1982

Ben Miller and Jovalle Thomas v. Lawrence S. McMullen : Brief of Appellant

Utah Supreme Court

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Anthony M. Thurber; Attorney for Plaintiffs-Respondents;

IN THE SUPREME COURT OF THE STATE OF UTAH

BEN MILLER and JOVALLE THOMAS, Plaintiffs and Respondents, v. LAWRENCE S. McMULLEN, Defendant and Appellant.	Case No. 18085

BRIEF OF RESPONDENTS

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NATURE OF THE CASE

This is a tort action arising out of a semi-truck-automobile accident which occurred on the 10th day of November, 1979, 4.1 miles West of Delta, in Millard County, State of Utah.

DISPOSITION IN THE LOWER COURT

The matter was tried to a jury, resulting in a special verdict favoring plaintiffs. The court entered judgment on the verdict on June 24, 1981 in favor of plaintiff, Ben Miller, in the amount of $67,650.00, and in favor of plaintiff, JoValle Thomas, in the amount of $73,750.00.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the judgment on the verdict.

STATEMENT OF FACTS

This negligence action arose out of an accident which occurred November 10, 1979, on U.S. Highway 6/50 in Millard County, Utah, just west of Delta, Utah. The respondent, Ben Miller was driving a Kenworth semi-tractor-trailer in the eastbound lane and appellant was driving a Subaru station wagon in the westbound lane.

Because the appellant could not remember anything about the accident, the testimony of plaintiff, Ben Miller, was crucial. Mr. Miller testified that the Subaru had turned into the eastbound lane signalling to make a left hand turn at an intersection. After applying his brakes, Mr. Miller elected to avoid a head-on and surely fatal collision by releasing the truck brakes and swerving into the westbound lane in an effort to go around the appellant's Subaru. As he executed that evasive maneuver, appellant in the Subaru looked up and noticed the oncoming diesel, and swerved back into the westbound lane after Mr. Miller had committed to his evasive maneuver. The collision occurred in the westbound lane.

During negotiations between appellant's insurance company and respondent, Mr. Miller submitted to a lie detector examination. A copy of the examination was furnished the appellant's insurance company, State Farm Mutual, which thereafter paid the $25,000.00 property damage limit of its policy insuring appellant Lawrence McMullen.

In chambers, immediately prior to trial, Mr. Thurber, attorney for respondents informed the court and counsel of the existence of the polygraph test and of his desire to introduce the results into evidence. Mr. Ivie, attorney for appellant, objected to such introduction. The court admonished Mr. Thurber not to mention the polygraph test in the opening statement, indicating that the court would decide the question of admissability later during trial when it arose. Mr. Thurber did not mention the lie detector test in his opening statement. Later, during cross-examination by Mr. Ivie, Mr. Miller volunteered that he had taken a lie detector test (R. 376).

At that point, appellant's attorney asked for a recess and made a motion for mistrial out of the presence of the jury. (R. 376-77) The motion was taken under advisement by the Court (R. 380). The next day at trial, the court heard testimony, out of the presence of the jury, regarding the circumstances under which the polygraph test was taken

(R. 532). The trial court denied appellant's motion for mistrial for the reason that since defense counsel had asserted Mr. Miller had lied on direct examination, it was not prejudicial or preventative of a fair trial when the witness "spontaneously blurts out" that he had passed a polygraph test regarding the matters at issue (R. 548-59). The court further ruled that it would allow the polygraph test into evidence only if the proper foundation was provided before hand to insure reliability of the results. (R. 549-50) Mr. Thurber reserved the right to call a polygraph examiner in rebuttal evidence (R. 551).

Later, during rebuttal, Mr. Thurber called Steven Taylor, a certified polygraph examiner, as a witness. In establishing foundation for Mr. Taylor's testimony, Mr. Thurber got no further than the witness's occupation when he was interrupted by defense counsel and a recess was called. The court ruled during the recess that the witness could not testify, and he was excused.

The trial thereafter continued to its conclusion and the jury returned a special verdict finding the appellant 100% negligent, and set damages at $67,500.00 with respect to the driver, Mr. Miller, and $73,750.00 with respect to the passenger, JoValle Thomas. Judgment was entered on the verdict in open court. Thereafter, appellant made a motion

for new trial and a motion for reduction of special damages. Both motions were denied by the trial court October 1, 1981.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE THE COURT'S DISCRETION IN DENYING APPELLANT'S MOTION FOR MISTRIAL.

Essentially, appellant's claims of error regarding denial of his mistrial motion go to the alleged belief that the jury was prejudiced by Ben Miller's spontaneous remark during cross-examination about the lie detector test. The context of this volunteered statement was cross-examination in which the appellant's attorney was attempting to show that the witness had lied during direct examination. When pressed, Mr. Miller rather angrily stated that he knew what Mr. Ivie was trying to do and that he had passed a lie detector test to verify what he was testifying was the truth. (R. 376)

This one brief remark is the only statement that could have possibly influenced the jury. Appellant in his brief quotes language from the transcript (See appellant's brief P. 4-7) concerning the discussions regarding the poly-graph test; but all of those conversations were out of the

presence of the jury and no prejudice could possibly have resulted. Next, appellant quotes language from the subsequent day of trial wherein the trial judge heard testimony out of the jury's presence regarding the test and thereafter ruled on the mistrial motion (See appellant's brief P. 7-9). Finally, appellant quotes language from the trial transcript (See appellant's brief P. 9-11) wherein Mr. Thurber began to qualify a polygraph examiner as an expert witness. Mr. Thurber got no further into the qualification process than name, residence, occupation and education when he was interrupted and the court refused to allow further testimony. Because the trial court denied the motion for mistrial and ruled the polygraph test result would be admissible only if the expert qualified and proper foundation was established, it is difficult to understand how Mr. Thurber's brief preliminary questioning could possibly have prejudiced the jury. The witness never even testified that he had conducted an examination.

Appellant appeals the Court's denial of his mistrial motion claiming error based upon prejudice resulting from the witness's reference to a lie detector test, <u>not</u> upon the question of admissibility of a lie detector test results. Therefore, whether the trial court's decision to admit the test result was error, or whether uniformity of criminal and

civil cases regarding admissibility should exist, is not the question. The question is whether Mr. Miller's volunteered statement was prejudicial under the circumstances.

A. The Granting or Denying of a Motion for Mistrial or New Trial is Within the South Discretion of the Trial Court. Such Discretion Will Not be Overturned Without a Showing of Substantial Prejudice.

The conduct of a trial lies within the trial judge's sound discretion. Because of the trial court's favored position to observe the subjective effect trial incidents have upon jurors, appellate review of the trial court's discretionary rulings is limited. Utah law is explicit on this point.

> "The granting of a motion for mistrial lies in the sound discretion of the trial judge, and his ruling should be overturned only when it clearly appears that he abused his discretion. A mistrial should be granted only when it appears that justice will be thwarted unless a jury is discharged and a new trial granted." Watkins & Faber v. Whitely, 592 P.2d 613, 616 (Utah 1979).

B. Standards of Appellate Review of a Trial Court's Exerise of Discretionary Power.

Utah law establishes a two part standard of review. The first part deals with abuse of discretion, and relates to the action taken by the trial court with regard to alleged improprieties. The second part involves substantial prejudicial effect and focuses upon whether the improprieties were

of substantial gravity to preclude a fair and impartial trial. The moving party must satisfy both elements before an appellate court will overturn the trial court's action.

> "The purpose of the trial is to afford the parties a full and fair opportunity to present their evidence and their contentions and to have the issues in dispute between them determined by a jury; and that when that has been accomplished we will not disturb the determination made by ...the trial court unless it is shown that there was a substantial and prejudicial error which prevented a fair trial,..." Lee v. Howes, 548 P.2d 619 621 (Utah 1976).

> "The broad discretionary power of the trial court in granting or denying of new trial is well established. And we have repeatedly expressed our reluctance to interfere with its judgment in such matters unless the action is clearly unreasonable and arbitrary." Page v. Utah Home Fire Ins. Co., 15 Utah 2d 257, 391 P.2d 290, 292-93 (1964).

The trial court has broad discretionary power over the conduct of the trial and in deciding the prejudicial effect of any alleged improprieties. The trial court's exercise of such discretion will generally not be overturned unless it is clearly demonstrated that the court abused its discretion. The reason for this deference to the trial court is:

> "[T]he advisability and indeed the necessity of enabling the trial judge to properly perform his function as the authority in charge of the trial by giving him a reasonable latitude of discretion in ruling on such matters. (footnotes omitted) Experience teaches that just as sure as human beings are involved, untoward happenings of

> various kinds will continue to occur during trials. It is the responsibility of the trial court to rule upon questions which arise concerning whether any such occurrence has prevented a party from having a fair trial;... Due to the fact that this is primarily his responsibility; and that he is in a position of advantage to observe the appearance, demeanor and reactions of all persons concerned, and the result which eventuates, his rulings on such matters should be looked upon with indulgence and should not be disturbed unless it clearly appears that he has abused his discretion." Robinson v. Hreinson, 17 Utah 2d, 261, 409 P.2d 121, 124 (1965).

As indicated, in order to justify overturning the trial court's decision requires a clear and convincing showing of the trial court's abuse of discretion. This is usually accomplished, if at all, by demonstrating to the appellate court's satisfaction the substantial prejudice the alleged improprieties had upon the verdict. Rule 61 of the Utah Rules of Civil Procedure addresses itself to this subject as follows:

> Harmless Error
>
> No error...or defect in any ruling or order of in anything done...by any of the parties, is ground for granting a new trial,...unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

The appellant has not demonstrated either substantial or any other prejudice arising from Mr. Miller's one single volunteered remark toward the beginning of a three day trial.

The trial judge carefully considered the remark, and heard testimony regarding the circumstances surrounding the polygraph examination of Mr. Miller. Appellant's counsel should have known about the polygraph test in advance of the trial since his real client (State Farm) was fully aware of its existence and had a copy. If counsel thereafter pressed Mr. Miller regarding the veracity of his story and in fact asserted as he did that Mr. Miller was lying, he could fully expect that the fact of the polygraph test would be volunteered. Under these circumstances there was no abuse of the court's discretion and certainly no substantial prejudice requiring reversal.

POINT II

NO PREJUDICE RESULTED FROM THE TRIAL COURT'S INSTRUCTING THE JURY REGARDING THE EFFECT OF COMPARATIVE NEGLIGENCE.

The trial court's decision whether to give or not to give an instruction is another discretionary matter. The standards of review outlined above apply equally to such rulings of the trial court.

The state of the law in Utah regarding informing the jury of the effect of comparative negligence is unsettled. Defendant cites Mc Ginn v. Utah Power and Light Co., 529 P.2d

423 (Utah 1974) arguing that decision should control. Mc Ginn involved an Idaho comparative negligence statute, and this court in its decision stated that the rule it was adopting was substantive and not separable from the statute. That decision is not determinative of the question how the Court should rule when faced with a case requiring application of the Utah statute.

The recent case of Lamkin v. Lynch, 600 P.2d 530 (Utah 1979) raised grave doubts as to the validity of the Mc Ginn rational. The concurring and dissenting opinions in Lamkin both indicated that Mc Ginn should be reconsidered.

The proposition that the jury should be informed of the effect of its apportionment of fault in a special verdict is forcibly argued by the last Professor E.W. Thode in Comparative Negligence, Contribution Among Tort Feasors, and the Effect of a Release---A Triple Play by the Utah Legislature, 1973 Utah L. Rev. 306 414-418. Professor Thode concludes that to allow the jurors to intelligently fulfill their sworn responsibility, they should be informed of the legal effect of their comparison of negligence. Indeed, according to Professor Thode, failure to instruct as to the effect may be may be affirmatively misleading.

> "Absent such an instruction, a sensible juror is likely to believe that plaintiff will re-

> cover, but that the damages will be reduced proportionately if plaintiff's contributory negligence is found to be less than one hundred percent. Such an assumption would be accurate in a 'pure' comparative negligence state, but not in Utah, where plaintiff's negligence must be less than the defendant's negligence for plaintiff to recover anything from the defendant." Id. at 418.

In the present case, the special verdict (R. 196-97) contained only five questions. Question three, dealing with apportionment of negligence, was not answered because in question two, the jury found that the respondent, Ben Miller, was not negligent. The jury made no finding of negligence requiring comparison which instruction 10 could have influenced at all. The court's instruction, if error, is on its face totally harmless.

Had the jury returned a comparative finding in the range of plaintiff fifty-five percent negligent and defendant forty five percent negligent, as happened in McGinn, then appellant's position might have merit. But where, as here, the jury found the appellant one hundred percent or wholly liable for causative fault, the questioned instruction could in no way have effected or prejudiced the jury. Appellant has completely failed to demonstrate the substantial prejudice required to justify this Court's overruling of the trial court's denial of appellant's motion for new

trial upon the ground of claimed error in the giving of the instruction.

CONCLUSION

The grounds for appeal asserted by appellant totally fail to demonstrate either abuse of discretion or substantial prejudice. Respondents respectfully request that the appeal be dismissed and remanded to the trial court for further proceedings.

DATED THIS 16 day of June, 1982.

Respectfully submitted,

ANTHONY M. THURBER
Attorney for plaintiffs-respondents

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and accurate copy of the foregoing Brief of Respondent, postage prepaid, on this the 16 day of June, 1982, to:

Ray H. Ivie, Esq.
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