

1962

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

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

OCT 23 1962

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

vs.

REX CLOWARD and RUBIN
McDOUGAL, d/b/a
The Frostop,
Defendants-Respondents.

Salt Lake, Supreme Court, Utah

Case No. 9687

RESPONDENT'S BRIEF

Appeal from Judgment of the Third District Court
for Salt Lake County,
Honorable A. H. Ellett, Judge.

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The Frostop,
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Case No. 9687

RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action to recover damages for personal injury arising out of an auto accident.

DISPOSITION IN THE LOWER COURT

The jury answered questions to a special verdict on the basis of which the court entered judgment in favor of the defendants. A motion for new trial was made and denied.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a new trial.

STATEMENT OF FACTS

The accident occurred on the morning of August 8, 1961, on Kearns Boulevard (5415 South)

between 4220 West and 4320 West, (R. 25, 85). The plaintiff, Paul Hill, was 11 years of age on July 13, 1961, (R. 53). The defendant, Rex Cloward, at the time and place of the accident was driving a 1958 International one-half ton truck, (R. 14). The truck had running boards on either side which were concealed and completely covered by the cab doors when the same were closed. Back of the cab and in front of the bed on the left side of the truck there was a little platform or running board about a foot long. There was a refrigerated box in the back of the bed of the truck in which ice cream products were carried. This box was right up against the cab of the truck. One side of the box was tight against the side of the truck and on the other side there was about six inches between the box and the side of the truck. There was thirty six inches between the back of the box and the tail gate, (R. 79, 80, 81). The truck had a music machine and played different tunes. It was used for the sale of ice cream products, (R. 17, 20, 21). It was admitted by the answer that Rex Cloward at the time and place of the accident was acting as an agent and employee of the defendant, Rubin McDougal, (R. 4).

The plaintiff's home was located at 4309 West 5500 South in Kearns, (R. 54). The defendant, Cloward, was proceeding west in the truck on 5500

South selling ice cream when the plaintiff and another boy, Bruce Davenport, came out and asked for some free ice cream. Cloward stopped in front of the Hill home, (R. 73, 74). He saw Bruce Davenport get on the little platform back of the cab on the left side of the truck, but according to him the plaintiff went to the back of the truck, (R. 74, 82). He did not at any time see the plaintiff on the platform, (R. 75). Davenport got off the truck before Cloward started up, (R. 82). At that time according to Cloward the Hill boy was in the area back of the truck and out of his vision, (R. 82). He was definitely not on the little platform or running board, (R. 83). Cloward proceeded slowly west and according to him when he got to a dip in the road at 4360 West, he heard the plaintiff say he wanted to get off. This was the first time he knew that the plaintiff was on the truck, (R. 83). He slowed down to 5 or 10 miles per hour. He could still not see the plaintiff, (R. 83), but told him he would let him off at the stop sign at the Kearns Boulevard, (R. 84). He then made a right turn on 4420 West and proceeded north to the stop sign at Kearns Boulevard which according to plaintiff's Exhibit P-2 is a distance of approximately a block, (R. 84). He came to a complete stop and at that time did not see the plaintiff on the truck and assumed that he got off, (R. 84). He turned right

and started off fairly slow as he made a right turn to proceed east on Kearns Boulevard, (R. 85). From that time on he did not hear the plaintiff say anything until he heard a yell and observed someone lying on the road behind the truck. He did not know it was the plaintiff but thought someone was trying to play a prank on him and continued on, (R. 85-86). At this time he was traveling between 20-25 miles per hour, (R. 78). He did not know that the boy was on any part of the truck after he left the stop sign and had no intent to scare or frighten him, (R. 87).

Cloward informed the investigating officer, Pearce, that he thought the plaintiff had got off at the stop sign, (R. 31). The plaintiff admitted that he knew it wasn't safe to ride where he claimed to be riding on the little platform on the left side of the truck, (R. 61). He had attended safety lectures in school before the accident and his parents had taught him it was dangerous to ride on vehicles, (R. 62). The plaintiff further admitted that the truck came to a full and complete stop on 4420 West at the stop sign at Kearns Boulevard and he "had plenty of time to get off," (R. 63). He admitted the only reason he didn't get off was because he thought the defendant, Cloward, was going to take him back home, (R. 63). Yet he never asked the defendant, Cloward, to take him home, and the

defendant, Cloward, never told him that he would do so, (R. 64). The plaintiff also admitted that he did not in fact know whether he "jumped, fell or slipped" from the truck, (R. 67). The investigating officer, Pearce, testified that the plaintiff told him that he didn't know whether "he slipped, fell or baled off the truck," (R. 31) and the plaintiff admitted telling the officer this, (R. 67). The investigating officer testified that the plaintiff got up from the street and ran to his home, (R. 26).

The plaintiff sustained some bruises and abrasions and a fractured left clavicle, (R. 38, 39). The Clavicle was treated by a Figure 8 splint which is shown on the plaintiff's exhibits P-1 and P-4, (R. 39). The splint remained on for five weeks, (R. 42). The doctor saw the plaintiff a total of five times, (R. 43). His total doctor bill including X-rays was \$82.50, (R. 44). The doctor admitted that the bruises and abrasions cleared up without incident and that the plaintiff was discharged from his treatment on September 12, (R. 45, 46); that the plaintiff had no functional disability and could use his arm and shoulder to the full extent as before and was free from pain, (R. 46, 47, 51). The doctor also testified "he could use his arm quite well in two weeks even with the splint on." (R. 48). The plaintiff started school which was either in the last week of August or the first of September and continued school regularly thereafter, (R. 68).

The action was originally brought in the minor's name only through his guardian ad litem, James L. Hill. However, during the course of the trial the court took the position that the minor could not recover the amount of the doctor bill; that this was properly the father's claim. It was then stipulated by both counsel that the father be made a party to the action, and if the plaintiff won a judgment, that judgment in addition would be entered in favor of the father for the amount of the special damages, to-wit: \$82.50, and that in the event the minor lost the case the father would be bound by the judgment, (R. 93).

ARGUMENT

POINT I.

DEFENDANT'S REMARKS CONCERNING INSURANCE DID NOT INDICATE LACK OF INSURANCE AND IN NO EVENT CONSTITUTED REVERSIBLE ERROR.

At the outset, it should be borne in mind that the witness, Rubin McDougal, was the first witness called by the plaintiff. The jury had just been selected, opening statements had been made, and at 11:16 A.M. Mr. McDougal was called as an adverse witness, (R. 13). The statement of which the plaintiff complains occurred within about the first five minutes of Mr. McDougal's testimony. The plaintiff's attorney did not move for a mistrial or seek to correct any alleged error or do any thing what-

soever, but proceeded directly on with the case. His second witness, Richard B. Pearce, was called, and his testimony was completed by 11:53 A.M., (R. 36).

The plaintiff complains that the defendant McDougal's testimony indicated that he had no insurance on the vehicle at the time of the accident. The defendant's testimony in this regard was:: "I have no insurance on it *at the present time.*" It was our opinion that the defendant, by such testimony, had clearly indicated to the jury that he did have insurance on his vehicle at the time of the accident, but since he did not have insurance on it at the time of the trial, he would not assume the responsibility of driving the vehicle. This was also the interpretation placed upon the testimony by the trial judge in ruling upon the plaintiff's motion for a new trial. The trial court took the position that the testimony could not have prejudiced the plaintiff but in fact prejudiced the defendant as indicating that the vehicle was covered with insurance at the time of the accident. We submit that this is the only reasonable interpretation that can be made of the testimony. Viewed in such light, it certainly could not have been prejudicial to the plaintiff. In fact, the plaintiff must not have considered the testimony as prejudicial because he made no attempt to examine the defendant to clarify the matter, nor did

he ask the court for a mistrial or for any cautionary instruction. His argument at this time is an after-thought and should have no merit.

The plaintiff contends that 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 has to post a bond or his license plates are taken away from him. In this connection, he argues that since the defendant testified he did not have any license plates on the vehicle, the only interpretation which could be derived from the statement was that his car was not insured at the time of the accident and his license plates had been taken away from him. The most obvious answer to this line of reasoning is that the plaintiff at the time of the trial could have questioned the defendant concerning the reason for his failure to have any license plates on the vehicle. Such testimony, if pursued, would have clearly indicated that the vehicle did have license plates on it; that the defendant placed the vehicle on a used car lot for sale; that subsequently the vehicle was removed to his brother's place and used on his brother's premises and that the defendant did not know whether the vehicle actually was licensed at the time or not. He knew he had not licensed it for 1962. The vehicle, in fact when produced for the inspection of the jury did have 1961 license plates on it. The defendant was under

a mistaken apprehension when he thought the vehicle was not licensed at the time of the trial. The plaintiff should not complain of something which he could readily have cleared up by his own examination had he felt that there was any merit to the argument which he is now pursuing. The defendant was the cautious type of individual which his testimony indicated because even though he did not have any insurance on the truck at the time of the trial, during the noon recess he called his insurance broker and arranged for a rider to be placed upon the vehicle to cover it with insurance so that he would not have to drive it to court without having it insured. He had merely permitted his insurance to lapse after the accident because he was not using the vehicle and either had it on a used car lot for sale or on his brother's premises.

Assuming for the purpose of argument that the statement made by the witness indicated a lack of insurance on the vehicle at the time of the accident, nonetheless, the law is well recognized that a party litigant may waive or be deemed to have waived his right to complain by failing to make appropriate objection or take proper motion at the time to seek to have the defect cured. This would seem to be particularly true in a case of this nature where the alleged error occurred in the opening minutes of the trial, where if the plaintiff felt he

was entitled to a mistrial, he could have made a motion and the jury could have been discharged and the case started over right then without any delay or the plaintiff could have pursued the matter by question and answer to develop what he now wants the court to erroneously assume regarding the lack of license plates and lack of insurance on the vehicle at the time of the trial.

In the case of *Graham v. Wriston*, (W. V.) 120 S. E. (2d) 713, cited by appellant, counsel for defendant in his closing argument strongly implied that the defendant was not insured at the time of the accident when he knew that he was. This is different from our case in that the defendant's counsel voluntarily made the statement in his closing argument and used it to his advantage and at a time when there was little that the plaintiff could do to correct the error. In our case there was no statement that the defendant did not have any insurance at the time of the accident and any statement concerning insurance was made at the very outset when it could have been easily cured or corrected or plaintiff could have moved for a mistrial and no delay would have been encountered.

See 39 Am. Jur. Section 14, page 39, where it is stated:

“* * * It is also a well-recognized and frequently applied principle that a party liti-

gant will be deemed to have waived, or will be considered as being estopped to rely upon, matters constituting grounds of new trial which come to his attention or knowledge during the course of trial, or of which he should, by the exercise of reasonable diligence, have acquired knowledge, where he fails to make objection at the time and seek to have the defects cured. In other words, one is not entitled to a new trial when it appears that he had knowledge of the irregularity of which he complains and did not promptly seek to have the defect corrected at the trial of the case, or that his failure to obtain such knowledge and have defect corrected, was due to his own fault or lack of diligence. Thus, a party who is aware of any fact or circumstance affecting the qualification or competency of a juror, but fails to make objection when the juror is sworn, or who, by reason of his own lack of diligence, fails to discover the juror's want of competency or qualification, cannot assert the existence of that fact as a ground for a new trial. It is equally well settled that a party litigant who acquires knowledge of misconduct on the part of a juror during the course of trial or of misconduct of his opponent, his counsel, or the court, directly affecting a juror, and fails to make objection thereto and seek a remedy at the time, or by lack of diligence fails to acquire knowledge of such misconduct in time to make objection before verdict, is deemed to waive his right to assert that as a ground for a new trial. * * **

See also 39 Am. Jur. Section 95, page 110:

“The defeated party may waive his right to a new trial on account of misconduct affecting the jury if, after knowledge thereof, he

goes on with the trial without objection. The general rule is that misconduct on the part of anyone in connection with the jury after their retirement, although it is of a character which might vitiate the verdict if brought to the attention of the court by timely complaint, is not available, after the return of the verdict, as a ground for a new trial or reversal, where it was known to the defendant or his counsel before the return of the verdict."

Furthermore, the defendant's testimony as indicated by the appellant in his brief was not elicited by either counsel but was brought out in response to questions made by the court. By weight of authority an irresponsive or inadvertent answer to a question which calls for proper answer is not ground for declaring a mistrial. See 4 A.L.R. (2d) p. 784.

See *Brazeale v. Piedmont Mfg. Co.*, (S.C.) 193 S.E. 39, wherein the court said:

"* * * Where improper reference is made to insurance, or an insurance agent, by the witness as was here done, and for which the plaintiff is not responsible, it seems that the only remedy that the court can give is to grant a motion to strike out the objectionable testimony and to instruct the jury to disregard it."

Certainly, in our case it is admitted that the defendant's counsel had nothing to do with the bringing out of the information to which objection is now being made. See also 21 Appleman Insurance Law & Practice, Section 12834 page 806:

“It is not every casual or inadvertent reference to an insurance company in the course of trial that will necessitate a mistrial. Whether the disclosure is such as to constitute error depends essentially upon the facts and circumstances peculiar to the case under consideration. And whether the jury should be discharged following such a disclosure depends generally upon whether there was good or bad faith in the injection of the question of insurance.

“A mistrial is generally granted only where the plaintiff’s counsel or witness has deliberately or wilfully undertaken to inform the jury of insurance, such as where there is an avowed purpose and successful attempt, and not where the information comes in incidentally in attempting to prove other facts or where the particular answer was not sought or anticipated. The rule of prejudicial error has no application where the evidence is introduced by the complaining party. The rule also does not apply where the information is innocently volunteered by a witness, or is interjected by an unresponsive answer to a proper question.”

See also *Burton v. Zions Cooperative Mercantile Institution*, 122 Utah 360, 249 Pac. 514. In that case certain remarks were made before the jury panel by a prospective juror on voir dire examination to the effect that in his experience insurance companies were very fair and made settlement whenever due, and that if such companies denied settlement, he felt they would have some ground for such

refusal. In that case, the Utah Supreme Court held that that remark did not warrant reversal of order denying plaintiff's motion for mistrial. Justice Crockett in writing the majority opinion said:

“Once the trial court has exercised his discretion and made his judgment thereon, the prerogative of this court on review is much more limited. If the trial court could reasonably decide that the jury would not be prejudiced and that the parties could have a fair trial, his ruling must stand. In other words, unless his determination appears to be so unreasonable that upon review it appears that he was plainly wrong, in that there is a strong likelihood that the plaintiff could not have had a fair trial, we cannot say that his failure to grant one was an abuse of discretion. The matter rests in the sound discretion of the trial court and the judgment thereon should be reversed only where there has been a plain abuse thereof.

“The foundation of this rule is the same as in numerous other areas of the law wherein appellate courts give deference to rulings of the trial court because his judgment must rest in large part upon his observance of the conduct, personalities and circumstances with which he has close contact. He sees and hears the participants; the manner in which they act and speak; sees their expressions, hears the inflections of the voice and has the opportunity to observe their reactions much better than can be demonstrated to an appellate tribunal from a cold record of the events.”

In this case the lower court had occasion to

observe the manner in which the testimony was given, the effect, if any, which it had upon the jury, and in his opinion the testimony was not prejudicial to the plaintiff but in fact was prejudicial to the defendant as indicating that the defendant carried insurance at the time of the accident.

As indicated by Justice Crockett in the Utah case, aforementioned, the burden was on the plaintiff to show affirmatively that there was an error and that it was prejudicial. "There is a presumption that the judgment of the trial court was correct, and every reasonable intendment must be indulged in favor of it; the burden of affirmatively showing error is on the party complaining thereof."

If we are going to indulge in assumptions, which is what the plaintiff has done in his brief, then the jury could well have assumed that there was insurance on the vehicle in view of the Utah Financial Responsibility Law which most people construe as absolutely requiring vehicles to be insured.

In summary, it is our position that the statement made by the defendant indicated that he had insurance on the vehicle at the time of the accident but not at the time of the trial. If there was any error, it was incumbent upon the plaintiff to call it to the court's attention, attempt to have it corrected,

or move for a mistrial, none of which he did. He should not be permitted to go through the case and then when the judgment did not meet with his approval attempt to have it set aside.

POINT II.

THE COURT'S INSTRUCTION NO. 14-A WAS NOT PREJUDICIAL AND WAS NOT GIVEN IN SUCH A MANNER AS TO BE DETRIMENTAL TO THE PLAINTIFF.

It is true that after the case had been concluded and arguments made by counsel to the jury, that the trial court indicated that he was going to give one more instruction which was designated 14-A and which reads as follows:

“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 or 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.” (R. 90, 91)

It is the plaintiff's contention that the giving of this instruction after the argument to the jury

deprived plaintiff's counsel of the right to review the instruction with the trial court and other counsel, gave special emphasis to the instruction and amounted to a directed verdict. The plaintiff does not contend that the instruction was erroneous or that it did not properly state the law. Therefore, he could not have been prejudiced in not having an opportunity to review the instruction with the trial court and other counsel.

The plaintiff was not taken by surprise. The instruction as given was the defendant's requested instruction No. 12. The pre-trial order which plaintiff had incorporated in the record on appeal refers to the issues as set forth in the pre-trial statements which the plaintiff did not have made a part of the record. In the defendants' pre-trial statement, copy of which had been served on the plaintiff's attorney prior to the time of the pre-trial hearing, the defendants set forth the following items of contributory negligence on the part of the plaintiff minor:

- “(a) Negligently and unlawfully and without permission riding on some portion of the defendants' vehicle;
- (b) Negligently failing to get off said vehicle after it stopped prior to the accident at which time the plaintiff minor had ample opportunity to remove himself from said vehicle;
- (c) *Negligently riding in a dangerous place on said vehicle and without permission;*

- (d) Negligently failing to take any proper precautions for his own safety.” (*Italics ours*)

The plaintiff was cross examined on the subject and admitted he was riding on a dangerous place.

In arguing the case to the jury defense counsel argued that the minor was guilty of negligence in riding on the platform or running board or any other portion of the vehicle not designed for passengers, and the plaintiff’s attorney had full opportunity to answer the same.

The plaintiff’s attorney did not see fit to include with the record on appeal all of the instructions as in fact given by the court. The burden, of course, is upon him to show error in giving of the instruction, and he cannot make inferences from instructions which he failed to include in the record on appeal. As a matter of fact, the instructions as originally given by the court outlined the plaintiff’s theory in two of the plaintiff’s requested instructions but wholly failed to cover in its instructions the contributing negligence in riding on a dangerous place on the vehicle which had been one of the defendant’s requests. It was for this reason that the court gave the additional instruction No. 14-A when he realized that the matter had not been covered in his instructions as given. In fact, the court would

have committed error had it failed to give the instruction No. 14-A. Utah Code Annotated 1953, Section 41-6-108, provides as follows:

“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 or intended for the use of passengers. * * *”

This is the matter to which the Instruction No. 14-A was directed. The plaintiff has not complained nor shown that this instruction was covered by other instructions and does not complain that the instruction as given fails to state the law.

While generally speaking instructions are all given at once, it is not uncommon to have instructions given at the close of arguments or out of order for some reason when either called to the attention of the court or when the court itself has discovered the necessity of giving the same.

See 88 C.J.S., Trial, Section 377, page 961, which reads as follows:

“A judge may modify or correct instructions at his own motion, and recall the jury for such purpose, or to amplify his charge, or to give additional instructions on material issues not covered by the original charge, provided the additional instruction or amplification states the law and the facts correctly and covers a point not covered in the previous instructions. * * *”

The court's other instructions specifically in-

formed the jury that if in the various instructions any rule, direction, or idea was stated in varying ways, no emphasis thereon was intended and none should be inferred; that the jury was not to single out any certain sentence or any individual point or instruction and ignore the others, but was to consider all the instructions as a whole and was to regard each in the light of all the others. The jury was further instructed that the order in which the instructions was given had no significance as to their relative importance.

The plaintiff in his argument claims that after the plaintiff mounted the platform or running board, he was in fact practically a captive of the driver. This, of course, is completely refuted by the plaintiff's own testimony in which he said that when the truck stopped at the stop sign, he had ample time to get off the truck but did not do so, notwithstanding the fact that he knew it was a dangerous place on which to ride.

The fact that the defendant, Cloward, did not go back to aid the boy he saw lying in the street was clearly explained in his own testimony that he did not know any boy was riding on his vehicle after he left the stop sign and that he figured it was some other boy playing a youthful prank upon him. This was, of course, a question of fact for the jury which the jury decided in the defendants' favor.

The plaintiff's attorney also claims that there was prejudicial error as indicative of the fact that the jury found that \$100.00 was all the damage to which the plaintiff minor was entitled and yet his special damages were \$82.50 which would only leave \$17.50 for pain and suffering. This is not true

and completely overlooks the fact that during the trial the father was added as a party plaintiff, and it was stipulated that if the plaintiff minor was entitled to recover anything, the court would award judgment to the father in addition thereto in the sum of \$82.50. The jury's verdict of \$100.00 for the general damages under the evidence in this case would not be classified as unreasonable and indicating any prejudice. Furthermore in view of its findings on negligence and contributory negligence the amount awarded was immaterial.

CONCLUSION

In this case the defendant did not inform or intimate to the jury that he had no insurance on his vehicle at the time of the accident, but merely that he did not have any insurance on it at the time of the trial. Such statement, therefore, was not prejudicial. In any event, the plaintiff by his failure to examine the witness or take other action or move for a mistrial waived any objection which he might have to this statement.

The court's instruction No. 14-A correctly stated the law and was not covered by any other instructions. There was no prejudicial error in giving the same to the jury. It is, therefore, respectfully submitted that the case should be affirmed.

Respectfully submitted,

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