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Garth Whitney v. Dave Walker And Chanae Walker : Respondent's Brief On Appeal

IN THE SUPREME CO
OF THE STATE O

GARTH WHITNEY,

Plaintiff and Re

vs.

DAVE WALKER and
WALKER,

Defendants and

Respondent

Appeal from a J
of Salt Lake Co

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IN THE SUPREME COURT OF THE STATE OF UTAH

GARTH WHITNEY,
Plaintiff and Respondent,

vs.

DAVE WALKER and CHANAE WALKER,
Defendants and Appellants.

Case No. 11959

Respondent's Brief on Appeal

STATEMENT OF THE KIND OF CASE

This is an action for personal injuries arising out of an automobile accident.

DISPOSITION IN THE LOWER COURT

The case was tried to a jury in the District Court of Salt Lake County and resulted in a verdict in favor of the plaintiff in the amount of Thirty Eight Thousand Eight Hundred Fifty One Dollars And 40/100 ($38,851.40).

RELIEF SOUGHT ON APPEAL

Plaintiff seeks that the jury verdict and judgment on the verdict be affirmed.

STATEMENT OF FACTS

On September 19, 1968, plaintiff, Garth Whitney, was standing by the side of his automobile in a church parking lot when he was struck by an automobile being operated by defendant, Chanae Walker, and owned by her father, defendant Dave Walker. The issues on appeal do not involve any factual problems of liability, but relate primarily to the question of damages. Respondent's statement of facts will, therefore, be limited to the facts establishing damages.

Garth Whitney is forty years of age, is married and has four children, ages three to seven (T-8). He is employed as a real estate salesman (T-8). At the time of the accident, he was hit in the right hip and knocked into the door of his automobile (T-12).

Mr. Whitney's personal injuries were mainly in his groin area. At the time of the impact, that area began to swell immediately to the size of "a two-quart fruit jar container" (T-14). He began to suffer immediate pain in his penis and scrotum area and down his legs (T-14).

Mr. Whitney was taken to the Cottonwood Hospital for emergency treatment. He was in severe shock (T-23); he had no blood pressure (T-23); his penis was partially torn away at the base where it attaches to the body (T-27); and there was a five to six inch tear in his scrotum which left his testicles exposed (T-17). He was im-

mediately given blood (T-23), was catheterized (T-16), his scrotum was sewed up (T-17), and his other injuries were attended to (T-17).

After the emergency treatment, he remained hospitalized for sixteen days (T-19, 30). During the first four to five days, he lost five pints of blood, nearly all of which was lost internally and most of which went directly to the area of the groin, scrotum and penis (T-25). While in the hospital, his penis and scrotum began to swell way out of proportion (T-19). The plaintiff described the scrotum as being the size of a ripe watermelon (T-19). His doctor described the swelling as being cantaloupe size which would be three to four times the normal size (T-32). Both the penis and scrotum turned a deep black color, as did the entire area around the hip, stomach, abdomen and buttocks (T-19). The injury was extremely painful (T-79). The hospital could not locate a supporter large enough to hold the testicles and had to put together a makeshift support from towels, which limited him to one position (T-29). Plaintiff also became jaundiced and contacted and was treated for gout (T-29).

As a result of the severe swelling, the blood in plaintiff's groin area puddled long enough to calcify (T-35); the injury interferred with normal circulation, cutting off the normal supply of blood (T-36, 42). This caused serious permanent injury which was diagnosed to include partial impotency (T-36) and deformity of the penis (T-34). The distal or front half of his penis has become smaller than the other half (T-34). He is unable to have

a normal erection (T-36, 37) and the front or distal portion of his penis remains soft and flaccid during erection (T-40, 61). There is a decrease of sensation in the distal part of his penis (T-31, 61). He is able to have intercourse only with difficulty (T-40); it is not as satisfactory because of poor function (T-40). Intercourse is not as frequent, not as effective and is attended by a strain on the nervous system (T-40). These injuries are permanent (T-43, 50).

The plaintiff's doctor has counseled with plaintiff's wife in attempting to get her to accept the situation and accept Mr. Whitney's maximum performance (T-41). Still, he feels he is unable to satisfy her and sex relations are unsatisfactory (T-60). Mr. Whitney feels that he has suffered a definite loss of manhood (T-60).

At the time of the trial, Mr. Whitney still suffered from soreness and tenderness around the base of the penis. There is a blood clot in the groin area. There is lumpiness in the penis, and the plaintiff has difficulty in urinating (T-60).

The record further shows that the plaintiff was off work for a period of six (6) months following the accident and had loss of income in the amount of Seven Thousand Nine Hundred Seventy Two Dollars And 42/100 ($7,972.42) (T-58).

ARGUMENT

POINT I

THE FAILURE TO APPOINT A GUARDIAN AD LITEM FOR DEFENDANT, CHANAE WALKER, DID NOT SUBSTANTIALLY AFFECT HER RIGHTS AND THE JUDGMENT SHOULD BE UPHELD.

The record in this case shows that defendant, Chanae Walker, was sixteen years old at the time of the trial herein; that she appeared in said action with her father, Dave Walker; that at all stages of the proceedings she was represented by a very distinguished and capable member of the Utah State Bar; that the case was vigorously contested; that at no time did she make application to have a guardian ad litem appointed for her; that she waited the return of a jury verdict and judgment without setting up her infancy as defense; and that no objection was ever made with respect to the failure to appoint a guardian ad litem until the filing of a Motion for a New Trial. Further, appellants have failed to show, nor have they made any claim, as to how the failure to appoint a guardian ad litem would have changed the result of the trial or would have prejudiced or affected her rights in any manner whatsoever.

Cases holding that a judgment would be void under the above circumstances are in the extreme minority, the weight of authority being to the effect that where there is a failure to appoint a guardian ad litem, the judgment is merely erroneous or irregular and is subject to being set aside only upon a showing that substantial rights of

the infant were affected by reason of the failure to appoint a guardian ad litem.

A leading case is *Trolinger vs. Cluff,* 56 Idaho 570, 57 P.2d 332. In that case, which involved a statute almost identical to the Utah statute relating to the appointment of guardian ad litems, the Idaho Court was faced squarely with the question as to the effect of the failure to appoint a guardian ad litem. After citing approximately forty (40) cases in support of the general rule, the Court held as follows:

> "While the judgment rendered in the damage action may have been irregular and erroneous, the rule supported by the great weight of authority is that the failure to appoint a guardian ad litem must affect the substantial rights of the infant before the judgment will be set aside, reversed or vacated. It must be made to appear that substantial rights of the infant were affected such as that the infant had a valid defense to the action, fraud, collusion, duress, or the same grounds upon which an adult might have disputed the judgment . . .
>
> What loss of substantial rights did the defendant in this case suffer? He was ably represented by counsel in every stage of the proceedings. A trial was had by jury, before whom he submitted his evidence, and his case is ably presented on appeal. Wherein are his rights affected and what different judgment would have been rendered, had he been represented by a guardian ad litem? None was pointed out.
>
> It seems to us that in a case such as the one at bar, unless the minor, who has reached his majority, makes some showing, to the effect that

he has a meritorious defense or that he has been misled, deceived, or in some way deprived of some benefit of an independent and unhampered defense, you should not be allowed to disaffirm a judgment obtained in the manner this judgment was obtained, or have the same vacated. After a most diligent investigation of the authorities, and a careful consideration of the record in this case, taking into consideration all of the facts and circumstances, we have concluded that sufficient grounds were neither alleged nor established to warrant vacating the judgment. No substantial rights of appellant were denied him."

In the case of *Tart vs. Register,* 257 N. C. 161, 125 S.E.2d 754, a case was tried against a minor without a guardian ad litem; and after the verdict had been entered, the court appointed a guardian ad litem to cure an oversight. The judgment was attacked, and the North Carolina Court held as follows:

> "In the present record, it affirmatively appears, both from the facts found by the judge below and a careful examination of the record as a whole, that the interests of the minor have been fully and amply protected and to the same extent as if a guardian ad litem had been appointed at the outset. A new trial will not be awarded for failure to appoint in apt time."

Other cases at random in support of the general rule are *Levystein Bros. vs. Obrien,* 106 Ala. 352, 17 So. 550; *King vs. Wilson,* 116 Cal. Ap.2d 191, 2 P.2d 833; *Ritzler vs. Eckleberry,* 167 Ohio 439, 149 N.E. 2d 728.

While the precise question has never been considered by the Utah Supreme Court, the Court did in the case of

Ballard vs. Buist, 8 Utah 2d 308, 333 P.2d 1071 uphold the validity of a summons issued by a minor plaintiff and served upon a defendant. The Court held that the instituting of the action by a minor without a guardian ad litem and the obtaining of jurisdiction over the defendant was a mere irregularity which could be cured by the subsequent appointment of a guardian ad litem and by amendment. This result seems to be in keeping with the general rule that the failure to appoint a guardian ad litem is not of a jurisdictional nature.

The majority rule as cited herein is also remarkably consistent with Rule 61 of the Utah Rules of Civil Procedure relating to harmless error. That rule provides as follows:

> "No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or othewise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substntial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

With respect to matters involving the appointment of guardians ad litem, most courts have reached the same result as provided in the above rule, even without such a strong statutory mandate.

It may further be noted that under Rule 17(c), Utah Rules of Civil Procedure, the responsibility for the ap-

pointment of a guardian ad litem of an infant over fourteen rests first with the infant. If the infant fails to make application, then it may be made by a relative or friend or by another party to the action. Here, neither the infant nor her father have made application. Thus any oversight by the plaintiff in failing to appoint a guardian ad litem cannot be blamed entirely upon the plaintiff, but is a direct result of defendants' failure to themselves comply with the rule. To now complain of error would seem to come within the language of the court in *Helman vs. Paterson,* 121 Utah 332, 241 P.2d 910 wherein it was stated that "a party who takes a position which either leads a court into error or by conduct approves the error committed by the court, cannot later take advantage of such error in procedure;" or within the language of *Hill vs. Cloward,* 14 Utah 2d 55, 377 P.2d 186 wherein the court states:

> "It would be manifestly unjust for a party to sit silently by, believing that prejudicial error had been committed, proceed with the trial to its completion, and allow the jury to deliberate and reach a verdict to see if he wins, and then if he loses, come forward with a claim that such an error rendered the verdict a nullity. If this could be done, proceedings after such an occurrence would be in vain and, thus, an imposition upon the court, the jury and all concerned. The court will not countenance any such mockery of its proceedings."

It might further be noted that even after the entry of judgment, the infant has failed to apply for the appointment of a guardian ad litem for the purpose of

prosecuting this appeal. Thus, even now, the actions of the defendants are inconsistent with their position, and it is questionable whether they would have any standing to raise this question on appeal.

Based upon all of the authorities as cited herein, and there being no showing or claim of any prejudice to the infant defendant, plaintiff urges that the judgment against said defendant remain undisturbed.

POINT II

IF THE JUDGMENT AGAINST THE INFANT WERE TO FAIL, IT WOULD NOT AFFECT THE JUDGMENT AGAINST THE ADULT DEFENDANT, DAVE WALKER.

Point II becomes mute and irrelevant in the event the court rules in respondent's favor under Point I. If, however, the court were to declare the judgment against the minor to be void, then the question arises as to the effect of such ruling upon the judgment against the adult defendant. Respondent claims that such judgment should stand.

The liability of defendant, Dave Walker, was based upon Section 41-2-22, *Utah Code Annotated,* 1953 which makes the owner of a vehicle liable for the negligence of a minor under the age of eighteen (18) whom he knowingly permits to drive the vehicle. Cases cited by the appellant to the effect that an exoneration of the agent is an exoneration of the principle are completely inapplicable. Here there is no exoneration of the agent.

If the case against the minor, Chanae Walker, fails, it is not because she is exonerated from liability, but because she is not properly before the court. The effect would be as though she had never been a party in the first place.

Respondent knows of no authority making an agent an indispensable or a necessary party in an action against a principal. Such actions are very common in this jurisdiction. It is inconceivable to think that defendant Dave Walker would have been entitled to a dismissal in the event plaintiff had originally elected to make him the sole defendant in the suit. It was held in *Munro vs. Doherr,* 156 F. Supp. 723 that where a Massachusetts statute imposes liability upon the owner of an automobile for the actions of a driver, the driver is not an indispensable party in an action filed against the owner. Here, defendant Dave Walker was properly made a party to the action; the issues of negligence upon which his liability arose were properly and fairly presented to a jury; and there is no valid reason why he should not be bound by the judgment.

In actions involving infant defendants, it has been held that where a judgment against an infant defendant for whom no guardian ad litem is appointed is reversed or set aside as to the infant, it will be upheld as to the other defendants. *Cowling vs. Hill,* 69 Ark. 350, 63 S.W. 800; *Lehew vs. Brummell,* 103 Mo. 546, 15 S.W. 765; *Robison vs. Gatch,* 85 Ohio App. 484, 87 N.E.2d 904.

Of particular relevance is the case of *Holland vs. Kodimer,* 11 Cal. 2d 40, 77 P.2d 843. In that case, it was held that where an adult defendant failed to request the court to appoint a guardian ad litem for an infant defendant notwithstanding that the right to do so was available to him, he cannot subsequently avoid a judgment against him on the ground of failure to appoint a guardian ad litem for the infant defendant.

The above authorities are directly in point and regardless of what the court does with the minor defendant, would require that the judgment against the father stand.

POINT III

THE COURT'S INSTRUCTION ON MORTALITY TABLES WAS PROPER.

Instruction No. 15 given by the Court was a standard JIFU instruction explaining that a person of the age of plaintiff had a life expectancy of 31.4 years. The instruction included a full and complete explanation of its restricted significance. Plaintiff contends that the giving of such instruction was perfectly proper. Plaintiff further claims that should the giving of this instruction be in error, that the error was harmless and not prejudicial.

Plaintiff acknowledges that the four Utah cases cited by appellants all state that mortality tables are admissible in evidence where there is evidence of permanent injury and where said injury results in an impairment of future earning capacity. None of the cases give any reason as to why a showing of lost earning capacity is

required, and one would wonder why such a showing is necessary. The mortality tables simply establish evidence as to the length of human life, and it would seem that said fact ought to be relevant in any case involving serious, permanent personal injury. In any event, we are not faced with that problem as the instant case easily comes within the framework of the decided cases.

Appellants in their brief have cited and relied primarily upon the case of *Schlatter vs. McCarthy,* 113 Utah 543, 196 P.2d 968. That case involved a leg injury to a railroad engineer which the doctor rated as a ten percent (10%) disability to the right leg. There was no medical testimony whatsoever as to the impairment of earning capacity. The Court held that even without any medical evidence of impairment of earning capacity the evidence, although admittedly not very satisfactory, would support such a finding. In straining to reach this decision, the Court held that it could be inferred that with a weakened leg, the plaintiff could not work as many hours as before or that he may not be able to continue his employment for as many years as if he had not been injured.

In comparing Schlatter to the instant case, we find here a much stronger case. Plaintiff here is employed as a real estate salesman. His income depends entirely upon what he sells. In the selling field, there can be no question but what a man's mental attitude and his confidence in himself has a direct relationship to his earning capacity. A person would have to close his eyes to reality to believe that where a man has suffered permanent damage to his reproductive organs to the extent that

he feels he has lost his manhood, where he feels inadequate as a man, and where he has the emotional problems of Mr. Whitney, that such would have no effect whatsoever upon his selling ability. Such a conclusion is totally unreasonable. Certainly, there is a far greater connection here between the injury and future earning capacity than the mere ten percent (10%) disability to one leg as in the Schlatter case.

Even if it were established that Instruction No. 15 were erroneous, said instruction was harmless. The instruction merely states the average length of human life. If this fact is irrelevant, it could not be prejudicial. The life expectancy factor was never emphasized in the evidence and was given in the instruction as a fact upon which the Court took judicial notice. Certainly any reasonably intelligent juror would be aware of the approximate length of human life even without the use of a mortality table.

This Court has stated on many occasions that instructions must be considered as a whole. One instruction should not be considered in isolation in order to predicate a claim of error upon it. So long as the instructions present the issues in a fair and understandable manner, no verdict will be nullified for minor errors or inconsistencies. *Heywood vs. D. & R. G. Railroad Company,* 6 Utah 2d 155, 307 P.2d 1045; *Taylor vs. Johnson,* 18 Utah 2d 16, 414 P.2d 575; *Hales vs. Peterson,* 11 Utah 2d 411, 360 P.2d 882. A careful examination of all of the damage instructions in this case will clearly show that the above requisites are met. Respondent has been unable to find

any Utah case, nor has any been cited by the appellant wherein prejudicial error has been found to result from the giving of an instruction on mortality tables.

Respondent further points out that the record on appeal does not show whether defendants made specific objection to Instruction No. 15. The objections to instructions were made after the arguments of counsel and after the jury retired to deliberate. At that time, counsel for the plaintiff paid no particular attention to defendant's objections and, therefore, is unaware whether specific objections were stated as required by Rule 51, Utah Rules of Civil Procedure. In any event, it is the responsibility of the appellant to provide the Court with a proper record on appeal. Matters not supported by the record are not reviewable on appeal. *Bullen vs. Anderson,* 81 Utah 151, 27 P.2d 213.

POINT IV

THERE WAS NO ERROR IN THE INTRODUCTION OF MEDICAL EVIDENCE.

Appellants under Point IV of their brief claim that the Court committed error in permitting a medical witness to refer to a condition known as prostatitis. Prostatitis is merely an inflammation or an infection of the prostrate gland (T-45). In examining Dr. Oniki, reference was made to a medical report of Dr. Dahl (who incidentally examined the plaintiff at the request of Mr. Midgley and is not plaintiff's doctor) (T-56). The trial court properly refused to permit counsel to refer to the report (T-43). Dr. Oniki was then asked if the tenderness

and pain at the base of the penis was consistent with prostatitis (T-45), and the witness answered that it was not (T-45). Dr. Oniki was then asked a few questions regarding his own medical findings and was asked whether he had a medical opinion as to whether or not Mr. Whitney had prostatitis (T-47). The answer was "only to the extent that Dr. Dahl has reported it, and since he is the urologist, it is not out of line that he does report this." While this answer may have been somewhat unresponsive and based upon heresay, it should be pointed out that neither the question nor the answer was objected to by the defendants. The matter was then dropped, and the witness was examined as to other matters.

In addition to the fact that no objection was made to the above answer, the whole episode over which appellants now claim error is rather insignificant when read in light of the entire record and the entire testimony of Dr. Oniki. The casual reference to prostatitis is somewhat trivial in comparison to the grievous permanent injuries that were conclusively established.

Appellants have cited no authority whatsoever to show where any ruling of the Court was either improper or prejudicial.

POINT V

THERE IS NO SHOWING IN THIS CASE THAT EXCESSIVE DAMAGES WERE GIVEN UNDER THE INFLUENCE OF PASSION OR PREJUDICE.

It would appear to respondent that the facts of this case speak for themselves with respect to the matter of damages. Certainly an award of Thirty Eight Thousand Eight Hundred Fifty One Dollars And 40/100 ($38,851.40), which includes One Thousand Three Hundred Fifty One Dollars And 40/100 ($1,351.40) special damages and Seven Thousand Nine Hundred Seventy Two Dollars And 42/100 ($7,972.42) loss of income is modest when considered in light of the serious nature of plaintiff's injuries. It is difficult to conceive of an injury more serious to a man than the type of injury that this plaintiff has sustained.

The one case cited by appellants, *Paul vs. Kirkendall*, 1 Utah 2d 1, 261 P.2d 670 does not support their position, but on the contrary would require an affirmation of the jury verdict. That case holds that the Supreme Court should be very reluctant to interfere with the decision of the jury and the trial court's ruling refusing a new trial, and further holds that the jury has a wide range of discretion in awarding damages. The Court, in that case, refused to grant the appellant a new trial and held that an award of Eleven Thousand Eight Hundred Dollars ($11,800.00) for back injuries was not excessive. The Court further held in the same case that an award of Five Thousand Dollars ($5,000.00) to the husband of the

injured party for partial loss of her services was not excessive.

The more recent case of *Schneider vs. Suhrmann,* 8 Utah 2d 35, 327 P.2d 822, further elaborates upon the reluctance of the appellate court to interfere with jury verdicts:

> "Cases dealing with the review of damages found by a jury, with invariable consistency, recite the reluctance of courts to interfere with such verdicts if there is any reasonable basis in the evidence upon which they can be sustained. This is based partly upon the often referred to advantages the fact trier has in being in immediate contact with the trial, the parties and the witnesses. In addition thereto, the question of damages for personal injuries involving the intangibles of pain and suffering, with respect to which reasonable minds are apt to differ greatly, are matters which a jury is peculiarly adapted to determine. One of the principal merits of the jury system is that it brings together people from different walks of life, with distinctive points of view arising out of their varied experiences. Bringing these different points of view to bear upon the appraisal of such values is a method to which the parties have a right. It is in order to preserve this right of trial by jury, and to afford litigants the advantages referred to above, that it has been the policy of courts to exercise forbearance in disturbing jury verdicts and to allow their deliberations to swing like a pendulum through a wide arc without interference so long as they remain within the bounds of reason. The refusal of the trial court to modify the verdict endows it with some further degree of sanctity which increases our hesitancy in disturbing it upon review."

It is to be noted that in the case now before the Court, the trial judge likewise considered defendants' Motion for a New Trial and was of the opinion that defendants had been given a fair trial and that the damages were not excessive.

12 A.L.R. 3d, 475 contains an exhaustive annotation of cases dealing with excessiveness of damages in personal injury cases involving the organic systems of the body. At Section 49 of this annotation, many cases are cited dealing with impairment of the male sexual power and function. It is to be noted from the annotation that judgments in the One Hundred Thousand Dollar ($100,000.00) category have been upheld as not being excessive.

Appellants have shown nothing whatsoever in their brief which would indicate passion or prejudice on the part of the jury.

CONCLUSION

Based upon all of the arguments and authorities as cited herein, plaintiff respectfully requests the Court to affirm the judgment of the trial court.

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