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

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

REPLY BRIEF OF APPELLANT

Appeal No. 8733

Appeal from the District Court of the Fourth Judicial District of the State of Utah
In and for the County of Utah

Honorable R. L. Tuckett, Judge

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ARGUMENT ON REPLY

Because of certain matters raised in the Brief of Respondents, the plaintiff and appellant deems it necessary to file a short reply brief. This brief reply will cover briefly three points: 1. Imputed Negligence, 2. Negligence of the Defendants, 3. Definition of "Park".

I. IMPUTED NEGLIGENCE

On Pages 8 and 9 the respondents refer to the pre-trial conference held in this case, and then assert that when issues of fact and questions of law have been formed at pre-trial, no proof is required at the trial.

Appellants disagree with this position asserted by

the respondents. In the first place, following an informal discussion at the pre-trial hearing, the trial Court decided that it was not necessary to formulate any pre-trial issues, and no pre-trial order was entered by the Court. We realize that this matter as raised by respondents in their Brief is outside of the record, but because an issue has been made of it by the respondents, we deem it necessary to set forth our views concerning what went on at pre-trial.

At the pre-trial, defendants raised the issue of contributory negligence. Counsel for the plaintiff expressed complete surprise that contributory negligence would be raised at which time defendants' counsel stated that under the law of Idaho the negligence, if any, of a husband was imputed to the wife. This was purely an assertion on the part of the defendants and at no time would or did plaintiff's counsel agree that such was the law in Idaho. In fact, the position was taken by plaintiff's counsel that they were not aware of any law where the negligence of a husband could be imputed to a wife except in a principal-agent relationship. At that point, the trial Judge remarked to defendants' counsel that the doctrine of imputed negligence was not the law in Utah and that in the absence of proof it would be assumed that the law of any foreign jurisdiction would be the same as in Utah. There certainly was no admission that the law of Idaho would impute the negligence of a husband to a wife nor was there any stipulation or ad-

mission that Idaho was a community property State. There was no determination made at that time that under the laws of Idaho the doctrine of imputed negligence existed, nor has there been any such determination made since said time. Nor has there been any proof offered in any form whatsoever, including the brief of the respondents on file before this Court, which establishes that the laws of Idaho recognizes the doctrine of imputed negligence.

We strongly contend that at no time or at no place has the doctrine of imputed negligence ever been established in this case.

But to go a step further, even if we assume that the doctrine of imputed negligence does exist in Idaho, we then say that it is not aplplicable in this case, and we cite now, as cited in our Brief, the case of *Bruton vs. Villoria* (1956, Cal.), 292 P. (2d) 638, which states unequivocally that even in a community property State, where the doctrine of imputed negligence is recognized, the negligence of the husband is NOT imputed to the wife where the parties are residents of a non-community property State.

The proof presented by the plaintiff is clear and convincing that the plaintiff and her husband were residents of Montana, and that Montana was not a community property State. The defendants and respondents have chosen to ignore this status of the law. If there is any

authority to the contrary, it has not been furnished to the plaintiff and appellants, or to either the trial Court or to the Supreme Court to our knowledge.

2. NEGLIGENCE OF THE DEFENDANTS

It is the plaintiff's contention that the defendants were guilty of negligence which was a contributing cause to the accident (1) by reason of their breach of the ordinance, and (2) independent of the ordinance, that plaintiffs were guilty of common-law negligence, and it is plaintiff's position that reasonable minds cannot differ on either of these points.

Reference is made to the recent case of *Burns vs. Fisher*, (Mont. 1957), 313 P. (2d) 1044, wherein the Montana Supreme Court held that a party was guilty of negligence as a matter of law when he remained seated in his truck that was stalled on a main arterial highway where traffic can be expected to be passed at any time. The Court refused to submit the question of negligence to a jury. The theory of the case, very strongly presented by the Montana Supreme Court, is that reasonable minds cannot differ that it is negligence to remain seated in a truck stopped on a main arterial highway without appropriate warning measures being taken, and that such negligence exists even though the lights of the truck are burning at the time of the collision.

The Montana Court cites a number of Maryland cases, and in particular, the case of *Martin vs. Sweeney*

207 Md. 543, 114 A. 2d 825, where plaintiff remained in a car which was allowed to remain on the traveled portion of a highway and was struck by an oncoming vehicle. Plaintiff was held guilty of contributory negligence as a matter of law. The Maryland Court stated:

> "It is axiomatic that the law places upon one the duty of exercising reasonable care for his own protection under any and all circumstances and that this requirement of the law is little more than is naturally practised under the instinct of self-preservation. What an ordinarily prudent and careful person would do under a given set of circumstances is usually controlled by the instinctive urge to protect himself from harm. Yockel vs. Gerstadt, 154 Md. 188, 194, 140 A. 40. This principle has been applied where one leaves a place of safety to venture into a place or posture of danger, and is harmed; in such cases, the venturesome one often has been held to be guilty of contributory negligence as a matter of law. Yocket vs. Gerstadt, supra; Billmeyer vs. State to Use of Whiteman, 192 Md. 419, 64 A. 2d 755; Schaub vs. Community Cab, Inc., 198 Md. 216, 81 A. 2d 597; Domeski vs. Atlantic Refining Co., 202 Md. 562, 97 A. 2d 313. Conversely, where one who remains in a place of danger with time and the physical ability to leave and is harmed, the courts have often held such failure to act to be contributory negligence as a matter of law. Restatement Torts Sec. 466".

Many cases are there cited in support of the statement. See also to the same effect Western Casualty & Surety Co. vs. Dairyland, etc., Co., 273 Wis. 349, 77 N. W. 2d 599.

We feel that reasonable men cannot differ on the fact that the defendants in this case are guilty of negligence regardless of the violation of any ordinance or statute.

3. DEFINITION OF "PARK"

On page 6 of respondents' brief, a definition of "park" taken from the Idaho Code is stated.

According to respondents, "park" means the standing of a vehicle, whether occupied or not, otherwise than temporarily for the purpose and while actually engaged in loading or unloading. We say that the defendants' conduct falls squarely and directly within this Idaho definition of "park", even if we accept as true the defendants testimony that the only purpose in stopping was to check the load and to tighten the binders. This act, if true, on the part of the respondents does not consist of "actually engaged in loading or unloading". The case of *State vs. Hintz* cited by respondents on page 6 of their brief does not construe the statute quoted by respondents but involves an entirely different statute of the Idaho Code.

In fact, it construes a provision of the Idaho Code which specifically says that the statute involved does not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway. It is certainly not any authority in this case.

We submit that by respondents' own definition, they were "parked" in violation of the Alameda City Ordinance.

CONCLUSION

In conclusion, if it is as a matter of law negligence to remain in a stalled truck, then certainly as a matter of law and knowledge and common sense of Courts it is certainly negligent to remain in a stopped truck when the truck is capable of motion and the drivers intentionally stop it for 20 minutes or half an hour on a main arterial highway going through a City. Reasonable minds cannot differ but that it is negligence under such circumstances to stop the truck and allow it to remain in that position for an appreciable length of time.

We strongly contend that the stopping of the defendants truck and allowing it to remain there without flares constitutes negligence which was a proximate cause or contributing factor toward the plaintiff's injuries.

Respectfully Submitted,

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