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Delta H. Lewis v. C. A. Savage et al : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

DELTA H. LEWIS,
Plaintiff and Appellant,

vs.

C. A. SAVAGE, KENNETH C. SAVAGE, C. A. SAVAGE, doing business as SAVAGE COAL AND TIMBER COMPANY, and SAVAGE COAL AND TIMBER COMPANY,
Defendants and Respondents.

Case No.
8733

BRIEF OF RESPONDENTS

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STATEMENT OF FACTS

The Statement of Facts contained in appellant's brief represents but a partial excerpt of the facts and is argumentative in form. We feel it necessary to restate these facts for the benefit of the court.

Plaintiff, Delta H. Lewis, and her husband, Dow T. Lewis, were residents of Montana. They left Whitehall on August 1, 1955, at about 11:00 o'clock in the evening, with their final destination being Salt Lake City. They stopped in Idaho Falls and then proceeded to Alameda, just

outside of Pocatello, where the accident occurred. They reached that point at approximately 4:45 A.M. on August 2nd.

The highway is two lanes from Chubbeck until it reaches Alameda, where it goes to a newly improved highway of four traveling lanes and an outer lane for part time parking. Where the two lanes go into the new highway there is an intersection with a stop light. Mr. Lewis was driving and had been traveling at about 50 miles per hour. The semaphore was green and when he passed the intersection and entered the new highway he turned from the left or center lane, across the next lane to the extreme righthand lane and struck the left rear end of defendants' truck which was stopped in the outside or righthand lane. Mr. Lewis did not see the defendants' truck until he was right on it. (T. 9-16)

After the accident Mr. Lewis observed that the lights were on in the truck and there were red flags located on the back of the lumber. The truck was stopped under a street light some 250 to 300 feet from the intersection with the semaphore. The street was fully lighted and dawn had broken and it was light enough to distinguish objects on, ahead and to the side of the road. At the time of the accident there was a milk truck traveling north about a full block south of the point of impact. There was very little traffic on the road that morning. Mr. Lewis' lights were good and he passed no cars going his way when the accident occurred, nor were there any cars in front of him going his way.

The course taken by Mr. Lewis' car from the intersection to the point of impact, together with the physical con-

dition of the road, are represented on the exhibits introduced in evidence. (T. 16-39)

The speed limit where the accident occurred is 35 miles per hour.

STATEMENT OF POINTS

POINT I.

THE NEGLIGENCE OF PLAINTIFF'S HUSBAND WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT.

POINT II.

PLAINTIFF WAS GUILTY OF NEGLIGENCE.

ARGUMENT

POINT I.

THE NEGLIGENCE OF PLAINTIFF'S HUSBAND WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT.

The record amply discloses that there can be no question as to the negligence of plaintiff's husband. The law of Idaho is the same as the law of Utah, which requires that a person driving an automobile must proceed at such a rate of speed that he may ordinarily be able to stop and avoid striking an object ahead of him which a prudent driver would see. *Maier v. Minidoka County Motor Company,* 105 P. 2d 1076. In that case the court said:

> "Generally it is evidence as a matter of law, or at least strong evidence of negligence, for a motorist to operate his automobile on a highway at such a speed that the automobile cannot be stopped within the distance within which objects can be seen ahead of the automobile."

The court continued and also addressed itself to the question of proximate cause, and its holding is even more conclusive in this case because plaintiffs urges violation of an ordinance as constituting negligence. The Idaho court said this:

> "Appellants urge in effect that traveling on the highway on a bicycle at night without a lighted headlamp as provided by statute constitutes negligence and therefore contributory negligence as a matter of law was proven. In Tendoy v. West, supra (51 Idaho 679, 9 P. 2d 1027), this court stated: 'In the absence of some probable causal connection, bald negligence per se can raise no presumption of proximate cause: it may be wholly innocent. It is no more effective than any other kind of negligence. Where, on the question of proximate cause, men's minds may honestly differ, it should always be submitted to the jury. Kelly v. Troy Laundry Co., supra (46 Idaho 214, 267 P. 222); Hooker v. Schuler, 45 Idaho 83, 260 P. 1027; Hall v. Hepp, 210 App. Div. 149, 205 N.Y.S. 474, holding that the violation of a traffic law must be established as the proximate cause of the injury, the question being one of fact, citing Clark v. Doolittle, 205 App. Div. 697, 199 N.Y.S. 814; Martin v. Oregon Stages, 129 Or. 435, 277 P. 291, 294, asking the pertinent question, "was the absence of a white light the approximate cause of the collision?" After declaring the plaintiff guilty of

> negligence per se for driving after sundown without a tail light, the court said in Gleason v. Lowe, 232 Mich. 300, 205 N. W. 199, 200, "It was a question of fact for the jury whether there was any causal connection between the statutory violation of plaintiff and the injury occasioned by defendant"; Martin v. Carruthers, 69 Colo. 464, 195 P. 105, 106, conceding plaintiff's negligence per se, but declaring, "There is room for two opinions under the evidence as to whether that negligence was a cause contributing to the collision." To the same effect are Darby v. Jarrett, 26 Ohio App. 194, 159 N. E. 858; Giorgetti v. Wollaston, 83 Cal. App. 358, 257 P. 109. But it is unnecessary to multiply authority.' "

Mr. Lewis drove into the rear of defendants' truck when he had two full lanes of unobstructed space to pass the truck; the truck was lighted with a tail light and two clearance lights in the rear with red flags on each corner of the lumber, and was under a street light where it was clearly visible. In fact, Mr. Lewis testified to the fact that the red flags were on the back of the truck and that the lights were on and he, in fact, had no difficulty seeing the milk truck coming about a block away and identified it as a truck. The only conclusion that can be reached from his own testimony is that he was either going too fast to turn and avoid the end of the truck, or he was negligently not paying attention to where he was driving.

Plaintiff repeatedly refers to circumstances which the record does not support, namely, a time element of half an hour that Officer Wharton purportedly saw the truck stand *before* the disaster. A careful reading of the record would indicate that Officer Wharton saw the lumber truck

and then went about his errands; that the accident occurred while he was so occupied and that he came upon the scene sometime after it had happened. He substantiated the testimony of the defendants that they had stopped only for the purpose of adjusting the load and were ready to start when the accident occurred. Officer Wharton also testified that the lane where the truck was parked was considered a parking lane by him, and that there were no signs to advise the defendants of anything to the contrary until another block farther south, and it could not be read from the truck stopped where it was. We submit that the negligence of Mr. Lewis is so glaring as to defy any other conclusion.

It is obvious in this case that Mr. Lewis' negligence was the sole proximate cause of the accident, and Mrs. Lewis should not be allowed to recover. The defendants were doing what they had a right to do as they were stopped to check the load and to tighten the binders. There is no violation of an ordinance prohibiting parking. Section 49-521 (d) of the Idaho Code defines "park" as follows:

> "(d) 'Park'—When prohibited means the standing of a vehicle, whether occupied or not, otherwise than temporarily for the purpose of and while actually engaged in loading or unloading."

The Idaho law has been construed and the Idaho Court has held that the statute forbidding parking at night on a highway was not violated when a truck stopped because of engine trouble. *State v. Hintz*, 102 P. 2d 639. In addition, the general rule of law throughout the United States seems to be that "park" means something more than mere

temporary or momentary stoppage on a road for a necessary purpose. Such things as changing a tire or engine trouble, or loading or unloading, or adjusting a load, have been held not to be in violation of the statute or ordinance. See *Motor Lines v. Gillette,* 177 So. 881, 235 Ala. 157; *Marinkovich v. Tierney,* 17 P. 2d 93, 93 Mont. 72; *State v. Carter,* 172 S. E. 415, 205 N.C. 761; *Palmer v. Marceille,* 175 A. 31, 106 Vt. 500; *Martin v. Oregon Stages,* 277 P. 291, 129 Ore. 435; *Fontaine v. Charas,* 181 A. 417, 87 N.H. 424; *Tibbetts v. Dunton,* 174 A. 453, 133 Me. 128; *Stallings v. Buchan Transport Co.,* 185 S. E. 643, 210 N. C. 201; *Fleming v. Flick,* 35 P. 2d 210, 140 Cal. App. 14; *Hartwell v. Progressive Transp. Co.,* 270 N. W. 570, 198 Minn. 488. The foregoing are but a few of many cases all holding the same.

Although plaintiff alleged the violation of an ordinance, and we submit no violation occurred in this case, the law is generally recognized that the question of proximate cause must be resolved. Even if the court should consider that a possible violation of the ordinance occurred, such violation could not have been a proximate cause of this accident. No emergency occurred which would have prevented Mr. Lewis from both seeing and avoiding the truck, and the truck did not block the highway in any degree sufficient to have caused the accident. In fact, Officer Wharton testified that the right wheels of the truck were right up against the curb. Counsel has cited the case of *Hillyard v. Utah By-Products Co.,* 263 P. 2d 287. That case dealt with the question of proximate cause. The only possibility of the violation of an ordinance being a proximate cause of that accident was that the driver of

the vehicle was unable to pass the truck because of oncoming traffic. No such circumstance exists in this case and the only thing that caused the accident was the failure of Mr. Lewis to keep his car under control sufficiently to drive down the highway in two free lanes of traffic, or more if he needed it, or to drive at a speed that was reasonable and safe under the circumstances, or to see a well lighted truck under a street light at a time when it was light enough to have seen a truck apparently with or without lights.

In plaintiff's brief counsel urge that the sanctity according to the verdict of the jury on conflict of the evidence is not present here. Surely counsel cannot apply a different rule of law to the sanctity of the court sitting as a jury. The court below tried the case and decided the same upon the facts, the defendant having prevailed. This court must consider the evidence and every reasonable inference in a light most favorable to the defendant. *Jensen v. Mower,* 294, P. 2d 683.

POINT II.

PLAINTIFF WAS GUILTY OF NEGLIGENCE.

Plaintiff has stressed the point that the laws of Idaho are presumed to be the same as the laws of Utah in the absence of proof to the contrary, and the courts will not take judicial notice of foreign law. Although no pretrial order was entered in this case, a pretrial was had and counsel in open court discussed the laws of the State of Idaho governing this case and the doctrine of imputed negligence. One of counsel stated to the court that he had not considered the law of Idaho and desired time within which

to study the matter. At this pretrial we urged the court to consider the dismissal of the case on the doctrine of imputed negligence and this particular issue of law was formed. It is our understanding that when issues of fact and questions of law have been formed at pretrial, under the Utah Rules of Civil Procedure no proof is required at the trial. The very purpose of the Rules is to avoid a multiplicity of proof. We submit it was fully understood by court and counsel that if the court determined that under the laws of Idaho the doctrine of imputed negligence existed, and if the court found negligence on the part of Mr. Lewis, there could be no recovery by plaintiff.

The laws of the state where the accident occurred control the rights and liabilities of the parties. In *Blashfield Cyclopedia of Automobile Law and Practice,* Vol. 9, Sec. 579, pages 31, 36 and 37, the rule is given:

> "Where an accident occurs in one state, and the suit is brought in another, the question may arise as to whether the laws of the forum or the laws of the state where the accident occurred control. The rights and liabilities of parties in automobile accidents, as a general rule, are determined by the laws of the state where the accident occurred. * * *
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> "Thus, under the law of the state where the injury occurs, the action may survive against the estate of the tort-feasor, but the right of action may not survive under the law of the state where the suit is brought. In such case, the right of action depends upon the law of the state where the injury occurs, rather than of the jurisdiction where the suit is brought. * * *
>
> "*A rule of law of the place where the accident*

occurs with reference to imputing the negligence of a motorist to a guest or other occupant riding in the automobile is deemed a rule of substantive law rather than merely a rule of evidence, and hence is controlling, though the lex fori be different." (Emphasis ours)

The foregoing authority cites the case of *W. W. Clyde & Co. v. Dyess,* 126 F. 2d 719, (C.C.A. 10th, 1942). This case is most interesting because of the similarity of the accident, and the wife sued to recover for personal injuries, alleging she was a guest in her husband's automobile. The accident happened in Utah and the court held that the law of Utah applied, rather than Texas where community property applied:

> "The right to recover damages for personal injuries is a property right in that state, and a chose in action for such injuries suffered by a married woman belongs to the community estate. Ezell v. Dodson, 60 Tex. 331; Texas Central Ry. Co. v. Burnett, 61 Tex. 638; Northern Texas Traction Co. v. Hill, Tex. Civ. App., 297 S.W. 778; Bostick v. Texas & P. Ry. Co., Tex. Civ. App., 81 S.W. 2d 216. And recovery cannot be had in that state for personal injuries sustained there by a married woman if the negligence of her husband was a contributing cause, for the reason that such negligence on his part is imputed to her. Missouri Pac. Ry. Co. v. White, 80 Tex. 2025, 15 S.W. 808; Texas & Pac. Ry. Co. v. Rea, 27 Tex. Civ. App. 549, 65 S.W. 1115; Northern Texas Traction Co. v. Hill, supra; Bostick v. Texas & P. Ry. Co., supra; Dallas Ry. & Terminal Co. v. High, 129 Tex. 219, 103 S.W. 2d 735.
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> "But with rare exceptions matters relating to

the right of action arising out of a tort which results in death, personal injury, or other wrong, are governed by the law of the place where the tort occurred. Northern Pacific Railroad Co. v. Babcock, 154 U.S. 190, 14 S. Ct. 978, 38 L.Ed. 958; Slater v. Mexican National Railroad Co., 194, U.S. 120, 24 S. Ct. 581, 48 L. Ed. 900; American Banana Co. v. United Fruit Co., 213 U.S. 347, 29 S. Ct. 511, 53 L.Ed. 826, 16 Ann. Cas. 1047; Cuba Railroad Co. v. Crosby, 222 U.S. 473, 32 S. Ct. 132, 56 L.Ed. 274, 38 L.R.A., N.S., 40; Vancouver Steamship Co., Ltd., v. Rice, Administratrix, 288 U.S. 445, 53 S. Ct. 420, 77 L.Ed. 885; Young v. Masci, 289 U.S. 253, 53 S. Ct. 599, 77 L.Ed. 1158, 88 A.L.R. 170; Hunter v. Derby Foods, Inc., 2 Cir., 110 F. 2d 970, 133 A.L.R. 255. And ordinarily where a tort is committed in one state and recovery of damages is sought in another, the substantive rights of the parties are governed by the law of the former while questions of remedy or procedure are referable to the law of the latter. O'Neal v. Caffarello, 303 Ill. App. 574, 25 N.E. 2d 534; Meyer v. Weimaster, 278 Mich. 370, 270 N.W. 715; Laughlin v. Michigan Motor Freight Lines, 276 Mich. 545, 268 N.W. 887; Sutton v. Bland, 166 Va. 132, 184 S.E. 231; Wood v. Shrewsbury, 117 W. Va. 569, 186 S.E. 294; Farfour v. Fahad, 214 N.C. 281, 199 S.E. 521.

"This accident occurred in Utah and the suit was instituted there. The place of the wrong and that of the forum concurred. And the community property system does not obtain there. More than that, the material part of section 40-2-4, Revised Statutes of Utah 1933, provides in substance that the husband shall have no right of recovery for personal injuries to the wife, that the wife may recover for such injuries as though she were un-

married and that the recovery shall include medical and other expenses paid or assumed by the husband. No case has been called to our attention in which the statute was construed. We are, therefore, obliged to proceed without direction or guidance by the supreme court of the state in respect to the meaning of the local statute. We think the statute, when fairly construed, embraces both substantive and remedial elements. It strips the husband of any right of recovery for personal injuries sustained by the wife arising out of the tort of a third person, and it vests in her the right to recover for such a wrong as though she were an unmarried woman. It places a married woman on equal footing with an unmarried woman in respect to redress for personal injuries growing out of a tort. It empowers a married woman to maintain in her own name a suit to recover for such injuries and it vests in her the recovery therefor to the same extent and for all purposes as though she were a single woman. Cf. Jacobson v. Fullerton, 181 Iowa 1195, 165 N.W. 358. And it fails to indicate any purpose to distinguish between residents and nonresidents of the state."

We call the court's attention to the cases of *Traglio v. Harris,* 104 F. 2d 439; *Venuto v. Robinson,* 118 F. 2d 679; *Muraszki v. William L. Clifford, Inc.,* 26 A.2d 578; *Skillman v. Conner,* 193 A. 563 and *Myrick v. Griffin,* 200 So. 383.

We submit to the court that the universal rule of law is to the effect that the law of Idaho, where the accident occurred, would apply in this case, and the negligence of the husband would be imputed to the wife and bar recovery.

CONCLUSION

From all of the evidence and a reading of the record it becomes most evident that the court correctly found that Dow Ted Lewis, plaintiff's husband, was guilty of negligence in the manner in which he was driving, and that such negligence was the sole proximate cause of plaintiff's injuries and damages; that he drove in such a manner that he failed to see what was evident, open and obvious and that he drove in such a manner that he could not stop in time to avoid striking defendant's truck.

It is also obvious from all of the testimony in the case that defendants were not guilty of violating any ordinance, and even if they had, the court found as a matter of fact that the defendants were not guilty of any negligence which was a proximate cause of plaintiff's injuries and damages. Such a finding on the part of the trier of the fact should not be disturbed.

Further, under the laws of the State of Idaho the negligence of the husband is imputed to the wife, and although the decision in this case by the trier of the fact is amply supported by the evidence as to sole proximate cause, the additional issue of imputed negligence in like manner bars plaintiff's recovery. We submit this latter proposition, in view of the fact that plaintiff raised the question in her brief, although the findings of the court do not deal with it.

Respectfully submitted,
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