FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

428

STEPHEN R. OLSON and JUDITH A. OLSON,

Appellants,

v.

TOWN OF ELDRIDGE, a Municipal Corporation; HARLEY OSMUN, and BILL KEPPY,

Appellees.

Filed April 14, 1977

85
2-58260

Appeal from Scott District Court - Nathan Grant, Judge.

Plaintiffs appeal trial court's grant of a new trial to defendants because of an excessive jury award of exemplary damages. Reversed and remanded.

Carlin and Darbyshire, of Davenport, for appellants.

McDonald, McDonald and Stonebraker, of Davenport, for appellees.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

ALLBEE, C.J.

Plaintiffs appeal asserting abuse of discretion in trial court's grant of a new trial to defendants on grounds of an excessive jury award of exemplary damages for the fatal shooting of plaintiffs' dog. We agree.

Plaintiffs, Stephen and Judith Olson, were owners of a large St. Bernard dog named "Max". Although he was AKC registered as a purebreed, Max was kept mostly as a family pet since he possessed the usual friendly propensities of a St. Bernard. Witnesses testified that Max was well-groomed and wore a collar containing current license and vaccination tags. Since the Olson's lived in a relatively secluded rural area at the edge of Eldridge, Iowa, Max was allowed to roam the farmyard freely and generally resided in a chicken coop.

On December 1, 1973, Max and a german shephard companion ventured into the town of Eldridge. Harley Osmun, chief of police, apparently received a complaint about the two dogs. At no time, however, were Max or his companion threatening any living thing. Osmun called Bill Keppy, one of his deputies, informed him of the complaint and told him to bring a firearm. Osmun and Keppy finally located Max and his companion and attempted to capture them. Both testified to seeing Max's collar with "metal" hanging from it, which both conceded were probably Max's tags. Despite this, Osmun and Keppy drove Max into a farm field whereupon, with orders from Osmun, Keppy shot Max with a 6 mm. hunting rifle. Max went down whining. Keppy ran to Max according to his testimony; strolled according to disinterested eyewitnesses; and put the *coup de grace* on Max, "insurance" as Osmun referred to it. When asked during trial what Max had done to deserve to be shot, Osmun replied "nothing". Osmun and Keppy both admitted that at the time they killed Max they knew their acts were contrary to section 351.27, The Code.

Plaintiffs filed their petition on December 6, 1973, seeking $300 in damages for Max's value. Additionally, plaintiffs sought $1000 each for intentional infliction of mental distress and $5000 in exemplary damages. Defendants conceded their liability for Max's value, but contested the other items of damages. The jury awarded plaintiffs $300 in actual damages and assessed $3000 in exemplary damages. Defendants moved for a new trial alleging the award of exemplary damages was so excessive as to be indicative of passion or prejudice in the jury. Trial court sustained the motion and plaintiffs appeal.

Exemplary damages are in no manner intended to be compensatory for the actual loss sustained by an injured party. Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850, 861 (Iowa 1973). Instead such damages are intended to punish the tortfeasor and to deter any potential wrongdoer. Grefe v. Ross, 231 N.W.2d 863, 868 (Iowa 1975). To be effective in this purpose, the exemplary damages awarded must be relatively large. Northrup v. Miles Homes, Inc. of Iowa, supra.

Unquestionably trial court has broad discretion in ruling on motions for new trial, but this discretion is not unlimited and must be based upon some reason that fairly appears in the record. Smith v. Ullerich, 259 Iowa 797, 805-806, 145 N.W.2d 1 (1966). We find no reason in this record that justifies the grant of a new trial.

The record of the trial shows plaintiffs injected no irrelevant or inflammatory matters into the proceedings. Plaintiffs' counsel did not harass or belittle Osmun or Keppy during his examination of them.

Nor can we say the amount of exemplary damages indicates passion or prejudice by the jury in light of the facts of this

case. The record bears substantial support for a finding of legal malice of the defendants. Defendants knew their act was contrary to law and in excess of their authority as police officers. The jury could also consider that defendants were acting under color of law while performing their unlawful deed. If the verdict was the result of passion and prejudice as defendants assert, it is likely the jury would have awarded the full amount allowable under the pleadings and instructions. Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850, 860-861 (Iowa 1973).

The amount of exemplary damages to be awarded is a matter which is pecularly within the discretion of the trier of fact. Grefe v. Ross, 231 N.W.2d 863, 868 (Iowa 1975). It is true as defendants argue that the award of punitive damages must bear some reasonable proportion to the actual damages incurred. Hartman v. Petersen, 246 Iowa 41, 47, 66 N.W.2d 849 (1954). But it is equally settled that no mathematical ratio is available to determine the relationship between actual and punitive damages and each case must rest on its own facts. Northrup v. Miles Homes, Inc. of Iowa, supra. This is especially true in this case where the actual damages caused by the death of a family pet may be small, but the legal malice was great. We also are mindful that here the exemplary damages have been assessed against three defendants rather than just one. It is plain that the size of the award was due to the mean and senseless nature of defendants' act. *Accord*,Northrup v. Miles Homes, Inc. of Iowa, supra at 861.

Trial court abused its discretion in granting defendants a new trial. This case hereby is reversed and remanded with directions to reinstate the jury verdict.