1952

D. W. Nichol v. Henning Wall, Virginia Wall : Brief of Respondent

Utah Supreme Court

Critchlow, Watson & Warnock; Attorneys for Appellee;

Case No. 7881

IN THE SUPREME COURT
of the
STATE OF UTAH

D. W. NICHOL,
Plaintiff and Respondent,

— vs. —

HENNING WALL,
Defendant and Appellant.

VIRGINIA WALL,
Defendant.

BRIEF OF RESPONDENT

CRITCHLOW, WATSON & WARNOCK
Attorneys for Appellee

INDEX

Authorities Cited—

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BRIEF OF RESPONDENT

STATEMENT OF FACT

The appellant in his statement of facts has correctly stated that the only question before this court concerns the evidence relative to the reasonable rental value of a chain saw and the finding of the trial court that $100.00 was a reasonable rental.

The plaintiff sued for the reasonable value of services and materials. The defendant answered and counterclaimed, alleging certain offsets. The plaintiff admitted all of the offsets except the rental charged in the sum of $680.00 for the chain saw for a period from September 20th to October 29th, 1948. The undisputed testimony of

both parties was to the effect that no rental was agreed upon (R. 22 and 54). The burden was on the defendant to prove the reasonable rental of the chain saw.

The chain saw was purchased for the sum of $659.00 new (R. 53).

The only knowledge the appellee had relative to the rental of chain saws is found in the following excerpts from the transcript (R. page 46):

> "The fellows I worked with cutting timber up there charged $20.00 a day when they swapped saws between them when they would break one of their saws."

and R. page 47-48:

Q. "Mr. Wall, did you at any time rent a chain saw?
A. "To Mr. Nichol.
Q. "Did you rent one from someone else?
A. "I wasn't able to get one.
Q. "And did you ever rent your chain saw to anyone other than Mr. Nichol?
A. "There was one tree man I let have it.
Q. "When was that?
A. "1949, $20.00.
Q. "That was one day?
A. "Yes.
Q. "Where?
A. "Here in Salt Lake.
Q. "Who was the man you rented it to?
A. "My brother."

This is the sum total of the appellant's experience with the rental of chain saws except that they were not

available. When the appellant was asked his opinion as to the reasonable rental the question was objected to on the ground it called for a conclusion and no proper foundation made and the objection was overruled (R. page 48).

STATEMENT OF POINT RELIED UPON

A. THE COURT WAS NOT BOUND BY APPELLANT'S TESTIMONY, BUT COULD PROPERLY FIND THE REASONABLE MEASURE OF RENTAL.

ARGUMENT

A. THE COURT WAS NOT BOUND BY APPELLANT'S TESTIMONY, BUT COULD PROPERLY FIND THE REASONABLE MEASURE OF RENTAL.

We take no issue with appellant regarding the power of a court generally to make a finding not supported by any evidence.

Appellant's position seems to be that if a party by opinion evidence says that the damage was a specified amount that the court or jury must accept this amount and no other as the actual damage. Under such a concept the court and jury would be precluded from taking into consideration the credibility of witnesses, the interest the witness may have in the case (an element we certainly have in abundance in this case) and all other factors which make the court or the jury the sole determiners of damage suffered.

The finding of the court indicates that he placed no credence in the testimony of the appellant. The appellant

had asked the sum of $680.00 as rental for 39 days for a saw which had cost him $659.00 (R. p. 52). The testimony is undisputed that the saw was used on two weekends (R. page 56). The court found the reasonable rental for the saw was $100.00.

It is conceded that the appellee expected to pay a reasonable rental but it is submitted that for him to pay an amount for rental in excess of the value of the saw new is out of all reason.

This court has spoken on this phase of the law and along with practically every other jurisdiction has held that opinion evidence is not binding on a court or jury on the question of damages. In the case of *Hirabelli vs. Daniels,* 44 Utah 88, 138 P. 1172, our court says the following:

> "The testimony of the doctor that $50.00 was reasonable was not binding on the jury. From the character and extent of the injury, and from all that the doctor did or was required to do in attendance upon the plaintiff, as was fully disclosed by the evidence and from the facts thus before them upon which the doctor's opinion or conclusion was based, the jury could justly reach the conclusion that $22, $2 more than was originally averred by him, was reasonable compensation for such service."

The court then cites the case of *Head vs. Hargrave,* 105 U.S. 45, 26 L. Ed. 1028. In this case the Supreme Court of the United States says the following relative to the question here under consideration:

> "To direct them (the jury) to find the value of the services from the testimony of the experts alone was to say to them that the issue should be determined by the opinions of the attorneys, and not by the exercise of their own judgment of the facts on which those opinions were given. The evidence of experts as to the value of professional services does not differ in principal from such evidence as to the value of labor in other departments of business, or as to the value of property. So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed; and it was only in that way that they could arrive at a just conclusion."

The holding in the case of *Head vs. Hargrave,* supra, was followed and cited with approval by the Supreme Court of the United States in the case of *The Conqueror,* 166 U.S. 110, 41 L. Ed. 937. In this case the owner of the vessel was suing the United States for demurrage. He produced experts to testify as to a proper allowance. These experts offered the only testimony on the subject. At page 943 of the L. Ed. the court said the following:

> "The amount of demurrage allowed, too, was so great as, if not to shock the conscience, at least to induce the belief that it must have been estimated by witnesses who were most friendly to the owner. The yacht cost originally $75,000. The proposition that her use for a little more than five months, during the autumn and winter, should be worth to her owner $15,000 over and above all her

> expenses, for which a separate allowance was made, is putting a strain upon our credulity which we find ourselves quite unable to bear. The truth is, that estimates of value made by friendly witnesses, with no practical illustrations to support them, are, as observed by the various courts through which the case of Sturgis vs. Clough, 68 U.S. 1 Wall 269 (17:58), passed too unsafe, as a rule, to be made the basis of a judicial award, unless it be shown with much greater certainty that it is in this case, either that the vessel was earning profits, or that she belonged to a class of vessels for which there was a steady demand in the market. We think the testimony upon the subject of demurrage in this case should have been held insufficient."

The law governing the point under consideration is stated unequivocably as follows in 20 Am. Jur. at pages 1059 and 1060.

> "Section 1208. There is, generally speaking, no rule of law which requires controlling effect or influence to be given to, and the court and jury are not required to accept in the place of their own judgments, the opinion testimony of expert witnesses merely because of the special knowledge of the witnesses concerning the matters upon which they give their testimony. Expert opinions are not ordinarily conclusive in the sense that they must be accepted as true on the subject of their testimony, but are generally regarded as purely advisory in character; the jury may place whatever weight they choose upon such testimony and may reject it, if they find that it is inconsistent with the facts in the case or otherwise unreasonable."

There are numerous citations supporting this statement of the law as set forth in the text. *Boston Insurance Co. vs. Read,* (C.C.A. 10th Okla.) 166 F. (2d) 551; *Richard & Gilbert Co. vs. Northwestern Natural Gas Corp.,* 16 Wash. (2d) 631, 134 P. (2d) 444. The rental which the appellant is trying to exact from the appellee is on its face unreasonable and his testimony certainly is self serving and because of his interest in the case, is entitled to no consideration.

CONCLUSION

It is submitted that in this case, under the law in this State, the court was not bound to find as damages the value stated by the appellant but could take in consideration all of the facts surrounding the transaction and upon the basis of the cost of the saw and the time it was used, place a value for reasonable rental.

The judgment of the court should be affirmed.

Respectfully submitted,

CRITCHLOW, WATSON & WARNOCK
NED WARNOCK,
Attorneys for Respondent.
1320 Continental Bank Bldg.
Salt Lake City, Utah