1970

Howell Ujifusa v. National Housewares, Inc. : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

HOWELL UJIFUSA,
Plaintiff and Respondent,

vs.

NATIONAL HOUSEWARES, INC.,
Defendant and Appellant.

Case No. 11901

RESPONDENT'S BRIEF

Appeal from the Third Judicial District Court
For the County of Salt Lake
Honorable Aldon J. Anderson, Judge

DWIGHT L. KING
2121 South State Street
Salt Lake City, Utah
Attorney for Plaintiff and Respondent

CHRISTENSEN & JENSEN
RAY R. CHRISTENSEN
1205 Continental Bank Building
Salt Lake City, Utah
Attorneys for Defendant and Appellant

TABLE OF CONTENTS

CASES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

HOWELL UJIFUSA,
Plaintiff and Respondent,

vs.

NATIONAL HOUSEWARES, INC.,
Defendant and Appellant.

Case No. 11901

RESPONDENT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

Defendant appeals from judgment in plaintiff's favor of $10,194.63 damages for the compression fracture of the second lumbar vertebra sustained while he was a passenger on a snowmobile being operated in defendant's business.

DISPOSITION IN THE LOWER COURT

Plaintiff's case was tried to a jury, issues were submitted on instructions by the court, and the judgment of $10,194.63 was rendered by the jury.

RELIEF SOUGHT ON APPEAL

Defendant seeks a determination as a matter of law that plaintiff is not entitled to recover the judgment or that the amount of the judgment is excessive.

STATEMENT OF FACTS

Plaintiff cannot agree that the Statement of Facts as contained in defendant's Brief is fair.

Plaintiff, it was undisputed, was a business guest of the defendant and was at Alta for the purpose of taking pictures of their snowmobile, using a camera which was in their line of products. See Exhibit P-12 for an illustration of some of the pictures taken by plaintiff.

The snowmobile was being driven by David Bigler, a Vice-President of defendant. (R. 166). He was familiar with the area over which the snowmobile was to be driven and had been to the area the prior week. He observed that there was a hump of snow blocking the service road created by snow that had been pushed in from the road below. (R. 167)

He observed that the hump was there and that he had to go around the edge of it in order to go up beyond the automobile traveled portion of the road. (R. 167-168) Plaintiff rode on the snowmobile sitting on the seat behind the driver and had no control over the way the vehicle was operated and could not see exactly where it was being driven. Mr. Bigler in-

tended to drive the snowmobile off the jump when he came back with the plaintiff riding on it, and actually drove it off the top of the hump at 15 to 20 miles an hour. He estimated that the snowmobile jumped 12 to 15 inches. (R. 168) Mr. Woodruff, a witness who was below watching the snowmobile come down over the hump, estimated that it jumped 10 to 12 feet across through the air. (R. 159) Bigler came down over the jump a second time and negotiated it without the snowmobile leaving the ground, and this time he estimates that his speed when going over the hump was approximately 5 miles an hour. (R. 169) He also stated that it was not necessary to go over the hump at all, that he could have sneaked around the side. (R. 169) The snowmobile has no shock absorbers. The driver stands up, holding the steering handles so that he can absorb the shock of driving over rough terrain. (R. 170). He testified that he did not intend to jump the snowmobile, (R. 172), and in his opinion, it jumped only 3 to 4 feet. Following the jump, Bigler landed on top of plaintiff, lighting on his stomach area, and the back of the machine caught the plaintiff in the middle of the back and his head was thrown back (R. 173). Following the injury to Mr. Ujifusa, Bigler tested the machine over the hump, and with the speed of the machine wide open, at approximately 35 miles an hour, it jumped off the hump a distance of 12 feet (R. 173).

Bigler did not intend to jump the snowmobile since he had two people on it, and the individual in back doesn't have much balance and can be thrown anywhere if you intentionally jump the machine fast with two people on it. Bigler did not advise plaintiff that he intended to jump the machine nor tell him to take any extra precautions (R. 173-174).

Plaintiff suffered immediate pain and injury following the jump as described by witness Bigler, and slid off the snowmobile into the snow and laid there. Witness Woodruff thought he had the wind knocked out of his lungs temporarily. After he had laid there for 60 seconds or so, they wondered why he didn't get up, and this went on for four or five minutes. They finally removed him from the scene, and he laid in the car for 15 to 20 minutes. (R. 60) Plaintiff was able to take the pictures required after the 20 minute interval, and after he returned home on the evening of December 20th, consulted Dr. Robert H. Lamb. Dr. Lamb x-rayed plaintiff and diagnosed his injuries as a compression facture of the second lumbar vertebra. (R. 104) A compression fracture is caused, on occasion, by a person being doubled over and having a weight fall on him, (R. 107), or from falling from a height and landing on his feet. The X-rays, Dr. Lamb testified, indicated that there was some change in the intervertebral disc itself as shown by the rough edges between the vertebrae. (R. 110) Dr. Lamb recommended that Mr. Ujifusa go into the

hospital because of the pain, where he could be made more comfortable sooner if he stayed off his feet. However, plaintiff's business demands were such that he could not go to the hospital, and so the doctor put him in a three point brace, giving pressure in the upper chest and on the surfaces of the bone below and at the middle of the back, extending the back as much as possible. (R. 113-114). Plaintiff wore the brace for 70 days, to March 1st (R. 114). Dr. Lamb examined plaintiff on the 17th day of April, 1969 and was of the opinion that he would continue to suffer discomfort in the back, soreness in his back, especially on quick motions or twisted motions, more than on flexion or extension of the spine, and on that day no essential change in the configuration of the second lumbar vertebra had occurred except that the healing process had taken place (R. 115). Dr. Lamb was of the opinion that degenerative changes in the area would take place and that it was just a matter of how much pain plaintiff was willing to tolerate—when the pain became intolerable to him, a fusion could be carried out at that time (R. 116). Dr. Lamb rated the plaintiff as having a 10% permanent partial disability of the spine, the disability being in the nature of soreness, discomfort, especially on motions of twisting of the spine (R. 117).

ARGUMENT

POINT I

THE COURT CORRECTLY DETERMINED THAT ASSUMPTION OF RISK SHOULD NOT BE SUBMITTED TO THE JURY, BUT DID SUBMIT THE QUESTION OF CONTRIBUTORY NEGLIGENCE.

This court, in two very recent decisions, has carefully set forth the principles which govern the submission to a jury of the question of assumption of risk, and has also differentiated between assumption of risk and contributory negligence. In *Johnson v. Maynard*, 9 Utah 2d 268, 342 P.2d 884, the court discussed assumption of risk at considerable length, pointing out that this doctrine developed originally in the cases where it was necessary to protect employers, and was designed to insulate the employers as much as possible from bearing the cost of human overhead (Utah, P. 272). The court then established the principle applicable in the following language:

> "The fundamental consideration underlying it is that one should not be permitted to knowingly and voluntarily incur an obvious risk of personal harm when he has the ability to avoid doing so, and then hold another responsible for his injury. Its essential elements are: knowledge of a danger and a free and voluntary consent to assume it."

In the case at bar, there is a complete lacking of the essential elements stated in *Johnson v. Maynard*

(supra). There was no showing that the plaintiff had knowledge that the defendant intended to drive the snowmobile over the hump and make it jump, and not having such knoweldge, there was no free and voluntary consent. Witness Bigler testified that it was not necessary to go over the hump, that he could go around it, it was not necessary to go over it at the speed with which he went over it, and that he could negotiate it at five miles an hour without it jumping at all. He specifically testified that he did not warn plaintiff that he intended to go over the jump nor advise him as to precautions he should take to safeguard himself from injury.

This is a case of the operator of the snowmobile unnecessarily going over the hump, going over it at a high rate of speed in excess of the speed with which it could be reasonably and safely negotiated. These acts of negligence, defendant could not anticipate, let alone know were about to occur.

The court submitted the plaintiff's case to the jury, advising them that if the plaintiff was contributorily negligent, he could not recover.

The court, in Instruction No. 9, submitted defendant's negligence in permitting the snowmobile to go over the drop or jump, and stated that defendant could not recover if he himself was negligent (R. 55). Again, in Instruction No. 10, the court submitted the negligence of defendant in failing to keep a lookout

for conditions of the surface over which the snowmobile was operated, and again advised the jury that if plaintiff himself was negligent, he could not recover (R. 56). In Instruction No. 11, the court submitted the defendant's negligence in operating at a speed which was unsafe, and advised the jury for the third time that the plaintiff could not recover if he were contributorily negligent (R. 57).

In Instruction No. 12, the court added a fourth instruction to the jury that the passenger must exercise reasonable care for his own safety, and that if he failed to exercise such care, he could not recover from the operator. The language of Instruction No. 12 is particularly applicable and is as follows:

> "So long as a passenger does exercise ordinary care for his own safety, and in the absence of appearances that caution him or would caution a reasonably prudent person in like position, he has a right to assume that the operator of the vehicle in which he is a passenger will perform all the duties required of such operator and will exercise reasonable care and caution to provide him with a safe trip." (R. 58)

It is the position of plaintiff that this language submitted to the jury a carefully and fairly worded instruction presenting the issues on which they were to deliberate, and that defendant could not, under any circumstances, have been prejudiced by the court's instructions.

The court also instructed the jury on unavoidable or inevitable accidents in Instruction No. 13, and advised them that if the accident was an unavoidable or inevitable accident, their verdict should be for defendant (R. 59).

It is plaintiff's position that the kind of negligence which caused him to be injured could not have been anticipated and was not inherent in a ride up or down the hill in a snowmobile. The injury resulted from the operator's failure to keep the vehicle operating at a speed which was reasonable considering the contour over which he intentionally drove the vehicle and which he admitted could be safely traversed. He could have directed it so as to avoid even the necessity of going over the hump or jump.

This court, in the recent case of *Evans v. Stuart*, 17 Utah 2d 308, 410 P.2d 999, stated that assumption of risk, while closely related to contributory negligence, is not identical with it, and again recited the rule set forth in *Maynard v. Johnson*, supra, that the risk to be assumed must be one which is of a known danger and there must be a reasonable opportunity to make an alternative choice (Utah, P. 312). The danger causing injury to plaintiff was not known, and there obviously was no alternative choice since he had no knowledge of the danger.

The most recent case discussing the doctrine of assumption of risk is *Hindmarsh v. O. P. Skaggs Food-*

liner, 21 Utah 2d 413, 446 P.2d 410. The court there made the following statement concerning the doctrine of assumption of risk:

> "The doctrine of assumption of risk is but a specialized aspect of the defense of contributory negligence. This court has repeatedly declared the law in that respect: that it applies only where the plaintiff knew of and appreciated a danger, and had a reasonable opportunity to make an alternative choice, but nevertheless voluntarily exposed himself to the danger in question. It is not shown here that the plaintiff had any such knowledge, nor a reasonable opportunity to make an alternative choice. Therefore, that doctrine does not entitle the defendant to the relief it seeks here."

It is respectfully submitted that the law as set forth in the cases quoted, clearly illustrate that the doctrine of assumption of risk was not applicable to the facts as shown by the evidence, and the court correctly submitted the case to the jury on the doctrine of negligence and plaintiff's contributory negligence. The court's instructions fully and carefully submitted to the jury for its determination the issues presented by the evidence, and the verdict should be upheld.

POINT II

THE DAMAGES AWARDED BY THE JURY WERE MODEST IN AMOUNT, CONSIDERING THE PERMANENT INJURY SUFFERED BY PLAINTIFF.

Plaintiff suffered a compression fracture of the second lumbar vertebra, which is a permanent injury, and as has been clearly outlined in the statement of facts, with reference to Dr. Lamb's testimony, a compression fracture never heals. The vertebra itself remains in a compressed state for the balance of an injured person's life, and no surgical intervention to restore the fracture is justified.

This kind of injury, giving a permanent disability of 10%, estimated by Dr. Lamb, means that Mr. Ujifusa will suffer the balance of his life. Testimony was that he was born on May 26, 1925, and at the time of trial would have been 44 years old (R. 128).

Plaintiff's business as a commercial photographer required him to engage in a great deal of physical activity, and for two months following his injury he was not able to do the ordinary work that the job required. He had to hire a helper to take his heavy cameras and other equipment around with him (R. 143). He testified that the back is painful, is constant, and is comparable to a constant toothache (R. 145).

Plaintiff testified that there were a lot of things he is not able to do that he did before, and it makes it necessary to farm out activities such as weddings. He had about five weddings per month which, to the time of trial, he was still farming out (R. 146). He testified that anything that requires a heavier camera, he sends someone else out to do the work or has his work done by other photographers (R. 146-147). In addition, the injury restricts his recreational activity. He can still fish and bowl, but can't play golf because the pain interferes with his swing (R. 148). Dr. Lamb testified that plaintiff's condition is permanent and that if pain becomes intolerable, it would require a fusion operation of the back (R. 116).

There was no dispute of Dr. Lamb's testimony, no medical witness was offered by defendant, and there was no serious controversion by evidence of the plaintiff's testimony concerning his injury. It is respectfully submitted that there is no basis for a claim that the jury was confused or impassioned or that the verdict which they gave was the result of passion or prejudice.

The Trial Court passed on the motion for reduction and remittitur of the verdict and concluded that it was not in excess of what was reasonable. It denied the motion made by defendant.

This court, in many cases, has examined the rules and attempted to set forth the principles which would govern the consideration of verdits where there was a

claim either of excessiveness or inadequacy. From all the cases, it would seem that the conclusion made by Justice Crockett in the case of *Stamp v. Union Pacific Railroad Company*, 5 Utah 2d 397, 303 P.2d 279, in his concurring opinion, are correct statements of the principles governing judicial consideration of verdicts. He stated:

> "The first such rule is that courts should exercise great caution and forbearance in disturbing jury verdicts to the end that the important right of trial by jury is preserved. Moreover, after the lower court has given its approval to the award by refusing to set aside or modify the verdict, that much additional verity is thereby conferred upon it and the appellate court, a fortiori, should be more reluctant to interfere with the jury verdict and the judgment of the court because of their advantaged position in having first-hand view of the proceedings and will do so only when to permit it to stand would work a manifest injustice."

Justice Crockett further differentiates between two kinds of excessiveness in awards, those so grossly excessive as to shock the conscience and indicate clearly that the verdict resulted from passion, prejudice or corruption, or that the jury totally misconceived its function. In such cases the verdict is tainted with injustice and a new trial should be granted unconditionally. It is respectfully submitted that no such claim of gross excessiveness would stand analysis in the present case. It must then be that the defendant is claiming that the plaintiff's verdict is

of the class described by Justice Crockett as follows:

> ". . . but where there is an award obviously above any reasonable appraisal of the damages suffered, which may have resulted from misconception of evidence, or error in judgment, or undue liberality to the extent that the court in fairness and justice cannot permit the award to stand in the amount given."

It is respectfully submitted that after all the analysis of the prior decisions of the court is completed, the statement found in *Duffy v. Union Pacific R. Co.*, 118 Utah 82, 218 P.2d 1080, Page 91, is probably accurate.

> "Previously decided cases are of little value fixing present day standards or in assisting courts in determining excessive awards. Both the court and jury are required to deal with many unknown factors and a good guess is about the best that can be hoped for. The permissible minimum and maximum limits within which a jury may operate for a given injury are presently far apart and must continue to be widespread so long as pain and suffering must be measured by money standards."

It is respectfully submitted that $10,194.63 is not an excessive amount to be awarded by a jury for a 10% permanent partial disability consisting of a compression fracture of the second lumbar vertebra.

CONCLUSION

Plaintiff respectfully submits that the jury verdict is fair, the amount not in excess of reasonable, considering the plaintiff's permanent injury, that defendant had a fair trial and the issues were submitted with lawful instructions, and that the judgment of the lower court should be affirmed with costs to the plaintiff.

Respectfully submitted this.....day of

....., 1970.

.....

DWIGHT L. KING
Attorney for Plaintiff and Respondent
2121 South State Street
Salt Lake City, Utah