

1949

Wilbert J. Dawson v. Board of Education of Weber County School District, Guy Elias Carr, and W. Ed Bingham : Brief of Appellant

Utah Supreme Court

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FILED

No. 7391

OCT 17 1949

IN THE

CLERK, SUPREME COURT, UTAH

SUPREME COURT

OF THE STATE OF UTAH

WILBERT J. DAWSON,

Appellant,

vs.

BOARD OF EDUCATION OF WEBER
COUNTY SCHOOL DISTRICT and
GUY ELIAS CARR,

Defendants,

W. ED BINGHAM,

Respondent.

Appellant's Brief

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Attorneys for Appellant.

STATEMENT

This is an appeal from the judgment of the lower court rendered on the 2nd day of February, 1949, in favor of the defendant W. Ed Bingham and against the plaintiff "no cause of action."

The facts as shown by the pleadings are:

That the appellant, Wilbert J. Dawson, was and is the father of Lawrence P. Dawson, who was of the approximate age of nine (9) years at the time of his death on May 8, 1948, when he was struck and killed by a car

driven by the defendant Guy Elias Carr at the intersection of Highway U-38 and 4800 South Street in Weber County, Utah, after having just alighted from a school bus owned by Weber County School District and driven by the respondent W. Ed Bingham, who was then and there an employee of the defendant School District.

The school bus had been proceeding northward on Highway U-38 and had been stopped on the southeast corner of the intersection of that highway with 4800 South Street. It was stopped in such a position that the school children thereon, when leaving the bus, were compelled, by reason of a ditch bank, grass and weeds, to walk around the front end of the bus into 4800 South Street in order to proceed westward along that street.

The boy Lawrence P. Dawson walked around the front end of the bus, into 4800 South Street and proceeded westward across Highway U-38 toward his home, which was west of the highway on 4800 South Street, when he was struck by an automobile driven northward on Highway U-38 by the defendant Guy Elias Carr and killed.

The place and manner of the stopping of the bus by the respondent W. Ed Bingham was contrary to the Regulations Governing Pupil Transportation and School Bus Standards of the Utah State Road Commission adopted June, 1947, in conformity with Section 57-7-176 of Utah Code Annotated, 1943, by and with the advice of the State Board of Education, the pertinent excerpts of which Regulations are hereinafter set out (p. 8, 9 of this brief).

The respondent denied that the place or manner of his stopping the bus was wrongful.

The complaint of the plaintiff was dismissed as to the

defendant Board of Education upon demurrer.

The trial of the cause as against the defendants Guy Elias Carr and W. Ed Bingham resulted in a verdict in favor of the plaintiff and against the defendant Guy Elias Carr in the amount of \$5,000.00 and a separate verdict in favor of the defendant W. Ed Bingham and against the plaintiff "no cause of action."

The judgment against the defendant Guy Elias Carr has been satisfied, with a full reservation of appellant's rights against W. Ed Bingham, the respondent herein.

STATEMENT OF ERRORS

A statement of errors upon which appellant relies for reversal of the judgment and decree of the District Court of the Second Judicial District of the State of Utah within and for Weber County, is as follows:

1. That the court erred in denying appellant's requested instruction Number 13, as follows:

"You are instructed that it was the duty of the defendant, W. Ed Bingham, to require the children to pass behind rather than in front of his bus. If you find from the evidence that he did not do so, then you will find that his failure so to do was negligence as a matter of law, and you will find in favor of the plaintiff and against said defendant."

2. That the court erred in denying appellant's requested instruction Number 14, as follows:

"You are instructed that if you find from the evidence that the defendant, W. Ed Bingham, did not require the deceased child, Lawrence P. Dawson, to pass behind rather than in front of the bus, that said defendant was guilty of misconduct as a matter of

law. Upon such a finding by you, you are further instructed that that misconduct on the part of said defendant overcomes any question of contributory negligence on the part of the deceased child, Lawrence P. Dawson, and you will then give no consideration whatever to any question of contributory negligence on the part of said child.”

3. That the court erred in denying appellant’s requested instruction Number 19, as follows:

“You are instructed that children must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution towards them must calculate upon this and take precautions accordingly.”

4. That the court erred in denying appellant’s requested instruction Number 27, as follows:

“You are instructed that a driver of a school bus is charged with the knowledge that children upon leaving said bus may be expected to act upon childish instincts and impulses and cross a street or highway in front of said bus without looking and without being mindful of their danger.”

5. That the court erred in denying appellant’s requested instruction Number 28, as follows:

“You are instructed that a person driving a school bus must expect children to be thoughtless of prior instructions, and must expect them to do the things children are apt to do, and must take such precautions and must do those things which the law and regulations require him to do for their safety.

“You are further instructed that the regulations

of the State Road Commission and the State Board of Education, adopted pursuant to law, provide that the driver of the bus shall require all pupils to pass behind the bus rather than in front of the bus, and require that a school bus shall not pick up or let off pupils except at regularly designated stops, and that the bus shall not be stopped in line of traffic to load or unload pupils.”

6. That the court erred in denying appellant’s requested instruction Number 31, as follows :

“If you find from the evidence that the defendant W. Ed Bingham could have required the deceased child Lawrence P. Dawson to pass behind rather than in front of the bus by definite, clear, or positive instructions, or by stopping his bus in such a position, or at such a place, as would require it, and that said defendant did not do so, then you will find that he was negligent, and you find in favor of the plaintiff and against the defendant.”

7. That the court erred in denying appellant’s requested instruction Number 32, as follows :

“If you find from the evidence that the defendant W. Ed Bingham could have stopped his bus in such a position, or at such a place, that the deceased child Lawrence P. Dawson would have been required to pass behind rather than in front of said bus, and that said defendant did not do so, then you will find that he was negligent, and you will find in favor of the plaintiff and against said defendant.”

8. That the court erred in denying appellant’s requested instruction Number 33, as follows :

“You are instructed that it was the duty of the defendant W. Ed Bingham to stop and discharge the deceased child Lawrence P. Dawson, and the other school children, at a regularly designated bus stop. If you find from all of the evidence that he did not do so, then you will find that his failure so to do was negligence as a matter of law. And you will find in favor of the plaintiff and against said defendant.”

9. The court erred in giving its instruction Number 12, as follows:

“You are instructed that there is no evidence in this case that defendant W. Ed Bingham stopped said school bus in a place which was not a regularly designated bus stop and this claim of negligence is withdrawn from your consideration.”

10. That the court erred in giving its instruction Number 13, as follows:

“You are instructed that there is no evidence in this case that immediately prior to said accident, the defendant W. Ed Bingham stopped said school bus in line of traffic to unload pupils and this claim of negligence is withdrawn from your consideration.”

11. That the court erred in giving its instruction Number 14, as follows:

“You are instructed that it was the duty of the defendant, Ed Bingham, to stop his bus in such a position and at such a place to require the children to pass behind rather than in front of his bus. If you find from the evidence that said defendant did not do so, then you will find that he was negligent, and

if you further find that said negligence was a proximate cause of the injuries and death complained of, you will find in favor of the plaintiff and against the defendant, W. Ed Bingham, and award plaintiff damages; provided however, you further find that the deceased boy was not guilty of contributory negligence.”

12. That the court erred in giving its instruction Number 15, as follows:

“You are further instructed that defendant W. Ed Bingham was not negligent because he did not take the alternate route and stop his bus on the so-called bridge stop. It was his legal right to take the route along highway U-38 traveling northward.”

ARGUMENT

It is our three-fold contention that: (1) The lower court erred in refusing to instruct the jury that the respondent W. Ed Bingham was guilty of negligence as a matter of law, and in failing to submit to the jury, with respect to the respondent W. Ed Bingham, the single question as to the amount of damages. (2) That the court erred in submitting to the jury the question of contributory negligence on the part of the deceased child Lawrence P. Dawson, for the reason that the statute (Section 57-7-177, Utah Code Annotated, 1943) defined and characterized the respondent W. Ed Bingham's actions as “misconduct”; that misconduct goes beyond negligence and amounts to negligence per se in effect, and precludes any defense of contributory negligence. (3) The lower court, having refused to instruct the jury that the respondent W. Ed Bingham was guilty of negligence

as a matter of law, erred in denying appellant's motion for a new trial, for the reason that the verdict was against the weight of the evidence.

First:

The pertinent sections of the Utah Code read as follows:

Section 57-7-176. Commission to Regulate Design and Operation of School Buses.

“The state road commission by and with the advice of the state board of education shall adopt and enforce regulations not inconsistent with this act to govern the design and operation of all school buses for the transportation of school children when owned and operated by any school district Every school district, its officers and employees, shall be subject to said regulations.”

Section 57-7-177. Id. Violation of Regulations-Penalty.

“Any officer or employee of any school district who violates any of the regulations provided for in the next preceding section shall be guilty of misconduct and subject to removal from office or employment. . . .”

Pursuant to the authority and direction of these sections of the Code the Utah State Road Commission, by and with the advice of the State Board of Education promulgated the following regulations:

1. Chapter 2, Paragraph 2-2 (a)

“The school bus shall not pick up or let off pupils except at regularly designated stops.”

2. Paragraph 2-2(b)

“The bus shall not be stopped in line of traffic to load or unload pupils. (Note: Widened shoulders where desirable for stops will be provided upon application.)”

3. Chapter 2, Paragraph 2-2(c)

“The driver shall require all pupils to pass behind rather than in front of the bus.”

The respondent W. Ed Bingham flew directly in the face of these requirements and drove where he pleased and stopped where he pleased, with the result that the very tragedy which the law and the regulations were designed to prevent did occur.

The section first quoted above (57-7-176) provides, among other things, that “Every school district, its officers and employees, . . . shall be subject to said regulations.” Section 57-7-177 provides that “Any officer or employee of any school district who violates *any* of the regulations provided for in the next preceding section . . . shall be guilty of *misconduct* and subject to removal from office or employment.” (Italics ours).

Obviously, the Legislature had determined that the lives of school children of this state were invaluable and had sought to throw every possible safeguard around them, and had fixed the punishment of those who violated the regulations which the Legislature intended to have established as a procedure of safe conduct.

The law and the regulations provided that the respondent W. Ed Bingham should require the school children when alighting from the school bus to pass to the rear of

and behind the bus. The reason for the requirement is evident. By requiring them to pass behind the bus, the children would be in the best possible position to protect themselves from oncoming traffic. In that position they would have a clear vision of traffic coming from the rear, unobstructed by the school bus; and they themselves would be visible to oncoming traffic.

“Whether the Legislature enacts a safety statute, it declares that injury from violation of it is reasonably to be anticipated. The Legislature establishes the standard of care to be exercised and liability for injury resulting from violation of the standard follows. *Osborne v. Montgomery*, 203 Wis. 223, 240, 241, 234 N. W. 372.”

Butts v. Ward, et al., 227 Wis.
387, 279 N. W. 6, 116 A. L. R. 1441

“The view that the violations of a statute may constitute actionable negligence is predicated upon the principle that when an act is forbidden by express provision of law, the standard of the legislature becomes absolute, and one who perpetrates the prohibited act will be deemed to be liable regardless of whether the resulting injury might have been foreseen by a prudent person.”

38 Am. Jr. 831, 832, Sec. 160
and cases cited.

In *Peterson v. Standard Oil Co.*, 55 Or. 511, 106 Pac. 337, Am. Cas. 1912-A. 625, the court stated in part (106 Pac. 341):

“It is to be regretted that two or three authoritative courts have fallen into the aberration of holding that the violation of a statute, or municipal or-

dinance, enacted for the public safety, does not establish negligence per se; but is merely what the books term 'evidence of negligence'—that is to say, competent but not conclusive evidence, to be submitted to the jury on the question of negligence or no negligence. It seems to have escaped the attention of the judges who have laid down this rule that it has the effect of clothing common juries with the dispensing power—the power to set aside acts of the Legislature—a power exercised by the early Kings of England, though its exercise was odious to our ancestors, so much so that the exercise of it disappeared with the Tudors.

“Whatever may be the rule where the measure of care is prescribed by the by-laws of a municipal corporation, logic and reason would seem to indicate that, where the laws of the state for the protection of the public have prescribed that certain precaution shall be observed in the labelling of kerosene and distillates, such requirements constitute a legislative declaration of the minimum of care necessary under the circumstances, and that a less degree of care is negligence as a matter of law, and that the pleading and proof necessary in case of injury arising under such circumstances need only show the breach of the statutory requirements, the fact that such breach was the proximate cause of the injury, and the damages sustained thereby.”

In a case discussing a statute requiring an audible warning when approaching pedestrians, the Michigan Court said, in the case of *Johnston v. Cornelius*, 166 N. W. 983, 985, in part:

“It lays a statutory duty upon drivers of automobiles, which may be greater than the duty of exercising ordinary prudence; but the driver of automobiles must, nevertheless, discharge such duty or respond for its neglect. *Levyn v. Koppin*, 183 Mich. 232, 149. N. W. 993.”

Second:

The Legislature laid down the rules. It wanted them obeyed for the protection of school children. It fixed penalties for violation. It said that a person breaking the rules would be “guilty of misconduct.”

We must presume that the Legislature used the word “misconduct” advisedly when enacting the law quoted above (57-7-177). It becomes important, therefore, to examine the meaning of the word “misconduct,” with which violations of these important code sections were characterized, in order to understand the importance which the Legislature attached to those sections, and in order to understand its determination to safeguard the lives of school children.

The term “misconduct” is a much stronger word than “negligence.” It goes far beyond negligence in scope and meaning and responsibility. In the case of *Mandella vs. Mariano*, 200 Atl. 478 (Rhode Island, 1938) the Court said in part:

“This is an action for negligence, and negligence, speaking generally, is a relative term implying failure to comply with an indefinite rule of conduct in the circumstances of any particular case. Intent is not an essential element of negligence. The term

‘misconduct’, on the other hand, implies a wrong intention and not a mere error of judgment; it implies fault beyond the error of judgment....

“In all the dictionaries that we have consulted, whether law dictionaries or those in general use, such as Ballantine, Black, Webster’s New International, and Winston’s Simplified dictionary, the term ‘misconduct’ is defined as a transgression of some established and definite rule of action; a forbidden act; a dereliction from duty; unlawful behavior; wilful in character; improper or wrong behavior. Where synonyms are given, the synonymous terms are misdemeanor, misdeed, misbehavior, delinquency, impropriety, mismanagement, offense. ‘Negligence’ or ‘carelessness’ is not included in the synonyms for ‘misconduct’. See 40 C. J. 1221 to the same effect.

“Unless a word has a definite technical meaning, in which case it is to be given that meaning, a word in common use is ordinarily held to convey the meaning that attaches to it in usual parlance. We are satisfied that the term ‘misconduct’, both in law and in ordinary speech, usually implies the willful doing of an act with a wrong intention....

“The case of *Citizens’ Insurance Co. v. Marsh*, 41 Pa. 386, is the only one of many decisions examined by us, where the issue was somewhat analogous to the one in the instant case. That case has been cited in later years as an authority for the general proposition that the term ‘misconduct’ implies malfeasance or unlawful conduct. There the plaintiff brought

suit on a policy of insurance for the burning of a steamboat. The defense set up that the burning was due to 'misconduct' on the part of the captain and not the result of ordinary negligence or carelessness. The facts showed that the captain had engaged his boat in a race with another steamboat; that, in order to secure extra steam, he had a barrel of turpentine brought out of the hold and the head knocked out; that he ordered the barrel placed in front of the boiler, so that the fuel could be saturated with turpentine immediately before being put into the boiler; that fuel so saturated caught fire, which, spreading first to the barrel of turpentine, and then to the boat itself, finally resulted in the burning of the boat. An act of congress in force at that time required that turpentine be kept in metallic containers or compartments lined with metal and at a secure distance from any fire.

“In reversing a decision for the plaintiff, the appellate court draws a sharp distinction between ‘negligence’ and ‘misconduct’. At page 394 of the opinion above cited, the court says: ‘These views may help to draw the distinction between mere negligence, carelessness, or unskilfulness, and misconduct. It seems to us that, in usual parlance, when these terms are contradistinguished, misconduct means a transgression of some established and definite rule of action, where no discretion is left, except what necessity may demand; and that carelessness, negligence, and unskilfulness are transgressions of some established but indefinite rule of action, where some discretion is necessarily left to the actor. Mis-

conduct is a violation of definite law; carelessness, an abuse of discretion under an indefinite law. Misconduct is a forbidden act; carelessness, a forbidden quality of an act, and is necessarily indefinite'."

It is interesting to note that, in the *Citizens Insurance Co. v. Marsh* case *supra*, the statute "required that turpentine be kept in metallic containers or compartments lined with metal and at a secure distance from any fire." So far as appears from the reference to that question by the Rhode Island Court, the statute itself did not characterize the violation as 'misconduct' but the court found that the captain's action was misconduct.

We are not left to any speculation in the case at bar. Here the statute itself brands the violation as 'misconduct' and prescribed the punishment therefor. The violation of the statute and the regulations, therefore, cannot be the subject of debate as to its meaning.

Along this same line we quote at length from 38 Am. Jr. pp 854, 855:

"178.—Wilful, Wanton, or Reckless Conduct.—There is an abundance of authority for the proposition that contributory negligence is not a defense in an action based upon wilful or wanton misconduct or intentional violence. Even in jurisdictions where the doctrine of comparative negligence is rejected as a general principle of the common law, contributory negligence is no defense to an action based on the defendant's reckless, wilful, wanton, or intentional misconduct. There is no more reason for permitting the defense of contributory negligence in a case where the injury was caused by wilful, wanton, or reckless misconduct, than there is for permitting it

in a case of assault and battery. No court has questioned the soundness of this proposition so far as injuries intentionally inflicted are concerned. So far as wanton conduct is concerned, some discernment must be exercised by the courts, or the defense of contributory negligence will be barred in any case merely by the artifice of describing the conduct of the defendant as wanton. The distinction between negligence and wilful and wanton misconduct is well defined. Although conduct of the defendant precluding the defense of contributory negligence has been called negligence with such qualifying adjectives as 'gross,' 'wanton,' 'reckless,' or 'wilful,' strictly speaking this is an incorrect and misleading use of the word 'negligence.' Negligent conduct, whatever may be the characterization applied to it, is not sufficient to preclude the defense of contributory negligence. A defendant's act is properly characterized as willful, wanton, or reckless, within the meaning of the foregoing rule, only when it was apparent, or reasonably should have been apparent, to the defendant that the result was likely to prove disastrous to the plaintiff, and he acted with such an indifference toward, or utter disregard of, such a consequence that it can be said he was willing to perpetrate it. The elements necessary to characterize an injury as wantonly or wilfully inflicted are (1) knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another, (2) ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand, and (3) the omission to use such care and diligence to avert the threatened danger, when to the

ordinary mind it must be apparent that the result is likely to prove disastrous to another. If one wilfully injures another, or if his conduct in inflicting the injury is so wanton or reckless that it amounts to the same thing, he is guilty of more than negligence. His conduct is characterized by wilfulness rather than by inadvertance; it transcends negligence and is different in kind. Otherwise stated, the omission to use care and diligence to avert a threatened danger to another constitutes conduct which precludes the defense of contributory negligence when it arises from a deliberate purpose to inflict injury and also when it is due to that reckless disregard for the safety of others to which the law imputes an intention to do harm. For an act to fall within the category of wanton or wilful negligence, which renders the defense of contributory negligence unavailable to a motorist who is charged with negligence, it need not spring from ill will or wear a cloak of malicious intent. . . .”

Referring to the foregoing “elements necessary to characterize an injury as wantonly or wilfully inflicted,” attention is invited to the fact that in the case at bar the respondent had more than a knowledge of the dangerous situation, he had a legal requirement to observe.

Third:

Appellant’s motion for a new trial should have been granted as against the respondent W. Ed Bingham for the reason that the verdict of the jury was against the great weight of the evidence which conclusively shows that entirely aside from the laws and regulations governing student transportation heretofore set forth he was

careless and negligent and guilty of misconduct in the following respects and for the following reasons: He was an experienced driver, having driven a bus for 18 years (Tr. p. 183), and he was charged with knowledge of the Laws and Regulations relating to the driving of school buses (Tr. p. 231). He knew of the dangerous intersection at Highway U-38 and 4800 South Street (Tr. pp. 193, 194) and of the speed of automobiles passing along U-38 and 4800 South Street (Tr. p. 193). He knew of a previous accident involving a student at that intersection (Tr. p. 189). Although on previous occasions he had instructed his student passengers on what to do, he did not do so on the date of this accident (Tr. pp. 130, 131, 193, 194, 214, 235). He had permitted, or by the place he stopped the bus had required, children to pass in front of the school bus on previous occasions (Tr. p. 145). He had on various occasions changed the route of the bus (Tr. pp. 185, 186) and had stopped at different places both on Highway U-38 and on 4800 South Street (Tr. pp. 98, 127, 185, 186, 187, 225). The area for stopping was wider on the northeast corner of U-38 (Tr. p. 198). There was no designated bus stop either on U-38 or 4800 South Street as required by law, and he used his own judgment as to where he stopped (Tr. p. 188). On the day of the accident it had been raining and he parked the bus for discharge of students on the southeast corner of the intersection of Highway U-38 and 4800 South Street in line of traffic (Tr. pp. 21, 42, 43), and in such a position that students proceeding west on 4800 South Street were compelled to go in front of the bus rather than behind it because of a ditch bank, mud and weeds (Tr. pp. 22, 23, 25, 43, 53, 139, 209, 216, 221). On the day in question Lawrence P. Dawson, deceased, walked around the front

of the bus (Tr. p. 190) and was struck by an automobile being driven by the defendant Guy Elias Carr (Tr. p. 192) receiving injuries as a result of which the boy died.

The evidence in this case discloses that Bingham in spite of regulations to the contrary, and in his own words, used his "own judgment" as to where he would stop the bus for the discharge of students. He had no legal right to stop at the intersection in question at all, because no stop had been designated there, but despite that fact he assumed the responsibility for so doing, and did stop. The effect of W. Ed Bingham's conduct in stopping the bus at various corners of the intersection resulted in confusion to the student passengers, who varied in ages from 6 to 14 years. At times he would stop on 4800 South Street facing west; at other times on U-38 on the southeast corner, and at other times he would proceed to the northeast corner of the same intersection. At still other times he stopped a block or so south of the intersection to let students off. On the day of this accident he stopped the bus in such a position that children alighting from the bus could not go around the back of the bus to proceed west because of wet weeds and mud caused by the rain. Mr. Bingham had been driving the bus for many years, and entirely aside from the regulations to the contrary in stopping as he did, knew or should have known that children in their youthful haste and impulse would go in front of the bus to get home. He did not take time to warn them of danger or to insist that they go behind the bus but on the contrary assumed an indifferent attitude towards them. In fact, he was so indifferent to their safety that he stopped the bus in such a position that they would have been forced to walk in mud, through wet

weeds to go around the back of the bus. In addition to that—he could have proceeded across 4800 South Street as he had previously done and parked on the northeast corner in such a position that the children would have been forced to go behind the bus. This he failed to do. Entirely aside from the questions relating to negligence as a matter of law, and “misconduct,” and contributory negligence, heretofore discussed in this brief, and referring for the moment to the questions relating to negligence in general, which evidently were the basis for the view of the lower court, we submit that the finding of the jury and the judgment of the court “no cause of action,” as to the respondent W. Ed Bingham were contrary to the great weight of the evidence. Knowing the traffic danger at the intersection, knowing the actions and conduct and habits of children, knowing that he could stop the bus where children could not pass in front of it, and knowing that repeated warnings are necessary for the safety of children, yet W. Ed Bingham in total indifference to the safety of these children took no steps whatever to protect or warn them on this day. There can be no question but what his negligence was one of the proximate causes of the accident which resulted in death to the boy Lawrence P. Dawson.

CONCLUSION

We respectfully submit that the verdict of the jury and the judgment of the court, as to the respondent W. Ed Bingham, should be set aside and the case remanded for a new trial.

Respectfully submitted,

LEWIS J. WALLACE

M. BLAINE PETERSON

Attorneys for Appellant

