

1979

Gull Laboratories Inc. v. Louis A. Roser Company : Brief and Answer to 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.

LOUIS A. ROSER COMPANY,
a Utah corporation,

Defendant-Appellant.

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Case No. 15721

BRIEF AND ANSWER
TO PETITION FOR REHEARING

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

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FILED

JAN 29 1979

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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

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RELIEF SOUGHT

Defendant requests this Court to deny Petitioner's Petition for Rehearing.

ARGUMENT

POINT I.

The Best Evidence Rule Requires a Party
to Produce under the Circumstances
the Best Evidence Available.

The purpose of the Best Evidence Rule is to prevent the substitution of an inferior type of evidence for a superior type. The Rule does not purport to allow the substitution of weaker evidence for stonger evidence. The Rule relates to the quality or grade of evidence. The Rule is operative against oral hearsay testimony as well as secondary writings.

The Rule does not exclude testimony which concerns the existence of a document, but does exclude evidence aimed to establish the truth of facts shown by secondary evidence. The exception to the Best Evidence Rule noted in the Petition for Rehearing has no application to the facts of this case as the testimony of Dr. Wentz was aimed at proving the amount of his business loss or expense based on his knowledge of the books and records. His testimony was secondary and inferior evidence and was improperly admitted by the Trial Court.

This Court was correct in reversing the Trial Court as at the trial the Plaintiff did not comply with Rule 70, U.R.E., and this Court properly followed the rule stated in Sprague v. Boyles Bros. Drilling Company, 4 Utah 2d 344, 294 P.2d 689 (1956). For further authority, see 29 Am. Jur. 2d, §448, discussing the Best Evidence Rule.

POINT II.

The Defendant is Entitled to a New Trial on All Issues.

Courts do not generally look with favor on restricting new trials to issues of damages only. In Hyland v. St. Mark's Hospital, 19 Utah 2d 132, 427 P.2d 736 (1967), this Court held that it was error for the Trial Court to grant a new trial on a question of damages only where there was a question of negligence involved. The Court said:

Notwithstanding the fact that the trial court's ruling does not impress us as wholly unreasonable, out of a desire that a new trial be fair to both sides, we believe that justice would best be served by removing any restriction upon it. There are undoubtedly some instances where limiting a trial to the issue of damages only may be justified, as our rules allow. But courts generally do not look with favor upon such a restriction. The reasons why this is so in personal injury actions are well exemplified in

this case. The questions relating to the plaintiff's injury, how it happened, who was at fault, and the pain and injury occasioned thereby, are so intermingled that if there is to be a new trial, in fairness to both parties it should be on all issues.

In Maxwell v. Portland Terminal Railroad Company, 456 P.2d 484 (Oregon, 1969), the Oregon court takes the position that if there is to be a new trial in a personal injury case, it should be on all contested factual issues regardless of the parties to pinpoint error. The court said:

In the ordinary two-party personal-injury case, however, evidence of fault can influence the jury's measurement of damages; and the kind and degree of injuries may influence some jurors in their evaluation of the evidence on liability. See Rosenberg, Court Congestion: Status, Causes and Proposed Remedies, in *The Courts, the Public and the Law Explosion* (Jones ed. 1965). Whatever logical problems these elements of lawyer folklore may suggest, we believe that neither side in this type of case should be encouraged to manipulate errors in one trial to gain tactical advantage in a new trial before a new jury. Accordingly, we hold that the new trial in a personal-injury case ordinarily should be a new trial on all contested factual issues, regardless of the ability of the parties on appeal to pinpoint error so as to show that the error, if any, may have affected only one issue. There will, of course, be exceptional cases in which the trial court, in the exercise of judicial discretion, properly will limit the issues for a new trial. But the standard to be applied in the exercise of this discretion is reasonable certainty that the issue or issues to be eliminated from the second trial are no longer viable issues in the case and

that their removal will not prejudice the right of either party to the kind of jury trial to which he would have been entitled but for the error or errors necessitating the new trial.

The Washington Supreme Court follows the rule that a new trial should be on all issues.

In Lofgren, et al, v. Western Washington Corporation of Seventh Day Adventists, 396 P.2d 139 (Wash. 1964), the Supreme Court of Washington said:

The record in the instant case is conflicting and discloses a close question of liability. There is evidence, if believed, that could result in the jury finding that Teryl was guilty of contributory negligence. The amount of the jury's verdict might suggest the possibility that the verdict was the result of compromise.

We conclude, therefore, that a new trial must be granted to retry all issues in the case.

In King v. O'Rielly Motor Company, 16 Ariz.App. 518, 494 P.2d 718 (1972), the Arizona Court of Appeals, Division 2, held that the new trial should not be restricted to the issue of damages.

In the instant case, there is a very substantial question on liability. The jury in the first trial found the Plaintiff thirty percent negligent and the Defendant seventy percent negligent. The jury may well have been prejudiced against the Defendant in the first

trial because it felt that the Defendant's counsel, myself, was objecting to some evidence and trying to conceal some facts. Whether evidence offered is admissible is purely a question of law, but jurors often regard an objection with suspicion and are prejudiced against the party who counsel makes objections.

CONCLUSION

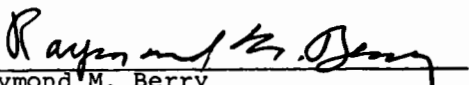
The Petition for Rehearing should be denied and all issues should be tried by the lower court.

DATED this 26 day of January, 1979.

Respectfully submitted,

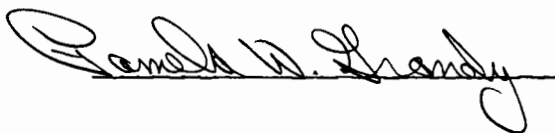
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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing Brief and Answer to Petition for Rehearing to Glen M. Richman and Dennis L. Wright of Richman, Wright & Wilkins, Attorneys for Plaintiff-Respondent, 79 South State Street, Suite 401, Salt Lake City, Utah, 84111, postage prepaid on this 29th day of January, 1979.

A handwritten signature in black ink, appearing to read "Ronald W. Hardy", written over a horizontal line.