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Dona R. Bullock v. Herbert John Ungricht : Reply Brief

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

DONA R. BULLOCK,

Plaintiff-Appellant,

vs.

HERBERT JOHN UNGRICHT, et al.,

Defendants-Respondents.

Case No.
13697

REPLY BRIEF OF APPELLANT

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County
Honorable Bryant H. Croft, Judge

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AUTHORITIES CITED

IN THE SUPREME COURT

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STATEMENT OF FACTS

The appellant reaffirms the statement of facts set forth in the opening "BRIEF OF APPELLANT" heretofore filed and disagrees with everything contained in the statement of facts set forth in "BRIEF OF RESPONDENTS" in conflict therewith. In the interest of time and space, however, appellant will not methodically refer to each inaccuracy contained in the statement of facts in the "BRIEF OF RESPONDENT", but will identify these inaccuracies in the argument hereinafter set forth.

ARGUMENT

INTRODUCTION

This reply brief will be confined to a reply to the arguments of the respondents found under "POINT III" and "POINT IV" set forth in the "BRIEF OF RESPONDENTS" and, for clarity, said points will be given corresponding numbers in this reply brief.

POINT III

THE TRIAL COURT ERRONEOUSLY ALLOWED THE INTRODUCTION OF EVIDENCE CONCERNING THE PETITION IN BANKRUPTCY FILED BY THE APPELLANT.

The plaintiff answered the question pertaining to the filing of a bankruptcy petition by her in April of 1971 before counsel had the opportunity to object thereto (T395: 28-30) but counsel thereupon objected thereto upon the grounds said evidence was irrelevant, incompetent and immaterial. (T396: 9-10) The court overruled the objection. (T396: 11)

It is significant to observe that the bankruptcy petition filed by the appellant was filed eight months before the occurrence of the collision involved in this litigation. Supposedly, counsel for respondents was seeking to show some relevancy between the filing of said bankruptcy petition and the pain and suffering sustained by the appellant as a result of the automobile collision. Appellant was asymptomatic until the collision. (T340: 20-30 and T341: 1-6) The testimony of the appellant, however, was to the effect that any emotional upset which she suffered in connection with her financial difficulties was remedied by the filing of the bankruptcy petition. (T396: 18) Counsel for respondents, however, in his desire to prejudice the appellant in the eyes of the jurors, then asked the appellant if it was not a fact that two creditors had filed actions against her wherein they contended that the obligations incurred to them by the appellant had been as the result of "misrepresentation."

(T396: 19-24) An objection was immediately made to this line of questioning (although the record incorrectly indicates that the objection was made by Mr. Eyre), pointing out that counsel was going into a matter completely unrelated to the case at bar. (T396: 25) At this point the trial judge called counsel to the bench and an off-the-record discussion was held between court and counsel. (T397: 8-9) During this off-the-record discussion, counsel for respondents exhibited to court and counsel the documents which have heretofore in prior briefs been referred to as proffered exhibit 12-D. These documents consisted of findings of fact, conclusions of law and a judgment in two separate cases, wherein it was found by the court that appellant was guilty of misrepresentation to each of the plaintiffs therein for the reason that she had improperly signed her husband's name to the loan application and the promissory note in each instance; and that, accordingly, the appellant was not entitled to a discharge from these debts in her aforesaid bankruptcy proceeding. Counsel for appellant pointed out that such evidence was highly inflammatory, would result in extreme prejudice to the appellant and would cause the trial of the case to go off on a tangent which would result in a completely erroneous verdict. Counsel for appellant even offered at that time to withdraw any claim for lost earnings, since the court had indicated he felt there might be some materiality in connection with that issue. The trial court then stated that he would allow counsel for respondents at

that time to inquire of the appellant as to whether or not two judgments were obtained against her by the plaintiffs in said proffered exhibits. Shortly thereafter court was recessed for the day and counsel were requested to remain so that counsel for respondents could offer the aforesaid findings of fact and judgments into evidence and have same marked as "12-D". (T398: 16-27 and T399: 1-4) Since counsel for appellant had not seen these documents before, the Court allowed him to withdraw them for the evening for the purpose of reading same, indicating that the next day the Court would determine whether said proffered exhibit had any probative value either on the question of the lost earnings of the appellant or on the matter of the credibility of the appellant. (T399: 8-15)

The next day counsel for appellant renewed the objection to the bankruptcy evidence, requesting that it be stricken, and also objected to the introduction of the proffered 12-D, the highly inflammatory and prejudicial evidence which counsel for respondents was seeking to introduce. An extensive discussion of these matters by counsel and the Court will be found in the record, commencing at page 412, line 11 and extending over to page 436, line 4. During the course of this discussion, counsel for appellant stated that if the bankruptcy evidence were allowed to remain in, it would be necessary for appellant to offer evidence explaining the bankruptcy, pointing out that there was an explanation and pointing out that in spite of all the sales

which the appellant made as a result of her sales ability, a loss was sustained because of top-heavy overhead expenses. (T427: 10-19; T431: 21-30 to T432: 1-6) Counsel for appellant stressed the necessity for going into an explanation of the bankruptcy if it were going to be allowed to remain in evidence, it being necessary to show why the bankruptcy was filed, why schedule C was as it was, etc. He further pointed out that he had "no idea of what we will get into from <u>that</u> point on." (Underlining added)

The trial court declared that if counsel for appellant sought to go into an explanation of the bankruptcy matter, the court would allow 12-D into evidence. The brief of respondents seeks to "soft-pedal" this shocking ruling by taking out of context only a portion of what the trial court said in this regard. (Brief of respondents, page 5) The position of the trial court is made very clear by a reading of the complete discussion of that subject. (T434: 1-17) It is clear that the trial court <u>definitely and positively</u> used the proffered 12-D as a threat and sword over the head of the appellant to keep the appellant from offering any explanation of the bankruptcy, thus, effectively keeping the appellant from rehabilitating herself in the eyes of the jurors. The court very properly did not allow 12-D into evidence but used the <u>threatened</u> admission of said exhibit into evidence as a very effective method of preventing any explanation by the appellant as to why the bankruptcy was

filed. The record makes it clear that she had a valid explanation, as hereinbefore mentioned.

Furthermore, the record is clear on the fact that the trial court considered bankruptcy a "dirty word" and that it was detrimental to the credibility of the appellant. (T434: 24-25; T435: 3-4) It is also significant to note that the trial court refused to permit appellant to withdraw any claim for loss of earnings, even though opposing counsel was perfectly agreeable to this withdrawal. (T432: 7-20; T433: 10-20) This was certainly a strange position for the trial court to take. It appears that the trial court was trying to find a justification for leaving the prejudicial bankruptcy evidence before the jury. The injection of the bankruptcy into this trial was erroneous and highly prejudicial and was designed to prejudice the case of the appellant. The trial court felt that it was relevant on the matter of the credibility of the appellant and it is obvious that the jurors felt the same. The facts of the accident were very clearly related by the appellant and would require a verdict in her favor, but the prejudice injected into this case by the bankruptcy, without any opportunity to explain why bankruptcy was taken, caused the jurors to cool toward the appellant and to doubt her integrity. While this had nothing whatsoever to do with the facts of this automobile collision, it caused the jurors to question appellant's credibility to the extent that the jury never got beyond the liability question. The question of any

supposed effect of financial or emotional problems upon the injuries sustained in the collision was never even reached by the jury. Counsel for respondents announced that he sought to introduce the evidence because of the adverse effect it would have upon the case of the appellant. (T426: 1-2) He sought to attack the credibility of appellant by evidence of a specific instance of her conduct, contrary to Rule 22(d) of Utah Rules of Evidence.

The error of the trial court in permitting the bankruptcy evidence to remain before the jury was highly prejudicial to the case of the appellant and the additional gross error of the court in refusing to permit appellant to offer any explanation of the bankruptcy without precipitating the introduction of the admittedly improper 12-D into evidence was highly prejudicial to the case of the appellant. There is no question that these errors prevented the appellant from receiving a favorable verdict in this case and that had these prejudicial errors not been committed, there would have been a different verdict.

IV

THE TRIAL COURT IMPROPERLY DENIED THE PLAINTIFF'S MOTION FOR A NEW TRIAL.

The trial court was afforded the opportunity to rectify this gross miscarriage of justice by granting a new trial and permitting appellant to try her case without the aforesaid improper attack upon her credibility. The trial court, however, saw fit to stand firm in its position. This was error. The purpose of a motion for a new trial is to rectify wrongs before

it is necessary to seek the help of the Supreme Court.

CONCLUSION

It is not necessary to cite further authorities than are already cited in the previous briefs. Appellant does not take issue with any of the rules of law contained in the brief of respondents. Those very rules cited by respondents make it clear that a judgment should not be disturbed unless it is shown that there is "error" which is "substantial" and "prejudicial" in the sense that it appears that there is a "reasonable likelihood" that the result would have been different in the absence of such error. This is precisely the situation we have here. The errors hereinbefore described were substantial and prejudicial and there is not only a "reasonable" likelihood that the result would have been different in the absence of such errors, but there is no question that the result would have been different in the absence of such errors.

The appellant seeks nothing more than a fair trial and an opportunity to have her legal rights determined in the absence of prejudice and inflammatory innuendoes.

It is, therefore, respectfully submitted that the judgment of the trial court should be reversed and that this case should be remanded for another trial.

Respectfully submitted,

HATCH & PLUMB

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Mailed a copy of the foregoing REPLY BRIEF OF APPELLANT to Attorneys for Defendant/Respondents:

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this 17th day of June, 1975.

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