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Utah Farm Bureau Insurance Co. v. Rex K. Chugg et al : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

UTAH FARM BUREAU INSURANCE
COMPANY, a Utah Corporation,

Plaintiff and Respondent,

-vs-

REX K. CHUGG,

Defendant and Appellant,

WILLARD A. LARSEN; Insurance Com-
mission of the State of Utah; HAL S.
BENNETT, DONALD HACKING and
RUE L. CLEGG, Commissioner of the De-
partment of Business Regulation of the
State of Utah and WALTER M. JONES,
Commissioner of the Insurance Commis-
sion of the State of Utah,

Defendants.

Brief of

Appellant

Appeal No.

8621

Appeal from the District Court of the First

Judicial District of the State of Utah

In and for the County of Cache

Hon. Lewis Jones, Judge

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and Appellant.

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STATEMENT OF FACTS

On or about the 23rd day of August, 1955, in consideration of the payment of a premium by Rex K Chugg, defendant and appellant, the Utah Farm Bureau Insurance Company, a Utah Corporation, plaintiff and respondent, executed and delivered a written automobile insurance policy to the said Rex K. Chugg in connection with a Dodge automobile owned by the said Rex K. Chugg. The said insurance company insured against collision, property damage and public liability in con-

nection with the use of said automobile for a period of time from the 23rd day of August, 1955, to and including the 23rd day of February, 1956.

On the 27th day of August, 1955, approximately 3 miles North of the town of Smithfield in Cache County, Utah, on U. S. Highway 91 the said Rex K. Chugg was involved in an automobile accident with Willard A. Larsen, one of the defendants herein.

On or about the 15th day of November, 1956, the said Willard A. Larsen commenced an action in the First Judicial District in and for the County of Cache, State of Utah, Civil Action No. 8202, against the said Rex K. Chugg for property damage and personal injuries resulting from the aforesaid auto accident.

The said insurance company refused to defend the action or assume any responsibility under the said insurance policy on the ground that the said Rex K. Chugg was driving the said automobile at the time of the accident under the influence of alcohol, contrary and in violation of Section (i) of the Exclusions contained in said Policy, which reads as follows:

“All coverage under this policy is suspended when vehicle is being operated by driver who is under the influence of alcohol.”

The said insurance company then commenced an action which is the subject of this appeal against the said Rex K. Chugg and others for the purpose of ob-

taining from the said District Court a declaration of the legal rights of the insurer under the policy heretofore mentioned. The said District Court after taking evidence concerning the question of intoxication found that the said Rex K. Chugg was intoxicated at the time of the accident and decreed that Section (i) of the above mentioned policy violated no provision of the Utah State Insurance Code, and that all coverage at the time of the accident was suspended and therefore said insurance company was and is not now nor shall be in the future under any obligation for possible liability or any duty to either the said Rex K. Chugg or the said Willard A. Larsen for injuries or losses resulting from said accident.

Statement of Points

The defendant and appellant relies upon the following points for a reversal of the judgment of the trial court.

1. The court erred in the admission of testimony concerning the alcoholic content of a blood specimen of the defendant and appellant.

2. The court erred in the admission of testimony concerning a record of conviction in a criminal court of the defendant and appellant for a violation of the Uniform Act Regulating Traffic on Highways.

3. The evidence is insufficient to support the Find-

ings of Fact of the trial Court that the defendant and appellant was at the time of the accident driving his automobile under the influence of alcohol.

4. The court erred in failing to decide that the provision of defendants and appellants automobile Insurance Policy which reads "all coverage under this policy is suspended when vehicle is being operated by a driver who is under the influence of alcohol" void as being contrary to public policy and Utah Law.

ARGUMENT

Point Number 1.

The court erred in the admission of testimony concerning the alcohol content of the blood specimen of the defendant and appellant.

To warrant the admission into evidence of the testimony that the blood specimen taken from the said Rex K. Chugg contained alcohol it was incumbent upon the plaintiff and respondent who is hereafter referred to as the insurance company, to prove the identity of the specimen by laying a proper foundation and if one link in the chain of possession is missing, the testimony concerning the specimen cannot be allowed into evidence. Kovak vs. District of Columbia, 160 F. 2d 588 (1947); Joyner vs. Utterback, 196 Iowa 1040, 195 N. W. 594 (1923); State vs. Weltha 292 N. W. 148 (Iowa 1949); State vs. Werling 13 N. W. 2d 318 (Iowa 1944) and State

vs. Perry 69 N. W. 2d 412 (Iowa 1955). Almost all of the above cited cases involved criminal action. However, the rule set forth above which is supported by the above cited cases is clearly applicable to civil action even though the burden of proof may be different than in criminal actions.

In the present case the foundation necessary is totally lacking. The doctors testimony concerning taking of the blood merely shows that the doctor arrived at the scene of the accident and found the defendant and appellant unconscious (Tr. 14 and 15) and that "My memory doesn't serve me a hundred per cent on it. I don't remember personally taking it, but the records state that I did." The doctor later clarified the record he referred to was the laboratory record. (Tr. 16) In response to a question "To whom was the blood sample given?" the doctor answered, "I don't remember . . ." (Tr. 17) Under cross examination the doctor stated "Well I don't remember who drew it." The doctor was then asked "Did you see the blood sample after that?" The doctor replied "No". The doctor further testified "That's right" to the question, "And you have no personal knowledge of where it was from that time on." (Tr. 19)

The only other testimony concerning the blood sample was that of Marie Viebell who testified that she had a record concerning a Rex K. Chugg which

showed blood to have been taken on August 22, 1955 and that the test was run upon the specimen August 28, 1955. The witness, Marie Viebell, then over the objection of counsel for the appellant testified that it was drawn by Dr. Robert S. Budge but that she had no part in drawing the blood (Tr. 6 and 7) The record does not show how, when or from whom Marie Viebell gained possession of the blood specimen nor does the record show the basis of her statement that the specimen was taken by Dr. Robert S. Budge. Even assuming that the doctor did take the specimen we have a situation in which no foundation was established. The record does not show when or where the blood was taken, who had possession of the blood after it was taken, how the blood got into the possession of Marie Viebell and what happened to the blood after it came into the possession of the said Marie Viebell.

Point No. 2

The court erred in admission of testimony concerning the record of conviction in a criminal court of the defendant and appellant for a violation of the Uniform Act Regulating Traffic on Highways.

Over the objection of counsel for Rex K. Chugg the Clerk of the City Court was allowed to testify that in the City Court of Logan City a Rex K. Chugg was convicted, in the case of State of Utah vs. Rex K. Chugg, after entering a plea of guilty, of the offense of drunk

driving. (Tr. 8, 9 and 10) Since the action was brought in the name of the State of Utah we must assume that the criminal action was based on a violation of 41-6-44 Utah Code Annotated 1953. (Uniform Act Regulating Traffic on Highways)

In this state it is not necessary for the defendant and appellant to rely on the general rule that a judgement or conviction in a criminal case is not admissible in a civil case, as evidence of the facts upon which it is based, because Section 41-6-170 Utah Code Annotated 1953 provides as follows:

“No record of the conviction of any person for any violation of this act shall be admissible as evidence in any court in any civil action.”

Counsel for the plaintiff and respondent in his oral argument to the trial court contended that this statute was not applicable because the defendant in the case of State of Utah vs. Rex K Chugg entered a plea of guilty and therefore, was not convicted of an offense as contemplated by 41-6-170 Utah Code Annotated. Under Utah Law a conviction can be based upon a plea of guilty. 77-1-11 Utah Code Annotated, 1953, provides in part:

“No person shall be convicted of a public offense unless by the verdict of a jury, accepted and recorded by the court, or upon a plea of guilty . . .”

In the case of Warren vs. Marsh, 11 N. W. (2d) 528 (Minn. 1943) the Minnesota court interpreted a Minnesota statute which is identical to 41-6-170 of the Utah

Code and in so doing found the question raised by counsel as being without merit. At page 530 of the opinion the Minnesota court states,

“Defendant asserts that the statute is inapplicable to an oral plea of guilty and that the testimony was admissible as an admission against interest The legislature, however, in our opinion, has closed the door to an inquiry into a violation under the traffic act in any civil action.”

The court goes on to say at Page 531:

“He [defendant] asserts that the phrase “Record of Conviction” does not apply to an oral plea of guilty. Such a conclusion we believe results in too narrow of construction of a statute and fails to take into consideration the general purpose of the provision. The word “conviction” in cludes a plea of guilty as well as finding of guilty.”

“Applying the test of construction to the statute under consideration, we have no hesitancy in arriving at the conclusion that the legislature intended to prohibit the asking of the very question put to the plaintiff in this case, as to whether or not he had pleaded guilty in Justice Court to a violation of the State Highway Traffic Regulation Act.

“2. Defendant contends that even though the court was in error in permitting the question to be asked, plaintiff waived the error by his interrogation of the witnesses concerning the circumstances of the trial before the justice. We feel that this contention is not well taken. Waiver is the voluntary relinquishment of a known right. Plaintiff made timely objection to the question and protected his record. After the adverse rul-

ing by the court, there was nothing for the plaintiff to do but make the best of the situation and endeavor to explain the circumstances surrounding the plea. This did not constitute a waiver on his part."

Point Number 3

The evidence is insufficient to support the Findings of Fact of the Court that the defendant and appellant was at the time of the accident driving his automobile under the influence of alcohol.

The only other evidence the court could have relied upon for its finding that the defendant and appellant was under the influence of alcohol at the time of the accident was the testimony of the deputy sheriff who arrived at the place of the accident shortly after it occurred (Tr. 20). The deputy sheriff testified that he put his head in the window of the automobile for "a minute" and that he could smell liquor (Tr. 22) Based solely on this observation of the defendant for a minute and although the record clearly shows that the defendant and appellant was suffering from pronounced shock (Tr. 15 and 17) and was at all times unconscious, the deputy sheriff stated that in his opinion the defendant was intoxicated. (Tr. 19, 20, 21, 22 and 23.) Certainly the one fact that the smell of liquor was coming from the defendant and appellant cannot be a valid basis for the opinion of the sheriff's deputy that the defendant and appellant was intoxicated. State vs. Johnson, (1930),

76 U 84, 88, 287 P. 909, at Page 911.

Point Number 4

The court erred in failing to hold the provision of the automobile insurance policy which reads "All coverage under this policy is suspended when vehicle is being operated by a driver who is under the influence of alcohol" void as contrary to public policy and Utah Law.

Although in our opinion the record is insufficient to support the court finding that the defendant and appellant, Rex K. Chugg, was intoxicated and therefore the court had no basis on which to decide that violation of the above provision suspended all coverage under the insurance contract, we will for the purpose of this argument assume Rex K. Chugg was under the influence of alcohol. 41-12-21 (f) Utah Code Annotated, 1953 (Safety Responsibility Act) in part provides:

"Every Motor vehicle liability policy shall be subject to the following provisions which need not be contained therein: (1) the liability of the insurance carrier with respect to the insurance required by this act shall become absolute whenever injury or damage covered by said motor vehicle or liability policy occurs; . . . and no violation of said policy shall defeat or void said policy;"

Clearly the purpose of the safety responsibility act is to make certain that the public is compensated for

damage and injuries suffered as a result of automobile accidents. It is obvious from reading this statute quoted above that the above mentioned exclusion contained in the policy is rendered void.

The cases involving this point are collected in 1 ALR 2d 822, as supplemented in 29 ALR 2d 811.

CONCLUSIONS

The court erred in admission of testimony concerning the alcoholic content of a blood specimen of Rex K. Chugg and the admission of testimony concerning the record of conviction of the defendant and appellant, Rex K. Chugg, for a violation of the Uniform Act Regulating Traffic On Highways. Therefore, there was no evidence to support the finding of the trial court that the defendant and appellant, Rex K. Chugg, was at the time of the collision with the said Willard A. Larsen driving his automobile while under the influence of alcohol.

Even if there is sufficient evidence to support the courts finding that the defendant and appellant, Rex K. Chugg, was driving his automobile while under the influence of alcohol the provision of the insurance policy which suspends coverage in the event "vehicle is being operated by a driver who is under the influence of alcohol" should have been declared void by the trial court as being contrary to public policy and the Utah Safety Responsibility Act.

Therefore it follows that the judgement of the trial court should be reversed.

Dated this 31st day of December, 1956.

Respectfully submitted

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