

2001

Dona R. Bullock v. Herbert John Ungricht : Petition for Rehearing

Utah Supreme Court

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TABLE OF CONTENTS

	Page
Petition for Rehearing.....	1
Nature of the Case.....	2
Disposition of the Case.....	2
Relief Sought on this Petition.....	2
Statement of Facts.....	2
Argument.....	4
POINT I. THIS COURT FAILED TO CONSIDER THE TRIAL COURT'S ERRONEOUS INSISTENCE THAT INFLAMMATORY AND HIGHLY PREJUDICIAL EVIDENCE REMAIN BEFORE THE JURY NOTWITHSTANDING THE FACT THAT SUCH EVIDENCE WAS RELE- VANT AND ADMISSIBLE ONLY FOR ITS PROBATIVE VALUE WITH RESPECT TO AN ISSUE PREVIOUSLY REMOVED FROM THE JURY'S CONSIDERATION.	4
Conclusion.....	10
Cases Cited:	
Bullock v. Ungricht (decision no. 13697, filed July 17, 1975)	2
Statutes and Rules Cited:	
Rule 22(c), Utah Rules of Evidence.....	8-10

IN THE SUPREME COURT OF
THE STATE OF UTAH

DONA R. BULLOCK,)	
)	
Plaintiff and Appellant,)	
)	
vs.)	Case No.
)	13697
HERBERT JOHN UNGRICHT,)	
et al.,)	
)	
Defendants and Respondents.)	

PETITION FOR REHEARING

Appellant Dona R. Bullock respectfully petitions the Court for a rehearing in this cause upon grounds as follows:

I.

The trial court erred in refusing to exclude certain inflammatory evidence highly prejudicial to the Appellant's cause, and this Court erred in sustaining the judgment of the trial court based thereon.

WHEREFORE, Appellant asks for a rehearing in this cause, that the matter be reconsidered and upon such rehearing the Court grant a new trial.

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BRIEF IN
SUPPORT OF PETITION FOR REHEARING

NATURE OF THE CASE

This is an action by the Plaintiff/Appellant, Dona R. Bullock, against the Defendants/Respondents, Herbert John Ungricht, et al., for injuries and damages sustained as a result of an automobile accident.

DISPOSITION OF THE CASE

A jury award of no cause of action in favor of the Defendants was rendered April 4, 1974, before the Honorable Bryant H. Croft, District Judge of the Third Judicial District. A motion for a new trial was heard and denied. From the denial of such motion and from the judgment, the Plaintiff appealed. This Court affirmed the judgment below. Bullock v. Ungricht, (decision no. 13697, filed July 17, 1975).

RELIEF SOUGHT ON THIS PETITION

Appellant seeks reversal of the judgment of the trial court and a new trial.

STATEMENT OF FACTS

Plaintiff's cause of action arises from an automobile accident that took place on December 16, 1971 at 1435 East 33rd South Street in Salt Lake City, Utah at about 9:30 p.m. (R. 246-249). According to Defendants' version of the accident,

after Defendants had made a left-hand turn onto 33rd South Street from Highland Drive, they noticed erratic accelerating and slowing by the Plaintiff's vehicle in front of them. Defendant claims to have slowed his car at this time to observe what Plaintiff's vehicle would do but subsequently and unavoidably slammed into the rear of Plaintiffs' car when it stopped abruptly to make a left turn. There was testimony by investigating officers that the road surface was coated with black ice. (R. 581, 608). Defendant claims there were no cars in the westbound lanes that would have required the Plaintiff to stop before turning left.

According to the Plaintiff's version of the accident, she had turned left onto 33rd South Street. She was stopped on 33rd South Street in the centermost eastbound lane with her left-turn signal blinking, waiting for traffic to clear to allow her to turn left into the driveway of an apartment building. She noticed headlights approach rapidly in the rearview mirror and shortly thereafter her automobile was struck from the rear by the Defendants' automobile. The resulting impact caused serious permanent damage to the Plaintiff's sixth cervical nerve, necessitating the removal of two cervical discs.

In addition to negligence and contributory negligence, an issue had originally been raised with respect to the Plaintiff's lost earnings resulting from her injuries. Plaintiff claimed \$8,000.00 in wages lost due to her inability to continue to work as the sales director for Utah American Corporation.

Midway through the trial, the court removed the issue

of the Plaintiff's lost earnings from the jury's consideration on the grounds that the evidence of lost earnings was too speculative to support an award for the same. (R. 430).

After the trial court eliminated the Plaintiff's lost earnings as a triable issue, the trial court refused to remove evidence from the jury's consideration that was admissible only for its probative value with respect to the issue removed. (R. 431). Such evidence, improperly kept before the jury, was inflammatory and greatly damaged the Plaintiff's credibility in the eyes of the jury. The factual circumstances of the court's improper ruling in this respect will be set forth in more detail in Plaintiff's argument.

The jury deliberated more than five hours before returning a verdict of no cause action, and never reached the issue of damages.

ARGUMENT

THIS COURT FAILED TO CONSIDER THE TRIAL COURT'S ERRONEOUS INSISTENCE THAT INFLAMMATORY AND HIGHLY PREJUDICIAL EVIDENCE REMAIN BEFORE THE JURY NOTWITHSTANDING THE FACT THAT SUCH EVIDENCE WAS RELEVANT AND ADMISSIBLE ONLY FOR ITS PROBATIVE VALUE WITH RESPECT TO AN ISSUE PREVIOUSLY REMOVED FROM THE JURY'S CONSIDERATION.

The trial court's erroneous ruling arose in the following manner. The Plaintiff had called several witnesses to testify concerning her earning abilities as they related

to her claim for lost earnings. The fact that her employer, Utah American Corporation, had not yet begun to do business was elicited. While cross-examining the Plaintiff, Defendant's counsel introduced the Plaintiff's prior act of bankruptcy in the following manner:

Q Your business venture as a salesman for Inch Master was very unsuccessful, was it not, Mrs. Bullock?

A Correct.

Q And, in fact, it resulted, did it not, in the filing of a bankruptcy petition by you in April of 1971?

A Yes, it did.

MR. LANGLOIS: Your Honor, I really have no objection to our going into this. It really doesn't mean anything. I fail to see the relativity of it. That is the thing I am concerned about. What is a fact is a fact. I fail to see how this has anything to do with this case. The only reason her business operation --

THE COURT: Just a moment, Mr. Langlois. Do you object to the question?

MR. LANGLOIS: I object because it is irrelevant, incompetent and immaterial.

THE COURT: Overruled. I think it is material.

Q (By Mr. Eyre) The bankruptcy petition which you filed, Mrs. Bullock, was the cause, I assume, of some additional emotional upset and trauma for you, was it not?

A Yes.

Q And that continued for quite a period of time, did it not?

A Not, it didn't. It was a relief to have it all over.

Q Well, it wasn't quite all over when you filed it, was it? Mainly, isn't it a fact, Mrs. Bullock,

that certain of your creditors, namely, First Security Bank, Walker Bank & Trust Company filed actions against you in the bankruptcy court alleging that you had incurred obligations to them through the use of misrepresentation?

. . . .

Q (By Mr. Eyre) Mrs. Bullock, as a result of the bankruptcy proceedings were judgments entered against you in favor of First Security Bank of Utah and Walker Bank & Trust Company and are those judgments still not paid? (R. 395-97).

There was, therefore, introduced into evidence over the objection of the Plaintiff's counsel, the fact of Plaintiff's prior bankruptcy, the fact that two creditors had filed claims against the Plaintiff alleging misrepresentations by her, and the fact that those claims resulted in two judgments against the Plaintiff that remained unpaid.

The tendency of such evidence to destroy the credibility of the Plaintiff in the eyes of the jury is self-evident. The issue of how and on what terms such evidence may properly be submitted to and remain before the jury is crucial in determining whether the Plaintiff had been denied her right to a fair trial of her action for negligently inflicted personal injuries.

The trial court and counsel for both parties clearly stated the theories upon which they either favored or opposed retention of the challenged evidence during an off-the-record discussion of the matter, recorded at pages 412 to 436 of the official record.

At page 415, line 30, to page 416, line 13, the Defendants' counsel lists his purposes in submitting the challenged

evidence:

. . . I recognize that counsel doesn't like it because, in my judgment, it will have an adverse effect and that is why I am seeking to introduce it. I will be quite candid with the Court. It does have probative value because it deals directly with her ability to earn and her sales ability, her general business ethics, which I think are relevant if she is going to assert a claim for lost income because of this business venture she was in.

In addition to that, it goes to the claim for pain and suffering, which her doctor says, at least, when he last examined, he felt was caused by the emotional functional overlay. In addition to that, I think it does have some probative value concerning her credibility and I will submit it on that basis.

Defendant's counsel thus expressly offered the evidence of the Plaintiff's act of bankruptcy and undischageable debts for its value for discrediting the Plaintiff apart from, and in addition to, whatever value it had for rebutting the Plaintiff's claim for lost earnings. The Defendant's counsel, therefore, submitted the fact of the Plaintiff's bankruptcy and her undischageable and unpaid debts as specific acts tending to destroy the credibility of the Plaintiff. Even had the issue of the Plaintiff's earning capacity not been previously eliminated as a trial issue by the trial court, it was reversible error for the trial court to refuse to give the jury an instruction limiting its consideration of the challenged evidence to the issue of the Plaintiff's lost earnings.

The reversible error of the trial court was compounded when the trial court itself removed the issue of the Plaintiff's lost earnings from the jury's consideration (R. 430). It subsequently refused to strike the evidence of the Plaintiff's

act of bankruptcy and of her undischageable and unpaid debts or to instruct the jury to disregard them. At this point in the trial, the only relevance of the challenged evidence was its tendency to destroy the credibility of the Plaintiff. To affect the credibility of a witness by introducing evidence of her specific acts relevant only as tending to prove a trait of character is expressly forbidden by Rule 22(c), Utah Rules of Evidence. The Plaintiff submits that if it violates Rule 22(c) to introduce evidence of specific acts relevant only for their tendency to affect the general credibility of a witness, it is, by necessary inference, a violation of Rule 22(c) not to strike such evidence when it later becomes irrelevant except for its tendency to affect the general credibility of a witness.

Here the trial court refused to strike evidence of the Plaintiff's act of bankruptcy and of suffering judgments based in part on allegations of misrepresentation, after such evidence had become irrelevant except for its tendency to affect the general credibility of the Plaintiff. This error was raised by the Plaintiff in her initial brief on appeal but not considered by this Court in its opinion.

Should there be any doubt that the trial court, while exercising its discretion to exclude evidence admissible for some purposes but inadmissible for others, contemplated that the challenged evidence would be used to attack the general credibility of the Plaintiff, that doubt is dispelled by the

trial court's following direction to counsel:

MR. LANGLOIS: And the bankruptcy, for whatever that is worth, I guess he can talk about it and so can I then?

THE COURT: You ought to talk about it only insofar as it might affect credibility. If I take from the jury the question of special damages for loss of earnings, as I think I will do based upon what I have heard so far, then you shouldn't discuss either the business venture that was intended or the bankruptcy as affecting the success -- the probable success of that business in your argument to the jury. (R. 434-435).

Should there be any doubt about the determination of the trial court to keep the challenged evidence before the jury, that doubt is dispelled by its refusal of the motion of Defendant's counsel to strike the prayer for lost earnings from the Plaintiff's complaint, despite the consent of counsel for both parties to such motion. (R. 432).

There is little room for doubt that the evidence of Plaintiff's act of bankruptcy, of the claims against her alleging misrepresentation, and of the unpaid judgments resulting from those claims, seriously damaged her credibility with the jury. The Plaintiff's account of the accident was clear and concise. If believed, it compelled a finding of negligence on the part of the Defendant and an absence of contributory negligence on the Plaintiff's part. The fact the jury deliberated for more than five hours before returning a verdict of no cause of action in favor of the Defendant demonstrates the closeness of the question of credibility in the minds of the jury and the high probability that the improperly retained evidence tipped the

scales on that issue against the Plaintiff. The Plaintiff's right to a fair trial of her claim for personal injuries negligently inflicted was thereby denied.

CONCLUSION

This Court failed to consider the prejudicial error of the trial court in two respects. First, the error of the trial court in receiving inflammatory and highly prejudicial evidence of the Plaintiff's specific acts for the tendency to rebut material evidence but refusing to instruct the jury to limit its consideration of such inflammatory evidence to the issue for which it was offered. Second, the error of the trial court in refusing to strike inflammatory and highly prejudicial evidence of the Plaintiff's specific acts after such evidence had become irrelevant except for its tendency to affect the general credibility of the Plaintiff, violating, by necessary inference, Rule 22(c) of the Utah Rules of Evidence.

Respectfully submitted,

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