

1978

Gull Laboratories Inc. v. Louis A. Roser Company : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GULL LABORATORIES, INC.,	:	
a Utah corporation,	:	
	:	
Plaintiff-Respondent,	:	
	:	
vs.	:	Case No. 15721
	:	
LOUIS A. ROSER COMPANY,	:	
a Utah corporation,	:	
	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third District Court
Salt Lake County, The Honorable Dean Conder, Judge

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TABLE OF CONTENTS

	<u>Page</u>
NATURE OF THE CASE.	1
DISPOSITION IN LOWER COURT.	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS.	1
ARGUMENT	
INTRODUCTION	6
POINT I: THERE WAS NO ERROR COMMITTED BY THE COURT IN RECEIVING EXHIBIT P-13 IN EVIDENCE.	7
POINT II: EVEN IF EXHIBIT P-13 WERE INADMISSIBLE, RECEIVING IT AS EVIDENCE WOULD ONLY BE HARMLESS ERROR	12
POINT III: ORDINARY PRUDENCE WOULD HAVE ENABLED ROSER COMPANY TO KNOW UPON WHAT FACTS GULL LABORATORIES BASED ITS CLAIM FOR RELIEF	13
POINT IV: THE EVIDENCE WAS SUFFICIENT TO JUSTIFY THE VERDICT AND THE DAMAGES AWARDED WERE NOT EXCESSIVE	16
CONCLUSION.	18

CASES CITED

	<u>Page</u>
<u>Continental Illinois National Bank and Trust Company of Chicago v. Eastern Illinois Water Co.</u> , 31 Ill. App. 3rd 148, 334 N.E.2d 96, 105-06 (1975).	8-9, 11
<u>Crellin v. Thomas</u> , 122 Utah 122, 247 P.2d 264 (1952)	6, 14-15
<u>Jensen v. Denver & R.G.Ry. Co.</u> , 138 Pac. 1185, 1192 (Utah, 1914).	7
<u>Lin Manufacturing Company of Arkansas v. Courson</u> , 436 S.W.2d 472 (Ark. 1969).	10
<u>Schiltz v. Cullen-Schiltz & Associates, Inc.</u> , 228 N.W.2d 10, 19-20 (Iowa, 1975).	9-10
<u>Uptown Appliance & Radio Co., Inc. v. Flint</u> , 122 Utah 298, 249 P.2d 826 (1952)	7

AUTHORITIES CITED

JONES, EVIDENCE (6th ed., 1972)	7-8
<u>Utah Rules of Civil Procedure</u> , Rule 59(a)	6-7
<u>Utah Rules of Civil Procedure</u> , Rule 61.	12

NATURE OF THE CASE

This is an action for damages resulting from the spillage by Appellant, Louis A. Roser Company's, agent of a goat serum conjugate developed for commercial laboratory diagnostic purposes.

DISPOSITION IN LOWER COURT

In December, 1977, a District Court jury found that Respondent, Gull Laboratories, Inc.'s, damages amounted to \$65,197.00 and that said damages resulted 70% from the negligence of Roser Company. Judgment was entered for Gull Laboratories in the amount of \$45,637.90, plus costs. Roser Company's motion for a new trial was denied.

RELIEF SOUGHT ON APPEAL

Appellant, Louis A. Roser Company, seeks a reversal of the judgment of the lower court and a new trial on all issues.

STATEMENT OF FACTS

The incident giving rise to this lawsuit occurred at Gull Laboratories, Inc. in Sandy, Utah, in the latter part of February, 1976. Dr. Myron W. Wentz is the director and principal stockholder of that organization.

Gull Laboratories, Respondent herein, had

engaged in scientific research from 1974 until the incident in question in 1976, developing a unique goat serum conjugate for use by hospitals, clinics and laboratories in a test kit to be used in diagnosing certain diseases. (R497).

In February, 1976, the kits were nearing readiness for introduction on the commercial market (R506) when the walk-in cooler in which the conjugate was being stored became defective, causing a potentially harmful temperature rise in the cooler. (R528, 697). Dr. Wentz called Fur Breeders Agricultural Cooperative, from whom Gull Laboratories leased the laboratory. Fur Breeders sent representatives who entered the cooler to check the refrigeration unit. (R593). They neither discovered the defect nor caused any damage to the conjugates or reagents stored in the cooler. (R528, 720-24).

Subsequently, Fur Breeders called Louis A. Roser Company and asked Roser Company to send someone to repair the unit. Roser Company then sent their "lead serviceman" (R676) to the laboratory on a Friday afternoon in February, 1976. Mr. Meyer, the repairman, testified that he wore corrective lenses because of cataracts and that his vision was a little fuzzy or cloudy (R653-54) and that he suffered from nerve deafness, making it difficult for him to hear.

(R658-59). There is a conflict of testimony concerning how he got to the cooler; he claims he went to the cooler without anyone showing him to it. (R659). However, it is uncontested that when he left, a flask containing the goat serum conjugate, the result of months of research and development, was tipped over and the conjugate lost due to spillage. (R536, 672a-73a, 693, 702). Meyer left the laboratory, he spoke to no one and thereafter denied any negligence or responsibility (R667-668) in the spillage of the conjugate. The jury in its verdict determined the facts to be otherwise.

Roser Company claims that the evidence is conflicting as to whether the conjugate was totally lost. (Brief of Appellant, Page 9). In fact, the only direct testimony by eye witnesses was to the effect that virtually all of the conjugate was spilled. (R538). In rebuttal, a competitor of Gull Laboratories, Dr. Muna, (R710a) testified that it might not have been a total loss, even though he was not a witness to the spillage. There is, in fact, no evidence that Dr. Muna was ever in Gull Laboratories at all.

Dr. Wentz immediately called Fur Breeders who said they would get him in touch with the proper people. (R538-39). Soon thereafter, a representative of Roser's

insurance company met with Dr. Wentz and prepared a three page estimate of what Dr. Wentz then thought it might cost to reproduce the spilled conjugate. (R578-82). A single page of that estimate, Exhibit D-16, was introduced by Roser Company as evidence of Gull Laboratories' loss. (R581). At the trial, Dr. Wentz testified that the actual cost of reproducing the conjugate came to \$65,197.00. He testified as to specific costs making up that figure (R559-61) and Roser Company had the opportunity to cross-examine him concerning the component and total cost. (R577-78). Exhibit P-13 was introduced as an itemization of those figures. Whether the actual loss was the amount contained in the insurance company's estimate, Exhibit D-16 or the amount testified to by Dr. Wentz from actual experience and itemized in Exhibit P-13, was a question of fact which was decided by the jury in favor of Gull Laboratories.

Roser Company has claimed that it was surprised by the testimony of Dr. Wentz regarding the actual amount of damages. (Brief of Appellant, Page 23). Roser Company had made no effort to discover this amount, even after Dr. Wentz stated in his deposition in November, 1976, that he had spent considerable time and money to replace the lost conjugate. Contrary to Roser Company's contention, (Brief

of Appellant, Page 28) attempts to reimmunize the animals began in March, 1976, and continued throughout the summer. (R557). Wentz further stated that his attempt to render conjugates adequate for his purposes was "...the thrust of my efforts since the accident, since the loss of the other material." (R272). Roser Company made no formal or informal requests to examine the records of Gull Laboratories concerning the loss resulting from the spillage and the resultant damages at anytime prior to trial. Such information could have been readily provided by Dr. Wentz since he personally directed the work of recovery (R556-59) and, contrary to the contention of Roser Company (Brief of Appellant, Page 18), he kept the records of Gull Laboratories' operations. (R577). A statement made by Roser Company's counsel before the jury on this subject was somewhat misleading. The court asked if Exhibit P-13 was a summation of what was on the books and records of Gull Laboratories. When Mr. Richman replied that it was, Roser's counsel said, (R560, lines 5-6):

MR. BERRY: I don't think its on the books
and records, Your Honor. I
haven't seen it on the books.

The implication was that he had reviewed the books and records and had not found that information. The fact is, he had never seen those records because he had never asked

to see them prior to that moment. Those records, nevertheless, existed and were prepared by and under the direction of Dr. Wentz who was able to give competent testimony concerning their contents.

ARGUMENT

INTRODUCTION

The Utah Supreme Court has said, in Crellin v. Thomas, 122 Utah 122, 247 P.2d 264 (1952): "The granting of a new trial should never be merely capricious and arbitrary, but should only be done when sound judicial discretion, in the interest of doing justice between the parties, so requires." Rule 59(a) of the Utah Rules of Civil Procedure defines the limits of such discretion, stating that the following are the pertinent grounds for granting a new trial:

Rule 59(a) Grounds

* * *

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against the law.

(7) Error in law.

Granting a new trial for reasons not circumscribed by the above mentioned rule would "prostitute the constitutional trial by jury." See Jensen v. Denver & R. G. Ry. Co., 138 Pac. 1185, 1192 (Utah, 1914); Uptown Appliance & Radio Co., Inc. v. Flint, 122 Utah 298, 249 P.2d 826 (1952).

POINT I

THERE WAS NO ERROR COMMITTED BY THE COURT
IN RECEIVING EXHIBIT P-13 IN EVIDENCE.

Roser Company claims that Gull Laboratories is "now estopped to deny its claim that P-13 is a summary and is consequently bound by the law pertaining thereto." (Brief of Appellant, Page 15). Whether that exhibit was or was not a summary is immaterial and Gull Laboratories can certainly not be estopped from claiming other grounds for the propriety of such evidence. Roser Company claims that such exhibit was improperly admitted as violating the best evidence rule. However, it is clear as set forth in 2 JONES, EVIDENCE, §7.4 (6th ed., 1972), p. 96, that the best evidence rule does not apply:

§7.4. Distinction Between Proof of Contents

and Proof of Facts Asserted in Writing. - While the instrument itself is the best evidence, and, if available, the only evidence of what it contains, it often happens that the recitals of the instrument are hearsay, such as the narration of events in a letter. In such cases the writing itself is not admissible to prove the truth of its recitals unless it can qualify under an exception to the hearsay rule. Thus two distinct rules are involved, the one relating to proof of what the instrument contains and the other relating to the probative effect of its recitals. The best evidence rule applies only in the case of the former. So if the writing is admissible to prove the facts which are recited therein, it may or may not have greater weight than oral testimony of the same facts; but the best evidence rule does not apply, and oral testimony and the writing are equally admissible except as limitations may be imposed by some other exclusionary rule of evidence.

Furthermore, there is no preferential rule which requires the production of the writing if the fact to be proved is an independent fact to which the writing is merely collateral or circumstantially relevant... ." (Emphasis added).

The legal principal thus stated has been followed generally in jurisdictions throughout the United States. Illustrative of this is an Illinois case where the Plaintiff attempted to show certain expenses as damages. It will be noted that in this case, Respondent introduced Exhibit P-13 also to show certain expenses as damages. The Illinois court stated in Continental Illinois National Bank and Trust Company of Chicago v. Eastern Illinois Water Co., 31 Ill. App. 3rd 148, 334 N.E.2d 96, 105-06 (1975):

At the trial, in order to prove expenses incurred by plaintiffs as a result of defendant's default on the mortgage, plaintiffs introduced a number of letters which had been sent to defendant by plaintiffs. The letters were nothing more than written notice of expenses which plaintiffs claimed pursuant to one or more provisions of the mortgage. Defendant at the trial objected to the admission of the exhibits as not competent because not the best evidence. The exhibits were admitted over defendant's objections. On this appeal defendant renews its contention that the exhibits were incompetent because not the best evidence... .

Defendant misunderstands the purpose and application of the best evidence rule. The best evidence rule applies only when the contents or terms of a writing are in issue and are, therefore, to be proved. (Citations). In the instant case the issue was not the contents of a writing but rather the amount of expenses that had been incurred by plaintiffs. The best evidence rule does not apply where a party seeks to prove a fact which has an existence independent of any writing, even though the fact might have been reduced to, or is evidenced by, a writing." (Citations). (Emphasis added).

It is clear that the principles set forth in JONES and Continental Illinois are applicable to the question before this court and that it is a misapprehension of the issues to contend that Exhibit P-13 is not admissible because it does not meet the requirements as an exception to the best evidence rule. In Schiltz v. Cullen-Schiltz & Associates, Inc., 228 N.W.2d 10, 19-20 (Iowa, 1975),

plaintiff tendered a "rundown" of costs and wages. The defendant contended that the plaintiff had in his possession receipts, vouchers, agreements or some form of written evidence which would better prove the elements of damage he testified to. On appeal, the court disagreed, saying:

The authors of McCormick on Evidence (Second Ed.), Section 229, say, "the only actual rule that the 'best evidence' phrase denotes today is the rule requiring the production of the writing."

Rule of best evidence obtainable is expressly, if not solely, applicable to documentary evidence, (Citation), and has no application where the fact to be proved is independent of any writing even though the fact has been reduced to a writing or is evidenced by a writing. (Citations).

The rule excludes testimony designed to establish the terms of a document, and requires the document's production instead, but does not exclude testimony which concerns the document without aiming to establish its terms. (Citations).

In Lin Manufacturing Company of Arkansas v. Courson, 436 S.W.2d 472 (Ark. 1969), the court quoted McKelvey on Evidence, 1944 Ed., at §345 as saying: "There is a distinction between proving a fact which has been put in writing and proving the writing itself. Because a fact has been described in writing does not exclude other proof of the fact." (Emphasis added).

The trial court was aware of the distinction

between the issues as perceived by Roser Company and as they actually were. Roser Company's objection was based on the best evidence rule. Objection was made to the introduction of P-13 as follows:

MR. BERRY: Your honor, I object to P-13 as not being the best evidence of the books and move his answer be stricken as not responsive as to showing that he had information firsthand on which he could make this summary.

The court responded as follows:

THE COURT: Based on that objection, I'll overrule it; the exhibit may be admitted. (R561).

It appears, as in the Continental Illinois case that Roser Company "misunderstands the purpose and application of the best evidence rule...In the instant case the issue was not the contents of a writing but rather the amount of expenses that had been incurred by plaintiff." In such a case, the best evidence rule is inapplicable and we need not concern ourselves with compliance with the requirements for allowing an exception thereto. The writing, Exhibit P-13, was as admissible as evidence as the oral testimony of Dr. Wentz concerning the subject matter covered by the writing.

POINT II

EVEN IF EXHIBIT P-13 WERE INADMISSIBLE,
RECEIVING IT AS EVIDENCE WOULD ONLY BE
HARMLESS ERROR.

Rule 61, Utah Rules of Civil Procedure, reads:

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or admitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. (Emphasis added).

Exhibit P-13 itemized the costs of reproduction of the lost conjugate. Oral testimony could properly have been, and in fact was, presented by Dr. Wentz concerning such costs. Company records were maintained by Dr. Wentz and the costs were incurred in work performed under his direction. He was qualified to express his knowledge verbally concerning the value of material and labor involved. Such evidence could properly have been, and was, placed before the jury by oral testimony. The acceptance of Exhibit P-13, even if erroneous, could have had very little effect, if any, on the substantial rights of the Roser Company. Its acceptance by the court was not inconsistent with the substantial justice required by Rule 61.

POINT III

ORDINARY PRUDENCE WOULD HAVE ENABLED
ROSER COMPANY TO KNOW UPON WHAT FACTS
GULL LABORATORIES BASED ITS CLAIM FOR
RELIEF

Roser Company's counsel, who introduced Exhibit D-16, which Gull Laboratories' counsel had never seen, without prior indication to Gull Laboratories that he would do so, complains that he was surprised by Gull Laboratories' introduction of Exhibit P-13. Exhibit D-16 was an estimate prepared before the fact, of what Dr. Wentz thought it would cost to reproduce the conjugate. It was prepared for the purpose of making a claim against the Roser Company's insurance company. Although it was rejected by Roser Company, Roser Company contends now that the figures contained in that estimate are more reasonable than the actual costs of reproduction, precisely determined after the fact. If such were the case, it might be ordinary prudence to neglect the normal and ordinary discovery procedures available to all parties to a lawsuit, e.g., interrogatories and production of documents. However, it is difficult to believe that for the purpose of computing damages, an ordinarily prudent person would accept an estimate of costs to be incurred as more reliable and accurate than a statement of costs actually incurred.

It is very common practice to ask opposing parties

upon interrogatories, to state the evidentiary basis for any claim or defense which they propose to present at trial. However, no interrogatory of any kind was served upon Gull Laboratories in preparation for the trial of this matter. Furthermore, Roser Company did not move, formally under the Utah Rules of Civil Procedure, or informally by a request directly to Gull Laboratories or its counsel for production of any record of any kind kept by Gull Laboratories. It can scarcely be argued under such circumstances that ordinary prudence was exercised in that aspect of Roser Company's trial preparation.

Roser Company cites at length from Crellin v. Thomas, supra, in support of its claim that a new trial should be granted because ordinary prudence could not have guarded against the receipt of Exhibit P-13. There are adequate legal and factual distinctions to disregard that case in this matter. In Crellin, there was no allegation that one party had surprised the other with evidence presented at trial. The party moving for the new trial had, in fact, discovered new evidence after the trial that would have helped its case at the trial. It is true that the trial court granted a new trial and was upheld on appeal although it was noted that the moving party might have discovered the evidence through Rule 33 discovery. In

that case, the Defendant was sued for slander after calling the Plaintiff a whore. The newly discovered evidence tended to prove that she was, and the Supreme Court obviously recognized the injustice involved in permitting the plaintiff to recover a verdict. It held that the trial court had not abused its discretion in allowing a new trial. No such injustice would result in this case. Furthermore, this case is not governed by Crellin in that no new evidence has been proffered.

Roser Company's counsel cites testimony of Dr. Wentz (Brief of Appellant, Page 16) in his deposition and at the trial to show that he was surprised by the introduction of evidence that the cost to reproduce the conjugate was \$65,197.00. However, Dr. Wentz' deposition (R271) clearly puts Roser Company on notice that such costs were not minimal. After testifying about having discovered a conjugate that could be obtained from a commercial supplier, the following exchange took place:

- Q. Did you know about the availability of that anti-human globulin product from the Baltimore laboratory before you had this accident?
- A. No, I did not. I had to determine myself and to work with the material myself to make it acceptable for use in the product. (Emphasis added).

After asking several questions concerning the

methodology of making the material acceptable, this exchange concluded as follows: (R272).

- Q. How much labor and time did you spend at your lab, yourself, in working on this after the accident to render this material more specific for your purpose?
- A. This has been the thrust of my efforts since the accident, since the loss of the other material. (Emphasis added).

The logical result of granting the relief sought by Roser Company on this appeal would be for attorneys to neglect all discovery in their trial preparation, and then request a new trial on the ground that all damaging evidence produced at the trial was a surprise.

POINT IV

THE EVIDENCE WAS SUFFICIENT TO JUSTIFY
THE VERDICT AND THE DAMAGES AWARDED
WERE NOT EXCESSIVE

There was ample evidence presented to support the verdict and to sustain the award of damages. Roser Company's witnesses did counter much of Gull Laboratories' evidence but all evidence was before the jury and it found in favor of Gull Laboratories.

Although Roser Company claims that "uncontroverted evidence given during the trial aptly illustrates Meyer's compliance...[with the standard of care required of a reasonable and prudent person]", (Brief of Appellant,

Page 24), this ignores the facts as set forth at the trial.

Mr. Carpenter, an employee of Gull Laboratories, testified to the careless habits of Roser Company's agent, Mr. Meyer and to the fact that he discovered the spillage after Meyer had left the walk-in refrigerator (R693) and that the conjugate had not been spilled prior to that time. (R694).

This testimony was corroborated by Mrs. Wentz (R702) who was working in the office at the time the spillage occurred. In addition, Dr. Wentz testified in more detail concerning what appeared to be the careless habits of Meyer (R527-31) and the fact that the conjugate was intact prior to Meyer entering the refrigerator and that it was spilled and totally unsalvageable after he left (R531-38, 672a-73a).

Although, as Roser Company points out, this evidence was challenged by statements of Meyer, the determination of this issue is within the responsibility of the jury and it, on the basis of the considerable evidence before it, decided this question of liability against Roser Company and in favor of Gull Laboratories.

With respect to the contention that the award of damages was excessive upon the evidence, such a position, again, is not sustained by the record. Dr. Wentz testified

in great detail concerning the unique quality of his product (R544-52) and his efforts to reproduce the conjugate in a quality equal to that of the spilled conjugate (R556-59) and the costs involved in doing so (R559-61). The unique quality of Dr. Wentz' conjugate was corroborated by Dr. Spendlove, a virologist on the faculty at Utah State University, (R641a-45a) and Dr. Robbins, Supervisor of the Immuno Chemistry Lab at the L.D.S. Hospital in Salt Lake City. (R661a).

Roser Company again countered this evidence concerning damages with testimony from Dr. Wentz' competitor, Dr. Muna, and all of this evidence was properly before the jury. The jury exercised its prerogative to decide which evidence to believe and did so in favor of Gull Laboratories.

CONCLUSION

1. There was no error committed by the court below in receiving Exhibit P-13 in evidence.

2. Even if Exhibit P-13 was inadmissible as evidence, only harmless error was committed because the evidence contained therein was properly before the jury in another form.

3. Ordinary prudence would have enabled Roser Company to know upon what facts Gull Laboratories based its

claim for relief.

4. The evidence was sufficient to justify the verdict and the damages awarded were not excessive.

DATED this 16TH day of JUNE,

1978.

Respectfully submitted,

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MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of the foregoing Brief of Respondent to RAYMOND M. BERRY, Attorney for Appellant, 700 Continental Bank Building, Salt Lake City, Utah 84101, postage prepaid on this 16 day of June, 1978.

Susan McKee