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Jerry Marcellin v. Delbert Osguthorpe : Brief of Appellant

Utah Supreme Court

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U.S. SUPREME COURT
FEB 16 1959

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IN THE SUPREME COURT
of the
STATE OF UTAH

JERRY MARCELLIN,

Respondent and Plaintiff,

—vs.—

DELBERT OSGUTHORPE,

Appellant and Defendant.

FILED

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Clerk, Supreme Court, Utah

Case No. 8944

BRIEF OF APPELLANT

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IN THE SUPREME COURT of the STATE OF UTAH

JERRY MARCELLIN,

Respondent and Plaintiff,

—vs.—

DELBERT OSGUTHORPE,

Appellant and Defendant.

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BRIEF OF APPELLANT

FACTS OF THE CASE

This is an appeal from a judgment for \$860.00 entered August 7, 1958, in favor of Jerry Marcellin, Respondent and Plaintiff, hereinafter referred to as Plaintiff, against Delbert Osguthorpe, Appellant and Defendant, hereinafter referred to as Defendant. The case arose out of an automobile accident occurring November 17, 1957, in Summit County, Utah. The judgment represents damage to Plaintiff's automobile.

On the morning of the accident Plaintiff left his home at Park City, Utah, for work at Chicago Bridge & Iron Works, Salt Lake City, Utah, at his customary time—between ten and five minutes before 6:00 A.M. (T. 3. References are to transcript and record, since the two are separate.) Plaintiff was driving a 1954 Chevrolet automobile in good working condition, equipped with new snow tires. It was dark. The road had an inch or two of new snow over ice; it was “very slick”. (T. 4, 28, 47).

After leaving Park City, Plaintiff traveled north along U.S. Alternate Highway 40 to a point west of Snyderville, Utah, where the highway curves, turned left at the curve and proceeded west, downgrade, at 35 to 40 miles per hour. He saw the headlights of another vehicle about 1,000 feet straight ahead in the lane for on-coming cars. They were on high beam. (T. 5, 6).

When 500 to 600 feet from the vehicle ahead, Plaintiff began blinking his lights. When 200 to 250 feet away, he concluded that the other vehicle was not going to dim its lights and eased off the accelerator, reducing his speed, possibly five miles per hour, but nevertheless continued until his headlights disclosed the red taillights of a Cadillac automobile 50 to 60 feet away stopped on a northwesterly angle blocking his lane of traffic. (T. 7, 8).

Defendant, meanwhile, had driven a pick-up truck from his dairy farm located on the south side of the highway onto the highway, turned right and proceeded east when observed the Cadillac automobile apparently dis-

abled (T. 62). He stopped even with the Cadillac to see if he could be of assistance. At this time he observed the headlights of Plaintiff's automobile approaching at a high rate of speed (T. 69). Defendant started backing toward the shoulder and to the west and had backed 27 feet when Plaintiff's automobile ricocheted from the rear bumper of the Cadillac into the front fender of the truck, the left side of which was 4 to 5 feet from the center of the highway, and continued through snow banks on the side of the road for a distance of 216 feet (T. 49, 57, 59). Defendant's truck was moved 2 or 3 feet by the impact (T. 30). The highway at the scene of the accident was 19 or 20 feet wide (T. 5).

Plaintiff admitted that his headlights would disclose objects 250 feet away, that he saw the Cadillac automobile as soon as his headlights fell upon it, but that he was unable to stop because he was going too fast. (T. 27, 32).

At the conclusion of the evidence, the court, over objection of the Defendant, submitted the case to the jury upon a special verdict containing the doctrine of Last Clear Chance, in addition to the issues of negligence, contributory negligence and proximate cause. In this connection, the jury was instructed:

"Under certain circumstances a plaintiff is entitled to judgment against a defendant even though the plaintiff be guilty of contributory negligence. This rule of law that thus permits a negligent plaintiff to recover judgment is known as the doctrine of last clear chance. If you determine

that the plaintiff was in fact guilty of contributory negligence, you should then consider whether or not the doctrine of last clear chance is applicable to this case. The doctrine is applicable if and only if you find from a preponderance of the evidence that each of the following five propositions is true :

1. That the plaintiff was in a position of danger from which he was unable to free himself by the exercise of due care.

2. That the defendant either discovered the plaintiff in his helpless position of danger, or by exercising due care would have discovered him.

3. That the defendant, after thus discovering the plaintiff, or after he thus should have discovered him had he exercised due care, then realized, or by exercising due care should have realized the danger to the plaintiff.

4. That at the time the defendant thus either discovered the plaintiff or should have discovered him, and after he thus realized or should have realized the plaintiff's helpless position of danger, he then had a clear opportunity to avoid the accident by the exercise of ordinary care and with his then existing ability. There must have been an actual opportunity existing at that moment for the defendant to avoid the accident. Also, it must have been a fair, clear opportunity and not just a bare possibility of doing so.

5. That the defendant then negligently failed to avail himself of that clear opportunity and as a proximate result, the plaintiff was injured.

If you find that each of the above five propositions is true, the doctrine of last clear chance

is applicable to this case, and the plaintiff is entitled to a verdict in his favor even though you find him guilty of contributory negligence. If you find that any one of the above five propositions is not true, the doctrine of last clear chance has no application and cannot be invoked by the plaintiff."

The jury found the Defendant guilty of violating the statute relative to dimming headlights, 41-6-135, U.C.A., 1953, and that this violation was a proximate cause of the collision (R. 74). The jury also found: "The Plaintiff was contributorily negligent in travelling too fast for existing conditions," but that: "The Defendant had the last clear chance as defined in the instructions to avoid the collision" (R. 75, 76).

After the verdict had been received, both Plaintiff and Defendant moved for judgment in their favor upon the verdict (R. 79). Plaintiff's motion was granted and Defendant's motion denied (R. 92). Judgment was thereupon entered for the Plaintiff and against the Defendant, from which this appeal was taken.

STATEMENT OF POINTS

I

THE DISTRICT COURT OF SUMMIT COUNTY, UTAH, ERRED IN SUBMITTING THE DOCTRINE OF LAST CLEAR CHANCE TO THE JURY IN THIS CASE.

II

THE DISTRICT COURT OF SUMMIT COUNTY ERRED IN GRANTING PLAINTIFF'S MOTION FOR JUDGMENT

UPON THE SPECIAL VERDICT AND IN REFUSING TO GRANT DEFENDANT'S MOTION FOR JUDGMENT UPON THE SPECIAL VERDICT.

ARGUMENT

I

THE DISTRICT COURT OF SUMMIT COUNTY, UTAH, ERRED IN SUBMITTING THE DOCTRINE OF LAST CLEAR CHANCE TO THE JURY IN THIS CASE.

The doctrine of Last Clear Chance as it applied in Utah is based largely upon proximate cause. If plaintiff's negligence continues up to the time of the injury and is a proximate cause thereof, Last Clear Chance is not applicable. This Court has firmly established this proposition and has repeatedly held that in cases where the plaintiff's negligence continues, Last Clear Chance is not to be considered but rather the usual rules of contributory negligence apply and if found defeat the plaintiff's claim.

In *Compton et al. v. Ogden Union Railway and Depot Company*, (Utah, 1951), 235 P. 2d 515, the plaintiff, while walking along a well defined pathway running parallel to the defendant's railroad tracks, was struck by a diesel engine operated by the defendant in its yard at Ogden, Utah. The Court said:

“ . . . When the injured person's negligence has not come to rest so that by the exercise of reasonable care she would have been able to avoid the peril at any time up to the moment of injury, the injury is then the result of the concurring

negligence of the plaintiff and the defendant. The one was just as much the proximate cause as the other.”

See also *Holmgren v. Union Pacific R. Co.*, (Utah, 1948), 198 P.2d 459, where the court pointed out that in Last Clear Chance cases the plaintiff’s negligence has become in a sense fixed and realizable and on to this state of things *the defendant approaches onto the negligent plaintiff* with and in control of the danger. (Emphasis added.)

In this case the jury has found that the negligence of Plaintiff was a concurring cause of the accident. This negligence consisted of failing to drive at a reasonable speed in view of the width, surface and condition of the highway, the traffic thereon, the visibility and the actual and potential hazards then existing (Instruction 9-E). In its very nature, this negligence continued until the moment of the accident.

Even if it be assumed, however, that Plaintiff’s negligence came to rest or became fixed, what opportunity did Defendant have to avoid the accident? Plaintiff argues that Defendant could have dimmed his lights and this accident thereby avoided.

This obviously would have required that Plaintiff guide his car like a sled between the Cadillac and the truck along a “weaving” course. Last Clear Chance, however, contemplates that Defendant, not Plaintiff, have the clear chance.

This is well stated in *Graham v. Johnson, et al.*, (Utah, 1946), 166 P.2d 230, where the court said:

“The liability of the defendant arose because he failed to take the opportunity which *he alone had* timely to avoid doing the plaintiff harm even though the plaintiff was negligent in getting himself in a position where he was helpless or because he was so inattentive that he was not alert to the approaching danger over which defendant had control.” (Emphasis added.)

* * *

“One should not be held liable for failing to avoid the effect of the other’s negligence in a situation where it is speculative as to whether he was afforded a clear opportunity to avoid it. In a situation where both parties are on the move the significance of the word ‘clear’ is most important. Otherwise we may put the onus of avoiding the effect of one’s negligence on a party not negligent. That party’s negligence only arises when it is definitely established that there was ample time and opportunity to avoid the accident which was not taken advantage of.”

Last Clear Chance cannot be applied on a showing that Defendant *may* have had a chance to avoid the accident. “Defendant must have had the *last* chance and also had a *clear* chance.” *Holmgren v. Union Pacific R. Co.*, supra. As the court observed in that case that he should have had the last chance implies that his chance to avoid the accident must have come later in point of time than any similar chance on the part of the injured person. That he should have had a clear chance implies that he

must have had more than a bare possible chance to avoid an unexpected peril created practically simultaneously with the happening of the accident by the negligence of the injured party.

In spite of this well settled principle, Plaintiff asks that this Court now hold that it is sufficient for application of Last Clear Chance that Plaintiff be able to avoid the accident but for the negligence of Defendant.

Even if so, how could Plaintiff have avoided the accident if he was in a position of inextricable peril as he must be to invoke the doctrine in the first instance?

It is a contradiction in terms to say while Plaintiff could not extricate himself from the roller coaster ride upon which he had embarked, nevertheless, he could have at once freed himself had Defendant's lights been dimmed.

The "dimming" cases are governed by principles of primary negligence and contributory negligence and where a blinded plaintiff has been found negligent, such negligence has been held a concurring cause of the accident. See "Duties and Liabilities of Vehicle Driver Blinded by the Glare of Lights," 22 A.L.R. (2d) 292 and "Glar-ing Headlights as Cause of Collisions," 9 N.C.C.A. (3rd) 190.

The doctrine of Last Clear Chance is a limitation upon the defense of contributory negligence and should not be extended further in its application than it can be supported by cogent reasoning. *Anderson v. Bingham Indus-*

trial Railroad Company (Utah, 1950), 214 P.2d 607. This Court has repeatedly held that Last Clear Chance has limited application to cases involving moving vehicles. *Hickok v. Skinner*, (Utah, 1948), 190 P.2d 514; *Beckstrom v. Williams*, 3 Utah 2d 210, 282 P.2d 309 (1955). Also, in this case Defendant was moving *away* from Plaintiff. It would, indeed, make more sense to apply the doctrine against Plaintiff than in his favor.

II

THE DISTRICT COURT OF SUMMIT COUNTY ERRED IN GRANTING PLAINTIFF'S MOTION FOR JUDGMENT UPON THE SPECIAL VERDICT AND IN REFUSING TO GRANT DEFENDANT'S MOTION FOR JUDGMENT UPON THE SPECIAL VERDICT.

Since the doctrine of Last Clear Chance can have no proper application to this case, the finding of the jury that the Plaintiff was "contributorily negligent," defined in Instruction 9-a as negligence on the part of a person injured which cooperating with the negligence of another, assists in proximately causing his own injury, it must follow that Defendant's motion for judgment, no cause of action, upon the verdict should have been granted.

CONCLUSION

If the doctrine of Last Clear Chance be deemed applicable to the facts of this case, then the defense of contributory negligence is emasculated.

The jury in this case found contributory negligence in driving too fast for existing conditions, which, in its very nature, continued to the moment of the accident.

Since Last Clear Chance can have no proper application under such facts, the District Court of Summit County should have entered judgment for the Defendant, no cause of action, upon the Defendant's motion following return of the special verdict. The District Court's error in failing so to do should now be corrected by this Court by reversal of the judgment on the special verdict with instructions to the clerk of the court to enter judgment for the Defendant and against the Plaintiff, no cause of action.

Respectfully submitted,

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