

1956

Leara Ann Deveraux v. General Electric Company and Harold J. McKeever : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

LEARA ANN DEVEREAUX,
Plaintiff and Appellant,

JUN 28 1956

— vs. —

Clerk, Supreme Court, Utah
Case No.
8472

GENERAL ELECTRIC COMPANY,
a corporation, and HAROLD J.
McKEEVER,
Defendants and Respondents.

Brief of Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

LEARA ANN DEVEREAUX,
Plaintiff and Appellant,

— vs. —

GENERAL ELECTRIC COMPANY,
a corporation, and HAROLD J.
McKEEVER,
Defendants and Respondents.

Case No.
8472

Brief of Respondent

STATEMENT OF THE CASE

The preliminary statement as contained in the brief of appellant is accurate and acceptable to respondent.

Also, the statement of the case is reasonably accurate, and, in the interest of expediency, we will not attempt to repeat such statement but shall only call the

attention of this Court to certain additional facts of serious import.

The locale of the accident involved was Highway U.S. 91, which is the primary highway between Salt Lake City and Provo, Utah. (Par. III of Plaintiff's complaint.) The highway is of multiple lanes (See Ex. 1, 2, 3, 4) and is heavily traveled (R. 20). There is no intersection at this place and the accident occurred within a range of 75 feet to 100 feet (R. 14) of the crest of a hill. The slope of the hill was downward to the north. There was no visibility from the place of impact over the crest (R. 14).

At the time of commencing her "U" turn plaintiff testified that she looked in both directions but that she saw no car that was close and that she never saw the vehicle that was being driven northward and stopped by the witness Breeze (R. 62 and 85), although this witness stopped for Officer Allred and was stopped in the center lane as plaintiff commenced her "U" turn. Plaintiff, at time of impact, was in the lane of travel which was the second lane to the east from the center of the highway (R. 31 and 41-42).

Plaintiff in her statement of facts takes due care to explain the use of an alcoholic beverage by defendant McKeever. It should be carefully noted that intoxication was not an issue in the case submitted to the jury nor has any appeal been taken from the failure to submit any such issue. We can only construe this is an attempt to influence this Court on a non-existent issue and irrelevant matter as far as this appeal is concerned.

Therefore, it is necessary that this Court consider the foregoing discussion of facts in conjunction with those set forth by appellant.

ARGUMENT

POINT I

PLAINTIFF WAS NOT DENIED HER RIGHT TO A JURY TRIAL IN VIOLATION OF THE CONSTITUTION AND APPLICABLE AUTHORITIES.

POINT II

IT IS ADMITTED THAT THERE WAS EVIDENCE INTRODUCED WHICH WOULD SUPPORT A FINDING THAT DEFENDANTS WERE NEGLIGENT IN THE OPERATION OF THE AUTOMOBILE AND THAT SUCH NEGLIGENCE PROXIMATELY CAUSED PLAINTIFF'S INJURIES.

Plaintiff, in this appeal, argues two matters that are not germane to the issues raised by the appeal, namely, (a) the sufficiency of the evidence of plaintiff to establish the negligence of defendant; and (b) an alleged error of the trial court in giving instruction No. 5, as argued by plaintiff commencing at page 16 of the brief.

The order granting the motion of defendant for judgment notwithstanding the verdict was upon the ground of contributory negligence of plaintiff, as preserved and argued by defendant in his motion to dismiss at the conclusion of plaintiff's case, and in the motion for directed verdict at the conclusion of the entire case, both of which motions were taken under advisement by the trial court. (R. 182, 192 and 195.) For the purposes of those motions

and the motion for judgment notwithstanding the verdict, the sufficiency of the evidence to establish negligence of defendant was assumed. It was just a question as to whether plaintiff was contributorily negligent. Why plaintiff on this appeal argues a matter with reference to which there is no longer an issue in the case is not understandable, unless plaintiff hopes thereby to draw a red herring across the path of this court to divert its attention from the real issue, namely, the conduct of plaintiff in making a "U" turn across a busy highway just over the brow of a hill where the view of oncoming traffic was limited to a distance too short within which to stop.

Plaintiff made no motion for new trial on the ground of its alleged error in giving Instruction No. 5; the correctness of the instruction was not before the trial court upon the motion of defendant for judgment notwithstanding the verdict; and is not now before this court for review. This is another red herring and has no place in the appeal.

POINT III

THE TRIAL COURT PROPERLY GRANTED DEFENDANTS' MOTION SETTING ASIDE THE VERDICT OF THE JURY AND ENTERING JUDGMENT FOR THE DEFENDANTS, NO CAUSE OF ACTION.

As hereinbefore indicated, the sole issue on this appeal is the determination of the contributory negligence of the plaintiff as a matter of law. A review of the decisions of this Court leave little doubt as to the pro-

priety of the ruling of the trial court.

Cederloff v. Whited, 110 Utah 45, 169 Pac. 2d 777. This case has been cited and construed on several occasions with approval. This decision involved a defendant who was making a left turn colliding plaintiff's vehicle approaching from the opposite direction. This Court, through Justice Wade, stated:

“Section 57-7-133, U.C.A. 1943, provides: ‘(a) No person shall turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety * * *.’ Defendant turned his car from a direct course in the highway into the lane of traffic intended for vehicles traveling in the opposite direction at a time when plaintiff's car was approaching in such close proximity that the collision occurred as soon as the front end of defendant's car had reached a few feet into plaintiff's lane of traffic. Had plaintiff's car run into the rear end of defendant's car after the front end thereof had entirely crossed plaintiff's course of travel, there might have been some question whether the turn could be made with reasonable safety, but under the facts in this case it is clear that as a matter of law the turn could not be made with reasonable safety, and the defendant was guilty of negligence. The defendant's testimony that he looked and did not see any car coming does not help his situation, because if he had paid attention to what was there to be seen he would have seen plaintiff's car coming, as it was approaching in the immediate vicinity, and there is no claim that it did not have proper lights. It is equally clear that such negligence of the defendant was at least one of the proximate causes of the accident. The accident was the immediate and direct result of this negligence, and

without such negligence it would not have occurred.

* * * *

“So under these circumstances plaintiff could not have avoided the accident, and defendant’s negligence was as a matter of law the sole proximate cause of the collision and resulting injury and the court erred in not so instructing the jury.”

The decision not only held that the maneuvers of the defendant were negligent as a matter of law but further held as a matter of law that such negligence was the sole proximate cause of the collision.

The Cederloff case, *supra*, was followed by the case of *Hart v. Kerr*, 110 Utah 479, 175 Pac. 2d 475, which again was a case where a motorist was turning to the left side of a highway when an accident occurred. Again, through Justice Pratt this Court stated:

“There seems to be rather an obvious conclusion at which to arrive from the evidence. Plaintiff knew defendant was coming fast (he testified 40 miles per hour); and plaintiff’s automobile was hit in front of its center—the conclusion: Plaintiff took a chance upon a faulty estimate of distances and speed and lost. Considering the duty imposed upon plaintiff by section 57-7-133 U.C.A., 1943, he clearly was at fault. We invite attention to our recent decision of *Cederloff v. Whited*, Utah, 169 Pac. 2d 777, where this section is discussed. In this case as in that the contact between the cars was such as to indicate that one party was too close at the speed he was going for the other to attempt a crossing. We are of the opinion that the principles of the Cederloff case are decisive of this case. The lower court properly directed a verdict of no cause of action.”

See also *Yeates v. Budge*, Utah, 252 Pac. 2d 220 and *French v. Utah Oil Refining Co.*, 117 Utah 406, 216 Pac. 2d 1002.

Graham v. Roderick, 32 Wash. 2d 427, 202 Pac. 2d 253, involved a collision when plaintiff was making a "U" turn in an intersection and that court in holding plaintiff negligent as a matter of law said:

"A 'U' turn movement, executed at an intersection within a city, is at best a more or less hazardous operation, often requiring considerable skill and vigilance to be safely executed, because of the fact that the operator engaged in such maneuver must observe and contend with traffic approaching from four directions.

"While both of the respondents in this instance testified that they looked to their left before proceeding into the cross-traffic of the arterial highway, they did not see appellant's automobile approaching, although it was there to be seen, nor did they stop before proceeding across the arterial.

"Respondents' principal contention and reason why they did not stop for, and give the right of way to, appellant's vehicle is that its lights could not have been burning, since they looked and saw none. The trial court made no finding that appellant's lights were not burning, although it did observe, in its memorandum opinion, that the lights 'may have been dim either from battery weakness or on low beam or on dimmers.' We can agree that such may have been the case, but, as appellant has pointed out, there is no evidence in the record to support any such theory.

"Because of this fact, we are left with a situation where the only rule which can be applied is

that a party will be deemed to have observed that which he necessarily would have seen if he had looked, and will not be absolved of the charge of negligently having failed to look, by testimony that he looked and did not see. *Paddock v. Tone*, 25 Wn. (2d) 940, 172 P. (2d) 481; *Stanley v. Allen*, 27 Wn. (2d) 770, 180 P. (2d) 90.”

Landfair v. Capital Transit Co., 165 Fed. 2d 255, involved a “U” turn by plaintiff. The United States Circuit Court of Appeals for Washington, D. C. used the following language in sustaining a directed verdict for the defendant:

“The facts giving rise to the suit follow. In the early evening of August 19, 1944, appellant was driving an automobile south on the west side of Fourteenth Street, in the Northwest section of the District of Columbia, and attempted a ‘U’ turn at a point north of Arkansas Avenue. This street is fifty feet wide, and traversing its center are two sets of streetcar tracks, one for northbound and the other for southbound traffic. Each set of tracks is four feet and eight inches wide with a ‘dummy’ space between of five feet and two inches. Appellant testified that she was traveling at a slow rate of speed, that she looked to the south for oncoming traffic and saw none, that she made the appropriate signal for her turn to following traffic, and then carefully attempted a ‘U’ turn and her automobile was struck broadside by a streetcar as she crossed the northbound tracks. She gave explicit testimony that her view to the south in the direction of the on-coming streetcar was sufficiently good to allow her to see clearly as far as Shepherd Street, three blocks to the south of the point where the collision occurred. Appellant further testified that she looked to the south and saw no oncoming vehicles as late as that

time when she was crossing the 'dummy' space between the car tracks, not more than five feet from the point of impact.

"The fact of the collision produces the inevitable conclusion that appellant must have seen the oncoming streetcar if she actually looked in its direction. *Northern Pacific R. Co. v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; *Miller v. Union Pacific R. Co.*, 290 U. S. 227, 54 Sup. Ct. 172, 78 L. Ed. 285. The duty to look cannot be questioned. *Chicago R. I. & P. Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542. Under comparable circumstances this court has previously rejected such testimony as that given by the appellant, declaring contributory negligence on the part of the injured person as a matter of law. *Glaria v. Washington Southern R. Co.*, 30 App. D. C. 559; *Faucett v. Bergmann, et al.*, 57 App. D. C. 290, 22 F. 2d 718. These rules apply where the plaintiff's case is based upon an allegation of last clear chance. *Washington Ry. & Electric Co. v. Buscher*, 54 App. D. C. 353, 298 F. 675."

The principles involved were again repeated in the case of *Capital Transit Company v. Hedin*, 222 Fed. 2d 41, as follows:

"We conclude that under Maryland's statute and judicial decisions, it was Hedin's duty to yield the right of way to the bus approaching on Ager Road, not only at the entrance to that highway, not only at the entrance to the second or north-bound roadway, but also throughout his passage across the second roadway on which the bus was traveling. He cannot avoid this duty by saying he looked and did not see the bus. And the excessive speed he attributes to the bus, which he did not see, does not in the circumstances of this case excuse him for driving into its path. There was

no evidence upon which the last clear chance doctrine could have been applied. The District Court erred in denying appellant's motions. Upon remand, the verdict and judgment thereon should be set aside and judgment should be entered for the defendant."

Applying the standards of care and principles of law that are discussed in the foregoing authorities, it is clear that the plaintiff in this case was negligent as a matter of law and that such negligence proximately contributed to the collision if not the sole proximate cause by reason of definite undisputed facts as shown by this record.

In an attempt to explain away the fact that plaintiff failed to see that which was apparent and obvious, the idea of "distribution of attention" is injected under the authority of *Martin v. Stevens*, Utah, 243 P. 2d 747. That case involved giving some attention to multiple streets in an intersection. Here there is no such excuse. At the commencement of plaintiff's "U" turn her only consideration could have been in regard to the northbound traffic up to the time of impact which occurred in the easternmost lane for traffic traveling north. In this respect, this Court has already spoken on the subject in the case of *Smith v. Bennett*, 1 Utah 2d 224, 265 Pac. 2d 401. That case involved a pedestrian plaintiff who was struck while crossing the traffic lanes for eastbound traffic. In regard to the demands on plaintiff's attention the following language is used:

"Plaintiff cites a series of cases illustrated by *Martin v. Stevens*, Utah, 243 P. 2d 747; *Lowder v. Holley*, Utah, 233 P. 2d 350; *Poulsen v. Man-*

ness, Utah, 241 P. 2d 152, in which the questions of contributory negligence and proximate cause were held to be jury questions. A major dissimilarity exists between the facts of the case now before the court and plaintiff's authorities. In these cases we were concerned with situations such as intersectional accidents where the plaintiff's attention was demanded in more than one direction or in more than one place. Since his attention could not be in all places and in all directions at once, it was a question of human judgment as to how his attention should be distributed among the several competing demands. A question of fact for the jury was presented as to whether his distribution of attention was reasonable. In the instant case there was but one demand upon plaintiff's attention. There is no room for a reasonable difference of opinion as to where her attention should have been concentrated; it was incumbent upon her to observe the condition of approaching traffic. That she failed to use due care in doing so is manifest from the evidence."

The Smith case cites with approval, and all to the same effect, *Mingus v. Olsen*, 114 Utah 505, 201 Pac. 2d 495; *Sant v. Miller*, 115 Utah 559, 206 Pac. 2d 719; and *Cox v. Thompson*, Utah, 254 Pac. 2d 1047. It is undisputed in this case (as a matter of fact, it was presented in plaintiff's case) that at the time plaintiff started her "U" turn that the Breeze vehicle was stopped at that very place (R. 67, 68), and plaintiff did not see it (R. 108, 119) nor did she see the car of defendant McKeever (R. 108, 119). This is exactly the principle discussed in the foregoing authorities.

Appellant's brief discusses the activities of Officer Allred and Sec. 41-6-63, Utah Code Annotated 1953, and

it is most interesting. The Code provision requires a motorist to comply with a *lawful order* of a police officer. The conversation and arrangements were neither an order nor a lawful order and no exigency nor emergency existed. See *West v. Cruz*, 75 Ariz. 13, 251 Pac. 2d 311, and *Falasco v. Hulen*, 6 Cal. App. 2d 224, 44 Pac. 2d 469. Certainly, nothing of this sort could be apparent to the defendant McKeever, (R. 6, 16, 17, 18, 24). At the time of the collision Allred was way over on the west side of U. S. 91 facing and traveling south (R. 41). Nothing was stated in word or acts that would relieve plaintiff from exercising due care. Quite the contrary, plaintiff was warned by Officer Allred when he stated, "Now, let's be careful." (R. 47.) In no better language could plaintiff have been warned of the danger and hazards of the turn she attempted. Of course, the officer's judgment was lacking. He could have directed plaintiff to a safe and lawful place where the turn might have been made.

It appears upon a fair examination of this record that plaintiff's maneuver violated the provisions of Sec. 41-6-67 and Sec. 41-6-69, Utah Code Annotated, 1953, and that such violations constitute negligence as a matter of law in addition to her lack of due care as previously discussed.

It seems unnecessary to argue the element of proximate cause. In all of the foregoing authorities this element was under consideration. Not only was the improper "U" turn unanimously regarded as the proximate cause of the collision but in this case as in *Cederlof v. Whited*, supra, it could properly be regarded as the sole

proximate cause.

Each and every authority cited by respondent is analagous, in point, and determinative of this appeal.

CONCLUSION

This Court stated in *Walker v. Peterson*, 3 Utah 2d 54, 278 Pac. 2d 291, that “*in all cases of collision, both drivers are required to exercise that degree of care which a reasonably prudent person under the circumstances would exercise for his own and others’ safety, and where the failure of a party to meet this standard is a contributing cause of the accident, no relief can be had on his behalf.*” (Italics added.) The facts of this collision and accident clearly and without doubt show that plaintiff woefully failed to meet the standard of care as required by the statutes of this State and the pronouncements of this Court.

Respondent submits that the judgment as it was finally entered by the trial court was the only proper judgment that could be so entered pursuant to law as it has been consistently determined by this Court.

Therefore, we respectfully urge that this Court sustain and affirm the action of the trial court.

Respectfully submitted,

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Attorneys for Defendants