

1953

Thad L. Hatch et al v. Garrett Freight Lines, Inc. : Appellant's Reply

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

THAD L. HATCH, Administrator with
the Will Annexed in the Matter of
the Estate of Herbert Sheldon
Neeshan, Deceased, and IVA M.
NEESHAN,

Plaintiff, and Appellant,
vs.

GARRETT FREIGHT LINES, INC.,
a corporation,

Defendant, and Respondent.

Case No. 7974

CONNIE LIETZ and
ELDON P. LIETZ,

Plaintiff, and Appellant,
vs.

GARRETT FREIGHT LINES, INC.,
a corporation,

Defendant, and Respondent.

Case No. 7975

JAMES P. XENAKIS and
JENNIE ZENAKIS,

Plaintiff, and Appellant,
vs.

GARRETT FREIGHT LINES, INC.,
a corporation,

Defendant, and Respondent.

Case No. 7976

APPELLANT'S REPLY

E. L. SCHOENHALS,
*Attorney for Plaintiff
and Appellant.*

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Ark. Supreme Court, 1983

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*Reference to pages of the record is designated
R..... - line.....*

BRIEF

Respondent is in error in claiming NEESHAN was driving. See transcript Volume 1, R475-4.

APPELLANT'S REPLY TO POINTS 1 AND 2
SPECIAL VERDICTS

Respondent admits that the case was never presented to the jury on plaintiff's theory, and attempts to excuse the court by contending that a special verdict does not require the court to present the case to the jury on plaintiff's theory. The authorities do not sustain this position.

53 AM JUR 741—Section 1070

SPECIAL VERDICTS

"Questions should not* fail to present a matter in issue completely."

"Negligently driven" is the only question put to jury and did not present the issue of faulty brakes pulling the unit to the wrong side.

53 AM JUR 746—Section 1077

"All material issues must be passed upon.*"

"In negligence actions where the question as to whether or not defendants negligence was the proximate cause of the injury is at issue a special verdict failing to find such issue is fatally defective, etc.*" and cases cited.

924 RIGHTS OF PARTIES AS TO SUBMISSION
OF DIFFERENT THEORIES

“In submitting a case *on special issues* each party is entitled to have his theory of the case and the facts constituting the cause of action, on the one hand and the matters pleaded in defense affirmatively submitted for the determination of the jury.* It is *IMPERATIVE* upon the court to *submit all issues* made by the pleadings and evidence.” and cases cited.

The mere fact there was a stipulation that there be a special verdict to determine liability before introduction of evidence of damage did not waive the requirement that the court submit the question of liability by including all of plaintiff's requested instructions, which were proper, particularly with respect to whether or not the faulty brakes by excessive friction on one side drug or pulled the tractor to the wrong side of the highway.

The interrogatory submitted by the court could not possibly permit the jury to find on the issue of whether the faulty brakes was the proximate cause of the tractor going to the wrong side, or whether there was any negligence in connection with brake maintenance. Said interrogatory contained the words “negligently driven.”

13 Words and Phrases 400

“to ‘drive’ is defined as to compel, or urge to move in some manner or direction. *Field v. Southern Surety Co. of New York*, 235 N.W. 571, 573, 211 Iowa, 1239.”

The jury were permitted to consider only one question, namely, whether the driver negligently drove or urged or compelled the tractor over the center line. The records show this erroneous instruction was objected and excepted to, and objections raised thereto in connection with the motion for new trial. This Appellate Court is familiar with the fact that the practices in the District Court are the same as they were in the case the bar, namely, the court presents the instructions to the jury and no opportunity is given to make exceptions thereon to the reporter or the court until after the jury has retired. This was done by both plaintiff and the defendant at R851, so defendant cannot complain. Nevertheless when the written instructions were handed counsel and hurriedly and partially read just before submission. Instruction No. 4 was so obviously offensive and obnoxious that there is no denial by the court or counsel but that appellant nevertheless without even being granted a hearing registered strenuous objection and pointed out the very things discussed in this brief even prior to submittal R230. Moreover, rule 51 states that the Appellate Court, in its discretion and in the interests of justice, may review the giving or failure to give an instruction whether objected to or excepted to or the record otherwise preserved.

Instruction No. 4 was erroneous under any conceivable facts or circumstances. It is impossible to conceive of a case where the jury could find that a party "negligently drove" or negligently urged or compelled a vehicle across the center of a highway. This would not be negligence but an affirmative intentional act. The defendant might be negligent in brake maintenance causing the vehicle to be pulled to the wrong side, or might be negligent in

speed or lookout, and lose control so that his vehicle without being driven or compelled or urged goes to the wrong side, in fact, the driver may even be using all his power to urge, compel or be fighting against the vehicle going to the wrong side and yet be negligent because of faulty brakes, speed or failure to keep a proper lookout, and resulting loss of control.

Moreover, the jury was never instructed on what negligent driving embraced. They were never instructed that a "statute" required equal adjustment of the brakes, or that negligence might embrace any one or more of the items included in plaintiffs requested instructions. It was never put to the jury which vehicle crossed the center line from any cause of negligence and was submitted on the question only of "negligently driven."

POINT 4

Re: TESTIMONY OF GRANT STAPLES

48 ALR 949

"the court holds that a trial court should not limit the number of witnesses of either party, on the only issue, or on any one of the controlling issues, of the suit; but on collateral matters the court may, and should, limit the number of witnesses, using discretion in so doing."

POINT 5

EXPERTS HYPOTHETICAL QUESTIONS

20 AM JUR, 665, Section 793

"The rule requiring the statement of hypothetical facts to an expert witness has *no application* to ques-

tions calling for the conclusion of *one who has personal knowledge of the subject of the inquiry*. If the witness called upon to give expert testimony is acquainted with the facts of the case—that is, if he has personal knowledge or has made personal observation—he may give his opinion upon the basis of his knowledge and observation in response to direct interrogation.”

Franklin Harris knew more about the facts than any witness before the court. The authorities have better answered respondent than counsel is able to do.

POINTS 6 & 12

CROSS EXAMINATION OF SHERIFF ROBINSON

Plaintiff and appellant was entitled to show the jury whether the Sheriff made any examination to determine if the brakes were in equal adjustment. This was proper where the examination of the scene as shown by the photographs disclosed that it was obvious the brakes were not in equal adjustment. It was entirely proper to interrogate the Sheriff on the question of whether or not he knew that the state law required equal adjustment, or was even familiar with the principle that both sides must be in equal adjustment. This is particularly true on cross examination of a witness who purportedly examined the scene as an officer of the law should when four people had been killed.

POINT 11

JUDGMENT NOT WITHSTANDING THE VERDICT

Respondent complains about being blasted with a sawed off shot gun. Respondent is in this position of peril

can he recover on a ground or a theory or RELY ON
 SE which he has directly or in effect REPUDIATED
 own testimony*"

by the facts in this case and has aptly described his own predicament because of the cold hard facts.

Respondent has elaborately treated the facts of the case in respondent's brief. Appellant recognized the fact that if there was any competent evidence at all upon which the jury would be entitled to make a determination against appellant, that appellant has no right to request this court to grant plaintiff and appellant's motion for a directed verdict. Appellant's motion, however, is based upon the premises that there was no competent evidence submitted by the defendant which could constitute a defense to the evidence of negligence and proximate cause as submitted by plaintiff.

32 C J S 1104

1040 CONCLUSIVENESS OF EVIDENCE

"As a general rule, a party is *bound by uncontradicted evidence produced* by him to prove a particular fact or facts; and where he introduces a witness to testify on his behalf he ordinarily vouches for the credibility of his testimony, and, in the absence of contradictory evidence, is *bound by such testimony.*"

1. The testimony of defendant's three witnesses, Robinson, White and Sherwood, was based on the marks crossing the highway as seen in Exhibit F as being made by the Studebaker. These marks were made before any of the above three witnesses appeared to examine the scene. See Exhibit 14, page 4, line 28. Defendant produced the witness Faile and is bound by his testimony. Faile in a sworn statement, Exhibit 14, page 6, stated that these marks were not on the highway immediately after the

Exhibit 14, defendant's witness sworn statement
 produced by defendant. See page 6.

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r the accident there was no mark, skid or otherw
 e his ... or. The

er the accident between the Studebaker and the t
there were no skid marks on the highway left by
ebaker in the area directly south of the seats
is."

8

crash but were made later by a Mercury automobile before Sherwood, White, or Robinson arrived at the scene, and were not made by the Studebaker but were made by a Mercury, and that the Studebaker made no marks. Defendant's witness, Faile, stated in a sworn statement introduced by defendant R802-6:

Exhibit 14, page 2, line 5

"affiant did not observe these marks prior to the time the Mercury came."

Exhibit 14, page 4, line 24

"While affiant was at the wreckage a Mercury car came up at a terrific rate of speed threw on his brakes and screeched his tires on the highway, came to rest about where seats and debris was located on the highway. Affiant recalled when the Mercury stopped he conversed with the parties standing at the wreckage.

How many sets of heavy skid marks can the court see?

Only one.

Who made them? According to the defendant's testimony the Mercury.

Defendant's witness Faile voluntarily and without suggestion or urging and using his best judgment identified these marks as Mercury tire skid marks R793-19. See also Exhibit 00 and PP. Defendant is bound by this testimony and the same is conclusive. This eliminates the entire and only defense offered by defendant against plaintiff's case.

There is no evidence before the court that Faile or any one else ever contradicted the above statements. All

imony of a witness on direct examination is no
ger than as modified or left by his further cross
nation.

9

evidence of these witnesses, White, Robinson and Sher-
wood, about these tracks is incompetent immaterial and
has no place before the jury. The court had no right to
permit the jury to speculate upon such incompetent evi-
dence. Counsel have failed to show where the evidence
of Faile aforesaid was ever contradicted, so the rule of law
applies. This leaves defendant only with the testimony of
Faile, Noyes, and Someson the driver. At R739-30 Noyes
says he could not see the position of the cars at impact and
did not see impact. Faile at R781, line 9: Did you see the
actual impact between the two vehicles, answer, No. Again
defendant's own witness, the driver of the tractor, Mr.
Someson stated A553-7.

3

"The way the road is down there, you don't know
whether a man is on his side of the road or not."

Someson in his depositions, page 12, line 20, also stated:

R 554-14

R 558-18

"Well, I really didn't look.* I was actually on the
outside of the cab before I knew anything."

4

Is there any competent evidence that the tractor was
not on its wrong side at time of impact? The court can
almost take judicial notice if the fact that going around
a curve one can't tell which side of the road a car is on
as it is approaching the curve, particularly at night, and
where as there is no center line painted in. The exhibits
also bear this out. See how the Studebaker in Exhibit E
is lower than the bank and weeds on the curve and one
couldn't even see the top of the Studebaker around the
curve. Now if the driver who is elevated in the cab and
in front can't tell, how can two men in a car only 50 feet
behind this huge trailer (see R745-27 only 50 feet behind)

(4)

son was also asked how he made his observations as t
was on the wrong side. He stated: Deposition 41-28

"We observed it silver cars on the road 1930
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control"

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is we? Look at Exhibit 00 and F. See Someson and

see through the trailer, through the tractor and have better vision than the driver. There is not a member of this court who was not attempted to pass a unit like shown in the exhibit, and it is common knowledge that you almost have to get entirely into the wrong lane to see around one of these huge box cars units. This makes the testimony of Noyes and Faile as not worthy for jury consideration and incompetent. This leaves the defense with no competent evidence offered in defense. In defense of what? (5)

1. Uncontradicted and admitted negligence in relining brakes on one side of tractor only, and in violation of manufacturer's published warning.

2. Violation of the Statute 57-7-205 (7) (C) requiring equal adjustment of brakes on opposite sides of the tractor.

3. Uncontradicted evidence of unequal adjustment of brakes on opposite sides by both experts and exhibits, and all the evidence.

4. Defendant's tractor actually being pulled to wrong side of highway and being on the wrong side of the highway. See all evidence and exhibits also uncontradicted that tractor was on wrong side.

5. R558-15 tractor driver admitted impact knocked feet off brakes. There are no brakes on front wheels. Impact had to be with tractor front on wrong side since rear duals were making brake skid marks clear beyond center line, and with the brakes off no rubber would have been laid down by the rear duals when said duals were crossing

over to the center of the road since the front would be 23 feet ahead of the skid marks. No explanation was given how rear dual tractor skid marks got over to wrong side.

6. Impact of the units required movement of the rear duals of the tractor. See R454-14 or 457-4 or 459-11. Rear dual movement is visible. The position of rear dual movement is consistent only with the front of the tractor being on wrong side of highway. It was shown that from the center of the rear wheels of the tractor to the front bumper was 23 feet. Measuring from the jiggle marks 23 feet along the skid marks placed the front of the tractor on its wrong side of the highway, and intercepted the light marks identified as Studebaker tire marks. Staples and Bowman likewise testified that the tractor was examined and that when they examined the jiggle marks the distance on the tractor when compared on the skid marks on the road placed the front of the tractor on the wrong side, and the damage demonstrated was consistent only with impact at this precise angle with the tractor front on the wrong side.

7. At R549-28, R551-16 the driver of defendant's tractor claimed the Studebaker was on its right-hand side with its right-hand wheels off on the unpaved shoulder when said Studebaker was 100 feet away from the tractor. At R569-28 the driver indicated his reflexes were normal. The tractor was traveling 37 miles per hour. The Studebaker was not going any slower than 37 miles per hour. They were approaching each other more than 110 feet per second. Since the driver's reflexes were normal, how could the driver even get his brakes on before the impact since there would be more than 100 feet of traveling distance by the two vehicles in the normal reaction time of one

second the two units had to travel more than 110 feet and there could be no brake marks before impact.

8. Also items set forth in appellant's brief.

Under the evidence before the court, particularly failure to reline brakes on both sides of the tractor, the lower court should have and was bound to have given a negligence per se instruction and judicial consideration in the administration of justice should have required the court to have granted defendant's motion for a directed verdict.

WHEREFORE appellant prays that the case be not only remanded and be reversed on all points submitted but be remanded with instructions for the jury to determine the damage question only under a mandate to enter a directed verdict.

Respectfully submitted,

E. L. SCHOENHALS,

*Attorney for Plaintiff
and Appellant.*

The claim of defendant regarding speed of the Studebaker does not constitute a defense to plaintiff's claims. Moreover, defendant has not shown by competent evidence that the Studebaker was on wrong side so speed is immaterial.

dants Exhibit 14 introduced by defendant.
dants witness Faile in a sworn statement stated:
4, line 5.

"At the time of the impact the tractor appeared
to be at a 45° angle with the road*"

lso R 787-30 and R752-15

It is impossible to put a 25 foot tractor at a 45°
with the road without completely blocking the entire
ay. See Exhibit GG. On Exhibit GG it shows tractor
45° angle with tractor not only across the road but
soft shoulder. Page 4, line 8:

"After the impact the tractor did not move over
25 feet."

It is impossible to have impact on tractor side of
ay and only move 25 feet. Tractor itself is 25 feet
and moved clear across highway and off same.

it 14, page 4, line 10.

"He could see the tractor swing out to the left
and assumed about a 45° angle to the highway be-
fore he heard the noise of impact. It appeared
to be about one second in time before the tractor
turned out until the impact."

The tractor was traveling 37 miles per hour or about
et per second; in one second it would have been on
rong side.

Defendant is bound by this testimony of his witness
duced by him. It is conclusive.