1995

Louis Ortiz v. Geneva Rock Products : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LOUIS ORTIZ, Plaintiff/Appellant, vs. GENEVA ROCK PRODUCTS, Defendant/Appellee.	Appeal No. 950391 CA Priority No. 15

BRIEF OF APPELLEE

APPEAL FROM AN ORDER IN THE THIRD JUDICIAL
DISTRICT COURT, IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE TYRONE E. MEDLEY PRESIDING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction to hear this appeal pursuant to Utah Code Ann. § 78-2a-3(j).

ISSUES PRESENTED FOR REVIEW

The defendant is satisfied with plaintiff's statement of issues. However, with respect to the standard of review on Issue No. 1, this defendant adds that in reviewing a challenge to a civil trial verdict, the appellate court views all evidence in the light most favorable to the verdict. Crookston v. Fire Ins. Exch., 817 P.2d 789, 799 (Utah 1991); Von Hake v. Thomas, 705 P.2d 766, 769 (Utah 1985). The appellate court must assume the jury believed the evidence and inferences that support the verdict. Canyon County Store v. Bracey, 781 P.2d 414, 417 (Utah 1989).

DETERMINATIVE LAW

Rules 402 and 403, Utah Rules of Evidence, are of central importance to Issue No. 2.

STATEMENT OF THE CASE

The defendant is satisfied with the plaintiff's representation with respect to the nature of the case, the course of proceedings, and its disposition in the court below. However, the plaintiff omitted critical facts which support the jury's verdict of no cause of action and the judge's ruling on the plaintiff's motion in limine.

With respect to Issue No. 1, those facts are:

1. The plaintiff knew that the chute on the concrete truck was broken. (R. 569).

2. The plaintiff knew that when a chute on a concrete truck breaks, the area around the concrete chute becomes a "dangerous area." (R. 570).

3. Notwithstanding the fact the plaintiff knew he was standing in a dangerous area, he stood with his back to the concrete truck. (R. 570).

4. The plaintiff knew that the driver and mechanic for the defendant were attempting to get the chute to move. (R. 574).

5. The plaintiff knew that he was standing in an area where the concrete chute would hit him if the mechanics were able to get the chute working. (R. 570).

6. Because the concrete truck engine was running and the drum on the truck was rolling, the plaintiff could not have heard the chute move. (R. 397).

7. The plaintiff agreed that he had a responsibility for his own safety on this construction site. (R. 574).

8. The plaintiff agreed that he did not need to be in the area where he was standing when he was hit because there was no concrete pouring work being performed at the time and his presence in the "danger area" was not necessary or required. (R. 575).

9. No employee of the defendant nor the plaintiff's immediate supervisor told him to stand in the area where he was injured. (R. 397).

10. The plaintiff's immediate supervisor, Mr. Cisneros, testified that the plaintiff did not need to stand where he was at the time the accident occurred. (R. 400).

11. Plaintiff's counsel called no person to the stand with any expertise regarding the standard of care for repairing cement trucks, either on site or at the shop. (Undisputed in plaintiff's brief).

12. The mechanic for the defendant who was attempting to fix the chute on site testified that when he arrived at the scene and began working on the truck, the plaintiff was not present in the area, nor was any other member of the concrete finishing crew. (R. 646, 649).

Plaintiff's Issue No. 2 is irrelevant since the jury never reached the issue of damages. However, the critical omitted facts with respect to Issue No. 2 are:

1. The only preexisting injuries discussed at trial related to the plaintiff's back and knee. (Undisputed by plaintiff's brief).

2. Plaintiff admitted that he is not working because of pain in his back. (R. 588).

3. Plaintiff admitted that he had multiple injuries to his back prior to this accident. (R. 575).

4. Plaintiff admitted that at least two of the prior injuries to his back had kept him off work for several months at a time. (R. 575).

5. Plaintiff admitted that even at the time this accident occurred, he was still suffering pain from his prior injuries. (R. 575-76).

6. Plaintiff admitted that some of his prior back injuries were "low back" injuries. (R. 577).

7. Plaintiff also suffered a preexisting compression fracture in his cervical spine

which continued to cause him pain up to the time of this accident. (R. 578-79).

8. Plaintiff admitted that torn ligaments in his knee resulting in surgery in 1983 was caused, not by traumatic injury, but by his knee simply wearing out because of his occupation. (R. 579).

9. Dr. Nord testified that plaintiff's back problems were due to "arthritic changes and degenerative disc changes" which were most certainly of a long-term nature. (R. 618).

10. Dr. Nord testified that even the L-1 "wedging" seen in x-rays pre-dated the 1991 accident. (R. 618).

11. Dr. Nord testified that a patient with the type of extensive degenerative changes apparent in the plaintiff would at least occasionally be symptomatic of his degenerative lumbar condition. (R. 620-21).

12. Dr. Nord testified that even if this particular accident had not occurred, the plaintiff likely would not have continued in the concrete business much longer because of his preexisting back condition. (R. 622).

13. Plaintiff's own treating physician described plaintiff's back condition as "very severe arthritic changes in his spine at multiple levels." (R. 506).

14. Plaintiff's own treating physician agreed that the back problem was a "preexisting" problem. (R. 506).

15. Plaintiff's own treating physician admitted at trial that, because of his

preexisting back condition, the plaintiff would not have been able to continue in the concrete business very long, even absent this accident. (R. 514).

SUMMARY OF ARGUMENTS

ISSUE 1

Viewing the evidence in the light most favorable to the jury verdict of no cause of action, the jury's verdict in this case must stand. The record is replete with evidence that the plaintiff knew the defendants were attempting to repair the concrete chute at the scene so that they could continue the concrete pour. When the mechanic for the defendant arrived, neither the plaintiff, nor any of his crew, were near the area where the repairs were taking place. While the driver of the defendant truck and the mechanic were attempting to repair the chute, the plaintiff, and only the plaintiff, decided to stand in an area where he could be hit by the chute if the mechanic was able to make the chute work. There was no reason for him to stand in that area since there was no concrete work being performed and certainly no reason for him to stand in that area with his back to the truck talking to a co-employee. The plaintiff admitted at trial that he had a responsibility for his own safety and based upon the plaintiff's multiple acts of negligence and no acts of negligence established on the part of the defendant, the jury found the defendant not negligent. In addition, the plaintiff put on no expert testimony regarding the "standard of care in the industry" with respect to repairing a concrete truck on site. Indeed, plaintiff put on no witness that had any experience driving or repairing a concrete truck. Accordingly, the jury's verdict should not be upset.

ISSUE 2

According to the plaintiff's own doctor and Dr. Nord, the plaintiff had severe chronic, progressive degenerative disorders in his back. His knee simply wore out because of the concrete work he had done for so many years. All the doctors that testified agreed that the plaintiff, because of his preexisting physical condition, would not have been able to continue in the concrete construction business very much longer. With that kind of testimony on the record, it is hard to understand how the trial court "abused its discretion" in allowing the defendant to question the plaintiff on his preexisting condition.

Regardless, the jury never reached the issue of plaintiff's preexisting medical condition and, therefore, even if it was error, it was harmless. State v. Verde, 770 P.2d 116, 120 (Utah 1989).

ARGUMENT

POINT I

THERE IS SUBSTANTIAL COMPETENT EVIDENCE SUPPORTING THE JURY'S VERDICT AND, THEREFORE, THE VERDICT SHOULD STAND.

Plaintiff ignores the overwhelming body of evidence that came out at trial regarding the plaintiff's negligence verses the defendant's negligence. Without citing to the record a second time, the evidence that came out at trial was that shortly after beginning a concrete pour, the chute on the concrete truck "froze." The driver of the truck moved the truck to a different area and called his dispatcher in an attempt to have a mechanic come and fix the

chute on site. A mechanic came to the site and when he arrived, he noticed that there were no workers anywhere near the area where the concrete truck was situated. Therefore, **there was no one to warn** or move out of the area as they worked on the chute. All of the work to attempt a repair was done inside the cab of the truck where the control cable was located.

The plaintiff was well aware of the fact that the chute was inoperable. That is why he was not performing any work at the time. He was also well aware of the fact that the driver of the truck and the mechanic were attempting to make the chute operable. Even with this knowledge, the plaintiff entered the "swing" area of the chute, with his back to the truck, and leaned on a shovel while talking to another co-worker. In this position, the plaintiff could not see or hear the chute begin to move. The only testimony elicited at trial from plaintiff's counsel was that the concrete truck driver and mechanic never knew that the plaintiff was standing in an area where he could be hit, since he was not standing there when they began to work on the truck and they were both inside the cab of the truck working on the cable mechanism. In fact, the truck driver and mechanic eventually were able to get the chute to do exactly what they wanted it to do--that is, have it move to the right so that they could continue the pour. As the chute moved to the right, it hit the plaintiff who, in the meantime, had decided to stand in that area with his back to the truck.

Although plaintiff now claims to have put on evidence regarding the "standard of care in the industry" with respect to repairing concrete trucks, it cannot be disputed that the only witnesses put on by the plaintiff regarding that issue was Mr. Cisneros, the supervisor for the

concrete finishing crew, and Mr. Padgen, another concrete finisher and former supervisor of the plaintiff. (R. 405-06).

Neither of these individuals has any expertise with respect to driving a concrete truck, repairing a concrete truck, servicing a concrete truck, or any other aspect of the hands-on portion of a concrete truck operation. "It is well settled that the standard of care must be determined by expert testimony unless the conduct involved is within the common knowledge of lay persons." Daniel v. Hilton Hotels, 642 P.2d 1086, 1987 (Nev. 1982).

Because plaintiff failed to establish the standard of care for repairing a concrete truck by expert testimony, his claim that defendant violated that standard cannot stand. On the other hand, the defendant put on evidence that the plaintiff negligently placed himself in a position of danger and that his injury was a result of his own failure to act reasonably.

Based upon the overwhelming evidence of non-negligence on the part of the defendant and negligence on the part of the plaintiff, the jury verdict of no cause of action should not be disturbed.

POINT II

THE TRIAL COURT CORRECTLY RULED THAT EVIDENCE OF THE PLAINTIFF'S PREEXISTING CONDITION WAS ADMISSIBLE.

To begin, the jury never reached the issue of damages, and therefore, Issue No. 2 in plaintiff's brief is irrelevant and this court need not address the issue. In the event the Court does address the issue, it is important to note that both the plaintiff's own treating physician, and

Dr. Nord, an independent medical examiner, testified that even if this accident and injury had not occurred, it is not likely that the plaintiff would have continued in the concrete construction business much longer because of his substantial, severe preexisting injuries and condition. With that kind of testimony having come before the jury, it is difficult to support a claim that the Court should not have allowed the jury to hear that testimony. The jury was properly instructed regarding preexisting conditions (Jury Instruction Nos. 36 and 37, R. 204, 205) and had the jury reached the issue of damages, they would have applied those instructions in their determination of damages. Rule 402, Rules of Evidence, supports the lower court's ruling. Rule 401 states:

> All relevant evidence is admissible. . . . Evidence which is not relevant is not admissible.

Both of plaintiff's concerns (the evidence was irrelevant and contrary to Biswell v. Duncan) are answered in Turner v. General Adjusting Bureau, Inc., 832 P.2e 62, 69-70 (Ut. Ct. App. 1992), cert. denied, 843 P.2d 1042 (Utah 1992). In Turner, plaintiff claimed that defendant caused her emotional distress because defendant masqueraded as a product research company to induce plaintiff to perform physical tasks contrary to her claims on a worker's comp claim. Plaintiff argued on appeal the evidence of her preexising psychiatric history and past drug abuse should not have been admitted because it was irrelevant and more prejudicial than probative. Plaintiff also argued that her preexisting condition was irrelevant because it was contrary to the "thin skull" theory which requires you to take a plaintiff as you find her. The court ruled that:

> The evidence involving Turner's pschiatric history and past drug use was probative of whether her claimed emotional distress damages were the result of a preexisting condition or were caused by defendant's conduct. Having reviewed the trial court's determination that the damages of unfair prejudice did not substantially outweigh the evidence's probative value, we conclude, in light of the discretion given to a trial court in performing a 403 balancing, that the court correctly admitted the evidence.
>
> Finally, pursuant to the tort law doctrine commonly referred to as the "thin-skull" or "eggshell skull" rule, Turner argues that because defendants are required to take her as they find her, the court abused its discretion in admitting evidence of her psychiatric history and past drug abuse. This argument fails because "even though it is true that one who injures another takes him as he is, nevertheless, the plaintiff may not recover damages for any preexisting condition or disability she may have had which did not result from any fault of the defendant." Brunson v. Strong, 412 P.2d 451, 453 (Ut. 1966).

Turner, at 69-70.

Evidence of plaintiff's preexisting condition was relevant and its admission did not violate the Biswell v. Duncun instructions.

CONCLUSION

Plaintiff put on no credible evidence of negligence on the part of the defendant. Contrary to his assertions, the plaintiff established no "standard of care" through expert testimony regarding the repair of the chute on site On the other hand, there was substantial

evidence put before the jury that the plaintiff himself was the cause for his injury.

In addition, all the doctors that testified at trial, for both plaintiff and defendant, testified that the plaintiff had a significant preexisting condition which contributed to his current complaints. Accordingly, the plaintiff's preexisting condition was at issue and properly admitted. Even if it was error, it was harmless, because the jury never reached the issue of damages. Therefore, the defendant respectfully requests that the Court affirm the lower court's judgment of no cause of action.

RESPECTFULLY SUBMITTED this 19 day of Dec., 1996.

RICHARDS, BRANDT, MILLER
& NELSON

GEORGE T. NAEGLE
Attorneys for
Defendant/Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first-class, postage prepaid, on this 20 day of DEC., 1996, to the following:

Matt Biljanic
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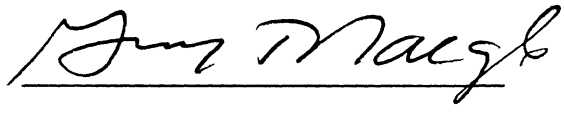

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