Katko v. Briney

183 N.W.2d 657
Supreme Court of Iowa
February 9, 1971

Marvin KATKO, Appellee, v. Edward BRINEY and Bertha L. Briney, Appellants. No. 54169. On appeal from the Mahaska District Court, Harold Fleck, J., judgment for plaintiff for both actual and punitive damages. Affirmed. Larson, J., dissented and filed opinion. Bruce Palmer and H. S. Life, Oskaloosa, for appellants. Garold Heslinga, Oskaloosa, for appellee.

MOORE, Chief Justice.

The primary issue presented here is whether an owner may protect personal property in an unoccupied boarded-up farm house against trespassers and thieves by a spring gun capable of inflicting death or serious injury.

We are not here concerned with a man's right to protect his home and members of his family. Defendants' home was several miles from the scene of the incident to which we refer infra.

Plaintiff's action is for damages resulting from serious injury caused by a shot from a 20-gauge spring shotgun set by defendants in a bedroom of an old farm house which had been uninhabited for several years. Plaintiff and his companion, Marvin McDonough, had broken and entered the house to find and steal old bottles and dated fruit jars which they considered antiques.

At defendants' request plaintiff's action was tried to a jury consisting of residents of the community where defendants' property was located. The jury returned a verdict for plaintiff and against defendants for $20,000 actual and $10,000 punitive damages.

After careful consideration of defendants' motions for judgment notwithstanding the verdict and for new trial, the experienced and capable trial judge overruled them and entered judgment on the verdict. Thus we have this appeal by defendants.

I. In this action our review of the record as made by the parties in the lower court is for the correction of errors at law. We do not review actions at law de novo. Rule 334, Rules of Civil Procedure. Findings of fact by the jury are binding upon this court if supported by substantial evidence. Rule 344(f), par. 1, R.C.P.

II. Most of the facts are not disputed. In 1957 defendant Bertha L. Briney inherited her parents' farm land in Mahaska and Monroe Counties. Included was an 80-acre tract in southwest Mahaska County where her grandparents and parents had lived. No one occupied the house thereafter. Her husband, Edward, attempted to care for the land. He kept no farm machinery thereon. The outbuildings became dilapidated.

For about 10 years, 1957 to 1967, there occurred a series of trespassing and housebreaking events with loss of some household items, the breaking of windows and 'messing up of the property in general'. The latest occurred June 8, 1967, prior to the event on July 16, 1967 herein involved.

Defendants through the years boarded up the windows and doors in an attempt to stop the intrusions. They had posted 'no trespass' signs on the land several years before 1967. The nearest one was 35 feet from the house. On June 11, 1967 defendants set 'a shotgun trap' in the north bedroom. After Mr. Briney cleaned and oiled his 20-gauge shotgun, the power of which he was well aware, defendants took it to the old house where they secured it to an iron bed with the barrel pointed at the bedroom door. It was rigged with wire from the doorknob to the gun's trigger so it would fire when the door was opened. Briney first pointed the gun so an intruder would be hit in the stomach but

at Mrs Briney's suggestion it was lowered to hit the legs. He admitted he did so 'because I was mad and tired of being tormented' but 'he did not intend to injure anyone'. He gave to explanation of why he used a loaded shell and set it to hit a person already in the house. Tin was nailed over the bedroom window. The spring gun could not be seen from the outside. No warning of its presence was posted.

Plaintiff lived with his wife and worked regularly as a gasoline station attendant in Eddyville, seven miles from the old house. He had observed it for several years while hunting in the area and considered it as being abandoned. He knew it had long been uninhabited. In 1967 the area around the house was covered with high weeds. Prior to July 16, 1967 plaintiff and McDonough had been to the premises and found several old bottles and fruit jars which they took and added to their collection of antiques. On the latter date about 9:30 p.m. they made a second trip to the Briney property. They entered the old house by removing a board from a porch window which was without glass. While McDonough was looking around the kitchen area plaintiff went to another part of the house. As he started to open the north bedroom door the shotgun went off striking him in the right leg above the ankle bone. Much of his leg, including part of the tibia, was blown away. Only by McDonough's*659 assistance was plaintiff able to get out of the house and after crawling some distance was put in his vehicle and rushed to a doctor and then to a hospital. He remained in the hospital 40 days.

Plaintiff's doctor testified he seriously considered amputation but eventually the healing process was successful. Some weeks after his release from the hospital plaintiff returned to work on crutches. He was required to keep the injured leg in a cast for approximately a year and wear a special brace for another year. He continued to suffer pain during this period.

There was undenied medical testimony plaintiff had a permanent deformity, a loss of tissue, and a shortening of the leg.

The record discloses plaintiff to trial time had incurred $710 medical expense, $2056.85 for hospital service, $61.80 for orthopedic service and $750 as loss of earnings. In addition thereto the trial court submitted to the jury the question of damages for pain and suffering and for future disability.

III. Plaintiff testified he knew he had no right to break and enter the house with intent to steal bottles and fruit jars therefrom. He further testified he had entered a plea of guilty to larceny in the nighttime of property of less than $20 value from a private building. He stated he had been fined $50 and costs and paroled during good behavior from a 60-day jail sentence. Other than minor traffic charges this was plaintiff's first brush with the law. On this civil case appeal it is not our prerogative to review the disposition made of the criminal charge against him.

IV. The main thrust of defendants' defense in the trial court and on this appeal is that 'the law permits use of a spring gun in a dwelling or warehouse for the purpose of preventing the unlawful entry of a burglar or thief'. They repeated this contention in their exceptions to the trial court's instructions 2, 5 and 6. They took no exception to the trial court's statement of the issues or to other instructions.

In the statement of issues the trial court stated plaintiff and his companion committed a felony when they broke and entered defendants' house. In instruction 2 the court referred to the early case history of the use of spring guns and stated under the law their use was prohibited except to prevent the commission of felonies of violence and where human life is in danger. The instruction included a statement breaking and entering is not a felony of violence.

Instruction 5 stated: 'You are hereby instructed that one may use reasonable force in the protection of his property, but such right is subject to the qualification that one may not use such means of force as will take human life or inflict great bodily injury. Such is the rule even though the injured party is a trespasser and is in violation of the law himself.'

Instruction 6 state: 'An owner of premises is prohibited from willfully or intentionally injuring a trespasser by means of force that either takes life or inflicts great bodily injury; and therefore a person owning a premise is prohibited from setting out 'spring guns' and like dangerous devices which will likely take life or inflict great bodily injury, for the purpose of harming trespassers. The fact that the trespasser may be acting in violation of the law does not change the rule. The only time when such conduct of setting a 'spring gun' or a like dangerous device is justified would be when the trespasser was committing a felony of violence or a felony punishable by death, or where the trespasser was endangering human life by his act.'

Instruction 7, to which defendants made no objection or exception, stated: 'To entitle the plaintiff to recover for compensatory damages, the burden of proof is upon him to establish by a preponderance of the evidence each and all of the following propositions:

'1. That defendants erected a shotgun trap in a vacant house on land owned by defendant,*660 Bertha L. Briney, on or about June 11, 1967, which fact was known only by them, to protect household goods from trespassers and thieves.

'2. That the force used by defendants was in excess of that force reasonably necessary and which persons are entitled to use in the protection of their property.

'3. That plaintiff was injured and damaged and the amount thereof.

'4. That plaintiff's injuries and damages resulted directly from the discharge of the shotgun trap which was set and used by defendants.'

The overwhelming weight of authority, both textbook and case law, supports the trial court's statement of the applicable principles of law.

Prosser on Torts, Third Edition, pages 116-118, states:

'* * * the law has always placed a higher value upon human safety than upon mere rights in property, it is the accepted rule that there is no privilege to use any force calculated to cause death or serious bodily injury to repel the threat to land or chattels, unless there is also such a threat to the defendant's personal safety as to justify a self-defense. * * * spring guns and other mankilling devices are not justifiable against a mere trespasser, or even a petty thief. They are privileged only against those upon whom the landowner, if he were present in person would be free to inflict injury of the same kind.'

Restatement of Torts, section 85, page 180, states: 'The value of human life and limb, not only to the individual concerned but also to society, so outweights the interest of a possessor of land in excluding from it those whom he is not willing to admit thereto that a possessor of land has, as is stated in s 79, no privilege to use force intended or likely to cause death or serious harm against another whom the possessor sees about to enter his premises or meddle with his chattel, unless the intrusion threatens death or serious bodily harm to the occupiers or users of the premises. * * * A possessor of land cannot do indirectly and by a mechanical device that which, were he present, he could not do immediately and in person. Therefore, he cannot gain a privilege to install, for the purpose of protecting his land from intrusions harmless to the lives and limbs of the occupiers or users of it, a mechanical device whose only purpose is to inflict death or serious harm upon such as may intrude, by giving notice of his intention to inflict, by

mechanical means and indirectly, harm which he could not, even after request, inflict directly were he present.'

In Volume 2, Harper and James, The Law of Torts, section 27.3, pages 1440, 1441, this is found: 'The possessor of land may not arrange his premises intentionally so as to cause death or serious bodily harm to a trespasser. The possessor may of course take some steps to repel a trespass. If he is present he may use force to do so, buy only that amount which is reasonably necessary to effect the repulse. Moreover if the trespass threatens harm to property only-even a theft of property-the possessor would not be privileged to use deadly force, he may not arrange his premises so that such force will be inflicted by mechanical means. If he does, he will be liable even to a thief who is injured by such device.'

Similar statements are found in 38 Am.Jur., Negligence, section 114, pages 776, 777, and 65 C.J.S. Negligence s 62(23), pages 678,679; Anno. 44 A.L.R.2d 383, entitled 'Trap to protect property'.

In Hooker v. Miller, 37 Iowa 613, we held defendant vineyard owner liable for damages resulting from a spring gun shot although plaintiff was a trespasser and there to steal grapes. At pages 614, 615, this statement is made: 'This court has held that a mere trespass against property other than a dwelling is not a sufficient justification to authorize the use of a deadly*661 weapon by the owner in its defense; and that if death results in such a case it will be murder, though the killing be actually necessary to prevent the trespass. The State v. Vance, 17 Iowa 138.' At page 617 this court said: '(T)respassers and other inconsiderable violators of the law are not to be visited by barbarous punishments or prevented by inhuman inflictions of bodily injuries.'

The facts in Allison v. Fiscus, 156 Ohio 120, 110 N.E.2d 237, 44 A.L.R.2d 369, decided in 1951, are very similar to the case at bar. There plaintiff's right to damages was recognized for injuries received when he feloniously broke a door latch and started to enter defendant's warehouse with intent to steal. As he entered a trap of two sticks of dynamite buried under the doorway by defendant owner was set off and plaintiff seriously injured. The court held the question whether a particular trap was justified as a use of reasonable and necessary force against a trespasser engaged in the commission of a felony should have been submitted to the jury. The Ohio Supreme Court recognized plaintiff's right to recover punitive or exemplary damages in addition to compensatory damages.

In Starkey v. Dameron, 96 Colo. 459, 45 P.2d 172, plaintiff was allowed to recover compensatory and punitive damages for injuries received from a spring gun which defendant filling station operator had concealed in an automatic gasoline pump as protection against thieves.

In Wilder v. Gardner, 39 Ga.App. 608, 147 S.E. 911, judgment for plaintiff for injuries received from a spring gun which defendant had set, the court said: 'A person in control of premises may be responsible even to a trespasser for injuries caused by pitfalls, mantraps, or other like contrivances so dangerous in character as to imply a disregard of consequences or a willingness to inflict injury.'

In Phelps v. Hamlett, Tex.Civ.App., 207 S.W. 425, defendant rigged a bomb inside his outdoor theater so that if anyone came through the door the bomb would explode. The court reversed plaintiff's recovery because of an incorrect instruction but at page 426 said: 'While the law authorizes an owner to protect his property by such reasonable means as he may find to be necessary, yet considerations of humanity preclude him from setting out, even on his own property, traps and devices dangerous to the life and

limb of those whose appearance and presence may be reasonably anticipated, even though they may be trespassers.'

In United Zinc & Chemical Co. v. Britt, 258 U.S. 268, 275, 42 S.Ct. 299, 66 L.Ed. 615, 617, the court states: 'The liability for spring guns and mantraps arises from the fact that he defendant has * * * expected the trespasser and prepared an injury that is no more more justified than if he had held the gun and fired it.'

In addition to civil liability many jurisdictions hold a land owner criminally liable for serious injuries or homicide caused by spring guns or other set devices. See State v. Childers, 133 Ohio 508, 14 N.E.2d 767 (melon thief shot by spring gun); Pierce v. Commonwealth, 135 Va. 635, 115 S.E. 686 (policeman killed by spring gun when he opened unlocked front door of defendant's shoe repair shop); State v. Marfaudille, 48 Wash. 117, 92 P. 939 (murder conviction for death from spring gun set in a trunk); State v. Beckham, 306 Mo. 566, 267 S.W. 817 (boy killed by spring gun attached to window of defendant's chili stand); State v. Green, 118 S.C. 279, 110 S.E. 145, 19 A.L.R. 1431 (intruder shot by spring gun when he broke and entered vacant house. Manslaughter conviction of owner-affirmed); State v. Barr, 11 Wash. 481, 39 P. 1080 (murder conviction affirmed for death of an intruder into a boarded up cabin in which owner had set a spring gun).

In Wisconsin, Oregon and England the use of spring guns and similar devices is specifically made unlawful by statute. 44 A.L.R., section 3, pages 386, 388.

The legal principles stated by the trial court in instructions 2, 5 and 6 are well established and supported by the authorities cited and quoted supra. There is no merit in defendants' objections and exceptions thereto. Defendants' various motions based on the same reasons stated in exceptions to instructions were properly overruled.

V. Plaintiff's claim and the jury's allowance of punitive damages, under the trial court's instructions relating thereto, were not at any time or in any manner challenged by defendants in the trial court as not allowable. We therefore are not presented with the problem of whether the $10,000 aware should be allowed to stand.

We express no opinion as to whether punitive damages are allowable in this type of case. If defendants' attorneys wanted that issue decided it was their duty to raise it in the trial court.

The rule is well established that we will not consider a contention not raised in the trial court. In other words we are a court of review and will not consider a contention raised for the first time in this court. Ke-Wash Company v. Stauffer Chemical Company, Iowa, 177 N.W.2d 5, 9; In re Adoption of Moriarty, 260 Iowa 1279, 1288, 152 N.W.2d 218, 223; Verschoor v. Miller, 259 Iowa 170, 176, 143 N.W.2d 385, 389; Mundy v. Olds, 254 Iowa 1095, 1100, 120 N.W.2d 469, 472; Bryan v. Iowa State Highway Commission, 251 Iowa 1093, 1096, 104 N.W.2d 562, 563, and citations.

In our most recent reference to the rule we say in Cole v. City of Osceola, Iowa, 179 N.W.2d 524, 527: 'Of course, questions not presented to and not passed upon by the trial court cannot be raised or reviewed on appeal.'

Under our law punitive damages are not allowed as a matter of right. Sebastian v. Wood, 246 Iowa 94, 100, 101, 66 N.W.2d 841, 844. When malice is shown or when a defendant acted with wanton and reckless disregard of the rights of others, punitive damages may be allowed as punishment to the defendant and as a deterrent to others. Although not meant to compensate a plaintiff, the result is to increase his recovery. He is the fortuitous beneficiary of such an award simply because there is no one else to receive it.

The jury's findings of fact including a finding defendants acted with malice and with wanton and reckless disregard, as required for an allowance of punitive or exemplary damages, are supported by substantial evidence. We are bound thereby.

This opinion is not to be taken or construed as authority that the allowance of punitive damages is or is not proper under circumstances such as exist here. We hold only that question of law not having been properly raised cannot in this case be resolved.

Study and careful consideration of defendants' contentions on appeal reveal no reversible error.

Affirmed.

Unabridged, except that the dissenting opinion has been omitted.

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