

1958

Ruth Ethel Drury Marshall et al v. George T. Tayler : Plaintiffs' Petition for Rehearing

Utah Supreme Court

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In the
Supreme Court of the State of Utah

FILED

JUL 31 1958

RUTH ETHEL DRURY MARSHALL,
et al.,
Plaintiffs and Respondents,

Clerk, Supreme Court, Utah

—vs.—

Case No. 8792

GEORGE T. TAYLER,
Defendant and Appellant.

PLAINTIFFS' PETITION FOR REHEARING

ROMNEY & NELSON
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JACK L. CRELLIN

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In the
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RUTH ETHEL DRURY MARSHALL, et al.,	} Case No. 8792
<i>Plaintiffs and Respondents,</i>	
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GEORGE T. TAYLER, <i>Defendant and Appellant.</i>	

PLAINTIFFS' PETITION FOR REHEARING

STATEMENT OF THE CASE

In an action for personal injuries arising out of the alleged tortious act of defendant, the plaintiffs prevailed, upon a verdict of the jury and entry of judgment by the lower court.

Upon appeal by defendant the verdict of the jury and the judgment of the lower court were reversed by this court in its decision filed July 7, 1958, and the plain-

tiffs herewith petition this court for rehearing upon that decision.

STATEMENT OF FACTS

The statement of facts as set forth in defendant's brief on appeal as modified by the statements of facts contained in the plaintiffs' brief on appeal is herewith incorporated in this Petition for Rehearing.

STATEMENT OF POINTS

POINT I.

THIS COURT ERRED IN FINDING THE PLAINTIFFS TO HAVE BEEN CONTRIBUTORILY NEGLIGENT OR HAVING ASSUMED THE RISK OF INJURY TO THEMSELVES IN THAT IT DID NOT CONSTRUE THE EVIDENCE IN THE MOST FAVORABLE LIGHT FOR PLAINTIFFS. FURTHERMORE, EVEN ASSUMING THAT PLAINTIFFS WERE GUILTY OF CONTRIBUTORY NEGLIGENCE OR ASSUMPTION OF RISK ORIGINALLY, THE DEFENDANT HAD THE LAST CLEAR CHANCE TO AVOID INJURING PLAINTIFFS AND, HAVING DISCOVERED THEM IN A POSITION OF PERIL, HE WAS UNDER A DUTY TO EXERCISE REASONABLE CARE FOR THEIR SAFETY.

POINT II.

BY ITS DECISION IN THIS CASE THE SUPREME COURT HAS USURPED THE FUNCTION OF THE JURY AND THE TRIAL COURT CONTRARY TO LAW.

ARGUMENT

POINT I.

THIS COURT ERRED IN FINDING THE PLAINTIFFS TO HAVE BEEN CONTRIBUTORILY NEGLIGENT OR HAVING ASSUMED THE RISK OF INJURY TO THEMSELVES IN THAT IT DID NOT CONSTRUE THE EVIDENCE IN THE MOST FAVORABLE LIGHT FOR PLAINTIFFS. FURTHERMORE, EVEN ASSUMING THAT PLAINTIFFS WERE GUILTY OF CONTRIBUTORY NEGLIGENCE OR ASSUMPTION OF RISK ORIGINALLY, THE DEFENDANT HAD THE LAST CLEAR CHANCE TO AVOID INJURING PLAINTIFFS AND, HAVING DISCOVERED THEM IN A POSITION OF PERIL, HE WAS UNDER A DUTY TO EXERCISE REASONABLE CARE FOR THEIR SAFETY.

This court is charged with the responsibility of construing the evidence in a case upon appeal most favorably to the successful party in the lower court. *Thompson v. Aldrich*, 5 U.2d 99, 297 P.2d 226; *Pantages v. Arge*, 1 U.2d 105, 262 P.2d 745; 5 C.J.S., Appeal and Error, § 1574. This the court did not do in this case. Quite to the contrary, this court has concluded that the plaintiffs could have released their holds on the door handles of defendant's automobile during that split second when the automobile was necessarily stopped in changing from a weaving reverse direction to a weaving forward movement. This conclusion has been reached in direct opposition to the plaintiffs' claim, amply supported by four witnesses, that the plaintiffs were knocked from their feet by the defendant's sudden weaving backward thrust and

were dragged backward in such a manner as to be unable to regain their balance. The instantaneous forward movement of the automobile did not afford the plaintiffs an opportunity to regain their balance such that they would be in a position to let go of the car handles and remove themselves from the danger of falling under the wheels of the automobile. (Tr. 121-122, 161-162, 262-263, 281-282). The medical testimony of the attending physician corroborated the statement of witnesses that the plaintiff Mrs. Tayler suffered cuts and bruises to her knees and toes and that both feet had abrasions with foreign matter ground into them *which was present on the top portion of the instep of the foot and the toes*. (Tr. 216). Mr. Marshall testified that he observed the flesh was torn from her knee with gravel ground therein and that both toe nails had been torn off with the flesh ground away to the bone. (Tr. 129). This testimony itself is absolutely indicative of the fact that Mrs. Tayler was dragged by the automobile and was not attempting to stop the auto's movement. The injuries to the upper parts of the toes and knees are conclusive in corroborating the testimony that these plaintiffs were knocked from their feet and literally dragged by the defendant's automobile. And it is equally as certain that these plaintiffs could not have arighted themselves or disengaged themselves from the car without risking immediate death from the weaving wheels of the automobile whether in its backward or forward motion, or even in that fragmentary split second in which, pursuant to the law of physics, this modern car may have stopped in its backward motion in order to proceed forward. This conclusion was reached by the

trial judge and jury with a first hand knowledge of the testimony. Furthermore, it is apparently conceded by this court that no error was made in the instructions to the jury upon contributory negligence and assumption of risk. Under these circumstances, this court is obligated to construe the evidence most favorably to the plaintiffs, and such a construction would most certainly require an affirmation of the lower court's judgment.

The court, as part of its opinion, states that "Mr. Marshall admitted that the car backed up and *stopped* before going forward." Actually he testified upon cross examination as follows (Tr. 142-143) :

"Q. Now when the car got down here, and stopped for a minute before it went forward—

A. I did not see it stop, no.

Q. Well were you watching all the time?

A. I told it. I said before because of the dust, I could not see it come to a full stop."

Thus it is clear beyond question that Mr. Marshall admitted the car stopped as a function of physical inertia, BUT HE DID NOT SEE THE CAR STOP BECAUSE HE WAS PREVENTED FROM SO DOING BY THE CLOUD OF DUST RAISED BY THE AUTOMOBILE'S UNUSUAL AND RECKLESS MOVEMENT. (Tr. 121-122). Be that as it may, Mrs. Tayler testified as follows:

"I had hold of the handle, and it swept me off my feet. Before I could get my bearings, he went back and forth, he weaved, I could not let go, I would have been run over. . . . Yes, it all happened so fast, like I said, he started with a jerk, and

weaved to the side, I lost my balance, and then he weaved to the other side, he backed up, *at no time did he stop to my recollection, he never stopped. He came forward weaving back and forth.* I could not let go, I would have gone under one of the wheels if I had of. All of a sudden, I hit an object.” (Emphasis added.) (Tr. 161-162.)

In all sincerity, and with due respect to this Honorable Court, after examining and re-examining the record and the law, we find it impossible to reconcile the same with the decision of this Court. Instead of construing the evidence in the most favorable light for the plaintiffs, (the prevailing parties) as the law uniformly requires, and as justice and the needs of society dictate, this Court has construed the evidence most favorably to, and in entire accord with the contentions of the defendant.

FURTHERMORE, even assuming that the plaintiffs were contributorily negligent or had assumed the risk of injury to themselves by not letting loose of the door handles at the moment this court considered most appropriate, still this court was in error in not sustaining the judgment of the lower court upon the doctrine of last clear chance or the rule that, after discovery of the peril brought on by one’s own trespass, contributory negligence or assumption of risk, the person in charge of the instrumentality causing the damage is then duty-bound to exercise reasonable care and caution for the safety of such a one. It is a well established rule, recognized in practically every jurisdiction, and variously referred to as “the doctrine of the last clear chance,” “the humanitarian doctrine,” and “the doctrine of discovered peril,” that

there may be a recovery for injuries sustained, notwithstanding plaintiff negligently exposed himself or his property to the danger from which the injury complained of arose, if defendant failed to exercise ordinary care to avoid the injury after becoming aware that the person was in a position of peril. See voluminous lists of authority in 65 C.J.S., Negligence, § 136. See also *Beckstrom v. Williams*, 3 U.2d 210, 282 P.2d 309; *Theurer v. Holland Furnace Company*, C.C.A. Utah, 124 F. 2d 494; *Lawrence v. Bamberger R. Co.*, 3 U.2d 247, 282 P.2d 335; *Compton v. Ogden Union Ry. & Depot Co.*, 120 U. 453, 235 P.2d 515; *Wines v. Rio Grande W. Ry. Co.*, 9 U. 228, 33 P. 1042; *Everett v. Oregon S. L. Ry. Co.*, 9 U. 340, 34 P. 289; *Hall v. Ogden City Street Ry. Co.*, 13 U. 243, 44 P. 1046; *Teakle v. San Pedro, L. A. & S. L. R. Co.*, 32 U. 276, 90 P. 402; *Knutson v. Oregon Short Line R. Co.*, 78 U. 145, 2 P.2d 102.

In the *Beckstrom* case, *supra*, this court held:

“The general principle of the last clear chance doctrine has been accepted in Utah from early times and is firmly established in our law. *Its most obvious application is in cases where the plaintiff is in inextricable peril.* * * *” (Emphasis added.)

The facts of this case make the application of the rule most obvious. Even assuming that the plaintiffs were contributorily negligent or had assumed the risk of injury to themselves by not releasing the door handles at the time the automobile concluded its backward motion, there can be no question that defendant was thereafter aware of their presence on the automobile and was aware

of their peril as he proceeded forward. The weaving and zigzagging previously referred to was aimed directly at dislodging the plaintiffs from their precarious positions in being dragged while holding the door handles of the automobile. Furthermore, it was testified on behalf of plaintiffs that there was no reason for defendant to drive under the canopy of the service station. (Tr. 151, 163-164). The fact that one plaintiff was slammed against a cola vending machine and the other against a gas pump as a result of this choice of direction by defendant is too far outside the realm of chance to have been accidental. The defendant himself testified that the plaintiffs were hanging on to his car handles (Tr. 335, 336). He also testified "I looked to the side of me, and it seemed to me, I saw Fern drop off." (Tr. 295). Also, "I saw Ruth's head bouncing up and down" (Tr. 295), and "I pulled along and I kept on going, until Ruth finally saw I was going, and she let go, and when she did, I knew she had made a mistake." (Tr. 296).

The defendant therefore admits that he was aware of the peril of plaintiffs after he proceeded forward. He further states that when Mrs. Marshall finally did let go of the car handles, he "knew she had made a mistake." Thus even the defendant recognized that her choice left little but disaster for her, by implying that she would have made a wiser choice by continuing to hold on to the door handle as the defendant headed for the open road at full throttle.

There can be no doubt that this case is classically adapted to the "obvious application" of the last clear chance doctrine, and this court erred in not so holding.

In our appeal brief we brought to the court's attention a recent Florida case similar to the one at bar, with facts even more detrimental to the prevailing plaintiffs than in this case. In that case, *Byers v. Gunn*, 81 So. 2d 723, the defendant's minor daughter, while driving her father's automobile, had stopped at a stop street. Four youngsters, including the plaintiff, approached the car and asked for a ride, which was refused. The daughter rolled up the windows and locked the doors, whereupon the four intruders sat down on the front fenders and hood of the car. The driver started the car in motion and, after attaining speeds up to 40 miles per hour, stepped on the brake causing the plaintiff to be thrown off and severely injured. The Supreme Court of Florida, affirming the lower court, allowed the plaintiff to recover upon a verdict of negligence. In so holding the court stated:

“The injured girl was a trespasser and the trial judge so informed the jury. The rule of law is clear that the standard of care owed to a trespasser is to refrain from committing a willful or wanton injury. This rule, however, gives way to the further proposition that after discovery of the peril to a trespasser, the driver of the automobile is then duty-bound to exercise reasonable care and caution under the circumstances. Absent contributory negligence on the part of the injured person there would appear to be no justifiable excuse for injuring a person in a position of manifest peril if such injury can be reasonably avoided, or as otherwise stated, if such injury can be avoided by the exercise of reasonable care and caution in the light of all the circumstances in the particular case.”

The court further held in this case that it could not be concluded as a matter of law that the plaintiff was guilty of contributory negligence or assumption of risk, and that the court was not justified in substituting its judgment for that of the jury.

The above authorities are unanimously in accord with the decision of the lower court in this case, and we feel that a fair interpretation of the facts as introduced at the trial, even without the indulgence of this court in viewing the evidence most favorably for plaintiffs as it is required to do, would lead this court to the inevitable conclusion that its previous decision was contrary to law and fact.

POINT II.

BY ITS DECISION IN THIS CASE THE SUPREME COURT HAS USURPED THE FUNCTION OF THE JURY AND THE TRIAL COURT CONTRARY TO LAW.

It is elemental that questions as to the credibility, weight, and value of evidence are primarily for the jury and secondarily for the trial court, and, in the absence of a clear abuse of discretion, are not, on appeal, a matter for review. A verdict approved by the trial court, if without legal error and supported by the evidence, is conclusive on appeal. The general rule is that the appellate court cannot invade the province of the jury with respect to determining the facts, and the verdict of the jury as dependent on the evidence is ordinarily taken as conclusive on the appellate court. 5A C.J.S., Appeal & Error, §§ 1647, 1653, and cases therein cited. Likewise the gen-

eral rule precluding interference by the appellate court with a fact determination of the jury supported by evidence applies with respect to findings in regard to assumption of risk, or as to contributory negligence in actions based on negligence. Thus in the case of *Malizia v. Oregon Short Line R. Co.*, 53 U. 122, 178 P. 756, the court held that even though it might entertain doubts as to whether the conduct of plaintiff's decedent in passing in front of defendant's engine in going over a public crossing was excusable, yet it must yield to the judgment of the jury. See also *Byers v. Gunn*, *supra*.

There can be no question that there was ample evidence by plaintiffs' witnesses upon which the jury could find that there was no contributory negligence by plaintiffs. The jury found that the defendant did not use due care for the safety of plaintiffs (R. 83, 86) and that plaintiffs did not assume the risk of injury to themselves (R. 84, 88), nor were they contributorily negligent (R. 84, 87). The trial court entered judgment accordingly.

It is manifestly unjust and contrary to law for this Court to have usurped the function of the jury in this case. One might ask why there was any need of a jury or the trial court proceedings at all in this action. An appellate court never sees or hears witnesses, knows nothing of their demeanor, which is frequently a determining factor as to their credibility, and can determine facts only on the basis of the cold written word. In the absence of error of law, on the part of the trial court or the jury, in eliciting testimony, is there any basis, in law or reason, upon which an appellate court can properly set itself as

a trier of facts and substitute itself for the jury? It appears to us that this Court has done just that.

This Court did not recite one single error of law in its decision. It does not question the sufficiency of the lower court's instructions as to any material matter. The opinion states in one breath that there can be no argument with the jury's findings as to wilfulness or wantonness on the part of the defendant (a point in favor of defendant) and then promptly breathes the kiss of death upon the verdict and judgment of the jury as to the questions of contributory negligence and assumption of risk by substituting its own judgment for that of the jury on these matters. This we say it cannot, or should not, do in accordance with the established rules of law in these particulars.

CONCLUSION

If our argument herein appears to be unusually vigorous, it should not be taken as anything but a sincere conviction of the correctness of our position, coupled with a realization that, at times, even Supreme Court Justices may be in error. If our position is correct, we feel assured that this Court will rectify the error and reverse its former decision, even though to do so may necessitate further determination of other matters of law in order to conclude this action.

In our humble opinion, this Court's present determination of factual matters violates four concepts of law, as follows:

- (1) It is not sustained by the weight of the evidence, as was the Jury's finding.

- (2) It is not based upon a construction of the evidence most favorable to the plaintiffs who prevailed in the lower court.
- (3) It does not recognize the doctrine of last clear chance or discovered peril.
- (4) It usurps and invades the province of the jury.

Respectfully submitted,

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