

1954

Leonard Bates v. Odell Walker Burns et al : Appellant's Answer to Petition for Re-hearing

Utah Supreme Court

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Robert Murray Stewart; Attorney for Plaintiff and Appellant;

Recommended Citation

Response to Petition for Rehearing, *Bates v. Burns*, No. 8207 (Utah Supreme Court, 1954).
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Case No. 8207

IN THE SUPREME COURT

OF THE

STATE OF UTAH

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LEONARD BATES, :

Plaintiff and Appellant, :

vs. :

ODELL WALKER BURNS et al, :

Defendants and Respondents :

-----oOo-----

APPELLANT'S ANSWER TO

PETITION FOR RE-HEARING

-----oOo-----

ROBERT MURRAY STEWART
Attorney for Plaintiff
and Appellant

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IN THE SUPREME COURT
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LEONARD BATES, :
Plaintiff and Appellant, :
vs. : Case No. 8207
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Defendants and Respondents :

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APPELLANT'S ANSWER TO
PETITION FOR RE-HEARING

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Comes now the appellant and answers respondents' petition for re-hearing: (This answer will set out respondents' grounds for rehearing in the order set out in respondents' petition. Each will be followed by our arguments and comments.)

I. THE COURT'S DECISION THAT THE NEGLIGENCE OF THE PLAINTIFF BATES INVOLVED AN ISSUE FOR THE JURY IS BASED UPON EVIDENCE NOT ADMITTED AND OVERLOOKS THE PLAINTIFF'S TESTIMONY ON CROSS-EXAMINATION.

The jury had sufficient evidence and testimony to believe that the defendant was travelling in excess of forty miles per hour. Respondents, in their petition for re-hearing, quoted the testimony of the witness Holdaway. Respondents' question and Holdaway's answer to it follow:

"Q. In other words, the speed limit was 40 miles per hour, the truck could have been travelling within the speed limit, is that right?

"A. It could, and possibly was going 10 miles per hour faster than that.
[Meaning faster than the speed limit which is forty miles per hour, or fifty miles per hour]

The defendants and respondents want the Court to decide from the evidence the rate of speed the defendant was travelling. This is the function of the jury. They temporarily overlook the law applicable to a motion for judgment notwithstanding the verdict on the ground that plaintiff was contributorily negligent as a matter of law. That law is to the effect that the Court is required, as a matter of law, to review the evidence in its MOST favorable light to the plaintiff. Defendants now ask the Court to decide the evidence in the LESS favorable light to the plaintiff.

II. THE DECISION IS UNCERTAIN IN THAT IT DOES NOT STATE WHETHER DEFENDANTS' CONTENTION THAT THE TRIAL COURT'S INSTRUCTIONS WERE ERRONEOUS WAS DECIDED UPON THE MERITS OR WHETHER THE OPINION HOLDS THAT SAID POINTS WERE NOT PROPERLY RAISED IN THIS APPEAL.

The question raised by the defendants on Point II of their petition was previously argued in their original brief, as shown on pages 33, 34 and 35 thereof. Defendants raise the question as to the propriety of Instructions #1 and #15. Instruction #1 sets out the plaintiff's alleged cause of action in his complaint and also what defendants admitted and denied. Instruction #15 tells the jury that if they find for the plaintiff, the damage must be limited to a just compensation for injuries and damages. Instruction #2 modifies or explains Instruction #1. In Instruction #2, the jury is instructed that the Court does not intend to indicate what facts have, or what facts have not, been proved in the case. The Court then tells the jury that the setting forth of the allegations of the complaint and the answer are only for the purpose of informing the jury what the respec-

tive parties claim the facts to be, and that the jury must determine for themselves what the true facts really are.

Instruction #15 is modified or explained by Instruction #16.

The jury certainly was not influenced in arriving at its verdict by reason of the items set forth in the Court's Instructions #1 and #15. In fact, the jury exercised complete independent judgment in arriving at the amount of their verdict. Plaintiff had prayed for a judgment in the total amount of \$108,779.50. The jury returned its verdict for the sum of \$5,779.50, or less than six per cent of the damages prayed for. Instruction #16, which follows Instruction #15, negatives any inference that the Judge is favoring the plaintiff in the outcome of the action. The jury simply was not mistaken in its interpretation of the Court's instructions.

III. THE DECISION OVERLOOKS AND FAILS TO CONSIDER THE LAW THAT INSTRUCTIONS TO THE JURY MUST BE BASED UPON THE EVIDENCE AND THAT A VERDICT UNSUBSTANTIATED BY THE

EVIDENCE CANNOT STAND.

The arguments set forth in answer to Points I and II may be considered in connection with an answer to defendants' Point III.

IV. THE DECISION OVERLOOKS AND FAILS TO CONSIDER RESPONDENTS' CONTENTION THAT THE JURY VERDICT WAS INVALID.

As pointed out in plaintiff's original brief, defendants still continue to insert a "cipher," thus "-----0," following the first item of the verdict "Physical injury, pain and suffering," in copying the jury verdict, when in fact no cipher exists in the original verdict. Why do defendants continue to do this?

To actually insert a cipher in the jury's original verdict, when the jury left the space blank, would constitute a felony on the part of the person, so inserting or altering the verdict. Fortunately, this was not done. What was done was to insert a cipher in the form of verdict of the jury, which did not exist in the original. This act constitutes misrepresentation of the true contents of the verdict, calculated, we are left to conjecture, to mislead the Court to the disadvantage of the plaintiff.

There are some cases which hold that where the jury in the first instance puts a "cipher" or uses the word "none" or the word "nothing" for compensatory damages, that the jury has made its decision with regard to compensatory damages and therefore any other part of the verdict that may be inconsistent with the finding of the jury with reference to compensatory damages would make the whole verdict improper and would be grounds for denying exemplary or punitive damages to the plaintiff.

In the case of Haydel v. Morton, 48 Pac (2d) 709, at page 712, (Cal.), the jury returned a verdict - compensatory damages "\$.00." The Court said that it did not "inadvertantly or by some mischance omit to assess the compensatory damages" but it "expressly found and determined" that plaintiff "had not suffered any actual damage."

In the case at bar, the jury omitted any showing on actual damages. In that wise, it differs from the Haydel case and under the many decisions cited, plaintiff would be entitled to compensatory damages since the facts of our case support compensatory damages.

See also, Mother Cobb's Chicken Turnovers, Inc.,

v. Fox, 73 Pac (2d) 1185, to the same effect.

On the other hand, where the jury left blank the item of compensatory damages, a different rule applies. In the case of Clark v. McClurg, 215 Cal. 279, 9 Pac (2d) 505 and 81 A.L.R. 908, also 3 Am. Jur. 730, the Court had the following to say:

"Where the jury by their verdict for the plaintiff impliedly find facts from which the law presumes that general damages follow, so that a cause of action for actual or compensatory damages is conclusively established, the fact that the verdict is for exemplary damages only is an error of form and not of substance, and is not grounds for a reversal. Under such circumstances it will be regarded as a general verdict covering all damages, both actual and punitive."

The Clark case was an action for damages, actual and punitive, for libel and slander. The jury returned a verdict reading:

"We the jury in the above entitled cause find for the plaintiff and assess her damages in the sum of _____ (\$ _____) Dollars as actual damages and the sum of Five Thousand (\$5,000.00) Dollars as punitive damages, making a total of Five Thousand (\$5,000.00) Dollars, this 20th day of September 1928."

This verdict is practically identical with

The Clark case was followed in the State of Montana in the case of Fauver v. Wilkoske, 211 Pac. (2d) 424; also in the Arizona case of Horn v. Ruess, 231 Pac (2d) 759, also the case of Livingston v. Utah--Colorado Land and Livestock Co., a Colorado case, 103 Pac (2d) 685. The following case, McConathy et al v. Deck, (A Colorado case) 83 Pac. 135, is in point.

This Court, in its decision, actually followed the reasoning and holdings of these cases by instructing the District Court to reinstate the verdict in plaintiff's favor. By reinstating the verdict, the verdict being unchanged would not show a cipher, but would show a blank as to the amount for physical injury, pain and suffering or, in other words, compensatory damages, which is in point with Clark v. McClurg, *supra*, and the cases referred to following it. The error of omission on the part of the jury was undoubtedly an error of form and not of substance and is not grounds for reversal. As the California Court said in the case of Clark v. McClurg, *supra*:


"Under such circumstances, it will be regarded as a general verdict, covering all damages, both actual and punitive."

That there is evidence to support compensatory damages there can be no doubt for part of it was stipulated to by both parties. A detailed statement of the evidence is shown at Pages 27, 28, 29, 30 and 31 of plaintiff's original brief.

CONCLUSION

Having briefly answered the four points set out in respondents' petition for re-hearing, it is respectfully requested that the honorable Court do not grant a re-hearing.

Respectfully submitted,



ROBERT MURRAY STEWART
Attorney for Plaintiff and Appellant
627 Continental Bank Building
Salt Lake City, Utah

I hereby certify that two copies of the foregoing Appellant's Answer to Petition for Re-Hearing were served on Stewart, Cannon & Hanson, attorneys for petitioners for re-hearing this 10th day of May, 1955.

Robert Murray Stewart

ROBERT MURRAY STEWART

Attorney for Plaintiff and Appellant
627 Continental Bank Building
Salt Lake City, Utah