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LINDA CHAPMAN, Plaintiff-Appellee, v. AMERIGAS, INC., Defendant-Appellant

Court of Appeals of Tennessee, Middle Section, at Nashville

1989 Tenn. App. LEXIS 528

August 2, 1989, Filed

PRIOR HISTORY: [*1] FROM THE LAW COURT, MAURY COUNTY, THE HONORABLE JIM T. HAMILTON, JUDGE.

COUNSEL: TRACY W. MOORE, MOORE & PEDEN, P.C., Columbia, Tennessee, Attorney for Plaintiff-Appellee.

GEORGE E. COPPLE, JR., Nashville, Tennessee, Attorney for Defendant-Appellant

JUDGES: BEN H. CANTRELL, JUDGE, HOUSTON M. GODDARD, J., WILLIAM C. KOCH, JR., J., CONCUR

OPINION BY: CANTRELL

OPINION

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BEN H. CANTRELL, JUDGE

This is a negligence action to recover for damages to the plaintiff's automobile. The circuit court judge awarded the plaintiff a judgment for property damage plus a Bum for the loss of use of the car.

On January 9, 1987, as plaintiff Linda Chapman traveled along Enterprise Road near Mt. Pleasant, she drove over a large red fire extinguisher in the road. The car sustained damage to its underside most notably to the oil pan.

The plaintiff sued Amerigas, Inc. in the General Sessions Court of Maury County alleging that the company negligently allowed the fire extinguisher to fall from one of its trucks. Amerigas appealed an adverse judgment in the general sessions court to the circuit court.

After the Circuit Court budge rendered judgment for the plaintiff, the defendant made a motion for a new trial or to amend the judgment. [*2] *In an order denying the defendant's motion, the judge made certain findings, including the following finding with respect to liability:*

8. The Defendant, despite contesting liability at the General sessions Court trial of this matter, did not do so at trial in this Court, yet has persisted in contesting Plaintiff's just claims for damages. Defendant has made no payment whatsoever on Plaintiff's behalf as compensation for repairs or loss of use. Defendant's above-mentioned conduct has served to prolong rather than contain the interval of Plaintiff's loss.

Later, however, the court, on its own motion, amended paragraph eight of the findings to read as follows:

8. The defendant and the plaintiff through their counsel, by agreement, prior to the beginning of any testimony, presented to the Court the evidence which would have been presented to show the liability of the defendant. This evidence consisted of the testimony of a witness who would have said he had seen the Amerigas truck parked at the driver's home with a fire extinguisher attached identical to the fire extinguisher which plaintiff ran over; photographs taken of trucks parked at the defendant's parking lot, showing identical [*3] *fire extinguishers attached to the trucks as the fire extinguisher which plaintiff struck. The Court then made a decision, finding defendant to be liable, and the case continued with proof being offered by both plaintiff and defendant as to damages.*

The defendant appealed to this court and filed a narrative statement of the evidence pursuant Tenn. R. App. P.

24(c). Plaintiff's counsel objected to the defendant's proposed statement and set out the plaintiff's own version of the facts. The judge entered an order reciting that "Plaintiff's Narrative Statement of the evidence, along with all exhibits duly marked and entered into evidence, are adopted by the Court pursuant to TRAP 24(e)."

The only part of the plaintiff's statement of the evidence dealing with the liability of the defendant is the first paragraph, which states:

This cause came to be heard on the 22nd day of April, 1988, before the Honorable Jim T. Hamilton, Circuit Judge for the 2nd Judicial Circuit, sitting in Maury County, Tennessee. The issues to be addressed were limited to damages as Defendant did not contest nor deny liability.

Plaintiff's attorney did not attach any exhibits to the statement of the evidence. [*4] *Only two exhibits from the trial in the circuit court appear in the record. One is a copy of a page from the National Auto Research "Black Book" which lists the values of cars similar to the one owned by the plaintiff. The other is an estimate of the cost to repair the plaintiff's automobile.*

Apparently, the clerk of the general sessions court transmitted three exhibits to the circuit court along with the other papers. Two of the exhibits related to the repairs to the car and the other was a police report made by the officer who investigated the accident. The police report contains the following statements:

Linda Chapman ran over a fire extinguisher which had fallen off of a truck being driven by Richard Dugger. The fire extinguisher was laying in the road at Mr. Dugger's driveway. Mr. Dugger lives on Enterprise Road, phone number 379-0132, work phone number is 359-2553. Mr. Dugger's wife advised the truck belongs to Richard's employer. The car received damage to the oil pan and undercarriage.

As this review of the facts shows, the record in this case is hopelessly incomplete. The findings of the circuit court judge (as amended) reflect that the defendant did not stipulate liability. [*5] *But the statement of the evidence, which the circuit court judge also approved, states that the defendant did not contest or deny liability. For this reason, we suspect, the record is woefully inadequate on the liability issue.*

It appears that, at the beginning of the trial in circuit court, the parties stipulated that there was a witness who, if called, would testify that "he had seen the Amerigas truck parked at the driver's home with a fire extinguisher attached identical to the fire extinguisher which plaintiff ran over." Further, although the pictures do not appear in the record, the circuit judge apparently saw some pictures of the defendant's trucks parked at another location with identical fire extinguishers attached to them. The plaintiff then testified that, as she drove along Enterprise Road near Mt. Pleasant early one morning, she suddenly and unavoidably struck a large red fire extinguisher in the road. This is all we can glean from the record on the question of liability.

The accident report introduced in the general sessions court does add a little to the plaintiff's case by identifying the driver of the truck and showing that the spot where the accident happened was [*6] *close to the driveway of the driver's home. But the accident report was apparently not introduced at the trial in the circuit court and was not authenticated by the circuit court. Hence, the report did not become a part of the record. See Gambill v. Middle Tennessee Medical Center, Inc., 751 S.W.2d 145 (Tenn. Ct. App. 1988)*; *Nash v. Love, 59 Tenn. App. 273, 440 S.W.2d 593 (1968)*. In addition, the statement in the report quoting the driver's wife is hearsay and would have been inadmissible in any event.

From the evidence in the record, we cannot sustain a finding of liability on the part of the defendant. There is nothing in the record to connect the truck or the fire extinguisher to the defendant. A showing that the fire extinguisher on the road was identical to the ones carried by the defendant's trucks is not proof that the one on the road actually came from one of the defendant's trucks. Even if that gap in the proof did not exist, there is no proof that the fire extinguisher came to rest on the road through any negligence of the defendant's agents. Therefore, the judgment against the defendant must be reversed.

In the interest of justice, however, we are not satisfied [*7] to stop there. It is obvious that the plaintiff's attorney thought that the defendant had conceded liability. That was, in fact, the ruling of the circuit court judge until seven months after the trial. It is not fair, therefore, to make the plaintiff defend the question of liability on appeal with the record so incomplete. Thus, we are of the opinion that, under the

authority of *Tenn. Code Ann. § 27-3-128* (1980), the cause should be remanded to the trial court for a new trial. *See Baker v. Promark Products West, Inc., 692 S.W.2d 844 (Tenn. 1985)*; *Cocke County Board v. Newport Utilities Board, 690 S.W.2d 231 (Tenn. 1985)*. While we have not reached the question of damages, we note that the briefs raise substantial issues in that area. We, therefore, direct that the new trial cover all issues of damages as well as of liability.

The judgment of the court below is reversed and the cause is remanded to the Circuit Court of Maury County for new trial on all issues. Tax the costs on appeal equally to the appellant and the appellee.