1984

Acculog, Inc. et al v. Keith Peterson : Brief in Support of Petition for Rehearing

Utah Supreme Court

Paul W> Mortensen; Harry E. Snow; Attorneys for Appellant;
Nelson L. Hayes; Richards, Brandt, Miller & Nelson; Attorney for Respondent;

IN THE SUPREME COURT OF THE

STATE OF UTAH

ACCULOG, INC., a State of Colorado corporation, ROBERT PFISTER and KENTON SHAW, co-partners doing business under the firm name and style of ACCULOG FIELD SERVICES,	:	Case No. 18133
Plaintiff-Appellant,	:	
vs.	:	
KEITH PETERSON, dba, PETERSON FORD,	:	
Defendant-Respondent.	:	

BRIEF IN SUPPORT OF
PETITION FOR REHEARING

POINT I

THE COURT COMMITTED ERROR IN REMANDING THE CASE FOR NEW TRIAL ON THE ISSUE OF LIABILITY BECAUSE THE ISSUE OF DEFENDANT'S LIABILITY WAS PREVIOUSLY DETERMINED, NOT APPEALED, AND IS NOT SO INTERMINGLED WITH ISSUES REMAINING TO BE DETERMINED THAT FAIRNESS TO BOTH PARTIES REQUIRES A RETRIAL OF ALL ISSUES.

The jury in this matter heard the evidence of liability and causation including the testimonies of each side's expert witnesses. The jury expressly found that the Defendant

negligently serviced the Plaintiffs's van and that such negligence was a proximate cause of the fire. (Special verdict Interrogatories Nos. 1. and 2.) The Defendant did not appeal this finding and therefore the same is res judicata and should be considered established at the next trial. Groen v. Tri-O-Inc., Utah, 667 P.2d 598 (1983). Even had the issue been appealed, the record shows that there was substantial evidence to support the finding and that it therefore should not be disturbed by the Court. Phillips v. JCM Development Corp., Utah, 666 P.2d 876 (1983). This Court in its opinion ruled that the Defendant failed to prove any contributary causation on the part of the Plaintiffs. Because there is no question remaining regarding causation of the fire it is illogical, burdensome and unfair to put the Plaintiffs to the burden of again proving the Defendant's negligence.

Whether a finding should be reopened in connection with a new trial on the issue of liability depends on whether the issue of liability and the remaining issues are so intermingled that fairness to both parties requires retrial of all issues. Groen, supra. at page 607, Footnote 11; Nelson v. Trujillo, Utah, 657 P.2d 730 (1982); Printed Terry Finishing Co. v. Lebanon, 274 Pa. Super 277, 372 A.2d 460. There is no intermingling of issues in this matter. The only issues that truly remain to be considered are 1) whether the Plaintiff's are entitled to recover lost

profits and, if so, how much, and 2) the value of the van. The value of the equipment destroyed was stipulated to at trial because the equipment was new and newly purchased at the time it was destroyed. These issues are clearly separate from the issue of liability. The issue of failure to mitigate damages should not be before the Court for the reasons set forth in Points II and III. However, even if mitigation of damages is in issue at the subsequent trial, the issue of mitigation is clearly separate from and not so intermingled with the issue of liability that the parties should be required to relitigate the issue of causation. This Court in its opinion herein has stated that there is a "material distinction" between "injury" and "damages". Because the evidence related to causation of the fire herein is wholly unrelated to issues of amount of damages and mitigation of damages, the Plaintiffs should not be required to reproduce three out-of-state witnesses as well as an out-of-state expert witness to reprove causation five years after their injury. This case should be remanded to enter judgment for the Plaintiffs on the issue of liability and for a new trial regarding issues related to unstipulated damages as was done in Henderson v. Meyer, Utah 533 P.2d 290 (1975).

POINT II

THE COURT COMMITTED ERROR IN CONSIDERING THE ISSUE OF MITIGATION OF DAMAGES AND IN APPARENTLY RULING THAT THE SAME MAY BE CONSIDERED AT THE NEXT TRIAL BECAUSE THE ISSUE WAS NEVER PLEAD OR OTHERWISE ASSERTED AT THE PREVIOUS TRIAL OR OTHERWISE PRESERVED FOR CONSIDERATION IN THIS APPEAL.

The Defendant never pleaded as an affirmative defense that the Plaintiffs had failed to mitigate damages. Likewise the defense of mitigation of damages was never asserted in the prior trial and was not raised on appeal by the Defendant. It is true that after the Plaintiff objected to the admission of evidence regarding the fire extinguisher the trial court compared the causation problem with a mitigation problem but the Defendant never attempted to raise a mitigation defense. Had he so done, the Plaintiffs would have objected.

Since mitigation of damages was never plead nor raised at the trial the issue was permanently waived and court has no jurisdiction to consider the issue or to allow the issue to be considered at a retrial. Rule 8(c), Utah Rules of Civil Procedure; Pratt v. Board of Education of the Uintah County School District, Utah, 564 P.2d 294 (1977); Phillips v. JCM Development Corp., Utah, 666 P.2d 876 (1983). The Defendants had their opportunity to properly plead and litigate the issue but having neglected to do so the issue in now barred by res judicata. Mendenhall v. Kingston, Utah, 610 P.2d 1287 (1980);

Wheadon v. Pearson, 14 Utah 2d 45, 376 P.2d 946 (1962). Groen v. Tri-O-Inc., supra. In justification of this rule it has been stated that a defendant should not be permitted to split his defenses and present them piecemeal in successive actions out of the same transaction, that there must be an end to litigation, and that where a party has an opportunity to present a defense and neglects to do so, the demands of the law require that he take the consequences. 46 Am Jur 2d, Judgments, §§431, 453. Consistent with the relief requested in Point I, retrial should therefore be limited to the issues of loss of profits and the value of the van.

POINT III

THE COURT COMMITTED ERROR IN APPARENTLY RULING THAT FAILURE TO HAVE A FIRE EXTINGUISHER MAY BE CONSIDERED AS EVIDENCE OF FAILURE TO MITIGATE DAMAGES.

Even if the issue of mitigation of damages is to be allowed to be raised for the first time at the new trial, the issue should be raised only within the realm of rational precedent and logic. The concurring opinion of Mr. Justice Oaks appears to invite the trial court to rule that a failure to have a fire extinguisher may constitute a failure to mitigate damages even when it requires a plaintiff to anticipate, without having any prior warning that he or his property is in actual jeopardy,

that someone may cause him harm. Plaintiffs have yet to see any one produce a case requiring an unsuspecting party to possess a fire extinguisher. Kelly v. Capital Motors, S.C., 28 S.E.2d 836 (1944), cited in the main opinion is directly to the contrary as it should be. The concurring opinion appears to set this court off on a new path hitherto untrodden upon by the courts of this country. If victims must carry fire extinguishers they must also carry insurance and therefore, the collateral source rule must fall and this court's decision in DuBois v. Nye, Utah, 584 P.2d 823 (1978) must be set aside since any prudent person with a sizeable investment should have insurance to protect it as well as a fire extinguisher.

The motorcycle helmet case cited by Justice Oaks must be carefully considered. (Halvorson v. Voeller, N.D., 336 N.W.2d 118 (1983).) First, the issue is a new one and there is a split of authority as to whether failure to wear a motorcycle helmet may consititue a failure to mitigate damages. See Rogers v. Frush, 257 Md. 233, 262 A.2d 549, 40 ALR 3rd 847 and other cases cited in 40 ALR 3rd 856, Annotation Failure of Motorcyclist to Wear Protective Helmet or Other Safety Equipment as Contributory Negligence, Assumption of Risk, or Failure to Avoid Consequences of Accident. Second, courts have been unwilling to allow the failure to wear a helmet to be used as any kind of defense absent a legislatively imposed duty to wear a helmet for purposes of

personal safety. (See prior cited authorities) Only after the legislature has imposed a duty to wear a helmet or a seatbelt for purposes of personal safety have courts been willing to impose a duty upon a victim to anticipate that another person would wrongfully harm him. The majority rule remains that failure to wear a seatbelt may not be considered as evidence of failure to mitigate damages. See Annotation Mitigation of Damages - Use of Seatbelt, 80 ALR 3rd 1033, and other authorities previously cited.

Again the issue is a tricky one and this court should not even seek easy answers in litmus paper tests such as "has the legislature or some other lawmaking body required by law that this victim have done thus-and-such?". The reason for this may be quickly grasped by looking at the Utah No-Fault Insurance Act §31-41-1 et. seq., Utah Code Annotated 1953, as amended. The legislature has clearly imposed a duty upon all automobile owners to have insurance. Since this duty has been imposed, will this court eliminate the collateral source rule and allow insurance benefits received to be considered as mitigated damages and will this court rule that an uninsured motorist who is injured by a negligent defendant is without recourse because he failed to anticipate the accident by having insurance? Such a ruling would not be consistent with the motive of the the legislature in passing the law since the stated purpose was to stabilize

insurance rates and to effectuate the disposition of small personal injury claims; not to grant defendants a mitigation of damages defense. (See §31-41-2. "Purpose of Act".)

Absent a law requiring that all persons must carry fire extinguishers with them at all times, the failure to have a fire extinguisher must not be allowed as evidence of failure to mitigate damages. Likewise even if a law were to exist requiring a person to have a fire exinguisher present to protect person or property, without clear proof that the legislature intended that a victim should not be compensated for his injuries in the event of failure to comply with the law, a court has no business making law to that effect.

Among other reasons for not permitting a fire extinguisher defense are that the defense would improperly require juries to speculate as to what would have happened had a fire extinguisher been present and used (Fischer v. Moore, 183 Colo 392, 517 P.2d 458 (1973)) and that it would set up a standard of care which no one has proven that most people have adopted (McCord v. Green, Dist. Col. App., 362 A.2d 720 (1976)).

Also, the concurring opinion is contrary to this court's statement that a Plaintiff has no obligation to mitigate damages by taking action which a defendant having primary duty of performance has failed to take. Alexander v. Brown, Utah, 646 P.2d 692 (1982). The Defendant had the primary duty to prevent a

fire to the van and its contents and, therefore, he cannot complain about the failure of the Plaintiff to perform this duty for him. Alexander, supra. at page 695.

Therefore, this court should, in harmony with established law, refuse to send this case back for any hearing on the issue of mitigation of damages, and should particularly refuse to resubmit the issue of failure to have a fire extinguisher.

CONCLUSION

Because the issues remaining to be determined are unrelated to liability, the Plaintiff should not be required to relitigate the Defendant's negligence and causation of the fire. Also, since the issue of mitigation of damages has never been properly raised it should not be considered at the new trial and, even if failure to mitigate may now be pleaded by the Defendant, no evidence regarding failure to have a fire extinguisher should be admissable.

Respectfully submitted .....

.....this 16 day of May, 1984.

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CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) true and exact copies of the foregoing Petition for Rehearing to Nelson L. Hayes, counsel for the Defendant-Respondant, RICHARDS, BRANDT, MILLER & NELSON, P. O. Box 2465, Salt Lake City, Utah 84110, dated this 16th day of May, 1984.

Annette Rice

SECRETARY