

1950

Jess Beutler v. Dewain Berger : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JESS BEUTLER,

Plaintiff and Respondent,

-VS-

DEWAIN BERGER,

Defendant and Appellant.

APPELLANT'S

BRIEF™

Appeal from the District Court of the
First Judicial District of the State of
Utah, in and for the County of Cache.

Hon. Lewis Jones, Judge.

FILED

Harvey A. Sjostrom

FEB 16 1950

Attorney for Appellant.

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

JESS SEUTLER,

Plaintiff and Respondent,

-vs-

DEWAIN BERGER,

Defendant and Appellant,

TO THE HONORABLE SUPREME COURT OF THE STATE OF UTAH:

STATEMENT OF FACTS which in

This is an action by the plaintiff against the defendant Berger for an alleged shooting and killing of a young mare by defendant, the property of plaintiff.

The plaintiff alleges in substance that Dewain Berger shot a 21 month old mare belonging to plaintiff with a 22 rifle, that the animal died and that it had a value of \$300.00 which sum he prays for: (Tr. 1) the

The defendant filed his answer and then his amended answer and counterclaim in which he denies both the shooting and killing said mare

and further alleges that said mare was not worth over \$15.00. He states in his counterclaim that plaintiff's horses ate \$50.00 worth of defendant's hay which sum he demands judgment for. (Tr. 2-4)

Plaintiff filed his reply admitting that his horses ate defendant's hay and alleging that he offered to pay defendant in kind or the sum of \$5.00. (Tr. 5) Defendant denied this in his Reply except as to the \$5.00. (Should have been termed rejoinder) (Tr. 7)

The case was tried by jury which in reply to the following interrogatories answered as follows:

1. Did the defendant shoot the plaintiff's horse in question, thereby causing its death?

Answer "Yes" or "No"

Answer "Yes"

2. What was the fair cash value of plaintiff's animal at the time and place of its death?

Answer: \$150.00

3. What was the fair market value of the feed consumed by plaintiff's horses on defendant's premises if any?

Answer: \$25.00 (Tr. 23 - 24)

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The Court then made its Findings of Fact and Conclusions of Law (Tr. 25) and rendered judgment against defendant Dewain Berger in the sum of \$125.00 and in favor of plaintiff. (Tr. 27)

THE EVIDENCE

The plaintiff testified that on the morning of February 10th, 1949, he went to look for his strayed horses and giving the horse he was riding "its head" the horse went straight to defendant's place which was across the road only a short distance to the south and west of the place where plaintiff kept his horses. (Tr. 55) That he rode into the Berger lane which ran east and west and just as he got almost parallel with the Berger house which faced the east on a road running north and south he heard a 22 shot. (Tr. 56) He heard only one shot. (Tr. 56) That the defendant said he shot to scare the horses away. (Tr. 56) That he, the plaintiff, chased two (2) of his horses in a north easterly direction and took them out of a gate there. (Tr. 56) He then came back shortly to get the mare that subsequently died, upon which mare was then

lying down. That the mare layed down two or three times on the way home.¹² (Tr. 56) That shortly after getting the animal home he found a bullet hole in its flank (Tr. 57) but did not go and accuse defendant of shooting mare. (Tr. 57) Later on he found another bullet hole in mares rump.¹³ (Tr. 58) Both were 22 shots. That the animal was very sick. That the morning after the shot was fired by Berger, Berger¹⁴ found the animal dead on his lane (Tr. 58) the animal evidently having again left plaintiff's corral during the night and came back to defendant's premises and was so informed by defendant who found the dead mare and went over and told plaintiff that his mare was dead.¹⁵ (Tr. 58) Plaintiff accused defendant of shooting it which was denied by defendant. (Tr. 58) That 2 shots of 22 caliber were later found in the mare and used as exhibits "A" & (Tr. 149) by plaintiff, that plaintiff arrived at the conclusion that defendant shot horse when he heard shot and (Tr. 174) found bullet hole in mare. (Tr. 67) There is no optical eviience that defendant shot other than in the aim to frighten animals and he

testified he had shot many times before that day to frighten animals from his place. That the distance between where horses were kept by plaintiff and the defendant's place was about 300 yards. (Tr. 67) That there was lots of shooting in vicinity. (Tr. 65) That Berger was a gentleman. (Tr. 70) Plaintiff further testified that he knew a ballistic test would show whether or not the recovered bullets came out of a certain gun but refused to submit to such a test. (Tr. 68) The reason he assigned for his refusal was that defendant might switch guns. (Tr. 68, 69, 70) But he made no counter offer himself. He had always known Berger to be an honorable man. (Tr. 70) Though there was snow on ground no blood was found by plaintiff. (Tr. 72) But there was blood found a couple of blocks north of Berger's place a day or two after the shooting by one Dorothy Helderly, a witness for defendant. (Tr. 123) Plaintiff had heard shooting on other days. (Tr. 74)

One Oscar Wimmergren, a veterinarian, called by the plaintiff and testified that the mare died

of peritonitis which came from an infection (Tr. 78, 79) and that it was the bullet which went thru the left flank and into the intestine which caused the peritonitis and death. (Tr. 78, 79)

On Cross, Dr. Winnergren testified that peritonitis and death could result from 5 hours after infection to two (2) weeks. (Tr. 80)

A one Averett Sawyer, a witness for plaintiff said he had heard a great deal of shooting almost every morning and evening in the vicinity of where the party litigents lived.

(Tr. 131)

ASSIGNMENT OF ERROR

On the other hand defendant agreed with plaintiff and testified that he shot once on the morning in question to frighten the horses away. (Tr. 100) And not at horses. Had to

shoot to get horses away. (Tr. 111) That 22

shots could be heard at least 2 blocks away.

(Tr. 111) That he shot in air and didn't shoot

horse, (Tr. 110) and that there had been and

was lots of shooting around North Logan and

in the vicinity of where parties lived. (Tr. 103)

A one Leo McConnell, witness for defendant,

stated he saw defendant shoot on the morning in question and that he shot but once and up in the air. (Tr. 116)

Barbara Berger, wife of defendant, said she was in bed that morning but heard but one shot. (Tr. 120)

Joseph Berger, father of defendant was called as a witness for defendant and testified that he had shot rabbits and coyotes with a 22 rifle, but was refused the right to answer as to the effect on them. (Tr. 130)

ASSIGNMENTS OF ERROR

Comes now the defendant and appellant and assigns the following errors upon which he relies for a reversal of Verdict of Jury, Findings of Fact, Conclusions of Law, and Judgment entered thereon.

1. The Court erred in permitting Leslie Allen, a witness for plaintiff over defendant's objection to answer to the question: "What is his reputation for keeping his horses penned up in his yard in the usual manner." To which witness answered "good" (Tr. 137)

2. On cross by defendant, Leslie Allen, a witness for plaintiff was asked: "You did not hear his (plaintiff's) reputation discussed in that respect prior to the shooting?" To which he answered "No sir." Whereupon defendant's counsel moved that testimony as given by witness as to plaintiff's reputation be stricken which was refused by the Court. (Tr. 138) This is error No. 2 assigned by defendant.

3. The Court erred in giving instruction 3, 25) No. 4 and every part thereof to which defendant excepted to and which reads: "You are instructed that the mere fact that an animal is trespassing does not give the landowner the right to kill or injure it or use excessive force or means of driving it away, and if he does so regardless of whether the action was willful or negligent, he is liable and cannot acquire the right to kill or destroy it by serving notice of intention so to do." (Tr. 16) on the ground that there is no pleading or contention in the evidence that defendant claimed the right to shoot the said mare nor that he had ever served notice on

plaintiff that he had a right to kill plaintiff's animals if they trespassed upon his property.

4. The jury erred in finding in answer to an interrogatory and in their verdict that defendant shot plaintiff's horse in that there is no evidence to support such finding and is contrary to all the evidence. (Tr. 23, 25)

5. The jury erred in finding in answer to an interrogatory that plaintiff's horse was worth \$150.00 or any sum over \$30.00. (Tr. 23, 25)

6. The Court erred in making and entering finding No. 2 (Tr. 25) that plaintiff's mare was of the value of \$150.00 or any sum over \$30.00.

7. The Court erred in making and entering finding No. 3 and every part thereof (Tr. 26) which reads: That on the said day defendant without any right or just cause or excuse, shot the said animal with a 22 rifle by reason of which said mare died on the following day, for the reason that there is no evidence that defendant shot the said mare, that such finding is contrary to all evidence, and that all evidence could be reconciled on reasonable grounds that defendant killed the mare in question.

8. The Court erred in making and entering that part of finding No. 3 (Tr. 26) that plaintiff was damaged in the sum of \$150.00 by the death of said mare, harmless variety. But

9. The Court erred in its conclusion of law (Tr. 26) that plaintiff was and is entitled to a judgment of \$125.00 against defendant after deducting \$25.00 that defendant was entitled to against plaintiff for damages sustained by defendant because of plaintiff's horses eating defendant's hay on the ground that there is no evidence that defendant killed said mare and all the evidence is that defendant's hay eaten by plaintiff's horses was worth \$50.00 and that there is no evidence to the contrary. (Tr. 99) It

10. The Court erred in making and entering judgment (Tr. 27) in the sum of \$125.00 in favor of the plaintiff and against the defendant for any sum on the ground that there is no evidence that defendant shot or killed said horse but is contrary to all the evidence. It is

11. The Court erred in denying defendant's motion for a new trial. (Tr. 36) p. 480 sec.

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STATEMENT AND ARGUMENT

At first glance it may appear that though the assignments of error 1 and 2 are well taken yet they are of the harmless variety. But we do not believe this is so for the reason that the jury would be prone to think that if plaintiff had a good reputation for keeping his stock in that the same would not have eaten defendant's hay in the amount of \$50.00 as claimed by defendant on his counterclaim and for which he received only a credit of \$25.00 by the jury and Court (Tr. 23, 25) and to which exception has been taken.

No evidence will be found in the transcript put in by the defendant that plaintiff was negligent in keeping his horses in but evidence will be found that his horses were frequently found at large. The allowance of the court below of plaintiff's reputation for keeping his horses in or his non-negligence was therefore highly objectionable and more so when such conversation came after the event in question. (Tr. 137)

See 22 C.J. pp. 474 Sec. 565 and pp. 480 sec.

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part: "It is also necessary that the reputation shown should be that which existed before the occurrence out of which the litigation arose."

We will discuss assignments of error no. 4 and 7 together because they go to the same thing: The fourth going to the finding by the jury that defendant shot and killed the horse in question and no. 7 a finding by the Court to the same effect.

DUTY TO RECONCILE EVIDENCE

The evidence cited in "this brief" and which is supported in the record that but one shot was fired by the defendant and that it was fired in the air. (Tr. 100, 116, 120) And that the defendant shot to frighten the horses away and not at them (Tr. 110, 116) That there were two shots of 22 caliber found in the horse. (Tr. 57, 58) That there was no blood on the snow. (Tr. 72) This evidence cited in the brief heretofore certainly shows that there was neither direct or circumstantial evidence to support the findings of the jury and the Court that defendant shot and killed the mare.

In the case of Edwards v. Clark et al, 83 P. (2) 1021 this Court said: "A verdict of a jury may not be based upon testimony showing only possibility or such a situation as requires a jury to base its verdict upon conjecture, speculation or suspicion." And the Court in the case of Bratt v. Magiolo 28 N.Y. S. 2nd 1011 lays down the rule a verdict contrary to the uncontradicted positive testimony cannot be supposed to be supported by any evidence. Plaintiff, it will be noted testified that the mare laid down soon after he heard the shot. But it will be further noted that, "the mere fact that one event follows another in time does not establish a casual relation between them." That is the language of U.S. Bussmann Mfg. Co. v. Nat. Labor Relation Board. C C A 111F (2) 783. And in the case of Columbus G.R. Co. v. Coleman 160 Southern 277, it is said: "Except in rare cases, proof without more than a certain event transpired as a result of stated conditions is proof only of the possibility and does not establish the probability." On inference to

be drawn from evidence see 32 C.J.S. pp. 1129
sec 1044 which reads in part on page 1133 there-
of as follows: "An inference is unjustified
and without probative force if it is inconsis-
tent with undisputed or clearly established
facts. Evidence which is consistent with
direct, positive and otherwise uncontradicted
testimony that a fact does not exist will not
support an inference that it does, and an in-
ference should not be adopted from a few of
the facts proved when it is absolutely incon-
sistent with and repelled by other equally
proved facts." See also 20 Am. Jur. at page
1030 sec. 1180 as to "the law applicable." It
will be noted that plaintiff drew the inference
that defendant shot the horse from the mere
fact that he heard defendant shoot and from
the fact of bullets being found in the animal.
(Tr. 67) But he could not explain away that
2 shots were found and not just one nor would
he agree to a ballistic test to see if the
shots found came from defendant's gun. (Tr. 68,
69, 70) Also his own witness, Dr. Wennergren

testified that peritonitis and death could come between 5 hours and 2 weeks from the shot and infection. (Tr. 80) All this points with great force that defendant was not the guilty party.

In the case of Whitehouse vs. Bryant Lumber Co. 97 Pac. 751 the Court said: "No legitimate inference can be drawn that an accident happened in a certain way by simply showing that it might have happened in that way and without further showing that it could not reasonably happen in another way." And in Overstreet vs. Ober 130 Southern, 648, it is said: "If the evidence in the case leaves it just as probable that the injury was the result of one cause as another, plaintiff cannot recover."

Let us now admit for the purpose of argument only and not one of fact that defendant's bullet struck the horse in question. What evidence is there that the supposed fired shot by the defendant was the cause of the infection and death any more than the other shot found in the horse? None at all. Dr. Wennergren testified that it was the shot that went thru the flank and intestine that was the cause of death. all

(Tr. 78, 79): And if defendant fired a shot at the horse and struck it can it be said that that was the shot that found its way into the intestine and was the cause of death? There is no evidence to that effect at all. "Where injury of which complaint is made may have resulted from either of several causes, for only one of which party is liable, it is for the complainant to show with reasonable certainty that the cause for which the party is liable produced the result." *Caudle v. Kirkbride* 117 Mo. A 412, 93 S.W. 868. To the same effect is *Treineling vs. Southern Pacific*, 51 Utah 189, 170 Pacific 80.

In discussing these assignments of error, 4 and 7, it must be held in mind that it is the duty of the trier of fact and those who make findings, as a matter of law, to reconcile the evidence if there is only a seeming conflict. That all the evidence could be reconciled upon a reasonable basis goes without saying to one familiar with the evidence. Neither the trial court or jury can select certain portions of the evidence and blindly close its eyes to all

the other evidence and reach a conclusion as to the facts or as to there being a conflict in the evidence 33 Utah 51, 92 Pac. 789. Since the evidence in this case can be harmonized upon a reasonable basis without disregarding the evidence of any witness, there then is not a conflict as a matter of law. In support of this proposition we cite this Court to the following cases: Sullivan vs. W., St. L. & P. R. Co. 58 Iowa 602, 12 N.W. 620. Tishamer vs. Union Pac. R. Co. 286 Pac. 377, 41 Wyo. 382, Floridan East Coast Ry. Co., vs. Achesen 135 So. 551, 137 So. 695. The foregoing cases support the proposition that where the direct testimony of the one party upon a given fact may be harmonized with the evidence adduced by the other side without disregarding any evidence in the case, then it is the duty of the trier of fact to do so, that in such a case, there is not what the law regards as a conflict in the evidence; that a legal conflict of evidence is "a mere difference that cannot be harmonized by the exercise of reason and in accord with the

probabilities arising from the nature of the case". This quotation is from Tishamer vs. Union Pacific Ry. Co. Supra. Since all the evidence can be easily harmonized the jury and the Court were duty bound so to do. 1st:

In assignment of error (no. 3) and every part thereof we believe the Court committed error when it instructed the jury that "You are instructed that the mere fact that an animal is trespassing does not give the landowner the right to kill or injure it or to use not excessive force or means of driving it away, and if he does so regardless of whether the action was willful or negligent, he is liable and cannot acquire the right to kill or destroy it by serving notice of intention so to do." The jury was told by the Court, in effect, in this instruction, that defendant claimed the right to kill the animal if it was trespassing when no such claim was made either in the pleadings or in the evidence. Also they were in effect told that there was some evidence that the defendant had served some notice upon the plaintiff that it was animals trespassed

upon the property of the defendant he had a right to destroy them. There is no such evidence in the record.

That an instruction must be based on the pleadings and evidence seems well established: Fritz vs. U. Tel. Co. 25 Utah 263, Sargent vs. Union Fuel Co. 37 Utah 392, Reeds Branson Instruction to Jurys, Third Edition, Vol. 1 Sec. 119.

This instruction also tacidly assumed that the defendant killed the animal. And I do not believe this Court needs any citation to show that this invades the prerogative of the jury. For it was for the jury to say without an intimation by the court that defendant killed the mare. It was therefore an instruction that took plaintiff's theory of the case as true and ignored the defendant's. This is reversable error. See 68 Fed. (2) 234, Hellman vs. Los Angeles R. Corp. 27 P. (2) 946, Nash vs. Myers 31 P. (2) 273.

Now as to assignment of error no. 11. An affidavit was filed by the defendant, Berger, in support of his motion for a new trial.

This affidavit recites in substance that Guy E. Merrill, one of the jurymen, stated shortly after the trial that he had 2 or 3 horses shot by 22 caliber rifle by boys and that they had died. That they immediately "went down". That said statements were made with considerable vehemence. No counter-affidavit was filed so we must take the statements as true. It is apparent from the affidavit that the jurymen acted supposedly upon personal knowledge on a question that only a qualified expert could testify. We believe on that point alone the Court below should have given a new trial. That a jurymen cannot so act see 39 Am. J.P. page 96.

There is one more point that this affidavit supports and on which we believe the said jurymen acted to defendant's prejudice than his supposed knowledge of the effect of 22 slugs on a horse. That was his failure to answer truly to the Courts question. He among other jurymen were asked by the Court for the purpose of qualification this question: "Any

of you ever had any experience like this of taking animals to the pound or animals trespassing, eating your hay ? Ever have any arguments with your neighbors about that kind of situation ? (Tr. 44) No juryman, including Mr. Merrill admitted having this kind of a situation as the shooting of horses.

That Mr. Merrill should have admitted that he had horses shot goes without question. If he had or so admitted or defendant had known Mr. Merrill would certainly have been challenged and relieved of his duty as a juryman. We believe that no citations are necessary in support of this proposition.

In assignments of error no. 9 and 10 it is but seemingly necessary to refer to our arguments in discussing the assignments of error heretofore made because if we are right in these and particularly if our argument is well taken as to assignments of error 4 and 7, there is no basis for the Conclusion of Law that plaintiff is entitled to any judgment against the defendant in any sum whatsoever

as found in said Conclusion, (Tr. 26) and in entering judgment for plaintiff and against the defendant as done for the sum of \$25.00. (Tr. 27)

In conclusion we may say that we believe that there is no legal basis for the Findings, Conclusions of Law and Judgment entered against defendant and appellant and respectfully request this Court to reverse and dismiss the same and enter judgment in favor of defendant and appellant in the sum of \$50.00 and against the plaintiff and respondent, on defendant's counterclaim, or order the lower Court so to do. If there is insufficient basis for that request we respectfully ask that judgment for plaintiff be vacated and the matter sent back for a new trial and that appellant have his costs.

Respectfully submitted,

Harvey A. Sjostrom,

Attorney for Defendant
and Appellant.