1969

Harold Memmott v. United States Fuel Company : Brief In Opposition To Petition For Rehearing

IN THE SUPREME COURT OF THE STATE OF UTAH

HAROLD MEMMOTT,

Plaintiff-Respondent,

vs.

UNITED STATES FUEL COMPANY, a corporation,

Defendant-Appellant.

Case No. 11392

BRIEF IN OPPOSITION TO PETITION FOR RE-HEARING

On Appeal from the District Court of
Carbon County, State of Utah
Hon. F. W. Keller, Judge

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This court rendered its decision in the above case reversing the trial court with directions to dismiss plaintiff's Complaint with prejudice. Plaintiff petitions for re-hearing on the ground "that the Court has misapprehended the salient facts upon which it bases the reversal." The opinion of this Court stated "we will assume the facts to be as the plaintiff and his son, who was with him, stated them to be, which are as follows."

The Court then stated the facts as testified to by the plaintiff and by his son except that one fact was more

favorable to the plaintiff than his own testimony. This Court, in its opinion, stated that "plaintiff's truck was out of control and could not be stopped without colliding with the cars upon the track. . . " The plaintiff testified that he could have stopped the truck "but if I had done, I'd have been stuck." (T. 55) This simply adds one more fact in favor of the defendant. Certainly getting stuck would have been the prudent choice to the election to drive down the tracks in a blizzard with snow knee deep "circling and zigzagging all over the yard."

This case was well briefed before argument and there is no reason to reiterate and rehash the case again. We simply refer the Court to the prior briefs on appeal. Plaintiff's dilemma arises from the fact that he objects to the Supreme Court believing his own testimony and stating the facts to be as he himself and his son testified even though the plaintiff called another witness which contradicted his own testimony. Plaintiff's picture, Exhibit 3, is not in accordance with plaintff's own testimony that the snow was knee deep, that "neither the truck road nor any of the tracks was cleared of snow."

Plaintiff's dilemma is further illustrated when he says at page 3 of his brief on petition for re-hearing that "defendant knew plaintiff must depart from the road, knew he had so been directed three days earlier, knew he had followed the same road on previous occasions." Obviously the plaintiff had never been directed to go where

he would hit the anchor and obviously he had not previously followed the course, where the anchor lay three days before as that trip was without accident or trouble of any kind.

It is also strange that plaintiff states on page 5 of his Brief that "The circumstance that railroad cars blocked the truck road at that point is quite immaterial. Plaintiff in order to enter the tipple was required to depart from the truck road in any event."

Plaintiff's own story was that he had got under the tipple from the east or lower side three days before the accident (T. 11); that on December 31 the only conversation he had with John Smith was to go down and get under the tipple (T. 12), that he saw the cars across the road so he decided to drive under the tipple by going down the tracks (T. 55).

We submit that this Court has not misapprehended the facts upon which it based its reversal. This Court has simply taken plaintiff's word for what happened. We submit that the Petition for Re-Hearing should be denied.

Respectfully submitted,

CANNON, GREENE, NEBEKER & HORSLEY

Paul B. Cannon

Attorneys for Defendant