

1955

Teddy B. Covington v. Mont C. Carpenter : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

----- FILED

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TEDDY B. COVINGTON, by his
guardian ad litem, Mrs. J.
B. Covington,

:
Clerk, Supreme Court, Utah

Plaintiff and Appellant,

v.

MONT C. CARPENTER,

Defendant and Respondent,

: No. 8386

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BRIEF OF APPELLANT

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INDEX

	<u>Page</u>
STATEMENT OF FACTS	1
STATEMENT OF POINTS	10
ARGUMENT	11

POINT I. THE LOWER COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR A DIRECTED VERDICT IN FAVOR OF DEFENDANT AND AGAINST PLAINTIFF AT THE CLOSE OF PLAINTIFF'S CASE.

(a) THERE WAS SUFFICIENT AND COMPETENT EVIDENCE SHOWING THAT DEFENDANT WAS GUILTY OF NEGLIGENCE WHICH WAS THE PROXIMATE CAUSE OF PLAINTIFF'S INJURIES 11

(b) THE EVIDENCE DOES NOT SHOW AS A MATTER OF LAW THAT PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE WHICH PROXIMATELY CAUSED THE INJURIES OF PLAINTIFF AND SAID QUESTION SHOULD HAVE BEEN SUBMITTED TO THE JURY FOR THEIR SOLE DETERMINATION 13

CONCLUSION 19

CASES

Martin v. Stevens, 243 P 2d 747,
____ Utah _____ 18

STATUTE

Utah Code Annotated, 1953,
Sections 41-6-100 and 106 12

TEXT

Blashfield, Encyclopedia of Auto Law
and Practice, Vol. 2, Par. 1105,
page 426 18

Officer's Diagram of Accident Scene 20

IN THE SUPREME COURT OF THE STATE OF UTAH

TEDDY B. COVINGTON, by his
guardian ad litem, Mrs. J.
B. Covington,

Plaintiff and Appellant,

v.

MONT C. CARPENTER,

Defendant and Respondent,

APPELLANT'S

BRIEF

No. 8386

STATEMENT OF FACTS

This case came on for trial on the 23rd day of May, 1955, before the Honorable Ray Van Cott, Jr., judge, and a jury. Plaintiff presented his case and at the close of plaintiff's evidence, defendant moved the court as follows:

(R. 54, 55)

"Comes now the defendant at the conclusion of the plaintiff's case and moves the court for a directed judgment of no cause of action in favor of the defendant and against the plaintiff on the following grounds and for the following reasons:

"1. That the plaintiff has wholly failed to prove by a preponderance of the evidence in the case any negligence on the part of the defendant which proximately caused the accident; and

- 2 -

"2. That the evidence introduced by the plaintiff conclusively and as a matter of law established contributory negligence on the part of the plaintiff which proximately contributed to the accident and the injuries complained of * * * ."

The court in response to defendant's motion stated: (R. 55, 56, 57)

"Ladies and gentlemen, the defendant's attorney in this case has made a motion to the effect that I should grant a directed verdict in the favor of the defendant and against the plaintiff and the basis of his motion is that taking the plaintiff's case as he has presented it, it shows that he was guilty himself of contributory negligence which proximately caused the accident and injuries that he has sustained and that the defendant was not guilty of any negligence which proximately contributed to that.

"Now under our law of negligence, as you probably have learned in these kind of cases, if a plaintiff is himself guilty of contributory negligence which proximately contributes to the happening of the event in any appreciable degree he cannot recover against another person, even though that other person may have been negligent himself. In other words, where there are two people that are negligent, the plaintiff and another, the plaintiff cannot recover. Or the plaintiff cannot recover if he himself is guilty of negligence and the defendant was not.

"Now I make this explanation to you so that you will see the reasons for the

action that I'm going to take. These things are not always easy but we are here as Courts of Justice to render justice, not sympathy. Now there is no question but what this plaintiff has been severely injured. We all have our sympathy for him. But that is of no concern to us in the trial of a lawsuit. As I explained to that juror who was here this morning these matters of negligent cases are not to be determined on who got hurt or who has the most money, or who is a friend of somebody, but they are to be based upon wrongful conduct upon the part of one or both parties involved and unless you can say that the defendant in this case was guilty of negligence which proximately contributed to this man's injuries and this man was not guilty of negligence himself which contributed to that accident and injuries to the plaintiff, the plaintiff isn't entitled to recover and under the law a situation such as this is, in my opinion could not be disputed by 8 reasonable people but what this plaintiff was himself to blame, at least in part, for this accident. By his own evidence he was 100, approximately 137 feet away from the scene of the accident when he was aware of the fact that this car was backing up into the highway. He traveled at 25 miles an hour himself and he took his eyes off of the course that his vehicle was traveling for a period of time from the time he went over the crosswalk until he turned around again when he was only 10 or 15 feet from the back end of this automobile. Now you can't drive down a highway approximately 120 feet with your head faced toward the direction from which you are coming and not be guilty of negligence yourself. He says there was nothing unordinary about the way the car backed out. So we will have to assume that

he was aware that it was approaching into his path at a normal rate. Now that is a totally different situation than if he had been traveling down the highway at 25 miles an hour looking ahead and this car suddenly lurched out from the curb and into his path. That would be another thing. But that isn't this case. This man has this car in view all of the time so under the law it is my duty, as I see it, to dismiss this case and he bears the brunt of his own negligence. As I say, I make that explanation to you because you have spent three fourths of the day here listening to this evidence. I don't know whether you agree with my decision or whether you do not. That, of course, I have to run the risk of, which is beside the point, because I am duty bound to do what I think at this stage of this proceedings is what I ought to do and as I say if it were a matter of sympathy I could feel sorry for the plaintiff and wish that he could be compensated and then if I start reasoning that way then I should feel sorry for the man whose money I take away for no fault of his own and that is why these cases must be tried on the law and nothing else.

"Now with that explanation, ladies and gentlemen, I'm going to grant the defendant's motion, which means that the plaintiff's case is dismissed. He has the right to appeal from my decision. Our Supreme Court is for the purpose of reading this record and to determine whether they agree or disagree with me on that premise. They sometimes do and they sometimes don't, but when they don't that is their responsibility and not mine. I do my duty and let them do theirs, as they see and as I say it is my opinion that 8

reasonable persons could not disagree with the proposition that this plaintiff was himself guilty of negligence and that being so it is my duty to grant their motion.

"I want to thank you for your attention to this matter and you will be excused until you are called again in another case.

"The defendant's motion will be granted as prayed. I mean as to the directed verdict it will be granted as made by you, Mr. Strong, and the Court will be in recess until tomorrow morning."

It is from the granting of this motion that plaintiff appeals.

The only two witnesses, other than the medical doctor, who testified, were Bernard E. Valgardson, the investigating officer and the plaintiff himself. Their testimony is substantially as follows:

This collision occurred on 9th South Street approximately 137 feet west of the west curb line of the intersection of 3rd East Street and 9th South Street. The time was approximately 11:25 A.M., the morning of October 3, 1953; the day was clear and the street dry.

Officer Valgardson in his testimony drew a diagram on the blackboard describing the scene of the collision. Unfortunately said diagram was not photographed, however, the report from which Officer Valgardson made said diagram is reproduced here and set forth in plaintiff's brief at page 20. Said diagram is self-explanatory and is specifically and in detail supported by the testimony of both Officer Valgardson and plaintiff. The width of the street is 60 feet, divided into two traffic lanes for westbound traffic and two for east-bound traffic, said traffic lanes being 10 feet wide. In addition there is a parking lane on each side of said street 8 feet wide. Further, the east and west traffic lanes are divided in the center of the street by a 4 foot section. At the time of the collision all of the lanes were clearly divided by yellow lines. The point of impact was ascertained as 21 feet south of the north curb line of 9th South Street and 137 feet west of the east curb line of 3rd East Street.

Plaintiff testified that he was proceeding west on 9th South Street and was traveling in the traffic lane nearest the center of the street and that he was proceeding approximately in the center of said traffic lane. That he was in the westerly crosswalk of 9th South Street when he first observed the defendant backing out of the parking area in front of the Salt Lake Cleaning & Dyeing Co., (See defendant's Exhibits 11, 12 and 13 for view of area in front of said company) and the rear bumper of defendant's car was almost emerged into the first lane of traffic. (R. 38, 49). Plaintiff upon further examination could not state definitely whether it was the 8 foot parking lane or the first 10 foot traffic lane that defendant's car had emerged into. Plaintiff testified that defendant was backing in a southeasterly direction, or on an angle to go out into the first lane of traffic. (R. 38) Plaintiff was concerned whether or not there was any other traffic coming up

behind him, so he glanced around to the rear to see if there was any other traffic coming from the rear. (R. 38) At that time plaintiff was traveling approximately 25 miles per hour. (R. 39, 45) When plaintiff turned around he was approximately 15 feet from the rear of defendant's car. He attempted to pull his motorcycle to the left out of the way and did pull it out of the way a very little before the impact. (R. 39) No part of the motorcycle came in contact with defendant's car, rather the brunt of the whole impact was directly on plaintiff's right leg as said leg came in contact with the left rear fender of defendant's car. (See defendant's Exhibits 10, 14 and 15) (R. 45) As shown in defendant's Exhibits 11, 12, and 13 the parking area in front of the Salt Lake Cleaning & Dyeing Co. is recessed 19 feet. (See also Officer Valgardson's diagram at page 20 of the brief. The west crosswalk

of 9th South Street is close to the west curb line of 3rd East Street. (R. 46)

Plaintiff testified that he traveled approximately 120 to 125 feet from the time he first saw defendant's car until he saw it the second time, when he was approximately 15 feet away from it. (R. 50, 51) There was no traffic in front of plaintiff, either going in the same direction as plaintiff or coming from the opposite direction. (R. 49) Officer Valgardson testified that in conversation with defendant that defendant stated that he did not at any time prior to the impact see the plaintiff; that he backed out at a speed of two to three miles per hour and had started to move forward when the collision occurred. (R. 30, 31) Plaintiff's testimony was that defendant was still backing when the impact occurred. (R. 35)

Defendant's Exhibits 11, 12 and 13, showing the recessed parking area in front of the Salt Lake Cleaning & Dyeing Co. were accepted

solely for the purpose of showing the general area, and nothing else. (R. 34) Whether there were any cars parked in the recessed area at the time defendant backed out the record is silent.

As shown in the officer's diagram and testimony, after the impact plaintiff was found 75 feet from the point of impact and the motorcycle 113 feet away. As a result of said collision plaintiff was injured severely.

STATEMENT OF POINTS

POINT I. THE LOWER COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR A DIRECTED VERDICT IN FAVOR OF DEFENDANT AND AGAINST PLAINTIFF AT THE CLOSE OF PLAINTIFF'S TESTIMONY.

- (a) THERE WAS SUFFICIENT AND COMPETENT EVIDENCE SHOWING THAT DEFENDANT WAS GUILTY OF NEGLIGENCE WHICH WAS THE PROXIMATE CAUSE OF PLAINTIFF'S INJURIES.
- (b) THE EVIDENCE DOES NOT SHOW AS A MATTER OF LAW THAT PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE WHICH PROXIMATELY CAUSED THE INJURIES OF PLAINTIFF AND SAID QUESTION SHOULD HAVE BEEN SUBMITTED TO THE JURY FOR THEIR SOLE DETERMINATION.

ARGUMENT

THE LOWER COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR A DIRECTED VERDICT IN FAVOR OF DEFENDANT AND AGAINST PLAINTIFF AT THE CLOSE OF PLAINTIFF'S TESTIMONY.

- (a) THERE WAS SUFFICIENT AND COMPETENT EVIDENCE SHOWING THAT DEFENDANT WAS GUILTY OF NEGLIGENCE WHICH WAS THE PROXIMATE CAUSE OF PLAINTIFF'S INJURIES.

The evidence is undisputed that defendant backed his car at an angle out of a 19 foot recessed parking area in front of the Salt Lake Cleaning & Dyeing Co. across an 8 foot parking lane, across a 10 foot traffic lane and 3 feet into the center traffic lane of 9th South St. That at no time either prior to beginning to back or during said backing procedure did defendant ever see or hear the plaintiff approaching on his motorcycle. According to Officer Valgardson's testimony defendant stated he was unaware of the presence of plaintiff until plaintiff collided with the rear of defendant's car. It is obvious from the un-

disputed testimony that plaintiff was clearly visible to be seen had defendant looked and saw what was there. Sections 41-6-100 and 106, Utah Code Annotated, 1953, provide:

"Vehicle emerging from alley, driveway or building--Duty to stop and yield right-of-way.--The driver of a vehicle within a business or residence district emerging from an alley, driveway or building shall stop such vehicle immediately prior to driving onto a sidewalk or into the sidewalk area extending across any alleyway or private driveway, and shall yield the right-of-way to any pedestrian as may be necessary to avoid collision, and upon entering the roadway shall yield the right-of-way to all vehicles approaching on said roadway."

"Backing--when permissible.--The driver of a vehicle shall not back the same unless such movement can be made with reasonable safety and without interfering with other traffic."

Defendant was negligent in failing to look and see the approaching vehicle of plaintiff, and in violating the above two sections of our code in failing to yield the right of way, and in backing when such backing could not be made with reasonable safety, and without interfering with other traffic.

THE LOWER COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR A DIRECTED VERDICT IN FAVOR OF DEFENDANT AND AGAINST PLAINTIFF AT THE CLOSE OF PLAINTIFF'S TESTIMONY.

- (b) THE EVIDENCE DOES NOT SHOW AS A MATTER OF LAW THAT PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE WHICH PROXIMATELY CAUSED THE INJURIES OF PLAINTIFF AND SAID QUESTION SHOULD HAVE BEEN SUBMITTED TO THE JURY FOR THEIR SOLE DETERMINATION.

Plaintiff when approximately 120 feet away first saw defendant backing into the street. At that time plaintiff was traveling approximately in the middle of the traffic lane nearest the center of the street. Defendant was emerging from the 19 foot recessed parking area in front of the Salt Lake Cleaning & Dyeing Company into the street. Plaintiff upon seeing defendant backing, turned around and looked to the rear to see if there was any traffic approaching from that direction, and when he turned around defendant had backed across the 8 foot parking lane, the next 10 foot traffic lane and at least

tiff was then traveling. Plaintiff stated in response to the question as to what direction defendant was backing: "Yes. It was backing in what you might call a southeasterly direction, or on an angle to go out into the first lane of traffic."

The main part of the lower court's decision in granting defendant's motion for a directed verdict is based upon the conclusion that plaintiff was guilty of contributory negligence as a matter of law. The lower court in arriving at this conclusion states: (R. 56, 57)

"* * * a situation such as this is, in my opinion, could not be disputed by 8 reasonable people, but what this plaintiff was himself to blame, at least in part, for this accident. By his own evidence he was 100, approximately 137 feet away from the scene of the accident when he was aware of the fact that this car was backing up into the highway. He traveled at 25 miles an hour himself and he took his eyes off of the course that his vehicle was traveling for a period of time from the time he went over the crosswalk until he turned around again when he was only 10 or 15 feet from the back end of this automobile. Now you can't drive down a highway approximately 120 feet with

your head faced toward the direction from which you are coming and not be guilty of negligence yourself. He says there was nothing unordinary about the way the car backed out. So we will have to assume that he was aware that it was approaching into his path at a normal rate. Now that is a totally different situation than if he had been traveling down the highway at 25 miles an hour looking ahead and this car suddenly lurched out from the curb and into his path. That would be another thing. But that isn't this case. This man has this car in view all of the time so under the law it is my duty, as I see it, to dismiss this case and he bears the brunt of his own negligence." (emphasis added)

It is plaintiff's contention that the court cannot say that plaintiff was guilty of negligence as a matter of law. By the plaintiff's own undisputed testimony, when plaintiff first appraised the situation defendant was backing in a southeasterly direction, or on an angle to go out into the first lane of traffic, and not as the lower court assumed, "that defendant was approaching into plaintiff's path at a normal rate." There is no evidence in the record to support the lower court's statement. Plaintiff having once appraised the situation, and traveling in an

entirely different lane of traffic than the one into which defendant was backing, looked to the rear to ascertain the traffic that was coming from that direction. The defendant, oblivious to any vehicles on the road other than his own, instead of turning into the first lane of traffic as his actions indicated, backed clear out into the center lane of traffic. Assuming that plaintiff's appraisal and calculation of defendant's actions and intentions were incorrect, it cannot be said that plaintiff because of said incorrect appraisal was guilty of negligence as a matter of law. That is a question of fact that the court cannot take from the jury. It must be remembered that this is not a two lane highway. Ninth South Street is a four lane highway, each lane 10 feet wide and, in addition, an eight foot parking lane on each side. Further, defendant came out of a 19 foot recessed parking area. Can this court say that plaintiff was wrong in his appraisal that defendant was backing out to go into the first lane of traffic

That his incorrect judgment was so grossly wrong that he was negligent as a matter of law, and that 8 jurors could arrive at no other conclusion? It was incumbent upon plaintiff to appraise the traffic situation and that is just what plaintiff did. Assume that traffic was coming from the rear of plaintiff in the first lane of traffic, the natural thing would be to move over into plaintiff's lane of traffic and if they were near enough to plaintiff, plaintiff would have to apprise himself of their presence. A distance of 120 feet at 25 miles per hour would be covered in approximately 3 seconds. Is it negligence as a matter of law for plaintiff to appraise the traffic to his rear?

Plaintiff upon viewing defendant's vehicle the second time was confronted with a sudden emergency and he did all that was possible to extricate himself from the situation. Plaintiff had the right to assume until he knew to the contrary that defendant would obey the law and would not interfere with the approaching

traffic, which was plainly and obviously in view had the defendant looked.

BLASHFIELD, ENCYCLOPEDIA OF AUTO LAW AND PRACTICE, Vol. 2, par. 1105, page 426, states:

"An approaching motorist on the highway, observing another backing toward him, is entitled to assume that the latter will operate his automobile with due care and caution (39). He has the right to believe that such driver will respect his right of way and leave a space open for his passage (40)."

- (39) Iowa - Carstensen v. Thomsen, 245 N.W. 734, 285 Iowa 427. Vt. - Ester v. Wilder, 182 A 204, 108 Vt. 37.
- (40) La. - Chitwood v. King, App., 155 So. 466.

In the case of MARTIN V. STEVENS, 243 P 2d 747, 749, 750; ___ Utah ___, the court states:

"The question of contributory negligence is usually for the jury and the court should be reluctant to take consideration of this question from it. Nielson v. Mauchley, Utah, 202 P 2d 547; Toomer's Estate v. Union Pacific Railroad Co. Utah, 239 P 2d 163. The expressions in those cases are in accord with this uniformly accepted doctrine. The right to trial by jury should be safeguarded. Before the issue of contributory negligence may be taken from the jury, the defendant's burden of proving both (a) that plaintiff was guilty of

contributory negligence, and (b) that such negligence proximately contributed to cause his own injury, must be met, and established with such certainty that reasonable minds could not find to the contrary; conversely, if there is any reasonable basis, either because of lack of evidence, or from the evidence and the fair inferences arising therefrom, taken in the light most favorable to plaintiff, upon which reasonable minds may conclude that they are not convinced by a preponderance of the evidence either (a) that plaintiff was guilty of contributory negligence or (b) that such negligence proximately contributed to cause the injury, the plaintiff is entitled to have the question submitted to a jury.

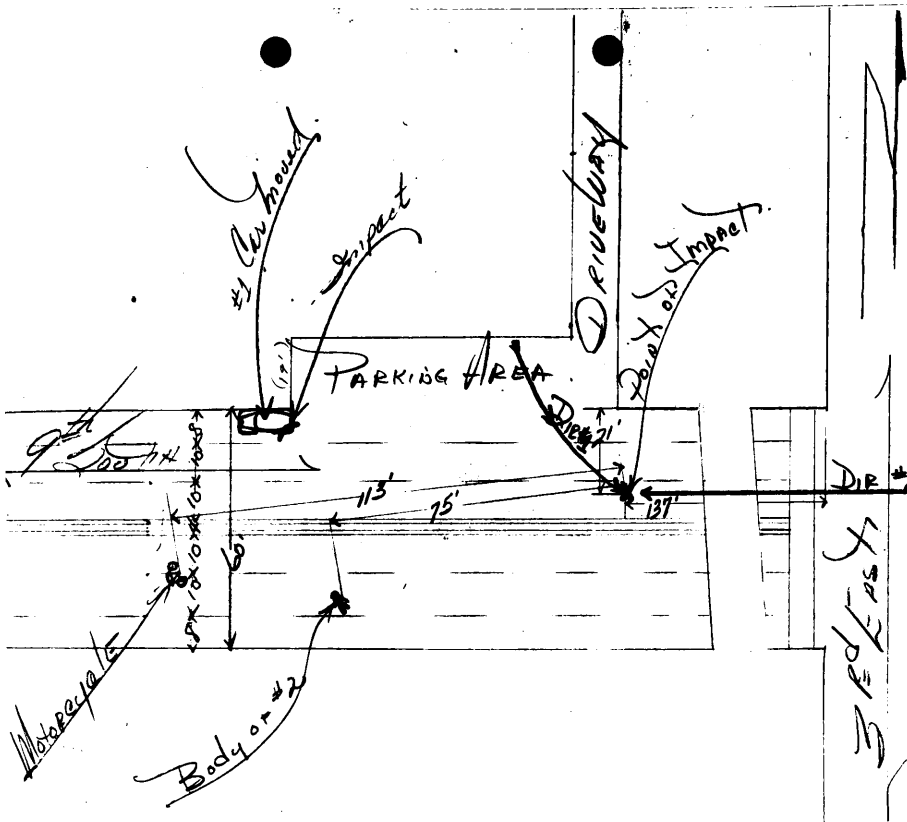
"Concurring in the case of Bullock v. Luke, 96 Utah 501, 98 P 2d 350, 354, Mr. Chief Justice Wolfe said: ' * * * we must be careful not to stretch contributory negligence to the point where we make it incumbent upon one not only to drive carefully himself, but to drive so carefully as always to be prepared for some sudden burst of negligence of another and be able to avoid it.'"

CONCLUSION

The judgment of the lower court should be reversed for the reasons set forth hereinabove, and the lower court instructed to grant a new trial.

Respectfully submitted,

McCullough, Boyce &
McCullough, Attorneys for
Plaintiff and Appellant



on motorcycle portable
 Oct. 3-1953
 Clear & Dry
 1 Carpenter (DEFENDANT)
 2 Conington (PLAINTIFF)
 Valgardson 731-1