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Ruth Neighbors Adams v. Floretta Lang : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

RUTH NEIGHBORS ADAMS,
Plaintiff and Appellant,

— vs. —

FLORETTA LANG,
Defendant and Respondent.

} No. 8141

APPELLANT'S BRIEF

Appeal from the District Court of Salt Lake County,
State of Utah, Honorable Martin M. Larson, Judge

MOSS & HYDE,
Attorneys for Plaintiff and
Appellant

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STATEMENT OF FACTS

This is an appeal from a jury verdict and judgment thereon, no cause of action.

On the 15th day of December, 1952, the plaintiff and defendant, with Mrs. Jaques and Bob Adamson, were driving west past the Magna Mill between Magna and Garfield in Salt Lake County. It was still dark. Defendant was driving and was traveling "not to exceed forty" miles per hour (R. 80). As they rounded a curve "the car started to skid on the ice." (R. 82). "We slid to our left." (R. 82). The car recrossed the highway and went over the edge of a fifteen-foot (15) bank down onto the railroad tracks (R. 84). There were icy spots here and

there on the road that morning. (R. 88). When the car first left the road, it traveled 90 feet along a hillside some five feet off the road. Then it returned to the highway and traveled across it some 47 feet and went over a cliff. (R. 93, 94). "It was foggy that morning." (R. 122).

STATEMENT OF POINT

IT WAS ERROR FOR THE COURT TO EXCLUDE TESTIMONY OF AN EXPERT WITNESS AS TO SPEED OF VEHICLE BASED ON A HYPOTHETICAL QUESTION.

ARGUMENT

S. S. Taylor was called as an expert witness in rebuttal to testify as to the speed of the Pontiac car at the time it started to skid. His qualifications as an expert were admitted (R. 237). He was asked a hypothetical question based on evidence admitted and in the record (R. 245, 246). Objection was made and sustained on the ground that the question was incompetent, irrelevant, and immaterial, not proper rebuttal, and as not assuming all of the facts of the case. After some clarifying questions and answers and a further objection, the Court became very angry and again sustained the objection on the grounds that the witness could not be asked a hypothetical question on facts not in "this record in the first place; second place, it isn't rebuttal." (R. 248). The witness was then asked if he had an opinion as to speed, and objection was made. The Court sustained the objection to the question as "wholly irrelevant." (R. 249).

It is submitted that every fact included in the hypothetical question had been testified to by one or more witnesses and was and is in the record. Besides, the expert witness had himself viewed the scene at least twice and had made certain measurements and observations. Under these circumstances, the question was competent, relevant, and material. An expert witness may be asked a hypothetical question based partly on personal observation and partly on premises supplied by hypothesis. *II Wigmore on Evidence* Sec. 678. Moreover, a hypothetical question need not cover all the facts which the questioner alleges in his case, so long as it includes facts on which there is or will be admissible evidence. *II Wigmore on Evidence* Sec. 682; *Travelers Insurance Co. v. Drake* (CCA Cal.) 89 F. 2d 47.

A hypothetical question may be framed upon any theory of interrogator which can reasonably be deduced from evidence, assumptions may be indulged on any fact within evidence, and facts not deemed material may be omitted. See *Christiansen v. Hollings* (Cal.) 112 P. 2d 723.

Certainly the expert opinion sought by the question was not irrelevant. Speed of the vehicle at the point of skidding was an essential element of the allegations of negligence. Every witness in the case (except the doctor and Mr. Adams) had testified as to speed.

In *Stamper v. Scholtz* (Tex.) 29 SW 2d 883 the Court held that "evidence of experts was permissible to show, from the circumstances detailed to them, as to what

the probable speed of the automobile was at the time the boy was struck.”

Finally, expert opinion as to speed was proper rebuttal. Plaintiff’s witnesses had testified as to speed. Defendant produced witnesses who testified to a lesser speed. In rebuttal plaintiff sought to show, through expert opinion based on certain physical factors, that the speed of the vehicle was greater than testified by defendant’s witnesses. The trial court ruled that the evidence of speed by defendant could not be rebutted.

The erroneous rulings of the trial court excluding expert testimony on the crucial issue of speed was prejudicial to plaintiff and her cause. The effect was to leave before the jury uncontradicted evidence of a lesser speed than that actually traveled by vehicle at the time and place in question.

CONCLUSION

The erroneous rulings of the trial court excluding the rebuttal testimony of the expert witness prejudiced the plaintiff in the presentation of her case. The verdict and judgment should be reversed, and plaintiff should be granted a new trial.

Respectfully submitted,

MOSS & HYDE,
*Attorneys for Plaintiff and
Appellant*