1977

Dorothy Black v. Robert L. McKnight : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

DOROTHY BLACK, Plaintiff-Appellant, vs. ROBERT L. McKNIGHT, Defendant-Respondant.	)	Case No.14724 BRIEF OF APPELLANT

NATURE OF THE CASE

This Appeal raises the issue whether a new trial should be granted to a party (appellant) who was rear-ended in a motor vehicle collision by the respondant's motor vehicle and the Trial Court failed to submit to the jury appellant's two principal theories as to the cause of the collision, which were fully substantiated by both direct and circumstantial evidence.

DISPOSITION IN LOWER COURT

A trial was held before the Honorable G. Hal Taylor, District Judge of the Third Judicial District, sitting with a jury on the 2nd, 3rd and 4th days of June, 1976. A general verdict was returned by the jury finding in favor of the respondant and against the appellant on June 4, 1976. On June 14, 1976, appellant moved for a new trial on the basis of the Trial Court's failure to instruct the jury on appellant's two principal theories of the case. Appellant's motion for a new trial was denied by the

Honorable G. Hal Taylor on July 19, 1976. Thereafter, on August 9, 1976, appellant timely filed a Notice of Appeal to this Court.

RELIEF SOUGHT ON APPEAL

The appellant respectfully requests this Court to grant appellant a new trial.

STATEMENT OF FACTS

On March 5, 1970, at approximately 12:30 a.m., on U.S. Highway 91 in Davis County, state of Utah, a collision occurred between a vehicle driven by the respondant and a vehicle driven by the appellant. (T.3) Visibility was clear and the road conditions were dry. (T. 5) Appellant was traveling en route from Brigham City with her now deceased sister as a passenger, south on Highway 91, in the outside lane of the highway. (T. 4, 6) About a quarter of a mile past the Kaysville elevators appellant noticed a vehicle with flashing red and white lights parked off to the side of the highway in the holding lane. (T. 6) Appellant believed that the vehicle in the holding lane was a patrol car because of the flashing white and red lights. (T. 6) Appellant was traveling approximately 60 miles per hour at this point in time. (T. 6) Traffic at that time of night, on the date of the collision, was moderate. (T. 7) At the time of the collision, Highway 91 was divided by a white dividing stripe separating the southbound and northbound lan

of traffic. (T. 7) There were two lanes for both southbound and northbound traffic. (T. 7)

After appellant noticed the highway patrol car parked off to the side of Highway 91 in a holding lane, (said patrol car was parked in a southerly direction on the same side of the highway as appellant was traveling) appellant noticed two horses walking from the inside lane of traffic to the outside lane of the two southerly lanes of travel on Highway 91. (T. 8) When the horses were approximately in front of appellant's vehicle, appellant slowed down and glanced in her rear view mirror. (T. 8) Appellant saw no lights behind her vehicle at this time. (T. 8) Appellant then signaled a left turn from the outside lane to the inside lane in order not to collide with the horses and to allow them to proceed across the highway. (T. 8)

After the horses had proceeded across the highway, appellant signaled for a right turn from the inside lane to the outside lane of travel. (T. 9) After appellant had signaled, and had entered the outside lane of travel, she consulted her rear view mirror and saw headlights bearing down on her vehicle from the rear. (T.9)

Appellant's vehicle then was struck in the left rear section by respondant's vehicle. (T. 10) The impact of the collision was so violent that it caused appellant's vehicle to flip

over several times causing serious and permanent personal injuries to plaintiff.

It was defendant-respondant's contention at trial that the collision actually occurred in the inside southbound lane of Highway 91 on the night of the collision, which contention was tacitly supported by the eye witness testimony of the police officer whose car was parked in the holding lane next to the highway and who witnessed intermittent movements of the appellant and respondant's vehicles prior to the collision. (T. 24, 61, 62)

Respondant admitted under cross examination that he was in the fourth week of working the swing shift at Hill Air Force Base as a production control specialist. (T. 68, 69, 70). Respondant also admitted under cross examination that the swing shift commenced at 3:30 p.m. and continued until 12:00 p.m. at night. (T. 70) Respondant testified that he observed a vehicle parked in the holding lane, that he noticed white tail lights in the back of the car. (T. 62, 72). Respondant estimated that his speed prior to the collision was between 60 and 65 miles per hour. (T. 73) It was respondant's testimony that he was attempting to overtake appellant's vehicle which was traveling south in the outside lane of travel when appellant's vehicle made an abrupt turn and swerved into respondant's lane of travel. (T. 62) Respondant contended that prior to this abrupt turn appellant gave no manual or mechanical turn signal. (T. 63)

At the conclusion of trial, the Trial Court submitted all of respondant's principal theories as to the cause of the collision with appellant's vehicle in its Intruction No. 13 to the jury. The Trial Court, however, did not submit all of appellant's principal theories as to the cause of the collision. It was appellant's contention that respondant's vehicle was following appellant's vehicle more closely than was reasonable and prudent under the then existing circumstances, and that respondant's vehicle was traveling at a rate of speed greater than was necessary to avoid colliding with appellant's vehicle.

ARGUMENT

POINT I

THE TRIAL COURTS FAILURE TO SUBMIT APPELLANT'S PROPOSED INSTRUCTIONS NO.'S 12(d) AND 13, WHICH WERE BASED UPON SECTION 41-6-62(a), UTAH CODE ANNOTATED, TO THE JURY WAS PREJUDICIAL ERROR.

Appellant assigns as error the trial courts failure to submit to the jury appellant's proposed instructions No.'s 12(d) and 13, which were predicated upon Section 41-6-62(a), Utah Code Annotated.

UTAH CODE ANN., Section 41-6-62(a) (1954), provides:

(a) The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the highway....

Appellant submits that there was abundant, direct and [illegible]stantial evidence illicited at trial sufficient to compel the trial court to submit to the jury the issue embodied [illegible] Section 41-6-62(a) and incorporated in the appellant's [illegible] jury Instructions No.'s 12(d) and 13.

[illegible] trial, appellant proffered the following direct [illegible]:

Q. "O.K. now, why don't you pick up when [illegible] noticed the police car and tell us what happened?

A. O.K. Then as we proceeded down there [illegible] two horses we noticed coming in front of us.

Q. Now, were they large horses, Mrs. Black?

A. Yes. One seemed taller than the other because one was light and one was dark. And this is what made it stand out. First I saw the light horse.

Q. How did you happen to notice that there were horses?

A. Well, I had my lights on high.

Q. And why was that?

A. Because -- well, there wasn't that much traffic. And of course whenever there was a car we would dim, but there wasnt' enough traffic on the north bound freeway to really be a problem. So I was driving with my lights on high.

Q. So the horses were travelling from the inside lane to the outside lane; is that correct?

A. Right, going across.

Q. Were they running or were they walking?

A. They were walking. And they were just about in front of us proceeding on the -- on across, so as I saw them I slowed down and glanced in my rear view mirror. I didn't see any light behind me. I signaled a left turn and moved out around. And of course the horses proceeded on across.

I signaled a right turn and backed in and almost at this time when I glanced up I saw the lights bearing down.

Q. Now, Mrs. Black, when you were in the inside lane, I believe you said you signaled to make a right hand turn to go back into the right hand lane?

A. Right.

Q. And I believe you said you consulted your rear view mirror. Did you have a side view mirror on your vehicle?

A. Yes. I have a side.

Q. Did you use that?

A. No.

Q. Why was that?

A. I am not really secure with the side. I mean I don't feel that this can see all that you need to. And of course the time involved I just glanced up in the rear view mirror and proceeded to make my turn.

Q. Now, when you were in the outside lane originally and you made your left hand turn to the inside lane, did you ever see any headlights? Did you ever see any vehicle behind you?

A. No, sir, not at any time.

Q. And after you were in the inside lane and the horses had passed you and you then signaled to go in the outside lane, did you ever notice any headlights in the mirror?

A. After I proceeded around in this manner in coming back in, and as I looked up I saw headlights bearing down.

Q. O.K.

A. From the rear.

Q. What happened next, Mrs. Black?

A. Well, we were struck on the left, or the left side.

Q. So his right front struck your car?

A. Struck the left.

Q. Left rear of your car?

A. Right." (T. 8, 9, 10)

Appellant submits the fact that the respondant's vehicle collided with the rear end of appellant's vehicle is uncontroverted. (See Exhibit 2-p, 3-p, 4-p, 5-p, 6-p, and 7-p) In addition, respondant's own direct testimony was as follows:

Q. "Then what happened?

A. We collided.

Q. And what portion of your car with what portion of hers?

A. Well, I'd judge about 14 to 18 inches of the front right bumper on my car hit approximately maybe the same area on the left rear bumper of her car." (T. 63)

Appellant contends that the direct testimony of the appellant and the uncontroverted fact that appellant was rear-ended by

respondant's vehicle was sufficient evidence to compel the trial court to submit appellant's proposed jury instructions No.'s 12(d) and 13, which were predicated upon Section 41-6-62(a), Utah Code Annotated. The Jury should have been required to decide whether the respondant was following appellant's motor vehicle more closely than was reasonable and prudent under the existing circumstances, and failure by the trial court to do so, constituted prejudicial error.

POINT 2

THE TRIAL COURT'S FAILURE TO SUBMIT APPELLANT'S PROPOSED JURY INSTRUCTION NO. 14 WHICH WAS PREDICATED UPON 41-6-46(a), Utah Code Annotated, WAS PREJUDICIAL ERROR.

Appellant assigns as error the trial court's failure to submit proposed instruction No. 14 which was predicated upon Utah Code Ann. Section 41-6-46(a) (1954) to the jury. Utah Code Ann. Section 41-6-46(a) (1954), provides:

> No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.

The trial court, however, chose to give only the first sentence of Section 41-6-46(a), in its Instruction No. 19 to the jury.

Appellant submits there was no logical reason for the trial court to bifurcate the "speed" statute in its Instruction

No. 19 to the jury. Appellant contends that the second sentence of Section 41-6-46(a), Utah Code Annotated, incorporates the holding in Dalley v. Mid-Western Dairy Products Co., 80 U. 331, 15 P.2d 309 (1932).

In the Dalley case this court said:

> In this jurisdiction the doctrine is established that it is negligence as a matter of law for a person to drive an automobile upon a travelled public highway, used by vehicles and pedestrians (sic) at such a rate of speed that said automobile cannot be stopped within the distance at which the operator of said car is able to see objects upon the highway in front of him. 80 U. at 336; 15 P.2d at 310.

Also, in O'Brien v. Alston, 61 Utah 368, 213 P. 791 (1923), this Court quoted from Serfus v. Lehi, etc., Ry. Co., 270 [illegible] 305, 113 A. 370, the following:

> [I]t is the duty of a chauffer traveling by night to have such a headlight as is will enable him to see in advance the face of the highway and to discover grade crossings, or other obstacles in his path, in time for his own safety, and to keep such control of his car as will enable him to stop and avoid obstructions that fall within his vision. (emphasis added.)

The net effect of the second sentence of Utah Code Annotated Section 41-6-46(a), is to add the additional speed requirement that "speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance, on or entering the highway...." which is in conformity with the

Dalley and O'Brien cases.

Appellant agrees for the sake of this issue on appeal, that respondant was traveling between 60 miles per hour and 65 miles per hour immediately prior to the accident which is in conformity with respondant's testimony proffered at trial. (See T. 62) Appellant likewise concedes that the posted maximum speed limit along highway 91 on the date of the collision was 70 miles per hour. Therefore, Appellant submits that with these facts taken into consideration, in addition to the facts that it was late at night on a relatively deserted highway; an extremely hazardous situation existed on an unlighted highway; a Utah Highway patrol car stopped off to the side of the highway in a holding lane; its red lights flashing for all passing motorists to observe; that respondant was, if he had been at all observant, forewarned that there was a potentially hazardous situation existing on that particular portion of the highway at that particular time which should have caused him to slow and become acutely aware of the danger. It was proper for the trial court to submit sentence No. 1 of Section 41-6-46(a), Utah Code Annotated, to the jury in light of respondant's resultant collision with the rear end of appellant's motor vehicle.

However, a critical part of that statute is likewise directed to the exact type of circumstance that occurred

in this case. It was appellant's theory that respondant did not properly or reasonably control his speed under the existing conditions so as to avoid colliding with the appellant's vehicle while he was upon the highway on the night of the collision. This was true, notwithstanding the fact that respondant's vehicle was argueably traveling at less than the lawful speed limit at the time of the collision.

Appellant suggests to this Honorable court that it was not only error for the trial court to refuse to instruct the jury on the second sentence of Section 41-6-46(a), Utah Code Ann., in this case, but that in light of the uncontroverted fact that respondant collided with the rear end of appellant's vehicle (an eventuality which is precisely dealt with in the second sentence of Section 41-6-46(a), Utah Code Ann., and which is an eventuality that suggests negligence on behalf of an offending motorist) and appellant's theory that the collision was proximately caused by respondant's failure to heed an officer's warning, (flashing red and white lights) and thereafter to fail to so control his speed, so as to avoid this type of collision, that it deprived the jury of appellant's principal theory of respondant's negligence which was amply supported by direct and circumstantial testimony and uncontroverted facts which should require this court to grant appellant's motion for a new trial.

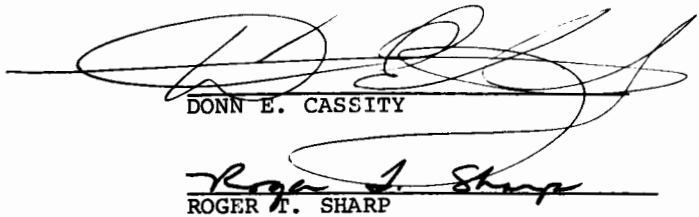
CONCLUSION

The instant case presents a fairly simple form of error on the part of the Trial Court. The Court simply did not instruct the jury on two key issues submitted by appellant as to the cause of collision between appellant's and respondant's vehicles. The two issues were: (1) whether or not respondant's motor vehicle followed appellant's motor vehicle more closely than was reasonable and prudent under the existing circumstances and (2) whether the second sentence of Section 41-6-46(a) dealing with speed causing the collision; should have been submitted to the Jury. The failure of the Trial Court to submit the said issues deprived appellant of submitting her principal theories of the collision to the jury after the same were fully and adequately supported and corroberated by direct and circumstantial evidence.

The absence of instructions on these two critical issues left the jury uninformed on the law relative to appellant's theories which were adequately supported by the evidence, to respondant's negligence pertaining to the collision with appellant's vehicle. A new trial is therefore essential to avoid possible injustice as prejudicial error clearly resulted in failing to instruct the jury on appellant's principal

theories of the cause of the collision.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that I filed ten (10) copies of Appellant's Brief with the Clerk of the Supreme Court and mailed two (2) copies to:

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this 1st day of November, 1976.

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