

2016

**Nani Nau Plaintiff/Appellant v. Safeco Insurance Company of
Illinois, a Washington Corporation. Defendant/Appellee**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

NANI NAU,

Plaintiff/Appellant,

v.

SAFECO INSURANCE COMPANY OF
ILLINOIS, a Washington Corporation,

Defendant/Appellee.

REPLY BRIEF OF THE APPELLANT

Appeal No. 20150427-CA

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ARGUMENT

An appellate court reviews the grant of a summary judgment motion for correctness, giving no deference to the legal conclusions reached by the trial court. Flowell Elec. Ass'n v. Rhodes Pump, LLC, 2015 UT 87, ¶ 8. Importantly, summary judgment is only proper where all facts and inferences are viewed in a light most favorable to the non-moving party, and despite such favorable inferences, the moving party is able to show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Utah R. Civ. Pro. 56(c). In the case at hand, not only was Safeco not entitled to judgment as a matter of law, but there was a specific question of material fact that required a finder of fact to make a factual determination, thereby precluding an award of summary judgment.

As discussed more fully below, this Court should reverse the summary judgment granted by the trial court because the trial court committed reversible error when it failed to acknowledge that Mr. Nau provided the trial court with “more than” just his own testimony to support his claims. The Court should also reverse the summary judgment granted by the trial court because the trial court committed reversible error when it found that the evidentiary doctrine of *res ipsa loquitur* did not apply to the instant case.

I. THE TRIAL COURT ERRED WHEN IT COMPLETELY EXCLUDED MR. NAU’S TESTIMONY FROM CONSIDERATIONS REGARDING THE EXISTENCE OF DEBRIS AND THE APPLICATION OF RES IPSA LOQUITUR.

Safeco improperly asserts in its opposition brief that, “[t]he trial court considered Mr. Nau’s deposition testimony, his out-of-court statement, and the testimony of Mrs.

Nau when it determined that the evidence fell short of proving, by clear and convincing evidence, the existence of debris in the roadway.”

By arguing in his initial brief that he presented “more than” his own testimony, Mr. Nau claims that he presented (1) his own testimony, and (2) additional evidence that, when combined with his own testimony, constituted “more than” his own testimony. However, in the case at hand, and contrary to Safeco’s claim in the foregoing paragraph, the trial court erred by not considering Mr. Nau’s testimony in determining the existence of the debris.

The trial court excluded Mr. Nau’s testimony instead of considering such testimony and then looking to see if there was additional evidence to meet the requirement of the statute that there be “more than” just Mr. Nau’s testimony. Specific statements by the trial court clearly indicate that the trial court reached its decision regarding summary judgment by improperly considering Mrs. Nau’s testimony and excluding Mr. Nau’s testimony. First, at the summary judgment hearing, the trial court stated that, “[h]aving carefully read the deposition testimony of Ms. Nau I’m not persuaded that her testimony...demonstrates the existence of debris in the roadway.” (R. at 000219, pg. 31). This statement clearly shows that the trial court was relying exclusively upon Mrs. Nau’s testimony to demonstrate the existence of debris on the roadway.

Second, the trial court further indicated that it relied solely on Mrs. Nau’s testimony and excluded Mr. Nau’s testimony in determining the existence of debris when it stated that summary judgment may still be applicable, “[e]ven if...a reasonable jury

could find that Ms. Nau's testimony was sufficient to demonstrate the existence of debris in the roadway." (R. at 000219, pg. 31). Again, this statement clearly indicates that the trial court completely excluded Mr. Nau's statements instead of starting with Mr. Nau's statements and then adding Mrs. Nau's testimony to meet the statutory requirement of "more than" the claimant's testimony.

Excluding Mr. Nau's testimony from its considerations is erroneous for two specific reasons. First, the plain language of the statute implies that the testimony of the covered person, Mr. Nau, must be presented, but that it must then also be accompanied by "more than" just this testimony. Here, the trial court erroneously required Mrs. Nau's testimony to exclusively establish the existence of the debris. Once combined with Mr. Nau's testimony and uncontroverted evidence regarding the location of the accident in the far left lane of a very busy interstate freeway, Mr. Nau showed sufficient support for his claim that debris existed in the roadway.

Importantly, the trial court found that *res ipsa loquitur* did apply to situations involving debris, but that in the instant matter, "without evidence of, of what the obstruction was beyond Mr. Nau's testimony the doctrine of *res ipsa loquitur* could not have a meaningful application." (R. at 000219, pg. 32). Accordingly, the trial court did not apply *res ipsa loquitur* because it excluded Mr. Nau's testimony from being considered regarding whether debris existed, not because of any other reason asserted by Safeco. However, as explained above, the trial court should have allowed Mr. Nau's testimony to be considered in determining the application of *res ipsa loquitur* because the limitations of Utah Code Ann. § 31A-22-305(6) do not apply to *res ipsa loquitur*, but only

to whether a vehicle existed. This would have allowed res ipsa loquitur to potentially apply to the instant matter, and for the matter to proceed to trial.

II. UTAH CODE ANN. § 72-7-409 ALLOWS THE COURT TO APPLY RES IPSA LOQUITUR TO THE INSTANT CASE.

Safeco erroneously claims that Utah Code Ann. § 72-7-409 does not satisfy the elements of res ipsa loquitur because the statute “does not impose liability on a reasonable motor vehicle operator when a load falls onto a highway due to the negligent or intentional conduct of a third party.” Opp. Memo at p. 13. In support of this statement, Safeco misinterprets and misapplies Klafta v. Smith, 404 P.2d 659 (Utah 1965).

In Klafta, the Utah Supreme Court provided a party the opportunity to rebut a presumption of negligence related to a violation of a precursor of Utah Code Ann. § 72-7-409. 404 P.2d at 661-662. Importantly, the Utah Supreme Court specifically stated that violation of the code constitutes prima facie evidence of negligence, although that presumption may be rebutted.

This rule from Klafta is important in the instant matter because, to apply res ipsa loquitur, Mr. Nau may properly rely upon the provisions of Utah Code Ann. §72-7-409. The fact that such presumption is rebuttable only applies if Safeco comes forward with facts to rebut this presumption, something Safeco has completely failed to do. If Safeco believes that circumstances exist that would alleviate any responsibility of a driver, that is Safeco’s burden to carry and Safeco has not presented any evidence to that effect. This rebuttable presumption actually supports Mr. Nau’s claims and does not automatically prevent Mr. Nau from moving forward.

Additionally, Safeco cites to Utah Code Ann. §41-6a-1712 as a basis for showing that a passenger or pedestrian could have thrown something onto the road, rendering the passenger or pedestrian liable, not the operator of the motor vehicle.¹ Subsection (2) of this section states that:

“A person who drops, throws, deposits, or discards, or permits to be dropped, thrown, deposited, or discarded, on any public road or highway any destructive, injurious, or unsightly material shall:

(a) immediately remove the material or cause it to be removed; and

(b) deposit the material in a receptacle designed to receive the material.

Mr. Nau’s claim is that the debris on the road was something big enough, hard enough, and strong enough to cause a significant bump when he hit it and sufficient to cause him to lose control of his vehicle. Something of that nature would definitely be something that a safe operator of a motor vehicle should notice if it is left behind on the freeway, even if it was dislodged by a passenger. Subsection (2) referenced above bestows a specific duty upon anyone who “permits” material to be left on the freeway to “immediately remove the material or cause it to be removed.” Accordingly, a driver who knew or should have known a heavy object was thrown from his vehicle and permits it to remain in the road has violated the duty set forth in Utah Code Ann. § 41-6a-1712 and this is the very definition of negligence.

III. MR. NAU WAS NOT REQUIRED TO PROVE THE EXISTENCE OF DEBRIS BY CLEAR AND CONVINCING EVIDENCE.

The trial court erroneously required Mr. Nau to show the existence of debris by clear and convincing evidence consisting of more than Mr. Nau’s own testimony. Safeco

¹ Safeco tries to claim that a pedestrian could have left the debris in the carpool lane of I-15 in Draper. This claim is far-fetched enough that the trial court did not consider it (R. 000219, pg 32). Similarly, Safeco’s claims that a maintenance or construction crew could be responsible are not persuasive. First, there is no evidence that any maintenance or construction crew were at the scene, and even if they were, they would most likely have been in vehicles, thereby leaving Mr. Nau’s claims just as viable.

also makes this claim in its opposition brief. (Opp. Brief at pp. 2-3). However, a simple review of the plain language of the controlling statute shows such requirement is in error.

Utah Code Ann. § 31A-22-305(6) states that:

When a covered person alleges that an uninsured motor vehicle under Subsection (2)(b) proximately caused an accident without touching the covered person or the motor vehicle occupied by the covered person, the covered person shall show the existence of the uninsured motor vehicle by clear and convincing evidence consisting of more than the covered person's testimony.

Importantly, nothing in the foregoing statute mentions anything about the standard to show the existence of debris in a roadway. Mr. Nau should have been allowed to present all the evidence he had regarding the existence of the motor vehicle. This evidence included debris in the road, the location of the debris in the roadway, and proof that the roadway was a five-lane interstate freeway.

A fact-finder could then determine whether these facts, considered together, constituted clear and convincing evidence that a vehicle existed and travelled on the roadway ahead of Mr. Nau. Therefore, the trial court committed reversible error, summary judgment should be reversed, and Mr. Nau should be allowed to present his claims to a finder-of-fact.

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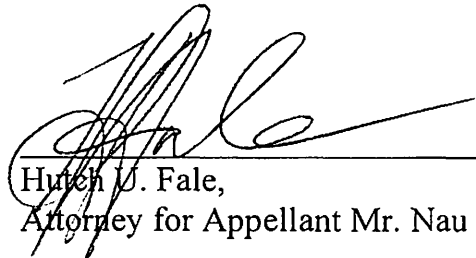
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CONCLUSION

For the foregoing reasons, the Court should reverse the summary judgment granted below and allow Mr. Nau's claims to proceed to trial.

Dated this 9th day of March, 2016.

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Hutch U. Fale,
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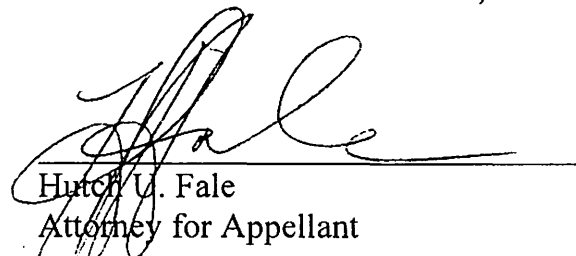
CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of this reply brief were sent via United States first-class mail, postage prepaid, on the following:

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