

APR 2 1963

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

OCTOBER TERM, 1962-63

1 Div. 910

4970

John W. Dunn

v.

A. K. Easley

Appeal from Baldwin Circuit Court

CATES, JUDGE

Mr. Dunn, the plaintiff below, appeals from a judgment in his favor. He assigns as error the trial judge's overruling his motion for new trial. He says there was manifest error because the jury's award for \$804.77 was legally inadequate.

2.

If a man loses an eye from a hunting companion's wild shot, has a jury given him inadequate damages in awarding him only (albeit precisely) the sum of his medical and hospital bills?

We state the tendencies of the evidence implicit in the verdict: Messrs. Dunn and Easley were on a dove shoot. Another man's shot crippled a bird. It came on toward Mr. Easley and then veered off flying "about head high" on (or near) a line between Easley and Dunn. Easley fired: he hit the bird and Dunn's right eye.

Code 1940, T. 7, § 276, recognizes "inadequate damages" as a permissible reason for granting a motion for new trial "filed within thirty days from entry of judgment."

Had the trial judge granted Dunn's motion, then under Hunter v. Schembs, 273 Ala. 304, 139 So. 2d 614, we should be compelled to affirm.

A verdict for the plaintiff in a negligence action is first, the jury's finding of liability and, second, a fixing of an award which they consider adequate to compensate the plaintiff (so far as money may do so) for the wrong done him.

The verdict below is a "judgment" on a question of fact as to liability. Hence, for this appeal, we must deal with Mr. Easley's shot as an act which a jury has found to be negligent.

From this premise, it follows that the same lack of care which led to Dunn's having to pay doctors and hospital bills must all the more be taken herein as the cause of his losing his eye.

Had the jury fixed more or less than the exact total of Dunn's undisputed cash outlay, we should be harder put to say what made up their award. Then it might be said that they were not reasonably satisfied of the fairness of the price paid for

3.

one or more items, simultaneously giving X dollars for special damages, Y dollars for pain and suffering, and Z dollars for permanent loss or disfigurement or both, lumping the total merely as X, Y and Z dollars "as damages."

Ordinarily, a lump-sum award in a general verdict under a simple negligence count (particularly if for more than nominal damages) is (on legal review of it alone) treated as a rock-like unit. Little v. Sugg, 243 Ala. 196, 8 So. 2d 866. " \* \* \* the verdict itself, in the light of the facts clearly disclosed by the evidence, usually furnishes the determining data."--Bouldin, J., in Yarbrough v. Mallory, 225 Ala. 579, 144 So. 447.

Here, the exactitude of the amount returned reveals a line of cleavage. It is improbable that this sum could have come from the evidence other than by adding up the items the plaintiff lists. We consider the jury was satisfied with the proof of medical and hospital bills.

The verdict so analyzed is, therefore, an implied reciprocal finding of no other compensation. In this the jurymen ignored the surest salient fact--the heart of the affair--that Mr. Dunn lost his eye.

We do not doubt that it is painful to be hit in the eye and also to have one's eyeball removed. But, for this case, we put to one side the way to weigh pain and suffering.

Had Mr. Dunn merely been temporarily hurt, the case would have been different. The capital loss of the eye itself, however, is a stark and irreversible reality.

Though Mr. Dunn may now be able to see as well as before, yet he has the use of only half of what God gave him to see with. He is somewhat like a motorist without a spare tire.

4.

To ignore the jury's failure to compensate Dunn for his eye, would be for us as a matter of law to stamp approval on an inconsistent verdict. Birmingham Ry. L. & P. Co. v. Coleman, 181 Ala. 478, 61 So. 890. Being "just a bit to blame" in negligence is as paradoxical as being partly pregnant.

Under the rule laid down by our Supreme Court, we consider we must reverse the judgment below. Yarbrough v. Mallory, supra; Kraas v. American Bakeries Co., 231 Ala. 278, 164 So. 565. See also Harwood, J., in Conner v. Hamlin, 33 Ala. App. 54, 29 So. 2d 570; Anno. 20 A. L. R. 2d 276. For a well reasoned opinion see Duncan, J., in Gomes v. Roy, 99 N. H. 233, 108 A. 2d 552.

Accordingly, we render judgment granting the motion for new trial.

REVERSED AND RENDERED.

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE COURT OF APPEALS OF ALABAMA

1st Div., No. 910

John W. Dunn Appellant

v.

A. K. Easley Appellee

From Baldwin Circuit Court

The State of Alabama, }  
City and County of Montgomery. }

I, Charles Bricken, Jr., Clerk of the Court of Appeals of Alabama, do hereby certify that the foregoing pages numbered from one to 4 inclusive, contain a full, true and correct copy of the opinion of said Court of Appeals in the above stated cause, as the same appears and remains of record and on file in this office.

Witness, Charles Bricken, Jr., Clerk of the Court

of Appeals of Alabama, at the Capitol, this the

2nd day of April, 19 63

Charles Bricken, Jr.  
Clerk of the Court of Appeals of Alabama.

4960

**THE COURT OF APPEALS OF ALABAMA**

1st *Div., No.* 910

John W. Dunn

*Appellant*

*vs.*

A. K. Easley

*Appellee*

*From* Baldwin Circuit *Court.*

**COPY OF OPINION**

BROWN PRINTING CO., MONTGOMERY

# THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

## THE COURT OF APPEALS OF ALABAMA

October Term, 19 62

To the Clerk of the Circuit Court of Baldwin County, Greeting:

Whereas, the Record and Proceedings of the Circuit Court of said County, in a certain cause lately pending in said Court between

John W. Dunn, Appellant,

and

A. K. Easley, Appellee,

wherein by said Court, at the \_\_\_\_\_ Term, 19\_\_\_\_, it was considered adversely to said appellant\_\_\_\_, were brought before our Court of Appeals, by appeal taken, pursuant to law, on behalf of said appellant\_\_\_\_\_.

Now, it is hereby certified, That it was thereupon considered by our Court of Appeals on the 2nd day of April 19 63, that said judgment rendered, granting the motion for new trial, of said Circuit Court be reversed and annulled, and ~~the cause remanded to said Court for further proceedings therein~~, and that it was further considered that the appellee pay

the costs accruing on said appeal in this Court and in the Court below\_\_\_\_\_

Witness Charles Bricken, Jr., Clerk of the Court  
of Appeals of Alabama, at the Capitol, this the  
2nd day of April 19 63

Charles Bricken Jr.  
Clerk of the Court of Appeals of Alabama.

4970

THE COURT OF APPEALS OF ALABAMA

October Term, 1962

1st Div. No. 910

John W. Dunn

Appellant.....

v.

A. K. Easley

Appellee.....

From Baldwin Circuit Court

CERTIFICATE OF  
REVERSAL

The State of Alabama,

Baldwin County.

} Filed

this 3 day of Apr 1963

Archie J. Duck  
clerk



THE STATE OF ALABAMA  
Baldwin County - Circuit Court

TO ANY SHERIFF OF THE STATE OF ALABAMA — GREETING:

Whereas, at a Term of the Circuit Court of Baldwin County, held on the \_\_\_\_\_

Second Monday in March, 1962, in a cer-

tain cause in said Court wherein John W. Dunn is

Plaintiff, and A. K. Easley is

Defendant, a judgement was rendered against said

A. K. Easley

to reverse which judgment, the said John W. Dunn

applied for and obtained from this office an APPEAL, returnable to the next  
of Appeals

Term of our Court of the State of Alabama, to be held at Montgomery, on

the 2nd Mon day of November, 1962 next, and the necessary bond

having been given by the said John W. Dunn

with John Chason and Norborne C. Stone, Jr., sureties,

Now, You Are Hereby Commanded, without delay, to cite the said A. K. Easley

or J. B. Blackburn, his attorney

, ~~attorney~~, to appear at the November Term of our

Court of Appeals

said ~~Supreme Court~~ to defend against the said Appeal, if he think<sup>s</sup> proper.

Witness, ALICE J. DUCK, Clerk of the Circuit Court of said County, this 27

day of April, A. D., 1962

Attest:

*Alice J. Duck*, Clerk.

90588

NO. 4970

**CIRCUIT COURT**  
**Baldwin County, Alabama**

*John W. Dunn*

Vs. { Citation in Appeal

*A. K. Earley*

Issued \_\_\_\_\_ day of \_\_\_\_\_, 196\_\_\_\_,

Received 27 day of Apr 1962  
on 2 day of May 1962  
served a copy of the within Citation  
A. K. Earley

service on \_\_\_\_\_

TAYLOR WILKINS, Sheriff  
By W. A. Selbert D. S.  
o m m

JURY LIST - SPRING SESSION - MARCH 12, 1962

1. Christnacht, Leroy, Civil Service, Lillian
2. Cabaniss, Ray, Newport, Bay Minette
3. Byrd, Carl, Civil Service, Stapleton
4. Bryars, Rudolph M., Brookley Field, Bay Minette
5. Bryha, Vernon A., Farmer, Elberta
6. Beasley, Wilson C., Merchant, Bay Minette
7. Bishop, Clarence, Farmer, Fairhope
8. Bloxham, Walter, Farmer, Fairhope
9. Brock, L.B., Farmer, Robertsdale
10. Gilbert, E.B., Mechanic, Bay Minette
11. Good, Joe, Farmer, Elberta
12. Crook, Prince, Laborer, Bay Minette
13. Guenther, Paul O., Civil Service, Foley
14. Gullledge, Carl, REA, Robertsdale
15. Akers, Redus M., Insurance, Bay Minette
16. Coleman, John E., Farmer, Bay Minette
17. Corley, Horace, W., Brookley Field, Bay Minette
18. Epperson, Edwin, Civil Service, Foley
19. Erdmann, Rudolph C., Plumber, Mag. Spgs.
20. Fell, Russell, Civil Service, Lillian
21. Hill, Robert, Merchant, Loxley
22. Jaye, James J., Farmer, Rabon
23. Jordan, Green, Merchant, Bay Minette
24. Kane, James, Farmer, Loxley
25. Keenan, Ruben A., Oil Dealer, Robertsdale
26. Keuler, Albert, Salesman, Loxley
27. King, Horace, E., Farmer, Mag. Spgs.
28. King, Vernon, Farmer, Robertsdale
29. Stucki, Alfred, Locker Plant Mgr., Elberta
30. Styron, Irby L., Plant Forman, Robertsdale
31. Moorner, Douglas, Clerk, Bay Minette
32. Moyer, Roy, Druggist, Fairhope
33. Nelson, J.L., Jr., Laborer, Fairhope
34. Nelson, Harry, Post Office, Bay Minette
35. Norton, Oudrecks, Farmer, Robertsdale
36. Norton, James J., Farmer, Robertsdale
37. Roberts, Raymond C., Farmer, Foley
38. Roley, Charlie N., Farmer, Perdido
39. Schrieber, Bill, Carpenter, Foley
40. Stephens, Ray, Banker, Bay Minette
41. Seibert, Fred, Jr., Farmer, Elberta
42. Stewart, Frank, State Emp., Gulf Shores
43. Stuart, Derrill, Contractor, Bay Minette
44. Lamberth, Jack Ogal, Farmer, Bay Minette
45. Strickland, Marvin, Laborer, Bay Minette
46. McDaniel, Schuler, Farmer, Robertsdale
47. Corte, Albert, Farmer, Belforest

P. XXXXX XXXX

D. XXXXX XXX

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JOHN W. DUNN,	X	
Plaintiff,	X	IN THE CIRCUIT COURT OF
vs.	X	
	X	BALDWIN COUNTY, ALABAMA
A. K. EASLEY,	X	
Defendant.	X	AT LAW NO. 4970
	X	

Comes the Plaintiff in the above styled cause and demurs to pleas 2 and 3 filed by the Defendant in said cause separately and severally and assigns the following separate and several grounds, viz:

1. That said plea does not state a defense to the cause of action.

2. That said plea is not a proper plea of contributory negligence.

3. That said plea attempts to set out the acts wherein it is alleged that the Plaintiff was guilty of contributory negligence but does not set out sufficient facts to establish contributory negligence.

4. That such plea is but a conclusion of the pleader.

5. The allegation in plea 2 that the Plaintiff placed himself in an exposed position in a field consisting of approximately 40 acres where approximately 25 men were shooting doves does not sufficiently charge the Plaintiff with any contributory negligence.

6. That said plea is vague and indefinite.

7. That said plea contains immaterial matter.

8. The allegation in plea 3 that the Plaintiff observed the Defendant aim or point a gun in his direction and made no effort to cover his eyes or otherwise protect himself is but a conclusion of the pleader and does not charge contributory negligence.

9. For aught that appears from plea 3 the Plaintiff had no opportunity to properly protect himself or cover his eyes.

10. That said pleas are not a defense to a civil assault which the Defendant committed on the Plaintiff.

*Charles Stone*  
Attorneys for Plaintiff

FILED

FEB 20 1962

ALICE J. DUCK, CLERK  
REGISTER

JOHN W. DUNN,  
Plaintiff,

VS

A. K. EASLEY,  
Defendant

\* \* \* \* \*

IN THE CIRCUIT COURT OF  
BALDWIN COUNTY, ALABAMA  
AT LAW NO. 4970

& \* \* \* \* \*

DEMURRER TO PLEAS

\* \* \* \* \*

FILED

FEB 20 1962

ALICE J. DUCK, CLERK  
REGISTER

JOHN W. DUNN,	)	
	)	IN THE CIRCUIT COURT OF
Plaintiff,	)	BALDWIN COUNTY, ALABAMA
VS.	)	
	)	AT LAW
A. K. EASLEY,	)	NO. 4970
	)	
Defendant.	)	

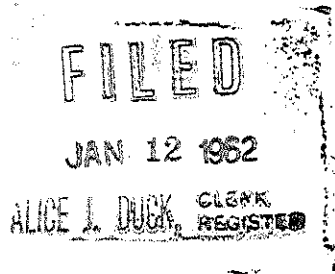
# DEMURRER TO COMPLAINT

Now comes the defendant, by his attorney, and demurs to the complaint and to each and every count thereof, separately and severally, and as grounds thereof assigns, separately and severally, the following:

1. It does not state a cause of action.
2. No facts are alleged on which the relief sought can be granted.
3. It is vague, indefinite and uncertain in that it does not apprise the defendant with sufficient certainty against what act or acts of negligence he is called on to defend.
4. The allegations of the complaint are conclusions of the pleader.
5. The allegations of the complaint are vague, indefinite and uncertain in that it does not allege how or in what way the defendant negligently shot the plaintiff.
6. No facts are alleged to show any duty owing by the defendant to the plaintiff.
7. No facts are alleged to show the violation of any duty owed by the defendant to the plaintiff.
8. The allegations of the complaint are vague, indefinite and uncertain in that it does not sufficiently describe where the plaintiff was located or situated at the time he claims to have been shot by the defendant.
9. The allegations of the complaint are vague, indefinite and uncertain in that it does not describe where the defendant was located or situated at the time the plaintiff claims to have been shot by the defendant.

10. The allegations of the complaint are vague, indefinite and uncertain in that it does not allege how or in what way the plaintiff was permanently injured.

*J. B. Blashen*  
Attorney for Defendant





DEMURRER TO COMPLAINT

JOHN W. DUNN,

Plaintiff,

VS.

A. K. EASLEY,

Defendant.

IN THE CIRCUIT COURT OF  
BALDWIN COUNTY, ALABAMA  
AT LAW                      NO. 4970

JOHN W. DUNN,

Plaintiff,

VS.

A. K. EASLEY,

Defendant.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

AT LAW

NO. 4970

PLEA

Now comes the Defendant in the above styled cause and for plea to the complaint heretofore filed in said cause and to each count thereof separately and severally says, separately and severally:

1. Not guilty.

2. At the time and place alleged in the complaint, the Plaintiff himself was guilty of negligence which proximately contributed to his alleged injuries and damages in that he then and there placed himself in an exposed position in a field consisting of approximately forty acres where approximately twenty-five men were shooting doves.

3. At the time and place alleged in the complaint the Plaintiff himself was guilty of negligence which proximately contributed to his alleged injuries and damages in that he observed the Defendant aim or point a shotgun in his direction and made no effort to cover his eyes or otherwise protect himself.

FILED

FEB 20 1962

ALICE L. DUCK, CLERK  
REGISTER

*J. B. Blackman*  
Attorney for Defendant

STATE OF ALABAMA

IN THE CIRCUIT COURT - LAW SIDE

BALDWIN COUNTY

TO ANY SHERIFF OF THE STATE OF ALABAMA:

You are hereby commanded to summon A. K. Easley to appear within thirty days from the service of this Writ in the Circuit Court to be held for said County at the place of holding same, then and there to answer the complaint of John W. Dunn.

Witness my hand this the 12 day of December, 1961.

Alice J. Dunn  
Clerk

Ed - 12-13-61

JOHN W. DUNN,

X

Plaintiff,

X

IN THE CIRCUIT COURT OF

vs.

X

BALDWIN COUNTY, ALABAMA

X

A. K. EASLEY,

X

AT LAW

Defendant.

X

COUNT ONE:

The Plaintiff claims of the Defendant the sum of One Hundred Thousand Dollars (\$100,000.00) as damages for that on, to-wit: September 30, 1961, while the Plaintiff and the Defendant were hunting doves in a field in Baldwin County, Alabama, which said field is located approximately one-half mile North of the intersection of Dobson Avenue and Seventh Street in Bay Minette, Alabama, where they both had a right to be, and at said time and place and while the Plaintiff and Defendant were both so engaged in hunting doves the Defendant negligently shot the Plaintiff and as a proximate result of such negligence the Plaintiff was injured in this: his right eye was so seriously damaged that he lost the sight thereof and it was necessary to remove his right eyeball; his left eye has been seriously damaged as a result of such injuries; he is permanently injured; he was caused to suffer much pain and mental anguish and he will continue to suffer pain and mental anguish on account of such injuries; he was caused to lose

much time from his employment; he was caused to incur large medical and hospital expenses in and about the care and treatment of his said injuries; he is rendered less capable of gainful employment and his capacity to earn a livelihood is seriously impaired, all to the damage of the Plaintiff, hence this suit.

COUNT TWO:

The Plaintiff claims of the Defendant the sum of One Hundred Thousand Dollars (\$100,000.00) as damages for that on, to-wit: September 30, 1961, the Plaintiff and the Defendant were hunting doves in a field in Baldwin County, Alabama, which said field is located approximately one-half mile North of the intersection of Dobson Avenue and Seventh Street in Bay Minette, Alabama, where they both had a right to be, and at said time and place and while the Plaintiff and the Defendant were both so engaged in hunting doves and while the Defendant was in such close proximity to the Plaintiff, the Defendant knew or should have known that if he fired a shotgun in the direction of the Plaintiff that the Plaintiff would be struck with the shot from the Defendant's shotgun. And the Plaintiff further avers that at said time and place and under such circumstances the Defendant negligently shot said shotgun in the direction of the Plaintiff at a dove which was flying close to the ground and which was passing directly between the Plaintiff and the Defendant and the Plaintiff was struck by the shot from the Defendant's gun and as a proximate result of the negligence of such Defendant the Plaintiff was injured in this: his right eye was so seriously damaged that he lost the sight thereof and it was necessary to remove his right eyeball; his left eye has been seriously damaged as a result of such injuries; he is permanently injured; he was caused to suffer much pain and mental anguish and will continue to suffer pain and mental anguish on account of such injuries; he was caused to lose much time from his employment; he was caused to incur large medical and hospital expenses in and about the care and treatment of his said injuries; he is rendered less capable of gainful employment and his capacity

to earn a livelihood is seriously impaired, all to the damage of the Plaintiff, hence this suit.

Chas. Stone  
Attorneys for Plaintiff

Plaintiff respectfully demands a trial of this cause by a jury.

Chas. Stone  
Attorneys for Plaintiff

FILED

DEC 12 1961

ALICE J. DUCK, CLERK  
REGISTER

We the jury find for the Plaintiff and assess his damages in the amount of \$804.77 for hospital and medical expenses.

Lloyd L. Christnach

Foreman.

4970

JOHN W. DUNN,  
Plaintiff,

VS.

A. K. EASLEY,  
Defendant

Received 13 day of Dec 1961  
and on 13 day of Dec 1961  
I served a copy of the within A & C  
on A. K. Easley  
By service on \_\_\_\_\_

TAYLOR WILKINS, Sheriff  
By W. A. Albert D. S.  
o m e

\*\*\*\*\*

IN THE CIRCUIT COURT OF  
BALDWIN COUNTY, ALABAMA

AT LAW

\*\*\*\*\*

SUMMONS AND COMPLAINT

\*\*\*\*\*

FILED

DEC 12 1961

ALICE J. DUCK, CLERK  
REGISTER

LAW OFFICES  
CHASON & STONE  
BAY MINETTE, ALABAMA