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Pearce L. Hines v. Nile W. Harbertson and Gil B. Seeley : Appellant's Brief

IN THE SUPRE
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PEARCE L. HINES,
Plaintiff

- vs -

NILE W. HARBERTSON
GIL B. SEELEY,
Defe

APPEL

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IN THE SUPREME COURT OF THE STATE OF UTAH

PEARCE L. HINES,
Plaintiff-Respondent

— vs. —

NILE W. HARBERTSON and GIL B. SEELEY,
Defendant-Appellant

Case No. 11682

APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

This is an action for personal injuries and property damage arising out of an automobile accident occurring on Hill Air Force Base, Utah.

DISPOSITION IN LOWER COURT

The case was tried to a jury. The Court dismissed the action as to Defendant Seeley, and directed a verdict against Defendant Harbertson. The jury was instructed on damages only, and returned with a verdict in favor of Plaintiff in the sum of $9,000.00 General Damages and $618.14 Special Damages. After a Motion for a New Trial was filed and argued, the Court granted Remittitur in the amount of $1,000.00.

RELIEF SOUGHT ON APPEAL

Defendant Harbertson seeks reversal of the Judgment, and a new trial.

STATEMENT OF FACTS

The automobile accident involved three cars, proceding north on Hickory Road, Hill Air Force Base, a two lane road. (T-10) It was daylight. Seeley, first in line, was a stranger to the base and was looking for his destination, when he observed a sign which stated "NO CIVILIAN VEHICLES BEYOND THIS POINT." (T-11) Seeley assumed the sign referred to Hickory Street traffic (which it did not) and stopped (T-11). His stop was in the lane of traffic, although there was ample room to his right to stop off the travel portion. (T-12) Plaintiff Hines was driving a Jeep behind Seeley. There was a dispute as to the manner in which the two vehicles ahead of Defendant Harbertson stopped, but Seeley testified that when he stopped he was not aware of any cars behind him. (T-12) Harbertson, following the Jeep, "May have" glanced to his right, but became aware of the Jeep stopping when he realized, 50 feet away, the distance was closing fast. (T-19) There were no brake lights on the Jeep, and no signal was given. (T-19) Harbertson jammed his brakes but collided with the rear of the Jeep, which struck the Seeley car. The accident, according to Seeley, occurred just after a turn in the road. (T-10) While the cars were standing in the road following the accident, while the participants were out of their cars, a northbound car almost collided with him. (T-27)

There was no intersection near the scene; the area was a warehouse area, with no pedestrians, as the shift had left overone-half hour before.

ARGUMENT

POINT ONE

THE COURT ERRED IN GIVING NO INSTRUCTIONS TO THE JURY ADVISING THEM OF THEIR DUTIES, DEFINING LEGAL TERMINOLOGY, OR FURNISHING GUIDE LINES FOR THEIR DELIBERATIONS.

In this case, the Honorable Trial Court literally told eight jurors to go out and assess damages, without instructing them at all. Two instructions were given on damages, one that six can find a verdict, and they were sent out to deliberate.

The jury had no cautionary instructions to guide them, such as those contained in J.I.F.U. (1.1 — Duties of Judge and Jury; 1.5 — Sympathy, Prejudice, Passion; 1.8 — Approach of Jurors to Deliberations; 1.13 — Resort to Chance Forbidden; etc., or the "Standard" Instructions to guide the jury defining Burden of Proof; Preponderance of the Evidence; Proximate Cause (which term was used in Instruction No. 1 but never defined).

We anticipate Respondent's contention that Defendant Harbertson never formally requested these instructions, and therefore cannot now complain. In the first place, the Honorable Trial Judge is a seasoned veteran before whom we have tried many jury cases. Never before had we found it necessary to formally request him, or any other Judge, that he give the jury basic

necessary instructions concerning their duties and responsibilities, and defining legal terms used in the instructions. Secondly, the record will support our efforts, by exceptions taken immediately after the jury retired to deliberate, which gave the Court the opportunity to correct the error by recalling the jury for further instructions.

In *53 Am. Jur. Trial,* Sec. 510, Pg. 412, the text states:

> "The law of every case, in whatever form presented, belongs to the court; and in a jury trial it is not only the prerogative of the judge, but his solemn duty, to declare it, especially where requested so to do. A court has power to instruct the jury on all questions of law growing out of the facts of a cause being tried, without a request from either party, and it has been declared to be better practice for the court in all cases to give the jury a knowledge of the definitions and principles of the law applicable. It is the rule in many jurisdictions that it is the duty of the court in civil cases to charge the jury on contested issues in the cause on trial irrespective of request by counsel for specific instructions. In carrying out this rule, the court should clearly and concisely define the issues as presented by the pleadings and the proof, and state the correct principles of law applicable thereto. In some jurisdictions the practice statutes and rules of practice impose an imperative duty upon the trial court to charge the jury. It is not to be inferred, however, that the trial court is bound upon its own initiative fully to charge the jury upon all facts and issues in this case; *under this rule it is the duty of the trial court to instruct the jury on the basic fundamental rules applicable to the principal facts in*

issue, and if its charge does not fully cover the facts and issues as counsel conceive them, it is the latter's duty to request instructions upon specific questions arising. In other jurisdictions it has been declared broadly that the court is not required to charge the jury on its own motion, when the parties negelct to request the court to give proper instructions, although it may be questioned whether, in most of the cases laying down this broad rule, the court did not have reference to the rule that objection cannot be taken to the omission of the trial court to charge upon particular issues ,or to the generality of the charge given, where counsel makes no effort to secure instructions submitting a particular point to the jury, or particularizing or making more definite the general charge to the jury. (Empasis added)

This Honorable Court has heretofore recognized the above obligations on the part of the Trial Judge.

In *Sutton vs Otis Elevator Co.,* 68 Utah 85, 249 Pac. 437 this Court stated:

> "It is contended that exceptions to the failure to give proper instructions are not available to Appellant because such instructions were not requested . . .
>
> If it is the duty of the Court to instruct the jury as to the law of the case, it is certainly its duty to give proper instructions. If it does not do so, and proper exceptions are taken, the error is available on appeal, unless it is harmless."

In *Hanks vs. Christensen,* 11 Ut. 2d 8, 354 P2d 564, this Court states:

> "Nevertheless, it is the Judge who has the final responsibility for conducting the trial. He should be allowed considerable latitude and dis-

> cretion with respect to the mechanics of procedure, and his rulings must be sustained unless he has acted in some manner which is clearly arbitrary and unreasonable and to the prejudice of the objecting party."

In *Johnson vs. Cornwall Warehouse*, 16 Ut. 2d 186 398 P2d 24, this Court states:

> "The object of jury instructions is to enlighten the jury on its problems."

However, even if this Court should hold that attorneys may not assume that the Trial Court will give standard cautionary and definition instructions, and therefore must request them, this Honorable Court has the power given by Rule 51, U.R.C.P. to review the Trial Court's error, and grant a new trial.

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto. . . . Notwithstanding the foregoing requirement, the Appellate Court, in its discretion, and in the interests of justice, may review the giving or the failure to give an instruction."

Requested Instructions were submitted by Counsel in this case on the morning of the first day of trial. From this Defendant's Requested Instructions (R-13) it can at least be inferred by this Court that we were taken a bit by surprise when the Trial Court directed a verdict against Harbertson, and dismissed Seeley from the case, despite the fact that Seeley had admittedly broken the law and set up the chain of circumstances resulting in the accident. There was no time then to re-submit new written instructions.

This Court has recognized this problem by the following language in *Hanks vs Christensen* (Supra, Pg. 5):

> "It is obvious that if he did not receive the requests until all of the evidence was in, he would be confronted with an almost insuperable task and that there would be undue delay requiring the jury to wait until the instructions could be prepared. However, it must also be appreciated that counsel is faced with some difficulties, particularly where changes in issues, or aspects of the evidence, occur during the trial. In order to cope with these problems adequately there must be some comity between the court and counsel. The latter must cooperate by submitting his requests as early as possible to aid the court in preparing the intructions to be given, and the court must permit some latitude for counsel to subit an additional instruction or two at a later time if the trial has taken some unexpected turn that would justify doing so."

See also 53 Am. Jur. Trial, Sec. 514:

> "The rule that the absence of a request for an instruction precludes a party from subsequently availing himself of the error in subject to exceptions. Thus, under the rule in some jurisdictions, *with reference to matter that is fundamental and goes to the gist of the case, it is the duty of the court to give an instruction, whether or not it is requested.*" (emphasis ours)

Again in *Hanks vs. Christensen* (Supra, Pg. 5)

> "The vital question is not when or how the objections are allowed to be made, but whether the instructions are correct. What the party is entitled to is a presentation of the case to the

> jury under instructions that clearly, concisely and accurately state the issues and the law applicable thereto so that the jury will *understand its duties.*" (emphasis ours)

Before the jury returned with their verdict, and in fact within moments after they had retired to the jury room, we called the Court's error to his attention by our exceptions. No action was taken by the Court, and we can only assume, therefore, that even if written instructions had been requested, that they would not have been given.

Because of the lack of any instructions required in all cases to insure a fair trial to all litigants, this Defendant, Mr. Harbertson, did not have a fair trial, and he is entitled to a reversal of the Judgment, and a new trial.

POINT TWO

THE TRIAL COURT ERRED IN DIRECTING A VERDICT AGAINST DEFENDANT HARBERTSON.

> "In (passing on a motion for a directed verdict) all of the testimony and all reasonable inferences flowing therefrom which tend to prove the (Appellant's) case must be accepted as true, and all conflicts and all evidence which tends to disprove it must be disregarded."

Coer vs. Mayfair Markets, 19 Ut. 2d 339, 431 P2d 566:

also citing *Boskovich vs. Utah Construction Company,* 123 Ut. 387, 259 P2d, 885, and

Holland vs. Brown, 15 Ut. 2d 422, 394 P2d 77, 10 ALR 2d 449

The evidence then, which the jury had a right to believe, was as follows:

Defendant Seeley, driving north in the only lane for north-bound traffic, after seeing the sign, unlawfully stopped in the traffic lane (contrary to 41-6-104 UCA 1953) without a signal, (contrary to 41-6-69 (c)), and in a place where there was ample room to stop off the roadway. (T-12) He stopped without knowing there were any cars behind (T-12), and in a warehouse area where there was no intersection, no pedestrians, and no on-coming traffic. Because of ample shoulders and flat areas off the road, there was no reason for following drivers to anticipate a car stopping in the lane of traffic. (Mr. Harbertson — T-23)

The square-backed Jeep obscured this Defendant's view of the Seeley car, and when the Jeep slowed suddenly, there were no brake lights or other signals on Plaintiff's car to warn Mr. Harbertson.

Under these facts, the jury questions were:

1. Was the Plaintiff contributorily negligent for failing to have adequate brake lights as required by law, and if so, was that negligence a proximate cause of the accident?

2. Should Defendant Harbertson, as a reasonable and prudent motorist have then reasonably anticipated that the vehicles ahead would stop, and if so, was his negilgence a proximate cause of the accident?

3. Was the negligence of Seeley, whose illegal actions set the chain of circumstances in motion, the sole, proximate cause of the accident?

POINT THREE
THE JURY VERDICT WAS EXCESSIVE.

A. Where the jury was not instructed on definitions of law, or cautioned on guide lines they must follow, their verdict must be assumed to be erroneous.

88 C.J.S., Trial, Sec. 266, Pg. 726:

> "The office or purpose of instructions is to inform the jury as to the law of the case applicable to the facts in such a manner that the jury may not be misled, and to furnish a guide to assist in reaching a verdict . . . in more general terms, it has been laid down that the purpose of instructions is to aid the jury clearly to comprehend the case, and to reach a just conclusion, a right decision, or . . . to arrive at a correct, fair, just or proper verdict . . ."

In *Wellman vs. Noble* 12 Ut. 2d 350, 366 P2d 701, this Honorable Court stated:

> "When the error assigned is the giving or failure to give instructions, the real inquiry should be were the issues of fact necessary to be determined, and the principals of law applicable thereto, correctly presented to the jury in a clear and understandable manner? That is the purpose of instructions . . ."

The Honorable Trial Court has found that the jury verdict was excessive as evidenced by his Order granting remittitur. Why he has concluded it was excessive only to the extent of $1,000.00 he has not divulged.

In the case at bar, the Plaintiff incurred $91.00 in doctor's bills (Exhibit "A") and $35.00 in physical therapy treatments (Exhibit "B"). All of these treatments were concluded in June of 1968.

The diagnosis (T-39) was

> ". . . a musculoligamentory strain of the lumbar spine and cervical spine . . . complicated by pre-existing degenerative joint disease, namely Osteoarthritis, and in addition he had a laceration of the right heel."

The jury verdict was $9,000.00 General Damages.

It goes without saying, that the Defendant has been deprived of a fair trial by jury, for the simple reason that the jury was not given instructions or guide lines by the Court, and they therefore had no way of knowing how to "arrive at a correct, fair, just or proper verdict."

A party's right to a jury trial is not satisfied where the jury trial is not properly conducted, the verdict admittedly is unfair, and the Judge's decision is substituted as a final judgment.

The Appellant, therefore is entitled to a new and fair jury trial.

Respectfully submitted,

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