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Leland E. Matern v. Ronald D. Phillips : Brief of Appellant

Utah Supreme Court

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McBroom & Hanni; Attorneys for Appellant;

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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

NOV 24 1958

LELAND E. MATERN,
Plaintiff and Appellant,

— vs. —

RONALD D. PHILLIPS
by his guardian ad litem,
HEBER PHILLIPS,
Defendant and Respondent

Clerk, Supreme Court, Utah

Case
No. 8935

BRIEF OF APPELLANT

McBROOM & HANNI

Attorneys for Appellant

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BRIEF OF APPELLANT

STATEMENT OF FACTS

The accident in question occurred on October 25, 1957, at the hour of 7:50 a.m. near the intersection of Third East and Fifth South in Salt Lake City, Utah. Appellant was driving his Ford pick-up truck south on Third East. He stopped his truck for a red light at Fifth South.

Respondent was driving a model 1949 Plymouth sedan. Soon after he started driving he noticed that his brakes were low. (R. 135) He pulled into a service station near the intersection of Third East and Fourth

South. He had the service station attendant put some brake fluid in. Without testing his brakes at all between the time the fluid was put in and the time of the accident, respondent drove out of the service station and proceeded south on Third East at a speed of twenty to thirty miles per hour. (R. 137A and 140) When respondent got to a point approximately sixty feet behind appellant's truck, he applied the brakes but had no pressure at all. Respondent's automobile crashed into the rear end of appellant's truck at a speed of twenty to thirty miles per hour. Respondent's automobile moved a distance of two feet after the impact and appellant's truck moved a distance of twelve feet from the point of impact.

Appellant, other than being shook up, noticed no difficulty or injuries at the scene of the accident. An hour or so after the accident appellant noticed that his neck got stiff and sore. It remained stiff and sore for a period of two or three days. The stiffness disappeared for a period of approximately two weeks and then it became stiff and sore again. At about the time appellant's neck became stiff and sore he got a case of Asian flu and thought nothing of the stiffness or soreness in his neck but merely thought it was caused by the flu. The stiffness and soreness of appellant's neck and his headaches continued to get worse until they got so bad appellant consulted a doctor on January 20, 1958.

Dr. Ray Greene, an orthopedist, dignosed appellant's condition as chronic, moderately severe, whiplash injury.

(R. 86) The doctor advised appellant that he should go into a hospital for treatment. Appellant was in the St. Mark's Hospital for a period of nine days. He was discharged on February 3, 1958.

The treatment of appellant consisted primarily of applying traction to his neck while he was in bed and the wearing of a cervical neck brace when he was up and moving around.

About April 1, 1958, Dr. Greene advised appellant that he should try to return to work if possible on a part-time basis. (R. 108) Appellant tried to return to work but was told by his foreman the company did not want appellant working until he could come back on a full-time basis. (R. 61) Appellant then, at the suggestion of the doctor, started working for a few hours each day on a home that appellant was building. Appellant was not released to return to work until June 2, 1958. (R. 110)

The uncontradicted evidence shows that appellant incurred the following out-of-pocket losses. (R. 66 to 70)

1. Lost wages from 1-20-58 to 6-2-58.....	\$1,691.69
2. St. Mark's Hospital.....	150.90
3. Professional pharmacy prescription	2.04
4. Cervical brace	17.34
5. Damage to truck.....	39.31
6. Dr. Ray Greene.....	145.00
<hr/>	
TOTAL.....	\$2,046.28

At the time of the accident in question appellant was employed by Western Steel Company as a mechanic machinist.

The case was tried to a jury on June 10 and 11, 1958. The trial court found that respondent was guilty of negligence as a matter of law and so instructed the jury. The question of whether respondent's negligence caused or resulted in the injuries complained of by appellant was left to the jury. The jury found the issues in favor of appellant and against the respondent and awarded appellant a verdict of \$1,004.59. \$39.31 was for truck damage, \$315.28 was the exact amount of the medical expenses incurred by appellant and the balance of the verdict, \$650.00, was for general damages. Appellant made a motion that the jury verdict be increased or in the alternative that appellant be granted a new trial. (R. 202A) This motion was denied by the court. (R. 202C)

POINTS ARGUED BY APPELLANT

1. The trial court's Instruction No. 8 and its refusal to give appellant's requested Instruction No. 1 was prejudicial error.

2. The damages awarded by the jury were inadequate and the trial court should have increased the amount of the verdict or in the alternative granted appellant a new trial.

ARGUMENT

POINT 1

THE TRIAL COURT'S INSTRUCTION NO. 8 AND ITS REFUSAL TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 1 WAS PREJUDICIAL ERROR.

Before the trial of the case started, counsel for both parties had a conference with Judge Hanson in his chambers. At that conference it was indicated by respondent's counsel that he intended to go into the fact that appellant had been involved in a similar accident approximately a year before the accident in question. Judge Hanson indicated in chambers that respondent's counsel would be permitted to go into the fact of the prior accident providing respondent was able to establish that said prior accident had something to do with the injuries that appellant was then complaining about. (R. 192-197) In view of the court's indications in chambers, appellant's counsel brought out the fact of the prior accident on direct examination. (R. 66) Appellant testified that the only injuries he received in the prior accident was some pelvic injuries and internal injuries. He testified he did not receive any injury at all to his neck or back. (R. 66-68) Dr. Ray Greene testified that if there had been any injury to appellant's neck caused in the November, 1956, accident, that he would expect to have seen some evidence of that fact in the X-rays. Dr. Greene testified he saw no changes in the X-rays that indicated any injury to appellant's neck in the prior accident. (R. 126, 127)

At no place in Dr. Reed Clegg's testimony, the expert called by respondent, was anything at all said that would in any way indicate that appellant's whiplash injury complained of in this case resulted from or had anything to do with the prior accident of November, 1956. (R. 126-142) Although respondent claimed that there was some relationship between the whiplash injury suffered by appellant that is the subject of this law suit and the prior accident of November, 1956, all of the affirmative evidence shows the prior accident had nothing at all to do with the present injuries. An examination of the entire record fails to show any evidence of any kind that tends in any way to indicate that the whiplash injury suffered by the appellant after the accident in question had anything to do with or was in any way caused by or contributed to by the prior accident of November, 1956.

Since respondent claimed there was some connection between the prior accident and appellant's present injuries and since appellant himself brought out as a part of his direct case the fact of the prior accident, there was no error on the part of the trial court in admitting evidence of the fact of the prior accident. However, when at the conclusion of respondent's case, there was no evidence at all in the record that tended to show any connection between the present injuries of appellant and the prior accident, it was the duty of the trial court to instruct the jury that the prior accident had nothing to do with appellant's present injuries and it was the duty of the trial court to instruct the jury to disregard any and all evidence concerning the prior accident in determining the

cause of appellant's injuries and in assessing appellant's damages. Appellant in his requested Instruction No. 1 requested the court to so instruct the jury relative to the prior accident. The court refused to give said requested instruction and failed to give it in substance or at all.

Instruction No. 8 as given by the court was as follows: (R. 20)

“You are further instructed that if you find that the plaintiff is entitled to damages, then in awarding him damages you may consider only his loss, if any, which a preponderance of the evidence shows resulted from the accident on October 25, 1957. He is not entitled to damages for a condition or loss from other accidents or causes unrelated to the collision with the defendant's automobile.”

A reading of Instruction No. 8 immediately shows that the jury was permitted to consider the fact of the prior accident and to speculate on what effect it may have had on appellant's present injuries.

While the instruction itself may not be an incorrect statement of the law, when it is read in light of the evidence that appears in the record concerning the prior accident, and when it is read in light of the fact that respondent failed completely to show any connection at all between the prior accident and appellant's present injuries, the prejudicial effect of the instruction can immediately be seen. This is particularly true in view of the fact that the trial court did not at any place instruct the jury that there was no evidence showing any connection at all between the prior accident and appellant's present injuries.

The last sentence of the instruction which reads, "*He is not entitled to damages for a condition or loss from other accidents or causes unrelated to the collision with the defendant's automobile,*" permits the jury to speculate or to infer that some part of the injury complained of by appellant was or could have been caused by the prior accident.

We submit that it was prejudicial error for the court to give its Instruction No. 8 and its refusal to give appellant's requested Instruction No. 1 which reads as follows:

"The defendant in this case is claiming that plaintiff's injuries, if any, were caused by the prior accident of November of 1956. In this connection you are instructed that the mere fact that plaintiff was involved in said prior accident, standing alone, is not sufficient evidence to show that plaintiff's injuries, if any, complained of in this action were caused or contributed to by said prior accident.

You are instructed that there is no evidence that plaintiff's injuries, if any, were caused or contributed to by said prior accident and you are further instructed that you are to ignore the prior accident in determining the cause of plaintiff's injuries, if any, and in assessing plaintiff's damages, if any."

It is generally held that evidence of a driver's previous accidents is inadmissible in a civil action arising out of a motor vehicle accident, since such evidence is immaterial in the determination of the drivers' negligence on the occasion in question. 5A Am. Jur., Sec. 946 and 948, p. 836, 20 A.L.R. (2) 1210.

When respondent failed to show that the November, 1956, accident had anything to do with appellant's present injuries the same principle would apply, namely, that evidence of the prior accident was immaterial and the court should have instructed the jury to disregard such evidence. Its refusal to so instruct was prejudicial error.

The trial court agreed that there was no evidence that tended to show any connection between the prior accident and the present injuries of appellant, (R. 181) but still refused to so instruct the jury.

POINT 2

THE DAMAGES AWARDED BY THE JURY WERE INADEQUATE AND THE TRIAL COURT SHOULD HAVE INCREASED THE AMOUNT OF THE VERDICT OR IN THE ALTERNATIVE GRANTED APPELLANT A NEW TRIAL.

The trial court found that respondent was negligent as a matter of law. The jury, by making an award to the appellant, found that respondent's negligence resulted in injury to the appellant. The uncontradicted evidence shows that appellant sustained the following losses: (R. 66-70)

Hospital Bill	\$ 150.90
Prescription	2.04
Cervical Brace	17.34
Truck Damage	39.31
Doctor Bill	145.00
Loss of Wages.....	1,691.69
TOTAL.....	\$2,046.28

The uncontradicted evidence shows that appellant suffered with a sore, stiff neck and suffered headaches from the time of the accident down to the time of trial and that appellant was still suffering from headaches at the time of the trial and that he would continue to suffer with them in the future. (R. 110) Appellant was in the hospital for nine days. At the time of the trial he was still using the traction at night and was still required to wear the cervical brace at times.

We think the case at bar falls squarely within the rule announced in *Bodon v. Suhrmann*, 327 P. 2d 826, Utah, where the court said,

“Nevertheless when the verdict is outside the limits of any reasonable appraisal of the damages as shown by the evidence, it should not be permitted to stand, and if the trial court fails to rectify it, we are obliged to make the correction on appeal.”

The uncontradicted evidence shows that appellant sustained out-of-pocket losses amounting to the sum of \$2,046.28. The jury in awarding appellant the sum of \$1,004.59 has disregarded the uncontradicted evidence in the case and its verdict is completely outside the limits of any reasonable appraisal of the damages as shown by the evidence. Appellant urges the Supreme Court to increase the amount of the judgment in this case or in the alternative to grant appellant a new trial.

Respectfully submitted,

McBROOM & HANNI

Attorneys for Appellant