

1957

Ida and James Williams v. Zion Cooperative Mercantile Institution : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

MAY 1 - 1957

IDA AND JAMES WILLIAMS,
Plaintiffs and Appellant,

vs.

ZIONS COOPERATIVE
MERCANTILE INSTITUTION,
Defendant and Respondent.

Clerk, Supreme Court, Utah

Case No. 8614

BRIEF OF RESPONDENT

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IN THE SUPREME COURT of the STATE OF UTAH

IDA AND JAMES WILLIAMS,
Plaintiffs and Appellant,

vs.

ZIONS COOPERATIVE
MERCANTILE INSTITUTION,
Defendant and Respondent.

Case No. 8614

BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

The Respondent joins with the Appellant in referring to the parties throughout as they appeared at the trial, i.e., the Respondent being the Defendant therein and the Appellant being the Plaintiff, Ida Williams only. Basically the Defendant joins in the statement of facts as found in Appellant's Brief with the observations and slight variations as shown herein.

STATEMENT OF FACTS

The statement of facts as recited by the Plaintiff herein as to the date and place of the accident and as to the motion of the Defendant are all accurately stated. Since the sole issue in this appeal is as to whether or not the Plaintiff was contributorily negligent as a matter of law, the fact as stated by the Plaintiff and with which the Defendant cannot agree is recited as follows:

“After Plaintiff had started into the intersection, when her car was about 25 feet from the panel truck, it suddenly pulled out of the intersection.” (R. 63, 65)

The Plaintiff herself testified that from a point 25 feet north of the intersection, she did not see nor look in the direction of the truck again until after the point of impact. (R. 50) The only witness to testify as to the position of the vehicles as they entered the intersection was the passenger in the automobile of the Plaintiff, Mrs. Singleton, who testified as follows:

“Q. Where were you in the intersection when you saw the truck start to pull out?

MR. CONDER: I think that would be immaterial as far as this witness is concerned.

THE COURT: I will let her answer.

A. We hadn't got into it exactly.” (R. 63)

STATEMENT OF POINTS

THE COURT DID NOT ERR IN RULING

AS A MATTER OF LAW THAT PLAINTIFF WAS CONTRIBUTORILY NEGLIGENT AND THAT SUCH CONTRIBUTORY NEGLIGENCE PROXIMATELY CAUSED OR CONTRIBUTED TO THE ACCIDENT.

ARGUMENT

POINT I. THE COURT DID NOT ERR IN RULING AS A MATTER OF LAW THAT PLAINTIFF WAS CONTRIBUTORILY NEGLIGENT AND THAT SUCH NEGLIGENCE PROXIMATELY CAUSED OR CONTRIBUTED TO THE ACCIDENT.

We will concede that this court upon reviewing the evidence where there has been a directed verdict must review it in the light most favorable to the Plaintiff in determining whether the Court erred in taking the case from the Jury (See *Nielsen v. Mauchley*, (1949) 115 Utah 86, 202 P. 2d 547). However, since the motion was made at the end of the Plaintiff's case, it will mean that this Court should consider the whole record on appeal. The evidence in this case is uncontradicted that the Defendant's truck was stopped at the stop sign on Third Avenue and facing east. (R. 50) The Plaintiff was traveling south on "B" Street. The Plaintiff was 25 feet north of the intersection when she saw the Defendant's truck, (R. 50) and she assumed that the truck would wait for her to clear through the intersection. She thereafter traversed the 25 feet and the north one-half of the intersection before the impact and never again looked to see the truck until the moment

of impact. During all of this time she was traveling only 20 miles per hour. It should be noted that she testified on direct examination that she was traveling 25 miles per hour (R. 16), however, on cross-examination she changed her speed to only 20 miles per hour (R. 51). This was the same figure that she had given in her deposition. (R. 52) The testimony of a witness on his direct examination is no stronger than as modified or left by his further examination or cross-examination. (See *Alvarado v. Tucker* (1954), 2 Utah 2d 16, 268 P.2d 986) Furthermore, the testimony that the speed was between 20 and 25 miles per hour can only support a finding of 20 miles per hour. (See *Alvarado v. Tucker, supra.*)

The Plaintiff further testified that there was no other traffic in the vicinity. (R. 49) The Plaintiff further called as a witness Mrs. Singleton, a passenger in the Plaintiff's car, who testified that the Defendant's truck started into the intersection before the Plaintiff had reached the intersection. (R 63) These facts present two distinct problems for the court's consideration. First, whether or not the Plaintiff on the favored highway owed a duty in this particular case to observe what is happening to the vehicle on the disfavored highway, which she failed to discharge. This matter has heretofore been discussed by our Court in the cases of *Hickok v. Skinner*, (1948), 113 Utah 1, 190 P.2d 514, and *Conklin v. Walsh*, (1948), 113 Utah 276, 193 P.2d 437, which cases will be discussed in greater detail herein. The second problem presented is whether

or not under these facts, the Defendant having once stopped for the stop sign and yielded the right of way to all vehicles in the immediate vicinity at the time of stopping at the stop sign then had the right of way and the Plaintiff owed a duty to yield the right of way by reason of U.C.A., 1953, Secs. 41-6-72 and 41-6-74.

In the case of *Smith v. Lenzi*, 74 Utah 362, 279 Pac. 893, we have a fact situation involving a city ordinance requiring the individuals to stop at an arterial or through highway and requiring the individual to yield the right of way to vehicles approaching from the left. That case involved an accident at Atkins Avenue and Highland Drive. There was a dispute in the evidence as to whether or not the Defendant had stopped at the stop sign. The jury returned a verdict in favor of the Plaintiff, and the Defendant appealed. This court reversed the jury's decision based upon certain of the instructions of the court. The court in discussing the law held:

“If the respondent stopped immediately before entering Highland Drive, he complied with all the requirements of the ordinance. From that moment he was free to move without restriction, so far as the ordinance is concerned. As he approached Highland Drive after stopping, the statute gave him the right of way as against automobiles coming in the direction the respondent was traveling, and made it the duty of such persons approaching from the left to yield the right of way. But these rights were only relative, and must be applied in the light of the conditions existing at the time.”

This then leads us, in the instant case, to the question, after the Defendant has complied with the statute by stopping and yielding the right of way which of the two vehicles entering the intersection from different highways, has the right of way. The statutory provision U.C.A. 1953, Sec. 41-6-72 (b) says:

“When two vehicles enter an intersection from different highways and at the same time the driver of the vehicle on the left shall yield the right of way to the vehicle on the right.”

Since in our principal case the Defendant's vehicle was proceeding from the west and going east and the Plaintiff's vehicle was proceeding from the north and going south, the Plaintiff's vehicle would be the one on the left if the two vehicles entered the intersection at the same time.

An examination of the record to show which vehicle entered the intersection first shows by the testimony of Mrs. Singleton, who was the only witness to the accident and saw the vehicles as they entered the intersection, that the Plaintiff had not entered the intersection when the Defendant's truck started to pull out. (R. 63)

This then leads to the second inescapable conclusion that the Plaintiff was negligent in failing to yield the right of way since the Defendant had already entered the intersection from a different highway. The statutory provision of U.C.A. 1953, Sec. 41-6-72 (a) states:

“The driver of a vehicle approaching an in-

tersection shall yield the right of way to a vehicle which has entered the intersection from a different highway.”

At the time Mrs. Williams saw the Defendant's truck she testified she was 25 feet north of the intersection. (R. 50) She would then have been besides the 25 feet north of the intersection also the one-half of the width of the intersection there as a distance to travel before the impact. She also testified that she was traveling about 20 miles an hour (R. 51) at the time she saw the Defendant's vehicle. Thus taking the testimony of the Plaintiff in a light most favorable to the Plaintiff, the Defendant had stopped and yielded to the vehicles in the immediate vicinity at the time that he stopped at the intersection. Although the Defendant's driver was not called as a witness to testify the testimony of the Plaintiff would clearly indicate this. The fact that the Plaintiff was under a duty of care for her own safety even though she was traveling upon the favored highway is well established in the law.

The case of *Hickok v. Skinner*, (1948), 113 Utah 1, 190 P.2d 514, is a case which has been recognized by this court and has laid down the well established rule that regardless of which driver is technically entitled to the right of way, both drivers must execute due care and caution for their own safety in proceeding into and across intersections:

“While the burden to drive so carefully as always to be prepared for, and to be able to avoid, the negligence of another should not be placed on either driver, there should be placed on both

the burden to keep a proper lookout and to use reasonable care to avoid a collision. *Neither should be permitted to close his eyes to other vehicles which he knows or has reason to believe are approaching, simply because a state statute or municipal ordinance designates him the preferred driver.* The rights of drivers approaching and crossing intersections are relative. Both drivers have the duties of being heedful and of maintaining a proper lookout. Plaintiff was neglectful in both particulars, and no jury could reasonably find that he was not negligent.” (Emphasis Added)

Blashfield Cyclopedia of Automobile Law & Practice, Perm. Ed. Vol. 2, Section 1037 at page 354 states the following:

“A driver who attempts to cross an intersection looking directly ahead, without looking up intersecting streets for approaching vehicles, and collides with a vehicle approaching from such street, must be deemed guilty of negligence per se, if, had he looked before attempting to cross, he would have seen the colliding car coming a short distance away.”

Such is certainly the case here. Having observed the Defendant’s vehicle stopped at a stop sign, the Plaintiff testified that she then looked straight ahead and failed ever again to look to the right to see what the Defendant’s automobile was doing, and before Plaintiff entered the intersection, the Defendant’s automobile was entering the intersection according to the testimony of Mrs. Singleton the witness in the automobile heretofore referred to.

The facts of the principal case clearly come within the facts of the case of *Conklin v. Walsh, supra*. In that case the Defendant was traveling east on South Temple and the Plaintiff's automobile was coming south on "O" Street. South Temple was the favored highway with stop signs protecting it at the intersection of "O" Street. The important question raised in this case is whether or not the Defendant was negligent as a matter of law. Mrs. Conklin testified that she stopped at the stop sign approaching South Temple. Defendant truck driver testified that he saw her approaching the stop sign but failed to see her stop. The court held:

"The difficult question in this case is whether or not the record established that the driver of the Walsh truck was guilty of negligence as a matter of law. *Mrs. Conklin's testimony that she stopped is uncontradicted.* Walsh was traveling an arterial highway at a fairly rapid rate of speed. He was some considerable distance west of the intersection when he saw the other car approaching from the side street controlled by a stop sign. *He thereafter completely ignored the Conklin car and drove blindly ahead without again checking the position and movement of the other car until too late to avoid colliding with it. The defendant truck driver was not justified in thus ignoring the movement of plaintiff's automobile.* The duty to keep a proper lookout applies as well to the favored as to the disfavored driver. Neither driver can excuse his own failure to observe because the other driver failed in his duty. Neither driver is at any time to be excused for want of vigilance or failure to see what

is plain to be seen. Drivers are permitted to cross over arterial highways after having stopped. True, they must yield the right of way to cars which are close enough to constitute an immediate hazard. *This rule, however, requires the exercise of some judgement. There is still a duty on the part of the driver traveling the arterial highway to remain reasonably alert to the possibility of the disfavored driver starting across the intersection in the belief that he can cross in safety. The duty of keeping a proper lookout attends all those operating motor vehicles, and other rules of the road do not relieve any driver of the necessity of complying with this requirement.*” (Emphasis Added)

The trial court found in this case that the Defendant was negligent as a matter of law and this court on appeal affirmed that decision by saying:

“The driver having failed to see Plaintiff’s automobile until too late to avoid the collision, we see no escape from the conclusion that he did not keep a proper lookout and was guilty of negligence in that omission. The trial court so held.”

The next case to reach this court is the case of *Nielson v. Mauchley*, (1949), 115 Utah 68, 202 P.2d 547. In this case the Plaintiff was traveling along an icy road and failed to see a school bus backing out of a yard until too late to avoid the collision. The trial court held that there was negligence as a matter of law and directed a verdict of no cause of action, which this court reversed because the question of whether or not he had been traveling too

fast and been able to avoid the collision were facts which should have been submitted to the jury. However, the court recognized and again reiterated the doctrine held in *Hickok v. Skinner, supra*, and *Conklin v. Walsh, supra*. The court said:

“The mere fact that Plaintiff had the right of way did not give him a right of proceed without regard to existing conditions. He must exercise due care and act as a reasonably prudent man would act under all pre-existing circumstances.”

Again we say to the court that in this particular case Mrs. Williams when 25 feet north of the intersection gave an utter disregard to the position of the Defendant herein and then proceeded blindly on into and through the intersection.

The next case to consider the rights and liabilities of the drivers at intersections is the case of *Gren v. Norton* (1949), 117 Utah 121, 213 P.2d 356. In this case the Plaintiff entered the intersection of 12th North and 5th West Street in Provo after apparently stopping for a stop sign on 12th North Street. The witnesses testified that the Plaintiff failed to observe the Defendant until shortly before the impact even though he had ample opportunity to do so. This court upon appeal held that the Plaintiff was guilty of negligence as a matter of law. The court held:

“As we held in the *Hickok vs. Skinner* case, *supra*, the fact that the statute gives a motorist a right-of-way into an intersection does not permit him to proceed across without observing the

movement of other vehicles which may be moving into and across the intersection . . . In this particular instance deceased was traveling at a slow rate of speed, should have seen the truck approaching, and could have stopped his car in a very short distance. He should not be charged with avoiding defendant's negligence but he is required to maintain a reasonable lookout for his own safety."

The next case of this court to consider this point is the case of *Spackman v. Carson*, (1950), 117 Utah 390, 216 P.2d 640. In this case the Defendant had a truck parked off from the highway and the Plaintiff traveling on a motorcycle failed to observe the Defendant truck as it proceeded onto the highway and going in the same direction and angled onto the highway. The appeal raised the issue whether or not the lower court erred in denying Defendant's motion for a directed verdict. The court in analyzing this case stated that it was a close case and observed that it was not a case of a vehicle parked off the highway under such circumstances as would "give warning that the driver had moved off the pavement onto the shoulder of the road only momentarily and might at any moment move back onto it as frequently happens with the traveling public." Certainly in the instant case which we have before us now, the Plaintiff should have been aware that the Defendant was in a position at any moment to move forward into the intersection since he had already stopped for the stop sign.

The court goes on to refer to the case of *Conklin v. Walsh*, *supra*, and distinguishes the two cases by

saying:

“Clearly, that case has no application here because there, unlike the instant case, the vehicles which moved onto the arterial highway was about to enter the arterial highway when first observed by the driver of the vehicle on the arterial highway and hence the latter was alerted to the possibility that the right of way might not be yielded to him.”

Certainly in the instant case that application of the Conklin-Walsh doctrine is clearly applicable. The Plaintiff should have been alerted to the fact that the Defendant at any moment was about to move into the intersection, and yet in utter disregard of the Defendant's position the Plaintiff continued on without even looking to the Defendant's truck. The Plaintiff obviously had the duty to see what was there to be seen (*Mingus v. Olsson*, (1949) 114 Utah 505, 201 P.2d 495) and had the Plaintiff observed the Defendant's movements before entering the intersection the Plaintiff would have observed that the Defendant had started forward and was entering the intersection. (R. 63) This is the testimony of Mrs. Singleton, the eye witness.

The next case to consider this particular point of intersection accidents is the case of *Poulsen v. Manness*, (1952) 121 Utah 269, 241 P.2d 152. This case involves the intersection of two country roads with no stop signs at the intersection. The court held that the right of way between the two cars was a matter for the jury. Justice Wolfe in his concurring opinion made the observation that this case differs

from the usual circumstances of city intersections as against the intersections out in the country. Certainly a greater degree of care is required of a driver on traveling the city streets where the traffic is much more congested and cars are traversing intersections at frequent intervals.

In the case of *Martin v. Stevens*, (1952) 121 Utah 484, 243 P.2d 747, we have an intersection case involving 18th East and Stratford Avenue in Salt Lake City. In that case there were no traffic signals or signs controlling traffic at the intersection. The matter of the negligence of the Plaintiff was discussed in the case but the testimony shows that the Plaintiff failed to see the Defendant's automobile until too late to avoid the accident. The court again reviewed the Conklin v. Walsh doctrine and the other cases in support thereof and made this observation:

“In order to avoid burdening this opinion with a repetition and analysis of each of these cases, one principal which distinguishes them from the case at bar can be succinctly stated: *Each of them was decided upon the proposition that the circumstances were such that the driver held to be negligent as a matter of law, either observed, or in the exercise of due care should have observed, the manner in which the other driver was approaching the intersection and clearly could by ordinary reasonable care have avoided the collision. Or to state it in other words, the negligence, or manner of driving, of the other driver was such that the driver appraising the situation was alerted to it or by using due care would have been so alerted in time so that*

by the exercise of ordinary precaution he could have avoided the collision. And, in each of these cases, this seemed to the court so clearly manifest that reasonable minds could not find to the contrary." (Emphasis Added)

The latest case the writer is able to find involving an intersection accident and discussed by this court is the case of *Bates v. Burns, et al*, (1956) 3 Utah 2d 180, 281 P.2d 209. In this case the Plaintiff's vehicle had been the one to stop at a stop sign and then had proceeded into the intersection. There was considerable conflict in the testimony as to the respective distances and speeds of the two vehicles. As the Plaintiff entered the intersection he was looking for traffic approaching from the west. This would be the direction from which the traffic would be coming as he crossed the first half of the highway. He then looked for the traffic coming from the east as he was approaching the center of the highway. This court in discussing this evidence and construing the law said that it would be a jury question, but again recognized that a person on a favored highway has the duty to observe all conditions for his own safety and affirmed the doctrine of the *Conklin v. Walsh* case. Certainly in the principal case the Plaintiff failed to observe the Defendant's vehicle which was stopped on her right side and the position of nearest approach to the intersection. This was true even after she observed that there was no traffic coming from the left and approaching the intersection.

The case of *Hundley v. United States* (1955) 131 F. Supp. 655 involves an intersection accident

between an army vehicle which had stopped for a stop sign and a motorist traveling about 15 miles per hour on a favored highway. Because of the ice-fog condition, the motorist's visibility was limited to 30 feet and in this case the court found that the motorist was guilty of contributorily negligence in failing to keep a proper lookout and in assuming that the vehicle which had stopped for the stop sign would remain at the stop sign. Obviously these facts are applicable to the instant case because the Plaintiff assumed that the Defendant would remain stopped at the stop sign and failed to give heed to his position any more than that.

CONCLUSION

The result in this case should be the affirmation of the lower courts ruling that the Plaintiff, Mrs. Ida Williams, was guilty of negligence as a matter of law, which negligence proximately contributed to or caused the accident herein since she failed to exercise the care of a reasonably prudent person under like or similar circumstances.

Respectfully submitted,

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