

1955

Yoshitaro Okuda and Jack Aramaki v. Jerry A. Rose : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
OCT 29 1955

Clerk, Supreme Court, Utah

YOSHITARO OKUDA and JACK
ARAMAKI the sole heirs of KIM
ARAMAKI OKUDA, deceased,

Plaintiffs and Appellants,

vs.

JERRY A. ROSE,

Defendant and Respondent.

Case No. 8399

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

STATEMENT OF THE CASE

This action was instituted by the Plaintiffs and Appellants, Yoshitaro Okuda and Jack Aramaki, as the sole heirs of Kim Aramaki Okuda, deceased, who died in an automobile-pedestrian accident on the 25th day of October, 1953. Trial before a jury was had on June 2nd, 1954, in the District Court for Salt Lake County. The jury returned a verdict against appellants, no cause of action. A motion for a new trial was duly filed by appellants. This appeal is prosecuted from the court's failure to grant the motion for a new trial.

As will be noted from the statement of facts and

from the record, there was no evidence produced in this case, either direct or circumstantial, as to the conduct of deceased prior to the impact with defendant's automobile. Appellants contend that the lower court committed reversible error in two particulars, namely, (1) the court instructed on the various ways in which decedent could be guilty of contributory negligence when that issue was not raised by the evidence, and (2) appellants duly requested an instruction to the effect that decedent was presumed to be in the exercise of due care which the court refused to give.

STATEMENT OF FACTS

The auto-pedestrian accident which gave rise to this action occurred at approximately 2200 South Main Street in Salt Lake City, Utah, on the 25th day of October, 1953, at about 1:30 A.M.

The deceased, Mrs. Kim Aramaki Okuda, a lady of Japanese descent was a resident of Helper, Utah. She had relatives and friends in Salt Lake City, including her son, one of the appellants, whom she visited on occasion. She did not speak English. On the evening that she met death, she had attended a Japanese movie shown at the Buddhist Church on West First South in Salt Lake City. After the movie she rode to Magna, Utah, with her sister, who lived in Magna, and her sister's son, Saige Aramaki. Saige Aramaki returned the decedent to Salt Lake City and let her out of his car on First South between West Temple and First West Streets. She was staying with friends in that neigh-

borhood. Mrs. Okuda was not seen alive after that.

The defendant, Jerry A. Rose, a resident of California, but at the time of the accident a resident of Murray, Utah, was employed as a rate clerk by the Interstate Motor Lines. He worked irregular hours. On the Saturday preceding this accident, which occurred early Sunday morning, he had worked until about noon and then went home. Sometime during the afternoon he purchased a pint bottle of 86.4 proof whiskey. He and his wife drank about $\frac{1}{2}$ of the bottle at home during the afternoon and early evening. At approximately 9:00 P.M. the defendant and his wife left their home in Murray and came into Salt Lake City to the Manhattan Club. They took the pint bottle of whiskey with them and consumed the remainder of the contents at this night club. They remained there until it closed at 1:00 A.M.

After leaving the night club, defendant Rose traveled south on Main Street to the intersection of 21st South and Main Street. He recalls stopping at that intersection in response to a red light. (R. 81). He was in the lane next to the shoulder of the road and stayed in that lane after leaving the intersection. (R. 81). The events subsequent to this are most graphically portrayed by the statement of defendant given the investigating officer immediately after the accident (Exhibit 5). It reads:

“I was driving along south Main Street south of 21st South when something hit my windshield immediately after a car had passed me—It (the

object), chipped my windshield and I pulled to the right—I heard another dull sound and being in doubt as to what made the sound I stopped the car and got out to see what the trouble was—I noticed an object down the road and went to investigate—I found a woman and various articles on the road. The woman was injured and I stopped the first car and instructed them to call Police and ambulance.”

/s/ Jerry A. Rose

The body which he found was that of Mrs. Okuda, who died within a few moments thereafter. *There were no eye-witnesses to the accident.* Neither Mr. Rose, the defendant, nor his wife who was riding with him in the front seat, saw decedent before the impact. (R. 84, and 125)

The physical facts found at the scene were described by officers Jackson, Bowden and Vaughn of the South Salt Lake Police Department and Highway Patrolmen Nuttal and Cook. The South Salt Lake Officers were in charge of the investigation and were assisted by the Highway Patrolmen. (R. 41)

Mrs. Okuda's body had not been moved [as testified by defendant (R. 86, 87)] and was found by the officers about six feet from the sidewalk on the west shoulder of main Street. (Ex. 1) The shoulder of the road is approximately 15 wide and this would place the body about 9 feet west of the travelled portion of roadway. (Ex. 1). The body was 15 steps north of a sign marked “entering South Salt Lake.” The Rose vehicle was 40

steps south of the body and it too was on the shoulder of the road* (see Ex. 1 which is reproduced herein for reproduction between pp. 5 & 6, reference). The vehicle was facing south with the front end at a slight angle toward the travelled portion of the roadway. (R. 54)

Definite fabric marks were imprinted on the right front fender of the vehicle which matched the fabric of the coat worn by decedent. (R. 39) There was a small dent in the right front fender of the auto and the right front head light rim was loose (Ex. 4).

Again, the record contains no evidence, direct or circumstantial, as to the conduct or actions of decedent before the impact. Based on such absence of fact, defendant contended that decedent was guilty of contributory negligence and the court instructed on the various ways in which decedent could have been negligent. That the court erred in this part of its instructions is the substance of Point I of the argument of this brief.

* It is to be noted that the defendant in his statement said that he found the body on the road. (Ex. 5). He testified that at no time did his vehicle leave the travelled portion of the roadway and that he stopped on the paved portion of the roadway. (R. 102) The physical facts show to the contrary that both the body of Mrs. Okuda and the Rose vehicle were off the roadway and on the shoulder. Thus, plaintiffs contend, and the jury could have found, that Mr. Rose turned his vehicle from a travelled course on a roadway without first ascertaining that such movement could be made with reasonable safety. Certainly, by failing to see decedent he was guilty of not maintaining a proper lookout.

STATEMENT OF POINTS

POINT I

THE COURT ERRED IN GIVING ITS INSTRUCTION NO. 7 PERTAINING TO CONTRIBUTORY NEGLIGENCE.

POINT II

THE COURT ERRED IN FAILING TO GIVE PLAINTIFFS' REQUESTED INSTRUCTION NO. 2 PERTAINING TO THE PRESUMPTION THAT DECEDENT WAS, AT THE TIME OF THIS OCCURRENCE, PRESUMED TO BE IN THE EXERCISE OF DUE CARE.

ARGUMENT

POINT I

THE COURT ERRED IN GIVING ITS INSTRUCTION NO. 7 PERTAINING TO CONTRIBUTORY NEGLIGENCE.

The only established fact in this case relative to the conduct of deceased was that having been struck by defendant's vehicle she was found about nine feet west of the travelled portion of the roadway, dying (Ex. 1). No one observed her movements before the collision. Defendant admitted that he did not see her until after the impact (R. 84).

From this state of the evidence the court nonetheless gave its instruction No. 7 pertaining to contributory negligence which plaintiffs duly excepted to (R. 140). The instruction reads:

“Instruction No. 7. You are instructed that the deceased in the exercise of ordinary care, and in order not to be guilty herself of contributory negligence, was governed by the following rules of law at the time and place in question.

1. You are instructed that it was the duty of the deceased in undertaking to cross the highway, if you should believe that she was so doing, to keep a reasonable and adequate lookout for automobiles using the street and to use reasonable and ordinary care to keep out of the way of such automobiles. In this connection it was her duty to look and observe whether there were any automobiles in such close proximity as to affect her safety and to continue to keep such a reasonable and prudent lookout as was reasonably necessary for own protection.

2. You are instructed that if you find from the evidence that the deceased was crossing the street at the time of the accident, or was commencing to cross the street and continued on, it was her duty to exercise ordinary care to ascertain her surroundings and the vehicles upon the highway at said time and not to remain in a place of danger, or otherwise fail to exercise reasonable and ordinary care for her own safety.

3. You are instructed that a pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection should yield the right of way to all vehicles lawfully upon the highway. Therefore, it was the duty of said deceased to yield the right of way to vehicles upon the street if you find that she was crossing or commencing to cross the street under the above circumstances.

4. You are instructed that it is unlawful for any person to walk upon a roadway where sidewalks are provided adjacent to the highway.

You are, therefore, instructed that if you find by a preponderance of the evidence that the de-

ceased failed to observe any of the above rules of law respecting her conduct and that her failure proximately contributed to the happening of the collision then and in that event the plaintiffs herein would not be entitled to recover for her death.”

The Court has stated to the jury in effect that decedent must have maintained a lookout for vehicles, which if she didn’t would constitute negligence; that if they believed she was crossing the road, not within a crosswalk, she must yield the right of way and if they found she was walking along the roadway she must walk on the sidewalk if there was one.

It is, of course, true, that the jury given facts of certain behavior may, in view of their own experience, conclude as a legitimate inference that such behavior did not amount to ordinary care. The inference, however, must be based on established fact. It cannot rest on conjecture and surmise. Under instruction No. 7 the jury was at liberty to find (1) that decedent failed to maintain a lookout, (2) failed to yield the right of way, and (3) was walking along the roadway where a sidewalk was provided and that by doing either of those three things she was guilty of negligence which would bar a recovery for her heirs. There is no element of fact in this case to establish any of the propositions. The jury at best could merely guess concerning decedent’s conduct and thus the result they reached could not be based on logic or reason.

They could have, however, been sufficiently impressed with the instruction, to believe that there was

evidence in the record from which they could find that decedent was negligent. They could believe that there must have been this evidence in the record or the court would not have given the instruction. It is for these reasons that the courts have declared that such abstract instructions constitute reversible error.

See Corpus Juris Secundum, Trial, Sec. 379, Vol. 88.

“Instructions should be concrete and specific as possible with respect to the facts and issues of the case, and not general or abstract, and it is improper to give an instruction announcing a naked legal proposition, however correct it may be, unless it bears on, and is connected with, the issues involved, and unless, further, there has been received some competent evidence to which the jury may apply it.”

This statement of the law is further amplified in succeeding sections in that volume and is supported by many cases.

Jenson vs. S. H. Kress & Co., 49 P. 2d 968 (Utah).

This was an action for personal injuries sustained by plaintiff when she somehow received a laceration in the abdomen caused by a piece of glass from one of the panels used by defendant on its show cases in its place of business. There was no evidence to show how the glass panel became cracked nor how long it had been in that condition.

In discussing one of the lower court’s instructions, the court said:

“Instruction No. 8 reads: ‘In determining

whether the defendant was negligent in maintaining the show case, you may consider the question whether or not it was cracked or broken, and, if so, whether or not the defendant knew or by exercise of ordinary care should have known it was cracked or broken and whether or not the defendant failed to give the plaintiff warning or notice of such condition; and all the circumstances in evidence, and from them you should determine whether or not the defendant was negligent.”

“The instruction was erroneous, not exactly on the ground argued by the defendant, but for the reason that there is no evidence that the defendant was negligent. Therefore, it was improper to predicate an instruction upon the theory that the jury might consider certain things to determine whether the defendant was negligent.”

The case was reversed and remanded.

Garrison vs. Trowbridge, 177 P. 2d 464 (Mont.).

This was an action for the death of a pedestrian which occurred at an intersection. After an adverse verdict the lower court granted a new trial to plaintiff. Defendant appealed this order. In affirming, the appellate court said in part:

“Furthermore, the court erred in giving instruction No. 15 reading: ‘You are instructed that all traffic, including pedestrians, must, when they approach an intersection of a city street in the City of Great Falls, and Second Avenue North, the same being a through street, stop and look before entering such intersection for the purpose of crossing the avenue.’ To the giving of that instruction plaintiff objected upon the ground ‘that there was a complete lack of any

evidence in the case upon which the giving of such an instruction can be predicated.' The objection to the instruction should have been sustained. There was no evidence showing that deceased did not stop before entering the intersection. It is not proper to give an instruction on an issue concerning which there is no evidence. (53 Am. Jur. 455)"

McCarthy vs. Pennsylvania R. Co., 156 Fed. 2nd 877 (CCA 7th).

This was a death action brought by the administrator of the estate of deceased who was an engineer for defendant railroad company. Decedent was killed as a result of an engine turnover when a journal box became over-heated. Judgment for defendant and plaintiff appealed. The only issue before the court was whether the trial court properly instructed the jury.

In commenting on the instructions the appellate court said in part:

"The court further instructed the jury: 'On the other hand (if you find) that the railroad company, knew at all times the things required of it by law, and that it did not violate the law requiring the use of engines in safe condition, even if you find the Defendant was negligent and did not comply with the law requiring the use of engines in good condition, but that such failure to comply with the law was not the cause of the injury to and death of the decedent, but that such injury and death were caused solely by his own acts, independently of any negligence on the part of the Defendant, it would be your duty to find for the Defendant. But, I have stated, such acts of negligence on the part of the Plaintiff, if you find

such acts of negligence, merely contributed to and were not the sole cause of his death, you should find for the Plaintiff.' . . . Secondly, the instruction is improper because it told the jury that plaintiff could not recover if his decedent was guilty of acts of negligence that solely caused his death. As an abstract proposition of law, that is correct, but there was no evidence of any independent acts of negligence by the decedent that were the sole cause of the accident and his death. The court had instructed on a proposition of law about which there was no evidence."

The judgment was reversed and a new trial granted.

The case of *Olsen vs. Warwood*, 255 P. 2d 725 (Utah) is distinguishable. This was an action for injuries to a minor child who was injured by the rear wheels of a school bus after the child had alighted from the bus. There was evidence that the bus had stopped; and that the driver had observed the minor plaintiff a good five feet from the bus before the vehicle was put back in motion. The court held that this evidence was sufficient for a jury to infer that plaintiff had walked or run toward the bus after disembarking and it was not error for the court to instruct in that regard.

The court announces the general rule to be, however, as follows:

"It is well settled in this jurisdiction that an instruction must be based on evidence, and that it is prejudicial error to submit a charged act of negligence to a jury for its consideration in the absence of evidence tending to support a finding that the act occurred. *Smith vs. Clark*, 37 Utah 116, 106 P. 653, 26 L.R.A., N.S., 953, and

see *Griffin vs. Prudential Ins. Co.*, 102 Utah 563, 133 P. 2d 333, 144 A.L.R. 1402; *Kendall vs. Fordham*, 79 Utah 256, 9 P. 2d 183. Likewise it is well settled that the court may not permit the jury to speculate upon the evidence and that a finding of fact cannot be based upon surmise, conjecture, guess, or speculation. *Jackson vs. Colston*, 116 Utah 205, 209 P. 2d 566; *Dern Inv. Co. vs. Carbon County Land Co.*, 94 Utah 76, 75 P. 2d 660.

The general proposition of law set forth in the Olsen case, *supra*, is applicable to the case at bar. Here, there is no evidence of decedent's conduct (as there was in the Olsen case) prior to the fatal collision. Yet, the jury was allowed to guess that decedent was crossing the street; that she did not maintain a proper lookout; that she failed to yield the right of way.

The error is doubly serious when one considers that the plaintiffs were deprived of the presumption of due care by the court's refusal to instruct on that point.

That the court erred in instructing on the presumption that deceased was in the exercise of due care is the subject of Point II of this argument.

POINT II

THE COURT ERRED IN FAILING TO GIVE PLAINTIFFS' REQUESTED INSTRUCTION NO. 2 PERTAINING TO THE PRESUMPTION THAT DECEDENT WAS, AT THE TIME OF THIS OCCURRENCE, PRESUMED TO BE IN THE EXERCISE OF DUE CARE.

As has heretofore been shown, there was no evidence produced at trial relative to the acts and conduct of deceased immediately before the impact. The only per-

son who had an opportunity to observe decedent (and negligently failed to do so), defendant, Jerry A. Rose, admitted that he did not see her before his vehicle struck her. There was no testimony to indicate where decedent was when struck. The physical evidence found was merely personal effects found near the body. There was no evidence of any scuff marks, skid marks or other signs of an impact on the travelled portion of the roadway.

This absence of fact demands the giving of an instruction to the effect that decedent was presumed to have been in the exercise of due care. Appellants requested such an instruction and duly excepted to the court's refusal to give it (R. 168 and 141).

The problem thus raised in regard to the presumption that a deceased person is presumed to have been exercising due care has been dealt with by the Utah Supreme Court in three recent cases. *Tuttle vs. P.I.E.*, 242 P. 2d 764, *Gibbs vs. Blue Cab*, 249 P. 2d 213 and *Mecham vs. Allen*, 262 P. 2d 285.

We conceive the doctrine of those cases to be that a deceased person is presumed to be in the exercise of due care (the presumed fact) which presumption arises from the fact that a person has been accidentally killed (the basic fact). The basic fact, of course, remains in the case. The presumed fact remains in the case until the party who has the burden of proving the non-existence of the presumed fact produces prima facie evidence to the contrary. If that burden is not discharged, the presumed fact remains in the case and the court should instruct the jury upon it.

See Justice Wade's concurring opinion in the Gibbs case, *supra*, footnote 1, at page 217:

"A presumption is merely a rule of law requiring the trier of the facts to assume one fact from proof of another fact or set of facts. This kind of a presumption merely places on the disfavored party the burden of going forward with the evidence; it is completely nullified upon the production of *prima facie* evidence to the contrary. In the absence of such contrary evidence, the court should direct the jury to assume the presumed fact. The judge and not the jury determines when the evidence is sufficient and when he concludes that it is, he submits the issue of fact which would otherwise be presumed to the jury to be determined from the evidence along with the other facts without mentioning the presumption."

A somewhat similar rule has been developed by the court in California, beginning with *Mar Shee vs. Maryland Assurance Corporation, Baltimore*, 210 P. 269, (Calif.). A later case stating and applying the rule of the *Mar Shee* case to a negligence action is *Westberg vs. Wilde*, 94 P. 2d 590.

"We think it well to state here that in our opinion there is a substantial difference in the situation before a court where the question of the plaintiff's negligence is in issue, and both plaintiff and his witnesses testified to all his acts and conduct at the time of his alleged negligence, from a situation where the acts and conduct of a decedent are the issues before the court. In the first instance, all possible facts both in favor of and against the alleged negligence of the plaintiff are before the court, and it is difficult for us

to preceive how any presumption as to his conduct can add to or detract from this evidence. Surely if this evidence conclusively supports the claim that he was negligent, then, according to our decisions cited above, the presumption as to his conduct has been dispelled. On the other hand, if the plaintiff has testified respecting his acts and conduct, and his testimony and that of his witnesses showed that he used ordinary care for his safety, and instruction to that effect would not be of any assistance to him; but if such evidence did not clearly and unmistakably clear him of the charge of negligence, then an instruction which would place his testimony in a more favorable light than it would be without such instruction would seem to be uncalled for, if not improper. In such a case the giving of any instruction as to the presumption of plaintiff's conduct would seem to be of doubtful propriety. It has, however, been held that the giving of such an instruction under the circumstances just related was not prejudicial. (Citing cases.) But in the other situation, where the acts and conduct of a deceased person are the subject of inquiry, and the testimony respecting such acts and conduct necessarily must be produced by witnesses other than deceased, unless such testimony meets the requirement of the rule in the Mar Shee case, and other cases decided by this court following the Mar Shee case, an instruction that the deceased is presumed to have exercised ordinary care of his own concerns is not only proper but this court in an unbroken line of decisions, has sustained the giving of such an instruction."

The precise question in this case is whether it can be said that prima facie evidence of contributory negli-

gence was produced by defendant. The record is silent on the subject. There was no testimony on the subject of decedent's conduct and the physical facts found at the scene do not aid the defendant in establishing contributory negligence, but rather, tend to indicate just the opposite. Can it be said then, that the court correctly found a prima facie case made out and correctly refused to instruct the jury on the presumption. The answer is no. The presumed fact remained in the case from beginning to end and it was prejudicial error for the court to refuse to instruct the jury thereon.

CONCLUSION

The instruction on contributory negligence in this case gave the defendant the benefit of the doctrine without requiring him to produce evidence on this point. The jury could then speculate that decedent failed to maintain a proper lookout or that she was crossing the roadway and failed to yield the right of way or they could guess that she was not crossing the roadway but rather was walking along side the road in an area where sidewalks are provided which was a violation of law and would be negligence. The instruction was clearly error for this reason and plaintiffs' urge that upon a retrial of this case, unless evidence of contributory negligence is produced, this issue, which is foreign to the evidence, be eliminated.

Equally important is the court's failure to instruct the jury that deceased was presumed to be in the exercise

of due care. There was no evidence to the contrary and that being the case, the presumption remains in the case from beginning to end. It was error for the court to fail to instruct on it.

For these two reasons, both of which are vital, plaintiffs urge the court to grant a new trial.

Respectfully submitted,

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