1977

Thomas Wayne Mccloud v. Maxine Lowe Baum : Brief of Appellant

Utah Supreme Court

Don R. Peterson; Attorney for AppellantsRay E. Ivie; Attorney for Respondent

IN THE SUPREME COURT

OF THE STATE OF UTAH

THOMAS WAYNE McCLOUD, Plaintiff-Appellant,	) :	
vs.	:	Case No. 14,817
MAXINE LOWE BAUM, Defendant-Respondent.	) :	

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH, HONORABLE GEORGE E. BALLIF, PRESIDING

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Smith v. Gellegos, 117 Utah 406, 400 P.2d 520 (1965)

Walker v. Petersen, 3 Utah 2d 54, 278 P.2d 291 (1954)

STATUTES CITED

41-6-73, Utah Code Annotated (1953)

57-7-137, Utah Code Annotated (1943)

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BRIEF OF APPELLANT

NATURE OF THE CASE

This is an action for personal injuries and property damage brought by the appellant, Thomas McCloud, when the motorcycle he was riding collided the automobile driven by the respondent, Maxine Baum, on March 28, 1974. It is claimed that respondent was negligent in the manner in which she operated her vehicle. The respondent denies any negligence on her part.

DISPOSITION IN THE LOWER COURT

The trial court submitted the issues of liability and damages to the jury. The jury found that defendant was not negligent. The appellant's motions for a directed verdict and new trial were denied.

RELIEF SOUGHT ON APPEAL

The appellant seeks to have the judgment of the trial court set aside and the case remanded with an order to enter a directed verdict on the issue of liability, and a new trial on the issue of damages alone.

STATEMENT OF FACTS

The facts of this are quite simple and there is no material

dispute concerning them. On March 28, 1974, at approximately 4:00 p.m., the appellant riding his motorcycle, was returning from work. (R. 281) He had just turned east on Center Street in Provo, Utah, from the old Geneva Road, (R. 281) and proceeded in an easterly direction on Center Street at a speed of approximately 30 m.p.h. (R. 281, 221, 250) The posted speed limit was 35 m.p.h. (R. 213) Center street in this area runs in an east-west direction, with one lane of traffic in each direction. (Ex. #1) The road is level and straight. (R. 2) On this day, the weather was clear and the roads were dry. (R. 280). Even though it was daylight, appellant had his headlight on, as was his custom, in order to be more visible to oncoming traffic. (R 281) After making his turn east on Center Street, appellant found himself behind a large truck carrying a camper. He followed this truck at a distance of some 30 feet. (R. 281, 266) As the truck/camper approached the intersection of 16000 West and Center Street, the driver activated his left turn indicater and moved into the intersection to make a left turn onto 16000 West (R 281, 342) There is some dispute as to whether the truck/camper actually stopped within the intersection or merely slowed down at the intersection and made his turn without stopping. Neither the appellant nor the respondent remember. (R. 271, 297, 305, 342) The only independent witness was stopped to the north of the intersection waiting to make a left hand turn. He stated that the truck never blocked his vision of the motorcycle, but it did block his vision of the respondent's automobile, indicating that the truck had at least partially completed its turn prior to the collision. (R. 272)

The respondent was approaching the intersection of 16000 West and Center from the east. As she neared the intersection, she

activated her left turn signal and came to a stop. (R. 356) She observed the truck/camper approaching with his left turn signal activated. She was able to see no cars behind the truck/camper and so proceeded to make her left turn. (R. 342) In the middle of her turn, she noticed the appellant about to enter the intersection from the west, but by that time it was too late to avoid the imminent collision, and the appellant collided into the respondent's car. (R. 348, 343, 284).

ARGUMENT

POINT I

THE RESPONDENT WAS NEGLIGENT AS A MATTER OF LAW IN FAILING TO YIELD THE RIGHT-OF-WAY AND THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR DIRECTED VERDICT.

At the time of the accident in question in March, 1974, Section 41-6-73, Utah Code Annotated, 1953, provided:

> The driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard, during the time when such driver is moving within the intersection.

As set forth in §41-6-73, U.C.A., the driver of a vehicle executing a left turn must yield the right of way whenever an oncoming vehicle is "within the intersection or so close thereto as to constitute an immediate hazard,. . ." In mandating that the left turning driver yield the right-of-way, the statute places primary responsibility upon the left turning driver to assess the conditions and potential hazards of the intended left turn, and requires that the left turn be attempted only when it is safe to do so. Further, the statute expressly states that if any approaching vehicle is so close to the intersection as to constitute an immediate hazard,

the left turning driver must yield the right-of-way to such oncoming vehicle until it is safe to complete the turn.

The rationale for such a rule is set forth in French v. Utah Oil Refining co., 117 Utah 406, 216 P.2d 1002 (1950), at page 1004:

> [The] burden is placed on the driver making the turn as he has control of the situation, and if there is a reasonable probability that the movement cannot be made in safety then the disfavored driver should yield. The driver proceeding straight ahead has little opportunity to know a vehicle is to be turned across his path until the movement is commenced and in many instances, the warning is too late for the latter driver to take effective action.

Left turns, as with other vehicular movements against the traffic flow, carry with them severe potential hazards. A left turning motorist usually must greatly reduce his speed, often coming to a complete stop in his own lane of traffic. He always changes his direction of travel, but most dangerously of all, he must cross over the lanes of traffic flowing in the opposite direction, risking collision with approaching vehicles. Since it is the left turning motorist who creates the potentially hazardous situation, and since it is the left turner that controls the decision of whether the turn and when to turn, and thus upon his decision exposes himself and oncoming vehicles to the possibilities of a collision, it is proper that the burden and responsibility of assessing the potential dangers involved fall upon him.

Such a rule is sound. It finds its roots in the common law and is based upon common sense and practical experience. (For a case holding that a left turning motorist is required by common law to yield the right-of-way to an oncoming motorist, see Blaylock v. Westlund, 197 Or. 536, 254 P.2d 203 (1953)) Utah has long followed such a rule by statute, (See §57-7-137, U.C.A., 1953, for

predecessor to present statute), and most states have adopted statutes identical or very similar to Utah's statute. See, e.g., Oregon: §115-337 O.C.L.A.; California: Vehicle Code §551; Colorado: §209, Chapter 16, C.S.A. 1935.

The legislative history of the Utah statute controlling left turns reflects the continuing and increasing concern of the legislature with regard to the dangers inherently associated with left turn maneuvers. Section 57-7-137, U.C.A. (1943), read as follows:

> The driver of a vehicle within an intersection intending to turn to the left shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard, but said driver, having so yielded and having given a signal when and as required by this act, may make such left turn and the drivers of all other vehicles approaching the intersection from said opposite direction shall yeild the right-of-way to the vehicle making the left turn.

The above language was carried over word for word into the 1953 code under §46-1-73. In 1961, however, the legislature deleted the following language from that section:

> . . .but said driver, having so yielded and having given a signal when and as required by this act, may make such left turn and the drivers of all other vehicles approaching the intersection from said opposite direction shall yield the right-of-way to the vehicle making the left turn.

In deleting this last phrase of §41-6-73, the Legislature clearly increased the burden placed on the left turning motorist. Prior to the deletion, once the left turner had activated his signal and came to a complete stop, he had the affirmative right to complete his turn once all vehicles had passed which were dangerously close to the intersection when he first entered the intersection. All approaching vehicles which had not been close to the intersection had the affirmative duty to yield the right-of-way.

The 1961 amendment to §41-6-73 also added the following underlined language:

> . . .so close thereto as to constitute an immediate hazard, during the time when such driver is moving within the intersection.

Under this language the left turning vehicle has the express duty to yield the right-of-way to any approaching vehicles that would not only be so close as to constitute a hazard at the commencement of the left turn, but also to any vehicles that would be so close as to constitute an immediate hazard any time.

Justice Crockett, in writing the opinion for the Court in Smith v. Gallegos, 117 Utah 406, 400 P.2d 520 (1965), noted the increased burden imposed on the left turning motorist by the 1961 amendment to §41-6-73, U.C.A. He states:

> The addition of the langauge just quoted clearly places a greater duty on the left turner in that he must yield not only to approaching vehicles close enough to constitute a hazard prior to beginning his turn, but also to vehicles which will constitute a hazard "during the time he is moving within the intersection," which includes the time it will be necessary for him to complete his turn. Smith, supra, at 571.

The 1961 amendment is clearly predicated upon the fact that in most, if not all situations, the left turning motorist not only has greater control over the situation but is also the one who creates any potential hazard. In light of this, the Legislature has determined that the policy of promoting safety on the highways is best served by placing a very heavy burden of responsibility upon the driver wishing to execute a left turn.

While it is clear that the law places the primary responsibility upon the left turning motorist, it does not require the left turning driver to be an absolute insurer of all accidents involving left turning vehicles. To interpret the statute in such a manner

as to find the left turning motorist negligent as a matter of law in every accident involving a left turning vehicle would be illogical, unrealistic, inconsistent with common experience, and would not serve to promote safety. This Court has consistently rejected such a rule. In Walker v. Peterson, 3 Utah 2d 54, 278 P.2d 291 (1954), Justice Crockett writing for the Court said:

> It is recongized that right of way, based on direction of travel, is the best and most easily applied rule as to driver preference at intersections. But in the very nature of things, it cannot be absolute. If it were, in any situation where there was considerable traffic, it would be a practical impossibility to safely make a left turn, no matter how long one waited, nor with what care he proceeded; the driver proceeding directly through would have complete license to commit any kind of negligence and claim the right of way under all circumstances, regardless of speed, lookout, distance away when he observed the left turner, and notwithstanding his own lack of care, always lay the responsibility upon the person making the left turn. It is so plain as to hardly warrant expression that one cannot, consistent with reason and justice, determine beforehand that in every case involving such an intersection collision, the driver making the left turn is solely responsible for the mishap.
> Walker, supra, at 293. (emphasis added)

The appellant does not question the above reasoning, and does not take the position that §41-6-73, U.C.A., requires that a left turning motorist be found negligent as a matter of law in every accident involving a left turning vehicle. There are many conceivable situations when a left turning motorist should not be liable as a matter of law even though a collision occurred while making a left turn. Walker v. Petersen, 3 Utah 2d 54, 278 P.2d 291 (1954) presents such a case. In Walker, the oncoming motorist was speeding excessively. The left turning motorist was clearly visible to the oncoming motorist for a great distance. To find the left turning motorist negligent as a matter of law in such a case, simply because there occurred a collision involving a left turning vehi-

cle, would be tantamount to proclaiming left turning drivers fair game for any motorist who could possibly hit him. Recognizing this, the Court said:

> Under the circumstances here, where the defendant was in the intersection substantially ahead of plaintiff in time, and was making the left turn when the plaintiff was far enough away that ordinary reasonable care would require that he not insist upon claiming the right of way, plaintiff cannot race on into the intersection and rely on it to exculpate himself from wrong.
>
> Walker, supra, at 293.

Similarly, the case of Smith v. Gallegos, 117 Utah 406, 400 P.2d 520 (1965), also involved an oncoming motorist who approached the intersection at an excessive rate of speed. In fact the evidence showed that not only was the oncoming truck speeding as it approached the intersection, it continued accelerating as it entered the intersection. Smith, supra, at 572. In such a case, as in Walker, supra, even though an accident occurred involving a left turning motorist, it clearly would be erroneous to find the left turning motorist negligent as a matter of law by reason of §41-6-73, U.C.A.

It is clear from the Smith and Walker cases that not all accidents involving left turning vehicles should result in finding the left turning motorist negligent as a matter of law. It is equally clear that there are cases where the left turning motorist is negligent as a matter of law by reason of §41-6-73. The narrow fact situation presented by the instant case is clearly such a case.

In the present case, the appellant was so close to the intersection while the respondent executed her left turn as to constitute an immediate hazard within the meaning of §41-6-73, U.C.A., and therefore, the respondent was negligent as a matter of law in

failing to yield the right-of-way. According to testimony elicited from the investigating officer by the respondent's counsel, the respondent's vehicle travelled some 43 feet from the commencement of the left turn to the point of impact. (R. 232) Testimony was also elicited establishing the respondent's average speed to be between 5 and 8 m.p.h. during her left turn. (R. 230, 367) Based upon these figures, it was determined that at 8 m.p.h., 3.6 seconds would elapse from the time the left turn was commenced to the moment of collision. (R. 382) If the respondent's average speed was 5 m.p.h., the elapsed time would have been 5.8 seconds. (R. 382) It was further established that the appellant's motorcycle left 50 feet of skidmarks and that 1.9 seconds of actual braking time was required to leave those skid marks, (R. 234) and, in addition, that it would take approximately 1.5 seconds of reaction time for the appellant to actually succeed in applying his brakes. (R. 222, 253) Adding the actual braking elapsed time (1.9 seconds) to the reaction elapsed time (1.5 seconds), we get 3.4 seconds as the minimum amount of time required for appellant to slow his motorcycle to a speed of 5 m.p.h. at the point of impact. If we assume that the respondent executed her turn at 8 m.p.h., thus requiring 3.7 seconds to arrive at the point of impact, since 3.4 seconds were required for the appellant to brake to a collision speed of 5 m.p.h. at the point of impact, it is obvious that from the moment the respondent commenced her turn, the appellant was so close to the intersection that the collision was unavoidable. Even if the appellant had been able to see the respondent commence her turn, and immediately responded by slamming on his brakes, the collision still would have occurred. In

such a situation the appellant would, without question, be so close to the intersection at the commencement of the turn as to constitute an "immediate hazard".

Now if we assume that the respondent's average turning speed was 5 m.p.h., the difference between the minimum time required for the appellant to slow to a 5 m.p.h. at the point of impact and the time necessary to complete the 43 foot turn to the point of impact is still only 2.5 seconds (5.9-3.4=2.5). If we assume again that the appellant is able to immediately percieve a danger situation and react to it immediately, even if he were able to observe the respondent the instant she commenced her turn, it would still be necessary to severely reduce his speed. This necessary reduction of speed would not be the result of the appellant speeding as in Walker, supra, or Smith, supra. It was clearly established that the appellant was going 30 m.p.h. which is 5 m.p.h. less than the posted speed limit. The reduction in speed would be caused by the respondent turning left in front of the appellant when he was so close that he would be required to immediately and drastically reduce his speed to avoid a collision. Such a reduction in speed would properly be termed an evasive action to avoid a collision.

The above computations clearly show that regardless of whether the respondent's average turning speed was 5 m.p.h. or 8 m.p.h. or something in between (which is most likely), the appellant was so close to the intersection at the time when the respondent commenced her left turn that he had been able to see the respondent when she commenced her left turn, the accident either could not have been avoided at all, or would have been avoided only by the narrowest of margins and only by the appel-

lant taking immediate action to avoid a collision. The appellant submits that he was, therefore, "so close to the turning vehicle as to constitute an immediate hazard" as contemplated by §41-6-73, and that the respondent was, therefore, required by law to yield the right-of-way to him. In failing to do so, she was negligent as a matter of law.

POINT II

RESPONDENT WAS NEGLIGENT AS A MATTER OF LAW IN FAILING TO KEEP A PROPER LOOKOUT IN THAT SHE ATTEMPTED TO EXECUTE A LEFT TURN WITHOUT ASCERTAINING WHETHER IT WAS SAFE TO DO SO. THE TRIAL COURT, THEREFORE, ERRED IN DENYING THE APPELLANT'S MOTION FOR A DIRECTED VERDICT.

The respondent claims that she did not see the appellant approaching and, therefore, did not realize that he was so dangerously close. Such a response does not excuse her from complying with the provisions of §41-6-73. Such a response is merely an admission of her further negligence in failing to keep a proper lookout. It was not impossible for the respondent to see the appellant approaching, she simply failed to make the necessary effort to showly move to a position that would have allowed her to observe any approaching vehicles.

In the present case, the respondent's view of oncoming traffic was at least partially blocked by the oncoming truck/camper that was about to turn left in front of the respondent. (R. 343) The respondent states that she looked to see if any cars were coming, and seeing none, she made her left turn. (R. 342) But when one's vision is blocked as the respondent's admittedly was, it is not enough to merely look in the general direction of the approaching traffic and then commence turning. The proper rule

in such a case is that upon entering an intersection, if one's vision is blocked, one has the duty to cautiously move to a position where he can effeciently observe traffic, stop again and make an effective observation, and then proceed only when it is safe to do so. In Rey v. Transport Indem Co., 23 Wis. 2d 182, 127 N.W.2d 251 (1964), it was held that when one's vision is so blocked upon entering an intersection, it is negligence as a matter of law to fail to follow such a procedure.

Had the respondent followed the above rule, she would have had a clear view of the road ahead. She could have observed the appellant who was about to enter the intersection, and the accident would have been avoided. Her failure to so act amounted to negligence as a matter of law.

The above rule is sound. It is not a great burden to require a left turning motorist who, upon entering an intersection, finds his vision blocked by an obstruction, to move to a position where he can effectively observe all approaching traffic. Such a procedure would require only an additional one or two seconds and would effectively reduce the possibility of a collision between a left turning vehicle and oncoming traffic. The current popularity of campers, vans and large motor homes make such a rule even more important. A truck with a camper, a large van, or a motor home can easily obscure many types of vehicles, not only motorcycles, but also many smaller cars that are seen with such increasing frequency on the highways. To not require left turning motorists whose vision is blocked by an obstruction to move to a point where the vision is no longer obstructed before attempting to complete a left turn, will only serve to invite an increasing number of accidents involving smaller cars and motorcycles, which are

easily hidden by larger vehicles.

CONCLUSION

Section 41-6-73, U.C.A., requires that left turning motorists yield the right-of-way to approaching vehicles that are within the intersection or so close to the intersection as to constitute an immediate hazard. The appellant was "so close to the intersection as to constitute an immediate hazard" within the meaning of the statute, and, therefore, the respondent was negligent as a matter of law in failing to yield the right-of-way. Further, the respondent was negligent as a matter of law in that she attempted to turn left while her view of oncoming traffic was blocked. Had she made a minimal effort to get a clear view of the oncoming traffic, she would have observed the appellant who was about to enter the intersection and the accident would have been avoided. The appellant, therefore, respectfully urges that this Court vacate the verdict of the lower court and render judgment for the appellant on the issue of liability and remand the case on the issue of damages.

Respectfully submitted this 11th day of April, 1977.

DON R. PETERSEN, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Appellant

MAILING CERTIFICATE

I certify that on the 11th day of April, 1977, I mailed two (2) true and correct copies of the foregoing Brief of Appellant to Ray H. Ivie, Attorney for Respondent, 48 North University Ave., Provo, Utah 84601.

DON R. PETERSEN