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Clarabell Kelley v. Salt Lake Transportation Company, and Green Cab Transportation Company, and Lewis Hartley : Reply Brief of Defendants and Appellants

Utah Supreme Court

Ingebretsen, Ray, Rawlins, and Christensen; Attorneys for Defendants and Appellants;

6329

IN

The Supreme Court

OF THE

State of Utah

CLARABELL KELLEY,
Plaintiff and Respondent,
vs.
SALT LAKE TRANSPORTATION COMPANY, a corporation; GREEN CAB TRANSPORTATION COMPANY, a corporation; and LEWIS BARTLEY,
Defendants and Appellants

Case No. 6329

REPLY BRIEF OF DEFENDANTS AND APPELLANTS

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No dispute exists as to the facts involved, nor with respect to the questions presented for determination. The difference of view has reference solely to the law applicable to the particular circumstances of this case.

I. The Question of Negligence

The first question considered by both appellants and respondent is the sufficiency of the evidence on the ques-

tion of negligence to make a case for the jury, or to sustain the verdict of the jury.

Respondent contends (Brief, page 5) that there was a conflict in the evidence on the question of speed which made that a fact to be determined by the jury. Respondent alleged in her complaint, as an act of negligence on the part of appellants, that the cab in which she was riding was traveling at a rate of speed in excess of 35 miles per hour at the time the brakes were applied and the cab brought to a stop. She testified (Tr. 48, Ab. 14) that the cab was going about 25 or 30 miles per hour; that (Tr. 56, Ab. 16) she had never driven a car; that the car which dashed up in front of the cab was going faster than the cab. The witness Bartley testified that the cab was going from 20 to 22 miles an hour (Tr. 102, Ab. 27). It is true the witnesses differ as to how fast the cab was going, but this is of no consequence and presents no proper issue of fact to be determined by the jury. There is no state law, and no city ordinance is pleaded, nor are any facts pleaded, which make a speed of 25 miles per hour a negligent or careless speed at the time and place in question.

There is no evidence from which even a presumption can be drawn that the speed involved was negligent, or caused the damage complained of, unless we draw that presumption from the sole fact that the plaintiff fell off the seat, and this is in fact the presumption which respondent relies upon, (See Brief, page 6). We think it is beyond dispute that the fact of the hap-

pening of the accident is no proof of negligence, nor even the basis of a presumption in this case, because (a) the doctrine of res ipsa loquitur was not pleaded *Loos v. Mountain Fuel Supply Company,)*.....*Utah*....., *108 Pac. (2d) 254,* at page 259); and (b) because even if it had been pleaded, it would not be applicable in a case where the other facilities involved, such as an approaching car, were not under the control of the defendant, (*Yellow Cab Company v. Hodson, et al (Colo.), 14 Pac. (2d) 1081).*

Respondent further contends that the jury had a right to indulge in a presumption, from the facts surrounding the incident, that the driver was not keeping a proper or any lookout (Brief, page 5). This is another effort to apply the doctrine of res ipsa loquitur, which, for the reasons shown, may not be done in this case.

However, even if the jury were permitted to draw from the fact that the accident occurred, an inference or presumption that the driver was not keeping a proper or any lookout, any such inference or presumption would immediately disappear in the face of positive and undisputed evidence that a careful watch and lookout was kept. See the evidence of Bartley (Tr. 101, Ab. 26) that he looked both right and left; that two cars had proceeded through the intersection immediately in front of him, and that the car approaching from the left did not show up until there was nothing to do but apply his brakes and stop to avoid a collision. A presumption is not evidence, and has no weight as such, but only determines the party who has the duty of going forward with the evi-

dence, and when that duty is met by the production of evidence, the presumption becomes inoperative. *Annotation :95 A. L. R. 881.* Professor Wigmore in his work on Evidence, 2nd Ed. Sec. 2491, says:

> "It is, therefore, a fallacy to attribute (as do some judges) an artificial probative force to a presumption, increasing for the jury the weight of the facts, even when the opponent has come forward with some evidence to the contrary."

Our Court has followed this view, *State v. Green, 78 Utah 580, 6 Pac. (2) 177,* and in *Buckley v. Francis, 78 Utah 606, 6 Pac. (2d) 188,* and in other cases. It has been stated that a presumption is "a mere house of cards, which one moment stands with sufficient force to determine an issue, but at the next by reason of the slightest rebutting evidence, topples utterly out of consideration of the tryer of facts," *Jones on Evidence, 2nd Edition, Sec. 32.*

In this case, therefore, where the rebutting evidence of keeping a proper lookout (Tr. 101, Ab. 26) and retarding the speed of the cab as it entered the intersection (Tr. 101, Ab. 26) is complete and undisputed, there can be no recourse to presumptions or inferences, nor can there be any left-handed application of the doctrine of res ipsa loquitur, in view of the repeated decisions of our court on that point.

The cases cited by respondent under this point, on pages 2 and 3 of her brief, state general rules of law applicable to proper facts and particularly applicable to

the facts in those cases which were entirely different and bear no analogy to the facts presented here.

II. The Release

Appellants, by their opening brief (pp. 19-22), have raised the question as to whether or not respondent has, by her Reply, pleaded facts sufficient to avoid the release set up in appellants' answer. This point was preserved by motions for non-suit and directed verdict, and by appropriate assignments of error. Respondent's brief makes no reference to this aspect of the case.

This plea attempting to avoid the release for fraud lacks such essential elements as (a) that the representations were false; (b) that they were known to be false by the person making them or that they were made with the intention that they should be acted upon by plaintiff.

The authorities (appellants' opening brief, (pp. 19-22) appear to hold that a plea in avoidance of a release for fraud must contain all the essential elements of a cause of action for false representation. Indeed, the case of *Bennett, et ux. v. Deaton (Idaho), 68 Pac. (2d) 895,* principally relied upon by the respondent, confirms this view of the law. In that case as shown at page 899 of the report referred to, and at page 13 of respondent's brief, the Court citing with approval the holding in *Woods v. Wikstrom (Ore.), 135 P. 192,* said:

> " 'If the defendant represented to the plaintiff, in order to prevail on him to execute the release, that the accident was unavoidable, and that he had no cause of action against him, *without believing said representation to be true,* and the

> plaintiff believed said representations, and, so believing, executed the release, such representations constituted fraud and vitiated said release, if the representations were false.' . . ." (Italics ours.)

At several points in respondent's brief it is stated that the consideration paid for the release was inadequate. The statements of fact made on this point are not, in every instance, complete nor accurate. See respondent's brief, page 11, where it is said, "particularly is this true when the amount paid in exchange for the release is so inadequate, as the evidence shows in this case that the $20.00 would not pay the expenses incurred for independent medical services and for hired help." At other places in respondent's brief, the true facts are shown which are these: that in exchange for the release, respondent was to receive not only the sum of $20.00 to pay the expense of household help, but also appellants were to pay all bills theretofore incurred by respondent for medical service, and to pay for such additional medical attention as she might require. See the testimony of Mr. Boynton (Tr. 119, Ab. 30):

> ". . . I told her that we would pay all doctor bills that she had so far incurred, her doctor and the one that we had advised, and that we would further pay doctor bills as long as she was under the treatment of Dr. Spencer Wright if she would go to him and take treatments until he released her. . . ."

and see again (Tr. 129, Ab. 32):

> "The proposition . . . in consideration of which the release was signed was not only the

> $20.000 but the payment of all past doctor bills and future medical service."

There is no claim in the pleadings of inadequacy of consideration, nor any claim of duress or undue influence, nor was there any such factor in truth involved. The record does not indicate that plaintiff's net recovery from the award made her by the jury would exceed the amount of past and future doctor bills, and the cash payment made her by appellants. In view of the issues framed by the pleadings, respondent's present suggestion of inadequacy of consideration is inappropriate.

In connection with the argument just referred to, respondent cites *Dovich v. Chief Consolidated Mining Co., 53 Utah 522,* at page 535, where the Court says:

> "Settlements of damage cases *between employers and employees* are to be encouraged, but disingenuousness and unfairness on the part of either are reprehensible." (Italics ours.)

A mere reading of the excerpt cited by respondent shows that the rule there laid down has no relevancy to the case at bar where no employer-employee relationship is involved and upon reading that case in full, we discover that Dovich was induced to sign a release without knowing that he was doing so, and upon the belief that he was signing a paper to get his insurance. On the contrary, in the case at bar, the respondent knew what she was signing, knew what she was to receive, and had independent advice.

There is one other point raised by respondent's brief

under this caption which requires consideration. The principal misrepresentation complained of is that agents of the defendants stated to the plaintiff that she would not be able to recover against the defendants for her injuries. Mrs. Kelley's evidence (Tr. 52-65, Ab. 16-18) was that Mr. Boynton told her that it didn't matter whether she employed an attorney or not, that she could not get more than they were offering her. Mr. Boynton testified (Tr. 126, Ab. 31) that he told Mrs. Kelly the defendants did not consider themselves liable for anything; that he told her in the presence of her brother, Mr. Utley, that what they were offering was all they were willing to pay. Do these statements amount to misrepresentations sufficient to avoid a release executed ten days after the accident happened, under circumstances where plaintiff's brother had invited defendants out to make an adjustment, and the adjustment was made with respondent on the independent advice of her brother, and after due deliveration? If so, then the rule that releases and adjustments are to be encouraged, must be reversed.

Respondent endeavors, in her brief, to fasten upon the point that Mr. Boynton and Mr. Jennings, who came out to see her, were expert adjustors, skilled in the law of liability for personal injuries, and that they took advantage of her. There is no proof of any such claim in the record and certainly none for the statement made at the top of page 11 of respondent's brief that these individuals had adjusted many cases arising out of injur-

ies to patrons of taxicab companies, and that they were in the category of experts, such as claim agents and claim adjustors.

Mr. Boynton testified (Tr. 123, Ab. 31) that he took Mr. Jennings out with him so that Mr. Jennings would be present at the conversation; that Mr. Utley, plaintiff's brother, had called that day and said that they were ready to talk final settlement; that defendants were interested in making a settlement to save legal expense.

We have re-checked the record in an effort to find any evidence supporting the contention that Mr. Boynton and Mr. Jennings were expert adjustors, or represented themselves to be such, or that they had or claimed to have any knowledge of the law applicable to the facts, and we can find none. We respectfully submit that there is neither a sufficient pleading, nor any evidence in the record, adequate to avoid the effect of the release shown.

III. Instructions

Respondent makes no serious effort to justify the refusal of the Court to give defendants' requested Instruction No. 6 This request was as follows, (Tr. 140, Ab. 42):

> "The defendants request the Court to instruct the jury that if the jury finds that the defendants did in fact state to the plaintiff that they were not liable, and she could not recover, then the jury should further determine whether such expression of opinion was honestly entertained and honestly made, and if the jury finds that such ex-

> pressions of opinion were made and were honestly entertained, then the Court instructs the jury that the expression of such opinion would not constitute misrepresentation, and that the release could not be avoided on that ground."

At page 20 of her brief, respondent says, in effect, that the Court's refusal to give defendants' requested Instruction No. 6 was justified by the same reason which justified the refusal to give request No. 5. A mere reading of the pleadings and the two instructions will show that they have no relation to each other. Requested Instruction No. 6 was asked upon the theory that a representation honestly entertained and honestly, even though mistakenly, made cannot be such a false representation of as will avoid a contract. It would seem that this view is incontestable. We refer the Court again to the cases cited in our opening brief at page 36, and add thereto the citation from *Bennett, et ux v. Deaton, et al, 68 Pac. (2d) 895,* as set out at page 13 of respondent's brief, which reads as follows:

> " 'If the defendant represented to the plaintiff, in order to prevail on him to execute the release, that the accident was unavoidable, and that he had no cause of action against him, *without believing said representations to be true,* and the plaintiff believed said representations, and, so believing, executed the release, such representations constituted fraud and vitiated said release, if the representations were false.' " (Italics ours.)

There is no evidence that the statements made in this case were made either carelessly or negligently, or

without belief in their truth. The contrary clearly appears. In any event, if the case was to have been submitted to the jury at all, appellants were entitled to an instruction upon this vital point.

As to the remainder of the objections to instructions given and requests refused, the appellants rest their case upon the arguments set forth in their principal brief.

Respectfully submitted,

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