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Julie Anderson Turner v. Amy Nelson : Reply Brief

Utah Supreme Court

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BRIEF

920195

IN THE SUPREME COURT OF THE
STATE OF UTAH

JULIE ANDERSON TURNER,)	
)	
Plaintiff/Appellant,)	
)	
v.)	Case No. 920195
)	
AMY NELSON,)	
)	
Defendant/Appellee.)	

APPELLANT JULIE TURNER'S REPLY BRIEF

APPEAL FROM A FINAL JUDGMENT OF THE HONORABLE
DENNIS J. FREDERICK IN THE THIRD JUDICIAL
DISTRICT COURT OF UTAH, SALT LAKE COUNTY

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APPELLANT'S REPLY BRIEF

Appellant, Julie Turner ("Turner"), respectfully submits this Brief in reply to the brief of Appellee Amy Nelson ("Nelson").

INTRODUCTION

Utah's comparative negligence statute is unique among its counterparts in sister states. While it retains many of the theoretical underpinnings of sister statutes, it applies them in a more reasoned and even-handed manner to negligence actions in Utah.

Utah was by far the last of the Pacific region states to enact a comparative negligence statute. As such, it enjoyed the benefits of other states' successes and failures, and was able to incorporate the wisdom of other states' judicial interpretations into its comparative negligence scheme.

This scheme, codified at Utah Code Ann. §§ 78-27-37 - 43, embodies the Utah Legislature's considered decision to restrict the apportionment of negligence to parties to the action. Underlying this decision are several important policy considerations.

The first, and foremost, consideration is fairness to all parties to the litigation. By restricting the apportionment of negligence to parties, the statute encourages the joinder of all potentially responsible tortfeasors into the initial litigation, which in turn ensures that no defendant will be liable for more than her share of fault.

The statute encourages joinder by allocating the burden of joining a responsible defendant to the party wishing to apportion negligence. This in turn ensures that all responsible parties will be present to protect their interests, and further ensures that fault will be allocated realistically and fairly in an adversarial

proceeding. Defendants are thus protected from paying more than their proportionate share of liability and Plaintiffs are protected from the inequity of a disproportionate and unenforceable judgment against an "empty chair."

The statute also promotes judicial economy. By encouraging joinder of all potentially responsible parties in the initial litigation, it prevents multiple and successive litigation by plaintiffs seeking to bind "ghost" tortfeasors legally for acts for which a jury may find them theoretically responsible.

Utah's comparative negligence statute represents a unique legislative balancing of competing policy objectives. It is the duty of this Court to protect and preserve that balance.

ARGUMENT AND AUTHORITIES

I. THE TRIAL COURT'S ADDITION OF THE NON-PARTY CITY TO THE SPECIAL VERDICT FORM THE DAY OF TRIAL WAS ERROR

A. Turner's Objection is not Moot

Nelson's first argument is that Turner's objection to the addition of the non-party City to the verdict form the day of trial is "moot" because Nelson was found to have no negligence by the jury. Nelson's argument is circular and without merit.

The doctrine of "mootness" requires that an actual controversy exist at all stages of appellate review, and not simply on the date the action is initiated. Roe v. Wade, 410 U.S. 113, 125, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). A justiciable controversy clearly exists between Turner and Nelson, arising from Nelson's collision with Turner after running a stop sign on July 6, 1989, which is

capable of review and decision by this Court. Turner's claim plainly is not "moot."

Nelson's claim that the addition of the non-party City the day of trial was of "no consequence" is disingenuous at best and similarly meritless. "Even if Salt Lake City had not been on the verdict form, defendant would have made the same argument, claiming that she was free of fault because the stop sign could not be seen." Nelson's Brief, at 12. Nelson's opening statement to the jury, however, impugns this assertion:

I think the real fault here that -- we're suggesting is with Salt Lake City. It's a bad design. They didn't have it well signed.

(R. 376)(emphasis added). Nelson argued that the City's negligent design, not her own alleged freedom from negligence, was the cause of the accident. It is difficult to imagine the same argument being made if the City were not on the verdict form.

The trial transcript clearly demonstrates that Nelson's primary defense was the alleged negligence of the "empty chair" City, not her alleged "freedom from negligence." Nelson's claim that the addition of the City "was of no consequence" is clearly without merit.

Nelson's reliance upon Beitzel v. City of Coeur d' Alene, 827 P.2d 1160 (Idaho 1992), is misplaced. In Beitzel, the Idaho Supreme Court upheld the trial court's refusal to include unnamed non-parties on the verdict form. The court held that because the jury had found the plaintiff not to be negligent, any non-party negligence would not serve to reduce the plaintiff's recovery because Idaho's comparative negligence statutes require

apportionment only when there negligence attributable to the person recovering. Id. at 1164 (emphasis added).

Beitzel is thus inapplicable because (1) the jury never reached the question of Turner's negligence, if any; and (2) Idaho's comparative negligence scheme operates differently than Utah's. Beitzel further does not apply by analogy, because comparative negligence statutes do not treat plaintiffs and defendants similarly.

The court's opinion in Beitzel is, however, instructive. It clearly demonstrates that even Idaho, the jurisdiction upon which Nelson relies so heavily for support, recognizes that non-parties may be excluded from negligence apportionment in appropriate circumstances. Id.; Hickman v. Fraternal Order of Eagles, 758 P.2d 704 (Idaho 1988). The Beitzel court also recognizes the policies of fairness to plaintiffs ("any negligence of the non-party could not serve to lessen the award to the plaintiffs") and of encouraging joinder of non-parties to the action ("[t]he verdict would not have been binding on the unnamed [non]party, in any event."). Id. at 1164-65.

The trial court's inclusion of the non-party City on the verdict form and as a "party" at trial clearly and conclusively altered the posture and presentation of the case below. It permitted the jury to assign all liability to an unrepresented "ghost" party, a party the jury knew could not and would not be bound by its verdict. Without the City present to protect its interests and to provide a truly adversarial atmosphere, Nelson was permitted to foist her liability upon an absent, unrepresented

party, thus denying Turner a fair trial. The court's decision was prejudicial and clearly erroneous and should be reversed.

B. Utah's Comparative Negligence Statute Cannot Be Construed Without Reference to § 78-27-41

Both parties agree that the interpretation of § 78-27-41 is the key to this appeal. Section 78-27-41 provides:

A person seeking recovery, or any defendant who is a party to the litigation, may join as parties any defendants who may have caused or contributed to the injury or damage for which recovery is sought, for the purpose of having determined their respective of fault.

Id. § 78-27-41 (emphasis supplied). Nelson argues that § 78-27-41 represents merely a "strategic option" to be employed by litigants when, and if, it serves their purposes. Nelson's Brief, at 14-15. Turner, conversely, asserts that § 78-27-41 represents an integral component of the comparative negligence scheme enacted by the Utah Legislature that requires joinder of a defendant as a prerequisite to apportionment of her alleged negligence.

Utah's well-settled rules of statutory construction clearly support the latter position. When construing a statute, all words are presumed to have been used advisedly by the legislature, and the construction of a statute which gives effect to all of its provisions is favored. Pate v. Marathon Steel Co., 777 P.2d 428 (Utah 1989); Madsen v. Borthick, 769 P.2d 245 (Utah 1988)(emphasis added). Further, statutes in Utah are not to be severed and considered piecemeal, but must be given effect in their entirety whenever possible. Peay v. Board of Education of Provo City School Dist., 377 P.2d 490 (Utah 1962)(emphasis supplied).

Nelson's interpretation strips § 78-27-41 of any practical effect. "Section 41 gives all parties to the lawsuit the ability to join joint tort-feasors for the purpose of discovery and trial." Nelson's Brief, at 14. Parties to a lawsuit possessed this ability at common law, and currently possess this ability under the Utah pleading code irrespective of § 78-27-41. See Utah R. Civ. P. 14, 15, 17, 19.

Section 78-27-41 thus, according to Nelson, confirms upon litigants that which they indisputably already possess. This interpretation divests this section of any legitimate effect in contravention of well settled strictures of statutory construction. It further relegates the section to the level of a mere instrument of a lawyer's stratagem to be used or discarded as convenience dictates. The Legislature is not in the business of "strategy."

The better reasoned interpretation, which gives effect to this section and its plain language, is that § 78-27-41, in the context of the Liability Reform Act, requires that a defendant (as defined in the Act) be joined as a party to the litigation before her negligence can be apportioned by the jury. The Utah Legislature included § 78-27-41 in the Act for a specific purpose clearly unrelated to considerations of "strategy" or "trial tactics."

It is the duty of this Court to accord effect to each provision of the Act, and to harmonize all provisions of the Act if at all possible. Madsen v. Borthick, 769 P.2d 245 (Utah 1988). Interpreting the Act to require joinder prior to apportionment harmonizes all sections of the Act without compromising the

legislative balance struck between considerations of tort reform, fairness to litigants and judicial economy.

Nelson focuses upon the use of the word "may" in § 78-27-41, and argues that it makes joinder optional. As this Court has previously held, however, use of a traditionally permissive word in a statute does not automatically render it permissive within the context of the statute:

There is no universal rule by which directory provisions may, under all circumstances, be distinguished from those which are mandatory. The intention of the legislature, however, should be controlling and no formalistic rule of grammar or word form should stand in the way of carrying out the legislative intent.

Kennecott Copper Corp. v. Salt Lake City, 575 P.2d 705, 706 (Utah 1978)(citing 1A Sutherland Statutory Construction § 25.03, at 299-300 (4th Ed.))(emphasis added). In the context of the Act, joinder under § 78-27-41 is only mandatory when a party seeks to have a non-party's negligence apportioned. The Legislature's use of the word "may" in § 78-27-41 thus embodies both a directory and a mandatory connotation.

Nelson also argues that non-parties' negligence must be permitted to be apportioned in order to maintain the "purity" of the comparative negligence scheme. Several sister states have considered, and expressly rejected, this argument on a variety of grounds. See Mills v. Brown, 735 P.2d 603 (Ore. 1987); Warmbrodt v. Blanchard, 692 P.2d 1282 (Nev. 1984); National Farmers Union Property & Casualty Co. v. Frackelton, 662 P.2d 1056, 1060 (Colo. 1983)(*En Banc*).

Moreover, Utah's comparative negligence scheme is concededly unique in both its form and its function. The fact that it differs from Idaho, Kansas or Oklahoma's¹ schemes makes it neither less effective nor less "comparative" than those states' statutes. Utah's scheme assigns the burden of joining a defendant tortfeasor to the party wishing to have the defendant tortfeasor's negligence considered, which represents a more equitable method of ensuring both that all responsible parties are represented at trial, and that all parties are treated fairly.

In support of her interpretation, Nelson raises the specter of a party's inability to acquire jurisdiction over a joint tortfeasor (the "practical realities" of modern lawsuits) forcing that party to bear a disproportionate degree of liability for plaintiff's injuries. Nelson's hypotheticals are unavailing. Clearly, commission of a tort within a state is sufficient to subject a tortfeasor to jurisdiction under the state's long arm statutes. *E.g.*, Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 268, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).

Assuming, *arguendo*, that a tortfeasor was beyond Utah's jurisdictional reach, it is far more equitable to require the defendant joint tortfeasors to bear the burden of that immunity than the injured (and often faultless) plaintiff. As the Colorado Supreme Court stated:

¹ Nelson's reliance upon Oklahoma case law for support is misplaced, since Oklahoma retains joint and several liability as a feature of its comparative negligence scheme. *E.g.*, Anderson v. O'Donoghue, 677 P.2d 648 (Okla. 1983).

[A] comparison of the negligence of absent tortfeasors may work to defeat any recovery by a deserving plaintiff . . . the plaintiff's claim against tortfeasors named as defendants should not be compromised in cases where the identity of an absent tortfeasors [sic] is unknown, such as the "phantom" in a three car hit-and-run accident. By requiring the jury to apportion 100 percent of the negligence among the parties, the burden of persuading the factfinder to resolve the comparative negligence equation is shared equally between the plaintiffs and the tortfeasors who participate in the trial.

* * * * *

[I]t is preferable to place the burden of finding and suing absent tortfeasors on those who caused plaintiff to suffer damages.

National Farmers Union Property & Casualty Co. v. Frackelton, 662 P.2d 1056, 1060 (Colo. 1983).

In § 78-27-41 the Utah Legislature has chosen to allocate the burden of finding and suing absent tortfeasors upon the party wishing to apportion those tortfeasors' negligence. This Court should enforce the Legislature's choice by giving effect to § 78-27-41 and reversing and remanding the trial court's decision below.

C. The Addition of the Non-Party City the Day of Trial Was Manifestly Prejudicial

In her Brief, Nelson asserts that Turner was not prejudiced by the addition of the non-party City the day of trial. In support of this assertion, Nelson argues that she claimed all along that the stop sign in question was partially obstructed and "not properly visible." Nelson further claims that the presence of the City did not alter the nature, presentation or outcome of the case.

Turner was prejudiced in three fundamental ways by the addition of the non-party City: (1) She was given inadequate notice and opportunity to prepare for the addition of a new party and new issues to the litigation; (2) She was improperly forced at

trial to prove a negative (the City's non-negligence); and (3) She was denied recovery for her injuries.

1. Inadequate Notice

Turner was notified the day of trial that she would be litigating the issue of the empty chair City's alleged negligence. The addition of a new party to the trial moments before opening statements are made to the jury clearly does not constitute fair or adequate notice.

Utah courts have long required that amendments to the pleadings or the addition of parties made shortly before, or at, the time of trial be fair to the opposing party. Girard v. Appleby, 660 P.2d 245 (Utah 1983). This Court has held, in fact, that such motions are to be construed so as to further the interests of justice, and are to be subjected to much stricter scrutiny when made at, or during, trial. Gillman v. Hansen, 486 P.2d 1045 (Utah 1971).

In Girard, the Court affirmed the trial court's denial of a motion to amend to add new causes of action the day of trial. The Court based its affirmance upon the plaintiff's inability to state an adequate reason for the untimeliness of the motion, and upon the disadvantage and surprise to the defendant, stating that "the interests of justice will best be served by the court's denial of the motion to amend." Id. at 248 (citing Johnson v. Brinkerhoff, 57 P.2d 1132 (1936)); see also Kelly v. Utah Power & Light, 746 P.2d 1189, 1190 (Utah Ct. App. 1987) (Proper standard for a trial judge considering a motion to amend is "whether the opposing side would be put to unavoidable prejudice by having an issue adjudicated for

which he had not time to prepare"). Similarly, in Tripp v. Vaughn, 746 P.2d 795 (Utah Ct. App. 1987), the court of appeals affirmed the denial of a motion to add a third party defendant made two weeks before trial where "inadequate reasons for the untimely motion were presented" Id. at 798.

Nelson has wholly failed to present an adequate reason for the timing of her motion to add the City. Nelson alone knew that the City was a proper party to the lawsuit from the day she was served. Her answer to Turner's complaint alleges that Turner's injuries were "caused by the negligence of third parties." Nelson never identified a third party, however, until six (6) days before trial.

Nelson clearly made a conscious "strategic" decision to "lay behind the log" until the week of trial before naming the City as a potentially responsible party. This was an admirably clever bit of lawyering on Nelson's part in the grand tradition of the Perry Mason "surprise witness." It proved to be remarkably successful.

Trial by ambush, however, was abolished in 1937 with the adoption of the Federal Rules of Civil Procedure. Rule 1 of the Utah Rules of Civil Procedure states that the rules "shall be liberally construed to secure the just, speedy and inexpensive determination of every action." Utah R. Civ. P. 1 (emphasis added). This Court has consistently required that the addition of parties shortly before or at trial be fair to the opposing party. Girard v. Appleby, 660 P.2d 245 (Utah 1983). The addition of the City the day of trial was neither fair to Turner nor just, and was clearly prejudicial. The trial court's decision should be reversed.

2. Proving the Negative

By allowing the City to be added to the verdict form, the trial court improperly put Turner in the position of having to prove a negative, i.e., the City's non-negligence, in order to recover for her injuries. In effect the trial court shifted the burden of proof. As the Colorado Supreme Court stated, "it is unfair to saddle the plaintiff with the burden of litigating liability issues of a non-party or to try the absent tortfeasor *in absentia* under conditions which could not bind that person under principles of res judicata or collateral estoppel." Frackelton, 662 P.2d at 1060.

3. Denial of Recovery

The greatest prejudice caused by the addition of the non-party City the day of trial was the denial of any recovery by plaintiff for her injuries. By shifting the focus from her own actions to the City's alleged negligent design or signing of the intersection, Nelson escaped liability for Turner's injuries, injuries which Nelson indisputably caused. This result could not have been reached under the facts of this case but for the presence of the City both on the verdict form and as an "empty chair" at trial.

The Colorado Supreme Court rejected this precise result under principles of equity and fairness to the plaintiff:

[A] comparison of the negligence of absent tortfeasors may work to defeat any recovery by a deserving plaintiff . . . the plaintiff's claim against tortfeasors named as defendants should not be compromised . . . By requiring the jury to apportion 100 percent of the negligence among the parties, the burden of persuading the factfinder to resolve the comparative negligence equation is shared equally between the plaintiffs and the tortfeasors who participate in the trial.

Id.

The jury's verdict is probably the best evidence of the prejudice caused by the addition of the City the day of trial. Nelson would seemingly have the Court believe that it was the City, not Nelson, who ran the stop sign and broadsided Turner. Had the court properly refused to add the City, the jury would have apportioned fault solely between Turner and Nelson. It is indisputable that, under the facts presented at trial, Nelson would have borne a substantial percentage, if not the entirety, of the liability for Turner's damages. The prejudice to Turner is clear and unequivocal.

Because the jury below was prevented from reaching the issue of whether Turner was in any way negligent, the Court should reverse the trial court and grant Turner a new trial in which the jury can apportion negligence between the plaintiff and the tortfeasor who participated in the trial, Turner and Nelson.

II. THE TRIAL COURT'S REFUSAL TO PERMIT REBUTTAL TESTIMONY WAS PREJUDICIAL ERROR

Nelson's reliance upon the principle of "surprise" as a ground for refusing Turner's proffered rebuttal evidence is indeed curious and ironic. The pot has called the proverbial kettle "black."

Contrary to Nelson's assertions, Turner was not required in her case in chief to prove that the stop sign was "unobstructed." Turner was required to prove that Nelson ran a stop sign, and that Nelson's negligence was the proximate cause of Turner's injuries. In Rodriguez v. Olin Corp., 780 F.2d 491 (5th Cir. 1986), the Fifth Circuit Court of Appeals pointed out that a plaintiff only bears

the burden of proving a *prima facie* case, and is not required to "prove the negative" of defendant's facts or theories:

This rule proceeds from the view that a plaintiff has the right to adduce whatever evidence is necessary to establish its *prima facie* case and is under no obligation to anticipate and negate in its own case in chief any facts or theories that may be raised on defense.

Id.; accord, Kaczmarek v. Allied Chemical Corp., 836 F.2d 1055 (7th Cir. 1987); Soliz v. Ammerman, 395 P.2d 25 (Utah 1964) (Rebuttal evidence is designed to meet facts not raised prior to the defendant's case in chief, not facts which *could have been* raised). In its decision, the court discussed the rules and considerations governing the admission or denial of rebuttal testimony. The court held that rebuttal evidence should be allowed where "new" testimony is presented during defendant's case in chief. The court stated that

Logic and fairness lead us to conclude that new evidence for purposes of rebuttal does not mean "brand new." Rather, evidence is new if, under all the facts and circumstances, the court concludes that the evidence was not fairly and adequately presented to the trier of fact before the defendant's case in chief.

Id. at 496.

Witness Nakling's proffered testimony was clearly proper rebuttal evidence that should have been admitted by the trial court. It was offered to refute Nelson's testimony that the stop sign was obstructed, and to controvert the testimony of Nelson's expert, who testified that, due to the obstruction, Nelson could not reasonably have been aware that she needed to stop. Nelson and her expert's testimony was unquestionably "new" evidence which Turner was under no obligation to anticipate and negate in her case

in chief. Rodriguez, 780 F.2d at 496. The fact that Nakling was not included on pretrial Turner's witness list is irrelevant in the context of rebuttal.

Moreover, it is undisputed that the substance of Nakling's testimony had not adequately been presented to the jury prior to Nelson's case in chief. See id.; see also Everett v. S.H. Parks & Associates, Inc., 697 F.2d 250, 252 (8th Cir. 1983)(plaintiff's rebuttal evidence "was not truly relevant until [defendant] presented its defense"). Turner was thus effectively prevented from offering any evidence that the sign was not obstructed. The trial court abused its discretion by prohibiting Nakling from testifying.

Finally, Nelson states in her Brief that

The Rules of Civil Procedure as adopted in Utah and most states of the United States are intended to provide each party with full access to the other's case to avoid surprises at trial. To allow one side to use a witness that was not revealed . . . jeopardizes the other party's trial preparation and should not be permitted.

Nelson's Brief, at 24. We could not have said it better. Had both parties to this appeal been accorded the fairness embodied in this paragraph, this case would not be before the Court.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Turner's Brief in Chief, Turner respectfully requests that the Court reverse and remand this case with instructions to grant Turner a new trial as to all issues.

Respectfully submitted,

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CERTIFICATE OF MAILING

I the undersigned do hereby certify that on the 5th day of March, 1993, a true and correct copy of the above and foregoing instrument was forwarded by U.S. Mail, with proper postage thereon fully prepaid, to the following counsel of record:

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