

1972

Lettie Dell Brock v. Dean O. Ward And State Farm Mutual Automobile Insurance Company : Petition For Rehearing

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In The Supreme Court of the State of Utah

LETTIE DELL BROCK,
Plaintiff-Respondent,

vs.

DEAN O. WARD and STATE
FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,
Defendants-Appellants.

Case No.
12737

PETITION FOR REHEARING

Comes now respondent in the above-entitled matter, and with all due respect to this Honorable Court and the individual Justices thereof, respectfully petitions this Court for a rehearing in this cause for the following reasons and upon the following grounds:

POINT I

THIS COURT ERRED IN RENDERING ITS MAJORITY OPINION IN THIS CAUSE BY FUNCTIONING AS

AN APPELLATE JURY AND AS A
 RESULT THEREOF EFFECTIVELY
 D E N I E D RESPONDENT HER
 RIGHT TO TRIAL BY JURY BY
 HER PEERS.

WHEREFORE, petitioner prays for a rehearing in this cause, that the matter be set for further argument and that upon such rehearing this Court vacate its decision on file herein and affirm the jury verdict in the lower court and the judgment entered thereon.

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**BRIEF IN SUPPORT OF PETITION
 FOR REHEARING**

ARGUMENT

POINT I

THIS COURT ERRED IN RENDER-

ING ITS MAJORITY OPINION IN THIS CAUSE BY FUNCTIONING AS AN APPELLATE JURY AND AS A RESULT THEREOF EFFECTIVELY DENIED RESPONDENT HER RIGHT TO TRIAL BY JURY BY HER PEERS.

This case does not involve the usual questions on appeal of inadmissible evidence being admitted at the trial or improper instructions to the jury. Neither is claimed by appellants. Appellants ask that this Court review the facts contained in the record on appeal and find respondent guilty of contributory negligence as a matter of law.

This Court has held in numerous cases that the factual question of contributory negligence becomes one of law only where the evidence is such that reasonable minds could not differ upon it.

It is difficult to believe that the foregoing rule of law was followed in the majority opinion in view of the numerous "reasonable minds" who not only could differ but *have* differed in this cause. The eight jurors in rendering their unanimous verdict are assumed to be average citizens of the community with reasonable minds. The two experienced trial judges are presumed to be reasonable by virtue of their positions on the bench. We then have the opinions of the two distinguished and able Supreme Court Justices who have indicated that reason-

able minds could differ on the evidence and that the verdict and judgment in the lower court should be affirmed.

It would seem that since twelve persons closely connected with the case have differed as to the evidence, that this Court in rendering its majority opinion assumed another role than prescribed in the rule of law previously discussed. In reviewing the majority opinion and the concurring opinion in connection therewith, it seems apparent that this Court sat as an appellate jury in determining the factual issues of this case.

The majority opinion discusses the facts of the case and then determines that respondent was negligent without ever treating the condition precedent to this, i.e., could reasonable minds differ upon the evidence. Also, the sudden glare aspect of the case is ignored, which negates the testimony regarding such sudden glare by the State Trooper, an independent witness who arrived at the scene shortly after the accident and the testimony of respondent herself. The majority opinion then makes a somewhat conjectural conclusion that the jury must have been swayed by empathy toward respondent as against the insurance company. This in view of the fact that many insurance companies desire to be named defendants in cases, as was the case in this matter.

In the concurring opinion to the majority opinion, this Court assumes the role of a juror in stating, "Her

self-serving testimony is unworthy of belief". This position overrides the prerogative of the trial jurors to determine which testimony is worthy of belief and also overrides the jurors' action in believing such testimony as well as the testimony of the independent witness and the State Trooper regarding the sun conditions in that particular area, at that particular time of the year, and under those particular conditions.

The testimony of these three witnesses and the record are disregarded when this Court in effect takes judicial knowledge of the fact that a motorist could not be momentarily blinded by the sun under the circumstances of this case. This is in direct contradiction to the testimony of the three witnesses and the record of the case, and it would seem that the use of judicial notice was carried to the extreme.

If this verdict and judgment can be overturned in the appellate court with a unanimous verdict and four judges disagreeing, it would seem that no jury verdict is safe or secure from reversal if a majority of three judges in the appellate court view the facts differently. It can be argued with some merit that such action is ultra vires.

It is respectfully submitted that if the majority decision of this Court is allowed to stand, respondent's right to a jury trial by her peers has been negated as will future litigants since said decision encourages trial judges to take cases from juries when they feel a

strong personal compulsion as to what the decision should be in the case. It is further submitted that the constitutional right of jury trial, as provided in the Constitution of Utah, Article I, § 10, 78-21-1 and 78-21-2, UCA 1953, and Rules 38 and 39 of the Utah Rules of Civil Procedure, should be enhanced rather than restricted.

CONCLUSION

Twelve reasonable minds *have* differed on the evidence in this cause and there is no basis for conjecture as to whether or not reasonable minds could differ. Therefore, petitioner respectfully urges this Honorable Court to protect her right to a jury trial and the fruits thereof. Petitioner respectfully urges a rehearing in this cause for the purpose of further consideration of vacating the majority decision and the affirmation of the jury verdict and the judgment rendered thereon in the trial court.

Respectfully submitted,

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