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Roland Lavar Denison v. Alvin D. Chapman : Respondents' Alvin D. Chapman and Continental Oil Company's Brief

Utah Supreme Court

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No. 8554—Civil

IN THE SUPREME COURT

of the

STATE OF UTAH

FILED

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Supreme Court, Utah

ROLAND LAVAR DENISON,

Plaintiff and Appellant,

—vs.—

ALVIN D. CHAPMAN, CONTINENTAL
OIL COMPANY, a corporation, and
DORA HARTLEY,

Defendants and Respondents.

RESPONDENTS' ALVIN D. CHAPMAN AND
CONTINENTAL OIL COMPANY'S BRIEF

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Continental Oil Company and Chapman

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No. 8554

RESPONDENTS' ALVIN D. CHAPMAN AND
CONTINENTAL OIL COMPANY'S BRIEF

STATEMENT OF FACTS

We cannot accept the statement of facts as set forth in the appellant's brief. While we recognize that in a case where a verdict has been directed in favor of the respondents, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the appellant, we believe that counsel for the appellant has overlooked the equally familiar principle that the testimony of a witness can be no stronger than it is left on cross-examination. In the instant suit, there is very

little conflict in the evidence. All of the witnesses were called by the plaintiff, and there is no substantial dispute in their testimony. The facts relevant to the issues of this appeal may be briefly stated as follows:

On the evening of the accident, the defendant Dora Hartley was enroute to a meeting in Orem (T. 63). She entered U.S. Highway 91 from the east side thereof, at the point where it is intersected by what is known as the Carterville Road (T. 63). Prior to entering the highway, Mrs. Hartley stopped in response to a stop sign, and observed for traffic approaching from the left or south (T. 64). She observed the Continental Oil truck approaching at a distance about two blocks away (T. 65). She entered the highway and proceeded northerly along the extreme easterly edge of the highway (T. 66). She was not certain whether she was entirely in the right hand lane of the highway, or partially in the right hand lane and partially on the right shoulder (T. 68, 73, 74). The street was covered with ice, and the lines marking the lanes of traffic were not visible (T. 68). The rear wheels of her car were equipped with snow tires, and it was in good mechanical condition (T. 66). She proceeded very slowly up the hill, at a rate of speed estimated by her at approximately 15 miles per hour (T. 67). She had had previous experience in driving this hill under wintry conditions; and she was cognizant of the perils involved (T. 67). She had her car completely under control (T. 68). At about the time the oil truck reached her (in the left hand lane for north bound traffic), she suddenly ("quick as a flash") lost control

of her car, and it spun in a counter-clockwise direction ("spun sideways out into the lane of traffic") (T. 70, 71). It made only about a quarter of a turn when it came forcibly into collision with something else, and then spun clockwise, finally coming to rest on the right hand, or east shoulder of the highway, and facing in a southerly direction (T. 71). None of the foregoing testimony is disputed by any other witness.

The defendant Chapman, operator of the oil truck, testified that he had stopped for the semaphore light at the bottom of the Orem hill (T. 90). When the light changed to green in his favor, he started up the hill in the extreme right hand lane. He observed the Hartley car in the lane ahead of him, (T. 86), and as he approached it, he swung out into the center lane to pass (T. 91). She did not appear to be having any difficulty, nor did her car appear to be out of control (T. 87, 90). As he was about to pass her car, it suddenly went out of control, and slipped or skidded into the pathway of his truck, coming into collision therewith, and causing him to lose control (T. 91, 93, 94). Notwithstanding Chapman's efforts to hold the truck on the right side of the road (T. 93), it slid diagonally across the highway, where it finally came to rest with the front end against the guard-rail on the west side of the highway (T. 94). At about the time the truck came to rest, it was struck by the plaintiff's automobile (T. 95). This testimony of Chapman is also undisputed.

The plaintiff testified that on the afternoon of the accident, he had been with his boys attending to their

horses in the northern part of Orem (T. 115). It had been snowing all afternoon (T. 115). They were returning to their home, but at about the top of the Orem Hill, the plaintiff decided to drive down the hill to the service station to fill his tank with gasoline (T. 118). On direct examination he testified that he was traveling at about 35 miles per hour two blocks north of the top of the hill, (T. 116), but that he slowed down, although to what extent he did not know, anticipating that he would turn off the highway toward his home (T. 117). After he started down the hill, he never again used the accelerator, (T. 117), and after testing his brakes and finding that they would not decelerate his car, he shifted down into second gear to further reduce his speed (T. 118). However, on cross-examination he admitted that according to his best judgment he was traveling 35 miles per hour at the top of the hill, (T. 131), and at a point only 200 feet north of the point of impact, he was traveling at 30 miles per hour (T. 132). He was aware of the danger of an accident when the defendant's truck was 50 to 60 feet away, (T. 122), but he was unable to stop in time to avoid a collision, and he struck the truck with such force and violence that his car bounced back up the hill six to eight feet (T. 15, 128), and both vehicles were damaged to the extent of \$1200 (T. 132). That he was going at a speed of 35 miles per hour at the top of the hill was corroborated by his son Douglas (T. 153). The plaintiff admitted that he had lived in Orem for 7 years; that he was thoroughly familiar with the Orem Hill; that in periods of adverse weather, the hill was usually

more slippery and difficult than the level road; and that he had reason to anticipate that the hill would be more slippery than the level road on the night of the accident (T. 128).

Mrs. Hartley testified that after the accident, the plaintiff said that he was going too fast for existing conditions (T. 75, 76, 78, 80, 81). He did not deny making such an admission (T. 127).

It is true that officers Levin and Loveless testified, over objection, that in their opinion, the maximum safe speed on the Orem hill on the evening of the accident was 10 to 15 miles per hour, (Levin) (T. 19); or 20 miles per hour, (Loveless) (T. 43). We believe that this was inadmissible opinion evidence, since it called for a conclusion on a subject on which laymen are capable of forming valid opinions without the need for expert assistance. However, both witnesses admitted, on cross-examination, *that they had had no experience in operating a transport truck and trailer of the kind being operated by Chapman, and that their opinions were based purely upon their experience in operating ordinary passenger type vehicles* (T. 32, 45). They admitted that they were not qualified to give an opinion as to what would be a safe speed for a truck and trailer having in mind the difference in weight, traction, controllability, etc. (T. 31, 32, 45, 46). On the other hand, the witness Chapman who had had considerable experience in the management of such equipment, (T. 98, 99), testified that in his opinion, 35 miles per hour was a safe speed for the truck and trailer on the evening of the accident, and a safer speed

than a lesser speed would have been (T. 105, 111, 112). He pointed out that at lesser speeds, there would be dangers of the equipment stalling on the highway, or "spinning out," which would imperil not only that equipment, but also other traffic on the highway (T. 104, 105, 108). The opinion of Chapman was the only opinion of a qualified witness as to the safe speed for the operation of a tank truck and trailer, and is not disputed or controverted by any admissible evidence.

We particularly wish to note our dissent to the statement on page 2 of the appellant's brief, that Denison slowed down to about 15 miles per hour as he approached the crest of the hill. We have searched the record in vain for any testimony to support that statement. There is considerable evidence to the contrary, which comes from the mouth of the plaintiff himself, and his infant son. We also disagree with the statement that Chapman was approximately one foot west of the dividing line between the two north traffic lanes. The only basis for such a statement is the opinion testimony of Officer Levin that the point of impact was one foot west of the dividing line (T. 21). But Chapman testified that he was "right against" or "over a little bit" from the center line (T. 91). The evidence shows without dispute that Mrs. Hartley was at all times on the extreme right hand side of the road, and that Chapman was in the proper lane to pass the Hartley automobile.

All of the witnesses agreed that at the time and place of the accident, the highway was covered with ice, and was extremely slippery.

STATEMENT OF POINTS TO BE RELIED UPON

POINT I.

THERE IS NO EVIDENCE THAT THE DEFENDANT CHAPMAN ATTEMPTED TO PASS THE HARTLEY AUTOMOBILE AT A DISTANCE SO CLOSE THAT THE JURY WOULD BE JUSTIFIED IN FINDING HIM GUILTY OF NEGLIGENCE.

POINT II.

THE DEFENDANT CHAPMAN WAS NOT DRIVING AT AN EXCESSIVE RATE OF SPEED, AND THE ACCIDENT WAS NOT CAUSED BY ANY EXCESSIVE SPEED ON THE PART OF CHAPMAN.

POINT III.

THE DOCTRINE OF RES IPSA LOQUITUR HAS NO APPLICATION TO THE FACTS OF THIS CASE.

POINT IV.

IF DEFENDANTS WERE GUILTY OF ANY NEGLIGENCE, PLAINTIFF WAS EQUALLY GUILTY OF CONTRIBUTORY NEGLIGENCE.

ARGUMENT

PRELIMINARY STATEMENT

Plaintiff's argument appears to be predicated upon a false premise. He apparently proceeds on the erroneous assumptions that because the accident occurred on the plaintiff's own right hand side of the road, and that the defendant's oil truck was at the moment of impact on the wrong side of the road, that as a matter of law

the plaintiff was free of fault, and that one or more of the defendants must have been guilty of some actionable negligence. Neither of these assumptions is well founded.

In at least four decisions of this court, a driver on the right side of the road has been held guilty of negligence in failing to avoid collision with an automobile on the wrong side of the road. In *Farrell v. Cameron*, 98 Ut. 68, 94 Pac. (2d), 1068, this court affirmed a finding by the trial court that the defendant was guilty of negligence, in failing to turn out and avoid the automobile in which plaintiff was riding, and which was approaching 12 to 15 inches across the center line and on the wrong side of the road. In *Ercanbrack v. Ellison*, 134 Pac. (2d) 177, the plaintiff was held guilty of negligence, although entirely on his own right side of the road, in not slowing up or stopping to permit the defendant's truck to complete the passing of another automobile proceeding toward the plaintiff. In *Thomas v. Sadleir*, 162 Pac. (2d) 112, the defendant was held liable to a plaintiff who was riding as a passenger in an automobile traveling partly on the wrong side of the road, since the defendant failed to travel in the extreme right hand lane, but was traveling in the lane nearest the center of the highway. And in *Horsley v. Robinson*, 112 Ut. 227, 186 Pac. (2d) 592, the defendant was held liable to a passenger in its bus, for failure to avoid striking an automobile which skidded out of control on a slippery highway, and passed in front of the defendant's bus. Incidentally, in the case last cited, the driver of the car which went out of control, and

into the pathway of the bus, was exonerated from liability.

The cases above cited leave no room for doubt, that the mere fact that a person is upon his own right hand side of the highway, does not relieve him from all responsibility to be alert for traffic which may cross his path, and to avoid collision with such traffic when there is a reasonable opportunity to do so.

Equally fallacious is plaintiff's contention, that because the truck of the defendant came upon the plaintiff's side of the highway, it must have been negligently operated. The evidence not only shows without dispute, but the uniformity of the testimony emphasized, that the highway at the time and place of the accident was covered with ice, and was extremely slippery. It is well settled that the mere fact that an automobile skids or slides on a slippery highway, is not evidence, in and of itself, of negligence on the part of the operator thereof. If the automobile was carefully operated, and was caused to skid through no fault of the operator, but due to the conditions of the highway beyond his control, then the operator is not guilty of negligence, and the accident is deemed unavoidable. See 5A Am. Jur. 346, 347, 439, Automobiles and Highway Traffic, Sections 193, and 341. The same rule has been recognized by this court. In *West v. Standard Fuel Co.*, 17 Pac. (2d) 292, this court said at page 294:

“There is no evidence that plaintiff did not have his automobile under control unless it may

be said that the fact that his automobile skidded into the truck is such evidence. Such fact may not be said to show as a matter of law that plaintiff did not have control of his automobile."

See also 3-4 Huddy, Cyclopedia of Automobile Law, Section 68, Page 120. The same rule is followed and numerous cases are cited in support thereof, in the annotations in 58 A.L.R., at page 261, and 113 A.L.R. 992, both relied upon by the plaintiff.

So far as the defendants Chapman and Continental Oil Company are concerned, there is no need for speculation or conjecture, as to the cause of the oil truck skidding out of control. The evidence is undisputed that the oil truck was proceeding northerly on its own side of the road, and in the proper lane for passing the Hartley automobile. While thus lawfully proceeding along the highway, it was struck by the Hartley automobile, which had momentarily skidded out of the control of its operator, and collided forcibly with the oil truck, thus forcing the oil truck out of the control of its driver, Chapman, and across the highway, and into the pathway of the plaintiff. There is no dispute that the oil truck was knocked out of control by the Hartley automobile, and not by any act on the part of its operator.

As we understand the plaintiff's position, he relies for recovery against the defendants Chapman and Continental Oil Company on two grounds: First, that they attempted to pass the Hartley automobile, at a too close, or unsafe distance; and secondly, that the truck was

operated at an excessive rate of speed in view of the conditions then and there existing. We consider these points seriatim:

POINT I.

THERE IS NO EVIDENCE THAT THE DEFENDANT CHAPMAN ATTEMPTED TO PASS THE HARTLEY AUTOMOBILE AT A DISTANCE SO CLOSE THAT THE JURY WOULD BE JUSTIFIED IN FINDING HIM GUILTY OF NEGLIGENCE.

According to the testimony of Mrs. Hartley, she was proceeding along the extreme right hand edge of the highway. Her right wheels might have been off the hard surfaced portion of the road and on to the shoulder. Officer Levin testified that the lanes of traffic were about 12 feet wide, and that the Hartley car was about six or seven feet wide. This would leave a distance of at least five to six feet between the left side of the Hartley car and the line dividing the two north bound lanes of traffic. Officer Levin also fixed the point of impact as one foot west of this dividing line. This would indicate a clearance distance of at least six to seven feet between the Hartley car and the oil truck.

The witness Chapman testified that he was near the center line of the highway, or as he put it, "right against, or . . . over a little bit" from the center line (T. 91). He could not properly have proceeded further to the left without endangering south bound traffic. He also testified that he had "over three feet" or "quite a bit further than that" of clearance of the Hartley car (T. 91).

It is difficult to conceive how the defendant Chapman could have allowed more passing distance. Mrs. Hartley was on the extreme right hand side of the road, and he was as near the center as he could properly drive. Clearly the accident occurred, not by reason of any fault on the part of Chapman, in allowing insufficient clearance of the Hartley automobile, but by reason of the Hartley automobile suddenly going out of control and into the oil truck.

POINT II.

THE DEFENDANT CHAPMAN WAS NOT DRIVING AT AN EXCESSIVE RATE OF SPEED, AND THE ACCIDENT WAS NOT CAUSED BY ANY EXCESSIVE SPEED ON THE PART OF CHAPMAN.

The argument that the oil truck was proceeding at an unsafe speed is equally without merit. While the speed of the truck was established practically without dispute at about 35 miles per hour at the moment of the accident, there is no competent evidence in the record that this was not a safe rate of speed for the truck to travel; and there is the uncontradicted expert testimony of Chapman himself, that 35 miles per hour was the minimum safe speed at which the truck could negotiate the hill. The plaintiff relies upon the testimony of the two police officers, fixing the maximum safe speed at 15 to 20 miles per hour. However, as we pointed out in our statement of facts, such opinions, even if admissible, were based purely upon the officers' experience in operating *ordinary passenger type vehicles*. Both admitted,

that they had no knowledge or experience whatsoever with truck and trailer equipment, and admitted, that such equipment by reason of its much greater weight, larger number of wheels and other differences, might be safely operated at a greater rate of speed under the conditions prevailing on the evening of the accident. Chapman, on the other hand, who qualified as an expert in handling of large truck and trailer units, testified that the truck and trailer could not have been operated up the hill at a lesser speed than 35 miles per hour without danger of "spinning out," which would endanger not only that equipment, but also all other traffic on the highway.

Even if a jury might find that 35 miles per hour was an excessive rate of speed under the circumstances, the evidence is clear, and without dispute, that the collision was not caused by speed, but was caused solely by the Hartley automobile going out of control and colliding with the oil truck. The same result would have occurred, if the truck had been going only 20 miles per hour.

POINT III.

THE DOCTRINE OF RES IPSA LOQUITUR HAS NO APPLICATION TO THE FACTS OF THIS CASE.

As a sort of last resort, the plaintiff suggests that he should be entitled to go to the jury under the doctrine of res ipsa loquitur. It requires no extended argument to demonstrate that the doctrine has no application to the facts of this case. It is well settled that in order for that doctrine to apply, the instrumentality causing the damage must have been under the sole and exclusive control

of the defendant, and that the accident must have been of such a nature that it would not ordinarily occur, except as a result of negligent inspection, use or operation. *Loos v. Mountain Fuel Supply Co.*, (Ut.), 108 Pac. (2d) 254. Neither element is present in this case. The truck was not in the exclusive control of Chapman and the Continental Oil Company. On the contrary, it had been knocked completely out of their control by the independent, intervening act of the defendant Hartley. Nor can skidding out of control be said to be such an event as will not ordinarily occur, except as a result of negligence on the part of the operator of the vehicle. On the contrary, courts have long and universally recognized that the most carefully operated vehicle may slide from its operator's control on slick and slippery roads. 5A Am. Jur., 439, Automobiles and Highway Traffic, Sec. 341. The case of *Barret v. Caddo Transfer & Warehouse Company*, 165 La. 1075, 116 So. 563, 58 ALR 261, cited and relied upon by the plaintiff, is ample authority on this point. The court there quoted with approval from *Linden v. Miller*, 172 Wis. 20, 177 N.W. 909:

“Skidding may occur without fault, and when it does occur it may likewise continue without fault for a considerable space and time. It means partial or complete loss of control of the car *under circumstances not necessarily implying negligence*. Hence Plaintiff's claim that the doctrine of *res ipsa loquitur* applies to the present situation is not well founded. In order to make the doctrine of *res ipsa loquitur* apply, it must be held that skidding itself implies negligence. This it does not. *It is a well-known physical fact that*

cars may skid on greasy or slippery roads without fault either on account of the manner of handling the car, or on account of its being there."
(Emphasis ours.)

As was picturesquely said in *L'Ecuyer v. Farnsworth*, 106 Vt. 180, 170 A. 677:

"The sudden and unexpected skidding of an automobile is one of the natural hazards of driving cars on icy roads, and it may happen to the best of operators; and the viatic vagaries of automobiles when skidding on icy roads are as well known to automobile drivers as those of cows."

Other cases to the same effect are found in the annotation in 58 ALR, commencing at page 269, where it is said:

"It has been generally held that the mere fact that an automobile skids on a slippery pavement does not of itself constitute evidence of negligence upon the driver's part so as to render the *res ipsa loquitur* doctrine applicable."

More recent decisions are collected in the annotation in 113 ALR, commencing at page 1014:

Plaintiff relies upon the recent decision of an intermediate appellate court of the state of California, *Barra v. deLaTorre*, (Cal. App.), 300 Pac. (2d) 100. We question the reasoning of the decision, but right or wrong, there were two distinguishing fact elements present in that case not present here. First, in that case, there was dispute in the evidence as to whether there had been an antecedent collision between defendant's vehicle and a third vehicle which had caused the subsequent collision with plaintiff's building. This is of great importance

in determining whether defendant had exclusive control. In the case at bar, the evidence is undisputed, and was developed by the plaintiff himself, that the oil truck was knocked out of control by an antecedent collision with the Hartley automobile, and wholly without fault on the part of the operator of the oil truck. Secondly, the California case did not involve icy slippery roads, such as were involved in the case at bar. And as above noted, skidding out of control on icy roads, does not necessarily bespeak negligence.

POINT IV.

IF DEFENDANTS WERE GUILTY OF ANY NEGLIGENCE, PLAINTIFF WAS EQUALLY GUILTY OF CONTRIBUTORY NEGLIGENCE.

In directing a verdict for the defendants, the trial court took the position that the evidence showed conclusively that the accident was an inevitable or unavoidable accident, not caused by the fault of any party to this action. In other words, the trial court found all of the parties free of negligence. We believe that this holding is not only supported, but compelled, by the evidence. However, we further contend that if the defendants were negligent in any of the particulars claimed by the plaintiff, it must necessarily follow that the plaintiff was guilty of contributory negligence, for the record shows without dispute, that his conduct was of the same kind and nature as that of the defendants, and if what the defendants did could be said to be negligence, it must follow that what the plaintiff did was likewise negligence. If it

was negligent for this defendant to travel 35 miles per hour up the hill, it was most certainly negligent for the plaintiff to travel 30 miles per hour down the hill. The plaintiff by his own admission had reason to suspect that the hill would be more icy than the level road, and a car going down hill is accelerated by gravity, whereas a car going up hill has the aid of gravity in stopping in the event of an emergency. Although the plaintiff claims to have reduced speed between the time he started down the hill, and the moment of impact, the evidence in this regard is very vague. However, the evidence is clear that he appreciated the danger of an accident 50 or 60 feet before the impact occurred, and that he was neither able to stop his automobile within that distance, nor was he able to reduce its speed appreciably. He struck the truck with such force and violence, that both vehicles were damaged to the extent of \$1200, and his own car bounced back up the hill six or eight feet. This was not a light blow.

On page 13 of his brief, plaintiff suggests that the jury had the right to find that Mrs. Hartley was negligent for even trying to negotiate the hill at the time of the accident. If this be so, the jury must also necessarily find that Denison was equally negligent in attempting to do the same thing. Contrary to another statement on page 13 of plaintiff's brief, Mrs. Hartley testified without contradiction or dispute, that she had experienced no difficulty negotiating the hill until the moment when she suddenly lost control of her car. Denison, on the other hand, admittedly had difficulty all the way down.

He first attempted to apply brakes, and found that had no effect whatsoever. He then shifted into second gear, and finally as a last resort cut off the ignition. All of this failed to avoid the accident.

CONCLUSION

Like counsel for the plaintiff, we have been unable to locate any cases so closely similar in point of fact, as might be said to be controlling or determinative of the case at bar. However, the general principles governing this case, are well settled. There is no evidence from which a jury might properly find that the defendants Chapman and Continental Oil Company failed to allow sufficient clearance in passing the Hartley car, nor is there evidence to show excessive speed on the part of these defendants, or that speed on the part of these defendants caused or contributed to cause the accident. The doctrine of *res ipsa loquitur* has no application to the facts of this case. The plaintiff was guilty of the same kind of conduct of which he complains on the part of the defendants. Either the accident was an unavoidable accident, not caused by the negligence of any party, as held by the trial court, or else the plaintiff was guilty of contributory negligence, and as such, was equally culpable for his own loss, and therefore, not entitled to recover. In either event, the judgment of the trial court is correct, and should be affirmed.

Respectfully submitted,

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Continental Oil Company and Chapman