

1960

Lavon Belnap Duncan v. Western Refrigeration Co. et al : Appellant's Reply

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

LAVON BELNAP DUNCAN,
Administratrix of the Estate of
Marion W. Duncan, Deceased.

Plaintiff and Appellant,

vs.

WESTERN REFRIGERATION CO.,
d b a UTAH ICE & STORAGE
COMPANY, and NORTON F.
HECKER, and HARTFORD ACCIDENT
& INDEMNITY COMPANY,

Defendants and Respondents.

FILED

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Supreme Court, Utah

Case No.
9173

APPELLANT'S REPLY

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LAVON BELNAP DUNCAN, :
Administratrix of the Estate :
of Marion W. Duncan, Deceased, :

Plaintiff and Appellant, :

vs. :

Case
No. 9173

WESTERN REFRIGERATION CO. dba :
UTAH ICE & STORAGE COMPANY, and :
NORTON F. HECKER, and HARTFORD :
ACCIDENT & INDEMNITY COMPANY, :

Defendants and Respondents.

REPLY OF APPELLANT

STATEMENT OF THE CASE

In Point III of their Answer, defendants answer Point I of plaintiff's Brief. After noting that plaintiff cited no authority in support of her contention that it was error to admit certain hearsay evidence on cross-examination, defendants then produced authorities all of which were consistent with the plaintiff's contention, if properly argued and applied.

The defendants also raised a new issue in their

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Answer found in Point I thereof. The defendants there reason that the Court should have directed a verdict in their favor based on two claims;

(a) That the plaintiff failed to produce any evidence of the defendant's negligence, and, indirectly,

(b) That the "pedestrian collided with the side of the automobile" and was thus, presumably, contributorily negligent.

Obviously, to argue part (b) above, the defendants are urging the Court to give weight and credence to the improper hearsay evidence complained of in Point I of plaintiff's Brief.

STATEMENT OF POINTS

POINT I

THE COURT DID NOT ERR IN REFUSING TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANTS.

ARGUMENT

POINT I

THE COURT DID NOT ERR IN REFUSING TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANTS.

(A)

Plaintiff presented evidence that defendant, Norton F. Hecker, was negligent as follows: The accident occurred at about 7:30 A.M. on a clear, dry,

summer day in August of 1958. The accident occurred at 1400 South Main Street in Salt Lake City, Utah, at which point Main Street is "a four lane highway, has a double yellow line down the center, and two lanes of traffic on each side of the yellow line, and then there is room for cars to park parallel on each side of the street in addition . . . it is about 75 feet wide." (R.165). Lorin Kelly testified that the defendant, Norton Hecker, was heard by him to say in answer to how the accident happened, "I didn't even see him".

Plaintiff further attempted to introduce evidence of defendant's speed being in excess of 30 m.p.h. on rebuttal and by way of reopening, as is argued in detail in Point VI of plaintiff's Brief.

The failure of the defendants to see the pedestrian under such ideal circumstances was certainly a basis for a finding by a jury of negligence in failing to keep a proper lookout. The evidence further showed a failure to sound horn or turn out to avoid impact which were facts to be considered by a jury and it was, therefore, not error for the Court to refuse to direct a verdict for the defendants. However, negligence on the part of defendants would have been more conclusive had the trial

court permitted the evidence as to defendant's speed to have been admitted on rebuttal or reopen as urged by plaintiff.

(B)

There was no proper evidence that decedent was guilty of contributory negligence.

Plaintiff was entitled to a presumption that her deceased, pedestrian husband was exercising due care in his own behalf as argued on pages 17 and 18 of plaintiff's Brief.

There was no proper statement in the record of what the deceased pedestrian was or was not doing at the time of the accident; the defendant, Norton F. Becker, elected to testify that he never saw the pedestrian with his feet on the ground.

We wish to simply refer the Court to the Utah Case of Gibbs et al, vs. Blue Cab, Inc. (1952), 249 Pac 2nd 213. In that case, as here, there was only circumstantial evidence of what the decedent was doing. The Utah Court there said,

"As a matter of law it cannot be said in this case what happened and consequently it cannot be said as a matter of law that there was or was not contributory negligence." . . . "We are committed to the principle that matters of

mate cause generally are jury questions unless the evidentiary facts are of such conclusive character as to require all reasonable minds to conclude that the ultimate fact of negligence, contributory negligence or proximate cause does or does not exist."

As to the error of the Court in admitting the objectionable hearsay statement on cross-examination of Lorin Kelly that his wife had told him that the defendant, Norton Hecker, had told her that the deceased had walked into the side of the defendants car, the defendants alone are responsible for inserting the improper and prejudicial testimony into the record.

Although the entire conversation between the defendant, Norton Hecker, and Mrs. Kelly became material so far as the subjects involved were relevant cross-examination, the evidence had to come in by competent means. The defendants, having established that Lorin Kelly heard no more of the conversation than that testified to on direct, were then free to call Norton Hecker or Mrs. Lorin Kelly to complete the conversation, and the plaintiff could not be heard to object to the remainder of the conversation on the basis of hearsay. This is so although the balance of the conversation may have contained self serving statements and would otherwise be hearsay: the balance of the conversation is

none the less admissable to explain the portion of the conversation introduced by the plaintiff who cannot thereafter use the hearsay rule to keep out the remainder of the conversation.

However, in this case the defendant did not attempt to complete the pertinent conversation, but improperly inquired as to a separate and subsequent conversation between the witness, Lorin Kelly, and his wife, as well as to statement of Mrs. Kelly at the time of her deposition which was heard by Mr. Kelly. Such subsequent conversation with Mrs. Kelly and statement by Mrs. Kelly were clearly hearsay so far as the witness Lorin Kelly was concerned and it was error to overrule the plaintiff's objection thereto.

That the improperly admitted hearsay evidence was prejudicial to the plaintiff is illustrated by the defendant's attempt to rely thereon in their brief. Defendant's misconception of the law on this point led the Court into error.

Although the principle is so well known as to be without need of citation of authority, being in essence Hornbook Law, we refer the Court to the following discussions in the recent work, McCormick, On Evidence:

"The Requirement of First Hand Knowledge.",

Sec. 10; and

"The Hearsay Rule and Its Exceptions,"

Secs. 223, 224, & 225. At page 461, McCormick says:

"When the witness reports on the stand that one declarant stated to him that another declarant made a given statement, this may be termed 'Double Hearsay' if both statements are offered to prove the facts asserted. 'Multiple Hearsay' would include double hearsay and . . . multiple hearsay is, of course, even more vulnerable to all the objections which attach to simple hearsay, and it seems that if it is to come in at all, each of the out of court statements must satisfy the requirements of some exception to the hearsay rule."

The subsequent statement made by Mrs. Kelly could be testified to by Mr. Kelly only where it satisfied some exception to the hearsay rule. For example, if Mrs. Kelly had been called as a witness to complete the conversation introduced by plaintiff, her statement to Mr. Kelly, although hearsay, might have become later admissible as a prior inconsistent statement for purposes of impeachment.

Obviously, without the improperly admitted hearsay evidence complained of by the plaintiff, the record is void of any evidence that the decedent was negligent.

CONCLUSION

It would have been error for the trial court to have directed a verdict in favor of the defendants. Rather, the Court committed reversible error in admitting hearsay evidence over the objection of the plaintiff and in refusing to admit evidence of speed through skidmarks on rebuttal or reopen.

The plaintiff should be granted a new trial.

Respectfully submitted,

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