1960

Milton Winn v. William B. Read : Appellant's Reply Brief

Utah Supreme Court

C. N. Ottosen; Attorney for Appellant;

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IN THE SUPREME COURT OF THE

STATE OF UTAH

FILED

OCT 10 1960

Clerk, Supreme Court, Utah

MILTON WINN,

Appellant,

vs.

WILLIAM B. MEAD,

Respondent.

APPELLANT'S REPLY BRIEF

Case No. 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

C. N. OTTOSEN,
Attorney for Appellant
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Salt Lake City, Utah

I N D E X

CASES CITED

TEXTS CITED

IN THE SUPREME COURT OF THE

STATE OF UTAH

MILTON WINN,
Appellant,

vs.

WILLIAM S. READ,
Respondent.

APELLANT'S REPLY BRIEF

Case No. 9209

STATEMENT OF FACTS

Appellant feels sufficient has been given in the briefs of the Appellant and Respondent to cover the facts of this case now before this Court on the second appeal.

POINT RELIED UPON

Point One

THE DOCTRINE OF THE LAW OF THE CASE HAS NO APPLICATION TO THE CASE BEFORE THIS COURT.

Point Two

THERE IS NOTHING IN THE ORIGINAL DECISION OF THIS COURT, NOR IN THE PROCEEDINGS IN, NOR IN THE ACTION OF, THE LOWER COURT IN THE SECOND TRIAL, THAT WILL SUPPORT THE LOWER COURT'S NEW FINDINGS AND DECISION, NOR THAT DEPRIVES THIS HONORABLE COURT FROM FURTHER ACTION IN THE CASE.

ARGUMENT

Point One

This case is clearly one "remanded to the lower court to make appropriate findings" and "if necessary to take additional evidence." This Honorable Court's decision

in that case did not expound any rule of law nor pass on any settled question." This case was sent back to make a determination on facts and make appropriate findings accordingly. The doctrine of the law of the case has no application in such cases. See Section 997 on Page 551 of Appeal and Error in Vol. 3, American Jurisprudence.

Point Two

IN THE ORIGINAL TRIAL OF THIS LAWSUIT THE PLAINTIFF TESTIFIED AND THE COURT FOUND THAT THE PLAINTIFF TRAVELED 30 RODS ON THE WEST SIDE OF THE HIGHWAY BEFORE BEING HIT. (R.16). IN THIS COURT'S DECISION IT HELD THAT THIS FINDING "FINDS NO SUPPORT IN THE EVIDENCE".

MAY THE APPELLANT HUMBLY SUGGEST THAT THE APPELLANT HAS, IN THIS AND THE LOWER COURT, VIGOROUSLY ASSERTED AND ATTEMPTED TO POINT OUT AND MAINTAIN THIS SIMPLE FACT. AND PLEASE NOTE THAT THE RESPONDENT HAS NOT MADE THE LEAST OR ANY EFFORT TO SHOW HOW THE LOWER COURT'S FINDING CAN BE SUPPORTED BY THE EVIDENCE IN THIS CASE.

After this case was remanded to the lower court, the Plaintiff again repeated his former testimony (R. 16 and 126) but did not add one bit of "additional" evidence, as was required by this Honorable Court's decision. So if that finding could not be supported in the evidence of the original case it cannot be supported now, and has been given no support, as this Court gave the Respondent, a[chance] and directed him, to do.

This Court also called it an "erroneous finding" under the old evidence; therefore, with no "additional" or change in the evidence it must still be an erroneous finding.

If this Court's decision was a mandate, or was in any way a final decision, so that for any reason it could come under the Doctrine of the Law of the Case, the Appellant submits that this Court's ruling is to the effect that the lower Court's finding, that the Plaintiff traveled 30 rods on the left side of the road, "finds no support in the evidence" and that the lower Court in view of the other evidence in the case should correct that finding unless "additional evidence, if available" be found to

support it. The record clearly shows such supporting evidence was never found. If we may presume to tell this Court what it said, and if there is here a Law of the Case, it is as follows: That the Court's finding that the Plaintiff traveling 30 rods on the left side is erroneous and not supported by the evidence and in the absence of new evidence, that is still this Court's decision.

Norris vs. Bristow (Mo. 1951)
236 SW 2nd 316, 26 ALR 2nd 366
McAdow vs. Kansas City W. R. Co.
100 Kan. 309, 164 Pac. 177
Vol. 3 Am. Juris. Appeal and Error
Section 985, Page 541
Chicago, St. Paul Ry. vs. Kulp
133 ALR 1445

SUMMARY

Appellant submits that it is absolutely impossible for the Respondent or the lower Court to support the lower Court's decision and finding under any or all of the evidence in this case, and respectfully demands that this Honorable Court order the lower Court to make appropriate findings in favor of the Defendant and Appellant.

Respectfully submitted,

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