

1958

Lydia G. Ivie v. Dennis Waring Richardson : Brief of Respondent

Utah Supreme Court

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JUN 23 1958

~~Clerk, Supreme Court, Utah~~

IN THE SUPREME COURT OF THE STATE OF UTAH

UNIVERSITY UTAH

DEC 19 1958

LYDIA G. IVIE,
Plaintiff and Respondent,

—vs. —

DENNIS WARING
RICHARDSON,
Defendant and Appellant.

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Case
No. 8856

RESPONDENT'S BRIEF

GORDON I. HYDE

*Attorney for Plaintiff
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LYDIA G. IVIE,
Plaintiff and Respondent,
—vs. —
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RICHARDSON,
Defendant and Appellant.

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RESPONDENT'S BRIEF

STATEMENT OF FACTS

We cannot agree that the facts are as set forth in appellant's brief. The plaintiff-respondent, carrying a bag of groceries and in the company of her niece, a child, walked north on 3rd East Street and down the edge of the driveway to a point which plaintiff indicated on Exhibit 1 and which is marked with an "X" in ink. (See R. 10 and Ex. 1) An examination of Exhibits 1, 3, and 4, will clearly show that at the edge of the driveway is a curbing and the plaintiff was standing upon the curbing at the edge of the driveway. The fact that plaintiff on cross-examination termed this curb area part of the drive-

way does not alter the fact that it is not such as a matter of fact. (See R. 30, 32) The witness clarified her previous answer on cross-examination by specifically showing that the area she was in was not on the driveway:

“REDIRECT EXAMINATION

“By MR. HYDE:

Q. Counsel makes somewhat a play on words, Mrs. Ivie, about what is driveway and what isn't driveway. There is an area south of here and north of here that the vehicles do not drive upon, isn't that true?

A. Yes, it is.

Q. And were you down beyond the area where the vehicles ordinarily drive?

A. Yes.

Q. That is all.

“RECROSS EXAMINATION

“By MR. BERTOCH:

Q. You say vehicles don't drive on this area, Mrs. Ivie?

A. Not normally in that area.

Q. Well this vehicle drove on it?

A. Yes.

“REDIRECT EXAMINATION

“By MR. HYDE:

Q. This vehicle wasn't driving normally was it, Mrs. Ivie?

A. No.

“MR. BERTOCH: No further questions.

“MR. HYDE: No further questions.” (R. 35,
lines 1-23)

The defendant backed out of the garage and while reaching for his sun glasses the car veered south to the point where the plaintiff and her niece were standing, knocking her to the ground. (R. 10, 30)

The jury found the facts in favor of the plaintiff and returned a verdict in favor of the plaintiff and against the defendant. The defendant appeals upon the grounds that the plaintiff was negligent as a matter of law and that in any event the Court committed error in its instructions to the jury. Since no appeal is taken on the issue of the amount of damages awarded I shall not reply to defendant's suggestion that her injuries did not warrant the award granted by the jury.

STATEMENT OF POINTS

POINT I

ON APPEAL FROM A FINDING AGAINST THE APPELLANT THE EVIDENCE MUST BE CONSTRUED MOST FAVORABLY TO THE RESPONDENT AND AGAINST THE APPELLANT.

POINT II

THE PLAINTIFF WAS NOT CONTRIBUTORILY NEGLIGENT.

- a) *The plaintiff violated no statute which would bar recovery as a matter of law.*
- b) *The question of negligence in this case was a question for the jury.*

POINT III

NO PREJUDICIAL ERROR WAS COMMITTED
BY THE COURT IN INSTRUCTING THE JURY.

ARGUMENT

POINT I

ON APPEAL FROM A FINDING AGAINST THE
APPELLANT THE EVIDENCE MUST BE CON-
STRUED MOST FAVORABLY TO THE RESPOND-
ENT AND AGAINST THE APPELLANT.

It is well settled law that on an appeal from an adverse verdict the Court must presume that the jury construed the testimony and resolved all conflicts in the evidence in favor of the respondent and in reviewing the jury's finding must construe the evidence most favorably to the respondent and against the appellant, and plaintiff-respondent is entitled to every reasonable inference to be drawn from the evidence. *Ware v. Nelson*, 88 N.W. 524; *Simpson v. Hillman*, 97 P. 2d 527; *Thompson v. Fiorito*, 9 P. 2d 989; *Lord v. Western Union*, 74 P. 2d 220.

POINT II

THE PLAINTIFF WAS NOT CONTRIBUTORILY
NEGLIGENT.

a) *The plaintiff violated no statute which
would bar recovery as a matter of law.*

The statutes cited by the appellant have no application to the facts of this case. The appellant complains that the Court did not give consideration to his conten-

tion that the spot upon which the respondent stood was part of the public roadway. The respondent offered no evidence to prove or tend to prove that the spot upon which respondent stood was part of a public highway or even that the adjacent drive strip was part of a public highway instead of a private driveway. The record is completely silent on this point. The inference in the absence of evidence must be to the contrary, for the jury so held and the Trial Judge fully considered this question when defense counsel argued this point on his motion for a new trial and submitted his memorandum to the Court to support this contention.

Section 41-6-8(d) U.C.A. 1953 cited by appellant to show the spot where plaintiff was standing as part of the public roadway defines what a *Business District* is and does not have anything to do with the question of public or private roadway. 41-6-8(c) U.C.A. 1953 applies to marked safety zones such as those set apart in a roadway for passengers to wait for a streetcar or bus and also does not apply to these facts.

The plaintiff in this action was standing still on a curbing adjacent to a drive apron and thus 41-6-79 U.C.A. 1953 does not apply. This statute applies only to persons crossing a roadway. We cannot speculate on whether this statute might have applied to show negligence had the plaintiff actually proceeded into the public roadway — those facts are simply not before the Court on this appeal.

The plaintiff was not standing upon or walking along a public roadway and hence 41-6-82 U.C.A. 1953 cited by appellant as an act prohibited by law does not here apply. The statute prohibits “*walking along and upon an adjacent roadway.*” There can be no question on this record that at the time the plaintiff was struck she was not even *walking*, and was not *upon a roadway*.

The appellant in his efforts to pull the respondent into and upon a public roadway cites statutory definitions 41-6-7(a), (b), (c) and (d). (See appellant’s brief, p. 6) He argues from a combination of these definitions that the entire area between the sidewalk and the paved street is therefore a part of the public roadway. It is obvious that the area adjoining the spot on which the respondent stood is a dirt and grass filled area between the sidewalk and the street curb. Certainly it would lead to a curious result to hold that a person standing upon his lawn watering it between a sidewalk and a curb could be struck by a negligent driver driving out of the street and over the curb, and be barred from recovery because he was by statutory definition upon a public roadway. Such a result was never intended by the legislature nor is the statute amenable to such a construction even by the most strained construction.

In the case before this Court the plaintiff was standing on the curbing adjoining the driveway and the defendant-appellant allowed his car to get out of control, swerving south into the plaintiff-respondent who had

every right to stand where she was standing. The fact argued by appellant that she was considering crossing the street at a point other than the corner intersection does not bear upon the issues in this case. *The fact is she had not crossed the street and was not struck in the course of crossing the street*, hence her intention is not material. She might well have changed her mind before venturing into the street.

It should be noted in concluding the consideration of this point that there is no evidence in the record to even show where the “adjacent property lines” as defined by 41-6-7(d) were located and the Court cannot presume without evidence that the spot where plaintiff-respondent stood was not private property adjoining a private driveway.

It should further be noted that 41-6-7(c) defines a roadway as “That portion of highway improved, designed, *or ordinarily* used for vehicular travel, exclusive of the berm or shoulder.” (Ital. supplied) The testimony is clear and must be taken as true for purposes of this appeal that plaintiff was not on the portion of the alley “*designed or ordinarily used for vehicular traffic*,” but on the contrary she was standing on the shoulder which was not ordinarily used for vehicular traffic:

“Q. Can you all see the picture. You came down this edge here?

A. Yes.

Q. Now is there an area of concrete beyond the driveway portion?

A. Yes, there is.

Q. And is that the area you were upon?

A. Yes.

Q. And where was your little niece standing?

A. She was standing on the curb in the gutter.

Q. In the gutter. Now could you determine after the accident whether the car had backed straight out the alleyway or had curved?

A. It had curved.

Q. And if it had proceeded on would it have stayed on the concrete?

A. No. It would have been on the dirt.” (R. 35, lines 2-16)

“Q. Counsel makes somewhat a play on words, Mrs. Ivie, about what is driveway and what isn’t driveway. There is an area south of here and north of here that the vehicles do not drive upon, isn’t that true?

A. Yes, it is.

Q. And were you down beyond the area where the vehicles ordinarily drive?

A. Yes.

Q. That is all.”

RECROSS EXAMINATION

“By MR. BERTOCH :

Q. You say vehicles don’t drive on this area, Mrs. Ivie?

A. Not normally in that area.

Q. Well this vehicle drove on it?

A. Yes.

REDIRECT EXAMINATION

“By MR. HYDE:

Q. This vehicle wasn't driving normally was it, Mrs. Ivie?

A. No.

“MR. BERTOCH: No further questions.” (R. 35, lines 2-22)

Since on appeal from the finding of the lower Court this testimony must be taken as true, she was not on a portion of a highway ordinarily used for vehicular travel and therefore even if there had been evidence in the record that she was on the edge of a public drive, she was not on the portion ordinarily used by vehicles. Her testimony as to this stands uncontradicted. The case of *Brunette v. Biecke*, 72 N.W.(2d) 702 involved a Wisconsin statute not at all like ours. It defined a highway as “every way or place of *whatever nature* open to the use of the public as a matter of right for the purpose of vehicular traffic.” 88.44(4) Wisconsin Statutes. (Emphasis supplied) Our statute limits the definition to the area of the highway *ordinarily* used for vehicular traffic. In this case the plaintiff was standing where only an automobile out of control could have struck her. A person standing on a curb not ordinarily used for vehicular traffic need not anticipate that a car driven by a driver who loses control as a result of reaching for his sun glasses will back into her.

b) *The question of negligence in this case was a question for the jury.*

Whether or not plaintiff kept a proper lookout is entirely an issue for the jury which the jury in this case resolved against the defendant.

The plaintiff testified that she looked to see if any car was coming out of the garage and saw none. (R. 10) The fact that she looked away and failed to see the car backing out is not negligence as a matter of law.

In the case of *Millay v. Town Taxi Co.*, 136 N.E. 127, 242 Mass. 314 the facts were similar to the facts in this case. There the plaintiff was standing not at the edge but *in* a public driveway talking to a friend at a point where the sidewalk crossed the driveway. The defendant *backed* his cab out of the driveway and struck the plaintiff. The defendant contended just as in this case that the plaintiff failed to keep a proper lookout and was therefore guilty of contributory negligence as a matter of law. On appeal the Appellate Court said:

“It could not have been ruled as a matter of law that the plaintiff was careless. . . . He also had a right to assume that travelers by automobile would not without giving some possible warning, run him down. . . . *The case was properly submitted to the jury and the exceptions must be overruled.*” (Ital. supplied) *Millay v. Town Cab Co.*, 136 N.E. 127, 242 Mass. 314.

In *Bourman v. Hutchinson*, 245 N.W. 596, 124 Neb. 188, the plaintiff was in an alley washing windows when

struck. The Court held the plaintiff was not contributorily negligent.

The argument of counsel that a safer route was available to plaintiff does not make plaintiff negligent as a matter of law in this case. Had she been struck in the roadway perhaps this could be argued — at least to a jury. In this case she was standing on the edge of a concrete curb bordering the driveway. She doubtless would have been safer in bed but it would be incredible to contend that as a matter of law since there were safer places to be that plaintiff was negligent as a matter of law.

In *House v. Brandt*, 185 Atl. 628, 323, Pac. 52, the plaintiff was walking past a truck in an alley. The truck started up and injured plaintiff. The defendant on appeal argued that the plaintiff could have taken a safer route to his destination. The Appellate Court said:

“A person who uses a street or highway that is thrown open for public travel, knowing that at the time there is a safer route which he may take to reach his destination . . . is not necessarily guilty of negligence because he does not take the safer route.” *House v. Brandt*, 185 Atl. 628, 323, Pa. 52.

In a recent well-written case the Michigan court treated the problem of contributory negligence and set out the modern trend of decisions. In that case the plaintiff was crossing a public road 250 feet south of an intersection and was not within a crosswalk. He was struck

after he had reached the middle of the road by the defendant. The jury held for the plaintiff and the Trial Judge granted Judgment N.O.V. on the ground that the plaintiff was negligent as a matter of law. The Supreme Court reversed the Trial Judge and in doing so said:

“It is not debatable that plaintiff’s observations and/or his deductions therefrom were inadequate for his protection. If our test for contributory negligence was whether or not plaintiff had done all that he conceivably could have done, or even all that, in retrospect, it is obvious he should have done for his own safety, no negligence action could ever be maintained . . . *This court should not leave the pedestrian a legal sitting duck.*” (Ital. supplied) *Ware v. Nelson*, 88 N.W. 2d 525. (Michigan 1958)

POINT III

NO PREJUDICIAL ERROR WAS COMMITTED BY THE COURT IN INSTRUCTING THE JURY.

The appellant excepts to the giving of Court’s instructions Nos. 4 and 10 on the ground that these instructions set out conditions upon which the plaintiff may recover but do not set out that plaintiff is bound if she is guilty of contributory negligence. All of the Court’s instructions must be read together as a whole to determine if the jury was adequately instructed.

In instruction No. 2 the Court explained twice that even if the plaintiff was otherwise entitled to recover,

if contributory negligence was found, she would be barred from recovery by reason of such negligence.

Instruction No. 4 must be read together with instructions 2 and 4(a) which clearly limited 4 to a recovery only on conditions that no contributory negligence was found. The Court, if anything, over-emphasized the issue of contributory negligence by repeating the charge that plaintiff would be defeated by any negligence on her part in instructions Nos. 2, 5 and 6.

These instructions are in harmony with the instructions given for the instructing of juries by the Committee for Jury Instruction Forms for Utah. That Committee said at page XVI:

“NO INSTRUCTION STATES ALL THE LAW

In many instances instructions must be given in connection with others to give an accurate picture of the legal principles involved. *A notable example of this is where there is an issue of contributory negligence. It seems needless repetition to include the proviso ‘unless you find against the plaintiff on the issue of contributory negligence,’ in the various instructions stating the basis upon which the plaintiff could recover. This should be kept in mind and instructions given together which are necessary to supplement each other.’* J.I.F.U. Page XVI. (Ital. supplied)

The Trial Judge certainly followed this admonition to the letter and to avoid needless repetition instructed separately on the issue of contributory negligence. The jury was told in instruction No. 2 that if the jury found contributory negligence they must find for the defendant

and against the plaintiff. Again immediately after instruction 4 the Court again repeated and admonished the jury that if the plaintiff did not keep a proper lookout the jury must find against her. To make this proposition crystal clear the Court added instruction 5 telling the jury that if both were "to a degree negligent" the plaintiff could not recover. It is hard to imagine a more complete and full explanation of all the circumstances that would defeat the plaintiff.

The appellant has not seen fit to include in his designation of record the defendant's requested instructions and they are thus not before the Court on this appeal, and his contention that the Court committed error in not granting one of these cannot be considered on appeal. *Dayton v. Free*, 148 P. 408, 46 U. 277; *Perry Ins. Co. v. Thomas*, 278 P. 535, 74 U. 193.

CONCLUSION

There is no evidence to justify this Court in holding the plaintiff-respondent negligent as a matter of law. The injury to the plaintiff was not the proximate result of the violation of any statute nor can it be held under the evidence that she was negligent as a matter of law.

The Court's instructions taken as a whole correctly advised the jury as to the law of the case. The verdict and judgment should be affirmed.

Respectfully submitted,

GORDON I. HYDE

*Attorney for Plaintiff
and Respondent*