

1961

Vada Wellman v. V. Glen Noble and Perry C. Adams : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the

STATE OF UTAH

FILED

APR 3 - 1961

VADA WELLMAN,

Plaintiff and Respondent,

vs.

V. GLEN NOBLE and PERRY C.
ADAMS,

Defendants and Appellants.

Clerk, Supreme Court, Utah

Case
No. ~~992~~ 9392

APPELLANT'S BRIEF

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and Appellants.*

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VADA WELLMAN,

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ADAMS,

Defendants and Appellants.

Case
No. 992

APPELLANT'S BRIEF

STATEMENT OF THE CASE

Plaintiff brought this action against the defendants to recover damages for personal injuries arising out of an automobile accident occurring on July 3rd, 1956 in Nebraska.

Jury Trial was held in Utah County, the Honorable R. L. Tuckett, Judge, presiding. The jury returned a verdict in favor of the plaintiff in the total amount of \$4,500.00.

Plaintiff filed a Motion for a New Trial on the ground of inadequate damages appearing to have been given under the influence of passion or prejudice, and moving for the new trial on the issue of damages only.

The Lower Court Ordered Additur in the sum of \$3,000.00 "and if the plaintiff and defendants fail to consent to the additur within 30 days, a new trial is Ordered on the issue of damages only."

Defendants filed a Petition for Intermediate Appeal to this Court, which was granted.

STATEMENT OF FACTS

On July 3rd, 1956 plaintiff was riding in a Cadillac driven by her brother in law, Mr. House. A Studebaker driven by Mrs. House, was travelling ahead of the Cadillac. In front and ahead of the Studebaker was a pickup truck pulling a house trailer. Defendant Adams, an employee of Noble, was following the above vehicles, driving a Freightliner tractor and trailer, or truck-trailer unit (T-172).

The above vehicles were proceeding west on U.S. 30, Deuel County, Nebraska. That highway is very narrow (T-175), only 18 feet wide, and provides only one lane of travel for either westbound or eastbound traffic.

The highway is flanked on both sides by grain fields for many miles (T-105, 171). The shoulders on the highway at or near the scene of the accident were only about 3 feet wide (T-175).

Adams was following the procession at a distance of about 200 feet for about 5 miles (T-172).

Most of the distance was on flat terrain, but the group came upon a series of rolling hills, or dips, or swales (T-171; 105). The vehicles ahead of Adams would, temporarily, move out of his vision as they disappeared down towards the bottom of the hill, while the truck-trailer was moving up towards the summit.

Adams, upon reaching the summit, would again observe the units ahead as they were approaching and passing again out of temporary view, over the next summit ahead.

The vehicles ahead of Adams traversed about three or four of these small dips (T-29) and the relative distance of about 200 feet was maintained between the truck and the Cadillac (T-172). The posted speed limit was 50 miles per hour for trucks and 60 miles per hour for cars (T-176).

Immediately before the accident, Adams observed the vehicles again disappear below the summit of the hill ahead. No brake lights, or other signal appeared to warn Adams of any change in the speed of the cars ahead (T-172) (T-195). Mr. House, driver of the car ahead of defendant, testified he was going downhill when he applied brakes to slow down (T-22).

As the truck-trailer was proceeding upgrade towards the summit, and of course unknown to Adams, the pickup truck with the house trailer behind, had run out of gasoline (T-181, 298), and was slowing and pulling off the road. The Studebaker and Cadillac were likewise forced to slow. When the defendant's truck reached the summit, Adams suddenly observed the cars ahead, the pickup truck partially off the road, stopped with the house trailer blocking more than half the westbound lane, and the Studebaker and Cadillac either stopped or virtually stopped behind the house trailer. The nearest car, the Cadillac, was only 100 feet ahead (T-177; 196). An opposite bound car prevented the defendant from attempting to swerve and pass the vehicles on their left (T-177).

The defendant jammed his brakes and had slowed to about 10 to 15 miles per hour, when the rear of the Cadillac was struck (T-176; 182). After the accident, all vehicles were in the bottom of the swale, and they were shortly moved so as not to endanger other vehicles approaching, whose drivers could not see them (T-180).

The plaintiff suffered a “whiplash injury” and a discussion of her injuries will be reserved for the Argument.

Defendants in their Answer and in the Pre-Trial Order, defended on the ground of Unavoidable Accident (R-6; 10) in that the defendant, Adams, as a reasonable and prudent driver, under the circumstances, could not have reasonably foreseen the events that preceded the accident; that he was faced with a sudden emergency; and that he acted reasonably under said emergency, but could not avoid the resulting accident. Defendants’ expert witness, Sgt. Laub, Utah Highway Patrol, testified that no vehicle, passenger car or truck, could stop in the distance of 100 feet at a speed of 40 miles per hour (T-211).

That at 40 miles per hour, *any* vehicle, on level road, would require a total distance to stop, including reaction time, of at least 124 feet; at 50 miles per hour 180 feet (T-211). That if the vehicle were travelling down grade, it would require more distance (T-213-214).

The Court refused to instruct the jury on any of the above defenses. (Defendants’ Requested Instructions (R-27, 28, 30)).

STATEMENT OF POINTS

The Appellants respectfully submit two points.

POINT ONE

THE LOWER COURT ABUSED ITS DISCRETION IN GRANTING ADDITUR TO A SUBSTANTIAL JURY VERDICT, AND THE VERDICT SHOULD BE REINSTATED.

POINT TWO

THE LOWER COURT COMMITTED PREJUDICIAL ERROR AGAINST DEFENDANTS IN DEPRIVING THEM OF THEIR DEFENSES AND A NEW TRIAL, IF NECESSARY, SHOULD BE HEARD ON ALL THE ISSUES.

ARGUMENT

POINT ONE

THE LOWER COURT ABUSED ITS DISCRETION IN GRANTING ADDITUR TO A SUBSTANTIAL JURY VERDICT, AND THE VERDICT SHOULD BE REINSTATED.

The Honorable Trial Court concluded in his Order granting additur, the following statement:

“...It appears to the Court that the jury disregarded the Court’s instructions pertaining to damages....”

The Pre-Trial Order had framed the issues, previously asserted by defendants’ in their Answer, as follows:

“The defendants also contend that the plaintiff received excessive medical care and treatment, over and above that reasonably necessary.”

A reading of the Record and Transcript of the trial, will bear out that defendants contended that plaintiff magnified her complaints, that she did not suffer with her injuries as grievously as her subjective complaints would have had the jury believe, and that her subjective complaints, *and the symptoms described by her, even if true, could not be a result of the accident.*

Reserving, for the moment, a recital of some of the evidence produced by the defendants, we look at the Court’s Instructions to the jury, in light with the issues: Instruction No. 10.

“If you find the issues in favor of the plaintiff . . . it will be your duty to award the plaintiff such damages, *if any*, as you may find . . . will fairly and adequately compensate her. . . .”

“You may award such special damages . . . *not to exceed* the sum of \$2,791.50. You may also award such sum, *if any*, by reason of her being unable to work”

“You may also award such general damages, *if any*, you find the plaintiff is entitled to for her injuries . . . you may consider the *nature and extent* of the injuries sustained by her, the *degree*

and character of her suffering . . . and the extent to which she has been prevented from pursuing the ordinary affairs of life. . . . The total must not exceed \$35,000.00. . . .”

Plaintiff to our knowledge, made no exception to this instruction, and certainly did not cite it as a ground for a new trial.

It seems to require no argument that if the jury is instructed that their verdict is *not to exceed* a certain sum, they are obviously being instructed that they may bring in a lesser amount, which will “fairly and adequately compensate her.”

If the jury is instructed, relative to earnings, that they *may* award such sum, *if any*, the jury is also being advised that they may award *nothing*, which is exactly what the jury did, and with ample reason for their verdict in so doing.

We submit that the Court’s coining of a phrase, and concluding that the jury disregarded his instructions, without any foundation for said conclusion, should not be permitted to stand in violation of defendants’ rights as litigants.

The Trial Court further stated as a reason for granting additur (R. 8) :

“. . . it appears to the Court . . . that the award was inadequate in view of all the evidence on that issue. It further appears that the verdict

was given under the influence of passion or prejudice.”

We invite this Honorable Court’s attention to the testimony of Dr. Reed Smoot Clegg, M.D. who was called by the defendants and whose testimony in full is found at pages 255 to 284 of the Transcript. The following, however, will indicate the gist of his testimony.

Dr. Clegg, an Orthopedic Specialist, examined plaintiff pursuant to Court Order, on February 4, 1960 (T-256). This examination included a “general survey, checking from head to feet,” and special attention paid to where the patient has complaints on the above date:

“ . . . the patient stated that her main complaint was pain in the neck area with radiation towards the shoulders . . . a dull aching pain, and at times there were sharp pains . . . she had previously had trouble in her lower back but this had disappeared . . . she was unable to do heavy physical activity because of this pain in the neck . . . she occasionally had some numbness in her hands and legs.”

X-rays were taken by Dr. Clegg, which were negative, and “were essentially normal for a person of this age group.” He did find, however, that there were “early changes . . . osteoarthritis which is commensurate with that of this age group” and which the Doctor stated was not unusual, and not associated with the injury.”

The Doctor concluded from his X-ray studies:

“I found no evidence of injury in this particular patient.”

“Q. Now, with relation to your . . . examination of the muscles and so forth, what was your finding?

A. I found that the patient was essentially normally healthy and physically well developed otherwise (T-259).
(At T-260)

Q. I will ask you if the symptoms she described to you with relation to the pain in the shoulders is a normal symptom from a person suffering from a whiplash injury?

A. It is not . . . and it was my feeling that the symptoms, the complaints, and symptoms, did not fit with the so-called whiplash injury.
(At T-281)

Q. Did you find any pain on motion in your examination of Mrs. Wellman?

A. I found that when I would ask where the pain was, that she would show me . . . tell me where, and point to it. And I found that by pressing on this area, that *there was a delayed reaction from the time I applied pressure until the response came that “that hurt.”* (Emphasis added).
(At T-284)

Q. Did you find any permanent disability in the case of Mrs. Wellman?

A. No Sir."

Bear in mind that Mrs. Wellman testified to the following residual complaints at the time of trial:

"I still have a headache . . . where the neck and the skull join . . . the cold night air affects my neck; makes it more painful." (T-132)

". . . any vibration, riding in a car, walking, and especially if I have high heels on (aggravates her pain) (While dancing) "The vibration from my heels, the dancing, having my arm up, my arm goes to sleep and also causes a spasm in my neck and shoulder."

"I still have a headache. It's there all the time, but it gets more severe if I have over-done, like using my arms or any riding . . . any vibration." T-133)

"They (neck and shoulders) get very tight at times and hurt me where I will stop whatever I happen to be doing and try to relax them, and it doesn't always work."

"Q. In the past, say, since the beginning of this year, has there been much of a change in your condition, either one way or the other?

A. Yes, I believe I am getting worse." (T-124)

The plaintiff's own doctor, Dr. J. C. Woodward, M.D. testified:

(T-71)

“Q. Did you find any fracture whatsoever of the bone structure of the patient’s body?

A. No.

(T-82)

Q. “. . . on your first examination, you listed her complaints, as nausea . . . you had never been present when she vomited?

A. No.

Q. She was unable to do her housework, and of course, you didn’t know personally about that?

A. No.

Q. Her neck was on fire, was there any way you could verify that from an . . . objective examination?

A. No, that is entirely a subjective thing.

(T-83)

Q. How did you confirm she had had headaches?

A. . . . I could confirm she was certainly justified in such a complaint. . . .

Q. . . . she had slight difficulty with her balance? . . . did you verify that?

A. I didn’t have her walk a straight line or anything.

Q. And her vision was blurred. Did you verify that?

A. No I did not.

(T-84)

Q. The muscle in front (of the neck) did you notice some spasm in that?

A. Yes.

Q. Based upon these findings, you immediately put her in the hospital?

A. Yes."

(T-79) The Doctor testified that he gave her about 127 therapy treatments, and that in addition, she had had about 18 additional treatments in the hospital; for over a period of 1½ years (T-120).

Doctor Reed Clegg, M.D., testified that in his opinion such a lengthy treatment with therapy was not reasonable, giving his reasons as follows:

(T-261) Referring to diathermy treatment:

"... in my experience, if a patient isn't responding to treatment in a few weeks, I would figure it is not a successful treatment. I would look for something else."

(T-262)

"... medicine is not as cut and dried as, perhaps, we would like it to be. And there is an element of experimentation in treatment. We have our phases of conservative measures and we feel since our patients respond readily to one thing and others don't, if our first phase of treatment isn't successful, then, to carry on over a long period of time is actually harmful in some cases."

“... some patients begin to look forward to the temporary relief, and our aim is to give permanent relief, and if we carry on over a period of months and months, they look forward to the treatment and they are almost more convinced that there is more wrong than actually is.”

Plaintiff, under Dr. Woodward's supervision, engaged in daily home traction treatments for one and one-half years (T-121).

Dr. Clegg further testified, with relation to traction treatments (T-260):

“In my particular case traction treatment is usually the second phase of treatment and this is usually tried for a period of a few days or a week, and if successful, then no further treatment is indicated. If it isn't successful, then, we go on to the next stage of treatment.”

(T-261)

“Q. I will ask you if it would be normal to continue traction, or reasonable, beyond three weeks period?”

A. In my estimation it would not be.”

Certainly the above excerpts in no way give a comprehensive account of all the testimony and evidence relative to the plaintiff's injury, and they are not intended to do so. However, we trust that enough of the conflicting testimony has been reviewed to pinpoint the fact that there was a definite joining of the issue of

damages, and that the jury was not presented with a one-sided issue to determine.

The jury awarded \$2500.00 Special Damages, and \$2,000.00 General Damages. The Lower Court granted additur of \$3,000.00 *and the plaintiff has filed a consent to the additur* (R. 54).

We presume, therefore, that the Honorable Trial Court and the plaintiff agree that if the jury believed every subjective complaint by plaintiff, as well as her overly helpful and ever believing doctor, \$5,000.00 rather than \$2,000.00 is an adequate award for General Damages.

What then, if the jury believed only *half* of the plaintiff's testimony concerning her subjective complaints? Should the verdict then be \$2,500.00? The ridiculousness of the attempt to rationalize why the verdict should be tampered with at all, is very apparent.

This honorable Court, in *Bodon vs. Suhrmann*, 8 Utah 2nd 42, 327 P. 2nd, 826 and in *Schneider vs. Suhrmann*, 8 Utah 2nd 35, 327 P. 2nd, 822, have fully reviewed and established the basis upon which a jury verdict should or should not be disturbed. This Court states, in the *Schneider* case at page 825:

“... the question of damages for personal injuries involving the intangibles of pain and suffering, with respect to which reasonable minds are apt to differ greatly, are matters which a

jury is peculiarly adapted to determine. One of the principal merits of the jury system is that it brings together people from different walks of life, with distinctive points of view arising out of their varied experiences. Bringing these different points of view to bear upon the appraisal of such values is a method to which the parties have a right."

Obviously, the Trial Court was more impressed with the plaintiff's evidence on damages, than was the jury. However, it is Hornbook Law that he may not set up his opinion against that of the jury, except under very rigid standards established by the Supreme Court.

Test the Lower Court's conclusion that the award was inadequate, with the language of this Honorable Court in *Jensen vs. D. & R. G. R. Company*, 44 Utah 100, 138 Pac. 1185, at 1192:

"... before the Court is justified (in setting aside a verdict) it should clearly be made to appear that the jury *totally* mistook or disregarded the rules of law by which the damages were to be regulated, or *wholly* misconceived or disregarded *all* the evidence, and by so doing committed *gross and palpable* error by rendering a verdict so enormous or *outrageous* or unjust as to be attributable to neither the charge nor the evidence, but only to passion and prejudice."

“ . . . (the Lower Court’s) action may . . . be inquired into and reviewed on an alleged abuse of discretion, or a capricious or arbitrary exercise of power in such respect. Such a review is not a review of a question of fact, but of law. . . . Our power to correct a plain abuse of discretion or undo a mere capricious or arbitrary exercise of power cannot be doubted.”

We submit also, that a complete review of the Record in the case at bar, will completely fail to disclose one iota of evidence that the jury was in any way prejudiced against the plaintiff. This Court has previously held that the size of the verdict, standing alone, does not show passion or prejudice.

In *Pauly vs. McCarthy* (1947), 109 Utah 431, 184 Pac. 2nd 123, at 126:

“ . . . in the mere fact that it was more than another jury, or more than the Court, might have given, or even more than the evidence justified, does not conclusively show that it was the result of passion or prejudice. . . .”

“ . . . no conduct on the part of the jury evincing passion or prejudice, has been called to our attention. The only point of complaint is the size of the verdict.”

We therefore submit, that the Honorable Trial Judge abused his discretion in concluding that the award was inadequate, and that the Jury Verdict should be reinstated.

POINT TWO

THE LOWER COURT COMMITTED PREJUDICIAL ERROR AGAINST DEFENDANTS IN DEPRIVING THEM OF THEIR DEFENSES AND A NEW TRIAL, IF NECESSARY, SHOULD BE HEARD ON ALL THE ISSUES.

The defendants' Answer alleged, as an affirmative defense, that the accident was unavoidable (R. 6). The Pre-Trial Order states:

“The defendants deny that they were negligent and claim as an affirmative defense that the driver of defendants' vehicle was confronted with a sudden peril and that the accident was unavoidable as far as the driver was concerned.” (R. 10)

Despite the definite framing of the issues, the Court refused defendants' requested instructions on foreseeability (R. 28), refused defendants' requested instruction on sudden peril (R. 30), and Unavoidable Accident (R. 27).

We submit it as obvious, from the Court's refusal, that he ruled that the defense of unavoidable accident would not be a proper defense, even if the jury were to believe the defendants' version of the accident, and the circumstances leading up to it.

We further submit, although it does not appear in the Record, that the Court was of the opinion that unavoidable accident is not a proper defense in an automobile accident suit, unless the facts bear out a

conclusion that the accident, if not the same as an "Act of God," are closely akin thereto.

In *Nelson vs. Lott*, 81 Utah 265, 17 Pac. 2nd at 275, this Court stated, in discussing the giving of an unavoidable accident instruction in an auto-pedestrian accident:

"... the writer is inclined to think the jury would interpret the instruction to mean that if they should believe the injury to the plaintiff was the result of unavoidable accident and not of negligence on the part of the defendant, their verdict should be in favor of defendant."

Again, this Court in *State vs. McQuillan*, 113 Utah 268, 193 Pac. 2nd, 433 (1948) stated:

"His (defendant's) version of the crucial issue was that he was suddenly confronted with a situation of peril which he could not avoid. Had the jury accepted such testimony as fact, *a verdict of acquittal would have been required in accordance with a specific instruction of the Court to that effect.*" (Emphasis added).

We further feel, with reasons not shown in the record, that the Honorable Lower Court was unduly influenced by a fairly recent pronouncement by the California Supreme Court. In *Butigan vs. Yellow Cab Co.* (1958), 49 Cal. 2nd 652, 320 Pac. 2nd, 500, 65 ALR 2nd, 1, wherein the Court reversed prior decisions and announced:

“Unavoidable Accident has no place in our pleading. . . . it is nothing more than a denial by the defendant of negligence, or a contention that his negligence, if any, was not a proximate cause of the injury.”

We will let the Montana Supreme Court answer the above pronouncement. In *Rodoni vs. Hoskin* (Montana), 355 Pac. 2nd, 296 (1960), at 299:

“We decline to follow the holding of *Butigan vs. Yellow Cab Co.*, *supra*, and conclude that the holding of *Lucero vs. Torres* (New Mexico) is better reasoned. It is our opinion that an instruction as to unavoidable accident could help the jury to understand the legal concepts involved in an appropriate case and would not confuse them or hinder them in reaching a just conclusion. However, an instruction as to unavoidable accident should be used with care and only allowed when the facts warrant it. *It might be appropriate where there was surprise, sudden appearance and reasonably unanticipated presence of a pedestrian*, as was stated in the *Lucero* case.”

In *Lucero vs. Torres* (1960), 67 N.M. 10, 350 Pac. 2nd 1028, the New Mexico Supreme Court also rejected the California holding in the *Butigan* case, stating:

“We do not mean to say that every motor vehicle accident case warrants the giving of an unavoidable accident instruction. On the other

hand, the very nature of some of the motor vehicle cases, such as this, suggests the genuine questions of mere accident or unavoidable accident, giving foundation for the instruction. *A prominent feature may be one of surprise, sudden appearance and reasonably unanticipated presence of a pedestrian, combined with circumstances which present a fair issue as to whether the failure of a driver to anticipate or sooner to guard against the danger or to avoid it, is consistent with a conclusion of his due care.* In such cases, the trial Courts are inclined to grant the instruction on unavoidable accident and their action in so doing is generally approved by the Appellate Courts (citing precedents from many jurisdictions. (Above emphasis added).

In the case at bar, defendants' entire defense was based on the defense of unavoidable accident, of which the elements of reasonable foreseeability under the circumstances, and the presence of sudden peril from which defendant could not extricate himself, are necessary adjuncts.

Defendant testified that he was driving within the posted speed limit; following the cars ahead at a safe distance; that it was wide open country where no intersecting highways were to be expected; that he, as a

reasonable driver, should not be required to anticipate that a vehicle ahead would run out of gas, or even if it did so, it would be in an unlikely area where not even the tail lights of the cars ahead would be visible; that when he reached the crest of the crucial hill, the nearest vehicle was only 100 feet distant; that an opposite bound car prevented him from swerving; that the distance of 100 feet made it impossible to stop (as verified by defendant's expert witness, Laub (T-208-214)).

Certainly, as stated in the *Lucero* case, *supra*, the elements of "surprise", "sudden appearance", "reasonably unanticipated presence of danger", are present and "combined with circumstances which present a fair issue as to whether the failure of the (defendant) to anticipate or sooner to guard against the danger or to avoid it, is consistent with a conclusion of due care."

How could a panel of laymen, with no understanding of the above principles, and with no instructions from the Court, even be expected to take the above defenses into consideration from the mere fact that they were instructed on the meaning of negligence?

In 65 ALR 2nd, the annotation summarizes the various theories adopted by the different jurisdictions. We submit, that under any of them, defendants in the case at bar, were entitled to the defense. These theories are listed as follows:

At page 32:

There must be evidence in the record which would give legal support to a finding that the occurrence complained of, was of the nature indicated in the instruction.

At page 43:

There must be evidence before the jury that the misadventure complained of, resulted from some cause other than negligence of one of the parties.

At page 48:

The evidence must present a specific theory under which the accident could have happened notwithstanding the fact that all the parties exercised such degree of care as is required by law.

At page 49:

Evidence showing the presence of any agency or factor over which the parties had no control and which, except by the exercise of *exceptional foresight*, they could not have predicted.

We earnestly submit, therefore, that if a new trial is necessary, defendants are entitled to have their defense fairly submitted to a jury.

CONCLUSION

It goes without saying, that trials of law suits are expensive for the litigants. Trials, Appeals, and re-trials give rise to the layman's axiom that in a law suit, "everyone loses but the lawyers," a misconception which the Bar has been combatting for decades.

It is for the above reason, that the defendants here move this Court for an Order reinstating the jury verdict, which in fact is in favor of the plaintiff. The parties have had their day in Court; the jury has rendered its verdict, and the defendants, despite the several errors committed against them, are willing that the litigation be closed.

But if it be necessary, the defendants are certainly entitled to a fair trial, wherein their defenses are fairly presented to a jury.

Respectfully submitted,

LOUIS E. MIDGLEY,
*Attorney for Defendants
and Appellants.*