1985

Ronald Lavar Denison v. Alvind D. Chapman : Brief of Appellant

Utah Supreme Court

KET NO. 8554A Civil

IN THE SUPREME COURT
of the
STATE OF UTAH

ROLAND LAVAR DENISON,
Appellant,

— vs. —

ALVIN D. CHAPMAN,
CONTINENTAL OIL COMPANY,
A Corporation, and
DORA HARTLEY,
Respondents

No. 8554
Civil

APPELLANT'S BRIEF

Appeal from the District Court, Utah County,
State of Utah
Honorable Maurice Harding, Judge.

DILWORTH WOOLLEY,
Manti, Utah.

WARREN M. O'GARA,
Salt Lake City, Utah.

Attorneys for Appellant

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STATUTES AD CASES CITED

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ALVIN D. CHAPMAN,
et al.,

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STATEMENT OF FACTS

This action is to recover for damages to property and for personal injuries sustained by appellant in a collision of his station wagon, traveling south in the west outside land of a four lane highway, with a semi-trailer oil truck, which was traveling north with another automobile, with the result that the semi-trailer crossed over the highway into the lanes of southbound traffic and directly in front of the station wagon.

The semi-trailer was owned by Continental Oil Company and was being driven by its employee, Alvin D.

Chapman. The third car was being driven by Dora Hartley.

The accident occurred the evening of February 22, 1955, on U. S. Highway 89-91, at about 20 North Street, in Provo, on the hill which forms the north bank of the Provo River approach. This is a four lane paved highway with gravel shoulders and guard rails on both sides. It is 68 feet wide between the guard rails.

Denison was driving south from Orem toward Provo. He slowed down to about 15 miles per hour as he approached the crest of the hill and did not increase his speed thereafter. Hartley entered the highway on a road coming from the east and was driving up the hill going north, in the outside lane, at about 15 miles per hour, as she testified. Chapman was also going north up the hill and at the time of the collision with the Hartley car he was about one foot west of the dividing line between the two north traffic lanes. He was traveling 35 miles per hour.

Chapman had been on the road all day, starting early in the morning at Woods Cross with a load to Panguitch and reaching the scene of the accident on his return journey. He saw the Hartley car come up to the stop sign and then proceed up the hill in the east lane. He was then driving in the east lane. As he drew toward the Hartley car he moved over into the inside lane so as to pass her. He was going 35 miles per hour. When he reached a point almost parallel with the Hartley car, the latter wavered and slipped and went into a spin into Chapman's lane and the semi-trailer collided with the Hartley automobile. The latter was thrown clockwise to the right and came to rest facing south near the east guard rail; Chapman lost control of his vehicle and it diagonaled across

the south bound lanes, collided with the west guard rail and stopped so as to block both lanes.

Denison coming down the hill in the west lane, as far over as he could get, saw the lights of the semi-trailer as it commenced to cross over, and, feeling that something was amiss and that danger threatened, switched off his ignition and attempted to bring his vehicle to a stop.

The highway on the hill was covered with a coat of ice, and was very slippery clear across the pavement and from the crest to the foot.

The trailer came across so suddenly and the road was so slippery that Denison was unable to bring his station wagon to a stop. He could not pass to the right because of the guard rail and a deep gulch; he could not pass to his left because the trailer blocked both lanes and he could not face oncoming traffic in the east lanes. So he sat tight and collided with the trailer.

The action is against Chapman, driver of the oil tanker, the Continental Oil Company, owner and employer, and Dora Hartley, driver of the third vehicle.

The theory of appellant's case is that both Chapman and Mrs. Hartley were negligent in the operation of their vehicles and that as a proximate result thereof the appellant sustained his damages and injuries.

At the close of our case in chief the court, on motions of respondents, took the case from the jury and dismissed our complaint, holding that we had failed to produce any evidence from which the jury might find that either Chapman or Mrs. Hartley was negligent in any manner; and that the whole series of events was the result of some accident; hence there was no liability.

Appellant feels that there was ample evidence to take the case to the jury on the issues of negligence and proximate cause; and therefore the court erred in granting the motions and dismissing the complaint. So we present to this court the evidence relating to those issues and invoke the ruling of this court as to its sufficiency.

The following is a summary of the testimony of the witnesses relating to such issues:

1. *Richard H. Levin* testified: (Tr. 7)

He is a Provo City police officer; was on duty the evening of this accident. Shortly before the accident he drove up the hill and turned around and was waiting for the traffic to clear so that he could return back south at the time Denison drove out from Orem, and came down the hill behind the Denison car but did not see the collision, but when he got to the top of the grade he could see there had been an accident. (Tr. 10) Other cars were there ahead of him. The oil truck was angled in and locked onto the guard rail with its front bumper. The station wagon had collided with the truck just forward of the traction wheels of the traction unit, between the first and second pair of wheels. (Tr. 11)

The highway was very icy. It was slick enough that a car coming to a stop on the hill and then trying to proceed ahead would have quite a little trouble getting traction. The sheet of ice extended from the top to the bottom of the hill. There was no snow on top of the ice. (Tr. 16)

The right hand wheels of the Denison vehicle were over the edge of the pavement and on the gravel shoulder. (Tr. 16) Witness talked with both Chapman and Mrs. Hartley. Chapman said he was going around 30 to 35

Her car was damaged on the front fender and front wheel, a dent in the back door, and a small dent on the rear fender.

6. *Alvin D. Chapman* testified:

He had driven that day from Woods Cross to Panguitch and back to Provo. He had taken no rest but coffee stops and about an hour and a half to unload. (Tr. 84)

As he approached the hill he saw Mrs. Hartley pull up to the stop sign and stop before entering the highway. He had come up the hill in the right hand lane; but when he saw her pull into the highway and turn north in that lane, he pulled over into the left lane. (Tr. 86)

The whole surface of the highway was covered with slick ice, (Tr. 87) from guard rail to guardrail. It was a very dangerous condition to drive on. Mrs. Hartley did not seem to be having any trouble when he pulled over.

He testified at the trial that he didn't increase his speed on the hill to pass Hartley. (Tr. 88)

But in his deposition he testified that when he first saw her he was going about 20 to 25 miles per hour. (Tr. 88) and that after he first saw her he increased his speed and was going about 35 miles when he overtook her and at the time of the collision with her car. (Tr. 89) He did see her car the instant before the impact. (Tr. 90) He did not see her in the spin. (Tr. 91) He imagined he was right close to the back end of her car when she had trouble. But he could not see the back end of her car. He did not recollect whether or not he saw the Hartley car go into the spin. (Tr. 92) He did not remember whether he tried to turn to his left to avoid the collision. (Tr. 93)

He admitted in his direct examination that he had testified as follows on his deposition:

> "Guess we were about three-quarters of the way up the hill and I don't know what happened to her car, but the first thing I knew she was coming back down the hill, either backwards or sideways and we collided." (Tr. 97)
>
> "and we collided and when her car hit the front of my truck, it just hit the bumper and the front wheel and evidently the front tire because I lost control of the truck and it skidded across the road sideways and I hit the guardrail and the truck slipped up the guardrail kinda so my truck was sitting on an angle and my trailer was following up the road. My trailer was out in the middle of the road and my truck was across the two lanes." (Tr. 97)

He testified on cross examination by his own attorney that a speed of 35 miles per hour was safer for him than 15 miles because of the danger of a spin-out at the lower speed. (Tr. 105)

7. *Roland Lavar Denison* testified:

His car was in good condition; the brakes and steering apparatus were in good working order; he had winter tires on the rear wheels. (Tr. 114) The road was slick in spots before he came to the top of the hill going south; from the top of the hill on down it was slick all over. (Tr. 116) About a quarter of a mile before he came to the top of the hill he took his foot off the gas and the car slowed down. (Tr. 117) Just before he got to the guard rail he noticed another car was slipping, he could see it in another car's lights, and he shifted into second at that point, which was about 12 feet north of the west guard rail. He tried to brake but the car kept going. (Tr. 118-119) The car which he observed was weaving in another

car's lights was in the east lane of traffic. The car was just slipping back and forth, not spinning. (Tr. 120) It was clear over on the east side of the highway. The road was clear of traffic ahead of him. (Tr. 121) When he went into second gear his car slowed down; he thought he was going 25 miles per hour or slower when he made the shift. (Tr. 122) The next thing he noticed the truck was coming across the road, so he turned off his ignition switch. There was nothing more to do. "We hit." He thought the truck was 50 to 60 feet ahead of him when he saw it coming across the road. He did not see the collision between the truck and the Hartley car, nor did he hear it. (Tr. 123) He did not try to turn around the truck to his left because he might collide with northbound cars. He was on the right side of the road as far as he could go. (Tr. 124)

He did not at any time travel at 35 miles per hour after he passed the turn-off road, which was about 782 feet north of the crest of the hill where you can see the rest of the highway. (Tr. 137-138) From the crest of the hill where you can see on down the road to the point of collision is 1,312 feet. (Tr. 139) The sum of those distances is 2,094 feet. At no time did he travel at 35 miles per hour in that distance. (Tr. 139)

8. *Douglas Denison* testified:

He is 11 years old; was riding in the station wagon with his father. Before they came to the road that turns off the car was going 35 miles per hour by the speedometer. (Tr. 148) His father shifted gears before they got to the guard rail. (Tr. 148-149) After he shifted his father cut off the motor. (Tr. 150 About 200 feet before the collision he noticed the speedometer; it was not over 15 miles per hour. (Tr. 151-155)

II.

ARGUMENT

Point 1.

THE EVIDENCE WAS SUFFICIENT TO TAKE THE CASE TO THE JURY ON THE ISSUES OF NEGLIGENCE AND PROXIMATE CAUSE; HENCE THE COURT ERRED IN GRANTING RESPONDENTS' MOTIONS AND IN DISMISSING THE COMPLAINT.

Plaintiff was driving carefully, well within the estimated safe limit for the place. He slowed down at the turn-off, which is about a quarter of a mile back of the crest of the hill where one can see the highway clear down to the foot. When he came to where he could see down the slope he shifted into second gear, and used his brakes as much as they could be used on the ice. His brakes were in good condition and he had winter tires on the rear wheels. He was driving on the extreme west lane, with his right hand wheels on the gravel shoulder feeling for traction. When he saw the Hartley car, over in the east lane, weaving in the light of the truck, he felt there might be trouble, so he turned off his ignition and continued his efforts to slow down by the use of his brakes. He had the right-of-way in his lane. No one had any right to cut in ahead of him from the east at that place and block him off from proceeding down the hill. He had a right to assume that no one would do so. He was alert to what was going on, or so the jury might well have inferred, and paying careful attention to the situation, the road ahead and the traffic. The truck cut in ahead of him, collided with the guard rail and stopped, blocking both lanes of south bound traffic. It came across when plaintiff was within about 50 feet of the point of impact. There

was not anything that plaintiff could do to avoid the collision. He was not negligent.

It is otherwise with respect to respondents. A collision occurred on the two lanes of north bound traffic between the truck and Hartley's car. The north bound lanes were of ample width to accommodate both vehicles, with room to spare. Mrs. Hartley for at least part of the distance after she entered the highway traveled well over on the east side. Chapman started up the hill in the east lane but moved over into the other lane to pass her. He was traveling 35 miles per hour. She said she thought she might have been going 15 or 20. The police officers testified that in their judgment 15 or 20 was the maximum safe speed at that place. The hill was covered with a slick coat of ice, from guard rail to guard rail and from the top to the bottom. Both drivers knew of this condition. It was apparent to them as soon as they started up.

It was not as if one or the other had suddenly come upon a slick spot in an otherwise safe surface, or a pot hole in a pavement which could not be seen until a driver was too close to slow down or turn to avoid being thrown off course, or spot of gravel in an otherwise firm surface.

It was a dangerous highway at that place and both drivers were well aware of the dangers.

There was no traffic immediately ahead of them, to their rear, or on either side to distract their attention.

Their vehicles collided within a foot of the dividing line between the north traffic lanes, as Chapman was in the act of passing the Hartley car. The jury might well have believed that there was plenty of room in his own lane for Chapman to turn to his left to avoid a collision; and that he should have done so, and that he was negligent for not doing so.

It was Chapman's duty in overtaking and passing Hartley to pass to her left at a safe distance. Sec. 41-6-55, UCA, 1953.

It was also his duty to drive at a speed no greater than was reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing, and to control his speed as was necessary to avoid colliding with the other vehicle. Sec. 41-6-46, UCA, 1953.

The jury had a right to find that Chapman did not overtake and attempt to pass Hartley at a safe distance; and to conclude therefrom that he was negligent in this respect, which negligence was the cause of the collision with the Hartley car and also with plaintiff's station wagon.

The jury had the right to find and conclude that the speed of 35 miles per hour was greater than was reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing, and that he failed to control his speed to the extent necessary to avoid colliding with the Hartley car. If they so found, then this was negligence as a matter of law, being in violation of the statute. The jury had the right, furthermore, to find and conclude that this negligence was a proximate cause of the collision between the truck and the station wagon.

At the trial Chapman testified that he did not observe the Hartley car immediately before the collision, his attenion being centered on the business of keeping the truck going and on the road ahead. But he also admitted that he had testified in his deposition that he saw the Hartley car sliding down the hill toward him immediately before the collision and that he did nothing to avoid a collision. From this and the other evidence the jury might well have concluded and found that Chapman was negli-

gent for not paying attention to the Hartley car, which was having trouble making the grade, and in failing to turn to his left or to slow his speed to avoid the accident; or the jury might have found that he in fact did see the Hartley car going into the slide toward his lane and that he was negligent in not taking any measures to avoid the accident. If he saw the Hartley car, over on the east side of the east lane, waving about and sliding toward his lane and even sliding back toward him, the jury had the right to find that he was negligent in not turning to his left in an attempt to avoid a collision.

It taxes credulity to believe that the accident could have happened if both Chapman and Hartley had been driving with due care communsurate with the hazards which they both knew existed.

It is a fact that both these drivers failed to keep control of their vehicles. The jury had the right to find that they were negligent for such failure. The jury had the right to find that Mrs. Hartley was negligent for even trying to negotiate the hill at the time, for it is apparent from her own testimony that she experienced great difficuly in keeping her car under control almost from the moment she entered the highway. The jury had a right to find that due care on her part in the dangerous situation in which she found herself required that she pull over to the side of the road and stop, instead of fighting the wheel and trying to make the grade.

It is manifest from the evidence that Hartley and Chapman by the operation of their vehicles set in motion a chain of events which led directly to the collision between the station wagon and the truck and to the resulting damages to the plaintiff. If Hartley had been driving with due care, if Chapman had not been traveling so fast or if

he had been paying attention and had even tried to avoid a collision, when he saw, if he did see, the Hartley car sliding down the hill toward him, then this accident would not have happened.

It is in evidence that other drivers had successfully negotiated that hill immediately before and immediately after this accident. There is no evidence that any other drivers were involved in accidents there. So it was not impossible to drive up or down the hill. If others could drive successfully over that dangerous highway, it is not unreasonable to conclude that Chapman and Hartley could have done so by the exercise of due care.

It is our contention that there was ample evidence to take the case to the jury upon the two issues, namely, (1) the negligence of Chapman and Hartley; and (2) that such negligence was the proximate cause of the collision between the truck and the station wagon and of the resulting damage to plaintiff. Hence that the court was in error in sustaining the defendants' motions and in dismissing the complaint. The court held as a matter of law that the evidence showed that there was no negligence and that the collisions were wholly accidental and that there was no liability.

The evidence shows how Chapman was operating and the speed of the truck; how Hartley was struggling to get her vehicle up the hill; the highly dangerous condition of the road, of which both of them were aware and saw before they commenced the ascent. It was for the jury to say whether either or both exercised due care in th circumstances; and if not, whether the negligence found was a proximate cause of the damages to plaintiff. These are conclusions of fact to be found by the jury, not conclusions of law to be decided by the court. In deciding

them as matters of law, the court usurped the functions of the jury and denied plaintiff of his right to the judgment of eight citizens on the issues.

There are hundreds of cases in the books in which the subject of skidding motor vehicles is involved. Questions of negligence and proximate cause have been raised in almost every conceivable manner. They all differ on the facts. We find none that can be said to be of controlling weight in this case. We point the way to some of them by citing:

> Barret, et al. v. Caddo Transfer & Warehouse Company, Inc., 165 La. 1075, 116 So. 563, 58 A. L. R. 261; and the annotation commencing at page 264 of the latter volume.
>
> Megan v. Stevens, et al., 91 F. (2d) 419; 113 A. L. R. 992; and the annotation in the latter volume commencing at page 1002.

It is urged that the case should have been submitted, to the jury under the doctrine of Res Ipsa Loquitur even though the Court had determined the matters foregoing against the plaintiff Denison. The facts surrounding this case clearly present a situation bringing into application the doctrine of Res Ipsa Loquitur. The icy condition upon the hill was not a sudden one presented only upon the hill but was generally prevalent. The defendent Chapman was acrossed the path of the plaintiff in the south-bound traffic lanes which could only have been the result of someones negligence. The oil tanker was under the exclusive control of the defendant Chapman and there was no negligent act on the part of Denison which created the situation.

Barrera v. De La Torre 300 P^2 100, California.

It is respectfully submitted that the court erred in taking the case from the jury and dismissing the complaint; and therefore the judgment should be reversed and appellant granted a new trial.

Respectfully submitted.

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