1971

Milton L. Weilenmann v. Grant Blackhurst : Brief of Respondent

Utah Supreme Court

Raymond M. Berry; Attorneys for AppellantJohn L. Black; Attorney for Respondent

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ILTON L. WEILENMA
Plaintiff and R

vs.

RANT BLACKHURST
ORRELL,
Defendant and

BRIEF OF RE

Appeal from Judgment of
Salt Lake County, Honora

WA
JOH
RA
ESQ
Suit
Attor

M. BERRY
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Continental Bank Bldg
, Utah 84101
Appellant

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CASES CITED

AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF UTAH

MILTON L. WEILENMANN,
Plaintiff and Respondent,

vs.

GRANT BLACKHURST MORRELL,
Defendant and Appellant.

Case No. 12421

BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

The parties will be referred to as in the court below. All italics are ours.

STATEMENT OF THE KIND OF CASE

This is an action brought by plaintiff against defendant for personal injuries, damage and loss suffered in an intersection accident.

40 *mph* at the point of his last recollection. The rec warrants no such statement.

Defendant was familiar with the intersection, w aware of the stop sign and intended to stop at it. cross-examination, he testified:

> "Q. You reached a point in that intersect where you came into contact with a sou bound vehicle having the right of way a proceeded South along "I" Street, did y not?
>
> A. That's the evidence. Yes, sir." (R. 204)

Defendant also testified on cross-examination that September, prior to the accident, his head lights h gone out for some unknown reason, that he had tak the automobile to a garage, and that the garage h been unable to find the cause of the light failure. (R 203)

The officer who investigated the accident believ that the head lights on defendant's automobile we broken in the collision. (R. 152)

A home is located near the northwest corner the intersection some 30 to 40 feet north of the nor curb line of 11th Avenue and 30 to 40 feet west of t west curb line of "I" Street. (R. 154, 184)

The trial court submitted the case to the jury h as to defendant's negligence and proximate cause a as to plaintiff's contributory negligence and proxim cause. The jury returned a verdict in favor of plain and the court rendered judgment on the verdict.

POINT I. THE TRIAL COURT CORRECTLY DECIDED THAT THE ISSUES OF WHETHER PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AND WHETHER SUCH NEGLIGENCE, IF ANY, PROXIMATELY CAUSED THE ACCIDENT, WERE FOR JURY DETERMINATION.

Defendant had the burden of establishing by a preponderance of the evidence that plaintiff was negligent and that his negligence was a proximate cause of the accident. Defendant utterly failed in both respects.

The evidence showed that plaintiff was slowing from 30 mph at the "slow" sign as he approached the intersection. As he came closer to the intersection, he looked to his right and viewed the area in the vicinity of the stop sign. He then looked to his left and saw no approaching vehicles. The steep decline of "I" Street and the dish-out at the 11th Avenue intersection required his careful attention. The home located on the northwest corner of the intersection limited his view to the west. Defendant was traveling 30 mph when he was approximately one and a half blocks from the intersection. His last recollection was one of intending to slow down and stop at the "I" Street stop sign.

The measurements taken by the officer show that plaintiff traveled through the intersection 33 feet 10 inches to the point of impact, while defendant traveled into the intersection 14 feet 6 inches to the point of im-

pact. Furthermore, defendant had traveled 28 feet pa the stop sign to the point of impact. Assuming that th two automobiles were traveling at the same rate o speed approaching and entering the intersection, plain tiff was in the intersection 5 feet 10 inches at the tim defendant was passing the stop sign.

The cases we hereinafter cite make it clear tha as plaintiff approached the intersection he was entitle to expect that he would be accorded the right-of-wa until he either saw, or in the exercise of ordinary car should have seen, that the contrary was true. Defendan contends that as a matter of law plaintiff had a duty to relinquish the intersection to defendant. The burde of proof on this issue was clearly on his shoulders. I order to sustain this burden it was necessary for de fendant to prove that he was himself driving in such an unusual manner that plaintiff, in the exercise o ordinary care, had an affirmative duty to take evasiv action. Defendant failed to discharge this burden. A a matter of fact, there was no evidence whatsoever as t defendant's conduct from a point one and one-ha blocks away from the intersection down to the ver point of impact.

The leading Utah case on burden of proof as t contributory negligence in an intersection case is *Gib et al. vs. Blue Cab* (1952) 122 U. 312, 249 P.2d 21 In the *Gibbs* case Justice Wade, in a special concu rence, stated: (pp. 321, 322)

> "The plaintiffs do not have the burden of pro ing that decedent was free from negligen

which proximately caused the accident or any particular fact or set of facts on those issues, but defendant is entitled to a directed verdict only if the evidence is such that the jury would have to act unreasonably if they were not convinced of decedent's fault in respect to such issues. Defendant has the burden of proving decedent was guilty of contributory negligence proximately causing the accident. Also in considering the evidence we should keep in mind that there is no direct evidence of what decedent did or how he got to the place of the accident, . . ."

This Court also recognized in the *Gibbs* case that *contributory negligence and proximate cause are usually jury questions in intersection cases* where Justice Henriod, in the majority opinion, stated at page 316:

> "As in other cases, the reasonable man doctrine, and the rules pertaining to the function of court and jury with respect to determination of negligence, contributory negligence or proximate cause, must be invoked in intersection cases—a type that creates more difficulty of decision than most. Difficulty arises in applying the simple, constant rules to shifting factual scenes."

The case of *Hess vs. Robinson, et al.* (1945) 109 U. 60, 163 P.2d 510, is squarely in point and adverse to defendant's position. That case involved an intersection accident which occurred in Ogden, Utah. Defendant was proceeding east on 31st Street, ran a stop sign and collided with plaintiff who was proceeding south on Grant Avenue. The trial court held that both defendant and plaintiff were negligent as a matter of law but left

at a speed of approximately 50 mph. The controll... circumstances on which the case turned was this Cour... opinion that plaintiff, just before entering the int... section, would have been justified in considering it s... to enter because at that point if the truck of defend... was proceeding at a rate of 50 mph and plaintiff w... proceeding at a rate of 5 to 10 mph (as the eviden... justified) the truck would have been at least 250 f... from the intersection. Consequently, plaintiff was e... titled to have assumed and acted on the assumpti... that defendant would exercise ordinary care and woul... yield him the right-of-way.

This Court, in *Morris vs. Christensen* (1960) 1... U.2d 140, 356 P.2d 34, carries through with the d... tinction so carefully analyzed in the *Stevens* case a... distinguishes *Johnson vs. Syme* (1957) 6 U.2d 31... 313 P.2d 468, the case so heavily relied on by coun... for defendant, with the following statement: (p. 142

> "The present action does not parallel the ca... of Johnson vs. Syme upon which defendan... rely. *In that case had plaintiff at any ti... observed that which he had a duty to obser... she would have been able to avoid the collisi... In the present action the trial court took an opp... site view and concluded that plaintiff's obser... tion would not have forewarned him of the i... pending hazard.*"

This Court also stated at page 142:

> "*But he who has the right-of-way need not a... ticipate sudden outbursts of negligence on t... part of another driver. Indeed it may be u...*

that the failure to observe is negligence proximately contributing to the harm only where by observing the driver could have avoided or lessened the resulting harm."

Another case holding that a person has no duty to drive under the apprehension that another driver will be guilty of a sudden burst of negligence is the case of *Peterson vs. Nielsen* (1959) 9 U.2d 302, 343 P.2d 731.

In conclusion on this point, we believe that the case gets down to a very few fundamental propositions. As far as defendant's conduct is concerned, only two possibilities are supported by the evidence: first, that defendant ran the stop sign at a speed of 30 mph or less, or second, that defendant stopped at the stop sign and then proceeded into the intersection and into collision with plaintiff's automobile. In either event he was negligent for failure to yield the right-of-way. As far as plaintiff's conduct is concerned, he was entitled to proceed into the intersection and to assume non-negligence on the part of defendant until and unless defendant's manner of driving either warned or should have warned him of impending danger. On the matter of warning, defendant has utterly failed to prove that his own manner of driving was of such nature as to warn plaintiff of impending danger. Yet defendant was faced with the burden of proving that such was the case in order to win this lawsuit.

POINT II. INSTRUCTION NO. 16 CORRECTLY STATES THE LAW AND IS SUPPORTED BY THE EVIDENCE.

Defendant claims that Instruction No. 16 was prejudicially erroneous for the reason that it incorrectly authorized a finding that defendant ran the stop sign. We need only point out in this connection that whether defendant stopped or didn't stop is immaterial for the reason that defendant was negligent as a matter of law in either case. He had no legal right to run the stop sign and he had no legal right to burst out from the stop sign in a sudden act of negligence. Furthermore, defendant, having produced no evidence whatsoever as to how the accident happened, leaves plaintiff's testimony completely undisputed. Under plaintiff's version of the accident, defendant simply failed to yield the right-of-way and was solely responsible for the accident. We firmly believe that plaintiff was entitled to a holding as a matter of law that defendant was negligent and that his negligence proximately caused the accident.

Defendant further complains that the court failed to instruct on the theory that defendant could have stopped and then had the right-of-way to proceed on account of plaintiff not being so close to the intersection as to constitute an immediate hazard. The trouble with this theory is that defendant has failed to sustain the burden of proof. See *Gibbs vs. Blue Cab*, supra.

Procedurally, it is of controlling importance that defendant made no request for an instruction on

theory discussed in the preceding paragraph. (R. 93-109) The Utah cases support the proposition that where it appears that the trial court has failed to instruct on a given point of law, the party adversely affected cannot complain of error on appeal unless the record reveals that he made a timely request for an instruction on said point at the trial. See *State of Utah, by and through its Road Commission vs. George Kendell,* (1968) 20 U.2d 356, 438 P.2d 178, and authorities cited therein.

POINT III. INSTRUCTION NO. 19 CORRECTLY STATES THE LAW AND IS SUPPORTED BY THE EVIDENCE. FURTHERMORE, DEFENDANT DID NOT TAKE A PROPER EXCEPTION TO SAID INSTRUCTION.

Instruction No. 19 is a correct instruction under the authorities cited in Point I which uniformly hold that a person having the right-of-way at an intersection has the right to assume that other traffic approaching said intersection will yield the right-of-way, unless he sees, or in the exercise of reasonable care should have seen, something to warn him to the contrary. This rule is well stated in J.I.F.U. Instruction No. 21.18 and although said instruction form uses the word "traffic signal," the principle is unquestionably the same where the intersection is controlled by a "stop sign" as in the case at bar. Apparently, counsel for defendant is disturbed because of the terminology. But only if the

questioned terminology is such that there is a likelih... that it confused or misled the jury would it be mater... Here, the evidence of the investigating officer and ... other witnesses made it impossible that the jury co... have been misled. This is nothing more nor less than ... effort on the part of counsel to lint-pick his way to ... undeserved win.

Furthermore, counsel is precluded from questio... ing Instruction No. 19 on the aforesaid basis by h... failure to take a proper exception, and to thus affo... the trial court an opportunity to correct what was ... most a technical error in terminology. See counse... exception at R. 260, where counsel merely states th... Instruction No. 19 is erroneous for the reason tha... "plaintiff is not entitled to rely on cross traffic obeyi... the traffic sign unless he himself is exercising ordina... care." At no time did counsel even come close to advi... the trial court of his present contention that the instru... tion was wrong because a "signal" is not a "sign."

CONCLUSION

As was pointed out by this Honorable Cour... *Martin vs. Stevens,* supra:

> "If a driver has to drive his car under the ... sumption that every one else is apt to be ne... gent, the next step would be for him to conclu... that he better get off the streets entirely or s... one is likely to hit him, and abandon the stre... to those who were just willing to take chan... If, under circumstances such as present in ...

case, where the plaintiff's right of way is so clear that no reasonable person could have any doubt about it, he could not assume that he would be afforded his right of way, the only way drivers could safely proceed at an intersection would be to resort to: 'You first, my dear Gaston,—no, after you, my dear Alphonse,' procedure or get out and hold a conference before either could safely proceed. * * * *

"It was the very purpose of avoiding uncertainty and confusion at intersections, and in order to make the movement of traffic both practical and safe, that rules have been established so that drivers will know which has the right of way."

We submit that in the case at bar plaintiff's right-of-way was so clear that no reasonable person could have any doubt about it. Accordingly, he was entitled to assume that his right-of-way would be honored and to act on that assumption.

We respectfully submit that the judgment in plaintiff's favor should be affirmed.

Respectfully submitted,

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MAILING CERTIFICATE

I HEREBY certify that I mailed two copies the foregoing Brief of Respondent, postage prepa to Raymond M. Berry of Worsley, Snow & Christens Attorneys for Defendant and Appellant, 7th Floor C tinetal Bank Building, Salt Lake City, Utah 841 on the ..... day of June, 1971.

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JOHN L. BLACK