-165-129, 131).

Finally, well after dark, Ault's canine alerted upon a scent and indicated the existence of the suspects in a large, thick clump of palmetto bushes. At this time Ault warned the potential suspects of his presence, that he was with the Martin County Sheriff's Office, and that he was accompanied by a canine unit, including a warning that the canine would be released if surrender was not immediately forthcoming. (R6-165-133, 134). This warning was heard by the Plaintiffs, but ignored. (R5-164-109).

In order to take control of the situation, protect himself and apprehend the suspects, Ault released his canine with the intention of having the canine find, locate, hold and apprehend the suspect. (R6-165-134,

135). This step was taken due to the late hour, the dark conditions and the knowledge that he was dealing with escaped felons, whose status as armed or unarmed was unknown. (R6-165-134, 139). Ault then followed his canine into the palmetto and observed Bear on top of one of the suspects, with a hold upon that suspect. (R6-165-135, 162). Ault proceeded to have the suspects handcuff themselves, removed the canine, exited the area placing the Plaintiffs in the custody of other officers with the Sheriff's Department, after walking some distance. (R6-165-141, 142). The Plaintiffs were transported to the hospital where they were treated for bites and scratches and then transferred to the custody of the Martin County Jail. (R5-164-91, 95, 45).

While at the jail, the Plaintiffs complained with regards to their treatment during the course of their arrest, with the resulting investigation being conducted by the Sheriff and an internal affairs investigator. (R5-164-47, 55, 70). Due to somewhat conflicting versions with regards to the incident and the extent to which the injuries may have been accidental, Sheriff James Holt did not reprimand Ken Ault or take further steps with regards to the matter. (R5-164-58, 71, 77).

It is upon these facts Plaintiffs' brought their action claiming a violation of their constitutional rights through the use of excessive force by Defendant Ken Ault,

state claims involving alleged assault and battery against Ken Ault and federal claims brought against Sheriff James Holt alleging negligence and failure to supervise and train his deputies. (R1-1). It is also upon these facts that the Court entered directed verdict in favor of Sheriff James Holt on the claims pertaining to the Sheriff, subsequent to its prior denial of the entry of summary judgment upon the same facts and law. Finally, upon these facts the jury hearing the case rendered judgment against Defendant Ken Ault and in favor of the Plaintiffs.

SUMMARY OF ARGUMENT

It is a well established rule of Florida law that all punitive damage awards must be supported by an award of nominal or compensatory damages. McClain v. Pensacola Coach Corporation, 13 So.2d 221 (Fla. 1943). Although this general rule was modified to a certain extent by this Court in Lassiter v. International Union of Operating Engineers, 349 So.2d 622 (Fla. 1976), it is clear that the Lassiter holding did not overrule the long established precedent of McClain v. Pensacola Coach Corp., supra.

In the years since the Lassiter decision, the issue of whether nominal or compensatory damages are indeed prerequisites to an award of punitive damages has repeatedly been addressed by the Florida district courts. The vast majority of these cases have continued to hold that an award of punitive damages cannot be sustained without an underlying award of nominal or compensatory damages. Sonson v. Nelson, 357 So.2d 747 (Fla. 3rd DCA 1978); Raffa v. Dania Bank, 372 So.2d 1173 (Fla. 4th DCA 1979); American Motorcycle Institute, Inc. v. Mitchell, 380 So.2d 454 (Fla. 5th DCA 1980); Hauser Motor Company, Inc. v. Byrd, 377 So.2d 773 (Fla. 4th DCA 1979); Buonopane v. Fritz, 477 So.2d 1030 (Fla. 4th DCA 1985).

In each of these cases applying the Lassiter decision, the underlying breach of duty, and the establishment of liability was found by the respective

juries. Yet the District Courts, in properly applying the Lassiter decision, held that the punitive damage awards were indeed improper. When these decisions are compared to the facts of the instant case, it becomes clear that the jury verdict awarding punitive damages to Plaintiff Roy Lohr cannot stand. In a situation where neither compensatory nor nominal damages are awarded to a plaintiff, any award of punitive damages is improper.

ARGUMENT

UNDER FLORIDA LAW AN AWARD OF PUNITIVE DAMAGES IS INAPPROPRIATE ABSENT AN AWARD OF NOMINAL OR COMPENSATORY DAMAGES TO A PLAINTIFF

It is a well established rule of Florida law that all punitive damage awards must be supported by an award of nominal or compensatory damages. The need for an underlying award of damages as a requisite foundation for an award of punitive or "exemplary" damages was set out by this Court in McClain v. Pensacola Coach Corporation, 13 So.2d 221 (Fla. 1943). In holding that the Plaintiff was not entitled to an exemplary damage award in his assault and battery action, the court stated: "Generally, exemplary damages are not recoverable in an action unless actual damages are shown, and such a rule is applicable to cases of assault and battery." 13 So.2d 221, at 222. Quoting for Am.Jur. 219.

Although this general rule was modified to a certain extent by this Court in Lassiter v. International Union of Operating Engineers, 349 So.2d 622 (Fla. 1976), it is clear that the Lassiter holding did not overrule the long established precedent of McClain v. Pensacola Coach Corp., supra.¹ Although this Court recognized that an award of

¹ The Lassiter opinion, in resolving a conflict among the Florida district courts, held that an award of punitive damages need not bear reasonable relationship to the amount of actual damages awarded, and thus an award of nominal damages was held sufficient to justify a punitive

punitive damages does not have to be proportionally related to the amount of actual damages awarded by the jury, in no way does the opinion specifically overrule the long standing requirement that some damages, either nominal or compensatory, must first be awarded.

In the years since the Lassiter decision, the issue of whether nominal or compensatory damages are indeed prerequisites to an award of punitive damages has repeatedly been addressed by the Florida district courts. The vast majority of these cases have continued to hold that an award of punitive damages cannot be sustained without an underlying award of nominal or compensatory damages.

The first decision to interpret Lassiter was Sonson v. Nelson, 357 So.2d 747 (Fla. 3rd DCA 1978). In Sonson, a civil action for assault and false arrest, jury verdicts were entered in favor of the three plaintiffs. No compensatory damages were assessed, but each plaintiff received a punitive damage award. In ruling on the defendant's motion for a new trial, the lower court determined that the verdicts were defective and granted a new trial. On appeal of this ruling, the Third District Court of Appeal affirmed the lower court's decision to grant the new trial, stating that: "The argument that the Lassiter decision allows no punitive damage judgment

damage award.

without at least nominal or compensatory damages is supported by the Lassiter decision." Sonson v. Nelson, 357 So.2d 747 at 748. Quoting at length from Lassiter on the question of nominal damages, the Sonson court determined that nominal damages were indeed a prerequisite to a punitive damage award, stating: "The issue of nominal damages not having been submitted to the jury, the trial court properly granted a new trial." Sonson, supra, at 748.

The Sonson decision was followed in Raffa v. Dania Bank, 372 So.2d 1173 (Fla. 4th DCA 1979), a civil suit for wrongful conversion. The jury, in finding for the plaintiff, assessed no compensatory damages but awarded the plaintiff \$25,000 in punitive damages. Following McClain v. Pensacola Coach Corporation, 152 Fla. 876, 13 So.2d 221 (1943), and Sonson v. Nelson, supra, the court stated: "The law is well settled that punitive damages require an award of compensatory damages . . . a verdict which finds no compensatory damages whatsoever and punitive damages of \$25,000 is within this prohibition." 372 So.2d 1173, at 1174.

The Lassiter decision was further explained in American Motorcycle Institute, Inc. v. Mitchell, 380 So.2d 454 (Fla. 5th DCA 1980). In reaffirming the general rule that punitive damages require underlying compensatory or nominal support, the court stated:

"The appellee argues that the case of Lassiter v. International Union Operating Engineers, 349 So.2d 622 (Fla. 1977) dispenses with the necessity for the compensatory award, and that the award of punitive damages implies a finding of the underlying breach of duty and the requisite nexus between that breach and the punitive damage award. We do not find that conclusion in Lassiter, nor have other post-Lassiter decisions." (citations omitted).

The court went on to conclude that:

"Lassiter merely resolved a preexisting conflict among various appellate court decisions by disallowing a rule that would require some mathematical relationship between the amounts awarded on one claim for compensatory damages and for punitive damage."

380 So.2d 452, at 454.²

Most recently, in Buonopane v. Fritz, 477 So.2d 1030 (Fla. 4th DCA 1985), the court reversed the trial court decision in a civil suit where the jury rendered a verdict in favor of the plaintiff, yet assessed a zero award of compensatory damages. This was followed by an award of \$3,000 in punitive damages. Although it is clear that the jury was satisfied that the plaintiff had "established liability for a breach of duty," Lassiter 349 So.2d 620 at

² Similarly, in Hauser Motor Company, Inc. v. Byrd, 377 So.2d 773 (Fla. 4th DCA 1979), a civil judgment against a corporation awarding no compensatory damages and \$1,500 in punitive damages was held to be defective and improper, and the 4th District, citing Sonson v. Nelson and Raffa v. Dania Bank, affirmed the lower court's grant of defendant's motion for a new trial.

626, the Fourth District Court of Appeal reversed the punitive damage award stating: "The law in Florida is clear that one cannot recover for punitive damages if no compensatory damages are awarded." 477 So.2d 1030 citing Lassiter, 349 So.2d 622 (Fla. 1976) and Raffa v. Dania Bank, 372 So.2d 1173 (Fla. 4th DCA 1979).

In each of these cases applying the Lassiter decision, the underlying breach of duty, and the establishment of liability was found by the respective juries. Yet the District Courts, in properly applying the Lassiter decision, held that the punitive damage awards were indeed improper. When these decisions are compared to the facts of the instant case, it becomes clear that the jury verdict awarding punitive damages to Plaintiff Roy Lohr cannot stand. Although the jury specifically found that breach of duty had been established, the general rule derived from Lassiter and its progeny clearly requires that more than the bare establishment of liability is necessary to support an award of punitive damages. Despite the entry of a "special verdict" against Defendant Ken Ault, the Florida law on this point is undeniably clear. In a situation where neither compensatory nor nominal damages are awarded to a plaintiff, any award of punitive damages is improper.

CONCLUSION

As the foregoing discussion and legal authority illustrates, the award of punitive damages to Plaintiff, Roy Lohr, cannot stand absent an award of nominal or compensatory damages.

Respectfully submitted this 15 day of February, 1988.



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