1988

Sonja M. King and Michael King v. Joe Barron : Petition for Rehearing

Utah Supreme Court

Lowell V. Smith; Hanson, Epperson and Smith; Attorneys for Appellee.
R. Dale Potter; Attorney for Appellants.

IN THE SUPREME COURT

OF THE STATE OF UTAH

Sonja M. King and
Michael King,

Plaintiffs and Appellants

No. 19968

vs.

Joe Barron,

Defendant and Appellee

APPELLEE'S PETITION FOR REHEARING

LOWELL V. SMITH
HANSON, EPPERSON & SMITH
Attorneys for Appellee
4 Triad Center, Suite 500
Salt Lake City, Utah 84180

R. DALE POTTER
Attorney for Appellants
C-274 Cedar Park
5284 South 320 West
Salt Lake City, Utah 84107

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PETITION FOR
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COMES NOW, Joe Barron, Defendant and Appellee, by and through his attorney undersigned, and, pursuant to Rule 35 of the Rules of the Utah Supreme Court, hereby petitions this Court for rehearing of the decision filed November 4, 1988.

This Petition for Rehearing is supported by the Memorandum of Points and Authorities attached hereto and incorporated herewith.

Counsel undersigned certifies that this petition is presented in good faith and not for delay.

Dated this 21st day of November 1988.

Lowell V. Smith

LOWELL V. SMITH
Attorney for Defendant/Appellee

MEMORANDUM OF POINTS AND AUTHORITIES

Nature of Petition for Rehearing

Appellee, Joe Barron, requests a rehearing of the Court's decision that Appellant, on redirect examination, should be able to testify that she did not receive an award in the King v. Fereday matter. The specific points which the Court should reconsider are set forth below.

1. THE COURT'S OPINION ERRONEOUSLY STATES THAT BARRON'S POSITION IS THAT PLAINTIFF SHOULD NOT BE ABLE TO EXPLAIN WHAT RESOLUTION WAS MADE OF HER CLAIM AGAINST FEREDAY.

The opinion states:

> "Barron contends that her testimony as to claims she made against Fereday was admissible as a prior inconsistent statement or as an admission against interest. Barron would stop the inquiry there and not allow Mrs. King to explain on redirect examination what resolution was made of her claims against Fereday." Opinion Pages 5-6 (hereinafter, "Op. Pg. ___")

In point of fact, the question asked by Plaintiff's counsel did not deal with a resolution of the claims made against both Mr. Fereday and Mr. Barron. Rather, the question asked was directed towards what "award" was made in the Fereday trial for the 1982 accident. In fact, the Plaintiff received no award because the jury in the Fereday trial found that the accident was caused by Mrs. King. The Fereday jury made no determination regarding whether there were damages appropriately related to the Fereday accident.

2. MRS. KING WAS GIVEN FULL OPPORTUNITY TO EXPLAIN THE RESOLUTION OF HER CLAIMS MADE IN THE FEREDAY MATTER.

The opinion states:

> "Once the subject of previous claims had been interjected into the case by defendant to discredit Mrs. King, we believe that she was entitled to make a full disclosure on that subject to rehabilitate herself and to dispel any inference that a verdict for her would result in double recovery." Op.pg 8-9.

Mrs. King was given, and took advantage of, her opportunity of explaining the reason she made the same claims in both lawsuits. Mrs. King reviewed the items claimed as damages thoroughly with the jury. The question asked by her counsel, however, regarding the award received was calculated to lead to confusion rather than clarification.

3. THE JURY WAS PROPERLY INSTRUCTED TO CONSIDER AND AWARD THOSE DAMAGES, IF ANY, WHICH IT FOUND TO BE ASSOCIATED TO THE BARRON ACCIDENT.

The jury was properly instructed to award those damages, if any, resulting from the Barron accident. The jury verdict of $1,865 was supported by the evidence. There is no evidence to suggest that the jury award was influenced by considerations of preventing a "double recovery".

THE PRECLUDED QUESTION ASKED BY PLAINTIFF'S COUNSEL DID NOT DEAL WITH A RESOLUTION OF PLAINTIFF'S CLAIMS AGAINST FEREDAY

The Court's opinion states that Mrs. King should be able, on

redirect examination, to explain what resolution was made of her claims against Fereday. The opinion implies that the question asked by Mrs. King's counsel would have explained the resolution of her claims.

In fact, the question asked by Mrs. King's counsel was not directed towards clarifying the resolution of the claim made against Fereday. Plaintiff's Counsel asked:

> Mr. Potter: Sonja, in the other action, was any award made for the post '82 expenses? Tr. pg. 126.

Timely objection was made and sustained by the Court.

As this Court noted in its decision, the jury in the Fereday matter made no award of damages **due to a finding that the Fereday accident was Mrs. King's fault, 100%.** The issue concerning whether an award was made was irrelevant because it did not deal with the issue before the Barron court; i.e., what damages, if any, were attributable to the Barron accident. Had Plaintiff's counsel inquired regarding whether the jury in the Fereday matter had made a determination as to what injuries were attributable to the Fereday accident or what injuries were attributable to the Barron accident, perhaps such a question would have been helpful to the jury in making its determination. However, no finding at all was made concerning damages in the Fereday matter.

To advise the jury that **no award** was made in the Fereday matter was to invite the jury to speculate that all of the damages

claimed by Mrs. King (in both lawsuits) had already been determined by a previous jury to be attributable to the Barron accident. The Court's ruling that the evidence was irrelevant left the jury to rely on the evidence submitted to it for its consideration without influence from what the previous jury had done.

Even if Mrs. King had been allowed to testify that she received no award in the Fereday matter, would the jury have been better informed? An explanation would have been required to show the reasons why no award was made. Would the jury then have required a summary of all of the evidence put on in the Fereday matter to understand why the jury ruled as it did?

Consider the situation where a jury may have awarded to Mrs. King the hundreds of thousands of dollars she sought from Mr. Fereday, would such evidence have been relevant in the Barron matter to show that Mrs. King was compensated for the 1982 accident as well as the 1978 accident?

The point is, of course, that an award of $150,000, $50,000, $5,000 , $5.00 or any other sum, is not evidence of what the jury did, or did not do, in the Fereday matter with regard to the damages claimed in the Barron matter.

It is submitted that the proper way to handle these matters is to have the jury instructed as it was here i.e., to judge the matter

on the evidence before it and determine what damages, if any, Mrs. King is entitled based on such evidence.

The fact is, the award is irrelevant to the Barron jury since it does not tend to make the existence of any fact more or less probable than it is without the evidence.

Utah Rules of Evidence, Rule 302, defines "relevant evidence" as:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Defendant does not object to a thorough discussion concerning Plaintiff's injuries, the number of accidents Plaintiff has been involved in, the resolution of the claims against other parties, whether a determination was made in the prior lawsuit as to the damages sustained by Mrs. King, etc. However, the question asked concerning an award was not probative of the issues before the Barron jury and did not deal with the resolution of the claims made in the Fereday matter as to Mrs. King's claim there that her injuries were caused by Mr. Fereday.

PLAINTIFF WAS GIVEN AN OPPORTUNITY OF EXPLAINING WHY SHE CLAIMED THE SAME INJURIES IN THE FEREDAY AND BARRON LAWSUITS

Plaintiff, on direct examination, expressed the injuries she believed were attributable to the accident with Mr. Barron. She

attempted to designate those injuries which were caused by the accident and those which she believed were aggravated by the accident. On cross-examination, Mrs. King was examined as to the fact that she claimed, at the Fereday trial, that those same injuries were caused by Mr. Fereday's negligence. She acknowledged that she had claimed the same damages from both Mr. Fereday and from Mr. Barron and had submitted the whole amount to the Fereday jury. (Tr. pg. 112)

On re-direct examination, was given full opportunity to distinguish between those injuries claimed to have been caused by Mr. Barron and those claimed from the prior accident. Mrs. King was examined as to the list of medical expenses which she had submitted to the jury as a recapitulation of the expenses which she now attributed to the Barron accident. Even though Mrs. King had submitted the same list of medical expenses to the Fereday jury (with the addition of the medical expenses incurred before the Barron accident) she acknowledged that some of the medical specials incurred after the Barron accident were clearly not related to the Barron accident. The medical recapitulation had encompassed all of the medical expenses incurred after the date of the accident. Mrs. King testified that some of her treatment was for on-going matters which she had already scheduled before the Barron accident and for which she did not seek compensation from Barron. For example, she had already had an appointment

scheduled with Dr. Gordon prior to being involved in the accident with Mr. Barron. Although she thought some of the expenses associated with the visit may have been attributable to the Barron accident, she acknowledged that some of the expense may not have been associated with the Barron accident. Her counsel indicated, on the record, that he would:

> "Stipulate that a portion of these expenses would not relate to the 1982 collision even thought they were after the 1982 collision, and that would be more specifically the physical therapy charges from Roger Larson that she was seeing before the '82 collision occurred." Tr. pg 125.

Mr. Potter, continuing with his redirect examination, asked Mrs. King to distinguish between those expenses attributable to the Barron accident and those expenses which were on-going. Mr. Potter asked:

> Mr. Potter: Sonja, just to make sure we all have this straight, are you asking for any compensation on these problems before 1982?
>
> No.
>
> Also, on the medical expenses, how much do you feel can be attributed to the 1982 collision that's on your summary?
>
> Mr. Smith: Your Honor, I would object unless there's some foundation as to what basis she's using to make that calculation.
>
> The Court: Sustained.

Thereafter, a discussion was had as to the basis for a determination as to what expenses were attributable to the Barron accident and what expenses were not. The Court ruled that Mrs.

King was fully entitled to tell the jury of the claims that she was making at the trial attributable to the 1982 accident which specific items represent the aggravation or the new condition that was created. However, the Court required her to establish a foundation for making the determination. The Court specifically allowed Mrs. King to testify as to what she believed was caused by the 1982 accident.

Thereafter, Mr. Potter asked:

> Sonja, in the other action, was any award made for the post '82 expenses?

Timely objection was made and sustained.

Mrs. King had already indicated which medical expenses she believed were related to the accident of 1982 and which expenses were not. The question asked concerned the award given by the Fereday jury. As mentioned above, having explained the medical expenses, having discussed the prior injuries claimed, the amount of the award (based on a finding that Mrs. King was at fault in causing the Fereday accident) was irrelevant.

THE JURY AWARD OF $1,865 WAS CLEARLY SUPPORTED BY THE EVIDENCE AND DOES NOT SHOW THAT THE JURY WAS INFLUENCED BY THE DISCUSSIONS CONCERNING THE FEREDAY TRIAL

The Court's opinion states:

> Arguably, the jury determined that while Barron was liable, Mrs. King's 1978 injuries were not substantially aggravated by the Barron accident. On the other hand, the low amount of the jury's verdict ($1,865) may have stemmed from a belief on the part of the jury that Mrs. King had recovered

> in the Fereday suit some of the damages sought in the instant case, and the jury did not want to award her double recovery. We conclude that the erroneous evidentiary ruling may have been prejudicial to Mrs. King, and we order a new trial on the question of damages only.

The jury award of $1,865 was supported by the evidence submitted. Mrs. King admitted that she did not go see her treating physician for two weeks after the accident. Evidence showed that, on her first visit to physical therapist Roger Larson days after the accident, she was feeling "improved". The parties had stipulated that, since the date of the Barron accident, Mrs. King had incurred $1,429.00 in expenses (Tr. pg 29). Of that amount, $336.00 was for a spa membership at Gloria Marshall Salon. (Tr. pg. 25). Plaintiff admitted, and her counsel stipulated, that some of the medical expenses incurred after the date of the Barron accident, were not attributable to the Barron accident. (Tr. pg. 125). She admitted that she had submitted her claim for lost wages (including the time after the Barron accident) to the Fereday jury for consideration. (Tr. pg. 60). She admitted that she had not worked for over two years before the Barron trial, had not looked for a job, and had no offers for employment. (Tr. pg. 61-52).

The jury was instructed, as this Court points out (Opinion pg. 9) to determine liability for the 1982 accident and to award damages flowing therefrom if Barron was found liable. There is no

evidence to suggest that the jury did anything other than follow the instructions submitted.

Further, Plaintiff did not seek for an additur or seek to have the trial judge modify the jury verdict. The jury was polled and each indicated that the verdict reached was his/her own.

CONCLUSION

For the foregoing reasons, and each of them, it is respectfully submitted that this Court should reconsider its opinion and reverse the decision reached.

Respectfully submitted this 21st day of November, 1988.

LOWELL V. SMITH
Attorney for Defendant/Appellee
HANSON, EPPERSON & SMITH
4 Triad Center, Suite 500
Salt Lake City, Utah 84180

CERTIFICATE OF MAILING

I certify that a true and correct copy of Defendant and Appellee's Petition for Rehearing was mailed, postage prepaid, this 21st day of November, 1988, to:

R. Dale Potter
Attorney for Plaintiff/Appellant
C-274 Cedar Park
5284 South 320 West
Salt Lake City, UT 84107