1967

Sharon Roberts v. Trackwork Construction Company : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

SHARON ROBERTS

vs.

TRACKWORK CONSTRUCTION COMPANY

Case No. 10862

BRIEF OF APPELLANT

Appeal from Judgment on Verdict of the 3rd Judicial District in and for Tooele County, State of Utah

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a judgment based on a special verdiuct of a jury wherein a finding was made in favor of the Defendant and against the Plaintiff, and from the rulings of the Court, denying Plaintiff's motion for a directed verdict, denying certain of Plaintiff's requests for instructions and from an Order denying Plaintiff's motion for a new trial.

DISPOSITION IN THE LOWER COURT

On November 9, 1965, the Plaintiff and appellant herein filed a Complaint against the Defendant for in-

juries she sustained when she drove her automobile along a road located upon the Tooele Army Depot, Tooele County, Utah, and across certain railroad tracks which intersected said road and which tracks were then and there repaired by the Defendant (R-1). Plaintiff alleged in her Complaint that the crossing was left unattended while being so repaired, with no warning signs to warn Plaintiff or other motorists using the road of the dangerous conditions of the road while so being repaired. Plaintiff alleges certain injuries sustained when the car which she was driving struck one of the rails of said track which was then and there projecting three or four inches above the other track upon said intersection, thereby creating a hazard; that the bumper of her car struck said rail, suddenly stopping her car and throwing her against the steering post with such force and impact that her lower jaw was broken; her teeth were knocked loose and had to be removed and other injuries suffered. Plaintiff alleges in substance that she was using the road in a lawful manner and driving at a rate of speed not in excess of 12 miles per hour. Defendant in answer denied the allegations of Plaintiff's complaint and alleges negligence and contributory negligence on the part of the Plaintiff (R-2). After certain discovery methods as provided by law had been taken by both of the parties, a pre-trial conference was held on the 9th day of June, 1966, in which the issues were defined as hereinabove set forth (R-7). This case came on for trial the first day of December, 1966. Plaintiff specifically requested in his request for instructions that the Court direct the jury to return a verdict in favor of the Plaintiff and against the

Defendant and leave to the jury only the question of the extent of the damages to the Plaintiff (R-16).

The Court submitted to the jury six propositions to be answered in its special verdict (R-12). The substance of the findings of the jury in the answer to these propositions was a general verdict in favor of the Defendant and against the Plaintiff. This verdict waus returned on December 2, 1966 (R-12). Thereafter the Plaintiff filed her motion for a new trial and set forth certain grounds in support of said motion (R-20). The Court thereafter on January 9, 1967, denied Plaintiff's motion. Plaintiff was not informed of the ruling until most of her time for appeal had gone by, but the Court thereafter, based upon Plaintiff's motion and affidavit (R-21 & 22), extended Plaintiff's time for appeal (R-23). Plaintiff thereafter filed Notice of Appeal from the rulings of the Court, both at the time of the trial as hereinafter set forth, and from the Court's denial of her motion for new trial.

RELIEF SOUGHT ON RULING

The appellant asks this Court to reverse the ruling of the trial Court denying plaintiff's motion for a new trial, based upon the trial Court's refusal to grant a new trial for the reason set forth in her motion (R-20), and for the Court's refusal at the time of trial to direct a verdict in favor of the Plaintiff and against the Defendant and leave to the jury only the question of damages. Plaintiff seeks to have this Court make and enter its order remanding this cast to the District Court for a new trial.

STATEMENT OF FACTS

The Defendant and Respondent herein was, on and prior to the 5th day of November, 1965, engaged by the United States Government in repairing and replacing certain railroad tracks and crossings at the Tooele Army Depot in Tooele County, Utah; that on the 5th day of November, while repairing the tracks it left one rail of the tracks projecting from three to four inches above the other rail and left the crossing otherwise in an unsafe condition for travel. The Plaintiff on said day was employed by the Tooele Army Depot, and in the course of her employment and in the discharge of her duties was traveling west along said road at the rate of speed of approximately twelve miles per hour (TR-4, line 6). The woman who was then and there riding in Plaintiff's automobile, Mrs. Irene Cherry, testified that Plaintiff was traveling about fifteen miles per hour (TR p. 29, lines 15-23). The only other individual witness was one Clyde Moore, who testified that the Plaintiff was traveling between 10 and 15 miles per hour and not in excess of fifteen miles per hour (TR, p. 44, lines 27-29). When Plaintiff attempted to cross the rail which was left projecting above the other rail, as hereinabove described, the car she was driving and particularly the bumper thereof, caught under the rail and stopped the car suddenly, throwing her against the steering wheel of the car, thereby fracturing her lower jaw and loosening the teeth of her lower jaw to the point where they all were required to be removed. (TR, p. 4, lines 9-11.) Evidence was introduced showing that the track and particularly the rail in question had been left projecting three or four inches across the road and intersection and unattended

and without any warning signals or other devices to warn the Plaintiff and other users of the road of the danger which the Defendant had created (TR, p. 11, lines 27-30). The jury in its special verdict in response to the Proposition #3, "The Defendant was negligent in that the Defendant did not warn the Plaintiff by signs or otherwise of the danger in crossing the tracks, answered "True." Further evidence was introduced by medical testimony of the injuries, pain and suffering of the Plaintiff and of the medical treatment which she was required to undergo (TR, p. 36-42). It was also shown at the time of the trial that the Defendant had placed gravel upon the crossing as a temporary means of making the crossing passable, which gravel had been partially thrown out of the location between the rails and the bed (TR, p. 90, line 1). There was also evidence introduced that the speed limit upon said road was 30 miles per hour (TR, p. 22, line 1).

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN ITS REFUSAL TO DIRECT A VERDICT IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT.

The trial Court erred in its refusal to direct a verdict in favor of the Plaintiff and against the Defendant and leave for its consideration only the extent of damages sustained by the Plaintiff. In this case there was no evidence offered in support of Defendant's position that the Plaintiff was guilty of contributory negligence. There was no evidence of excessive speed on the part of the

Plaintiff. The only testimony of the eye witness was by the Plaintiff, Mrs. Cherry, the passenger, and Mr. Clyde Moore who saw the accident. They each testified that the speed of the car did not exceed fifteen miles per hour. In this regard the testimony of the Defendant's witness, Mr. Kay Hanson, should be noted. His testimony reflects that at most his investigation was of a casual nature (TR. 101, lines 2 and 3). Further, that his computations were not exact and were, in fact, planned so as to come out even.

Mr. Hanson testified that if the car were going ten to fifteen miles per hour, it could not have lifted the rail. He therefore concludes that the car must have been going faster. His computations are based on a premise that the rail was down. Mr. Hanson testified that it would be necessary for 200,000 pounds of force to pull up the 69 feet of rail and spines. In short, what Mr. Hanson has done is to assume the result he wants and work his calculations around that result.

The Defendant's next witness, Kenneth Schefski, testified that a car in normal working condition would not bottom or touch the bumper to the road. This witness again assumes a speed of at least twenty-five miles per hour and states that the slower a car travels, the less likely it would be to bottom out.

The evidence taken as a whole, would indicate that a car traversing this crossing at a speed of from twelve to fifteen miles an hour would not bottom out. The only possible conclusion that a reasonable mind could draw, is that the rail in question was left so high as to constitute a hazard to vehicular traffic.

POINT 2

THE TRIAL COURT ERRED IN ITS REFUSAL TO GRANT PLAINTIFF A NEW TRIAL.

The Court erred in its refusal to grant Plaintiff's motion for a new trial. The same considerations which would require a directed verdict also compel a new trial. In both cases the moving party's evidence is such that it can lead to one conclusion. In neither case would the opposing party have sustained its burden of proof. In this case, there is no competent evidence that the Plaintiff failed to use due care and caution in the control and operation of her vehicle, nor could she, in the normal course of things, observe the danger which the Defendant had created. In short, there is no evidence to support the jury's findings. In such cases it is well settled that the trial Court has the power to set the jury's verdict aside and to grant a new trial. The rational is that the jury has either misconstrued he evidence, been confused, or has ignored the Court's instructions. To let a verdict stand where there is no competent evidence to support it, is to deny to the Plaintiff her right to trial by jury. In the case of Saltas vs. Affleck, 99 Utah 381, 105 Pac. 2d, 171, the Court held, "A new trial may be granted upon the Court's own motion when there has been such a plain disregard by the jury of the instructions of the Court on the evidence in the case as to satisfy the Court that the verdict was rendered under a misapprehension of such instructions or under the influence of passion or prejudice." Moffat, C. J., "While we so stated, we also held that the amount of the verdict is a matter exclusively for the jury. On the ground of adequacy of the verdict alone,

the Court may not interfere with the jury's verdict. However, if inadequacy or excessiveness of the verdict presents a situation that such inadequacy or excessiveness shows a disregard by the jury of the evidence or the instructions of the Court as to the law applicable to the case as to satisfy the Court that the verdict was rendered under such disregard or misapprehension of the evidence or instructions or under the influence of passion or prejudice, then the Court may exercise its discretion in the interest of justice and grant a new trial."

32 C.J.S., p. 116, Section 1042, "A verdict or finding must be based on the evidence and must be based on the facts proved. Under this well established rule, the verdict or finding cannot rest on surmise or speculation. Likewise, under the above mentioned well established rule a verdict or finding cannot rest on conjecture. Likewise, under the above mentioned well established rule, a verdict or finding cannot rest on guess, supposition, assumption, imagination, or suspicion. The evidence on which the verdict or finding is based must be competent, legal evidence, and must support every material fact; and where there is no evidence, or the evidence as to a material issu eis insufficient, the decision should be against the party having the burden of proof. The evidence must be sufficient to warrant a reasonable belief in the existence of those facts which the verdict or finding establishes; the verdict or finding must be grounded on a reasonable certainty as to probabilities arising from a fair consideration of the evidence, and not on mere possibilities.

While there is no set formula for determining the quantum of evidence required, each case being governed

by its own circumstances, the verdict or findings must be supported by substantial evidence. Under the above mentioned rule, according to the decisions, a scintilla of evidence is not sufficient."

See Seybold vs. Union Pacific Railroad Co., 121 Utah 61, 231 Pac. 2nd 174. "First, as to the question of lights on the caboose: Was there sufficient evidence for the jury to find it had no lights? We have no disagreement with the time-honored rule that if there is substantial evidence to support the conclusion of the trier of the fact, it will not be disturbed on review. But that means more than a mere scintilla of evidence. See 9 Wigmore, 3d Ed., Sec. 2494, for a discussion of the test to be applied to the quantum of evidence necessary to support a finding by the trier of fact. In that section, at page 296, he says,

"There was an old phrase that a mere scintilla of evidence was sufficient; but this has been abandoned by most courts."

Citing a plethora of cases. After referring to a variety of methods of phrasing the rule and a great many authorities, he concludes the section with this:

> "Perhaps the best statement of the test is: Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain."

We approve the rule thus stated by Mr. Wigmore. If there is any substantial competent evidence upon which a jury acting fairly and reasonably could make the finding, it should stand. But if the finding is so plainly unreasonable as to convince the court that no jury acting

fairly and reasonably could make the finding, it cannot be said to be supported by substantial evidence. See also 20 Am. Jr. 1033."

Dern vs. Carbon County Land Company, 94 Utah 76-75 Pac. 2nd 660. "A finding of fact cannot be based on surmise, conjecture, guess or speculation." Jensen vs. Howell, 75 Utah 64, 282 Pac. 1034. "In this jurisdiction the binding effect of findings of the trial court in law cases is different from that in equity cases. In the former, the findings, as a general rule, are approved if there is sufficient competent evidence to support them, and, ordinarily, are not disturbed, unless it is manifest that they are so clearly against the weight of the evidence as to indicate a misconception, or not a due consideration of it."

Spackman vs. Benefit Association of Railway Employees, 97 Utah, 91, 89 Pac. 2d, 490: Moffat, C. J., "A verdict of a jury may not be based upon testimony showing only possibility or such situations as requires a jury to base its verdict upon conjecture, speculation or suspense. Edwards vs. Clark, et al., 96 Utah, 121, 83 Pac. 2d 1021.

Valiotis vs. Utah-Apex Mining Company, 55 Utah 151, 184 Pac., 802, Pratt, D. J., "If it should appear that the evidence on which the verdict is based is so incredible or inherently improbable or so inconsistent with or contrary to natural laws or physical facts, as to impel but the one conclusion that the verdict is the result of mistake, prejudice, or passion, we might then very properly say that the verdict is not supported by substantial evidence, or that there is not a substantial conflict of evidence, and

therefore the lower court abused its discretion or erred in refusing to grant the new trial. In such a case we look into the evidence, examine its legal effect, and opposing logical tendencies, if any, not for the purpose of deciding the facts, as we may do in equity cases, but to determine whether or not the trial court erred in its application of fixed legal principles. Our power or authority to do so must, of course, be exercised cautiously; but the fact that an incautious exercise of such power may transcend our constitutional authority in cases at law to hear and determine questions of law only is not inconsistent with its existence. A question of law is never an abstract question. It arises only with respect to ascertained facts or their logical and legal tendencies as matter of proof. The inquiry then is: What are the facts? And, secondly, what is the legal principle applicable thereto? If the evidence, taken as a whole, be reasonably susceptible of opposite conclusions as to the existence or nonexistence of an ultimate fact, depending upon inferences to be drawn therefrom, or the weight to be given to the testimony of this or that witness, or set of witnesses, we must conclusively presume the fact to be such as will support the ruling which we are called upon to review; but if, after giving due consideration to the fact that the trial judge is better able to weigh conflicting evidence, the evidence be such nevertheless as to impel but one reasonable conclusion, and that as to a fact adverse to the ruling, it would be our duty as an appellate court to so declare, notwithstanding there might be some conflict in the evidence."

In Stafford vs. Adams, 113 Mo. App. 717, 88 S.W. 1130, the court said:

"It is the duty of courts to determine what constitutes substantial evidence, and the business of the triors of fact to settle conflicts therein."

And the same court, in Brockman Commission Co. vs. Aaron, 145 Mo. App. 307, 130 S.W. 16, said:

> "While appellate courts uniformly adhere to the rule that the credibility of witnesses and the weight to be given their testimony are issues of fact and not of law, the rule has never been carried to the length of requiring courts to accord probative value to testimony that is so palpably false or absurd that no reasonable mind would give it any credence. It is within the province of the court to ascertain whether or not testimony has any evidentiary strength, and, if it is found to be impotent, to cast it aside as though it had not been given."

In the case of Toledo, St. L. & W. R. Co. vs. Howe, 191 Fed. 776, at page 782, 112 C.C.A. 262, at page 268, "substantial evidence" is defined with reference to the facts of that case as follows:

> "It must be said Judge Severens, something of substance and relevant consequence, and not vague, uncertain or irrelevant matter not carrying the quality of "proof" or having fitness to induce conviction.' "

And again, at page 785, of 191 Fed., at page 271 of 112 C. C. A.:

> "If the circumstances are such that it can be said fair-minded men might not agree as to the conclusions to be drawn, the case must be submitted to the jury."

In Newton vs. Railroad Co., 43 Utah, at page 229, 134 Pac. at page 571, this court said:

> "If it is clear that the injured person failed to exercise ordinary care, the question is one of law; but, if the circumstances are such as to leave that question shrouded in doubt to the extent that different minds may fairly and honestly arrive at different conclusions, then it is a question of fact."

We submit the Court in the case at bar, erred in its refusal to grant a new trial based upon the insufficiency of the evidence of any negligence or misconduct on the part of the Plaintiff.

POINT 3

THAT THE COURT ERRED IN ENTERING A JUDGMENT UPON INCONSISTENT JURY FINDINGS.

The jury found Proposition #1 and Proposition #2 to be false. In substance the propositions were that the defendant created an unobservable hazard for vehicular traffic by leaving the rail too high. The jury then went on to find Proposition #3 to be true. The defendant was negligent in failing to warn the plaintiff by signs or otherwise of the danger in crossing the tracks. If it were not the danger created by the high rail, then it can only be speculation as to what other danger the jury refers to in Proposition #3. The Kansas Supreme Court in the case

of King vs. Vets Cab Inc., 179 Kansas 379, 295 Pac. 2d. 605, 56 A.L.R. 2d 1249, discusses inconsistent special findings. That Court holds that the trial Court may not ignore such inconsistencies and must upon proper motion order a new trial.

"We next turn to defendant's contention that the court erred in overruling its motion for judgment on the answers to the special questions. Did these answers to the questions compel the court to set aside the general verdict and render judgment in favor of defendant, or grant a new trial? It is an elementary rule that a general verdict in favor of a party to an action imports a finding in his favor upon all issues in the case, not inconsistent with the special findings, and nothing will be presumed in favor of the special findings. They shall be given such construction, if possible, as will bring them into harmony with the general verdict, and the court is not permitted to isolate one answer and ignore others, but is required to consider all of them together, and if one interpretation leads to inconsistency, and another to harmony with the general verdict, the latter is to be adopted. Marley vs. Wichita Transportation Corp., 150 Kan. 818, 96 P. 2d 877; Sams vs. Commercial Standard Ins. Co., 157 Kan. 278, 130 P. 2d 859. The general verdict may be set aside only when the special findings are contrary to the verdict and compel judgment setting aside the general verdict as a matter of law. Unless the effect of special findings, when considered as a whole, is such as to overthrow the general verdict, the verdict must stand. Johnson-Sampson Construction Co. vs. Casterline Grain & Seed, Inc., 173

Kan. 763, 252 P. 2d 893. With the foregoing rules of law in mind, it is apparent the jury found by its answer to question No. 3 that plaintiff's fall was not the result of an unavoidable accident, and by its answer to question No. 2, defendant was negligent in that plaintiff was having difficulty in descending from the cab, and the driver should have assisted her. In view of the answer to question No. 2, the general verdict and the evidence, it is obvious that the jury found plaintiff was having difficulty in alighting from the cab and that she had requested assistance from the driver, and he was guilty of negligence in not rendering assistance. By its answer to question No. 1, the jury found plaintiff was guilty of negligence only to the extent that she did not wait for reasonable assistance from the driver in alighting from the vehicle. The jury did not find by direct answer that plaintiff was guilty of contributory negligence. The answer is not clear, definite and certain. It is ambiguous and too uncertain to be a basis for a valid judgment in favor of the defendant on the theory that she was guilty of contributory negligence. It is inconsistent with the answer to question No. 2. In one answer, the jury finds that the driver should have assisted her, implying that he had opportunity and time to do so, and in the other that she did not wait for assistance, whatever the term "wait" implies. Consistent special findings control the general verdict when contrary thereto, but when they are inconsistent with one another, some showing a right to a verdict, and others showing the contrary, the case is left in the condition of really being undecided, and a new trial should be granted. Willis vs. Skinner, 89 Kan. 145, 130 P. 673; Packer vs.

Fairmont Creamery Co., 158 Kan. 191, 146 P. 2d 401; McCoy vs. Weber, 168 Kan. 241, 212 P. 2d 281; In re Estate of Erwin, 170 Kan. 728, 228 P. 2d 739; 89 CJS, Trial #552, p. 307. It cannot be said that the defendant was entitled to judgment on the answers to the special questions."

It is not only within the bounds of the trial judge, but it is his duty to set aside a verdict where a jury has failed to follow the Court's instructions or has made inconsistent findings on propositions submitted to it. "Virginian R.R. Company vs. Armantrout, 166 Fed. 400, 4 A.L.R. 2d 1064. The law gives ample power to see that justice is done in cases pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require. Aetna Casualty & Surety Co. v. Yeatts, A Cir., 122 F 2d 350.

The power of this court to reverse the trial court for failure to exercise the power, where such failure, as here, amounts to an abuse of discretion, is likewise clear. It is true that under #22 of the Judiciary Act of 1789, 28 USCA #879, there may be no reversal on writ of error for any error in fact; and this rule has been frequently applied where reversal is sought because damages are excessive or inadequate. Fairmont Glass Works vs. Cub Fork Coal Co., 287 US 474, 53 S. Ct. 252, 77 L. ed 439. We do not understand the rule to have application, however, in those exceptional circumstances where the

verdict is so manifestly without support in the evidence that failure to set it aside amounts to an abuse of discretion. In a situation of that sort, reversal is no more based on "error in fact" than reversal for refusal to direct a verdict for insufficiency of evidence. Whether there has been an abuse of discretion is a question of law in the one case, just as is the legal sufficiency of the evidence in the other. An appelaute court is not required to place the seal of its approval upon a judgment vitiated by an abuse of discretion."

The inconsistent findings are no findings. It is as if the Court has entered judgment upon no verdict at all. The jury here has failed in its duty to determine the facts. The only remedy in this event is to order the matter tried anew.

CONCLUSIONS

Plaintiff and appellant herein, submits in conclusion, that there was no evidence offered at the time of the trial to support defendant's position that the plaintiff was contributorily negligent or that she in any way was guilty of any improper conduct which tended to cause the injuries of which she complains. She was therefore entitled to have the jury determine only the question of the extent of her damages and she was further entitled to an order from the Court directing the jury to find liability on the part of the defendant. To cure this error in the District Court's ruling, appellant herein submits that she is en-

titled to have this case remanded to the District Court for a new trial granted.

Respectfully submitted,

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