1957

John Kalaher v. Shirley May Brown : Brief of Respondent

Utah Supreme Court

Warren M. O'Gara; Counsel for Respondent;

In the

Supreme Court of the State of Utah

JOHN KALAHER,
Plaintiff and Respondent,

vs.

SHIRLEY MAY BROWN,
Defendant and Appellant.

Case No.
8566

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

STATEMENT OF FACTS

The plaintiff-respondent (hereinafter referred to as the Plaintiff) does agree with the statement of facts contained in the Appellants-defendant's (hereinafter referred to as defendants) Brief so far as the facts have been stated but Plaintiff does point out further facts which are found in the record.

That upon the corner between the intersecting streets of Orchard Drive and 6800 South there was a cherry orchard (TR. 11) ; that Orchard Drive was at a down grade as it comes into the intersection with 6800 South from the

north and 6800 was up grade as it came into the intersection from the northwest (TR. 11).

That the defendant came upon Orchard Drive suddenly and into the path of the plaintiff's auto when plaintiff was very close to the intersection (TR. 16) and that this intersection was a "T" intersection with 6800 South coming into Orchard Drive and not continuing on through.

The Honorable John F. Wahlquist found as the trier of fact that the defendant's negligence in failing to yield the right-of-way, in failing to keep a proper lookout and in going through a stop sign was the sole proximate cause. In relation to the question of contributory negligence, Judge Wahlquist stated that the question of contributory negligence in this case is one of fact rather than of law (TR. 21).

STATEMENT OF POINTS

POINT I

THE COURT DID NOT ERR IN FAILING TO FIND CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PLAINTIFF.

POINT II

THE SOLE PROXIMATE CAUSE OF THE COLLISION WAS THE NEGLIGENCE OF THE DEFENDANT.

POINT III

THAT THE FINDINGS OF THE TRIAL COURT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

ARGUMENT

POINTS I AND II

THE COURT DID NOT ERR IN FAILING TO FIND SOLE CONTRIBUTORY NEGLIGENCE ON THE PART OF PLAINTIFF. THE SOLE PROXIMATE CAUSE OF THE COLLISION WAS THE NEGLIGENCE OF THE DEFENDANT.

The record shows that the plaintiff was proceeding upon a through highway and at the time of approaching the intersection was traveling at about 30 m. p. h. The collision occurred when the defendant suddenly drove her vehicle from a stop sign into the path of the plaintiff's motor vehicle (TR. 3) and when the plaintiff's automobile was so close to the intersection that other motorists were yielding the way to the plaintiff (TR. 16). It should be noted that the highway known as Orchard Drive in Bountiful, Utah is a two-lane highway 22 feet in width (TR. 4). Further the record discloses that the plaintiff turned to his left in an effort to avoid the resulting collision (TR. 9). The facts clearly show a collision resulting from the sole negligence of the defendant driving from a stop sign and into the path of the plaintiff's auto when it was unsafe to do so.

Defendant urges that the Supreme Court must take one statement made by the plaintiff and from it conclude that the plaintiff was negligent as a matter of law and that such negligence proximately contributed to the collision. Plaintiff submits that whether a failure to observe was negligence and a proximate cause of a collision must be determined by considering all the factors involved as to the

situation at the intersection and of the respective drivers at and immediately before the collision.

Leo Butler Co. v. *Wilburn,* 64 S. E. 2d 738, 192 Va. 263,

Winston v. *Wilburn,* 111 P. 2d 764, 8 Wash. 2d 216.

The question of negligence in this instance is not a matter of law but is a question of fact to be determined by the trier of fact.

Lowder v. *Holley,* 233 P. 2d 350, 120 Ut. 231,

Mathias v. *Eichelberger,* 45 P. 2d 619, 182 Wash. 185,

Costo v. *Hansen,* 261 P. 428, 123 Or. 20,

Coombs v. *Perry,* 275 P. 2d 680, . . . Ut. . . .

and further the question of proximate cause of the alleged negligence of plaintiff in failing to observe defendant is one to be determined by the Court sitting as the trier of fact. There is substantial evidence in the record upon which the trier of fact could find that the sole proximate cause of accident was the negligence of the defendant and the alleged negligence of the plaintiff did not proximately contribute to the collision.

Devereaux v. *General Electric Company,* 304 P. 2d 375. . . . Ut. . . .

POINT III

THAT THE FINDINGS OF THE TRIAL COURT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

This case is one based upon negligence of defendant and for damages resulting to plaintiff. Therefore it comes

within the well recognized principle that the Supreme Court is bound by the findings of fact of the lower court which are supported by substantial competent evidence, and that the plaintiff having prevailed in the lower court is entitled to the benefit of the evidence viewed in the light most favorable to him together with every inference and intendment fairly and reasonably arising therefrom.

Wyatt v. *Boughmax,* . . . U. . . ., 239 P. 2d 198,

McCollum v. *Clothier,* . . . U. . . ., 241 P. 2d 468,

Rule 72 (a), Utah Rules of Civil Procedure,

Pender v. *Anderson,* 235 P. 2d 360, . . . U. . . .,

Palfreyman v. *Bates and Rogers Const. Co.,* 158 P. 2d 132, 108 U. 142,

Beckstead v. *Brinton,* 142 P. 2d 409, 105 U. 395.

The testimony of the independent witness Darlene Bach shows that she was waiting in her auto on 6800 South Street for plaintiff to clear before she drove upon Orchard Drive; that defendant "pulled out in front of him (plaintiff)"; that defendant "was sitting there and all of a sudden she just pulled out in the road" (TR. 16). Plaintiff submits that the foregoing facts substantiated by the testimony of the plaintiff constitute substantial evidence upon which the Court could find in light of all the facts presented at trial that the sole proximate cause for the collision was defendant's negligence in failing to yield the right-of-way, failing to keep a proper lookout and in going through a stop sign.

CONCLUSION

The plaintiff and respondent therefore submits that under the law and the facts of this case the Judgment and Findings of the lower court should be sustained.

Respectfully submitted,

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Counsel for Respondent.