

1992

Brian Burns v. Cannondale Bicycle Company, The Bicycle Center : Reply Brief

Utah Court of Appeals

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BRIEF

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DUCKET NO. 920708

IN THE UTAH COURT OF APPEALS

BRIAN BURNS,)	APPELLANT'S REPLY BRIEF
)	
Plaintiff/Appellant,)	
)	
vs.)	
)	Case No. 920708-CA
CANNONDALE BICYCLE COMPANY,)	
THE BICYCLE CENTER, and JOHN)	District Court No. 900901567
DOES I THROUGH V)	
)	Category 16
Defendants/Appellees.)	

APPEAL FROM SUMMARY JUDGMENT GRANTED BY THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH HONORABLE HOMER WILKINSON, JUDGE

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Utah Court of Appeals

MAY 24 1993

Mary T. Noonan
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Clerk of the Court

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I.

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II.

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III.

ARGUMENT

POINT I

THE DISPUTED FACTUAL ISSUES IN THIS CASE ARE MATERIAL
AND THE GRANTING OF SUMMARY JUDGMENT WAS IMPROPER

Defendants both admit that there is a dispute of fact relating to the cause of the accident. Appellee, Cannondale Bicycle Co. ("Cannondale") admits there is a factual issue on the question of whether Mr. Blomquist admitted a defect in the bike caused the accident (see Cannondale Brief at p. 3) and as to whether The Bicycle Center ("BC") discarded the defective parts which caused the bike to malfunction. Cannondale Brief at pp. 2-3. BC admits the same factual disputes exist. See BC Brief at pp. 4-5.

In a nutshell, the argument of appellees is that because Dr. Burns cannot offer proof as to the specific nature of the defect, he cannot prevail even though BC admitted to Dr. Burns and other witnesses that a malfunction of the bicycle caused the accident wherein the doctor was injured.

Because the defective part or parts which caused the malfunction were discarded by the Bicycle Center (see Burns Deposition at pp. 53-64; Peterson Deposition at pp. 14-15) Dr. Burns is unable to show the specific defect. However, if a jury believes the testimony of Todd Bradford, Brad Peterson and Dr.

Burns, then they will find that the bicycle malfunctioned and caused Dr. Burn's injuries.

Cannondale argues there is a "significant" difference between a "malfunction" and a "defect." See Cannondale Brief at p. 3. Cannondale neglects to inform the Court as to what this "significant" difference is or why it is material to the issues in the case.

A "malfunction" is defined as "to function improperly" Webster's Encyclopedic Dictionary (Lexicon 1990). A "defect" is defined as:

The want or absence of some legal requisite; deficiency; imperfection; insufficiency . . . a deficiency in something essential to the proper use for the purpose for which a thing is to be used. Some structural weakness in part or component which is responsible for damage. Black's Law Dictionary, 6th ed. 1990 at p. 418.

Thus, a malfunctioning product is by definition "defective" if it malfunctions and causes damage as in this case. Black's Law Dictionary defines a defective condition as one where there is a propensity to cause physical harm not contemplated by the user. Id. In this case, the malfunction/defect caused the bike to stop suddenly and throw Dr. Burns to the ground. To claim that an admission of the owner of the bicycle shop, who is admitted to be the agent of Cannondale, that a malfunction of the bike

caused Dr. Burns' injuries creates a question of material fact as a matter of law. See Appellant's Brief at Point I.

POINT II

PROOF OF THE SPECIFIC DEFECT IS NOT NECESSARY WHERE DEFENDANT'S DESTROYED THE MALFUNCTIONING PART

Taken in the light most favorable to Plaintiff, the evidence shows that the bicycle malfunctioned injuring Dr. Burns; that Dr. Burns informed The Bicycle Center he had been injured and that he believed the brakes had malfunctioned. The Bicycle Center, an agent of Cannondale, repaired the bicycle and discarded the malfunctioning part(s).¹ Having destroyed or discarded the malfunctioning part(s), BC and its principal, Cannondale, are equitably estopped from claiming the part(s) were not defective or from relying on plaintiff's inability to produce the defective part(s) as a basis to defeat his claim. Where they have admitted a malfunction of the bike caused the injury, they cannot use the inability to produce the destroyed part(s) as a defense. Defendants' act of destroying the evidence of the malfunction cannot in equity and good conscience be allowed to serve as the basis for defeating Plaintiff's claim. Defendants should not be allowed to use their own act of destroying the evidence of the

¹Neither Defendant has contested the claim made in Appellant's Opening Brief that The Bicycle Center was the agent of Cannondale regarding repairs on the bike.

malfunction as a basis for defeating Dr. Burns' claim when they have admitted a malfunction caused the accident. If this Court adopts Defendants' argument in this case that notwithstanding Defendants' destruction of the malfunctioning parts, Plaintiff cannot prevail because the specific malfunction which occurred cannot be proven, it will set a precedent which encourages wrongdoers to destroy evidence to avoid liability. To avoid such an unjust consequence, the principles set out in Point II of Appellant's Brief on spoliation of evidence need to be applied to this case. If the principles set out in the spoliation cases are adopted along with general equitable principles, then the admission of defendants that a malfunction of the bicycle caused the accident should be sufficient to allow Dr. Burns to recover in this case.

POINT III

THE TRIAL COURT ACTED PROPERLY TO GRANT THE PROTECTIVE ORDER

The argument of Defendants that the trial court abused its discretion in granting a protective order requiring the parties to maintain the confidentiality of certain records produced by Dr. Burns is without merit because it misstates the real basis of the order. The Defendants correctly state the law with respect to the normal requirements for a protective order. What the Defendants ignore is that the protective order was issued in this instance to enforce an oral agreement made by the parties prior to release to

Defendants of the records at issue. Plaintiff's counsel released all records and documents requested by Defendants based upon his understanding that defense counsel had agreed to maintain the confidentiality of the produced documents. (See affidavit of Edward T. Wells, R. 435-438.) When counsel for Defendants then told Plaintiff's counsel there was some question in their minds as to the breadth of the confidentiality agreement, Plaintiff's counsel asked the trial court to enforce the agreement of the parties by way of a motion for a protective order. See R. 375-77. The Motion was supported by a Memorandum (R. 378-85) setting out the facts relating to the agreement of counsel on confidentiality. Affidavits as to the facts were filed by counsel. See R. 415-418; 435-438. The trial court decided the factual issue in favor of Plaintiff and granted the Motion.

The problem with Defendants' claim on appeal is that they ask this Court to overturn a factual finding of the trial court on a correction of error standard. See Brief of The Bicycle Center at Point VI. In fact, the protective order is a result of the trial court finding that Plaintiff's version of the agreement between counsel was the correct version and the protective order reflects the agreement (stipulation) claimed by Plaintiff. As a general rule, the weighing of evidence and finding of facts lies entirely within the province of the trial court and the appellate court

defers to the trial court's findings. E.g. Bustamante v. Bustamante, 645 P.2d 40 (Utah 1982); Nielsen v. Chin-Hsien Wang, 613 P.2d 512 (Utah 1980). The trial court found, on disputed testimony of the attorneys, that counsel had agreed to treat documents produced by Dr. Burns as confidential. The Court entered its protective order to enforce the stipulation of the parties. It is hornbook law that a court will enforce a stipulation. See State v. A.N.W. Seed Corp., 54 Wash. App. 729, 776 P.2d 143 (1989); Pulliam v. Pulliam, 137 Ariz. 343, 678 P.2d 528 (1984).

The rules of appellate review preclude a reviewing court from substituting its judgment for that of the trial court on factual issues. Hidden Meadows Development Co. v. Mills, 590 P.2d 1244 (Utah 1979). For this reason, the finding of the trial court that counsel had agreed, prior to delivery of the disputed documents, that confidentiality would be maintained, should not be disturbed. Thus, the protective order should not be disturbed.

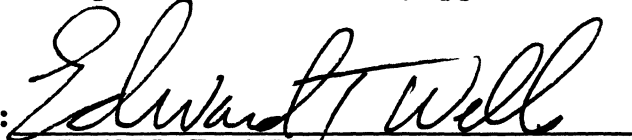
IV.

CONCLUSION

For the reasons stated herein and in appellant's opening brief, the Summary Judgment Order should be reversed and the case should be remanded for trial on the merits. In addition, the protective order of the trial court should not be disturbed.

DATED this 24 day of May, 1993.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff/Appellant

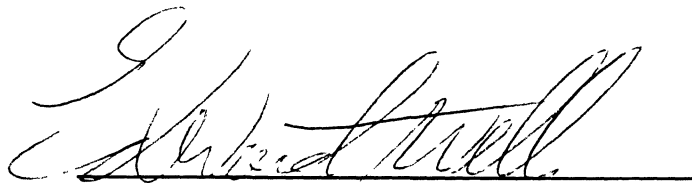
By: 
EDWARD T. WELLS

CERTIFICATE OF MAILING

I certify that two (2) true and correct copies of the foregoing APPELLANT'S REPLY BRIEF (Burns v. Cannondale Bicycle Company, et al) were mailed, postage prepaid, on the 24 day of May, 1993, to the following:

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