1995

Louis Ortiz v. Geneva Rock Products : Reply Brief of Appellants

Utah Court of Appeals

George T. Naegle, Gary L. Johnson; Attorneys for Appellee .
Matt Biljanic, Attorney for Appellant.

IN THE COURT OF APPEALS

IN AND FOR THE STATE OF UTAH

LOUIS ORTIZ, Plaintiff/Appellant vs. GENEVA ROCK PRODUCTS, Defendants/Appellees	COURT OF APPEALS Case No. 950391-CA Priority No. 15

REPLY BRIEF OF APPELLANTS

Appeal from An Order of the Third Judicial District Court,
In and For Salt Lake County,
The Honorable Tyrone E. Medley, Presiding

MATT BILJANIC, Esq. (0323)
Attorney for Appellant Louis Ortiz
6925 Union Park Center #600
Midvale, Utah 84047

GEORGE T. NAEGLE, Esq. (5001)
GARY L. JOHNSON, Esq.
Attorneys for Appellee
Geneva Rock Products
Key Bank Tower, Seventh Floor
50 South Main Street
Salt Lake City, Utah 84110

IN THE COURT OF APPEALS

IN AND FOR THE STATE OF UTAH

LOUIS ORTIZ, Plaintiff/Appellant vs. GENEVA ROCK PRODUCTS, Defendants/Appellees	COURT OF APPEALS Case No. 950391-CA Priority No. 15

REPLY BRIEF OF APPELLANTS

Appeal from An Order of the Third Judicial District Court,
In and For Salt Lake County,
The Honorable Tyrone E. Medley, Presiding

MATT BILJANIC, Esq. (0323)
Attorney for Appellant Louis Ortiz
6925 Union Park Center #600
Midvale, Utah 84047

GEORGE T. NAEGLE, Esq. (5001)
GARY L. JOHNSON, Esq.
Attorneys for Appellee
Geneva Rock Products
Key Bank Tower, Seventh Floor
50 South Main Street
Salt Lake City, Utah 84110

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

IN THE COURT OF APPEALS

IN AND FOR THE STATE OF UTAH

LOUIS ORTIZ, Plaintiff/Appellant **vs.** GENEVA ROCK PRODUCTS, Defendants/Appellees	:	COURT OF APPEALS Case No. 950391-CA Priority No. 15

PLAINTIFF'S REPLY TO DEFENDANT'S STATEMENT OF FACTS AND ARGUMENT REGARDING THE JURY'S FINDING OF "NO NEGLIGENCE" ON THE PART OF GENEVA ROCK PRODUCTS

POINT I — DEFENDANT, IN HIS STATEMENT OF THE CASE, MISCHARACTERIZES THE TRIAL TESTIMONY ON SEVERAL KEY ISSUES

Defendant states, "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." (Brief of Appellee at 2, ¶5). In fact, this is precisely the opposite of what plaintiff testified:

> Q. [By defendant's counsel] Was there any doubt in your mind that you were standing in an area where you could be hit by the chute if it swung?

A. [Ortiz] It didn't even enter into my mind; I am sorry.

(R. at 570).

Defendant's brief then goes on to state that "plaintiff agreed that he did not need to be in the area where he was standing..." (Brief of Appellee at 2, ¶8), and that no one, not even plaintiff's supervisor Cisneros, told him to stand in that area or felt he "needed" to stand there (Brief of Appellee at 2, ¶¶ 9, 10). Defendant omits the fact that plaintiff testified he "always" stood in the work area (R. at 575), and that Cisneros *knew* where Ortiz was standing and believed this to be an appropriate place for Ortiz to stand and wait (R. at 385, 398).

Further, as to the testimony of Stephen Barnes, the mechanic involved in the incident, defendant states that when Barnes "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," (Brief of Appellee at 3, ¶12), and that when Barnes arrived at the scene, "he noticed that there were no workers anywhere near the area where the concrete truck was situated." (Brief of Appellee at 7)

In fact, Barnes contradicted himself on this issue, testifying both that he noticed there were no workers in the area, and that he didn't notice whether or not there was anyone in the area:

> Q. (examination by defendant) When you got to the truck to work on it, was there a crew, any finishing crew in the area?
>
> A. (Barnes) I didn't see any. *[R. at 646]*
>
> . . . .

Q. Did you wonder where the crew was when you first pulled up?

A. Yeah. When I first got there, I didn't see anybody around and I asked Paul where the finishers were and he said they were down the street. *[R. at 649]*

. . . .

Q. (examination by plaintiff) And when you first arrived, there was nobody in this area?

A. (Barnes) I never noticed whether there was anyone there or not. *[R. at 657]*

Obviously, it mischaracterized the trial testimony to imply that this witness made a conscious effort to check the area to see if anyone was present in the area of the truck and chute, when the witness himself is unclear about what he did or did not see or do when he arrived on the scene. **Furthermore, both Cisneros and Ortiz testified that Ortiz was in the area when Barnes arrived, because Ortiz had accompanied the truck when the driver moved it to show Cisneros where the next pour area would be (R. at 384, 535).**

Finally, defendant states that, after the chute froze up, the driver moved the truck to "a different area" to effect repairs on site (Brief of Appellee at 6). Presumably, this is an attempt to suggest that the driver had made a conscientious decision to move the truck so that the repair work would not endanger the finishing crew. However, there was no testimony presented that this was the case. Rather, the testimony of both Ortiz and Cisneros was that the driver, accompanied by Ortiz, simply moved the truck to "the next pour area," (R. at 384, 535), the very work area where the finishing crew would go once they had completed their work in the area that had already been poured. It is absurd to

suggest that the driver did not know Ortiz was there or that he did not expect the crew to arrive in the new work area.

> POINT II — ALL FACTUAL ALLEGATIONS AND ARGUMENTS SET FORTH BY THE DEFENDANT, BOTH AT TRIAL AND IN HIS BRIEF, SPEAK TO THE ISSUE OF COMPARATIVE NEGLIGENCE. AT NO TIME DOES DEFENDANT PRESENT ANY EVIDENCE OR ARGUMENT WHATSOEVER OF "NO NEGLIGENCE" ON THE PART OF THE DEFENDANT, GENEVA ROCK PRODUCTS

Defendant, both at trial and in his brief, centered all his factual allegations, testimony and argument around the issue of whether or not the plaintiff was *also* negligent in his actions which resulted in the accident at issue. All testimony cited in by defendant in his Statement of the Case and subsequent Argument [much of it disputed above by plaintiff] attempts to argue that plaintiff knew or should have known that he was standing in a dangerous area, and that, in so doing, he exhibited negligent, unreasonable or inappropriate behavior. However, defendant presents no evidence whatsoever to counter plaintiff's evidence that defendant was negligent.

In his opening remarks to the jury, defendant's counsel acknowledges that his client was negligent, but that he intended to show to the jury that the plaintiff was also negligent:

> (Naegle to the jury) You will have to determine who is really responsible. Whether Mr. Ortiz is at least equally responsible for his own conduct. **We will take half of the blame**, but Mr. Ortiz must take the other half... *(emphasis added)* [R. at 373]

Having set forth to the jury that his client was "half" responsible for the accident, defendant's counsel then elicits testimony from plaintiff designed to show that plaintiff,

also, was negligent. *At no time during the trial does defendant present even a scintilla of evidence that defendant's actions which resulted in injury to the plaintiff were not in any way negligent.*

Defendant did not call the driver of the truck to the testify, and the mechanic involved in the accident testified both he should have broken down the chute before attempting any repairs and that the driver of the truck was ultimately responsible for actions of the cement chute (see statements and argument in Point I, above), assessments that were shared by plaintiff's witnesses Cisneros and Padgen (see statements and argument in Point III, below).

Consequently, in his brief, defendant is unable to cite to any statement on the record that might suggest that defendant was not guilty of any negligence in the actions resulting in this accident. Instead, defendant once again makes factual allegations, some disputed by plaintiff, but all speaking solely to the issue of plaintiff's alleged *comparative* negligence. Defendant's entire argument, is therefore, irrelevant, as the issue at bar does not concern comparative negligence, but involves only the finding of "no negligence" on the part of the defendant.

Clearly, because of the admission by defendant's counsel that his client was half responsible for the accident, combined with the fact that defendant's counsel presented no evidence exonerating completely his client's actions, it is impossible that the jury, upon reviewing the evidence, could have come to a verdict of "no negligence" on the part of Geneva Rock Products.

POINT III — PLAINTIFF CLEARLY ESTABLISHED, BOTH AT TRIAL AND IN HIS APPEAL BRIEF, THE "STANDARD OF CARE" FOR THE ON-SITE REPAIR OF THE CEMENT CHUTE THROUGH THE TESTIMONY OF GARY CISNEROS, GEORGE PADGEN, AND STEPHEN BARNES.

Defendant contradicts himself in his argument regarding expert testimony concerning the "standard of care" for the repair of the cement chute. Defendant first contends that plaintiff *knew* he was in a "dangerous area," knew the chute was broken and that the mechanic and driver were trying to repair it, had "some 20 years experience in the concrete business" (R. at 569), and so on and so forth. (Brief of Appellee at 2) In fact, defendant argues that plaintiff's experience in concrete work had resulted in such a high level of knowledge regarding the standard of care for repairing cement truck chutes, that plaintiff "negligently placed himself in a position of danger and that his injury was a result of his own failure to act reasonably." (Brief of Appellee at 8)

Defendant then goes on to argue that neither the plaintiff Ortiz, his supervisor Gary Cisneros, nor even plaintiff's expert George Padgen, "had any expertise regarding the standard of care for repairing cement trucks, either on site or at the shop." (Brief of Appellee at 3, ¶11)

Clearly, defendant has defeated himself with his own argument. Cisneros and Padgen each had more than 20 years experience in the concrete business. (R. at 377, 405) Both were supervisors who possessed, by virtue of their experience [as acknowledged by defendant], expertise in the standard of care required for the on-site repair of a cement truck chute. Both testified that plaintiff was standing in a reasonable and appropriate area when the incident occurred (R. at 385, 398, 412, 417). Both testified that the driver

of the cement truck is responsible at all times for the location and action of the cement chute, and that it is the driver's responsibility to keep the chute out of the worker's area (R. at 399, 417), an expert opinion also expressed by defendant's own witness, Stephen Barnes, the mechanic involved in the incident (R. at 656-657). Both testified that the chute should have been "broken down" before any repair was attempted (R. at 389-90, 415, 417), again an expert opinion also expressed by defendant's own witness, the mechanic involved in the incident (R. at 659). Even if defendant is reluctant to accept the expertise of plaintiff's witnesses, which expertise was not challenged *at any time* during the trial, defendant must accept the expertise of his own witness, the mechanic Stephen Barnes.

PLAINTIFF'S REPLY TO DEFENDANT'S STATEMENT OF FACTS AND ARGUMENT REGARDING THE PLAINTIFF'S MOTION IN LIMINE

In responding to plaintiff's Issue No. 2, defendant again brings up a series of statements which do not speak to the issue of the admission of testimony regarding injuries to the plaintiff which were not related to the accident. During the trial, defendant cross-examined plaintiff regarding several accidents which resulted in injuries to plaintiff's neck, shoulder, knee, etc. (R. at 578-586) None of these accidents caused or were related in any way to the accident or the plaintiff's injuries which resulted from the accident. To briefly quote again from Biswell,

> The rule is well settled that when a defendant's negligence aggravates or lights up a latent, dormant, or asymptomatic condition, or one to which the injured person is predisposed, the defendant is liable to the injured person for the full amount of damages which ensue, notwithstanding such diseased or weakened condition.

Biswell v. Duncan, 742 P.2d 80,88 (Utah App. 1987) [See Brief of Appellant at 18.]

Defendant, in his brief, dismisses this ruling without explanation, and instead cites Turner v. General Adjusting Bureau, Inc. 832 P.2d 62, 69-70 (Utah App. 1992), applying the "thin skull" rule, as the determinative ruling on this issue. The two rulings appear, then, to be contradictory, but the closer look shows they are not.

The Turner ruling states that plaintiff may not recover for any pre-existing condition, and, indeed, plaintiff is not attempting to recover damages from defendant as to any of the other injuries plaintiff may have suffered previously in his lifetime. The trial court allowed testimony of previous injuries to plaintiff's neck, shoulder, et al., although plaintiff was not seeking recovery for any of those alleged injuries. Any testimony presented by defendant regarding these alleged injuries was, therefore, irrelevant and, likely, prejudicial.

At the time of the accident, plaintiff was working, was not under any medical care or engaged in any physical therapy, and was not complaining of any injury to his back. **Hence, according to Turner, defendant, and the jury, was required to accept plaintiff as they found him at the time of the accident — apparently healthy, active and employed.** According to the evidence, whatever damage may have been done to his back from previous accidents was latent. The Biswell ruling states that if defendant's actions aggravates or lights up a latent injury, then defendant is responsible for the full amount of

damages caused by the injury. Unless such evidence involved an active, debilitating injury to plaintiff's back, any testimony presented by defendant regarding previous back injuries can only be irrelevant and, likely, prejudicial.

Furthermore, evidence that plaintiff's knee might have eventually collapsed is also irrelevant and prejudicial. Plaintiff's knee is not the injury being complained of, and, according to the evidence presented at trial, at the time of the accident, any alleged injury to plaintiff's knee was also latent and was not a factor in precipitating the accident. Again, any testimony presented by defendant regarding this injury was, therefore, irrelevant and, likely, prejudicial.

CONCLUSION

The evidence is clear that the jury disregarded all evidence as well as the admissions of defendant's own counsel in finding "no negligence" on the part of Geneva Rock Products. The jury's verdict and the trial court's amended judgment should be set aside. Alternatively, this Court should determine that the trial court abused its discretion in denying plaintiff's Motion in Limine and should remand this case for a new trial with instructions to bar all such evidence relating to alleged injuries which plaintiff might have sustained in previous, unrelated accidents.

DATED this 15th day of January, 1997.

MATT BILJANIC
Attorney for Plaintiff Louis Ortiz

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of January, 1997, I mailed in the United States mail, postage prepaid, a true and correct copy of the foregoing REPLY BRIEF OF APPELLANTS to:

GEORGE T. NAEGLE, Esq. (5001)
GARY L. JOHNSON, Esq.
Key Bank Tower, Seventh Floor
50 South Main Street
Salt Lake City, Utah 84110