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Hollis E. Walker v. Levi G. Peterson : Plaintiff's Brief

Utah Supreme Court

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

HOLLIS E. WALKER,

Plaintiff and Respondent,

— VS. —

LEVI G. PETERSON,

Defendant and Appellant.

FILED
SEP - 1 1954

Clerk, Supreme Court, Utah

PLAINTIFF'S BRIEF

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IN THE SUPREME COURT of the STATE OF UTAH

HOLLIS E. WALKER,

Plaintiff and Respondent,

— vs. —

LEVI G. PETERSON,

Defendant and Appellant.

Case No. 8213

PLAINTIFF'S BRIEF

STATEMENT OF FACTS

Defendant has failed to include some facts which the plaintiff considers important to the presentation of his side of the case and therefore briefly restates the facts in this brief.

This was an action to recover damages to plaintiff's vehicle which arose out of an accident that occurred at an intersection in the north city limits of Bear River City, Utah on the 14th day of April, 1952 at about 11:30 A.M. The road was dry and visibility was good. (R. 4, Lines

4, 12, 13, 18 and 20). The plaintiff was traveling south on highway 30-South (an arterial highway) approaching Bear River City, Utah and had as a passenger in his car with him his wife. The defendant had been traveling north on said highway but had stopped his car east of the hard surface on said highway some 20 or 30 feet south from the intersection in question for the purpose of talking business with another party. The other party had been driving a truck which was parked north of the intersection and on the east side of said highway 30-South. After the conversation had ended the defendant went to his car and the third party went to his truck and both drivers commenced to go back on the hard surface of the highway, the truck proceeding in a northerly direction and the defendant proceeding north for a short distance and then making a left hand turn into the intersection to go west.

After re-entering his car defendant states that he checked the highway for other traffic, (R. 72, Lines 23-30; R. 73, Lines 1 to 3). He first saw the plaintiff's vehicle coming from the north just after he re-entered his car. (R. 73, Lines 4 to 9). According to Mr. Peterson, at this time the plaintiff's vehicle was still in a 60 mile per hour zone (R. 73, Lines 29 and 30), and he states that the plaintiff's car was still in that zone when the defendant pulled onto the highway. (R. 74, Lines 1 to 4). However, an independent witness, Mr. Alvin Madsen, who was traveling behind the Walker car testified under careful

cross-examination by defendant's counsel that he first saw the defendant's car moving when he, Madsen, was about 500 to 600 feet north of the intersection (R. 39, Lines 7 to 19), and that at this point he was traveling at about 300 feet behind Walker (R. 39, Lines 20 to 29), which would thus put plaintiff 200 to 300 feet from the intersection. The plaintiff testified that when he first saw the defendant, defendant was coming from behind the truck and just entering his lane of traffic (R. 58, Lines 18 and 19) and that the small stock truck was just entering its lane of traffic from the left side of the road. (R. 59, Lines 1 to 14). He also testified that his estimate would be that the distance he was away from defendant's vehicle when he first saw it was approximately 100 feet (R. 58, Lines 4 to 7). He stated that he had time to apply his brakes and sound his horn but no chance to change his direction. Officer Sackett, witness for the defendant who investigated the accident and measured the skid marks made by the plaintiff's vehicle testified that the plaintiff laid down 148 feet of skid marks prior to impact. (R. 98, Lines 2, 5, 6 and 13).

The defendant testified that after he first saw the Walker car in the 60 mile per hour zone, which was according to defendant's testimony, over 127 paces away from the center of the intersection, (R. 119, Lines 5 to 10). He did not look for the plaintiff's car again until the plaintiff honked his horn, at which time defendant could see that he was going to get hit (R. 127, Lines 23 to 28). When the plaintiff honked his horn defendant

testified that plaintiff was 150 to 200 feet from the intersection (R. 120, Lines 5, 6; R. 130, Lines 3 to 5), and defendant further states that he was near the center line of the highway when he heard the plaintiff's horn. (R. 128, Line 22; R. 119, Line 28).

The court found that Mr. Walker was exceeding the speed limit of 60 miles per hour when he was in the 60 mile per hour zone (although there is no evidence in the record to support this finding) and also found that he was traveling at a speed five miles or more in excess of 45 miles per hour as the Walker car approached the intersection, and that said speed constituted negligence, but that the proximate cause of the accident was the defendant's negligence in making a left turn on a through highway and his failure to keep a proper lookout. (R. 131, Lines 1 to 26).

STATEMENT OF POINTS

POINT NO. I.

WHETHER THE COURT WAS IN ERROR IN FAILING TO FIND THAT PLAINTIFF FAILED TO KEEP A PROPER LOOKOUT.

POINT NO. II.

WHETHER THE PLAINTIFF'S NEGLIGENCE, AS FOUND BY THE COURT, IN DRIVING AT A SPEED IN EXCESS OF THE POSTED SPEED, DID AS A MATTER OF LAW PROXIMATELY CONTRIBUTE TO THE ACCIDENT.

ARGUMENT

POINT NO. I.

WHETHER THE COURT WAS IN ERROR IN FAILING TO FIND THAT PLAINTIFF FAILED TO KEEP A PROPER LOOKOUT.

Plaintiff's testimony that he did not see the Peterson car until he was 100 feet away conflicts with the graphic evidence laid down by the plaintiff's car by way of skid marks to the extent of 148 feet prior to the point of impact. Obviously plaintiff made an incorrect estimate of the distance when he stated he first saw defendant's car 100 feet away. The plaintiff testified that he saw the defendant's car as it pulled out from behind the truck and that he honked his horn and applied his brakes when he saw the defendant's vehicle start to cross the highway.

The defendant testified that when he heard the plaintiff's horn the plaintiff was in the neighborhood of 200 feet north of the intersection and it would appear, using the brake marks of 148 feet and the reaction time of three fourths of a second prior to the application of brakes and while the plaintiff was traveling at approximately 45 miles per hour (which the court found the plaintiff was traveling) 200 feet would be closer to the distance that the plaintiff first noticed the danger created by the defendant's automobile. Both the plaintiff and the independent witness, Mr. Madsen, testified that the defendant's car came from behind the truck and made the left turn. The truck apparently obscured plaintiff's vision of de-

fendant's vehicle for part of the time. Certainly under the evidence presented it was a question of fact for the court to determine whether or not the plaintiff failed to keep a proper lookout and there was sufficient evidence that the plaintiff was keeping a proper lookout.

POINT NO. II.

WHETHER THE PLAINTIFF'S NEGLIGENCE, AS FOUND BY THE COURT, IN DRIVING AT A SPEED IN EXCESS OF THE POSTED SPEED, DID AS A MATTER OF LAW PROXIMATELY CONTRIBUTE TO THE ACCIDENT.

Counsel for defendant wants the court to decide that the sole proximate cause of this accident was not the improper left hand turn of the defendant and his failure to keep a proper lookout. He contends that the plaintiff, whom the court found was traveling in excess of the posted speed limit as he approached the intersection was guilty of contributory negligence. This is a question of fact to be decided by the court sitting as trier of the facts. See 5 American Jur., page 882, Sec. 689, where it is said:

“It is generally for the jury to decide whether the speed of the vehicle proximately contributed to the accident and whether such speed was excessive considering in connection therewith the hazards of the surrounding circumstances.”

See also: 10 Blashfield Cyclopedia of Automobile Law and Practice, Part I, page 662, Section 6607 where it is said:

“Speed in excess of that permitted by statute, ordinance or other traffic regulation may constitute negligence per se. Nevertheless, there is still a jury question as to whether or not such violation was the proximate cause of the injury or damage complained of.”

The case of *Yeates v. Budge*, decided by this court January 12, 1953, 252 Pac. (2nd) 220 raises the very point in question here. In that case, in which the defendant was making a left turn at an intersection, the trial court found that the plaintiff traveling in the opposite direction from the defendant was driving too fast for existing conditions, but decided, nevertheless, that the sole and proximate cause of the accident was the left turn of the defendant without signal and when the plaintiff was so close as to constitute an immediate hazard. Our Supreme Court in that matter referred to the case of *Cederloff v. Whited* cited in the appellant's brief but stated that it did not need to go to the extent of the holding in the *Cederloff* case since the *Cederloff* case was decided as matter of law whereas in the *Yeates v. Budge* case the trial court (the fact finder) found Mrs. Yeate's negligence to be the sole proximate cause of the accident. Such is the case in the matter now before this court. The court was clearly correct in finding that the proximate cause of the accident was the improper left turn of the defendant and that plaintiff's speed was not contributory negligence. If defendant had exercised the care required of a reasonably prudent man he would have checked the progress of the Walker vehicle prior to cross-

ing into the south bound lane of traffic. Had the defendant taken the time to make an estimate of the plaintiff's speed, he would have ascertained without the slightest trouble that at plaintiff's speed it was not safe or prudent to proceed into the south bound lane of traffic. The defendant cannot complain that he was mislead or lulled into a false sense of security by plaintiff's speed or distance from the intersection because defendant never seriously took pains to calculate either. There is a conflict in the evidence as to the respective location of the two vehicles at any particular time but there is sufficient evidence so that the trial court could find that the plaintiff's vehicle was so close to the intersection as to cause it to be an immediate hazard to the defendant's vehicle at the time it was making a left turn and this could be true even had the plaintiff been traveling at 40 miles per hour, the posted speed limit. The front of plaintiff's vehicle struck the right front of defendant's car, headlight and right front wheel. If the plaintiff had been traveling a little slower he would have perhaps struck the car in the middle or a little toward the back.

Defendant's counsel has gone into detail and discussed many of the Utah left turn cases. However, each of these cases was decided upon the individual facts and circumstances of the case. For the most part the facts in each case have been set out in appellant's brief. A reading of the cases cited by the appellant's counsel clearly indicates the thoughts and holding of the Utah Su-

preme Court on cases involving left hand turns. In *Cederloff v. Whited*, 169 Pac. (2nd) 777, 778, the Court says:

“Had plaintiff’s car run into the rear end of defendant’s car after the front end thereof had entirely crossed plaintiff’s course of travel there might have been some question whether the turn could be made with reasonable safety. . . .”

In the present case, plaintiff struck the right front of defendant’s car, headlight and right front wheel. (R. 6, Lines 29 and 30, R. 7, Lines 1 and 2). In *Hart v. Kerr*, 175 Pac. (2nd) 475, 477, Mr. Justice Pratt says:

“There seems to be rather an obvious conclusion at which to arrive from the evidence; plaintiff knew the defendant was coming fast. . . .”

Here the defendant knew or ought to have known that plaintiff was coming fast,

“. . . and plaintiff’s automobile was hit in front of its center . . . The conclusion: Plaintiff took a chance upon a faulty estimate of distance and speed, and lost.”

Isn’t that what this defendant did? He made a faulty estimate of distance and completely neglected his duty to make any estimate of plaintiff’s speed. In *Hickok v. Skinner*, 190 Pac. (2nd) 512, plaintiff is non-suited. The court by Mr. Justice Latimer remarked:

“Plaintiff made no effort to estimate the speed of the approaching vehicle.”

Again at page 516 plaintiff is rapped by the Court.

“For his prolonged inattention to the traffic that was approaching west on 21st South.”

“He testified that having once seen defendant’s automobile approaching the intersection, 400 to 500 feet to the east, he started his car forward from a point 20 feet back from the intersection, drove into and almost across the intersection or a distance of 65 feet without ever looking again in the direction from which defendant’s car was approaching.”

For his failure to estimate the speed of the approaching vehicle, for his failure to look again, the court found that he “failed to act in prudent and careful manner.” But, it is in *French v. Utah Oil Refining Company*, 216 Pac. (2nd) 1002 that we find some of the clearest language in support of plaintiff’s case. In this case plaintiff was driving north on 2nd West in Salt Lake City, Utah. Defendant’s truck and trailer was going south on the west lane of traffic. Plaintiff made a left turn at 4th South and was hit by the defendant in the right front fender. At the time of making the left hand turn plaintiff was going 8 m.p.h. and the defendant was about 120 feet away traveling 20 or 25 m.p.h. At this point plaintiff was somewhere in the intersection. The Court said at page 1003:

“In giving the plaintiff the benefit of the evidence more favorable to him, we conclude that at the time he entered the intersection and intended to make his turn to the left, defendant’s truck was not in the intersection. However, we are forced to

conclude that regardless of the variation in the stories of plaintiff as to the relative location of the vehicles the evidence conclusively establishes that the truck was so close to the intersection at the time plaintiff intended to and did turn west as to constitute an immediate hazard.”

and at page 1004 :

“When a statute prescribes that a turning vehicle must yield the right of way when the latter is close enough to constitute a hazard it anticipates the exercise of reasonable judgment, on the part of the driver turning. However, a burden is placed on the driver making the turn as he has control of the situation, and if there is a reasonable probability that the movement cannot be made in safety, then the disfavored driver should yield. The driver proceeding straight ahead has little opportunity to know a vehicle is to be turned across his path until the movement is commenced and in many instances, the warning is too late for the latter driver to take effective action.”

It is therefore readily apparent that each case cited by plaintiff and defendant was determined on the particular facts and circumstances surrounding each accident. No court can lay down a rule to indicate what is so close as to constitute an immediate hazard. This is a question of fact. Just as whether or not the speed of the vehicle did or did not contribute to an accident. We have simply tried to point out in this brief that the court in this case was fully justified in finding that the sole and proximate cause of the accident was the defendant's improper left hand turn. Section 41-6-73, U.C.A. 1953 says :

“The driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard, but said driver, having so yielded and having given a signal when and as required by this act, may make such left turn and the drivers of all other vehicles approaching the intersection from said opposite direction shall yield the right of way to the vehicle making the left turn.”

Here the plaintiff was approaching the intersection rapidly and had the defendant exercised even the simplest measure of precaution, had he attempted to make even a superficial appraisal of the relative position of the plaintiff's car to his own, he would never have attempted the maneuver which caused this accident.

This is true even though the plaintiff had been traveling at 40 m.p.h. That even at 40 m.p.h. defendant turned so close that it was impossible for plaintiff to successfully stop his vehicle to avoid the accident. Thus, if plaintiff could not stop at 40 m.p.h. in time to keep from hitting the defendant's car, he cannot be accused of contributory negligence because he was slightly exceeding 40 miles per hour as he approached the intersection. Defendant was not in any way misled by plaintiff's excessive speed.

CONCLUSION

In conclusion we submit that there are ample facts to support the trial court's finding that defendant's negligence was the sole and proximate cause of the accident and that there was no error in the judgment made and entered by the lower court and that the same should be affirmed.

Respectfully submitted,

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