

1957

Leonard J. Hudson v. Floyd W. Decker : Brief of Appellant

Utah Supreme Court

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Case No. 8655

IN THE SUPREME COURT

of the

STATE OF UTAH

LEONARD J. HUDSON,

Plaintiff and Appellant,

-v s-

FLOYD W. DECKER,

Defendant and Respondent.

BRIEF OF APPELLANT

RICHARD W. BRANN
DEAN N. CLAYTON
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* * * * *

LEONARD J. HUDSON,

Plaintiff and Appellant,

-vs-

FLOYD W. DECKER,

Defendant and Respondent.

* * * * *

Brief of Appellant

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* * * * *

STATEMENT OF FACTS

This is an appeal by the Plaintiff-Appellant,
hereinafter called Plaintiff, from a judgment for
Defendant-Respondent, hereinafter called Defendant,
on a jury verdict directed by the Honorable Parley
E. Norseth, District Judge, on the 24th day of
January, 1957, in the District Court of the Second

Judicial District, Weber County, Utah. Since the record on appeal is in two parts, Plaintiff will hereinafter refer to the transcript of evidence as (T) and the balance of the record as (R).

At the close of Plaintiff's case in chief, Defendant moved the Court for a directed verdict (T. 86, 87), and the Court took the motion under advisement until the afternoon session. The record does not show, but the writer is confident Defendant will admit, that Defendant also rested and advised the Court in chambers that no further evidence would be offered on behalf of Defendant. Since the facts adduced in the record are undisputed, the question of whether Defendant also rested is important only in that possibly, if not probably, the facts could in no way be explained, varied or controverted by Defendant. Plaintiff's motion for a new trial was denied by the Court on February 11, 1957.

Plaintiff and Defendant, employees of U. S. Hill Air Force Base, were temporarily assigned to Larsen Air Force Base, Moses Lake, Washington, for

one month's duty extending from May 17, 1955, to June 17, 1955 (T. 5, 49, 60, 61). Defendant desired company for the return trip to the parties' residences in Utah and requested Plaintiff to ride with him (T. 61). On June 17, 1955, Plaintiff and Defendant, in Defendant's 1950 Plymouth sedan, drove from Moses Lake, Washington, to Spokane, Washington, lodged overnight and then, about 5:00 o'clock A.M., June 18, 1955, commenced driving from Spokane, Washington, to the place of the accident complained of by Plaintiff (T. 49-52). Defendant drove and Plaintiff was a non-paying guest passenger (T.50, 61).

On June 18, 1955, about 1:00 o'clock P.M., the parties had arrived at a point approximately 44 miles north of Salmon City, Idaho, and approximately 2 miles south of the Summit of Lost Trail Pass, on U. S. Highway 93, within Lemhi County, Idaho (T. 44, 51). The highway was paved and dry, visibility was clear and weather good, and the terrain was mountainous with moderate curving of the highway (T. 6, 67, Plaintiff's Exhibits C, D and E). The Defendant drove

his automobile south from the summit of Lost Trail Pass at a speed between 30-40 miles per hour (T. 51), about 2 miles south of the pass Defendant started to slow down rounding a curve (T. 53), slowed down to "not over ten miles an hour" on the second curve (T. 54), continued to slow down to 5-10 miles an hour (T. 54) and then drove off the highway into a ravine bordering the highway (T. 54, Plaintiff's Exhibits C, E and F). Plaintiff's Exhibits B, F and G show the condition of Defendant's automobile after it landed in the ravine.

Plaintiff's witnesses Harmon W. Cheney, James Larsen and David Burt returning from Moses Lake, Washington, in Mr. Larsen's automobile, saw tracks running off the highway and then saw Defendant's automobile below (T. 6, 7). David Burt took the photographs in evidence (T. 11). Harmon Cheney testified that in the immediate vicinity of where Defendant's automobile went off the highway there was a "thin coat" of loose sand or fine gravel on the paved highway (T. 21, 28), but that he was travelling

at 40 miles per hour in the right lane at this point and had no difficulty whatsoever in negotiating the curve (T. 26, 27, 28).

Plaintiff suffered severe injuries, including a fractured vertebrae and right femur, and incurred considerable medical expenses as a result of the accident (T. 70-81). The medical testimony of Dr. Louis S. Peery is omitted from the record (R. 13). Since there is little chance of dispute as to Plaintiff's receiving more than nominal personal injuries as a result of the accident, the Plaintiff will confine himself primarily to talking about the evidence necessary to raise a question of fact on the issue of reckless disregard.

STATEMENT OF POINTS

POINT I.

The Court erred in sustaining Defendant's motion for a directed verdict and directing a verdict in favor of Defendant and against Plaintiff upon the ground and for the reason that the undisputed evidence in this cause was sufficient to raise a jury question.

ARGUMENT

Plaintiff appeals from a judgment for Defendant on a directed verdict. Only Plaintiff offered evidence in this case and such evidence is undisputed. The rule is established in this state, that upon Plaintiff's appeal from a judgment for Defendant on a directed verdict, this Court will consider and apply the evidence in the light most favorable to Plaintiff's cause of action and every controverted fact shall be resolved in Plaintiff's favor, A. W. Sewell v. Commercial Cas. Co., 80 Utah 378, 15 P. 2d 327; Jackson v. Colston, 116 Utah 295, 209 P. 2d 566; Boskovich v. Utah Const. Co., _____ Utah _____, 259 P. 2d 885, 886. The question here resolves itself into one of whether, after considering the evidence in a light most favorable to Plaintiff, it would be unreasonable to find in favor of Plaintiff under the pleadings. Winchester v. Egan Farm Service, 4 Utah 2d 129, 288 P. 2d 790. Stated another way,

" . . . if by admitting for the purposes of the motion all facts which the evidence, given a reasonable construction in favor of

the adverse party, tends to support or prove, it appears that all essential facts are supported by evidence with respect to which reasonable men may arrive at different conclusions, or the evidence is such that reasonable minds may draw different inferences, the motion should be denied and the case submitted to the jury." 53 Am. Jur., Trial, Sec. 362; Accord: 61 C.J.S. Motor Vehicles, Sec. 526.

The Utah Rules of Civil Procedure are directly descended from the Federal Rules of Civil Procedure, although they contain a few modifications to suit local practice. Rule 50 (b), U.R.C.P., provides, in substance, that whenever a motion for a directed verdict is made at the close of the evidence and denied for any reason, the trial court is deemed to have submitted the cause to the jury subject to a later determination of the legal questions involved. The U. S. Circuit Court in Fratta v. Grace Line (C.C.A.2d) 139 Fed.^{2d} 743, 744, admirably states the text authority and Federal view of the intent and purpose of Rule 50 (b):

"We take this occasion to suggest to trial judges that, generally speaking--although there may be exceptions--it is desirable not to direct a verdict at the

close of the evidence, but to reserve decision on any motion therefor, and to allow the jury to bring in a verdict; the trial judge may then, if he thinks it improper, set aside the verdict as against the weight of the evidence and grant the motion, F.R.C.P., Rule 50 (b) . . . with the consequence that if, on appeal, we disagree with him, we will be in a position to reinstate the verdict, thus avoiding the waste and expense of another trial." See also: Moss v. Pa. R. Co., 68 F. Supp. 740; Barron & Holtzoff, Federal Practice and Procedure, Sec. 1076.

Few things are more devastating to a trial lawyer than a directed verdict. A jury verdict of no cause of action can be explained to a client as the conclusion of eight reasonable persons of ordinary and varying experience. A directed verdict is the conclusion of one person resulting from his attitudes and experience alone. Ordinarily, if a case is slim on questions of law or liability, a jury verdict of no cause of action kills the litigation for everyone concerned. A directed verdict usually requires an appeal and, if the trial court was wrong, another trial resulting in double expense to litigants and the State and possible loss to Plaintiff's cause by lapse of time and loss of evidence. Ofttimes,

verdicts are directed in the heat of the trial and under pressure. If the issues be submitted to the jury and then retained under advisement by the Court for ten days, then surely there is time for calm and dispassionate consideration and evaluation of the record and the law, presumably giving rise to far less chance of error and possibly cutting down the number of appeals and retrials. Rule 50 (b), U.R.C.P., was drawn in the light of such considerations.

Plaintiff's complaint alleged and the evidence showed that Plaintiff was injured in the State of Idaho while being transported by Defendant as a guest (R. 1). The Idaho "guest statute," Sec. 49-1001, Idaho Code was pleaded and reads as follows:

"No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause for damages against such owner or operator for injuries, death or loss, in case of accident, unless such accident shall have been intentional on the part of the said owner or operator or caused by his intoxication or his reckless disregard of the rights of others."

After much confusion, the Idaho Supreme Court crystallized a definition of "reckless disregard" as

follows:

"The term 'reckless disregard' as used in said section means an act or conduct destitute of heed or concern for consequences; especially foolishly heedless of danger, headlong rash; wanton disregard, or conscious indifference to consequences."

q- Foberg v. Harrison, 71 Idaho 11, 225 P. 2d 69, 71; Turner v. Purdum, (Idaho), 289 P. 2d 608, 611, and see other cases cited therein. q-

This Court, in Shoemaker v. Floor, 117 Utah 434, 217 P. 2d 382, recognized the Idaho view that reckless means "to hold the driver liable for a lesser degree of negligence than an 'intentional' act" and in said case this Court cited with approval Hughes v. Hudelson, 67 Idaho 10, 169 P. 2d 712, which reversed a nonsuit and held the evidence sufficient to make a prima facie case. In the Hughes case, supra, proof of a 45 mile speed together with physical facts showing the host to have driven his vehicle partially on a soft shoulder 360 feet before returning to the highway and overturning, thereby killing the guest, "constitute sufficient proof to make a prima facie case to put the Defendant on his proof".

The only issue in this case at the bar is

whether Plaintiff's undisputed evidence was sufficient to go to the jury for determination of the ultimate issues raised by the pleadings. What constitutes reckless disregard is a question of fact, each case standing to a large extent on its own bottom and, therefore, decided cases being of little aid in resolving the question. Von Lackum v. Allan, 219 OK F. 2d 937, 938. Plaintiff's evidence of "reckless disregard" is undisputed, but almost wholly circumstantial. However, as noted in 20 Am. Jur., Evidence, Sec. 1189, "In many instances facts can be proved only by circumstantial evidence, and in some instances even though there is direct testimony, the circumstantial evidence given may outweigh, or be more convincing than direct or positive testimony."

McCormick, Law of Evidence (1954), Sec. 306, discusses burden of producing evidence in a clear and sound manner. He points out that in the usual civil case, the Plaintiff passes through three stages of judicial hospitality: (1) where if Plaintiff stops, he will be thrown out of Court; (2) where if Plaintiff

stops and Defendant does nothing, the issues are submitted to the jury; and (3) where if Plaintiff stops and Defendant does nothing, a verdict will be directed in Plaintiff's favor. Strictly speaking, the burden of going forward does not shift until stage three since Defendant can refuse to go forward and yet not suffer a directed verdict, until stage three. It is Plaintiff's contention in this case that Plaintiff clearly arrived safely at stage two, although there may be room for argument as to whether Plaintiff arrived at stage three. Plaintiff vigorously asserts that a reasonable jury could infer the fact of Defendant's "reckless disregard" from the undisputed evidence presented.

The Defendant, as an adverse witness, testified that he drove his automobile from the summit of Lost Trail Pass at a speed between 30-40 miles per hour (T. 53), that he slowed down to "not over ten miles an hour" rounding the curve immediately preceding the modest curve on which the accident occurred (T. 53), that he continued to slow down to 5-10 miles per hour

(T. 54) and that he then drove off the highway into the deep ravine below (T. 54, Plaintiff's Exhibits C, D, E and F). No reason or explanation was at any time given by Defendant as to why he drove off the highway.

At the place where Defendant drove his automobile off the highway, the weather was good and visibility clear, and the highway was paved and dry (T. 6, 67, Plaintiff's Exhibits C, D and E). Plaintiff's Exhibits C, D and E clearly show that the curve at this point was considerably less than severe. True, there was a thin coat of sand or gravel on the highway, but this did not interfere with the negotiation of this curve at forty miles per hour by Plaintiff's witness Harmon Cheney a few minutes after Defendant drove off the highway (T. 21, 26, 27, 28). In any case, there is not a scintilla of evidence in this case that such sand or gravel interfered with Defendant's operation of his automobile or that there was any other intervening agency that caused Defendant to drive off the highway.

Ordinarily in a guest case, the Plaintiff is claiming excessive speed. In the case at the bar, Plaintiff does not claim excessive speed, but that, according to Defendant's testimony, the speed was so very modest that only intentional or reckless disregard could have brought about this accident. There is absolutely no evidence of an intervening agency bringing about the driving off the highway. The Idaho case Mason v. Mootz, 253 P. 2d 240, and the Utah case, Riccuiti v. Roberson, 2 Utah 2d 45, 269 P. 2d 282, both argued vigorously to the trial court by Defendant, do not have any relevance or application to this case at the bar because both involve intervening agencies, a horse in the first case and the dropping of a lighted cigarette in the second case. Obviously, a blow out, or ice, or an animal, or the driver looking for an insect or cigarette are all instances of intervening agencies that explain away what otherwise might be intentional conduct or reckless disregard. In the instant case, it is again emphasized that there is no evidence whatsoever

of an intervening agency giving rise to an explanation of why Defendant drove off the highway at the time and place alleged by Plaintiff.

The case of Hebert v. Allen, (Iowa) 41 N.W. 2d 240, sums up Plaintiff's position in this case. In the Hebert case, Defendant was travelling 15-20 miles per hour on a straight road and suddenly, without known reason, swerved from the highway into a telephone pole, thereby injuring Plaintiff who was riding on the fender. The Iowa Supreme Court reversed a directed verdict and, among other things, said:

"But though the doctrine of *res ipsa* may not apply, it was not for the court to imagine possible explanations other than the obvious one of recklessness. The day was clear and bright, there was no other vehicle in sight, the terrain was flat, there is no evidence of any unusual street condition, the car was apparently under the driver's complete control a matter of seconds before the "accident," no diverting circumstances are shown. When the car started to swerve one of the passengers said to the other "He is probably trying to scare us." That was the natural explanation that came to the mind of one witness as a part of the *res gestae*. It is a reasonable one under this Record. As was said in White v. Center, supra, 218 Iowa, at page 1033, 254 N.W. at page 92: "We have no evidence on the part

of the Defendant, and, if we are to indulge the imagination and conjure possibilities, there is practically no limit to which we may not go. * * * If, before the Plaintiff can make out a case, he must negative every possibility which might relieve the Defendant from liability, it would be practically impossible to establish a case of negligence or recklessness against the driver of any automobile. Surely, this is not the law. * * *

"Neither court nor jury has any way to learn the mental attitude of the driver except by inference from his conduct. As said in Mescher v. Brogan, 223 Iowa 573, 581, 272 N.W. 645, 650: "It is the action and conduct * * * that measure the degree of care and determines whether or not one is proceeding * * * with a heedless disregard for * * * the rights of others."

"Defendants would have us hold there was no evidence here as to the driver's "actions and conduct" from which an inference of recklessness could be drawn. This we cannot do. The movement of the car, under the Record presented, was some evidence of the conduct of the driver. This is not to say "res ipsa loquitur." It would be just as true if the car had never struck the pole--if there had been no "accident."

"We have said that while no presumption of negligence arises from the mere fact of injury, "Such presumption may and often does arise from the nature of the cause or manner of the injury." Cahill v. Illinois Central R. Co., 148 Iowa 241, 246, 125 N.W. 331, 332, 28 L.R.A., N.S., 1121.

"The statute creates liability for injury due to "reckless operation" of the car. Certainly the jury could have found under this Record that the car was being

operated by Defendant Hildebrand. And whether such operation was reckless was clearly a jury question.

"We have examined all the cases cited by Defendant in support of the court's ruling. Our decision here does not run counter to the ruling in any of them."

Another case in point is Doheny v. Coverdale, (Mont.) 68 P. 2d 142, where the guests were killed and only circumstantial evidence was available indicating the automobile was driven off the road into a tree without reason showing. The Court held the circumstantial evidence sufficient to raise a jury question on the issue of gross negligence and reckless operation. Also see Thompson v. Kost (Ky.) 194 S.W. 2d 976; Orico v. Williams, (Conn.) 97 A. 2d 556.

Handwritten note:
"and re. name may"

Assume, for purpose of discussion only, that Defendant did in fact consciously and intentionally drive his automobile off the embankment in this case. What further proof could Plaintiff produce of such intentional conduct in this case? Presumably, on a direct question, Defendant would emphatically deny such intentional conduct, yet the denial would not

change the ultimate fact. Who, besides the Defendant, on this earth can possibly know the mental workings of Defendant's mind at the time he drove off the embankment. As a practical matter, reasonable men must determine a man's intent from all the facts and circumstances surrounding the incident in question. If the facts point in one direction, then the burden should shift to the Defendant to show additional facts pointing in another direction. Psychiatrists have long recognized that more than a few automobile accidents are intentional in that they are the result of conscious or subconscious feelings of aggression, guilt or self-destruction. The question, as in this case, is how far an injured claimant must go in proving such intentional conduct by circumstances in order to raise a jury question.

There is no dispute in the evidence regarding Plaintiff's severe injuries, including a fractured vertebrae and right femur, and extensive medical treatment and hospitalization (T. 70-81 inc.) and medical expenses exceeding \$1,000.00 (Plaintiff's

Exhibits A and H). Little more need be said on Plaintiff's medicals since the Court directed its verdict for failure of proof on the issue of reckless disregard (T. 88, 89).

CONCLUSION

The evidence was sufficient to go to the jury on the issue of Defendant's "reckless disregard" where the undisputed evidence showed Defendant drove his automobile off the highway into a deep ravine below, without explanation or reason given, while operating his automobile at a speed reduced from 35-40 miles per hour to 5-10 miles per hour on a dry paved highway with visibility good and only a modest curve at the point of leaving the highway.

Respectfully submitted,

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