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O. K. Clay v. Stephen L. Dunford et al : Appellant's Reply Brief to Respondents' Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

O. K. CLAY, Administrator of the
estate of ARNOLD KARTCHNER,
also known as ARNOLD G. KART-
CHNER, also known as ARNOLD
GRANT KARTCHNER,

Plaintiff and Appellant,

vs.

STEPHEN L. DUNFORD, PAUL H.
STEVENS, BURNS L. DUNFORD
and L. CLAYTON DUNFORD,
doing business as THE DUNFORD
BREAD COMPANY,

Defendants and Respondents.

Case No. 7705

APPELLANT'S REPLY BRIEF TO
RESPONDENTS' PETITION FOR REHEARING

FILE

MAR 26 1952

Clerk, Supreme Court, Utah

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APPELLANT'S REPLY BRIEF TO
RESPONDENTS' PETITION FOR REHEARING

RESPONDENTS' POINT I.

THIS COURT FAILED TO PASS UPON AND DETER-
MINE ALL QUESTIONS OF LAW INVOLVED IN THE CASE
PRESENTED UPON THE APPEAL AND NECESSARY TO

THE FINAL DETERMINATION OF THE CASE, CONTRARY
TO THE PROVISIONS OF RULE 76(a) U.R.C.P.

The respondents assert that this court has failed to pass upon and determine all of the questions of law involved in this case.

It is our understanding that the court is not required to pass upon all of the questions raised on appeal where, as in this case, reversible error is found by a consideration of one or more points presented by the appeal. It was so held in the case of *Wright v. Southern Pacific Company*, 15 Utah 421, 49 Pacific 309, where it was said that it was not usual or necessary for the Supreme Court to pass upon each and every question raised on an appeal when the case is reversed. It is sufficient to pass upon and determine such questions raised upon the appeal as were necessary to the final determination of the case, and this has been done in this case.

RESPONDENTS' POINT II.

THIS HONORABLE COURT ERRED IN HOLDING THAT
THE INSTRUCTION ON ASSUMPTION OF RISK WAS
PREJUDICIAL ERROR.

The court in its opinion has determined that Instruction No. 7 was reversible error; that by this instruction, the jury could have arrived at its verdict even though it may have concluded that the defendant was negligent,

and the deceased was not guilty of contributory negligence (Opinion, Page 2). It further determined, "Applying the above principles to the facts of this case, we are convinced the only proper instructions here are those relating to negligence and contributory negligence."

It was also determined in the concurring opinion of Chief Justice Wolfe that Instruction No. 7 did not fit the facts of this case, and that in the great majority of negligence cases an instruction upon the effect of plaintiff's contributory negligence will cover all that need be said to the jury in a case involving alleged negligence, and that one does not assume the risks of danger which he has no reason to anticipate; that an analysis of the decisions and cited authorities in the brief leads to the conclusion that counsel invites error by requesting an instruction on assumption of risk unless certain conditions referred to in the opinion exist.

The respondents now admit that there was error in Instruction No. 7, but contend that such error did not result in prejudice to the appellant. To so argue is to attempt now to examine the minds of the jurors in arriving at a verdict. If the instruction was wrong, as held by this court, it would seem certain that there was prejudice resulting to the appellant. From that instruction, the jury might well assume that appellant in alighting from his automobile did incur an obvious risk of personal injury. The court has determined by its opinion that the uncontroverted evidence shows that at the time of the accident, the deceased was standing on the shoulder

of the highway where vehicles ordinarily do not travel and in a place that was not so palpably dangerous that deceased could be considered to have assumed the risk.

The driver of respondents' truck admitted that his speed immediately before the truck struck the deceased was 20 miles per hour, which would be 30 feet per second. The distance from an extended curbline on 3rd East Street to the point of accident is 167 feet, so that the element of time involved from the time the truck left the intersection of 13th South and 3rd East Street until it struck the deceased was $5\frac{1}{2}$ seconds. In fact, in computing the time that the deceased would be engaged in opening the door of his station wagon, alighting therefrom, conversing with the little boy, closing the door and having stood there approximately one second as testified to by the eye-witness driving west on said 13th South Street, it would probably take from seven to ten seconds at least, and if such were the case, the respondents' truck would definitely not be in view of the deceased at the time he commenced to alight. We submit, as a matter of law, that the deceased had a right to assume that any motor vehicle proceeding easterly on 13th South would not leave the main traveled portion of the highway and follow a course which would cause the truck to strike some portion of the deceased's automobile under all of the existing circumstances. Instruction No. 7, admittedly in error, would necessarily be prejudicial to the rights of the appellant.

The respondents contend that the court's Instruction No. 10, complained of by appellant on this appeal, is a correct statement of law. The appellant urged on appeal that this instruction was erroneous and prejudicial. We are still of the opinion that Instruction No. 10 is in error, but the court, having found reversible error in the giving of Instruction No. 7, found no necessity for passing upon Instruction No. 10. If there appears sufficient reason to modify the decision of the court, we think such modification should be limited to a consideration of Instruction No. 10. The error of this instruction is argued in the Appellant's Brief at Page 28, and the instruction is there set forth in full. The instruction is certainly more favorable to the respondent than the evidence warrants. Instead of using the criterion of ordinary or reasonable care, it adopts the criterion of vigilance. Not only does it adopt this criterion as to the duty of deceased, but it adopts the rule of vigilance for the purpose of discovering perils by which he may be menaced and their avoidance after they are ascertained.

We submit that the evidence in this case does not permit of any finding that the deceased failed to use ordinary care to save himself from injury by the negligent act of the driver of respondents' truck. There would seem to be no good reason in so far as disclosed by any fact in this case to depart from the standard rule of reasonable and ordinary care. Nor is there any justification to emphasize such duty of care on the part of the deceased. This is especially true when this instruction

is viewed in the light of the evidence as to what the deceased did or failed to do at the time and place of the accident in question. Again, Paragraph 2 of the instruction is in error in that it again emphasizes the necessity for the deceased to exercise vigilance to discover the approach of traffic *and to particularly discover the truck being then and there operated by Montell Magnum*. By this instruction, as well as by Instruction No. 7, the appellant is deprived of the rule of law which gave to the deceased the right to assume that other persons operating vehicles upon the highway would conform to traffic rules and regulations. There was ample room for all motor vehicles to pass the point where the deceased's truck was parked and certainly he should not be charged with any higher degree than ordinary care in observing the approach of traffic, and especially such traffic as was moving along the highway in a manner different to the ordinary use of the highway, especially so in view of the time element involved.

It seems remarkable to the writers of this brief that respondents so glibly use expressions to the effect that the deceased placed himself in a position of obvious peril in the light of the clear and undisputed facts as disclosed by the evidence.

RESPONDENTS' POINTS III. AND IV.

THIS HONORABLE COURT ERRED IN FAILING TO
HOLD THAT THERE WAS NO EVIDENCE IN THE RECORD

TO WARRANT A FINDING THAT ANY NEGLIGENCE UPON THE PART OF THE DEFENDANT'S DRIVER WAS THE PROXIMATE CAUSE OF THE ACCIDENT.

THIS HONORABLE COURT ERRED IN FAILING TO HOLD THAT THE DECEASED WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW BARRING ANY RECOVERY IN THIS ACTION.

Respondent claims in its argument under Point III. that the court erred in failing to hold that there was no evidence which would have justified a finding of negligence on the part of the defendants' driver, and under Point IV., urges substantially the same grounds in that the court erred in failing to hold that the deceased was guilty of contributory negligence as a matter of law. In addition to what we have said concerning the questions of determining every issue presented by either the appellant or the respondents, may we further say that we do not believe that a cross-appeal was ever perfected from the judgment of the lower court as contemplated by the provisions of Rule 74 (b) and Rule 75 (d) U.R.C.P., The only step taken by counsel to perfect a cross-appeal is the statement in Respondents' Brief (Page 25, Point 5), that the court erred in refusing to grant defendants' motion for a directed verdict. By Rule 75 (b), it is provided that where any one or more parties have appealed as required by Rule 73, other parties may cross-appeal from the order or judgment of the lower court without filing a notice of appeal, provided, however, such

party or parties shall file a statement of the points on which he intends to rely upon such cross-appeal within the time as required by Subdivision (d) of Rule 75. Referring to Rule 75 (d), it will be observed that if the respondent desires to cross-appeal, or if the appellant has filed a statement of the points on which he intends to rely and the respondent desires to have the appellate court consider other or additional matters, the respondent shall within ten days after the service and filing of appellant's designation serve and file a statement of respondent's points either by way of such cross-appeal or for the purpose of having considered other or additional matters than those raised by appellant. It will also be observed from Rule 75 (g), that the clerk is required to prepare the record on appeal which must include the designations or stipulations of the parties as to matters to be included in the record and any statement by the appellant or the respondent of the points on which said parties intend to rely.

It seems illogical upon an appeal by a plaintiff or defendant that the respondent for the first time and without taking any action of any kind to perfect his cross-appeal, should be entitled to have all other points reviewed by merely calling attention to such claimed errors in his reply brief.

Assuming that a cross-appeal may be perfected in the manner respondent has followed it, it would still be clear from the opinion of the court that Points 3 and 4

have been fully and correctly determined. At Page 3 of the opinion, the court says, "We are convinced that the only proper instructions here were those relating to negligence and contributory negligence. Again at Page 2 of the opinion, "Most of them (referring to the cases cited by respondents) relate to cases where a pedestrian leaves a place of safety and suddenly walks into the path of moving traffic on regularly traveled portions of the highway, and none is analogous to this case."

We have again examined some of the cases cited by respondents where a person has alighted from a standing vehicle and moved into a position of danger. In these cases, the pedestrian alighted from a standing vehicle and suddenly moved into the path of approaching traffic, which involved a situation entirely different from the facts in the case at bar, and none of them fit the facts as shown by the evidence in this case.

In the *Peterson Case* cited in Respondents' Brief on Petition for Rehearing, Page 11-12, the court specifically points out that, "She either ran in front or in back of the car that was parked * * * and as the child darted out from in front or in back of the parked car, he had no opportunity of seeing her." Similarly in the *Goff Case* cited at page 19 of Respondents' Brief, the court says, "We have never departed from the rule stated in *Harris vs. Commercial Ice Company*, (Citations), that one who steps into a busy street and is immediately

struck by a passing vehicle which he could have seen had he looked cannot recover.” There is no analogy whatever in any of the cases cited by respondents to the facts in the case at bar.

Respectfully submitted,

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