

1959

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

Utah Supreme Court

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Hanson, Baldwin and Allen; Walter L. Budge; Attorneys for Respondent;

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

JAN 13 1959

LELAND E. MATERN,
Plaintiff and Appellant,

Clerk, Supreme Court, Utah

VS

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

Case No. 8935

BRIEF OF RESPONDENT

HANSON, BALDWIN and ALLEN
WALTER L. BUDGE

Attorneys for Respondent

SUBJECT INDEX

	Page
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
STATEMENT OF POINTS	3
ARGUMENT	4
POINT I. THE TRIAL COURT'S INSTRUCTION NO. 8 CORRECTLY STATES THE LAW AND THE COURT'S REFUSAL TO GIVE APPEL- LANT'S REQUESTED INSTRUCTION NO. 1 WAS NOT ERROR.	4
POINT II. THE VERDICT WAS WELL WITHIN THE LIMITS OF A REASONABLE APPRAIS- AL OF THE DAMAGES AS SHOWN BY THE EVIDENCE.	8
CONCLUSION	11

INDEX OF AUTHORITIES

Bodon vs. Suhrmann, 327 P. 2d 826	1
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LELAND E. MATERN,
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vs

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guardian ad litem,
HEBER PHILLIPS,
Defendant and Respondent.

} Case No. 8935

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

This cause of action arose as the result of a traffic accident. The case was tried to a jury in the District Court of Salt Lake County, the Honorable Stewart M. Hanson, presiding. Your appellant prevailed in the Court below but brings his cause to this Court seeking an additur to the jury verdict or, in the alternative, that this Court grant a new trial. Appellant relies upon the holding of this Court in the recent case of *Bodon v. Suhrmann*, 327 P. 2d 826.

STATEMENT OF FACTS

At 7:50 a.m. on October 25, 1957, appellant's pickup truck was stopped for a traffic light at the intersection of Third East and Fifth South in Salt Lake City. Respondent's automobile collided with the rear of appellant's truck.

Appellant, then 28 years of age, was an iron worker and steel mechanic (Tr. 20); and, at the time of the accident, was constructing a home for himself in Union, Utah, at about 18th East and 73rd South Streets, doing all the work himself (Tr. 21). Appellant claimed a "whiplash" injury to his neck with resultant stiffness in the neck. Immediately following the accident appellant did not think that he had suffered injury (Tr. 25). Later in the morning his "neck began to hurting" and he decided not to work on his house that day but went home and rested (Tr. 25). His neck continued to be stiff for "about two or three days." (Tr. 26). Some two weeks or so later the stiffness returned and appellant contracted a case of Asian flu (Tr. 26). The stiffness remained until "about the middle part of December" when appellant's flu went away and he got rid of his cold (Tr. 26). However, about the 1st of December he started getting headaches which became progressively worse and finally, on January 20th, appellant went to a doctor (Tr. 27). Appellant had worked at his regular job during this interval (Tr. 27).

The physician recommended hospitalization in order that appellant's neck could be placed in traction, and appellant entered the hospital on January 25 where he remained for nine days (Tr. 28, 29). After leaving the hospital, appellant applied traction to his neck at home and made use of a cervical brace. On April 1 appellant's doctor advised that he start divorcing his brace and that he return to part time work (Tr. 34). Appellant worked on his house during the months of April and May (Tr. 34-36) and returned to his full time employment on June 2, 1958. Appellant showed special damages in the sum of \$315.28 and damage to his truck in the amount of \$39.31. Appellant claimed loss of wages amounting to \$1,691.69 (Tr. 39).

The jury verdict was for:

General Damages	\$650.00
Special Damages	315.28
Damage to Truck	39.31
<hr/>	
Total Damages	\$1,004.59

Of this your appellant complains.

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT'S INSTRUCTION NO. 8 CORRECTLY STATES THE LAW AND THE COURT'S REFUSAL TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 1 WAS NOT ERROR.

POINT II.

THE VERDICT WAS WELL WITHIN THE LIMITS OF A REASONABLE APPRAISAL OF THE DAMAGES AS SHOWN BY THE EVIDENCE.

ARGUMENT

POINT I.

THE TRIAL COURT'S INSTRUCTION NO. 8 CORRECTLY STATES THE LAW AND THE COURT'S REFUSAL TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 1 WAS NOT ERROR.

Your appellant had been involved in a similar accident when his car was run upon from the rear about one year prior to the accident which gave cause to the case at bar. Appellant's counsel directly examined his client concerning that accident to show that the injuries there sustained were dissimilar to those suffered by appellant as a result of the accident of October 25, 1957. Appellant testified that in the prior accident he suffered internal injuries and that he had no injury to his neck nor did he suffer headaches (Tr. 39). On cross examination, appellant denied that he suffered any bruises in the first accident (Tr. 44). To rebut this testimony respondent resorted to the complaint in that action which alleged:

As a result of defendant's wrongful conduct plaintiff received numerous bruises, internal injuries and was otherwise injured. (Tr. 45).

The Court permitted the use of this evidence for purposes of impeachment only. (Enlargement of Record of Appeal, 4).

Appellant thereafter requested the following instruction be given:

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. (Appellant's Brief, 8).

The Court refused to give the instruction and appellant claims prejudicial error, stating:

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. (Appellant's Brief, 8).

Certainly the evidence used and here complained of did not go to the "determination of the driver's negligence."

The Court did instruct the jury:

INSTRUCTION NO. 8

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. (R. 20).

The Court further instructed the jury:

INSTRUCTION NO. 6

You are instructed that you will award to the plaintiff such damages, if any, as you find from a preponderance of the evidence will fairly and justly compensate him for personal injury and damage, if any, which were proximately caused by the collision.

In determining the amount of such damages, you are instructed that you should consider all pain and suffering that the plaintiff has endured, if any, both mental and physical, ever since he sustained his injuries and that he will probably endure in the future.

In determining compensation for pain and suffering, if any, you may take into consideration its probable duration and its severity.

The law furnishes no way by which to measure what is reasonable compensation for mental and physical pain and suffering, but it is left to the sound judgment and discretion of the jury trying the case to determine from a preponderance of the evidence what is reasonable compensation to compensate plaintiff for any physical or mental pain and suffering he has endured or will probably endure in the future.

You are further instructed that you may take into consideration loss of bodily function, if any, which plaintiff has suffered or which he will probably suffer in the future.

In determining the amount of damages referred to in the first paragraph of this instruction, you are further instructed that plaintiff is entitled to compensation for his actual loss of past earnings, if any, resulting as a proximate result of the accident in question.

You may likewise compensate plaintiff for such reasonable sums as were necessarily incurred for medical expenses.

The total amount of damages assessed for medical expenses may not exceed the sum of \$315.28, and the total amount of damages assessed for pain and suffering, loss of bodily function and loss of earnings, if any, may not exceed the sum of \$20,000.00, being the amount prayed for by plaintiff in his complaint. However, in the event that you do not find that the plaintiff's injuries, loss of earnings and medical expenses were the proximate result of the negligence of the defendant, you will, however, award him the sum of \$39.31

for the damages to his truck, which amount the Court finds is the proximate result of the defendant's negligence.
(R. 17, 18).

The jury was correctly and fully instructed as to the law of the case. It is not improper to impeach a witness and by so doing test his credibility to the jury.

It is to be recalled and it is admitted that, "appellant's counsel brought out the fact of the prior accident"; (Appellant's Brief, 5), and, too, that the jury verdict was for appellant, although in a lesser sum than that which appellant sought. That was the prerogative of that jury after a proper weighing of the evidence. We see no error, prejudicial or otherwise, in the instructions given or in the Court's refusal to give the requested instruction. Appellant offers no authority to the contrary.

POINT II.

THE VERDICT WAS WELL WITHIN THE LIMITS OF A REASONABLE APPRAISAL OF THE DAMAGES AS SHOWN BY THE EVIDENCE.

Relying solely upon appellant's own testimony, it can only be concluded that the sum awarded was well within a reasonable appraisal of the damages. The accident occurred on October 25, 1957, and appellant suffered a stiff neck which developed later on that day (Tr. 25); and which lasted two or three days (Tr. 26). The stiffness departed for a period

of two weeks and then returned concurrently with a "cold" and "a little case of the Asian flu." (Tr. 26). After the flu went away and appellant divorced his cold, about December 1 headaches set in (Tr. 26); and, on January 20, Appellant first went to see a doctor (Tr. 27).

Appellant had worked at his regular job all of this period of time (Tr. 27).

On the 25th of January, appellant was hospitalized (Tr. 28), for nine days (Tr. 29). The headaches persisted through February and March; however, "progressively getting better." (Tr. 32-33). On April 1 the doctor advised appellant to start "divorcing" his brace and to "become a little active." (Tr. 34). During April and May appellant worked on his house (Tr. 34-36). Appellant laid brick in April (Tr. 35); and, although there was some dispute in the evidence as to how long appellant worked each day and how much of the work on the house had been completed before the accident, [the county building inspector testified that work had not been started on October 12, 1957 (Tr. 123)], it is undisputed that the building of the house progressed. Respondent's Exhibits D.4 through D.9 speak for themselves. As the result of the collision there was but slight damage to the truck; there was, and appellant freely admitted doing it, considerable heavy construction work done on appellant's home. We

can only conclude that the jurors either considered appellant to have been a malingerer or felt that appellant was not entitled to full wages for time lost while making use of such time building a house for himself.

Nevertheless, and in spite of all of the above, your appellant here says that the "uncontradicted evidence" places his cause squarely within the rule announced in *Bodon v. Suhrmann*, supra. We would contend that the application of any of the rules enunciated in that case must of necessity be applied as law to a particular fact situation; it is not sufficient to say only, as does appellant, that:

* * * when the verdict is outside the limits of any reasonable appraisal of 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.

We must also ask the pivotal question here:

* * * Under the rules, is the award of \$1004.59 so small, in comparison to the damages which would necessarily be found from any reasonable appraisal of the evidence, that this court should grant the plaintiff some affirmative relief with respect to it?

Surveying the evidence in the light most favorable to the jury's findings, that question, in this case, can only be answered in the negative.

CONCLUSION

The verdict of the jury should not be disturbed.

Respectfully submitted,

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