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Delfin E. Ortega v. Perry A. Thomas : Appellant's Reply Brief

Utah Supreme Court

K. Samuel King; Attorney for Respondent;
Hanson & Baldwin; Merlin R. Lybbert; Attorneys for Appellant;

IN THE SUPREME COURT
of the
STATE OF UTAH

DELFIN E. ORTEGA,
Plaintiff and Respondent,

vs.

PERRY A. THOMAS,
Defendant and Appellant.

Case No. 9709

APPELLANT'S REPLY BRIEF

APPEAL FROM THE JUDGMENT OF THE THIRD DISTRICT COURT FOR SALT LAKE COUNTY, HON. MARCELLUS K. SNOW, JUDGE.

HANSON & BALDWIN and
MERLIN R. LYBBERT
515 Kearns Buiding
Salt Lake City, Utah
Attorneys for Appellant

DRAPER, SANDACK & DRAPER
606 El Paso Natural Gas Building
Attorneys for Respondent

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ARGUMENT

APPELLANT DID NOT WAIVE HIS ASSIGNMENT OF ERROR TO THE COURT'S VERDICT-DIRECTING INSTRUCTION NO. 12.

Respondent in his Point III (Respondent's Brief, p. 3), alleges that the defendant and appellant took no exception to a "explanatory instruction" and thereby "irrevocably put aside his claim of error by stipulating that it be given." Since the premise upon which the respondent bases this allegation is not supported by the record, a review of pertinent facts is necessary.

The jury had deliberated more than seven hours

when they sought assistance from the court concerning the meaning of Instructions No. 12 and 14. (First Additional Record, filed November 6, 1962.)

Thereafter, the court gave the following instruction upon stipulation of counsel.

> "The instructions you ask about do set out the law applicable to the opposite theories of each case of each party. You should follow the instruction which you think is supported by a preponderance of the evidence."
> (First Additional Record, page 2.)

At the hearing on the motion for a new trial, plaintiff's attorney contended that the defendant had waived his right to object to the "explanatory instruction". The following comments by the court are taken from the record:

> "THE COURT: The Court knows that both counsel were acting in good faith. Both counsel actually wanted to win their lawsuits, but at the same time they wanted to present error-free instructions and see that error-free procedure was followed at all times. Of course, in looking back now, by hindsight, of course, there may have been things we all would have decided differently at that time. But I think that both parties, for that matter, took adequate exception, and I felt all the exceptions that were taken by Mr. Hanson, certainly preserved his right to argue this point and to appeal them, because I think the exceptions as he has argued them here this morning, and the points of law were certainly properly excepted to at the trial, and they are properly before the court. There is no question about

that. The Court doesn't think he waived anything by helping to draft or consenting that the last clarifying instruction was [sic] given to the jury. I don't think that in any way prejudiced Mr. Hanson's right to make his motion, or his right to appeal."

(Transcript, Motion for New Trial, pp. 28 and 29.)

Counsel for the plaintiff persisted in urging his theory of waiver upon the court. The record then records the following:

"THE COURT: Of course, Mr. Hanson has already objected to the instruction given.

"MR. KING: But the fact apparently was completely —

"THE COURT: I think the error, if any, had been committed and I don't think anything we could have done at that time would have helped."

(Transcript, Motion for New Trial, p. 31.)

The reasons the giving of Instruction No. 12 constituted error are set forth in Appellant's Brief, Point I, page 4. It is pertinent to observe however, that when the "clarifying instruction" was given the error had already occurred, and the jury had been wrestling with it for seven hours. The time to have corrected that error was before the instructions were read to the jury, when a proper exception had been taken, rather than attempt clarification after the jury was plunged into the conflict

which existed between Instruction No. 12 and No. 14. These two instructions were irreconcilable. To accept one was to reject the other. The fact that the jury could not reconcile them bespeaks the thoroughness with which they undertook their charge and affirms the validity of the objection which had been made to those instructions by defendant. The "clarifying" instruction did not clarify, it merely informed the jury to consider the case on the basis it had been submitted to them. The error remained and their dilemma continued.

It was incumbent upon the court to properly state the law. The defendant should not be penalized for his attempt to assist the court in eliminating an error which had been made, and proper exception reserved.

The right to alter the instructions, or to give additional instruction was, of course, within the sound discretion of the trial judge. The court realized that after the jury had been considering the conflict between these instructions for such a period of time that any attempt to correct them by patchwork would draw undue attention to the revised instruction and create further prejudice. Under the circumstances the court probably did all it could do to avoid additional error.

The court in seeking counsel's assistance in preparing a clarifying instruction understood and stat-

ed that neither of the parties "waived anything", and that the defendant's right to take an appeal on the originally assigned error was preserved. (Transcript, Motion for New Trial, p. 29.)

The clear implication of plaintiff's argument is that the presence of opposing counsel at a time when the plaintiff was urging error upon the court, not only condoned the error but waived any right to object to it. The record is plain that a proper objection was taken to Instruction No. 12 and was continued at every point in the proceedings.

It is, of course, the responsibility of the plaintiff as well as defendant to assist the court in giving proper instructions and to refrain from committing error. However, plaintiff suggests that because defendant was not successful in persuading the court to avoid error, against his own arguments to the contrary, defendant cannot now complain, but has in effect, waived his right to appeal. Surely, defendant's counsel cannot be expected to be more diligent in plaintiff's cause than is his own counsel. Plaintiff presented the misleading instruction and urged the court to adopt it, which was done, against the specific objection of the defendant.

The plaintif contends that the defendant "irrevocably" put aside his claim of error by stipulating that the explanatory instruction be given. Plaintiff then cites several cases which he asserts affirm

that proposition. None of the cases are helpful. In *McCall* v. *McKendrick*, 2 Utah 2d 364, 374 P.2d 962, the complaining party failed to take any objection whatsoever to the instructions given. He requested permission to state an objection on appeal ~~given~~ and was denied. Similarly, in *Devine* v. *Cook*, 3 Utah 2d 134, 274 P.2d 1073, the objections taken were not explicit; nevertheless, the court found that they were sufficient. In the case of *Ludlow* v. *Los Angeles-Salt Lake Railway*, 73 Utah 513, 275 Pac. 593, the question was not even discussed. Neither does *State* v. *Kesler*, 15 Utah 143, 49 Pac. 293, treat the problem. Although, 53 Am. Jur. Trial Sec. 513 contains a general discussion of Instructions given after submission of a case to a jury, it is not helpful here.

No case is cited by the plaintiff which supports the proposition that a defendant waives or puts aside any claim of error by stipulating to a special instruction given to the jury at their request in the face of a reservation of the objection to the prior instruction.

ARGUMENT

DEFENDANT HAS NOT WAIVED HIS RIGHT TO APPEAL FROM A RULING CONCERNING A DECLARATION OF THE COURT THAT A POLICE OFFICER WAS AN EXPERT WITNESS.

The plaintiff and respondent in his brief (p. 13), asserts that since the defendant did not argue on

motion for new trial that certain remarks of the court were prejudicial, such assertion cannot now be urged on appeal. In support of this position the plaintiff cites the case of *Law* v. *Smith,* 34 Utah 394, 408, 409, 410, 98 Pac. 300.

In that case an appeal was taken directly from a judgment entered on a jury verdict. The basis of the appeal was challenged because the claimed errors had not been presented to the trial court on motion for a new trial. The court, in discussing appellate procedure stated:

> "The right to move for a new trial is present in every case, whether legal or equitable, or whether tried to a court or jury. If a party thinks he can convince the trial court that it committed a judicial error and will grant him a new trial without an appeal, he may make his motion and obtain a ruling upon it; but, when he has obtained one ruling from the court and has taken or is given a statutory exception, he need not require the court to repeat the error before he is entitled to a review of the error by this court . . . . If the trial court has passed upon a matter in the course of trial and an exception is taken or is given by the statute, the ruling or decision made by the trial court, if assigned as error, is before this court for review on appeal . . . any other holding would bring about the incongruity of requiring the trial court to pass twice on some matters, while it may do so but once on others.
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> * * *
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> "*From what has been said it necessarily fol-*

lows that all orders, rulings and decisions made by the trial court during the trial. . . . are before this court for review without a motion for a new trial." (Emphasis added.)

It is only in those cases where a matter arises following trial that it must be brought to the attention of the trial court by way of a motion for a new trial, and the trial court given an opportunity to pass upon the matter, before an appeal lies. The case so holds.

The right to appeal as stated in Rule 72, Utah Rules of Civil Procedure, contains no such limitations as suggested by respondent.

As plainly appears from the record, (T. 133-136), and as cited at page 19 of Appellant's Brief, the defendant properly objected to the comment of the court, the matter was then discussed in chambers and the objection was clearly reserved.

The trial court passed upon defendant's objection during the course of trial and the correctness of that ruling is properly before this court for review.

CONCLUSION

Defendant and appellant did not waive any right of appeal by stipulating to a "clarifying instruction" given by the court after the case had been submitted to the jury. Further, a ruling made

by the Court during the course of trial is properly before this court on appeal without submitting it for review on Motion for a New Trial.

Respectfully submitted,

HANSON & BALDWIN and
MERLIN R. LYBBERT
515 Kearns Buiding
Salt Lake City, Utah
Attorneys for Appellant