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Case Digests

CASE DIGEST

EVIDENCE: Admissions; Opinions

Sears v. Mid-City Motors, Inc., 179 Neb. 100, 136 N.W.2d 428 (1965).

Plaintiffs, owners of a building, brought an action against their lessee, Mid-City Motors, Inc., and Service Junk Company, the alleged agent of Mid-City Motors, to recover for damages to a building, caused by fire. At the conclusion of the evidence, plaintiffs' suit against Service Junk was dismissed. The case against Mid-City Motors was allowed to go to the jury and resulted in a verdict for the plaintiffs. Mid-City appealed. Plaintiffs cross-appealed from the order dismissing their suit against Service Junk. In their first opinion, the Supreme Court of Nebraska affirmed the dismissal of Service Junk and reversed the judgment recovered against Mid-City. See *Sears v. Mid-City Motors, Inc.*, 178 Neb. 175, 132 N.W.2d 361 (1965). On rehearing, the Nebraska Supreme Court vacated its previous decision and affirmed the decision of the trial court. *Held:* The evidence warranted a judgment exonerating the servant and holding the master liable for damages that the plaintiffs incurred.

The cause of action arose out of the conduct of two employees of Service Junk. The defendants, Mid-City Motors (formally Meeks Rent-A-Car Company) and Service Junk, entered into an agreement whereby Service Junk agreed to remove the sprinkler system and to pay to Mid-City the difference between the value of the material removed and the cost of removal. There was evidence in the record of the trial that Mid-City would furnish help to the employees of Service Junk if needed. The plaintiffs alleged that the defendants were liable for the damage because of negligence in the operation of an acetylene torch used in removing the sprinkler system.

In their first decision, the Nebraska Supreme Court held that Service Junk was not liable because plaintiffs failed to prove that the alleged negligent acts of Service Junk's employees caused the fire. However, the court said that there was evidence admitted against Mid-City alone which the jury was not to consider against Service Junk. This evidence was in the form of admissions made by Mid-City in a petition filed by Meeks Rent-A-Car, prior to the change of its name to Mid-City Motors, against Service Junk alleging that Service Junk's employees' negligent acts were the cause of the fire. Plaintiffs contended the admissions in this petition were sufficient to submit the issue of proximate cause to

the jury. The Nebraska Supreme Court, in the first decision, said the admissions were not sufficient to establish a *prima facie* case of causation because other evidence in the case controverted these admissions. On rehearing, the court vacated this determination and held that the petition was properly submitted to the jury for the purpose of establishing causation.

It has generally been held that pleadings may be used against the pleader as an admission of the facts stated therein. McCORMICK, EVIDENCE § 242 (1954). Accordingly, in a situation where an agent is employed and damage results to both a third party's property and the principal's property, it is imperative that the principal consider the consequences before bringing an action against the agent. If an independent contractor relationship cannot be shown, the institution of an action against the agent can have the anomolous effect of holding the principal liable for the damages to the third party in a subsequent suit against both principal and agent, although the agent has been completely exonerated.

There was also a question in the case as to whether certain opinions as to the cause of the fire given by the president of Mid-City to an arson investigator should have been admissible as evidence. Both the trial court and the Supreme Court, in their first decision, excluded the evidence. This issue was not discussed in the second reporting of the case. In their first decision, the Supreme Court citing *Kellner v. Whaley*, 148 Neb. 259, 27 N.W.2d 183 (1947) said: "To be competent as an admission a statement must be one of fact, and a statement which is mere opinion or conclusion of law is as a rule inadmissible." *Id.* at 269, 27 N.W.2d at 189. However, it should be noted that there is authority in Nebraska for the admissibility of opinions. See *Johnson v. Kern*, 117 Neb. 536, 225 N.W. 38 (1929). See also Note, 32 NEB. L. REV. 501 (1953).

PRODUCTS LIABILITY: Evidence

Bronson v. J. L. Hudson Co., 376 Mich. 98, 135 N.W.2d 388 (1965).

Action against defendant retailer for injury and damages allegedly caused by chemical irritants in a ladies undergarment, a cotton slip, purchased and worn by the plaintiff. Plaintiff's proof showed that she wore the slip when new, before washing it. After wearing the article, she developed a rash and her eyes and tongue became swollen. No indication of rash, dermatitis

or allergy appeared in the plaintiff's past medical history. Plaintiff's doctor diagnosed the ailment as severe dermatitis. Another doctor testified that such a cotton garment could cause the severe dermatitis condition. No direct proof was offered of what specific irritant if any, was present in the slip, nor was any direct proof offered that the slip actually caused the ailment.

The lower court granted the retailer's motion for a directed verdict and the plaintiff-buyer appealed.

The Supreme Court of Michigan reversed, holding that although in the typical products liability case the plaintiff is usually able to produce some direct proof of defect and causal relationship between that proof and injury, it was error to conclude as a matter of law, that the plaintiff had not established a prima facie case. The court stated that from the evidence presented reasonable minds could differ as to the inference drawn therefrom and that the plaintiff's evidence raised jury questions as to whether chemical irritants were present in the slip and whether they caused the plaintiff-buyer's dermatitis.

The liability of a seller of chattels to the ultimate consumer has continually been extended. See generally PROSSER, TORTS § 95 (3d ed. 1964); 2 HARPER & JAMES, TORTS § 28 (1956). This case extends the seller's liability by lessening the plaintiff's burden of proof. The plaintiff no longer needs to show by direct evidence the causal link between the product and the injury. He need only bring forth enough evidence so that reasonable men might infer that the injury was caused by the supplier's product—an inference which the defendant must try to rebut before the question of causation reaches the jury.

Patterson v. George H. Weyer, Inc., 189 Kan. 501, 370 P.2d 116 (1962), reached a similar result. In that case the court held that the plaintiff need not produce an analysis of the product so as to show its defect or harmfulness. The plaintiff need only bring forth enough circumstantial evidence "from which the simple, reasonable and common-sense inference could be drawn by the jury" that the plaintiff's injury was caused by the defendant's product. *Id.* at 505, 370 P.2d at 119.

Nebraska has followed the modern trend of extending the seller's liability to the consumer by adopting the Uniform Commercial Code. NEB. REV. STAT. (U.C.C.) § 2-314 (1964) establishes an implied warranty liability against suppliers. This section, however, leaves the question of evidence to judicial decisions.

Thus, *Bronson* and other cases like it will determine the limits and the effectiveness of that code section.

CONSTITUTIONAL LAW: State Reprosecutions

United States v. Wilkins, 348 F.2d 844 (2d Cir. 1965).

In a habeas corpus proceeding, relator sought his release from imprisonment in a state prison under a second degree murder sentence. Relator had been tried three times on a first degree murder indictment. After the first trial's conviction of second degree murder was reversed on appeal, a retrial resulted in a first degree conviction. This sentence was also reversed, followed by a second degree sentence secured in a third trial. *Held*: The reprosecution of the relator for first degree murder following his successful appeal of his second degree conviction transgressed the limitations imposed on the state by the due process clause of the fourteenth amendment to reprosecute an individual for the same crime. Although the third trial resulted only in a second degree conviction, it is constitutionally inadequate because there was a reasonable possibility that the jury was influenced by the first degree indictment.

The dissent argued that *Palko v. Connecticut*, 302 U.S. 319 (1937) established that a state reprosecution for a higher degree after a reversal of a lesser degree conviction was not violative of due process. Although recent decisions may presage the overruling of both the holding and reasoning of *Palko*, such an incorporation of the fifth amendment guarantee against double jeopardy into the due process clause of the fourteenth amendment should be left to the United States Supreme Court.

Although the Supreme Court has yet to invalidate any state reprosecutions, the Court derived authority for its proposition that some limitations exist, first, from the premise implicit in those Supreme Court cases in which a double jeopardy claim was interposed against a state. *E.g., Bartkus v. Illinois*, 359 U.S. 121 (1959). Second, the doctrine of selective incorporation, whereby the fundamental guarantees of the Bill of Rights are absorbed by the fourteenth amendment, indicates that at least the basic core of the double jeopardy guarantee is applicable to the states. See Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963). The New York procedure was clearly outside the permissible limits of due process whether tested by federal precedents under the fifth amendment, by the basic core of the double jeopardy concept, or by the fundamental

fairness principle of the due process clause of the fourteenth amendment.

The court's holding raises the limitations on state reprosecutions to conformity with those permissible under the federal double jeopardy standard. *Green v. United States,* 355 U.S. 184 (1957). While New York based its reprosecution procedure on a statute providing that retrials should proceed in all respects as if no trial had been had, the same procedure is adopted in other states by judicial authority. See, *e.g., Bohanan v. State,* 18 Neb. 57, 24 N.W. 390 (1885). Under such a procedure, the Nebraska rule is that a conviction for a lesser offense than informed against is not a bar to reprosecution for a greater offense on retrial. *Macomber v. State,* 137 Neb. 882, 291 N.W. 674 (1940). A detailed analysis of reprosecution problems can be found in Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions,* 74 HARV. L. REV. 1 (1960).

CONFLICT OF LAWS: Most Significant Contacts Choice of Laws Rule

Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

Plaintiff, a guest in an automobile, sued the host driver in New York to recover for injuries received in a two car collision in Colorado. Both parties were residents of New York, but were unacquainted before attending summer school in Colorado when the accident occurred. New York allowed a guest to recover for ordinary negligence, while Colorado's "guest statute" barred an action unless the host's negligence consisted of willful and wanton disregard of the rights of others. Following the "most significant contacts" rule adopted in *Babcock v. Jackson,* 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), the appellate division held that Colorado law governed the relationship. *Held*: Judgment affirmed. Under a correct application of the *Babcock* rule, Colorado had the superior connection with and interest in the issue of recovery in this host-guest relationship. Here, the site of the accident was not merely fortuitous, as it was in *Babcock,* but arose from a relationship formed and created in Colorado. Both parties were residing temporarily in Colorado rather than merely traveling through the state. In addition, Colorado's "guest statute" had the overriding purpose of reserving the assets of negligent host-drivers for injured parties in other cars.

Dissent: Rather than placing undue reliance upon the place of the guest-host relationship, the relevant consideration should

be New York's policy of requiring tort-feasors to compensate guests for negligence. As both parties were domiciled in New York, the automobile was insured in New York, and New York would have the burden of caring for the injured parties, New York law should govern the standard of care required of a host driver.

While the writer of the *Babcock* opinion was the principal dissenter in *Dym*, this resulted not from any disavowal of the "most significant contacts" rule, but from a disagreement over which factors should be given controlling weight. The RESTATEMENT (SECOND), CONFLICT OF LAWS §§ 379, 379a (Tent. Draft No. 9, 1964) supports both opinions. Therefore, the fear of many attorneys over the uncertainty inherent in the rule has been realized. See, *e.g.*, Sparks, *Babcock v. Jackson—A Practicing Attorney's Reflections Upon the Opinion and Its Implications*, 31 INS. COUNSEL J. 428 (1964). This case clearly indicates a reluctance to extend the *Babcock* rule to situations where residents of the state have been absent for longer than a temporary excursion. The most that can be generalized is that the local law of the state where the injury occurred will usually be applied, unless some other state has a greater governmental interest in the relationship, or the specific issue to be determined in the controversy.

Nebraska adheres to the older rule of *lex loci delicti*, under which the relationship between a resident host and his guest is governed by the law of the state where the injury occurred. *Whitney v. Penrod*, 149 Neb. 636, 32 N.W.2d 131 (1948). The comparative merits and disadvantages of adopting the "most significant contacts" rule have been extensively commented on. See 63 COLUM. L. REV. 1219 (1963). Some doubt has been cast on the meaning of the rule by *Murphy v. Barron*, 45 Misc. 2d 905, 258 N.Y.S.2d 139 (Sup. Ct. 1965), where the Pennsylvania law of contribution between joint tort-feasors was applied to a collision occurring in Pennsylvania involving New York residents.

TORT: Recovery For Mental Distress in the Absence of Physical Injury

Korbin v. Berlin, 177 So. 2d 551 (Fla. 1965).

Action by a six year old girl through her guardian and next friend alleging that the defendant knowingly made false statements to her concerning the conduct of her mother. Plaintiff further alleged that the statements were made "for the purpose of causing the plaintiff-child undue emotional stress, mental pain and anguish."

The Supreme Court of Florida reversed and remanded the trial court's decision which held that a suit for emotional distress, in the absence of physical injury, does not state a cause of action.

Infliction of mental distress, as a separate tort, is comparatively recent in origin. See generally PROSSER, TORTS § 11 (3d ed. 1964). The Nebraska Supreme Court in *Kurpgeweit v. Kirby,* 88 Neb. 72, 129 N.W. 177 (1910), held that a suit for emotional distress, in the absence of physical injury, stated a cause of action. This holding was restricted in *LaSalle Extension Univ. v. Fogarty,* 126 Neb. 457, 253 N.W. 424 (1934) to circumstances where the act was done wilfully and maliciously rather than resulting from mere negligence. A further restriction upon this tort action seems inherent in *Korbin,* which requires the act or statement of the defendant be "intended and reasonably calculated to cause the child '*severe* emotional distress.'" (Emphasis added.) *Korbin v. Berlin,* 177 So. 2d 551, 553 (Fla. 1965).

This test of severity adopted in *Korbin* is supported by RESTATEMENT, TORTS, § 46 (Supp. 1948).

Nebraska has not required severity as a basis for bringing the tort action, but only as a basis for the measurement of damages caused by the tortious act. The adoption of severity as a standard, although increasing the burden of proof on valid claims, will undoubtedly minimize the existence of fictitious claims.