

1955

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

Utah Supreme Court

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George K. Fadel; Attorney for Respondent;

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Case No. 8235

IN THE SUPREME COURT RECEIVED
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.

BRIEF OF RESPONDENT

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Bountiful, Utah

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IN THE SUPREME COURT of the STATE OF UTAH

LOTTIE B. BEST,

Plaintiff and Respondent,

— vs —

MARILYNN HUBER, FRED HUBER
and FRED HUBER COMPANY,

Defendants and Appellants.

} Case No. 8235

BRIEF OF RESPONDENT

STATEMENT OF FACTS

This cause was tried before a jury, in the District Court For Salt Lake County, State of Utah, which returned a verdict in favor of plaintiff for damages suffered in an automobile collision.

On January 16, 1953, plaintiff was a front-seat passenger in her automobile being driven by her husband, northerly along 11th East Street, Salt Lake City, Utah, and the vehicle was stopped at the stop sign for north-bound traffic situated at the south of the intersection of

11th East and 5th South Streets, and had been stopped a few minutes awaiting opportunity to enter the intersection (R. 31), when plaintiffs' automobile was struck directly in the rear by a vehicle driven by defendant, Marilynn Huber (R. 70). Salt Lake Police Officer, Pierson, investigated the accident and determined that 11th East Street is 51 feet wide; that the point of impact was 27 feet south of the 5th South Curb Line and 21 feet west from the east curb line of 11th East Street; that the plaintiffs' automobile was damaged in the rear (R. 4); that plaintiffs' 1941 Cadillac sedan was moved 15 feet by the impact; that he inspected and checked the brake pedal of defendant's vehicle and found that the brake pedal depressed to the floorboard until it was pumped four or five times, then it stayed up a little ways (R. 5) and felt fairly solid (R. 12); that upon inspection of ground and wheels, no evidence of brake fluid leaking could be found (R. 5); that the distance within which a motor vehicle can be halted for an unanticipated stop under conditions of 11th East Street at a speed of 25 miles per hour is 32 feet braking distance plus 27 feet reaction distance or a total of 59 feet; at 30 miles per hour the braking distance is 46 feet and the reaction distance 33 feet, or total of 79 feet (R. 6).

The defendant, Marilynn Huber, was called to testify by plaintiff as an adverse party, and testified that she had driven westerly on 8th South Street to 11th East Street, having come down the 8th South hill in second gear and braking with the foot brake, traveling at 25 to

30 miles per hour, and made a right turn at 11th East Street without coming to a complete stop (R 14 & 15); that she proceeded northerly along 11th East Street and from the intersection at 6th South Street could see vehicles stopped at the stop sign at 5th South Street (R 16); that there were no other cars between defendant's vehicle and plaintiffs' vehicle and nothing obstructed defendant's vision as she approached 5th South; that she traveled in the portion of the street immediately east of the center line; that no cars were on the right side of defendant at any time as she approached 5th South Street (R 17); that she was traveling 20 or 25 miles per hour as she approached 5th South (R 18) but admitted that she previously testified upon deposition that she was traveling 25 or 30 miles per hour when she first applied the brakes (R. 20); that she was $2\frac{1}{2}$ to 3 car lengths from plaintiffs' vehicle when she applied her brakes (R 18); that there were no other cars east of plaintiffs' vehicle as she approached (R 18); that she did not remove her foot from the accelerator until she was about $2\frac{1}{2}$ to 3 car lengths away (R. 19); that when she first pressed the brake pedal it went to the floor board and she pumped the brakes two or three times before the collision (R 21); that she had never previously pumped brakes, but that it was common sense to pump the brakes to add more braking (R 21); that she had ridden with a boy friend who pumped his brakes as a matter of habit though his brakes were good (R 22); that the hand brake on defendant's car was in good condition but that she did not attempt to use the hand brake; that she did

not turn easterly to go around the right side of plaintiffs' car because by the time she pumped the brakes there was no time to turn (R 22) and she made no attempt to turn aside to avoid direct collision with plaintiffs' vehicle (R 70); that she knew the stop sign was at the intersection of 5th South and 11th East Streets having traveled this route nearly every day since she started driving (R 72)

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT PROPERLY DENIED MOTIONS OF THE DEFENDANTS TO DISMISS, FOR DIRECTED VERDICT AND TO SET ASIDE VERDICT, THERE BEING SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT AND JUDGMENT.

POINT II.

A PARTY IS NOT BOUND BY THE TESTIMONY OF AN ADVERSE WITNESS WHOM HE HAS CALLED FOR EXAMINATION, EVEN TO THE EXTENT THAT SUCH TESTIMONY IS NOT REBUTTED.

ARGUMENT

POINT I.

THE TRIAL COURT PROPERLY DENIED MOTIONS OF THE DEFENDANTS TO DISMISS, FOR DIRECTED VERDICT AND TO SET ASIDE VERDICT, THERE BEING SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT AND JUDGMENT.

This court has on many occasions stated the rule regarding the propriety of directing a verdict. A very recent pronouncement of the rule by this court in the case of *Iona Combs vs. William D. Perry*, File No. 8097, October 22, 1954, reaffirms the test as to when a motion for directed verdict should be granted, as follows:

Taking the evidence, together with every inference fairly arising therefrom, in the light most favorable to the plaintiff, reasonable minds could fairly say that they were not convinced by a preponderance of the evidence that the defendant failed to use reasonable care under the circumstances.

The trial court may not weigh the evidence nor determine where the preponderance is, but if there is some substantial evidence in support of the essential facts which the plaintiff is required to prove in order to entitle her to recover, or if the evidence and the inferences deducible therefrom are of a character which would cause reasonable men to arrive at different conclusions with respect to whether all of the essential facts were or were not proved, the question is one of fact for the jury and not one of law for the court. *Christensen vs. Utah Rapid Transit Co.*, 83 Utah 231, 27 P. 2d 468; *Stickle v. Union Pacific R. Co.*, Utah, 251 P. 2d 867.

The evidence adduced at trial fairly supports the verdict of the jury in finding the defendants negligent in at least one or more of the following particulars:

(a) Driving a motor vehicle on the highway without adequate brakes.

(b) Failure to apply the hand brake.

(c) Failure to turn to avoid the collision.

(d) Failure to apply the foot brakes timely enough.

(a) Regarding the negligence of the defendant for driving with inadequate brakes, the jury was instructed as follows (R. 27) :

Instruction No. 11

“You are instructed that the law of the state of Utah as set forth in the State Statutes in force and effect at the time of the accident provided as follows :

41-6-144

(a) The following brake equipment is required :

(1) Every motor vehicle, other than a motorcycle or motor driven cycle when operated upon a highway shall be equipped with brakes adequate to control the movement of and to stop and hold such vehicle, including two separate means of applying the brakes, each of which means shall be effective to apply the brakes to at least two wheels. If these two separate means of applying the brakes are connected in any way, they shall be so constructed that failure of any one part of the operating mechanism shall not leave the motor vehicle without brakes of at least two wheels.”

The defendant, as she drove along 11th East toward the stop sign which she knew to be at the 5th South intersection, was not faced with an emergency stop, but was anticipating a stop (R. 72). The defendant admitted that she had previously testified upon deposition that she was traveling between 25 and 30 miles per hour when she first applied her brakes (R. 20). It is common knowledge and practice with every reasonable driver that in approaching an anticipated stop, the foot brake is gradually engaged to bring the vehicle to a gradual stop. Officer Pierson testified that for an emergency stop at a speed of 30 miles per hour the braking distance is 46 feet of solid braking plus a reaction distance of 33 feet, or a total of 79 feet. Thus if the defendant had been making an emergency stop she would have required 79 feet to stop from the time she first noticed the necessity for stopping. The jury could reasonably conclude that the defendant, in preparing for a known stop, would have to apply her brakes much in advance of that required for an emergency stop, and in so doing, if her brakes had suddenly failed her, she would have known this fact while she was yet some distance from the plaintiff's car and would have made an effort to turn, use the hand brake or otherwise endeavor to avoid the collision. However, the fact that the defendant stated that she kept traveling directly towards plaintiff's car and pumped the foot brake pedal rather than to employ other methods of braking or attempting to turn as she pumped, is a strong indication to the jury that the defendant had previously pumped her brakes and that the brakes after being

pumped had held on previous occasions but became progressively worse so that on this occasion it required more pumping than previously. This is borne out by the fact that she claimed never to have been in the habit of pumping brakes, never knew anyone who pumped the pedal to correct faulty brakes, and yet she claimed that instinctively on this occasion she pumped the brakes. The inference from her testimony is that she would have continued to pump the brakes several more times if the collision had not intervened. The officer testified that he inspected the wheels and the ground for any leaks in the brake system and found no evidence of leakage, and that the brake was fairly solid after being pumped four or five times, which testimony the jury could consider in negating a sudden failure of brakes (R. 6). Furthermore, the claim of the defendant that the brakes upon the next prior application of the brakes on the 8th South Street hill, held when only depressed one-quarter of the brake pedal distance makes it incredible that the brakes would suddenly fail upon a gradual application for an anticipated stop. These facts reasonably prove that the foot brake system had been defective for some time and required the pumping procedure before effective operation.

(b) Defendant testified that the car she was driving was equipped with a hand brake in good operating condition, but that she failed to use the same (R. 22).

The duty of the defendant to have used the hand brake is stated by necessary implication in the case of *Sams v. Adams Transfer & Storage Co., et al.*, (Missouri,

1950) 234 S.W. 2d 593. Plaintiff was a passenger in a streetcar which was struck at an intersection by a truck driven by defendant's employee. The truck driver testified that as he was approaching the intersection, he stepped on the foot brake and found that it was out of commission. He then reached for the hand brake but the best he could do was to keep the truck, which was going about 25 miles per hour, from increasing speed. He sounded the horn of the truck continuously from that time until the truck struck the streetcar. He turned to the left at the intersection in an attempt to go north on the west side of the streetcar but because of the speed of the truck was unable to make the turn, and the truck struck the streetcar. He testified that he had made two stops that morning and that the vacuum booster brakes operated by a foot pedal were working efficiently, but failed him at this intersection. Judgment for the Plaintiff was affirmed by the Supreme Court of Missouri which said at page 594:

“As we review the evidence of the truck driver, Adams was guilty of negligence as a matter of law. Conceding that the vacuum booster brakes were working efficiently that morning and failed suddenly, the evidence shows the contrary as to the hand brake.

It is agreed that under the law the truck was required to be equipped with two sets of adequate brakes in good working order. . . . The driver of the truck stated that when the vacuum booster brakes failed he attempted to use the hand brake which ‘seemed to hold it (the truck) from going

much faster but it wouldn't bring it to a stop.' There is no evidence in this record that the hand brake failed suddenly. The only inference to be drawn from the evidence is that the hand brake was weak, inadequate, and inefficient. Adams in its brief stated that the evidence disclosed the brakes were regularly inspected. The driver did testify that 'The equipment is inspected regularly by the shop.' As to the meaning of 'regularly' was are left in the dark. The witness may have meant yearly, monthly, or daily. . . . Enough has been said to show that under the evidence it must be ruled that Adams was guilty of negligence as a matter of law." . . . "No evidence was produced in the case before us of any legal excuse why the hand brake was inadequate."

The court then reviews a case cited by Adams but states that it is against Adams' theory. This was the case of *Lochmoeller v. Kiel*, Mo. App., 137 S.W. 2d 625, reviewed at page 595:

"As we read that case it is authority against Adams' theory. The facts in the two cases were similar except that the collision in the Lochmoeller case was very slight and the brakes on the truck failed when an attempt was made to stop the truck at the stop sign and within a few feet of the street-car. The plaintiff submitted his case to a jury on the charge of negligence of defective brakes as a question of fact. The owner of the truck introduced evidence that the brakes were up to the time of the collision in good working order and that without warning a small gasket had blown out of the braking mechanism. The court held

that plaintiff had submitted the question of negligence as one of fact and therefore could not contend on appeal that it was a question of law."

(c) Defendant testified that her vehicle collided directly into the rear of the Plaintiff's vehicle and that the reason she didn't attempt to turn one way or the other was that she didn't have time to do so (R. 70). The jury could reasonably have found that the defendant could have turned her vehicle within a much shorter distance than she could have stopped the same; that if the defendant's brakes really surprised defendant by sudden failure, the defendant would and should have turned the steering wheel, even slightly, at the same time she was pumping the brake pedal, to avoid the collision. Defendant testified that the lane to her right was clear and open for travel during her entire approach (R. 17), that there were no cars on the east side of plaintiff's car (R. 18). The officer testified that the point of impact was 21 feet west of the east curb (R. 4), leaving sufficient space for passing on the right side. From these facts the jury could reasonably have found that the defendant was negligent in failing to turn to avoid the collision. The duty of the defendant to employ other means to avoid the accident is set forth in the following two cases: *Russell v. Electric Garage Co.*, Nebraska 1912, 90 Neb. 719, 134 N.W. 253. Defendant's electric automobile collided with plaintiff's hack causing personal injuries to plaintiff. From a verdict and judgment for plaintiff, defendant appeals. Affirmed upon remittur of part of the damages. The facts are set forth in the following portion of the opinion:

"The vehicles were traveling in the same direction, east, and at substantially the same rate of speed. At the point where they were traveling there was a slight down grade, but there is no evidence to show that the street was not perfectly level north and south between the curbs. . . . When he (defendant) finally saw the hack about 25 feet ahead of him, the only effort he made to avoid a collision was by applying the brakes. When he applied them the car began to skid. Observing then that his brakes were not having the desired effect, we think it was plainly his duty to have used his steering lever and turned out so as to avoid the collision. That the mechanism of his car was all in working order, and that there was ample room to have passed the hack on either side, is admitted. The driver says he was helpless. That, under the evidence, is an unwarranted conclusion. If he had testified that, when he found his brakes were not going to prevent a collision, he tried to turn out, but was unable to do so, that claim might have been made with some show of reason. We do not think it is a sufficient exercise of diligence by the driver of an automobile, when he sees he is about to collide with a vehicle of any kind, to use one of the methods at hand for avoiding a collision, and, when he sees that is not going to have the desired effect, sit, either helpless or careless, and fail to use other means at hand. . . ."

Templeton vs. Northern Texas Traction Co., et al., Texas 1919, 217 S.W. 440. Plaintiff motor cyclist was injured while riding along side of the track of the street railway and a vehicle in front of him turned left without giving a signal, and plaintiff also turned left to avoid the truck

but struck an excavation along side the track. The jury found plaintiff contributorily negligent. The court in commenting on this contributory negligence stated:

“The plaintiff explains his failure to turn to the right when the driver of the truck turned to the left and his failure to shut off the power of his motorcycle or throw out the clutch, or apply the brake, by saying that it all happened so instantaneously that he did not have time to think. It was shown, however that the plaintiff was an experienced operator of a motorcycle, that his machine was in good order at the time, and the jury had an opportunity to observe the plaintiff during the trial, and we think it was all for the jury, and that we would not be authorized to set aside the finding on the ground of an insufficiency of the evidence.”

(d) The jury could reasonably have found the defendant negligent in failing to apply the foot brakes timely enough in that defendant testified that she did not remove her foot from the accelerator until she was about $2\frac{1}{2}$ to 3 car lengths from plaintiff's car (R. 19). Three car lengths would be about 60 feet. Defendant was traveling 30 miles per hour when she first applied the foot brake (R. 20). If, in fact, the defendant waited until she was 60 feet away before removing her foot from the accelerator, the jury could find that she would not have been able to stop, since according to the stopping distances stated by Officer Pierson it would require up to 70 feet even for an emergency stop.

POINT II.

A PARTY IS NOT BOUND BY THE TESTIMONY OF AN ADVERSE WITNESS WHOM HE HAS CALLED FOR EXAMINATION, EVEN TO THE EXTENT THAT SUCH TESTIMONY IS NOT REBUTTED.

The appellant apparently contends that because plaintiff called one of the defendants, Marilynn Huber, as an adverse party, the plaintiff should be bound by the testimony of the plaintiff. Rule 43 (b) Utah Rules of Civil Procedure provides as follows :

“Scope of Examination and Cross-Examination. A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or body politic or of a partnership or association which is an adverse party, and interrogate him by leading questions without being bound by his testimony and may contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief.”

A proper interpretation of this rule is that the plaintiff is bound by only such testimony of the defendant as the jury elects to believe. Rulings of the Federal Circuit Court of Appeals support the contention of the plaintiff.

Moran v. Pittsburgh - Des Moines Steel Co., U. S. Court of Appeals, Third Circuit, July 17, 1950, 183 F. 2d 467. In the trial of this cause the plaintiff had called one, Jackson, an officer of the defendant, under Rule 43 (b). The trial court held (86 Federal Supplement 855 at Page 273) that in calling an adversary, a party vouches for his testimony to some extent, and cannot select that which is favorable and reject that which is unfavorable where he has not attempted to contradict the unfavorable testimony. However, upon appeal, the Circuit Court reversed the district court, and in this point held as follows:

“We find, moreover, still a third error in the trial court’s handling of the Jackson testimony and this one was highly prejudicial. The jury was instructed, with regard to it, that to the extent that testimony as produced from a person called for cross-examination is not rebutted by either direct proof or circumstances it is conclusively taken to be true. A fair inference from the entire charge was that in the absence of rebuttal the plaintiff was bound by everything Jackson said.

We do not have here a case in which a party calls a supposedly favorable witness who gives unfavorable testimony. It is frequently said in such situations that the party calling the witness is bound by his testimony. That rule has been assailed by Wigmore as a primitive notion which no longer finds defenders. But we need not in this case either affirm or repudiate that rule. Here, Jackson was called in the first place as an adverse witness under Rule 43 (b), which expressly provides that such an adverse witness may

be contradicted and impeached. Rule 43(b), we think, is utterly inconsistent with any notion about being bound by his testimony. It seems to us that any statement to the effect that a party is bound by the testimony of a witness whom he is free to contradict and impeach is inherently anomalous."

None of the cases cited by defendants support the contention of the defendants that their motions for dismissal, directed verdict and judgment notwithstanding the verdict should be granted.

Morrison v. Perry, 104 Utah 139, 104 Pac. 2d 772, (App. Br. 7) was a case where defendant collided with an approaching decedent's vehicle on the decedent's side of the road. The jury found the defendant to be negligent in spite of defendant's explanation that the decedent first came over onto defendant's side of the road and defendant turned over to decedent's side to avoid decedent when decedent also turned back. The cause was reversed for other reasons, but the court indicated there was sufficient evidence to support the jury verdict in favor of plaintiff. The jury apparently did not believe the explanation offered by the defendant as to why the collision occurred on the wrong side of the road.

White v. Pinney, et al., 99 Utah 984, 108 P. 2d 249, (App. Br. 8) was a case where the jury found no negligence upon part of defendant where a wheel from a dolly being carried on defendant's passing truck, catapulted from defendant's truck, crossed the street and struck

plaintiff. The jury apparently believed the defendant's explanation, and no other evidence of negligence was introduced.

Hanson v. Wecherle (Cal. 63 Pac. 2d 323, (App. Br. 9) was not a case of failure of brakes. The decedent in that case was an assistant to the truck driver. The truck wasn't functioning properly and each time that the engine failed, the decedent would get out of the truck and block the wheels while the driver started the engine. This had been done about twenty times, then the last time, the decedent dismounted from the truck, the truck moved backward 5 or 6 feet before it stopped. There was no evidence of faulty brakes. There was evidence that the decedent may have slipped and fallen under the wheels. From jury verdict for plaintiff, defendant moved both for new trial and for judgment notwithstanding the verdict. The trial court granted motion for new trial but denied the motion for judgment notwithstanding the verdict. This was affirmed on appeal, the court saying that the questions involved were questions of fact for the jury and not questions of law to be decided upon appeal.

Trudeau vs. Sina Contracting Co., 62 NW 2d 492, cited by the appellant (Appr. Br. 10) clearly holds that the question of negligence in cases of claimed brake failures is for determination by the jury:

“Ordinarily the condition of brakes and the manner of their use or application, or the failure to use or apply one or both lines of brakes when

the situation demanded, would constitute actionable negligence if determined to be a proximate cause of the collision. But in the light of the testimony presented here the acts and conduct of the defendants constitute prima facie evidence of negligence only and, therefore, a proper issue for jury determination under the charge of the trial court."

"The existence of an emergency excusing an act otherwise negligent is, like negligence, ordinarily a question of fact."

Sothoron v. West, 180 Md. 539, 26 Atl. 2d 16, cited by appellant (App. Br. 11) was a case tried by the court without a jury in which the defendant driving a strange car descended a steep hill, found the brakes would not hold, tried the emergency brake, but could not stop in time to avoid collision with rear of plaintiff's vehicle stopped at a semaphore. Trial court granted judgment to defendant which was reversed on appeal. The appellate court commented that it was "almost inconceivable" that during the course of her travel the defendant would not have had occasion to use the brakes before arriving at the steep hill, said nevertheless it was her duty to inspect the brakes before driving. In that portion of the opinion quoted by the appellant, the court stated that "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."

The foregoing review of the cases cited by the appellant indicates that the determination of the facts by the jury in cases such as the instant case should not be disturbed upon appeal.

CONCLUSION

We respectfully submit that the trial court properly denied the motions of the defendants for dismissal, directed verdict and judgment notwithstanding the verdict. The jury properly found the defendants guilty of negligence in one or more particulars, and this verdict is amply supported by the evidence.

Respectfully submitted,

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