1979

Rachel Armelinda Cintron v. Elma J. Milkovich : Respondent's Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

RACHEL ARMELINDA CINTRON, Plaintiff and Respondent,	)	
vs.	)	Case No. 16440
ELMA J. MILKOVICH, Defendant and Appellant.	)	

RESPONDENT'S BRIEF

APPEAL FROM THIRD JUDICIAL
DISTRICT COURT OF SALT LAKE COUNTY,
THE HONORABLE ERNEST F. BALDWIN, JR., JUDGE

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TABLE OF CONTENTS

STATUTES CITED

CASES CITED

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STATEMENT OF THE NATURE OF THE CASE

This is an action to recover monetary damages for injuries sustained as a result of a two vehicle collision which occurred on February 14, 1976, in Midvale at the intersection of Allen and Center Streets.

DISPOSITION IN THE LOWER COURT

This personal injury case was tried to a jury before The Honorable Ernest F. Baldwin, Third Judicial District Court Judge.

The jury returned a special verdict which found that the defendant, Elma J. Milkovich, failed to keep a proper lookout and failed to yield the right of way to the plaintiff, Rachel Cintron Doyle. The jury also found that the plaintiff did keep a proper lookout. However, they found she failed to keep her vehicle under reasonably safe and proper control and drove at a speed that was not safe, reasonable and prudent under the circumstances.

Based on those findings, the jury apportioned betw
the parties the negligent conduct which proximately caused t
collision. They found the defendant sixty per cent (60%) neg
and the plaintiff forty per cent (40%) negligent.

The defendant made a motion for a new trial which
denied.

RELIEF SOUGHT ON APPEAL

The plaintiff-respondent seeks affirmation of the
Judgment of the lower Court.

STATEMENT OF FACTS

The appellant's statement of facts is basically co
however, it discusses at great length testimony not pertinen
this appeal. Therefore, the respondent submits this stateme
facts.

On February 14, 1976, at approximately 5:00 p.m.,
plaintiff-respondent, (hereinafter referred to as plaintiff)
sister, and a friend Lonnie were westbound on Center Street
Murray, Utah (TR45). Center Street is a four-lane divided h
with separate left-hand turn lanes (see Exhibit 1-D, 3-P and
The occupants of the vehicle driven by plaintiff were return
home from shopping (TR45). Defendant-appellant, (hereinafte
referred to as defendant), was making a left-hand turn from
northbound Allen Street to westbound Center Street at the ti
the collision (TR86 and Exhibit 1-D). This intersection is

controlled by two stop signs which control the traffic utilizing Allen Street. (Exhibit 1-D and 2-P.)

Defendant testified that she had accelerated away from the stop sign to an approximate speed of 10 miles per hour at the point of impact (TR78). Regardless of whether defendant stopped or not, plaintiff began to apply her brakes when she saw defendant leave the stop sign area and began to pull in front of plaintiff (TR47).

Plaintiff stated that after defendant pulled away from the stop sign and began to pull onto Center Street, that she still thought defendant would stop and allow plaintiff to pass before pulling into the westbound traffic. When it was apparent that defendant was not stopping, plaintiff took her foot off of the brakes turning her wheel to the right in an attempt to avoid the collision (TR47).

The visibility is quite unobstructed from the stop sign through the Rio Grande underpass (TR40, 60 and Exhibit 5-P).

As plaintiff swerved to avoid defendant's car, the left rear portion of the car driven by plaintiff came in contact with the left rear portion of defendant's car. Then plaintiff's car proceeded up over a curb and across a snow covered lawn before coming to rest (TR47).

Plaintiff was injured in this accident requiring surgery (TR51). Plaintiff incurred medical expenses and loss of income as

a result of the impact (TR52, 53 54, 55).

This appeal centers on the speed and location of t vehicles and the duties of the drivers of these vehicles und circumstances. The testimony as to the speed of the plainti vehicle ranges between 30 and 40 miles per hour (TR46, 60, 9 The posted speed limit was 35 miles per hour. Plaintiff tes that she accelerated to maintain her speed coming up the hil that she accelerated the speed of her automobile as inferred defendant (TR59).

ARGUMENT

POINT I.

THE QUESTION OF PLAINTIFF'S VEHICLE CONSTITUTING AN "IMMEDIATE HAZARD" WITHIN THE MEANING OF SECTION 41-6-72.10 (2) UTAH CODE ANNOTATED (1953) IS A QUESTION OF FACT, TO BE DETERMINED BY THE JURY.

Section 41-6-72.10(2) Utah Code Annotated (1953) r a driver stopped at a stop sign to "yield the right of way" follows:

> (1) Preferential right of way may be indicated by stop signs or yield signs as authorized in section 41-6-99.
> (2) Except when directed to proceed by a police officer, every driver of a vehicle approaching the stop sign shall stop at a clearly marked stop line, but if none, before entering the crosswalk on the near side of the intersection, or if none, then at a point nearest the intersecti roadway where the driver has a view of approaching traffic on the intersecting roadway before entering it. After having stopped, the driver shall yield the right of way to any vehicle in

> the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time when such driver is moving across or within the intersection or junction of roadways.

This state requires that the defendant yield the right of way to the plaintiff's vehicle if it constituted an "immediate hazard" to the defendant's vehicle at the time the defendant's vehicle was within the intersection. In its special verdict, the jury concluded that defendant was negligent in that she failed to keep a proper lookout and did not yield the right of way to plaintiff's vehicle. Defendant contends that plaintiff's vehicle was not an 'immediate hazard' and that, therefore, defendant could not be guilty of failing to yield the right of way to plaintiff. This position is untenable because the question of whether or not plaintiff's vehicle constituted an "immediate hazard" is one of fact, and therefore, a matter to be decided by the jury.

The court gave the following jury instructions on "immediate hazard":

INSTRUCTION NO. 21

> You are instructed that at an intersection where a stop sign is erected at one or more entrances thereto, the driver of a vehicle facing said stop sign is required to stop in obedience thereto and yield the right of way to vehicles not so obliged to stop, which are within the intersection or approaching so closely thereto as to constitute an immediate hazard; but, said driver having so yielded may then proceed and the drivers of all other vehicles approaching the intersection on said through highway shall yield the right of way to the vehicle so proceeding into or across the through highway.

INSTRUCTION NO. 22

> You are instructed that an immediate hazard exists whenever a reasonably prudent person having stopped at the entrance to a through highway in obedience to a stop sign, would apprehend the probability of colliding with an oncoming vehicle on the through highway were he then to attempt crossing the said through highway.

The jury heard testimony that the defendant when a stopped at the stop sign could see to the bottom of the high under the underpass (TR40). They also heard testimony that, a the time defendant pulled away from the stop signn the plain should have been quite visible to defendant since plaintiff no trouble observing defendant during this same period (TR46, 47).

In Hughes v. Hooper, 431 P.2d 983, 984 (1967), thi court held:

> "The rights and duties of drivers approaching intersections are questions dealing with the standard of conduct to be expected of a reasonably prudent man and are peculiarly a matter for the jury. Contributory negligence is therefor primarily to be resolved by the trier of facts since it involves these same rights and duties. It is not to be treated as one of law unless the facts and inferences from them are free from doubt. If there is doubt, the issue is for the jury."

Similarly, whether defendant was negligent in fail to yield the right of way to plaintiff and whether the plain vehicle constituted an "immediate hazard" involve these same rights and duties. There is evidence supporting the plaintif view of the occurrence as well as that of the defendant. Th was doubt as to the facts and the issue was properly submitt

the jury which found these facts to favor the plaintiff.

A very similar factual case, Johnson v. Cornwall Warehouse Company , 15 U.2d 172, 175, 389 P.2d 710 (1964), involved a defendant's vehicle making a left hand turn from a stop sign into the path of the plaintiff's vehicle. This court stated:

> "In view of the discrepancies in the evidence as to how far west of the intersection plaintiff's car was at the time defendant driver entered the intersection, it was a fact which the jury should have determined whether defendant driver proceeded into the intersection without keeping a proper lookout and at a time it was not safe to enter."

It is the duty of this court to view the evidence in a light most favorable to plaintiff. (See Johnson v. Cornwall, supra., Seegmiller v. Western Men, Inc., 20 U.2d 352, 437 P.2d 892 (I968)). There is evidence in the record to support the finding that plaintiff was an "immediate hazard." The jury's finding of facts should not be overturned simply because there was conflicting testimony.

In Marsh v. Irvine, 449 P.2d 996, 22 Utah 2d 154,I57 (1969) which also involved an automobile collision, this court said:

> "We agree that the jury should not be allowed such unbridled license as to base its verdict upon something which would be a physical impossibility. But....that does not appear to be the situation here. It was the jury's prerogative to choose the evidence they would believe and to place whatever emphasis and draw whatever reasonable inferences therefrom they desired so long as they were not wholly inconsistent with reason."

The jury's verdict is not inconsistent with reason and

is not based upon something constituting a physical impossi
There is more than sufficient evidence in the record as to
and location of vehicles to support the jury's special verd
The jury exercised its prerogative to choose the evidence it
believe and to place whatever emphasis and draw whatever rea
able inference therefrom it desired. Its decision was that
plaintiff's claim had the support of the preponderance of th
evidence.

POINT II.

THE TRIAL JUDGE DID NOT ERROR IN REFUSING TO INSTRUCT THE JURY AS TO THE SUBSTANCE OF A MUNICIPAL ORDINANCE. THE DUTY IMPOSED BY THIS ORDINANCE WAS ADEQUATELY COVERED IN THE JURY INSTRUCTIONS.

The defendant requested the following instruction
uested jury instruction no. 18):

> "Under the ordinance of Midvale City, it is provided that the driver of any vehicle traveling at an unlawful speed shall forfeit any right of way he might otherwise have. If, therefore, you find from the evidence in this case that the plaintiff's vehicle was being driven at an unlawful speed, then I instruct you that the right of way which she might otherwise have had at such intersection would be forfeited."

It is the duty of the trial judge to determine whi
requested jury instructions are applicable to the case. Uta
Rules of Civil Procedure Rule 51. A requested instruction m
not be given if the substance of the requested instruction i

otherwise covered by the instructions given.

In Hardman v. Thurman, 121 Utah 143, 239 P.2d 215 (1951), the defendants claimed that the trial court erred in not giving certain instructions which correctly stated the law. This court found the refusal to instruct the jury not to be prejudicial error, stating:

> "Defendant's final contention is that the court erred in not giving certain instructions requested by the defendants. We have carefully compared the requested instructions and the instructions given by the court and while it must be conceded that several of the requests denied correctly stated the law, nevertheless the substance thereof was given in the instructions of the court. Hence it was not error to to refuse the request of defendant. The court adequately instructed the jury on all matters so as to correctly present the defendant's theory of the case. We find no prejudicial error. 239 P.2d at 219.

Similar results have been reached in Muir v. Christensen, 15 U.2d 182, 389 P.2d 734 (1964); McMurdie v. Underwood, 9 U.2d 400, 346 P.2d 711 (1959); and Lee v. Howes, 548 P.2d 619 (Utah 1976). In these cases the jury was sufficiently schooled in the applicable law to make a determination of the comparative negligence of each party. The cases held that a refusal to give requested instructions was not error when, "the basic issues were fairly and intelligibly presented to the jury for its determination." 9 U.2d at 405.

The defendant's requested instruction no. 18 originates from a Midvale City Ordinance valid at the time of the accident

but later repealed. Assuming, arguendo, that the requested tion correctly states the law, the trial court did not error refusing to give this instruction. The substance of the ins was otherwise given to the jury.

The jury was instructed as to the applicable law g the duties of each driver. These instructions, taken as a w cover the substance of the defendant's requested instruction 18. This instruction deals with the duty of the plaintiff wi regard to speed and right of way. It is apparent from the s verdict of the jury that the jury considered these factors i assessing the forty per cent comparative negligence against plaintiff.

POINT III.

THE DEFENDANT'S RIGHT TO A FAIR TRIAL WAS NOT PREJUDICED BY THE COURT'S EXAMINATION OF PLAINTIFF'S WITNESSES.

During the course of the trial, the trial judge ex some of the plaintiff's as well as some of the defendant's w nesses. This examination did not result in the defendant bei denied a fair trial as asserted by the defendant.

The defendant, in her brief, wishes to count the n of questions asked of the plaintiff's witnesses and of the d dant's witnesses and to equate the number of questions asked prejudice. The defendant does not specify which particular or questions tendered by the court caused the alleged prejud

the fair trial.

The questions asked by the court were intended to clarify testimony already given or requested. Defense counsel concurred that particular questions should be asked (TR8). The appendix to the defendant's brief which includes the questioning alleged to be improper deletes lines 13 and 14 of page 8 of the transcript. Also, the questions asked by the court aided in the presentation of the defense case (TR10, Line 18 et.seq.).

The plaintiff concurs with the defendant that State v. Mellen, 583 P.2d 46 (Utah 1978) correctly states the law as so the judge's authority to examine witnesses. The court stated:

> "[The] judge should and normally does exercise restraint in examining witnesses, so that he does not unduly intrude into the trial or encroach upon the function of counsel....Notwithstanding what has just been said, the judge does have a function beyond sitting as a comparatively silent monitor of proceedings. In order to discharge his responsibility of carrying out the above stated objective, it is within his prerogative to ask whatever questions of witnesses as in his judgment [are] necessary or desirable to clarify, explain or add to the evidence as it relates to disputed issues. 583 p.2d at 48. [Emphasis that of the defendant].

The defendant does not point out how the questions of the court went beyond clarification, explanation or addition to the evidence as it related to disputed issues. Therefore, the trial judge correctly exercised his discretion in his examination of witnesses. This examination was not error nor was it prejudicial to the defendant.

CONCLUSION

The plaintiff's vehicle was an "immediate hazard" within the meaning of Utah Code Annotated Section 41-6-72.10 evidence did raise some conflict as to the location of the v The court correctly submitted these issues to the jury for t decision.

There is no basis for defendant to claim error bec the proper jury instruction no. 18 was not given. It is the of the trial judge to make a determination of the applicabil and the necessity for that instruction. The underlying basi that jury instruction was amply given in the other instructi the jury. The basic issues of this case were fairly and int presented to the jury for its determination.

A judge should exercise restraint in examining wit so that he does not unduly intrude into the function of coun This is something that must be determined by the circumstanc some cases will require more questions by the trial judge th others. It is not only the trial judge's prerogative but al function, to ask questions of witnesses which he, in his dis feels necessary or desirable to clarify, explain or add to t evidence as it relates to any of the disputed issues.

Plaintiff respectfully submits that the judgment o lower court should be affirmed.

DATED this 29th day of November, 1979.

Respectfully submitted,

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MAILING CERTIFICATE

Mailed two copies of the foregoing Respondent's Brief to L. L. Summerhays, of Strong & Hanni, Attorneys for Defendant/Appellant, 604 Boston Building, Salt Lake City, Utah 84111, this 30th day of November, 1979.