HULSIZER *v.* JOHNSON-BRENNAN CONSTRUCTION CO.

5-2178 339 S. W. 2d 116

Opinion delivered October 17, 1960.

1. WORKMEN'S COMPENSATION—REVIEW ON APPEAL, FINDINGS BY COMMISSION.—If there is substantial competent evidence to support the finding of the Commission, it will be affirmed on appeal.
2. EVIDENCE—HYPOTHETICAL QUESTIONS, ASSUMING FACTS OUTSIDE OF. —An expert in answering a hypothetical question must base the answer on admitted facts and cannot assume facts contrary to or in addition to the admitted facts.
3. WORKMEN'S COMPENSATION—REVIEW ON APPEAL, ADMISSION OF INCOMPETENT EVIDENCE. — Doctor's answer to hypothetical question assumed a fact contrary to an autopsy made by another doctor. *HELD:* The Commission committed reversible error in admitting the answer as competent evidence.

Appeal from Benton Circuit Court; *Maupin Cummings*, Judge; reversed and remanded.

Little & Enfield, for appellant.

Pearson & Pearson, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a Workmen's Compensation case. Mrs. Alta Hulsizer filed

nation of how he arrived at 15%. Such testimony, as we have heretofore explained, is not substantial to support the figure of $7,500.

Appellees' witness Barry, stating that he took a different approach, estimated the total amount for the taking and damages at $13,400. His explanation of how he arrived at the above figure is not entirely clear. He said that the logical entrance to the forty acres (for subdivision purposes) would be off the Alexander road at the middle of the forty; that this was not now possible since the state had taken the 439 foot frontage; and this would create an engineering problem in platting. After a lengthy explanation of his theory the witness concludes:

". . . if you put the road over this way too far you would have too many lots facing that road that would have to come this way, but this would divide it equally, about 660 feet on two separate blocks. Now this fellow would have to go up here to get out; of course, there could be another road up here between the main service road that would come up here. Then this taking here, this is to form selling lots fronting this road here. Put this on the North 20, and already you have here a paved road available there, but on the South 20 you have to come and build your own road. You have to create your own frontage and here you come in and build your own road to create your new frontage, and that being through 660 feet there is a direct loss to the property owner, because he can't use it because it narrows down too much, he can't use it. That would be 660 feet then less 65 which would be 635 feet at $10.00 a foot would be $6,350.00. This new road would be 635 feet long and at $10.00 a foot to construct this paved road would be an additional $6,350.00. Then to bring the gas line in there would be $1.10 a foot for approximately 710 feet."

From the above it is not clear to us just how appellees would lose 635 foot frontage when the State has taken only 439 feet, nor is it clear why 635 feet of extra road, in addition to what would have to be built in any event

for a subdivision, would be required. This was not explained by the trial court in the finding of facts. At any rate a shadow of unsubstantiality is cast over the entire matter by the last portion of the witness' testimony.

Q. "You know it costs lots of money to develop a subdivision, to put in utilities and paved streets?"

A. "Yes."

Q. "And it's purely a speculative proposition?"

A. "Yes, a subdivider always speculates, he gambles."

Q. "And there's other land closer to Little Rock and closer to Benton that has not been developed?"

A. "Uh-huh."

Q. "That is all."

Speculation is not a sound basis upon which to predicate a verdict, and it cannot take the place of proof. See: *Sadler, Trustee* v. *Scott,* 203 Ark. 648 (at page 652), 158 S. W. 2d 40, cited and approved in *Arkansas Highway Commission* v. *Byars, supra* at 852.

In contrast to the above, we have the expert testimony of the two witnesses on behalf of appellant. Adams, who owns property in Saline County and who stated that he "had experience in buying and selling" in that county, figured appellees' total damage at $161 but was willing to make it $175. His reasons, in part, are set forth in his own words as follows:

Q. "What was the market value of the property after part of it was taken by the Highway Department?"

A. "Actually there is very little difference, if any, in the market value. In fact, by reason of the improved access to the property afforded by the new highway it has made the property a more desirable piece of property to own for further development for most any use it might have."

Watson, an expert witness for appellant, after explaining his reasons, fixed appellees' total damages at $250, and he was also of the opinion that the highest and best use of the property was for housing development purposes.

Having in mind all we have heretofore set out and giving appellees the benefit of all reasonable doubts, we cannot in good conscience say that the substantial evidence in this case supports a judgment in excess of $7,000. In doing so we answer in the negative the questions posed and approved in *Arkansas Highway Commission* v. *Dupree,* 228 Ark. 1032 (at page 1037), 311 S. W. 2d 791, to-wit:

"Must appellate judges close their eyes and their minds to the obvious fact that in a particular case the evidence, from its very nature, could not have been convincing, though it produced a given result? Shall we affirm that such evidence was necessarily substantial because it was favorably acted upon by the jury?"

Therefore, if appellees enter within 17 calendar days a remittitur accepting a judgment in the amount of $7,000, such judgment will be affirmed, otherwise the judgment of the trial court will be reversed and the cause remanded for a new trial.

ROBINSON, J., not participating.

MCFADDIN and JOHNSON, JJ., dissent.

ED. F. MCFADDIN, Associate Justice, dissenting. My dissent is because—as I see it—the Majority of this Court is sitting as an appellate jury and weighing and evaluating the evidence.

This case was tried in a law court. The parties agreed —as they had a right to do—to try the case before the Court without a jury. Our cases are legion to the effect that in such a situation the finding of the Trial Court has the force and effect of a jury verdict, and it is the duty of the Supreme Court to affirm the findings if there is any substantial evidence in support thereof. I submit that there is an abundance of evidence to support the findings

was examined. No evidence of hemorrhage or softening within the brain tissue was noted.

"DIAGNOSIS: Cerebral Hemorrhage." (Emphasis supplied.)

When the case was heard before the Full Commission the transcribed testimony, heard before the Referee, was presented and the only other additional witness was Dr. Riggall, who testified as an expert as to the cause of Ivan Hulsizer's death. There is no claim that Dr. Riggall ever saw Ivan Hulsizer, alive or dead. The doctor stated that he had read a transcript of the testimony before the Referee and was then asked a hypothetical question as to the cause of Ivan Hulsizer's death. The hypothetical question incorporated in it the autopsy report about the brain of Hulsizer:

"And upon opening the cranium free blood covered the whole area of the brain and it was found throughout the cavity extending down into the spinal column. *No ruptured vessels could be demonstrated and no areas indicative of previous trauma* to the head were found and that death resulted from shock due to cerebral hemorrhage." (Emphasis supplied.)

The hypothetical question ended:

"From the foregoing assumed facts, do you have an opinion to a reasonable medical certainty whether the work caused or contributed to the cause of the death of the hypothetical Ivan Hulsizer?"

Dr. Riggall giving an answer covering three typewritten pages concluded that Hulsizer died because of a congenital pathological defect known as a congenital aneurysm. In so concluding the doctor said:

"I find it easy to reconstruct the picture and I am certain from those facts that death occurred from the *rupture of a congenital aneurysm of one of the internal carotid vessels and this was not found by the maker of the post mortem,* because it is on the floor of the brain and could not be seen unless the brain had been removed

and that is the usual method of showing this lesion. (Emphasis supplied.)

Promptly the attorney for Mrs. Hulsizer objected, saying:

"I object and ask that the entire answer be stricken from the record for the specific reason that the autopsy report and report of the autopsy surgeon does not show such defect. He is assuming such defect to be there and that the autopsy surgeon did not do a proper job of autopsy and is presupposing facts without the record and the whole response should be stricken from the record." The Commission allowed the doctor's answer to remain; and therein we consider reversible error to have occurred. It is readily apparent when the autopsy report is compared with Dr. Riggall's answer — as we have emphasized the portions — that he assumed a fact contrary to the autopsy report: *i.e.,* that a blood vessel had ruptured in a portion of the brain not discovered by the doctor making the autopsy. On this assumption — contrary to the autopsy report — Dr. Riggall predicated his conclusion. Dr. Riggall's testimony must be discarded as stating something to be a fact that was not shown on the autopsy report. Dr. Riggall's entire testimony is bottomed on his position that because of his medical experience he knew more about the brain than did the physician who made the autopsy report and that certain facts had to be true as regards the autopsy even though such facts were not shown. Superior knowledge is a wonderful attribute; but an expert in answering a hypothetical question must base the answer on admitted facts and cannot assume facts contrary to or in addition to the admitted facts. That is the vice of Dr. Riggall's testimony.

There are two sources from which an expert can gain facts in a case like this. One is from a personal examination, and the other is the factual statement in the hypothetical question. As previously stated, Dr. Riggall never saw Ivan Hulsizer, alive or dead: so Dr. Riggall's only source from which he could gain facts on which to

testify must be the facts stated in the hypothetical question. As the Supreme Court of Washington stated in *Clayton* v. *Dept. of Labor,* 48 Wash. 2d 754, 296 P. 2d 676:

"If his opinion is based upon a hypothetical question and he assumes the existence of material conditions not established by the evidence or not included in the question or inferable therefrom, he destroys the validity of his answer . . ."

The same Court in *Berndt* v. *Dept. of Labor,* 44 Wash. 2d 138, 265 P. 2d 1037, said:

"It is equally clear that, when an expert who knowns nothing about an individual except what is included in a hypothetical question assumes the existence of certain conditions not included in that question and not necessarily inferable therefrom, he destroys the validity of his answer. See *Rich* v. *Philadelphia Abattoir Co.,* 1947, 160 Pa. Super. 200, 50 A. 2d 534. In that case the expert assumed the existence of arteriosclerosis, which was not established by the evidence. In this case, the expert assumes worries about economic security and a diseased coronary artery, neither of which was established by the evidence or included in the hypothetical question."

In *Atlantic Coast Line R. Co.* v. *Shouse,* 83 Fla. 156, 91 So. 90, the Supreme Court of Florida said:

"The answer of an expert witness to a hypothetical question must be given upon the basis of the facts stated in the question, and without recourse to other facts within his own knowledge. See *Fuller* v. *City of Jackson,* 92 Mich. 197, 52 N. W. 1075; *City of Wichita* v. *Coggshall,* 3 Kan. App. 540, 43 Pac. 842; *Link* v. *Sheldon,* 136 N. Y. 1, 32 N. E. 696; *Burns' Ex'r.* v. *Barenfield,* 84 Ind. 43. But the witness in this case not only declined to answer the question upon the basis of the facts stated, but had recourse, not to facts within his own knowledge, but to an imaginary case of his own construction, built in part from some of the facts embraced in the question, his deductions from conflicting evidence referred to in

the question, and in part from his imagination, and a case which had no basis whatever in the record."

Other courts have recognized the same rule. See *Fidelity & Cas. Co.* v. *Van Arsdale*, Tex. Civ. App., 108 S. W. 2d 550; *Mounsey* v. *Bower*, 78 Ind. App. 647, 136 N. E. 41 and *Ballance* v. *Dunnington*, 241 Mich. 383, 217 N. W. 329, 57 A. L. R. 262. See also Rogers on "Expert Testimony", 3rd Ed. § 54; and 32 C. J. S. 366 *et seq.*, "Evidence", § 557 *et seq.*

The Commission committed error in allowing Dr. Riggall's answer as competent. Therefore, the judgment of the Circuit Court affirming the Commission is reversed and the cause is remanded to the Circuit Court with directions to reverse the Commission's award and remand the cause to the Commission for further proceedings in accordance with this opinion.

GEORGE ROSE SMITH and ROBINSON, JJ., dissent.

GEORGE ROSE SMITH, J., dissenting. I agree that the opinion of an expert witness cannot properly be based upon a set of hypothetical facts for which there is no proof in the record. For instance, in *Payne* v. *Thurston*, 148 Ark. 456, 230 S. W. 561, a medical witness was asked a hypothetical question which included an assumption that the plaintiff had suffered an injury to her left side. There was actually no evidence of such an injury. It was correctly held that the question was defective, for neither the jury nor the court could possibly determine the extent to which the witness's opinion was based upon the fact that was assumed but not proved.

That is not the situation in the case at bar. Here the physician performing the autopsy concluded that the cause of death was cerebral hemorrhage, but he did not attempt to specify the exact spot at which the hemorrhage occurred. On this point he merely reported that the entire brain was examined and that no evidence of hemorrhage within the brain was noted.

Dr. Riggall simply attempted by a process of reasoning to determine the situs of the hemorrhage. He stated

that within the cranium there are only three arteries of sufficient size to produce a hemorrhage such as that disclosed by the autopsy. Two of these arteries are so situated that the jet of blood from a fatal hemorrhage would plow a channel within the brain tissue so large that it could not be missed at the post mortem examination. But, reasoned Dr. Riggall, if the rupture occurred in the third artery—the internal carotid artery—it would account for the condition actually found and yet might not be observed by the maker of the post mortem, as the rupture would be on the floor of the brain and not readily discernible. From this conclusion Dr. Riggall went on to give his basis for thinking that the decedent's work would not have contributed to a hemorrhage within the internal carotid artery.

I think the majority are misapplying the rule which precludes an expert witness from basing his opinion upon a fact not in evidence. If, for instance, this autopsy had contained a positive finding that the hemorrhage took place in one of the two arteries first mentioned by Dr. Riggall, then of course he could not have based his opinion upon an assumption that the damage happened within the internal carotid artery. In that situation the rule in question would be properly applied.

But this is not the case at hand. The autopsy actually contained an affirmative finding of a cerebral hemorrhage, and by definition such a hemorrhage must occur within the brain. But the author of the post mortem report did not attempt to say just where within the brain the hemorrhage took place; he merely stated that no evidence of the hemorrhage within the brain was noted. All that Dr. Riggall did was to attempt by a chain of logic to demonstrate where the hemorrhage probably occurred. His opinion was of course open to contradiction by other testimony and to rejection for want of persuasiveness, but it was clearly admissible. Otherwise we are driven to the patently untenable position that is being adopted by the majority. That position boils down to this: (1) If the autopsy report affirmatively shows the situs of the hem-

orrhage that fact cannot be disputed by expert opinion, for that would contradict the report. But (2) if the autopsy report fails to show the situs of the hemorrhage the missing fact cannot be supplied by expert opinion, for that too would contradict the report. Thus it makes no difference whether or not the post mortem examiner makes a finding of the cause of death, for in either case his report constitutes the final word. I cannot agree with such questionable logic and therefore dissent.

ROBINSON, J., joins in this dissent.