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Jesse P. Hanson v. General Builders Supply Co. : Appellants' Petition for Rehearing and Supporting Brief

Utah Supreme Court

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Woodrow D. White; Attorneys for Plaintiff and Respondent;

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IN THE SUPREME COURT
of the
STATE OF UTAH

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JESSE P. HANSON,

Plaintiff and Respondent,

vs.

GENERAL BUILDERS'

SUPPLY COMPANY, a Utah
Corporation, and STEPHEN G.
KNIGHT,

Defendants and Appellants.

MAR 6 - 1964

Supreme Court, Utah

Case No. 9884

APPELLANTS' PETITION FOR REHEARING
AND SUPPORTING BRIEF.

Appeal from Third District Court, for Salt Lake
County, Hon. Joseph G. Jeppson, Judge

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IN THE SUPREME COURT
of the
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JESSE P. HANSON,

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SUPPLY COMPANY, a Utah
Corporation, and STEPHEN G.
KNIGHT,

Defendants and Appellants.

Case No. 9884

APPELLANTS' PETITION FOR REHEARING
AND SUPPORTING BRIEF.

General Builders Supply Company, and Stephen G. Knight, Appellants in the above entitled matter, by and through their attorneys of record herein, pursuant to Rule 76(e) Utah Rules of Civil Procedure, respectfully petition this Honorable Court for a rehearing in the above entitled cause upon the grounds that the decision is erroneous in holding that defendants by not formally excepting to the Trial Court's ruling that they were liable as a matter of law, waived their right to have this ruling reviewed on appeal.

WHEREFORE, Appellants request that a rehearing be granted and that the court examine the evidence and grant Appellants a new trial.

HANSON AND BALDWIN AND
ROBERT W. BRANDT

By.....

*Attorneys for Defendants
and Respondent.*

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Salt Lake City, Utah

BRIEF IN SUPPORT OF PETITION FOR REHEARING

POINT I

THE DECISION IS ERRONEOUS IN HOLDING THAT DEFENDANT BY NOT FORMALLY EXCEPTING TO THE TRIAL COURT'S RULING THAT DEFENDANTS WERE "LIABLE AS A MATTER OF LAW" WAIVED THEIR RIGHT TO HAVE THIS RULING REVIEWED ON APPEAL.

The opinion states:

"The details need not be canvassed, since the court instructed the jury that there was negligence as a matter of law, to which no exception was taken before the verdict was rendered."

Rule 46 of the Utah Civil Procedure provides "Exceptions unnecessary". Formal exceptions to rulings or orders of the court are unnecessary. *It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him. (Emphasis ours)*

Throughout the trial of this case it was clear that Defendants' primary defense was that the driver was faced with a sudden and unexpected brake failure (R-48, 173, 176, 177, 200) and that the evidence was sufficient to present a jury question as to whether or not defendants were negligent.

While it is conceded that such is not a part of the record on appeal it must be stated that at a conference in the Trial Court's chambers at the conclusion of the evidence and prior to instructing the jury, defendants again set out their defense of an unforeseeable mechanical failure and stated their position to the court that the evidence was sufficient to present a jury question on that issue. The court stated that it intended to hold the defendants liable as a matter of law and refused defendants' request to instruct the jury on the issues of negligence.

In *Coray v. So. Pac. Co.*, 112 Ut. 166, 185 P2 963 (1947) the Trial Court directed a verdict for the defendant. Plaintiff did not except to the Court's ruling. It was contended by defendant on the appeal that the Court's action in directing a verdict could not be reviewed as plaintiff had not taken exception to the ruling. It was held by this court in that case that the order *directing a verdict* for the defendant constituted a decision finally determining the rights of the parties and that it came within the provisions of Sec. 104-39-2 UCA 1943 providing for an automatic exception. Rule 46 URCP as set forth above supplants Sec. 104-39-2 and also eliminates the necessity of formal exceptions.

In the present case the court in its decision states:

"Had counsel excepted to the instruction, he

would have perfected his record. But having affirmatively expressed complete satisfaction with the court's action, defendants, in all fairness, are deemed to have waived any automatic statutory exception."

The Trial Court in only one of its instructions referred to its ruling as to liability. It was Instruction No. 9 D which reads as follows:

For the purpose of this proceeding, it has been determined that the defendants are liable for any injury the plaintiff suffered proximately resulting from the automobile collision in question. Therefore, you are only required to determine what injury to the plaintiff, if any, has been so caused, and the amount of damages, if any, that plaintiff is entitled to recover as compensation therefor. Such a determination of legal liability should in no way influence or prejudice you either for or against the defendants. You should neither punish nor reward the defendant on account of such determination. The award you make to the plaintiff should be such sum as you find from a preponderance of the evidence will fairly and adequately compensate him for injury and damage proximately resulting from the negligence of the defendant.

Assuming, as defendant did in this case, that its exception to the court's ruling of liability as a matter of law was automatically preserved by statute (Rule 46 URCP); it is difficult to see how it can

be deemed to have waived this right by not excepting to Instruction No. 9 D. The instruction was a proper one to be given in view of the court's ruling as to liability and ironically it is an instruction that was prepared and requested by the defendant after the court ruled that he would hold the defendant liable as a matter of law.

If defendant is required to except or refrain from requesting such an instruction it is placed in the dilemma of either waiving its exception to the court's ruling or going before the jury without adequate instructions. As was stated in the Coray case "The purpose of an exception is" * * * to give the trial court opportunity to correct errors." The Trial Court was well apprised of the appellant's defenses, not only from the pleadings and evidence at the trial but on their Motion for a New Trial. The result arises not from the Trial Court's lack of opportunity to correct the error but rather from the view taken by it of the evidence and the law.

Rule 52(a) Utah Rules of Civil Procedure although requiring that exceptions be taken to the court's instructions also provides "Notwithstanding the foregoing requirement, the Appellate Court, in its discretion, and in the interests of justice, may review the giving or failure to give an instruction."

CONCLUSION

It is respectfully submitted that under provisions of Rules 46 & 51 of the URCP, the action of the Trial Court in ruling that defendants were liable as a matter of law, should be reviewed by this court and that a new trial should be granted to the Appellants.

Respectfully submitted,

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