

1957

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

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Hirschbach v. Dubuque Packing Co.*, No. 8661 (Utah Supreme Court, 1957).
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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

JUL 17 1957

RAYMOND HIRSCHBACH,
Plaintiff and Appellant

Clerk, Supreme Court, Utah

vs.

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

BRIEF OF RESPONDENTS

**MORETON, CHRISTENSEN
& CHRISTENSEN AND
JAMES A. MURPHY**

Attorneys for Respondents.

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IN THE SUPREME COURT
of the
STATE OF UTAH

RAYMOND HIRSCHBACH,

Plaintiff and Appellant

vs.

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

Defendants and Respondents.

Case No. 8661

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

The respondents deem it necessary to add the following to the statement of facts as set forth in the brief of appellant. The driver of the appellant's vehicle was an employee, (R. 3), and, at the time of the accident was driving it in the course of his employment. (R. 10). The statement that the respondents were negligent (App. Br., pg. 1), and the further statement as to the amount of damages suffered by the appellant, if any, (App. Br. pg. 2), are wholly irrelevant and immaterial to this appeal. As we see it, the sole issue boils down to whether, under the facts of this case, the appellant was guilty of negligence as a matter of law.

STATEMENT OF POINTS TO BE ARGUED

POINT I.

THE DISTRICT COURT DID NOT ERR IN GRANTING THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT.

ARGUMENT

A long and unbroken line of Utah decisions well establishes the law applicable to the facts of this case. Although there are earlier decisions, what is generally regarded as the leading Utah case on the subject, is *Dalley vs. Midwestern Dairy Products Co.*, 80 Ut. 331, 15 Pac. (2d) 309, where the court quoted with approval from the case of *O'Brien vs. Alston*, 61 Ut. 368, 213 Pac. 791, as follows:

“But entirely apart from any statutory requirements, the law requires that, if a person desires to operate his automobile on the public streets or highways after dark, he must see to it that it is equipped with proper, suitable, and sufficient lights, so that the operator may discover any objects or obstructions that may be encountered on the highway. The law in that regard is clearly and tersely stated in *Serfas v. Lehigh, etc., Ry. Co.*, 270 Pa. 306, 113 A. 370, 14 A.L.R. 791, where the court, in speaking of the duty of the operator of an automobile to have the same equipped with proper lights, said:

“ * * * It is the duty of a chauffeur traveling by night to have such a headlight as will enable him to see in advance the face of the highway

and to discover grade crossings, or other obstacles in his path, in time for his own safety, *and to keep such control of his car as will enable him to stop and avoid obstructions that fall within his vision.*'” (Emphasis Ours)

The rule expressed imposes a duty upon persons operating vehicles on our highways at night, not only to have the vehicle equipped with adequate lights, but also to heed the obstructions that they see within the range of their lights and to maintain sufficient control of their vehicle to avoid such obstructions.

On the night of the accident in the case at bar, the weather was clear and visibility good. (R. 36). The view of appellant's driver was unobstructed, (R. 33), and he observed the parking lights of the respondents' trailer. The appellant's driver failed to heed this clearly visible obstruction until it was too late to avoid the collision, (R. 36), and the accident ensued.

In the most recent expression of this court in the case of *Fretz vs. Anderson*, 5 Utah (2d) 290, 300 Pac. (2d) 642, the court at page 648 of that case stated:

“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 concomitant that the motorist must equip his machine with proper headlights and be able to stop within the distance of the lights' projection.” (Emphasis Ours.)

The facts of this case bring it clearly within the operation of the above quoted rule. The obstruction in the road, or the object parked on the road, respondents' trailer, was discernible, and it was not avoided, either by stopping or by turning aside.

We recognize, of course, that exceptions to the Dalley Rule have been created where the driver's view of the stationary object in the collision was in some way obstructed, e.g. smoke, mist and headlight glare in *Moss vs. Christensen-Gardner, Inc.*, 98 Ut. 253, 98 Pac. (2d) 363; the blinding headlights in *Neilson vs. Watanabe*, 90 Ut. 401, 62 Pac. (2d) 117; the dense fog in *Trimble vs. U. P. Stages*, 105 Ut. 457, 142 Pac. (2d) 674; and the curve in the road in *Hodges vs. Waite*, 2 Utah (2d) 152, 270 Pac. (2d) 461. However, in the case at bar by the appellant's own admission, there was no obstruction to the driver's view of the stopped vehicle of respondent, immediately prior to the accident, and therefore, nothing to take the case out of the operation of the Dalley rule.

Two post-Dalley cases, *Olson v. D. & R. G. R. R.*, 98 Ut. 208, 98 Pac. (2d) 944, and *Horsley vs. Robinson*, 112 Utah 227, 186 Pac. (2d) 592, have recognized that the Dalley rule is not limited to the concept that a person operating a vehicle on the highway must drive at a speed at which it is possible to stop within the range of apparent visibility. The court, in the latter case, in commenting on *Nickoleropoulos vs. Ramsey*, 61 Ut. 465, 214 Pac. 304, stated at page 598:

"We held that defendant was negligent as a matter of law, no matter how dark and stormy the night or how bad the visibility, if he drove at such a rate of speed that he was unable to avoid running plaintiff down within the distance plaintiff could be seen walking ahead of defendant's car on the highway. To the same effect see: *Dalley vs. Mid-Western Dairy Products Co.*, 80 Ut. 331, 15 P. 2d 309, *Haarstrich v. Oregon Short Line Co.*, 70 Ut. 552, 262 P. 100; *O'Brien v. Alston*, 61 Utah 358, 213 Pac. 791."

"The Nickoleropoulos vs. Ramsey case is in substance a holding that it is negligence to operate a vehicle on the highway at any time without having it under sufficient control so that others using the highway will not be unreasonably endangered thereby, regardless of how slow it is required to travel to accomplish that end." (Emphasis ours).

The case of *Wright vs. Maynard*, 120 Ut. 504, 235 Pac. (2d) 916, cited by the appellant, is clearly distinguishable from the case at bar and from the *Dalley* case. In *Wright vs. Maynard*, the defendant driver struck a moving object (the plaintiff), while avoiding the parked vehicle on the roadside. In both the case at bar and the *Dalley* case the parked vehicle was struck. The logic of *Wright vs. Maynard* supports the position of the respondent in the case at bar. In *Wright vs. Maynard*, the question of defendant's negligence was held to be one of fact for the jury because, although the defendant was not able to *stop* in time to avoid the collision, he had sufficient control of his automobile to *turn out* and

thus avoid collision with the stationary obstruction. In the case at bar, appellant neither stopped nor turned out, but continued blithely into collision with respondents' vehicle without offering any plausible excuse whatsoever for doing so.

The following language from *Dalley vs. Midwestern Dairy Products* at 15 Pac. (2d) 311, is particularly pertinent to the case at bar:

"... As plaintiff approached the place where the truck was standing on the night in question, the highway was straight and level for a distance of at least a mile. The truck was directly in front of him and in his course of travel. According to his testimony he was keeping a constant lookout ahead. If he was not keeping a lookout ahead, he was guilty of negligence in failing to do so. There was nothing to obstruct his view. It was an ordinary, clear, quiet summer night with no moon. So far as appears there was nothing to divert his attention from the road in front of him. He knew he was traveling upon a highway that was used by pedestrians, and persons traveling on horseback and in horse-drawn vehicles, none of whom are required to disclose a light to warn others of their presence upon the highway. In such case *it must inevitably follow that plaintiff did not keep a lookout ahead, or, if he did, he either did not heed what he saw or he could not see the truck because his lights were not such as were prescribed by law.*" (Emphasis ours.)

The facts of the case at bar are even stronger than those in the Dalley case, because here respondents' vehicle

was adequately equipped with lights indicating its presence, whereas in the Dalley case the defendant's truck was completely unlighted and amounted to a trap for the unwary motorist.

The fundamental fallacy of appellant's position is that he fails to conceive that there are two facets to the Dalley rule.

(a) The operator must drive at such speed as to be able to stop or otherwise avoid substantial objects on the highway within the distance illuminated by his headlights.

(b) He must see and *pay heed* to what is there to be seen. This latter facet is of course, not limited to the Dalley case, but applies to all driving situations. It has been often recognized by this court and commented on in other lines of traffic cases such as open intersection cases and pedestrian cases.

It would be an anomaly indeed if a plaintiff in one case would be guilty of negligence as a matter of law in failing to observe and avoid a wholly unlighted obstruction in a highway; while in another case where the obstruction was lighted and observed by the plaintiff, it should be held a jury question whether he was guilty of negligence on the feeble excuse of "mistake of judgment." Many types of negligence are "mistakes of judgment," e.g. a driver entering an intersection in the belief that he is ahead of another approaching from the right;

a driver attempting a left hand turn in the belief that approaching cars are not so close as to constitute an immediate hazard. But where the mistake is as gross as appears here, no jury should be permitted to speculate on its legal effect.

The appellant cites *Smith v. Bennett*, 1 Ut. (2d) 224, 265 Pac. (2d) 401, as supporting his contention that mere errors of judgment are questions for the jury. However, he overlooks an important qualification of the rule of that case, as set forth in the opinion of the Court:

“A major dissimilarity exists between the facts of the case now before the court and plaintiff’s authorities. In these cases we were concerned with situations such as intersectional accidents where the plaintiff’s attention was demanded in more than one direction or in more than one place. Since his attention could not be in all places and in all directions at once, it was a question of human judgment as to how his attention should be distributed among the several competing demands. A question of fact for the jury was presented as to whether his distribution of attention was reasonable.

“In the instant case there was but one demand upon plaintiff’s attention. There is no room for a reasonable difference of opinion as to where her attention should have been concentrated; it was incumbent upon her to observe the condition of approaching traffic. That she failed to use due care in doing so is manifest from the evidence.” (Emphasis ours.)

In the case at bar, appellant's driver saw the parked truck of respondent some 400 feet ahead. He erroneously concluded that the respondents' truck was moving. The sole object requiring the attention of appellant's driver immediately prior to the accident was the stopped truck of the respondents. The driver's attention should have been solely on this object before him. Long before a collision occurred he should have recognized the true situation and either stopped or turned out to avoid a collision.

The appellant, (at page 10 of his brief), cites *Davis et al., v. Brown*, 20 Wash. (2d) 219, 147 Pac. (2d) 263 as an example wherein a court, committed to the doctrine of the Dalley case, recognized an "error in judgment" distinction. However, the Washington Court was not committed to the Dalley rule. In the case of *Morehouse vs. City of Everett*, 141 Wash. 399, 252 Pac. 157 (1926), the Supreme Court of Washington definitely rejected the Dalley rule. The Washington rule is wholly contrary to the Utah rule, and the Washington decision is of no aid in the determination of the case at bar. Nor is there any need to go beyond the pronouncements of this court in seeking a solution to the problem.

The plaintiff would have us believe that no "judgment" was exercised in the Dalley, Fretz and Benson (*Benson vs. D. & R. G.*, 4 Ut. (2d) 28, 286 Pac. (2d) 790) cases. It is respectfully submitted that every conscious human action requires the exercise of some degree of

judgment, whether or not that judgment be erroneous, or whether or not the action based on that judgment be negligent. The cases heretofore cited establish a well-defined standard of conduct for persons operating vehicles on the highway during the night. As applicable to this case the *objective* standard may be stated thus: A person operating a vehicle on the highway at night must keep such control of his vehicle that will enable him to stop and avoid obstructions that fall within his vision.

Any violation of this objective standard of conduct is negligence as a matter of law. The “mere error of judgment” of the appellant’s driver coupled with the speed of his vehicle led to a violation of this standard of conduct — a failure to control the vehicle and avoid the object within the range of vision. There could be no more absolute breach of a positive duty. Yet, the appellant contends that the court should at this late date accept a subjective test of “error in judgment” in contraposition to a clear objective standard promulgated and many times reaffirmed by our Court. We have well recognized exceptions to this objective standard of the Dalley rule, but similarly these exceptions are based upon objective extraneous factors, i.e. interference with visibility. On the other hand plaintiff proposes a subjective modification of our rule based on “error in judgment”. Could not this same modification be grafted into every objective standard of conduct which the court has laid down? Regarding the use of “judgment” as a standard,

Justice Tyndal once said, "Instead . . . of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to condition such as a man of ordinary prudence would observe." *Vaughn v. Menlove*, 3 Bing. N.C. 468, 475; 132 Eng. Rep. 490, 493 (1837).

In the case at bar we have a well established standard of care which a man of ordinary prudence should observe. This standard of care has been violated. The inevitable conclusion is that the appellant is guilty of negligence as a matter of law.

CONCLUSION

The facts of this case bring it squarely within the Dalley rule. The court below correctly concluded that the plaintiff was guilty of contributory negligence as a matter of law. The judgment should be affirmed.

Respectfully submitted,

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