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Raymond Hirschback v. Dubuque Packing Co. : Brief of Appellant

Utah Supreme Court

Skeen, Worsley, Snow & Christensen; Attorneys for Appellant;

IN THE SUPREME COURT
of the
STATE OF UTAH

RAYMOND HIRSCHBACH,
Appellant and Plaintiff,

— vs. —

DUBUQUE PACKING CO.,
a corporation, and
GIFFORD-WILSON,
Respondents and Defendants.

No. 8661

BRIEF OF APPELLANT

SKEEN, WORSLEY, SNOW
& CHRISTENSEN
Attorneys for Appellant

1501 Walker Bank Building
Salt Lake City, Utah

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FACTS OF THE CASE

This appeal is from a Summary Judgment entered February 21, 1957, dismissing the Amended Complaint of Appellant, hereinafter referred to as Plaintiff (R. 40).

On May 29, 1956, Plaintiff filed his Amended Complaint alleging that on or about September 5, 1955, on U.S. Highway 40-50, a public highway within the State of Utah, approximately four miles west of Knolls, Utah, Defendants negligently parked a motor vehicle and as a

result a collision occurred, causing damage to Plaintiff's motor vehicle in amount $6,921.79, loss of use in amount $1,500.00 and damage to cargo in amount $2,399.20 (R. 9, 10, 11).

On December 17, preliminary motions having been disposed of, Defendants filed their Answer and Counterclaim admitting the collision but denying the other material allegations of the Amended Complaint, alleging contributory negligence upon the part of Plaintiff's driver and demanding damages by way of counterclaim in amount $8,358.27 (R. 24, 25, 26, 27, 28).

Also on December 17, 1956, Defendants served and filed Interrogatories pursuant to Rule 33, Utah Rules of Civil Procedure, designed to obtain an admission that there was no obstruction to the vision or view of Plaintiff's driver at the time he approached the place where Defendants' tractor and trailer were parked (R. 29, 30). The Answer to these Interrogatories showed that the view of Plaintiff's driver was not obstructed (R. 33).

On February 7, Defendants served their Motion for Summary Judgment under Rule 56, Utah Rules of Civil Procedure, upon the ground that as a matter of law Plaintiff's driver was negligent and such negligence was a proximate cause of the accident and damage sustained by Plaintiff (R. 38). This motion was noticed for hearing on February 19, 1956, and in view of the difficulty of obtaining an affidavit from Plaintiff's

driver, a non-resident, it was agreed between counsel for Plaintiff and Defendants that counsel for Plaintiff file an affidavit based upon the written statement of Plaintiff's driver, in lieu of the driver's affidavit. This agreement was brought to the attention of the Court prior to the hearing on Defendants' motion and for purposes of the motion the facts summarized in the affidavit were taken as true. From this affidavit the following facts appear:

Immediately prior to the accident, Plaintiff's driver, Byers, was proceeding in a westerly direction along U. S. Highway 40-50 at approximately 40 miles per hour. It was night time. The weather was clear and visibility was good. The highway was straight, level, dry, black-top and in a good condition. It consisted of two lanes separated by a painted line. Byers had his driving and clearance lights on. His driving lights were sufficient to disclose vehicles at a distance of at least 350 feet ahead and were functioning properly. Byers' brakes were sufficient to stop his truck and trailer within 30 feet after application at a speed of 20 miles per hour and were in good working order. As Byers approached the scene of the accident, he observed the clearance lights of Defendants' trailer ahead of him. At this time Byers could have stopped in time to avoid a collision. However, he erroneously concluded that Defendants' trailer was moving. He continued to observe the trailer as he approached, but remained under the erroneous impression that it was moving in the same direction he

was. When Byers realized that the trailer was stopped, he immediately swerved to the left and endeavored to apply his brakes; but he was unable to avoid the collision. There were no flares warning of the presence of Defendants' trailer; there was no flagman directing traffic; there was no warning of any kind to approaching traffic that the trailer was stopped except the mere presence of the trailer itself (R. 36, 37).

The Court concluded that Plaintiff's driver was guilty of negligence proximately contributing to the accident as a matter of law under the rule announced in *Dalley v. Midwestern Dairy Products Co.*, 80 Utah 331, 15 P.(2d) 309 (1932), and entered judgment dismissing plaintiff's Amended Complaint, from which judgment this appeal is taken.

STATEMENT OF POINTS

THE DISTRICT COURT ERRED IN GRANTING THE MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT.

ARGUMENT

THE DISTRICT COURT ERRED IN GRANTING THE MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT.

Plaintiff contends that the Dalley Case is not applicable to the facts of this case and, therefore, a genuine issue of fact exists relative to the alleged contributory negligence of Plaintiff's driver.

In the Dalley Case the plaintiff's automobile struck an unlighted truck parked partly upon the traveled portion of the highway. The court said plaintiff either did not keep a lookout ahead or if he did he either did not heed what he saw or could not see the truck because his lights were not such as were prescribed by law—either of these alternatives constituting negligence as a matter of law. In that case, the plaintiff testified that he did not see the standing truck until he was within 15 or 20 feet of it, that he was then so close that he was unable to avoid the collision.

Citing *Nikoleropoulos v. Ramsey,* 61 Utah 465, 214 P. 304 (1923), and *O'Brien v. Alston,* 61 Utah 368, 213 P. 791 (1923), the Utah Supreme Court said:

> "In this jurisdiction the doctrine is established that it is negligence as a matter of law for a person to drive an automobile upon a traveled public highway, used by vehicles and pedestrians, at such a rate of speed that said automobile cannot be stopped within a distance at which the operator of said car is able to see objects upon the highway in front of him."

It is apparent that in the case now before this Court the driver *could* have stopped within the distance at which he was able to see objects upon the highway in front of him and hence the very foundation of the Dalley Case will not support its application to this case.

It is believed that a brief resume of the decisions considering the Dalley Case may serve to point up the

fundamental differences of the case now before this Court.

In *Hansen v. Clyde, et al.,* 89 Utah 31, 56 P.(2d) 1366 (1936), the failure of the plaintiff driver to see the barrier which his automobile struck was due to the character of his headlights and a curve in the highway. Citing the Dalley Case, our Supreme Court said:

> "When a driver upon a public highway with his light equipment cannot see more than 50 feet ahead of him, it is his duty to drive at such speed as will enable him to stop within that distance."

The facts alleged in *Nielsen v. Watanabe,* 90 Utah 401, 62 P.(2d) 117 (1936), were held not to bring that case within the rule of the Dalley Case where the driver was suddenly and unexpectedly blinded by the headlights of an oncoming car.

A similar result was reached where there was an accumulation of smoke and mist with visibility further impaired by the glare of headlights of an approaching automobile. *Moss v. Christensen-Gardner, Inc.,* 98 Utah 253, 98 P.(2d) 363, (1940).

In *Olson v. Denver & R.G.W.R. Co., et al.,* 98 Utah 208, 98 P.(2d) 944 (1940), our Supreme Court said that railroads have a right to presume that motorists on crossing streets will proceed carefully and lawfully and will drive with their cars in such control as to be able to stop within the distance at which they can see objects ahead.

Where a bus driver entered a patch of dense fog suddenly, it was held that he was not guilty of negligence as a matter of law in striking an automobile upon the highway in *Trimble, et ux., v. Union Pacific Stages, et al.,* 105 Utah 457, 142 P.(2d) 674 (1943); and, a curve in the road obscuring the obstruction was sufficient to avoid application of the Dalley Case in *Hodges v. Waite,* 2 Utah (2d) 152, 270 P. (2d) 461, (1954).

In *Wright v. Maynard,* 120 Utah 504, 235 P.(2d) 916 (1951), the court observed that although the driver was not able to stop within the distance he could see substantial objects in front of him, still he saw them in time and had sufficient control of his car to turn aside and avoid running into them had they remained stationary. The plaintiff, however, moved from his position near the door of a stalled car and jumped into the path of defendant's car. It was held to be a question for the jury to determine whether defendant's inability to stop was the proximate cause of the accident or whether that cause was the unexpected change of position by plaintiff.

In *Takataro Shiba, et al., v. Weiss, et al.,* 3 Utah (2d) 256, 282 P.(2d) 341 (1955), an accident occurred on a stretch of highway which was straight and level for at least a distance of about one-half mile from the point where the collision occurred and since there was no evidence of any obstructions to the view of the driver, and since there was additional evidence of excessive speed, the court said by way of dictum that the driver of the

automobile in striking a truck parked partly on and partly off the highway was guilty of negligence as a matter of law. This point, however, was not directly involved in the appeal.

In *Benson v. Denver & Rio Grande Western R. R. Co.*, et al., 4 Utah (2d) 38, 286 P.(2d) 790 (1955), the court reaffirmed the rule announced in Dalley v. Midwestern Dairy Products Co., in its identical language:

> "In this jurisdiction the doctrine is established that it is negligence as a matter of law for a person to drive an automobile upon a traveled public highway, used by vehicles and pedestrians, at such a rate of speed that said automobile cannot be stopped within the distance at which the operator of said car is able to see objects upon the highway in front of him."

The facts bringing the Benson Case within the rule of the Dalley Case were the admissions of the plaintiff that he was traveling at a speed at which he could not stop his automobile within the distance of visibility.

The Dalley rule was again applied in *Fretz v. Anderson*, 5 Utah (2d) 290, 300 P.(2d) 642 (1956), where an overturned automobile was observed on the east half of a paved road by a Ringsby truck driver who was traveling south on the west half of the pavement. The truck driver stopped a short distance beyond the wreck and parked partly on the west shoulder. While he was preparing to set out flares, plaintiff, driving north, smashed into the damaged car apparently because of

being temporarily blinded by the lights of the truck. In holding the negligence of the plaintiff to be for the jury the court said:

> "The rule that a motorist is normally required to so operate his machine as to be able to see and avoid substantial discernible objects in the road ahead is generally recognized, as is its concommitant that the motorist must equip his machine with proper headlights and be able to stop within the distance of the lights' projection. However, this does not mean that a motorist striking an object in the highway is guilty of negligence as a matter of law under any and all conditions. The case of Dalley v. Midwestern Dairy Products Co., 80 Utah 331, 15 P.(2d) 309 upon which appellant relies merely announces that general rule, holding that the plaintiff who struck an unlighted truck on an unobstructed highway was guilty of contributory negligence either in failing to maintain the proper lighting equipment or in failing to observe what proper lights would have shown."

These decisions have been briefly summarized to illustrate the factual foundation essential for the application of the rule. In each of the cases where the rule has been applied the driver has been guilty of negligence in one or more of these particulars:

1. Driving at a speed rendering it impossible to stop within the range of apparent visibility; or

2. Failing either to see or heed that which would have been visible at a time when a collision could have been avoided at the speed then employed; or

3. Improper lights or brakes.

Here, none of these is present. The driver of Plaintiff's truck could have stopped within the range of his headlights, could have avoided the collision after discovering the presence of Defendants' truck and had his truck equipped with proper lights and brakes. Here, we have at most a mere error in judgment—a matter traditionally within the province of the jury. *Smith v. Bennett,* 1 Utah (2d) 224, 265 P.(2d) 401 (1953).

In the Dalley Case, the parked truck was unlighted; here, there were the usual driving lights. This might on first impression seem to make Plaintiff's driver all the more negligent, yet, on further consideration it is obvious that this very fact caused his confusion.

Where the parked vehicle is unlighted, as in the Dalley Case, or is not a vehicle normally found on roads, as in the Benson Case, or is not in a normal position, as in the Fretz Case, no exercise of judgment is required. Defendants' truck being in a position normally occupied by moving vehicles, lighted in the customary fashion, engendered the misconception and proximately caused the accident.

It was so held in *Davis, et al., vs. Browne, et ux.,* (Wash., 1944) 147 P.(2d) 263, where suit was brought by Davis and others for personal injuries sustained as a result of a collision between the Davis car and the Browne car. The road where the collision occurred was

straight and level; the Browne car was stopped in the middle of the yellow line dividing the two northerly lanes for the purpose of a change of seats and drivers. The tail lights of the car were aglow as were the headlights. The Davis car approached from the same direction at a speed of 35 to 40 miles per hour. The driver observed the Browne car at a distance which he estimated to be 500 feet. He thought the car was moving and veered slightly to the left with the apparent intention of passing the Browne car. When about 100 feet from the Browne car he realized that it was not in motion and immediately applied his brakes and swerved to the left to avoid a collision. The right front end of the Davis car struck the left rear end of the Browne car. In affirming a judgment for the plaintiffs the Supreme Court of Washington said:

> "The mere fact that Davis did not realize that the Browne car was stationary upon the highway until he himself was within approximately one hundred feet of it cannot be said to constitute negligence on his part regardless of all other circumstances. It was, of course, his duty to exercise reasonable care, under the existing circumstances, to observe the presence of the automobile ahead of him and avoid coming in contact with it. At the same time, he had the right to assume, until the contrary became reasonably apparent, that other users of the highway would conform to the rules of the road, and, likewise, to assume that a car ahead of him was in motion rather

than that it was standing still in the middle of the road contrary to the positive injunction of the statute."

* * *

"In this instance, Davis was traveling along a course and at a rate of speed in conformity to law. Seeing the car ahead and thinking it was in motion, he veered slightly to his left when two hundred fifty feet away, with the evident intention of overtaking and passing that car. Had the car ahead been moving, Davis most probably would have succeeded in passing it in safety. It was not until he was within approximately one hundred feet of the Browne car, that either he or his companions realized that it was standing still. We are unable to say that the trial court was in error in refusing to hold that, under the existing circumstances, Davis was guilty of negligence in not sooner discovering that the Browne car was stationary."

There was a vigorous dissent in this case by one justice who viewed this as an "assured clear distance ahead" case, under a doctrine which had been the law of the State of Washington since 1920, the doctrine of our own Dalley Case. *Ebling v. Nielsen, et al.,* (Wash., 1920) 186 P. 887. Thus, in a jurisdiction committed to the Dalley rule the error in judgment distinction was recognized. To fail to recognize this distinction under modern traffic conditions would, to use the words of Justice Wolfe, ". . . make driving at night on much used

arterials practically an impossibility." *Moss v. Christensen-Gardner, Inc.,* 98 Utah 253, 98 P.(2d) 363 (1940), dissenting opinion.

Today's traffic realities quite literally require split second decisions. A minimum legal headlight will disclose objects only 350 feet ahead. 41-6-134(a), U. C. A., 1953. A minimum legal brake will not stop an automobile going at the maximum legal speed at night time of 50 miles per hour in less than 250.9 feet, 41-6-144(b), U. C. A., 1953, leaving only 100 feet for perception time and reaction time, which, at 50 miles per hour, allows only about 1.4 seconds. Perception time and reaction time vary from approximately ¾ of one second under daylight conditions to as much as three seconds under night time conditions. Even applying, however, the daylight average reaction time as was done in the Benson Case reduces the time for making a decision, which could perhaps be termed the "judgment time," to approximately .6 seconds. A person having a three second reaction time under night time conditions, of course, would have insufficient time to stop, much less for the exercise of judgment.

The time for the exercise of judgment under conditions permissible under the motor vehicle code is exceedingly small and a slight indecision, a slight delay, an erroneous first impression or a momentary confusion may indeed be fatal.

Reasonable minds *can* differ as to whether such indecision, delay or momentary confusion is negligence under the circumstances of this case.

CONCLUSION

Appellants respectfully urge that there was a substantial question of fact generated by the pleadings, Interrogatories, Answer to Interrogatories and Affidavit, all before the Court at the time of hearing upon Defendants' Motion for Summary Judgment. This question of fact is: Did the failure of Plaintiff's driver to perceive that Defendants' truck was stopped on the highway, rather than moving, amount to negligence or was this an error in judgment consistent with the exercise of due care? This being so, the lower Court erred in granting Defendants' Motion for Summary Judgment and dismissing Plaintiff's Amended Complaint with prejudice and upon the merits.

Respectfully submitted,

SKEEN, WORSLEY, SNOW
& CHRISTENSEN

Attorneys for Appellant