

2001

# Kent F. Fuller v. Zinik Sporting Goods Company : Brief of Respondent

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

KENT F. FULLER, a minor  
appearing by and through  
CONNIE J. FULLER, his  
guardian ad litem,

*Plaintiff and Appellant,*

vs.

ZINIK SPORTING GOODS  
COMPANY, a corporation, and  
THOMAS E. FOLKMAN,

*Defendants and Respondents.*

Case No.  
13905

## BRIEF OF RESPONDENTS

**Appeal from Judgment and Order  
Third District Court, Salt Lake County  
Honorable Peter F. Leary, Presiding**

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## BRIEF OF RESPONDENTS

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### STATEMENT OF CASE

This is a civil action brought by the plaintiff against defendants alleging false arrest, false imprisonment and malicious prosecution.

Plaintiff was arrested while shoplifting at the store of defendant, Zinik Sporting Goods, located on Main Street, Salt Lake City, Utah.

## DISPOSITION IN LOWER COURT

The matter was tried to a jury. The trial court submitted the three issues of false arrest, false imprisonment and malicious prosecution to the jury on separate verdicts. The jury's finding on each of the verdicts was in favor of the defendants, no cause of action. (R. 150-152). Thereafter, plaintiff made a motion for a new trial which was denied. He appeals therefrom.

## RELIEF SOUGHT ON APPEAL

Defendants seek affirmance of the jury verdicts and trial court's order denying plaintiff a new trial.

## STATEMENT OF FACTS

The facts hereinafter set forth will reflect the testimony of the witnesses and the plaintiff in a light most favorable to the jury's findings and verdict, together with all reasonable inferences flowing therefrom. A considerable amount of time and space has been devoted by the plaintiff to a recitation of facts viewed in a light most favorable to the plaintiff but contrary to the jury's findings. Since it is the jury's prerogative to pass upon the credibility of the evidence and of determining the facts, the defendants will recite the facts in such a light. *Flynn v. W. P. Harlin Construction Company*, 29 Utah 2d 327, 509 P.2d 356.

On August 14, 1973, at about two o'clock p.m., the plaintiff, Kent Fuller, rode into Salt Lake City on his motorcycle where he parked the same at a parking meter on Main Street (R. 7). He entered Zinik's Sporting Goods on Main Street. He carried his helmet by the chin strap which was slung over his arm. When he entered the store, he went towards the rear where the mountain climbing equipment was located. (R. 12). In this area, he noticed a pegboard-type display of equipment used in mountain climbing. The display included the price of each item on the board by a sign located over the peg from which the item was hung and also by a price sticker attached to the item. Mr. Fuller stated that he looked at the items and in doing so, picked up a karabiner to check its price (R. 33-34). A karabiner is an object used in climbing to attach to wedges driven into the rocks so that a rope may thereafter be attached. It has the appearance of a large chain link where one end can be opened with a catching device to pass the link through the hole of the wedge. (Exhibit 2 P).

While standing in the area of the climbing equipment, an employee of the defendant, Zinik's, observed Fuller placing a karabiner under his shirt at the waist area where he attempted to conceal it. The employee, Mr. Spicer, after making this observation, called the matter to the attention of other employees, Richard Bringham and Gary Beckstead. (R. 68-70). As soon as Mr. Spicer passed the word to the other employees

that the plaintiff was apparently attempting to steal the karabiner, he moved from the area of observation to the check stand located near the center of the main floor of the store (R. 71). At this point, employee Bringhurst stated that he noticed the plaintiff fumbling his motorcycle helmet and lifting two envelopes which were in the helmet so he could put the karabiner inside the helmet and under the envelopes (R. 80). Beckstead was directed to approach Fuller and wait on him. (R. 71). In doing so, he asked Fuller if he could be of assistance. Fuller told him he was interested in buying a water jug or container for his mother. At this point the employee directed him to the counter a few feet away where the water jugs or containers were displayed (R. 95). After looking at a water jug or container, Mr. Fuller indicated his desires to purchase the jug and with the clerk, Gary Beckstead, he walked to the check stand. Upon arriving at the check stand, Beckstead asked Mr. Fuller as follows:

“Q. And did Mr. Fuller find the water container he was looking for?

“A. I pointed it out to him. I believe I picked it off the deal and handed it to him. He said that was what he wanted. I took it from him. I walked down to point 4 with him following behind him.

“Q. That’s the check stand?

“A. Yes, where I walked around the check stand, and at that time, I asked him if there was anything else, and he said, no, and —.” (R. 95)



After the sale of the water bag had been entered on the cash register and payment received, the plaintiff then walked away from the check stand, carrying his helmet where he went to the counter containing bows and arrows. At this point, Mr. Thomas E. Folkman, the Assistant Manager for the store, observed the plaintiff standing at the display of bows and arrows. Mr. Folkman had been summoned by one of the employees from his office upstairs and had been informed there was a shoplifter in the store. Mr. Folkman then walked from near the front of the store toward the bow and arrow display which was south of the check stand area. Mr. Beckstead, the clerk, was then asked what took place at this point. He stated:

“Q. Did you hear any conversation at all between Mr. Folkman and Mr. Fuller?

“A. Just that Mr. Folkman asked Mr. Fuller if he had a karabiner.

“Q. What did he say, Mr. Fuller?

“A. I don't recall what he said. It gives me the impression that he said that he didn't know what he was talking about.” (R. 96-97)

Mr. Spicer who initially noticed the attempted theft testified:

“Q. All right, thank you. Now, when you walked up to Kent Fuller, did you have a conversation with him?

“A. I said, ‘May I help you, young man?’ and he said ‘I'm just looking around.’”

"Q. And where were you when Mr. Fuller and the other fellow, Mr. Beckstead, got up to the check stand?

"A. I stayed in the same place.

"Q. The north end of the check stand.

"A. Yes.

"Q. Did you hear conversations between the two of them at the check stand?

"A. Mr. Beckstead says: 'Would it be cash?' And he says 'Okay.' He says, 'Is there anything else that you would like to pay for, young man?' And the reply from the customer was, 'No.' " (R. 71)

Mr. Fuller then walked from the check stand over to the bows and arrows. The Assistant Manager and defendant, Mr. Folkman, waited for the plaintiff to give him an opportunity to return the karabiner to the pegboard. When it became apparent to Mr. Folkman that the plaintiff was not going to do so, Mr. Folkman then approached him and asked him where the item was. The plaintiff then indicated that he didn't know what the Assistant Manager was talking about. Thereafter, he was requested to open his pockets inside out to see if they were being used to conceal the karabiner. When the pockets appeared empty, Mr. Folkman then told the plaintiff that he wanted to look inside the helmet underneath the envelopes (R. 102). At this point, the karabiner was discovered under the envelopes. Thereafter, the plaintiff was taken to a room at the rear of

the store where Mr. Folkman called the police. Another employee stood outside the room while Mr. Folkman made the phone call. As soon as Mr. Folkman had completed the call, the following transpired:

“Q. What did you do when you got into the back room?

“A. I sat down, called the police and just waited, and after I hung up the phone, Mr. Fuller said, ‘Why don’t you let me pay for it?’ I said ‘I’m sorry, but that’s not the policy of the store. If you shoplift, you have to pay the price.’ ” (R. 102-103)

Thereafter the police arrived and placed Fuller under arrest, taking him to the police station. Mr. Folkman further testified:

“Q. And did Mr. Fuller at any time to your recollection ever tell the police that he hadn’t stolen anything?

“A. No, sir, he did not.” (R. 53, 102-103)

After arriving at the police station, the plaintiff called his mother. She then called the defendant store and indicated that her son had been arrested for shoplifting. She asked whether or not the Assistant Manager, Mr. Folkman, wouldn’t drop the charges. He told Mrs. Fuller that he was not permitted to do such a thing as it was the store’s policy to prosecute shoplifters. (R. 103-105).

The plaintiff testified he was merely carrying the

merchandise, trying to make up his mind whether or not to buy it (R.43). No mention was ever made of the karabiner, its cost or the desire of the plaintiff to purchase the same until after the police were called. At this point, he then asked the Assistant Manager if he wouldn't permit him to pay for the item and leave the store.

## **POINTS URGED FOR AFFIRMANCE**

**POINT I. THE TRIAL COURT PROPERLY REFUSED TO GRANT PLAINTIFF'S MOTION FOR A DIRECTED VERDICT AS TO LIABILITY FOR HIS DETENTION AND ARREST.**

**POINT II. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE ISSUES OF PROOF.**

## **ARGUMENT**

**POINT I. THE TRIAL COURT PROPERLY REFUSED TO GRANT PLAINTIFF'S MOTION FOR A DIRECTED VERDICT AS TO LIABILITY FOR HIS DETENTION AND ARREST.**

Appellant in his brief cites Section 77-13-30, Utah Code Annotated, 1953 as amended, in support of his argument. That statute states:

"A peace officer, or a merchant, a merchant's employee, servant or agent, who has reasonable and probable ground for believing that goods held or displayed for sale by the merchant have been taken by a person with intent to steal may, for the purpose of investigating such unlawful act and attempting to affect a recovery of said goods, detain such person in a reasonable manner for a reasonable length of time."

A companion statute concerning civil liability for arresting shoplifters recites as follows:

"A peace officer or a merchant, a merchant's employee, servant or agent, who causes such detention of a person as provided in Section 77-13-30, or who causes the arrest of a person for larceny of goods held or displayed for sale shall not be criminally or civilly liable where the peace officer, or merchants, merchant's employee servant or agent has reasonable and probable ground for believing that the person detained or arrested committed larceny of goods held or displayed for sale." Section 77-13-32, Utah Code Annotated 1953, as amended.

Thereafter, in appellant's brief, he cites decisions and statutes from other jurisdictions which admittedly contain provisions unlike those of Utah statutes.

The jury in the instant case reviewed all of the

evilence. It answered each and every verdict in favor of the defendants. It was the prerogative of the jury to decide whether or not the plaintiff was in the store with an intent to steal the defendant Zinik's property. It was further the prerogative of the jury to decide whether or not the employees of the defendant, including Mr. Folkman, acted reasonably and prudently under the circumstances and had reasonable and probable grounds for believing that the goods held by Zinik's for sale had been taken by the plaintiff with the intent to steal. These issues of fact were found against the plaintiff. Unless the plaintiff can show that the jury's finding is clearly erroneous and contrary to the evidence viewed in a light most favorable to their findings, the verdicts should be allowed to stand.

Plaintiff in his brief has omitted testimony concerning his attempt to conceal the merchandise and his refusal to pay for the merchandise when passing through the check stand. Plaintiff's counsel cross-examined the defendant and Assistant Manager, Folkman, concerning the propriety of customers carrying merchandise with them in and about the store trying to decide whether to make a purchase. In response to these inquiries, Mr. Folkman answered as follows:

"A. Most people do not inspect merchandise without looking at it. I can't see how he inspected it in his motorcycle helmet underneath the pictures without seeing it." (R. 106).

Plaintiff testified on direct examination that he did not intend to steal the merchandise. The jurors obviously did not believe this testimony in light of all of the other evidence and so indicated by their verdicts. Appellant does concede that the Utah Statutes quoted above absolve employees from civil liability if reasonable and probable ground exists for believing that a person is intending to commit larceny of goods. The jurors, after hearing all of the testimony, including that of the plaintiff, unanimously concluded that there was probable grounds to believe that plaintiff was trying to steal the karabiner. There is nothing in our statutes that require the merchant or his employees to wait until the thief has fled before attempting recovery of the goods. The plaintiff had passed through the check stand and rejected a request to pay for the goods. He further told Mr. Folkman that he didn't know what he was talking about when he asked him where he had hidden the karabiner.

Plaintiff was given every reasonable opportunity to pay for the merchandise or remove it from his helmet and replace it on the shelf which he did not do. When it became apparent that he was not going to do either of the alternatives mentioned above, he was confronted by Mr. Folkman. At this late point, the plaintiff did not tell anyone that he had the karabiner on his person nor did he tell them he wanted to purchase it. He remained silent while he was asked to go through his pockets in an effort to locate the item. When it was

not found in its pockets, Mr. Folkman then asked him to display his helmet in order that he might discover what was underneath the envelopes. The item was then found by Mr. Folkman inside the helmet. It was not until the police had actually been called that the plaintiff requested permission to purchase the item and leave the store to avoid arrest. He told his mother he had been arrested for shoplifting in the store when he telephoned her from the jail. She was in the courtroom during all of the testimony acting as his guardian ad litem. Testimony was received that Mrs. Fuller called the store stating that her son had been arrested for shoplifting, indicating that he had never done anything like this before. She asked that the charges be dropped. No rebuttal evidence was offered.

Certainly, the facts as stated above clearly show there was reasonable grounds for the jury to make the findings necessary to support its verdicts. The facts surrounding the shoplifting were for the jury's determination. In the case of *Hindmarsh v. O. P. Skaggs Foodliner*, 21 Utah 2d 413, 446 P.2d 410, this Court discussed the rules that apply in reviewing the findings of a jury. It stated:

“When the jury has made its determination, these further basic principles of review apply: Inasmuch as it is the prerogative of the jury to judge the credibility of the witnesses, we are obliged to assume that they believed the evidence which supports their verdict; and therefore, it is our duty to survey the evidence and all reason-



able inferences that fairly can be deduced therefrom in the light favorable to the verdict.”

See also *Erwell & Son, Inc. v. Salt Lake City Corporation*, 27 Utah 2d 188, 493 P.2d 1283; *Ivie v. Richardson*, 9 Utah 2d 5, 336 P.2d 781; and *Niemann v. Grand Central Markets, Inc.*, 9 Utah 2d 46, 337 P.2d 424.

Plaintiff recites considerable evidence and testimony to the effect that he had the funds in a checking account and that his folks had a charge account in the store which would negate any idea that he had a reason to steal. Fortunately, all thefts are not committed by the poor. The jurors chose to believe the defendants' evidence. They obviously believed that the plaintiff, Kent Fuller, was attempting to steal the merchandise. The court correctly refused a directed verdict on these factual issues.

## POINT II. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE ISSUES OF PROOF.

The plaintiff complains that the court improperly instructed the jury concerning the burden of proof required of the parties. The court gave Instruction No. 11 which told the jurors in substance that the statutes quoted permit employees of merchants to detain persons where there is reasonable and probable

grounds to believe the person being detained or arrested was committing larceny of goods held for sale. The court thereafter informed the jurors in said instruction that if they believed the plaintiff took the goods with intent to steal and that his detention was reasonable under the circumstances, they should return a verdict for the defendants (R. 166). The court then gave Instruction No. 19. This instruction told the jurors in essence that if at the time of the plaintiff's arrest, the jury should find that defendants did not have reasonable or probable grounds for believing that plaintiff had committed larceny, they were further instructed that they should return a verdict in favor of the plaintiff and against the defendants (R. 174). The instructions given by the court clearly and accurately informed the jurors of the law involved in the case. The fact that the court did not give a supplemental instruction on proof did not in any way modify the proof required of the parties to the action. The jurors were certainly not misled by the court's refusal to give the additional instruction. In the case of *In re Richards Estate*, 5 Utah 2d 106, 297 P.2d 542, this Honorable Court stated:

“A refusal to give an instruction cannot be the basis for reversal unless the jury was insufficiently advised of the issue they were to determine, or it appear that they would have been confused or misled to the prejudice of the persons complaining thereof.”

The jurors were certainly in possession of all of

the facts. The court's instructions clearly indicated that they were to decide the issues of probable cause and what the result would be based upon their findings. They were clearly told that if they felt there was no probable cause for the defendants to detain and arrest the plaintiff, then defendants would be liable to the plaintiff. The issues were properly presented to the jury and resolved against the plaintiff. This Court stated in the case of *Hales v. Peterson*, 11 Utah 2d 411, 360 P.2d 822:

“However, from the standpoint of administering even-handed justice, the court must dispassionately survey such claims against the over-all picture of the trial, and if the parties have been afforded an opportunity to fully and fairly present their evidence and arguments upon the issues, and the jury has made its determination thereon, the objective of the proceedings has been accomplished. And the judgment should not be disturbed unless it is shown that there is an 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, which we have concluded does not exist here.”

This Court also considered complaints lodged against instructions given at trial and reviewed the law concerning the same in the case of *Rowley v. Graven Brothers & Company*, 26 Utah 2d 448, 491 P.2d 1209. The Court stated:

“The mandate of our law is that we do not re-

verse for mere error or irregularity. We do so only if the complaining party has been deprived of a fair trial. The test to be applied is: Was there error or irregularity such that there is a reasonable likelihood to believe that in its absence there would have been a result more favorable to him? If upon a survey of the whole evidence this question must be answered in the negative, then there is no justifiable basis for reversal of a judgment."

The court's instructions given at the time of trial clearly informed the jury of the issues. The jurors obviously found that there was probable cause to detain the plaintiff and cause his arrest. Plaintiff has shown absolutely nothing in the record to indicate that the court should have given the additional instruction and had it done so, the jury's determination would have been different. The trial court correctly instructed the jurors on the law. Based upon the evidence and the court's instructions, the jurors found against the plaintiff.

On Page 28 of plaintiff's brief, he states:

"The fact that the jury returned a verdict of No Cause of Action can only be justified by a finding that justification existed for making the detention and arrest."

With this statement we agree. The jury's determination was made from facts presented at trial. Such is their exclusive prerogative. Plaintiff has failed to carry his burden of showing reversible error.

## CONCLUSION

It is readily understandable why counsel for plaintiff, his son, feels so strongly about the case in question. The jurors obviously felt from the testimony of the plaintiff and witnesses that there was an intent to steal the merchandise. Their findings, unanimous on each verdict, clearly advised the litigants and the court that the jurors felt there was ample cause for the detention and arrest of the plaintiff for his conduct. It is respectfully submitted that the juror's verdicts and the ruling of the trial court in refusing to direct a verdict or grant a new trial to the plaintiff should not be disturbed.

Respectfully submitted,

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