

1988

Jerry Ricketts v. V and H Leasing Services, Inc. a Wisconsin corporation : Brief of Respondent

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 88-0208-CA IN THE UTAH COURT OF APPEALS

JERRY RICKETTS,

Case No. 88-0208-CA

Plaintiff and
Appellant,

vs.

V & H LEASING SERVICES, INC.
a Wisconsin corporation,

Defendant and
Respondent.

BRIEF OF RESPONDENT

APPEAL FROM THE ORDER REGARDING PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT AND DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR DAVIS COUNTY, STATE OF UTAH, CIVIL NO.
39279, THE HONORABLE DOUGLAS CORNABY PRESIDING.

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SUMMARY JUDGMENT IN THE SECOND JUDICIAL DISTRICT COURT
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39279, THE HONORABLE DOUGLAS CORNABY PRESIDING.

JURISDICTION OF THE COURT AND NATURE OF THE PROCEEDINGS

This court has jurisdiction pursuant to Rule 4A of the
Rules of the Utah Court of Appeals and pursuant to an Order of
Transfer from the Supreme Court of the State of Utah.

Jerry Ricketts appeals from an Order denying his Motion for
Partial Summary Judgment and granting the Motion for Summary
Judgment of V & H Leasing Services Inc., (V & H).

ISSUE PRESENTED FOR REVIEW ON APPEAL

Is an owner/lessor who retains no control over a vehicle, is not benefited by its use, does not select the maintenance contractor, nor provide liability insurance, liable to a third party for the lessee's failure to maintain the vehicle's parking brake.

STATEMENT OF THE CASE

This case arises out of personal injuries to Jerry Ricketts allegedly resulting from a faulty parking brake on a truck owned by V & H, but leased to Swanson Building Materials ("Swanson"). On November 24, 1987, Judge Cornaby granted V & H's Motion for Summary Judgment and denied Mr. Ricketts' Motion for Partial Summary Judgment. R. 189.

On August 15, 1980, V & H, a leasing company located in Marshfield, Wisconsin, leased a new 1980 Ford F700D truck to Mr. Ricketts' employer, Swanson Building Materials, on a 60 month Business Net Lease Agreement. Swanson used the truck in its construction business in Utah. The lease required Swanson to provide liability insurance as well as to maintain the truck and make repairs. R. 103-108. The lease stated in pertinent part:

MAINTENANCE AND REPAIRS.

(a) Lessee, at the expense of Lessee, shall maintain each vehicle and each part thereof in good working order and condition, properly serviced and

lubricated, and make all necessary repairs and replacements thereto

R. 107.

V & H did not send a representative from its place of business in Wisconsin to Utah to inspect or maintain the truck after Swanson took delivery of the truck in Wisconsin on August 15, 1980. Nor did V & H have any knowledge of any alleged failure by Swanson Building Materials to maintain the truck until after Mr. Ricketts filed his lawsuit more than four and one-half years into the five year lease period. V & H still has no knowledge as to whether any alleged failure to maintain the truck proximately caused the accident. R. 103-104.

The operations manager for Swanson, Eric Eichbauer, was responsible for maintaining the truck in question and testified in his deposition as follows:

Q. Now, if I understand you correctly, it was the responsibility of Swanson to do the maintenance or repairs on the trucks?

A. You bet.

Q. In other words, if there was something wrong with the parking brake, it was the responsibility of Swanson to get it fixed?

A. Well, it was directly the driver's responsibility to come in and let me know, and then it was my responsibility to schedule the truck in to go down for servicing.

. . .

Q. When you got it out here, you were responsible for the repair of the brakes or any other repairs that the truck needed?

A. As I stated, if the driver made me aware, as Operations Manager, the overall responsibility was mine, yes, sir.

Q. And you didn't charge it back to V & H did you?

A. No, we did not. Not after normal warranty. Even then, that would be handled by Ford Motor, not V & H.

Eichbauer Deposition, pp. 21-23.

On or about February 27, 1985, Mr. Ricketts was working for Swanson at a job site in Bountiful, Utah. The truck rolled backwards allegedly due to a faulty parking brake and pinned Mr. Ricketts' arm against another vehicle. Just before the accident, the truck was being driven by another Swanson employee while Mr. Ricketts was guiding that driver in a backing maneuver. R. 83-87.

SUMMARY OF ARGUMENT

Swanson admits that it was responsible for maintaining the truck. Assuming arguendo that Swanson was negligent in its maintenance work, the mere fact of ownership is insufficient to impute Swanson's negligence to V & H.

There is no evidence in the record that V & H, four and one-half years after it transferred the vehicle to Swanson, had any notice that Swanson was not properly maintaining the truck. Furthermore, nothing short of a personal trip from Wisconsin to Utah to inspect the truck thoroughly could have revealed a

possible problem. Under the standard of "reasonableness" V & H's duty toward a third party such as Mr. Ricketts could never stretch so far.

ARGUMENT

MERE OWNERSHIP IS NOT SUFFICIENT AS A MATTER OF LAW TO HOLD A LESSOR LIABLE TO THIRD PARTIES FOR THE LESSEE'S NEGLIGENCE.

As a general rule, a lessor cannot as a matter of law, be held liable for the lessee's negligence. "If the owner is not present in the car, but has entrusted it to a driver who is not his servant, there is merely a bailment, and there is usually no basis for imputing the driver's negligence to the owner. Prosser & Keaton on The Law of Torts, § 73, p. 523-24 (5th Ed.); Forrester v. Kuck, 579 P.2d 756 (Mont. 1978); Siverson v. Martori, 119 Ariz. 440, 581 P.2d 285 (1978); Nava v. Truly Nolan Exterminating, 140 Ariz. 497, 683 P.2d 296 (1984).

Plaintiff's claim against V & H sounds in strict liability because it is based solely on the fact that V & H owned the vehicle in question. Plaintiff's argument is a radical departure from established Utah law. As the Utah Supreme Court noted recently:

As a general rule, ownership of a motor vehicle does not alone subject the owner to liability for the negligence of permissive users.

Lane v. Messer, 731 P.2d 488, 491 (Utah 1986).

The Utah Supreme Court noted that the only exceptions to the foregoing rule are when an owner permits a minor to drive a vehicle, negligently entrusts a vehicle to another, or the owner knows or should know of an unsafe condition of the vehicle. Id. at 491. Of the foregoing exceptions to the rule, the only one which could possibly apply in this case would be whether V & H knew or should have known of an unsafe condition of the truck. The record is clear that V & H did not have actual knowledge of any unsafe condition. Thus, the only issue before this court is whether V & H should have known of an unsafe condition. The record is without any such evidence.

V & H operates out of Marshfield, Wisconsin. Four and one-half years of the five year lease had expired by the time of the accident. Under the Business Net Lease Agreement, Swanson, as the lessee, assumed responsibility for all maintenance and insurance. Swanson readily admits its responsibility. Thus, both parties to the leasing contract clearly understood its terms. Plaintiff cannot sue the lessee, Swanson, because it was his employer. That fact has lead to this attempt to overreach the bounds of established law.

Every court which has addressed a similar factual situation had refused, as a matter of law, to hold the lessor liable to third parties for the lessee's negligent maintenance. The only exception is a case cited by plaintiff where the court found an

agency relationship between the owner and operator who was responsible for the truck's maintenance. Kaley v. Catalina Yachts, 232 Cal. Rep. 384 (Cal. App. 1986). There is no evidence in the case at hand of employee sharing or anything else which would make Swanson the agent of V & H for purposes of maintaining the truck. Thus, the Kaley case is unpersuasive.

Courts addressing a bailment or lease situation similar to that at hand, however, have all ruled as a matter of law in favor of V & H's position. Even a case cited in Mr. Ricketts' brief supports V & H's argument. Wilcox v. Glover Motors, Inc., 269 N. Carolina 473, 153 S.E.2d 76 (1967). In Wilcox, defendant Doranne Anders was test driving a used vehicle owned by defendant Glover Motors, when an accident occurred. The court found that a bailment had been created by the test drive. The court stated that although the statutory duty to maintain operative brakes rested on both the owner and the operator of the vehicle, negligence of one party in that regard would not be imputed to the other:

The burden is upon the plaintiff to prove that the bailor at the time that he allowed the vehicle to leave his possession for such purpose, knew, or in the exercise of reasonable care and inspection of the vehicle should have known, that the brakes were defective. . . . The doctrine of res ipsa loquitur does not apply to a brake failure several hours and many miles after the delivery of the car to the bailee.

Id. at 83.

Mr. Ricketts cites Wilcox for the proposition that both the owner and the operator have a duty to maintain. That may be true, but in the absence of any evidence that V & H knew or should have known of a problem with the parking brake, summary judgment should be affirmed.

In Forrester, supra., the court granted summary judgment in favor of the owner-lessor. There, the owner leased five trucks to the plaintiff's employer. Plaintiff's employer was required to repair and maintain the trucks and provide liability insurance just as in the case at hand. The facts established that the lessee, plaintiff's employer, had absolute control over the use of the trucks which were engaged solely in the employer's business. The trial court granted summary judgment in favor of the owner-lessor which was affirmed on appeal. The appellate court held that liability for the negligent use of a vehicle cannot be predicated against the owner at common law merely because he owns the vehicle.

The case at hand should have the same result. V & H had relinquished possession of the truck to Swanson four and one-half years before the accident. Swanson was not an agent of V & H. Mr. Ricketts alleges, however, that because Swanson, his employer, may have negligently maintained the truck, V & H is responsible. Plaintiff's argument is unsupported by case law and directly contradicts the plain language of the lease

agreement which was clearly understood by the contracting parties.

Nava, supra., is in accord. There, an airplane owner, Truly Nolan, had engaged the services of a Mr. Apodaca to repair the airplane. After completing the repairs, Apodaca recommended a test flight which Truly Nolan authorized. The plane crashed after take-off killing the pilot and a passenger. The crash was allegedly caused by the absence of counterweights on the plane's elevators. Plaintiff alleged the owner, Truly Nolan, was vicariously liable for the negligence of the pilot and was negligent in failing to discover and warn the pilot of a dangerous condition, i.e., the absence of the counterweights. While the jury returned a verdict in favor of the plaintiff, the trial court entered judgment notwithstanding the verdict in favor of the airplane owner because there was not an agency relationship between the owner and the pilot or the repairman. The court noted that the Restatement defines "Agency" as:

. . . the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act in his behalf and subject to his control, and consent by the other to so act.

Restatement (Second) of Agency, § 1 (1958). The court held that a bailment had been created rather than an agency stating that the primary distinction between an agency and a bailment is the bailee's freedom from control by the bailor and the

inability of the bailee to subject the bailor to liability in contract or tort. Restatement (Second) of Agency, § 12, Comment C (1958).

In the case at hand, there is no evidence whatsoever of any agency relationship between V & H and Swanson. Swanson was never acting on behalf of V & H nor subject to its control. A mere bailment arose which is insufficient as a matter of law to subject V & H to liability for Swanson's negligence. See also Siverson, supra., (as a matter of law, the owner-bailor of the vehicle is not liable to a bailee or a third person for a dangerous condition which arises after delivering the vehicle to the bailee.)

V & H does not deny that it owned the truck. Nor does V & H deny that the Utah Code requires vehicles to have adequate parking brakes.¹ Neither the Utah Code nor the case law, however, makes the owner strictly liable as plaintiff suggests. An owner is liable for brake failure only if the owner's conduct is unreasonable under the circumstances. White v.

¹Utah Code Ann. § 41-6-145(b) (1979) states:

Every motor vehicle and combination of vehicles shall have a parking brake system adequate to hold the vehicle or combination on any grade on which it is operated under all conditions of loading on a surface free from snow, ice or loose material or which shall comply with performance standards issued by the department.

Pinney, 108 P.2d 249 (Utah 1940); Hall v. Warren, 632 P.2d 848, 851 (Utah 1981); Little America Refining Co. v. Leyba, 641 P.2d 112 (Utah 1982); Maloney v. Rath, 71 Cal. Rep. 897, 445 P.2d 513 (1968).

The record is undisputed in the case at hand that the truck was new when delivered to Swanson. Swanson had exclusive control of the truck and it was used solely for Swanson's benefit. Swanson clearly understood its contractual responsibility to insure and maintain the truck. V & H had no notice of any maintenance problems before or after the time of delivery.

Other cases relied upon by plaintiff stand for nothing more than the proposition that a vehicle owner who is also the operator of the vehicle has the duty of reasonably maintaining the vehicle. The rationale is that the owner is the party primarily benefited by the vehicle's use; he selects the contractor for maintenance and insures against liability. Those cases are inapposite here because, the owner, V & H, was not the operator nor the party benefited by the truck's use. V & H did not select the maintenance contractor or insure the truck.

Mr. Ricketts' brief is a tortured and misleading interpretation of statute and case law. All of the statutes and cases are in accord that V & H is not liable to plaintiff without evidence of one of the following:

1. An agency relationship between V & H and Swanson;
2. Defective brakes at the time of delivery to Swanson; or
3. V & H knew or should have known of Swanson's alleged negligent maintenance.

There is no evidence in the record to support any of the foregoing theories.

CONCLUSION

Based upon the foregoing, V & H respectfully requests that the trial court's grant of summary judgment in favor of V & H be affirmed.

DATED this 24th day of May, 1988.

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SCMJLS258

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, four true and correct copies of the foregoing Brief of Respondent to the following party on the 24th day of May, 1988:

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