

1949

John W. Nielsen v. Glen Mauchley : Brief for Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Nielsen v. Mauchley*, No. 7203 (Utah Supreme Court, 1949).
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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

JOHN W. NIELSEN,

Plaintiff and Appellant,

vs.

GLEN MAUCHLEY,

Defendant and Respondent.

} Case No. 7203

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

BRIEF FOR RESPONDENT

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FILED
SEP 14 1946
CLERK, SUPREME COURT, UTAH

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BRIEF FOR RESPONDENT

Respondent agrees with statement in Appellant's brief relating to the proceedings out of which this appeal has arisen. Similarly, except for palpable typographical errors, respondent agrees with appellant's summary of the complaint and answer.

Respondent disagrees in some particulars with appellant's summary of the facts. The general facts as to time, the locality where the accident occurred and the icy condition of the road are not in dispute. As to what the record shows bearing upon how the accident happened and the position of the two vehicles with respect

to each other, the parties are not in accord, hence this additional statement. Appellant in his brief, has designated himself as plaintiff and respondent as defendant. Those designations, accordingly, will be continued in this brief.

FACTS

Plaintiff admits that as he approached defendant's dwelling house from the west on the College Ward-Millville Road, in Cache County, Utah, and when he was 300 feet west of the driveway to said house he saw defendant's bus emerge from beside the east of defendant's house and come into view, backing out beyond the south wall of said house toward the road (Tr. 92). Both vehicles continued on and while plaintiff traveled a distance of fifty-seven feet (Tr. 93) defendant's bus traveled, without stopping, from the house to the fence, then twenty-four feet (Tr. 94) across the roadway to the edge of the north shoulder (Tr. 96, 97). Then it "went right out onto the road" and "clear across it." (Tr. 97).

The transcript of the evidence shows the following in the plaintiff's testimony (Tr. 96):

"Q. All right, then, where was the rear end of his bus when you were on the culvert?

A. The rear end of his bus was, I'd say, just about out to the shoulder. The back end of the bus.

Q. Now you say the back end of the bus was about out to the shoulder?

A. Yes.

Q. When you were on top of the culvert?

A. Yes.

Q. Now is that your testimony

A. My testimony, yes."

Again the plaintiff testified as follows (Tr. 97):

"Q. But when you were on top of the culvert the back end of his bus was about even with the north shoulder

A. I'd say yes.

Q. There's no doubt about that, is there?

A. I don't think so."

Neither vehicle stopped and they were at that moment about 243 feet apart. Plaintiff then was apprehensive and looked down at his speedometer "to see just about what speed my car was running at that point, because I realized what was going to happen." (Tr. 92).

Plaintiff had been aware of the movement of defendant's bus while he traversed the fifty-seven feet, had come up onto the top of the culvert and had reduced his speed from about 25 miles per hour to about 20 miles per hour (Tr. 65).

There was six feet of shoulder and thirty-three feet more space to the fence on his right to the south beyond the shoulder, (Tr. 88), thirty-nine feet all told, yet plaintiff continued on, covered the intervening distance, turned north to his left across the center of the road and collided with the bus, the left front wheel and fender of plaintiff's automobile making contact with the left side of the bus "Right in front of his left rear wheel" (Tr. 99). The left rear wheel of the bus was two feet north of the center line (Tr. 99). The bus was at approximately 45° angle with the highway, facing northwest (Tr. 100).

After being warned of the danger, realizing what was going to happen, plaintiff continued on approximately 120 feet, one half the distance between the culvert and defendant's driveway, without doing anything to avert the impending collision. Then, he tried to stop—"and it couldn't be done." (Tr. 66).

At the close of the evidence, defendant moved for a directed verdict charging plaintiff with negligence and carelessness proximately resulting in the accident and injuries complained of.

In ruling on that motion the court said:

"In considering this motion the Court must take into consideration the testimony, which seems too clear to be controverted, and in ruling on this question I'm going to consider the testimony of the plaintiff only without considering the testimony of the defendant. It is presumed that the testimony of the plaintiff is given in the light most favorable to the plaintiff, and on that presumption the Court must look at the testimony." (Tr. 171)

Thereupon the motion was granted.

ARGUMENT

Defendant agrees with the principle advanced by plaintiff that in determining whether the evidence justified the ruling for the directed verdict the appellate court must take the view of the evidence most favorable to the plaintiff. And judging from the number of cases cited by plaintiff bearing upon that point, one might think that the predominant sin of trial courts in the

granting of directed verdicts is failure to view the evidence in the light most favorable to the party resisting the motion. Close study of the cited cases, however, shows that in most instances special rules were ignored which accounts for the failure to view the evidence in its most favorable light. The motion for a directed verdict has been likened to a demurrer to the evidence and as said by this court in reversing the trial court in one case where a motion for directed verdict had been denied.

“There are other conflicts between the plaintiff’s testimony and that of defendant, but we need not consider these conflicts in the evidence in passing upon the questions now under review. In deciding the questions whether or not a nonsuit should have been granted or a verdict directed for the defendant, we must view the evidence in the light most favorable to the plaintiff. In testing the sufficiency of the evidence with respect to these questions the defendant stands in the position of admitting the truth of plaintiff’s evidence, and all reasonable inferences which the jury might fairly draw therefrom favorable to the plaintiff.” *Elswood vs. Oregon Short Line*, 82 Utah 235, 23 P. (2nd) 925.

That comment specifically referring to conflicts between plaintiff’s testimony and that of defendant, with defendant’s motion for a directed verdict to be decided, illustrates a frequent error of trial courts, which is, allowing themselves to be influenced by defendant’s testimony. Doing so amounts to an invasion by the court of the province and function of the jury. Of the cases cited in plaintiff’s brief in that class are, *Roach vs. Railroad*

Co., 69 Utah 530, 256 Pac. 1061, *Ricks vs. Budge*, 91 Utah 307, 64 Pac. (2nd) 208, and *Lee vs. New York Life Insurance Co.*, 95 Utah 445, 82 Pac. (2nd) 178.

In *Uhr vs. Eaton*, 95 Utah 309, 80 P. (2nd) 925, also cited by plaintiff, the trial court held the defendant immune to damages in a slander case because she had been consistent in her statements in the initial interview with the prosecutor and at the preliminary hearing. The court did not give effect to the rule that bad faith or falsity destroys the immunity, and that evidence of falsity in the damage case should be passed upon by the jury.

In *Graham vs. Johnson*, 109 Utah 346, 166 Pac. (2nd) 230 (modified on motion for rehearing), the court ruled out plaintiff's claim to recovery because he was clearly negligent, failing to recognize that, "the so-called humanitarian doctrine of last clear chance applies" to nullify the effect of that neglect.

In *Groesbeck vs. Lakeside Printing Co.*, 55 Utah 335, 186, Pac. 103, it was failure to give importance to the position of plaintiff, an employee of tender years, injured while subject to the mechanical hazards of a printing press, that accounted for the reversal of the trial court.

Where as here, however, depending upon the testimony of the plaintiff alone for the facts, we think the court was not obliged to sift somewhat contradictory statements of plaintiff himself and take only those which would make up an unreasonable account of what took place. It is presumed, as Judge Morrison said that the

plaintiff's own testimony states the most favorable view of the plaintiff's case. And of the plaintiff's own testimony where there are conflicts, he could believe that least favorable to the plaintiff.

This court, on that point, has said in a case where plaintiff had sued for damages, alleging negligence of defendant and had himself testified as to the conditions constituting such negligence, in reversing the trial court for refusing to grant a non-suit because of contributory negligence:

“The plaintiff's knowledge of the dangerous place at the time of the accident is shown by his own testimony. In such a case where a non-suit is asked, the trial court may consider such testimony true as bears the most strongly against the interest of the plaintiff.” *Fowler vs. Pleasant Valley Coal Co.*, 16 Utah 384, 52 P. 594.

To the same effect is *Putnam vs. Industrial Commission*, 80 Utah 187, 14 P. (2nd) 973, where this court said in reviewing an award of the Industrial Commission.

“In considering the testimony of the applicant on the issue as to whose employ he was in, we must look, not alone to the answers made by him to leading questions, or an assumption that he was in the employ of Putnam, but to the whole of the testimony bearing on the subject. As to that, the familiar rule is applicable that testimony of a witness on his direct examination is no stronger than as modified or left by his further examination or by his cross-examination. A particular part of his testimony may not be singled out to the exclusion of another part of equal importance bearing on the subject.”

Accordingly, while the view of the evidence adopted by the trial court may not be as favorable as plaintiff would like it to be, yet tested by the rules of evidence enunciated above, it is what the trial court had a right to take as the plaintiff's case. And shielded from the diluting effect which consideration of defendant's evidence would have had upon it, it becomes "the view most favorable to the plaintiff" which the appellate court should consider in passing upon this appeal.

Another principle which this court will take notice of in reaching its conclusion is that the judgment of the trial court is presumed to be correct.

"Every presumption must be indulged on appeal in favor of correctness of judgment below and hence in absence of anything in the record to the contrary, we must presume that the court was right in directing judgment for the defendant." Hutchinson vs. Smart, 51 Ut. 172, 169 P. 166.

Plaintiff seems to misconstrue just what the judgment is. In Appellant's Brief, page 6, this reference is made:

"The court held that in-as-much as the plaintiff was travelling 25 miles an hour when 300 feet from the point he was contributory negligent as a matter of law."

The trial court actually said:

"Here this accident occurred on an early winter morning at 7:40 when it is admitted that the roads were icy and slick. Mr. Nielsen has testified that as he crossed the culvert, which is approximately 250 feet on his testimony,—that

he observed that school bus backing out; that he was apprehensive that there might be an accident, and he looked at his speedometer and ascertained that he was going twenty-five miles an hour. Yet in view of that warning which he had, or that apprehension which he had 250 feet down the road, he continued on until the accident occurred.” (Tr. 171).

From this it is clear that the court determined upon two acts of negligence by plaintiff:

1. “Yet in view of the warning which he had, or that apprehension which he had 250 feet down the road, he continued until the accident occurred.” (Tr. 171).

2. “The law also requires a person driving upon the highway to have sufficient control of his automobile that he can handle it in cases of emergency, that he is not to drive his automobile at a rate which is—or a speed which is excessive in view of the time of day, the visibility on the highway, and the weather conditions. The conditions being such as they were, a speed of twenty-five miles an hour, if that were the speed upon that highway, when the testimony tends to show that an accident 250 feet lower down the road could not be avoided without skidding and swerving and striking the car, it seems to me that the testimony that has been given is sufficiently clear and compelling that the Court must find as a matter of law that the plaintiff was negligent in the operation of his automobile and that his negligence, if not the cause of, contributed to the injuries which he received.” (Tr. 171, 172).

Plaintiff seems to argue also that the trial court erred by finding that defendant was not negligent.

Otherwise we fail to understand the applicability of the cases cited on pages 10 and 11 of Appellant's brief.

The court said respecting defendant (Tr. 172):

“ . . . Now in this particular instance the defendant may have been negligent, he may have been culpably negligent, yet I feel that the testimony shows that the plaintiff was also negligent, which negligence contributed to his injury, and the Court in the circumstances must direct a verdict in favor of the defendant and against the plaintiff ‘no cause of action’.”

Under the circumstances of this case, it is elemental that if plaintiff were negligent and such negligence contributed to or was the proximate cause of the accident and injuries he cannot recover from defendant regardless of any classification of defendant with respect to negligence. Accordingly, we shall answer plaintiff's argument concerning right of way, wholly as it relates to plaintiff's own negligence.

In the Minnesota case, *Salters vs. Uhler*, 292 N. W. 762, cited by plaintiff at page 8 of his brief, the Supreme Court said:

“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.”

And then concluded apparently that there was no such reasonable ground shown in the evidence, as the trial court was reversed for granting defendant's motion for a directed verdict.

In contrast to that, the facts in our case, as hereinbefore set out, show that when this plaintiff was on top of the culvert 243 feet away, he knew that an accident would happen. Defendant was then driving onto the north shoulder and continued onto the hard surface. In face of all of that, plaintiff kept on from the culvert to half way to defendant's driveway, (about 120 feet) before he did anything about it, before he tried to stop "and then it couldn't be done." Even under the requirement of the *Salters* case, this plaintiff knew when he was 243 feet away, that defendant was entering onto the shoulder of the road, that he had only six feet of shoulder, and then the hard surface, and that he did not stop. There was no need for a "jury to decide whether plaintiff apprehended the risk seasonably," as there was in the *Salters* case. He "knew what was going to happen," and admits traveling about 120 feet before doing anything to prevent it. There is no conflict between plaintiff and defendant in that evidence to require the functioning of a jury. And as reasonable minds would all agree that failure to act while traveling even twenty feet or fifty feet, coming closer all the time to tragedy, would be unwise, all would certainly agree that to continue on for 120 feet at 20 miles per hour would be foolhardy and careless beyond excuse. Certainly then, on the two grounds, it was negligence as a matter of law.

The Minnesota Supreme Court in allowing plaintiff *Salter* such a favorable position with respect to the right of way statute, supports what has been called the "absolute" right of way rule. That rule, however, does not

represent the weight of authority and clearly is not the law of this state.

An annotation in 136 A.L.R. 1497, 1498, shows the distinction between conferring an "absolute" right of way upon the favored vehicles and the "relative" view. In that annotation it is said:

"As pointed out in the earlier annotation (89 A.L.R. 838) by the weight of authority a 'relative' construction is given to statutes confirming rights of way. As illustrative of the decisions adhering to the 'relative' construction, reference may be made to the following cases decided since the prior annotation, in which it was expressly held that in the application of statutes or ordinances giving vehicles approaching from the right, the right of way, priority of time in approaching an intersection and distance are important factors and that the statutes do not give an 'absolute' privilege to the vehicle approaching from the right."

This court has had occasion recently to review the obligations of drivers who dispute the meaning of right of way and to declare that such right is not "absolute" but "relative." Listed with the cases in 136 A.L.R. 1497, 1498, *supra*, is a Utah case prominent a few years ago and referred to with approval by the recent decisions of this court which have considered the right of way rule, *Bullock vs. Luke*, 98 Utah 501, 98 Pacific (2nd) 350. There this court *reversed the trial court for failure to grant defendant's motion for a directed verdict* and said:

"He who has the right of way may assume that the driver on the left will afford him that

right. . . . But his rights are only relative . . . The circumstances may be such, that by his own conduct, he who has the apparent right of way has lost the benefit of that right; or the circumstances may be such that for him to insist that this position on the right entitled him to proceed first through the intersection would be carelessness and negligence upon his part. The possessor of the right of way is not relieved of the necessity of exercising care simply because he is the driver on the right."

Justice Wolfe in his concurring opinion explained why this court adopted the "relative" rather than the "absolute" view in these words, "This ruling encourages both the drivers to be careful."

In the case of *Hickok vs. Skinner*, Utah, 190 Pacific (2nd) 514 in affirming the rule of the Bullock case this court said:

"Regardless of which driver is technically entitled to the right of way, both operators must use due care and caution in proceeding into and across intersections. While the burden to drive so carefully as always to be prepared for, and to be able to avoid, the negligence of another should not be placed on either driver, there should be placed on both the burden to keep a proper lookout and to use reasonable care to avoid a collision. Neither should be permitted to close his eyes to other vehicles which he knows or has reason to believe are approaching, simply because a state statute or municipal ordinance designates him the preferred driver. The rights of drivers approaching and crossing intersections are relative. Both drivers have the duties of being heedful and of maintaining a proper lookout."

In *Conklin vs. Walsh*, Utah....., 193 Pacific (2nd) 437, this additional comment with respect to right of way is made in affirming the action of the trial court which *directed a verdict for plaintiff on the ground that defendant was negligent as a matter of law:*

“The duty to keep a proper lookout applies as well to the favored as to the disfavored driver. Neither driver can excuse his failure to observe because the other driver failed in his duty. Neither driver is at any time to be excused for want of vigilance or failure to see what is plain to be seen.”

Summarizing the facts, this court had said:

“Defendant’s truck driver, knowing there was a car approaching from the north, never looked again in that direction until it was too late to avoid a collision.”

It might well say now:

“The favored driver, knowing that the bus was at the edge of the north shoulder, and was continuing on across its width of six feet onto the pavement, did nothing about it while he traveled about 120 feet until it was too late to avoid a collision.”

The rule set out above would then be applicable to our case, as we think it is applicable, and so justify the action of the trial court in directing the verdict for defendant.

It is recognized that our case, strictly speaking is not an intersection case except as the highway on which the plaintiff, Nielsen, was driving intersected with de-

fendant's driveway. As plaintiff admits in his brief, Section 57-7-139 U. C. A. 1943, has not been construed by this court. This section had been considered by the Supreme Court of the state of California in the year 1930, prior to the time it became the law of this state, in a case also cited by plaintiff. The California statute read:

“The driver of a vehicle entering a public highway from a private road or drive shall yield the right of way to all vehicles approaching on said highway.”

This, except for a few immaterial variations, is identical with the Utah statute. The California court had this to say regarding it:

“The argument is made that, irrespective of the distance between the approaching car driven by the defendant, Mary Horn, and the private highway on which the truck was emerging, it gave the defendant the right of way. The subdivision of the section, however, is not susceptible of any such interpretation. If interpreted literally as the subdivision reads, or as it then read, no one could ever drive from a private road upon a public highway if any one were approaching upon such highway irrespective of the distance. The subdivision must be construed to give effect to the intent of the legislature which was to prevent automobile drivers on private roads from entering a public highway when a car was approaching upon such highway so near as to constitute an immediate hazard, and not that no one should enter upon a public highway from a private road or driveway so long as the public highway was in use.” Wakefield vs. Horn (Cal.) 293 Pac. 97.

It is assumed that plaintiff quoted the said section

and cited the Salters case to justify the view that plaintiff had an absolute right of way. It is submitted that the decision of the California court, interpreting the private driveway statute, and the decisions of this court relative to right of way in intersection cases adequately refutes that contention and justified the trial court in this case in granting defendant's motion for a directed verdict.

We dispute not plaintiff's statement that contributory negligence as a matter of law, can properly be found by the court only where reasonable minds would agree that the party charged with negligence acted in an imprudent manner so as to contribute to the accident and injuries; nor do we dispute that cases where a court will so declare are rare; nor that where the evidence of plaintiff and defendant are in conflict it is the province of the jury to find the facts.

We do contend, however, that neither of those rules were violated by the judgment of the trial court in this case, that on the contrary the neglect of plaintiff, judged from his own testimony alone, was so patent, that as in the Bullock vs. Luke case, supra, this court could have properly reversed the trial court had it failed to grant defendant's motion.

Defendant accordingly prays that the judgment be affirmed.

Respectfully submitted,

MERRILL C. FAUX

Attorney for Respondent.