1995

Fred Leblanc vs. James Wilker : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

FRED LEBLANC,	:	**REPLY BRIEF OF APPELLANT**
Plaintiff/Appellant,	:	Appeal No. 950440
vs.	:	
JAMES WILKER,	:	Priority No. 15
Defendant/Respondent.	:	

REPLY BRIEF OF PLAINTIFF/APPELLANT

APPEAL FROM THE JUDGMENT OF THE THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE ANNE M. STIRBA PRESIDING

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ARGUMENT

I. THE LOWER COURT'S DECISION TO DENY PLAINTIFF'S MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND FOR NEW TRIAL WAS CLEARLY ERRONEOUS.

A. THE DOCTRINE OF AVOIDABLE CONSEQUENCES PRECLUDES, AS A MATTER OF LAW, ANY FINDING THAT MR. WILKER'S NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF MR. LEBLANC'S POST-COLLISION AMBULANCE RIDE, EMERGENCY ROOM TREATMENT AND DIAGNOSTIC EXAMINATIONS.

Because of the doctrine of avoidable consequences, no sufficient evidence exists to support the lower court's legal conclusion that Mr. Wilker's negligence was not the proximate cause of at least Mr. LeBlanc's post-collision ambulance ride, emergency room treatment and diagnostic examinations. When viewed in the light most favorable to the verdict, the evidence marshaled in support of the jury's verdict may be sufficient to support a finding that Mr. Wilker's negligence was not the cause of some of Mr. LeBlanc's injuries. Nonetheless, the testimony of Dr. Daniel Vine regarding the diagnostic examinations and the testimony of emergency room physician Dr. Amy Geruso, prohibits a ruling that, as a matter of law, Mr. Wilker's negligence was not the proximate cause of Mr. LeBlanc's ambulance ride, emergency room treatment and diagnostic examinations. That supporting testimony is cited in Appellants principal brief, pages 9-12. Furthermore, Mr. Wilker did not even attempt to rebut this point in his principal brief before the court.

In Hansen v. Mountain Fuel Supply Co., the Supreme Court of Utah held that "the

doctrine of 'avoidable consequences' mandates that the plaintiff submit to medically advisable treatment. Failure to do so may destroy the plaintiff's right to recover for a condition that he or she could have thereby avoided or alleviated". 858 P.2d 970, 976 (Utah 1993). The undisputed testimony shows that it was reasonable and necessary to transport Mr. LeBlanc by ambulance to a local hospital for emergency room treatment and diagnostic examination. In Hansen, the Utah Supreme Court held that costs attributable to diagnostic examination are "consistent with the definition of 'injury' in the Restatement of Torts." Id. at 977. (citing Restatement (Second) of Torts § 7). Moreover, a reasonable need for medical examinations is compensable, even absent proof of other injury. Friends For All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816 (D.C. Cir. 1984).

In the face of Dr. Geruso and Dr. Vine's testimony regarding Mr. LeBlanc's emergency room treatment and diagnostic examination, Mr. Wilker failed to proffer any evidence which would have shown either that Mr. LeBlanc did not incur specific costs or that Mr. LeBlanc's treatments were not reasonable and necessary. Furthermore, Mr. Wilker failed to respond to and ignored this very same argument in his brief. Accordingly, this Court should reverse the lower court's order denying: 1) Mr. LeBlanc's motion for a directed verdict on the issue of proximate cause, and 2) Mr. LeBlanc's motion for judgment notwithstanding the verdict and new trial and remand this matter for further proceedings.

II. VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE VERDICT, THE EVIDENCE IS STILL INSUFFICIENT TO SUPPORT IT.

"To successfully attack the verdict, and appellant must marshall all the evidence supporting the verdict and then demonstrate that, even viewing the evidence in the light most favorable to that verdict, the evidence is insufficient to support it " Cambelt Int'l Corp v Dalton, 745 P 2d 1239, 1242 (Utah 1987) In Utah, a jury verdict will not be disturbed if there was sufficient evidence to support the verdict Crookston v Fire Ins Exchange, 817 P 2d 789 (Utah 1991) Mr Wilker argues that there was plenty of evidence to support the jury verdict, however, a close look at the evidence relating to Mr LeBlanc's psychological and back injuries reveals an insufficient amount of evidence to support the jury's verdict that none of Mr LeBlanc's injuries were proximately caused by Mr Wilker's negligence

A. THERE IS AN INSUFFICIENT AMOUNT OF EVIDENCE TO SUPPORT THE JURY'S VERDICT THAT MR. LEBLANC'S PSYCHOLOGICAL INJURIES WERE NOT PROXIMATELY CAUSED BY MR. WILKER'S NEGLIGENCE

The only evidence submitted on Mr LeBlanc's psychological injuries was from Dr Lester John Nielsen, Jr , Social Security psychologist, and Dr Ralph Gant, a psychologist Dr Nielsen testified only that Mr LeBlanc was malingering with respect to his psychological problems Nevertheless, Dr Nielsen did not testify that Mr LeBlanc did not have any psychological injuries proximately caused by Mr Wilker's negligence (R at pp 1028-29) Moreover, Dr Gant testified that Mr LeBlanc had psychological injuries which were proximately cause by head

trauma during the automobile accident (R. at 272-75). Additionally, Dr. Gant testified that his opinions were based on valid information that he corroborated through interviews and testing (R. at 265-66). Accordingly, the jury was presented with no evidence that Mr. LeBlanc did not suffer any psychological injury proximately caused by Mr. Wilker's negligence, rather Mr. Wilker presented evidence only to Mr. LeBlanc's alleged malingering of his problems which was refuted by Dr. Gant's testimony. Therefore, there was an insufficient amount of evidence to support the jury's verdict that Mr. Wilker was not the proximate cause of Mr. LeBlanc's psychological injuries.

B. THERE IS AN INSUFFICIENT AMOUNT OF EVIDENCE TO SUPPORT THE JURY'S VERDICT THAT MR. LEBLANC'S BACK INJURIES WERE NOT PROXIMATELY CAUSED BY MR. WILKER'S NEGLIGENCE.

The only evidence submitted on Mr. LeBlanc's back injuries was from Dr. Richard Schwartz, a nuerosurgeon, Brian Ritucci, a private investigator and Dr. Richard Wright, a chiropractor . Dr. Schwartz testified that Mr. LeBlanc's back injury did not warrant surgery, however, he did not testify that Mr. LeBlanc's back was not injured in the accident with Mr. Wilker. (R. at 616-617). Brian Ritucci testified that he observed Mr. LeBlanc at a soccer game, nearly two years after the accident, "carrying different items to and from his vehicle, and engaging in normal day-to-day activities" (R. at pp. 902-19). Finally, Dr. Wright testified that Mr. LeBlanc had back injuries which were proximately caused by the accident and furthermore, that all of his treatments were medically necessary (R. at 240, 46 & 47). Accordingly, the jury was presented

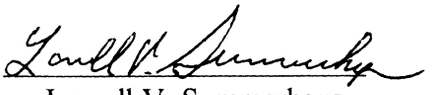
with no evidence that Mr LeBlanc did not suffer any back injury proximately caused by Mr Wilker's negligence, rather Mr Wilker presented evidence only to the extent of Mr LeBlanc's back injury that it did not warrant surgery and that two years after the accident Mr LeBlanc was observed engaging in normal day-to-day activities Moreover, Mr Wilker presented no evidence which directly disputed Dr Wright's testimony that Mr LeBlanc suffered a back injury proximately caused by Mr Wilker's negligence Therefore, there was an insufficient amount of evidence to support the jury's verdict that Mr Wilker was not the proximate cause of Mr LeBlanc's back injuries

CONCLUSION

Wherefore, this Court should reverse the lower court's order denying Mr LeBlanc's motion for judgment notwithstanding the verdict and new trial and remand this case for a new trial on all issues or other proceedings In the alternative, this court should remand the lower court's denial of Mr LeBlanc's directed verdict on the issue of proximate cause and remand the case for a new trial on all issues of other proceedings

RESPECTFULLY SUBMITTED this 17th day of July 1996

ADAMSON & SUMMERHAYS

By 
Lowell V Summerhays

CERTIFICATE OF HAND-DELIVERY

I HEREBY CERTIFY that two (2) true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** (LeBlanc v. Wilker) were hand-delivered, this 17th day of July, 1996, to the office of the following:

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