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John W. Nielsen v. Glen Mauchley : Brief of Appellant

Utah Supreme Court

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7203

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN W. NIELSEN,
Plaintiff and Appellant,
v.
GLEN MAUCHLEY,
Defendant and Respondent.

Case No. 7203

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APPELLANT'S BRIEF

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Appeal from the District Court of the First Judicial Dis-
trict of the State of Utah, in and for Cache County.

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v.
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Appeal from the District Court of the First Judicial District, in and for Cache County, State of Utah.

APPELLANT'S BRIEF

STATEMENT

This appeal is taken from a judgment of the Honorable Mariner M. Morrison, District Judge, whereby and wherein on the 5th day of March, 1948, he directed a verdict in favor of the defendant, no cause for action, and entering judgment thereon in favor of the defendant, and thereafter, on the 22nd day of March, 1948, on proper application refused to grant plaintiff a new trial. (Tr. 33, 35, 36, 41, 58, 172, 173.

PLEADINGS

The plaintiff set forth that on the 9th day of January, 1947, the defendant carelessly and negligently backed a school bus from a private driveway into a public street; that the same was caused to collide with plaintiff's automobile which he was driving; that he was negligent in failing to keep a proper lookout for vehicle travelling on

the highway and particularly the vehicle of the plaintiff; that he failed and admitted to have control of the school bus; that he failed and admitted to yield the right-of-way to plaintiff; that he backed the school bus into the highway without giving a signal or warning of his intention to do so; that the plaintiff's automobile was damaged and he sustained personal injuries. Damages in the sum of \$8, 331.26 were asked. (Tr.4,6).

ANSWER

The answer admits all the allegations of the complaint except the damages and the negligence charged. Defendant alleged contributory negligence of the plaintiff setting forth that he was negligent driving 35 miles an hour knowing the road was icy and slippery; that he failed to keep a proper lookout for vehicles entering the road; that knowing the road was icy and slippery, he applied his brakes causing his automobile to skid across the road striking the school bus; that plaintiff did not have his automobile under control in that after observing the school bus he failed to reduce his speed so as to pass the bus without having to apply his brakes in an attempt to reduce the speed thereof. (Tr. 12, 13).

Upon the issues thus framed, a trial was had before the Honorable Mariner M. Morrison sitting with a jury on the 5th day of March, 1948.

THE EVIDENCE

The public road on which the collision occurred is oiled and hard surfaced extending in a easterly and westerly direction in Cache County, Utah, known as the College Ward-Millville Road. The thoroughfare is about

85 feet wide from fence to fence; hard oiled surface, 16 feet wide; the shoulders on each side, 6 feet wide from the north shoulder to the north fence is about 24 feet and from the south shoulder to the south fence is about 33 feet. (Tr. 4, 13, 60, 61, 88.) It intersects with Highway 91, also known as the Logan-Hyrum Road, at a point about four miles south of Logan, Utah, at which point it terminates. Tr. 4, 13, 64.)

The collision complained of took place on the College Ward-Millville Road at a point about 443 feet West of the intersection and out from the private driveway of the defendant. The driveway runs in a northerly and southerly direction just east of and into defendant's house. (Tr. 65, 135.) The defendant's house is situated on the north side of the road. (Tr. 102.)

On the morning of the 9th day of January, 1948, the defendant left his house at Youngward, Utah, at about 7:20 a. m., driving his automobile. He drove generally in an easterly direction toward his intended destination of Avon and Paradise, eventually travelling on the College Ward-Millville Road. He was travelling at the rate of about 25 miles per hour and in his lane of traffic on the south portion of the road. (Tr. 61, 89.) The night before, it rained, and having froze during the night and the roads were icy and slippery. This fact was known to both the plaintiff and defendant. (Tr. 65, 133.)

When the plaintiff reached a point about 300 feet west of the defendant's house, he saw a school bus, which defendant was driving, emerging in a backward, southerly direction from the east side of his house along his private driveway. (Tr. 64, 66, 89.) At this point, he took

his foot off the accelerator and the speed of his automobile decrease to about 20 miles per hour. As he went over a culvert, the bus was somewhere between defendant's fence line and the north shoulder of the road. The culvert is about 229 feet west of defendant's house. (Tr. 64, 65, 136.) He continued to watch the school bus, thinking it would stop, he thought this until he reached a point about half way between the culvert and defendant's house, or about 115 feet away, when he decided that it was not going to. When confronted with this situation, the plaintiff applied his brakes but couldn't stop because of the slippery condition of the road. The defendant, instead of stopping and yielding the right-of-way as plaintiff had a right to expect and did expect, continued to back the school bus south-easterly across the road until the rear wheels of the school bus were about 2 feet off the south line of the hard surface of the highway, blocking the road. (Tr. 65, 66, 88, 93, 96.) The school bus was 29½ feet long, 8 feet wide and weighed 12,000 pounds. (Tr. 90, 111.)

The plaintiff attempted to avoid a collision by applying his brakes and turning to the north side of the road, thinking that the defendant would stop and permit him to pass. As he did so, the defendant started the school bus in a forward position, and just as the rear left wheel of the bus cleared the center of the road to the north about 2 feet, the collision occurred. The plaintiff's automobile was about straddle the center of the road. (Tr. 66, 98, 99.)

In explaining his attempt to avoid the collision, the plaintiff testified: (A) "As I was watching his bus, I saw him backing out on the road, but I had no idea he was

coming out across the highway until I got down about half way between the culvert and his driveway when he came out, and I tried to stop but it couldn't be done. As he backed out, there was a telephone or electric light pole on the south side of the road, and there was no chance for me to go between the pole and the rear end, and I couldn't get between the fence and the pole, and his being in the position he was, I figured I could get in front of him, but just as I turned my car to go, he pulled up in front of me. I then turned my car back on the ice." (Tr. 65,66.)

The defendant neither gave a signal that he was going to back across the road nor did he sound his horn nor give any warning that he intended to do so. (Tr. 66.)

Since the damage and injuries are not in question, we will not detail them. here.

In considering this appeal, we must take the evidence most favorable to the appellant.

GROESBECK V. LAKESIDE PRINTING CO.

55 Utah 335, 186 P. 103.

ROACH V. RAILROAD CO.,

69 Utah 530, 256 P. 1061.

MILLER V. WHITE,

70 Utah 145- 258 P. 565.

BARLOW V. UTAH LIGHT & TRACTION CO.,

77 Utah 556, 298 P. 386.

RICKS V. BUDGE,

91 Utah 307, 64 P. (2d) 208.

HEDDEN V. TOWN OF BINGHAM CANYON,

94 Utah 442, 78 P. (2d) 637.

UHR V. EATON,

95 Utah 309, 80 P. (2d) 925.

LEE V. NEW YORK LIFE INS. CO.,

95 Utah 445, 82 P. (2d) 178.

GRAHAM V. JOHNSON, et. al.

166 P. (2d) 230

At the conclusion of the evidence, the defendant made a motion for a directed verdict on the grounds that the plaintiff had failed to show any negligence on the part of the defendant as alleged in his complaint: (1) That he failed to keep a proper lookout. (2) That he failed and admitted to have his automobile under control. (3) That he failed to yield the right-of-way. (4) That he failed to give a signal or warning of his intention to back into the highway. (5) That such were not the approximate cause of plaintiff's damage and injuries. (Tr. 166, 170.)

The Court held that in-as-much as the plaintiff was travelling 25 miles an hour when 300 feet from the point of impact, that he was contributory negligent as a matter of law. (Tr. 172)

Thereafter, the motion for a new trial was denied. (Tr. 41.)

ASSIGNMENTS OF ERROR

Errors committed by the trial court upon which appellant relies for a reversal of the judgment:

1. That the court erred in granting defendant's motion for a directed verdict in favor of said defendant and

in entering judgment thereon.

2. The court erred in denying plaintiff's motion for a new trial.

ARGUMENT

RIGHT OF WAY

We will not repeat the evidence as disclosed in the statement of fact except as it is necessary to point out the law applicable thereto.

The defendant, notwithstanding that he knew that the roads the morning of the accident were in an icy and slippery condition, proceeded to back his 29½ foot school bus south-easterly across the road from his driveway until it blocked the road to traffic travelling in either direction. He did not, as would be expected of him by a driver coming from the west, back into the north lane, but continued without warning or signal to completely cross the road, until the rear wheels were off the south side of the hard surface of the road, and this he commenced to do when the plaintiff was only about 110 to 120 feet away.

In contrast to this, the plaintiff, in the meantime, as he proceeded down the road, kept a lookout, first seeing the defendant when about 300 feet away, at which time he let up on the accelerator and the speed of his automobile was reduced to about 20 miles an hour. He continued to watch the defendant, always expecting that the defendant would stop and yield him the right-of-way. The first notice he had, however, that the defendant was not going to do so was when he was about 120 feet away

from defendant's driveway. He then applied his brakes and attempted to stop. He could not do so, however, because of the condition of the road. In the meantime, defendant pulled nearly across the road and then started forward again. Plaintiff, however, at this point, attempted to avoid the accident by driving in front of the defendant. However, instead of defendant permitting him to proceed in front of him, he pulled forward again and the collision occurred just north of the center of the road. Under these facts and conditions, question of whether the defendant was negligent or not was a question for the jury.

The Court had before it 57-7-139 U.C.A. 1943, which provides:

The driver of a vehicle about to enter or cross a highway from a private road or driveway shall yield the right-of-way to all vehicles approaching on said highway.

This section has not been construed by this court. However, similar statutes of other states have been interpreted and they have uniformly held that in the circumstances similar to the one in question, the question of whether a driver of a vehicle emerging from a driveway into a public street was negligent in so doing was one for the jury.

The Supreme Court of Minnesota in the case of Salters vs. Uhler 292 N. W. 762, reversed the decision of the trial court, which directed verdict against the plaintiff under the following facts. The plaintiff's evidence shows that as he travelled down the highway at about 30 to 35

miles an hour, he first noticed the defendant's vehicle parked in a private driveway about 600 feet away. That when 300 feet from the driveway, he turned toward the center of the road. He was then going approximately 31 miles an hour. At about 250 feet from the driveway, the bus started to leave the driveway at from 3 to 6 miles an hour. The plaintiff continued to drive in the center of the road with the idea of permitting defendant to stop on the shoulder. When the front wheels of the defendant's vehicle reached the top of the incline, he was about 150 feet away; that he was 75 feet away when defendant reached the north edge of the pavement and going 25 miles an hour.

The defendant continued, however, and the collision occurred.

The Court said:

*This statement is relevant here as a reasonable man plaintiff was entitled to assume that defendant would yield the right-of-way, at least until a reasonable basis to the contrary appeared. If this were not so, the right-of-way would be of little value and ordinary traffic on the highway bottlenecked at every private driveway on which a vehicle was approaching the main thoroughfare. Defendant owed the right-of-way, and on the present record clearly violated it. Precisely at what point plaintiff should have appreciated that his right-of-way would be violated need not be resolved now***until a reasonable ground appeared to make plaintiff appreciate that defendant was going to enter the highway irrespective*

of plaintiff's presence, he had a right to assume that due care would be exercised. It was for the jury to decide whether plaintiff apprehended the risk seasonable and thereafter conducted himself as a reasonable man.

In *Keller vs. Maricopa Tractor Company, et al*, 123 P (2d) 166, the Arizona Court said:

Kehncke testified that he saw plaintiff approaching 15 feet before the front of his truck reached the paved slab. He thus had warning that he was endeavoring to cross the pathway of an approaching vehicle which had the right-of way. We think that under such circumstances it was his duty not to attempt the crossing unless, as a reasonable prudent man, he had a right to believe he could complete it before the motorcycle reached him. He did not look to see how far away the motorcycle was just before the truck entered the paved highway, but did look when its front had reached the center of the road. Even taking his own testimony as to his speed in the light most favorable to him, it is evident that when the front wheels of the truck were at the edge of the pavement the motorcycle could have been more than 600 feet away, which agrees with plaintiff's testimony on this point. Considering the length of the truck and trailer and the slow speed at which it could travel, can we say a jury could not legally have found it was negligent for him not to look for and observe the position of the motorcycle immediately before

he entered the pavement, and seeing it at not over 600 feet distance, not to wait till it had passed.

The District Court of Appeals of California in the case of McDougall vs. Morrison, 130 P (2d) 149, held that where a vehicle stops at the edge of a road before entering the highway and saw a vehicle 500 feet away, that whether or not he was negligent in entering the highway and driving into the highway was a question for the jury.

The true rule is that, under the section of the Vehicle Code above quoted, it is made the duty of the driver of an automobile entering the highway from a private drive to look for approaching cars, and not to proceed if one is coming, unless, as a reasonably prudent and cautious person he believes, and has a right to believe, that he can pass in front of the other in safety. Wakefield v. Horn, 109 Cal. App. 325, 293 P. 97; see, also Conley v. Marvin, 210 Cal. 330, 291, P. 830; see cases collected 5 Am. Jur. p. 670, & 306; Henderson v. O'Leary, 177 Wis. 130, 187 N.W. 994, 24 A.L.R. 946.

Each case must turn upon its own facts. Contributory negligence as a matter of law, can only be found where reasonable minds cannot but conclude that a reasonably careful and prudent person situated as was plaintiff would not have acted as he did. The situations where a court will so declare are rare. Casselman v. Hartford

Acc. & L. Co. 36 Cal. App. 2d. 700 98 P. 539;

Enz v. Johns, 112 Cal. App. 1, 296 P. 115. If the evidence is in conflict, the finding of the trier of the facts is conclusive.

See Parker etal vs. Brooks, 300 N.W. 400. Kosher vs. Kocker, etal, 4 N.W. 2d 158, Nix vs. Wodworth, etal, 53 P. 2d 765.

The defendant in driving was required to exercise care and caution commencerate with the occasion. Under the statute, he was required not to enter the highway until under the circumstances he could do so with reasonable certainty that he could do so with safety. Whether he did or not was a question for the jury to decide.

SPEED

The Court said that the plaintiff was negligent in this matter of law because of excessive speed. In this respect, the evidence showed that at the time and place in question, that he was travelling about 25 miles an hour; that upon seeing defendant's bus emerging from the side of his house that he took his foot off the accelerator and slowed down, and that accordingly in the distance of about 50 feet his automobile slowed down to 20 miles an hour; that he continued thus to slow down and that he only applied his brakes when the defendant pulled his bus across the road in front of him. The defendant created an emergency. The plaintiff used the best judgment he had under the circumstances. Whether he should have applied his brakes was a question for the jury. He did all in his power to avoid the accident. What more he could have done does not appear. The plaintiff concedes that although the maximum speed limit allowed

here was 60 miles an hour that he could not travel at such a rate but that he was compelled to drive at a speed not greater than would be reasonable and prudent under the conditions having regard for the actual and potential conditions existing on the highway. That whether the rate of speed that plaintiff was driving at that time of day in question was negligence we believe was a question for the jury.

In the case of *Humphreys vs. Complete Auto Transit Inc., et al*, 9 N. W. 2d 55, the Supreme Court of Michigan said that where the plaintiff was driving at the rate of 25 to 40 miles an hour on icy roads was a question for the jury. The defendant moved for a directed verdict. The motion was denied and the case submitted to the jury. From a verdict in favor of the plaintiff, the defendant appealed.

The Court said:

In the case at bar, there was testimony that the defendant had driven over this highway on numerous occasions and on all kinds of weather conditions. On the day of the accident, the pavement was generally icy. The defendant could see an object the size of an automobile at a distance of 700 feet, yet he did not see plaintiff's car before the impact. He was travelling at the rate of from 25 to 40 miles per hour. He knew of the decline in the pavement but he did nothing to reduce his speed. Considering all the circumstances, we are of the opinion that reasonable minds might differ as to whether defendant's driver was neg

ligent. The question was therefore one for the jury.

In the case of Eisenhower, etal, vs. Halls Motor Transit Company, etal, 40 Atl. 2d, 458, the Supreme Court of Pennsylvania held that where a truck and trailer was loaded and driving at from 20 to 30 miles an hour on a downward slope, and in so doing failed to negotiate the turn and skidded into a tree, that whether such was negligence was a question for the jury.

The Court said:

According to what may be a permissable rate of speed at one time and place and under given circumstances, may be wholly improper on other on other occasions and different circumstances, and in cases where unusual conditions that exist, it has been held that the question as to speed was for the jury.

See: Russel vs. Berger, 50 N. E. 2nd, 642.

CONCLUSION

Decision of the trial court should not be permitted to stand, it should be reversed. To hold that a driver of a vehicle because he drives on slippery roads of 25 miles an hour, is negligent as a matter of law ignores all the facts cognizant with every day driving. Furthermore, to permit a driver of a vehicle emerging from a private driveway into a public way to do so when a vehicle is approaching within the distance the facts in the case disclose, is to defeat the very purpose for which the statute was passed. In this case, the defendant knew of the

conditions of the road. He started from a stopped position, thus having control over the situation in all of its aspect. Nevertheless he elected to proceed onto the highway knowing, or he should have known, that to do so would likely involve the school bus he was driving and the plaintiff's vehicle in a collision. To say the least, the questions to be resolved here are one for the jury and the trial court in directing a verdict for the defendant invaded the jury's province.

We respectfully ask that the decision be reversed and that a new trial be granted.

Respectfully submitted,

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