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

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

ROY JAMES BARNHILL d/b/a

Zions Furniture Upholstering

Plaintiff and Appellant

vs.

YOUNG ELECTRIC SIGN COMPANY,

a corporation

Defendant and Respondent

FILED

JUN 24 1962

Supreme Court, Utah

Case No. UT-1

9591

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BRIEF OF RESPONDENT

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

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a corporation

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Case No.
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BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

Roy James Barnhill dba Zions Furniture Upholstering hereinafter referred to as "Plaintiff" brought this action against Young Electric Sign Company, a corporation, hereinafter referred to as "Defendant." Plaintiff claimed that Defendant was negligent in the maintenance and repair of an electric sign which was located on top of the building occupied by Plaintiff and as a result, Plaintiff's business and goods were destroyed by a fire on October 30, 1959.

At the close of the Plaintiff's case the Court granted a motion for a directed verdict on the ground that there was no reasonable basis on which a jury could find that defendant caused the fire or that defendant was negligent.

STATEMENT OF FACTS

In the following statement of facts we will attempt to present the material facts most favorable to the plaintiff, whether disputed or not, together with the undisputed facts which favor the defendant.

Plaintiff owned and operated a furniture and upholstery business in a building located at 2000 South Main, Bountiful, Utah. (R. 21) The building occupied by the plaintiff is in the "Y" at Parkin Junction, across the highway from the Slim Olson Service Station in Bountiful, Utah. Defendant had installed and maintained an electric sign on top of the building with a "Cream O'Weber" advertisement on the south side of the sign and a "Hod Sanders Clover Club Potato Chips" advertisement on the north side of the sign. (See plaintiff's exhibit P-1) The building occupied by Plaintiff was completely gutted by a fire which occurred during the early morning of October 30, 1959. (R. 30)

Lynn Mendenhall, a truck driver for Pacific Intermountain Express, testified that he drove past the building occupied by the plaintiff about 2:15 or 2:25 A.M. on the morning of October 30, 1959. (R. 45) Mendenhall stated he did not remember whether the sign was on and there was nothing in the building that attracted his attention. (R. 46) Mendenhall stated there was a severe wind on the night of October 30, and that he called his home

office to advise it was unsafe for unladen vehicles to travel on the highway because three trucks had been blown over by the wind. (R. 46)

Elmer Lee, a journeyman lineman for the Utah Power and Light Co. was on a trouble call in Val Verda (a mile and a half to two miles northeast of Slim Olsen's Service Station) at about 3:30 A.M. on October 30th, 1959, when he noticed a kind of orange color around Slim Olsen's. (R. 48) When he arrived at the Parkin Junction he saw the building engulfed in a raging inferno. (R. 49) *Lee testified that the sign was definitely off when he went to it.* (R. 51) He also stated there was a severe wind blowing debris and smoke and tinder across the highway toward the west. (R. 49)

John Meyer, the nightman for Slim Olsen's Service Station saw the fire between 3:00 and 4:00 A.M. on the morning of October 30th, 1959. (R. 52) Because of the terrific wind Meyer had been out watching the signs and the roof of the warehouse at the Service Station, when he happened to glance over and saw the flames in the building. (R. 53) When Meyer first saw the fire it appeared to be inside the building. (R. 54) Meyer testified that he did not think the sign was on when he noticed the fire. *He stated the sign turned off around midnight or shortly thereafter.* (R. 54)

Ralph Gayhart, a bus driver for Greyhound Bus Co. drove past the Parkin Junction heading South toward Salt Lake at approximately 2:45 A.M. on the morning of October 30, 1959. (R. 64) Gayhart stated as he approached the Junction he saw a "disturbance" on the sign.

He also saw a fire on top of the building. (R. 64-65) Gayhart testified he could not say whether the fire was underneath the sign or not. (R. 65) Gayhart said there was a terrific wind on the night of October 29-30th and it was all he could do to keep the bus on the road. (R. 68)

David Knapton, Raymond Fivas and Helen Hunt, employees of plaintiff, all testified that they arrived at work between 8:00 and 9:00 A.M. on the morning of October 30, 1959 and that the interior of the building had been completely destroyed by the fire. They all testified that on October 29, 1959, the day before the fire, defendant's employees had been out working on the sign. (R. 90, 104, 113) Knapton and Fivas testified there was something hanging down from the sign when they arrived at the building the morning after the fire. (R. 91, 105) Knapton had no judgment as to when the object came down. (R. 96) Fivas testified that defendant's employees came out the morning after the fire and cut down the object hanging from the sign. (R. 106)

Knapton and Fivas said they used tobacco while on the job. (R. 98, 108) Knapton testified there was a gas furnace located in the front of the building in the showroom. (R. 98) He also admitted that they had just stocked up on matting, stuffing and cotton used in the upholstery business. (R. 100) He stated they had quite a lot of flammable finishing equipment in the eastern part of the building. Helen Hunt admitted there was a stove in the building beside the furnace. (R. 114) She said the stove had not been lit for a month but it was fired up in September or October. (R. 115) Helen Hunt stated she turned the gas furnace down when she left the building

on the evening of October 29, 1959. Fivas admitted that a windstorm had blown out the windows in the building two or three times before. (R. 108)

James Barnhill, the plaintiff, testified he arrived at the building at about 8:00 on the morning of October 30, 1959. (R. 32) Barnhill testified that the item he saw hanging down from the sign was about eight or nine inches across and about six to eight feet long. (R. 130) Barnhill did not know when the object came down from the sign. (R. 130)

The Court granted defendant's motion for a directed verdict after the plaintiff rested.

POINT I

THERE WAS NO EVIDENCE FROM WHICH THE JURY COULD FIND THAT THE SIGN CAUSED THE FIRE.

There is no evidence whatsoever in this record to show that defendant's sign caused the fire. It is fundamental that plaintiff must produce some competent evidence from which the jury could find that the sign caused the fire before he is entitled to go to the jury. He failed to produce any evidence of causation. The uncontroverted evidence shows that the cause of the fire is unknown. The building was completely destroyed during a violent windstorm in the early morning. The damage occurred before anyone could examine the interior of the building. *Defendant is not required to show the cause of plaintiff's damage. That burden belongs solely to the plaintiff.* The facts adduced by the plaintiff's witnesses do not reach the dignity of circumstantial evidence as they produced nothing more than mere possibilities. This court has held that a jury may not base a verdict on speculation or conjecture. *Wightman v. Mountain Fuel Supply Co.* 5 Utah 2d 373, 302 P. 2d 471 (Utah 1956); *Jackson v. Colston et al* 116 Utah 295, 209 P. 2d 566 (Utah 1949).

The fact that there was high voltage in the sign proves nothing because the uncontroverted evidence showed that the sign shut off around midnight. *The fire was not discovered until approximately three hours after the sign went off which would raise the presumption that the sign had nothing whatsoever to do with the fire.* There were many instrumentalities which could have caused the

fire, including the gas furnace, the stove, cigarette butts left by plaintiff's employees and any number of causes that would be attributable to the violent wind.

The fact that defendant's employees were working on the sign the day before the fire proves absolutely nothing. This fact would raise the presumption that the sign was left in good condition. The presence of plaintiff's employees in the building the day before the fire with the gas furnace on is a fact more probative of the cause than the presence of defendant's employees. The fact that the fire was seen on the roof of the building and there was a disturbance on the sign does not show the cause of the fire. *There was no evidence that the fire started on the sign. The undisputed evidence proved that the sign shut off at midnight and was off when the fire was discovered.* (R. 51-54) The fact that the fire was seen on the roof is no indication of the cause of the fire, particularly in view of the fact that the building had partitions and rooms which would have blocked outside vision of a fire inside the building. (R. 131)

The evidence that part of the sign was hanging down after the fire is not probative of the cause in the absence of evidence as to when the part fell. *If the part fell down after midnight when the sign was off, it would not have carried any electricity and obviously could not have started the fire.* The weather report (plaintiff's exhibit P. 7) shows that the strongest winds occurred during the early morning of October 30, 1959, after the sign was shut off. It is most likely that part of the sign fell after the electricity was off and after the fire had damaged the sign.

Plaintiff's facts do not constitute any evidence on which a jury could find that the sign caused the fire. The wisdom of the rule that a jury should not be allowed to speculate is demonstrated by the facts of this case. It can be argued that it is possible that the windows in the building were blown out by the wind, that the gas furnace turned on, overheated and caused the fire. Or it could be argued that one of defendant's employees left a cigarette near some flammable material that was fanned into a fire by the wind. There is the further possibility that the electric power lines running into the building could have been broken by the wind, shorted and caused the fire. There are numerous possibilities that are more probative of the cause of the fire than defendant's sign.

Plaintiff might just as well have brought suit against one of his employees or Utah Power and Light Co. as point a finger of blame at this defendant.

Plaintiff produced no evidence to show that the fire started in the sign. He completely failed to show that anything from the sign came in contact with the roof at any time or if it did, that it was charged with electricity. Plaintiff's evidence proved that his property was destroyed by a fire that occurred during the early morning of October 30, 1959. An examination of the record shows absolutely no evidence of the cause of the fire.

The trial court properly ruled that the plaintiff failed to make out a case for the jury.

POINT II

RES IPSA LOQUITUR IS NOT APPLICABLE IN THE ABSENCE OF COMPETENT EVIDENCE AS TO THE CAUSE OF THE FIRE.

Plaintiff cannot use the doctrine of *res ipsa loquitur* as a means of getting the question of causation to the jury. Until the plaintiff has shown by some competent evidence what caused the fire, we do not reach the question of the applicability of *res ipsa loquitur*. *Res ipsa loquitur* is limited to the question of whether the defendant was negligent—it has nothing to do with the element of causation.

In the case of *Jackson v. Colston supra* an action was brought to recover damages for the alleged burning of the lower leg of the plaintiff, claimed to have been inflicted while she was undergoing reducing treatments administered under the direction of the defendants. The trial court granted a motion for a directed verdict on the ground that there was nothing more than speculation as to the cause of the plaintiff's injuries. On appeal, the plaintiff claimed that the doctrine of *res ipsa loquitur* should apply, which, with the medical testimony, was sufficient to require the court to submit the case to the jury. This court affirmed the trial court holding that the doctrine of *res ipsa loquitur* could not be used as a vehicle to get the case to the jury, in the absence of competent evidence of the cause of the injuries. This court said:

“However, a proper understanding of the nature and scope of the doctrine (*res ipsa loquitur*) makes it unnecessary to determine whether the rule

should be applied in the case at bar. In any action for personal injuries arising out of alleged negligent acts or omissions of the defendant, it is incumbent upon the plaintiff to prove first, that the defendant was negligent and, second, that the defendants' negligent acts or omissions proximately caused the injury sustained by the plaintiff. In a proper case, the doctrine of *res ipsa loquitur* may relieve the plaintiff of the duty of showing specific acts of negligence, but the authorities unanimously hold that the causal connection between the alleged negligent acts and the injury is never presumed and that this is a matter the plaintiff is always required to prove affirmatively. *Res ipsa loquitur is limited to the question of whether the defendant was negligent—it has nothing to do with the element of causation.* * * * the rule is stated as follows: * * * In every personal injury case the plaintiff must establish two propositions: First, that the defendant was negligent; and second, the causal connection between the negligence and the injury complained of. Negligence is sometimes presumed, as in cases where the doctrine of *res ipsa loquitur* applies, or where there has been a violation of a statutory duty, but the proximate cause of an injury is never presumed. On this question there is no conflict of authority.” (Italics ours)

In *Farmers Home Mutual Insurance Company vs. Grand Forks Implement Company* 55 NW 2d 315 (North Dakota 1952) the Supreme Court of North Dakota held that the doctrine of *res ipsa loquitur* was not available to establish proximate cause. In the Farmers case a fire began in defendant's machine shop and spread to and damaged the place of business of the plaintiff's insured. At the time the fire was discovered, the defendant's em-

ployees were cleaning a generator and a motor by using gasoline and a brush. There was some evidence that the fire may have been caused by a short circuit. The plaintiffs claimed the doctrine of *res ipsa loquitur* was available to show the actual motivating source of the fire. The court refused to apply the doctrine stating:

“Plaintiffs are clearly in error in their theory that the principle of *res ipsa loquitur* is available to establish proximate cause. In proper cases, where proximate cause is established, the doctrine of *res ipsa loquitur* comes into play to establish *prima facie* proof of negligence. The doctrine ‘has no application to proximate cause and does not dispense with the requirement that the act or omission on which defendant’s liability is predicated be established as the proximate cause of the injury complained of; * * *’ *the doctrine of res ipsa loquitur does not raise any presumption as to what did occasion the injury, but, after the evidence has established the thing which did occasion the injury, then, under certain circumstances, this doctrine will raise a presumption of negligence.*” (Italics ours)

In *Kendall vs Fordham* 79 Utah 256, 9 P. 2d 183 (Utah 1932) the Supreme Court of Utah held the doctrine of *res ipsa loquitur* did not apply to a case involving damages caused by a fire. Here an action was brought to recover damages for the alleged negligence of the defendant in causing a fire which burned up a wheat field of about 93 acres belonging to the plaintiffs. The defendants drove their car on plaintiffs wheat field and left it to go talk to one of the plaintiffs. After an hour or two when the defendants returned to the car they discovered it was burn-

ing. In attempting to put out the fire, a burning pad was thrown on the wheat field thereby causing the fire. The Court stated there was no evidence in the case to show what started the fire in defendant's automobile, and therefore the Court was in error in permitting the jury to speculate as to its origin. The Court said:

"No claim is here made, nor can the claim be successfully maintained, that the doctrine of *res ipsa loquitur* has any application to the facts disclosed by the evidence in this case, nor can it be said that parking an automobile on or near dry June grass adjoining a wheat field is an act of negligence. There is likewise no evidence that the automobile was smouldering with fire when the defendant and Mr. Carter left it to go over to where one of the plaintiffs was engaged in repairing his combine harvester. The court was in error in submitting these alleged acts of negligence to the jury."

Dean Prosser in his work on Torts states that *res ipsa loquitur* cannot be invoked to permit the jury to speculate on causation.

"It is never enough for the plaintiff to prove merely that he has been injured by the negligence of someone *unidentified*. Even though there is beyond all possible doubt negligence in the air, it is still necessary to bring it home to the defendant. On this too the plaintiff has the burden of proof by a preponderance of the evidence; and in any case where it is clear that it is at least equally probable that the negligence was that of another, the court must instruct the jury that the plaintiff has not proved his case. *The injury must be traced to a*

specific instrumentality or cause for which the defendant was responsible, or it must be shown that he was responsible for all reasonably probable causes to which the accident could be attributed." (Italics ours) Prosser on Torts 2d. Ed. p. 204

Plaintiff has cited the case of *Wightman v. Mountain Fuel Supply Co. supra* as authority for the contention that there is a greater probability that the sign caused the fire than some other cause. In the Wightman case a gas explosion destroyed the plaintiff's house and killed Mr. Wightman. It should be noted that in the Wightman case *the cause of the explosion was established*. The gas had definitely caused the explosion—the issue was whether the explosion occurred in the area for which the gas company was responsible or in the area for which the Wightmans were responsible. The court said there must be a *reasonable basis shown in the evidence from which a jury could conclude that the explosion occurred in the area for which the gas company was responsible*. In the instant case there is *no evidence as to the cause of the fire*. This court refused to apply *res ipsa loquitur* and stated:

"This brings us to the issue, crucial to the plaintiff's case, whether her evidence was sufficient upon which to base a finding that the source of the explosion was in the area for which the gas company was responsible. *Such proof cannot rest upon speculation or conjecture, nor upon a mere choice of probabilities*. To give rise to a jury question there must be something in the evidence from which the jury could reasonably believe that there is a greater probability that the explosion occurred in that part of the installation than in the pipes or

appliances installed by and under the care of the Wightmans. Only if there is some such basis in the evidence would there be any foundation to permit the jury, under *res ipsa loquitur*, to infer that some defect or lack of due care in the gas company's part of the installation caused the leak and the resulting explosion." (Italics ours)

The court further stated:

"Nevertheless, a finding of liability of damages must rest on something substantial. We believe that the trial court correctly decided that there was no reasonable basis shown in the evidence which would justify a conclusion that there was any greater likelihood that the explosion occurred in the gas company's part of the installation than in the house piping or appliances for which the Wightmans were responsible. It thus did not err in refusing to submit the matter to the jury."

Even when the cause of the injury is known this Court has been reluctant to apply the doctrine of *res ipsa loquitur*. In the case of *Matievitch v. Hercules Powder Company*, 3 Utah 2d 283, 282 P. 2d 1045 the plaintiff was injured by a cap and stick of dynamite of defendant's manufacture that exploded as he placed them in a drill hole. This court held the doctrine of *res ipsa loquitur* was not applicable when there was no evidence as to how or why the dynamite exploded, no evidence as to when or how it was manufactured and none as to how or by whom it had been handled or treated prior to use. There was evidence that the plaintiff handled the dynamite in a manner other than as recommended by instructions which accompanied the containers in which they were packaged.

The court rejected plaintiff's theory of *res ipsa loquitur* and made the following statement:

"Plaintiff urges that the doctrine of *res ipsa loquitur* is applicable under the circumstances recited. We cannot agree. To do so would be to impose absolute liability and insurability upon manufacturers of explosives and perhaps most any other commodity. *To do so would be to extend the fact or fiction of control necessary to invoke the doctrine to an unreasonable, impractical and unrealistic degree, where mere injury could dispense with plaintiff's burden of proving a defendant's negligence, even where it would be impossible for defendant to show freedom therefrom.*"
(Italics ours)

Plaintiff is attempting to use the doctrine of *res ipsa loquitur* as a crutch to get the matter of causation to a jury. The courts and text writers have uniformly held that causation must be based on some competent evidence and cannot rest on speculation. A gas furnace, a stove, smoking material, all present in a building heavily stocked with flammable materials, coupled with a violent wind-storm which very likely blew out the windows—these factors linked together demonstrate the speculative elements surrounding this fire.

Plaintiff's failure to produce any testimony that would support a verdict that the sign caused the fire precluded the submission of the case to the jury.

CONCLUSION

The building occupied by the plaintiff was destroyed by a fire which occurred in the early morning during a violent windstorm. *There is no evidence as to the cause of the fire.* There was no evidence whatsoever that defendant's sign caused the fire. As this court stated in the *Wightman* case *supra*.

“Nevertheless a finding of liability for damages must rest on something substantial.

* * *

Such proof cannot rest upon speculation or conjecture nor upon a mere choice of probabilities.”

The undisputed facts in this case show that there is no reasonable basis on which a jury could find that defendant caused the fire or that defendant was negligent.

The order granting the motion for a directed verdict was proper and should be affirmed.

Respectfully submitted,

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