1978

Dennis Ray Edwards v. Ann Beard Didericksen : Respondent's Reply Brief

Utah Supreme Court

Reed M. Richards; Maurice Richards; Attorneys for Appellant;
D. Gary Christian; James Blakesley; Attorneys for Respondent;

IN THE SUPREME COURT

OF THE

STATE OF UTAH

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DENNIS RAY EDWARDS, A Minor
by and through his Guardian ad Litem,
EDWARD EDWARDS,

Plaintiff and Appellant,

vs.

Case No. 15780

ANN BEARD DIDERICKSEN,

Defendant and Respondent.

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RESPONDENT'S REPLY BRIEF

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Appeal from the District Court of
Box Elder County, State of Utah
Honorable VeNoy Christofferson, Judge

-----oooOooo-----

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RESPONDENT'S REPLY BRIEF

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STATEMENT OF THE NATURE OF THE CASE

This is an action for personal injuries sustained by appellant, Dennis Ray Edwards, a minor, by and through his guardian ad litem, Edward Edwards, to recover damages from defendant/respondent for injuries received in an automobile accident which occurred on the 24th day of January, 1976.

DISPOSITION IN LOWER COURT

The case was tried before a jury which found that the defendant was not negligent, resulting in a verdict and judgment for the defendant.

RELIEF SOUGHT ON APPEAL

Defendant seeks affirmation of the lower court Judgment.

STATEMENT OF FACTS

On January 24, 1976 the plaintiff and his brother, Danny, left their parents residence in Honeyville, Utah to pick up Danny's girl friend, Devon Taylor, who lived near Thatcher in Box Elder County. Danny was the owner and driver of the vehicle at all times relevant to this case. The plaintiff and Devon were passengers. Immediately prior to the accident, the driver was cautioned by both passengers to slow down because he was exceeding the speed limit.

After picking up Devon, the three youths had proceeded north on State Route 102, and approximately one and a half miles south of the Thatcher Church on State Route 102, the Edwards vehicle was involved in a collision with another vehicle driven by the defendant, Ann Beard Didericksen.

Prior to the accident there was some horse play in the Edwards vehicle while the group was traveling north on State Route 102. The horse play involved the driver's right hand being pulled such that the vehicle swerved on to the berm and gyrated back and forth across the road.

At trial, the plaintiff attempted to show that the accident had been caused when the defendant made a left hand turn from the highway into the driveway of her residence in front of the Edwards

vehicle. Defendant however introduced evidence showing that eye-witnesses had observed the Edwards vehicle traveling at an excessive rate of speed and apparently out of control. Michael Alan Grimsby testified that he observed the Edwards vehicle out of control one mile prior to the accident site. Peter C. Peterson testified that he saw the Edwards vehicle out of control a few hundred feet prior to the accident site. The defendant testified that she approached the place where she was to turn into the driveway of her home, signaling her intention to make a left hand turn and came to a stop on the roadway. She observed the Edwards vehicle approaching from the south fish-tailing or swerving back and forth on the roadway or otherwise out of control and decided if she stayed stopped on the roadway she would be struck by the Edwards vehicle. In an effort to avoid being struck by the oncoming car defendant proceeded to make a left turn off the roadway and into her driveway. The Edwards vehicle swerved into the borrow pit and hit the defendant's vehicle which had entered the defendant's driveway.

Plaintiff's vehicle was a 1962 Thunderbird which was ten (10) months overdue for a safety inspection, which had a disconnected power steering pump, and mismatched tires consisting of a fifteen inch (15") tire on the front left wheel of the vehicle and fourteen inch (14") tires on the other wheels. The road where the accident occurred was straight and level and afforded a clear and unobstructed view for

both drivers of at least two hundred (200) yards. At the time of the accident, the pavement was clear and dry.

Plaintiff presented Officer Larry Forsgren of the Utah Highway Patrol at the trial. Forsgren arrived at the scene shortly after the accident occurred and completed an accident investigation. At trial he gave an extensive and complete account of the observations and investigation which he made regarding the accident. The jury was shown the pictures that were taken of the accident site, his conclusions concerning the path taken by the Edwards vehicle, the approximate speed of the Edwards vehicle in the moments prior to impact and his conclusions concerning the principal point of impact. On objection, what the trial Judge prohibited him from stating was his opinion about which of the parties were at fault in causing the accident. The trial Judge ruled that the jury was capable of reviewing the evidence and accurately determining fault.

ARGUMENT

THE TRIAL COURT'S CONCLUSION THAT THE JURY WAS COMPETENT TO REACH A CORRECT JUDGMENT WITHOUT THE OFFICER'S OPINION AS TO WHICH PARTY WAS AT FAULT WAS PROPER AND IS CONSISTENT WITH PRECEDENT BOTH IN UTAH AND IN OTHER JURISDICTIONS.

POINT I

Prior Utah cases have held that the exclusion of an expert's opinion as to which party was at fault was proper.

In its Brief plaintiff properly states that an expert may express an opinion on causation even if the opinion goes to the ultimate fact and issue in question. However, plaintiff failed to focus upon the requirement that the opinion be in an area where a juror is likely to prove incapable of forming a correct judgment without skilled assistance.

In Hooper v. General Motors Corp., 123 Utah 515, 260 P.2d 549 (1953), the court stated the following general rule:

> ' . . . opinions as to the cause of a particular occurrence or accident given by witnesses possessing peculiar skill or knowledge--that is, experts--are admissible where the subject matter is not one of common observation or knowledge, or in other words, where witnesses because of peculiar knowledge are competent to reach an intelligent conclusion and inexperienced persons are likely to prove incapable of forming a correct judgment without skilled assistance.' Id. at 552. [Emphasis added.]

The issue in Hooper was whether or not a wheel was defective. Having observed certain characteristics of the wheel in question, the expert was then asked his professional opinion as to whether or not these characteristics signified a defective wheel. This Court concluded that such a conclusion required a degree of sophistication of which the average juror was incapable.

In its Brief, plaintiff has focused upon whether or not an expert may offer an opinion which goes to the ultimate issue in

question. Admittedly Rule 56 of the Utah Rules of Evidence, ¶4, allows such an opinion, but only when such an opinion is "otherwise admissible." The Hooper standard as affirmed in Joseph v. W. H. Groves Latter Day Saints Hospital, 7 Utah 2d 39, 318 P. 2d 330 (1957) and Stagmeyer v. Leatham Bros., Inc., 20 Utah 2d 421, 439 P. 2d 279 (1968) requires as one of the elements that an opinion to be "otherwise admissible" be in a field where the average juror would be unable to evaluate the evidence and render a correct judgment without the assistance of the skilled experts opinion.

In the instant case the jury was asked to decide whether the accident was caused by the defendant negligently turning in front of the vehicle in which the plaintiff was riding, or whether it was caused by the Edwards vehicle hurdling towards the defendant's and hitting the defendant's vehicle in the defendant's driveway after the defendant had made an emergency turn into her driveway in a fruitless attempt to avoid being struck by the onrushing out-of-control vehicle.

In making that determination the jury had before it evidence from all three occupants of the Edwards vehicle, Mrs. Didericksen, a neighbor who witnessed the accident, an individual parked along side the road who had observed the Edwards vehicle swerve across the road and narrowly avoid hitting him approximately one (1) mile prior to the accident and the testimony of Officer Forsgren

As noted earlier, Officer Forsgren testified extensively concerning all of the observations which he made of the accident scene, the questions he asked of the participants following the accident, the photographs he took of the accident scene, the conclusions which he had reached concerning the location of the vehicles at impact, the path taken by the Edwards vehicle prior to impact, his estimation as to the speed of the Edwards vehicle in the moments before impact, etc.

The final question to be resolved after the presentation of all the evidence by both parties was this: Was the Edwards vehicle swerving out of control before or after the defendant began the turn into her driveway? The jury needed no expert's opinion regarding this point: It was in a position to weigh the evidence and decide which version of the facts was to be believed. Accordingly, Officer Forsgren's opinions concerning fault were unnecessary and properly excluded by the trial court.

In Macshara v. Garfield, 20 Utah 2d 152, 434 P. 2d 756 (1967) this court decided the identical issue raised on appeal by plaintiff and resolved it in favor of excluding the officer's conclusions concerning causation. Macshara involved an automobile accident where the issue presented was which party entered the intersection first. At trial, the trial judge refused to allow a traffic officer to in effect reconstruct the accident from his interpretation of the physical

evidence and make his conclusion as to which party entered the intersection first. In affirming the trial court's ruling this court stated:

> . . . We think the trial court was correct in not allowing the officer to in effect reconstruct the accident and the speed and direction of the vehicles on the basis of such physical evidence as: gouge marks on the lawn and on the curbing, the damage to the automobiles, and the course he assumed they took after the impact. The disallowance of the evidence was in conformity with the rule that such an opinion is not addmissible if a layman of ordinary intelligence can just as well interpret the evidence as the experts. In this connection it should be observed that all of the complete evidence, including photographs taken of the vehicles, were before the jury. And further, that the trial court did allow the officer to give his observations as to the damage to the vehicles and its causation, and to give his estimate of their speed based upon the skid marks. Id. at 757. [Emphasis added.]

Macshara is directly in point with the instant case. In Macshara the question was which party entered the intersection first; in the instant case the issue is did the defendant initiate her turn before or after the Edwards vehicle began swerving across the roadway. As in Macshara, the officer in the instant case was permitted to give his observations concerning the path taken by the Edwards vehicle, the speed of the Edwards vehicle, and the probable point of impact. Plaintiff has raised no issues which distinguished the instant case from Macshara. Accordingly, in the instant case the trial court's judgment should be affirmed.

This Court has acknowledged that the trial court is to be given wide discretion in its rulings upon the admissibility of expert's opinions. Marsh v. Irvine, 22 Utah 2d 154, 449 P. 2d 996 (1969) involved a suit by a passenger against the driver of the vehicle in which the plaintiff was riding and against the driver of another automobile who collided with the first vehicle. At trial, the judge admitted and excluded portions of the testimony of two experienced police officers who were involved in the investigation of the accident. On appeal defendant Irvine argued that the trial court had been incorrect in its decisions as to which portions of the testimony should be accepted and which excluded. This court stated:

> . . . Without belaboring the detail thereof we make the following general observations which are controlling here. When it appears that the determination of an issue will be aided by knowledge of something which is not generally known by laymen, it is in order to permit one who has specialized knowledge on the subject, and thus may properly be called an expert, to testify concerning his knowledge and/or his opinion to provide better understanding of the situation. Because of his position as the authority in charge of the trial, the trial judge should be allowed a reasonable latitude of discretion both as to the necessity for such expert testimony and as to the qualification of the witness to give it. We are not persuaded that he transgressed the bounds of reason or abused his discretion here. Id. at 999. [Emphasis added.]

In the instant case plaintiff has cited no cases which hold

that the exclusion of an officer's opinion concerning causation on facts similar to those of the instant case consitituted an abuse of discretion. Rather, plaintiff asserts without authority that the average juror would be incapable of analyzing the causation question on the basis of the evidence presented by the police officer and other witnesses. This assertion is contrary to the decisions reached by this court in Macshara and Marsh. Consistent with those cases this Court should affirm the trial court's ruling.

POINT II

The trial court's exclusion of the officer's opinion on causation is consistent with decisions in other jurisdictions.

Lollis v. Superior Sales Co., Inc., 580 P. 2d 423 (Kan., 1978) involved a suit by a motorcyclist for injuries he sustained when his motorcycle, which had been following a beer truck, collided with the right rear side of the truck as it was making a right turn.

Under Kansas Rules of Evidence opinion testimony of experts on ultimate issues is admissible when the opinion will aid the jury in the interpretation of technical facts or when it will assist the jury in understanding material in issue. The Kansas court stated:

> . . . We have no quarrel with the rule recognized in Spraker v. Lankin, supra, that experienced police officers and reconstruction experts, having the requisite experience and training, should be permitted to express opinions as to the speed of vehicles involved in highway collisions

> when based upon the evidence observed at the scene of the accident, including direction of travel, skid marks, point of impact, damages to the vehicles, and the location in which the vehicles came to rest. We have concluded, however, that a highway patrolman or other expert may not properly state either his opinion as to which of the parties was at fault in causing an accident or his opinion concerning what actions of the parties contributed to the accident. Id. at 431. [Emphasis added.]

The instant case raised the identical issue resolved by the Kansas Court. In the instant case the investigating officer was permitted to testify as to all of his findings but was not permitted to testify as to his conclusion concerning the causation of the accident.

In both the instant case and Lollis the situation was one where the normal experience and qualifications of layman jurors would have enabled them to draw proper conclusions without the aid of expert conclusions or opinions and accordingly expert's opinion on causation were properly excluded.

Bailey v. Rhodes, 276 P. 2d 713 (Ore., 1954) involved a suit by a guest for injuries sustained in an automobile accident against the driver of the automobile alleging negligence on the grounds of successive speed and intoxication. The trial court allowed an investigating officer to testify to his conclusions concerning the defendant's rate of speed at the time of the accident. The Oregon Supreme Court

reversed stating that:

> . . . A jury is as well able to draw its own inferences and reach its own conclusions from the facts presented . . . Id. at 719.

In Kelso v. Independent Tank Co., 348 P. 2d 855 (Okla., 1960) the Oklahoma Court stated that:

> . . . Where the cause of a motor vehicle collision is within the knowledge and understanding of ordinary persons, it is an ultimate issue for the jury, and it is prejudicial error to admit expert opinion testimony on such issue, over objection of opposing party. Id. at 856.

Although some courts have excluded evidence on the basis that it goes to the "ultimate issue" in the case, the underlying basis of the exclusion is that the opinion evidence being offered is not necessary for a jury to properly decide the case. In Kelso, despite the use of the term "ultimate issue" by the court, the court made clear, as is reflected in the above quoted citation, that the opinion evidence was being excluded because it was within the knowledge and understanding of ordinary persons and consequently was not required by the jury.

The Alaska Supreme Court has recognized and adopted the above discussed principle. In Meyst v. East Fifth Avenue Service, Inc., 401 P. 2d 430 (Alas., 1965) the court affirmed the trial court's exclusion of an expert's opinion on causation of the automobile accident

The court ruled that the expert's opinion was properly excluded not because it went to the ultimate issue or invaded the province of the jury, but because the jury could make its own independent determination as to the cause of the accident on the basis of the other evidence introduced at trial.

CONCLUSION

All of the above discussed cases reached the identical decision that was reached by the trial court in the instant case. All of the cases involved automobile accidents and a determination as to which party caused the accident. In all of the cases the Appellate Court concluded that an expert's opinion as to causation of the automobile accident should be excluded because the jury was in a position to determine causation on the basis of the evidence available to it.

In Macshara this court specifically adopted the position taken by defendant in the instant case and ruled that the exclusion of the expert's opinion as to causation was proper. The position of Macshara is consistent with case law in other jurisdictions. Plaintiff has cited no cases in which a contrary concludion was reached. The Hooper case cited by plaintiff is distinguishable from the instant case because Hooper required a decision as to whether or not a wheel was defective. Determination of the defective condition of a product is substantially different from determining which of two parties' actions were responsible for causing the accident. The thrust of plaintiff's

argument is that the officer's opinion on causation was excluded because it was an ultimate issue. Plaintiff argues further that "ultimate issue" evidence is admissible and hence that the trial court committed error in excluding the opinion evidence. However, as this Court has pointed out in Joseph, supra, the fundamental issue is not whether the opinion evidence goes to the ultimate issue before the jury, but whether or not the opinion evidence is otherwise admissible, i.e., is the subject of inquiry beyond the field of knowledge generally possessed by laymen. Id. at 334.

Plaintiff fails to pass this test. The trial court properly ruled that the jury was in a position to reach a knowledgeable conclusion as to the individuals responsible for the accident in the instant case. The jury had before it the testimony of the participants, eyewitnesses, and Officer Forsgren concerning the facts he found upon his investigation and his conclusions concerning the path of the Edwards vehicle and the principal point of impact. His opinion concerning causation was not necessary for the jury to reach an accurate decision.

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For these reasons defendant respectfully requests that the judgment of the court below be affirmed.

Respectfully submitted,

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MAILING CERTIFICATE

I hereby certify that I mailed three (3) copies of RESPONDENT'S REPLY BRIEF to Reed M. Richards and Maurice Richards of Richards, Caine & Richards, attorneys for plaintiff and appellant, 2568 Washington Boulevard, Ogden, Utah 84401, this 20th day of October, 1978.

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