

1958

Jerry Marcellin v. Delbert Osguthorpe : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT

of the

STATE OF UTAH

JERRY MARCELLIN,

Respondent and Plaintiff,

-VS.-

Case No. 8944

DELBERT OSGUTHORPE,

Appellant and Defendant.

BRIEF OF RESPONDENT

FACTS OF THE CASE

Respondent accepts the version of the facts presented by the Appellant on pages 1 and 2 of his brief but takes the following view of the facts discussed by Appellant

on page 3 of his brief. After the Appellant stopped to aid the driver of the Cadillac, he testified that he observed the headlights of Plaintiff's automobile approaching. As soon as he saw the car coming, he started to back up (T.67). He was aware there was a situation of peril (T.63). He continued backing to a point where his right wheels were off the blacktop before Plaintiff's automobile ricocheted from the rear bumper of the Cadillac into the left front fender of his truck (T.67). The impact pushed his truck back another two or three feet, and it came to rest with its left front at a point 27 feet diagonally across the road from the left rear of the Cadillac (T.47). The testimony varied as to the width of the space between the Cadillac and the truck through which Plaintiff might have passed, depending upon the observer

who testified. Respondent said 8 or 10 feet (T.18,19). Anyway, the jury found that it was wide enough so that if the Plaintiff had been able to see, he had a clear chance to pass through without striking either of the vehicles.

Respondent testified that as he approached Appellant's truck, he was blinded by its lights and he saw the tail light of the Cadillac only after he had broken through the glare of these lights, a distance of 50 or 60 feet from the Cadillac (T.7,25). Appellant states in his brief that Respondent saw the Cadillac when 250 feet from it. This is not our interpretation of the testimony. Following a series of rather bewildering questions on cross-examination, Respondent stated that his lights when on dim illuminated objects 350 feet ahead (T.27). He also said that the first sign

he saw of the Cadillac was its tail light 50 or 60 feet away, which was illuminated itself. Apparently, confused by the manner in which the question was put, he admitted on cross-examination that he first saw the Cadillac when his lights struck it. Counsel would have the Court infer from this that he saw the Cadillac when he was 350 feet from it. The jury obviously did not so conclude, and we submit none of the testimony bears this out.

Respondent testified that he could not have stopped in this short distance after he saw the tail lights. Had it not been for the blinding lights, he could have turned out and avoided the Cadillac throughout most of the distance. After Respondent reached a point 200 to 250 feet from the Defendant, at which time he concluded

that the Defendant would not dim his lights, he eased off his accelerator and lost perhaps 5 miles an hour of speed. When he did see the Cadillac, he was able to swerve to the left far enough so that its bumper scraped his car for a depth of only two or three inches, and this thrust him to the left into the truck.

ARGUMENT

I

As to Defendant's contention that the doctrine of last clear chance should not have been submitted to the jury in this case:

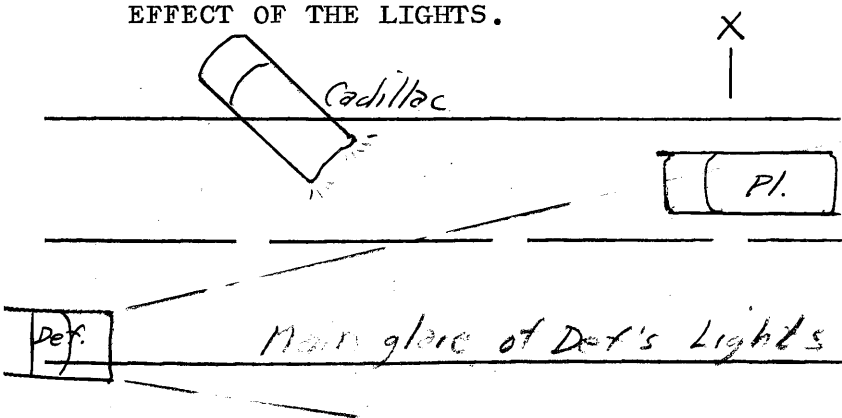
As Respondent traveled the last 250 feet to the point of impact, he was unaware of his peril, but throughout part of this distance, he was not in an inextricable position; that is to say, he could have slowed down to 10 or 15 miles per hour, and

when he reached the point 50 feet from the Cadillac where he first saw it, he would have been able to turn out and miss it. However, as he proceeded along through this distance, he reached a point where, due to the slickness of the road, he could no longer slow sufficiently to turn out and miss the Cadillac within the 50 feet. He had then reached a point of inextricable peril as far as anything he could have done for himself was concerned. However, for some additional distance, it was still possible for the Appellant to save Respondent by dimming his lights. This is so because throughout this distance the Respondent, even at the speed he was going, could still have swerved to the left sufficiently to avoid the Cadillac if he could have seen. He finally reached

a point where, even if he had been able to see, he would still not have been able to swerve and avoid the accident. Very shortly after this, he saw the red light and attempted unsuccessfully to avoid it. The jury accepted this analysis of the physical facts.

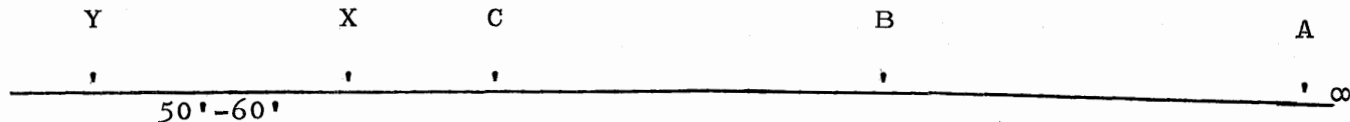
I call the Court's attention to the following two diagrams:

EFFECT OF THE LIGHTS.



Not till Plaintiff breaks through the beam of Defendant's lights at point X, 50 feet from the Cadillac, does he see the gleam of its tail light.

Position of Cadillac	Point where Plf. saw Cadillac	Last point where Plf. at 30± mph could have steered out of peril if he could have seen	Last point where Plf. could have slowed from 35± mph to such speed, say 10-15 mph, as would have permitted him to steer out in last 50 feet	Point where Plf. con- cluded Def. would not dim
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From A to B, Plaintiff is not in inextricable peril but is unaware of his danger.

From B to C, Plaintiff is in inextricable peril, but Defendant can still save him.

After C, nothing can be done.

Appellant first claims that the doctrine of last clear chance in Utah is based largely upon proximate cause and asserts that if Plaintiff's negligence continues up to the time of the injury and is a proximate cause thereof, last clear chance is not applicable.

I submit this is totally unsound. In substantially all of the last clear chance cases, the negligence of the Plaintiff continued up to the time of injury. The Utah Court has characterized the doctrine as the humanitarian doctrine and stressed the fact that in all cases where it applies, the negligence of the Plaintiff does continue to the time of the accident. The case of Compton et al. v. Ogden Union Railway and Depot Company (Utah, 1951) 235 P. 2d 515, cited by the Appellant is simply

not in point. When in that case the Court uses the words, "the injured person's negligence has not come to rest," it does not mean that the negligence has ceased. What it means is that the negligence, either in the form of inattentiveness or the form of a course of action which has resulted in inextricable peril, has fixed the subsequent course of events so that the Defendant, as a reasonable person, should realize that the peril exists, hence the last clear chance. The Court in effect says in the Compton case that it was not yet apparent to the Defendant that the Plaintiff's negligence would continue or persist until she was in a position of inextricable peril. This is pointed out by the Defendant in his reference to the case of Holmgren v. Union Pacific R. Co., (Utah, 1948), 198 P. 2d 459.

In our case, the Defendant has admitted knowing that the situation of peril had come into being.

This problem is extensively annotated in 92 ALR 47, 119 ALR 1041 and 171 ALR 365. For purposes of analysis in the notes, this class of cases is broken into categories as follows:

FIRST CATEGORY: Danger actually discovered by Defendant; injured person physically unable to escape.

SECOND CATEGORY: Danger actually discovered by Defendant; injured person physically able to escape.

THIRD CATEGORY: Danger not actually discovered by Defendant, but ought to have been; injured person physically unable to escape.

In our case, the last category would

not be involved inasmuch as the Defendant testified that he was aware of the peril--that he saw the Plaintiff was not slowing down.

However, I submit the Plaintiff here ran through the first two categories, that is, as he approached the scene, he was at first in peril because he was unaware of the danger but was physically able to slow down and escape the peril in spite of being blinded by the headlights. This was the second category listed above. However, he reached a point where it was too late to slow down enough (due to the slick road which precluded heavy application of brakes) to steer aside with only a 50-foot view of the peril. Yet for some distance, he could still have turned aside if the lights had been dimmed. From that point to the point

where there was no opportunity to even steer out of peril, he was in category number one. This was the basis of submission of the instruction to the jury.

As a second argument in Appellant's first point, Appellant argues in effect that even if the Defendant had dimmed his lights, it would still be necessary for Plaintiff to take a further step, i.e. to guide his car between the Cadillac and the truck. He claims that this precludes the application of the doctrine of last clear chance to this case. I feel this point can be answered by reference to any of the so-called "warning" cases. These are numerous and indicate that the doctrine is applicable where a warning may cause the Plaintiff to take the necessary action to avoid the peril. The Appellant cites

certain dictum from the case of Graham v. Johnson, et.al., (Utah, 1946), 166 P. 2d 230, and on re-hearing, 172 P. 2d 665.

We feel, however, that the case supports our position. In that case, the Plaintiff, a 13-year old boy, was playing football in the street with two companions. This was in violation of the city ordinance. Defendant drove along the street, and from the testimony the jury might have found that she drove toward the Plaintiff. The Court pointed out that she had a duty of due care because of the circumstance of the presence of the boys in the street. She failed to sound her horn and warn the boys of her approach. As she approached the boys, one of them called a warning to the Plaintiff, whose back was toward the driver and he started running diagonally across the street, and thus the collision resulted. It was this fail-

ure to sound the horn and warn, which was relied upon by the Plaintiff as a basis for an application of the last clear chance doctrine. In holding the doctrine might apply, this Court clearly acknowledges that an affirmative act by the Plaintiff would be required to remove himself from the line of the peril or to avoid getting into the line of peril.

This appears to me to be the same problem facing the Plaintiff in the principal case, although in this case the dimming of the lights, rather than the sounding of the horn, was the step which could have been taken to enable him to avert the peril toward which he was then directed.

Besides the Graham case, the case of Morley v. Rogers, 252 P. 2d 231, also deals with the situation where the Plaintiff will

have to take affirmative action to save himself after warning. Again the Court held the doctrine applicable.

The last point made by the Appellant is that the last clear chance doctrine has limited application to cases involving moving vehicles. In the Graham case, the Plaintiff was moving. In the Morley case, he was riding a bicycle and veered out in front of the Defendant. The Court held that this did not matter. It said that by sounding his horn, the Defendant could have caused the Plaintiff to turn back to the right and out of the way "and avoid the collision."

In the case of Beckstrom v. Williams, 3 Utah 2d 210, 282 P. 2d 309, the Court also deals with a moving Plaintiff. The

Court has this to say:

"A rule has been expressed in a case where two automobiles collided that the doctrine of last clear chance 'is of limited application in the case of two moving vehicles.' We appreciate that application of the doctrine in a case where both vehicles were moving and rapidly changing positions with respect to one another is fraught with difficulties. There is the unlikelihood that one driver would have a clear chance to observe the inability of the other to avoid a collision and still have time and opportunity thereafter to avoid it himself. We therefore do not believe that the extension of the application of the doctrine in

such situations should be encouraged. But the reason for the limitation of the doctrine as just discussed is much less cogent where one vehicle was moving very slowly as here."

As the Court points out, the doctrine is not likely to be applicable with two rapidly moving vehicles. But that is not our case. One is nearly standing still and where this happens to be the Defendant, there is just as much room to apply the doctrine as where it is the Plaintiff who is moving rapidly into a trap set by the Defendant.

II

It follows that if the doctrine of the last clear chance applies in this case, the District Court properly entered judg-

ment for the Plaintiff on the Special Verdict.

CONCLUSION

On the fundamental question of whether the Defendant had a clear chance to avoid the accident, I wish to stress that a mere dimming of the lights at the proper time would have permitted the Plaintiff to have avoided the collision, which occurred with an impact of only about three inches depth. The jury apparently felt that this was so, and I submit that Defendant here had as much chance to avoid this accident as any of the Defendants did in any of the cases cited hereinabove

RESPECTFULLY SUBMITTED,

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