1960

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

Utah Supreme Court

L. Delos Daines; David R. Daines; Attorneys for Respondent;

In the Supreme Court of the State of Utah

MILTON WINN,
Appellant,

-vs-

WILLIAM B. READ
Respondent.

RESPONDENT'S BRIEF

9209

Appeal from the District Court of the First Judicial District of the State of Utah, in and for the County of Cache

Honorable Lewis Jones, District Judge

L. DELOS DAINES,
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CASES CITED

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MILTON WINN,
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RESPONDENT'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 complaint and the defendant's counter-claim. The plaintiff appealed the lower court's decision to this Honorable Supreme Court, case No. 8575, in August of 1956. This court's decision in that first appeal was handed down February 19, 1959. On March 19, 1959, this Honorable Court issued a Remittitur remanding this case back to the District Court for further proceedings. The reason given by this Honorable Court for the remittitur as set forth in the opinion is quoted as follows:

"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. *If, as a matter of fact, the horseman, though on the wrong side of the road, did travel for 30 rods, or any substantial distance, on the left-hand side of the road,* then the defendant should have observed him and should have avoided running into him. *If he failed so to do, he was guilty of negligence that was the sole proximate cause of the collision.*

In view of the erroneous finding and the state of the record, the case is remanded to the lower court to make appropriate findings on this crucial issue and enter an appropriate judgment, and if necessary, to take additional evidence, if available, with respect thereto."
(Italics supplied).

It appeared from the reading of the record that although there was evidence that the plaintiff had traveled North along the road way for 30 rods prior to the point of the accident that it was unclear by the record on what portion of the road with relation to East and West or right or left, the plaintiff was travelling. Therefore, this honorable Supreme Court found that the evidence did not support the court's finding that the plaintiff had traveled 30 rods along the left hand side of the road and parallel thereto for 30 rods prior to the accident, and the Court in its opinion by Justice McDonough stated the law of the case as follows:

"If, as a matter of fact, the horseman, though on the wrong side of the road, did travel for 30 rods, or any

substantial distance, on the left-hand side of the road, then the defendant should have observed him and should have avoided running into him. If he failed to do so, he was guilty of negligence that was the sole proximate cause of the collision."

The district court was directed to make findings and if necessary take additional evidence to clear up the question of the location of the horse at the time of the accident and where plaintiff was riding the horse just prior to the accident.

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 introduced with respect to the location of the horse on the highway at the time of the accident and just prior to the accident. The court made changes in its findings consistent with the new evidence produced

It appears to the respondents that there was only one question that the court had to decide on the Remittitur of this Honorable Court and that said court was bound by the law of the case which was remanded to it. That one point was the location of the horse on the highway at the time of the accident and where the horse and rider had been traveling on the roadway just prior to the accident.

POINT RELIED UPON

THE DISTRICT COURT IN REVERSING ITS POSITION AND FINDING FOR THE PLAINTIFF

AFTER REMITTITUR FROM THE SUPREME COURT WAS BOUND IN ITS ACTION BY THE LAW OF THE CASE WHICH HAD BEEN REMANDED TO IT AND ACTED SONSISTENTLY WITH THE DIRECTIONS OF THE SUPREME COURT IN TAKING NEW EVIDENNCE AND THE NEW EVIDENCE DIRECTLY SUPPORTED THE FINDING AT THE FORMER TRIAL. THUS IN OBSERVING THE MANDATE OF THIS COURT AS TO THE LAW OF THIS CASE, THE DISTRICT COURT PROPERLY REVERSED ITS FORMER DECISION.

It is submitted that the only new evidence produced supported the fact that the plaintiff had been riding his horse just off the oild surface of the road on the West, or left hand side of the road for 30 rods or more prior to the point of the collision.

Plaintiff's exhibit one on remittitur clearly shows that just prior to the accident the horse and rider had proceeded along the West or left-hand side of the road, and the record taken at the same time on the hearing clearly supports the following findings; that the horse and the rider had proceeded down the West or left-hand side of the road just off the oil for 30 rods or more at the time of the accident. (R 134, 135, 136 & 137).

In light of such finding based on the newly adduced evidence, the lower court had no alternative other than to render judgment in favor of the Plaintiff in accordance with the law of this case, quoted as follows:

> "If, as a matter of fact, the horseman, though on the wrong side of the road, did travel for 30 rods, or

any substantial distance, on the left-hand side of the road, then the defendant should have observed him and should have avoided running into him. If he failed so to do, he was guilty of negligence that was the sole proximate cause of the collision."

It is clear that from an entire reading of the record that there was a sharp conflict between the plaintiff's testimony and that of the defendant with respect to where the horse was at the time of the accident and just prior to the accident. It is submitted that under these circumstances, the District Court sitting as the finder of the facts had the right to choose from all of the evidence that testimony which it would believe so long as it was supported by substantial and competent evidence.

The Plaintiff and Respondents are in agreement with the statement in appellants brief that the new evidence was substantially the same as was given at the former hearing and did not contradict what the plaintiff had testified to at the former trial. However, it did clear up the one point which was not made clear by a reading of the orginal record of this case as to plaintiffs location with respect to East and West on the highway at the time of the accident and just prior thereto, and it appears that this was the important point, which this Honorable Court wanted cleared up by taking new evidence by the trial court.

The new evidence supported the earlier findings of the trial court, which the appellate court had found were not sufficiently supported by the record. Therefore it was necessary that the District Court abide by the law of the case and reverse its former decision and hold for the plaintiff.

SUMMARY

The respondent therefore respectfully submits that the District Court in reversing its former decision and finding for the plaintiff, has acted consistently with the new evidence produced and the law of the case which was remanded to it, and that its findings are supported by the evidence and that said court was bound to reverse its former decision by reason of the law of the case which was remanded to it from this Honorable Supreme Court, and that said judgment as now entered in favor of the plaintiffs and against the defendants on their complaint should be affirmed by this honorable court.

Respectfully submitted,

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