1969

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

IN THE SUPREME COURT OF THE STATE OF UTAH

JACK CHRISTIANSON and
MURL CHRISTIANSON,
Plaintiffs and Appellants,

vs.

JOANNE DRBRY,
Defendant and Respondent.

Case No.
11695

BRIEF OF RESPONDENT

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

The plaintiff, Jack Christianson, brought this action for property damage, and the plaintiff, Murl Christianson, brought the action for personal injuries alleged to have been caused by the negligence of the defendant.

DISPOSITION IN THE LOWER COURT

The District Court, upon motion of the plaintiffs, entered judgment in favor of Jack Christianson for his property damage in the amount of $77.62 plus his costs, and in favor of the plaintiff, Murl Christianson, on the issue of liability, reserving for trial only the issue of damages to the plaintiff, Murl Christianson (R-27). The issue of damages with reference to the plaintiff, Murl Christianson, was tried to a jury. Contrary to the statement in Appellant's brief, the District Court entered judgment on the jury verdict which awarded plaintiff, Murl Christianson, $1,500 for general damages and $1,054.59 special damages (R-71). Thereafter the plaintiff, Murl Christianson, moved the trial court for a new trial upon the same grounds and for the same reasons as submitted to the Supreme Court of the State of Utah in the brief of Appellant (R-75). Memorandums were submitted to the court by both the Appellant and the Respondent and the District Court entered its order denying the plaintiff's motion for a new trial (R-80 through R-87 inclusive).

RELIEF SOUGHT ON APPEAL

The plaintiff, Murl Christianson, has taken this appeal and has requested the Supreme Court of the State of Utah to grant a new trial on the issue of damages. The Respondent opposes the relief sought by the Appellant.

STATEMENT OF FACTS

The Respondent admits the facts stated by the Appellant but believes the facts are insufficient to provide this Honorable Court with a proper perspective. The Respondent recites other additional facts which Respondent believes to be pertinent:

Appellant was a passenger in an automobile which was struck from the rear by an automobile driven by the Respondent on the 23rd day of September, 1965 (R-103, 104, 105). Immediatley following the accident the Appellant continued with her planned evening's activities by going to the show at the Valley Music Hall (R-123). The damage to the vehicle was modest; the repairs having cost $77.62 (R-2, R-22).

Within a few days after the accident the Appellant saw Dr. Groneman on one professional visit for which she was charged $5.00 (R-21). Except for his initial examination and his prescription for therapy she was not treated further by Dr. Groneman (R-125). Dr. Groneman was not called as a witness.

The Appellant was first seen by Dr. Chapman on April 19, 1967, some eighteen months after she had seen Dr. Groneman (R-136).

While she was being seen and treated by Dr. Chapman she continued to drive from her home in Utah County to Price, Utah, to assist her ill mother and father in the operation of a motel (R-125, 126).

The Appellant was seen and examined by Dr. S. William Allred on October 22, 1968 (R-188).

Dr. Chapman hospitalized Mrs. Christianson and performed a myelogram on January 2, 1969 (R-148).

X-rays were taken by Dr. Groneman in September of 1965 (R-160, 162, Ex. D-7, D-12). X-rays were taken by Dr. Chapman in April of 1967 (R-136, 150, 151, 152, Ex. P-4, P-5, P-6). X-rays were taken by Dr. Allred in October of 1968 (R-188, 191, Ex. D-14, D-15, D-16, D-17). X-rays were taken and a myelogram performed by Dr. Chapman in January of 1969 (R-148).

Dr. Chapman was called as a plaintiff's witness (R-133). Dr. Chapman had not examined the 1965 X-ray taken by Dr. Groneman until the time of trial R-160). During the trial Dr. Chapman examined the Groneman X-ray (R-162, Ex. D-12) that was taken within a few days after the accident and acknowledged that this X-ray showed a narrowing disk space that predated the accident (R-163). Dr. Chapman further acknowledged that "it is possible for a disk to degenerate and cause the type of symptoms suffered by Mrs. Christianson without a traumatic injury" (R-160, 161). Dr. Chapman categorically stated that the disk narrowing demonstrable on the Groneman X-ray was not caused by the accident and was not related to the automobile accident (R-161, 162, 163). Dr. Chapman further testified that there was not any appreciable differences in the X-rays taken by Dr. Groneman in

September of 1965, and the X-rays taken by him in April of 1967 (R-165). Dr. Chapman testified that the myelogram taken in January of 1969 disclosed a disk protrusion (R-149).

Dr. Allred was called as a witness for the defendant concerning his examination of the Appellant of October 22, 1968 (R-187). He testified that his examination did not reveal any numbness; did not reveal any difficulty with her eyes; and that it did reveal an actual range of the neck with no associated muscle spasm. He could find no specific areas of trigger point pain. She had a full range of motion of her upper extremities. There was no evidence of atrophy about the upper extremities. The reflexes and sensation of the upper extremities were normal and the grip of her hands was good bilaterally (R-189, 190). He further expressed the opinion that there was no specific nerve root irritation (R-190). Dr. Allred took X-rays which demonstrated the same degenerative disk disease that was shown on the Groneman X-ray in 1965. He testified that "the lipping of the cervical spine would have taken more than four or five years to develop" (R-191, 192, Ex. D-14, D-15, D-16, D-17). Dr. Allred testified that in his opinion the condition of the cervical spine was present prior to the accident which occurred in September of 1965 (R-194). Dr. Allred testified that the myelogram did not show a disk protrusion but that it showed "the lipping" of the cervical spine that occurred gradually over a period of time (R-195). He further testified that a myelogram taken

prior to the accident would have shown the same condition (R-195).

On cross-examination of Dr. Allred it was his testimony that in his examination of October 22, 1968, he could not find any objective cause for the symptoms complained of by the Appellant (R. 219).

The medical testimony in this case is lengthy. The direct examination of Dr. Chapman takes 27 pages of the record and his cross-examination takes 19 pages of the record. The redirect examination of Dr. Chapman takes 7 pages of the record. The direct examination of Dr. Allred takes 9 pages of the record. His cross-examination takes 24 pages of the record; his redirect examination and recross-examination takes 3 pages of the record (R. 133-through R-222 inclusive).

ARGUMENT

POINT I

THE COURT DID NOT ERR IN PERMITTING QUESTIONS AND ANSWERS OF DR. ALLRED OBJECTED TO BY THE APPELLANT.

In redirect examination of Dr. Allred counsel for the defendant asked a series of questions. The same was objected to by plaintiff's counsel because the questions were based upon the word "could." It is submitted that under the circumstances the word "could" was perfectly proper. Plaintiff's counsel had every

opportunity to cross-examine Dr. Allred and following the redirect by the defense, plaintiff again had the opportunity to further examine Dr. Allred.

The material found in 31 Am. Jur. 2d under Expert and Opinion Evidence states the rule. Section 44 on page 548 states:

> "Expert opinion testimony may be given in terms of an opinion that something might, *could,* or would produce a certain result. Opinion testimony of this nature is said to be admitted into evidence on the theory that an expert witness' view as to probabilities is often helpful in the determination of questions involving matters of science or technical or skilled knowledge."

See Section 103:

> " . . . A very liberal practice of permitting opinion testimony of experts in the field of medical practice is indulged. A duly qualified physician may . . . state his opinion as to the nature of the disease, injury, or disability, from which a person is or was suffering, and as to the facts or causes which probably, or *might have,* produced such condition . . . "

See Section 113:

> "As a general rule, expert medical opinion evidence has been admitted where the witness expressed it in language which sufficiently described the opinion as representing his own best judgment regarding particular facts or hypotheses supported by the evidence, and indicated with reasonable certainty that causation existed or could be found, the testimony not constituting a pure, unsupported conclusion; and, as satisfy-

> ing this requirement, courts have approved substantiated statements of probability, possibility, and likelihood, and statements to the effect that a cause might lead or could have lead to a result proved. Such witnesses have been permitted to state what in their opinion was the "possible," "probable," or "likely," etc., cause of, or what "might" or *"could"* have caused, death or a particular physical condition."

The Utah Supreme Court in the case of Moore v. D. & R.G., cited in 4 Utah 2d 255, 292 P 2d 849 (1956) reversed the trial court because in the view of the Supreme Court there was insufficient evidence to create a jury issue because the only medical testimony related to a "possibility." The Supreme Court found that the plaintiff failed to meet his burden with such a limited amount of evidence. However, the Court in that case used the following language:

> "This court has long recognized that the mere use of words such as "belief," "impression," "probability," or "possibility" will not *exclude* a witness' testimony where his expression does not indicate a lack of personal observation, but merely the degree of positiveness of his original observation of the facts or the degree of positiveness of his recollection."

In a subsequent case In Re Richard's Estate cited in 5 Utah 2d 106, 297 P 2d 542 (1956) the Supreme Court of Utah referred to the Moore v. D. & R. G. case on page 547 as follows:

> "Counsel further suggests that the answers of this expert were so uncertain and vague that

> they should not have been submitted to the jury . . . This was an erroneous interpretation of that holding. That case recognized that the mere use of such words as "belief," "impression," "probability," or "possibility" did not render testimony inadmissible, but held that in the particular context the qualifying phrases rendered the testimony too insubstantial when standing alone to support the verdict."

It is submitted that there was no impropriety in permitting Dr. Allred to answer the questions containing the word "could."

POINT II

THE APPELLANT WAS NOT PREJUDICED IN ANY WAY BY THE QUESTIONS AND ANSWERS OF DR. ALLRED TO WHICH THE APPELLANT HAS OBJECTED.

Considering the lengthy medical testimony by the two physicians who were called as witnesses and considering their agreement in some regards and their disagreement in others, it cannot be said that the jury was not fully and completely apprised of the contentions of the parties. The jury had a full and fair opportunity to hear, see and understand the testimony of both physicians and to hear them express those certain opinions wherein they agreed and those certain opinions wherein they disagreed.

By reviewing a few of the pertinent and essential facts the verdict of the jury is understandable; is com-

pletely supported by such facts and cannot be said to be the result of any passion or prejudice. For the purpose of justifying the jury's verdict, I call to the attention of the court some of the specific facts over which there was no controversy and which stand in the record uncontroverted:

1. Following the accident the plaintiff saw her family physician on one professional visit and was not thereafter seen or treated by him on a professional basis.

2. Some eighteen (18) months after the accident the Appellant went to see Dr. Chapman for the first time.

3. Dr. Chapman admitted that she had a pre-existing cervical condition and his testimony was to the effect that it had been in the making for at least ten years prior to the date of the accident. His opinion was corroborated by the opinion of Dr. Allred.

4. The nature of the impact between the cars was modest as was evidenced by the photograph introduced into evidence showing the condition of plaintiff's car following the accident, and further substantiated by the fact that the repair bill was less than $80.

5. The modest nature of the impact was further demonstrated by the fact that the Appellant and other parties in the vehicle went on to Valley Music Hall, stayed and watched the show and then drove back home that evening.

While Dr. Allred's testimony was in conflict with

that of Dr. Chapman, it should be noted that it was the opinion of Dr. Allred that had a myeloma been taken before the accident that it would have shown the same results as the myelogram taken some two months before the trial, and he explained this by indicating on the X-ray taken the day after the accident the spurring on the bony structure that caused the displacement in the spinal column of the radioactive material used in the myelogram.

The jury awarded to the Appellant all of the medicals and specials claimed by Appellant and in addition thereto awarded to her $1,500 general damages. It is obvious that the jury believed, and such belief is substantiated by the evidence, that Appellant had a preexisting condition and that the Respondent was in no way responsible for all of the physical difficulties and problems of the Appellant.

CONCLUSION

The judgment of the trial court and the jury should be affirmed and the appeal of the Appellant demanding a new trial on the issue of damages should be denied and dismissed.

Respectfully submitted,

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