1978

Craig Rees v. Albertson's : Brief of Appellant

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

BRIEF OF APPELLANT

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

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BRIEF OF APPELLANT

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 (R79) that this appeal is made.

STATEMENTS OF FACTS

On or about September 3, 1974, appellant Rees, and three others, McGehee, Andrews and Harris, purchased beer from the Albertson's market in Logan, Utah. (P32,L19, Dep. Craig Rees; P13,L10, Dep. Ricky Harris) Rees made the actual purchase of the beer. (P32,L19 Dep. Craig Rees) They then drove to Bear Lake

where they purchased more beer. (P36, L11, Dep. Craig Rees) While returning to Logan, they experienced a serious automobile accident wherein Andrews and McGehee were killed and Harris injured. As a result of the deaths and injury (P7,L23, Dep Leslie Langford) appellant Rees made payment in satisfaction thereof in total settlement of $54,742.50.

Appellant Rees then brought suit against respondent Albertson's for contribution pursuant to the Comparative Negligence Act of Utah, Utah Code Annotated 78-27-39. This action was based upon the fact that the purchasers of the beer were under-age, no identification was requested, and an excessive amount of beer was sold by Albertson's to these minors.

Initially, the respondent made a motion for summary judgment, (R35) which was denied by the trial court. (R48) Respondent then filed a motion for review (R55), which was allowed by the trial court. (R76) Respondent then filed an affidavit in support of his motion for summary judgment. (R51) Appellant then filed an affidavit in opposition to respondent's motion for summary judgment. (R63) Respondent then filed a

memorandum in opposition to appellant's affidavit. (R66) Appellant then filed a formal request for oral argument, (R70) pursuant to Rule 2.8 of the Rules of Practice in the District Courts of the State of Utah. The Court, without oral argument, then handed down its memorandum decision and judgment entered. (R48) Appellant then filed its own motion for review, (R76) which was denied by the trial court.

ARGUMENT

POINT I

THE TRIAL COURT DID ERR IN GRANTING DEFENDANT'S MOTION TO REVIEW AND SET ASIDE THE ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Respondent's initial motion to review the court's denial of its motion for summary judgment (R.055-057) is nothing more than a motion to reconsider. This court in Utah State Employee's Credit Union vs. Riding, 24 Utah 2d 211, 469 P.2d 1, (1970) stated:

> After the decisions above, the Andersons, on May 28, 1969, filed a motion to reconsider the judgment denying the motion to vacate and to vacate it. Under the record here, we are unaware of any such motion under our rules, . . .
>
> We think the motion to reconsider the motion to vacate the judgment is abortive

> under the rules, but even if it weren't, it was error under the rules to hear and act upon it without notice.

In Drury vs. Lunceford, 18 Utah 2d, 415 P.2d 662, (1966), this court stated:

> It is significant that our Rules of Civil Procedure do not provide for a motion for the trial court to reconsider or to review its ruling granting or denying a motion for new trial. . .
>
> When this has been done and the court has ruled upon the motion, if the party ruled against were permitted to go beyond the rules, make a motion for reconsideration, and persuade the judge to reverse himself, why should not the other party who is now ruled against be permitted to make a motion for re-reconsideration, asking the court to again reverse himself? Tenacious litigants and lawyers might persist in motions, arguments and pressures and theoretically a judge could go on reversing himself periodically at the entreaties of one or the other of the parties ad infinitum. This reflection brings one to realize what an unsatisfactory situation would exist if a judge could carry in his mind indefinitely a state of uncertainty as to what the final resolution of the matter should be.

It is also of interest that the trial court allowed Albertson's to file a motion to review and (R.055-057) after said order was set aside and a new order entered, upon Craig Rees' filing of an identical motion, which would reinstate the court's original ruling, the court

denied defendant's (we believe it was meant plaintiff's) motion stating:

> . . . and also in view of the decisions given in two Utah cases Drury vs. Lunceford, 415 Pac. 2d 662 and Utah State Employee's Credit Union vs. Riding, 469 Pac. 2d P. 1, the court further holds that it is an improper procedure and dismisses the motion. (memorandum decision, dated October 26, 1977)

Thus it appears that the trial court did err in granting Albertson's motion to review and set aside, by entering an order granting Albertson's motion for summary judgment after denying it. The trial court even admits that this is an improper procedure. (R.079)

POINT II

THE TRIAL COURT DID ERR IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

There are important issues of fact yet to be decided by the trier of fact, which were not considered by the court when it granted respondent's motion for summary judgment. These are: Whether Albertson's was negligent in selling beer to minors; whether the Albertson's beer contributed to appellant's intoxication; and if negligent, the percentage of their contribution.

The trial court's failure to allow appellant oral argument, after requested in writing by the appellant, resulted in the trial court being without knowledge of these issues of fact.

The basis of Albertson's motion for summary judgment was that it would be impossible to determine, from the alcohol content of the parties, how much of the Albertson's beer was consumed and was influencing the actions of the occupants at the time of the accident. (R68) However the affidavit of Dr. Stewart Harvey, (R63) foremost expert in alcohol and its effect on the human body, and a professor of pharmacology at the Department of Pharmacology, University of Utah, states that the beer obtained from Albertson's contributed to the appellant's intoxication at the time of the accident. (R65) The affidavit of Newell Knight, (R58), Utah Highway Patrol, indicates basic agreement with the affidavit of Dr. Stewart Harvey, but claims that the percentage of the Albertson's alcohol cannot be determined. (R59)

Respondent, therefore, claims that since the percentage cannot be determined with exactness, that

Albertson's should be free and their motion for summary judgment granted. (R69)

In the affidavit of Stewart Harvey, Craig Rees' expert, (R65) Dr. Harvey stated:

> . . ., it is my opinion that it is possible to determine that the alcohol from the beer purchased from Albertson's and consumed by plaintiff Rees was still in Rees' system at the time of the accident in question.

Albertson's erroneously believes that since in Rees' expert's affidavit it did not state the approximate amount of intoxication attributable to the Albertson's beer that it cannot be done, it can be done approximately, however, that amount is not in issue at this time.

The requirement to prevent a granting of a summary judgment is the existence of a material fact which is genuinely at issue. The intoxication of Rees and its proximate cause of the accident is given (Albertson's motion to review and set aside an order denying defendant's motion for summary judgment, R.56 para. 6). Albertson's also assumes that their beer was still in Rees' system at the time of the accident. (Albertson's

memorandum in reply to affidavit of Stewart C. Harvey, para. 5, R.67).

The question at issue is whether Albertson's beer contributed to the cause of the accident. Any alcohol in an individual's system contributes to his intoxication. Albertson's states that Rees' intoxication was a proximate cause of the accident, (R.56) and will also assume that their beer was still in Rees' system at the time of the accident. (R.67) It appears clear that Albertson's beer contributed to Rees' intoxication which was a proximate cause of the accident. (R.45) The only questions that remain are whether Albertson's was negligent in selling beer to a minor, and if negligent what percentage should their contribution be. These are both questions of fact which are reserved for the trier of fact.

In addition, Rees filed by mail his request for oral argument, pursuant to Rule 2.8(e) of the Rules of Practice in the District Court of the State of Utah. (R.070) Rule 2.8(e) states:

> (e) In all cases where the granting of a motion would dispose of the action on the merits, with prejudice, the 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.

Defendant Albertson's motion was not denied, therefore Rees' was entitled to oral argument, prior to any decision.

Summary judgment can be given only in a case when there is no dispute on a material issue of fact. This court in Russell v. Park City Utah Corporation, 29 Utah 2d 184, at page 187, 506 P.2d 1274 stated:

> The fundamental and controlling rule in this case is that summary judgment should be granted only when it clearly appears that there are no issues of material fact in dispute which if resolved in favor of the adverse party would entitle him to prevail.

It is a severe remedy to grant a summary judgment. This court said in Housley v. Anaconda Company, 19 Utah 2d 124 at p. 127, 427 P.2d 390:

> Prior decisions point out that summary judgment is a drastic remedy and should be granted with reluctance.

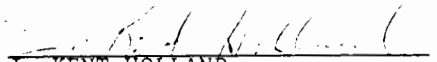
Therefore summary judgment should only be given if there are no issues of material fact.

CONCLUSION

Appellant respectfully represents to the court that summary judgment in favor of the defendant was not warranted.

RESPECTFULLY submitted this 6th day of February, 1977.

HANSON, RUSSON, HANSON & DUNN



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