

1952

Gertrude Gibbs, Lynn P. Gibbs and Gaye Gibbs Smith v. Blue Cab, Inc. : Respondent's Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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Case No. 7710

In the Supreme Court of the State of Utah

GERTRUDE GIBBS,
LYNN P. GIBBS and
GAYE GIBBS SMITH,
Plaintiffs and Appellants,
vs.

BLUE CAB, INC., a corporation,
Defendant and Respondent.

FILED
DEC 9 - 1952
Utah Supreme Court, Utah

RESPONDENT'S PETITION FOR
REHEARING AND BRIEF IN SUPPORT THEREOF

SKEEN, THURMAN, WORSLEY & SNOW
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Attorneys for Respondent

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In the Supreme Court of the State of Utah

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| GERTRUDE GIBBS, LYNN P. GIBBS and GAYE GIBBS SMITH, <i>Plaintiffs and Appellants,</i> | } | Case No. 7710 |
| vs. | | |
| BLUE CAB, INC., a corporation, <i>Defendant and Respondent.</i> | | |

RESPONDENT'S PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

PETITION FOR REHEARING

The respondent, Blue Cab, Inc., a corporation, petitions the Court for a rehearing and reargument of the above entitled case upon the following grounds:

POINT I.

THE COURT HAS MISCONSTRUED THE RECORD IN THIS CASE, AND HAS FAILED TO GIVE WEIGHT TO THE PERMISSIBLE INFERENCES TO BE DRAWN FROM THE RECORD, AND ITS DECISION, THEREFORE, SHOULD BE RECALLED AND THE CASE REHEARD.

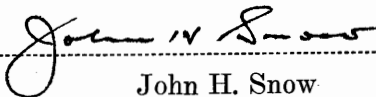
POINT II.

THE DECISION OF THE COURT RESULTS IN CONFUSION AND UNCERTAINTY IN THE AUTOMOBILE INTERSECTION LAW OF THIS STATE, AND THE DECISION, THEREFORE, SHOULD BE RECALLED AND THE CASE REHEARD.

WHEREFORE, petitioner prays that the judgment and opinion of the Court be recalled and a reargument be permitted of the entire case.

A brief in support of this petition is filed herewith.

SKEEN, THURMAN, WORSLEY & SNOW

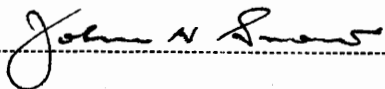
By  _____

John H. Snow

Attorneys for Respondent.

JOHN H. SNOW hereby certifies that he is one of the attorneys for respondent and petitioner herein, and that in his opinion there is good cause to believe that the judgment and decision of the Court is erroneous and that the case should be reheard and reargued as prayed for in said petition.

Dated this 9th day of December, 1952.

 _____

BRIEF IN SUPPORT OF
PETITION FOR REHEARING

POINT I.

THE COURT HAS MISCONSTRUED THE RECORD IN THIS CASE, AND HAS FAILED TO GIVE WEIGHT TO THE PERMISSIBLE INFERENCES TO BE DRAWN FROM THE RECORD, AND ITS DECISION, THEREFORE, SHOULD BE RECALLED AND THE CASE REHEARD.

There appears to be no need for a restatement of the facts of this case at this time inasmuch as the facts were thoroughly outlined and discussed in the original briefs and upon oral argument. The decision of the Court, however, indicates that the facts have been misconstrued and misapplied, and the Court has either ignored or minimized the effect of the logical and permissible inferences which should be drawn from the facts in order that a just and proper decision be rendered.

The Court's decision appears to consist of a holding, first, that the question of whether or not the negligence of decedent, in not having a lighted lamp upon his bicycle, was contributory negligence, was a question of fact for the jury, and second, a holding which lumps the questions of other acts of negligence on the part of decedent and the negligence of defendant, if any, into one package to be submitted to and considered by the jury. Practically no reference is made in the decision to the other elements of negligence on the part of deced-

ent, and the question of negligence of defendant, if any, is disposed of with a passing comment. We shall first discuss the question of the unlighted bicycle.

The bicycle of decedent had no light as required by law. Title 57-7-154, Utah Code Annotated, 1943; Section 27E2, Ogden City Ordinances. It seems to be conceded that the absence of the lamp was negligence, per se. The next question, obviously, is whether that negligence contributed to the cause of the accident to the extent that the appellants would be barred from recovery, as a matter of law. The Court, in the majority opinion, passes lightly over the problem with the comment that this is a jury question, particularly because of the fact that "immediately prior to the time of impact the bicycle, and therefore the lamp, was pointed away from the vision of the defendant . . ."

From this comment, it would seem that the Court has failed to consider the effect of the fact that decedent and his bicycle, in the many seconds prior to impact, were mere shadowy shapes in the darkness, if, in fact, they were visible at all. Since there was no lamp, there was no indication of their presence at the sidewalk line, the stop sign area, the curb line, or at any place in the northerly half of the intersection. It is just this situation that the statutes involved were designed to prevent. If there had been a lamp, the defendant would have been warned in ample time to have avoided the accident.

Why was the bicycle wheel turned? It was turned to avoid the impact, just as the defendant's cab was turned. At that time, it was too late to give any warning. The negligence of the decedent had borne fruit. The accident was about to happen. That the front of the bicycle was then turned away from the vision of the defendant is absolutely immaterial. The danger foreseen by the framers of the statute and ordinance had already materialized.

If the decedent had had a light upon his bicycle, the rays from that light would have been seen either as he passed the sidewalk line, or passed the stop sign area, and curb line, and entered into the north half of the intersection. Even if the bicycle had been pointed away from the taxicab in the area near the point of impact, the rays from the lamp could have been seen upon the darkened street, or reflected from the wet surface of the road. The cab driver, from the time he left Adams Avenue, one block to the west, would have had the opportunity to see a light at one or the other of the indicated points, and thus, would have had the opportunity to take steps to avoid the collision. He would not have been placed in the position of attempting, at the last moment, to avoid an accident which had been made inevitable by the carelessness of the bicyclist.

The Court, however, avoids discussion of those facts and inferences by stating that what the bicyclist did,

prior to impact, is "relegated inescapably to the realm of conjecture." By this statement, we assume the Court means that it cannot be determined with certainty whether the decedent rode his bicycle, walked with it, or was standing in the middle of the intersection with it. Even if this be true, we fail to see how it can benefit appellant's case. A man who rides a bicycle without a light into a through street, into the path of an on-coming vehicle, is negligent. If he walks with his bicycle without a light, and into the path of a vehicle, he is negligent. If he stands in the middle of a street, in the path of a vehicle, he is negligent. That this decedent did at least one of these things is inescapable. He had to get to the point of impact some way.

No matter which of the choices is utilized, the absence of the light is still a dominant factor in the happening of the accident. It would be difficult to conceive of a situation better designed to illustrate the wisdom of the law requiring a light upon a bicycle. To say that such a law is a wise law, but then to say, in the same breath, that a jury might reasonably find that the violation of the law, under these facts, is of no legal consequence, is to render the law meaningless.

If this case is tried anew and submitted to the jury, as it necessarily would be under the Court's decision, it is not difficult to imagine the bewilderment of the members of the jury when they are told that the conduct of

the decedent was negligent and a violation of the law, on the one hand, but that, on the other hand, maybe it didn't make any difference, after all.

A fair appraisal of the Court's holding on the question of the unlighted bicycle leads unavoidably to the conclusion that the decision gives undue emphasis to the fact that the bicycle was turned away from the cab driver just before impact, and fails to consider the effect of the absence of the light prior to that time, and fails to consider the effect and meaning of the statutory enactments upon this subject.

The majority opinion of the Court, it seems to us, has failed to give adequate consideration to another factor in this case. There seems to be no escape from the conclusion that the decedent was contributorily negligent by placing himself in the intersection at the time and in the manner which he did in this case. We do not urge, as indicated by the Court, that "anyone killed or injured in an intersection . . . of necessity must have been guilty of some carelessness contributing to the mishap." However, no adequate answer has yet been heard to the question posed by Counsel upon oral argument of this case to the effect that, if decedent was acting with due care, how could he have arrived at the center of this intersection in the face of the on-coming taxicab?

The Court recognizes that there was clear visibility

for a block from the scene of the accident, as found by the trial court after inspection of the scene. The Court, however, attempts to minimize the effect of the personal inspection by stating that it was made "on an ordinary day when factors of darkness, wetness, rain, mist, etc. were absent." What possible difference the absence of these factors could mean to this case is nowhere made clear. If anything, the presence of these factors at the time of the accident makes it even more clear that decedent was guilty of negligence. This is so because the doctrine of the reasonable man requires the exercise of more care under such circumstances than is required on a bright, clear, dry day. Likewise, there is nothing in the factors of darkness, wetness, rain or mist, which makes headlights become less visible to a bicyclist. If anything, these factors make the headlights more prominent because the reflection from the headlights is multiplied a thousandfold as the rays of light strike droplets of water in the air and the wet planes and surfaces of the street ahead of the taxicab. Further, in a drizzle such as was present on this occasion the sound of the vehicle is much more apparent to an average person because of the noise of the tires upon the wet pavement than is the case when dry tires move upon dry pavement.

If there was ever a case where it can be said with legal certainty that an accident occurred because of the fault of one of the participants, this is that case. Nothing

in the majority decision of the Court discloses how reasonable men could possibly differ on the question of decedent's negligence. A jury of such men might disagree in that some of its members might find decedent negligent because he entered the intersection without looking. Others might find that he looked but failed to heed what he saw. Still others might find that he ran through the stop sign, or that he entered a through street at a time when another vehicle was approaching so close as to constitute a hazard. Still others might find he was standing in the middle of the street with the bicycle with no lamp upon it on a dark and rainy morning, and finally, others might find that he did one or two or three, or all of these things. But, whatever such a jury found, whether it be one or more, or all, of these things in combination, we cannot see how any jury could find that none of these factors, either singly or in combination, failed to have a contributing effect upon this accident. Such a contention reduces the law to an absurdity and renders meaningless the statutes concerning lights upon vehicles and rights of way at through-highway intersections, and destroys the effect of the statutes and decisions of this state which place the same burden of care upon a bicyclist as is placed upon a motorist.

The decision of the Court apparently gives little weight to the numerous specifications of negligence on the part of decedent, and disposes of all of them by stating that the jury "may have determined that

deceased acted as an ordinary prudent person in failing to appraise accurately the proximity of the cab, or its speed, so as reasonably to have misjudged his ability to clear the intersection in safety." Thus the Court states that a jury could absolve decedent from the charge of contributory negligence even if the jury found that Mr. Gibbs failed to stop for the stop sign, failed to look for on-coming traffic, or having looked, failed to heed what he saw, all such failures apparently being excused because of the possibility that Mr. Gibbs might have misjudged the situation in which he found himself.

In so holding, however, the Court overlooks the question already discussed, namely, that the deceased had no light upon his bicycle. That is an element of negligence which cannot be excused on the ground of poor judgment. It is an element that is constant in the case and bears upon each and all of the other elements of negligence. It acted in concert with the other acts of negligence on the part of deceased.

Logically it is of no avail to plaintiff to argue that there is no proof that Gibbs was riding the bicycle. While the Court apparently paid little heed to the argument respondent advanced upon the original hearing of this case to the effect that the inferences to be drawn from the physical facts pointed inescapably to the fact that decedent was riding the bicycle, there is still another fact not previously discussed which bears out this point.

If, as has been suggested by appellant, in a pure after-thought, the decedent was standing in the street with his bicycle, or was walking with it, then there is no explanation for the sudden turn of the wheel of the bicycle to the left of decedent. The natural and logical thing for a person to do if he was walking or pushing a bicycle and suddenly became aware of a car bearing down upon him, would be to step back to safety, or to rush blindly ahead, but it would not be a natural reflex for him to turn the wheel of the bicycle, as apparently was done in this case. This point is urged because it is important in the consideration of whether or not decedent acted as an ordinary and prudent man, and whether or not he should be charged with the same degree of care as is a motorist under the laws of this state.

Any attempt now to justify plaintiff's position upon the ground that decedent was not riding his bicycle is to refuse to give weight to the inferences which should be drawn from the facts and gives weight to inferences which can be based upon no fact at all.

By its holding in this case the Court has said that even in the face of all of these acts of negligence there still must be submitted to a jury the question of whether or not the negligent acts and omissions contributed to the cause of the accident. To say that a jury of reasonable men could examine this record, consider these facts

of negligence, draw the logical inferences from the facts, and in the light of ordinary experience find deceased not guilty of contributory negligence, is to defy reason and logic and to mock the experience of the ordinary individual who sits upon the jury. Such a decision allows and invites a jury to enter into "the realm of conjecture," and there to speculate and search out reasons why conduct, which is ordinarily and almost without exception considered negligent, should not be said to be negligence sufficient to bar recovery in this case.

POINT II.

THE DECISION OF THE COURT RESULTS IN CONFUSION AND UNCERTAINTY IN THE AUTOMOBILE INTERSECTION LAW OF THIS STATE, AND THE DECISION, THEREFORE, SHOULD BE RECALLED AND THE CASE REHEARD.

A source of particular disturbance to Counsel is that portion of the majority decision of the Court wherein it is confessed that the law of intersection cases is so confused that no longer can reliance be placed upon the earlier decisions of the Court. It is stated that since no two cases "possibly could present analogous facts," henceforth the Court must analyze each case upon its own facts, without regard to precedents.

It is submitted that such a course of action flies in the teeth of the doctrine of *stare decisis*, upon which much of the structure of Anglo-Saxon law has been based.

The stability of the law has been guaranteed by this doctrine. The laws by which our people are governed have thereby become fixed, definite and certain, and we have been able, in the conduct of our affairs, to rely upon the law as established, until such time as a court of competent jurisdiction, in the exercise of its wisdom, has determined that the over-all welfare of mankind required a change in the law.

By its decision in this case, however, the Court has not determined that intersection law should be changed, but has apparently found that the law has become too difficult to apply to the shifting factual situations presented for determination. It is proposed that the cardinal principle of adherence to judicial precedent be abandoned, and that each case be decided without attempting to fit the decision into the judicial edifice constructed by our courts over the years. The cases shall be decided, says the Court, without any attempt to "reconcile the same by apology for, explanation of, or nice distinction between" earlier decisions. If, as stated by the Court, "disharmony" exists in the decisions, it is difficult to see how the proposed plan of action will restore harmony to the scene, because each case will announce its own principle, and become its own precedent.

Under this decision, neither the Bench nor the Bar of this state will be able to determine the rights of principals in an intersection case, since such rights will

necessarily depend upon the ultimate analysis of each case by this Court. As the opinion of the Court indicates, "minds differ" and there are "characteristic differences in point of view." As the personnel of the Court shifts and changes in the passage of time, the effect of this decision will be to cause the determination of legal rights to depend, not upon the structure of the law, but upon the composition of the Court—upon the "differences in point of view" of the Justices (or Judges) who sit in judgment upon each individual case.

During the course of preparation of this Petition and Brief, Counsel has received numerous inquiries from other members of the Bar, who ask if, under the facts of this case, the decision of the Court should be interpreted as overruling these leading intersection cases which have heretofore guided the Bench and Bar in the daily practice of their profession: *Bullock v. Luke*, 98 Utah 501, 98 Pacific (2d) 350; *Hickok v. Skinner*, 113 Utah 1, 190 Pacific (2d) 514; *Conklin v. Walsh*, 113 Utah 276, 193 Pacific (2d) 437; *Gren v. Norton*,Utah, 213 Pacific (2d) 356.

As we understand these inquiries, members of the Bar are confused because the Court, while not expressly repudiating the cited cases, has indicated that their effect is to be minimized, and that, in the future, each case will be decided by the Court on the basis of its own facts, without regard to the question of whether or not

the conduct of the litigants conformed to the standards previously laid down as law.

To illustrate the problem, this question has been posed: if an accident occurs involving two vehicles which collide upon an intersection not protected by traffic controls, with clear visibility available to each driver for a considerable distance, are the parties to be held to the principle of *Bullock v. Luke, supra*, or will be the case be examined upon its facts, and a jury allowed to speculate as to whether or not one or the other of the drivers made a "mistake in judgment" or in some other way is to be excused from the consequences of his conduct? We confess our inability to answer such a problem upon the basis of the decision in the instant case, and we respectfully request that the Court furnish its guidance to members of the Bench and Bar upon this subject.

The Court notes, in its decision, that the "fallibility of humanity" may provoke error and injustice as each case is analyzed. It is submitted that this statement furnishes one of the strongest possible arguments against the policy of disregarding precedent. To stand by precedent is to guard against human fallibility. There can be no stability in the law if it is to be decided, not by the Court, which is a perpetual instrument of justice, but by the differing minds of the Justices who may, from time to time, comprise the Court. As is stated in 14 *American Jurisprudence*, Courts, Sec. 61, p. 285, "par-

ties should not be encouraged to . . . speculate on a fluctuation of the law with every change in the expounders of it.”

CONCLUSION

Respondent sincerely urges that, on the basis of the foregoing argument, and in view of the importance of the questions inherent in this case, the Court should grant a rehearing and reargument and that the Court should thereupon review the entire matter, and upon such review, it is our sincere conviction that the Court will feel compelled to find that the trial court was not arbitrary in its decision and that its decision should be affirmed.

Respectfully submitted,

SKEEN, THURMAN, WORSLEY & SNOW
JOHN H. SNOW

Attorneys for Respondent,