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Hagen Truck Lines v. Sheriff of Weber County and Weber County Commission : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

HAGEN TRUCK LINES,

Plaintiff/
Respondent,

v.

SHERIFF OF WEBER COUNTY,
and WEBER COUNTY COMMISSION,

Case No. 18301

Defendants/
Appellants.

BRIEF OF APPELLANTS

Appeal from the Judgment of the Second District Court
Weber County, The Honorable S. Mark Johnson, Judge

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NATURE OF THE CASE

This is an action for damages for negligent destruction of property. Plaintiff's truck was involved in an accident and Weber County deputy sheriffs ordered that the cargo be destroyed, thinking it was unsalvagable. Plaintiff claims it should have been salvaged.

DISPOSITION IN THE LOWER COURT

This case was tried to a jury on November 5, 1981. The case was tried before the Honorable S. Mark Johnson, a Circuit Court Judge who was assigned to sit on the District Bench pro

tem. The jury returned a general verdict in the amount of \$19,377.00.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the trial court judgment and seek to have the case remanded for a trial on the issue of damages.

STATEMENT OF FACTS

On the night of December 10-11, 1977, the Plaintiff, a trucking company, was transporting a load of meat over the highways of Weber County. Very early Sunday morning, December 11, 1977, the Plaintiff's vehicle, for a reason which is not known, crashed through the guardrail on an overpass known as the Slatersville exit in Weber County. The vehicle plummeted over the overpass landing on the roadway beneath. The fuel tanks apparently burst, causing diesel fuel to be spread over the entire area, and to cover the vehicle and its load. The diesel fuel ignited, causing a very hot fire. One of the occupants of the truck was thrown clear and injured only slightly. The other occupant of the truck was trapped in the cab and was killed.

The Weber County Fire Department was called to the scene early in the morning while it was still dark. The fire marshal testified as follows:

Q. Could you see a truck down there under the overpass?

A. We didn't--it was such a mess, we didn't really know what it was--it was so--such a--everything was destroyed, you might say, beyond recognition. There was parts up on top of the freeway, there was parts on the side, there was parts down in the bottom. It was--it was--it was a terrible mess, you might say.

Q. Can you give us an idea as to how high the flames were going.

A. Oh they--they were up as high as what the overpass is.

. . .

Q. Okay. Now, was this wreckage, was it covered with spotty fires or was it covered with just one big fire?

A. When we got there it was--mostly consumed the whole area.

Record 209-210.

The fire marshal also testified that petroleum fires burn at a temperature of between 500 and 1,000 degrees. (Record 206).

After several hours of pumping water, the fire was finally extinguished. The fire marshal described the cargo after the fire as follows:

It had been soaked with diesel and it was--some of it, like I say, had been burned. Some of it was--well, a lot of it had been burned. A lot of it, all of it probably had been soaked with diesel.

Q. How much of it had been burned, do you recall?

A. Oh, the majority of it.

Q. Did you notice that it had a plastic bag around each piece?

A. Yes. . . .

Q. What can you tell me about the condition of the plastic bags?

A. Not very good because they had been burned, consumed, the major portion of them--practically all of them, because of the diesel and then the fire.

The accident was investigated by the Weber County Sheriff's Department. The person in charge of that investigation was Deputy Mike Schlosser. Schlosser testified that at about 6:30 a.m. the truck occupant's body was finally found. By that time the fire was substantially extinguished. At about 7:00 a.m. Schlosser met with his superior, Sergeant Hackworth and the person who was in charge from the fire department to decide what to do with the cargo. Schlosser testified as follows:

Q. What was that decision?

A. It was a joint one, joint decision, that from the intense amount of heat that had been involved and the great amount of water that had been used, the condition of how the cargo was laying strung around the area, that we knew this--the vehicle was a total loss, and we felt also that the meat would be impossible to salvage.

Record 17.

The county road crews were then instructed to dispose of the cargo at the county landfill. Schlosser then went to the hospital to interview the driver of the truck. Schlosser testified that the driver was somewhat groggy and could not recall the name of the trucking company that owned the vehicle and the load. The driver told him that it was his first trip with this company (Record 22-23).

Schlosser had found a telephone number, however, on a slip of paper when he had been digging through the cargo looking for the truck's occupant. Through a series of phone calls, he was finally able to identify the owner of the truck. He told them that their truck had been involved in an accident, that one of their drivers was dead and another was hospitalized, and that the truck and its cargo were thoroughly destroyed.

He was told that someone from the trucking company would come to Salt Lake as soon as possible.

Early that afternoon, representatives of the trucking company arrived in Salt Lake City. After viewing the accident scene and what was left of the truck, they went to the Weber County landfill to inspect the cargo. The men arrived at the Weber County landfill just as it was getting dark. Plaintiff's representative, Mr. Hicks testified about his inspection as follows:

Q. Okay. Did you make an inspection of the cargo at that time?

A. Yes.

Q. And could you outline for us what you did?

A. Well, at the time it was getting dark out, but I didn't go down into the trench. There was a trench dug there. The area that the meat was in was roughly 30 feet long, about 10 feet across, about 6 feet deep. There was also a number of dead animals at the dump. The meat was--had been thrown on top of this, dumped on top of some of these animals. Alongside of it. I didn't go down into the dump. I made a general inspection of it. I did take out a number of pieces of meat and set them on the outside of the dump. Those meat--pieces of meat, I found cartons which had been crushed down, but were--they did look in kind of bad shape, but when I pulled the box open, the insides of the boxes were relatively clean and the meat was intact.

Q. Was there any diesel oil or fuel on it?

A. Those particular pieces there were not. Then because it was getting dark and it was getting difficult to see what we were doing there, we left for the evening. And the next morning I rented an automobile and drove out there early in the morning because I wanted to make a closer inspection, find the product I did Sunday afternoon.

Q. Can you tell us about that inspection you made?

A. Well, that product was in very good condition. The poly bags were not ruptured on it. It did not have any contamination on the meat. The insides of the boxes were relatively clean, though from the outside it did not have that great of an appearance. So I wanted to go out and make a better inspection of it the next day, which I did. I went out on the Monday morning, and at that time I got back down to the dump again, and I went from one end of it to the other as far as meat, and I rummaged through 150-200 pieces of meat trying to get an idea of what kind of percentage was reus-

able. And then after that I did set some of that outside the dump and one of those pieces was returned for laboratory examination. . . .

Q. When you came to make your further investigation the next day, can you tell us what you did?

A. At that time basically I did three things: I--first I went back down to the dump, and I did a full visual inspection of it, trying to take in everything that I could find that was not covered up. The second thing I did, I got down and dug through the stuff, and this is when I inspected approximately 150-200 pieces of meat, moving about by hand. I did this in the dump. And then I--the last thing I did, I removed several more pieces to the outside of the dump, and one of those pieces is what I took with me back to Ogden to have it--used as a sample for testing.

Q. Okay. On the basis of that investigation, did you come to any opinion as to how much of the meat was salvageable at that time?

Mr. Daniels: Would you caution the witness, your Honor, that that can be answered yes or no as to whether he can form an opinion.

The Witness: Yes

The Court: All right, the answer is yes.

Mr. Winegar: Yes, and what is that opinion?

Mr. Daniels: Objection, your Honor, I think it lacks foundation and is calling for total speculation.

Mr. Winegar: Your Honor, I think we have qualified him. He handles 200 of these cases a year. That he's had both on the killing floor--

The Court: Well, he may answer to the meat that he inspected, but as to the percentage, that portion of the entire load, I don't think that would be proper, if your question is worded as such.

Mr. Winegar: Okay. Let's word it that way. Of the approximately 150-200 pieces that you inspected at that time and the Monday morning in the trench, can you give us your opinion as to what percentage of those that you did inspect to be salvageable?

A. For human consumption, I'd say 40 percent.

(R. 97-98; 101-102).

This was the only evidence relating to damages.

ARGUMENT

DAMAGES WERE NOT PROVED TO A SUFFICIENT DEGREE TO ALLOW THE JURY TO BASE AN AWARD ON ANYTHING OTHER THAN SPECULATION.

Plaintiff's only evidence concerning damages is found in the testimony of Mr. Jerry Hicks. Mr. Hicks testified that he had inspected from 150 to 200 pieces of meat. He said of those that he inspected, 40 percent could have been used for human consumption. He did not testify as to the entire cargo load, but only to the 150 to 200 packages he inspected. The court sustained an objection to the question relating to the entire cargo and allowed Mr. Hicks to testify only as to the packages which he inspected.

Neither Mr. Hicks nor any other witness testified that the 150 to 200 packages that were inspected were similar to or representative of the entire cargo.

There must be some evidence upon which a jury can base a verdict for damages. Here the critical link is missing. Even Mr. Hicks' testimony as to the pieces he examined is a gross approximation, but the uncertainty here goes to the weight of the evidence and can be considered by the jury. Where there is absolutely no evidence that the meat that he inspected bears any resemblance to the part that he did not inspect, there was no evidence upon which a jury could base a verdict regarding the rest of the load. The court should have instructed the jury in accordance with Defendants' proposed jury instruction as follows:

You may not award damages of a speculative nature. Plaintiff's investigator testified that he examined from 150 to 200 packages of meat. Should you determine that damages should be awarded, you may award damages based only upon the damage to this amount of meat, the damage to the remainder being speculative.

The rule for determination of damages is clearly recognized and is reasonably consistent in most jurisdictions. The Utah court has stated the rule to be as follows:

Where a rule of law has been established for the measurement of damages, it must be followed by the finder of fact, and to recover damages plaintiff must prove not only that she suffered a loss, but must also prove the extent and amount thereof. Furthermore, to warrant a recovery based on the value of the property there must be proof of its value or evidence of such facts as will warrant a finding of value with reasonable certainty.

Bunnell v. Bills, 13 Utah 2d 83, 368 P.2d 597 (1962).

The cases uniformly hold that although the plaintiff need not prove damages with mathematical precision, damages cannot be based on mere speculation or conjecture.

In this case, the trial court apparently changed his position during the course of the trial. Although he did not allow the jury to hear evidence of damage to the entire cargo, he allowed the jury to assess damages to the entire cargo. Mr. Hicks was asked his opinion as to the portion of the cargo which was salvageable for human consumption. The trial court did not allow Mr. Hicks to testify as to the entire cargo, but only as to the 150 to 200 packages that he examined. There was no other evidence about whether any of the remainder of the cargo was salvageable. Mr. Hicks was not asked if he had an opinion as to whether the packages that he examined bore any resemblance to the remainder of the cargo. We can speculate that he would have answered in the affirmative and that the pieces that he inspected were similar in composition to the remainder of the cargo. We can just as well speculate that he would have answered that the 150 to 200 pieces that he inspected were selected from a portion of the cargo which was not burned as badly. At this point it is impossible for the court to say what Mr. Hicks' testimony would have been.

The jury had no way of knowing what portion of the remainder of the cargo was salvageable and could have based its determination on nothing but speculation.

The trial court's decision to allow the jury to assess damages for the entire cargo was based on the case of Sparks v. Ballenger, 376 S.W.2d 955 (Mo. 1964). That was a case where the plaintiff was involved in an automobile accident and was injured. While being taken in the ambulance he was involved in a second accident and suffered further injuries. There was substantial evidence that one of the plaintiffs had suffered an injury to his knee that he did not sustain in the first collision. There was evidence that his wife did not sustain any cuts or bruises about her face or head in the first collision, but she did sustain them in the second collision. Physicians had testified that pre-existing injuries were aggravated. The court instructed the jury that the mere fact that damages may not be calculated with absolute certainty or exactness is not a bar to recovery.

Obviously, this Missouri case is correct. A plaintiff should not be barred from recovery merely because he cannot calculate the damages with certainty or exactness. In every personal injury case involving future losses or the determination of an award for pain and suffering, damages cannot be computed with precision. But the case is not authority for the

proposition that an action should be submitted to the jury for a determination of damages when there is no evidence as to the amount of damages. The plaintiff is always required to produce some substantial evidence to give the jury a basis for making an award.

Another case involving a second injury is Scott v. Rainbow Ambulance Service, Inc., 452 P.2d 220 (Wash. 1969). In that case the plaintiff was injured when she fell on a sidewalk. While being transported to an ambulance, the attendant let her fall out of a stretcher and she was further injured. The court applied the long standing rule where two injuries have occurred the plaintiff has the burden of segregating the damages from each. The court dismissed the case after the plaintiff's opening statement when her attorney admitted that he could not segregate the damages.

The Scott case really applies the same rule as the Missouri Sparks case, and which is applied routinely in this state: the plaintiffs must show by a preponderance of the evidence insofar as reasonably possible, which of the injuries were probably attributable to the first accident and which were probably attributable to the second accident.

In this case this was done for the 150 to 200 packages of meat which were examined. Damages could not be calculated with

precision or certainty as to these packages. The Plaintiff's investigator, based upon his experience, gave his opinion as to a probable proportion, but no evidence was presented as to the remainder of the load.

It is also significant to note that there is no evidence the Defendants in any way created the problem which made ascertainment of damages difficult. After the truck accident, the meat was a smoldering mess on the roadway. In order to ascertain damages, an investigator with a knowledge of meat would have had to go through the meat in sufficient detail to form an opinion as to its condition generally. Had the meat been moved to another location, Plaintiff's investigator would have had to go through the same procedure. At the Weber County landfill he would have had to do exactly the same thing and was not prevented from so doing. The fact that he chose to inspect only 150 to 200 packages of meat was his own decision.

CONCLUSION

In this case the trial court ruled that Plaintiff had not established sufficient foundation for his expert to testify as to the damages caused to the entire cargo. Consequently, the court allowed the expert to testify only as to 150 to 200 packages of meat which he examined. Rather than remaining consistent with this position, however, the trial court then allowed the jury to assess damages as to the entire cargo load.

There was no evidence upon which a jury could have legitimately assessed damages as to the portion of the load which was not inspected by Plaintiff's expert. The case should be remanded for a new trial.

DATED this 25 day of June, 1982.

Respectfully submitted,

SNOW, CHRISTENSEN & MARTINEAU

By:


SCOTT DANIELS

CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) true and correct copies of the foregoing Brief of Appellants to:

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postage prepaid on this 28th day of June, 1982.

A handwritten signature in cursive script, reading "Jill Robinson", is written over a horizontal line.