1971

Ben Arnovitz v. John Louis Tella : Respondent's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

BEN ARNOVITZ,
Plaintiff and Appellant,

vs.

JOHN LEWIS TELLA,
Defendant and Respondent.

Case No. 12491

RESPONDENT'S BRIEF

Appeal from Judgment of Third Judicial District Court of Salt Lake County
The Honorable Joseph G. Jeppson, Judge

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STATEMENT OF KIND OF CASE

Appellant commenced this action seeking to recover for property damage and personal injuries suffered in an automobile collision involving Appellant and Respondent, and Respondent counterclaimed for damages to his automobile.

DISPOSITION IN THE LOWER COURT

The case was tried below to the Court sitting without a jury. The Court rendered judgment in favor of the

Respondent and against the Appellant for no cause of action on Appellant's Complaint, and in favor of Respondent and against Appellant on Respondent's Counterclaim in the sum of $500.00 with interest at 6 percent from June 8, 1970, until date of judgment, and thereafter at 8 percent per annum until satisfied, plus costs of $18.10.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the Court's judgment in its entirity.

STATEMENT OF FACTS

Respondent agrees with Appellant as to the time and place of the collision as outlined in Appellant's Brief, and agrees that two separate and distinct collisions occurred involving the two parties.

Respondent disagrees with Appellant's statements as to the relative severity of the two collisions and the amount of damages directly attributable to each. It is Respondent's view of the facts, apparently accepted by the lower Court, that the first collision, in which Appellant's vehicle struck Respondent's vehicle from the rear, was sufficiently severe to break the carburetor control mechanism governing the acceleration of Respondent's vehicle, and tear the front seat of Respondent's vehicle

from the floorboard. Either by the jolt of the collision itself, or by the involuntary movement of Respondent as he was thrust backwards by the jolt and the breaking of the seat, the automatic transmission shift leaver was forced into reverse position. This, along with the fact that Respondent's vevhicle was now racing "wide open," resulted in the second collision, in which Respondent's vehicle backed into Appellant's vehicle. (Tr. 83, 84, and 85)

ARGUMENT

POINT I

WHERE THERE IS A CONFLICT IN THE EVIDENCE, THE REVIEWING COURT MUST VIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PREVAILING PARTY.

Appellant's Points II, III, IV, and V all go to the sufficiency of the evidence. It is not seriously disputed that the first collision was caused by Appellant's vehicle running into the rear of Respondent's vehicle. Respondent testified that this initial impact broke the seat of his vehicle loose from the floor and forced the vehicle's gear shift leaver into the reverse position, which caused the second impact. (Tr. 83) Respondent also testified that he had no intention of backing his vehicle into that of Appellant, and no intention whatsoever of harming Appellant. (Tr. 87)

Respondent's version was supported by the testimony of Officer Mower, the investigating officer who inspected the Respondent's vehicle at the scene and testified that the front seat was loose from the floor and that the vehicle's accelerator "was stuck wide open." (Tr. 101)

Appellant's witnesses testified that Respondent backed rapidly (Tr. 8, 23, and 37), that his engine was racing (Tr. 10, 29, and 48), and that the two collisions were almost simultaneous (Tr. 40, 52, and 53). Such testimony is supportive of Respondent's version of the cause of the second collision, which certainly seems more reasonable than Appellant's allegations that the Respondent deliberately and maliciously backed his vehicle at a rapid rate of speed into Appellant's vehicle, thus exposing himself to serious injury.

In short, there is at best a conflict in the evidence. The Appellant asks the Court to believe his version of the facts rather than Respondent's version, which the Court is not obligated to do.

Prior Utah cases make it clear that the reviewing Court must review the evidence and whatever reasonable inferences can be drawn therefrom, in the light most favorable to the prevailing party, and not in the light most favorable to the Appellant as Appellant asks. Pollick vs. J. C. Penny, 24 Utah 2nd 405, 473 P 2nd 394 (1970); Brigham vs. Moon Lake Elec. Ass'n, 24 Utah 2nd 292, 470 P 2nd 393 (1970); Howe vs. Jackson, 18 Utah 2nd 269, 421 P 2nd 159 (1966).

The same general rule would also apply regarding the amount of damages awarded by the Court which Appellant claims was an erroneous award. Respondent testified that his vehicle was worth $600.00 to $650.00, and that he had priced similar vehicles on the open market and found that they were selling for $450.00 to $700.00 (Tr. 88). Respondent also introduced into evidence two editions of a local newspaper, dated near the time of the collision, each containing therein a classified advertisement for a vehicle of the same model and year. The advertised prices of these vehicles were $400.00 and $700.00 (Tr. 88 and 89). Respondent also testified that the car was "totaled out." (Tr. 89).

There was no testimony introduced rebutting the value of the car. Under these circumstances, where the Court found that the car was "totaled" it was obligated to accept Respondent's evidence as to the value, as there was no other evidence before it.

POINT II

A JUDGMENT SHOULD NOT BE REVERSED ON APPEAL UNLESS THERE IS ERROR OF SUCH SUBSTANTIAL NATURE THAT THERE IS LIKELIHOOD THAT THE RESULT WOULD HAVE BEEN DIFFERENT IN ITS ABSENCE.

Respondent admits that the weight of authority in this jurisdiction apparently allows witnesses to testify concerning the visible emotions and demeanor of others

in certain instances as claimed by Appellant in Point I of his Brief on appeal. Respondent does not believe that the Court erred in excluding the testimony it did in this case, and contends that even if it were error, it was not substantial or prejudicial and therefore was not reversible error.

Appellant cited Fritz vs. Western Union Telegraph Company, 25 Utah 263, 71 P 209 (1903), and In Re Miller's Estate, 36 Utah 228, 102 P 996 (1909) to support his allegation that reversible error was committed. It should be noted that in both of these cases, the witness was well acquainted with the person his testimony concerned, and the foundation laid in both cases showed that the witness was qualified to make such a judgment based upon his familiarity with the individual and his opportunity to observe such emotion. The law in Utah is to the effect that a trial judge has a reasonable right of discretion as to how far afield examination of witnesses may be pursued, and his rulings should not be disturbed unless it clearly appears that he was in error in his judgment or that he abused his discretion. In Re Baxter's Estate, 16 Utah 2nd 284, 399 P 2nd 422, 17 ALR 3rd 700 (1965).

In the case at hand, the two witnesses questioned as to the emotion exhibited by Respondent were apparent strangers to him, and had apparently never seen him before. Their observations were made while riding in and driving an automobile (Tr. 7 and 23) located across the intersection from Respondent who was also in an auto-

mobile. The observation of each lasted only a few seconds, as both admitted they did not see the first collision (Tr. 18 and Tr. 34 lines 25 through 27), and both witnesses were somewhat unsure of just what type of emotion Respondent exhibited.

Mr. Jensen testified that Respondent "appeared to be quite disturbed and angry about something," and that "he had—well, he looked like he was disturbed." (Tr. 7) A "disturbed" look is not at all out of harmony with Respondent's testimony. Mr. Jensen testified as follows (Tr. 33 and 34)

> Q You don't know? Did he have his arm up on the back of the seat loking over his left shoulder? Or did he just have his head turned?
>
> A Well, I don't know.
>
> Q You don't know? You didn't observe that? Could you clearly see his face?
>
> A No.
>
> Q You couldn't clearly see his face?
>
> A I don't remember, except that—
>
> Q Well, you answered my question. You don't remember.
>
> A I guess.
>
> THE COURT: Except that maybe she is not saying that. Finish your answer, please.
>
> THE WITNESS: Well, I saw his face.
>
> Q (By Mr. Moffat) Could you clearly see his face?
>
> A I think so.

Q And this was with him looking over the left shoulder and you at the intersection of Second South?

A Uh huh.

Q Before you made the turn?

A Uh huh.

Appellant's other witness testified that Respondent looked over his right shoulder (Tr. 37), which would indicate that his head was turned away from the Jensen vehicle.

Without more of a foundation, the Court was correct in not allowing the witnesses to testify as to the emotional state of Respondent. The Court did allow the witnesses to testify as to what they observed (Tr. 11 and 29), which under the circumstances, was all that the witnesses could reliably testify to.

Our case would seem to be nearer the situation in Weaver vs. State, 1 Ala App 48, 55 So. 956 (1911), than the cases cited by the Appellant. In the Weaver case, the Court said

> The question asked the witness Levi, "Was the deceased at the time quarrelsome," or "in a quarrelsome mood during the seven minutes immediately preceding the shooting?" sought to elicit the opinion of the witness, and the facts from which the jury, as was its province, and not that of the witness, draw such a conclusion, and the State's objections to such questions were properly sustained.

In denying an application for the rehearing of this case in 2 Ala App 98, 56 So. 749 (1911) it was said

> The questions in point here call for more than a mere shorthand rendering of facts, or such an opinion as witness may give under the recognized exceptions to the general rule against the permissibility of opinion evidence; these questions call for the mental status, the mood in which the deceased was, extending over a period of seven minute's time. How he evidenced such a quarrelsome mood during that length of time was certainly susceptible of narration.

It should be pointed out that the instant case was tried before the Court sitting without a jury, whereas, both cases cited by Appellant in support of the claimed error, were tried before a jury. The judge's rulings on evidence are not as critical in a trial to a Court sitting without a jury, since a trial judge will include in his consideration of the issues his knowledge as to the competency, materiality and effect of the evidence. In Re Baxter's Estate, supra; Sweeny vs. Happy Valley, Inc., 18 Utah 2nd 113, 417 P 2nd 126 (1966).

Even should the Court determine that error was committed, it is Respondent's position that it was not reversible error in this case. The record shows that the Court was advised that the witnesses believed Respondent was angry, so that issue was before the Court. The following testimony was made without objection. (Tr. 7)

> A . . . And what attracted my attention was Mr. Tella, or the one—the driver—the defendant was looking over his shoulder at the car behind him and leaning back over his seat looking back at—behind him, and I just couldn't figure what he was looking for. But I watched him for a minute,

and all at once I noticed that he—well, he appeared to be quite disturbed and angry about something. I don't know.

Q Proceed with your testimony.

A He had—well, he looked like he was disturbed.

Therefore, the testimony Appellant later tried to elicit from the witnesses would only be cumulative, and its exclusion would not be so prejudicial as to be reversible. Also, the vantage point of the witnesses' observation and their uncertainty as to what they saw, as explained above, would limit the value of their testimony on this point. Prior Utah cases make it clear that the reversal of a judgment is justified only when there is some error of such substantial nature that there is likelihood that the result would have been different in its absence. Eager vs. Willis, 17 Utah 2nd 314, 410 P 2nd 1003 (1966); In Re Baxter's Estate, supra. Rule 5 of the Rules of Eivdence as adopted by this Court states the rule as follows

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless (a) it appears of record that the proponent of the evidence either made known the substance of the evidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence by questions indicating the desired answers, and (b) the Court which passes upon the effect of the error or errors is of the opinion that the excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding.

CONCLUSION

Respondent maintains that the trial court was correct in its ruling because:

1. There is at least a conflict of the evidence as to the negligence and contributory negligence of the parties involved, and there is substantial evidence supporting the Findings of Fact of the trial court. This Court must view the evidence in light most favorable to Respondent's position.

2. The Court rightfully exercised its discretion in excluding certain testimony of Appellant's witnesses, which action was not error. Even if error were committed, it was not so prejudicial or substantial as to be reversible error where the case was tried by the judge without a jury, where the testimony would have been cumulative had it been introduced, and where the circumstances were such that any conclusions the witnesses might have reached regarding Respondent's emotional state would have been extremely speculative.

WHEREFORE, Respondent respectfully prays that the action of the trial court be affirmed.

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