1957

Leara Ann Deveraux v. General Electric Company and Harold J. McKeever : Petition for Rehearing

Utah Supreme Court

Rich, Elton & Mangum; Attorneys for Respondents;

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

Petition for Rehearing

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Come now the defendants and respondents and respectfully petition the Court for a rehearing of the above case and of the decision made and filed December 10, 1956; and state and allege that the Court has erred in the following particulars:

1. The majority opinion mentions and considers only the negligent failure of plaintiff to look or if she did look her negligent failure to see what was there to be seen. No consideration appears to have been given by the majority opinion to the U-turn made by plaintiff and appellant in complete violation of Sec. 41-6-67, Utah Code Annotated 1953.

2. The majority opinion contains inconsistent legal conclusions.

3. The majority opinion disregards a long line of decisions by this Court and in effect reverses these decisions only by implication, thus clouding well established precedents.

ARGUMENT

POINT 1. NEGLIGENT U-TURN IN VIOLATION OF SECTION 41-6-67, UTAH CODE ANNOTATED 1953, AS PROXIMATE CAUSE OF ACCIDENT.

From the uncontroverted facts in this case as recited by the majority opinion, plaintiff and appellant was negligent in *two* respects, not just one. First, she was negligent in not looking, or if she did look, in failing to see what was there to be seen. This negligence was admitted by the majority opinion, but it was held that this failure to see was not necessarily as a matter of law the proximate cause of the accident. But what of the other negligence of plaintiff and appellant? What about making a U-turn within 500 feet of the crest of a hill where the turning vehicle could not be seen by a car approaching from the same direction until such car had topped the crest? This is an independent act of negligence which is not related to plaintiff's failure to see. To illustrate the point let us take an example. Assume "A" makes a U-turn on a straight and level highway where there are no obstructions to visibility. "A" fails to observe on-coming traffic and is struck by "B." There was noth-

ing illegal or improper about the *place* where "A" attempted to make the U-turn. "A" 's negligence was his failure to maintain a proper lookout and his turning when on-coming traffic created a hazard.

Now assume "A" made a U-turn within 400 feet of the crest of a hill and from which point there was no visibility back over the crest. Assume "A" fails to observe traffic before starting the U-turn. Assume "A" is struck by a car traveling in the same direction as "A." Now "A" is clearly negligent as a matter of law in two respects: (1) Failure to maintain a lookout, and (2) making a U-turn in a place where it is *illegal* to do so.

The precise and only reason that our statute forbids a U-turn near the crest of a grade when the turning vehicle cannot be seen by an approaching car within 500 feet is to prevent an accident such as is involved in this case. A turn made in violation of this statute is a negligent turn as a matter of law. Furthermore, such an illegal and negligent turn must have been a contributing proximate cause of this particular accident. Whether plaintiff saw or even looked for other cars is far less a contributing factor to this accident than *the choice of the place where she did attempt her illegal and negligent U-turn.* The record viewed in the most favorable light from plaintiff-appellant's viewpoint clearly establishes that there was no visibility from the place of impact over the crest of the hill (R. 37), and that the U-turn was attempted at a point not over 400 feet from the crest

(R. 60). Plaintiff-appellant attempted her U-turn in a *place* which the law recognized to be dangerous and hazardous and therefore absolutely prohibited. Are we now to say that motorists may violate this absolute prohibition and then if an accident occurs demand the right to submit their case to a jury? *Proximate cause* as well as *negligence* must be found as a *matter of law* and not be left to conjecture by a jury.

The majority opinion recites that "the jury could reasonably find that she (plaintiff-appellant) used *due care* in starting to make the turn as she did." The majority opinion also recites, "for even though she (plaintiff-appellant) had observed all of the existing conditions she was *not necessarily negligent* in proceeding into the highway as she did." (Italics added) We submit the error of these conclusions. Under Utah Statute no U-turn could legally be made by anyone, *including the officer,* at the particular *place* involved. An illegal turn is not and *cannot* be a turn made with "due care," and "not necessarily negligent."

We conclude, therefore, that the majority opinion must of necessity have been considering *only* the negligent failure of plaintiff appellant to look or if she did look her negligent failure to see what was there to be seen. At no point does the majority opinion appear to have considered the independent negligent action of attempting a U-turn at a *place* where it was *forbidden.* This illegal act must be held to be a contributing proximate cause of the accident which resulted.

POINT II. THE MAJORITY OPINION CONTAINS INCONSISTENT LEGAL CONCLUSIONS.

The majority opinion states "Appellant's failure to see the stopped cars undoubtedly was negligence." Also, "So she either did not look or failed to observe what was there to be seen before she entered the highway to make the U-turn and in that respect she was negligent as a matter of law."

In spite of these two categorical conclusions by the majority opinion that plaintiff was guilty of negligence as a matter of law, we find two statements which are completely inconsistent therewith. These two inconsistent statements are: "The jury could reasonably find that she used due care in starting to make the turn as she did," and "she was not necessarily negligent in proceeding into the highway as she did."

Are the trial courts of Utah to be left with these inconsistent conclusions to *confuse* them in trying future automobile collision cases? We hope not.

POINT III. *THE REVERSAL, BY IMPLICATION ONLY, OF A WELL ESTABLISHED LINE OF DECISIONS CLOUDS THE PRECEDENTS OF THIS COURT.*

This Court in *Cederlof* v. *Whited,* 110 Utah 45, 169 Pac. 2d 777; *Mingus* v. *Olson,* 114 Utah 505, 201 Pac. 2d 495; *Cox* v. *Thompson,* ..... Utah ....., 254 Pac. 2d 1047, and *Benson* v. *D. & R. G. W. Ry.,* 4 Utah 2d 38, 286 Pac. 2d 790, denied recovery because the injured party was guilty of contributory negligence as a matter of law. In each of

these cases the contributory negligence consistent of failure to maintain a proper lookout or of failure to see what was there to be seen. In one of the above cases,[1] in addition to this failure to see what was there to be seen, the plaintiff was also walking across a busy highway at a place where no cross walk was marked. While it was not illegal for plaintiff to cross at such a point, the statute did provide that the pedestrian was bound to yield the right of way to a vehicle upon the road. This court held that "If decedent had yielded the right of way to defendant's automobile *or* if he had looked up the road and seen the approaching car and paid heed to the danger which it presented, the accident would never have happened. It is patent that the negligence of the decedent was a substantial factor in bringing about his death."

In the case now before this court the plaintiff-appellant made an *illegal* and *absolutely prohibited U-turn* in addition to failing to see what was there for her to see. If the majority opinion stands, confusion and uncertainty will result with respect to the law established by the foregoing cases.

The majority opinion cites as precedent decisions three Utah cases, *Combs* v. *Perry*, 2 Utah 2d 381, 275 Pac. 2d 680; *Lowder* v. *Holley*, 120 Utah 231, 283 Pac. 2d 350; *Bates* v. *Burns*, 3 Utah 2d 180, 281 Pac. 2d 209. In all three of these cases the plaintiff was the favored party with the right of way. In each case plaintiff was legally at the *place* of impact and defendant was clearly violating basic statutes of our State. In all three cases this Court

[1]Cox v. Thompson, supra.

further found that even if plaintiff had looked and seen what was there to be seen that each of the plaintiffs could have proceeded as they did without necessarily being negligent because of their favored position and because of their right to assume that the defendants would yield the right of way. None of these same propositions apply in favor of this plaintiff in the case now being argued. Plaintiff had no right of way, she was illegally turning within the 500 foot danger area from the crest of a hill, and she failed to maintain a proper lookout. Not one of the controlling factors are here present which prompted this Court to permit the issue of contributory negligence to go to the jury in the three cases cited by the majority.

We close by referring the Court to the excellent and compelling logic of the dissenting opinion. We submit that this opinion argues this case for us in a most logical and convincing manner.

Respectfully submitted,

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