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T. Frank Sevy v. Utah State Farm Bureau Insurance Co. : Brief of Appellant

Utah Supreme Court

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Kipp and Charlier; Attorneys for Defendant

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IN THE SUPREME COURT
of the
STATE OF UTAH

— FILED

SEP 26 1958

T. FRANK SEVY,

Plaintiff and Respondent, Clerk, Supreme Court, Utah

vs.

Case

No. 8952

UTAH STATE FARM BUREAU
INSURANCE COMPANY,

Defendant and Appellant.

APPELLANT'S BRIEF

KIPP AND CHARLIER

Tel Charlier

Attorneys for Defendant

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T. FRANK SEVY,

Plaintiff and Respondent,

vs.

UTAH STATE FARM BUREAU
INSURANCE COMPANY,

Defendant and Appellant.

} Case
No. 8952

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

This appeal is taken from a Judgment entered in favor of the plaintiff in the sum of \$1446.92 with interest thereon from March 31, 1956 entered by the Honorable John C. Sevy, Jr., on April 25, 1958 in the Sixth Judicial District of the State of Utah in and for Garfield County.

STATEMENT OF FACTS

On or about March 25th or 26th of 1956, the plaintiff in this action, Mr. T. Frank Sevy, was delivered a 1955 Pontiac by one George Talbot, who was the sales representative of Pearson & Crofts, an automobile dealership in Richfield, Utah and Panguitch, Utah. The testimony is that Mr. T. Frank Sevy resides in Panguitch and that he had two automobiles, one being a 1949 Pontiac and the other a 1951 Chevrolet Pick up. It further appears that on or about March 27, 1956, one Von Davis, a representative of Pearson and Crofts, together with George Talbot, called at the residence of the plaintiff and negotiated for the purchase of a 1955 Pontiac automobile. It further appears that on this occasion certain documents were signed and later endorsed by the parties and sale of the automobile was consummated at that time.

Mr. Sevy carried his insurance with the defendant company and appellant herein and his testimony is that he informed Von Davis and George Talbot that he wanted to keep his insurance with the Farm Bureau Insurance Company.

Shortly thereafter the testimony is that there was a discussion as to the paint on the 1955 Pontiac automobile and also the seat covers and it was agreed by and between the parties that the Pearson and Crofts Company would paint the automobile and also replace the seat covers and clean the car as agreed between the parties. It further appears that on that occasion that Von Davis was then given the 1955 Pontiac automobile to drive to Richfield for the purpose of installing the seat covers and taking care of the paint job as agreed. While

en route to Richfield, Utah, the automobile was wrecked and this action brought after said accident.

The testimony is also to the effect that the plaintiff informed Mr. James Yardly, the representative for the appellant in the Panguitch area, that he had purchased another car and wanted his insurance transferred to the other car on the evening of March 27.

Subsequent to the 1955 automobile being wrecked it appears further that another 1955 Pontiac was sold to the plaintiff shortly after the automobile was wrecked.

STATEMENT OF POINT

POINT I

THE EVIDENCE INTRODUCED IS INSUFFICIENT TO PROVE THE ALLEGED DAMAGE TO THE AUTOMOBILE OF THE PLAINTIFF.

ARGUMENT

POINT I

THE EVIDENCE INTRODUCED IS INSUFFICIENT TO PROVE THE ALLEGED DAMAGE TO THE AUTOMOBILE OF THE PLAINTIFF.

The burden of proof that is placed on the plaintiff suing for damages to a motor vehicle using the cost of repairs is as follows:

1. The necessity for repairs as a result of the injury.

2. That the repairs made were reasonably proper to be made; and

3. That the cost thereof was reasonable.

This character of proof should fully develop the pertinent facts. 5a Am. Jur., Automobiles and Highway Traffic, Sec. 1114, p. 950; also see *City of Oklahoma City vs. Wilcoxson*, 48 P. (2d) 1039, 1043 (1935).

In conjunction with the above stated rule as to damages see the annotation of cases in 169 A.L.R. pp 1107-1111. On page 1111, we find the following:

"COST OF REPAIR AS ALTERNATIVE MEASURE OF DAMAGE.

The use of the cost of repairs as the measure of damage is often expressly recognized as an alternative to the right to recover the difference is the reasonable market value of the car before and after the accident.

Thus, in *Parilli v. Brooklyn City R. Co.* (1932) 236 App. Div. 577, 260 NYS 60, the court said: "There are alternative methods of making punitive damages sustained where personal property has been injured. The proper and simple method is to prove the amount of lessened market value or the difference in the value of the property immediately preceding and following the wrong . . . An alternative method is a proof of repair value of the necessary repairs made to restore it as nearly as possible to its original condition." The court continues: "*Of course, there must be proof that the repairs were necessary and were reasonable worth the sum paid, for without it neither the value of the repairs nor the extent of the*

injury is thereby established . . . It is not sufficient to make proof of the amount paid." (Italics ours.)

These then being the essential elements of proof required of the plaintiff, the next question, of course, is whether or not the evidence adduced was sufficient to prove the damages claimed.

In the instant case there is only one witness who made any remarks about damages or the amount thereof. That was Mr. Von Davis. The plaintiff failed to introduce any documentary evidence as to how much specific damage was done to the car; whether the injury complained of was entirely caused by the accident, or that the repairs were reasonable. The testimony was further that Pearson and Crofts was the only place an estimate was obtained and, as claimed by the defendant, were, in fact, the owners of the car pursuant to the later transactions of the plaintiff on the purchase of another 1955 Pontiac automobile. Hence, it is perfectly obvious that Pearson and Crofts could have placed the estimate at any figure they so desired.

In any event the plaintiff failed to show by any evidence, documentary or otherwise, that the repairs were reasonable and that they were reasonably proper to be made.

What capacity does Von Davis have with Pearson & Croft? Mr. Davis (R. 45) testified that he is the sales manager for Pearson & Croft and that he was with George Talbot, a salesman for Pearson & Croft in Panguitch, Utah, when the plaintiff purchased the 1955 automobile that was wrecked. He does not testify that he is a mechanic; that he himself ap-

praised the damaged car; that he knew it to be reasonable, or that he had any knowledge about the amount of the bill except that an appraisal was made by someone. He was allowed to testify as to the amount arrived at by a third person. In fact, it was complete hearsay on the part of the witness Von Davis, that an appraisal was prepared and that he knew anything it (R. 59). The record further discloses that all of his testimony was objected to by counsel for the appellant as not having a proper foundation and certainly that it was hearsay.

We find on page 58-59 of the transcript as follows:

“Q. Now, in regard to the damage to the 1955 Pontiac, you testified that after it was damaged it was taken to Pearson & Crofts; is that correct?

A. Yes.

Q. Was there any appraisalment made of those damages?

A. Yes, a repair . . .

BY MR. CHARLIER: Just answer yes or no.

A. Yes.

Q. Yes, there was an appraisal is your testimony?

A. Yes.

Q. And after that appraisalment was made of the damages, what was done with it?

A. The car was stored.

Q. I mean, what was done with the appraisal?

A. The appraisal was sent to the Farm Bureau Insurance Company in Salt Lake City.

Q. And did you send the appraisal to the Farm Bureau Insurance Company?

A. Yes.

Q. And what was the total amount of that appraisal?

BY MR. CHARLIER: We will object to that, Your Honor.

A. \$1446.

BY MR. CHARLIER: Just a minute.

BY THE COURT: What's that?

BY MR. OLSEN: The total amount of the appraisal sent by him to their company.

BY MR. CHARLIER: We object, there's no foundation.

BY THE COURT: Objection overruled if he knows.

A. \$1446.92.

Q. Could you tell the Court where that appraisal was prepared?

A. The appraisal was prepared in our garage by our mechanic and itemized—each operation was itemized.

Q. Now, would you explain to the Court a little further how these appraisals were worked out, how you itemized those things, in what manner?

A. All operation changes, as replace the right door, glass replacing, the right rear fender, replace the radiator, all operations are itemized and if the part is replaced, the cost of replacement, the cost of the new part, the new part is put on the estimate and, also, the labor if a damaged part is to be repaired, the amount of repair is put on. Each operation that it takes to repair the automobile."

Von Davis, himself, did not make the estimate and certainly the court erred in allowing him to testify as to the repair

because a proper foundation was not laid and it was complete hearsay on his part. It was certainly not within the witness's own knowledge as to the reasonableness of the repairs or whether or not they were necessary and properly a consequence of this particular accident and certainly such evidence should not be admitted. He failed to testify about the particular damage to this car and speaks in generalities.

The law is clear that a witness must be properly qualified as an expert in order to be competent to testify as to the reasonable value of repairs or their costs.

Bailey vs. Ford, 145 A. 85, 127 S.E. 821 (1927).

Moore vs. Levy, 128 Cal. App. 687, 18 P. 2d 362 (1933).

We further find in the case of Spaulding Manufacturing Company vs. Holliday, 32 Okla. 823, 124 P. 35, 36 (1912):

"Matters capable of proof should not be left to conjecture. Verdict should be based upon evidence, but not upon guess work, especially concerning things so easily capable of proof."

It has been held in many cases and also found in Vol. 6 of Blashfield Cyclopedia of Automobile Law and Practice in Section 3430 as follows:

"Testimony as to the value of repairs by the witness when he did not testify to the necessity of the repairs covered by the estimate, nor to the accuracy of his estimated value, is mere hearsay."

Clearly this is exactly what happened in this case and Mr. Von Davis at no time was qualified to testify as to the value of the repairs; that the repairs were made necessary as a result of the accident; nor that the value of the repairs was reason-

able. Hence, it follows that they were merely statements that are hearsay on the part of the witness and the plaintiff has clearly failed to establish any damages in this case.

Also see *Edwards vs. Maryland Motor Car Insurance Company*, 197 N.Y.S. 460, 204 App. Div. 174 (1922).

The purported bill that Mr. Von Davis referred to while on the stand, but was never introduced into evidence, during the entirety of his testimony being objected to by counsel for the appellant, necessarily follows that no damages were sufficiently proven by the plaintiff. Based on such evidence if the court were to allow the testimony of Von Davis as to the appraisal of the repairs of this car to stand with nothing else, it would indeed be a dangerous practice. The law certainly requires more evidence as to the exact damages incurred in this matter and certainly they were easily obtainable from the Pearson & Crofts Dealership, but the record is completely devoid of any documentary proof which would sustain the damages in this action. Clearly the law requires absolute certainty of observation or statements by a witness giving an opinion. See 20 Am. Jur., Section 768.

It has been held on many occasions that a mere general statement that is vague and indefinite will not justify a verdict for damages. See *Smith vs. Calley et al.*, 284 P. 974 (1930). In the Smith case it is held that damages must be proven and if they are not proven then of course the trial court has no way to measure the damages and as such damages will not be awarded to the plaintiff and they would be entitled to nominal damages only.

The same reasoning is found in the case of *Moore vs. Levy*,

supra, wherein we find the following quotation from Corpus Juris and found on page 365 of said case to be as follows:

“Competent evidence of the cost of repairs may be admitted, and one who is qualified from his proved experience to be a judge of the amount ordinarily charged at the usual and market rates for the work and material necessary to repair a motor vehicle, and who supervised the making of repairs upon the vehicle in question is a competent witness as to the reasonable cost thereof, evidence of the amount expended for repairs is admissible only as it may bear upon the reasonable cost of those reasonably proper and necessary, but the actual cost of repairs may be shown in connection with evidence that such cost was reasonable, and a bill for repairs may be admitted to prove the reasonable cost, when there is testimony to the effect that the items contained therein are correct and that the charges therefore are all just and proper, but not in the absence thereof. If a repair bill merely identified by the management of a shop who made the repairs who did not supervise them, or have any personal knowledge thereof, is not admissible. It is error to admit testimony to the cost of repairs other than those shown to be due to the injuries complained of.” 42 Corpus Juris Section 1297.

Clearly this is the standard that the law requires in order for a plaintiff to set forth the damages he has received as a result of an accident. It is obvious from the testimony in this case that the plaintiff has failed to meet this burden and the witness Von Davis has no reasonable way to ascertain the damage caused to the 1955 Pontiac that was sold to T. Frank Sevy. It necessarily follows that since he cannot testify as to these elements the court had insufficient evidence before it to award damages to the plaintiff.

The court does not have any standard whatsoever by which to base the damages involved in this case and as such the court should, based on the evidence, enter only an award of nominal damages against this defendant.

It has been stated in *Moore vs. Daggett*, 150 A. 538, 129 Me. 162 (1930), that in event there is no evidence on which to base damages properly, only nominal damages can be recovered.

It necessarily follows from the above stated cases and the evidence in this case that the court erred in not granting defendant motion to dismiss the plaintiff's complaint (R. 94) due to the fact that the plaintiff has utterly failed to prove any damages. Counsel for the defendant made a proper motion at that time, but the court denied said motion.

CONCLUSION

It is respectfully submitted to this Honorable Court that for the above stated and foregoing reasons that the trial court erred in granting the plaintiff damages based on the evidence before the court and as such the judgment should be reversed and an entry for nominal damages only be entered.

Respectfully submitted,

KIPP AND CHARLIER
Tel Charlier

Attorneys for Defendant