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H. C. Tebbs v. Lynn Peterson : Brief of Respondent

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

FILED

SEP 14 1951

H. C. TEBBS,

Plaintiff and Appellant,

vs.

LYNN PETERSON,

Defendant and Respondent.

Clerk, Supreme Court, Utah

Case

No. 7707

BRIEF OF RESPONDENT

STEWART, CANNON & HANSON
AND E. F. BALDWIN, JR.

Attorneys for Respondent.

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STATEMENT OF FACTS

This appeal is from the judgment of dismissal entered upon the second trial. At the first trial a non-suit was granted because it clearly appeared from the evidence that plaintiff was guilty of contributory negligence.

The collision occurred about four or five miles west of Duchesne, on the 5th of January, 1947, at

about 8:00 P.M., when the plaintiff drove his car into the rear end of the defendant's truck, which was proceeding towards Duchesne just ahead of the plaintiff. The question at the last trial in April, 1951, was the same as at the first, which occurred in October, 1948, to wit: Was plaintiff guilty of contributory negligence? which involves the further question as to whether plaintiff should have been permitted to go to the jury in view of an about-face in his testimony, in an attempt to make a case, which on the first trial he did not have.

POINT RELIED UPON

That it appears from the record that appellant's evidence at the first trial clearly shows that he was guilty of negligence as a matter of law. That his evidence at the last trial, wherein he endeavors to exculpate himself, is so manifestly contrary to his former statements under oath as to justify the court in disregarding it.

ARGUMENT

How far was the truck beyond the curve in the highway? At what distance did plaintiff see or should he have seen the truck after rounding the curve? What opportunity did he have to either pass to the left of the truck or to stop before colliding with it? What was the evidence at the first trial? What is the evidence at the second trial? Will the courts permit a plaintiff to trifle with the court by altering his testimony to

make a case, when on the first trial it affirmatively appeared that he had no case?

EVIDENCE AT FIRST TRIAL

At the first trial, plaintiff, then represented by attorneys Dillman and Shields, first fixed the point of impact of plaintiff's car with defendant's truck at the east end of the curve referred to in the evidence (Tr. 34). The following day, after further consideration, he changed his testimony and fixed the point of impact where the letters "HCT" appear in black on Exhibit 1, which point is approximately 275 feet east of the east end of the curve (Tr. 37). He further testified at the first trial that he was traveling about 40 miles per hour (Tr. 43) and that with his lights at low beam, he could see about 200 feet (Tr. 32). Three times during the trial of the Hirose case (which arose out of the same collision) plaintiff stated that he was not over 12 feet away when he first saw the truck (Tr. 34 and 40) and later in the first trial of his own case he stated he could not have been over 20 feet away (Tr. 34), which statement he later amended to fix the distance at 50 feet (Tr. 34).

With reference to cars approaching the truck from the opposite direction, he stated:

"Q. Now, Mr. Tebbs, calling your attention to your testimony at the last trial:

'Q. Well didn't you tell us, Mr. Tebbs, that the truck that you saw on the

highway, or the object, was about 12 feet in front of you when you first saw it?

'A. That's right, when I saw it.

'Q. Then you were watching ahead of you, weren't you?

'A. Well, the only thing that has got me there, if I may answer, there could have been a car coming that might have blinded me somewhat.

'Q. Well, was there a car coming? Did you see any car coming?

'A. I don't know.

'Q. Well, in other words, the fact there could have been a car coming is just a possibility, you don't remember anything like that do you at this time?

'A. I don't.

"Q. Did you so testify?

"A. I did, but may I state I was thinking of lights, not car; if you are blinded, you can't see a car.

"Q. As a matter of fact, didn't you tell us before that when you testified, the reason you didn't see the truck was as you came east around the curve your lights shot off the highway and when you suddenly straightened out to go east on the straight-of-way, the truck was right in front of you. Didn't you so testify?

"A. I think so; yes sir, that's right.

"Q. The last time we were over here on this case, we were here about three and a half days, were we not?

"A. I was, yes sir.

"Q. And other than what you said, it was a possibility there was a car could have blinded you there wasn't anything said about lights any time during the trial, was there?

"A. This was the only instance I remember of.

"Q. And your testimony at that time that was a mere possibility; isn't that right?

"A. That was right as to lights, but as to car, I don't contend I ever saw a car. I was blinded; that is the confusion of that testimony.

"Q. And here we are now, April 30, 1951, and you say your memory is clearer now and you remember being blinded by lights?

"A. Yes sir.

"Q. And you put that in your complaint this time when you re-filed your suit, didn't you?

"A. Yes.

"Q. After you talked to your lawyers, you decided those lights were there?

"A. Well, I always had it in mind there was a light, whether it was a motorcycle or an automobile, I don't know, but I was blinded." (Tr. 40-41.)

It will be noted that plaintiff endeavors to explain away his testimony that he did not know whether he saw any car coming, by stating that he was thinking "of lights, not car." (Tr. 40.) If he was thinking of lights, then he evidently meant to say that he *saw* no lights approaching from the east when he

was asked if he saw a *car*. He also testified that the reason he did not see the truck was that as he rounded the curve, his lights shot off the highway and as he straightened out on the straight-of-way, the truck was right in front of him (Tr. 40-41). The one lane of travel was clear so that he might have passed to the left of the truck (Tr. 42). He testified that his lights on low beam revealed objects 200 feet away; that he did not see the truck until he was within 12 feet of it or 20 feet of it (Tr. 40, 32). He fixed the location of the point of impact at the first trial where the letters "HCT" in black appear on Exhibit 1, approximately 275 feet east of the east end of the curve (Tr. 35).

EVIDENCE AT THE SECOND TRIAL

Plaintiff testified that he was blinded by the lights of an oncoming vehicle when he was "around the turn about 100 feet"; that he was traveling approximately 40 miles per hour; that although he could have seen the truck 150 feet away, "coming that fast" he did not have time to turn left around it (Tr. 43); that the one lane of the highway was clear (Tr. 44); that there was a large rock protruding into the road as he went around the curve, which obstructed his vision and a mountain which goes back a long way "you can't see around," (Tr. 16); that the rock was located "300 feet or a little more" west from the truck (Tr. 16); that the strong light blinded him when he was "probably 50 to 70 feet, I can't say," from the truck (Tr. 16-17); that his brakes were in good con-

was asked if he saw a car. He also testified that the reason he did not see the truck was that as he rounded the curve, his lights shot off the highway and as he straightened out on the straight-of-way, the truck was right in front of him (Tr. 40-41). The one lane of travel was clear so that he might have passed to the left of the truck (Tr. 42). He testified that his lights on low beam revealed objects 200 feet away; that he did not see the truck until he was within 12 feet of it or 20 feet of it (Tr. 40, 32). He fixed the location of the point of impact at the first trial where the letters "HCT" in black appear on Exhibit 1, approximately 275 feet east of the east end of the curve (Tr. 35).

EVIDENCE AT THE SECOND TRIAL

Plaintiff testified that he was blinded by the lights of an oncoming vehicle when he was "around the turn about 100 feet"; that he was traveling approximately 40 miles per hour; that although he could have seen the truck 150 feet away, "coming that fast" he did not have time to turn left around it (Tr. 43); that the one lane of the highway was clear (Tr. 44); that there was a large rock protruding into the road as he went around the curve, which obstructed his vision and a mountain which goes back a long way "you can't see around," (Tr. 16); "That the truck was located "300 feet or a little more" southeast from the turn (Tr. 16); that he first observed the truck when he was "probably 50 to 70 feet, I can't say", (Tr. 16-17); that his brakes were in good con-

dition; that the truck had no tail light (Tr. 18) and that the truck was located at the point on Exhibit 1 where he has marked a red cross with the letters "HCT" in black (Tr. 38), which is probably 125 feet east of the east end of the curve.

Hirose testified that *two* cars came with bright lights which made him blind (Tr. 4), and that "we come to that rock and the turn, then at the same time big light come into us, make us blind," (Tr. 5); that there was no tail light on the truck and he first saw the truck when they were within 40 feet of it (Tr. 5), although at the first trial he stated that he first saw the truck when he was within 200 feet of it (Tr. 11; however, when confronted with this later statement, he said, "I told you 200 feet but I don't know much at that time though" (Tr. 11). Like Tebbs, who said that at the trial in October, 1948, he was very nervous and upset and "I didn't put the study and thought on it that I have now," (Tr. 39) Hirose seems also to have put some study on it and was therefore much better informed in 1951 than he was in 1948.

In addition to the testimony of plaintiff and Hirose, other evidence on plaintiff's behalf at the second trial is to the effect that the front lights of Peterson's truck were on (Tr. 64); that Marchant and Wilkinson on their way west from Duchesne and at a point about a mile or a mile and a half east of the place of collision, were passed by a car going in the same direction they were traveling (Tr. 71)—this to create the inference that it was the car with the blinding

lights, but there was no evidence that this car ever arrived at the place of the collision, or whether it turned out on some side road; however, it is a straw at which plaintiff grasps. Aside from the fact that it is altogether improbable and unreasonable that Marchant and Wilkinson could in April, 1951, recall that a car passed them at some particular point on a highway four years and three months prior to the date of their statement, their testimony does nothing more than to create an inference that this particular car proceeded to the place where the collision occurred, and based upon this inference is another inference that it had the bright lights which plaintiff claims blinded him. This is basing one inference upon another inference, which is not allowable. (*Utah Foundry Co. v. Utah Gas & Coke Co.*, 42 Utah 533, 131 P. 1173).

It is remarkable that plaintiff's memory in April, 1951, two and one-half years after the first trial, is so much better than at the first trial in October, 1948, one year and a half after the event; however, he confirms his first statement that the truck was located approximately 275 feet east of the east end of the curve, by admitting at the second trial that in rounding the rock at the curve he was "300 feet or a little more" from the truck (Tr. 16). However, the most serious departure from his testimony relates to the blinding lights of an oncoming car. From a statement at the first trial that there was just a possibility that he was blinded but that he remembered no car (Tr. 40-41), he stated at the second trial:

“Q. How do you account for that Mr. Tebbs, that when two years have gone by— Let’s say this trial was in October 1948, and we are now in 1951, and you say your memory is clearer now that it was at that time?

“A. I was very nervous and upset and I didn’t put the study and thought on it that I have now. My best recollection now is that I was blinded.” (Tr. 39.)

and again he stated “my recollection today is positive I was blinded.” (Tr. 40,) Whether he was blinded by the one light or two, he does not know (Tr. 41). The light could have been from a motorcycle (Tr. 42). In any event, he does not claim that there were lights from two cars, as did Hirose (Tr. 4). Plaintiff attempts to escape the purport of his testimony at the first trial by the transparently ridiculous statement that at the first trial he was asked about seeing a “car,” not “lights” (Tr. 42); this to make it appear that his present statement that he was blinded by *lights* is consistent with his former statement that he saw no *car*.

Is it not passing strange that plaintiff, *of course without the merest suggestion from anyone*, worked out such a fine distinction? Is it not strange that, likewise, at the second trial, plaintiff came to realize how important it was for him to be blinded by lights in order to bring his case within technical rules of law announced in this court’s decisions that blinding lights will, under some circumstances, relieve a plaintiff from the charge of contributory negligence? How strange that the plaintiff was able to educate himself and his

memory between the first trial and the second as to what evidence defeated him at the first trial and what changes were necessary to give him a chance to win at the second. How important it was to make it appear that it was not his fast driving or the fact that in rounding the curve "coming that fast" (Tr. 43), his lights shot off the highway, which prevented him from seeing the truck 300 feet or more away, but that he failed to see the truck because he was blinded by on-coming lights. His becoming blinded just had to be in the case or he had no case and it would never do to have it appear from the record that when his lights would reveal objects 200 feet away, he did not see the truck until he was within 12 feet of it or within 20 feet of it. That of itself would show gross carelessness, so he tries to make a somewhat better showing by now stating that although he could have seen the truck 150 feet away (Tr. 43), the fact that he was blinded by the bright lights when he was probably 50-70 feet away from the truck (Tr. 16-17) caused him to collide with it. This evidence shows that he traveled at least 80 feet while the truck could have been seen by him before the lights blinded him, so he had plenty of opportunity to stop and avoid colliding with it. (*Hanson v. Clyde*, 89 Ut. 31; 56 P. (2nd) 1366).

The facts in this case as developed at the first trial are practically the same as in the case of *Dalley v. Mid-western Dairy Products Company*, 80 Ut. 331; 15 P. (2nd) 309, the only exception being that the straight-of-way approaching the truck in the Dalley case was

memory between the first trial and the second as to what evidence defeated him at the first trial and what changes were necessary to give him a chance to win at the second. How important it was to make it appear that it was not his fast driving or the fact that in rounding the curve "coming that fast" (Tr. 43), his lights shot off the highway, which prevented him from seeing the truck 300 feet or more away, but that he failed to see the truck because he was blinded by the oncoming lights. His becoming blinded just had to be in the case or he had no case and it would never do to have it appear from the record that when his lights would reveal objects 200 feet away, he did not see the truck until he was within 12 feet of it or within 20 feet of it. That of itself would show gross carelessness, so he tries to make a somewhat better showing by now stating that although he could have seen the truck 150 feet away (Tr. 43), the fact that he was blinded by the bright lights when he was probably 50-70 feet away from the truck (Tr. 16-17) caused him to collide with it. (Hanson v. Clyde, 89 Ut. 31; 56 P (2nd) 1366).

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longer than the 300-foot straight-of-way between the east end of the curve and the defendant's truck in this case. It appeared in the Dalley case that Dalley's car was equipped with good lights and good brakes; that the lights on his car would disclose ordinary objects about 200 feet ahead; that Dalley did not see the truck until he was within 15 or 20 feet of it; that there were no lights on the rear end of the truck; that he was keeping a constant lookout ahead; that just before he struck the truck, he was traveling on the right side of the road and the truck was on the right side of the road but the lights of his car did not reveal a car until he was within 15 or 20 feet from where it was standing and that if the truck had been equipped with a tail light he would have been able to see the truck in time to stop or turn out; that he was unable to stop or turn his car so as to avoid collision after he discovered the truck. Counsel's remark that the Dalley case was decided by a 3-2 decision and that it has been subject to some adverse criticism, should not lessen his good opinion of it. Rather, as the author of it, he can have a sense of pride in the fact that no criticism which has been offered against the decision has been sufficient to overcome it.

In *Gohlinghorst vs. Ruess*, 146 Neb. 475, 20 N. W. (2nd) 381, plaintiff's testimony as to facts concerning the collision, was contrary to her deposition in another case in which she was not a party. The court for that reason affirmed a dismissal of her case. To quote:

“It is the contention of the defendants that where a plaintiff materially changes her sworn testimony in this manner to meet the exigencies arising in the trial of the case that it is discredited as a matter of law and should be disregarded.

“We think the testimony of plaintiff was such that it cannot sustain a judgment in her favor. A plaintiff may not recite upon oath one statement of facts in one judicial proceeding and then, to meet the exigencies of the occasion in the trial of a different suit, recite under oath an entirely different story. As was said in *Gormley v. Peoples Cab, Inc.*, 142 Neb. 346, 12 SCJ 31, 6 N. W. (2d) 78:

‘Such conduct cannot be tolerated to the extent, when it is clearly apparent, of requiring a trial judge to submit the credibility of such testimony to a jury, and of permitting a party to mock law and justice.’

* * * *

“The convenient loss of memory to escape the fatal effect of positive sworn testimony on the one hand, and in amazing resurrection of memory more than two years later as to facts and incidents tending to make a case, make the evidence incredible as a matter of law in the absence of any reasonable explanation of the conflict.

* * * *

“It is the general rule in this jurisdiction that in a jury trial when the defendant moves for a directed verdict at the close of plaintiff’s evidence, such motion must be treated as an admission of the truth of all material and relevant

evidence and all proper inferences to be drawn therefrom, and if the evidence so considered tends to sustain the allegations of the petition, and the petition states a cause of action, the case should be submitted to the jury. But this rule does not control where it appears that other evidence of the plaintiff demonstrates conclusively, or to a degree that the minds of reasonable men cannot differ thereon, that such evidence favorable to plaintiff is incapable of belief."

See also *Peterson vs. R.R. Co.* (Neb.) 278 N. W. 561; *Ellis vs. Omaha Cold Storage Co.* (Neb.) 250 N. W. 760.

In *Smith v. R. R. Co.*, 184 Fed. 387, the court uses this language:

"As the inconsistency is in the testimony of a party, a stricter rule is applicable than where the inconsistency is in the testimony of an ordinary witness. * * * While it is true that upon a second trial the plaintiff's case may be changed or strengthened by new testimony, yet the right of a plaintiff at a second trial to make by his own testimony a complete departure from the case presented at the first trial is not unlimited. A plaintiff, we think, having sworn to facts resting in his own observation and knowledge before one jury, should not be permitted to swear to facts directly inconsistent and to obtain from a second jury a verdict in his favor which will involve the conclusion that his testimony at the first trial was knowingly false. A party testifying under oath is more than mere witness. He is an actor seeking the intervention of the judicial power in his behalf, and thus subject to the rule '*allegans contraria non est audiendus*,'

which, as stated in Broom's Legal Maxims, page 130, 'expresses in technical language the trite saying of Lord Kenyon that a man should not be permitted to "blow hot and cold" with reference to the same transaction, or insist at different times, on the truth of each of two conflicting allegations according to the promptings of his private interest.' "

See also *Hamilton vs. Frothingham*, (Mich.) 40 N. W. 15.

In *Steele v. R. R. Co.*, (Mo.) 175 S. W. 177, the court remarks:

"We are not bound, even as appellate court, to believe a mere witness in a case where it appears from conclusive physical facts or otherwise patently that such evidence is either perjured or clearly mistaken. Why then are we compelled to believe a litigant swearing for himself under the same circumstances."

In *Insurance Co. v. Bonacci*, 111 Fed. (2) 412, the court declares that a party cannot in his own case be heard by a court to deny what he solemnly swore was true yesterday.

This case is not only important from the standpoint of the interest of the parties involved; it is also important because it will give the courts and the legal profession an opportunity to ascertain whether this court will tolerate trifling in judicial proceedings. This is no case where a witness made an honest mistake in his testimony, which, of course, he should always be permitted to correct on timely application, but after revealing the facts to the counsel he first employed,

and deliberately testifying in support of his complaint as to all the facts and circumstances surrounding the collision, plaintiff employs other counsel to whom, two years and a half following the first trial, and after he had put more study and thought on it, (Tr. 39) he revealed other facts, to wit: That the truck was located near the east end of the curve, and that positively, and without any question, he was blinded with lights, which fact his former employed, Hirose, confirms. To prove that the impact occurred nearer the end of the curve, plaintiff states that he found certain bits of chrome which he identified as a part of his car and which he picked up when, in company with his son, he went back to the highway two months after he got out of the hospital (Tr. 50). He had been confined to the hospital for nearly six weeks (Tr. 21), so he picked up the chrome more than one hundred days after the collision and after the highway had been covered with snow and sleet and in all likelihood, scraped by highway machinery (Tr. 56-57), all of which conditions rendered the evidence of where the chrome was found absolutely worthless as tending to prove where the collision occurred.

As much as we regret the necessity of such a statement, we say that there could not be a more obvious "doctoring" of testimony in order to avoid the consequences of prior statements under oath, and in order to avoid the rule in the Dalley case and to make applicable the doctrine of the *Nielsen v. Watanabe*, 90 Ut. 401; 62 P. (2nd) 117, case with respect to blinding lights.

We respectfully submit that the trial court was clearly justified in holding that "the plaintiff is bound by the testimony given in the former hearing" and that even if plaintiff was blinded by lights he should have slowed down.

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