

1951

Ruth Bunke Hardman v. Gaines Edward Thurman and Woodrow W. Dickey dba Dickey Woody Produce Company : Brief of Appellants

Utah Supreme Court

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Edwin B. Cannon; Rex J. Hanson; Ernest F. Baldwin, Jr.; Attorneys for Appellant;

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IN THE
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SUPREME COURT
OF THE
STATE OF UTAH

RUTH BUNKER HARDMAN, Admin-
istratrix of the Estate of Oswald
C. Hardman, deceased,
Plaintiff and Respondent,

vs.

GAINES EDWARD THURMAN and
WOODROW W. DICKEY, doing
business as Dickey Woody Prod-
uce Company,
Defendants and Appellants.

Case
No. 7609

BRIEF OF APPELLANTS

FILE

MAR 16 1951

EDWIN B. CANNON,
REX J. HANSON,
ERNEST F. BALDWIN, JR.,
Attorneys for Appellant.

Supreme Court, Utah

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STATEMENT OF FACTS

This is a statutory action for damages by reason of the death of Oswald C. Hardman on or about the 29th day of October, 1949. On said date at about the hour of 9:00 or 9:30 P. M. the plaintiff, Ruth Bunker Hardman, wife of the decedent, was driving his auto-

mobile, in which decedent with their small child was also riding, south on State Street in Salt Lake City in the lane next to the center of the street. State Street north of 21st South has four lanes of paved highway and has a gravelled surface east of the east lane wide enough for vehicular travel. South of 21st South State Street has six paved lanes. The speed limit on State Street south of 21st South is 40 miles per hour, and the speed limit north of 21st South is 35 miles per hour. As Mrs. Hardman entered the street intersection she turned left to go east on 21st South, and when she had arrived at approximately the west line of the east lane of 21st South her car was struck by the truck of the defendant, causing the death of said Oswald C. Hardman. A verdict was rendered for the plaintiff and this appeal is from the judgment entered on said verdict.

POINTS RELIED UPON

1. Plaintiff negligent; defendants not negligent.
2. The court erred in permitting witness Brady to testify as to operation of brakes on truck and trailer based on assumed facts of which there was no evidence.
(118)
3. The court erred in permitting witness Swigart to give his expert opinion as to speed of truck (178, 189) when there was no basis in the evidence for such testimony.

4. The court erred in permitting witness Peterson to give hearsay testimony as to qualifications of Oswald C. Hardman (199).

5. The court erred in denying defendants' motion for a directed verdict (290-291).

6. The court erred in refusing to give defendants' requested instructions:

(a) In refusing to direct a verdict for defendants (Requested Ins. No. 1).

(b) In refusing Requested Ins. No. 2 that if Thurman was not liable Dickey could not be held liable.

(c) In refusing Requested Ins. No. 4 that plaintiff's negligence must be imputed to Oswald C. Hardman, deceased.

(d) In refusing Requested Ins. No. 5 on the issues of contributory and imputed negligence.

(e) In refusing Requested Ins. No. 7 which was a proper statement of the law applicable to the facts under defendants' theory.

ARGUMENT

DEFENDANT NOT NEGLIGENT—PLAINTIFF'S NEGLIGENCE WAS PROXIMATE CAUSE OF DEATH.

There were only three eye-witnesses to the accident, Daniel Lauriente, a witness for the plaintiff, Wayne Parrish, the driver of a tanker, and Thurman,

the driver of the defendants' truck. Lauriente was talking to a friend at a point south of the intersection and on the west side of State Street and first saw the truck when it was 75 to 100 feet south of the intersection (103) and he estimated that its speed was 30 to 35 miles per hour (95). He states that when the truck entered the intersection the light was green and that the light was still green at the time of the collision (97).

Parrish testified that when the light turned green, he entered the intersection from the south in the lane next to the center and proceeded to about the center of the intersection with the purpose of making a left-hand turn west into 21st South as soon as traffic from the north had cleared, and while he was stopped, defendants' truck came by him on the right at a speed of approximately 25 miles per hour when it struck the Hardman car (225).

Thurman testified that he came into the street intersection in the second lane, to the right of the Parrish truck, at a speed not exceeding 20 miles per hour (236) and first saw the Hardman car when the front end of it was approximately in line with the front end of his truck (236). That he had no time or opportunity to turn either to the right or to the left to avoid striking the car; that he did all he could to stop his truck but was unable to do so and the truck struck the right door of the Hardman car (Ex. B). Mrs. Hardman testified that she never did see the truck at any time (219).

The evidence is that the trailer on the defendants' truck is 13 feet 2 inches in height (280); that there were the usual headlights on the truck itself and also lights on each corner of the trailer (238).

There is no dispute that when defendants' truck entered the street intersection the light was green (96, 235, 237). It was green even at the time of the impact (97, 104) and the driver could not be guilty of negligence unless he was exceeding the speed limit. There are no facts upon which the plaintiff can possibly invoke the doctrine of last clear chance because there is no evidence that the truck driver saw, or that by the exercise of reasonable care he should have seen, the plaintiff's car in time to avoid the collision. He did not see plaintiff's car until "it was right in front of me" (236). He had hardly time to get on the brakes (237). Defendants' negligence, therefore, if they were negligent, must depend on whether, just before and at the time of the impact, the truck was being driven at an excessive speed.

What is plaintiff's proof as to the speed of the truck? The only evidence she offered was that of witness Swigart, physics professor at the University, who determined the speed by computation from certain assumed facts. Those assumed facts were that the friction coefficient at 21st South and State Street was .83, determined by an experiment made by officer Youngberg in an automobile with good brakes, by operating it at 35 miles an hour and applying the brakes violently

so as to lock the wheels. This experiment established the coefficient. Then, accepting this coefficient, Swigart assumed in making his computation that the skid marks of the truck with all wheels locked were 76 feet in length, and therefore he computed the speed of the truck at 42.6 miles per hour. He testified, referring to his formula for the computation of the speed, that he would assume that all wheels slid (167, 168). He testified:

“What I said, I would like to say, making the assumption that this vehicle is sliding on all wheels through this distance, the 126 feet given to me, we would have to subtract from that the length of the truck; I believe you can see why that is. If the wheels are suddenly braked the back wheels start to make skid marks back of the truck, and if we are having all wheels skid the final skid would not be from the front of the truck, not the entire mass, it would be the distance minus the length of the truck, 126 minus 50 would be 76 feet—if that is assumed it is sliding—well I can work the problem using that figure or use any distance the figure might show.” (178)

Again:

“Now I want to be clearly understood when I make that calculation to make that statement, I have taken data on coefficient of friction .8 and I have made the assumption that the truck is sliding for a distance of 76 feet. I am not saying that I know definitely his speed was this and again I figure in here from data *I have not taken*. In all from that understand-

ing that will give a calculated speed of about 42.6 miles per hour.” (189)

As he states he had not himself taken the data, he had assumed as correct data given him in the questions propounded and, he testified, his conclusions are no better than the data upon which they were based (195). So we must ascertain whether the evidence shows that the truck wheels were locked and that the truck slid for 76 feet.

Thurman, the truck driver, states that it was impossible to lock the wheels of the truck and trailer when loaded (243) and this truck was loaded when the accident happened (284, 289).

Clarence E. Brady, deputy sheriff, states that he held the tape while he and William M. Clark, Police Officer, made the only measurements that were made of any tire marks, and Brady says that the only measurements made by Clark and himself were from the point of impact to where the Hardman car came to rest (115, 116). That that measurement was only of the mark left by the left front tire of the truck (113). He states that the trailer marks were the heaviest south of the point of impact and that Exhibit 2 shows these marks (125), but that he could not testify from the skid mark which he saw whether all the wheels of the unit were skidding from the farthest point south to where the truck came to rest (114, 115). He says he did not check the rear tractor wheels of the truck (115). He didn't make any check of the tires to see

whether all had been slid (115, 116). That from the point of impact to where the Hardman car came to rest

“we only measured one skid mark. That is the only one I recall. I never looked for any others. I didn’t look for them and I certainly can’t testify that I did. I only saw one skid mark. That is the one Officer Clark and I measured. That is from the point of impact to where the car came to rest. The heaviest marks are up to that.” (116)

On cross-examination he testified:

“Q. The only brake marks you observed at the time from the point of impact north to where the truck came to a stop was the one left by the left front wheel?

“A. That is correct.

“Q. And if there was one by the right wheel you didn’t see that?

“A. I didn’t see that.” (119)

Again:

“Q. You say the trailer tire left some rather heavy marks?

“A. Yes, sir.

“Q. Can you describe those as to their width and color and density?

“A. No, sir. I was not the investigating officer. I was just holding the tape measuring the slide mark. I didn’t investigate any mark, merely took measurements. I was just assisting Officer Clark in his investigation.” (121)

Officer Clark testified that the marks made by the truck commenced 57 feet south of the south curb of 21st South (131) and from that point to the point of impact was 81.7 feet (143). The truck was 50.3 feet in length (144) which would give a distance of 30.4 feet the truck traveled as shown by the marks until it struck the Hardman car (152). He testified that the brake marks did not show the same constant density.

“They were a discoloration, that is they weren’t dark brake marks like you leave by skidding a car but there was a definite difference between those marks and the surface they covered or traveled over.

“Q. You say they weren’t a dark black mark like you usually see when you examine brake marks?

“A. They were not a real dark black, no, sir.

“Q. Will you state that brake marks leave a black mark on the surface?

“A. That is my understanding.” (149)

He again stated that the marks he saw were not like the usual black brake marks (154); that he did not see the brake marks as they appeared on Exhibit No. 1 (156); that the water marks as shown by the dark surface were quite distinct and that the dark marks shown on Exhibit 2 were made by water (157).

The court will observe that Exhibits 1 and 2, which fairly represent the appearance of the highway

at the time (155), show no marks indicating a skidding of the truck or trailer wheels when locked and the same may be said of Exhibit C. The fact is, as stated by Thurman, that he had no time to apply the brakes to make the truck and trailer skid, if it had been possible to do so (and he states that was not). The conclusion is justified that as soon as he saw the Hardman car, he retarded his speed as much as possible but could not and did not lock the wheels and therefore left no skid marks; that his speed was so reduced that with his heavy load he pushed the Hardman car only about 45 feet (Ex. A).

In view of this evidence what effect can be given to the testimony of expert Swigart as to the speed of the truck? He made his computation on the assumption that the wheels of the truck and trailer were locked and slid for a distance of 76 feet but there is no evidence to support such assumption so his testimony was incompetent and without probative value. Assuming, then, as we must, that there is no competent evidence whatever that the truck was exceeding the speed limit when it entered or while crossing the street intersection, what basis can there be for any claim of negligence when it is undisputed that ~~when~~ the truck entered the street intersection on a green light and that after entering it his vision of the intersection was obstructed by the tanker which had stopped in the center, and by the car preceding in front and to the left of him in lane No. 2 (260), so that he had no chance whatever to avoid colliding with the Hardman car? If the

driver of the truck was at all times within his rights and did not in any particular violate any rule of the road, either by speed or otherwise, and if, as appears from the evidence, the plaintiff made a left turn across the lane of travel of the truck where she had no right to be, her negligence was the proximate cause of the fatality.

It was plaintiff's duty when she intended to turn left to yield the right of way to defendants' truck which was proceeding north on the green light. Yet she says she never saw the truck, which is conclusive proof that in making the left turn she did not keep a proper lookout for northbound traffic, for the truck was so close when it entered the intersection on the green light as to constitute an immediate hazard. The language used in *French v. Utah Oil Refining Co.*, _____ Utah _____, 216 Pac. (2d) 1002, should be controlling here. Justice Latimer declared:

“When a statute prescribes that a turning vehicle must yield the right-of-way to another on a straight-of-way when the latter is close enough to constitute a hazard, it anticipates the exercise of reasonable judgment on the part of the driver turning. However, a burden is placed on the driver making the turn as he has control of the situation, and if there is a reasonable probability that the movement cannot be made in safety then the disfavored driver should yield. The driver proceeding straight ahead has little opportunity to know a vehicle is to be turned across his path until the movement is commenced and in many instances, the warning is

too late for the latter driver to take effective action. This is apparently what happened in this case. Plaintiff elected to run the risk of clearing ahead of the on-coming truck which was so close that even though it was moving at a reasonable rate of speed a collision could not be avoided. In so doing, he met with his mishap and his negligence contributed to his injury and prohibits his recovery.”

Plaintiff testified that she stopped after entering the intersection when the front of her car was halfway between the pedestrian lane and the semaphore (Tr. 211-212). While so stopped two or three cars proceeded north; one northbound signalled to turn left and stopped, then a tan car going north stopped immediately east and parallel with the car which was signalling to go west (Tr. 212). Then it was, after having waited for such disposition of the traffic, that plaintiff shifted into low and proceeded east at five miles per hour (Tr. 216) and, although she looked east and south she never did see defendants' truck. She did not even see the semaphore light as she turned east (Tr. 217). She did not see the tanker driven by Wayne Parrish (Tr. 218) although it was headed north in the inner lane and had stopped to make the turn west (Tr. 224) and she proceeded east into the far east lane of northbound traffic when, if she had been on the lookout traveling at only five miles per hour, she certainly would have observed the truck and its 13-foot high trailer and could have stopped in time to avoid being hit. How appropriate are the words of

Justice Wolfe in *Cederloff v. Whited*, 110 Utah 45, 49-50, 169 Pac. (2d) 777, wherein the position of the parties was reversed:

“If the jury found that defendant made the turn very slowly in accordance with his testimony, then his negligence was the sole cause of the collision. Had the driver of plaintiff’s car observed defendant slowly making the turn, in accordance with defendant’s testimony, he would be justified in assuming that defendant had seen his approach and would stop, as the law required him to do, before entering the northbound traffic lane, and to allow plaintiff’s car to pass. To drive in that manner would be an invitation to the driver of plaintiff’s car to continue in his regular course and when defendant continued to crawl into plaintiff’s lane of traffic and failed to stop, as the law required him to do, it would be too late to avoid the accident by the time plaintiff’s driver could discover that defendant was not going to stop. Thus, as a matter of law, defendant’s negligence would be the sole proximate cause of the accident.”

We submit that it affirmatively appears that the plaintiff’s conduct in failing to keep a proper lookout and in failing to yield the right of way to the oncoming truck of defendant establishes beyond question that her negligence was the sole proximate cause of the accident, and her negligence must be imputed to her husband as he was the owner of the car and she was presumably driving it at his direction.

Fox v. Lavender, 89 Ut. 115, 56 Pac. (2) 1049.

ERRORS IN RULINGS OF THE COURT

1. The court erred in permitting witness Brady to testify as to operation of the brakes on the truck and trailer.

Witness Brady was permitted to answer the following question:

“Assuming that the evidence in this case then will show that the foot brake operates both the tractor and trailer wheels, then an air brake in proper functioning order would apply equally on all wheels, would it not?” (118)

No foundation had been laid for such question and the answer was permitted on the basis that it would be connected with evidence later to be introduced but which never was introduced. The evidence in fact showed that there were two sets of brakes—a foot brake for the truck and a hand brake for the trailer (243).

2. The court erred in permitting witness Swigart to give his expert opinion as to the speed of defendants' truck (178-189). Witness Swigart testified that based upon a coefficient .8 and the skidding with all wheels of truck and trailer locked for a distance of 76 feet, the speed of the truck was 42.6 m.p.h. As we have heretofore shown, there was no evidence that all wheels of the truck and trailer were locked or that they, when so locked, skidded for 76 ft. or at all (Tr. 187-188).

3. The court erred in permitting witness Peter-

son to answer questions as to discussions in directors meetings as to the qualifications of Oswald C. Hardman. This evidence was pure hearsay (199).

4. The court erred in denying defendants' Motion for a directed verdict for the reasons hereinbefore set forth (a) that there was no evidence that defendants were negligent; (b) that the evidence shows that plaintiff was negligent, that her negligence was the proximate cause of the accident and that her negligence was imputable to Oswald C. Hardman (290-291).

ERRORS OF THE COURT IN REFUSING CERTAIN INSTRUCTIONS REQUESTED BY DEFENDANTS

1. Defendants' requested instruction No. 1, for a directed verdict (38) should have been given. There is no evidence upon which the case should have gone to the jury.

2. Requested instruction No. 2 (39) that if Thruman was not liable Dickey could not be liable, was also a correct statement of the law which defendant was entitled to have given.

3. Under the evidence and under the rule announced in *Fox v. Lavender*, 89 Ut. 115, 56 Pac (2d) 1049, defendants were entitled to have their requested instruction No. 4 given, for obviously if decedent was negligent, no cause of action for his death arose, and as plaintiff's negligence was imputed to him, if she was negligent, then plaintiff could not recover. Plain-

tiff offered no evidence to rebut the presumption that plaintiff was driving the car at decedent's direction.

4. Requested instruction No. 5 (42) is a correct statement of the law of contributory negligence and is also applicable to the facts on the question of imputed negligence under *Fox v. Lavender*.

5. What reason can possibly excuse the court for refusing to give requested instruction No. 7? (45) Certainly it was a correct statement of the law applicable to the facts, in line with defendants' theory, and no other instruction was given covering the elements embodied in it.

6. Requested instruction No. 11 (51) is in accord with Sec. 57-7-137, and defendants were entitled to an instruction that it was not sufficient for plaintiff to say that she looked and did not see what obviously she must have seen if she had looked. Here came the truck with trailer 13 feet in height, with lights on both. She was negligent if she failed to see what she must have seen if she had looked, and her testimony was inherently erroneous because it was contrary to the physical facts. 20 Am. Jur., pp. 1033-4.

7. Requested instruction No. 12 (52) excluding from the jury's consideration the elements of deceased's suffering and the element of sympathy or mental distress of plaintiff, was a proper instruction.

Corbett v. O.S.L.R.R.Co., 25 Ut. 449,
71 Pac. 1065.

The only instruction touching this particular element is instruction No. 15 (70) which does not negative the consideration of the elements of mental suffering or sympathy.

We respectfully submit that the judgment should be reversed. There is exactly the same justification for protecting a defendant from damages when he is not liable as for awarding damages to the plaintiff when he is entitled to recover.

EDWIN B. CANNON
REX J. HANSON,
ERNEST F. BALDWIN, JR.,
Attorneys for Appellant.