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Knight Adjustment Bureau v. Young : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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900029-CA

IN THE UTAH COURT OF APPEALS

KNIGHT ADJUSTMENT BUREAU,
A Utah Corporation,

Plaintiff/Appellant,

vs.

ROBERT YOUNG,

Defendant/Appellee.

Case No. 900029-CA

BRIEF OF APPELLEE

APPEAL

FROM THE THIRD CIRCUIT COURT

COUNTY OF SALT LAKE, MURRAY DEPARTMENT

HONORABLE MICHAEL K. BURTON, JUDGE

ARGUMENT PRIORITY CLASSIFICATION 14.B.

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COURT OF APPEALS

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JURISDICTION

This appeal is from proceedings in a circuit court other than small claims, and hence the Court of Appeals has jurisdiction under Subsection 78-2a-3(2)(d) of the Utah Code. The Notice of Appeal dated December 27, 1989 and the Amended Notice of Appeal dated January 29, 1990 apparently comply with Rule 3.(a) of the Rules of Appellate Procedure sufficiently to confer jurisdiction upon this Court to review the Judgment dated January 3, 1990.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

The appellee asserts that the pertinent issues and the corresponding standard of review are as follows:

1. Was expert testimony needed to verify that the permanent crown that fell out after about one and one-half years was not installed in a workmanlike manner?

This issue would at first seem to be a question of law, requiring no deference to the trial court. On the other hand, it could well be based on insufficiency of evidence, requiring appellant to marshall all the evidence in support of the finding. Hansen v. Stewart, 761 P.2d 14 (Utah 1988).

2. Did the plaintiff suing for compensation have the burden to prove that the services provided were performed in a workmanlike manner?

This issue would also at first seem to be a question of law, requiring no deference to the trial court.

STATEMENT OF THE CASE

This action was brought by plaintiff to collect a debt claimed and assigned to it by a dentist. A bench trial was held and the trial court found that some of the services were not performed in a workmanlike manner, and the dentist was paid at least enough to cover the value of other services. Thus the plaintiff had no cause of action. Based on the reciprocity statute applicable to attorney's fees, defendant was awarded \$150 attorney's fees, which have been paid.

The facts in more detail are as follows:

1. On or about the 9th day of August, 1986, defendant entered into an agreement whereby Dr. Steven A. Moore extended credit to defendant for the charges for dental treatment.

2. Implied in that agreement was that the dental treatment for which there would be a charge would be performed in a workmanlike manner, consistent with the standards among like professionals.

3. The said agreement provided for the payment of attorney's fees in the event of a suit to collect the unpaid balance of such charges.

4. During the latter part of 1986, beginning on or about August 9, 1986, Dr. Moore installed two permanent crowns in the defendant's mouth, charging \$315 for one and \$300 for the other.

5. Defendant's insurance paid \$324 during that latter part of 1986, and defendant subsequently paid another \$70, for a total of \$394.

6. About one and one-half years after the crowns were

installed, one of them fell out and was lost down the drain while the defendant was brushing his teeth.

7. All of Dr. Moore's rights under the said agreement were assigned to the plaintiff, and plaintiff brought this action to collect amounts it alleged to be due.

8. Defendant had to incur attorney's fees well in excess of \$150 to defend this action at the trial level.

9. At trial, neither plaintiff nor defendant called an expert witness to testify as to whether the dental services were performed in a workmanlike manner, consistent with the standards among like professionals.

10. After hearing the evidence presented, including the foregoing, the trial court made the factual finding that the crown that fell out was not installed in a workmanlike manner nor in accordance with the standards among dentists practicing in the community.

11. Based on the facts found, the trial court concluded and ordered that the defendant owed plaintiff nothing by reason of the said agreement, and awarded \$150 in attorney's fees to the defendant pursuant to Section 78-27-56.5 of the Utah Code providing for reciprocal rights to recover attorney's fees.

12. Thereafter plaintiff instituted this appeal and specified in its Docketing Statement dated January 29, 1990 that: "The issue presented by this case is whether the trial court could base its ruling upon facts not in evidence, in effect, taking judicial notice of the standards of practice in the local dental community and applying that standard to the facts of this case."

SUMMARY OF ARGUMENTS

1. No expert testimony was needed to verify that the permanent crown that fell out after about one and one-half years was not installed in a workmanlike manner.

There was no special knowledge required of an expert to assist the trier of fact in determining whether a PERMANENT crown which fell out after about one and one-half years was or was not installed in a workmanlike manner. The trier of fact could be expected to understand these facts and draw correct conclusions.

2. The plaintiff suing for compensation had the burden to prove that the services provided were performed in a workmanlike manner.

The plaintiff's prima facie case included proving that the services were performed, and were performed in a workmanlike and acceptable manner. Plaintiff did not even attempt to carry this burden.

ARGUMENT

1. NO EXPERT TESTIMONY WAS NEEDED TO VERIFY THAT THE PERMANENT CROWN THAT FELL OUT AFTER ABOUT ONE AND ONE-HALF YEARS WAS NOT INSTALLED IN A WORKMANLIKE MANNER.

It is not uncommon, and perhaps even the rule, that expert testimony is required to establish whether a professional performed in accordance with the appropriate standard of care.

However, there are instances, such as when a doctor leaves a foreign object in a person's body, or when a lawyer allows the passage of a statute of limitation, that such testimony is not required. See Wagenmann v. Adams, 829 F.2d 196, 219 (1st

Cir. 1987).

This Court recently discussed the necessity for expert testimony in Salt Lake City S. D. v. Galbraith & Green, 740 P.2d 284 (Utah App. 1987).

The issue in that case was whether there was a breach by an insurance consultant of its duty to provide legal advice. The Court set forth the following principles as the basis for its holding that expert testimony was not required to show the standard of care:

If the matter at issue in the case is one which requires special knowledge not held by the trier of fact, expert evidence must be presented. If, however, the matter is one which is within the knowledge of the average trier of fact, no expert testimony is required. [Citations.]

Expert testimony is not required "simply because the circumstances are outside the average juror's experience if the other evidence is such as to present the issues in terms which the jury can be expected to understand." [Citation.] If the jury is capable of understanding the primary facts of the case and drawing correct conclusions from them, no expert testimony is required. Id. at 289.

In the instant matter, the testimony relating to whether the crown was installed in a workmanlike manner was that it was to be a permanent crown, but that it fell out about one and one-half years later while the defendant was brushing his teeth, and that he was still facing the prospect of paying to have it redone.

There would seem to be nothing any more technical about those facts than the fact of finding a foreign object left by a doctor in a person's body, or the fact of an attorney allowing passage of the statute of limitation.

Thus the trial court was correct to conclude that he, like the average juror, certainly had sufficient experience to determine that the crown "ought to stay in the mouth for a longer time" and that Mr. Young "didn't get the services that he's been billed for." Transcript (in Addendum) at 29.

The evidence presented fully supported this finding. As the trial court stated, "[G]iven the information that I have, I have to conclude that [the one crown] came out because it wasn't put in right." Transcript at 31-32.

He went on to explain as follows:

So, I think logic tells me that it came out through no fault of his, and the only conclusion I can say is that he didn't get what he was billed for. Transcript at 32.

2. THE PLAINTIFF SUING FOR COMPENSATION HAD THE BURDEN TO PROVE THAT THE SERVICES PROVIDED WERE PERFORMED IN A WORKMANLIKE MANNER.

In this case, as in any case, the plaintiff had the burden of proof with respect to a prima facie case. The prima facie case included proving that the services for which compensation was sought were performed, and were performed in a workmanlike manner.

In the case of Nielsen v. Chin-Hsien Wang, 613 P.2d 512, 514 (Utah 1980), the Court stated:

The rule in Utah is that to recover on his contract, a contractor must first establish his own performance [or] a valid excuse for his failure to perform.

Clearly defendant's obligation to pay was conditional upon Dr. Moore's appropriate performance. Plaintiff had the burden to prove the existence of that appropriate performance.

In the case of General Ins. Co. of America v. Carnicero Dynasty Corp., 545 P.2d 502, 504 (Utah 1976), the Court stated, "Where consideration is lacking, there can be no contract."

The Court went on to state that "consideration or a substitute therefor must be established as part of plaintiff's prima facie case in a contract action." Id. at 505.

Cases where that burden of proof has been properly carried include Litho Sales, Inc. v. Cutrubus, 636 P.2d 487, 489 (Utah 1981) ("plaintiff presented the testimony of an expert that, under the circumstances, the printed product was acceptable in the industry"); Asay v. Rappleye, 593 P.2d 132, 133 (Utah 1979) ("testimony of the plaintiff and his son that the work was completed in accordance with the terms of the contract"); and Keller v. Deseret Mortuary Co., 23 Utah 2d 1, 3, 455 P.2d 197 (1969) ("substantial, reasonable and credible evidence to support ... finding that the plaintiff had performed the construction in a good and workmanlike manner").

Defendant had made it clear long before trial that he contended nothing was owing because of the poor quality of the work, and that thus there had been no consideration for any additional money to be paid. Nevertheless, plaintiff put on no evidence whatsoever that the services provided had been performed in a workmanlike manner, thus failing to carry its burden of proof.

CONCLUSION

The appealed Judgment of the trial court should be affirmed in all respects, since it comports with law, justice, and equity. Furthermore, this Court should affirm and make it clear that defendant be and is awarded single or double costs and his attorney's

fees incurred in defending this matter on appeal, because of the frivolous nature of the appeal and based on the provisions of Section 78-27-56.5 of the Utah Code. It is particularly a burden on the defendant to assist the Court on an appeal in a case such as this, which deals with charges of \$615 for two crowns, of which defendant paid \$394, only \$221 less than the total original amount.

DATED this 27th day of June, 1990.

Lynn P. Heward
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MAILING CERTIFICATE

I hereby certify that the required number of copies (two per agreement with the plaintiff) of the foregoing Brief were mailed to Kathryn Denholm, P.O. Box 520308, Salt Lake City, Utah 84152 on this 27th day of June, 1990, with postage attached thereon.

Lynn P. Heward