1995

Marvin A. Dalton Jr Plaintiff/Petitioner vs. Brian G. Herold, Defendant/Respondent : Reply Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

MARVIN A. DALTON, JR.,	Case No. 950414
Plaintiff/Petitioner,	Court of Appeals No. 941070-CA
vs.	
BRIAN G. HEROLD,	Third District Court No. 920903329 PI
Defendant/Respondent.	

REPLY BRIEF OF PLAINTIFF/PETITIONER

APPEAL FROM A MEMORANDUM DECISION OF THE UTAH COURT OF APPEALS

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PRELIMINARY STATEMENT

Petitioner's jurisdictional statement and statement of the issues are fully set forth in his original brief, and need not be restated here. Petitioner does not agree with Respondent's characterization of the issues, but simply stands on his own original statement.

IV.

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

Respondent's discussion of the manner in which the accident occurred, including Dalton not wearing a helmet, and his discussion of Dalton's incarceration are not directly relevant here. These matters were not before the jury, and have no bearing on this appeal, which involves only the issue of damages. Respondent's effort to inject into this proceeding the fact, that no evidence was presented as to Dalton's opportunity for medical care while incarcerated, likewise has no part in this proceeding. Had Respondent wished to place those facts before the jury, he should not have stipulated otherwise (C.R. 373). Petitioner is also constrained to note that much of this material is not supported by citation to the record.

Respondent does provide a reasonably accurate description of the manner in which the Appellate Court's opinion bootstraps the standard of review issue (Resp. Br., p. 4). By creating a threshold issue of law (the power to consider an additur), which just happens to be decided by a non-deferential review of the evidence, the Appellate Court circumvents the intermediate action of the trial court and accords it no deference. This amounts to a standard of review, under which the Appellate

Court first reviews the evidence de novo in order to determine if a deferential review is warranted.

Respondent emphasizes that Petitioner has raised a new issue in his brief before this Court, as if this was done covertly. Petitioner expressly admitted, that "[t]his issue was not presented to the Court of Appeals," and cited authorities supporting its consideration at this time. (Pet. Br., p. 21). Respondent's refusal to even address this issue should be at his own peril.

B. Statement of Facts

Again, much of Respondent's statement has no bearing on this matter, particularly facts regarding the details of the accident. Additionally, Respondent's speculation as to how the jury might have arrived at a special damages award of $3,000 is not fact, but pure conjecture (Resp. Br., p. 10). In similar fashion, Respondent's so-called "facts" concerning mitigation depend largely upon interpretation, rather than evidence. Indeed, it is based primarily upon Respondent's interpretation of medical records, rather than the testimony presented by the physicians who appeared at trial. As noted, only three such physicians testified (Pet. Br., p. 5). This evidence as to Dalton's need for future medical care was uncontroverted (App. Ex. 4, p. 3; Pet. Br., pp. 6-7).[1]

[1]Citations to the Appendix are to the Appendix attached to Petitioner's original brief.

The relevant facts involve Dalton's injuries and the need for, and cost of, future treatment. In this regard, he sustained: multiple fractures to the right maxillary antra area; a blow out fracture of the floor of the right orbit; a tripod fracture, nasal fracture, and tooth fracture; a dislocated meniscus; temporomandibular joint dysfunction; facial nerve damage with numbness; diplopia - blurry vision; flattened right maxilla; and, arm, shoulder, hand and knee injuries (C.R. 652-62, 750-82, 832-36, 874-75, 881, 886). Even Respondent's expert agreed that Dalton was 4% disabled (C.R. 897; Tower., Ex. 10).

Dalton's first expert, Dr. Hodnett, testified that Dalton would require an osteotomy (rebreaking of the jaw bones) at a cost of $15,000 (C.R. 783-84). Dalton's second expert, Dr. Vaun Mikesell, testified as to the need for additional surgery, an arthroplasty, at a cost of $7,000 to $11,500, and a bridge at a cost of $1,200 to $1,300 (C.R. 824, 836-37, 841). Respondent's expert offered no testimony relating to the cost of, or the need for, these surgeries. He testified only that Dalton would not require future surgery for facial nerve damage, which was not an item included in the additur (C.R. 573, 874-76). In allowing the additur, the trial court did not include any items other than those which were uncontested.

V.

SUMMARY OF ARGUMENT

POINT A

RESPONDENT HAS FAILED TO PROVIDE ANY SUPPORT FOR THE STANDARD OF REVIEW UTILIZED BY THE COURT OF APPEALS.

The issue of what standard of review applies to an additur is one of first impressions in Utah. Whereas Petitioner has cited cases from other jurisdictions, which are squarely in point, Respondent has no support for the Appellate Court's non-deferential standard. These authorities are consistent with Utah law. Because additur is an alternative to a new trial, it must be reviewed under the same abuse-of-discretion standard. See Ryn, Inc. v. Platte County Memorial Hospital, 842 P.2d 1084, 1086-87 (Wyo. 1992); Hazelwood v. Harrah's, 862 P.2d 1189, 1192 (Nev. 1993); Donaldson v. Anderson, 862 P.2d 1204, 1206 (Nev. 1993); Crookston v. Fire Insurance Exchange, 817 P.2d 789 (Utah 1991); Nelson v. Trujillo, 657 P.2d 730; 734 (Utah 1982).

POINT B

RESPONDENT FAILS TO ARTICULATE ANY STANDARD FOR DETERMINING WHEN ORAL ARGUMENT MAY BE DENIED.

Oral argument is an important part of the appellate process, and should not be arbitrarily denied. Respondent has failed to provide any reasonable standard by which the denial of oral argument here could be justified.

VI.

ARGUMENT

POINT A

RESPONDENT HAS FAILED TO PROVIDE ANY SUPPORT FOR THE STANDARD OF REVIEW UTILIZED BY THE COURT OF APPEALS.

Respondent devotes little attention here to the real issue -- namely, the proper standard of appellate review for an additur. He prefers, instead, a philosophical discussion of the right to a trial by jury and an overview of his version of the facts.

What Respondent does say with regard to standard of review is inaccurate, albeit illustrative of the legal controversy here. An additur does not replace the jury's verdict with the court's own judgment (Resp. Br., p. 12). Rather, it accords the party, against whom a new trial has been granted, an option by which he might avoid that additional time and expense by agreeing to an adjustment. See Nelson v. Trujillo, 657 P.2d 730, 734 (Utah 1982). It is the optional nature of an additur and its express nexus to an order for a new trial, which compels that it be reviewed under the standard applied to motions for a new trial. It is not, as Respondent would contend, like a j.n.o.v. or directed verdict because there is no mandatory displacement of the jury's verdict with the court's judgment. There is, as with a new trial, a rejection of that verdict -- but it is not replaced with the

court's judgment unless the defendant rejects the option of a new trial.

Each party relies upon a differing interpretation of Crookston v. Fire Insurance Exchange, 817 P.2d 789 (Utah 1991) and Dupuis v. Nielson, 624 P.2d 685 (Utah 1981), although neither case is squarely in point. Indeed, it is safe to say that this issue is one of first impression in Utah. In this regard, Petitioner has cited cases from other jurisdictions which are squarely in point, and expressly hold that the proper standard for appellate review of additurs and remittiturs is abuse of discretion. See Ryn, Inc. v. Platte County Memorial Hospital, 842 P.2d 1084, 1086-87 (Wyo. 1992); Hazelwood v. Harrah's, 862 P.2d 1189, 1192 (Nev. 1993); Donaldson v. Anderson, 862 P.2d 1204, 1206 (Nev. 1993). Respondent does not even address these cases. Nor does he cite any case from any jurisdiction applying a non-deferential standard of review to an additur or remittitur. In the absence of controlling Utah authority, the cases cited by Petitioner should be extremely persuasive, particularly given that they are consistent with Utah's established standards of review. These cases recognize the principal upon which Petitioner relies -- that an additur is related to a motion for new trial, and should be reviewed under the standard applicable to new trial motions. In Utah, that is abuse-of-discretion. See Nelson, 657 P.2d at 731-33; Goddard v. Hickman, 685 P.2d 530, 532 (Utah 1984).

Additionally, Respondent does not refute Petitioner's argument that the application of an abuse-of-discretion standard compels affirming the additur. Accordingly, there should be no need to have the Appellate Court redecide the case. Rather, it should be reversed outright.

Respondent's extensive reliance upon what the jury might have been thinking in awarding $3,000 in special damages is speculative and irrelevant. It rests, primarily, upon the equally speculative conclusion that Dalton failed to mitigate his damages. It is, apparently, Respondent's position, that Dalton could have obviated the need for massive reconstructive surgery by brushing his teeth on a more regular basis. Beyond that, Respondent mischaracterizes Dr. Stadler's testimony by asserting that he opined "that no future surgery would be necessary or helpful." (Resp. Br., p. 14)(emphasis added). Rather, Dr. Stadler[2] testified only that there was no need for future surgery for facial nerve damage -- a much narrower proposition (C.R. 573, 874076). Once Dr. Stadler's opinion is properly confined, Respondent's reliance upon the bare fact that Dalton obtained no treatment is reduced to pure conjecture. Giving Respondent's characterization even some credibility (which is more than is warranted), it establishes at most that the evidence was conflicting. Indeed, this is the most

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[2]Dr. Stadler conceded he is not a surgeon and does not do surgery.

that the Court of Appeals would say, and even it did not hold that the evidence in Respondent's favor was overwhelming (App. 1, p. 2). Under an abuse-of-discretion standard, conflicting evidence compels affirming the trial court. See Goddard, 685 P.2d at 534.[3]

Finally, as noted above, there is no support for the Appellate Court's application of some threshold test, under which it determines whether or not the trial court was empowered to consider an additur. The whole premise of this defies logic. The Appellate Court calls this an issue of law, thus justifying de novo review. Yet, it resolves this issue by substituting its view of the evidence for that of the trial court. This is contrary to well-established principles, that the trial court is in a better position than an appellate court to decide such questions. See State Road Comm'n v. Kendell, 438 P.2d 178 (Utah 1968). It also accords no recognition to the intermediate action of the trial court. In the final analysis, such reasoning could open the door to de novo review of any matter, because any issue decided by a trial court must depend, in part, upon its power under the law to consider the matter.

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[3]The very severity of Dalton's injuries suggests that the trial court's judgment should have been affirmed, even if a more exacting standard is proper (which it is not). It is difficult to comprehend how such a terribly injured face could be repaired for a mere $3,000.

POINT B

RESPONDENT FAILS TO ARTICULATE ANY STANDARD FOR DETERMINING WHEN ORAL ARGUMENT MAY BE DENIED.

Oral argument is a regular part of the appellate process, and should not be withheld without some basis for doing so. Respondent provides no such standard. Respondent's argument regarding oral argument fails to address the points raised by Petitioner. Once again, Respondent avoids the issue of what standards should apply in favor of an assertion of his opinion, that Petitioner's position was adequately presented in his briefs before the Court of Appeals.

Respondent's suggestion that Petitioner some how failed to marshall the evidence is absurd. In the Court of Appeals, Petitioner was defending the trial court's order and judgment, not attacking the jury's verdict. Here, Petitioner is challenging the standard of review applied by the Court of Appeals, which likewise involves no need to establish that the verdict was contrary to the evidence. The Court of Appeals has already found the evidence to be conflicting, which is all that Petitioner needs under a proper standard. Although it is difficult to comprehend what this has to do with oral argument, Petitioner had no obligation to marshall the evidence.

VII.

CONCLUSION

Petitioner has presented a well supported argument on the central issues here -- the proper standard of appellate review. Respondent has failed to provide any basis in support of the standard applied by the Court of Appeals and, instead, relies upon a subjective characterization of the evidence. The issue is not whether there is some version of the facts which might support the jury's verdict. The issue is whether or not the trial court abused its discretion in conditioning denial of a motion for new trial upon an additur. It did not, and its judgment should have been affirmed. Respondent elected not to accept the new trial offered by the trial court. Instead, the Respondent accepted the additur and then appealed. Respondent waived his right to appeal by accepting the additur as opposed to the new trial.

RESPECTFULLY SUBMITTED this 24 day of June, 1996.

ROBERT J. DeBRY & ASSOCIATES

BY: _____
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CERTIFICATE OF HAND-DELIVERY

I hereby certify that on the 20 day of June, 1996, I caused two true and correct copies of the foregoing *REPLY BRIEF OF PLAINTIFF/PETITIONER* to be hand-delivered, to the following:

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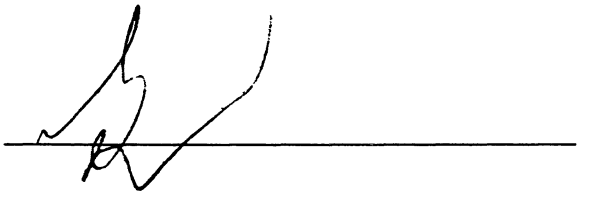

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