

1960

Milton Winn v. William B. Read : Brief of Appellant in Support of Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

MILTON WINN,

Appellant,

vs.

WILLIAM B. READ,

Respondent.

BRIEF IN
SUPPORT OF
PETITION
FOR
REHEARING
Case No.
9209

APPELLANT'S BRIEF

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IN THE SUPREME COURT
of the
STATE OF UTAH

MILTON WINN,	<i>Appellant,</i>	} BRIEF IN SUPPORT OF PETITION FOR REHEARING Case No. 9209
vs.		
WILLIAM B. READ,	<i>Respondent.</i>	

APPELLANT'S BRIEF

POINTS (1) AND (2) OF PETITION

THIS COURT ERRED IN REMANDING THIS CASE TO THE LOWER COURT TO FIND OR SUBSTANTIATE FINDINGS IT HAD ALREADY DECLARED NON-SUPPORTABLE AND ERRONEOUS AND WHEN REHEARING PRODUCED NO NEW FACTS, THIS COURT PERPETUATED SAID ERROR INTO ITS FINAL DECISION.

ARGUMENT

In the original record of this case the Plaintiff testified that on the day of the accident in question he left his home on horseback, went down First South to Third West, in Smithfield, Utah, and turned north (R. 13). As he rode north he was riding on the left side of the road, on the shoulder, just off the oiled portion of the hard surface. It was a six foot shoulder (R. 14, 15). He had traveled about two-thirds of the way along the block, or about thirty rods, on the west or left hand side of the road (R. 16), and the horse was still on the shoulder next to the edge of the oil when his horse was hit by the Defendant (R. 24).

Your Petitioner submits that the Plaintiff certainly made his position clear, and established, by these facts, what he claimed as his position on the road when the accident happened, in such a way that they needed no further clarification or support. The lower court in the original case found them to be true (R. 6).

This court in its decision of February 19, 1959, Case No. 8575, referred to the Plaintiff's claim, and the court's finding, that the Plaintiff went thirty rods on the west side. Then you declared that such a finding was not supported by the evidence and as the record stood, such finding was erroneous.

Your Petitioner has always so maintained, and strenuously still so maintains, and submits that the Defendant's theory of this case is the *only* possible position that is physically *possible* under the facts of this case, and as the record now stands, the Plaintiff's claim above referred to is still unsupportable and any finding to that effect is erroneous.

On remand to the lower court no *additional* evidence was introduced as this court required; the evidence introduced was exactly the same story as given in the original record and left the record absolutely unchanged. Only the lower court changed its mind, and your Petitioner humbly suggests, not for reasons based on the facts as the record of the testimony will show. Therefore, if the facts were clear and complete to start with and never changed, and the lower court once felt the Defendant was entitled to the verdict, and your Honorable Court felt the Plaintiff's version was not supported by the evidence and the court's finding on that point was erroneous, it is still not supported and erroneous.

Therefore, we submit this this court's decision of October 28, 1960 in this case is erroneous for the reason that it perpetuates a former decision that is erroneous.

That the error was in remanding the case for the purpose of finding something already clearly stated in

the record, and which was already labeled by this Court as unsupportable and erroneous, and which, if re-established, would still be unsupportable and erroneous. And when the lower court changed its findings on the same set of facts, without "additional" or other evidence to support it, this court gave support to the lower court's change of decree even though this court had declared such evidence unsupportable and certainly must have felt such evidence was still unsupportable and any such findings erroneous.

POINTS (3) AND (4) OF PETITION

THIS COURT ERRED IN SUPPORTING THE LOWER COURT ON A FINDING OF FACTS INCREDIBLE OF BELIEF, CONTRARY TO PHYSICAL AND MECHANICAL LAWS, AND CONTRARY TO INCONTROVERTIBLE PHYSICAL FACTS AND IN AFFIRMING THE LOWER COURT'S FINDING MERELY BECAUSE THE LOWER COURT "CHOSE TO BELIEVE" SUCH FACTS.

ARGUMENT

Through two trials in the lower court, and by briefs written for two hearings before this Honorable Court, we are now before this court with the following facts, which are accepted, uncontradicted, not denied and not contested by anyone: After the impact, the Petitioner's car came to rest at a 22.5 degree angle in the west lane

of traffic headed in a northwesterly direction. The left front wheel was six inches, and the left rear wheel four feet, in on the west side of the hard surface and still in the west lane of traffic (R. 39, 40, 42, 43, 48, 49, 73 and 74). The Plaintiff's car had left 48 feet of skid marks going back from the rear wheels in a southeasterly direction, beginning straddle of the center line of the roadway (R. 40, 42). The point of impact, determined by the officer from the glass and debris, was about six feet east of the west edge of the road and just under the rear end of the Plaintiff's car where it was found standing (R. 49, lines 5-6). (The six feet is arrived at from the officer's statement that the left rear wheel of the Petitioner's car was four feet from the west edge, and the glass and debris was still further east and up under the car near the back end.)

The Petitioner's automobile *was never off* the highway. The impact places the horse about six feet in on the highway. The horse reared onto the car and sustained a gash on the left side (R. 58, 75, 77, 81, 82).

The Petitioner's claim is that the Plaintiff was on the east side and improperly made a left turn onto the highway, and rode in front of the oncoming car. The Petitioner tried to avoid hitting the horse when he realized the danger. This is consistent with all established, and explains all, physical facts.

Petitioner submits the Plaintiff's claim is incredible of belief, in the face of, and contrary to, the physical facts. It is *impossible* for the accident to have happened his way. The Plaintiff's position is aggravated still further by his testimony (R. 37) that he heard the car coming from the rear and turned his horse towards the brush on the west side. This puts him further away and his testimony still more incredible in the face of the physical facts.

We are confronted with the simple fact, under the Plaintiff's version, that the horse never got *on* the hard surface, the Defendant's car never got *off* the hard surface, and the horse at the *time* of impact was at least six to eight feet away from the *point* of impact according to the physical facts established by the testimony of all witnesses. This is, of course, impossible and incredible and cannot support a finding based on the Plaintiff's testimony.

A judgment *must* be reversed, if not supported by competent evidence. No support shall be given to oral evidence contrary to incontrovertible physical facts or any evidence from witnesses incompatible therewith.

Please read Petitioner's quotation from Section 899 of Appeal and Error in Vol. 3 of American Jurisprudence

at Page 463-4, and quoted in full on Page 3 of the Appellant's Brief in this case.

In the case of *Cofran and Brannen vs. Swanman* (Minn. 1947), 29 N.W. 2nd, 448, the Plaintiffs claimed that the Defendant got into the west and wrong lane. The Plaintiffs and Defendant were in the same automobile. The court gave a verdict for the Plaintiffs but the physical facts, the skid marks and the debris, were all found in the east lane. The skid marks showed that the Defendant's automobile stayed in his lane, but that the other car came into his lane. The Supreme Court reversed the lower court in spite of the oral testimony of the Plaintiffs and said:

"In determining whether the evidence sustains the verdict, it is not for the court to weigh the evidence other than to determine its sufficiency in law, where, however, the established physical facts demonstrate that an accident could not have occurred as claimed, it is the duty of the court to say so. If the undisputed or conclusively shown physical facts negate the truthfulness or reliability of the testimony upon which a verdict is based the verdict is without foundation and must be set aside. Facts proven to the point of demonstration control as against mere declarations of witnesses.

"If an inference of negligence from part of the facts is inconsistent with, and repelled by

other facts conclusively shown, negligence is not shown.

“A finding of negligence cannot rest on testimony which is clearly inconsistent with admitted or conclusively shown physical facts.”

Repetitions of courts' holdings would only be burdensome to this court, but the Petitioner would like to refer this Honorable Court to the following cases. Every one of these cases involves situations where tire marks and debris were found and in each case considerable oral testimony was introduced contrary to these physical facts. The substance of the findings in all these cases were to the effect that where human testimony is in direct conflict with established physical facts and common knowledge it is labeled as incredible and will not support the verdicts or the judgments of the court or jury. That courts cannot accept as true that which is indisputable evidence demonstrated by physical facts, and that physical facts which demonstrate that findings are based upon that which is untrue the verdict cannot stand. See the following cases:

Strand vs. Cooperative Insurance Mutual
(Wis. 1949), 40 N.W. 2nd, 552.

Horen vs. Davis (Pa. 1922), 118 Atl., 22, 24.

Chambers vs. Skelly Oil Co. (Kan. 1937), 87
F. 2nd, 853, 856.

Polock vs. Philadelphia Rapid Transit Co.
(Pa. 40), 11 Atl. 2nd, 665.

Blair vs. Consolidated Freight (Mich. 1950),
41 N.W. 2nd, 512.

Lambert vs. Millers Administrator (Ky. 1939),
125 S.W. 2nd 1019.

Klep vs. McMackin (N.Y. 1936), 288 NYS,
619.

Lessig vs. Reading Transit (Pa. 1921), 113
Atl., 381, 382.

Winterberg vs. Thomas (Colo. 1952), 246 Pac.
2nd, 1058, 1061.

SUMMARY

The Petitioner sincerely feels that the court erred in affirming the lower court's decision in the face of the uncontradictable physical facts involved in this case and that this court has a duty in the face of such uncontroverted facts to lend no support to a verdict based on testimony contrary to such physical facts, regardless of the belief or disbelief of the judge of any lower court in oral testimony contrary thereto. We sincerely feel that the Petitioner is entitled to a rehearing in the above entitled case and hereby request such a hearing.

Respectfully submitted,

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