1972

Pearl Ann Holdaway v. Roger Vernon Hall : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

PEARL ANN HOLDAWAY,
Plaintiff-Respondent,

vs.

ROGER VERNON HALL,
Defendant-Appellant.

Case No. 12836

BRIEF OF APPELLANT

Appeal from a Verdict of the Third Judicial District Court in and for Salt Lake County, Honorable Merrill C. Faux, Judge

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NATURE OF THE CASE

This is an appeal from a jury verdict on a personal injury case for the plaintiff, plaintiff claiming special damages in the sum of $3,683.50 for an injured finger alleged to have been caused by willful battery. Defendant claimed that any injury was accidental or negligent. The jury returned a verdict of $3,683.50 special damages, $7,000 general damages, and $10,000 punitive damages. The defendant moved for a new trial on the

basis of error and excessive damages. The trial judge ordered a remittitur of $5,000 of the punitive damages and denied a new trial.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal and new trial.

STATEMENT OF FACTS

Plaintiff and defendant had been going together frequently from July of 1968 until January of 1969, including bowling as partners in a league once a week (R-77). On the 31st day of January (later changed to the 25th of January on amendment allowed by the Court to conform to the doctors' records, R-16) they went to the bowling alley together, had a falling out, she left the bowling alley, and went home with her sister and brother-in-law (R-81). She locked and barricaded the door. She testified she saw the defendant come across the street, try the back door, and then come to the front door and broke in, grabbed her hand and "threw me back" (R-85). The police arrived almost immediately (R-89).

She claimed to have been working at Albertson's for $120.00 per week take home pay (R-89), but admitted on cross-examination that her gross pay was $2.47 per hour on a 40 hour week (R-122). She claimed to have worked as a grocery checker at Albertson's

or Warshaw's until the time of her injury, but could produce no W-2 forms on demand from either store for the year 1969 (R-120 and 122).

She denied bowling or going out with the defendant after the injury. She went to Dr. Cutler on what she testified to be January 25, which was later amended to be January 31. He charged her $20.00 (R-18). Dr. Cutler referred her to Dr. Clayton in April, some two months after the injury. Dr. Cutler x-rayed but found no fracture (R-117). She testified she told Dr. Clayton the defendant had bent her hand back and injured her finger (R-124). Dr. Clayton's testimony and his records show she told him it was "injured in an accident about three months ago." He further testified that on examination the flexion and extensor tendons were within normal limits and the fingers extended to the normal limits and moved to full extension (R-96). Plaintiff testified she was hospitalized for a week. The hospital records (Exhibit 14-P) show she was hospitalized for thirty-six hours (R-168).

The defendant testified as to the relationship between he and the plaintiff, as to an argument on the date of the injury (R-179), that they had discussed matrimony (R-180), they argued through bowling; she went home alone. He followed, broke in and was talking to her. She reached for the wall telephone to call the police and he tried to take it away, and her finger was injured (R-181). They went out together several times after the injury, including bowling and dates and for coffee (R-181).

He received a summons in May of 1970, one and a half years later (R-182).

DAMAGES

With regard to special damages, the only evidence in the record is:

a) The following exhibits to which reasonableness of the charges was stipulated without admission of liability: Exhibit 9-P, anehthesiologist, $45.00; Exhibit 10-P, Dr. Clayton, $160.00; Exhibit 13-P, medicine and splint, $11.00; Exhibit 15-P, hospital bill, $303.95, for a total of $519.95.

b) In addition thereto, there was testimony of Dr. Cutler (R-118) of a bill of $20.00. Testimony regarding a bill of a Dr. Bateman for psychiatric visits prior to the injury (Exhibit 8-P), was not offered.

c) Plantiiff testified as to the value of a screen door, $10.00, a door, $75.00, and a sweater, $30.00, for a total of $115.

The grand total is $654.95.

With regard to the items under "c", there was no foundation as to value and no claim for property damage in the pleadings (Complaint, R-1). The Court instructed at Instruction 13, last paragraph (R-50), that special damages could not exceed $3,683.50, to which the defendant took exception (R-204). At R-138, after verdict, defense counsel notified the Court of his

intent to move the Court to set the verdict aside on the basis of the finding on special damages, but deferred his motion due to the absence of plaintiff's counsel. The Court replied:

> "The Court will take the view that they cannot recover more special damages than they prove." (R-209).

INSTRUCTIONS

Although the defendant's defense was accident and negligence, together with contributory negligence, the Court refused to submit the defendant's theory to the jury by refusing to give instructions on accident, negligence or contributory negligence (R-200), and further refused to give an instruction on intent (R-201), to which the defendant duly excepted. The Court also gave an instruction on trespass, although no trespass was pleaded.

CONDUCT OF THE JURY

The jury, after retiring, came back with a query:

> "We have namely a question as to the amount of damages that may be awarded in this case." (R-204-206).

The Court gave a partial reinstruction on damage instructions. Twenty minutes later the jury came in announcing they had reached a verdict (R-136). The Court asked for the verdict, but the jury was not aware

they had jury forms and filled them in in the box (R-207). Counsel notified the Court of his intention to make a motion.

MOTION FOR NEW TRIAL

Defense counsel filed a motion for new trial (R-58), based on Rule 59(a) (1) and 59(a) (6), Utah Rules of Civil Procedure. After hearing on the motion (unreported), during which counsel agreed that there was not over $800 in special damages at a maximum, the Court urged counsel to try and settle the case, and on February 10, 1972, entered a judgment leaving the special and general damages as in the verdict and reducing punitive damages by $5,000 (R-65). Defendant made timely appeal.

POINTS ON APPEAL

POINT I

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE DEFENDANT'S THEORY OF THE CASE.

POINT II

THE JURY FAILED TO FOLLOW THE INSTRUCTIONS OF THE COURT AND IGNORED THE INSTRUCTIONS AND PLEADINGS SENT TO THE JURY ROOM, INCLUDING THE VERDICT FORMS.

POINT III

THE DAMAGES WERE EXCESSIVE IN ALL THREE CATEGORIES AND MORE PARTICULARLY IN THE AREA OF SPECIAL DAMAGES.

POINT IV

INSUFFICIENCY OF THE EVIDENCE TO JUSTIFY THE VERDICT.

POINT V

THE COURT ERRED IN FAILING TO GRANT A NEW TRIAL.

ARGUMENT

POINT I

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE DEFENDANT'S THEORY OF THE CASE.

The defendant contended that the injury to the plaintiff was occasioned by accident or negligence in his attempt to take the phone away from her. There was evidence to support his theory in addition to his own testimony (Plaintiff's Exhibit 14-P). The hospital admitting diagnosis of Dr. Clayton states:

> "This patient had the ring finger accidentally injured about three months ago."

Defendant requested his theory of the case in his answer and in his requested instructions 3, 4, 5 and 7, all of which were refused by the Court, the Court using the following language at R-200-201:

> "THE COURT: After listening to this evidence, I am not going to give any instruction on accident, negligence or contributory negligence. The evidence is clear that this was a forced entrance into the home, that any thought of friendly or affectionate relationship between these parties had been terminated at the time Mr. Hall broke into the residence. The matter is going to be submitted wholly on the question of whether or not there was assault and battery, whether there was any injury as a result of the battery; if so, the extent of the injuries and the amount of damages that plaintiff would be entitled to.
>
> MR. HATCH: May I assume under that theory that the Court would give an instruction on the question of the necessity of intent in assault and battery?
>
> THE COURT: With respect to intent, the Court will only give a definition of assault, a definition of battery, and an instruction if the jury finds there was a battery that the plaintiff will be entitled to such damages as proximately resulted from such battery.
>
> Intent in an assault and battery as a criminal matter is of great importance. In a civil action for assault and battery, the jury will determine whether there was intent to do what plaintiff claimed was done from the facts and circumstances of the occurrence."

The cases are almost without exception that both sides are entitled to have their theory of the case presented to the jury for a determination of fact if there is any evidence to support that theory. (See 53 Am. Jur. 2d, Trial, Sec. 649 at page 500, citing cases.) The Court entirely deprived the defendant of the defenses pleaded and let the case go to the jury on plaintiff's theory alone.

POINT II

THE JURY FAILED TO FOLLOW THE INSTRUCTIONS OF THE COURT AND IGNORED THE INSTRUCTIONS AND PLEADINGS SENT TO THE JURY ROOM, INCLUDING THE VERDICT FORMS.

The jury apparently entirely ignored the Court's instructions as to special damages, finding special damages as requested in the complaint in the sum of $3,683.53, when a thorough canvass of the entire record shows evidence of only $654.95 (see Statement of Facts where the damages are detailed with record or exhibit citation thereto). Even the $654.95 on which there was some proof includes $115.00 for a door, a screen door and a sweater though there was no property damage claimed in the pleadings nor any amendment for such property damage. This amounts to an approximate one sixth of the special damages in the jury's verdict.

The defendant took due exception to the court's instructions on damages, specifically excepted to the special damge figures in Instruction 13 (R-204). The defendant also indicated a motion for new trial on special damages (R-209), with the Court stating:

> "The Court will take the view that they cannot recover more specials than they prove."

On motion for new trial, the Court ignored the proof of special damages and entered a verdict for special damages some six times the amount proved.

POINT III

THE DAMAGES WERE EXCESSIVE IN ALL THREE CATEGORIES AND MORE PARTICULARLY IN THE AREA OF SPECIAL DAMAGES.

There can be no argument that the jury returned a verdict for special damages in the full amount alleged in the complaint which is almost six times the maximum amount of damages on which any proof shows in the record. The judgment for special damages was in the sum of $3,683.50 and the maximum amount proved was $654.95. (See Statement of Facts wherein all damages testified to are itemized and page number given.) (See JIFU, page 166, Section 90.6, and *Berry v. St. Louis-San Francisco Ry. Company,* 324 Mo. 775, 26 S.W. 2d 988).

It is apparent that the jury gave the maximum damages alleged in the complaint with no consideration of those proved or even attempted to be proved in the plaintiff's case. It is also apparent from the minor nature of the injury that the verdicts for general punitive damages are excessive to the extent that they should "shock the conscience of the Court." Also the award, when compared with awards for other similar injuries, is clearly excessive. (See 22 Am. Jur. 2d, Damages, Sec. 380, et seq., and 16 A.L.R. 2d 173, et seq.)

POINT IV

INSUFFICIENCY OF THE EVIDENCE TO JUSTIFY THE VERDICT.

It is heretofore pointed out in Point III, *supra,* that there was no evidence whatsoever of special damages in excess of $654.95, yet the jury awarded $3,683.50 special damages. There is no competent evidence of loss of earnings in the record and little as to permanent nature of the injury to the damaged fourth finger. Yet the jury awarded $7,000 general damages and $10,000 punitive damages (later reduced by the trial court on motion for new trial to $5,000 punitive). All of this for a partial loss of extension in one knuckle of one finger.

The jury's attitude becomes clear when they queried the Court as to the amount of damages that may be awarded in the case (R-204) and then came

back almost immediately with the excessive amounts of damages now contained in the verdict though they hadn't been over the papers sent with them to the jury room to find that they had verdict forms with them (R-207). The verdict was filled in in the jury box (R-207).

POINT V

THE COURT ERRED IN FAILING TO GRANT A NEW TRIAL.

Defendant made proper and timely motion for new trial (R-58 and 59), and after hearing arguments reduced the punitive damages by $5,000 and otherwise entered judgment on the verdict (R-65).

The Court at that time was fully aware that nothing in excess of $650 special damages had been proved or had proof been offered as to any greater amount. The Court was also aware that the defendant excepted to the amount in the special damages instruction (R-204), and had indicated to counsel that "the Court will take the view that they cannot recover more specials than they can prove" (R-209). Still the Court, on motion for new trial, left the special damages as returned in the verdict even though the plaintiff's counsel made no contention that a greater amount had been proved than the $654.95 claimed by defense counsel. The Court should have granted a new trial.

SUMMARY

It is clear that the damages are excessive and could only have been arrived at under a basis of passion and prejudice. The instructions as to damages were in error. The Court wholly and willfully refused to instruct as to defendant's theory of the case.

It is respectfully requested that the Court reverse the verdict and remand to the lower court for a new trial.

Respectfully submitted,

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