

1963

Sherman V. Lund v. Mountain Fuel Supply Co. : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Lund v. Mountain Fuel Supply Co.*, No. 9835 (Utah Supreme Court, 1963).

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IN THE SUPREME COURT
of the
STATE OF UTAH

SHERMAN V. LUND,
Plaintiff-Appellant,

vs.

MOUNTAIN FUEL SUPPLY
COMPANY,
Defendant-Respondent.

FILED

APR 30 1963

Clerk, Supreme Court, U

No.
9835

BRIEF OF APPELLANT

**Appeal from an Order of the 2nd Judicial District for
Davis County, Dismissing Appellant's Complaint
Honorable Thornley K. Swan, Judge**

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IN THE SUPREME COURT
of the
STATE OF UTAH

SHERMAN V. LUND,

Plaintiff-Appellant,

vs.

MOUNTAIN FUEL SUPPLY
COMPANY,

Defendant-Respondent.

No.
9835

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

Appellant brought an action against the respondent company for damages to his real property as a result of a gas leak occurring in the respondent's line where the service line of the appellant joined the main line in the street (R 1). Appellant alleged that respondent was negligent in failing to bury its gas main at a sufficient depth in the street to guard against any damage to the main or service line caused by traffic using the

street. Appellant also contends that the portion of the line where the break occurred was under the exclusive control of the respondent and, therefore, relied upon the doctrine of *res ipso loquitur* (R 5). A break occurred in the gas main and thereafter, the leaking gas followed the line of least resistance and entered the appellant's property by following the service line. Natural gas saturated a large portion of the appellant's property, killing his lawn, shrubbery and fruit trees (Tr 13-29).

DISPOSITION IN LOWER COURT

Appellant produced evidence concerning the location of the gas leak and the damage done to his property and then rested his case (Tr 5, 13-29, 82). The Court's Pre-Trial Order states that the following are uncontroverted facts:

- “A. Defendant had constructed, prior to 1958 and since that time has been in the business under an exclusive franchise of furnishing gas for fuel to residences and business establishments within the area involved, including plaintiff's residence.
- “B. That the construction, operation and maintenance of the gas lines involved were for all time herein under the exclusive control of defendant.
- “C. That the main transmission line from which the gas escaped was constructed by defendant at the usual depth below ground surface at which such lines are buried within the area involved.” (R-5).

Respondent then, after inquiring as to whether or not the Court was going to consider the doctrine of res ipsa loquitur and its application to the facts of the case, moved the court for a dismissal (Tr 83, 84). The Court took the motion under advisement and the following day, informed counsel for the parties that it was the Court's opinion that there not not sufficient evidence to go to the jury on the question of negligence and that the Court felt that the doctrine of res ipsa loquitur did not apply. The Court, then, granted respondent's motion (Tr 86). Counsel for the appellant moved the Court for leave to re-open the case to present further evidence on the question of negligence and indicated to the Court what the evidence would be (Tr 86, 90, 91). The Court refused to permit the appellant to re-open his case (Tr 91).

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the lower Court's Order of Dismissal and a new trial.

STATEMENT OF FACTS

The appellant is a resident of the City of Bountiful, Utah. In the spring of 1958, he noticed that his lawn and shrubbery, as well as other plant life in his yard, were turning yellow and dying. This condition was discovered after returning from a two-week vacation. After several weeks of attempting to discover the reason

for the condition, he finally discovered that there was natural gas seeping from a leak in the gas main in the street. The gas was following the service line to his home, and had saturated the ground all around the line. The natural gas became so dense in the ground that it eventually killed the plant life (Tr 13-29). Appellant informed the gas company of the existence of a leak. It was discovered at the junction of the service line with the company's main line in the street (Tr 5). Thereafter, the gas company made various tests on his premises by penetrating the soil with a meter to test the density of the gas. It was determined that the gas was of such sufficient density that a large percentage of the plant life on the property would probably die (Tr 19, 20). Appellant, pursuant to the advice of respondent's employees, saturated his premises with water and cultivated wherever possible in an effort to dissipate the gas and save his shrubbery, but he was unsuccessful (Tr 23).

This action was brought to recover the damages to the property as a result of the leaking natural gas. At the trial of the case, the appellant produced testimony as to the depth of the gas main and the fact that the leak had occurred causing damage to his property (Tr 8, 9, 13-29). Thereafter, in reliance upon the Pre-Trial Order concerning the uncontroverted facts of exclusive control, operation and maintenance of the gas lines by the company, he rested his case. The Court, pursuant to the company's Motion for dismissal, took under advisement the question of

the applicability of the doctrine of *res ipsa loquitur*. The following day, the Court informed counsel that it was of the opinion that the doctrine did not apply and that insufficient evidence had been produced at that point to raise a question of negligence for the jury's determination. The Court, then, granted the company's Motion for Dismissal. Immediately thereafter, counsel for appellant moved for permission to re-open to present further evidence to the Court on the issue of negligence and the possible application of the doctrine of *res ipsa loquitur*. Counsel for the respondent strenuously objected to a re-opening of the case (Tr 83-91). The jury was present as well as all of the witnesses. The matter could have been handled with dispatch and without prejudice to the company. The Court indicated to counsel for the respondent that his objection to re-opening of the case would very probably only cause further delay in the matter (Tr 87). The Court was persuaded not to allow the case to be re-opened.

POINTS URGED FOR REVERSAL

POINT I

APPELLANT'S EVIDENCE, COUPLED WITH THE PRE-TRIAL ORDER, RAISED SUFFICIENT ISSUES OF FACT TO INVOKE THE DOCTRINE OF RES IPSA LOQUITUR.

POINT II

THE COURT ABUSED ITS DISCRETION IN REFUSING TO ALLOW THE APPELLANT TO RE-OPEN HIS CASE WHERE NO PREJUDICE WOULD HAVE RESULTED.

ARGUMENT

POINT I

APPELLANT'S EVIDENCE, COUPLED WITH THE PRE-TRIAL ORDER, RAISED SUFFICIENT ISSUES OF FACT TO INVOKE THE DOCTRINE OF RES IPSA LOQUITUR.

The Pre-Trial Order specifically states that the construction, operation and maintenance of the gas lines involved were, at all times, under the exclusive control of the gas company (R 5). Appellant's evidence clearly indicated that the gas line leaked, causing his damage. In the case of *Wightman vs. Mountain Fuel Supply Company*, 5 Utah 2d 373, 302 P.2d 471, this Honorable Court stated that in order to invoke the doctrine of res ipsa loquitur, the following must be found:

- “1. That the accident was of a kind which, in the ordinary course of events, would not have had due care been observed;
2. That it happened irrespective of any participation by the plaintiff; and

3. That the cause thereof was something under the management or control of the defendant or for which it is responsible.”

The facts in the instant case clearly indicate that the conditions set forth in the above cited case have been met by the appellant. Ordinarily, gas lines do not leak if due care has been observed. The appellant did not, in any way, participate in the cause of the leak. The Pre-Trial Order clearly states that the line containing the gas was under the exclusive management and control of the gas company for which it was responsible. Based upon the foregoing facts and evidence, the appellant was entitled to have the issue of negligence based upon the doctrine of *res ipsa loquitur* submitted to the jury. This doctrine was specifically made an issue in the case in accordance with the Pre-Trial Order and the appellant rightfully relied upon the doctrine and its application to the facts. If the trial court, at the conclusion of appellant's case, decided, as it did, that the doctrine should not be applied under the facts as presented, the appellant should have been allowed to present further evidence to the Court and jury on issues of specific negligence as no possible prejudice would have resulted.

POINT II

THE COURT ABUSED ITS DISCRETION
IN REFUSING TO ALLOW THE APPEL-
LANT TO RE-OPEN HIS CASE WHERE NO
PREJUDICE WOULD HAVE RESULTED.

The jury had not been dismissed (Tr 86). All of the witnesses were present. No delay of any nature whatsoever would have occurred in permitting the appellant to re-open. This Honorable Court stated in the case of *Wasatch Oil Refining Company vs. Wade, Judge, et al*, 92 Utah 50, 63 P.2d 1070,

“A motion to re-open the case for the purpose of introducing further evidence is addressed to the sound discretion of the court, which will be *liberally* exercised in behalf of allowing the whole case to be presented . . . ” (Italics ours.)

The appellant recognizes that a motion to re-open a case is addressed to the sound discretion of the trial court. It is respectfully submitted that in exercising such discretion, the trial court should liberally grant such motions in a furtherance of justice, especially where no prejudice will result to the opposing party. The refusal to grant a party's motion to re-open is the exception rather than the rule. See 53 Am. Jur., Page 110, Section 124, wherein the author states

“It is common practice for the trial court to allow the case to be re-opened and additional evidence introduced in order to prevent a non-suit, where counsel for the plaintiff has omitted evidence by accident, inadvertence, or even because of a mistake as to the necessity of offering a particular witness or particular evidence.”

In the instant case, counsel for the appellant was under the impression that the doctrine of *res ipsa loquitur* was to be applied in the case and not until he had been informed by the court that the doctrine was

not going to be allowed did he consider it necessary to offer further evidence. At this point, the appellant had rested his case in reliance upon the doctrine. Counsel for the respondent was also uncertain as to the application of the doctrine (Tr 83). The trial court indicated to counsel for respondent that perhaps appellant should be allowed to re-open (Tr. 87, 88). It is further stated in 53 Am. Jur., supra, as follows

“A refusal to re-open the case may be an abuse of discretion, where the party has acted in good faith, and where no prejudice would result to the other party.”

Generally, in those cases wherein the court denies plaintiff the right to re-open, the evidence is such that he could not prevail based upon his own contributory negligence. In the case of *Duncan vs. Western Refrigeration Company*, 11 Utah 2d 19, 354 P.2d 572, this Honorable Court upheld the lower court's refusal to allow a party to re-open. This case, unlike the instant case, presented a situation wherein the party moving to re-open was probably contributorily negligent based upon the evidence already presented. The majority opinion indicated that there was ample evidence on which the jury could so find that would bar the plaintiff's recovery. For this reason, the majority of the court refused to find that the lower court had abused its discretion in not allowing the case to be re-opened. In the dissenting opinion of Justice Crockett, he states:

“Furthermore, even if the matter had only been discretionary with the trial court, it seems

to me that the exclusion of the evidence would have been an abuse of discretion. The court's duty is to exercise its discretion in favor of admitting all competent evidence offered in good faith which has a bearing on the issue because that is the only way the truth may be found and justice done."

Appellant respectfully submits that in the instant case, there was no evidence or issue of contributory negligence (R 3). The case was based solely upon the negligence or lack of negligence of the gas company in causing or allowing the gas to leak from its main onto the appellant's property causing the damage in question. The trial court had not indicated at the time of Pre-Trial nor at the time appellant introduced his evidence that it was not going to allow the doctrine or *res ipsa loquitur* to be applied. Based upon the assumption that the doctrine would be allowed as per the Pre-Trial Order, appellant rested his case. He was then informed by the court that the doctrine was not applicable, and a dismissal was granted. It is respectfully submitted that the trial court abused its discretion in refusing to permit the case to be re-opened for the purpose of producing further evidence material to the issues of the case. A previous jury had found the company negligent and awarded damages accordingly. The matter was then appealed to this Honorable Court and reversed as a result of erroneous instructions. Supreme Court Case No. 9389.

CONCLUSION

The appellant presented sufficient evidence to raise the issue of negligence under the doctrine of *res ipsa loquitur* and the lower court erred in refusing to apply the doctrine. The lower court also erred in refusing to permit the appellant to re-open his case after the Court had informed him that it was not going to allow the doctrine to apply. Immediately upon being so informed by the Court, the motion to dismiss was granted. The appellant moved to re-open the case to present further evidence. The record clearly shows that the jury, witnesses, and all counsel were still present in the courtroom. The case could have gone forward immediately without prejudice or delay to anyone. The trial court also indicated its concern about its authority to allow the re-opening, but indicated to the respondent that unnecessary delay might be caused by its failure to do so. It is respectfully submitted that the doctrine of *res ipsa loquitur* does apply under the facts of the instant case. The trial court abused its discretion in refusing to permit appellant to re-open. Justice dictates that the lower court's order dismissing appellant's complaint should be reversed and a new trial granted with instructions to the lower court requiring the application of the doctrine of *res ipsa loquitur*.

Respectfully submitted,

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