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Utah Court of Appeals

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BRIEF
FILED
AUG 22 1995
COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

CONNIE MYERS,	:	
Plaintiff/Appellant,	:	
vs.	:	Case No. 950282-CA
ALBERTSONS, INC.	:	
Defendant/Appellee.	:	Priority No. 15

BRIEF OF APPELLANT

Appeal of the final decision of Michael Glasmann
Second Judicial District Court
Weber County, State of Utah

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER RULES AND STATUTES

IN THE UTAH COURT OF APPEALS

CONNIE MYERS,	:	
Plaintiff/Appellant,	:	
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BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction of this matter pursuant to Utah Code Annotated, Section 78-2-2(3)(j). The matter has been poured over to the Utah Court of Appeals pursuant to Rule 42, Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

There are two issues in this appeal:

1. Whether the trial judge conducted an adequate voir dire of jurors pursuant to Evans v. Doty, 824 P.2d 460 (Utah App. 1991) and Barrett v. Peterson, 868 P.2d 96 (Utah App. 1993); and,

2. Whether the trial court erred in failing to grant plaintiff's motion for a directed verdict on the issues of negligence and causation of injury at the close of defendant's case.

The standard of review is an abuse of discretion standard.

DETERMINATIVE STATUTES AND CONSTITUTIONAL PROVISIONS

There are none.

STATEMENT OF THE CASE

Nature of the Case

Plaintiff was injured on October 18, 1990 as she entered the South Ogden Albertsons store. A bag boy pushed a line of carts over her foot. Plaintiff alleged that she was negligently injured.

Course of the Proceedings

A jury trial was conducted and the jury returned a verdict of no cause of action.

STATEMENT OF THE FACTS

1. On October 18, 1990, Connie Myers arrived to grocery shop at the South Ogden Albertsons store. (Tr. 149; Record 287).

2. She saw bag boys in the outside lot gathering carts. (Tr. 149; Record 287).

3. Just as she arrived at the store's front door, Kim Jensen, a bag boy who was pushing a line of carts, struck Mrs. Myers' right foot and ankle. (Tr. 150; Record 288).

4. Mrs. Myers foot was caught under the carts and her knee twisted, both of which resulted in injury. (Tr. 150; Record 288).

5. Defendant's store manager, Craig Howard, acknowledged on cross-examination that bag boys, pushing a

line of carts are not supposed to hit customers.

> Q. Would you agree that's not now they are taught to perform their job?
>
> A. Yes sir.
>
> Q. And would you agree that they are taught not to run into customers?
>
> A. They are not taught to run into customers.
>
> Q. And they are supposed to avoid customers?
>
> A. With carts, yes. (Tr. 250; Record 388).

6. Mr. Howard also agreed he saw physical evidence of actual injury in that he observed a red mark on Mrs. Myers' heel where the line of carts had struck her.

> Q. Mr. Howard, you told us earlier that when you saw the back of her foot there was a red mark on the ankle area?
>
> A. Yes, ma'am - yes sir, excuse me.
>
> Q. That was clearly indicating an impact on the cart to Connie of sufficient strength that it was not a usual event?
>
> A. It is not a usual event, no, sir. . . (Tr. 249; Record 387).
>
> Q. So, you are telling us you saw some physical marks of injury on her ankle, but you are not saying that was the only place of physical injury?
>
> A. Yes, sir.

7. Mrs. Myers was wearing shoes with ankle socks. Mr. Howard did not see the injury to the top of Mrs. Myers foot because she didn't take her sock off. (Tr. 251; Record 389).

8. Kim Jensen, the Albertsons bag boy who had been pushing the line of carts that struck Mrs. Myers, agreed that he was not supposed to hit customers with carts. (Tr. 235; Record 373).

9. Mr. Jensen agreed that he misjudged Mrs. Myers passing in front of him and turned the carts into the door before she had passed.

> Q. Okay. And you would agree, or would you agree then, that you had simply misjudged her passing in front of you when you made your movement with the carts. And that's what hit her?
>
> A. That's correct. (Tr. 235-236; Record 373-374).

10. Mrs. Myers' co-worker at Hill Air Force Base, Leena Waring, who had, in October, 1990, only worked with and known Mrs. Myers for one week, saw her on the Monday or Tuesday following Mrs. Myers' injury. She saw Mrs. Myers limping, heard the story of how she was injured, and saw the black and blue bruising on the top of Mrs. Myers' foot. (Tr. 53; Record 100).

11. Dr. Norman Bos, Mrs. Myers' treating orthopedic surgeon, testified that Mrs. Myers' foot was actually injured in that she suffered nerve damage from the carts running

across the top of her foot (Tr. 80; Record 218) and the damage to the foot, in turn, caused injury to her right knee leading to surgery (Tr. 89; Record 227) and permanent damage to both areas of her body.

12. At the close of defendant's case, plaintiff's counsel made a motion for a directed verdict concerning negligence and causation on the basis that no reasonable person could conclude under the circumstances that the bag boy in pushing a line of grocery carts into a customer after misjudging whether it was clear to proceed was not negligent and because the clear, uncontroverted evidence established a physical injury. Therefore, the only issue was the degree of injury and hence the amount of damage sustained. (Tr. 260; Record 398) and (Tr. 264; Record 402). Plaintiff motion was denied.

13. At the start of the trial, there was a specific discussion with the judge asking that the type of questions deemed appropriate by Evans v. Doty and its progeny be asked of jurors. The trial court refused to ask those types of voir dire questions instead choosing to ask only general and non-specific questions about jurors' attitudes toward tort reform. The discussion with the court is contained in the record on pages 59-61 of the transcript; Record 107-109.

The only questions permitted in this regard were asked by the court itself.

"I would be interested in knowing and ask you to

raise your hand in response to this question, if any of you have any biases against individuals who would bring a lawsuit for damages related to a personal injury, do any of you have a feeling about that one way or the other? A feeling that people shouldn't bring that type of lawsuit? Any biases at all? Would you raise your hand if you have any thoughts in that area? (Tr. 21, Record 159). No juror responded positively to these questions.

SUMMARY OF THE ARGUMENT

The trial court refused to permit an adequate voir dire of prospective jurors under the cases of Evans v. Doty, 824 P.2d 460 (Utah App. 1991) and Barrett v. Peterson, 868 P.2d 96 (Utah App. 1993). A new trial must be ordered.

The trial judge failed to grant plaintiff's motion for a directed verdict on the issues of negligence and causation at the close of the defendant's evidence. The jury should only have been determining plaintiff's damages. The jury's verdict should be reversed and the case remanded for trial on the issue of plaintiff's damage only.

ARGUMENT

Point I

It is reversible error to prohibit questions of prospective jurors about attitudes and biases toward tort reform during voir dire. Plaintiff's counsel specifically asked the trial judge to explore himself, or permit plaintiff's counsel to explore with jurors their attitudes and

biases toward injury lawsuits and their exposure to tort reform propaganda. Plaintiff's request citing specifically Evans v. Doty, 824 P.2d 460 (Utah App. 1991) was rejected. Instead, the trial judge prohibited exploration of this subject matter. Only vague, general questions were asked which were clearly insufficient to properly elicit and explore attitudes held or information received by jurors in this area.

The standard of review is an abuse of discretion standard. Barrett v. Peterson, 868 P.2d 96 (Ut. App. 1993).

As occurred in Barrett, the trial court asked no questions itself, nor permitted questions by plaintiff's counsel about whether jurors had heard or read anything relating to tort reform issues. The several questions actually asked left plaintiff's counsel "wholly unable to determine which, if any, prospective jurors had been exposed to tort reform propaganda, much less whether that exposure produced hidden or subconscious biases affecting their ability to render a fair and impartial verdict."

The court's refusal to even ask threshold questions concerning exposure to tort reform information prevented plaintiff from intelligently exercising her peremptory challenges.

In the total absence of appropriate questions regarding these subjects, reversible error has occurred.

Point II

It was error for the trial court to fail to direct

a verdict in plaintiff's favor on the issues of negligence and causation under the facts of this case.

A motion for directed verdict, while rare, had been held appropriate where the court is able to conclude, as a matter of law, that reasonable minds would not differ on the facts to be determined from the evidence presented. Management Committee of Graystone Pine Homeowners Assn., ex rel, Owners of Condominiums v. Graystone Pines, Inc., 652 P.2d 896 (Utah 1982). However, all evidence on a motion for directed verdict should be viewed in the light most favoring the non-moving party. Mel Hardman Productions, Inc. v. Robinson, 604 P.2d 913 (Utah, 1979).

A directed verdict should be granted, however, when the party having the burden of proof "has established his case by evidence that the jury would not be at liberty to disbelieve." Hurd v. American Hoist and Derrick Co., (C.A. 10th 1984) 734 F.2d 495. And it is appropriate to grant a directed verdict on the issues of liability and causation if the evidence warrants it on those subjects. Kohutko v. Four Columns, 498 N.E.2d 522 (Ill. App. 1st Dist. 1986).

In this case, it was admitted by defendant's store manager that bag boys should not strike customers with lines of grocery carts.

It is self-evident that to do so is negligence when, as here, the customer is simply walking into the store and the bag boy, as he did in this case, admitted that he misjudged

whether Mrs. Myers had passed him by a sufficient distance for him to safely proceed and swing his carts into the store entrance.

It was Mrs. Myers' testimony that the bag boy did not pause, but ran the carts over her foot while engaged in a race with another bag boy toward the front door of the store. The testimony of the bag boy was that he stopped to wait for Mrs. Myers to pass. Under the testimony most favorable to the defendant, the bag boy stopped, then proceeded too soon. In either scenario it is negligence to strike a customer with sufficient force to cause unmistakable evidence of injury.

In this case, there was uncontroverted evidence of physical injury. Plaintiff testified that the top of the foot was damaged. This was corroborated by her co-worker Leena Waring and by Dr. Norman Bos, who found definite evidence of nerve damage in the same location.

Under the evidence as testified to by defendant's store manager, he saw physical evidence of injury on Mrs. Myers' ankle. It was undisputed that a physical injury occurred. Therefore, the only issue for presentation to the jury was not whether Mrs. Myers' had been struck by the carts, nor whether she had been injured, but rather the degree and worth of the injury sustained. Under the facts of this case, it was therefore an abuse of the trial court's discretion in failing to grant plaintiff's motion for a directed verdict.

CONCLUSION

During voir dire of the jury, plaintiff was entitled under the existing case law of this state to have questions asked of the jury concerning attitudes and biases toward tort reform. No such questions were asked. A new trial must be ordered.

Also, under the facts of this case, plaintiff was entitled to a directed verdict on liability and causation. Therefore the case should be remanded for a new trial with a determination of plaintiff's damages being the only issue.

DATED this 21 day of August, 1995.

MARQUARDT, HASENYAGER & CUSTEN

JAMES R. HASENYAGER
Attorney for Appellant

CERTIFICATE OF MAILING
****

I hereby certify that on this 22 day of August, 1995, I mailed two true and correct copies of the above and foregoing Brief of Appellant, postage prepaid, to the following:

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