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Paul Hill v. Rex Cloward and Rubin McDougal dba The Frostop : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

PAUL HILL, by and through his
guardian ad litem, JAMES L. HILL,
Plaintiff-Appellant,

vs.

REX CLOWARD and RUBIN Mc-
DOUGAL, d/b/a The Frostop,

Defendants-Respondents.

FILED
JUN 11 1964
Supreme Court, Utah
Case No.
9687

APPELLANT'S BRIEF

Appeal from the Judgment of the Third Dis-
trict Court for Salt Lake County, Honorable
A. H. Ellet, Judge.

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APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action to recover damages for personal injury.

DISPOSITION IN THE LOWER COURT

A jury in the Third Judicial District Court brought in a verdict of no cause of action, based upon a special verdict in the court of the Honorable A. H. Ellet. A motion for a new trial was denied.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a new trial.

STATEMENT OF FACTS

The plaintiff, Paul Hill, an eleven year old minor, was injured on August 8, 1961, when he fell from an ice cream truck being driven by one of the defendants, Rex Cloward, a seventeen year old minor, the plaintiff receiving among other injuries, a broken clavicle. The defendant Rex Cloward was acting as the agent and employee of the other defendant, Rubin McDougal, who owned the business and the truck. (R. 60;14) The ice cream truck that was being driven by the defendant Rex Cloward was a three quarter ton truck with large mirrors on both sides, and played simple tunes to attract children and to induce them to purchase ice cream. (R. 17, 18) The truck had a foot long running board not more than twenty inches from the drivers position in the front of the truck. (R. 80) On that date, the plaintiff and another boy were in front of the plaintiff's house at 4309 West 5500 South, Kearns, Utah. The defendant Rex Cloward drove up in front of the house with the truck, playing the said tunes. The two boys approached the truck and asked for free crushed ice cream cones. At this point the facts are in dispute. It was the plaintiff's contention that the plaintiff Paul Hill was standing on the running board of the truck when the defendant Rex Cloward, being irritated

by the boy's request for free cones or as a matter of adolescent impulsiveness, suddenly took off and stopped briefly at a stop sign at 4420 West 5500 South; that plaintiff Paul Hill asked Cloward to let him off or he would tell his father but that Cloward accelerated the car, and the boy fell off the truck (R. 55). It was the defendant's contention that the plaintiff had actually gotten onto the back of the truck out of the vision of the driver; that the driver was only aware of his presence through the plaintiff's statements to him from the back of the truck; that the driver Rex Cloward stopped at the stop sign to let him off; that he thought the plaintiff had gotten off the truck and was unaware of his fall from the truck until later on in the day (R. 75, et seq.).

The court then submitted a special verdict to the jury and on the basis of their answers to the special verdict, directed a no cause of action judgment against the plaintiff. (R. 100) The plaintiff then moved for a new trial which was denied (R. 109), from which the plaintiff now appeals.

ARGUMENT

POINT I

THE DEFENDANT'S REMARKS CONCERNING HIS LACK OF INSURANCE CONSTITUTED REVERSIBLE PREJUDICIAL ERROR.

During the interrogation by the Court of defendant Rubin McDougal, the owner of the business and truck in question, made the following statements (R. 15, 16):

“Court: Why don’t you bring the truck up and let us look at it? Can it be brought up?”

A. I haven’t any insurance or license on it. I have the truck, yes.

‘Court: We can take care of your license, bring it up and let us look at it, will it run?”

A. Certainly it will run. I have no insurance on it at the present time.

Mr. Strong: Will you bring it up?

A. Surely, if someone wants to put the insurance on it and take the responsibility.”

The remainder of that portion of the interrogation concerns the immunity of McDougal from arrest for driving the truck to the courthouse without a license on it.

It should be clearly apparent from this portion of the record and the testimony of the witness that it was the intention of the defendant McDougal to convey the impression to the jury that his car was not insured at the time of the accident. It is common knowledge in the

State of Utah that in the event of a motor vehicle accident, if the owner is not insured, he either has to post a bond or his license plates are taken away from him. Also, the accident occurred on August 8, 1961, at which time the defendant had license plates. The trial was held on February 19, 1962, at which time the defendant's license plates should have still been in good standing. There can be no other interpretation that can be derived from this statement of the defendant. It should also be noted that this testimony was brought out upon interrogation by the Court. It had no purpose to be mentioned except for the reason we have previously alluded to.

There are three factors involved here :

1. This statement was not elicited by either counsel, but by the court.
2. It was a voluntary declaration by the defendant having little, if any, reference to the question of the court.
3. It was a statement made regarding the lack of insurance by the defendant himself.

The cases on the issue of where insurance is mentioned in a personal injury case involving motor vehicles are multitudinous and many and have been subject to review by many courts. It is apparent from a survey of the cases that the whole subject of mentioning insurance in a negligence case is surrounded with taboo, shibboleth,

and ceremony, which was designed primarily to protect the defendant from excessive verdicts in favor of the plaintiff. See *Trial and Tort Trends Through 1954, Pre-Convention Seminar*, Afternoon Session, August 29, 1954, "The Forbidden Word", By Payne H. Ratner, Wichita, Kansas, p. 138.

In the case at hand, however, involves the opposite of the issue, and that is where the defendant himself states that he has no insurance. This too is designed and calculated to sway and influence the mind of the jury in the opposite direction. The end result of such statements would result in an insufficient verdict for the plaintiff, or, as in the instant case, a verdict of no cause of action against the plaintiff.

In the general annotation in A. L. R. on the subjection, 4 *A. L. R.* 2d 761, "Admissibility of evidence and propriety and effect of questions, statements, comments, etc., tending to show that defendant in personal injury or death action carries liability insurance", at P. 773, Section 4: "Evidence that defendant is not insured, or only partly insured."

"Where nothing has been done or said from which the jury might infer that the defendant is protected by liability insurance it is improper for defendant to show that he does not have insurance protection, *Socony Vacuum Oil Co. v. Marvin* (1946) 313 Mich. 528, 21 NW 2d 841;

Brown v. Murphy Transfer & Storage Co. (1933) 190 Minn 81, 251 NW 5; *Clayton v. Wells* (1930) 324 Mo 1176, 26 SW 2d 969; *Piechuck v. Magusiak* (1926) 82 NH 429, 135 A 534; *Davis v. Underdahl* (1932) 140 Or 242, 13 P2d 362; *Cosgrove v. Tracey* (1937) 156 Or 1, 64 P2d 1321.

“Indeed in at least one case it has been held proper to exclude evidence that defendant is not insured although there is already in the case evidence from which it may be inferred that he is insured”, citing *Avent v. Tucker* (1940) 188 Miss 207, 194 So 596.

The latest pronouncement that we could find on the subject comes from *Graham v. Wriston*, *Supreme Court of Appeals of West Virginia*, (1961), 120 S. E. 2d 713, at P. 713, quoting from the syllabus:

“9 . . New Trial Closing argument that jurors were in position of having a blank check with defendant’s name signed on it, implied that defendant was not insured and especially since counsel making such argument knew that defendant was in fact insured, it was not an abuse of discretion to set aside verdict for defendant and grant new trial because of such argument; notwithstanding fact that state trooper had testified at trial he had made pictures available to insurance company and defendant’s counsel had such pictures.”

and at p. 720, the Court quotes from *Haid v. Loderstedt*, 45 N.J. Super. 547, 133 A. 2d 655, 657, as follows:

“‘It seems to us that the prejudice suffered ordinarily by a plaintiff through the improper revelation of absence of insurance coverage by the defendant is likely to be even greater than when the disclosure of such protection of the defendant is injected by the plaintiff. Certainly it cannot be said to be less hurtful. But more than this, the act of conveying the information to the jury by a defendant is more deserving of condemnation when the action knows that the implied fact is untrue. And so the inclination of a court to find prejudicial error in such a situation is more readily stimulated.’”

‘It is true that the plaintiffs did not ask for a mistrial when the objection to counsel’s remark was sustained. Nor did the trial judge instruct the jury to disregard the statement. However, we think the transgression of the ordinary rules of fair play was so flagrant that on the basis of plain error another day in court should be given to the probable victims of their adversary’s disingenuousness.’”

It would appear that if the courts have chosen to build a high wall of taboo around the mention of the word “insurance” by the plaintiff, in view of the general knowledge of juries that the defendant is usually insured (See *The Forbidden Word*, Ratner, *supra*, at P. 141: General Knowledge of Insurance), it would seem more appropriate to build even a higher wall of taboo around the mention of the forbidden word by the defendant.

POINT II

THE ACTION OF THE TRIAL COURT IN GIVING AN ADDITIONAL INSTRUCTION DETRIMENTAL TO PLAINTIFF AFTER ARGUMENT BY COUNSEL CONSTITUTED REVERSIBLE PREJUDICIAL ERROR.

In the present case, after instructions had been given and the case being fully argued to the jury, the trial court proceeded as follows: (R. 90)

“THE COURT: Gentlemen, I am going to give you one more instruction. I am going to insert it. It will be — let’s see. It will be No. 14-A. and will read thus:“

“No. 14-A. No person shall ride, and no person driving a motor vehicle shall knowingly permit any person to ride, upon any portion of any vehicle not designed nor intended for the use of passengers. In this case it is undisputed that the plaintiff was riding on the vehicle at a place neither designed nor intended for the use of passengers. If, therefore, you find from a preponderance of the evidence that the plaintiff, considering his age, intelligence and experience, knew or in the exercise of due care should have known that it was dangerous to ride or attempt to ride on the vehicle in the manner in which he was attempting to do, then and in that event, you are instructed that the plaintiff was negligent.”

Plaintiff took a proper exception to this instruction (R. 96).

It would appear that the giving of this instruction after seemingly all of the instructions were given, and after argument to the jury by counsel, would not only deprive plaintiff's counsel from the right to review the instructions with the trial court and other counsel, but by giving special emphasis to this instruction, would amount to in effect a directed verdict in favor of the defendant. In 3 *Am Jur* 639, Appeal and Error, Section 1121, Time of Giving, it is stated:

"It is not per se prejudicial error that instructions are given to the jury after the argument, in disregard of the statute, but if injury results by giving an instruction at the wrong time, it is reversible error."

"One must show injury in order to secure a reversal for a breach of a rule of court requiring instructions to be settled between the court and counsel before argument to the jury begins.", citing 2 *ALR* 1493, *Sheldon v. James* 175 *Cal.* 474, 166, *P.* 8.

That the errors we have listed under the two points that we urge for reasons for reversal did indeed prejudice the jury is apparent from an examination of the record. It should be recalled that it was the plaintiff's contention that after the plaintiff mounted the running

board of the truck, he was in fact practically the captive of an adolescent driver. Question No. One of the Special Verdict reads as follows (R. 103) :

“Question 1: After leaving the stop sign, did Rex Cloward know or in the exercise of reasonable care should have known that Paul Hill was still on the truck? Answer No.” In response to questions by his own counsel, the defendant Paul Hill states as follows (R. 84) sel, the defendant Rex Cloward states as follows (R 84)

“Q. Now, as you started up, did you think he was on the truck?

A. No. I thought he would have sense enough to get off.

Q. Well, did you think he had got off?

A. *I wasn't sure.*” (emphasis ours)

Then on R. 85, line 22, during the same period of questioning, the testimony proceeds as follows :

“Q. What is the next thing that you heard or saw?

A. Next thing I heard was *he yelled.*” (emphasis ours)

At which point counsel for defendant attempts to correct this by a leading question.

“Q. You heard a yell?

A. Yes.”

See also page 86 of the Record, wherein the defendant Rex Cloward testifies that he saw a boy lying in the middle of the road, but made not attempt to stop or investigate. The fact that he did not go back to give aid is indicative of guilt as to the wilfulness of his conduct, and his knowledge of the fact that the boy was still on the truck.

Finally, the prejudicial attitude of the jury is indicated by the answer to Question No. Five of the Special Verdict, which reads as follows (R. 105):

“Question 5: As shown by a preponderance of the evidence in this case, what amount of money would fairly and adequately recompense Paul Hill for any and all damage and injury he sustained as a result of his fall from the ice cream truck? Answer \$100.00”

Yet the medical testimony indicates that the boy suffered a broken clavicle and that the special damages themselves were \$82.50, which would leave damages for

pain and suffering assessed in the amount of \$17.50. Can it be denied that the two facts mentioned had indeed prejudiced the minds of the jury?

CONCLUSION

To conclude, we submit that it is one of the primary functions of an appellate court in negligence cases to ascertain if each of the litigants has been given a fair trial and has had indeed "his day in court". We further submit that because of the prejudicial nature of the two errors we have raised on appeal, the plaintiff has not had his day in court. It is of particular importance that the fact of the lack of insurance coverage by the defendant be invested with the same, if not greater, protection than the disclosure of the fact that the defendant is insured. We therefore respectfully request that the judgment be reversed that the plaintiff be granted a new trial.

Respectfully submitted,

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