2001

Allen C. Winters v. W.S. Hatch Co : Brief of Appellant

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

ALLEN C. WINTERS,
Plaintiff-Appellant,

vs.

W. S. HATCH CO.,
Defendant-Respondent.

Case No. 13997

BRIEF OF APPELLANT

Appeal from the judgment of the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable G. Hal Taylor, presiding.

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TABLE OF CONTENTS

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STATEMENT OF THE NATURE OF THE CASE

Allen C. Winters appeals from a judgment of the Third Judicial District Court, Salt Lake County, State of Utah, granting respondent a judgment notwithstanding the verdict and against plaintiff of no cause of action.

DISPOSITION IN THE LOWER COURT

Appellant obtained a jury verdict on special interrogatories for damages for personal injuries against respondent and thereafter the Court below granted re-

spondent's motion for a judgment notwithstanding the verdict.

RELIEF SOUGHT ON APPEAL

Appellant seeks the reversal of the Court below and reinstatement of the verdict of the jury with directions that judgment be entered thereon.

STATEMENT OF FACTS

Appellant filed a complaint seeking damages from defendant for personal injuries arising out of an accident caused by respondent in the State of Nevada (R-138). Thereafter a trial by jury was held. Respondent's motion for a directed verdict at the close of the case was denied (T. 441). Appellant was given judgment on the special verdict (R-54-59). The jury was submitted the issues of respondent's negligence, appellant's contributory negligence, and damages on special interrogatories. All eight jurors found respondent to be negligent and that the negligence was the proximate cause of appellant's injuries (R-55). Six of the jurors found appellant not to be negligent while two found he was (R-55).

After the entry of the judgment respondent sought a judgment notwithstanding the verdict or in the alternative a new trial. The Court below granted respondent's motion for judgment notwithstanding the verdict, set aside the judgment on special verdict, and gave judgment against appellant of no cause of action (R-13). The motion for new trial was denied (R-2).

ARGUMENT

POINT I.

THE LOWER COURT ABUSED ITS DISCRETION AND DENIED APPELLANT HIS RIGHT TO JURY TRIAL BY GRANTING RESPONDENT J U D G M E N T NOTWITHSTANDING THE VERDICT.

The law in Utah and Nevada is virtually indistinguishable in considering the standards governing the granting of a judgment notwithstanding the verdict.

This Court has often dealt with varying fact situations and determined the propriety of a lower court's ruling on a motion for a judgment notwithstanding the verdict. In *Koer* v. *Mayfield Markets*, 19 Utah 2d 339, 431 P. 2d 566 (1967), a slip and fall case, the plaintiff got a jury verdict and the trial court granted a judgment n.o.v. for defendant. The jury had the issues of the defendant's negligence and the plaintiff's contributory negligence before it on special interrogatories and found for plaintiff on both issues. This Court, on the evidence in in the case, sustained the lower court's action, but pointed out that a trial court, in passing on a motion for a judgment n.o.v., can only enter such a judgment for one reason — "the absence of any substantial evidence to support the verdict." This Court then examined in detail the evidence, as must be done in each case, and concluded that there was no substantial evidence to support the jury's verdict.

This Court has also recognized the other basic considerations involved in granting a judgment n.o.v. In *Schow* v. *Guardtone*, 18 Utah 2d 135, 417 P. 2d 693 (1966), this court noted that trial courts should exercise reluctance and caution in interfering with the parties' desires for a jury trial. Whenever a judgment n.o.v. is granted, as in *Schow* and this case, the right to jury trial is eliminated entirely. This Court was acutely aware of this in *Holland* v. *Brown*, 15 Utah 2d 422, 394 P. 2d 77 (1964), when it said, 394 P. 2d at 79:

> In appraising this action of the trial court, it is important to distinguish between the granting of a new trial and the entering of a judgment notwithstanding the verdict. As to the former, the trial court is indeed endowed with a wide latitude of discretion in granting a new trial when he thinks the jury's vredict results in manifest injustice. This power is necessary to fulfill his function of maintaining general supervision over litigation to guard against miscarriages of justice which sometimes occur at the hands of juries. Allowing this broad discretion in the trial court to grant new trials does not deprive the parties of a fair trial by jury, but on the contrary, assures it. However, the granting of a judgment n.o.v. does completely override the jury and their verdict and thus effectively deprives the party of his right to a jury trial. Therefore, this can properly be done only when under the evidence and the law there is no reasonable basis in the evidence, or lack of it, to justify the verdict given.

This Court more recently dealt with this same issue

in *Flynn* v. *Harlin Const. Co.*, 29 Utah 2d 327, 509 P. 2d 356 (1973). In that case the plaintiff received a jury verdict on two issues. The trial court granted defendant's motion previously made for a directed verdict on one of those issues. While a judgment n.o.v. was not involved, the same standards apply. See, e.g. *Koer, supra.* This Court critically analyzed the trial court's reasoning in granting defendant's motion and reversed his action and reinstated the verdict and ordered judgment thereon.

This Court noted that the court was being very conscientious to see justice done, but in so doing the trial court usurped the jury's function. The trial court commented on credibility of witnesses, a prerogative belonging solely to the jury. This Court stated the rules and rationale well:

> We have no doubt that it is salutary for a trial judge to desire to be actively involved in the trial and to be eager to see that justice is done. Nevertheless, under our system of justice, it is neither essential nor desirable that the resolution of disputed questions of fact be forced into the exact mold of thought of any particular individual or judge. When a party has so requested, he is entitled to a trial by a jury of his fellow citizens. In order that that right be safeguarded as it should be, it is essential that the jury have the exclusive prerogative of passing upon the credibility of the evidence and of determining the facts.
>
> Therefore, no matter how ardent may be the trial judge's desire to see that justice is done from his own point of view, he has an obligation

of judicial restraint: to make allowance for the fact that other reasonable minds might arrive at a different conclusion than his own. This requirement of disciplined objectivity, in letting someone else have their way, and of letting justice be done from someone else's point of view, is one of the most difficult to achieve, and also one of the highest and most desirable of judicial qualities. Yet, unless this principle is applied in practical operation, the right of trial by jury becomes but a delusion. The jury is permitted to go meaninglessly through all of the procedures of the trial and render the verdict, but only on the undisclosed condition that, unless its verdict agrees with the thinking of the trial judge, it will be set aside and held for naught. This case with everything involved therein, including eight days of trial, is a prime example of the futility and frustrations in such procedure. It offers to plaintiff the hollow satisfaction of vindicating his contention that defendants had wrongfully terminated his contract, but deprives him of any material redress therefor. This is not what was intended by the right of trial by jury.

It has long been established in our law that a court should not take the case from the jury where there is any substantial dispute in the evidence on issues of fact, but can properly do so only when the matter is so plain that there really is no conflict in the evidence upon which reasonable minds could differ. As was said for this court long ago by the greatly respected Justice Frick:

> . . . unless the question is free from doubt, the court cannot pass upon it as a matter of law . . .

> . . . if . . . the court is in doubt whether reasonable men, . . . might arrive at different conclusions, then this very doubt determines the question to be one of fact for the jury and not one of law for the court.
>
> It should be plain from what has been said above that there was such a dispute in the evidence here, and that the court was correct in his rulings during the trial: in admitting the evidence, and in submitting the issues to the jury.

Further, in passing on a motion for a judgment n.o.v. the court is to review the evidence and all inferences therefrom, in the light most favorable to the verdict. See, e.g. *Bates* v. *Burns*, 3 Utah 2d 180, 281 P. 2d 209 (1955). Some courts have also held that even if the evidence is undisputed a judgment n.o.v. may be improper if different inferences may reasonably be drawn therefrom. See, e.g., *Chavira* v. *Carnahan*, 77 N. M. 467, 423 P. 2d 988 (1970).

All of the above standards and rules governing judgments notwithstanding the verdict are true as to Nevada law. That is, basically, if the facts are disputed or reasonable, men could draw different inferences from the facts, the question is one of fact for the jury and not one of law for the court.

If there is evidence "tending to support the verdict, or where there is a conflict of evidence, so that the jury could properly decide, either way, even though the conflict is such that the court would be justified in granting a new trial," a judgment n.o.v. is not proper. *Dudley*

v. *Prima*, 84 Nev. 549, 445 P. 2d 31 (1968). See also, for the same rules as above stated, *Sheeketski* v. *Bortoli*, 86 Nev. 704, 475 P. 2d 675 (1970).

It is of course clear that all of the above cases are guidelines and standards but that each case must turn on its own facts. In some of the above cases the court concluded, applying the above standards, that there was no substantial or reasonable evidence to support the jury's verdict. In some cases there was. In this case the issues the court faced and the issues this court must face are the negligence of the defendant and the contributory negligence of appellant. The lower court did not comment on which ground the judgment n.o.v. was granted, nor does the judgment itself reflect whether the court ruled appellant negligent as a matter of law or respondent not negligent as a matter of law.

As to respondent's negligence the jury unanimously found respondent negligent. The drivers of respondent's truck, Doran Higley and De Roy Higley each testified that they looked before pulling out and didn't see anything and then they pulled out and were hit.

De Roy Higley testified as follows:

T. Page 263, *Lines* 27-30; *T. Page* 264, *Lines* 1-21:

> Q. Is — I say, tell me what then occurred, what happens?
>
> A. Well, we started to merge and I definitely looked and I didn't see anything, and he made the comment that — or I did, I suppose

that, "Well, there's nothing coming," so we were on our way.

Q. Well, did your partner look with you?

A. Yes, he did.

Q. And by what means did he look?

A. Well, by turning his head to the left.

A. Yes, sir, uh-huh.

Q. Which would be looking west?

A. Uh-huh.

Q. You were proceeding down the road that enters onto the highway; is that right?

A. Uh-huh.

Q. And how did you look?

A. Well, I looked through my mirrors, but also by leaning forward as far as I can and looking back to the left.

Q. You looked in your mirrors and looked outside the window and back to your left; is that correct?

A. Yes.

T. Page 266, *Lines* 3-6:

Q. Did you look more than once?

A. Well, yes, I did.

Q. You did?

A. I did. After I entered the traffic lane and I still never seen anything.

From an analysis of the preceding testimony of the driver, he indicated that he looked before merging and saw nothing. He obviously did not see the appellant's vehicle which was clearly there to be seen.

Applying the above rules, it is abundantly clear that the testimony of De Roy Higley alone is substantial evidence to support the jury's verdict as to respondent's negligence. Clearly the lower court applying the substantial evidence test erred reversibly if it granted a judgment n.o.v. if it ruled as a matter of law respondent was not negligent. The jury, upon proper instructions, unanimously concluded respondent was negligent. To rule that as a matter of law respondent was *not* negligent would be to say the entire jury did not have a reasonable mind on it. In this case the court denied respondent's motion for a directed verdict at the end of the case. This would indicate, in the language of this court from *Flynn, supra,* that the matter was not "free from doubt" and that the lower court had a question as to what reasonable minds would do so he submitted it to the jury, who, being reasonable minds, decided the matter.

The identical analysis applies to the issue of appellant's contributory negligence. Reasonable minds decided six to two that appellant was not negligent. The testimony that the jury could have relied on, and the inferences therefrom, is extensive and has its source in various witnesses. The following is exemplary:

Testimony of Al Winters; T. Page 47, *Lines* 28-30, *T. Page* 48, *Lines* 1-3, 21-25:

A. I — when I left the cafe I got in my truck and I drove down the street a ways and turned up on the freeway, and I was going down the freeway, I can remember drinking some coffee not far out of Reno, and then beyond there — just — it's vague, but I remember some traffic, it seems like — it seems I can recall passing another truck somewhere.

A. No, sir. The last thing I can say for sure that I remember was going by a truck not far from there. I can't say exactly how far back it was, but I can almost definitely say I did pass — remember definitely passing that truck, like I say it's quite vague.

T. Page 92, *Lines* 29, 30; *T. Page* 93, *Lines* 1-9:

Q. No, I believe you testified on direct examination that before the accident you recall passing another vehicle; is that right?

A. Yes, sir, I believe it is.

Q. Do you recall what kind of vehicle it was?

A. I believe it was a semi, a set of trucks, I think it was a tractor with two trailers.

Q. And do you recall how long a period of time it took you to pass that vericle?

A. Not really, no, sir. It seems like I can remember going by it fairly fast like it was going a bit slower.

Testimony of James Owen Frei; T. Page 197, *Lines* 13-21:

A. If we — we ran this test to determine the visibility factor and also to get the speed factor, but as we approached back in this area that's here, we flashed our light in the truck I was riding it, and this second truck that was stopped started to accelerate so both vehicles would reach the area the accident occurred in at approximately the same time, and with him moving I could say the visibility was obstructed, and then the taillights were at all times visible, was only obstructed for 500 or a thousand feet.

T. Page 215, *Lines* 18-30:

Q. Did you ever pass another truck as you were proceeding to that area?

A. No. We were passed by several cars, but not trucks.

Q. And which lane of traffic were you proceeding in?

A. We were in the right-hand lane.

Q. Did you ever pass another truck and go to the inside lane and then come back to the outside lane?

A. No, we didn't.

Q. Do you have an opinion as to whether your view would ever have been obstructed had you passed a truck?

A. It would have been temporarily obstructed.

Q. Depending on where you passed the vehicle?

A. Well, yes, certainly.

Testimony of Douglas McNaught, T. Page 239, *Lines* 9-13:

> Q. Do you recall seeing clearance lights on either truck?
>
> A. I can't honestly recall seeing clearance lights, but I can only say in my own mind for me to recognize them as trucks —

Mr. McNaught after the accident testified concerning his recollection of the lights on the Hatchco vehicle:

T. Page 241, *Lines* 25, 26:

> A. I was able to make out the rear end of the tank truck, whether the lights were on or not, I can't recall.

Testimony of Doran L. Higley, T. Page 278, *Lines* 6-30; *T. Page* 279, *Lines* 1-10:

> Q. How many times on April 24 of 1974 did you testify that — or April 25 of 1974 did you testify that you brought your vehicle to a stop prior to entering the highway?
>
> MR. JENSEN: I will object to this as argumentative, repetitive. He has gone into this. The witness has admitted changing a certain number of times.
>
> THE COURT: Well, the objection — what do you claim for this? The witness has testified that he — he changed his mind. His recollection at the time of the deposition was taken was that he did stop.

MR. ATHAY: It's a prior inconsistent statement. I think the Jury is entitled to know how many times he made that prior inconsistent statement. That's what I claim for it.

THE COURT: Well, the fact that he made it more than once on the same day, I think the objection is well taken. It's sustained.

Q. (By Mr. Athay) Mr. Higley, is your recollection better now than it was on April 25 with respect to this incident?

A. I would say so.

Q. It is better now?

A. Yes.

Q. Is it better now because it's been refreshed by some other documents?

A. Well, it was proven by a tachograph for one thing.

Q. That's with respect to the stopping?

A. Yes.

Q. How about the other areas of your testimony?

A. Well, I am in doubt.

Q. You are in doubt?

A. Such as the lights, yes. I don't know really. I know they were on. I could say that honestly. When we stopped, come to rest, I don't know if the trailer lights were on.

Testimony of David Lord:

An independent expert, David Lord, attempted to

reconstruct the accident. The following testimony can be taken one of two ways:

1. That appellant, Allen C. Winters, had passed a vehicle and was proceeding in a general left to right direction from the inside to the outside lane just prior to impact, or,

2. That appellant, Allen C. Winters, had begun to take some evasive action by heading his vehicle towards the side of the road in an effort to avoid a collision with the defendants' Hatchco vehicle.

T. Page 312, *Lines* 4-24:

> A. 27-P is a gouge on asphalt, the photograph which I took in May, 1971. 26-P is a scrape which is a close-up I took in 1971.
>
> Q. Is there any particular angle that those marks proceeded on?
>
> A. Yes.
>
> Q. At a general left to right movement?
>
> MR. JENSEN: Well, I am going to object to any further testimony on the grounds that there is no showing as to their relationship to his area.
>
> MR. ATHAY: I am laying the foundation to do that. That's why I am proceeding.
>
> MR. JENSEN: I move the last answer be stricken, Your Honor, as immaterial at this point and no foundation shown.
>
> THE COURT: Go ahead and show your foundation as to what the marks are.

Q. (By Mr. Athay) O. K. Where were the — can you describe the direction of the marks?

A. In a general left to right direction on the highway.

T. Page 321, *Lines* 22-30:

Q. Now, Mr. Lord, did you reach any conclusions with respect to the direction which the F & B truck was driving?

A. Yes.

Q. And what factors did you rely upon to reach that conclusion?

A. Photographs of damage, the photographs of the skid marks, the skid marks that I observed at the scene, the chops, the gouges, the photograph of damage to the F & B truck.

T. Page 322, *Lines* 1-30:

Q. Would you step down and indicate quickly and briefly to the Jury which photographs best exhibit that which you have just described?

A. O. K. All of them tell a little bit. These three —

Q. Identify the exhibits as you use them.

A. Plaintiff's 17, plaintiff's 29 and plaintiff's 14. First of all, in plaintiff's 17 which is a shot of the front of the F & B truck, you are looking at it from the left front sort of on an angle toward the front of the truck, you can see

the damage carries considerably deeper on the left side of the truck. You can see the outline of the tank there which places it coming into it on an angle. You see a brief outline of the tank here, heavier damage on the left side. It come into it at an attitude exposing more on the left side of the tank — or the left side of the vehicle to the tank. You can see a rough outline of the tank here.

Here is the radiator which made the perpendicular marks on the back of the tank. What I am saying is this: If this represented the front of the F & B truck and this represented the rear of it — of the tank, it came in —

Q. Which photographs are you referring to?

A. This would be the F & B. I am using the photographs of the truck. This was the front of the F & B and this was the rear of the tank, the same is at an attitude such as this. That's why they have much deeper damage in the rear — or excuse me — on the left side of the F & B truck. He drove on it. This is further evidence by the wheel that we have looked at. It's been moved from the left to the right.

T. Page 323, *Lines* 1-7:

A. . . . It would take quite a bit of force moving toward the right here of the truck to break that axle and to move those wheels off to the right as they have done. This would require left to right movement.

Also the characteristics of damage on the rear of the tanker shows a right to left — or excuse me — a left to right movement.

Respondent put in evidence that appellant must have been negligent or he would have seen respondent's clearance lights. Doran Higley (T. 277) and De Roy Higley (R-405) testified the lights were on on their truck when they pulled out. However, the matter is not free from doubt. Another witness said he wasn't sure the lights were on (T. 239). Further, as this court noted the general rule in *Flynn, supra,* the jury did not have to believe such evidence. To say they should have is to usurp their function as being the sole judges of witness credibility.

Thus, as with the issue of respondent's negligence, there is reasonable, substantial evidence, and inferences therefrom, that reasonable minds could find that plaintiff was not negligent. Reasonable minds so found in the jury room and the fact that the trial court agreed with the two jurors who felt appellant negligent is not an adequate reason under the law to nullify the jury system. Trial by jury should not be so easily disposed with because the thinking of the jury did not agree with that of the tiral court.

In short, in this case there were two basic issues, defendant's negligence and appellant's contributory negligence, and there was a conflict in the evidence or those issues upon which reasonable minds could differ, as witnessed by the jury's six to two vote on one of those issues. Because that is so, it was reversible error to grant a judgment notwithstanding the verdict and nullify the jury system.

CONCLUSION

For the reasons above stated, that the court below erred and abused its discretion in granting a judgment notwithstanding the verdict for respondent, appellant respectfully submits that the judgment of the court below be reversed, the jury verdict be reinstated, and that judgment issue thereon.

Respectfully submitted,

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