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Case Comments

Dicta Editorial Board

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Until the case of *Fish v. Liley*,[11] it was generally believed that a cause of action for wrongful death to a husband did not survive the death of a tort-feasor, inasmuch as the survival statute barred all actions for injuries to the person upon the death of the tort-feasor. In *Fish v. Liley*, recovery was allowed against the deceased tort-feasor's estate on the grounds that the right to recover against the deceased tort-feasor was a property right which survived and was therefore not an action for trespass for injuries to the person. It is to be presumed that this doctrine may be extended to include all persons who were entitled to recover under the Wrongful Death Statute, including parents, children, and a suit by the husband against the deceased tort-feasor for the death of his wife.

Perhaps the *Fish v. Liley* case has further extensions. The reasoning in the case might open a new avenue for a wife to seek recovery for injuries which do not result in death. Strictly construed, this case recognizes that a wife has a property right in the continued life of her husband, the amount of which is measured by her pecuniary loss upon his death. It does not take a great deal of imagination on the basis of this case to see the possibility that the court might find that the wife has a property right in the continued physical well-being of her husband and in his continued availability as a handyman, chauffeur, mechanic and father. Such loss can be measured with some degree of certainty in much the same way as the courts measure a husband's right to recover for the loss of his wife's services as housekeeper, nurse and mother.

CASE COMMENTS

DAMAGES—RECOVERY OF EXPENSES OF LITIGATION IN A SUBSEQUENT ACTION—Landis was sued in a tort action by McGowan. Pikes Peak Company was joined as a defendant, and cross claimed against Landis as an indemnitor and for costs of defending against McGowan's action. Costs were awarded the Pikes Peak Company, as well as to McGowan, who was successful in that litigation. An appeal was taken by Landis, and Pikes Peak Company only participated to defend the costs awarded by the lower court.[1] Landis paid the judgments. Sun Indemnity Co., as subrogee of Pikes Peak Co. now sues Landis for expense of taking depositions for use in the prior trial, and attorney fees and disbursements, including $250 for services of attorneys in connection with the appellate proceedings wherein Pikes Peak Co. obtained affirmance of its judgment against Landis.

[11] 120 Colo. 156, 208 P. 2d 930 (1949).
[1] Landis v. McGowan, 114 Colo. 355, 165 P. 2d 180 (1946).

Held: The indemnitee is not entitled to attorney's fees incurred in connection with trial of the issue of indemnity. Attorney's fees and costs of litigation are recoverable only as part of the damages resulting from defendant's wrongful act, and plaintiff cannot split his cause of action to recover on part of his costs in one suit and part of his costs in a subsequent action. Nor can plaintiff allocate his costs between defending against the claim filed by McGowan and in asserting his right to indemnity from Landis. Having asserted a claim for costs in his cross claim, plaintiff should have made proof of all of his costs in that action, if he were entitled to them. Having failed to do so, the matter is now res judicata.—*Sun Indemnity Co. v. Landis,* 119 Colo. 191, 201 P. 2d 602 (1948).

As a general rule the costs and expenses of litigation, other than the usual court costs, are not recoverable in an action for damages nor in a subsequent action for costs incurred in the previous litigation.[2] Early Colorado cases refused attorney fees as damages, holding that such fees were not to be allowed as damages in the absence of a statute or contract to that effect,[3] and that the allowance of attorney's fees is not discretionary with the court.[4]

Certain exceptions to this rule have grown up. In suits in which a fund or estate has been impounded reasonable expenses including counsel fees incurred by one seeking to collect, or preserve, the fund or estate, will be allowed.[5] It will be noted these actions are usually equitable in nature. In equity suits where no fund has been impounded, it has been generally assumed that recovery of expenses should be limited to taxable costs.[6] Where the adverse claim or defense was unconscionable, fees of counsel have been allowed as costs,[7] and it is frequently said that assessment of costs is within the sound discretion of the court. This statement is usually found in cases of an equitable nature.[8]

It is well settled, and usually provided by statute, that a wife suing or defending in an action for divorce or separation is entitled to an order requiring the husband to pay her reasonable counsel fees. Statutes also provide for attorney's fees and other expenses as items of costs, especially in suits to collect wages, certain actions against railroad companies and other corporations, etc.

When the natural and probable consequence of a wrongful act involves a plaintiff in litigation with others, Colorado has gen-

[2] Winkler v. Roeder, 23 Neb. 706, 37 N. W. 607 (1888); Pacific Postal Tel. Cable Co. v. Bank of Palo Alto, 109 F. 369 (1901).
[3] Spencer v. Murphy, 6 Colo. App. 453, 41 P. 841 (1895).
[4] Joslin v. Teats, 5 Colo. App. 531, 39 P. 349 (1895).
[5] McCormick on Damages 237 (1935).
[6] Patterson v. Northern Trust Co., 286 Ill. 564, 122 N. E. 55 (1919).
[7] Guardian Trust Co. v. Kansas City Southern Ry. Co., 28 F. 2d 233 (1928); Geijsbeek v. Martin, 27 Colo App. 316, 148 P. 921 (1915).
[8] Willoughby v. Willoughby, 71 Colo. 356, 206 P. 792 (1922); Union Exploration Co. v. Moffat Tunnel Improvement Dist. 104 Colo. 109, 89 P. 2d 257 (1939).

erally held reasonable expenses of the litigation may be recovered from the wrongdoer.[9] This holding is in line with the general rule.[10] Most courts have held the costs of litigation must be recovered in a subsequent suit, but there seems no reason for this rule, and one case [11] held attorney fees could be recovered in the same action between the parties, saying:

> The case rests not on the fact that the services of counsel were rendered in a different action than the one in which recovery was allowed, but upon the fact that the wrong of defendants was of such a character that it necessitated the employment of counsel to give the plaintiff redress.

It would seem from the instant case that Colorado would follow this view, although it would probably be limited strictly to cases where the claim of a third party was involved unless the action were vexatiously commenced, in which case attorney fees may be allowed.[12]

To give an indemnitee or a joint tort feasor the right to claim his costs in defending a suit, where he is entitled to indemnity, he must first notify his indemnitor, or joint tort feasor of the pendency of the suit and call upon him to defend it.[13] However, where the indemnitee failed to request the indemnitor to defend the action against him, and defended with full knowledge and consent of the indemnitor, it has been held he can recover attorney fees and other expenses incurred in the suit.[14]

The instant case correctly holds, under the orthodox view, that attorney fees and other costs of litigation cannot be recovered where the action is to litigate the question of indemnity. But it would not seem that the problem of allocation of costs between the defense against liability to a third party, and asserting the claim for indemnity should have caused the court any difficulty. That a loss cannot be exactly determined will not defeat a claim or allow the wrongdoer to escape at the expense of his victim.[15] Whenever the wrongful act of one person results in liability being imposed on another, the latter may have indemnity from the person actually guilty of the wrong, and this should include his costs in defending against the suit in which the liability became fixed.[16]

In actions not involving a third person, generally costs are not allowed to defendant beyond the statutory court costs, on the theory that to do so would discourage litigation of rightful claims, and defendant's injury is *damnum absque injuria*.[17] In allowing

[9] International Bank of Trinidad v. Trinidad Bean and Elevator Co., 79 Colo. 286, 245 P. 489 (1926).
[10] McCORMICK ON DAMAGES 247 (1935).
[11] Malloy v. Carroll, 287 Mass. 170, 191 N. E. 661 (1934).
[12] Colo. Rules Civ. Proc., 3(a).
[13] Fidelity & Casualty Co. of N. Y. v. Northeastern Tel. Exchange Co., 140 Minn. 229, 167 N. W. 800 (1918); Ireland v. Linn Co. Bank, 103 Kan. 618, 176 P. 103 (1918).
[14] Miller v. New York Oil Co., 34 Wyo. 272, 243 P. 118 (1926).
[15] Goldstein v. Rocky Mountain Envelope Co., 78 Colo. 341, 241 P. 1110 (1925).
[16] Miller v. New York Oil Co., *supra*.
[17] O. S. Stapley Co. v. Rogers, 25 Ariz. 308, 216 P. 1072 (1923).

expenses as an element of damages, the trend seem to be toward a more liberal view in equitable actions. In *Morris v. Redak,*[18] the Colorado Supreme Court again supported this view. In denying plaintiff his costs in securing depositions, the court said:

> We consider that taking depositions of witnesses in preparation for trial is something in the nature of a luxury, and that one who avails himself of this procedure does so at his own expense. . . . If the testimony of the person whose deposition is taken is not available at the trial, and the deposition is offered in lieu thereof, then the court would have discretion in determining whether the expense of procuring the deposition should be assessed as costs again the losing party.

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DAMAGES—MAY NOMINAL DAMAGES BE RECOVERED WITHOUT SHOWING ACTUAL DAMAGES?—The parties entered into a written agreement whereby plaintiff purchased from defendant his interest in their partnership business, the contract providing that defendant would not reenter business in competition with plaintiff. Defendant, in violation of the agreement, entered business for which plaintiff brought an action seeking an injunction and damages for breach of contract. The trial court denied the application for a temporary injunction because, "There had been no showing of real or actual injury." The supreme court reversed and remanded the case with instructions to issue the injunction to be effective pending determination of the case on its merits.—*Ditus v. Beahm,* — Colo. —, 232 P. 2d 184 (1951).

In so holding, the court stated the rule as being well settled that:

> Where an established business has been sold and there is a valid covenant not to compete, a breach is regarded as the controlling factor and injunctive relief follows almost as a matter of course. In such cases the damage is presumed to be irreparable and the remedy at law is considered inadequate. It is not necessary to first prove special pecuniary damages or show an actual loss of customers. Injunctive relief may be given, even though nominal damages are shown, or although no actual damage is shown.

Although the decision does not specifically deal with the problem of awarding damages, the court limiting its disposition of the case to the question of the injunction, the language of the court suggests that the breach of the contract will warrant a judgment for nominal damages even though actual damages may not be shown. In granting the injunction, the court particularly stated that in such case the damage is presumed to be irreparable. Such damages, it would seem, would require an award for nominal damages even in the absence of actual damage.

Under the prevailing authority, nominal damages are awarded as a recognition of some breach of duty owed by defendant to

[18] 1950-51 C.B.A. Adv. Sh. 345 (No. 20, June 30).

plaintiff and not as compensation for loss or detriment sustained. In effect the court will allow an adverse relief against the party owing the duty, if he violates it, though he has caused no loss.[1]

In breach of contract cases, the rule seems to be settled that the mere breach by defendant, though unaccompanied by injury to plaintiff, gives rise to a cause of action for nominal damages.[2] On the other hand many courts require a showing of actual damages in cases of fraud and deceit; therefore, without proof of actual damages the case will fail and nominal damages will not be allowed.[3] Thus in an action to recover damages for false representation, the trial court was reversed for failure to direct a verdict in favor of defendant because of plaintiff's failure to make out a case of actionable false representation when he had based his test of an alleged year's value of a business on only one month's trial.[4] In so deciding, the court held that:

> Even if a representatition be fraudulent and of past or existing fact, and the party to whom it is addressed acts upon it, an action of deceit will not lie unless damage has resulted.

The general rule seems to be that in the absence of actual detriment, the plaintiff in an action for trespass to person or property may nevertheless recover nominal damages, and the rule is likewise in actions for deliberate and willful trespass.[5] However, it has been recently held by the Colorado Supreme Court that in an action for assault and battery, the record being devoid of any evidence of damage sustained by the plaintiff, a directed verdict and judgment for defendant was proper.[6]

Thus, *Ditus v. Beahm* does not specifically consider whether a showing of actual damages must be made to warrant a judgment for at least nominal damages. It does suggest, however, that since the mere breach of contract against competing gives rise to a presumption of irreparable damage so as to warrant a temporary injunction, such a breach would in addition give rise to actual damages if so shown. It would at least warrant nominal damages though the loss of customers or other actual damage has not been established.

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[1] McCORM'CK ON DAMAGES 85 (1935).
[2] Cooper v. Clute, 174 N.C. 366, 93 S. E. 915 (1917); Kiblinger v. Sank Bank, 131 Wisc. 595, 111 N. W. 709 (1907).
[3] Alden v. Wright, 47 Minn. 225, 49 N.W. 767 (1891); Bailey v. Oatis, 85 Kan. 339, 116 P. 830 (1911).
[4] Sposata v. Heggs, ... Colo. ....., 1950-51 C.B.A. Adv. Sh. 328 (No. 18, May 26).
[5] Parker v. Kirkpatrick, 124 Me. 181, 126 A. 824 (1924); Lee v. Lee, 180 N.C. 86, 104 S.E. 76 (1920).
[6] Davis v. Heinze, 117 Colo. 155, 184 P. 2d 493 (1947).