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Reid E. Jensen v. Connie Gail Thomas : Reply Brief of Appellant Reid E. Jensen

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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REID E. JENSEN,

)
)
Plaintiff and)
Appellant,)

-vs-

CASE NO. 14838

CONNIE GAIL THOMAS,

)
)
Defendant and)
Respondent.)
)

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REPLY

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POINT I

THE SURPRISE TESTIMONY WAS INJECTED INTO THE TRIAL
BY RESPONDENT THOMAS

The key issue of this case is when the surprise testimony came in. Jensen claims that the surprise first came in on direct examination of Dr. Herschgold by Thomas. Thomas on the other hand claims that his direct examination was innocent. Thomas claims that the surprise came on Jensen's cross-examination. Thomas argues that Jensen cannot now complain for his own blunders in cross-examining the witness.

A review of the record shows that Thomas developed the surprise testimony by direct examination. Prior to the trial, Jensen was advised that Dr. Herschgold's testimony would be limited to the Raynaud's issue. (R. at 85 and two unnumbered sheets between R. 226 and R. 227). Notwithstanding that representation,

Thomas began to elicit testimony from Hershgold directly related to the T.I.A. issue:

- Q. Dr. Hershgold, with regard to people who have what's called arteriosclerosis, or hardening of the arteries, could you explain to us in layman's terms, if you can, what that means to us in terms of what happens to our blood vessels when we have that condition?
- A. Well, very simply, and much of this is not known in medicine, something happens to the innermost lining of the blood vessels, particularly the arteries, so that the lining becomes rough. It becomes elevated as fat clings underneath the lining of the blood vessel and a roughening occurs. If you actually were to look at the vessels you could see places where the lining is not smooth, where there is elevation. It sticks up. And there may be places where it's rough.

Now, the blood is always traveling over this rough area of the lining of the blood vessels and there may be many of these. There are particles in the blood called blood platelets whose function it is to stick to rough places on blood vessels or cut surfaces to blood vessels. If a blood vessel is cut, if you cut a vessel, the reason it stops bleeding is because these blood elements, the platelets in particular, plug up the holes, literally plug up that hole.

Well now, when the artery -- an artery is injured by this hardening process, arteriosclerosis, or more properly atherosclerosis, platelets also stick to this rough area because that's what they are designed to do.

Well now, it may happen that as the platelets stick more and more they form an obstruction. And this obstruction

may then go on to form a larger obstruction as blood backs up behind it. When this happens a thrombus or what people will call a blood clot occurs.

Now, should this occur in the coronary arteries you may get a heart attack, or if it occurs only partially so that the blood going through the artery is much lessened in flow, you will get heart pain or angina because there is insufficient blood going to the heart and it screams out in pain it is not getting enough oxygen. This same thing may occur in blood vessels going to the brain, or as the case in transient ischemia attacks, which I imagine would be pertinent to address here, in transient ischemia attacks something very interesting happens. In this instance, in someone who had hardening of the arteries, simply call it, there are rough patches in the arteries in the neck. And platelets, these same blood elements that make plugs to plug up holes in the blood vessels, stick to these patches and they form kind of like lumps on them.

And then every so often these lumps break away from this rough patch and they are free to go to the brain. And they may enter various vessels of the brain and perhaps cause a permanent plug. But more often they kind of break up there or they are so small that they sort of sneak on through after getting stuck.

When this happens you get a temporary plugging effect and we call these transient ischemic attacks where ischemia means insufficient blood to a part. The most common cause then, by far, of transient ischemic attack is first the roughening of the blood vessel which comes from hardening of the arteries, this practice that I mentioned before, and then the plugs peeling off this rough area and sticking in various places in the brain. . . .

- Q. At my request did you make an examination of Mr. Reid Jensen?
- A. At your request, yes, I did so.
- Q. And that was for the purpose of determining something unrelated to the transient ischemic anemia; is that correct?
- A. That is correct. I was asked to examine Mr. Jensen from the point of view of seeing whether an injury could have a different result than what's being talked about here.
- Q. And at that time did you determine a history -- take a history from Mr. Jensen?
- A. Yes, I did. I asked him about his problems and asked him questions which were part of a regular medical history.
- Q With regard to this problem of hardening of the arteries, arteriosclerosis, did you recall if that history indicated whether or not he had that condition?
- A. Well, Mr. Jensen told me that he had had two heart attacks, that he had been operated on to repair arteriosclerotic or damaged parts occurring in arteries. He had a by-pass examination. He told me about having headaches which were bothering him also, but there was in his history evidence that his arterio tree, his blood vessels, was affected by arteriosclerotic disease.
- Q. Do you recall whether he had high blood pressure?
- A. Mr. Jensen had, on the one occasion I examined him, what we would call mild to moderate high blood pressure. I took his blood pressure twice. Nurses took it, that is the technicians in the office took it as well. And his blood pressure was of the order of 140 to 150 systolic over about a hundred diastolic.

I say of the order of because we took three different measurements. And they were within that range. This constitutes high blood pressure. (R. at 234-38) (Emphasis added).

It is clear from this testimony that Hershgold was called to the witness stand to show that Jensen's visual problem and transient ischemic attacks were caused by arteriosclerosis and not by the automobile accident. Jensen was never forewarned that he would be forced to face Hershgold's testimony on transient ischemic attacks or arteriosclerotic disease.

The implication of Hershgold's testimony was that Jensen's T.I.A. was caused by the arteriosclerosis -- not by the automobile collision. In fact, Mr. Nebeker (Thomas' lawyer) summed up the import of the direct examination as follows:

THE COURT: Are you going to pose a hypothetical?

MR. NEBEKER: No, I am merely asking him to testify to the fact that when he saw Mr. Jensen he had this condition [arteriosclerosis] that that condition is something that gives rise to this problem of having these platelets break off. They can travel to the brain and cause these mini-strokes [T.I.A.] (R. 242)

That is all pretty strong medicine for an expert who was originally going to testify only about the totally unrelated Raynaud's disease.

POINT II

THE "SURPRISE" IN THIS CASE WAS THAT JENSEN
HAD TO CROSS-EXAMINE AN EXPERT WITNESS.

Most of the briefs have dealt with Hershgold's testimony. What he said. What he did not say. When he said it. However, it must be emphasized that the "surprise" in the case was not Hershgold's testimony. The real "surprise" was that Jensen had to cross-examine an expert witness.

It is always difficult to cross-examine an expert witness. It is virtually suicide to cross-examine an expert witness without preparation. In this case Jensen was fully prepared to cross-examine Hershgold on Raynauds. However, Hershgold did not stick to Raynauds. He launched off on "Transient Ischemic Attacks" and "Arteriosclerosis". In fact at the time of trial, Jensen was not prepared to cross-examine any expert on T.I.A., since the testimony on T.I.A. was, by stipulation, all to be given by depositions (R. 258 ¶8).

Thomas makes great light of the fact that Jensen blundered through the cross-examination only to make matters worse. Perhaps so. But the most treacherous task for any trial lawyer is to cross-examine an expert without preparation. If Jensen made no cross-examination, the jury could well infer that the direct testimony was true and unimpeachable. If Jensen attempted to cross-examine, he was on unfamiliar terrain without adequate preparation.

The leading treatise in the field states the problem as follows:

. . . it is essential in the preparation of a successful cross-examination [of an expert] to have a complete mastery of the facts of the case based, upon a full investigation, a utilization of all discovery procedures available, a study of all medical reports, the hospital records, the authoritative medical literature on the subject involved, and a conference with the medical witnesses (and medical consultant) for advise and counsel. Goldstein Trial Technique, Second Edition §16.01

It is no wonder that Jensen claims "surprise" when he was forced to go into the lions den without an opportunity for such preparation. And if Jensen blundered the corss-examination, that simply demonstrates the need for complete preparation.

POINT III

HERSHGOLD'S SURPRISE TESTIMONY CAME IN VIOLATION OF RULES 26(e)(1) AND (2) OF THE UTAH RULES OF CIVIL PROCEDURE

Rule 26(e) of the Utah Rules of Civil Procedure requires a party to supplement his responses to requests for discovery as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to . . . (b) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which . . . (b) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to

amend the response is in substance a knowing concealment. (Emphasis added)

It is clear from the language of this rule that a party and his counsel are obligated to amend any answers to interrogatories which have become incorrect since the original answers were made. It appears that this is particularly true of answers dealing with the identity of expert witnesses and the substance of their testimony. Indeed, a duty to supplement in respect to expert witnesses is imposed even though failure to do so would not result in a knowing concealment. The stringency of the rule in regards to expert testimony is probably based upon the fact that ~~cross~~^{cross}-examination of an expert witness is the most treacherous of all cross-examinations.

On May 25, 1976, Thomas answered Jensen's interrogatories as follows:

INTERROGATORY NO. 1: Identify each expert witness you intend to call at the trial of the above-entitled matter, identifying by name, address, specialty and the basic substance of said witness's testimony.

ANSWER: Defendant intends to call Dr. Edward J. Hershgold who will testify, in substance, in accordance with his letter dated May 14, 1976, a copy of which has been furnished to plaintiff's counsel. . . . (R. at 85)

The letter referred to above indicates that Dr. Edward J. Hershgold had examined Jensen concerning the cause of his Raynaud's phenomenon and that his diagnosis was that the cause of the Raynaud's phenomenon was unknown (Two unnumbered pages of the record between pages 226 and 227.)

From this discovery, Jensen was convinced that if Dr. Hershgold was called as a witness at trial, his testimony

would be limited to the causation of Raynauds. In fact, Jensen deposed Dr. Hershgold on June 1, 1976, only in regards to the causation of Raynauds. Jensen was never at any time informed that Dr. Hershgold would testify at trial on any other matter.

If Jensen had been informed of Dr. Hershgold's new testimony he could have prepared for it. The least he could have done was to depose Dr. Hershgold on the cause of plaintiff's visual difficulties. In addition, he could have gone into detail with his own expert, Dr. Henry Van Dyk, as to why in Jensen's particular case, the transient ischemic attacks were not caused by hardening of the arteries but rather by unusual mobility of the neck resulting from a neck injury suffered in the automobile accident with defendant. Finally, Jensen may have brought forth a doctor with the same expertise in blood as that of Dr. Hershgold to contradict his testimony. As it was, Jensen was caught by surprise and could not employ any of these devices.

POINT IV

A NEW TRIAL IS A PROPER SANCTION FOR VIOLATION OF RULE 26(e).

There can be no doubt that Thomas violated Rule 26(e) of the Utah Rules of Civil Procedure by not updating the response to Jensen's interrogatories. Usually improper answers to interrogatories are handled pursuant to the sanctions of Rule 37 of the Utah Rules of Civil Procedure which provide for a court order requiring proper answers. In this case, involving a failure to update a response, the sanctions of Rule 37

are inapplicable. This is true because Jensen did not discover the "surprise" until trial. The damage was done.

The only real sanction for violation of Rule 26(e) trial is for the court to grant a new trial for surprise pursuant to Rule 59. If a new trial is denied, violations of Rule 26(e) resulting in "knowing concealments" will go unpunished. Not only will violators of Rule 26(e) go without punishment, but parties in civil litigation will be denied fair trials. Other attorneys will be encouraged to circumvent Rule 26(e) and "surprise" their opponents at trial with unexpected testimony.

The recent case of Tabatchnick v. G. D. Searle & Co. 67 FRD 49 (1975) is instructive. In that case pre-trial discovery had disclosed that the plaintiff would call a particular expert witness at the trial. The defendant deposed the expert in preparation for the trial. However, at trial the plaintiff called a new and unexpected expert witness. The court held that "failure to give ample notice before trial to enable defendants to examine a new expert and consult own experts in highly technical fields would deprive defendants of fair opportunity to prepare for trial and to cross-examine."

The reasoning of that case is directly applicable to the matter sub judice.

Rule 26(e)(1) of the Federal Rules of Civil Procedure is also pertinent. So far as applicable here, that rule imposes a duty to supplement responses for discovery addressed to "the identity of each person expected to be called as an expert witness at trial, the subject

matter on which he is expected to testify, and the substance of his testimony." This duty is directed to be discharged "seasonably". In the absence of unexpected developments, supplementation after the jury has been drawn cannot be considered to have been made "seasonably". The subjective explanation for the default is irrelevant. It makes no difference whether it was due to failure to prepare for trial or to an intentional purpose to gain the benefit of surprise. The rule bars the result without regard to cause, except for those beyond control. . . .

Rulings of this kind are not made lightly. In this case, the result is inescapable because it is plainly evident that the plaintiffs' dilemma is attributable entirely to a failure to properly prepare for trial although more than ample time was available. The consequences cannot be visited on defendants. . . .

The bar allowed to practice before the federal court here is put on notice by this ruling that cases must be prepared for trial, and that the consequences of failure to do so will fall on their own clients.

CONCLUSION

In this trial Thomas used the lethal weapon of surprise. The surprise was injected into the trial in specific violation of Rule 26(e).

Under those circumstances, Jensen could not get a new trial. Jensen's only practical remedy is a new trial where he can properly prepare to meet the new and prejudicial testimony of Dr. Hershgold.

DATED this _____ day of _____, 1977.

Respectfully submitted,



ROBERT J. DEBRY