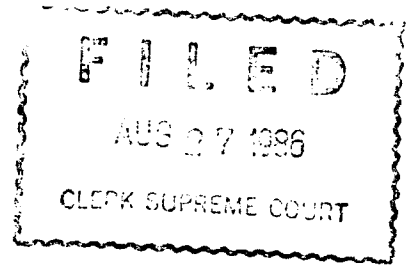


IN THE COURT OF APPEALS OF IOWA



WILLIAM C. RAUS,)

Plaintiff-Appellee,)

vs.)

DAVID RAUS,)

Defendant-Appellant,)

262

Filed August 27, 1986

DAVID RAUS and DONNA RAUS,)

Counterclaiming-)
Plaintiffs,)

vs.)

WILLIAM C. RAUS,)

Counterclaimant-)
Defendant.)

6-154
85-1051

Appeal from the Iowa District Court for Delaware County (No. CL 1604)

- George L. Stigler, Judge.

Defendant appeals from judgment in an assault and battery civil action arising out of an altercation between defendant and his brother. **AFFIRMED.**

Raymond R. Stefani and Raymond R. Stefani II of Gray, Stefani & Mitvalsky, Cedar Rapids, for defendant-appellant.

Franklin R. York of White, Stone, Aasgaard & York, Marion, and Brad J. Brady of Crawford, Sullivan, Read & Roerman, Cedar Rapids, for plaintiff-appellee.

Heard by Donielson, P.J., and Snell and Hayden, JJ.

SNELL, P.J.

This case concerns an assault and battery civil action resulting from an altercation between two brothers, William and David Raus, which occurred at Smitty's auto garage in Manchester, Iowa, on August 17, 1983. While William was at the garage having his car tires balanced and rotated, David appeared and allegedly called William "the coward of the county."

William claims that David struck him in the back of the head and then grabbed him by the neck and twisted his collar, which resulted in a brief fight. David claims that William initiated the fight, charging him from behind and striking him repeatedly. William filed a civil action of assault and battery on December 16, 1983. David counterclaimed on January 5, 1984, alleging that William had assaulted him.

Conflicting evidence was presented at trial as to whether or not David held feelings of hostility and resentment toward William. Evidence does show that David did not share in his mother's estate upon her death; her will gave David's share to his children and made David's other brother, Harlan, their conservator. The mother's attorney, Mr. Pettit, now deceased, allegedly related statements to William made by David to the attorney in which David blamed William for his being disinherited by their mother and threatened to get even with William. Over defense objection, William was allowed to testify that he was told by the attorney that David said, "I'm going to get Bill," and "I'm going to get him good for this." David denied making such statements. Harlan Raus was also allowed to testify regarding threats David had made against William. The evidence shows that William felt nervous and uncomfortable around David and did his best to avoid him. However, William testified that prior to the August 17 incident, David had not made threats or used physical force against him.

William Gearhart was a customer in Smitty's on August 17 and witnessed the fight between the Raus brothers. He testified that he saw David bump William "a little bit" as David walked past William. He also testified that William did not charge David from behind but that David grabbed William around the neck and applied an arm lock. The witness did observe William striking David before he stepped in and broke up the fight. After the incident the witness recalled William showing him the pointed end of a tire tool and stating to him, "I got him." The service manager at Smitty's was working on William's car that day and testified that he observed the Raus brothers pushing and shoving for only about fifteen to thirty seconds. He observed David holding Bill's collar. After the altercation, David asked the service manager to relay David's apology to the owner of Smitty's. After the incident, William approached the manager with the tire tool in his hand and stated, "I bet that son-of-a-bitch has a sore belly. I got him good with this."

Medical testimony given by two doctors showed that William suffered cervical strain syndrome (pulled neck muscles) as a result of the incident. Two other doctors found no evidence of acute injury. Testimony by another physician showed that as a result of the struggle David sustained a puncture wound and a small abrasion on his abdomen.

The court's instructions to the jury included those for punitive damages. The jury returned a verdict in favor of William which awarded him \$7,300 in compensatory damages and \$20,000 in punitive damages. David's post-judgment motions for judgment notwithstanding the verdict and for a new trial were denied by the trial court.

On appeal, David contends that the trial court erred: (1) by admitting evidence of threats made by David which were inadmissible hearsay; (2) in submitting punitive damage instructions to the jury and in allowing an award of punitive

damages when it was not supported by sufficient evidence; (3) in permitting both of William's attorneys to participate in opening and closing arguments; and (4) in failing to sustain David's motion for directed verdict in light of the insufficiency of the evidence of assault by David.

Hearsay Objection. The trial court allowed William to testify regarding what his brother Harlan and Attorney Pettit told him that David had threatened on the ground that it explained the conduct and beliefs of William on August 17, 1983. David argues that William offered this testimony to prove the truth of the matter asserted, hence it was inadmissible hearsay.

We initially note that the trial court's ruling on David's hearsay objection resulting in admission of the challenged evidence will be upheld if it is sustainable on any ground appearing in the record. State v. Jespersen, 360 N.W.2d 804, 806 (Iowa 1985). Iowa R. Evid. 802 provides that "hearsay is not admissible except as provided by the Constitution of the State of Iowa, by statute, by these rules of the Iowa Supreme Court." Iowa R. Evid. 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted." The Iowa Supreme Court has recognized the "distinction between statements offered to prove the truth of a matter asserted and those offered to prove only (1) the fact such statements were made or (2) their effect on subsequent actions of the hearer" State v. Rush, 242 N.W.2d 313, 319 (Iowa 1976).

We are satisfied in the present case that William's testimony was not hearsay because it was offered for the purpose of showing it was said to explain William's actions. More specifically, the statements were not offered to prove the truth of the matter asserted but rather to show why William was afraid of David and felt threatened by him. William was entitled to introduce evidence showing the reasonableness of his apprehension of danger on his self-defense

claim. The weight to be afforded such evidence was within the jury's province. Furthermore, William's assertion regarding David's threats was subject to cross-examination. While Attorney Pettit was deceased and so unavailable to testify, Harlan and David, the other declarants, were available for cross-examination. We conclude that William's testimony was admissible because definitionally nonhearsay.

Punitive Damages Instruction. David next contends that the trial court erred in submitting the instruction on punitive damages to the jury and in allowing the award of \$20,000 to stand because there was insufficient evidence to support a punitive damage recovery.

Punitive damages are allowable upon "an adequate showing of wrongful or illegal conduct committed or continued with the willful or reckless disregard of plaintiffs' rights." Kellar v. Peoples Natural Gas Co., 352 N.W.2d 688, 693 (Iowa Ct. App. 1984). Punitive damages are justified where a defendant acts maliciously. Beeck v. Aquaslide 'N'Dive Corp., 350 N.W.2d 149, 167 (Iowa 1984). In the absence of malice punitive damages cannot be awarded. Giltner v. Stark, 219 N.W.2d 700, 708 (Iowa 1974). "[M]alice may be actual (express), such as personal spite, hatred, or ill will, or it may be legal (implied), as where the defendant acts illegally or improperly with willful or reckless disregard for another's rights." (emphasis omitted) Id. (quoting Freeman v. Bonnes Trucking, Inc., 337 N.W.2d 871, 879-80 (Iowa 1983)). "[W]hen the evidence tends to establish defendant's conduct was done in such a manner and under such circumstances as to show heedlessness and an utter disregard and abandonment as to what result might flow from doing the act complained of or from the manner in which it is done a finding of legal malice sufficient to support submission of punitive damages to the trier of fact would be justified." Id.

The rule would seem to be: exemplary damages may be awarded where defendant acts maliciously, but malice may be inferred where defendant's act is illegal or improper; where the nature of the illegal act is such as to negative any inference of feeling toward the person injured, and is in fact consistent with a complete indifference on the part of defendant, liability for exemplary damages is not based upon the maliciousness of the defendant but is based, rather, upon the separate substantive principle that illegal or improper acts ought to be deterred by the exaction from the defendant of sums over and above the actual damage he has caused. (citation omitted)

Amos v. Prom, Inc., 115 F. Supp. 127, 136-37 (N.D. Iowa 1953). "Thus, if A deliberately assaults and batters B under circumstances consistent with no other state of mind on A's part than animosity toward and a desire to harm B, actual malice—that is, maliciousness—may properly be inferred." Ellis, Punitive Damages in Iowa Law: A Critical Assessment, 66 Iowa L. Rev. 1005, 1021 (1980).

Even nominal or unascertainable actual damages will still justify an award of punitive damages. Pringle Tax Service, Inc. v. Knoblauch, 282 N.W.2d 151, 154 (Iowa 1979); Rowen v. LeMars Mutual Ins. Co., 282 N.W.2d 639, 661 (Iowa 1979). The assessment of damages is traditionally a jury function and will be disturbed only for the most compelling reasons. Giltner, 219 N.W.2d at 709.

In the case at bar the conduct of David involved an intentional illegal act from which the jury could infer malice. We cannot say the trial court abused its discretion in allowing the punitive damages issue to be submitted to the jury. Neither can we say that the verdict of \$20,000 was so excessive as to shock the conscience and show passion and prejudice. We, therefore, affirm the \$20,000 punitive damages award in William's favor.

Closing Arguments. At trial, William was represented by Attorney York on his claim against David and Attorney Brady on David's counterclaim. David argues that the trial court erred in allowing both of William's attorneys to participate in giving opening statements, presenting evidence, cross-examining wit-

nesses, and delivering closing arguments. David asserts that William had an unfair advantage because of the duplicative presentation of his theory to the jury and David's case was prejudiced thereby.

In a joint trial where a party is a plaintiff in one action and defendant in another, it is generally recognized that whether the party may appear by two separate sets of attorneys and the extent to which each attorney may argue separately to the jury rests within the discretion of the trial court. Lynch v. Bissell, 116 A.2d 121, 126 (N.H. 1955); Simon v. Carroll, 241 Minn. 211, 62 N.W.2d 822, 824 (Minn. 1954). We conclude in the present case that the trial court did not abuse its discretion in permitting both of William's attorneys to participate at trial.

Sufficiency of Evidence. David asserts that the trial court erred in overruling his motions for directed verdict and judgment notwithstanding the verdict because there was insufficient evidence presented on the issue of David's intent to assault William.

"A directed verdict or a judgment notwithstanding the verdict in defendant's favor is appropriate if there is no substantial evidence in support of one of the elements of plaintiff's claim." Dennett v. City of Des Moines, 347 N.W.2d 691, 692 (Iowa Ct. App. 1984). "However, after viewing the evidence in the light most favorable to the plaintiff, if reasonable minds could differ on the issue, it is appropriate to submit the issue to the jury and the verdict should be upheld." Id. This is true regardless of whether the evidence favoring the plaintiff is contradicted. Blong v. Snyder, 361 N.W.2d 312, 315 (Iowa Ct. App. 1984).

In this case, in order for William to recover, he had to prove that David acted intending to cause a harmful or offensive contact or intending that William be placed in eminent apprehension of such contact.

We recognize that the evidence was conflicting. However, the testimony of William and Gearhart indicated that David was the aggressor in the altercation that occurred in Smitty's on August 17, 1983. Gearhart demonstrated for the jury the described attack by David. There was evidence that David bumped William from behind at William's car after calling him "the coward of the county." There was testimony that when William attempted to leave the garage area David grabbed him by the neck and choked him. From this evidence and the jury's own assessment of the credibility of the witnesses, the jury could have concluded that David assaulted William. Because sufficient evidence supported the jury's verdict, the trial court properly denied David's motions for directed verdict and judgment notwithstanding the verdict.

AFFIRMED.