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George W. Williams v. Arthur Hardman : Brief of Defendant and Appellant Arthur Hardman

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

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GEORGE W. WILLIAMS,
Plaintiff and Respondent,

vs.

ARTHUR HARDMAN, dba
Hardman Auto Sales, et al.,
Defendant and Appellant.

Clerk, Supreme Court, Utah

No. 8663

BRIEF OF DEFENDANT AND APPELLANT
ARTHUR HARDMAN

HANSON, BALDWIN & ALLEN
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Appellant Arthur Hardman

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PRELIMINARY STATEMENT

On December 20, 1955, Nathan Child was driving a 1951 International Pickup Truck east on Highway 40, approximately 10 miles west of Salt Lake City when the vehicle suddenly veered from the south center of the highway to the north side, where it collided with an automobile driven by plaintiff, George W. Williams, resulting in serious injuries to him. The plaintiff brought this action to recover damages against Nathan Child, Arthur

Hardman, dba Hardman Auto Sales and Barrus Motor Company. The suit was brought against Hardman as a defendant on the theory that Child was his servant or agent and against Barrus Motor Company on the theory that the steering apparatus and the wheels of the vehicle were in a defective condition, which the Barrus Motor Company knew or should have known.

The allegations of negligence were denied by all three defendants. Hardman also denied that Child was his agent or servant.

When the plaintiff had rested, the court, upon motion, dismissed the Barrus Motor Company from the action. The jury returned a verdict in favor of the plaintiff and against the defendants Hardman and Child in the sum of \$78,055.17.

This appeal is taken by the defendant Hardman upon the grounds that there was no evidence to submit to the jury on the issue of whether Child was his servant or agent and that his motion for a directed verdict of no cause of action should have been granted. He also contends that the court erroneously gave certain instructions and refused to give others, and that the verdict was so excessive as to indicate the jury was governed by passion or prejudice.

STATEMENT OF FACTS

The defendant Hardman is a resident of Sunset, Utah, where he operated a garage and used car lot (R. 122). The defendant Child had known Hardman for some time before December 20, 1955 (the date of the accident). They were friends; Child had purchased cars from him in the past.

Sometime before December 20th Child told Hardman he was interested in buying a used pickup truck (R. 124). A short time later Hardman informed Child that he had located an International 1951 pickup truck which might interest him, and arrangements were made for Child to accompany Hardman to Tooele, Utah in order that he could see the vehicle (R. 82). They drove from Sunset to Tooele in Hardman's wrecker truck. Hardman did not pay Child any wages or compensation for making the trip, nor did Child pay any of the trip expense (R. 133).

After arriving in Tooele they inspected the pickup truck; took it for a test drive during which both drove it. The test revealed that certain minor repairs were necessary. Child said if those defects were fixed he would take the truck (R. 94). Hardman told Child that he would not pay Barrus Motor Company for the truck unless Child would take it as he did not want to stock any merchandise at that time of the year (R. 131). Barrus Motor made the

repairs. The truck was then accepted by Child at the agreed purchase price of \$650.00 plus the turn-in value of Child's old truck (R. 97 and 132). Child intended to pay Hardman \$500.00 cash on the purchase price when they got back to Sunset and to obtain credit for the balance (R. 97). Hardman paid Barrus \$600.00 for the truck. They did not have the Registration Certificate but did deliver to Hardman the Certificate of Title, which he did not deliver to Child (R. 125, 126). He intended to place "Stickers" on the truck when he got back to his place of business (R. 128). The purpose of the stickers is to allow the purchaser to drive the vehicle for twenty days in order that he may have time to obtain license plates (R. 132). The Certificate of Title obtained from Barrus would be sent in to the State Motor Vehicle Department for a new Certificate of Title which would be issued to Child in his name (R. 135).

The deal between Hardman and Child for the sale of the truck to Child was virtually complete in Tooele (R. 128). The paper work would be done when they returned to Sunset (R. 139). Hardman did not intend to have Child sign a Conditional Sales Contract nor did he intend to retain title until the balance of the purchase price was paid (R. 137). A note for the balance was mentioned but there was no discussion as to its terms. Hardman assumed

Child would sign a note (R. 138). Hardman was willing to accept Child's credit (R. 140).

Before leaving Tooele on the return trip Child considered the truck his and wanted to drive it back (R. 99-100). Hardman considered the truck belonged to Child, his only interest being to obtain the purchase price (R. 141). Hardman gave no instructions on driving the truck to Child; however, he did state that generally on trips of this kind they occasionally passed each other (R. 129-30, 134). On the return trip Child drove the pickup truck. Hardman towed another vehicle behind his wrecker.

The collision with the car driven by the plaintiff happened about one and one-half miles west of Morton's Salt Plant on U. S. Highway 40. After the accident Hardman made no demand on Child for the purchase price of the truck because Child was off work for seven months and then lost his job (R. 332).

STATEMENT OF POINTS

POINT I.

THE EVIDENCE ESTABLISHES AS A MATTER OF LAW THAT THE DEFENDANT NATHAN CHILD WAS NOT DRIVING SAID PICKUP TRUCK AT THE TIME OF THE ACCIDENT AS THE AGENT OR SERVANT OF THE DEFENDANT ARTHUR HARDMAN.

POINT II.

THE COURT ERRED IN ITS INSTRUCTIONS ON THE LAW AND BY FAILING TO SUBMIT TO THE JURY INSTRUCTIONS REQUESTED BY DEFENDANT.

POINT III.

THE VERDICT WAS EXCESSIVE, APPEARING TO HAVE BEEN GIVEN UNDER THE INFLUENCE OF PASSION AND PREJUDICE.

ARGUMENT

POINT I.

THE EVIDENCE ESTABLISHES AS A MATTER OF LAW THAT THE DEFENDANT NATHAN CHILD WAS NOT DRIVING SAID PICKUP TRUCK AT THE TIME OF THE ACCIDENT AS THE AGENT OR SERVANT OF THE DEFENDANT ARTHUR HARDMAN.

This case arose out of the same accident, and the evidence on the issue of whether Child was acting in the capacity of Hardman's agent or servant in driving the truck is substantially the same as the evidence in the case of *Ida M. Johnson. Administratrix of the estate of C. Tennyson Johnson, Deceased*, vs. *Arthur Hardman, et al.*, No. 8647, now pending on appeal in this Court, and the case of *Walter Anderson* vs. *Arthur Hardman, et al.*, No. 8580, on which this Court has rendered a decision, not yet final as the defendant will file a Petition for Rehearing. Both parties made an exhaustive research of the law applicable on the issue of Hardman's responsibility for Child's operation of the

truck in the appeal of those cases. The defendant has no additional authorities to cite to the Court on the same issue in this appeal and in order to avoid needless repetition, refers the Court to his briefs filed on the appeal in the two preceding cases.

POINT II.

THE COURT ERRED IN ITS INSTRUCTIONS ON THE LAW AND BY FAILING TO SUBMIT TO THE JURY INSTRUCTIONS REQUESTED BY DEFENDANT.

Appellant contends that the court's instructions considered as a whole were prejudicially erroneous to the defendant in that his theory of the case as supported by the evidence was not submitted to the jury.

In the court's instruction number 1, which purported to set out the contentions of the parties, the jury was told in substance that plaintiff alleged Child was Hardman's agent and that Child was negligent in driving the pickup truck; that the defendants denied they were negligent, but the instruction omitted the contention of Hardman that Child was not his agent. Inasmuch as the instruction purports to state the contentions of the parties, omitting the issue of agency was probably interpreted by a jury of laymen as meaning there was no issue on agency even though they were told in the court's subsequent instruction number 2 that the

burden of proof to show that Child was Hardman's agent or servant was on the plaintiff.

The court's instruction number 6 reads as follows (R. 379) :

“You are instructed that whether one person is agent of another depends upon right of control of one over another, and if you find from the evidence that after delivering the truck to Child at Tooele Hardman had no control or right of control over the operation of the vehicle and *that it was not being driven by Child for or on behalf of Hardman, then you are instructed that Child was not the agent of Hardman at the time of the accident* and your verdict must be for the defendant Hardman.”

The italicized part of this instruction requires the jury to find that Child was Hardman's agent, if the truck was being driven “for or on behalf of Hardman” even though the evidence showed Hardman had no control or right of control over the operation of the vehicle, which is not in accord with the law in this state. *Dowsett v. Dowsett*, 116 Utah 12, 207 P. 2d 809; *Conklin v. Walsh*, 113 Utah 276, 193 P. 2d 437.

Defendants earnestly contend that there was no evidence whatever to show that the relationship of master and servant existed between Hardman and Child. Child was not paid any wage or compensation by Hardman. In making the trip to Tooele he was motivated only by his interest in buying the

truck. However, the issue of whether Child was Hardman's servant or employee was submitted to the jury in instructions 2, 9 and 12. The law is well settled that it is error to instruct the jury on an issue of liability not supported by the evidence. See *State Bank of Beaver County v. Hollingshead*, 82 Utah 416, 25 P. 2d 612.

In the case of *Clay v. Dunford* (Utah), 239 P. 2d 1075, it was held to be prejudicial error to instruct on assumption of risk when the facts in the case did not present the issue.

The repetition of the issue of master and servant at the end of instructions 2, 9 and 12 unduly emphasize plaintiff's theory of recovery. In the case of *Shields v. Utah Light and Traction Company*, 99 Utah 307, 105 P. 2d 347, 349, the court stated:

“The reiteration of given propositions to a jury in the instructions does not have judicial approval.”

After reviewing the detailed instructions the court stated:

“And the ensuing emphasis on applicable laws favorable to plaintiff's side as the result of the continued reference, and the repeating of certain law propositions resulted in the unbalancing of the charge and error.”

This case was cited with approval in the later Utah decision of *Devine v. Cook*, 3 Utah 2d 134, 279 P. 2d 1073.

In its instruction number 8 the court submitted the issue of whether Hardman and Child were engaged in a joint venture at the time of the accident, which defendant contended was error and that the evidence showed as a matter of law that this relationship did not exist in that it was undisputed that Child did not contribute or pay anything towards the expense of the trip. Hardman was not riding in the truck driven by Child at the time of the accident, the purchase price had been agreed upon and Child had taken possession of the vehicle, Hardman's only remaining interest in the transaction being to receive the purchase price. If Hardman had been involved in the accident, could his negligence have been imputed to Child? The question suggests a negative answer. If the relationship between them was joint venture, it must work both ways. This issue was again submitted to the jury and repeated in instruction number 12, further, tending to emphasize the proposition.

POINT III.

THE VERDICT WAS EXCESSIVE, APPEARING TO HAVE BEEN GIVEN UNDER THE INFLUENCE OF PASSION AND PREJUDICE.

The defendant Hardman does not contend that the plaintiff's injuries were not serious or that he will not sustain permanent disability as a result. The attending physician testified that in his opinion the plaintiff would be unable in the future to do physical work of the type that he was doing at the

time of the accident but might be able to do a sitting job if qualified for it (R. 189). The doctor was unable to say whether or not the plaintiff would obtain a union of the broken left femur (R. 183). He anticipated excellent results on the injury to the right knee (R. 184). The prognosis of recovery of injury to the right arm was indefinite (R. 185).

There can be no doubt that the jury was extremely sympathetic for the plaintiff, which was reflected in their verdict. Anticipating such might happen the defendant in Request No. 15 asked the court to instruct the jury as follows (R. 41):

“You are instructed that your verdict must be based solely and exclusively upon the evidence in the case. You should not be governed by passion, prejudice, sympathy or any motive whatever, except fair and impartial consideration of the evidence, and you must not under any circumstances allow any sympathy which you may have or entertain for the plaintiff to influence you in any degree whatsoever in arriving at your verdict. The court does not charge you not to sympathize with the plaintiff because it is only natural and human to sympathize with persons who have sustained loss, affliction or misfortune, but the court does charge you not to allow that sympathy to enter into your consideration of the case or to influence your verdict.”

which was refused.

We appreciate that whether a verdict is excessive damages on the facts and circumstances

of each case. Nothing would be gained by citing the court numerous decisions involving different fact situations. The case of *Stamp v. Union Pacific*, 5 Utah 2d 397, 303 P. 2d 279, reaffirms the principle and earlier decisions that the reviewing court has the power to reduce a verdict clearly given under the influence of passion or prejudice, and the opinion analyzes the situations where the amount of the verdict so indicates.

We believe that this verdict is unreasonably high in comparison with other verdicts in this jurisdiction.

CONCLUSION

We respectfully submit that the evidence established as a matter of law that Child was not Hardman's agent in the manner in which he drove the pickup truck, and the verdict should be set aside and a judgment of no cause of action entered in favor of the defendant Hardman, that the court's instructions were prejudicially erroneous and the verdict was so excessive as to clearly indicate the jury was governed by passion or prejudice.

Respectfully submitted,

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Appellant Arthur Hardman