1954

A. H. Hodges v. Evander L. Waite : Brief of Respondents

Utah Supreme Court

L. E. Nelson; Attorney for Plaintiff and Respondent;

In the Supreme Court of the State of Utah

A. H. HODGES,
Plaintiff and Respondent

vs.

EVANDER L. WAITE, also known as E. L. WAITE
Defendant and Appellant

CASE NO. 8018

RESPONDENT'S BRIEF

Honorable Lewis Jones, District Judge

L. E. NELSON,
Attorney for Plaintiff
and Respondent.

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INDEX OF CASES AND STATUTES

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STATEMENT OF CASE

This action was filed in the District Court of Cache County, by the plaintiff to recover damages from defendant as a result of a collision between the plaintiff's truck and defendant's pickup truck and trailer, which occurred on October 20, 1951, in Logan Canyon. A trial before a jury resulted in a verdict in plaintiff's favor for $309.75 upon which judgment was entered by the trial court. The defendant filed a motion for judgment nothwithstanding the verdict, or in the alternative a motion for a new trial, which was denied on April 13, 1953.

STATEMENT OF FACTS

This statement of facts is made for a more complete understanding of the material facts omitted in appellant's brief.

The plaintiff, a resident of Smithfield, has been engaged in the trucking business since 1933, hauling flour, mill feed and grain from Malad, Idaho, to towns in Western Wyoming via, Logan Canyon. On October 20, 1951, plaintiff was returning through Logan Canyon from one of his regular trips, and about 6:30 p. m., and after dark, he reached a point known as Temple Fork, about 17 miles from Logan, and as he proceeded around a curve on the highway he saw the defendant's horse and trailer about 40 or 50 feet ahead of him in the right hand lane of traffic. (R. 41, 76). Plaintiff immediately applied the brakes on his truck and swerved to the left in an attempt to avoid a collision, but time and space would not permit, and he collided with the left rear end of the defendant's trailer and truck. (R. 41, 78).

It was after dark and the defendant had stopped his pickup truck and a cattle trailer attached thereto in the right lane of traffic facing south on a curve in the highway for the purpose of loading a horse in the trailer. (R. 137). The defendant had failed to post warning signals of any kind to warn motorists that he had stopped his truck on the highway at the place of the collision. (R. 45). At the time of the collision the defendant was loading the horse in the trailer, and he jumped to the East to avoid being struck. His son Jean was sitting in the seat behind the wheel. After the collision both cars moved forward about 70 feet. (R 44, 45). When the cars stopped he and plaintiff descended from their respective vehicles and the defendant came down and joined them. (R. 45).

The plaintiff said to both of them, "What were you doing parked here?" And they replied, "We were loading

a horse and we'd have been gone in just a minute. If we had had another few seconds we would have been out of your way." Plaintiff testified that immediately after the accident he posted flares on the highway about 100 feet above the curve to warn approaching traffic of the presence of the vehicles standing on the curve. (R. 54).

William A. Noble was called as a witness by plaintiff. (R. 114). His deposition was taken on January 18, 1953, (R. 114, 200) and admitted and read in evidence at trial (R. 114). He and Lynn Hillyard were hunting deer and were camped along the highway, a short distance below the place where the collision occurred. They heard the impact and came immediately to the place of the collision. (Tr. 201-204). He testified that it was after dark when the accident occurred. The trucks were inter-locked and facing down the canyon.

Upon further examination he testified:

Q. Do you know whether this accident occurred on a straightaway or on a curve? A. It happned just around the turn. Q. Around the curve? A. As near as I can remember. In other words, Alden's truck wouldn't have seen the vehicle parked there until he had come almost around the turn, giving him not much distance between the two. Q. Now which lane of traffic were the vehicles standing in? A. When I saw them they were both in the right lane. (R. 204).

ARGUMENT

Point 1. *The verdict and judgment entered thereon are supported by a preponderance of the evidence.*

The testimony of the plaintiff and his witnesses disclosed that the collision occurred on a curve in the highway, and defendant had parked his truck and trailer in the right lane of traffic on a curve on the highway after dark without posting flares or any light on the highway to warn approaching traffic of the presence of his vehicles on the highway. (R. 41, 45, 76).

The plaintiff testified that the accident occurred on a curve and his testimony was corroborated by the testimony of Highway Patrolman, Ed Pitcher, (R. 101) who investigated the accident, and William A. Noble, who arrived on the scene shortly after it occurred, and he testified that the collision occurred "around the turn." (R. 204).

The defendant and his son Jean attempted to show that the accident occurred on the staightaway above the curve, but just where thereon was not definitely fixed. If this were true, then how did the vehicles stop 135 feet south of the junction of the Temple Fork road, which enters the main highway at the beginning of the curve? Officer Pitcher testified to that. His measurement fixed the location of both vehicles at 135 feet south of the Temple Fork road and they were facing south. (R. 101).

The jury, no doubt, found and concluded that the accident occurred on the curve as plaintiff and witness Noble testified, (41, 76, 204) and also found that no warning signals were posted by defendant to warn the plaintiff and other motorists of the presence of his vehicle upon the highway.

Section 57-7-191, (b) Laws 1949, in force at that time required defendant to display a red light visible from

a distance of 500 feet to the rear. The substance of this statute was given to the jury in instruction No. 4,

Point 2. *Defendant's requested Instruction No. 5, was properly denied.*

It is submitted that defendant's request No. 5, (R. 11) was properly denied by the Court. By the terms of this request the jury would have been instructed to return a verdict in favor of the defendant. In effect, defendant was asking the court to completely ignore the testimony of plaintiff and his witnesses. The Court did by its instructions fully instruct the jury on defendants theory as reflected by the testimony of the defendant and his witnesses. (R. 7-10, 13, 14, 16).

Point 3. *The Court properly denied defendant's motion for Judgment notwithstanding the verdict, or in the alternative motion for new trial.*

Defendant contends that evidence produced by plaintiff established as a matter of law that plaintiff's contributory negligence was the proximate cause of the accident. The trial court by its instruction number one submitted this question to the jury. "Was the plaintiff negligent?" The jury answered. "No." It is difficult to perceive how defendant can make such a contention in view of the positive answer of the jury. The instructions of the court covered these issues, instruction 5 and 6. (R. 16). So that, the verdict of the jury based upon proper instructions by the court, and on conflicting testimony is conclusive upon defendant.

Appellant relies upon the following cases: Nikoleropoulos vs. Ramsey, 61 Utah 465, 214 P. 304; Dalley vs.

Midwestern Dairy Produce Co., 80 Utah 331, 15. P 2d. 300; Wright vs. Maynard, 235 P. 2d. 916, Pollard vs. Whitman 183 P. 2d. 175.

Nikoleropolous vs. Ramsey, 214 P. 304, is not in point on the facts. At the time of and immediately prior to the accident in that case, plaintiff was walking along the extreme right side of the paved highway. At that place there was no sidewalks. The defendant's automobile approached plaintiff from the rear. It was raining, clear vision was obscured. Defendant saw plaintiff when about 6 feet away, but made no attempt to avoid the accident. The plaintiff was lawfully on the highway. So the question of contributory negligence was not under consideration. The sole question devolved upon whether defendant was negligent. This court held that he was.

In Dalley v. Mid-Western Dairy Products Company, 15 P. 2d. 309, the alleged accident occurred at night on a straight level highway. The defendant's truck was parked partially on highway and shoulder. It was an ordinary summer night, and the weather was clear. There was nothing to obstruct the driver's view as he approached the truck. The truck was not standing upon a curve.

The case of Wright vs. Maynard, (Utah) 235 P. 2d. 916, does not support defendant's contentions. At the conclusion of the trial in that case on motion of plaintiff the trial court directed a verdict in favor of plaintiff and against the defendant, thus holding as a matter of law that defendant Maynard's alleged negligence was the proximate cause of the accident, and instructed the jury to re-

turn a verdict for the plaintiff. In the instant case, the trial court submitted the case to the jury on both the question of proximate cause and whether plaintiff was guilty of negligence, and the jury found in favor of plaintiff on both propositions.

The citation to Shimizer vs. Kurtz 11 P. 2d. 1, is an error, since the case is not reported in 11 P. 2d.

The facts and issues in the case of Pollard vs. Whitman 183 P 2d. 175, (Wash.) are entirely different from the facts in the case at bar. The accident occurred at night on a street in the city of Seattle. The defendant admitted negligence but charged plaintiff with contributory negligence. The trial court ruled that he was free from negligence and directed the jury to return a verdict for plaintiff and determine the amount of damages. On appeal the judgment was reversed and new trial granted, for the reason that the issue of plaintiff's contributory negligence should have been submitted to the jury.

It is respectfully submitted that after the trial court had submitted the issue between the parties to the jury for their determination of the facts under proper instructions, that the verdict of the jury and judgment entered thereon should stand.

In the case of Maragake's vs. United States, 172 F. 2d. 393, the Court in the course of the opinion observed that —

> "The later Utah cases have rationalized the rule to allow an area of discretion under conditions" suddenly and un-expectedly" arising within the clear vision ahead, which with the exercise of due care the

driver could not have avoided the collision. Trimble vs. Union Pacific Stages, 105 Utah 457, 142 P. 2d. 674. See also West vs. Standard Fuel Co., 81 Utah 300, 17 P. 2d. 292; Nielsen vs. Watanabe, 90 Utah 401, 62 P. 2d. 117; Moss vs. Christensen-Gardner, Inc., 98 Utah 253, 98 P. 2d. 363. The Trimble case, supra, clarifies the rule by pointing out the various circumtances under which the negligence of a driver of an automobile, charged with this standard of care, is a question of fact and not of law."

The foregoing statement of law – as laid down in the Trimble case, certainly is applicable to the situation which suddenly confronted plaintiff when he first saw defendant's truck and trailer immediately in front of him on the curve. Plaintiff's testimony is undisputed that he immediately turned his truck to the left to avoid the collision. This was a question of fact and the jury had a right to, and did, believe his testimony.

The following Utah cases have held that the rule requiring a motorist to drive at such speed that the automobile may be stopped within the distance at which the driver of the same is able to see objects upon the highway in front of him – is a rule with some limitations and restrictions.

Moss vs. Christensen-Gardner, Inc., 98 P 2d. 365; Nielsen vs. Watanabe, 62 P. 2d. 117, Trimble vs. Union Pacific, 142 P 2d. 674.

In the Moss case the facts are very similar to the case at bar, and the rule there stateed is applicable to the situation confronting the plaintiff as he proceeded around the

curve in the instant case. Mr. Justice McDonough who wrote the opinion, stated the rule which we contend is applicable to the instant case in the following language:

> "The complaint here questioned is silent as to whether the highway near where the truck was parked is straight or crooked, level, or otherwise. If the truck could not, because of some obstruction, be seen as plaintiff and her husband approached it prior to the time they were blinded, and if plaintiff's husband was driving at a lawful rate of speed an automobile properly equipped with lights and brakes without any reason to believe the headlights of another automobile would suddenly or unexpectedly blind him, that while so blinded the collision occurred without time for him to reduce his speed or stop his automobile, the rule announced in the cases relied upon by defendant and heretofore cited in this opinion would not apply. Under such circumstances it may not be said that plaintiff's husband was, as a matter of law, guilty of contributory negligence."

In the Nielsen case, supra, the rule applied in the Moss case, was followed and re-applied to the factual situation confronting Mr. and Mrs. Neilsen immediately prior to the collision of their car with the Watanabe truck which was stopped on the highway. In that case this Court held that Nielsen was not guilty of contributory negligence as a matter of law:

> "If the truck could not, because of some obstruction be seen as plaintiff and her husband approached it prior to the time they were blinded, and if plaintiff's husband was driving at a lawful rate of speed an automobile properly equipped with lights and brakes without any reason to believe the headlights of another

automobile would suddenly or unexpectedly blind him, that while so blinded the collision occurred without time for him to reduce his speed or stop his automobile, the rule announced in the cases relied upon by defendant and heretofore cited in this opinion would not apply. Under such circumstances it may not be said that plaintiff's husband was, as a matter of law, guilty of contributory negligence. 3-4 Huddy Cyclopedia of Automobile Law (9th Ed.) p. 59, sec. 30 and cases there cited."

The language of Mr. Justice Larson in the Trimble case, supra, is definitely applicable to the factual situation confronting plaintiff in the instant case immediately prior to the collision:

"Appellant argues that since defendant's bus was moving at such a speed after entering the fog that it could not be stopped within the driver's range of vision, the driver, and his principles, the defendants were guilty of negligence as a matter of law. Thus in effect appellants ask this court to say that one driving on a highway at night is bound to anticipate that there will be fog, smoke, or some other obstruction which will reduce the driver's vision, and that therefore all must drive at such speed that should they meet with such an obstruction they can stop their automobile within the range of their vision as it is limited by this obstruction. We do not believe this to be the correct rule of law, or the situation to which the rule laid down in the Dalley case, supra, was intended to apply."

Respondent earnestly contends that the doctrine announced in the foregoing cases is determinative of the issues involved in the case at bar. It is respectfully sub-

mitted that the trial courts verdict and judgment entered thereon is supported by a preponderance of the evidence, and proper instructions, and is entitled to be affirmed, together with respondent's costs herein.

Respectfully submitted,

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Attorney for Plaintiff
and Respondent.