

1962

Roy James Barnhill dba Zions Furniture Upholstering v. Young Electric Sign Company : Brief of Appellant

Utah Supreme Court

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Ray, Quinney & Nebeker; Stephen B. Nebeker; Attorneys for Respondent

Horace J. Knowlton; Attorney for Appellant;

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IN THE SUPREME COURT 1962

of the
STATE OF UTAH

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ROY JAMES BARNHILL,
dba ZIONS FURNITURE
UPHOLSTERING,

Y 4 - 1962

Plaintiff-Appellant,

Clerk, Supreme Court, Utah

vs.

No.
9591

YOUNG ELECTRIC SIGN
COMPANY, a corporation,
Defendant-Respondent.

APPELLANT'S BRIEF

Appeal from the Judgment of the
3rd District Court for Salt Lake County
Hon. Aldon J. Anderson, Judge

Horace J. Knowlton
214 Tenth Avenue
Salt Lake City, Utah
Attorney for Appellant

Stephen B. Nebeker of
Ray, Quinney & Nebeker
Deseret Building
Attorneys for Respondent

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IN THE SUPREME COURT
of the
STATE OF UTAH

ROY JAMES BARNHILL,
dba ZIONS FURNITURE
UPHOLSTERING,

Plaintiff-Appellant,

vs.

YOUNG ELECTRIC SIGN
COMPANY, a corporation,

Defendant-Respondent.

No.
9591

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action for damages to the plaintiff's business and goods caused by the negligence of the defendant in the operation and repair of an electric sign over the building occupied by the plaintiff.

DISPOSITION IN LOWER COURT

The case was tried to a jury. From a directed verdict in favor of the defendant, taking the case from the jury, plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment and judgment in his favor as a matter of law, or that failing, a new trial.

STATEMENT OF FACTS

Plaintiff operated the Zions Furniture Upholstering business at a place known as Parkin Junction, across the road from Slim Olson's Service Station in Bountiful, Utah, in a building over which the defendant operated and maintained a large neon and electric sign. In the early morning of October 30th, 1959, during a high wind, the building, including the business and goods of the plaintiff, was completely destroyed by fire. The fire started on the roof of the building in the vicinity of the sign. A disturbance was observed in the sign at the time a fire was seen on the roof of the building and before the fire had reached the inside of the building. The electric and neon sign was completely within the control of the defendant, whose workmen were on the roof of the building late the night before the fire, moving and repairing parts of the sign. Each side of the sign was fed by 110 volts of electricity, which was

boosted by transformers to a voltage as high as 16,000. Part of the sign was dangling from electric wires at a place where the roof would have been. The plaintiff suffered damages in the sum of approximately \$25,500 as a result of the fire.

ARGUMENT

Point 1. The case should have gone to the jury on the doctrine of *Res Ipsa Loquitur*.

The neon and electric sign was an object of instrumentality wholly within the control of the defendant. (R. 16, 93 and 102). *Moore vs. James*, 5 U 2nd 91, 297 P 2nd 221.

The fire started on the roof of the building in the vicinity of the sign. Mr. Mendenhall (R. 33) a driver for the Greyhound Bus, drove past the building going north shortly before the building was consumed and saw no fire on the inside of the building. He could not have seen a fire of the size described by Mr. Gayhart (R. 51) on the roof of the building because of the fire-wall and the slope of the roof. Mr. Gayhart, on the other hand, driving a Greyhound bus toward the south, was able to and did see a fire on the roof of the building shortly before the building was enveloped in flames, showing that it was more probable that the fire was caused by the sign than from the inside of the building. *Wightman v. Mountain Fuel Supply Company*, 5 Utah 2nd 373, 302 P 2nd 471.

Point 2. The trial court erred in refusing to submit the case to the jury on the question of Circumstantial Evidence.

There had been other severe winds in the vicinity of the building before the 30th of October, 1959, and during the time that the defendant had been maintaining its sign on the building (R. 16). The windows of the building had been blown out three different times and the defendant knew or with the exercise of ordinary care should have known of the probability of such storms.

The transformers in the defendant's sign boosted the power from 110 to 16,000 volts and created an instrumentality capable of starting the fire (R. 29).

There were agents of the defendant's working on the sign the day and night before the fire, repairing changing or adjusting the sign (R. 19).

The fire actually started on the roof of the building and there was a disturbance in the sign (R. 55).

There was a part of the sign hanging by what appeared to be electric wires the morning after the fire, which would have rested on the roof had there been a roof there (R. 22 and 95).

From JAMES V. ROBERTSON, 39 U. 414, 119 P. 1068:

"A plaintiff suing for negligence need merely show a state of facts from which the jury may logically infer negligence, and, where the jury

believes plaintiff's evidence from which the inference of negligence may be deducted, the evidence ordinarily sustains a finding of negligence, though defendant disputes all of plaintiff's evidence."

From **BUSSE V. MURRAY MEAT & LIVE-STOCK COMPANY**, 45 Utah 596:

"No case should be taken from the jury unless it appears, as a matter of law, that no recovery can be had upon any view which can reasonably be drawn from the facts which the evidence tends to establish. (Cain v. Gold Mountain Mining Co., 71 Pac. (Mont.) 1004.) To hold otherwise would be to deprive a litigant of the right of trial by jury. (Nyback v. Lumber Co., 90 Fed., 776.)

and further from **BUSSE V. MURRAY MEAT & LIVE STOCK CO.**, 45 Utah 596:

"True, negligence as well as how the accident occurred may be inferred from known or established facts and circumstances. Such inference must, however, be based upon some known or established fact or facts and cannot be conjectured or inferred from other inferences. In failing to show negligence, we think this case comes squarely within the principle which controlled the case of **Quinn v. Utah Gas & Coke Co.**, 42 Utah 113; 129 Pac. 362; 43 L.R.A. (N.S.) 328. See, also 3 Elliott on Evidence, Section 2503.

" . . . The controlling question, therefore, is what were plaintiffs required to prove in order to make out a prima facie case for the jury?

“The writer is not aware of any better statement of the law in that regard than is contained in 1 Shear. & Redf. Neg. (Sixth ed.) section 58, where the author states the rule in the following language:

“The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant and of resulting injury to himself. Having done this, he is entitled to recover, unless the defendant produces evidence sufficient to rebut this presumption. It has sometimes been held not sufficient for the plaintiff to establish a probability of the defendant’s fault, but this is going too far. If the facts proved make it probable that the defendant violated his duty, it is for the jury to decide whether he did so or not. To hold otherwise would be to deny the value of circumstantial evidence. As already stated, the plaintiff is not bound to prove his case beyond a reasonable doubt; and, although the facts shown must *be more consistent with the negligence of the defendant than with the absence of it*, they need not be inconsistent with any other hypothesis. It is well settled that evidence of negligence need not be direct and positive. Circumstantial evidence is sufficient. In the nature of the case, the plaintiff must labor under difficulties in proving the fact of negligence; and as that fact itself is always a relative one, it is susceptible of proof by evidence of circumstances bearing more or less directly upon the fact of negligence; and as that fact itself is always a relative one, it is susceptible of proof by evidence of circumstances bearing more or less directly upon the fact of negligence, a kind of evidence which

might not be satisfactory in other classes of cases open to clearer proof. This is on the general principle of the law of evidence which holds that to be sufficient or satisfactory evidence which satisfies an unprejudiced mind."

"A careful reading of the foregoing statement of the law which emanates from two of the ablest, as well as the most careful text-writers upon the subject, will, we think, convince anyone that the facts and circumstances of this case are not such that a court would be justified to declare as matter of law that there is no substantial evidence upon which a jury could base a finding of negligence on the part of the defendant in laying the two tracks so close together.

"At most, the question of negligence may be said to be doubtful; and, where such is the case, it has become elementary in this jurisdiction, as well as in many others, that the question is for the jury." *Johnson v. Silver King Consol. Mining Co. of Utah*, 54 Utah 34.

And from *MORBY V. ROGERS*, 122 U. 540, 252 P2 231, 1953:

"Father for death of 13 year old son, only evidence by defendant's drivers of the car. Boy on bike. "It is not new or novel principle that acts of negligence may be proved by circumstances. Certainly, in many cases, particularly where the only eye witnesses are parties having an interest in the action, such circumstances are the only means by which certain facts may be discovered. In such cases it is proper that such circumstances should be evaluated by the jury in whose province lies the power to believe or disbelieve the testimony and evidence, to observe

the demeanor of the witnesses, and then draw such reasonable conclusions from the whole record as may be warranted. "We are of the opinion that reasonable minds could find negligence on the part of the defendant from the evidence in the record. The trial court did not err in letting the question of defendant's negligence go to the jury under the evidence."

From CORPUS JURIS SECONDUM, P. 243,
Page 1100:

"Direct or positive negligence is not necessary but defendant's negligence may be established by circumstantial evidence and by proof of facts from which negligence may reasonably be inferred . . . " That no other conclusion can be fairly or reasonably drawn from them" seems to be the test."

and AM JUR., 38, 993, Paragraph 297:

"Rejection of the doctrine of *res ipsa loquitur* does not mean that negligence may not be established by circumstantial evidence as well as by direct evidence."

Respectfully submitted,

HORACE J. KNOWLTON
Attorney for Appellants