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John Durrant v. Bradley E. Bryant, Workers Compensation Fund of Utah, and Utah Transit Authority : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOHN DURRANT, Plaintiff/Appellant, vs. BRADLEY E. BRYANT, WORKERS COMPENSATION FUND OF UTAH, and UTAH TRANSIT AUTHORITY, a Utah corporation, Defendants/Appellees.	)	Appeal No. 970659-CA **APPELLANT'S REPLY BRIEF**

APPEAL FROM
THE SECOND JUDICIAL DISTRICT COURT
OF WEBER COUNTY
Judge Stanton M. Taylor

Oral Argument Priority Classification No. 15

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Utah State Cases

Other Authorities

ARGUMENT

I. THE COURT IS NOT PRECLUDED FROM CONSIDERING UTA IN THIS APPEAL BECAUSE THERE WAS PLAIN ERROR IN THE RECORD.

UTA argues that because Plaintiff's motion for a directed verdict was directed solely at Defendant Bryant, the court may not consider UTA a party to the motion for judgment notwithstanding the verdict. While generally this is true, an exception exists when there is plain error in the record. Henderson v. Meyer, 533 P.2d 290 (Utah 1975). In Henderson, husband and wife plaintiffs sued for damages arising out of an automobile accident. Neither plaintiff moved for a directed verdict. At the close of the trial, the jury found no cause of action for either plaintiff. On appeal, the Utah Supreme Court felt that the evidence regarding liability was so clear that it would be a miscarriage of justice not to consider plaintiffs' motion for judgment notwithstanding the verdict, and created an exception to the general rule. Id. at 292.

Similarly, in the case at bar the evidence is clear that one of the defendants should have been found liable for plaintiff's injuries. There was no evidence of comparative fault, and either defendant was in a position to avoid the accident. The jury's finding of no negligence on the part of either defendant was in direct conflict with the evidence presented. Thus, although UTA was not a party to the motion for directed verdict, this Court may still consider UTA's fault because to turn the plaintiff away with no remedy at this point would be a miscarriage of justice per the Henderson exception.

II. DEFENDANT BRYANT'S ACTIONS WERE NOT REASONABLE UNDER THE CIRCUMSTANCES.

A. Defendant Bryant Still Has No Legally Sufficient Excuse for Failing to Yield the Right of Way.

Defendant Bryant argues that his actions were reasonable under the totality of the circumstances, which provides him with a legal excuse for his violation of the failure to yield statute, U.C.A. § 41-6-73. In support of this argument, defendant cites three cases in which the court found that failure to yield the right-of-way was not necessarily negligence. However, these cases are all pre-1970. Although none has been expressly overruled, the principle they stand for has evolved into the prima facie evidence standard of Ryan v. Gold Cross Services, Inc., 903 P.2d 423 (Utah 1995) and Gaw v. State ex. rel. Utah Dept. of Transp., 798 P.2d 1130, 1135 (Utah Ct. App. 1990), cert. denied per unpublished order of Utah Supreme Court (Jan. 11, 1991)).

In the 1940's and 1950's, failure to yield the right of way was tantamount to negligence as a matter of law. See, e.g., Cederloff v. Whited, 110 Utah 45, 50-51, 169 P.2d 777, 779-80 (Utah 1946) (holding that where a left turn could not be made with reasonable safety, the defendant was guilty of negligence as a matter of law); French v. Utah Oil Refining Co., 117 Utah 406, 410, 216 P.2d 1002, 1004 (Utah 1950) (stating that because the driver making a left-hand turn has control of the situation, he must yield if the movement cannot be made safely). Later, this rule was softened so that the defendant was relieved of liability if his actions were reasonable under all of the circumstances. See Hardman v. Thurman, 121 Utah 143, 239 P.2d 215 (Utah 1951); Smith v. Gallegos, 16 Utah 2d 344, 400 P.2d 570 (Utah 1965); McCloud v. Baum, 569 P.2d 1125 (Utah 1977).

However, the law as it currently stands places a heavier burden on one who violates a safety statute. Once evidence of a statutory violation has been presented, the burden shifts to the violator. Such a person is then required to articulate not just a factual excuse, but an excuse which is legally sufficient to justify violation of the statute. Gaw, 798 P.2d at 1135. See also Hall v. Warren, 692 P.2d 737 (Utah 1984); Jorgensen v. Issa, 739 P.2d 80 (Utah Ct. App. 1987); MUJI 3.11 (1993). Regardless of Defendant Bryant's claims that he acted reasonably, under current case law he can present no evidence of any of the enumerated legal excuses, and thus has failed to meet his burden to rebut his admission of negligence.

B. The Cases Cited by Defendant Bryant are Distinguishable Because There is No Evidence of Comparative Fault in the Case at Bar.

Even if the trio of cases cited by Defendant Bryant were still good law, they are still distinguishable on the facts. In each of the three, the reason the court found liability a jury question was that there was significant evidence of comparative fault on the part of the driver traveling straight. In Hardman, the driver going straight was operating a large truck. The court found that he should have seen the left-turning car and that he was traveling at an excessive rate of speed. Hardman, 121 Utah at 147, 239 P.2d at 217. The court found the truck driver's actions so unreasonable that the left-turning driver, not the driver going straight, had the right of way. Id. at 150, 218.

Similarly, in Smith, the driver going straight was speeding and had made a lane change just before the intersection. Smith, 16 Utah 2d at 347, 400 P.2d at 572. In McCloud, the plaintiff was a motorcyclist who swung to the right around a slow-moving vehicle immediately

before the intersection, so that the plaintiff was not even in a lane of travel at the point of impact. McCloud, 569 P.2d at 1127.

The facts of the case at bar are easily distinguishable. Although there were signs indicating that traffic was merging ahead, at the site of the accident, both northbound lanes were open for travel. (R. Vol. I 194:22-24; 202:25 - 203:4.) Thus, Plaintiff Durrant was in a legal lane of travel, and there is no evidence that he was speeding or otherwise acting negligently.[1] However, even if, hypothetically, there were facts indicating a degree of comparative fault, the jury should have found all parties negligent and then assessed the percentages of fault. Plaintiff's actions could not have relieved Defendant Bryant of his obligation to yield the right of way. Cintron v. Milkovich, 611 P.2d 730, 732 (Utah 1980) (citations omitted). The jury's conclusion that Bryant was not negligent simply cannot be upheld either by the facts or the law.

III. THE TRIAL COURT'S VOIR DIRE REGARDING TORT REFORM WAS PREJUDICIALLY INSUFFICIENT.

Appellees raise essentially two main arguments with respect to the jury questionnaire/voir dire issue. First, Appellees claim that the trial court's questioning was adequate to ferret out bias. However, Appellees fail to acknowledge the fact that under current case law, the trial court must do more than merely search for grounds to dismiss jurors for cause. Rather, the court must thoroughly question the panel regarding specific exposure to tort-reform propaganda, and then follow up on these questions to discover jurors' individual opinions regarding such material. Evans v. Doty, 824 P.2d 460, 461-62 (Utah Ct. App. 1991), cert. denied 836 P.2d 1383 (Utah

[1] Although Defendant Bryant's counsel argued during closing that Plaintiff was negligent for failing to follow the merge signs, failing to merge in a reasonable manner, speeding, and failing to maintain a proper lookout, there is no evidence in the record to support any of these charges.

1992). The distinction is that the trial court must do more than merely discover if jurors have strong feelings which might justify dismissal for cause. The court must ask jurors about materials they have read or been exposed to and explore these issues to provide counsel with full opportunity to utilize peremptory challenges. Id.

In this case, the trial court asked a series of four questions, two regarding articles on "the need to change the system" and two regarding "excessive judgment[s]." (R. Vol. I 26:16-23). These questions were inadequate for two reasons. First, the court did not pause for responses after each question. Instead, they were asked in a paragraph-type format which did not allow jurors time to respond until the court had completed its speech. Second, the "excessive judgment" questions, on which the court ended, were in the negative. Specifically, the court asked "Anybody here who has not heard of those kinds of cases?" The fact that there was no response should have indicated to the court that every juror on the panel had heard of "excessive judgments," and thus every juror required follow-up questioning.

Instead, the court proceeded with a for-cause question, seeking to discover only if any juror was biased as a result of their exposure to this type of information. (R. Vol. I 27:1-14). The court never asked how jurors had heard about excessive judgments, what type of articles or news programs they had been exposed to, or what their specific opinions were. Thus, the trial court denied Plaintiff the opportunity to discover information crucial to Plaintiff's educated use of peremptory challenges.

Appellees' second argument is that because Plaintiff's counsel was permitted to ask the jury a few follow-up questions, Plaintiff has waived the right to raise this issue on appeal. However, when the trial court informed counsel that the jury questionnaire would not be administered, the court in essence instructed counsel that the court would address the tort-reform

issue, and counsel would be permitted to ask merely clean-up questions. Moreover, there is ample evidence in the record that the trial court refused to utilize either the jury questionnaire or the specific questions proposed by Plaintiff to preserve the record for appeal.

CONCLUSION

Defendant UTA's argument that it is exempt from appeal should be rejected because the jury's finding that neither defendant was negligent was plainly in error. Further, Defendant Bryant's contention that he should be relieved of liability because he acted reasonably under the circumstances must also be rejected. The law requires Defendant Bryant to state a legal excuse for his failure to yield the right of way, and Bryant has failed to do so. Finally, although the trial court's voir dire regarding tort reform may pass for purposes of challenges for cause, but it was insufficient to permit counsel to make informed decisions regarding peremptory challenges.

DATED this 16th day of January, 1998.

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CERTIFICATE OF SERVICE

I certify that I caused to be mailed, postage prepaid on this 5th day of January, 1998, two (2) true and correct copies of the foregoing Reply Brief of the Appellant, to each of the following:

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