1987

Diamond Parking, INC. v. George H. Mortimer : Brief of Appellant

Utah Court of Appeals

George H. Mortimer; pro se.

IN THE UTAH COURT OF APPEALS

DIAMOND PARKING, INC., Plaintiff-Respondent, vs.	BRIEF OF THE APPELLANT
GEORGE H. MORTIMER, Defendant-Appellant.	Docket No. 870295-CA

Appeal from the Small Claims Department of the Fifth Circuit Court, State of Utah, Salt Lake County, Salt Lake Department, Judge Sanaya

DIAMOND PARKING, INC.
No attorney of record

George H. Mortimer
Appearing pro se

Argument priority classification: 14. b.

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JURISDICTION OF THE COURT OF APPEALS

On June 30, 1987, the Fifth Circuit Court rendered a judgment adverse to defendant-appellant in Case No. 874010673 SC. A NOTICE OF APPEAL was duly filed with that court on July 7, 1987, and a copy thereof was duly mailed to plaintiff-respondent. Under Rule 3 (a), Rules of the Utah Court of Appeals, this court has jurisdiction of cases arising in the circuit court when a notice of appeal is filed within the time allowed by Rule 4. Rule 4 (a) allows 30 days from the entry of the judgment appealed from within which to file the notice of appeal. The foregoing actions of defendant-appellant comply with these requirements, thereby conferring jurisdiction on this court.

NATURE OF THE PROCEEDINGS

The action was for damages caused to the ticket spitter machine at the plaintiff's parking lot in Salt Lake City, Utah, on March 31, 1987, when defendant accidentally backed his automobile into it after following faulty instructions given to him by plaintiff's employee.

ISSUES BEFORE THE COURT OF APPEALS

1. Is there sufficient, admissible competent evidence to support the lower court's findings?

2. Is the judgment erroneous as a matter of law on the basis of the lower court's findings properly made?

DETERMINATIVE STATUTES AND RULES

Judicial Code:

78-27-29 Voluntary paymnent or settlement of claim not admission of liability.

No settlement, partial settlement or voluntary payment of a claim against any party shall be construed as an admission of liability by that party or his insurer with respect to any claim arising from the same event or set of facts, whether that payment or settlement is made by the party, an insurer or any other person on behalf of the party or the insurer.

78-27-38. Comparative negligence.

The fault of a person seeking recovery shall not alone bar recovery by that person. He may recover from any defendant or group of defendants whose fault exceeds his own. However, no defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant.

78-27-40. Amount of liability limited to proportion of fault - No contribution.

Subject to Section 78-27-38, the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendnat. No defendant is entitled to contribution from any other person.

Utah Rules of Evidence

Rule 409. PAYMENT OF MEDICAL AND SIMILAR EXPENSES.

Evidence of furnishing or offering or promising to pay medical, hosital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

STATEMENT OF THE CASE

a. Nature of the case. The action is for damages done to plaintiff's ticket spitter machine at its parking lot in Salt Lake City, Utah, when defendant accidentally backed his automobile into it after following incorrect instructions about what to do as he was taking a parking ticket for the parking lot available to patrons of an adjacent restaurant from the ticket spitting machine on the north side of the ticket booth opposite the entrance to the parking lot.

b. course of the proceedings. A trial was held in the small claims court of the Fifth Circuit Court, State of Utah, Salt Lake County, Salt Lake Department, on June 30, 1987. Present for plaintiff was John Smistad, manager of the parking Olot, and the employee, David Wright, who gave defendant false instructions of where to drive in response to defendant's question what to do as he took a parking ticket from the ticket spitting machine. The false instructions were the proximate cause of the damage to the parking ticket spitting machine. Defendant was present and handled the matter pro se.

c. disposition at trial court. The judge awarrded judgment to plaintiff of the full amount claimed plus costs.

d. relevant facts. There is no written record in the case but only a tape of the proceedings. It is not practicable to make citations to the tape. The relevant facts are:

1. Defendant and his wife were planning on having dinner at a restaurant in Salt Lake City, Utah, on March 31, 1987.

There is a parking lot just north of the building which houses that restaurant which is available to patrons of the restaurant by entering an alley west of the building, getting a parking ticket at a ticket booth from a ticket spitting machine at the north side of the ticket booth, parking in the lot, having the restaurant validate the parking ticket when the meal is being paid for, delivering the validated ticket to the attendant in the ticket booth opposite to the entrance to and exit from the parking lot, and leaving by retracing the entrance route.

2. The ticket booth is located directly opposite an entrance into the parking lot from the alley. It is situated on the left side of the alley so that an automobile must drive between the booth and the entrance to the parking lot, take a ticket from ticket spitting machine, and make a sharp right turn in order to drive into the parking lot.

3. It was defendant's first use of the parking lot on March 31, 1987. As he drove his car into the alley his attention was focussed on the ticket booth at the left and he did not notice the entrance to an above-ground parking lot on the right side of the alley opposite the ticket booth. He felt it was necessary to inquire about what to do of the attendant in the ticket booth

4. Defendant asked the attendant in the ticket booth what procedure he should follow as he took a parking ticket. The attendant said, "Go ahead and park, have the restaurant validate the ticket and give it to me on your way out."

5. Ahead was a ramp going down to underground facilities, as the pictures show. Following the attendant's instructions to "go ahead", defendant drove his car ahead and down the ramp thinking that the parking area for the restaurant was in the underground facilities. On arrival at the bottom of the ramp, defendant found that the entrances to the underground facilities were all closed so there was no place to park at the lower end of the ramp. The ramp was too narrow to make a U-turn so that it was necessary for defendant to back his automobile up the long ramp. As he approached the top of the ramp he could see the entrance to the above-ground parking lot opposite the ticket booth so he turned the steering wheel counterclockwise to turn the car about 90° clockwise and aim the front end toward the entrance to the parking lot. Through the rearview mirror defendant could see the upper part of the ticket booth but not the much lower ticket spitting machine. A moment after defendant applied the brakes to stop the rearward movement of the car, the rear bumper hit the ticket spitting machine. No damage was done to the bumper. Plaintiff claims that the ticket spitting machine was damaged to the extent itemized on the repair bill.

9. Summary of the argument. Defendant's argument is summarized as follows:

a. Defendant was parking for the first time in the parking lot available to patrons of the restaurant where he and his wife planned to eat dinner and was completely uninformed as

to the location of the parking lot and the procedure to follow in using it prior to eating a meal in the restaurant. He therefore asked the attendant what to do as he took a ticket from the ticket spitting machine at the north end of the ticket booth.

b. The attendant's instructions which wrongfully told him to "go ahead and park" were the proximate cause of the accident which followed because the only way defendant could "go ahead" was down the ramp which lay straight ahead.

c. Defendant used reasonable care in backing his automobile out of the ramp where the attendant erroneously told him to go and in entering the parking lot opoosite the ticket booth. The accident which occurred at the end of the backing operation was primarily the fault of the wrong instructions given to defendant by plaintiff's agent for which plaintiff is responsible and secondarily because the ticket spitting machine was so low that it could not be seen from the rear view mirror of defendant's automobile.

d. The lower court erroneously found defendant to be solely responsible for the damage to the machine and awarded judgment to plaintiff for the full amount of the repair bill plus court costs. After finding that defendant had responsibility for the damage, the judge was obligated by 78-27-38 and 40 to assess the proportion of fault attrributable to defendant, which he did not do, and award no more damages against defendant than the percentage or propoortion of fault

attributable to defendant, which obviously is less than 100%.

10. Detail of the argument. The facts in the case show that the proximate cause of the accident was the erroeous instruction plaintiff's agent gave to defendant in response to the question what he should do after taking the parking ticket from the ticket spitting machine. The attendant told him to "go ahead" instead of telling him to make a sharp right. 'Ahead" was the long, narrow ramp going down to underground facilities which defendant reasonably assumed included the parking area for the restaurant. It was not until he arrived at the bottom and found all entrances to the underground facilities closed that he realized the parking arrea was not at that level. This discovery necessitated backing the car up the long, narow ramp.

It was not until defendant had backed his car almost to the top of the ramp that he could see through the rear view mirror the entrance to the above-ground parking area directly opposite the ticket booth and saw other automobiles making a sharp right turn from the ticket booth in order to enter the above-ground parking area.

As soon as defendant had backed his car to the top of the ramp, he turned the steering wheel sharply counterclockwise in order to turn the front of the car toward the entrance to the above-ground parking lot so he could drive the car into it. As he backed up on this curve, the upper part of the ticket booth came into view in his rear view mirror but the ticket spitting machine did not because it is much lower than the

ticket booth. When the car was far enough back to permit defendant to drive forward through the entrance to the above-ground lot, he applied the brakes but just before the backward movement stopped the rear bumper hit the ticket spitting machine. No damage was done to the bumper. Plaintiff claims the ticket spitting machine was damaged to the extent stated on the repair bill.

Defendant does not contest the amount it cost plaintiff to have the damage repaired.

Defendant vigorously contests the holding of the lower court that defendant must pay the entire cost of the repairs. Defendant takes the position that since the proximate cause of the accident was the faulty instruction given him by the attendant, plaintiff's agent, the entire cost of the repairs should be paid by plaintiff.

If, however, it is held that any damage is attributable to defendant, the Judicial Code, 78-27-38 and 40 preclude a recovery to plaintiff greater than the proportion of ault attributable to defendant.

This view is supported by the decisioons of the Utah Supreme Court in DIXON V. STEWART, 658 P. 2d 591 (Utah 1982) and ACCULOG, INC., V. PETERSON, 692 P. 2d 728 (Utah 1984).

11. Conclusion. It was error for the court to assess the entire damages against defendant as if the entire responsibility for the accident was defendant's. The damagres should have been assessed entirely against the plaintiff

because if the attendant had said, "turn sharply right and enter the lot", the accident would never had occurred. However, if the court had thought that defendant had any resonsibility for the accident, the judge's duty under the law was to determine what proportion of the fault was defendant's and to assess no greater proportion of the damages against defendant than the proportion of his fault.

WHEREFORE, defendant prays the court:

1. To reverse the judgment of the lower court and its award of damages against defendant for the full cost of repairing the damage plus court costs and dismiss the action with prejudice.

2. In the event the court finds that any fault for the accident is attributable to defendant, to reverse the judgment and remand the case to the lower court to assess the proportion of fault attributable to each party.

Respectfully submitted,

George H. Mortimer

CERTIFICATE OF SERVICE

I, George H. Mortimer, defendant, acting pro se, hereby certify that I have caused 4 copies of the annexed BRIEF OF APPELLANT - DEFENDANT to be served by first class mail on DIAMOND PARKING, INC., addressed as follows:

DIAMOND PARKING, INC.
P.O. BOX 1391
SALT LAKE CITY, UTAH 84110

this 8th day of September, 1987.

George H. Mortimer