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

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, Defendants/Appellants.	)	Case No. 18301

BRIEF OF RESPONDENT

On 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

An accident occurred involving a Hagen Trucking rig carrying primal cuts of meat. This suit seeks damages for the Weber County Sheriff department's order disposing of the meat which Hagen claims was salvageable.

DISPOSITION IN THE LOWER COURT

The jury found the defendants negligent in the destruction of the cargo and returned a verdict in the amount of $19,377 of the approximately $60,000 value of the meat before the accident.

RELIEF SOUGHT ON APPEAL

The Appellant seeks to have the case remanded for further proceedings on the issue of damages. If the case is remanded for further proceedings on the issue of damages, the respondent seeks an instruction allowing greater damages. Appellants notice of appeal indicated that additional relief was sought on other issues. Since these have not been addressed in the appellants' brief they will be considered abandoned and not be treated herein.

STATEMENT OF FACTS

The appellant has relayed the facts in the light most favorable to it when in actuality, the facts should be stated in

the light most favorable to the respondent. The facts relevant to the appeal are very few. The appellant spends a page and a half quoting the fire marshall's observations of the fire and that "some" and later "a lot" and still later "the majority" of the meat had been burned. Respondent will avoid the temptation to rebute this or restate other facts which are more favorable since none of these facts are relevant to the appeal. Suffice it to say there was considerable evidence showing that the county personnel were exagerating the extent of the fire damage, that this evidence was believed by the jury, and that no appeal of it has been taken. This appeal is taken on a very narrow issue - whether there is any evidence that the meat individually inspected by the respondent's recovery expert at the dump ". . . bears any resemblance to the part that he did not inspect. . . ." (Appellant's brief at 9.) As such, respondent will add some additional background and then add additional facts relevant to the appeal.

BACKGROUND

The meat involved in the accident was vacuum packed in a three-ply plastic container that was impervious to diesel fuel. Unless punctured the meat could be repackaged and consummed. Punctures might necessitate trimming but would not necessarily ruin the product. The meat was in turn packed in cardboard boxes, approximately two to a box.

Former Deputy Sheriff Schlosser arrived at the scene and was put in charge of the investigation. Schlosser, after consultation with others, decided between 6:00 and 6:30, at a time which he was not even sure what the cargo was, to have it hauled to the dump where it was placed in a trench with dead animals and other refuse. The county road crews came with front end loaders, scooped the cargo up, dumped it into trucks, then hauled it to the dump where it was dropped in the trench, thus further damaging the product. Once placed in the dump with dead animals, the USDA Inspectors would not allow consumption of the meat. Former Deputy Schlosser admitted he had a duty to contact the truck company before disposing of the cargo, if possible, yet did not despite evidence that he knew the company's identification.

It was shown that in an accident of this type the trucking company would send recovery crews by private jet who, under supervision of the United States Department of Agriculture, Meat Inspection Division (MID), would recover the meat. To the extent necessary the company and MID would unpackage, trim, test and repackage the product. The product no longer fit for human consumption is used in pet food and even that which is burned, charred or soaked in diesel has some value as "tankage" which is used in fertilizers and other non-edible products.

The damage evidence showed that various percentages of the meat could have been recovered for human consumption, pet

food, and "tankage," or non-edible uses. Evidence also showed the cost of this recovery, the value of the meat in those three categories, the recovery methods, the trimming procedures, the USDA inspection requirements, the value loss due to shorter shelf life, the effects of rancidity, putrification, and aging, that one average piece of meat was removed from the dump, tested and found to be very edible, and other factors necessary for the jury to properly determine damages. These are not contested by appellant, however, and need no further detail.

ADDITIONAL FACTS DIRECTLY RELEVANT TO THE APPEAL.

Evidence directly relating to the appellants' argument is in reality a question of whether the 150 to 200 packages individually inspected by Mr. Hicks was a fair sampling of the load. The facts relating to this question quoted by appellant can be summarized as follows:

> Mr. Hicks made a "general inspection" of the meat and then pulled some boxes out of the dump and inspected the meat inside them. As it was getting dark he left and returned the next morning. Upon arrival he made a "full visual inspection," "went from one end of it [the meat] to the other" and "rummaged" through the meat. Mr. Hicks testified that ". . . I got down and dug through the stuff, and this is where I inspected the approximately 150 to 200 pieces of meat, moving about by hand." (R. 97-98; 101-102)

In addition to the above testimony quoted by appellant, Mr. Hicks testified in response to a question of what kind of

cuts of meat he inspected in the trench, that "it was a cross-section of what was there," (R. 116) and that even after the accident, the fire, and the handling and dumping by county road crews, some of the boxes were still intact with meat inside, though the boxes were crumpled. (R. 98)

The photos taken both at the scene and at the dump show unburned boxes still in tact, let alone meat still in the plastic wrapper.

ARGUMENT

I. THE VERDICT RENDERED BY THE JURY WAS BASED ON FACT AND REASONABLE INFERENCES FROM FACT AS ALLOWED BY LAW.

A. The appellant's burden On this appeal.

The appellant's burden on this appeal is substantial. It is a time honored rule that a jury's finding of facts will not be overturned unless they are entirely without foundation in the evidence and so unsubstantial that no reasonable mind could have so concluded. This court stated in Prince v. Peterson, 538 P.2d 1325 (Utah 1975):

> We frequently declare our committment to the jury system, under which it is the perogative of lay citizens to determine questions of fact, both as to liability and the fixing of damages; and in cases of this character their varied experiences and their closeness to the reality of everyday affairs qualify them to fix damages as well as or perhaps better than judges. The court should give the jury system more than lip service, by honoring the jury's perogatives; and by declining to interfere therewith unless the determinations made are

> entirely without foundation and evidence, or are so fragmentary and unsubstantial that no reasonable minds acting fairly on the evidence could have so concluded. In addition to what has been said concerning the fact that the jury seems to have sensed what had occurred and to have done justice concerning it, the trial court also indicated his approval by refusing to interfere with the verdict or to grant a new trial.

Prince, supra at 1329.

Both the jury and the trial judge have made a similar determination in this case. The plaintiff must show not merely that a reasonable person might disagree, or that some reasonable persons might disagree, but that all reasonable minds would disagree with the jury's verdict.

> ". . . we would not reverse and compel a finding in accordance with that contention unless the evidence were such that all reasonable minds would necessarily so find. Conversely, if there is a reasonable basis in the evidence, or from lack of evidence, upon which reasonable minds could remain unconvinced, we would not disturb the ruling of the trial court. Centurian Corporation v. Fiberchem Incorporated, 562 P.2d 1252 at 1253, (Utah 1977) (emphasis added.)

Not only must the appellant show that all reasonable minds would disagree with the jury's verdict, it must also show that the error was substantial and prejudicial. This court stated in Lamb v. Bangart, 525 P.2d 602 (Utah 1974):

> This court has previously stated that in any lawsuit of several days duration, counsel can usually find matters upon which he may claim error, but this court will not reverse on mere error but only if it be substantial and preju-

> dicial to the extent that there is a reasonable likelihood that unfairness or injustice has resulted.

Lamb, supra at 610.

With this burden in mind we should examine the error claimed to have been found in the trial.

B. Appellants claimed "missing link" is a desire to verbalize the obvious, and is a reasonable inference from the evidence.

It first is important to realize what the appellant is not arguing. Appellant does not contest liability. Nor does it contest that a portion of the cargo could have been salvaged and that some damages have justifiably been assessed. Appellant only contests that the amount of the damages is too large. Appellant contests the amount of damages on one narrow point--that the evidence does not support the amount of damages because there is "absolutely no evidence" that the sampling Mr. Hicks made bore any resemblance to the meat not individually sampled. The appellant had a fair trial and the verdict of the jury rests soundly on the evidence and should not be disturbed.

1. Findings of Fact are to be Based on Evidence and Reasonable Inferences Therefrom.

Appellant is in error because its argument assumes that every minor point must be verbalized and that reasonable inferences are not part of the evidence. To the contrary, fact

findings are based upon both verbalized evidence and reasonable inferences from that evidence. Lym v. Thompson is one of the early Utah cases dealing with inferences. In Lym, there was some steel tubing which was unaccounted for. No one actually saw anyone take the tubing but circumstantial evidence pointed to the defendant in this civil action. The lower court found for the plaintiff and the defendant appealed. This court stated:

> We are called upon to decide whether or not there is evidence in the case that will directly or by inference support the decision of the trier of the facts. In deciding that question we decide merely--so far as circumstantial evidence is concerned--that if there are inferences to be drawn therefrom that will support the lower court's conclusions upon the probabilities of that evidence, we are bound to uphold the decision, even though had we been trying the case we might have stressed the inferences adversely to such a conclusion.

Lym v. Thompson, 184 P.2d 667 at 669 (Utah 1947).

More recently, Morris v. Farmer's Home Mutual, 500 P.2d 505, (Utah 1972), dealt with an appeal of a finding that flood water came from a plumbing fixture in the basement rather than from outside the house. The defendant appealed because no one actually saw where the water came from and thus claimed there was insufficient evidence to support the verdict. This court stated:

> The nature of the world about us and the goings on therein are such that we witness only a small percentage of it by direct observation. A large portion of our awareness and knowledge is necessarily derived from deductions based upon our observations of existing

> facts and circumstances. It is important to apply this principle to the perogative of the court as the fact trier. He is entitled to make his findings of fact not only on evidence concerning direct observations, but also to draw whatever inferences a person of ordinary intelligence and experience could fairly and reasonably draw therefrom.

Morris, supra at 507.

The case at bar goes one step further. It is as if someone actually observed some of the water in Morris coming into the basement from a plumbing fixture and then left, only to return and find additional water. Appellant now argues that damages can only be assessed for the amount of water which was actually observed coming into the basement and claims it is pure speculation as to the source of the remaining water since no one saw it. Mr. Hicks made a "full visual inspection" of all the meat then actually examined 150 to 200 individual pieces. It is a natural and reasonable inference that those individually examined were generally representative of the whole. Especially in light of Mr. Hicks testimony that he "dug through" the meat, went from "end to end" and saw a "cross-section" of meat cuts.

The arguments of the appellant really go the weight of the evidence. Appellant in effect complains about the sample size and would have had Mr. Hicks inspect every package. The appellant alludes to this in saying "The fact that he chose to inspect only 150 to 200 packages of meat was his own decision." (Appellant's brief at 13.) Appellant can cross examine and

argue to the jury that the sample size was not large enough to accurately portray the damage to the entire load, but it is a question of fact for the jury to determine.

In reality Mr. Hicks could not have said much more than he did i.e. that he dug down through them, went through one end of the trench to the other, etc. Had he said what appellant now claims is the missing link, i.e. that the packages he did inspect resembled those he did not, he would have little basis for any such statement. Mr. Hicks could not say that the pieces that he personally inspected were similar to those he did not personally inspect without personally inspecting the remainder. Mr. Hicks would have had to inspect each piece to draw that conclusion.

That, however, is unnecessary. The inference is there. The weight given to that inference could have been and was subject to cross-examination and other testimony as to the percent salvageable in the separate categories. But the strength of those inferences is the basis of final argument, not an appeal. Appellant bases its appeal on the quest for a verbalization of an obvious inference. That verbalization is not necessary.

Finally, The Corporation Of the President Of the Church Of Jesus Christ Of Latter-Day Saints v. Jolley, 467 P.2d 984 (Utah 1970), involved a similar issue on appeal. In that case, a verdict was entered for the plaintiff imposing a constructive trust on two automobiles purchased at least in part by embezzled

funds. Some of the funds could be traced directly to the purchase of the automobiles, but the defendant appealed as to those funds which were not directly traceable. This Court stated:

> Such direct tracing of funds is not an indispensable requisite to the conclusion arrived at. In the nature of the function of determining facts it is essential that the court or jury have the perogative of finding not only facts based upon direct evidence, but also those which may be established from the reasonable inferences that may be deduced therefrom.

Corporation of Pres. of Ch. of Jesus Christ at 985.

The court goes on to show that the circumstances of the funds provided a basis from which the trial court could reasonably believe that the money used to purchase the car was embezzled. The court thus upheld the entire verdict. Just as every dollar need not be traced between the embezzeled funds and the purchased autos, likewise, the testimony here need not show a direct link between each piece of meat and dollar of damages. The reasonable link between those individually inspected and the remainder is sufficient.

That link was drawn when Mr. Hicks testified that he made a "general inspection" of the meat and then pulled some boxes out of the dump and inspected the meat inside them. The next day he made a "full visual inspection" then "went from one end of it (the meat) to the other" and "rummaged" through the

meat. Mr. Hicks stated he " . . . got down and dug through the stuff, and this is where I inspected approximately 150 to 200 pieces of meat, moving about by hand" and that the cuts he inspected were "a cross-section of what was there." (R. 97-98; 101-102; 116)

Though this seems the most logical inference to draw, it should be noted again that all reasonable minds must reach the conclusion that it could not have been a cross-section for the verdict to be disturbed. As the court continued in Morris:

> It is my impression that at times any of us may be too much inclined to judge what is reasonable on the basis of what seems reasonable solely from our own point of view, and if it does not coincide with our own conclusion, to deem it unreasonable, rather than to allow reasonable latitude as to what other reasonable minds may conclude. In order to honor the prerogative of the trial court as the finder of the facts, it is essential that this court should be as objective as possible, and keep in mind that the test to be applied is not necessarily whether the members of the court would reach the same conclusion, but whether the findings as made would be within the ambit of what any reasonable minds might find, even if they should differ from our own views. . . . upon the basis of the traditional rules which allow the trial court the perogative not only of finding the facts shown by direct evidence, but also of drawing any reasonable deductions and inferences that could fairly and reasonably derive therefrom, and which require this court to review the total record in the light favorable to his findings, we are not persuaded that they are so without a reasonable basis in the evidence that they should be overturned.

Morris, supra 507, 508.

And so it is with this case. There is no "missing link" but only inferences fairly drawn by the jury.

II. THE LAW ON DAMAGES IN DUAL ACCIDENT CASES.

The appellant has treated as one issue what is actually two. The appellant states "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, 373, S.W.2d. 955, (Mo. 1964)" and goes on to discuss two of three cases which the trial court considered, but considered for a different purpose.

At the trial the question arose as to the amount of damages recoverable and who would suffer if the damages could not be reasonably apportioned. This case involved an accident and fire which damaged the meat, for which Weber County was not responsible. The case also involved the negligent action of Weber County in handling a food product with front end loaders, shovels and dump trucks and thus damaging the same product. It should be remembered that the product was totally salvageable for human consumption unless the three-ply plastic container was punctured by some means. It was impossible for Mr. Hicks to say whether punctures that were existent at the time he inspected the meat in the trench came from the initial accident, or the front end loader, the dumping, etc.

The respondent asked the trial court to rule that when damages cannot be separated from two causes, and the second cause

was by the negligent action of another, that both parties must attempt to apportion the damages but if they cannot be separated, the defendant will be held responsible for the damages from both accidents. This result was reached in Washewich v. LeFave, 248 So.2d. 670 (Fla.App. 1971), and is based on the reasoning that the apportionment problem was caused by the defendant's negligence.

The trial court in the present case ultimately rejected this theory, and since plaintiff could not apportion the damages but only prove the amount of damages after both incidents, the defendant paid only for the meat's value at the dump rather than at the accident site. The trial court relied on the two cases cited in appellant's brief in refusing to shift the burden of proof. Those two cases, Scott v. Rainbow Ambulance Service, Inc. 452 P.2d 220 (Wa. 1969) and Sparks v. Ballenger, 373 S.W.2d 955 (Mo. 1964), take a different stance on the dual causation of damage issue and state that the defendant cannot be held liable for the entire amount of damages but instead the burden of proof is lessened for the plaintiff. The plaintiff must show "insofar as reasonably possible which of the plaintiff's injuries were probably attributable to the first accident and which were probably attributable to the second accident. Scott, supra at 222, (emphasis by the court). The Missouri Supreme Court similarly held that the burden of proof was not shifted to the defen-

dant but that an instruction should be given to the jury that "under such circumstances you may determine the damages, if any, from such reasonable inferences as you may find warranted by the evidence and all other instructions herein, even though the results be only approximate." Sparks, supra at 958.

This principle is the basis of respondent's cross-appeal. Were the case to be remanded for additional proceedings on damages, the lower court should be instructed that if the damages on the two accidents are not separable, the defendant will be responsible for the entire injury. The Washewich court stated it this way:

> On the basis of the foregoing authority, it is our opinion that where the evidence reveals two successive accidents and the defendant is only responsible for the second accident, the burden is on the plaintiff to prove to the extent reasonably possible what injuries were proximately caused by each of the two accidents. The jury should be instructed to make and apportionment of damages as between the two accidents insofar as it may be reasonable possible to do so, but if an apportionment is impossible, the jury may be authorized to charge the defendant with all damages flowing from the entire injury. Washewich, supra at 672.

The reasoning for this position is sound. The Florida Court stated:

> The rule [holding the defendant liable for all damages if they cannot be apportioned] has as its purpose the prevention of the subsequent wrongdoer of escaping responsibility where his conduct contributed to the creation of the situation of the problems of apportionment arose. Washewich, supra at 673.

That reasoning is even stronger in this case. It is accepted that the county was negligent and evident that at least some of the damage resulted from that negligence. The percentages Mr. Hicks tesified to were at the trench, and the problem of apportioning how much additional damage was done by the county in moving the food product with its heavy equipment cannot be determined. This problem of apportioning was directly caused by the county's negligent conduct. The county has all the witnesses and without a shift in the burden of proof it has no incentive to bring forward possible testimony to clarify the damage issue. This encourages the destruction of evidence by a negligent party before examination can be made. In a sense this rule is a continuation of the established rule that a defendant takes the plaintiff as he finds him, i.e. if your negligent act injures an already ailing plaintiff and makes a separation of damages impossible, then you are responsible for the entire damage. This, however, is a separate issue than that of the evidence sustaining the verdict. It need not be reached since the evidence clearly upholds the verdict.

CONCLUSION

This appeal is based on ignoring reasonable inferences drawn by the jury and upheld by the trial court. The law is clear that the jury has considerable latitude in drawing reasonable, common sense conclusions from the witness' observations.

A fair trial was held and appellant is entitled to no more.

Respectfully submitted this 13th day of September, 1982.

CHRISTENSEN, JENSEN & POWELL

By_____
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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 1982, two copies of the foregoing Brief of Respondent, were mailed, postage prepaid, to the following:

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