Supreme Court of the State of Washington

Opinion Information Sheet

Docket Number: 73306-6
Title of Case: Linda Blaney V Intn'l Assn of Machinists & Aerospace Workers
File Date: 04/01/2004
Oral Argument Date: 09/18/2003

SOURCE OF APPEAL

Appeal from Superior Court,
County
Honorable Sharon Armstrong

JUSTICES

Authored by Mary Fairhurst
Concurring: Faith Ireland
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Charles W. Johnson
Gerry L Alexander
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No. 73306-6
SANDERS, J. (dissenting) -- I agree with the majority insofar as it holds the trial court erred by instructing the jury "to calculate future earnings `from today until the time Ms. Blaney may reasonably be expected to retire.'" Majority at 7 (quoting Clerk's Papers at 240).1 But this instruction was anything but harmless.
Under a label of de novo review the majority follows directly in the Court of Appeals' footsteps to hold the aforementioned instruction was harmless as a matter of law, basing its conclusion on the lack of any nonspeculative rebuttal evidence proffered by petitioner International Association of Machinist and Aerospace Workers, District No. 160 (District). Majority at 8-9.
In Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 898 P.2d 284 (1995), another Washington Law Against Discrimination case, this court found instructional error. Id. at 310-12. Applying the correct test for harmless error analysis, we remanded the matter for a new trial and said:
"When the record discloses an error in an instruction given on behalf of the party in whose favor the verdict was returned, the error is presumed to have been prejudicial, and to furnish ground for reversal, unless it affirmatively appears that it was
harmless. . . .

"A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case."

Id. at 311 (quoting State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)).
That the majority characterizes the evidence as "speculative" suggests no rational jury could have disagreed with Blaney's proffered evidence that she would have worked until 65 as Blaney testified or 63 as Dr. Lowell Bassett testified. But of course since she had the burden of proof the jury had no duty to credit any of her evidence, even if uncontradicted. Nearhoff v. Rucker, 156 Wash. 621, 626, 287 P. 658 (1930). A jury's "verdict will not be set aside unless the court can say, as a matter of law, that there is neither evidence nor reasonable inference from the evidence to support the verdict." Arnold v. Sanstol, 43 Wn.2d 94, 98, 260 P.2d 327 (1953). Had the jury been properly instructed, it very well could have reached the conclusion Blaney did not meet her burden to prove the duration of her employment by a preponderance of the evidence. It could have found instead she would not have worked until her 63rd or 65th birthday based on the District's evidence that Blaney might have been terminated before such time.

But the instruction above diverted the jury's attention away from any evidence which suggested Linda Blaney might have been terminated prior to her retirement. Based on that instruction the jury had no reason to examine or weigh the District's cross-examination of Dr. Bassett's testimony or the evidence which suggested Blaney's employment might not have run its full course. It was tantamount to a directed verdict on the issue of how long Blaney would work, which should be -- as the majority correctly notes -- an inherently factual question within the sole province of the jury. See majority at 6-7. Depriving the jury of its duty to resolve such a fact is by definition harmful.

Moreover, despite the majority's characterization, the evidence proffered by Blaney was speculative and had to be by its nature. Contra majority at 8. When asked how long she planned to work at Kenworth Trucking Company (her place of employment), she testified, "I plan on working till I'm 65 because I need the, uhm, health insurance. I have diabetes and, uh, not going to be able to buy health insurance, so I - I would imagine that I'm going to be working until I'm 65." 3 Verbatim Report of Proceedings (VRP) at 398 (emphasis added). She further testified that there had been cyclical cutbacks at Kenworth, but that it was "not very likely" she would lose her job due to those cutbacks. Id.

This testimony suggests the possibility Blaney might have lost her job prior to her 65th birthday, or that her diabetes might have prevented her from continuing her employment as a trucker. While it may not have been likely Blaney would have been laid off, it was by no means certain. Furthermore Dr. Bassett testified as an expert economist who opined Blaney would work an additional 12.81 years. 6 VRP at 965. He testified:

So, uhm, I next calculated a sort of average retirement age, and she was just, uh - Ms. Blaney was just age 50. So if you look statistically at how long people work, uh, 62.8 would be an average figure, taking account of the fact that there's always some probability that people will die. There's, uh, a probability that people will be injured. And people typically retire between ages 62 and - and 67. So 62.8 is a - a figure that would take account of all those statistics.

Id. (emphasis added). Expert witnesses are called to the stand for the express purpose of rendering opinions. See generally 5B Karl B. Tegland, Washington Practice: Evidence Law and Practice sec. 702.1, at 3-31 (4th ed. 1999). Unlike the layperson, the expert witness may testify to matters to which he or she has no firsthand knowledge. Id. Although all expert opinions must be grounded in adequate foundation, Walker v. State, 121 Wn.2d 214, 218, 848 P.2d 721 (1993), such opinions are not binding on th jury. Moyer v. Clark, 75 Wn.2d 800, 806, 454 P.2d 374 (1969). Dr. Bassett's testimony was an educated guess at the amount of earnings Blaney would expect to receive. He assumed Blaney would work for an "average" number of years. 6 VRP at 965. By its very nature Dr. Bassett's testimony was, at least to a certain degree, speculative, but more fundamentally it was based on an erroneous instruction that the retirement date was necessarily determinative.

The jury might have reached the same conclusion had a proper instruction been given. But it is not the province of this court to assume it would have done so unless the instruction was "`trivial, or formal, or merely academic.'" Mackay, 127 Wn.2d at 311 (quoting State v. Wanrow, 88 Wn.2d at 237). I would reverse the Court of Appeals and remand for a new trial on damages. Because the majority holds otherwise, I dissent.

1 I do not take issue with the majority's resolution of the tax offset issue. See majority at 9-15.