

1979

Gull Laboratories Inc. v. Louis A. Roser Company : Petition for Rehearing

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.

PETITION FOR REHEARING

On appeal from the Judgment of the Third District Court,
Salt Lake County, the Honorable Dean Conder, Judge

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Clerk, Supreme Court, Utah

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF
THE SUPREME COURT OF THE STATE OF UTAH:

Oral arguments on this cause were heard by this court on December 12, 1978, and a decision thereon was filed by the court on December 27, 1978.

The Petitioner respectfully requests a rehearing in this cause upon the following grounds:

1. Petitioner believes this court has overlooked the rulings of a majority of the jurisdictions which have considered the issue before the trial court and its decision does not fit the facts peculiar to this case.

2. The decision of the court remanded the case for a new trial on all issues, including liability, even though the decision did not touch the issue of liability and even though the record was replete with evidence sustaining the verdict to the jury on that issue.

This Petition is supported by a brief in support thereof as set forth hereinafter.

WHEREFORE, Petitioner hereby prays:


1. That a rehearing be granted.
2. That the judgment of this court heretofore entered on December 27, 1978, be vacated and that the opinion of this court be modified to agree with the provisions of law and controlling authority set forth in Petitioner's brief

herein.

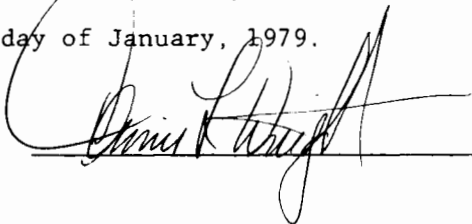
3. That, in the alternative, the decision be modified to provide that the case be remanded for a new trial only on the issue of damages, and that the verdict of the jury as to liability be affirmed.

Respectfully submitted,

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I hereby certify that I mailed two true and correct copies of the foregoing Petition for Rehearing and the accompanying brief to Raymond M. Berry, Attorney for Appellant, 700 Continental Bank Building, Salt Lake City, Utah 84101, postage prepaid, this 15 day of January, 1979.



BRIEF IN SUPPORT OF PETITION FOR REHEARING
REVIEW OF APPEAL

Judgment was entered in favor of Plaintiff, Gull Laboratories, and against Defendant, Louis A. Roser Company, after a jury trial in December, 1977, Roser appealed in May, 1978, claiming, (1) the court committed prejudicial error in receiving Exhibit P-13 in evidence; (2) ordinary prudence could not have guarded against the receipt of Exhibit P-13; (3) the evidence was insufficient to justify the verdict; (4) the damages awarded were excessive and unjustified upon the evidence; and (5) the court committed error in law in ruling on admissibility of evidence.

This court addressed itself only to the problem raised by the fifth point and held that the trial court erred in admitting P-13. It concluded that the jury relied on P-13 in making its award and remanded the case for a new trial.

ARGUMENT

POINT I

PETITIONER BELIEVES THIS COURT HAS OVERLOOKED THE RULINGS OF A MAJORITY OF THE JURISDICTIONS WHICH HAVE CONSIDERED THE ISSUE BEFORE THE TRIAL COURT. THE COURT'S DECISION DOES NOT FIT THE FACTS PECULIAR TO THIS CASE.

This court, in reaching its decision in this case,

cited Rule 70 of the Utah Rules of Evidence and other decisions interpreting that rule as decisive in this matter. Petitioner respectfully believes that Rule 70, which is the Best Evidence Rule, does not apply to the facts in this case.

Rule 70 states in part:

(1) As tending to prove the contents of a writing, no evidence other than the writing itself is admissible...
(Emphasis added).

The rule goes on to list certain exceptions and procedural requirements as cited by this court in its decision. Petitioner has no argument with the ruling of this court in Sprague v. Boyles Bros. Drilling Co., cited in its decision in this case. Its interpretation of Rule 70 is reasonable.

Petitioner's point, however, is that the Best Evidence Rule, with its exceptions and procedural requirements, does not apply under the facts of the instant case. It is no more reasonable to say that the books and records of the Plaintiff company are the best evidence of the damages suffered by it than to say that an automobile accident report is the best evidence of an automobile accident.

There was no effort on the part of Petitioner to prove the "contents of a writing" at the trial. The purpose of Dr. Wentz' testimony (R559-61, 577-78) was to prove the amount of damages sustained as a result of the accident

caused by Defendant. Those damages existed independently of any record thereof that may have been kept. Many hours of professional and technical labor were expended, and many other costs were incurred, and these facts exist and would remain even had no record thereof ever been made on the books of the company.

The best evidence rule applies where there is an attempt to prove the contents of a document such as a check, telegram, deed or contract. It is evident that a check itself could best show the date, amount or whether there was a qualified endorsement thereon. It could not, however, show the underlying reasons for issuing the check.

2 JONES, EVIDENCE, §7.4 (6th ed., 1972) p.96, in discussing the Best Evidence Rule, describes a distinction in facts which makes the Best Evidence Rule inapplicable in this case.

...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... 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).

In this case, the fact to be proved was the damages suffered by Petitioner, not a record thereof. Where this distinction has been addressed by the courts, they have held that the Best Evidence Rule does not apply. 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, 106 (1975), the court referring to circumstances not too unlike those in this case said:

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 may have been reduced to, or is evidenced by, a writing. (Emphasis added).

This position is also upheld in Schiltz v. Cullen-Schiltz & Associates, Inc., 228 N.W.2d 10, 19-20 (Iowa, 1975); Lin Manufacturing Co. of Arkansas v. Cowson, 436 S.W.2d 472 (Ark. 1969); People ex rel Person v. Miller, 56 Ill. App. 3d 450, 371 N.E.2d 1012, 1020 (1977); State v. Schlenker, 234 N.W.2d 142 (Iowa 1975); Local Board of Health v. Wood, 243 N.W.2d 862, 871 (Iowa 1976); and Brewer v. State, 513 S.W.2d 914 (Ark. 1974). See also, McCORMICK, EVIDENCE (2nd Ed.) §229; 4 WIGMORE, EVIDENCE (Chadbourn Rev.) §1174; and McKELVEY, EVIDENCE §345.

Petitioner respectfully submits that if the Best

Evidence Rule is inapplicable, which it earnestly believes it is, then the procedure set forth in Rule 70(2) requiring originals to be made available for inspection, is not applicable. Plaintiff's Exhibit P-13, was not in fact a summary of documents, the contents of which were to be proved, regardless of how counsel for either party, or even the trial court, may have labeled it, but was the summary of testimony offered by Dr. Wentz and was an actual record compiled by Dr. Wentz relevant to the issue of damages. It was not offered until after the testimony was given by Dr. Wentz.

The records of the company were certainly available to Defendant for inspection using available discovery techniques. It is in this light that Petitioner's counsel offered to supply the original records only if subpoenaed. Given the inapplicability of the Best Evidence Rule with its requirement of producing the original documents to support a summary, Petitioner was under no obligation to produce the records requested. Accordingly, he was justified in suggesting that they would be produced only if subpoenaed. Two days into the trial was a little late to be attempting to make discovery.

If the decision in this case is allowed to stand, it will extend the Best Evidence Rule well beyond its original intent, its rationale and its recognized bounds. Carried to its logical conclusion, the best evidence of an automobile accident would be the accident report. Extending the Best

Evidence Rule to those areas of proof not involving the contents of a writing would severely limit the ability of party litigants to prove their legitimate claims inasmuch as all facts, including damages, are not always completely reflected on written records or documents.

POINT II

THE COURT SHOULD MODIFY ITS DECISION TO REMAND THE CASE FOR A NEW TRIAL ONLY ON THE ISSUE OF DAMAGES.

In reaching its decision, this court only considered the question of admissibility of evidence as it related to damages. The question of liability was not considered but the case was remanded for a new trial on all issues.

There was ample evidence to support the determination by the jury that the Defendant was negligent. Mr. Carpenter, an employee of Plaintiff, testified to the careless habits of Defendant's agent and to the fact that he discovered the spillage after said agent 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 another employee of Plaintiff (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 Defendant's agent (R527-31) and the fact that the

conjugate was intact prior to said agent's entering the refrigerator and that it was spilled and totally unsalvageable after he left (R531-38, 672A-73A).

On the basis of the above evidence, the jury decided the question of liability against Defendant and in favor of Gull Laboratories. To require the parties to again present evidence concerning this matter would impose a burden of time and expense upon both parties that would be unjustifiable under the circumstances.

CONCLUSION

In Brunson v. Strong, 412 P.2d 451 (1966), this court stated:

Due to its acknowledged prerogatives, its advantaged position and the desirability of safeguarding the integrity of the jury system, the courts are and should be reluctant to interfere with a jury verdict and will not do so as long as there is any reasonable basis in the evidence to justify it.

Petitioner submits that there was ample evidence to justify the verdict of the jury concerning both liability and damages. The claim of Defendant that P-13 was inadmissible because originals were not supplied for inspection misses the point and seeks to apply an irrelevant doctrine of law to the facts of this case. To apply the Best Evidence Rule in cases where the contents of a writing are not the issue, but merely

corroborative of independent facts, would tend to subvert the value of oral testimony in favor of written evidence when in actual practice, such subversion is not justified.

For the reasons set forth herein, this court should reconsider its decision and reinstate the judgment of the trial court in its entirety. In the alternative, the case should be remanded only on the issue of damages.

Respectfully submitted,

RICHMAN, WRIGHT & WILKINS

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