

1960

Walter H. Ruf v. Association for World Travel Exchange and James F. Kenny : Brief of Plaintiff and Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Ruf v. Association for World Travel Exchange*, No. 9114 (Utah Supreme Court, 1960).
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In the
Supreme Court of the State of Utah

WALTER H. RUF,
Plaintiff and Respondent,

vs.

ASSOCIATION FOR WORLD TRAV-
EL EXCHANGE and JAMES F.
KENNY,
Defendants and Appellants.

Case No.
9114

**BRIEF OF PLAINTIFF
AND RESPONDENT**

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STATEMENT OF FACTS

The facts of this case are not complicated.

The only question for consideration is whether the evidence supports the verdict as to the extent of damages. The defendants, driving North on 4th East Street, ran through a stop sign and hit the automobile of the plaintiff roadside (R. 50, 62, 63, 108). The plaintiff's automobile was thrown a distance of about 34 feet by the impact (R.

60). The plaintiff was thrown from the automobile, landing on his back (R. 71-72).

No error has been assigned by the defendants relating to the issue of liability. The alleged error goes solely to the issue of damages.

Although the nature and extent of the damages are shown in detail in the transcript, they can be summarized briefly. Prior to the accident, plaintiff was in good health (R. 79). He had no pain or disability (R. 79, 80). He was an experienced typewriter and office equipment salesman (R. 78, 80). Plaintiff has continued to suffer pain and disability from the time of the accident (R. 74-80). Plaintiff is required to wear a steel back brace (R. 74-75). He is unable to perform his work as a typewriter and office equipment salesman (R. 77-78). After treatment for several months, his doctor, Dr. William S. Allred, prescribed a spinal fusion operation (R. 142). This operation would result in the fusion of two vertebrae, causing a limitation of motion but relieving pain (R. 142). Dr. Allred believes that a spinal fusion operation would result in improvement to plaintiff's back (R. 142). Plaintiff's earnings prior to the accident were between \$450.00 and \$500.00 per month (R. 82, 83, 84). Plaintiff's earnings dropped each month after the accident (R. 85). His earnings in October, 1959 were \$319.05 (R. 86). In February, 1959 he earned \$220.00 (R. 86). From the end of February through April, he made approximately \$150.00 (R. 86).

The jury verdict was in the amount of \$1,344.57 special damages and \$20,000.00 general damages.

STATEMENT OF POINTS

POINT I.

THE VERDICT IS NOT EXCESSIVE; SAID VERDICT IS SUPPORTED BY THE EVIDENCE.

POINT II.

THE COURT DID NOT ERR IN REFUSING TO GRANT DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE TO GRANT A NEW TRIAL.

POINT III.

THE COURT DID NOT ERR IN GIVING INSTRUCTION NO. 9.

POINT IV.

THE COURT DID NOT ERR IN ITS INSTRUCTIONS ON DAMAGES.

ARGUMENT

POINT I.

THE VERDICT IS NOT EXCESSIVE; SAID VERDICT IS SUPPORTED BY THE EVIDENCE.

Defendants' recital of the facts is fragmentary; it fails to give the Court a true and complete understanding of the substantial evidence which supports the verdict.

Evidently the defendants' argument is that the plaintiff sustained no injury as a result of the accident. On page 10 of the defendants' brief, the statement is made: "Admittedly, the man required a spinal fusion operation to repair the degenerative disease that pre-dated the accident and *which was in no way related to the accident by causation or aggravation.*"

The italicized statement is contrary to the evidence. The plaintiff testified that he had had good health prior to the accident (R. 79). The only trouble that he had had was a minor back ailment in April, 1953 (R. 79). This ailment was corrected and never bothered him (R. 79). Plaintiff had sustained no injuries in his lifetime (R. 79). He had never been in another accident (R. 80). He had never been hospitalized before the accident (R. 80). Immediately prior to the accident, plaintiff was active and energetic (R. 98, 102, 124) and engaged in gainful employment for the Schreyer Typewriter Company (R. 80). Plaintiff testified that following the accident, he had constant pain and tenderness in his back (R. 72, 73, 74, 75). This evidence is undisputed.

The witnesses, Evelyn Maria Ruf Smith, Franz Schreyer John Ashworth Thompson, and Margie Vivian Angell all testified that plaintiff appeared in good physical condition prior to the time of the accident and did not manifest any pain or difficulty in performing his livelihood (R. 98, 100, 102, 124, 153, 154). The witnesses, Evelyn Maria Ruf Smith, Margie Vivian Angell, and Franz Schreyer testified that after the accident plaintiff appeared unable to perform

the usual functions without difficulty (R. 97-99, 100-103, 124, 125). This evidence is undisputed.

Dr. William S. Allred examined the plaintiff after the accident and on numerous other occasions and treated plaintiff during the period prior to the trial (R. 139-147). Dr. Allred is an orthopedic specialist (R. 137). Dr. Allred testified that the accident of September 5, 1958 precipitated the symptoms of which the plaintiff complains (R. 143). Dr. Allred testified that it was not uncommon for persons to have a narrowing of an intervertebral space without experiencing pain (R. 143, 151). Dr. Allred testified that the plaintiff was, in his opinion, unable to continue carrying typewriters or other heavy equipment (R. 147). Dr. Allred recommended a spinal fusion operation (R. 142). The Doctor felt that with a spinal fusion operation, plaintiff could expect *some* improvement in the condition of his back (R. 142). However, the Doctor observed that the spinal fusion operation would result in some limitation of motion due to the fusion of vertebrae (R. 142).

Defendants' witness, Dr. Paul Milligan, admitted on cross-examination that he had found limitation of motion which was visible in his examination of plaintiff's back (R. 169); that a violent throw from an automobile with a man landing on his back could, and in fact did, cause some disintegration of the intervertebral disc (R. 171). Dr. Milligan also testified that he had every reason to believe what plaintiff had told him with respect to *having pain in his back* (R. 171). Dr. Milligan admitted that the accident was, or might have been, the precipitating cause of the symptoms of which plaintiff complains (R. 173). There-

fore, both medical witnesses testified, in substance and effect, that the accident was probably the precipitating cause of plaintiff's disability, pain and suffering.

No contention is made by the plaintiff that he is entitled to recover for a pre-existing physical condition. However, plaintiff is entitled to recover for the aggravation, resulting in disability, pain and suffering, of a condition which caused no disability or pain prior to the accident. The evidence in this case supports the finding, or for that matter establishes without dispute, that plaintiff's disability, pain and suffering were caused or precipitated by the negligence of the defendants.

Furthermore, the evidence supports the finding by the jury as to the extent of the damages. Plaintiff is entitled to recover for any and all damages proximately resulting from the defendants' negligence, including pain and suffering, past and future, loss of earnings, and other elements, as specifically set forth in the Court's Instruction No. 8 to the jury. The jury was instructed that it could not speculate as to the extent and nature of plaintiff's injuries, and should compensate plaintiff only for those injuries which it found from a preponderance of the evidence were directly and proximately a result of the accident. It must be assumed that the jury read, understood and followed the instructions.

The evidence establishes that the plaintiff was, prior to the accident, able to perform the work of a typewriter and office equipment salesman (R. 79) ; that the plaintiff was capable of earning, and had earned between \$450.00 and \$500.00 per month in the said line of work (R. 82, 83,

84). The evidence shows that the plaintiff was not able to perform the duties of an office equipment and typewriter salesman after the accident (R. 77, 98, 103, 125, 142). Plaintiff's earnings after the accident did not exceed \$319.05 per month (R. 86). Plaintiff was fifty-four years of age at the time of the accident (R. 66). The medical witnesses, as well as the plaintiff, confirmed the fact that plaintiff suffered pain after the accident (R. 142, 171). The effect of a spinal fusion operation would be to fuse the vertebrae, causing a permanent limitation of motion in the lower back (R. 142).

In summary, there was substantial evidence from which the jury could find damages in an amount equal to or in excess of the verdict.

POINT II.

THE COURT DID NOT ERR IN REFUSING TO GRANT DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE TO GRANT A NEW TRIAL.

The defendants treat Points I and II together for purposes of argument. The statement is made that they relate to the same propositions. It is evident that there is no basis set forth in the defendants' brief or otherwise for a judgment notwithstanding the verdict or for a new trial. Although a verdict which is unsupported by the evidence, or a verdict resulting from passion and prejudice of the jury might entitle a party to a new trial, there is no showing in this case either that the verdict is unsupported by the evi-

dence or that the verdict was a result of passion and prejudice.

POINT III.

THE COURT DID NOT ERR IN GIVING INSTRUCTION NO. 9.

Defendants contend that Instruction No. 9 is erroneous in that it permits the jury to speculate as to the loss of earning capacity of the plaintiff. Defendants state that there is no evidence, documentary or otherwise, concerning plaintiff's life expectancy or for the period in which he might be gainfully employed. A reading of the entire context of Instruction No. 9, as well as other instructions given to the jury, will satisfy the Court that the jury was not permitted to speculate. Subsections 2 and 3 of Instruction No. 9 are as follows:

"2. If the impairment of earning is not permanent, then the computation of damage must be based only on the period for which the temporary loss of capacity is reasonably certain to continue.

"3. If the impairment of earning capacity is permanent, then the period for computation of loss would be the time that it could reasonably be anticipated plaintiff would be gainfully employed, which might but may not necessarily be for the plaintiff's full life expectancy."

In addition thereto, Instruction No. 10 charged the jury as follows:

"You are further instructed that plaintiff is not entitled to recover for any claimed injury or damage which is of uncertain, speculative, or doubtful nature. Therefore, if the plaintiff shall have failed to

prove any claimed injury or any claimed element of damage by a preponderance of the evidence, or if the evidence respecting any such matters is evenly balanced, you must resolve such issue in favor of the defendant.

“You are not allowed and must not speculate as to the extent and nature of the plaintiff’s injuries, but if you find he is entitled to damages, he should be compensated only for those injuries which you find from a preponderance of the evidence were directly and proximately a result of the accident complained of. A party is not entitled to recover for imaginary injuries or injuries of a type or nature that are not a result of the accident or injury complained of.”

The jury was not required to find a permanent impairment of earning capacity. It was charged on what it should do in the event that it determined from the evidence that such impairment of earning capacity was permanent. The jury was further charged that if the impairment of earnings was not permanent, then the computation of damages must be based only on the period for which the temporary loss of capacity was reasonably certain to continue. In Instruction No. 10, the jury was expressly charged to the effect that it could not speculate as to the damages nor take into account injuries of an uncertain or doubtful nature.

Defendants suggest that there is no documentary or other evidence concerning plaintiff’s life expectancy or work expectancy. The only evidence which might properly have been received, which was not received on the issue of life expectancy, would be the mortality or life expectancy tables. Plaintiff is aware of no rule which prevents the

jury from determining from the evidence and in its own sound discretion, the elements of damage in the absence of life expectancy tables. In the last analysis, the question of life expectancy and the period for which a plaintiff might be gainfully employed, is within the sound judgment of the jury, based upon the evidence in the case. If, as the defendants suggest, the jury was permitted to speculate with respect to life expectancy and period of gainful employment, then such is the case in every trial wherein life expectancy and work expectancy data is not introduced.

The fact is that plaintiff endeavored to have the jury charged with respect to the life expectancy of the plaintiff, but such instruction was not given.

There is no serious doubt but what there is evidence from which the jury could find that plaintiff sustained permanent impairment of earnings and earning capacity.

POINT IV.

THE COURT DID NOT ERR IN ITS INSTRUCTIONS ON DAMAGES.

There is no merit whatsoever to the contention by defendants that the Court's instructions on damages were unbalanced in favor of the plaintiff and against the defendants.

Defendants state that the Court's instructions on the question of damages were contained in Instructions Nos. 8, 9, 10 and 13. This is incorrect. In addition to the Instructions Nos. 8, 9, 10 and 13, relating to damages, the matter

of damages was covered in Instructions Nos. 11 and 12. Instruction No. 11 was in conformity with Defendants' Requested Instruction No. 11. Instruction No. 12 was for the benefit of the defendants and in conformity with Defendants' Requested Instruction No. 14. Instruction No. 8 is a general instruction on the question of damages, generally recognized as being a correct and fair instruction as to the law applicable to the issue of damages. There is certainly no charge made in the said instruction which contains an incorrect statement of the law. Instruction No. 9 deals specifically with the question of impairment of earning capacity. Said instruction contains a correct statement of the law. Plaintiff submits that the instruction was as beneficial to the defendants as to the plaintiff. Particularly, subparagraph 2 of the said instruction charged the jury on one aspect of the defendants' theory of the case. Instruction No. 10 is, in its entirety, Defendants' Requested Instruction No. 13.

The first paragraph of Instruction No. 13 is practically identical with the provisions of Defendants' Requested Instruction No. 12. The last paragraph of Instruction No. 13, although not requested by defendants, correctly states the law.

It is significant that no exception was taken by defendants to the Court's instructions, nor to the failure to give Requested Instructions, except with respect to the giving of Instruction No. 9.

Defendants can show no prejudice resulting to them from the instructions.

CONCLUSION

The Respondent respectfully submits that the only real question to be considered by the Court on this appeal is whether there is ample evidence to support the verdict and judgment. The record shows the evidence to be ample. There is no showing of any passion or prejudice on the part of the jury. The Court is called upon by the Appellant to substitute its judgment for that of the jury. This, the Court cannot and should not do. The judgment should be affirmed.

Respectfully submitted,

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