1953

Allen Beck v. Rhodes Jeppesen, dba Jeppesen Potato Chip Company and Ozias Harvey Harward : Brief of Respondents

Utah Supreme Court

Aldrich & Bullock; Attorneys for Plaintiff and Respondent;

In the Supreme Court of the State of Utah

ALLEN BECK,
Plaintiff and Respondent,

vs.

RHODES JEPPESEN, d.b.a.
Jeppesen Potato Chip Company,
and OZIAS HARVEY HARWARD,
Defendants and Appellants.

CASE
NO. 7960

RESPONDENT'S BRIEF

ALDRICH & BULLOCK,
Attorneys for Plaintiff
and Respondent

NEW CENTURY PRINTING CO., PROVO, UTAH

TABLE OF CONTENTS

CASES CITED

In the Supreme Court of the State of Utah

ALLEN BECK,
Plaintiff and Respondent,

vs.

RHODES JEPPESEN, d.b.a.
Jeppesen Potato Chip Company,
and OZIAS HARVEY HARWARD,
Defendants and Appellants.

CASE
7960

BRIEF OF RESPONDENT

STATEMENT OF FACTS

Many of the facts set forth in the Appellants' Brief are not disputed by the Respondent. However, Respondent contends that there are ample facts and substantial evidence to justify and sustain the decision of the trial court.

As pointed out by the Appellant, the collision occurred on an alley way about 12 feet wide at the rear of certain business buildings in downtown Provo. The Respondent, Allen Beck, had just started out from a parked position and

was travelling in an easterly direction, still in low gear (R. 7). As the front of his car went past the edge of the building, he saw the truck about twenty or thirty feet away (R. 7). Respondent estimated his own speed at about 10 miles per hour (R. 17). As quickly as he saw the truck, Respondent applied his brakes (R. 7). The truck, driven by Defendant, Ozias Harvey Harward, hit into the Respondent's car just back of the right front fender, knocking the Respondent's car sideways into a power pole (R. 7). Defendant, Rhodes Jeppesen, sitting beside the driver of the truck, saw the Respondent's car at a time when Defendants' truck was thirty to forty feet away (R. 52). He "hollered, hold 'er" to the driver (R. 53). According to Defendant Harward, its driver, defendants' truck was only travelling 3 to 4 miles per hour just prior to the collision (R. 46). Mr. Harward, driver of the truck, came over to Respondent immediately after the accident and stated to the Respondent that he was sorry he didn't see him (R. 8). Appellant's car was pushed sideways four or five feet into a pole (R. 21). The right front end of Appellant's car was not damaged (R. 39, 63).

STATEMENT OF POINTS

Point I. The Plaintiff's evidence was substantial and was sufficient to support the finding of the court that the Defendants were negligent.

Point II. The Plaintiff's evidence was sufficient to support the court's decision that the negligence of the Defendants was the proximate cause of the Plaintiff's injuries.

Point III. There was no error on the part of the court in refusing to hold the Plaintiff guilty of contributory negligence as a matter of law or from the facts.

ARGUMENT

POINTS I AND II

THE PLAINTIFF'S EVIDENCE WAS SUFFICIENT TO SHOW THAT THE DEFENDANTS WERE NEGLIGENT AND THAT SUCH NEGLIGENCE WAS THE PROXIMATE CAUSE OF PLAINTIFF'S INJURIES.

The Plaintiff had just started from a parked position, and his car was in low gear (R. 7). As the front of Plaintiff's car got to the edge of the building where he could see, he saw the truck approximately twenty or thirty feet back in the alley from the intersection and Plaintiff applied his brakes (R. 7). In order for the Plaintiff's car to have been pushed sideways into the pole, the Plaintiff's car was obviously stopped within a distance of ten feet or less.

Appellants adhere to and argue the proposition that Respondent's car sideswiped them. The Respondent submits that it would be utterly and physically impossible for the Respondent's car to have struck Appellants' truck without causing so much as a scratch on the right front portion of Respondent's car. The trial court heard and considered such argument both at the trial and at the hearing on motion for new trial, and rejected that contention. Respondent's car was struck on the side, just back of the right front fender, and was knocked sideways into a power pole (R. 7). The right front portion of Respondent's car was not damaged at all (R. 23, 39, 63). Appellants try to explain this away by saying that Appellants' bumper was higher than Respondent's bumper. Appellants, however, do not and could not contend that Appellants' bumper was higher than Respondent's right front fender, which was not damaged at the front of the car.

Defendant Rhodes Jeppesen testified that Respondent's car was thirty to forty feet away when he first saw it (R. 52). According to Defendant Harward, he could not have been driving over "probably three or four miles per hour" (R. 46). At a speed of three to four miles per hour and with a distance of thirty to forty feet, Respondent submits that an ordinary and prudent driver could readily have brought the truck to a stop and thereby avoided striking the Respondent's car, which was, and had to be, in the so called intersection. Moreover, Defendant Harward, the driver of the car, was not keeping any kind of a proper lookout, because he told the Respondent immediately after the accident, "He was sorry, he didn't see me" (R. 8).

The record on appeal must be read in the light most favorable to the party for whom the trier of facts has found. **Lowder v. Holley, et al (Utah), 233 P(2) 350, 351.** Respondent respectfully submits that the record contains substantial evidence to support the finding that the Defendants were negligent and that their negligence was the proximate cause of the accident.

POINT III

THE TRIAL COURT PROPERLY AND CORRECTLY REFUSED TO FIND THE RESPONDENT GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW OR FROM THE FACTS OF THIS CASE.

On brief the Appellants charge Respondent with contributory negligence for (1) Excessive speed; (2) Failure to yield the right of way, and (3) "For failing to be just a little more cautious than normally expected." Respondent will deal with those charges in the order above set forth.

1. Excessive Speed. It is true that there is conflict as to the speed at which Respondent was travelling. The trial Judge had the respective witnesses before him and was in a position where he could see and hear the witnesses and evaluate their testimony. He heard the Respondent testify that he was still in low gear and that he was travelling about 10 miles per hour (R. 7). The trial Judge had a right to believe that testimony. Moreover, Respondent urges that this testimony is far more likely to be correct and far more plausible and convincing than was the estimate of Defendants that the Plaintiff was going 40 miles per hour. Had the Plaintiff been speeding at all, he would readily have covered the few remaining feet in the intersection before Defendants could cover thirty to forty feet at three to four miles per hour. The record contains substantial evidence to support the finding of the trial court.

2. Failure to Yield the Right of Way. The rule that the car to the right has the right of way at an intersection comes into play only when the two enter the intersection at the same time. When one car preempts the intersection, that car is entitled to the right of way. However, in the instant case it was not merely a case where Plaintiff entered the intersection first, but was a situation that would satisfy the minimum requirements of the Boulevard rule. It was a blind corner, and neither party could see through that wall. Plaintiff testified: "I was just starting out, I think I was in low gear, as the front of my car got past the edge of the building where I could see I noticed the truck approximately twenty or thirty feet back in there, and I slammed on my brakes and then it hit into me just back of the right front fender, knocking me sideways into the power pole on the left side of my car on the front" (R.

7). The speed of the Defendants' truck, according to the testimony of the Defendants, was three to four miles per hour (R 46). Obviously, at that speed and with that distance the Defendant driver had a clear opportunity to stop his vehicle had he been keeping a proper lookout and had he observed what was on the road ahead of him. Defendant, Rhodes Jeppesen, testified that he first saw Plaintiff's car when he was thirty to forty feet away (R. 52). As pointed out by Mr. Justice Wolfe in his concurring opinion in the **Lowder v. Holley** case, supra, reasonable minds can and certainly do differ in a case like this, but one cannot say there was any error in the fact finder's conclusions.

The crux of the question is whether the Plaintiff used "due care." **Martin v. Stevens, (Utah), 243 P(2) 747.** On the basis of the record here considered that determination was properly one for the trier of the facts, and the record contains substantial evidence to support a finding that Plaintiff did use "due care."

3. Failure to Be Just a Little More Cautious Than Normally Expected. It must be assumed that the trial court took into account all of the facts and circumstances made known to him. Certainly, the test he applied in determining whether the Plaintiff was guilty of contributory negligence was whether or not the Plaintiff used the same degree of care and caution that an ordinary and prudent person would have used under like or similar circumstances. The evidence here shows that a tall building stood adjacent to the intersection. One look at the Plaintiff's Exhibits on file herein clearly establishes that one could not see through that building. The Plaintiff had just started from a parked position and was still in low gear, travelling about 10 miles per hour (R. 7). It was a physical impossibility

for him to see what was coming on the east side of that building until his car advanced to a point beyond the edge of the building where his view was not obstructed. There is not one shred of evidence in this record that a speed of 10 miles per hour was beyond a speed that would have been used by an ordinary prudent person. The Plaintiff obviously stopped his car within a distance of seven or eight feet, because his car was pushed sideways into the pole at the northeast corner of the intersection. His car was about 15 feet long (R. 16) and the intersection, (measured obliquely) was only 18 feet (R. 21). When the Plaintiff could first see the Defendants their truck was twenty to thirty feet back from the intersection (R. 7) and travelling at from three to four miles per hour (R. 46). Certainly, the Defendant Harward, had he been watching the road ahead, could have stopped the truck in time to avoid the collision, and Respondent feels confident that the trier of the facts reasoned that an ordinary and prudent person under similar circumstances would have been able to do so.

CONCLUSION

There is substantial evidence to support the findings of the lower court that the Defendants were guilty of negligence and that such negligence was the proximate cause of Plaintiff's injuries. The Respondent urges the Supreme Court to affirm the decision and to award the Respondent his costs incurred for this appeal.

Respectfully submitted,

ALDRICH & BULLOCK,
45 North University Ave.,
Provo, Utah
Attorneys for Respondent