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Jack Christianson and :Murl Christianson v. Joanne Debry : Brief of Appellant

In the Supreme Court of the State of Utah

JACK CHRISTIANSON and
MURL CHRISTIANSON,

Plaintiffs and Appellants

vs.

JOANNE DEBRY,

Defendant and Respondent

Case No.
11685

BRIEF OF APPELLANT

Appeal from a Judgment of the Third District Court
Salt Lake County, State of Utah
The Honorable Aldon J. Anderson, Judge

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NATURE OF THE CASE

This is an action for personal injuries and property damage caused by the negligence of the defendant.

DISPOSITION IN THE LOWER COURT

The District Court found defendant negligent as a matter of law and entered judgment on a jury verdict in the amount of $3,500.00. The Court denied plaintiffs' Motion for New Trial, which motion was based primarily on the same ground raised here on appeal, i.e., error in the admission of certain testimony by defendant's expert witness, Dr. Allred.

RELIEF SOUGHT ON APPEAL

Plaintiffs request that this Honorable Court grant them a new trial on the issue of damages.

STATEMENT OF FACTS

During the course of the trial the court allowed counsel for defendant, over the objection of plaintiffs' counsel, to question defendant's expert witness, Dr. Allred, as follows:

> Q. (By Mr. Cowley) Considering the nature of the degenerative disk disease you have observed in Mrs. Christianson, I want to ask if you have an opinion as to whether or not that condition could account for the headaches.
>
> A. Yes, it could.
>
> Q. Do you have an opinion?
>
> MR. HOWARD: Your Honor, I am going to object to the question on the basis it "could" because "could" is not the proper question to ask of the witness if he is asking an opinion because we are not interested in possibilities.
>
> Q. (By Mr. Cowley) I'll ask you again Doctor if you have an opinion within the degree of medical probability that that condition could cause the headaches.
>
> MR. HOWARD: I make the same objection.
>
> THE COURT: Objection is overruled.
>
> MR. HOWARD: Your Honor, he has used the word "could".
>
> MR. COWLEY: I said within the degree of medical probability.

THE COURT: It is a matter of weight for the Jury. The objection is overruled.

THE WITNESS: Within the degree of medical probability it can cause headaches.

Q. (By Mr. Cowley) Within the degree of medical probability can it cause the soreness or stiffness of the neck?

A. Yes, sir.

MR. HOWARD: May I have a continuing objection to that?

THE WITNESS: Yes.

THE COURT: You may.

MR. HOWARD: To the manner in which this question is framed. I think it is objectionable.

THE COURT: You may. (R. 211)

On two occasions, in chambers, prior to submitting the case to the jury, the plaintiff requested a special instruction for the jury to disregard the objectionable testimony. This request was not recorded in the record, but the plaintiff believes the defendant will not dispute the request having been made.

ARGUMENT

THE COURT ERRED IN ALLOWING DEFENDANT'S EXPERT MEDICAL WITNESS TO TESTIFY AS TO THE POSSIBILITY THAT PLAINTIFF MURL CHRISTIANSON'S SYMPTOMS WERE CAUSED BY A PREEXISTING CONDITION.

It is a well-established rule of law that "an ex-

pert's opinion, if not stated in terms of the certain, must at least be stated in terms of the probable, and not merely of the possible." 31 Am.Jur.2d 548, "Expert and Opinion Evidence", § 44 (1967).

In Moore v. Denver & R.G.W.R.R. Co., 4 Utah 2d 255, 292 P.2d 849 (1956) expert testimony was allowed by the trial court to the effect that *"it was possible* that the accident initiated the condition" of nerve irritation and consequent disabilty for whch plaintiff might recover. 4 Utah 2d 257, 292 P.2d 880. The Supreme Court held that "since no affirmative evidence was offered on this issue" the speculative testimony of the witness, together with his "learned and convincing discourse on ruptured discs" made it likely that the jury would consider the disputed point as proven and that "therefore, an instruction should have been given to cure a possible prejudice." 4 Utah 2d 259, 292 P.2d 851.

To the same effect is Chief Consol. Min. Co. v. Salisbury, 61 Utah 66,210 P. 929 (1922) in which the court held insufficient to support liability testimony of an expert witness to the effect that the accident in question "might" have accelerated the diseased condition of the plaintiff's heart and hastened his death. Cf. Kujawa v. Baltimore Transit Co., 224 Md. 195, 167 A.2d 96, 89 A.L.R. 2d 1166 (1961): "The rulings of this court have been consistent in holding that an expert witness must base his opinion on probability and

not on mere possibility." 89 A.L.R. 2d 1173.

The questions of defendant's counsel clearly called for conclusions by the expert witness as to "possibility" rather than "probability" that the plaintiff's injuries were caused by a pre-existing condition. Dr. Allred testified not that the condition "did" or "probably did" cause plaintiff's headaches, but only that it "could" have done so. The assertion that cause A "could have" or "can" produce effect B is clearly the grammatical equivalent of an assertion that B "possibly" follows from A. The mere prefacing of a question with the formula, "within a degree of medical probability," could, etc, does not convert such speculative testimony given in response thereto into an assertion that the causal connection is "probable".

CONCLUSION

It follows from the foregoing that allowing the objectionable testimony to go to the jury was prejudical error and that plaintiffs' motion for new trial should be granted.

Respectfully submitted,

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Mailed a copy of the foregoing, postage prepaid, to James P. Cowley, Pugsley, Hayes, Watkiss, Campbell and Cowley, Suite 400 El Paso Natural Gas Building, Salt Lake City, Utah 84111, this ..... day of July, 1969.