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Milton Winn v. William B. Read : Brief of Appellant

Utah Supreme Court

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C. N. Ottosen; Attorney for Appellant;

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IN THE SUPREME COURT OF THE STATE OF UTAH

— FILED

JUL 6 - 1960

MILTON WINN,

Appellant,

Clerk, Supreme Court, Utah

— vs. —

Case

WILLIAM B. READ

No. 9209

Respondent,

APPELLANT'S BRIEF

C. N. OTTOSEN

Attorney for Appellant

65 East 4th South — Suite 201

Salt Lake City, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

MILTON WINN,

— vs. —

WILLIAM B. READ

Appellant,

Respondent,

Case
No. 9209

APPELLANT'S BRIEF

STATEMENT OF FACTS

This case is now before this court for the second time on appeal.

The case was originally tried before the court, sitting without a jury, in the First Judicial District Court for Cache County, Utah, on May 31, 1955. Judge Lewis Jones presided and made findings and gave judgment of no cause of action for both the Plaintiff's Complain and the Defendant's Counter-claim. The Plaintiff appealed the lower court's decision to this Honorable Court (Su-

preme Court case No. 8575) in August of 1956. This court's decision in that first appeal (R-106) was handed down February 19, 1959 (*Winn v. Read*, 8 Utah 2nd 394; 335 Pac. (2nd) 627). On March 19, 1959, this Honorable Court issued a Remittitur (R. 105) remanding this case back to the lower court for further proceedings in accordance with the opinion (R. 106). Without presuming to tell this Court what its opinion held, Appellant feels safe in stating that this court held that lower court's findings were erroneous and not supported by the evidence, and ordered the lower court to either amend its findings or to get additional evidence to support its findings.

The case was called up for hearing pursuant to this Honorable Court's Remittitur on the 26th day of October, 1959, and again on the 11th day of January, 1960. Evidence was taken but nothing new was added and the original evidence of the case remained absolutely unchanged. This Court's opinion (R. 106) raised ome question about whether the Plaintiff did travel for 30 rods on the west side of the highway. New evidence (R. 136) verified this fact but the same thing was testified to in the original trial (R. 16). The court made changes in its findings and reversed its decision using absolutely the same evidence, so that now the decision and the findings are not alone contrary to, but *impossible* to support under, the evidence.

POINT RELIED UPON

THE LOWER COURT ERRED IN REVERSING ITS POSITION AND FINDING FOR THE PLAINTIFF AFTER REMITTITUR FROM THE SUPREME COURT FOR THE REASON THAT NONE OF THE EVIDENCE PRODUCED

IN ALL THE TRIALS AND HEARINGS IN THIS CASE
WILL SUPPORT THE LOWER COURT'S FINAL FIND-
INGS AND DECISION.

Appellant humbly submits that one of the most universally accepted rules is that the findings and judgment of a lower court must be sustained and supported by, and be consistent with, the evidence. Therefore, where there is no competent evidence to support findings the appellant is entitled to a reversal or a new trial.

In Section 899 of Appeal and Error in Vol. 3 of American Jurisprudence at Page 463-4 we read:

“899. FINDINGS CONTRARY TO, OR INCONSISTENT WITH EVIDENCE. The rule giving great weight in the appellate court to the finding of the trial court on a question of fact lays no restraint on the power of the former to ascertain, by full and careful investigation and analysis of the evidence, what the facts and circumstances are and whether the general finding is consistent therewith, or, in other words, whether there is any evidence to sustain the finding. The findings of the trial court will not ordinarily be disturbed, but the appellate court is not necessarily concluded thereby. Such findings have weight with the appellate court, but they are not controlling upon it unless they are supported by competent evidence. Findings not supported by any competent evidence or which disregard controverted credible evidence, or which are contrary to a conclusion of law resulting from other facts found, cannot be sustained, and a judgment based thereon will be reversed. The question whether or not the facts found support the conclusions of law is one of law. If the finding is the result of *bias or prejudice*, mistake or misapprehension, or misconception of the legal effect of the evidence, or if the

evidence shows that the judgment is clearly wrong on the sole issue of fact, it will be set aside.” (Emphasis supplied)

In the case of *In Patterson’s Estate* (1939) the Supreme Court of Pennsylvania (3 Atlantic 2nd 320-1) held:

“If there is no evidence to support the (Court’s findings), or if it appears from the record that there is a capricious disbelief of the evidence, then the findings are worthless.”

See also Section 1144 in *Trial* in Vol. 53 *American Jurisprudence*, Page 798.

The most significant statement in the opinion of this Honorable Court issued in the decision on the first appeal was the statement in the next to last paragraph of that decision (R. 106):

“The finding made by the trial court that the Plaintiff horseman had traveled for 30 rods on the left hand side of the road parallel thereto *finds no support in the evidence.*” (Emphasis supplied)

This Honorable Body flatly called the court’s finding “erroneous.” The case was sent back by this Court “to make appropriate findings” and to take additional testimony if available.

At the hearings thereafter, testimony was taken, but it was the same testimony as given at the original trial, brought out nothing new and was only cumulative.

The Appellant therefore most strongly urges that the findings are still erroneous and that the evidence abso-

lutely will not support the Court's findings. In fact, the Appellant contends that it is *impossible* for the accident to have happened as claimed by the Plaintiff and as now supported by the lower court's last findings and decision.

Please note that the lower court gave the first decision to the Appellant *and now with no change in the facts*, the lower court reverses itself. May the Appellant further call this Court's attention to the lower court's reasons for its change of heart and the reversal of its findings and decision. The court's reason's for its decision are set out in the transcript of evidence taken when remanded back by this Court. (See R. 143, 148, 150, 152 and 153)

As to the question of liability, there is only one fact in dispute. The Appellant contends the Plaintiff's horse crossed suddenly and negligently from the east side of the road to the west, across in front of the automobile of the Appellant, and caused the accident. Whereas the Plaintiff contends he drove his horse down the west shoulder of the highway for 30 rods, and never got on the hard surface portion of the highway.

The other facts are not in dispute. In fact, they were supplied exclusively by the Plaintiff's own witnesses. The Plaintiff was riding a brown horse (R. 27). The accident happened after sundown, just at dusk, and the Appellant had the lights on his car (R. 14, 47, 48, 73). The Appellant's car came to rest at a 22.5 degree angle in the west lane headed in a northwest direction, the left front wheel being six inches, and the left rear wheel being four

feet from the west dge of th hard surface of the highway (R. 39, 48, 49). The Appellant's right front wheel was one to two feet from the center line (R. 43). The Appellant skidded and left tire marks of 48 feet beginning from a point where the marks about straddled the center line and headed generally in a north-west direction to the point above indicated (R. 40, 42). The tracks were measured from the rear end where the tracks of the rear wheels started, to the front end where the tracks of the front wheels ended. The Appellant's car had four-wheel brakes and measured 10½ feet between the wheers thereby cutting the actual skid to about 38 feet (R. 79 to 89). That the point of impact set by the dirt, debris and glass was at a point at and under the rear end of the car as it stood when the right rear wheel was four feet from the west edge of the road. *This would place the point of impact about six feet east of the west edge of the road* (R. 49, lines 5-6). This cannot be disputed, it is the testimony of the Plaintiff's own witness, and it is in absolute harmony with all the other testimony of the Plaintiff's witnesses. Therefore, it appears that we find the Appellant, after he discovers his peril and puts on his brakes, skidding 38 feet from the east lane to the west lane to avoid some peril and it must have been the Plaintiff's horse because the collision was with the horse in the west lane six feet from the west edge of the road.

As previously indicated, the Plaintiff contends he rode his horse in a northerly direction on the west shoulder off the hard surface. (R. 14, 16, 24, 135 to 139 inclusive and Plaintiff's Exhibit No. 1) And the Plaintiff veri-

fies in the rehearing before the lower court that the horse was hit 4 to 6 feet out on the shoulder (R. 138). Even the lower court admitted that it should make a finding that the impact occurred “off the edge of the highway” (R. 152) but refused to make it more explicit in spite of the Plaintiff’s own testimony.

The Appellant contends he was traveling north, maybe close to the center on the highway and was suddenly confronted with a horse in his line of travel and to avoid a collision turned his car to the left, put on his brakes, but was too late to avoid colliding with the horse crossing from east to west. Appellant’s car came to rest in the west lane of traffic without even getting onto the shoulder on the west side (R. 39, 40, 42, 43, 48, 49, 73 and 74).

The Court’s findings are to the effect that the Plaintiff rode his horse in a northerly direction on the west side of said street on the shoulder and just off the west edge of the tarred road for about 30 rods. That the Defendant or the Appellant drove his automobile on the same highway in a northerly direction and carelessly and negligently ran his automobile into the horse of the Plaintiff while the Plaintiff was still riding the horse on the west shoulder and just off the hard surface of the highway. That the Plaintiff was injured and that the Appellant’s negligence was the proximate cause of the Plaintiff’s injuries (R. 112, 113, 152). The Appellant respectfully points out why he is convinced that there is *no evidence to support* the court’s findings or the Plaintiff’s

theory. The evidence of the Plaintiff, plus the evidence of every one of his other witnesses leaves us in this position: THE HORSE NEVER GOT ON THE PAVEMENT; THE CAR NEVER GOT OFF THE PAVEMENT; AND THE HORSE AND CAR WERE NEVER CLOSER THAN AT LEAST 8 FEET APART.

The Plaintiff has been allowed, in fact urged, to fill the records of this case with the statement that he never got on the hard surface and only traveled the shoulder (R. 14, 16, 24, and 135 to 139 inclusive). The Plaintiff made it clear in the last hearing that horses are afraid of hard roads and that he, the Plaintiff, always rode his horse on the shoulder (R. 137). Also, in spite of his attorney's and the lower court's efforts to keep him "right off the edge" of the hard surface, the Plaintiff admitted that he was out 4 to 6 feet on the shoulder both while traveling and when hit (R. 138, 139). Then the Plaintiff added a very significant statement which makes the court's findings much harder to support. The Plaintiff, while traveling on the shoulder, heard a car coming to his rear and without looking back "pulled off the road into the brush" (R. 36, 37). How could the Plaintiff be hit by a car under his theory, and the court's findings, when the evidence shows the point of impact was *6 feet up on the hard surface* (R. 49, lines 5-6) and *before impact* the horse was already running for cover somewhere between "just off the edge" and "down in the brush" off to the west off the highway. At this point the Appellant claims that it is *impossible* to support the court's findings with the evidence in this case.

Appellant contends further that the Plaintiff's theory and the court's findings are untenable for the further reason that all the Plaintiff's witnesses, plus the physical facts, establish beyond a doubt that the point of impact was 6 feet east of the west edge of the hard surface (R. 49, lines 5-12 inclusive, and R. 51). Also, every single witness testified that the Appellant's car came to rest at an angle in the west lane facing northwest, the left front wheel was 6 inches to a foot from the west edge, and the left rear wheel 4 feet from the west edge of the oiled road. Therefore, the automobile never got off the hard surface (R. 39, 43, 48 and 49).

The Appellant again urges that for the reasons given above the evidence will not support the court's findings and in fact it is impossible to harmonize them.

The Appellant does desire to point out that the Appellant's theory, supported by his own evidence, *plus the evidence of all of the Plaintiff's witnesses*, and the physical facts, is the only consistent analysis of this case. The Appellant maintains the Plaintiff was riding his horse on the east side and carelessly and negligently made a left turn onto the highway into the path of the Appellant's oncoming car. This absolutely accounts for:

(a) the skid marks of the Appellant when he says he braked and turned to the left to avoid hitting the horse that had loomed up in his lights on the east side. How else can one explain the skid marks as found by everyone in the light of normal human experience? Further,

38 feet of skid marks means usually that a driver went an additional 30 feet during his “thinking time” after he observed his danger. Or the Appellant, *if the Plaintiff was on the west shoulder*, saw the Plaintiff while yet over 70 or 75 feet away. Why should the Appellant, safely driving north on the highway, deliberately drive and skid over to the west side of the street to hit someone he had just seen. We submit it is not consistent even in the field of negligence. It would have to be deliberate or worse to even be explained and there is no evidence to even suggest it.

(b) The impact of the automobile and the horse, occurring right at the end of the skid marks, and 6 feet in on the highway, plus the fact that the car was still on the highway after impact and in a position absolutely consistent with the Appellant’s story.

(c) The damage to the car by a rearing horse, causing windshield and auto top damage (R. 75, 77, 81, 82).

(d) The horse was hit on the hind legs and sustained a deep gash on the *left* thigh (R. 58).

SUMMARY

The Appellant therefore submits that this Court’s first ruling that the court’s findings were erroneous and not then supported by the evidence is still true and the new findings are still not supported by the evidence. That by the same token the court’s last findings and judgment

are contrary to the evidence and the Appellant demands a reversal of the lower court's decision or the right to a new trial.

Respectfully submitted,

C. N. OTTOSEN

Attorney for Appellant

65 East 4th South — Suite 201

Salt Lake City, Utah