

1960

Lavon Belnap Duncan v. Western Refrigeration Co. et al : Petition for Rehearing Brief

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. : Case

WESTERN REFRIGERATION CO. dba : No. 9173
UTAH ICE & STORAGE COMPANY, and :
NORTON F. HECKER, and HARTFORD :
ACCIDENT & INDEMNITY COMPANY, :

Defendants and Respondents. :
:

PETITION FOR REHEARING

Comes now the plaintiff in the above entitled action
by and through Ramon M. Child, of Child, Spafford & Young
her attorneys and respectfully petitions the Supreme Court
of the State of Utah for a rehearing of her appeal filed
herein, upon the grounds and for the following reasons:

POINT I

A MAJORITY OF THE COURT ERRED IN MISCONSTRUING THE
FACTS AND BASED THEIR CONCLUSION AND JUDGMENT ON FACTS NOT
IN EVIDENCE.

POINT II

THE COURT ERRED IN FAILING TO TREAT THE SUBSTANCE
OF POINT VII OF APPELLANT'S BRIEF.

POINT III

THE COURT ERRED IN STATING AS A MATTER OF FACT THAT
DRIVERS OF "OTHER CARS DID NOT STOP".

Respectfully submitted this 5th day of August, 1960

CHILD, SPAFFORD & YOUNG

BY Ramon M. Child
Attorneys for Petitioner
2188 Highland Drive
Salt Lake City, Utah

BRIEF

STATEMENT OF FACTS

In the majority opinion of the court, the following paragraph is found:

"The only evidence of defendant's negligence offered by plaintiff was a fragment of a conversation between one Kelly and his wife, the latter saying that defendant had remarked "I didn't even see him," which hearsay evidence introduced by plaintiff, was expanded on cross-examination by further hearsay, objected to without merit by plaintiff, to include the wife's assertion that defendant also had said "He ran into the side of my car."

This statement by a majority of the Court is in error.

The entire transcript and record in this matter, the evidence submitted at the trial, and the contentions of both the Appellant and the Respondent agree that Appellant at the time of the trial properly introduced evidence of a fragment of a conversation between one Mrs. Kelly and the defendant Norton Hecker, wherein the witness, Mr. Kelly testified that he overheard Norton Hecker make the declaration (against interest) "I didn't even see him." The dissenting opinion of Justice Crockett properly states the facts as to this point.

It is also agreed and the evidence conclusively shows that the "other cars" testified to by Norton Hecker did

stop at the scene, but later left without identifying themselves.

STATEMENT OF POINTS

POINT I

A MAJORITY OF THE COURT ERRED IN MISCONSTRUING THE FACTS AND BASED THEIR CONCLUSION AND JUDGMENT ON FACTS NOT IN EVIDENCE.

POINT II

THE COURT ERRED IN FAILING TO TREAT THE SUBSTANCE OF POINT VII OF APPELLANT'S BRIEF.

POINT III

THE COURT ERRED IN STATING AS A MATTER OF FACT THAT DRIVERS OF "OTHER CARS DID NOT STOP".

ARGUMENT

POINT I

A MAJORITY OF THE COURT ERRED IN MISCONSTRUING THE FACTS AND BASED THEIR CONCLUSION AND JUDGMENT ON FACTS NOT IN EVIDENCE.

Based upon the imaginary facts erroneously assumed by a majority of the court, the court probably arrived at a logical conclusion. However, the true facts as to the testimony of Mr. Kelly were not as assumed by the majority of the court, but were properly set forth in the dissenting opinion. Syllogistic reasoning demands that if the

court in all fairness properly states the facts as to the

evidence introduced by the plaintiff through the witness, Mr. Lorin Kelly, the court is then compelled to conclude that plaintiff's objection to defendant's question on cross-examination as being hearsay was proper and the trial court should have sustained the objection.

To the major premise of true facts the court should apply the minor premise of valid principles of law. By adhering to the principles of logic the court cannot then fail to reach a correct conclusion. Justice Crockett in his dissenting opinion correctly stated the facts of this case. He also applied correct principles of law and arrived at the only possible conclusion dictated thereby. His dissent has sufficiently highlighted the true facts surrounding Mr. Kelly's testimony to show even the casual reader that the majority of the court was in error in branding his testimony as "hearsay".

The court is not justified in mis-stating the facts in order to support a conclusion which for some reason they may prefer. Parties to an appeal are entitled to expect the court to religiously apply proven principles of law to an accurate statement of the facts. Less than this makes the right of appeal a hollow mockery. The greatness of

Justice Brandeis rested in his passionate cry, "What are the facts?"

That the Supreme Court will grant a petition of a rehearing and modify or reverse its prior judgment in cases where it has erroneously construed the facts is held in the Utah cases of *Cummings v. Nielson*, 42 Utah 157, 12 Pac. 619, and *Beaver County v. Home Indemnity Co.*, 88 Utah 52 Pac. 2nd 435.

POINT II

THE COURT ERRED IN FAILING TO TREAT THE SUBSTANCE OF POINT VII OF APPELLANT'S BRIEF.

Nowhere in its opinion has the court directed its attention to the error cited in Point VII of Appellant's Brief.

It must therefore be concluded that the court overlooked this point and that the Appellant has never had her right of appeal thereon.

That the court will grant a petition for rehearing and modify its judgment under such circumstances is held in the Utah cases of *In re McKnight*, 4 Utah 237, 9 Pac. 299 and *Brown v. Pickard*, 4 Utah 292, 9 Pac. 573, 11 Pac. 512.

POINT III

THE COURT ERRED IN STATING AS A MATTER OF FACT THAT DRIVERS OF "OTHER CARS DID NOT STOP".

This error is merely cited to illustrate that the majority of the court did not fully grasp the facts of the case.

CONCLUSION

During the heat and pressure of trial, Counsel cannot be expected to educate the trial judge as to the fine points of the law of evidence. Where the trial judge commits error it remains for the Supreme Court, on appeal, to so inform him. Only in this way can high standards in our Utah Courts be achieved and maintained.

The effect of the court's present majority opinion in this case is to wink at error.

The majority of the Supreme Court should modify its opinion in this case, join in the dissenting opinion of Justice Crockett and grant a new trial.

Respectfully submitted,

CHILD, SEAFFORD & YOUNG

BY Ramon M. Child
Attorneys for Appellant