

1953

Norma D. Cox v. Cyril P. Thompson : Appellants' Petition for Rehearing and Supporting Brief

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

NORMA D. COX, ADMINISTRATRIX OF
THE ESTATE OF JACKSON BLAINE COX,
Deceased,

Plaintiff & Appellant,

vs.

CYRIL P. THOMPSON,

Defendant & Respondent.

CIVIL NO.
7796

APPELLANTS' PETITION FOR RE-HEARING
and
SUPPORTING BRIEF

FILED

APR 13 1953

Clerk, Supreme Court, Utah

BRANT H. WALL and
JAY ELMER BANKS, Attorneys
for Plaintiff & Appellant.

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POINT 1: THE COURT SHOULD HAVE SUSTAINED EACH OF THE POINTS RAISED IN APPELLANT'S BRIEF ON APPEAL UNLESS IT WAS THE COURT'S INTENTION TO MODIFY OR REVERSE THE EXISTING LAW HERETOFORE ANNOUNCED BY THIS COURT COVERING SAID POINTS OF LAW.

POINT 2: THE COURT ERRED IN FAILING TO CONSTRUCT THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE PLAINTIFF.

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IN THE SUPREME COURT OF THE STATE OF UTAH

NORMA M. COX, ADMINISTRATRIX OF
THE ESTATE OF JACKSON BLAINE COX,
DECEASED,

Plaintiff & Appellant,

VS.

CYRIL P. THOMPSON,

Defendant & Respondent.)

CIVIL NO.

APPELLANTS' PETITION FOR RE-HEARING
and
SUPPORTING BRIEF

Comes now the plaintiff and appellant in the
above entitled matter, through her counsel Brant
H. Wall, Esq. and Jay Elmer Banks, Esq., and re-
spectfully petitions the court to grant a rehear-
ing in the said cause for the reason and upon the
grounds and on the points following:

STATEMENT OF POINTS

POINT I : The court should have sustained
each of the points raised in appellants brief on

appeal unless it was the courts intention to modify or reverse the existing law heretofore announced by this court covering said points of law.

POINT 2: The court erred in failing to construe the evidence in a light most favorable to the plaintiff.

ARGUMENT

POINT 1: The decision announced by the court in this case poses an interesting dilemma, the resolution of either horn of which should result in a decision for the plaintiff and appellant.

If, under the principle of construing the evidence in a light most favorable to the plaintiff, the court should choose to believe the testimony of the plaintiff's witness Mr. Ferre, the decision should be in favor of the plaintiff since that witness unequivocally placed the point of impact as occurring in lane 1 (T.R. 53, 54, 55), and under such circumstances the decedent could not have been negligent in failing to yield the right of way.

in perception as set forth in the opinion of Chief Justice Wolfe at page 3, to-wit:

- (1) "Mr. Ferre observed the mishap from in front of the cafe,
- (2) He viewed the scene over his parked automobile,
- (3) He did not see the car prior to the impact,
- (4) He glanced away from the scene for a second or two,
- (5) The street was dimly lighted,"

the court should choose to disregard the testimony of Mr. Ferre, as it apparently did, then in such event the facts presented would be similar to the situation found in the recent case of Tuttle vs. Pacific Intermountain Express Co., 242 Pac 2nd 764, and the ruling of law in that case would squarely conflict with the decision under consideration. In that case, (Tuttle vs. Pacific Intermountain Express Co.) under one theory of what the facts were, there was no testimony concerning decedents conduct prior to the accident, with the possible exception of the defendant driver, and the court there said, in part:

"....Under these circumstances, there is no evidence whatsoever regarding his conduct just preceding his death. Therefore, the plaintiff is entitled to the presumption that he used due care for his own safety, and upon that presumption the jury could base their refusal to find him guilty of contributory negligence."

Similarly, in the very recent case of Compton vs. Ogden Union Ry. & Depot Company, (Utah 1951), 235 Pac. 2nd 515, where the court was discussing the presumption of due care doctrine, it was there stated:

"The presumption is applicable where there is no evidence as to care used, or perhaps where the evidence comes from an adverse witness who may be subject to disbelief by the jury, or where there is sufficient uncertainty in the evidence as to cast doubt on the testimony." (underlining ours)

The elimination of the testimony of Mr. Ferre would result in the courts being able to consider, on this point, only the testimony of the defendant and his buddies who would definitely be adverse witnesses and subject to disbelief by a jury.

To conclude on this point, if plaintiff's witness, Mr. Ferre, is believed or subject to belief, the plaintiff should prevail in this appeal. If, on the other hand, said witness is disregarded be-

cause the court felt that he was not an adequate percipient witness, as it in effect did, then the facts should bring into play the principle of law laid down in the Compton case, supra, and the plaintiff should prevail on appeal. We submit therefore, that it was not the courts intention to either modify or reverse it's prior ruling as announced in the Compton case and Tuttle case on this point, and therefore respectfully request the court to grant this petition for rehearing.

POINT 2: It is fundamental law, which requires no citations, that in considering a motion for a Directed Verdict, and on an appeal from an Order granting such motion, the court must view the evidence in a light most favorable to the plaintiff.

From the decision of Chief Justice Wolfe, it is noted that there exists a discrepancy on this point in that considering the testimony of Mr. Ferse he does not take the evidence most favorable to the plaintiff, but rather attempts to reconcile such testimony with that of the defendant and his fellow associates.

Under this principle of construing the evidence in a light most favorable to the plaintiff, if there is to be any reconciliation of the testimony of the various witnesses it certainly should be favorable to the plaintiff when ruling upon a motion for a DIRECTED VERDICT and not favorable to the defendant. In relation to this point, we respectfully invite the courts attention to the testimony of witnesses Wimber (T.R. 231, 233), Smith (T.R. 255, 262) and the defendant Thompson (T.R. 293) which could easily be reconciled and in corroboration of Mr. Ferres' testimony showing the point of impact to be in lane 1. It is unquestionable that there is conflicting evidence of the material fact of decedents position at time of impact; Ferre unequivocally places decedant in lane 1 (T.R. 53, 54, 55) at time of impact and appellant contends that a reasonable man can draw a reasonable inference from the testimony of defendant and his witnesses, Wimber and Smith, that the decedent was struck in lane 1 if one understands the doctrine of RELATIVE MOTION and upon which it is reasonable to believe that their testimony was based. A careful review of

their testimony will clearly show that they viewed the mishap while the set of circumstances were in a state of flux, whereas the witness Ferre observed the impact under the following conditions:

1. He was standing on a concrete slab well elevated above the parked vehicle referred to in the decision.
2. The area was very well lighted, contrary to the statement in the opinion, (T.R. 13, 31, 51, 117, 180, 203).
3. The highway was dry, weather clear and Ferre had an unobstructed view of the decedent and the area involved.

Where there is ground for debate, as here, as to what facts are established, a directed verdict is improper. In the case at bar the point of impact is a material fact, and in considering whether or not a directed verdict should have been given, should your honorable body disregard Mr. Ferres' testimony, which, in effect, is what you do by reconciling his testimony with the defendant and his witnesses Wimber and Smith, by holding that his testimony "does not conflict in any material degree"? To do so takes the question of credibility of the witnesses away from the jury. Can't the jury disregard the testimony of defendant and his witnesses


When being interested in the outcome

of the case and believe the witness Ferre as to where the point of impact occurred? We think that they could, or if they did not disregard defendant's testimony that they could reconcile same with the testimony of Mr. Ferre.

CONCLUSION

In conclusion, we would like to invite your attention to the point that the case at bar is an appeal from a Directed Verdict and not from a jury verdict. Appellant respectfully submits the matter and urges that there has been a material misunderstanding of the fact, in that the facts most favorable to the appellant have been overlooked or have not been given appropriate consideration, and further that the decision being based upon the facts assumed has resulted in a decision contrary to the law heretofore announced by this court. Wherefore, appellant respectfully requests that this petition for rehearing be granted.

Respectfully submitted,


BRANT H. WALL & JAY ELMER BANKS
Attorneys for Appellant