

1952

## Richard Shields v. Peter Ramon : Brief of Respondent

Utah Supreme Court

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7822

Case No. 7822

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

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RICHARD SHIELDS,

*Appellant,*

— vs. —

PETER RAMON,

*Respondent.*

**FILED** **BRIEF OF RESPONDENT**  
JUL 13 1962

Clerk, Supreme Court, Utah

WILFORD W. KIRTON, JR.,  
ALBERT R. BOWEN,  
*Attorneys for Respondent.*

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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RICHARD SHIELDS,

*Appellant,*

— vs. —

PETER RAMON,

*Respondent.*

Case No. 7822

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BRIEF OF RESPONDENT

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STATEMENT OF FACTS

Respondent disagrees with Appellant's statement of facts and for that reason now sets forth the facts which he contends are supported by the record.

The accident here involved occurred in the nighttime, during a very heavy fog. (R. 39). Visibility was very restricted. In one place Appellant's witness, Dipol, testi-

fied that visibility was no greater than 25 feet. (R. 30). Later he said it would not be possible to see an approaching car at a distance greater than 20 feet under the conditions prevailing at the intersection at the time of the accident, (R. 32) and that safe driving speed at the time was not in excess of 5 miles per hour. (R. 32.)

It was under these adverse weather conditions that Respondent was slowly proceeding northward on State Street in the lane next to the double lines dividing opposing lanes of traffic. Stopping at about the intersection of Truman Avenue and State Street before making a left turn to the West, Respondent observed headlights of two cars approaching from the North. He permitted them to go by and noticed they were traveling slowly—no more than 10 miles per hour (R. 39). Looking again to the North he saw no other headlights (R. 39). He then began making a left turn very slowly—from two to five miles per hour. Appellant, just before impact, was traveling along State Street in the lane next to the dividing double lines in a southerly direction. According to Appellant's witness, Dipol, Appellant stated to the officer, some thirty to forty-five minutes after the accident, that he, Appellant, was traveling thirty miles per hour just before impact and twenty-five miles per hour at impact (R. 35 and 36). Appellant also told the officer he did not see Respondent's car until it was "right in front of him" (R. 30 and 31). Appellant, himself, admitted that he was traveling twenty-five miles per hour.

Respondent saw Appellant's lights approaching very

suddenly (R. 45 and 46), just prior to impact. The front part of Appellant's vehicle made contact with the right rear side of Respondent's car. (R. 27 and 28). From the impact Respondent's car traveled 67 feet while Appellant's car traveled 12 feet; (R. 34) no skid marks were left by either car.

## ARGUMENT

Respondent has no argument with the law and the cases cited by Appellant. They state the law in this jurisdiction covering cases to which they apply. Respondent disagrees only with the attempt made by Appellant to apply them to the case at bar. In none of the cases cited by Appellant are there any fact situations similar to the one here before the court. In all of these cases visibility was unrestricted. In the case before the court in this appeal the visibility of both drivers was extremely impaired.

It is settled law that a driver in encountering a fog is not bound as a matter of law to stop and wait for the fog to lift in order to escape a charge of negligence. 60 C.J.S. P. 699; *Peasley v. White*, 152 Atl. 530; 129 Me. 450.

The degree of care to be exercised by an automobile driver in a fog varies with the conditions of the fog, of the roadway and of traffic. In other words, a driver must exercise a degree of care consistent with existing conditions. 60 C.J.S. P. 697; *Cole v. Wilson*, 127 Me. 316; 143 Atl. 178; *Silva v. Waldie*, 82 P. (2) 282; 42 N.M. 514.

*Respondent Not Guilty of Negligence as a Matter of Law*

Appellant contends that under the facts of this case the court below was required to find respondent guilty of negligence as a matter of law. This, in spite of the fact that the evidence in support of the judgment and decree rendered, was that respondent was traveling very slowly and cautiously; that he stopped in preparation for making a left hand turn; that he perceived head lights of two other cars approaching him at a slow rate of speed; that he permitted them to go by, and looking again to the North saw no other head lights and thereupon began to make a left turn very slowly, and as he was doing so appellant's car coming on at a speed of 30 miles an hour struck respondent's car in its approximate center and knocked it some 67 feet down the road.

We believe it was clearly within the province of the court to weigh these facts which were put in evidence and which appear as a matter of record and that the case is not one which this court on appeal can say fastens negligence upon the Respondent as a matter of law.

We refer the court to 5 *Am. Jur.* Page 892, wherein it is said:

"725. *Impaired Visibility.* — Generally where the driver of an automobile has been injured, or his car damaged, in a motor accident where his view was obscured by dust, smoke, or atmospheric conditions, it is a question for the jury whether his conduct constituted contributory negligence, unless the facts and circumstances surrounding the accident, and the inferences that may be drawn therefrom, are not in dispute. Factors to be considered in connection with arriving at a de-

termination of the motorist's contributory negligence are the speed of his automobile, extent of visibility, control of car, and any other matters explanatory of the proper degree of care and caution demanded under the circumstances."

See also:

*Schuster v. Johnson*, 145 A 29, 108 Conn. 704; *Moffitt v. O.L.D. Forwarding Co.*, 73 N.E. (2d) 164; 331 Ill. App. 278; *Caudle v. Zenor*, 251 N.W. 69; 217 Iowa 77; *Reserve Trucking Co. v. Fairchild*, 191 N.E. 745; 128 Ohio St. 519; *Langill v. First Nat. Stores*, 11 N.E. (2d) 593; 298 Mass. 559; *Cummins v. Southern Fruit Co.*, 36 S.E. (2d) 11; 225 N.C. 625; *Pope v. Clary*, Tex Civ. App. 161 S.W. (2d) 828.

In the above case of *Moffitt v. O.L.D. Forwarding Co.* the court had this to say:

"The question of contributory negligence is preeminently for the consideration of the jury, as such negligence cannot be defined in exact terms, and unless it can be said that the action of the injured person is clearly and palpably negligent it is not within the province of the Court to substitute its judgment for that of the jury."

Of interest on this point are the cases appearing in 37 A.L.R. 584, et seq, and 73 A.L.R. 1027 et seq. In the cases annotated in the foregoing citations the various courts held that the question of contributory negligence under the facts of the respective cases there appearing was a matter for the trier of the fact to decide and would not be disturbed on appeal.



In the case of *Alitz v. Minneapolis & St. L. R. Co.*, 196 Iowa, 437, 193 N.W. 423, an automobile driver was struck and injured by a train at a crossing in which visibility was obstructed by smoke and fog. From a judgment in favor of the plaintiff, defendant appealed and argued that under the facts of the case plaintiff was chargeable with contributory negligence as a matter of law. The court there said:

“The question thus presented is not to be answered or determined from the simple fact of the collision, divorced or separated from its attendant circumstances. If, for instance, the jury should believe from the evidence, as it was authorized to find, that the smoke did obscure plaintiff’s view of the track, and that such obscurity was accentuated by cloudy, misty, or foggy weather, and that the approaching train was being operated through this screen at a high rate of speed, without sounding the proper crossing signals, then a finding by the jury that plaintiff’s act in attempting the crossing was consistent with reasonable care on his part could not be set aside as having no support in the record. Such conclusion is not at all inconsistent with the precedents cited by appellant, where the simple fact of the presence of smoke or steam obscures the traveler’s vision has been held insufficient to excuse a rash attempt to make a crossing.”

In the case of *Queen vs. Washington Water Power Co.*, 128 Wash. 553; 223 Pac. 1045, plaintiff’s car was damaged when struck by a street car at a crossing and plaintiff’s vision was reduced to 20 feet by a severe snow

storm. Under such facts the court held that it was a question for the jury whether the plaintiff had acted as a prudent person under the circumstances and he could not be held to be guilty of contributory negligence as a matter of law. See also *Devoto v. United Auto Transp. Co.*, 223 Pac. 1050, 128 Wash. 604.

It is submitted by Respondent that the question of contributory negligence under the law and facts of this case was a question for the trier of the fact, which question was resolved in favor of the respondent and against the appellant; that the judgment in this case is fully sustained by the record and may not be disturbed in this appeal. *Point II - Appellant Guilty of Negligence as a Matter of Law*

Appellant makes no argument in support of his contention that he is entitled to judgment. We make brief reference to this matter, however, in order to leave no doubt as to our position with respect to it.

We believe that appellant was guilty of negligence as a matter of law under the case of *Nikoleropoulos v. Ramsey*, 214 P. 304; 61 Utah 465, which states the law in this jurisdiction to be that it is negligence for a person to drive an automobile on a public street at such a rate of speed that it cannot be stopped within the distance at which the operator is able to see objects on the street in front of him. Officer Dipo, Appellant's own witness, testified that visibility was restricted to between 20 to 25 feet and that safe driving speed was 5 miles per hour. Appellant admitted he was traveling 25 miles per hour just prior to impact and according to Dipo, Appellant admitted to him on the scene that he was traveling 30

miles per hour. Neither automobile left skid marks because neither party was able to see the other until just immediately before impact when it was too late.

A reading of the whole record will make it clear to this Court, as it was clear to the Court below that this accident happened as a result of Appellant traveling at a grossly negligent rate of speed in a dense fog; that although Respondent was traveling slowly and cautiously as the circumstances required, he was helpless when Appellant suddenly appeared out of the fog coming at a high rate of speed; and that Appellant was unable to avoid the collision because unable to stop within the range of his vision.

### CONCLUSION

In conclusion we submit that the judgment of the District Court of Salt Lake County is fully sustained by the record and should therefore be affirmed with costs to Respondent.

Respectfully submitted,

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