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Jess Beutler v. Dewain Berger : Brief of Respondent

Utah Supreme Court

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In the Supreme Court of the State of Utah

JESS BEUTLER,
Plaintiff and Respondent,

vs.

DEWAIN BERGER,
Defendent and Appellant.

Case No.
7438

RESPONDENT'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

M. C. HARRIS and
CHARLES P. OLSON

*Attorneys for Plaintiff and
Respondent, Jess Beutler*

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JESS BEUTLER,
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RESPONDENT'S BRIEF

STATEMENT OF FACTS

Much of the Statement of Facts by appellant contains the testimony most favorable to the defendant, but since the facts in the case are not long nor complicated we refrain from repeating the statement of facts stated but content ourselves with briefly adding the following facts:

Even though the plaintiff accepted the word of the defendant at the time and place of the shooting that the shooting was to scare the horses and did not at that time accuse defendant of shooting the animal the next

morning, which was the next meeting of the parties, he did promptly accuse the defendant of shooting the animal and at that time the defendant told the plaintiff in substance "that he could shoot anything on his property as long as he left it lay." They had an argument about that. (Tr 58)

The plaintiff could not get the colt at first so took the other animals home and retuned at once for this colt. The colt was now down and laid down twice while he was taking it home, and he thought it had a bad case of colic (Tr. 56) but later in the morning on examination he discovered the bullet hole above the flank. (Tr 57) On cross examination the plaintiff testified in answer to questions by appellant's counsel that he could tell the bullet had gone "right in through the intestines. I arrived at the conclusion he had shot the animal. I heard the shot and there was no other conclusion to arrive at when there was bullet hole through her." (Tr 67)

The plaintiff testified that it was more than two months after the shooting before anything was said about gun balistics and that in the meantime there were lots of places to put the gun that had been used. (Tr 69)

ARGUMENT

Respondent will take up appellant's points in the same order they are presented in his brief.

Assignments 1 and 2. Plaintiff's evidence as to reputation.

The appellant assigns as error the Trial Court's permitting the plaintiff, in rebuttal, to introduce evidence of the plaintiff's reputation in the community for keeping his animals penned up in the yard in the usual manner. This evidence went to the question of number of times the plaintiff's animals had trespassed upon defendant's premises and consequently the amount of damages to which defendant was entitled on the counterclaim. The jury fixed his damages at \$25.00. In his notice of appeal he did not purport to appeal from the verdict in his favor on the counterclaim. Under these circumstances the assignment cannot be prejudicial on this appeal.

Briefly on the merits of the ruling, however, it should be said that there was evidence that plaintiff's fences were in order and the fresh snow was so deep that the animals escaped over the fence (Tr 61). Defendant offered some evidence the animals trespassed on his premises on a number of occasions. This evidence was disputed by other witnesses (Tr 98, 120, 121, 125). The evidence was material on the matter of the amount of damages caused by the animals. Counsel's authority in 22 C. J. go to the question of defendants character in criminal cases and has no bearing here.

The question of amount of damages was for the jury and it was therefore proper rebuttal after de-

fendant's cross examination of plaintiff on the subject (Tr 61) to show plaintiff's reputation in the community as to such conduct, such evidence being relevant to the issue of amount of damages.

3 to 10. Sufficiency of Evidence to Sustain Verdict and Judgment.

The appellant addresses the same arguments to this Court about the evidence that he did to the jury; viz, the plaintiff only heard the defendant shoot once. The animal had been struck by two bullets. Under the rule that evidence should be reconciled if possible it was the duty of the jury to reconcile the evidence by finding the plaintiff had failed to prove the defendant shot the bullet that killed the animal. It is contended that all of this argument merely goes to the weight of the evidence. The weight of the evidence is for the jury and the rule is so well established that no exhaustive list of cases are here cited, that this court on appeal will not examine into the weight of the evidence but will only inquire as to whether or not there is any substantial evidence to support the verdict. From *State Bank of Beaver vs Hollingshead* 82 Ut. 416, 25 Pac2nd 612 we quote the following:

“It is no consequence what our opinion may be as to the facts. If there is substantial evidence to sustain the verdict, this court is powerless to set it aside. (Citing previous Utah cases) Many cases to this effect have been decided by this court.”

The evidence and circumstances here not only support the verdict but the verdict is the only logical result from the evidence. The animal was in good health the night before. It was early in the morning in a rural community. Plaintiff happened along just at the time defendant shot. The bullet was a 22 bullet. The animal had not yet gone down when plaintiff rode out to the horses but it did not move and plaintiff took his other animals home. When he came back in a few minutes the animal was down. It went down two or three times on his way home (300 yards); it acted like a bad case of colic. He examined and found the bullet hole. He called the veterinarian. There was nothing he could do and he expected the animal to die that day. It did die that night. The veterinarian's testimony that the animal died as a result of the gun shot wound is not disputed. It is difficult to imagine a more complete case. The fact that the defendant offered evidence that there was other shooting in the neighborhood (not the same morning) and the horse also carried another flesh wound might be some ground for argument that the death might have resulted from a bullet fired by someone else, but if this could be dignified to be called a dispute in the evidence it went only to its weight. The jury rightly concluded that the testimony could not be harmonized in defendant's favor.

The malpractice case of *Edwards vs Clark* 83 Pac 2nd 1021 is not in point in any way and we have no

quarrel with the rule that a verdict must have more to support it than a possibility that it might have happened in that manner. Neither does the rule in 32 C.J.S. at 1133 that evidence is inconsistent with direct, positive and otherwise uncontradicted testimony that a fact does not exist will not support an inference that it does, have any application to the facts in this case. The rule is that facts need not in every case be established by exact scientific uncontradicted evidence. It is enough that sufficient evidence of a fact be offered to convince a reasonable person of the existence of the fact.

Balistics. Counsel on cross examination elicited from the plaintiff that about two and one-half months after the shooting defendant suggested that they have a balistics test of the gun and bullet found in the horse as a means of settling the case. Plaintiff declined to take the bait saying that it would be an easy matter to bring in some other gun. In fact, it would seem very logical for the defendant to do that very thing before making such an offer. He could have resorted to a balistics examination of the bullet and his gun if he cared to do so. Counsel argued this matter very fully to the jury. The jury did not appear to be impressed. It was a question of weight of the evidence for the jury was settled by the verdict. Certainly, there is nothing in this circumstance to require this court to hold as a matter of law that the defendant would have submitted the same gun with which he admittedly fired

the shot on that morning.

Instruction No. 4. Plaintiff assigns as error the giving of Instruction No. 4 to the effect that defendant had no right to kill a trespassing animal. Apparently it is conceded that the instruction contains a correct statement of the law, 3 C.J. 2nd 1328 Section 213. Appellant objects to the instruction for the reason "The jury was told by the court, in effect, in this instruction, that the 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." The instruction says nothing about defendant's claiming a right to kill the animal. The evidence does however show that at the time the plaintiff accused the defendant of shooting the animal, defendant said in substance that he "had a right to shoot anything on his place as long as he left it lay there." (Tr 58) An examination of the entire record also shows that the subject was brought up by the court in his examination of the jury and this instruction was not given for the purpose of inferring claims by either people but of narrowing the issues to be decided by the jury and informing them that there was no issue in the case of a right to kill the animal. If there was any error it was clearly harmless. Considered as an instruction limiting the issues it was just as much in defendant's favor as in favor of the plaintiff. The error was also harmless here because the jury rendered no general verdict.

Appellant also asserts that it is reversible error for the Court to instruct on plaintiff's theory of the case and to ignore the defendant's theory. The case was submitted to the jury upon special interrogatories, which in no way favored either theory of the case, but left the findings of fact, based on the evidence, up to the jury. On such interrogatories, the jury found that the defendant did shoot the plaintiff's horse, thereby causing its death, which finding was in plaintiff's favor and which accepted his theory of the case. As to the Court's instructions which accompanied the special interrogatories, they were in part based on requested instructions submitted by the plaintiff. Defendant, on the other hand, failed to submit any requests for instructions, and the rule is well settled that error cannot be based on failure to give particular instructions when no request therefor is made. *Taylor vs. Los Angeles & S.L. Ry. Co.*, 61 Utah 524, 216 Pac. 239; *Salt Lake & U. Ry Co. vs Schramm*, 56 Utah 53, 189 Pac. 90. The authority cited by appellant supports this rule of law in the following language, found in *Nash vs Myers*, 54 Ida. 283, 31 P. (2d) 273, at page 181: (Cited by appellant at p. 19 of Appellant's Brief.)

“***the Court should instruct on appellant's as well as respondents' theories of the case *where appropriate instructions are presented.*”
(Italics supplied)

Assignment of Error 11

Appellant assigns as error the trial court's refusal to grant a new trial on defendant's motion which was based upon an affidavit by the defendant, Dewain Berger, as to certain alleged mis-conduct of one of the jurors, Guy E. Merrill. The affidavit of the defendant filed in support of the motion for a new trial comes squarely with the case of Glazier vs. Cram, 71 Utah 465, 267 Pac. 188. The defendant's affidavit is apparently based on hearsay, or at best, upon information and belief. This Court, in the Glazier case made the following statement:

“Much of the matter stated in the affidavits is alleged on information and belief. As to such matter the brief of counsel for defendant calls our attention to the following language in Hayne on New Trial (Rev. Ed.) p. 240:

“Affidavits based upon information and belief are wholly valueless for the purpose of establishing the facts upon which an irregularity of this description’

“The affidavits of jurors are inadmissible to impeach their verdict, except where it was arrived at by resort to chance.”

The defendant's affidavit does not purport to set forth when or where or to whom or under what circumstances the Juror Merrill made the alleged statement, and even if he had made the statement and it had been true it would not have been grounds for challenge of the juror for cause.

The Court then cites considerable authority in support of this rule.

The affidavit relied upon by appellant, aside from the defects above noted, is not in and of itself sufficient grounds for the granting of a new trial. The affidavit states that one of the jurymen called upon his own knowledge and experience in considering the case. This is a necessary function of all juries, and each and every jurymen must depend on his knowledge and experience in weighing evidence. The rule as stated in the authority cited by the defendant and appellant at page 20 of his Brief, 39, Am. Jur. page 96, section 83, is as follows: That a juror is not precluded "from applying his own general knowledge and experience to the examination of the case in estimating the weight of the evidence."

The appellant further alleges that the said juror acted to appellant's prejudice in failing to answer truthfully the Court's questions to the jury. An examination of the questions asked by the Court, as set out on pages 20 and 21 of appellant's Brief, and compared with the contents of the affidavit, will show that the juror in no way made a false answer. The Court's questions had to do with experience with taking animals to the pound and with trespassing animals eating hay. There were no questions about any of the jurymen having experience with "this kind of a situation as the shooting of horse" as alleged in appellant's brief. If

appellant's counsel had desired to pursue further questioning on this point, the opportunity was available to him. He did not attempt to do so, and is now estopped from complaining that this jurymen should have been challenged. *Johnson vs. Allen*, 108 Utah 148, 158 P. (2d) 134, wherein the Court stated, when discussing a situation similiar to that set up by appellant in the instant case:

“Counsel for the defendant did not attempt on voir dire to ascertain the existence of such relationship so that he could interpose a challenge. Rather, as noted by the trial court ‘counsel is attempting to impose a legal obligation upon a lay juror to disclose technical sources of possible prejudice, which counsel, himself, failed to pursue.’ ”

Appellant, at the trial, was satisfied with his questioning of the jury, and cannot now place the burden upon the jurymen to disclose every possible experience in their life which may have some degree of similarity with the evidence which might be later presented to them.

CONCLUSION

The defendant did not appeal from the part of the judgment that allowed him \$25.00 damages and therefore cannot complain that the jury should have awarded him \$50.00 in place of the \$25.00.

The case was fully and fairly submitted to the jury. It is a small case and nothing has been presented to

establish that the administration of justice should put these parties to the expense of another trial. Nothing is made to appear that a new trial would reach a different result. The verdict of the jury in favor of the plaintiff was clearly sustained by the evidence and the judgment should therefore be affirmed.

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Attorneys for respondent.