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Martin I. Broberg v. Tim Hess and Karen Hess : Brief of Appellant

Utah Court of Appeals

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870547

IN THE UTAH SUPREME COURT

MARTIN I. BROBERG,

Plaintiff/Appellant,

vs.

TIM HESS AND KAREN HESS,

Defendants/Respondents.

BRIEF OF APPELLANT

Case No. 87-0329

Category No. 14b

APPEAL FROM A JUDGMENT OF THE FIRST JUDICIAL
DISTRICT COURT OF CACHE COUNTY, STATE OF UTAH,
HONORABLE OMER J. CALL, JUDGE

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)	
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Robert J. DeBry & Associates, attorneys for
appellant Martin I. Broberg, respectfully submit appellant's
brief.

I. PARTIES TO THIS PROCEEDING

The parties to this proceeding are:

Martin I. Broberg	-	Plaintiff, appellant
Tim Hess	-	Defendant, respondent
Karen Hess	-	Defendant, respondent

II. STATEMENT OF JURISDICTION

Article VIII, Section 3 of the Utah Constitution and UTAH CODE ANN. §78-2-2(3)(i) (1953), provide the Utah Supreme Court jurisdiction of this appeal.

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the lower court erred in refusing to submit the following jury voir dire question. "Has any member of the panel ever worked for an insurance company. If so, for whom and when?"

2. Whether the lower court erred in refusing to submit the following jury voir dire question: "Is any member of the panel a member of or have any financial interest in State Farm Insurance Company?"

3. Whether the lower court erred in refusing to grant plaintiff a new trial.

IV. STATEMENT OF THE CASE

This is an appeal from the judgment of the district court and subsequent order denying Broberg's (plaintiff/appellant) motion for a new trial. (R. 240, 241, 256 and 260.)

A statement of the facts relevant to the issues presented for review are:

1. Broberg rented a basement apartment owned by the defendants (hereafter Hess) (R.1, 15).

2. On or about February 24, 1985, Broberg slipped on ice while attempting to go down the outside basement stairway. (R. 1, 226, 227.)

3. There was no handrail or bannister along the apartment stairway. (R. 1, 43.)

4. Hess was insured by State Farm Fire and Casualty Co. (R. 50.)

5. In order to determine any implied or actual bias of any juror and to enable counsel to intelligently exercise his client's peremptory challenges, Broberg's counsel submitted to the judge the following juror voir dire questions.

A. Has any member of the panel ever worked for an attorney or an insurance company? If so, who and when?

B. Is any member of the panel a member of, or have any financial interest in State Farm Insurance Company? (R. 107,108.) The court refused to ask whether any member of the panel ever worked for an insurance company and also refused to give Instruction No. B. (Tr. 10, 11, 15, 20, R.92.)

6. After the jury returned a verdict in favor of Hess. Broberg moved the court for a new trial on the grounds that the court committed reversible error when it failed to give the foregoing instructions. (R. 241, 242.)

7. The lower court summarily denied motion for a new trial. (R.241.)

8. Broberg timely filed a notice of appeal. (R. 256,260.)

V. SUMMARY OF ARGUMENT

Broberg has a fundamental right to a trial by an impartial jury. The purpose of voir dire is to protect that right and to allow Broberg to discover any actual or implied bias. This Court in Balle v. Smith, 17 P.2d 224 (Utah 1932) held that a personal injury plaintiff is entitled to learn whether any juror is interested in or connected with any insurance company. The lower court refused to follow Balle and deprived Broberg of his voir dire rights and made it impossible for him to intelligently exercise his peremptory challenges. This Court should reverse the judgment and order a new trial.

VI. ARGUMENT

- A. This Court Must Order a New Trial Because the Lower Court Eliminated Broberg's Right to Know Whether Any Juror Was Connected With or Had an Interest in an Insurance Company.

Plaintiff's fundamental right, to a trial by impartial jury, is protected and guaranteed by Utah's Constitution. International Harvester Credit Corp. v. Pioneer Tractor and Implement, Inc., 626 P.2d 418, 421 (Utah 1981).

A litigant is entitled to a trial by an impartial and disinterested jury and he must be given a reasonable opportunity to obtain such a panel. Balle v. Smith, 17 P.2d 224, 229 (Utah 1932). Accordingly, the law in Utah is clear and long-standing. Broberg was entitled to know whether any juror had worked for or had a financial interest in the defendant's insurance company. In Balle v. Smith, 17 P.2d 224 (Utah 1932), this court specifically and unequivocally held:

We hold . . . that counsel for plaintiff is entitled to learn whether any juror is interested in, or connected with, any insurance or casualty company that may be interested in the case, as insurer of defendant's liability. Balle at 230.

Balle v. Smith, is still the law in Utah and was quoted with approval in Killpack v. Wignall, 604 P.2d 462, 463 n.1 (Utah 1979).

This case is squarely governed by Balle v. Smith. There is no wiggle room.

In the present case, plaintiff's counsel submitted the following two questions to determine whether a member of the jury panel ever worked for, or had a financial interest, in the defendant's insurance company.

1. Has any member of the panel ever worked for an attorney or an insurance company? If so, who and when?

2. Is any member of the panel a member of, or have any financial interest in, State Farm Insurance Company?

If anything, the questions asked in the present case, are more narrowly drawn than the question asked in Balle which was, "Are you acquainted in any way with what is known as International Lloyd's Company [the insurance company]?" Balle at 228. The Utah Supreme Court, in refusing to grant a mistrial, noted that the object of voir dire is to ascertain whether there are grounds for a challenge for either actual or implied bias and to enable the party to exercise intelligently his peremptory challenges. Balle at 230. The court then said:

Clearly, one interested in such an insurance company, as a stockholder or employee would be subject to challenge. Balle at 230.

Clearly, plaintiff was entitled to learn whether a member of the jury panel worked for the insurance company. Clearly, plaintiff was entitled to learn whether any member

of the panel had an interest in an insurance company. Clearly, the lower court directly violated this court's holding in Balle v. Smith and abused its discretion. While it is true that "Matters of possible bias and prejudice on the part of the jury are within the sound discretion of the trial court," King v. Fereday, 739 P.2d 618, 622 (Utah 1987), it is also true that a party is entitled to exercise his peremptory challenges upon impartial perspective jurors and he should not be compelled to waste a challenge to accomplish that which the trial court should have done. State v. Moore, 562 P.2d 629, 630-631 (Utah 1977).

The court's failure to give the requested voir dire questions deprived Broberg of his right to intelligently exercise his peremptory challenges and/or challenges for cause. The lower court's failure is an abuse of discretion, reversible error and requires a new trial. Kiernan v. Van Shaik, 347 F.2d 775 (5th Cir. 1965)

Counsel not only has the right to inquire if any perspective juror has a relationship to the defendant's insurance company. The counsel may also inquire into that relationship if one exists The court did err, however, in refusing to allow counsel to make further inquiry of the six policyholders. Such inquiry was necessary to enable counsel to determine if there was a basis for a challenge for cause and counsel later in making an intelligent exercise of his peremptory challenges . . . [t]his case must be remanded for a new trial for the reasons stated above. Oglesby v. Conger, 507 P.2d 883, 885 (Colo. App. 1973).

A reading of this court's recent ruling in King v. Fereday, 739 P.2d 618 (Utah 1987) shows that the lower court abused its discretion. In King, the plaintiff requested questions to elicit information that would indicate any juror's connection to an insurance company. King at 622. The lower court's denial of the requested questions was upheld by this court only because the trial judge agreed to ask if any juror had "stock ownership in a business and, if so, the nature of the business." The trial judge also agreed to ask the name of the business if anyone indicated ownership in an insurance business. King at 623.

In contrast to King, the lower court, in the present case, failed to ask any questions whatsoever that would indicate the stock interests of the jurors. (Tr. 2-20.) No question was asked that would indicate to plaintiff's counsel whether any of the jurors had an interest in or had been connected with an insurance company. The court abused its discretion. The remedy is a new trial.


VII. CONCLUSION

To protect his fundamental right to a trial before an impartial jury, Broberg was entitled to learn whether any juror had ever worked for or had a financial interest in the defendant's insurance company. The lower court's refusal to

allow Broberg to inquire about any possible employment or financial interest, in defendant's insurance company is reversible error and requires a new trial.

DATED this 6th day of November, 1987.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Appellant.

By: 
DALE F. GARDINER

CERTIFICATE OF MAILING

I hereby certify that four true and correct copy
of the foregoing BRIEF OF APPELLANT (Broberg v. Hess) were
mailed, U.S. Mail, postage prepaid, this 6th day of
March, 1987, to the following:

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