1966

Beth F. Drury v. Colleen Lunceford : Appellant's Brief

IN THE SUPREME CO
OF THE STATE OF U

BETH F. DRURY,
Plaintiff and Respondent,

— vs. —

COLLEEN LUNCEFORD,
Defendant and Appellant.

APPELLANT'S

Appeal From the *Judg*
Fourth Judicial District
State of
Honorable Maurice

Eaq.

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IN THE SUPREME COURT OF THE STATE OF UTAH

BETH F. DRURY,
Plaintiff and Respondent,

—vs.—

COLLEEN LUNCEFORD,
Defendant and Appellant.

Case No. 10466

APPELLANT'S BRIEF

NATURE OF CASE

The case on appeal herein involves the question of whether or not it is error for a trial judge to enter an order, upon plaintiff's motion, vacating his own prior unconditional order granting a new trial to defendant upon its motion seeking the new trial.

DISPOSITION IN LOWER COURT

The above-captioned case was tried before the Honorable Maurice Harding, Judge of the Fourth Judicial District Court, sitting without a jury. At the conclusion of the evidence Judge Harding granted judgment in favor of plaintiff and against defendant for the sum of

$2,126.20, representing $126.20 special damages and $2,000 general damages. Several days later, and apparently upon his own motion, the trial judge entered his "Reconsideration" granting plaintiff judgment against defendant for the sum of $4,926.20 representing special damages in the sum of $126.20 and general damages in the sum of $4,800.

Thereafter, the trial judge granted plaintiff's motion for a new trial and subsequently granted defendant's motion for an order setting aside his previous order granting a new trial.

RELIEF SOUGHT

The relief sought on appeal is as follows: Reversal of the judgment of the lower court remanding the case to the District Court for a new trial.

STATEMENT OF FACTS

This case arises out of an automobile accident which occurred on or about April 1, 1964, at or near the intersection of 1280 North Street and 500 West Street in Provo, Utah County, Utah. (R-2, T-31) A complaint was filed by plaintiff seeking judgment against defendant for medical expenses and general damages for personal injuries. (R-3, 4) The matter was tried on February 15, 1965, before the Honorable Maurice Harding, Judge of the District Court of Utah County. (R-17) At the conclusion of the evidence after both sides had rest-

ed, and after having argument by counsel for both parties, the Court found the issues in favor of plaintiff and against defendant and awarded damages as follows: Special damages, $126.20 and general damages, $2,000 (R-17). A minute entry was entered pursuant to the Court's order.

On February 17, 1965, apparently on the Court's own motion Judge Harding entered his "Reconsideration" increasing the judgment by awarding plaintiff special damages in the sum of $126.20 and general damages in the sum of $4,800.

In accordance with the "Reconsideration" referred to judgment was entered on March 5, 1965. (R-24) On March 2, 1965, defendant by her attorneys, made a Motion for a new trial. The basis of the motion was that the (a) conduct of the Court in increasing the general damages by its "Reconsideration" upon its own motion was a manifest injustice to defendant, and (b) the increased damages awarded by the Court in its "Reconsideration" upon its own motion was excessive and not in accordance with the evidence presented (R-22).

At the hearing of defendant's Motion, the court stated from the bench that it had previously advised counsel for plaintiff, prior to the issuance of the "Reconsideration," if defendant filed a motion for new trial because of the increase in the general damages the Motion would be granted.

An order granting defendant a new trial was entered by Judge Harding on May 4, 1965. (R-25)

Shortly after the entry of the Court's Order granting a new trial, plaintiff, by her attorney, made a motion for an order setting aside the Court's order granting the new trial. (R-28) On September 8, 1965, the Court granted plaintiff's Motion and made the following specific findings in relation thereto:

> 1. There were no irregularities in the proceedings of the Court or either of the parties during the trial, and the Court did not abuse its discretion whereby either party was prevented from having a fair trial.
>
> 2. There was no accident or surprise which ordinary prudence could have guarded against at the trial.
>
> 3. There is no newly discovered evidence material for the party making the application, which he could not, with reasonable diligence have discovered and produced at the trial.
>
> 4. That the damages were not excesesive, the Court specifically finding that it is of the opinion that the damages awarded by the Court on this matter are entirely reasonable.
>
> 5. That there is not insufficient evidence to justify the amount of damages awarded, and that the verdict of the Court is not against the law.
>
> 6. That there have been no errors in law in the trial.

The order and judgment setting forth the above findings is found at R-32, 33, 34.

It is from the Court's order setting aside its previous order for a new trial and the judgment in the case that this appeal is taken.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN RECONSIDERING ITS DECISION UPON ITS OWN MOTION.

After the parties had presented evidence in an effort to support their respective contentions and after counsel for the parties had completed argument to the Court the Trial Judge orally announced his decision in favor of plaintiff and against defendant for the sum of $2,126.20. This amount represented special damages of $126.20 and general damages of $2,000.00 (R-17, T-37). The oral decision of the Trial Judge and the Minute Entry thereon was made on February 15, 1965. Two days later, on February 17, 1966, apparently on his own motion, the Trial Judge entered his "Reconsideration" of the matter and increased the general damages he had previously awarded to plaintiff from $2,000.00 to $4,800.00.

In the instant case and in all cases tried before a judge, sitting without a jury, the trial judge takes the place of the jury and becomes one who hears and considers the evidence, finds facts, determines liability, computes and assesses damages, if any. In such cases the trial judge performs a dual function; he adopts rules of law for his guidance and finds facts as guided by those rules. *Branchi* v. *Denholm & Mck. Co.*, 302 Mass. 469, 19 N.E. 2d, 697, 121 ALR 460. See also 53 Am. Jur. Trial § 1123. Although the Court is generally granted

greater latitude in the reception of evidence in non-jury trials and in the way the trial is conducted, essentially, the trial judge is to conduct himself as a juror would after having heard evidence on the matter. 32 Am. Jur., Trials §§ 1125, 1128.

Inasmuch as appellant could find no law on this point assigned as error, other than from the State of Washington, it will outline the standard to which jurors must adhere in this matter and contend that a trial judge must govern himself accordingly in non-jury cases.

Jurors are allowed all reasonable opportunity before the verdict is put on record and they are discharged, to ascertain the facts and determine the amount of their award if one is warranted. Before they are dismissed as jurors from the case, their power over the verdict remains and they have the right to alter it so as to conform to the real intention and purpose. *Bino* v. *Veenhuizen,* 141 Wash. 18, 250 P. 450, *Stephens* v. *Draper,* 350 P. 2d 506 (Okla.). Before it has been discharged from the case a jury may reconsider its verdict and make corrections as to damages. *Daniels* v. *Celeste,* 303 Mass. 148, 21 N.E. 2d 1. See the annotation at 49 ALR 2d 1339-1341.

However, it is generally held that after the jury has been permanently discharged from a case, they cannot be reassembled to amend or correct their verdict as to a matter of substance. *Beglinger* v. *Shield,* 164 Wash. 147, P. 2d 681.

In the case of *Fanner* v. *Wilkoskee,* 123 Mont. 228, 211 P. 2d 420, 17 ALR 2d 518, the court indicated that the time for correcting an insfficient verdict is at the time it is announced in open court and before it has been accepted and ordered filed for record and before the jury has been discharged from the case.

What the courts generally mean is that a jury cannot be reassembled to amend or correct their verdict as to a matter of substance if the amendment requires reconsideration of the issues by the jury. *Settle* v. *Allison,* 8 Ga. 201,, 52 Am. Dec. 393. Also see the annotation at 66 ALR 539.

It is appellant's contention that the Trial Judge in a non-jury case as the trier of the fact takes the place of the jury and therefore by analogy may not reconsider his decision once he has given it and certainly may not do so where the amendment to his decision requires a reconsideration of the evidence presented and the issues involved. Certainly he may not do so upon his own motion as was done in the instant.

One jurisdiction, and the only jurisdiction deciding this question according to appellant's research, has indicated the contrary to what appellant asserts herein. In *Ritter* v. *Johnson,* 168 Wash. 153, 300 P. 518 (1931) 79 ALR 1370, the Court declared that the trial court sitting without a jury may change a decision orally announced on the merits before judgment has been entered thereon.

POINT II

THE TRIAL COURT ERRED IN SETTING ASIDE ITS UNCONDITIONAL ORDER GRANTING DEFENDANT'S MOTION FOR A NEW TRIAL.

Rule 59, Utah Rules of Civil Procedure provides as follows:

> (a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:
>
> (1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.
>
> (2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.
>
> (3) Accident or surprise, which ordinary prudence could not have guarded against.
>
> (4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable dilence, have discovered and produced at the trial.
>
> (5) Excessive or inadequate damages, ap-

pearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

It will be noted that the trial court may grant a new trial for, among other reasons, (a) irregularity in the proceedings of the court, (b) error in law.

Appellant contends that it was an irregularity in the proceedings in the action of the trial judge announcing his oral decision from the bench on the day of the trial and then two days later, on his own motion, after having mulled the evidence over in his mind and reconsidered the evidence and the issues having increased the general damages awarded by approximately 240%. It is certain that the trial judge thought this was an irregularity for he advised counsel for plaintiff that after his increase in the general damages, if counsel for defendant moved for a new trial the motion would be granted. A new trial was granted and appellant contends that the trial judge was correct in granting it.

In granting or refusing a motion for a new trial, the trial court may exercise its sound discretion which the losing party may invoke in light of the whole proceedings in the case.

Law v. *Smith*, 34 U. 394, 98 P. 300. See also *Soltas* v. *Affleck*, 99 U. 381, 105 P. 2d 176. It is axiomatic in this state that granting or refusing of motions for new trials is a discretionary matter. *Uptown Appliance & Radio*

Co., Inc., v. *Flint*, 122 U. 298, 249 P. 2d 826. However, it is true that the trial court has no discretion to grant a new trial absent a showing of one of the grounds specified in Rule 59. *Tangaro* v. *Manero*, 13 U. 2d 290, 373 P. 2d 390.

In this regard appellant respectfully asserts that the trial judge had basis for granting the new trial on the following grounds, Rule 59 (a) (1) (5) (6) (7). The basis under Rule 59 (a) (1) (6) and (7) being that it was an irregularity on the proceedings by the trial court and even in law for the court to reconsider the evidence and issues on its own motion and to change its oral decision. In Rule 59 (a) (5) the increase on the general damages of 240% certainly appears to have been given under the influence of passion.

In relation to the granting of defendant's motion for a new trial, it should be noted that the court's order granting the new trial was unconditional. Having heard and unconditionally granted defendant's motion for a new trial it was error for the trial court to entertain plaintiff's motion to vacate its prior order granting the new trial. In the proceedings in the lower court plaintiff did not petition the court for a rehearing on defendant's motion for a new trial but made a new separate and distinct motion to vacate a prior unconditional order of the court. Appellant contends it was error for the court to hear plaintiff's motion and to grant it.

Whether the court may reconsider an order granting or denying an application for a new trial is a ques-

tion which has frequently been considered by the courts of the various jurisdictions. In some jurisdictions, Utah included, the trial court is held not to have the power to reopen the trial after once disposing of it. *Luke* v. *Coleman*, 38, Utah 383, 113 P. 1023, *Browning* v. *Hoffman*, 86 W. Va. 468, 103 SE 484, *Middleton* v. *Finney*, 214 Col 523 6P. 2d 938, 78 ALR 1104; *United R. Co.* v. *Superior Ct.*, 170 Col 755, 151 P. 129. See also the annotations at 141 ALR 401 and 61 ALR2d 647. That foundation of the rule is that the modes in which a decision may be reviewed are prescribed by statute, and the courts are not at liberty to substitute other modes in their place. *Luke* v. *Coleman*, op. cit. Another reason is that there must be some point where litigation in the lower court terminates and the losing party is turned over to the appellate court for redress. See 39 Am. Jur., New Trials § 206, p. 202.

It seems clear that a trial court may modify or vacate its conditional order for a new trial. *National Farmers Union Property and Casualty Company* v. *Thompson*, 4 U2d 7, 286 P. 2d 249 (1955), *Harris* v. *Speers*, 55 U. 474, 186 P 445 (1920).

In *Luke* v. *Coleman* an action was commenced in the City Court of Salt Lake City to recover judgment against defendant on a promissory note. A judgment was granted against defendant and he appealed to the District Court of Salt Lake County. At the de novo trial in the District Court before a jury a verdict and judgment were entered in favor of defendant and against

plaintiff, no couse of action. Shortly thereafter plaintiff filed a motion for a new trial in the District Court which was heard and denied. After this denial plaintiff petitioned and moved the court to grant a rehearing and reargument of plaintiff's motion for a new trial. Defendant thereupon filed a motion to strike plaintiff's petition for a rehearing on the ground of lack of jurisdiction of the court. The court heard plaintiff's petition and denied it.

One of the questions on appeal in this matter involved the propriety of the court hearing plaintiff's motion for a rehearing on his original motion for a new trial because of the time element for appeal.

In discussing the plaintiff's motion for a rehearing on its original motion for a new trial and due to the court's denial of same the Supreme Court said at 113 P. 1024:

> We think the District Court had no power to entertain such a motion. It is unknown to our practice. In California, where the practice relating to new trials is similar to ours it has been firmly established that the Court has no power to reopen the question of granting or denying a motion for a new trial. Haltum vs. Greif, 144 Cal. 521, 78 Pac. 11; Carpenter vs. Supreme Ct., 75 Col. 596, 19 Pac. 174; Egan vs. Egan, 90 Cal. 15, 27 Pac. 22; Long vs. Superior Ct. 71 Cal. 481, 12 Pac. 306, 416; Coombs vs. Hibber, 43 Col. 452.

In acting with approval from the *Haltum* v. *Greif* case, the Utah Supreme Court stated:

> The decisions of this court are numerous and uniform to the effect that a judgment or order once

> regularly entered can be reviewed and set aside only in the modes prescribed by statute. If they have been entered prematurly, or by inadvertence, they may be set aside on the proper showing (Odd Fells' Sav. Bank v. Deuprey, 66 Cal. 170 [4 Pac. 1173] and cases cited), and if the order as entered is not the order as made, the minutes may be corrected so as to make them speak the truth (Garoutte v. Haley, 104 Cal. 497 [38 Pac. 194] and cases cited); but subject to these exceptions the order is reviewable only on appeal, and the decision of the trial court having been once made after regular submission of the motion, its power is exhausted — it is function officio.

The Utah case of *National Farmers Union Property and Casualty Company* v. *Thompson,* op cit, is not controlling in the instance because it involves a different problem than the case on appeal herein. In that case an affirmative recovery was obtained.

> Where the affirmative recovery was obtained by the defendant but the court, on its own motion, granted a new trial unless within 10 days the defendant should file his consent to a specified reduction in recovery, it was held that the fact that within the 10-day period the defendant filed his motion to set aside the conditional order operated to hold that order in abeyance until the trial on the motion, and he did pass on it 5 months later.

In that case the order of the court was that the new trial was not granted or denied until after the expiration of 10 days and unless the defendant consented to a reduction on recovery. Hence the court had not finally disposed of the matter until the condition had been met or not met.

Harris v. *Speers*, op cit., is not in point or relation to the case on appeal herein because it also involved a conditional order.

In view of the law and facts of the instant case appellant urges that the trial court properly granted defendant's motion for a new trial. Once having heard and granted defendant's motion, the matter was disposed of and the court erred in intervening and granting plaintiff's motion to vacate the order granting defendant a new trial. Plaintiff's relief from the order granting a new trial was to the Supreme Court and not the trial court.

POINT III

THE DAMAGES HELD BY THE COURT UPON IT'S RECONSIDERATION OF ITS DECISION WERE EXCESSIVE.

The trial of this case was not a very complicated one and was disposed of in about one day. After hearing all of the evidence and while it was fresh in his mind the trial judge ruled from the bench granting judgment in favor of plaintiff for special damages in the sum of $126.00 and general damages in the sum of $2,000.00. Two days later after having mulled the matter over the trial judge increased the general damage to a sum of $4,800.00 on an increase of approximately 240%. Appellant has already pointed out that it is its position that the trial court erred in changing its early decision—the tremendous increase in the general damages after

the court had reconsidered the evidence and issues. This only leads us on to believe that the great increase was a result of prejudice or passion. The best evidence of the correct value of the general damages to be awarded by the trial judge when the matter was fresh in his mind, that is, on the day of the trial.

Appellant incorporates into Point III all of the beliefs and applicable factual facts in law discussed in Points I and II of this Brief. That by reason of the excessive amount of the general damages over the original evaluation of the case the grounds for a reversal and for remanding the matter into the District Court or a new trial or reinstatement for the original decision of the trial court.

CONCLUSION

Based on the foregoing argument and authorities it appears clear that this court should revise the decision and judgment of the District Court and remand the case to the District Court for reinstatement of the original decision of the Court or for the granting of a new trial.

Respectfully submitted,

KIPP AND CHARLIER
TEL CHARLIER, Esq.
520 Boston Building
Salt Lake City, Utah

Attorney for Defendant and Appellant