1983

Patti Simonson v. Robert Gordon Travis : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

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PATTI SIMONSON,

Plaintiff-Appellant,

vs. Case No. 19148

ROBERT GORDON TRAVIS,

Defendant-Respondent.

- -

BRIEF OF RESPONDENT

- -

Appeal from the Judgment of the
Second Judicial District Court of Davis County,
Honorable Doublas L. Cornaby and
Thornley K. Swan, Judges.

- -

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NATURE OF THE CASE

This is an action commenced by Plaintiff against Defendant for injuries allegedly sustained in an automobile accident. Because Plaintiff executed a release, the sole issue in this appeal is the validity of the release and its effect upon Plaintiff's claim.

DISPOSITION IN LOWER COURT

Defendant-Respondent agrees with the statement conatined in Appellant's Brief as to the procedural events occurring in this case.

RELIEF SOUGHT ON APPEAL

Defendant-Respondent seeks affirmance of the lower court's decision of no cause of action based upon the validity of the release executed by Plaintiff.

STATEMENT OF FACTS

Defendant-Respondent essentially agrees with the statement of facts contained in the Brief of Appellant. However, Appellant has taken the liberty in some instances of drawing inferences contrary to the lower court's decision and in incorrectly characterizing the testimony of Defendant's insurance adjuster. For this reason, and for the purpose of presenting the testimony in chronological order, Respondent shall restate the factual proof.

The plaintiff was involved in a two-car intersection accident at Roy, Utah on February 1, 1978. Several days after the accident she contacted Defendant's insurance company, State Farm Insurance, concerning the damage to her car. (Tr. 20). Shortly thereafter, a State Farm adjuster went to Appellant's home and made an estimate as to the amount of damage. (Tr. 21-22) The estimate was for a total of $622.45. (Ex. 1).

Approximately five weeks subsequent to the accident the plaintiff went to the State Farm claims office on Harrison Boulevard and had a conversation with a secretary. Plaintiff testified that she refused to sign a release that had been previously prepared by the adjuster Mr. Homer Randall. Mr. Randall was not present the day she first visited the State Farm office. (Tr. 25). She examined a release that had been previously prepared by Mr. Randall. (Ex. 2). She stated that she could not recall whether the release contained a typewritten clause above the printed form during this first visit. (Tr. 31).

Plaintiff testified that the secretary at State Farm told her that she would have to sign the release if she wanted to get the check for her car repair. She recalled that upon reading the release agreement that it "didn't sound right" because she did not want to release everything. She stated that the release sounded like she was releasing all of her claims and not just her property damage. (Tr. 24).

During this period of time the plaintiff stated she was going to a doctor for treatment from the accident but did not know the extent of any injuries at that point in time. (Tr. 23). Plaintiff explained that because of her medical bills, her concern over her personal injuries, and the language contained in the release form she refused to sign the document. (Tr. 24). It was her position that she had never agreed to release anything other than her claims for property damages. Plaintiff denied being told by the secretary that the property damage claim could not be paid until all of the claims had been settled. (Tr. 33).

Plaintiff recalled that the following day Mr. Randall called her on the phone to ask her why she refused to sign the release. She told him that she did not understand the release very good and that it seemed like she was releasing everything including her personal and medical claims. She told him, according to her testimony, that she only wanted the car taken care of and that she was still seeing a doctor. She related that she wanted her medical bills and personal injuries kept open. (Tr. 25-26).

She stated that Mr. Randall told her that the release was only for her property damage but that Mr. Randall never specifically mentioned any of the typed language contained in the release. He never related this language into his supposed statement that the release was only covering property damage. (Tr. 26-27).

Mr. Randall, on the other hand, testified that he had prepared the release on a standard form utilized by State Farm. (Tr. 7). The typed portion on the exhibit contained a standard State Farm clause which was utilized at that time for the purpose of preserving subrogation rights of a claimant's own no-fault insurer. (Tr. 8, 12, 35).

Randall stated that he personally filled out the handwritten portion of the release. (Tr. 8). The amount of $622.45 was the exact amount of the estimate for the property damage. (Tr. 9). Randall stated that he knew that the plaintiff was going to a doctor but did not know whether the doctor had released her from treatment. He also knew that she was insured under her own no-fault policy which would have covered all of her medical bills up to a minimum of $2,000. He did not know the limits of her no-fault coverage but testified that most policies had no-fault coverage limits in excess of $2,000. (Tr. 12). He stated that in some cases you can estimate what the medical expenses of an injured party will be five weeks after the accident while in other cases you cannot. (Id.).

While Mr. Randall recalled having a conversation with

the plaintiff concerning the release, he could not truthfully state all of the substance of that conversation. He did not believe, however, that he could have told her that the release was only for property damage and that she did not need to worry about her other claims. (Tr. 16). He stated that as a standard procedure he would tell all claimants that the release would cover everything with the exception of the medical bills that State Farm would have to pay to the claimant's own insurance company. He testified that if there was an arrangement to only pay for the property damage that another type of form would have been utilized rather than the release form used in this instance. (Tr. 35). He explained that he would have used an advanced cost receipt form if the property damage only was being released. He stated that the form actually signed by Mrs. Simonson could not be used for that purpose and that people would not sign it because it was a general release. (Tr. 36).

The day following her conversation with Mr. Randall, the plaintiff went back to the State Farm office and signed the exact form that she had previously refused to sign the day before. (Tr. 32). The secretary on this day also informed her that the release had to be signed in order for her to receive a check for the property damage on the car. (Tr. 33).

Plaintiff stated that she had never personally met Homer Randall during any of these negotiations. (Tr. 25). She explained that she signed the release simply because she trusted

Homer Randall and did not think he would lie to her. (Tr. 32).

During these negotiations Randall also agreed to pay an additional amount for a car rental. Accordingly, a second draft for $31.50 was given to the plaintiff on March 15, 1978. (Ex. 5). In addition to the $622 paid to the plaintiff for her automobile repair, State Farm also paid to Plaintiff's insurance carrier approximately $2,100 as reimbursement for their expenditures under Plaintiff's no-fault insurance policy. (Tr. 37).

Plaintiff stated that her overall medical bills exceeded $5,000. Some of those bills had been paid by her no-fault carrier and by her own health insurance carrier, Blue Cross. She did not, however, submit many of the bills to Blue Cross and could not submit them at the time of trial because of untimeliness. (Tr. 29).

Finally, Plaintiff testified that she had retained all of the money paid to her by State Farm and had not made any effort to give the money back after asserting that the release did not cover medical costs and personal injuries. (Tr. 30).

ARGUMENT

POINT I

THE LOWER COURT WAS CORRECT IN RULING THAT PLAINTIFF HAD THE BURDEN OF PROOF TO INVALIDATE THE RELEASE.

Appellant argues that the lower court erred in requiring her to carry the burden of proof in invalidating the release.

According to Plaintiff, it was Defendant's obligation to utilize the release as an affirmative defense to Plaintiff's lawsuit and was therefore incumbent upon the defendant to prove the validity of the release. (Appellant's Brief, p. 11-13). This argument is erroneous.

It is fundamental that once a party relying upon a release establishes the execution of the release by the other party, that the burden is on the releasor to show by clear and convincing evidence that the release should be set aside. Witt v. Watkins, 579 P.2d 1065 (Alaska 1978); Fieser v. Stinnette, 509 P.2d 1156 (Kan. 1973).

This Court in Maxfield v. Denver & Rio Grande Western Railroad Co., 330 P.2d 1018 (Utah 1958) followed this rule and stated that one who attacks a release of liability has the burden of proving its invalidity. In addition, "Under Utah law, in order to overcome the effect of a release or other written instrument, the contrary evidence must be clear and convincing." (Id. at 1019).

A review of the record shows that Plaintiff failed to meet this burden.

POINT II

THE LOWER COURT WAS CORRECT IN FINDING THAT PLAINTIFF HAD EXECUTED A GENERAL RELEASE.

Appellant argues in her brief that the release executed by the plaintiff was only a conditional release which did not

include claims for personal injuries or medical expenses. She cites various rules of contractual construction arguing that the release either clearly excludes these types of claims or, in the alternative, that the release is ambiguous and requires parole evidence. (Appellant's Brief, p. 14-18).

Respondent agrees that the document is unambiguous as a matter of law and that it is definitely a general release of all claims. As noted by Appellant herself, all of the provisions of a release must be construed together. (Appellant's Brief, p. 17). If the interpretation now given to the typed language by Appellant is correct then the majority of the language contained in the printed form has no effect. In other words, if the typed language exempts claims for personal injuries and medical expenses from the release, it is entirely inconsistent with the printed language which includes all claims "both to personal and property."

An examination of this document as a whole shows that it is not inconsistent and that both the printed form and the typed portion are concerned with independent matters. The printed form, with ink insertions contained in parentheses, states the following:

> For the sole consideration of ($622.45) the receipt and sufficiency whereof is hereby acknowledged, the undersigned hereby releases and forever discharges (Robert G. Travis) and (his) heirs, executors, administrators, agents and assigns, and all other persons, firms or corporations liable or who might be claimed to be liable, none of whom admit any liability to the undersigned but all expressly deny any liability, from any and all claims, demands, damages, actions, causes of actions or suits of any kind or nature whatsoever, and particulary on account of all injuries,

known and unknown, both to person and property, which have resulted or may in the future develop from an accident which occurred on or about the (1st) day of (February, 1978) at or near (5700 South 1900 West, Roy, Utah).

Undersigned hereby declares that the terms of this settlement have been completely read and are fully understood and are voluntarily accepted for the purpose of making a full and final compromise adjustment and settlement of any and all claims, disputed or otherwise, on account of the injuries and damages above mentioned, and for the express purpose of precluding forever any further or additional claims arising out of the aforesaid accident.

Undersigned hereby accepts draft or drafts as final payment of the consideration set forth above. (Ex. 2). (Emphasis added).

There can be no doubt that the language contained in the release related to all types of claims both for property damage and for personal injuries. Plaintiff herself admitted that when she read the release it "sounded like she was releasing everything." (Tr. 24). The printed release form, therefore, contains all of the elements of a general release.

The typed clause above the printed portion of the release is not inconsistent. It states the following:

The undersigned is not releasing any part of his claim for which he has received or will in the future receive payments under personal injury protection insurance available to him. The present or future subrogation rights of any insurer for making payments under such coverage is reserved. (Emphasis added).

This clause simply states that any sum received by the claimant pursuant to his own personal injury protection insurance policy is not released and that his insurance carrier reserves any present or future subrogation right to be reimbursed

for that amount. The fact that the terms "personal injury protection insurance" and the term "such coverage" is utilized in this clause clearly indicates the interpretation just recited rather than the notion of Appellant that this clause exempted personal injuries from the terms of the general release.

Moreover, even if the release were deemed ambiguous, thereby allowing parol evidence to be admitted, there was no showing that Plaintiff had any understanding whatsoever of this clause or that she relied upon its insertion into the release form. Plaintiff could not recall when the clause was inserted and never attempted to state what she believed its intent to be.

The document, on its own face, therefore, is a complete bar to Plaintiff's action in the absence of showing of mutual mistake, fraud or other equitable grounds to defeat the clear meaning of the language. Appellant failed to meet this burden as will be discussed infra.

POINT III

THE LOWER COURT WAS CORRECT IN FINDING CONSIDERATION FOR A GENERAL RELEASE.

While the lower court did not make a specific finding of consideration for the release, the finding of such consideration was implied. Appellant argues, however, that since Plaintiff was only paid the same amount as the estimated damage to her property that she therefore had no consideration for the release of her personal injury claims. Appellant then argues that because of the inadequacy of the consideration the general

release cannot be said to extend to personal injuries and special damages. (Appellant's Brief, p. 20-21). Such an argument is without merit.

A release is a surrender of a claim which may be given for less than full consideration or even gratuitously. DeNike v. Mowery, 418 P.2d 1010 (Wash. 1966). Plaintiff by the terms of the release itself received $622. Certainly, by any standard this sum of money was itself adequate to support consideration of the agreement.

Appellant forgets that while State Farm Insurance believed that its insured was probably responsible for the accident, it had no obligation to pay for the property damage until a complete and thorough investigation had been conducted or, in the extreme, until the matter had been litigated and a judgment rendered. State Farm agreed to short cut this procedure and to pay the property damage sum immediately.

Plaintiff may at the time have thought her injuries were minimal, that she suffered no compensable injuries, and that her own insurance carrier would cover all of her medical and lost wages expenses. Plaintiff obviously wished to receive the compensation for her automobile's damage immediately without further delay. State Farm, on the other hand, agreed to pay this amount immediately upon the condition that she would make no future claims of any nature against it. These bargained for promises together with the consideration of the actual monetary amount was sufficient to sustain the adequacy of the considera-

tion for the release.

Clearly, both parties received a benefit and both parties suffered a detriment. It was not necessary that Plaintiff be allotted a certain consideration for each of her possible claims arising from the accident. The lower court decision was not in error.

POINT IV

THE LOWER COURT'S FINDING RELATING TO TENDER IS NOT BASIC TO THE ISSUES RAISED ON THIS APPEAL.

The lower court noted in its Findings of Fact that since executing the release of March 8, 1978 the plaintiff had retained all of the consideration she received as a condition of giving the release. (Tr. 38). Appellant argues extensively that this finding as to tender invalidated the court's decision of a valid release. (Appellant's Brief, p. 22-24).

Respondent does not believe that the finding of tender is relevant to this appeal. Certainly, it is undisputable that Plaintiff did not tender back any amount of the money she receive from State Farm. As such, the finding of fact is correct.

Respondent has never contended that the failure to tender these amounts was the basis for the court's decision in finding the release to prohibit Plaintiff from making any further claims. The question of tender normally goes to ratification of an act. The fact that Plaintiff failed to tender any amount during the numerous years between the execution of the agreement and the

commencement of the lawsuit would be some evidence of her ratification of the release agreement but certainly would not be conclusive for sustaining the court's finding of validity of the release. There is no evidence that the lower court relied upon the failure to tender as the sole basis for the decision and therefore any discussion as to the requirement of a tender in this type of situation is merely academic.

POINT V

PLAINTIFF FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE ANY CLAIM OF FRAUD IN THE EXECUTION OF THE RELEASE AND THE LOWER COURT DECISION UPHOLDING THE RELEASE IS THEREFORE CORRECT.

This Court has held on numerous occasions that evidence of fraud must be clear, precise and indubitable and must be proved with clear and convincing evidence. Kelley v. Salt Lake Transportation Co., 116 P.2d 383 (Utah 1941); In re Swan Estate v. Walker Bank & Trust Co., 293 P.2d 682 (Utah 1956).

The record in this case does not support any claim of Plaintiff that she was fraudulently induced to execute the release now in contention. The basis of any claim she can now assert is that she was tricked by Mr. Randall into signing the release form. This claim by Plaintiff is contradicted by not only the language contained in the release itself but by the testimony of Mr. Randall and the circumstances surrounding the release.

The plaintiff admitted that the release clearly told her

that she was waiving all of her rights by signing it. She made her "change of mind" upon a telephone conversation with Randall who allegedly assured her that the release did not mean what it really said. Plaintiff herself never claimed that Randall told her that the typed language at the top of the release agreement cancelled out the other language at the bottom. In fact, she could not recall whether the typed language was present even before she spoke with Randall.

While Randall could not recall the specifics of the conversation per se, he stated that he did recall talking to the plaintiff and that he was sure he would have given her the same answer that he told all claimants concerning the release form. Plaintiff produced no evidence showing any motive why Randall would want to misrepresent or trick the plaintiff into signing the release. Randall's testimony was completely consistent that he would never have told her that the release covered only property damage and was in direct contradiction to any claim made by the plaintiff.

It is always a question for the trier of fact to determine whether a Plaintiff sustains the burden of proof in attacking a release on grounds of fraud. Ketchum v. Wood, 438 P.2d 596 (Wash. 1968). It is also the perogative of the trier of fact to determine the weight to be given the testimony of witnesses and wherever there is any circumstance which reasonably provides a basis for refusing to find in accordance with a witness' testimony the trier of fact may do so. One element which may be so

considered is the interest of the witness. Aagard v. Dayton & Miller Ready Mix Concrete Co., 361 P.2d 522 (Utah 1961).

In Melvin v. Stevens, 458 P.2d 977 (Ariz. 1969) the exact type of claim was asserted. In that case the plaintiff contended that the adjuster told her that signing the release was only for the damage to her car alone. The adjuster claimed that while he advised the plaintiff to wait awhile and see what developed as to her injury that she nevertheless chose to go ahead and sign the release to get the money for a new car. The Arizona court stated:

> It is not within our province to determine whether the conversation as described by Reece (the adjuster) took place; that was purely a question of fact to be determined by the trial judge and he evidently found it to be true. We cannot reverse his decision under these facts. (Id. at 980).

The trial court in the instant case could also have considered evidence that was not produced by the plaintiff. For example, Plaintiff introduced no evidence showing that she ever attempted to submit medical claims to State Farm after the release had been signed. Since she testified that she believed the release only covered property damage, the question could be asked why she did not submit her excess medical bills to State Farm for payment. The record shows that the only notification of any claim against the release was the actual filing of the lawsuit over two years after the release had been signed.

Respondent submits that not only was there failure of clear and convincing proof of fraud but there was a failure of

any proof of fraud. The evidence shows that the plaintiff some five weeks after the accident elected to immediately receive her payment for the property damage to her automobile. The lower court could have believed that she was upset when she learned she had to give up all claims against State Farm in order to receive this amount but she later decided to execute the release anyway based upon her assumption that her own insurance carrier would cover her expenses and that she was not seriously harmed.

It should be noted here that the plaintiff failed to produce any evidence as to the exact extent of her injuries at the time the release was signed or the amount of medical bills that she had expended at that time. The lower court could correctly infer that this failure to produce evidence showed that while Plaintiff knew she had sustained some injury from the accident she did not believe it was very serious and therefore agreed to execute the release to expedite her property damage claim.

Thus, the facts and evidence in this case show no clear and convincing proof that Plaintiff was fraudulently induced into executing the release. It was the lower court which was able to observe the demeanor of the witnesses and to decide the sincerity and truthfulness of this testimony. This conclusion should not be upset by this Court in the absence of clear abuse or misapplication of the law. Stone v. Stone, 431 P.2d 802 (Utah 1967).

Finally, Plaintiff argues that Utah statutes and insurance regulations create a confidential relationship which somehow shifts the burden of proof in these types of cases. This argument is completely irrelevant to this appeal.

First, unlike the California case cited by Appellant (Appellant's Brief, p. 27) no action has ever been initiated against either State Farm Insurance Co. or the adjuster. Second, the regulations upon which Plaintiff relies were not even in effect at the time of the events of this case as admitted by Appellant herself. (Appellant's Brief, p. 30).

Finally, to equate the role of Mr. Randall in this case to that of a confidential advisor is completely baseless. For example, in the In re Swan Estate case cited by Appellant (Appellant's Brief, p. 28) a close friend and attorney drafted the will of the deceased and named himself as a beneficiary. This type of a relationship can hardly be said to exist in the instant case.

Here, Mr. Randall was an insurance agent representing the defendant who collided with Plaintiff in the automobile accident. There was no contractual relationship existing between Randall and the plaintiff. Furthermore, Plaintiff had not even personally met Randall but only spoke with him on the telephone. The evidence does not support any finding of a close personal relationship of trust and confidence.

Respondent agrees that insurance agents have duties to both their own insured and to adverse parties. Respondent readily

admits that any insurance agent who is guilty of wrongdoing should be disciplined by the insurance industry or by the state. It may even be, as Appellant now asserts, that some type of civil cause of action could be asserted based upon the newly enacted regulations and statutes. However, the present appeal does not involve any such fraudulent or unethical conduct nor does the present state of the law allow any such civil action being maintained.

The presumptions and burdens in this type of case are clear. Appellant's attempt to shift these presumptions and to claim an undue influence is neither legally nor factually supported in this record.

The lower court was correct in concluding that the plaintiff failed to meet her obligation in proving any of the defenses asserted against a general release form. As such, the release was binding and Plaintiff was precluded from maintaining this action.

CONCLUSION

Without being melodramatic, it is fundamental that written documents maintain their integrity if the economic and legal system is to function. It is for this reason that extreme high standards have been established by courts if a party is to set aside a written document and to take a position directly contrary to it.

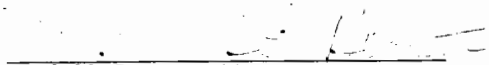
The release in this case is clear, as a matter of law,

and prevents Plaintiff from now asserting a claim against Defendant for personal injuries and medical expenses. Plaintiff herself knew of the consequences of signing such a document and was aware of the language of the document from her own admitted testimony.

It was up to the trial court to decide whether Plaintiff sustained her burden in overturning the effect of this agreement. It was the trial court which heard the testimony of all the witnesses and which had the opportunity of observing their demeanor during testimony. While Plaintiff can certainly argue the facts to show an alleged misrepresentation, Defendant can argue the facts to show that no such misrepresentation occurred. The trial court was the exclusive judge of this testimony together with all inferences and implications arising from the acts and omissions of the parties.

The lower court rejected Plaintiff's argument that the release was invalid. The lower court sustained the validity of the written document based upon a full evidentiary hearing. Respondent submits that this decision was correct and therefore it should be affirmed.

Respectfully submitted,



Wendell E. Bennett
Attorney for Defendant-Respondent

MAILING CERTIFICATE

I hereby certify that I mailed copies of the foregoing Brief of Respondent to Richard W. Brann, Attorney for Plaintiff-Appellant, 419 - 27th Street, Ogden, Utah 84401 this 1 day of September, 1983.

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