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Donald Raymer and Millers' Mutual Insurance Association v. Hi-Line Transport, Inc. : Appellant's Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

MILLERS' MUTUAL INSURANCE ASSOCIATION,

Plaintiff and Appellant,

vs.

HI-LINE TRANSPORT, INC.,

Defendant and Respondent.

Case No. 9996

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the
Fourth District Court for Wasatch County
Hon. Joseph E. Nelson, Judge

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STATEMENT OF FACTS

The facts are set forth in Appellant's brief, with supporting citations in the record, and need not be repeated.

POINT ONE

APPELLANT'S BRIEF COMPLETELY MISREPRESENTS THE BASIS OF PLAINTIFF-APPELLANT'S CLAIM. PLAINTIFF'S CLAIM IS BASED ON TORT, NOT ON "AGREEMENT."

The defendant and respondent's brief does not accurately represent the theory upon which the plaintiff and appellant predicates its claim against Hi-Line Trans-

port, Inc. Respondent erroneously argues that plaintiff's claim is based on some "secret agreement."

Appellant's claim is based on the *tort* committed by Hi-Line.

Respondent's liability originated May 17, 1960, in the accident when Hi-Line recklessly drove onto the wrong side of the road and collided headon with and demolished the Buick. The subsequent actions of the insurance adjusters as agents for Hi-Line Transport, Inc. *did not create* the liability, and did not affect that liability by increasing it, by diminishing it, or by extinguishing it. Only had the insurance agents proceeded to actually pay the claim would that liability have been affected or extinguished.

Respondent's brief merely sets up a straw man where it argues that there was no *agreement* that Hi-Line personally would pay the claim. Appellant does not claim that there was an *agreement* that Hi-Line would personally pay. The liability of Hi-Line is predicated upon the commission of a tort by Hi-Line, not upon an *agreement* by Hi-Line to pay. It is no answer to the plaintiff's claim to say that Central Casualty had no authority to bind Hi-Line to personal liability as is argued by respondent's brief. The consent of a tortfeasor to assume liability is not needed. The tortious conduct gives rise to the liability, not any act of consent by the tortfeasor, either personally or through its agent.

Respondent's brief misconstrues the basis of plaintiff's claim and sets up a straw man when it argues as though appellant's claim was created or originated by the actions of the insurance adjusters as agents for Hi-Line Transport, Inc. That is not the case. The actions of the insurance adjusters as agents for Hi-Line Transport, Inc. are significant in this case only because the respondent seeks to enjoy the fruits of the actions of its insurance adjusters, which induced the subrogee to refrain from joining in the Salt Lake County action. Hi-Line Transport now claims that because Millers was induced to remain out of the Salt Lake County action, Hi-Line may now escape from its liability to the plaintiff arising out of Hi-Line Transport, Inc., tortious conduct. This points up the inequity of the respondent's position.

The tort, the causation, and the damage are admitted. But respondent claims the subrogee is estopped from claiming compensation. Respondent seeks equity, but is unwilling to do equity. Hi-Line claims it should be freed of its liability to the subrogee by estoppel because the subrogee relied upon the representation of Hi-Line's agents that the subrogation claim would be considered separately and upon its merits when the personal injury claim was tried. At the same time Hi-Line thus seeks to profit from the actions of the adjuster, it tries to repudiate any responsibility for the adjuster's actions. Hi-Line seeks equity but refuses to do equity.

It would be contrary to principles of fairness and equity to extinguish the liability of the tortfeasor to the

plaintiff in this case by allowing Hi-Line Transport, Inc. at one and the same time to claim and enjoy the fruits and advantages of the actions of its agents, Homer Bray Service, Inc., and Central Casualty Company, and at the same time shun and avoid any responsibility for the actions of those agents.

Respondent completely misconstrues the nature of the plaintiff's claim by arguing that it is based upon *secret* actions of Hi-Line's agents. Hi-Line cannot accurately or equitably claim ignorance of its agents' actions, especially when it relies on those actions as the basis for its own claim of estoppel. When Hi-Line committed the tort it observed through its agents that it as a tortfeasor had totally destroyed a new Buick. When demands for payment by the subrogee were made, those demands were referred by Hi-Line to Central Casualty Company and its network of adjusters for investigation, negotiation and defense pursuant to the policy, and Hi-Line should not disclaim knowledge ot its agents. Hi-Line Transport, Inc. participated fully in the trial of the first case after having been served with a complain which clearly placed Hi-Line Transport, Inc. on notice of the fact that a sizeable subrogation claim existed and that it was not included in the first action.

Hi-Line Transport, Inc., an admitted tortfeasor, comes before the court with unclean hands and asks to be relieved of its liability and unjustly enriched or rewarded because its authorized agents induced the subrogee to

refrain in good faith from entering the Salt Lake County action.

POINT TWO

RESPONDENT'S BRIEF DOES NOT ACCURATELY REPRESENT THE NATURE AND EFFECT OF THE CORRESPONDENCE BETWEEN APPELLANT AND HI-LINE'S AGENTS.

The conduct and correspondence of Hi-Line's authorized agents for the negotiation and adjustment of claims (Record 27 and 28):

a. Did consent to and acquiesce in the treatment of the subrogation claim as a separate cause of action.

b. Did waive Hi-Line's right, if any, to have the entire loss handled in a single suit.

c. Did represent to Appellant and lead Appellant to reasonably believe that the subrogation claim would be handled separately and on its merits after the disposition of the personal injury claims.

d. Did induce Appellant in reasonable reliance on the representations of Hi-Line agents, to refrain from entering the Salt Lake County action.

The conduct and correspondence of Hi-Line's agentc did not give rise to a contract or agreement which superceded or affected Hi-Line's tort liability.

The correspondence (Record 27 and 28) between Homer Bray Service, Inc. and Appellant does not constitute an "agreement" or release of Hi-Line's tort liability.

a. It is merely a consent to the handling of the subrogation claim as a separate claim or cause of action, to be considered on its merits after the personal injury action, and a waiver of Hi-Line's right, if any, to have the entire loss considered as one claim.

b. It contains no understanding as to the amount to be paid, if any.

c. It contains no understanding as to whether the liability is contingent, or conditional (or upon what contingencies or conditions it might rest), or admitted, or absolute.

d. It does not contain a requisite memorandum in writing of the terms of an agreement to satisfy the Statute of Frauds (Section 25-5-6 U.C.A. 1953) governing agreements one to be bound for the obligation of another.

e. It contains no express or implied release of tort liability of Hi-Line.

f. It contains no suggestions that Hi-Line's tort liability would be released by anything short of actual payment and formal releases.

g. It contains no suggestion that Central Casualty was substituting itself for Hi-Line as the party primarily liable.

It is clear that had Central Casualty proceeded to make actual payment it would have insisted on a release of the claim against Hi-Line, and treated the payment as a settlement of Hi-Line's liability.

POINT THREE

RESPONDENT'S REFERENCES TO THE SPARGUR CASE ARE INCOMPLETE AND MISLEADING.

It is pointless to argue what the Ohio court held in the case of *Spargur vs. Dayton Power and Light Company*, 7 Ohio Ops. 2d 138, 152 N.E. 2d 918 (1958) because the court can read firsthand what the Ohio court held. It is important to point out, however, that Respondent's briefs to the trial court and the Supreme Court of Utah do not fully disclose the *pertinent* parts of the holdings of the Ohio court. Appellant believes the partial quotations helped to mislead the trial court into error of law. Respondent's quotations from this Ohio case on which Respondent heavily relies are incomplete and misleading in this respect: The holding had two branches: one applying to the power company, and the second applying to four other defendants.

1. The first holding was that although the insured had brought a prior suit against the power company for damage to the insured and recovered judgment against the power company the *subrogee could bring a second suit for recovery of the damages of the subrogee against the power company.* The position of Dayton Power & Light Company is the same as the position of Hi-Line

Transport, Inc. in this action in that *the first actions* found that the negligence of Dayton Power & Light Company, and Hi-Line Transport, Inc. were the proximate causes of the respective damages. *This branch of the holding is in point with the instant case.*

2. The second branch of the holding is *not* in point. The Ohio court held as to the second group of defendants (builders and contractors) who had been found in the first action to be *free from negligence* and hence *not responsible* for the damages, that they were not to be under necessity of defending the second suit.

The Respondent's reference to the Spargur case is misleading because (a) it is silent on the first branch of the holding where the facts are analogous and the holding is adverse to Respondent, and (b) it mentions only the second branch of the holding where the facts are not analogous and language refers to a dissimilar factual situation.

Respectfully submitted,

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