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General Insurance Company of America v. Mark Lewis : Brief of Appellant

Utah Supreme Court

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7671

In the Supreme Court of the State of Utah

GENERAL INSURANCE COMPANY
OF AMERICA, a Corporation,
Plaintiff and Appellant,

vs.

MARK LEWIS,
Defendant and Respondent.

No. 7671

FILED
MAY 18 1951

BRIEF OF APPELLANT

Clerk, Supreme Court, Utah

F. ROBERT BAYLE,

*Attorney for Plaintiff and
Appellant*

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BRIEF OF APPELLANT

STATEMENT OF FACTS

This action was filed by the General Insurance Company of America, hereinafter referred to as "Insurance Company," against one Mark Lewis for the recovery of damages arising from an automobile accident.

The Insurance Company issued its collision Policy No. 5967A-3009 to one Samuel P. Park on August 10, 1947, thereby

undertaking to insure Park's 1937 Studebaker automobile for a one-year period against such damages as might be caused by collision for the value of the automobile, less the sum of \$50.00 which was the deductible amount to be paid by the said Park (Plaintiff's Exhibits B and C).

On the morning of December 22, 1947, Mr. Park left his home in the company of his son, Kenneth W. Park, and a Bill Howell (Tr. 13 and 29), for the purpose of proceeding to work at the plant of the Geneva Steel Company, located just west of Orem, Utah (Tr. 10). Mr. Samuel Park was driving his Studebaker sedan and his son and Mr. Howell were riding as passengers in the front seat (Tr. 13 and 20). They proceeded from Provo, Utah, toward the said steel plant along Highway 114, which is a two-lane roadway, one lane for northbound traffic and one lane for southbound traffic (Tr. 2, 3 and 10). This highway is an improved hard-surfaced roadway and runs generally in a north-south direction near the steel plant (Tr. 3 and 11). It was daylight, and visibility was good. A light snow was falling, and the highway was covered with hard-packed snow, and was icy in spots (Tr. 3, 4, 19 and 25).

At about 8:40 A.M. on this morning, Mr. Park brought his automobile to a stop, facing North, on said highway at a point approximately one-quarter of a mile South of the Geneva plant (Tr. 3, 11 and 12). There was a line of cars ahead of Park's automobile as there had been an accident further North on the highway (Tr. 11). He stopped his car on the easterly shoulder of the highway, in line with the other automobiles ahead, with the left wheels of his car about 8

feet to the east of the center of the highway (Tr. 11, 12, 14, 20, 21 and 22). Mr. Park's car was stopped off the highway on the east shoulder, as far as possible, in view of the snow piled along the edge thereof (Tr. 7, 20 and 22).

Mr. Park and his two passengers remained seated in the car and after about four or five minutes, his automobile was struck from the rear by the defendant, Mark Lewis, driving his 1937 Plymouth Sedan automobile (Tr. 2, 3, 4, 5, 6, 9, 11, 20 and 24). Immediately before this collision, the defendant was on his way to work at the Geneva plant and had as passengers in his car, Guy Lewis and Frank Clayson (Tr. 6). He was driving between 15 and 20 miles per hour and his car was following about forty feet behind the automobile of one George Armour (R. 28 and Tr. 4 and 25). Armour brought his car to a stop behind the Park automobile and when the defendant applied the brakes on his car, the same skidded on the highway, collided with the left side of the Armour vehicle, and then skidded some 20 additional feet into the rear of the Park automobile (Tr. 4, 5, 8, 9, 25, 26 and 27). The impact against the rear of the Park car caused it to collide with the rear of the automobile directly in front of it (Tr. 12, 13 and 21). The impact of the defendant's car with the rear of the Park vehicle was sufficiently severe to tear loose the front seat of the Park vehicle and throw Park and his two companions into the rear seat (Tr. 12, 13 and 20).

As a result of this collision, the Park automobile sustained damages in the sum of \$262.55 (Tr. 17 and 18—Plaintiff's Exhibit A). On January 14, 1948, the Insurance Company delivered its draft for \$212.55 to the said Samuel P. Park

in reimbursement for the damages, less the sum of \$50.00 paid by him under the deductible terms of his policy (Tr. 17—Plaintiff's Exhibit B). In exchange for this draft, Park executed and delivered to the Insurance Company a Proof of Loss which contained a subrogation agreement (Tr. 17 and 18 — Plaintiff's Exhibit C). The plaintiff sued defendant under the subrogation agreement for the amount of the damages to the Park automobile which it paid by reason of said insurance policy. The Court entered judgment in favor of the defendant and against the plaintiff Insurance Company, no cause of action.

STATEMENT OF POINTS

The plaintiff filed this appeal, and has designated and included the entire record, and all the proceedings and evidence in the action, and in its appeal relies upon the following points:

1. The Court erred in making and entering Finding of Fact No. 7 to the effect "that after Samuel P. Park stopped his automobile, he did nothing to warn the defendant or other drivers of other automobiles approaching from the South upon said highway and that by failing to do so, he was guilty of negligence which contributed to the damages sustained to his automobile," for the reason that said Finding is contrary to law.

2. The Court further erred in making and entering Finding of Fact No. 7 to the effect "that the said Samuel P. Park failed to move his car off the road onto the shoulder and parked in

the lane of traffic, and that by so doing he was guilty of negligence which contributed to the damages sustained to his automobile," on the ground and for the reason that said Finding is unsupported by the evidence and contrary to law.

3. That there is no evidence to support the Conclusion of Law No. 1, and the Judgment of no cause of action is contrary to law.

ARGUMENT

POINT I

The trial court concluded that there was no question but what the defendant was negligent in the operation of his automobile (Finding of Fact No. 6—R. 29) but resolved that the Plaintiff Insurance Company was not entitled to recover by reason of the contributory negligence of its insured. Accordingly, the only problem to be disposed of in this appeal is whether or not from the facts at hand, the acts of the plaintiff's insured constituted contributory negligence.

The evidence shows, without dispute or contradiction, that the insured of the plaintiff Insurance Company, Samuel P. Park, stopped his automobile directly behind several other cars and thereafter did nothing to warn other drivers of vehicles approaching from the rear. There was a light snow falling but all witnesses testified that visibility was good. Mr. Park experienced no difficulty in stopping his car because of unusual highway conditions; he pulled off to the right as far

as he could do under the circumstances. Did the law require that he then get out of his vehicle and attempt to warn drivers approaching from the rear of a condition that was obviously apparent to any of such drivers who should have been keeping a reasonable and proper lookout? We respectfully submit not. For the law to require that each driver remove himself from his automobile and endeavor to warn others approaching a line of cars from the rear would present an impossible traffic situation and be a hazard in itself. Such a ruling would impose a duty upon all drivers traveling upon snow-covered streets to give warning to any other driver approaching a line of vehicles from the rear, of the presence of such line of vehicles whether they be temporarily waiting for a traffic control signal to change from red to green, or for any number of other reasons which might have required traffic to halt. Such a requirement would in each instance mean that any temporary stopping on the proper side of the roadway for a necessary purpose would be tantamount to negligence if the driver so stopping failed to immediately get out of his vehicle and endeavor to warn other drivers approaching from the rear. This we do not believe to be a requirement of the law.

In the case of *Reuben E. Caperton v. Ben Mast et al*, 85 Cal. App. 2nd 157, 192 Pac. 2d 467, the plaintiff had a trailer hitched to the rear of his car. He attempted to turn around on the open highway at night and his engine stalled causing the trailer to block the highway. The defendant was driving a truck with the lights on low beam, failed to observe the plaintiff's trailer, and collided with it and the plaintiff's car. The court held that the collision was the *proximate result* of the

negligence of the defendant, unaided in any degree by an act or omission of the plaintiff, and awarded damages.

Before the defense of contributory negligence will prove availing, it must be shown that the acts alleged as constituting such defense *directly contributed to the injury*... 5 American Jurisprudence, Para. 407, page 739.

The test by which the contributory negligence of a person injured in an automobile accident is measured is whether he acted as a reasonably prudent man would have acted under the peculiar circumstances of the case, considering the surrounding hazards and any other factors explanatory of the particular situation. 5 American Jurisprudence, Para. 408, Page 740.

We believe the case of James E. Smith vs. Clinton Webb, 10 S. E. 2d 503, 131 ALR 558, to be in point. Plaintiff sued defendants, owners of a school bus, to recover for personal injuries and property damage sustained in a collision between a school bus and a pick-up truck driven by plaintiff as a result of the plaintiff driving into the rear of the defendant's bus when it stopped on the highway to pick up a passenger.

The court, denying plaintiff's right to recover, said:

"A driver is charged with the duty of taking care and caution in the operation of his vehicle commensurate to the known and obvious danger. It was the plaintiff's own want of care, plus the icy condition of the highway, which was the *sole proximate cause* of the accident."

Likewise in the case of Conrey vs. Abramson, 294 Mass.

431, 2 N.E. 2d 203, the court in sustaining a directed verdict for the defendant in a suit brought by the plaintiff to recover for injuries resulting when a car in which plaintiff was a passenger collided with the rear of a second car which stopped suddenly because defendant's car in front of it suddenly stopped, said:

"Defendant was not bound to anticipate that after he had come to a stop, and another automobile had stopped behind him, a third automobile would strike the second and a passenger in the third would be injured. The evidence was not sufficient to warrant a finding that the negligence of defendant was the proximate cause of plaintiff's injuries."

The temporary stopping on the proper side of a highway for a *necessary purpose* is not negligence. *Winter vs. Davis*, 217 Iowa 424, 251 N. W. 770; 42 C. J. para. 13, page 613.

The court's attention is respectfully invited to *Estes vs. Slater*, 3 N. Y. Supp. 2d 287, 18 N. E. 2d 690. In this case a judgment for the plaintiff was affirmed where plaintiff had stopped his car to give his name to another motorist against whose car he had collided, and while so doing, his car was struck in the rear by the defendant's car which was proceeding in the same line of traffic on the highway.

Applying the foregoing principles to the instant case, it is difficult to perceive how the trial court could conclude that the plaintiff Insurance Company was not entitled to judgment as a matter of law. What acts of the plaintiff's insured could be said to have contributed to the damages sustained to his automobile? He acted as any reasonably prudent person

would have done under the peculiar circumstances of the situation. He stopped his car directly behind and in line of the other automobiles awaiting traffic on the highway to clear. He was on his own proper side of the highway and was off to the right as far as he could safely be. The automobile of George Armour stopped behind the Insurance Company's insured without incident and apparently without any difficulty. Then the defendant, approaching from the rear, collided with Armour's car and in turn with that of the Insurance Company's insured. The trial court concluded that plaintiff's insured was negligent in failing to get out of his automobile and warn other motorists who might be approaching from the rear of a situation on the highway which any motorist could see or should have been able to see. We respectfully submit that the trial court erred in this respect and that as a matter of law, it cannot be said that plaintiff Insurance Company's insured was negligent under these circumstances.

POINT II

It is the contention of the Insurance Company that the trial court erred in making and entering a Finding of Fact to the effect that its insured was contributorily negligent in stopping his automobile in the lane of traffic and in not moving off onto the shoulder of the roadway. (Finding of Fact No. 7—R. 29). We respectfully submit that the record is absolutely without evidence to support such a finding.

The Court's attention is invited to those portions of the record wherein testimony of witnesses concerning this question

is set forth. We shall first consider the testimony of witness Mark Lewis, the defendant, on direct examination (Tr. 4):

By Mr. Bayle: "Did you collide with any cars on the highway at that time?"

A. Mr. Park's.

Q. Would you explain how that happened, please?

A. Well, I was going to Geneva and was just driving along and this car in head of me pulled off, a car pulled off in front of me, and there was a car stopped in front of him and I couldn't get off the road because it was too slippery, and I couldn't turn off to the left because cars coming from Geneva and if I turned I hit into them, so all I could do was let her go."

The defendant then testified rather vaguely on cross examination as follows (Tr. 7):

By Mr. Merrill: "Do you have any idea as to the width of the shoulders on that morning?"

A. Well, just plenty room off the shoulder for another car.

Q. Were the shoulders cleared of snow?

A. No. There was snow on it.

Q. How many inches of snow were on the shoulders?

A. Gosh, I don't know."

Again on cross examination, the defendant said (Tr. 7 and 8):

By Mr. Merrill: "How many cars were ahead of you? When you were proceeding north on the highway?"

A. When I was driving along?

Q. Yes. Prior to the accident.

A. One.

Q. Which way were you going?

A. North.

Q. Could you see any cars ahead of him stopped or parked at that time?

A. No.

Q. Did he make a sudden turn to get off the highway?

MR. BAYLE: Just a moment. Which are you speaking of, Mr. Park's car?

MR. MERRILL: No. The car in head of Lewis.

MR. BAYLE: I don't think that's material, Your Honor. (Argument).

THE COURT: He may answer.

A. Oh, not too fast.

Q. Did he slow up any?

A. Yes, when he got on the shoulder he slowed right up.

Q. Did he give you any time to stop.

A. No.

Q. Then what happened to your car after you hit him?

A. Sideswiped him, and ran into the back of Park's car.

On cross examination, the Insurance Company's insured, Mr. Park, testified concerning the position of his automobile upon the roadway as follows (Tr. 14 and 15):

Br. Mr. Merrill: "How wide were the shoulders there, Mr. Park?

A. Shoulders?

Q. Yes. Where you parked.

A. From the cement out?

Q. Yes.

A. Well, I wouldn't know. There was a slope from the pavement off to the side. That's all I remember.

Q. Was it possible for you to pull your car over to the shoulder from the place you were parked at?

A. Over to the shoulder?

Q. Yes, to get off the highway?

A. Shoulder runs right up to the highway, you mean?

Q. Well, could you have pulled off the highway from the place you were parked at?

A. How far off the highway?

Q. Well, so that the traffic could proceed along the highway?

A. North?

Q. Yes.

A. Well, I don't know. I don't know if it was gone off to the side or not. It was covered with snow.

Q. You didn't make any effort to pull your car off the highway, did you?

A. I stopped right behind the row of cars.

Q. That was on the main portion of the travelled road there, wasn't it? You were still on the highway when you parked, were you not?

A. With two wheels.

Q. What?

A. With two wheels.

Q. How far from the center line of the highway were you from on your right-hand side?

A. Oh, probably eight feet.

Q. Was it possible to go around you, where you were parked there?

A. They wouldn't let them go around there."

Witness Kenneth W. Park testified as follows concerning the east shoulder of the highway (Tr. 20):

By Mr. Bayle: "Do you remember, with reference to the right edge of the highway, where your father's automobile was prior to the impact?

A. Vaguely.

Q. And where was it?

A. It was pulled off to the right as far as he could get, due to the fact there was quite deep snow off to the side of the highway."

This same witness, on cross examination, said (Tr. 21 and 22):

By Mr. Merrill: "Whereabouts was your father's car, with reference to the center line of the highway?

A. That would be quite impossible to tell. There was snow covering the center line.

Q. When he was parked, wasn't he parked on the main portion of the highway, going north?

A. Partially.

Q. How do you mean partially?

A. He was off to the right as far as he could go.

Q. How deep was the snow on the shoulders?

A. I'd say close to a foot.

Q. Was there any other cars further off the shoulders in back of you, or in front of you?

A. All about the same. They were in line."

Witness Guy P. Lewis, called on behalf of the defense, said (Tr. 25):

By Mr. Merrill: "How were the shoulders? On the right-hand side?

A. Oh, it was about two or three inches of snow on them."

Mr. Guy Lewis said on cross examination (Tr. 25 and 26):

By Mr. Bayle: "When did you first see these automobiles ahead of you?

A. When the man that was in front of us pulled off to the side of the road.

Q. He pulled off to the rear of those cars?

A. Yes.

Q. And Mr. Lewis' automobile started to skid then, didn't it?

A. Yes, sir.

Q. It was out of control, wasn't it?

A. No, it wasn't. He put on the brakes and he just skidded.

Q. Did he go straight forward?

A. Straight forward, yes, sir.

Q. I think you said he struck the car directly ahead of him?

A. Yes, sir, the car that pulled off the side of the road, on the left side.

Q. Hit that on the left side?

A. Yes.

Q. Did he pass the left side of that car?

A. Yes.

Q. And did he strike any other cars?

A. Yes, he struck one that was parked in the road ahead of him.

Q. It was in line with other cars, wasn't it?

A. Yes."

We have detailed the evidence in respect to this question so as to make clear the basis for our contention that the trial court erred in making such a finding of fact and thereby concluding that the Insurance Company's insured was negligent. We respectfully submit that there is not the slightest evidence available in the record to support such a conclusion and we respectfully submit that the trial court was in error in this respect.

POINT III

Passing to what we considered the third point of error, we take the position that the trial court's judgment, of no

cause of action, is unsupported by the evidence and contrary to law. A thorough and careful perusal of the evidence fails to justify a conclusion that the Insurance Company's insured was guilty of acts which in any way contributed to the resulting collision. He acted as only he could under the circumstances, and certainly as any other reasonably prudent person would have been obliged to act. The *sole proximate cause* of this collision and the resulting damages to the automobile of the Insurance Company's insured was the negligence of the defendant in failing to keep a proper lookout for conditions existing on the highway, and in driving too fast for those existing conditions.

CONCLUSION

We respectfully submit that each of the points of error is well taken and should be sustained, and that the judgment of the trial court should be reversed with direction to enter judgment in favor of the plaintiff Insurance Company for the amount of the prayer in its complaint, with costs.

Respectfully submitted,

F. ROBERT BAYLE,

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Appellant*