1956

Jack Aldon Hewitt v. The General Tire and Rubber Co. : Brief of Appellant

Utah Supreme Court

Woodrow D. White; Attorney for Plaintiff and Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

JACK ALDON HEWITT,
Plaintiff and Appellant,

— vs. —

THE GENERAL TIRE AND RUBBER COMPANY, a corporation,
Defendant and Respondent.

Case No.
~~8052~~
8502

Appellant's Brief

WOODROW D. WHITE
Attorney for Plaintiff and Appellant

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STATEMENT OF FACTS

In this case, at the conclusion of the presentation of evidence, the respondent made a motion for a directed verdict which motion the court took under advisement pending the verdict of the jury. The jury returned a verdict in favor of the appellant on April 23, 1953 (R. 3). On the same date the clerk signed and entered the judgment on the verdict (R. 4). Thereafter the respondent renewed its motion for directed verdict and in the alternative for a new trial (R. 5-6). The court granted the motion for a directed verdict and entered judgment not-

withstanding the verdict in favor of the respondent, no cause of action (R. 8-9). From this judgment the appellant appealed and this court on May 24, 1955, filed its decision reversing the trial court and ordering that the judgment upon the jury verdict be reinstated (R. 11-15). Upon denial of the petition for rehearing the remittitur was issued December 2, 1955 (R. 10). The respondent made a motion to deny interest and retax costs which was heard on January 25, 1956, and the District Court made and entered an order disallowing the appellant's interest from the date of the judgment on the verdict to the date of the order entered by the Supreme Court denying the petition for rehearing (R. 18, 23). From this order appellant has filed this appeal.

STATEMENT OF POINT UPON WHICH APPELLANT RELIES

The appellant is entitled to interest on the verdict and the judgment from April 23, 1953, until paid.

ARGUMENT

Section 15-1-4, *Utah Code Annotated,* 1953, provides that the judgment obtained in this case shall bear interest at the rate of 8% per annum. Rule 54 (e) provides as follows:

> "(e) *Interest and Costs to be Included in the Judgment.* The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascer-

tained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the Register of Actions and in the Judgment Docket."

It is the view of the Appellant that Rule 54 (e) is decisive of the question now before this Court, as it requires the Clerk to include in the judgment signed by him any interest on the verdict or decision from the date it was rendered. Both the verdict and the judgment on the verdict were entered on April 23, 1953. It has been similarly decided in California, which has a statute substantially identical to ours. Section 1035, *California Code of Civil Procedure,* provides as follows:

> "The Clerk must include in the judgment entered up by him any interest on the verdict or decision of the court from the date it was rendered or made, and the costs, if the same have been taxed or ascertained; and he must, within two days after the same are taxed or ascertained, if not included in the judgment, insert the same in a blank left in the judgment for that purpose, and must make a similar insertion of the costs in the copies and docket of the judgment."

The above section was re-enacted in 1933 as part of Section 1033 of the *California Code of Civil Procedure.*

We desire to refer the court to the case of *Bond vs. United States Railroad of San Francisco* (1911) (Calif.) 113 P. 2d 366. In that case the jury returned a general verdict in the amount of $4,500.00 and the jury also made

answer to certain particular questions of fact. On the basis of those answers, the defendant moved the court to return a judgment to the plaintiff for $405.00 and no more, which motion the trial court granted. The plaintiff appealed, and the Appellant Court ordered that the court below enter judgment for the plaintiff in the amount of the general verdict of $4,500.00. In applying the above-mentioned California statute, the court held as follows (at page 373):

> "The appellant asks the court to modify the judgment heretofore given by adding a direction that in giving the judgment in the court below the accrued interest on the verdict shall be included. Our consideration of the verdict and judgment was entirely in relation to the state of the case at the time the judgment appealed from was given in the court below. It was with reference to that period that we directed the entry of judgment by that court for the sum of $4,500 upon the going down of the remittitur. There was no intention to restrict the power of the court below, or of its clerk, to perform the ministerial duty of computing the interest which has accrued between the date of the return of the verdict and the entry of the judgment and including it in the judgment finally entered, as provided by section 1035 of the Code of Civil Procedure. The court below will be at liberty to perform that duty, or see that its clerk does so, notwithstanding the language of the mandate of the decision hereinbefore given by this court."

See also *Golden Gate Mill and Mining Company vs. Joshua Hendy Machine Works* (Calif.) 23 P. 45; *Degnan vs. Young Brothers' Cattle Co.* (Kan.) 103 P. 2d 918;

Glen vs. Rice (Calif.) 162 P. 1020. In the latter case, the court held that interest ran from the original date of the judgment upon modification of the judgment by the appellant court. See also *Zeidler vs. Goelzer* (Wis.) 211 N.W. 140. In that case, under a statute which directs that interest from the date of the verdict shall be computed by the clerk and added to the costs of the party entitled thereto, it was held that interest should run from the date of the verdict on the original trial even though an intervening new trial was ordered on appeal for the determination of a single issue.

We also desire to refer the court to the case of *Stever vs. Associated Transport, Inc.,* 63 N.Y.S. 2d 606, affirmed in 70 N. E. 2d 169. In that case the jury rendered a verdict in the amount of $40,000.00. A motion for new trial was made on all the statutory grounds. The court granted the motion on the ground of excessiveness of damages but stipulated for denial of the motion in the event plaintiff would accept a lesser amount of $22,500.00. The plaintiff failed to accept the reduction and appealed. On appeal the order granting the new trial was affirmed with leave given to the plaintiff to accept the reduced amount. The plaintiff accepted, and included in the amount of the judgment was $1185.00, interest from the date that the verdict was entered to the date of judgment. It was held that plaintiff was entitled to interest from the date of the verdict.

The case of *Metcalf vs. City of Watertown,* C.C.A. 7th, 68 F. 859, was a suit upon a judgment. In that

case the trial court made a finding to the effect that a judgment had been rendered in the sum averred in the complaint but gave judgment to the defendant on the ground that the statute of limitation barred recovery. Thereafter, the Supreme Court reversed the trial court's order and directed the trial court to enter judgment for the plaintiff on the finding. Afterwards, at the same term of court, the trial court disallowed interest from the date of the original finding and the entry of the judgment from which the plaintiff appealed. The court said at page 864:

> "The judgment of the Circuit Court is reversed with costs, and the cause remanded with direction that the appellant be given judgment for the amount due upon the finding of August 2, 1889, including interest to that date, with interest thereon to the date of judgment hereby ordered . . ."

There is a statute in Wisconsin which provides that the clerk shall add interest from the date of the verdict or report.

The United States Court of Appeals for the Fifth Circuit has adopted, and in several cases reaffirmed, the rule which we seek this court to apply here. The leading case is *Louisiana and* ***Arkansas Railway*** *Company vs.* ***Pratt,*** C.C.A. 5th, 142 F. 2d 847. In that case the plaintiff brought a suit under the F.E.L.A. and obtained a verdict for $5,000.00, but the trial court entered judgment non obstante veredicto for the defendant. On appeal the judgment was reversed and the cause

remanded with instructions that judgment be entered upon the verdict. The judgment entered pursuant to the mandate allowed interest from the date of "judicial demand", applying the Louisiana statute. The defendant appealed on the interest point only. We quote from the decision, commencing at page 853:

> "In all actions for personal injuries brought under the Federal Employers' Liability Act, the remedy given by that statute is exclusive, and all state laws are superseded in so far as they attempt to cover the same field. At the time the Act was enacted, interest was not allowable on claims for personal injuries until the amount of damages had been judicially ascertained. This was upon the theory that no debt was due prior thereto or that interest was a part of the damages and was merged therewith in the amount awarded . . ."
>
> "The determination that interest was not properly allowable from the date of judicial demand gives rise to the inquiry as to the date from which it should begin to run. The only applicable federal statute, Section 966 of the Revised Statutes, provides that interest shall be allowed from date thereof on all judgments in civil causes recovered in a district court. Under this statute, as appellant admits, appellee was entitled to interest at least from the date of entry of judgment on the mandate. It has been held to be within the equity of Section 966 of the Revised Statutes to award interest from the date of the verdict where, without fault of the plaintiff, an appreciable time has elapsed between the rendition of the verdict and the entry of the judgment. Moreover, Rule 58 of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c,

provides that, unless the court otherwise directs, judgment upon the verdict of a jury shall be entered forthwith by the clerk. Under said rule, *the date of the verdict and the date when the judgment should have been entered* are the same in this case. For these reasons, we conclude that plaintiff below was entitled to interest from the date judgment should have been entered as required by said Rule 58. Such award is within the equity of the federal interest statute on judgments, and is not inconsistent with the Federal Employers' Liability Act. (Italics ours)

"The judgment appealed from is reversed, and the cause remanded to the district court with instructions to enter judgment for the amount awarded by the jury with interest thereon from the date of the verdict."

Another Fifth Circuit case is that of *Givens vs. Missouri-Kansas-Texas R. Co. of Texas,* 196 F. 2d 905. For the convenience of the court, we set forth the decision in its entirety.

"By the mandate of this court issued April 23rd, 1952, the judgment of the district court overruling the plaintiff's motion for judgment in the amount of $12,000.00 was reversed with instructions to enter such a judgment on the verdict of the jury. The appellant, plaintiff below, now moves the court to amend its mandate so as to direct that the judgment to be entered by the district court provide for interest at the rate of six per cent (6%) per annum from the 7th day of December, 1950, the date the plaintiff below filed his motion for judgment on the verdict of the jury. In so moving to amend this court's mandate, the appellant is following the proper procedure as approved by the Supreme Court in

Briggs v. Pennsylvania Railroad Co., 334 U. S. 304, 306, 68 S. Ct. 1039, 92 L. Ed. 1403. In the same case the Second Circuit had also indicated that this was the appropriate procedure. 164 F. 2d 21, 23, 1 A.L.R. 2d 475.

"In that case the Supreme Court had granted certiorari to resolve a conflict between the decision of the Second Circuit and a decision of this circuit in Louisiana & Arkansas R. Co. v. Pratt, 142 F. 2d 847, 153 A.L.R. 851. In the Second Circuit case no motion to amend the mandate had been made during the term at which it was entered and both the Second Circuit and the Supreme Court on certiorari pretermitted a decision of the question of whether on proper application interest should be allowed from the day on which the plaintiff was originally entitled to judgment in the district court.

"It is provided in mandatory terms by 28 U.S.C.A. 1961 that 'Interest shall be allowed on any money judgment in a civil case recovered in a district court.' That section further provides that 'Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law.' The law of Texas as set out in Article 5072, Revised Civil Statutes of Texas, provides that interest on judgments shall be at the rate of six per cent (6%) per annum. Rule 58, F.R.C.P., 28 U.S.C.A., provides that judgment upon the verdict of the jury shall be entered forthwith by the clerk unless the court otherwise directs.

"The verdict of the jury was in response to forty special issues and was rendered on December 4th, 1950. On December 7th, 1950 both the plaintiff and the defendant moved for judgment on the jury's verdict. It was not until February

13th, 1951 that the district court decided these motions and entered judgment for the defendant. In Briggs v. Pennsylvania R. Co., 164 F. 2d 21, 22, Judge Chase speaking for that circuit said:

> 'Since no judgment could have been entered until the motion pending after verdict had been decided by the trial court, no interest can be allowed between the date of the verdict and May 28, 1945 when that motion was decided and the judgment for the defendant was erroneously entered.'
>
> "We think that our decision in Louisiana & Arkansas R. Co. v. Pratt, supra, was in all respects sound. Accordingly it is ordered and adjudged that the mandate of this court heretofore issued on the 23rd day of April, 1952 be recalled and that an amended mandate be issued to provide that the judgment in the amount of $12,000.00 to be entered by the district court shall provide also for interest on that amount from the 13th day of February, 1951. To that extent the motion to amend the mandate is granted."

In *Coyle Lines, Inc. vs. United States*, C.C.A. 5th, 198 F. 2d 195, the court again re-affirmed the principal which we desire this court to apply in the case at bar. That case was a suit in admiralty. At the trial, the court found the libelant had been damaged in the sum of $21,661.35 but also found mutual fault on the part of both parties, and, therefore, gave judgment to the libelant in the amount of $10,830.67. In the first appeal from this judgment reported in 195 F. 2d 737, the Fifth Circuit Court found that the United States was solely at fault, and reversed the judgment of the trial court

directing that the libelant be awarded the full amount of its damages with interest and costs. The case came up to the Circuit Court again on the interest question and was reported in 198 F. 2d 195. In that case, the court ruled that interest should be allowed from the date libelant was originally entitled to judgment. The applicable federal law referred to in the opinion allowed interest at the rate of 4% per annum against the Government upon the money judgment. The court said at page 196:

> "The interest on the damages should be calculated at the rate of 4% per annum until satisfied and should run from April 25, 1951, the date on which the libelant was originally entitled to judgment in the district court."

Subsequently, the Fifth Circuit Court re-asserted the rule in the case of *Wright vs. Paramount-Richards Theatres, Inc., et al.,* C.C.A. 5th, 198 F. 2d 303. The jury in that case returned a verdict for the plaintiff in the amount of $16,000.00. Subsequently, the motion for the judgment notwithstanding the verdict was granted, and the judgment entered for the defendants. The court reversed the trial court judgment, saying (at page 308):

> "The cause is reversed with instructions to enter judgment on the verdict of the jury in favor of the plaintiff in the amount of $16,000.00 with interest from the date on which said judgment should have been entered, April 23, 1951. See opinion on motion to amend mandate, May 27, 1952, in Givens vs. Missouri-Kansas-Texas R. Co., 5th Cir., 196 F. 2d 905."

Finally, in the case of *Yarno vs. Hedlund Box and Lumber Co.* (Calif.) 237 P. 1002, the jury gave a verdict for $22,310 on breach of contract. On appeal the court ruled that the judgment should be reversed and the cause remanded with instructions to ascertain the worth of the recovery at the time of the return of the verdict in accordance with directions given in the opinion. The trial court was ordered to enter a judgment for the reduced amount. Thereafter, the trial court found the worth of the recovery at the time of the return of the verdict was $19,065.69 and allowed interest thereon in the amount of $1445.69 from the original date of the judgment. The defendant appealed from that portion of the judgment which allowed interest, and the judgment was affirmed.

CONCLUSION

At the time the verdict was handed down by the jury and the judgment on the verdict was entered in this case, the amount of plaintiff's damages became liquidated and were definite of ascertainment, and the plaintiff under the statutes of this state is entitled to interest upon that liquidated claim during the period in which he was prevented from having the use of the money. The plaintiff would not receive full justice under the law upon reinstatement of the verdict unless such interest is allowed. We respectfully conclude that the order of the district court should be reversed; that the cause should be remanded to the trial court with instructions

to enter a judgment in favor of the plaintiff for interest or the judgment on the verdict from April 23, 1953.

Respectfully submitted,

WOODROW D. WHITE
Attorney for Plaintiff and Appellant.