1974

Iris H. Stringham v. James Broderick : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

IRIS H. STRINGHAM,
Plaintiff-Respondent.

vs.

JAMES BRODERICK,
Defendant-Appellant.

Case No.
13696

RESPONDENT'S BRIEF

Appeal from the Judgment of the Seventh
Judicial District for Emery County
Honorable Edward Sheya, Judge, Presiding

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vs.

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STATEMENT OF KIND OF CASE

Respondent agrees with the Appellant's Statement of the Case.

DISPOSITION IN THE LOWER COURT

The case was tried to a jury. The verdict and judgment were in favor of the plaintiff. The jury awarded the plaintiff $3,327.56 for special damages, $13,488.36 for lost earnings and $10,000.00 as general damages.

RELIEF SOUGHT ON APPEAL

Respondent respectfully requests that the judgment

rendered by the lower court be affirmed and that the Respondent be awarded her costs.

STATEMENT OF FACTS

On March 27, 1971, the plaintiff and the defendant were traveling in separate cars from West to East on U. S. Highway 50 and 6. The weather was clear but windy. The roads were dry. About 5 miles northwest of Green River, Utah, both parties encountered severe wind storms carrying dust and debris.

The plaintiff proceeded through a small dust storm which quickly passed. The plaintiff then immediately entered a second dust storm. This storm reduced the plaintiff's visibility to virtually zero. In response, the plaintiff reduced her speed to about 5 mph..

The defendant passed through the first storm and entered the second storm at approximately 50 mph. The defendant smashed into the rear end of the plaintiff's car ramming it forward into the rear end of a third vehicle.

The plaintiff's car burst into flame. The plaintiff's husband, a passenger, was killed. The defendant pulled the plaintiff from the burning wreckage. The plaintiff brought this action as a response to recover some of her damages suffered in the above-described accident.

ARGUMENT

POINT I.

THE LOWER COURT WAS CORRECT IN

REFUSING TO GIVE AN INSTRUCTION ON UNAVOIDABLE ACCIDENT.

The appellant asserts that the trial judge inadvertently failed to give the instruction on unavoidable accident. That is just not the case. The appellant relies on the trial judge's statement, "I think that I shall give an instruction on contributory negligence and also on unavoidable accident and let them mull both of those over." (Transcript, p. 332, lines 29-30; p. 333, 1.)

This comment came in chambers as part of a discussion of a series of motions to limit the issues to be submitted to the jury. The comment was made prior to the presentation of argument by plaintiff's counsel and consideration of the authorities submitted for plaintiff's position. The trial judge concluded the discussion in chambers by referring to one of the authorities submitted by plaintiff's counsel.

> I haven't had a chance to read it yet, (*Wellman* v. *Noble*, 12 Utah 2d 80, 335 P. 2d 66), this was just submitted to me a few moments ago just before lunch, and I haven't had a chance to read it, *then I will determine whether this is a proper instruction.* (Emphasis added.) (Tr. p. 333, 17-22.)

It is abundantly clear that the trial judge's refusal to give the instruction on unavoidable accident was not inadvertent. It was done on the strength of the argument and submitted authorities offered by palintiff's counsel.

The heart of the concept of unavoidable accident is that the accident was of such a nature that it occurred without being the proximate result of anyone's negligence. The instruction requested by the defendant expresses this same idea.

> The law recognizes unavoidable accidents. An unavoidable accident is one which occurs in such a manner that it cannot justly be said to have been proximately caused by negligence as those terms are herein defined. In the event a party is damaged by an unavoidable accident, he has no right to recover, since the law requires that a person be injured by the fault or negligence of another as a prerequisite to any right to recover damages. J. I. F. U. 16.1.

In *Wellman* v. *Noble,* 12 Utah 2d 350, 352, 366 P. 2d 701 (1961), this Court laid out the considerations relevant to deciding whether or not an instruction on unavoidable accident is necessary.

> [1] When the error assigned is the giving or failure to give instructions, the real inquiry should be were the issues of fact necessary to be determined, and the principles of law applicable thereto, correctly presented to the jury in a clear and understandable manner? That is the purpose of instruction and if it is accomplished, the failure to give additional ones is not of controlling importance. In this case the court told the jury in clear and unmistakable language that there could be no recovery unless plaintiff proved by a preponderance of the evidence that the defendant was negligent and such negligence proxi-

> mately caused the accident, which terms were properly defined and related to the specific acts of negligence charged. The only possible meaning and effect of this instruction was to advise the jury that they could not find for the plaintiff, if the occurrence was an unavoidable accident. This is an adequate answer to the plaintiff's complaint about the failure to instruct on the subject of unavoidable accident.

This statement is controlling in the present case. The concept embodied in unavoidable accident is that the plaintiff cannot recover unless the defendant is found to have been negligent and that his negligence was the proximate cause of the accident. The jury was amply instructed in this concept.

Instruction No. 12 clearly carries the same impact. "The mere fact that an accident happened, considered alone, does not support an inference that any party to this action was negligent." Instructions No. 2, 4, 5, and 13 all contribute to this idea that recovery cannot take place without a showing of negligence on the part of the defendant. The conclusion is inescapable that the jury was adequately instructed in the matter of unavoidable accident and that the trial judge did not err in refusing to give the defendant's requested instruction.

The facts of the present case also lead inexorably to the conclusion that the issue of unavoidable accident is not involved here any more than in practically any other accident case. The hazardous road conditions should have put the defendant on his guard that exces-

sive speed would be dangerous. The defendant testified that he saw the tail lights of a car through the storm. He, of course, was aware of the dangers of crashing into the rear end of another car and the difficulties involved in bringing his car to a stop "and the consequent necessity of keeping a safe distance and a close watch on the cars ahead. Thus, there was ample basis to find him negligent, and only the ordinary indication of an unavoidable accident." *Wellman*, supra, at Utah 2d 353.

POINT II.

THE AFFIDAVITS OF THE JURORS IN THIS CASE COULD NOT BE SUBMITTED TO IMPEACH THEIR VERDICT.

It has been the long standing rule of law in virtually every jurisdiction that jurors cannot impeach their own verdict except where special types of misconduct occur. This Court dealt with the rule of law in Utah at length in the well-reasoned opinion in *Wheat* v. *Denver & R. G. W. R. Co.*, 122 Utah 418, 250 P. 2d 932, 936-7 (1952).

> [7] The question first to consider in regard to this alleged misconduct of the jury is whether this evidence presented to the court, both the affidavits and the oral testimony, was competent and admissible. With certain exceptions, a juror's affidavit is inadmissible to impeach the jury's verdict. In the case of People v. Ritchie, (12 Utah 180, 42 P. 209, 212. See also Morrison v. Perry, 104 Utah 151, 140 P. 2d 772, Hepworth v. Covey Bros. Amusement Co., 97

Utah 205, 91 P. 2d 507), this court adopted the California interpretation concerning the statutory enumeration of grounds for a new trial, our former statute having been taken from and identical with their code. The construction involved is that because the statute enumerated a single circumstance (chance verdict) where misconduct of the jury could be proved by the affidavit of a juror, under the maxim "expressio unius, exclusio alterius", it is implied that in no other cases could evidence of other misconduct be proved by such affidavits. Rule 59, U. R. C. P., now supplants the statute and is identical, in the parts here pertinent, with the former statutory provision except that bribery has been added to chance verdicts as a ground that may be shown by a juror's affidavit in seeking a new trial.

The rule prohibiting jurors from impeaching their verdict is founded on sound reasoning and has long been recognized. In People v. Flynn (7 Utah 378, 26 P. 1114, 1116), we said:

> "It is well settled that affidavits of jurors will not be received to impeach or question their verdict, nor to show the grounds upon which is was rendered, nor to show their misunderstanding of fact or law, nor that they misunderstood the charge of the court, or the effect of their verdict, nor their opinions, surmises, and processes of reasoning in arriving at a verdict."

The policy behind this statement applies with equal cogency to the oral evidence of jurors proffered upon a hearing of a motion for a new trial. To permit litigants to get jurors to sign affidavits or testify to matters discussed in connection with their functions as jurors would

open the door to inquiry into all manner of things which a losing litigant might consider improper; misconceptions of evidence or law, offers of settlement, personal experiences, prejudice against litigants or their causes or the classes to which they belong. It would be an interminable and totally impracticable process. Such post mortems would be productive of no end of mischief and render service of a juror unbearable. If jurors were so circumscribed in their deliberations, it is likely that judge and counsel would have to be present in the jury room attempting to monitor and regulate their thought and discussions into approved channels. Fortunately, jurors are under no such limitation, but are allowed freedom in their deliberations. As this court wrote in Ogden L. & I. Railway Company v. Jones (51 Utah 62, 168 P. 548, 551, 250 P. 2d — 59½:

> "It is elementary that a juror may not be heard to impeach his own verdict. * * * The law, * * * wisely provides that a juror may not disclose facts which would go in impeachment of his verdict * * *"

which thought is affirmed by the eminent authority, Mr. Wigmore, who writes, "* * * the verdict as uttered is the sole embodiment of the jury's action as such without regard to the motives or beliefs which have led up to their act." (8 Wigmore, Evidence (1940) 668).

[8] Both the affidavits and the oral testimony offered being incompetent, there exists no basis for considering whether the jury was in fact guilty of any misconduct which would have required the granting of a new trial.

There are no exceptional circumstances in the present case that would justify deviation from the established rule of law. Appellant argues that certain statements were made in rereading the jury instructions in the jury room that confused six of the jurors. This Court had dealt with this type of situation in *Cooper* v. *Evans*, 1 Utah 2d 68, 262 P. 2d 278 (1953).

> It is suggested that there is substance to the foregoing contention because when the trial court advised the jury of the judgment required by their findings, several members of the jury voiced disapproval, claiming they had misunderstood; and that the result was not as they desired. Upon the motion for a new trial, proof of such misunderstanding was proffered in affidavit for. These latter matters, including the proof by affidavit, were properly disregarded. *Jurors may not thus impeach* their *own verdict because of disappointment or even confusion.* (Utah 2d 70, citations deleted, emphasis added. See also *Hathaway* v. *Marx*, 21 Utah 2d 33, 439 P. 2d 850 (1968).

It is abundantly clear that the affidavits of five of the jurors are not admissible for purposes of impeaching the verdict rendered, nor to show the grounds upon which the verdict was rendered, or other circumstances surrounding it, and such a rule is applicable to this appeal.

POINT III.

THE TRIAL JUDGE'S INSTRUCTIONS ON CONTRIBUTORY NEGLIGENCE WERE

CLEAR AND DID NOT PREJUDICE THE DEFENDANT IN ANY WAY.

The concept of contributory negligence was given to the jury in Instruction No. 3. That Instruction was supplemented by statements in Instruction No. 1 and by the definition of negligence and proximate cause in Instruction No. 2. The test to be applied by the jury was "what a reasonable and prudent person would have done under the circumstances."

The appellant claims that the trial judge's failure to give J. I. F. U. Instruction 2.5 was reversible error. The only difference between the Instruction given and the J. I. F. U. Instruction is that the J. I. F. U. Instruction states with particularity what would have constituted contributory negligence. Appellant claims that by right, he should have had the jury so instructed. It is clear from the record what specific acts that were entered into evidence could have been particularly stated as constituting contributory negligence.

The trial judge asked counsel for the defendant what evidence there was from which the jury could find contributory negligence.

> MR. MANGAN: It may be the circumstance of an unavoidable accident or it may be contributory negligence. It is a matter which you may have to rule on as a matter of law, but I feel that Mrs. Stringham going into a storm and being in it five minutes and the density that she had where she couldn't see the car in

> front of her, the Fish and Game couldn't see the car in front of them, and to continue to proceed along at five miles an hour was a situation where they were opening not only themselves but others to hazard who may not know what the situation was. I think that she should have gotten off the road. I think that a reasonable prudent person would have gotten off the road, especially where they had the space that road had.
>
> MR. HOWARD: Well, that isn't a sufficient charge of negligence. She says when she answered my question she thought it was safer to go ahead. If the argument were sound that she were to get off the road or shouldn't do what she did then everyone on the highway that day was guilty of negligence. On the other hand, if we had driven our car or everyone had driven their car like Mr. Broderick drove his, why the fish and game people would have been in the back of the car in front of them, we would have struck the Fish and Game people going at fifty miles an hour. (Tr. p. 330, l. 26, to p. 331, l. 20.)

It is inconceivable that the trial judge would instruct the jury that as a matter of law the plaintiff was negligent if she did not pull off of the road. The only other possibility for contributory negligence was that raised by the trial judge. "Now I wonder if she slowed down too abruptly." (Tr. 332, l. 2.) As counsel for the defendant admitted, "We have no evidence as to how she slowed down other than her testimony and so it is the only thing available." (Tr. p. 332, l. 7.) It is clear that no evidence or unreasonable inferences were suggested to the trial

court that would lead to specific definition of acts that would constitute contributory negligence.

Notwithstanding the Court's correct action in not giving any instruction on contributory negligence due to a complete lack of any such evidence in the record nevertheless defendant's counsel obstinately and erroneously argued contributory negligence in his closing remarks to the jury therefore the defendant can't complain inasmuch as he actually succeeded in getting his message to the jury.

The appellant offers *Flippen* v. *Millward,* 120 Utah 373, 234 P. 2d 1053 (1953), as supporting his claim of error in failing to give the requested instruction. This case is not controlling nor applicable to this appeal. The posture on appeal of the *Flippen* case is the exact opposite of that in the present case. There, the plaintiff is appealing an adverse judgment on the basis that an instruction given by the trial court was not warranted under the facts. The instruction was:

> You are instructed that no person shall suddenly decrease speed of a vehicle without first giving an appropriate signal which would indicate to a driver immediately to the rear that said vehicle was going to decrease its speed; and if you find by a preponderance of the evidence that plaintiff suddenly decreased her speed upon said highway without giving a signal that could be seen and observed by a driver in the rear and that her failure to give such signal in sufficient time to warn defendant caused or contributed to the accident and the resulting injuries, if any,

> then you verdict shall be in favor of defendant on plaintiff's complaint, no cause of action, (120 Utah 374.)

This Court held that there was evidence offered at trial from which the jury could reasonably conclude that the plaintiff was contributorily negligent.

> From the evidence we have outlined above a jury could have reasonably found that if both appellant's and respondent's testimony were true as to the rate of speed their cars were traveling prior to the accident that the accident could not have occured unless appellant had either suddenly stopped or suddenly decreased her speed. While it is true, as contended by appellant that no one directly testified that she suddenly slowed up without signalling, there is evidence from which the jury could reasonably infer that she did so and therefore the court properly instructed as it did. (120 Utah 376.)

Even with the court upholding the action of the trial court, it did say that the instruction was poor. The trial judge would have better instructed the jury if he had phrased his instruction in terms of the evidence; namely that the plaintiff did not have brake lights on the car.

> Under these circumstances, it would have been better had the court instructed that unless her car was equipped with a stop light signal which she could and did use it would have been negligent for her to suddenly stop or decrease her speed. (120 Utah 376.)

This case does not support the position of the Appellant,

but rather, stands for the proposition that the verdict and judgment of the trial court should be upheld on appeal whenever there exists substantial evidence supporting the verdict.

CONCLUSION

The plaintiff-respondent contends that the trial judge was correct in his instructions to the jury and that the jury reached a correct verdict. A special instruction laying out unavoidable accident would have been redundant and would have overly emphasized defendant's version of the case.

The appellant is incorrect in asking this Court to consider affidavits of jurors as evidence in support of impeachment of their verdict. The appellant was not prejudiced by the trial judge's failure to give J. I. F. U. 2.5. There was no evidence offered that would have justified such an instruction. The appellant had his view of the case represented to the jury on contributory negligence in Instructions 1, 2 and 3.

The plaintiff-respondent respectfully requests that this Court affirm the verdict and judgment of the trial court.

Respectfully submitted,

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