

1954

Lottie B. Best v. Marilynn Huber et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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LOTTIE B. BEST,
Plaintiff and Respondent,

— vs. —

MARILYNN HUBER,
FRED HUBER, and
FRED HUBER COMPANY,
Defendants and Appellants.

Case No.
8235

FILED

OCT 18 1954

Supreme Court, Utah

Brief of Appellants

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IN THE SUPREME COURT OF THE STATE OF UTAH

LOTTIE B. BEST,
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FRED HUBER, and
FRED HUBER COMPANY,
Defendants and Appellants.

} Case No.
8235

Brief of Appellants

This appeal has to do with only one question. Did the plaintiff establish negligence on the part of defendant? The facts are uncontradicted and were presented by plaintiff as part of plaintiff's case. The defendants presented no evidence because defendant was called in plaintiff's case and related the facts as to the mechanical failure in defendants' car without prior warning, which caused the accident. These are the facts as established by plaintiff:

STATEMENT OF FACTS

Marilyn Huber, with consent of her father, drove the family car to school on January 16, 1953. She was on that date within 26 days of her 18th birthday (R. 66). The car was a 1949 Kaiser sedan. She resided at 2471 Douglas Street, Salt Lake City, and in driving the car to school had driven it in heavy traffic along 13th East Street, almost bumper to bumper, using the brakes, which were working all right (R. 80). She parked her car on 8th South (R. 67) while she was in school, and then when she left school she drove west on 8th South to 11th East, coming almost to a complete stop at that intersection, made a right turn on 11th East and drove north. In proceeding down 8th South she used the brake and it went nicely, depressing about one-fourth of the way down and she had full braking power (R. 68, 69). Prior to the accident the brakes were full, always held, and she had no trouble with them (R. 69). About a block away from the intersection of 11th East and 5th South she saw vehicles stopped at the 5th South intersection. She was traveling at about twenty or twenty-five miles per hour (R. 71) and while approaching the intersection released the pressure on the gas and the compression slowed the car to about fifteen miles per hour (R. 72, 73). About $2\frac{1}{2}$ to 3 car lengths away from the plaintiff's car (about the length of Judge Baker's court room) (R. 73) she applied her brakes and the brake pedal went to the floor boards (R. 73, 74). She pumped the brakes two or three times and they didn't hold at all and she hit plaintiff's car in the rear (R. 74),

which was stopped at the intersection. The car was equipped with a hand brake in good condition, but she didn't have time to use it after she discovered that the foot brake had failed (R. 75), nor did she have time to turn to avoid the collision after such discovery (R. 75).

“Q. Do you think you would have had time to turn out if you had turned after the first pump of the brake?

A. No, I don't believe so.”

The Sunday before the accident she had driven the car to Brighton to ski and the brakes were functioning all right (R. 78). On the date of the accident she had no occasion to use the brakes between 8th South and 5th South until just a few car lengths before the accident (R. 79) and when the brake pedal went to the floor and she had no brakes she was shocked and surprised. The hill on 8th South is steep and the brakes were entirely sufficient to bring her to almost a complete stop and enable her to make a right-hand turn. (R. 78, 79). After the accident, it was discovered that the master cylinder was the cause of the trouble (R. 77).

This was the evidence produced by plaintiff as to the cause of the accident and the conduct of defendant with reference thereto.

POINTS

1. THE TRIAL COURT ERRED IN DENYING MOTION OF DEFENDANTS FOR DISMISSAL AT THE CONCLUSION OF PLAINTIFF'S CASE.

2. THE TRIAL COURT ERRED IN REFUSING TO DIRECT A VERDICT FOR DEFENDANTS.

3. THE TRIAL COURT ERRED IN DENYING MOTION OF DEFENDANTS TO SET ASIDE VERDICT AND ENTER JUDGMENT FOR SAID DEFENDANTS.

Upon the foregoing evidence presented by plaintiff as to the cause of the accident, defendants rested their case without the presentation of any evidence, moved the court for a directed verdict, which was denied (R. 125, 126) and moved the court for a judgment notwithstanding the verdict (R. 139), which was likewise denied (R. 140).

ARGUMENT

Concisely stated, the point raised by all three of the above propositions is:

WHERE AN ACCIDENT OCCURS BY REASON OF SUDDEN MECHANICAL FAILURE, WITHOUT REASON TO ANTICIPATE SUCH EVENT, AND WITH JUSTIFIABLE REASON TO BELIEVE THE MECHANISM TO BE PROPER AND IN GOOD CONDITION, NO NEGLIGENCE IS SHOWN AS A MATTER OF LAW. IT IS AN ACCIDENT FOR THE OCCURRENCE OF WHICH NO LIABILITY ATTACHES.

The trial court recognized the correctness of the above statement of law by giving the following instruc-

tions to the jury, from which plaintiff does not cross-appeal, and it is the law of this case.

“INSTRUCTION NO. 8

“You are instructed that the fact that a collision occurred and injury and damages resulted does not of itself show that it was produced by negligence. Such a result may be the result solely of accident. If this collision occurred without it being produced, in whole or in part, by the negligence of Marilyn Huber, then it was an unavoidable accident.

“An owner or operator of a motor vehicle is not an insurer against injuries or damage being caused by its operation but is liable only for negligence, and hence, an injury caused by the vehicle, without any negligence or wrong on the part of or attributable to the owner or operator, is considered as an unavoidable accident, for the consequences of which neither the owner nor the operator can be held responsible. Thus, you are further instructed that where the brakes of an automobile have previously functioned properly but suddenly, and without warning, failed to respond, their failure does not render the owner or operator guilty of negligence unless they had previous knowledge of the defective condition.”

“INSTRUCTION NO. 9

“You are instructed that where the operator of a motor vehicle is by a sudden emergency placed in a position of imminent peril to herself or to another, without sufficient time in which to determine with certainty the best course to pursue, she is not held to the same accuracy of judgment as is required of her under ordinary circumstances, and is not liable for injuries or damages

caused by her if an accident occurs, even though a course of action other than that which she pursued might have been more judicious, provided she exercised ordinary care in the stress of the circumstances to avoid an accident.” (R. 24-25)

The above evidence being undisputed, without conflict, in fact produced by plaintiff herself, it is manifest that the jury disregarded the evidence; and that the trial court in its rulings with reference thereto failed to apply the law which the court itself pronounced to be the law applicable to the facts of the case.

There being no dispute on the facts, it was a law question for the court and should have been so regarded.

It was not a case of the jury believing or not believing evidence presented by defendant. The evidence was presented by plaintiff as a part of plaintiff's case.

That the above law is sound is amply sustained by the authorities.

Section 41-6-144, U.C.A. 1953, provides that every motor vehicle when operated on the highway shall be equipped with brakes adequate to control movement and stop the vehicle, including two separate means of applying the brakes, each of which shall be effective to apply the brakes to at least two wheels. This statute is substantially the same as similar statutes in other states. Courts generally, including this Court, have held that violation of these traffic laws is negligence per se unless such violation is excused by reason of a sudden emergency which reasonable prudence could not foresee,

such as unanticipated mechanical failure immediately prior to the accident. This is true as to all traffic violations, liability for which is not absolute, but rebuttable upon proper showing. Lights may be suddenly extinguished; steering gear or other equipment break; or a tire blow out; or some other part of the mechanism fail. The operator of a vehicle is not an insurer as to the condition of his car so long as he does not act negligently with reference thereto. We respectfully submit that under the following authorities the trial court was in error in its rulings.

This Court, in *Morrison vs. Perry*, 104 Utah 139, 140 Pac. 2d 772, considered the violation of a traffic law, the result of explanation, and the fact that any presumption disappears where the evidence is uncontradicted and stands alone.

“Defendant in his brief says that it is true that when a collision occurs on the defendant’s wrong side of the road a presumption of negligence arises in the absence of evidence explaining why his car was on the wrong side of the road. Defendant then vigorously argues that the moment an explanation is offered the presumption ceases and does not longer exist. This is true, but the evidence upon which the presumption was based remains in the case and is to be considered by the jury, unless there is no conflict between such evidence and the explanatory evidence. See *State v. Green*, 78 Utah 580, 6 P. 2d 177; *Buckley v. Francis*, 78 Utah 606, 6 P. 2d 188; 9 *Wigmore on Evidence* (3rd Ed.) Sec. 2491. Defendant cites *Saltas v. Affleck*, 99 Utah 65, 102 P. 2d 493, 495. In that case the court said: “The evidence offered

in rebuttal of the presumption of the agency of the driver from proof of ownership may be so uncontradicted and conclusive as to entitle the court to say as a matter of law that the presumption has been rebutted.' Here we do not believe such evidence to be conclusive."

In that case there was other evidence to be considered, but in this case there was not. The fact that under our rules the plaintiff is not bound by the evidence of an adverse party which he presents, does not have the effect of eliminating the evidence. It was the only evidence on the subject.

White v. Pinney, 99 Utah 484, 108 Pac. 2d 249. This was a case arising under the doctrine of *res ipsa loquitur*; hence unlike the present case where no inference is involved, but the question of mechanical failure was involved and it is pertinent in that regard. Here is what this court said:

"Defendants would not be liable for accident resulting from a defect in the mechanism of their truck and equipment of which they had no knowledge, *and* which would not be revealed by reasonable and prudent inspection. We quote from 3 Huddy: *Cyclopedia of Automobile Law*, 9th Ed., Section 71:

"Generally speaking, it is the duty of one operating a motor vehicle on the public highways to see that it is in reasonably good condition and properly equipped, so that it may be at all times controlled, and not become a source of danger to its occupants or to other travelers.

"To this end, the owner or operator of a motor vehicle must exercise reasonable care in the

inspection of the machine, and is chargeable with notice of everything that such inspection would disclose. This rule applies whether the operator is the owner of the vehicle or rents it from another, or permits another to use it, or lets it to another for hire. But, in the absence of anything to show that the appliances were defective, the owner or driver is not required to inspect them before using the car or permitting it to be used.'

"The great weight of authority holds that there is no liability on the part of the owner where an outsider has been injured by a defective mechanism which was unknown to the owner and which would not have been disclosed by a reasonable inspection. * * *

"The owner or operator of a motor vehicle must exercise reasonable care in the inspection of the machine, but in the absence of anything to show the appliances were defective the owner or driver is not required to inspect them each day before using or permitting them to be used. * * * If the operator or person in charge of such vehicle has done all that would be expected of an ordinarily prudent person, and a failure of his equipment occurs, not reasonably foreseen, he is not guilty of negligence."

Numerous authorities are cited and approved, including Huddy, to sustain the law announced.

This case was reaffirmed as to its applicable law in *Wyatt vs. Baughman*, Utah, 239 Pac. 2d 193.

Hanson vs. Weckerle (Cal.), 63 Pac. 2d 323. This was a case involving faulty brakes, becoming manifest just prior to the accident. The court said:

“However, we are of the opinion from the facts set out in the record that the brakes had held the backward movement of the automobile some twenty times previous to the accident, and likewise stopped the backward movement of the vehicle within 5 or 6 feet at the time of the accident, establishes beyond controversy the efficiency of the brakes. Notwithstanding the length of the arguments both for appellant and for the respondents, there are just a few questions involved in this case, i.e., whether the appellant used due diligence in the stopping of the truck, or was negligent in not applying the brakes preceding the actual stopping of the engine and the commencement of the backward movement. In other words, from the previous use of the brakes on the truck, in stopping the same, should the appellant have apprehended the immediate failure of the engine, and at the moment of stopping, had his brakes so applied as to prevent any backward movements? The testimony shows that Hanson was accustomed to block the truck when it stopped; that he was somewhere outside of the truck for that purpose at the time it stopped. Prior to the accident there had been no backward movement of the truck, and therefore he had a right to assume that when the truck stopped, it would stand stationary as on former occasions, and that the block might be immediately placed in position.”

Trudeau, et al. vs. Sina Contracting Co. (Minn.), 62 N.W. 2d 492. The court held that evidence of faulty brakes was prima facie evidence of negligence, but added that it was not conclusive evidence of liability, and holding that if defendant was confronted with a sudden emergency through no fault of his own it was excusable

and there was no liability. This was a brake case very similar in many respects to the case at bar.

Sothoron v. West, 180 Md. 539; 26 Atl. 2d 16:

“This is not the case of a latent defect which could not have been discovered. A person driving a strange car for the first time owes a duty to the public to see that there are no obvious defects in its mechanism which are apt to cause injury to others. Defective brakes are obvious, because they can be detected by the simple pressure of a foot. The test is so simple that anyone can make it. If such a test shows the brakes in working order, and then they suddenly fail, the driver may not be liable for negligence in driving with them. If no test is made, if the brakes are not even tried, the driver cannot rely upon a presumption that the machine is safe. He will not then be excused from liability for the destruction he may cause upon the public highway because he did not know his brakes were bad.”

In the instant case a test was made on 8th South hill immediately prior to the accident and several times prior to the accident in driving the car in traffic, and they were found to be in good working order. It was a sudden mechanical failure without warning.

The Supreme Court of California stated the general rule in *Satterlee v. Orange Glenn School District*, 177 Pac. 2d 279. Violation of a statute is negligence per se or presumptive negligence but stated the following:

“An act which is performed in violation of an ordinance or statute is presumptively an act of negligence, but the presumption is not conclusive

and may be rebutted by showing that the act was justifiable or excusable under the circumstances.

* * *

“Thus in *Rath v. Bankston*, *supra*, where an automobile was parked partly on the highway in violation of the statute, the defendant was allowed to show that despite reasonably careful inspection the gasoline supply became exhausted, and the car stalled. In another case where a collision occurred with a car which had no taillight, evidence that the light was inspected and found in good order a short time before was held admissible to negative the presumption of negligence.”

5 Am. Jur. 642, Sec. 252, Automobiles:

“On the other hand, the mere failure of brakes to function properly is not conclusive of the driver’s negligence. It seems that where the brakes on an automobile have previously functioned properly, but suddenly fail to respond, their failure does not render the owner guilty of negligence or contributory negligence, unless he had knowledge of the defective condition. Nor is driving on a public highway an automobile with defective brakes, contrary to the provisions of the statute, negligence per se which will render the driver absolutely liable for resulting injuries, regardless of circumstances.”

60 C.J.S. 638, under “Motor Vehicles” has the following to say relating to brakes and violation of statutes relating thereto:

“Violation as negligence. While there is authority to the contrary, operation of a motor vehicle without adequate brakes, in violation of a statute or ordinance, has been held to constitute negligence per se or prima facie evidence of an

intent to violate the statute in this respect, rendering the motorist liable for injuries proximately resulting from such defect. However, he will not be responsible where he is not chargeable with negligence in respect of the defect in the brakes, as where he was excusably ignorant of their defective condition, and the mere fact that a motor vehicle had defective brakes does not show actionable negligence imposing liability for injuries where such defect was not the proximate cause of the accident.”

Huddy Ency. of Automobile Law 3-4, Sec. 72, it is stated that failure to have a car equipped with proper brakes is negligence per se, but adds:

“Where, however, there has been no lack of care on the part of the owner or operator, and the failure of the brakes is unexpected, or the result of an accident, no liability ensues.”

Brotherton vs. Day & Night Fuel Co. (Wash.), 73 Pac. 2d 788:

“While it is true that violation of a statute is, generally speaking, negligence per se, it is also true that such violation is not negligence when due to some cause beyond the violator’s control, and which reasonable prudence could not have guarded against.”

This doctrine was reaffirmed by the Washington Court in *Jess vs. McNamen*, 255 Pac. 2d 902.

Bryant, et al. v. Tulare Ice Co. (Cal.), 270 Pac. 2d 880:

“While the general rule is that the violation of a statute is presumptive evidence of negligence it is also well established that in an emergency or under unusual conditions circumstances may be shown to excuse the violation.”

Howard v. Ringsby Truck Lines, 2 Utah 2d 65, 269 Pac. 2d 295. This court considered and passed upon the degree of care required of a party in an emergency, approving the doctrine announced in Restatement of the Law of Torts, 769, and used the following language:

“It must be borne in mind, however, that Byington was faced with a sudden and unexpected happening—and emergency—not caused by his own tortious conduct, and consequently he is relieved of the same coolness of judgment which would be required of him in the absence of an emergency. * * * Human reactions are not instantaneous and the time required to react varies according to the nature of the danger and the surrounding circumstances. * * * During this brief interval, Byington had to react to the danger, determine a course of action and stop a truck traveling 45 miles per hour. We are in accord with the following apropos statement made by the court in *Rollison v. Wabash R. Co.*, 252 Mo. 525, 160 S. W. 994, 999:

“ * * * To predicate negligence on two seconds of time is in and of itself a monumental refinement. We cannot adjudicate negligence on such pulse beats and hairsplitting, such airy nothings of surmise.’ ”

53 American Jur. 263, Sec. 326, under “Trial”:

“Upon proper motion the court may grant a non-suit where the evidence establishes facts

constituting a complete defense to the action or the existence of such a defense is admitted.”

In this case the plaintiff herself presented the defense and the facts constituting the defense.

See also *Stark's Estate* (Cal.), 119 Pac. 2d 961.

We respectfully submit that there was no issue of fact for submission to the jury; the evidence was uncontradicted, not susceptible of different interpretation by different individuals, and it was a law question for the court. Plaintiff, by presenting the defense as well as her case, was in the same position as a party who sues on a note and then proves as a part of her case that there is no liability on the note.

Respectfully submitted,

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