1977

Craig Rees v. Albertson's : Respondent's Brief on Appeal

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

CRAIG REES,

Plaintiff and Appellant,

vs.

ALBERTSON'S, INC.,

Defendant and Respondent,

Case No. ~~15227~~ 15527

RESPONDENT'S BRIEF ON APPEAL

Appeal from a Judgment of the First District
Court of Cache County,
Honorable Venoy Christopherson, Judge

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BRIEF OF RESPONDENT

STATEMENT OF CASE

The appellant, Craig Rees, has appealed from the decision of the Honorable Venoy Christopherson, Judge, First Judicial District Court, granting a summary judgment in favor of the respondent, Albertson's Inc.

DISPOSITION IN LOWER COURT

It is from the summary judgment granted the respondent and the order of the court denying appellant's motion for review that this appeal is made.

STATEMENT OF FACTS

On or about the morning of September 3, 1974, appellant Rees and McGehee purchased some beer; the appellant does not remember where. Later that morning, the two mentioned above, picked up Harris and Andrews. The four then bought more beer, allegedly from respondent Albertson's Inc., and a fifth of 100 proof liquor from the State Liquor Store. The four then drove to Bear Lake and on the way, appellant and McGehee were mixing the liquor with their beer. (Langford Dep. 15:9-19; 20:2-4). They drove into Idaho where additional beer was purchased. While returning to Logan, they experienced a serious automobile accident wherein Andrews and McGehee were killed and Harris injured. (R22)

As a result of the deaths and injury appellant Rees made payment

in satisfaction thereof in total settlement of $54,742.50. Appellant Rees then brought suit against respondent Albertson's Inc. for contribution pursuant to the Comparative Negligence Act of Utah, Utah Code Annotated 78-27-39 (1953, as amended).

On or about April 22, 1977, respondent filed a motion for summary judgment, (R35), which was supported by a memorandum, (R36). On or about May 5, 1977, appellant filed a memorandum in opposition to respondent's motion for summary judgment, (R44). Thereafter, respondent's counsel, Stephen G. Morgan, and appellant's counsel, John M. Chipman, stipulated that the clerk of the court would not be advised that the matter was ready for decision (pursuant to Rule 2.8 of the Rules of Practice for the District Courts of the State of Utah) until respondent had an opportunity to file an Affidavit of Newell G. Knight, (R48). On or about May 27, 1977, the court, being unaware of said stipulation, filed its memorandum decision denying respondent's motion for summary judgment, (R55). Thereafter, on June 17, 1977, Mr. Morgan received and filed the Affidavit of Newell G. Knight (R49, 51). On July 5, 1977, the court wrote a letter to Stephen G. Morgan with a copy to John M. Chipman, which stated as follows:

> "In view of the affidavit of Mr. Newell G. Knight, the court feels it is in order to review its decision and would suggest a motion to review or set aside the decision in order that counsel for the plaintiff would have time for an appropriate response to said motion." (See Exhibit A attached)(R54)

Thereafter, on or about July 8, 1977, respondent filed a motion to review and set aside the order denying respondent's motion for summary judgment which was supported by the Affidavit of Newell G. Knight, (R55, R58).

Thereafter, on or about August 3, 1977, appellant filed a counter-affidavit of Stewart C. Harvey, (R63). On or about August 9, 1977, respondent filed a memorandum in reply to the affidavit of Stewart C. Harvey, (R66). On or about August 17, 1977, appellant filed by mail a request for oral argument on respondent's motion to review, (R70).

On or about August 23, 1977, the court filed its memorandum decision granting respondent's motion to review and set aside the order denying respondent's motion for summary judgment and granting summary judgment in favor of respondent, (R71). On or about August 30, 1977, appellant filed a motion to review and set aside the order granting respondent's motion for summary judgment, (R76). On or about October 26, 1977, the court filed its memorandum decision denying appellant's motion to review, (R79; see also App. Brief p. 5).

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENT'S MOTION TO REVIEW AND SET ASIDE AN ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

The court granted respondent's motion to review the court's denial of its motion to summary judgment in accordance with Rule 60 of the Utah Rules of Civil Procedure. Rule 60(b)(1) provides:

> On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: mistake, inadvertance, surprise, or excusable neglect.

In this case the mistake, inadvertance, surprise, or excusable neglect occurred when the respondent filed its motion for summary judgment with

its supporting memorandum and appellant filed its memorandum in opposition to the motion for summary judgment and both entered into a stipulation that neither would notify the clerk of the court to submit the matter for decision until respondent had had an opportunity to file an affidavit of Newell G. Knight. The court being unaware of the stipulation, elected to decide respondent's motion before either appellant or respondent had contacted the clerk of the court to notify him that the matter was ready for decision in accordance with Rule 2.8 of the Rules of Practice in District Court of the State of Utah.

Pursuant to Rule 60 U.R.C.P. respondent made its motion to review. After considering the motion to review and the accompanying affidavit filed by respondent and appellant's counter-affidavit, the court granted respondent's motion to review and granted summary judgment in favor of the respondent.

In Meagher v. Equity Oil Co., 5 Utah 2d 196, 299 P.2d 827 (1956) the court held that:

> It is well established that the court may vacate, set aside or modify its orders or judgments entered by mistake or inadvertance which do not accurately reflect the results of its judgments.

In the present case, the trial court ruled on the motion for summary judgment prior to having considered the respondent's affidavit or appellant's counter-affidavit. After the trial court became aware of this additional information, the court felt that "it is in order to review its decisions and suggested that counsel file a motion to review or set aside the decision in order that counsel for the plaintiff have time for an appropriate response to said motion." (See Exhibit "A" attached). Thereafter, the court waited for both sides to file all the motions and memorandums they de-

sired and after reviewing the same, the court then correctly granted respondent's motion to review and summary judgment.

In 60 C.J.S. 94 (Motions and Orders §62(1), it provides that:

> A court, while retaining jurisdiction over the cause in the progress of which it made an order, may, for sufficient cause shown, amend, resettle, modify, or vacate the order.

This appears to be the general rule in most jurisdictions, including Utah.

In Re Estate of Mecham, 537 P.2d 312 (1975), involved a lower court that had granted a motion to strike objections to an accounting of an estate. The motion to vacate that order was held to be the effective order in the case.

Through dicta, the court in Luke v. Coleman, 38 Utah 383, 113 P. 1023 (1911), said:

> According to some of these decisions (speaking of decisions in other jurisdictions cited earlier in the case), a second application for a new trial may be made within the term in which the judgment was rendered, when it is based on grounds not included in the first application, and satisfactory reasons given for the omission.

(The procedural rules involved in Luke are materially the same as the current rules.) These examples would clearly indicate that there exists a motion to review a prior order, both in case law and in the statutes.

Drury v. Lunceford, 18 Utah 2d 74, 415 P.2d 662, (1966), and Utah State Employees Credit Union v. Riding, 24 Utah 211, 469 P.2d 1 (1970), the two cases used by the appellant in its brief in support of its position are distinguishable from the present case. In the Drury v. Lunceford, case supra, from which the appellant quotes dicta, the

court speaks of a motion to review a granting or denying of a motion for new trial not being in the Utah Rules of Civil Procedure. It is significant to note that later in that case the court says that:

> It should be observed that what we have said herein is intended to apply to the fact situation shown in the instant case where, pursuant to regular procedure, the court has acted deliberately and advisedly in granting the new trial. However, we also recognize that there may be situations where an order denying or granting a new trial may have been made by inadvertence or mistake, or where there was some irregularity in connection with the obtaining or the granting of the order, in which instance the court could of course act to correct any such mistake or irregularity.

In the present case the court did not have access to the affidavits and thus did not act advisedly in denying respondent's motion for summary judgment. This inadvertence or mistake justified the trial court in reviewing the denial of respondent's motion for summary judgment and, in fact, the court suggested that a motion to review or set aside would be appropriate under the circumstances. (See exhibit A attached)

In Utah State Employees Credit Union v. Riding, supra, while doubting that a motion to reconsider a judgment denying a motion to vacate judgment is authorized under the Utah Rules of Civil Procedure, the court looked at the merits of the motion. After finding no merit in the motion and that the opposing party had not received notice of the motion, the court ruled that the trial courts acting on and hearing the motion was error. In the present case the appellant had notice of the motion to review and the accompanying affidavit, and pursuant to such, appellant filed a counter-affidavit. The mistake and inadvertence

involved in not providing the trial court with all of the information prior to its denial of the motion for summary judgment and the subsequently provided information to the trial court with the motion to review, show good merits upon which the court could base both hearing and acting on the motion to review. In addition, the court suggested that a motion for review or set aside would be appropriate under the circumstances. (See Exhibit A attached).

Thus the trial court did not err in granting respondent's motion to review and set aside an order denying respondent's motion for summary judgment.

POINT II

THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

There is no conflict between the opinions of respondent's expert and those of appellant's expert. Therefore, there is no dispute of fact and the trial court's granting of respondent's motion for summary judgment was correct.

Appellant's expert, Stewart C. Harvey, states that in his opinion, "it is possible to determine that the alcohol from the beer purchased from Albertson's (respondent) and consumed by Plaintiff Rees (appellant) was still in Mr. Rees' (appellant's) system at the time of the accident in question and therefore would contribute to Plaintiff's (appellant's) intoxication at the time of the accident in question."

Respondent's expert, Newell G. Knight, states that in his

opinion, "there is no way in which it is possible to calculate the amount of intoxication, if any, that could have resulted from the beer purchased from Albertson's Inc. (respondent). In other words, in my opinion, it would be impossible to determine whether or not the beer purchased from Albertson's (respondent) was a proximate cause of Plaintiff's (appellant's) intoxication at the time of the accident in question."

Appellant argues that these two opinions are in conflict and that the granting of summary judgment was error by the trial court because there is a dispute of facts. In reality the two opinions are not in conflict and therefore, there is no dispute of fact.

Assuming that appellant's expert is correct that some of the beer purchased from respondent was still in appellant's system at the tim of the accident, that does not mean, ipso facto, that whatever amount that was left in appellant's system was a proximate cause of appellant's intoxication at the time of the accident. Section 41-6-44(b)(1), Utah Code Annotated 1953, was amended, provides that if there was at that tim 0.05 percent or less by weight of alcohol in the person's blood, it shal be presumed that the person was not under the influence of intoxicating liquor.

Therefore, in the present case, if the amount of respondent's beer left in appellant's system at the time of the accident was 0.05 percent or less by weight of alcohol, then respondent's beer left in appellant's system was not a proximate cause of appellant's intoxicatio

The two experts do not contradict each other, the only difference between the two is that respondent's expert goes one step further in the analysis than appellant's expert. Appellant's expert says that since some of the respondent's beer remained in the appellant's system at the time of the accident it contributed to his intoxication. Respondent's expert says that even if this is true "it is impossible to calculate the amount of intoxication, if any, that could have resulted from the beer purchased at Albertson's (respondent's)". Appellant's expert does not purport to suggest what the amount of intoxication, if any, the respondent's beer caused, since as respondent's expert stated that would be impossible to determine. There are no issues of fact to render a summary judgment improper.

Rule 2.8 of the Rules of Practice in District Court of the State of Utah, (e) provides that a "party resisting the motion may request oral argument and such request shall be granted unless the motion is denied. If no such request is made, oral argument shall be deemed to have been waived." In the present case the appellant filed its counter-affidavit on or about August 8, 1977, yet did not make a request for oral argument until on or about August 17, 1977. That delay and the fact that the memorandum decision granting the motion was issued on August 23, 1977, would indicate that the trial court would be justified in deeming the request for oral argument was waived by the appellant. Even if the court was not so justified, the facts that appellant now believes create an issue of fact were well laid out in the counter-

affidavit before the trial court when it ruled on the motion for summary judgment. Hence, if there was any error, it was only harmless error and would not have changed the granting of summary judgment in favor of respondent.

CONCLUSION

Respondent submits to the court that summary judgment in favor of respondent was warranted and should be affirmed.

RESPECTFULLY submitted this 22 day of March, 1978.

MORGAN, SCALLEY, LUNT & KIMBLE

Stephen G. Morgan

STEPHEN G. MORGAN
Attorney for Respondent

CERTIFICATE

I HEREBY CERTIFY that I delivered two copies of the foregoing Brief of Respondent to J. Kent Holland, Esquire, Attorney for Plaintiff-Appellant, at his office at 702 Kearns Building, Salt Lake City, Utah, 84101, this 29 day of March, 1978.

Stephen G. Morgan
STEPHEN G. MORGAN

EXHIBIT "A"

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

STATE OF UTAH

July 5, 1977

[illegible] CLERK LOGAN
[illegible] CLERK BRIGHAM
[illegible] CLERK RANDOLPH
[illegible] PARKER REPORTER LOGAN

VENOY CHRISTOFFERSEN
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Stephen G. Morgan
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Suite 200 State Exchange Building
345 South State Street
Salt Lake City, Utah 84111

Re: Craig Rees vs. Albertson's Inc.
Civil No. 15841

Dear Mr. Morgan:

In view of the affidavit of Mr. Newell G. Knight, the Court feels it is in order to review its decision and would suggest a motion to review or set aside the decision in order that counsel for the plaintiff would have time for an appropriate response to said motion.

Sincerely,

VeNoy Christoffersen
District Judge

VC:lgh

cc: John M. Chipman