

IN THE SUPREME COURT  
STATE OF FLORIDA

KEN AULT,

Petitioner/Defendant,

vs.

ROY LOHR,

Respondent/Plaintiff,

CASE NO. 71,817

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

FILED  
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COURT

BRIEF OF RESPONDENT

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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 FACTS

Respondent disagrees with the Petitioner's Statement of Facts with regard to the opportunities to surrender himself and the occurrences during his recapture. Had the facts been as stated by Petitioner, the jury would not have found in Plaintiff's favor.

After escaping, the Plaintiffs walked through the fields in the area of the Correctional Center and didn't get very far from the Vocational Center itself. They discovered that they had been walking in circles. (R5-164-35). Although shortly after the escape of the Plaintiffs, the Martin County Sheriff's Office was requested to assist in the tracking and apprehension (R5-164-67), Plaintiffs had no opportunities to turn themselves in without officers from the Correctional Facility (which they had fled in fear of their lives) being present. (R5-164-36, 103, 108). At approximately 10:30 p.m. the Plaintiffs were recaptured by Petitioner, who had K-9 Bear with him. (R5-164-38). Plaintiffs concealed themselves within the clear area of a palmetto head until the time of their apprehension. (R5-164-36, 103). Shortly prior to the apprehension, Plaintiff Randolph noticed someone with a flashlight and a dog come by. The dog came in the front of the palmetto head and stopped. The dog was then pulled back. The dog then came around behind Plaintiff in the palmetto head, entering the Palmetto head with Petitioner.

Petitioner walked between the Plaintiffs with the dog. Petitioner, with gun drawn, ordered Plaintiffs to freeze and roll over on their stomachs, placing their hands behind their ears. (R5-164-39).

After inquiring whether Plaintiffs had any weapons, Petitioner threw a pair of handcuffs down between them, instructing Plaintiff Lohr to cuff themselves together. Plaintiff Randolph put his right arm out and Plaintiff placed a handcuff on Plaintiff Randolph's right arm and then on his own arm. They then shook the handcuffs to demonstrate that they were secure. Petitioner then told Plaintiff to lie back down. (R5-164-40, 104).

Throughout this entire time, Petitioner had a flashlight on Plaintiffs and did not radio for any assistance or notify anyone that he had captured the Plaintiffs. (R5-164-40). After the Plaintiffs had laid back down, Petitioner commenced kicking at their feet and commanding his dog to "Get him, Bear, get him, Bear." The dog bit Plaintiff Randolph on his shoulder and Plaintiff Randolph thought that the dog was going for his throat. The dog was on top of him, scratching and biting and eventually started grabbing him by the buttocks and picking him up and dropping him. Plaintiff Lohr was bitten on the back of the leg, the shoulder and the back of his head. Throughout the entire attack, Plaintiffs were yelling and screaming for Petitioner to call the dog off. Petitioner alternated the dog

between the Plaintiffs, with Plaintiff Randolph catching the brunt of the attack. The attack continued until Petitioner called the dog off and told the Plaintiffs to get up. (R5-164-41, 42, 43, 104). The entire attack by the dog occurred after Plaintiffs were handcuffed. (R5-164-41).



## SUMMARY OF ARGUMENT

The fact that the Rule of Florida Law with regard to the issue raised is not well established is clearly demonstrated by the United States District Court of Appeals' certification of the question to this Court.

The general rule as stated in McClain v. Pensacola Coach Corporation, 13 So.2d 221 (Fla. 1943) was modified by this Court in Lassiter v. International Union of Operating Engineers, 349 So.2d 622 (Fla. 1976), indicating that it is the liability for the breach of a duty that supports a punitive damage award.

In the years since the Lassiter decision, Respondent agrees that the Appellate Courts have consistently held that, absent an award of nominal or compensatory damages, an award of punitive damages cannot be allowed to stand. 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. Eritz, 477 So.2d 1030 (Fla. 4th DCA 1985). However, in each of said cases, the finding of the underlying breach of duty can only be inferred from the fact that the jury awarded punitive damages.

On the other hand, in cases in which the jury specifically found a breach of the underlying duty, the award of punitive

damages was allowed to stand even though the jury made no award of nominal or compensatory damages. Eglin Federal Credit Union v. Curfman, 386 So.2d 860 (Fla. 1st DCA 1980); Nales v. State Farm Mutual Automobile Insurance Company, 398 So.2d 445 (Fla. 2d DCA 1981).

Since the jury affirmatively determined that Petitioner did, in fact, batter Respondent, the award of punitive damages should be affirmed.

## ARGUMENT

UNDER FLORIDA LAW, PUNITIVE DAMAGES ARE PROPERLY ALLOWABLE  
UPON A SPECIFIC FINDING OF LIABILITY AGAINST THE DEFENDANT

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If the current status of the law with regard to punitive damages is well settled in the State of Florida, it is settled in favor of Plaintiff herein.

All of the cases relied upon by Defendant are distinguishable from the case before the Court. There was no specific finding of liability in any of said cases, and in that regard, Plaintiff fully agrees with Defendant's quotation from the case of American Motorcycle Institute, Inc., v. Mitchell, 380 So.2d 454 (Fla. 5th DCA 1980) that a finding of the underlying breach of duty cannot be implied from the fact that punitive damages are awarded. It is not Plaintiff's contention that this was the holding in Lassiter v. International Union of Operating Engineers, 349 So.2d 622 (Fla. 1976).

Although the principal issue raised in Lassiter was the requirement of a relationship between punitive and compensatory damages, this Court did state the following:

"Nominal damages are awarded to vindicate an invasion of one's legal rights, where, although no physical or financial injury has been inflicted, the underlying cause of action has been proved to the satisfaction of a jury. (citations omitted). Accordingly, the establishment of liability for a breach of duty will support an otherwise punitive damage award, even in the absence of financial loss

for which compensatory damages would be appropriate. (emphasis added). Id. at 625-26.

The distinguishing factor between the case before this Court and the cases relied upon by Defendant is the finding of a breach of duty as the underlying liability for the award of punitive damages.

In Sonson v. Nelson, 357 So.2d 747 (Fla. 3rd DCA 1978), no compensatory damages were awarded nor was there any finding of liability against the Defendants on the actions for assault and false arrest. There being no finding of liability, the reversal of the award of punitive damages is proper under both Lassiter supra, and McClain v. Pensacola Coach Corporation, 13 So.2d 221 (Fla. 1943). Similarly, in the case of American Motorcycle Institute, Inc., v. Mitchell, 380 So.2d 454 (Fla. 5th DCA 1980), there was no finding of liability on the count for which the jury awarded punitive damages.

The Complaint in Mitchell, was a two-count Complaint, the first count sounding an action in contract and a second count sounding an action in fraud and requesting punitive damages. In rendering its verdict, the jury awarded compensatory damages on the contract count but only punitive damages on the fraud count. Again, there was no finding of liability on the fraud count rendering the finding of punitive damages fatally defective.

In both Hauser Motor Company, Inc., v. Byrd, 377 So.2d 773 (Fla. 4th DCA 1979), and Raffa v. Dania Bank, 372 So.2d 1173

(Fla. 4th DCA 1979), the jury returned a general verdict in favor of Plaintiffs awarding no compensatory damages but awarding punitive damages. The verdicts contained no basis of establishing the liability of the Defendants in either case. It is Plaintiff's contention that it was the use of the general verdict form without the rendering of compensatory damages that rendered said verdicts for punitive damages defective.

The last of Defendant's cited authority is Buonopane v. Eritz, 477 So2d 1030 (Fla. 4th DCA 1985). Based upon Defendant's statement that the Plaintiff therein had "established liability for a breach of duty," it would appear most favorable to Defendant's position herein. However, Plaintiff can find no such language in said opinion. The Court in Buonopane, in discussing the verdict, merely said:

In this civil case, the jury brought in a zero verdict in favor of the Plaintiff on the question of compensatory damages. Paradoxically, in a separate verdict form, they assessed punitive damages in the amount of \$3,000.00. Id. at 1030.

There was no finding that the Plaintiff had "established liability" for a breach of duty.

Based upon that verdict, the only way any breach of duty can be said to have been established is by implying the same from the awarding of punitive damages. Plaintiff has already conceded that this is improper but it is not what occurred in the case before this Court.

As previously indicated, it is Plaintiff's contention that Lassiter, supra shifted the criteria from whether or not compensable or nominal damages are awarded to whether or not liability has been established for a breach of duty. In the case presently before this Court, the jury specifically found that Defendant Ault used excessive force or battered Plaintiff Lohr and further specifically found that Defendant Ault acted maliciously, intentionally, wilfully, wantonly, or with conscious disregard to the rights of Plaintiff, Roy Lohr. (RE-35, 36). As such, the jury in this case clearly found a liability for the underlying tort of battery.

The only cases on point would support the position of Plaintiff in this case. In Eglin Federal Credit Union v. Curfman, 386 So.2d 860 (Fla. 1st DCA 1980), the Court held that the jury's failure to assess nominal damages did not preclude an award of punitive damages since the jury, on a special verdict form, specifically found that the Defendant had converted Plaintiff's property. In other words, the jury in that case specifically found that there had been a breach of the underlying duty thereby establishing liability.

In the case of Nales v. State Farm Mutual Automobile Insurance Company, 398 So.2d 445 (Fla. 2nd DCA 1981), the Court held that, even though Plaintiff may not be entitled to compensatory damages under Florida's No Fault Law because he fails to meet the threshold of permanent injury, he can still

recover punitive damages if there is a finding of liability.

It appears from the record of the present case that the jury was clearly instructed that a finding of liability on the issue of assault and battery was necessary for the awarding of punitive damages. The jury was instructed that:

"On the issue of whether Plaintiff suffered an assault and battery, if you find for Plaintiffs and also find that Defendant Ault acted with malice, moral turpitude, wantonness, wilfulness, or reckless indifference to the rights of others, you may, in your discretion, assess punitive damages against such Defendant as punishment and as a deterrent to others." (R6-165-225).

That the jury followed this instruction, which was given without objection, is evident from their verdict wherein they first found that Defendant Ault did batter Plaintiff and, based thereon, awarded punitive damages to Plaintiff.

In summary, it is Plaintiff's contention that the Rule of Law in Florida should require the finding of liability for a breach of duty before a Plaintiff can be entitled to punitive damages. In this regard, Plaintiff would direct the Court to the comments made by Justice Pearson in the case of Guthartz v. Lewis, 408 So2d 600 (Fla. 3rd DCA 1982). At Page 602, Foot-note 4, Justice Pearson stated:

"Since an award of nominal damages is the functional equivalent of a finding of liability without actual damages, it would appear where liability is established there should be no need to insist upon the formality of nominal damages."

To hold otherwise in a case where the special verdict clearly established the liability of the Defendant for the underlying tort would advance a Rule of Law which emphasizes form over substance.

In a situation where the liability of the Defendant is clearly established by way of a special verdict, an award of punitive damages is proper, even in the absence of an award of compensatory or nominal damages.



CONCLUSION

As the foregoing discussion and legal authority illustrates, the jury having found liability for the breach of a duty, the award of punitive damages to Plaintiff should be affirmed and the question certified to this Court by the United States District Court of Appeals for the Eleventh Circuit should be answered in the negative.

Respectfully submitted this 24th day of February, 1988.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent by U.S. Mail to KEITH C. TISCHLER, ESQ., Parker, Skelding, McVoy & Labasky, 318 North Monroe Street, Post Office Box 669, Tallahassee, FL 32301, this 24th day of February, 1988.

  
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SALVATORE SCIBETTA