

1994

Jerry Stevenson v. Karen Stevenson, State Farm Insurance Company : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Jerry Stevenson v. Karen Stevenson, State Farm Insurance Company*, No. 940037 (Utah Court of Appeals, 1994).
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IN THE UTAH COURT OF APPEALS

JERRY STEVENSON,	:	
Appellant,	:	
v.	:	
KAREN STEVENSON and STATE FARM	:	No. 940037-CA
INSURANCE COMPANY,	:	
Appellees.	:	Priority No. 15

REPLY BRIEF OF APPELLANT,
JERRY STEVENSON

Appeal from the Second Judicial District Court
of Weber County, State of Utah, the Honorable
Michael J. Glasmann, District Judge

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Utah Court of Appeals

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DETERMINATIVE STATUTES, RULES AND REGULATIONS

Utah Code Annotated Section 78-27-40 (1986)

Subject to Section 78-27-38, the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant. No defendant is entitled to contribution from any other person.

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REPLY BRIEF OF APPELLANT,
JERRY STEVENSON

Appellant, Jerry Stevenson, respectfully submits his Reply Brief in these appeal proceedings.

ARGUMENT

I. APPELLANT JERRY STEVENSON HAS PRODUCED SUFFICIENT EVIDENCE UNDER THE INDIVISIBLE INJURY RULE TO SUBMIT HIS CASE TO A JURY.

In her Brief, appellee Karen Stevenson, contends that Jerry Stevenson has not met his burden of proof under the indivisible injury rule. In support of her contention, appellee cites Petersen v. Parry, 448 P.2d 653, 659 (Idaho 1968) which is said to stand for the following proposition:

Therefore, defendants are jointly and severally liable for a plaintiff's injuries under the Rule only when the plaintiff is able to prove that each defendant proximately caused some injury to Plaintiff. (Brief of Appellee, p. 8)(emphasis original).

This ignores a key element of the indivisible injury rule. Not only does the rule serve to hold tortfeasors jointly and severally liable for indivisible harm, it also reduces or shifts the burden of proof the plaintiff must meet on the issue of proximate causation. This aspect of the rule is recognized in Washewich v. LeFave, 248 So.2d 670, 672 (Fla. Ct. App. 1971) (emphasis added) where the court stated "the burden is on the plaintiff to prove to the extent reasonably possible what injuries were proximately caused by each of the two accidents." See also Annot., Apportionment of Damages Involving Successive Impacts by Different Motor Vehicles, 100 A.L.R.2d 16, 59; Section 9 (specifically addressing case law "shifting or relaxing burden of proof as to causation") (1965).

Furthermore, Petersen v. Parry, 448 P.2d 653, 659 (Idaho 1968) does not support appellee's position. In Petersen, two vehicles collided head-on on a two lane highway in Idaho. The parents of a child killed in the collision brought a wrongful death suit against both deceased drivers. There were no survivors from the accident. Because there were no survivors, the facts were limited. The two vehicles were travelling 60 miles per hour when the second car (car #2) was substantially in the oncoming lane. The first car (car #1), presumably in an attempt to avoid the oncoming car, skidded and unfortunately also drifted slightly into the oncoming lane. The result was a head-on collision which killed all involved. There was no indication that car #2 took any evasive action. Suit was brought against both drivers.

Relevant to the instant case is the court's limited discussion of proximate cause in the context of the suit against car #1. Petersen, 448 P.2d at 659. The plaintiff sought to submit the case based on Summers v. Tice, 199 P.2d 1 (Cal. 1948). The court restated the single injury rule, but declined to apply it in the Petersen case because, "[a]s previously noted in this opinion, the evidence at hand is insufficient to support a finding of negligence on the part of R1 herein. Therefore, . . . Tice [is] inapplicable." Id. The court had noted previously that there was no indication that the driver of car #1 had in any way acted negligently. Id. at 657-58. In addition, plaintiff's expert could not testify as to what caused the accident, as opposed to the instant case, where there is no dispute about what caused the accident. Id. at 658. Here, the dispute is whether the accident caused plaintiff's injury. Appellee's reliance on Petersen reveals a misunderstanding of the indivisible injury rule. A central aspect of the rule is the reduction or shifting of burden of proof on the element of proximate cause. Another aspect of the rule is the imposition of joint and several liability. Appellee simply ignores that fundamental aspect of the indivisible injury rule which reduces or shifts the burden of proof on proximate cause. Instead she argues that before joint and several liability may be imposed a plaintiff must still prove that defendant's negligence was the proximate cause. This argument sidesteps the fact that the rule not only reduces or shifts the burden of proof on the element of proximate cause, but also may impose joint and

several liability.

Appellee misstates appellant's position on page 11, n.3 of her brief, where it is stated that "[p]laintiff states that other jurisdictions have allowed indivisible injury rule cases to go to a jury even though the element of proximate cause is missing." First, this is not an accurate reflection of the position taken by appellant. It is appellant's position that other jurisdictions, under the indivisible injury rule, have either shifted or relaxed the burden of proof on the element of proximate causation. A relaxed standard of proof on the issue of proximate causation does not constitute, as appellee's suggest, the complete absence of the element of proximate cause. See appellant's brief, p. 7 ("Further, while allowing the issue of proximate cause to go before a jury on a showing of possibility is a departure from traditional Utah law, other jurisdictions have allowed such cases to go before a jury under the single injury rule."). Cases cited in Section I.A. of appellant's brief support this position. Washewich v. LeFave, 248 So.2d 670, 672 (Fla. Ct. App. 1971)(element of proximate cause "somewhat relaxed . . . where the evidence indicates that the defendant's negligence has proximately resulted in an aggravation of a pre-existing injury . . .). Since these courts allow the submission of plaintiff's case under a relaxed standard of causation, the only other standards left is either a showing of possibility or entirely shifting the burden to disprove causation to the tortfeasors. This was the entire purpose for the creation of the indivisible injury rule, to allow plaintiffs to escape the

harsh results of traditional standards of causation where "the plaintiff cannot carry the impossible burden of proving the respective shares of causation." Holtz v. Holder, 418 P.2d 584, 588 (1966). Further, William L. Prosser, Law of Torts (Fourth Edition), states:

There is one special type of situation in which the usual rule that the burden of proof as to causation is on the plaintiff has been relaxed. It may be called that of clearly established double fault and alternative liability.

. . .

[T]he California supreme court has solved the problem by placing the burden of proof on the issue of causation upon the two defendants. There is support for this in . . . American automobile cases of "chain collisions," in which the plaintiff is injured by one or two more negligently driven cars, but cannot prove which. It seems a very desirable solution where negligence on the part of both defendants is clear, and it is only the issue of causation which is in doubt, so the choice must be made between letting the loss due to failure of proof fall upon the innocent plaintiff or the culpable defendants. (Prosser, p.243).

Appellant Jerry Stevenson cannot prove to a "reasonable degree of medical probability" what damage the second impact caused. This is because the accident occurred a few seconds of each other. It is simply impossible to apportion out which collision caused or aggravated Jerry Stevenson's injuries. This situation is entirely the result of defendants' tortious conduct. Therefore, equity is on the side of relaxing Jerry Stevenson's burden of proof on the issue of proximate causation in this narrow and limited context.

II. THE INDIVISIBLE INJURY RULE IS CONSISTENT WITH COMPARATIVE FAULT PRINCIPLES.

On page 12 of appellee's brief, it is suggested that "the Utah legislature has deliberated the issue and has clearly rejected the concept of joint and several liability." However, there is no evidence which suggests that the legislature considered a situation where multiple tortfeasors, either in concert or rapid succession, produce one single indivisible injury. The impossibility of apportionment of fault under appellee's analysis would result in a complete absence of liability for tortfeasors fortunate enough to have committed their torts simultaneously or nearly simultaneously with other tortfeasors. This is an unjust result and does not appear to have been intended by the legislature. Comparative fault principles solely apply where apportionment is possible. However, where proof of causation is impossible because of the conduct of the defendants, comparative fault principles ought not to apply.

In the alternative, Section 78-27-40, Utah Code Annotated states directly that a defendant is only liable for "that percentage or proportion of fault attributed to that defendant." The language of the statute directs comparison by way of fault, not causation. Therefore, the single indivisible injury rule can still be applied in the context of a comparative fault system. The appellee, Karen Stevenson, would be entitled to have the other tortfeasors on the jury verdict form and could argue that the other tortfeasors were also at fault. The indivisible injury rule has two separate and distinct aspects; first, it allows the imposition of joint and several liability, and second, it reduces or shifts

the burden of proof of the plaintiff on the element of proximate cause. This Court may fashion a rule which, in recognition of the equities involved in multiple collision cases, allows a reduction in a plaintiff's burden on the issue of proximate causation yet denies joint and several liability consistent with Utah's comparative fault system.

CONCLUSION

Appellant Jerry Stevenson asks this Court to reverse Judge Glasmann's ruling and remand this case thereby allowing Jerry Stevenson to present his case to a jury.

DATED this 12th day of May, 1994.

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CERTIFICATE OF MAILING

I hereby certify that on this 12th day of May, 1994, I mailed four true and correct copies of the above and foregoing Reply Brief of Appellant, postage prepaid, to the following:

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