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Colleen Stock Rasmussen v. John Alan Sharapata : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS

OF THE STATE OF UTAH

COLLEEN STOCK RASMUSSEN,	:	
Plaintiff-Appellee,	:	Case No. 930642-CA
	:	
vs.	:	
JOHN ALAN SHARAPATA,	:	Priority No. 15
Defendant-Appellee.	:	

PLAINTIFF-APPELLANT'S REPLY BRIEF

Appeal from a Judgment of the Fourth Judicial District Court,
The Honorable Ray M. Harding, District Judge, Presiding

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ARGUMENT

Plaintiff-Appellant Colleen Stock Rasmussen ("Stock Rasmussen") here replies to the response brief of Defendant-Appellee John Alan Sharapata ("Sharapata"). Stock Rasmussen contends that the delineation of issues and authority supporting those issues is sufficiently stated in her initial brief. The purpose of this reply brief is to clarify points raised in Sharapata's response that are misleading or unfounded.

I. VOIR DIRE AND CHALLENGE OF JUROR BRANSCOMB

In his discussion of the standard of review governing the questioning and retention of juror Brent Branscomb, Sharapata has summarily dismissed the relevancy of the abuse of discretion standard of review governing a party's submission of voir dire questions. Brief of Defendant-Appellee at 1 n.1. The same argument resurfaces later in the brief, where Sharapata contends that Stock Rasmussen "admitted" that the trial court acted properly with respect to the voir dire of juror Branscomb, and thus the propriety of the trial court's subsequent questioning of Branscomb is undisputed. Id. at 9.

In making such a contention, Sharapata fundamentally misunderstands Stock Rasmussen's argument. That argument is divided into two prongs:

(1) The trial court should have permitted more liberal questioning of Mr. Branscomb, in harmony with the principles of Evans v. Doty, 824 P.2d 460 (Utah Ct. App.), cert. denied, 836 P.2d 1383 (Utah 1992), and Barrett v.

Peterson, 868 P.2d 96 (Utah Ct. App. 1993).

(2) Should issue (1) be resolved in Sharapata's favor, the trial court still should have granted Stock Rasmussen's motion for a new trial based on the information Stock Rasmussen gleaned in the limited voir dire.

Sharapata has deemed "irrelevant" and undisputed issue (1), an issue consuming five pages of Stock Rasmussen's brief. It is not irrelevant. Sharapata may have concluded that it was irrelevant because his understanding of "voir dire" encompasses only those questions asked *before* impanelling, not after. Stock Rasmussen has contended that while Evans and Barrett deal with such a traditional view of voir dire questioning, the policy behind allowing liberal voir dire extends to questions asked after impanelling when new information requires that those questions be asked (as here). In the pre-impanelling voir dire the trial court *did* appreciate the policies behind Evans and Barrett. That understanding, however, did not carry over into its questioning of juror Branscomb. Stock Rasmussen was hobbled by the trial court in that questioning, and this was an abuse of discretion.

With respect to Sharapata's lengthy treatment of whether Stock Rasmussen could have struck juror Branscomb for cause, Sharapata has failed to point out that the trial court's failure to allow the voir dire requested would have revealed the information needed to determine whether Branscomb could be challenged for cause or merely challenged peremptorily. The jury selection process is divided into two phases: (1) information is gathered; (2) counsel may use such information to demonstrate a proper challenge for cause, or use it to peremptorily challenge the juror.

Interference with the first phase--gathering information--constitutes reversible error, as

Evans and Barrett have demonstrated. If the initial information-gathering is interfered with, how may a record for appeal be prepared to demonstrate that the juror should have been removed for cause? An unsatisfying response to such a query produced the results in Evans and Barrett, and that is why those cases do not concern themselves with whether the contemplated challenges in those cases would have been for cause or not. Interference with the initial gathering itself is sufficient to warrant reversal,[1] a point underscored by Barrett in its statement that voir dire illuminates information crucial to *both* for-cause and peremptory challenges. Barrett, 868 P.2d at 98. Indeed, the court stated "'the fairness of the trial may depend on the right of counsel to ask voir dire questions designed to discover attitudes and biases, *both conscious and subconscious, even though they "would not have supported a challenge for cause."*'" Id. (quoting State v. Worthen, 765 P.2d 839, 845 (Utah 1988)(quoting State v. Ball, 685 P.2d 1055, 1060 (Utah 1984)))(emphasis original). This point is lost on Sharapata, both in his understanding of applicable law and his characterization of Stock Rasmussen's "main contention" as being the propriety of challenge rather than the error of refusing liberal voir dire. He has attempted to mislead this court by emphasizing the issue of whether Stock Rasmussen's challenge would have been for cause (issue (2) above) while ignoring the threshold issue of whether

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[1] In this case, a mistrial should have been granted, but it was not. This illustrates a practical difference between voir dire errors committed before impanelling and those made after: before impanelling a party may complain that the trial court abused its discretion in refusing to allow certain questions, and this issue will be preserved for appeal. When a juror comes forward with previously undivulged information after impanelling, as here, it is appropriate for counsel to move for a mistrial based on the fact that a juror will be impanelled about which insufficient information has been obtained. An appeal may then be taken from the denial of the motion for a mistrial. A practical and effective way to avoid mistrials in such instances would be to require that an alternate juror always be available.

enough information was ever gathered to exercise *any* kind of challenge (issue (1) above). The questions are different, and Sharapata's attempt to mix them is simply wrong.

II. INCONSISTENT JURY VERDICT

Sharapata claims that there is "abundant evidence which shows that the Plaintiff herself was negligent and that this negligence was the proximate cause of her injuries." Brief of Defendant-Appellee at 20. Had the jury indicated that Stock Rasmussen was the proximate cause of the accident, this might have been true. But the jury did not so find. Sharapata now asks this Court to speculate that the jury *may* have had grounds to find that Stock Rasmussen was the proximate cause of the accident, notwithstanding a blank space in the special verdict form where the jury could (and should) have made its analysis of the accident crystal clear. Sharapata muddles the issue with discussion of "last clear chance", a doctrine he recognizes is no longer viable in Utah with the advent of comparative negligence analysis. Emphasizing, as one should, the meat of such analysis, one is compelled to follow this line of reasoning:

(1) Sharapata was found negligent by the jury.

(2) That negligence took the form of either a failure to keep a proper lookout, or a failure to yield.

(3) Stock Rasmussen was found negligent by the jury.

(4) Evidence adduced at trial demonstrates that comparative negligence could *not* have taken the form of anything but failure to use a headlamp.

(5) Negligence predicated on a failure to keep a lookout or failure to yield presupposes the victim's visibility.

(6) Thus, Stock Rasmussen must have been visible despite her failure to use a headlamp.

(7) Thus, Stock Rasmussen's negligence could *not* have been a proximate cause of the accident.

Sharapata has introduced contentions that are simply inapposite: no evidence as to any other type of comparative negligence was presented to the jury. Sharapata may argue to this Court any variety of theory on which to base Stock Rasmussen's liability, but such arguments must fall on deaf ears given the record below.

Sharapata cites the general (and accurate) proposition enunciated in Bennion v. LeGrand Johnson Construction Co., 701 P.2d 1078 (Utah 1985), that there is nothing incongruous with a jury finding a party negligent but not the proximate cause of injury. Sharapata's blanket citation of this rule betrays his failure to appreciate that *in this case*, as noted above, there is a glaring incongruity with a failure to find proximate cause. Bennion is thus distinguishable on its facts.

A final note as to the marshalling requirement. Stock Rasmussen has clearly stated her position as to this requirement in her brief. Based on that statement, it is clear that she is not only well attuned to those requirements, but has even attached, for the Court's convenience, all relevant portions of the transcript below where *any* testimony touching on the conduct of either her or Sharapata was adduced. Even a cursory examination of the reproduced portions of the

transcript would illustrate that they favor *both* sides of this dispute. This is what the marshalling rule requires. Sharapata has failed to allege with any particularity what portions of the record are missing. Indeed, every citation to the transcript in Sharapata's brief has been attached to Stock Rasmussen's brief. Sharapata's argument lacks candor. The marshalling requirement has been satisfied.

III. PROPRIETY OF CLOSING ARGUMENT

Sharapata contends that the standard of review cited by Stock Rasmussen with respect to this issue is once again "irrelevant," admissibility not being at issue. Defendant-Appellee's Brief at 3 n.2. To the contrary, admissibility is a key issue, for in passing on the propriety of Sharapata's closing argument, this Court must consider the inadmissibility of the evidence referred to. Sharapata's further contentions are addressed by the authority cited by Stock Rasmussen in her initial brief.

IV. ERROR IN FOUNDATIONAL OBJECTIONS

Sharapata contends that Stock Rasmussen has misstated the standard of review concerning foundational objections. This is not true. The footnote cited in State v. Ramirez, 817 P.2d 774 (Utah 1991), clearly stated that questions of admissibility are ultimately reviewed for correctness. Stock Rasmussen submits that questions of foundation are questions of admissibility for purposes of determining the proper standard of review: a court is ultimately required to

review the proper application of legal principles underlying a foundational ruling in the same manner it reviews the legal principles underlying a ruling on admissibility.

The contention that Stock Rasmussen has not sufficiently identified which evidentiary rulings she has objected to is unfounded. In her brief Stock Rasmussen specifically contends that she is appealing from foundational objections overruled at trial, and then cites the pages on which those objections occurred. No ambiguity or lack of specificity has resulted from this approach.

DATED this 1st day of August, 1994.

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MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing were mailed to the following, postage prepaid, this 1st day of August, 1994.

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