2001

Walter G. Henderson v. Harry R. Meyer : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

WALTER G. HENDERSON and
HELEN L. HENDERSON, his wife,
Plaintiffs and Appellants,

- vs -

HARRY R. MEYER and RONALD
EUGENE MEYER,
Defendants and Respondents.

Case No.
13702

BRIEF OF RESPONDENTS

Appeal from the Judgment of the
Second District Court for Davis County
Honorable Thornley K. Swan, District Judge

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INDEX

CASES CITED

INDEX (Continued)

STATUTES AND TEXTS

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Brief of Defendants-Respondents

NATURE OF THE CASE

This was an action against the defendants-respondents (hereafter called defendants) by plaintiff-appellant, Helen L. Henderson, (hereafter called plaintiff) for damages for her claimed bodily injuries and by plaintiff-appellant, Walter G. Henderson, for damages for his claimed property damage and which was alleged to have resulted from a two-car automobile accident that occurred in Bountiful, Utah, on April 22, 1972.

DISPOSITION IN THE LOWER COURT

The trial of the case was heard before the Honorable Thornley K. Swan, District Judge, in and for Davis

County, Utah, sitting with a jury, and on March 21, 1974, the jury returned a verdict of no cause of action in favor of both the defendants and as against both plaintiffs, and judgment was duly entered thereon. Subsequently, plaintiffs filed a Motion for Judgment N.O.V., or in the Alternative for a New Trial and, after hearing, the Honorable District Judge denied said Motions.

RELIEF SOUGHT ON APPEAL

Defendants seek affirmance of the jury verdict and judgment entered thereon by the Lower Court.

STATEMENT OF FACTS

The defendants do not agree with the Statement of Facts as contained in the appellants' Brief since the facts are not fully set forth therein and, to the extent they are, they are not stated in the light most favorable to the prevailing party on this appeal, that being the defendants. A full Statement of the Facts will be set out hereafter and in the body of the Argument following Point I. Because of this, and to avoid repetition, they will not be recited here.

ARGUMENT

POINT I

THE FACTUAL ISSUES DECIDED BY THE JURY IN THIS CASE WERE PROPERLY SUBMITTED TO IT AND THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT.

On the subject matter of liability, the only issues which the jury was called upon to decide were whether

or not the defendant, Ronald Eugene Meyer, (hereafter called Ronald Meyer or Mr. Meyer), was negligent immediately prior to the accident in question and, if so, whether his negligence proximately caused the accident in question and the injuries and damages claimed by the plaintiffs. No claim was made at the trial by the defendants that the plaintiffs were contributorily negligent. Also, it was conceded at the trial that if Ronald Meyer (who was 17 years old at the time of the accident) was liable, that so was the other defendant, Harry R. Meyer, who was his father. This was so since the latter owned the vehicle being driven by his son, Ronald Meyer, and, further, since the father had also signed the son's application for driver's license. Therefore, and by reason of the ownership and the signing, the father was responsible for any liability of the son and under 41-2-22 U.C.A., 1953, and 41-2-10 U.C.A., 1953, respectively.

Prior to considering the evidence relating to the disputed issues of liability in this case, it is appropriate to have in mind certain principles. One of these is the well-established rule that since the jury found the issues in favor of the defendants, they are entitled to have this Court consider all of the evidence, and every inference and intendment fairly arising therefrom in the light most favorable to the defendants' position. *Toomer's Estate v. Union Pacific Railroad Company,* 121 Utah 37, 239 P.2d 163; *Lewis v. Rio Grande Western Railway Company,* 40 Utah 483, 123 P. 97. Another principle which should be kept in mind and which is also well-established is that the determination of facts under our judicial system is left exclusively to the jury and its determination thereon

is final excepting only where the evidence is so clear that all reasonable minds would find one way and so that a verdict contrary thereto must have resulted from passion or prejudice, or misconception of the law or the evidence, or in arbitrary disregard thereof. *Lemmon v. Denver & Rio Grande Western Railroad Company,* 9 Utah 2d 195, 341 P.2d 215.

As is frequently the situation on appeals of this kind, the party against whom the jury found seeks to have this Court substitute its judgment on the facts for the judgment of the jury. Therefore, and rather than stating the facts in the light most favorable to the defendants, the plaintiffs in their Brief have often stated facts in the light most favorable to them. The following is believed to be a fair statement of the material facts in this case bearing on the disputed issues of liability and in the light most favorable to the defendants. All of the facts hereafter stated are from the trial testimony of Ronald Meyer (Tr. pp 52-60) and except as otherwise indicated by a reference to another portion of the Transcript.

The plaintiff, Helen L. Henderson, brought this action for damages for her personal injuries. The 1964 Mercury automobile which she was driving at the time was registered in her husband's name, Walter G. Henderson, he being the other plaintiff. He was not in the vehicle at the time of the accident, and his sole claim in this lawsuit was for a small amount of property damage to the vehicle.

The accident in question occurred about noon on Saturday, April 22, 1972, and it was a two vehicle accident with the left front of the Meyer vehicle colliding with the right rear of the Henderson vehicle (Tr. p 44). Prior to the collision, both vehicles had been northbound on 200 West in Bountiful, Utah. That street has one lane each way for north and southbound traffic. The accident occurred in the block on 200 West between 400 South Street to the south of where the accident occurred and 300 South to the north. Both Fourth and Third South are streets traveling east and west and which intersect at right angles to 200 West. Although not precisely stated in the record, it appears that the point of the collision occurred in the northbound lane on 200 West and approximately mid-way between Fourth and Third South Streets.

To the west from the point of collision was a Norge Town Cleaners into which Mrs. Henderson was intending to turn left (Tr. 71). She claimed that she had come up and had been stopped waiting for southbound traffic to go by before proceeding to make her left turn (Tr. 71). Ronald Meyer testified that he thought Mrs. Henderson was stopped when he first saw her, although he also testified that he thought she had just stopped since her rear bumper was still high.

Mr. Meyer testified that as he was proceeding north on 200 West and just as he came through its intersection with Fourth South that he first saw a white Rambler station wagon to his right which was exiting from a drive-in parking lot on to 200 West. At that time, Mr. Meyer's speed was about 30 miles per hour and the speed

limit on that street at that time was 35 miles per hour. When Mr. Meyer saw the Rambler it was traveling from east to west at right angles to him. He observed it while it traveled a distance of approximately 100 feet and its course was such that it was coming west toward where he would be passing it northbound on 200 West. Mr. Meyer testified that just before he got to where the Rambler was exiting on to Second West and from this driveway that he honked his horn at the Rambler. That car then entered 200 West and with its front door about over the gutter on the east side of the street. Mr. Meyer testified that he moved to his left to avoid this Rambler and "in case he [Rambler] did come out in the road after I [Meyer] honked my horn" (Tr. 57). However, the Rambler stopped. As Meyer passed in front of the Rambler, he looked to his right rear out the rear window of the pickup truck he was driving. Meyer didn't know how long he looked, but it was only as he passed. When he looked back to the road in front of him, the Henderson vehicle was too close for him to be able to stop without hitting it. Considering the position Mr. Meyer had observed her bumper in and indicating that she had just stopped, it may have been that Mrs. Henderson slowed and stopped her vehicle during the brief period Mr. Meyer's attention was diverted by the Rambler. Immediately upon seeing her, Meyer applied his brakes and swerved to his right. His travel speed had been approximately 30 miles per hour and the investigating officer estimated from Meyer's skid marks that the latter had reduced his speed to approximately 15 miles per hour at impact (Tr. p 51). The extremely minor damage to the

rear of the Henderson vehicle and as shown in the photograph of it admitted into evidence (defendant's Exhibit 1 in envelope attached to p. 24 of Rec.) may well have caused the jury to conclude that Meyer's speed was even less than 15 miles per hour upon impact.

It is clear from the testimony of Meyer that he was concerned as he was traveling north that the Rambler might enter the street and collide with him and as a consequence thereof, his attention to the road ahead of him was diverted away for a brief period. Moreover, and on this point, Mrs. Henderson herself testified that immediately after the accident that she had heard Mr. Meyer tell the investigating officer that "he [Meyer] thought the car [Rambler] was going to hit him" (Tr. 74).

Because of this claimed danger to Mr. Meyer from the Rambler, the Court included among its instructions to the jury the standard one on "Sudden Peril" that is No. 15.4 from JIFU. (Court's Instruction No. 21A Rec. p. 59). In essence, that instruction told the jury that if they believed that Mr. Meyer had been suddenly confronted with peril arising from either the actual presence or the appearance of imminent danger to himself that he was not required to use the same judgment and prudence as would have been required of him in the absence of that peril. No objection or exception was made or taken to the giving of this instruction to the jury and it is obvious that no legitimate objection could have been made since the evidence fairly presented an issue involving that instruction.

It is evident from the foregoing recitation of facts, and as applied to the law, particularly this "sudden peril" situation, that the issue of Mr. Meyer's negligence was one to be decided by the jury and that the trial court would have committed prejudicial error had it directed liability in favor of the plaintiffs and as against the defendants as a matter of law. The jury may well have concluded upon the evidence, and obviously did, that the danger posed to Mr. Meyer by this Rambler heading toward 200 West and on a collision course with Meyer's own vehicle was sufficient to excuse his inattention to the road ahead of him and for the brief period of time that he was inattentive. Moreover, the jury may well have concluded that the period of Meyer's inattention was indeed brief and that had his attention not been diverted away by the danger posed by the Rambler that the accident would not have occurred. The jury may well have believed that even with the peril from the Rambler that Meyer was able to slow his vehicle from the speed it had been traveling and by 15 miles per hour and perhaps more. He was also able to turn his vehicle to the right and so that only approximately one-half of his vehicle collided with approximately one-half of the rear of the other vehicle. On this evidence, the jury may well have concluded that had Meyer not been diverted by the Rambler for perhaps one or two seconds that he would have been able to have stopped or turned and so as to have completely avoided the accident in question. In other words, the jury on the Trial Court's instructions may have concluded that the accident resulted from the sudden peril of the Rambler rather than from any negligence on Mr. Meyer's part.

Considering all of the evidence and the inferences that may have been reasonably drawn therefrom by the jury, it is apparent that this was a case where the jury was justified in excusing Mr. Meyer's rear-ending of the Henderson vehicle and because of the "sudden peril" that the jury believed resulted from the presence of the Rambler. Although they do not involve the "sudden peril" doctrine, it is respectfully submitted that this Court has held that a jury question exists on an issue of liability in an automobile accident case and in at least two cases involving vehicular collisions where any issue of liability was more doubtful than it is in this instant case. *Fairbourn v. Lloyd*, 21 Utah 2d 62, 440 P.2d 257; *Gibbons v. Orem City Corp.*, 27 Utah 2d 184, 493 P.2d 1280.

In reviewing the record of this case relating to the issues of liability, the members of this Court may well conclude that had they sat on the jury that they would not have reached the verdict the jury did. Counsel for the defendants would be less than candid if he did not admit that the jury verdict came as a surprise to him and that a contrary verdict had been expected. It was apparent that counsel for the plaintiff was even more surprised in this regard and this expectation possibly explains his failure to even request of the Court prior to the submission of the case to the jury that the issues of liability be withdrawn from the jury and as will be discussed more fully under Point II hereafter. Nevertheless, the test is not what is expected or probable, but it is rather whether there was any competent evidence to support the verdict that was returned. In the instant case, a unanimous jury found, in effect, that

Ronald Meyer was not negligent. Obviously, the Trial Judge believed that the jury was within its prerrogative in reaching that verdict or he would not have submitted the issues to them, nor would he have allowed the verdict to stand thereafter and in the face of the post-trial motions that were made by the attorney for the plaintiffs. On this subject matter of the proper function of the court and jury and under our judicial system, this Court had the following to say in the case of *Stickle v. Union Pacific Railroad Company,* 122 Utah 477, 251 P.2d 867, at 871:

> "Courts, as final arbiters of law, could arrogate to themselves arbitrary and dangerous powers by presuming to determine questions of fact which litigants have a right to have passed upon by juries. Part of the merits of the jury system is its safeguarding against such arbitrary power in the courts. To the great credit of the courts of this country, they have been extremely reluctant to infringe upon this right, and by leaving it unimpaired have kept the administration of justice close to the people. Of course, the rights of litigants should not be surrendered to the arbitrary will of juries without regard to whether there is a violation of legal rights as a basis for recovery. The court does have a duty and a responsibility of supervisory control over the action of juries which is just as essential to the proper administration of justice as the function of the jury itself. Nevertheless, we remain cognizant of the vital importance of the privilege of trial by jury in our system of justice and deem it our duty to zealously protect and preserve it."

POINT II

PLAINTIFFS FAILED TO MAKE ANY MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF THE EVIDENCE AND THEY ARE NOW FORECLOSED THEREBY FROM CLAIMING THAT THE ISSUES OF LIABILITY SHOULD NOT HAVE BEEN SUBMITTED TO THE JURY.

Rule 50(a) of the Utah Rules of Civil Procedure provides that a party may move for a directed verdict in his favor and at the close of the evidence. That rule further provides that "a motion for a directed verdict shall state the specific ground[s] therefor." Rule 50(b) U.R.C.P. makes clear that a Motion for a Judgment N.O.V. is only appropriate where "a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted" Rule 50(a) and (b) of the Federal Rules of Civil Procedure, and upon which our Utah Rules of Civil Procedure were based, are identical and as they relate to the language of those rules at issue in the instant case.

As argued under Point I above, defendants contend that the evidence was ample to justify the Trial Court in submitting the issues of liability in this case to the jury. However, and even if this Court were to reject the defendants' argument under Point I above and were to hold as a matter of law that all reasonable minds must have concluded on the evidence that Ronald Meyer was negligent and that his negligence proximately caused the accident, still, the plaintiffs are now foreclosed to make that argument. This is so because the plaintiffs failed to properly request of the Trial Court and at the close of the evidence, a directed verdict in their favor and as against the defendants. Not having made that motion or

request anywhere in the record either orally or in writing, the plaintiffs cannot now complain that the issues of the defendants' liability were improperly submitted to the jury and because of insufficient evidence. Moreover, it is very clear from the law that will be hereafter cited that there is no basis under which the Court could have granted a Judgment N.O.V. and where a request or motion for a directed verdict was not made at the close of the evidence and prior to the time the jury retired to deliberate.

In order to have the complete record of all proceedings in the trial of this case before this Court on appeal, the defendants designated as record on this appeal not only the testimony of all witnesses at the trial, but also "the record of all discussions among counsel, among counsel and the Court, and every other portion of the record stenographically transcribed * * *" (Rec. 103). This was done to conclusively demonstrate to this Court that at no time upon the record did plaintiffs or their counsel in writing or orally request of the Trial Court that it direct a verdict in their favor and in the manner clearly required by Rule 50(b) U.R.C.P.

It is further true that plaintiff's attorney ~~excepted to~~ during the course of the trial (not "at the close of the evidence" as required by Rule 50) did submit his request that the jury be instructed as follows:

> "You are instructed to return a verdict in favor of plaintiff, Helen L. Henderson, and against defendants on the issue of liability." (Rec. 26)

It is further true that plaintiffs' attorney excepted to the Trial Court's failure to give that instruction (without

stating any reasons for so excepting) and after the jury had retired to deliberate (Tr. 196). Of course, following the trial and within the time permitted by the Utah Rules of Civil Procedure, the plaintiffs did move the Court for a Judgment N.O.V. or in the alternative for a new trial and it was then and only then that the plaintiffs ever contended that the issues of the defendants' liability should not have been submitted to the jury and on the grounds that all reasonable minds would have to have concluded that Ronald Meyer was guilty of negligence as a matter of law and that his negligence proximately caused the injuries and damages to the plaintiffs. In other words, the plaintiffs waited until about one week after the jury had reached their decision on liability before it was ever contended to the Trial Court that this issue of liability wasn't properly before the jury. As will appear from the cases referred to hereafter, it would be improper under these circumstances to allow the plaintiffs to now contend that the issues of liability were improperly submitted to the jury.

The only possible basis that the plaintiffs have for contending that they made a Motion for a Directed Verdict in the Trial Court would have to be predicated upon their requested Instruction No. 1 which is quoted above. It is interesting to note that the only request contained in that requested instruction relates to plaintiff, Helen L. Henderson, and no request is made for the other plaintiff, Walter G. Henderson. Although his claim is relatively minor and involves only a small amount of property damage, it is apparent that no possible basis exists for contending that any motion for a directed verdict was made in his favor and as against the defendants

and even if this Court were to hold that requested Instruction No. 1 qualifies as a Motion for a Directed Verdict under Rule 50 U.R.C.P.

It is also significant to note that not only did the plaintiffs in this case fail to properly request that the issues of the defendants' liability be taken from the jury, but they even submitted instructions to the Trial Court concerning their theories as to how the issues of Ronald Meyer's negligence should be presented to the jury. Plaintiff's requested Instruction No. 2 defines negligence and was given by the Court (Rec. 27). Plaintiffs' requested Instruction No. 5 is a detailed statement of the manner in which the plaintiffs believed Ronald Meyer to have been negligent and it was also given in substance by the Court (Rec. 29). It is submitted that these requested instructions compound the problem that exists by reason of the plaintiffs' failure to properly move for a directed verdict. That is, not only was no such motion made, but they then requested that the Trial Court give instructions on the very subject matter they are now contending should have been withdrawn from the jury. Under these circumstances, it is respectfully submitted that it would be a poor precedent indeed to charge the Trial Court with prejudicial error in having submitted the issue of negligence to the jury.

Counsel for defendants has not been able to find any Utah cases that have interpreted Rule 50 and on the point at issue. However, there are a number of Federal cases that have ruled upon this issue and which are believed to be squarely in point and considering that the

Utah and Federal rules are identical on this subject matter. Some of these cases are *Guglielmo v. Scotti & Sons, Inc.*, 58 F.R.D. 413 (1973); *Brandon v. Yale and Towne Manufacturing Company,* 220 F. Supp. 855 (1963), Affirmed per curiam at 342 F.2d 519 (1965); *Massaro v. United States Lines Company,* 307 F.2d 299, (1962); *Eisenberg v. Smith,* 263 F.2d 827 (1959), Cert. Denied 360 U.S. 918.

In *Guglielmo v. Scotti & Sons, Inc., Supra,* the Court held that Federal Rule 50(a) required a party to move for a directed verdict at the close of all the evidence in order to preserve its right to move for a judgment N.O.V. after the verdict. In that case, the fact that one of the parties chose not to move for a directed verdict at the close of all of the evidence foreclosed any consideration of its later request for a judgment N.O.V. Also, in that case, the party appealing had made some request for specific charges to the jury which it claimed had constituted a motion for a directed verdict. The Court held otherwise and found that the specificity requirement of Rule 50(a) had not been met.

In *Brandon v. Yale and Towne Manufacturing Company, Supra,* one of the parties had requested an instruction to the jury which was very similar to the plaintiffs' requested Instruction No. 1 in the instant case. The requested instruction from the *Brandon* case was as follows:

> "Under all the evidence in this case, your verdict must be in favor of the defendant."

The party who had requested that instruction in the *Brandon* case contended that this request constituted a motion for a directed verdict under Rule 50 F.R.C.P. The Court held otherwise and stated:

> "Such a request is unspecific in its terms and does not meet the requirements of Rule 50(a) * * *"

This same kind of situation was involved in the case of *Massaro v. United States Lines Company, Supra.* In the *Massaro* case, the Court had the following to say on this subject matter:

> "United sought, as we have said, judgment n.o.v. against Northern Metal. But United made no motion for a directed verdict under Rule 50(a). We therefore do not have the question of the sufficiency of the evidence before us. [Citations omitted] A motion for a directed verdict is a prerequisite of a motion for judgment n.o.v. [Citations omitted]
>
> "We cannot deem United's request for charge No. 9 as affording it aid in its predicament. Request for charge No. 9 was as follows: 'Under all of the evidence, your verdict in the third-party action must be in favor of the third-party plaintiff'. Such a request does not meet the requirements of Rule 50(a) for the request in its terms is unspecific and was made at the beginning of the trial. It was waived when it was not renewed at the close of the evidence."

To the same effect is certain language from *Eisenberg v. Smith, Supra,* which is as follows:

> "The Government next says that the plaintiffs are not entitled to consideration of their motion

for judgment notwithstanding the verdict, because they made no motion for a directed verdict at the conclusion of the presentation of all the evidence. F.R. Civ. P. 50(b), 28 U.S.C., provides that '* * * a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict * * *' Rule 50(a) states that 'A motion for a directed verdict shall state the specific grounds therefor.' These plaintiffs, in the first of their requested points for charge to the jury, did ask for the following: 'On the basis of the evidence and the applicable law, you are directed to find a verdict for the Plaintiffs.'

"This request, thrown in along with a considerable list of points for charge, is not, we think a compliance with the rule as stated in Section 50(a) and quoted above. *It certainly gives the trial judge no hint of what the position of the party making the motion is, except that he wants the lawsuit decided in his favor. The purpose of the rule requiring the stating of grounds is, of course, to let the trial judge and opposing counsel see what the problem is so that the decision will be the best that can be had.* [Citations omitted]" (Emphasis Supplied)

It is evident that the purpose for requiring compliance with Rule 50 in Utah, as well as in the Federal system, is as stated above in the language from the *Eisenberg* case. How can the trial judge possibly be expected to take the case from the jury on the issues of Meyer's negligence and proximate cause where he is not even requested to do so prior to the jury's retiring to deliberate and where, in fact, he has been requested

to instruct the jury on theories of negligence propounded by the very parties who are now contending that those issues should never have been submitted to the jury.

Although not squarely in point to the instant case since the procedural questions raised there were somewhat different than here, it is nevertheless believed that dicta in the Utah case of *Brigham v. Moon Lake Electric Association,* 24 Utah 2d 292, 470 P.2d 393, is helpful to the resolution of this case. In the *Brigham* case, this Court stated at 24 Utah 2d 294:

> "An appellate court ought not to do that which was not requested of the trial court. The recent case of *Price v. Sinnott,* 460 P.2d 837, 841 (Nev. 1969), states the law:
>
> > '* * * It is solidly established that when there is no request for a directed verdict, the question of the sufficiency of the evidence to sustain the verdict is not reviewable. [Citations omitted] A party may not gamble on the jury's verdict and then later, when displeased with the verdict, challenge the sufficiency of the evidence to support it.'
>
> "In the case of *Christensen v. Stuchlik,* 91 Idaho 504, 427 P.2d 278, 280, 281 (1967), the court said:
>
> > 'The failure of the appellant here to present to the trial court a motion for directed verdict not only foreclosed the trial court from consideration of his motion for judgment notwithstanding the verdict, but under decisions interpreting the Federal Rules of Civil Procedure, such failure precludes the appellate court from reviewing the sufficiency of the evidence to sustain the verdict. * * *' "

CONCLUSION

The issues of liability were properly submitted to the jury under appropriate instructions from the Court and there was sufficient evidence to justify its verdict in favor of the defendants and against the plaintiffs. Even if there had not been sufficient evidence, the plaintiffs are in no position to complain at this point and inasmuch as no Motion for a Directed Verdict at the close of the evidence was made by the plaintiffs and pursuant to Rule 50 U.R.C.P.

The judgment based upon the jury verdict should be affirmed.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing Brief to Anthony M. Thurber and Thomas A. Jones, Attorneys for Plaintiffs-Appellants, 263 South Second East, Salt Lake City, Utah 84111, this 17th day of January, 1974.

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