1958

Franklin D. Richards v. Robert A. Anderson : Brief of Appellant

Utah Supreme Court

Moreton, Christensen, Christensen & Jay E. Jensen; Attorneys for Appellant;

In the Supreme Court of the State of Utah

FRANKLIN D. RICHARDS,

Plaintiff and Appellant,

vs.

ROBERT A. ANDERSON,

Defendant and Respondent,

Case No.
8970

APPELLANT'S BRIEF

MORETON, CHRISTENSEN, CHRISTENSEN
& JAY E. JENSEN
Attorneys for Appellant

INDEX

CASES CITED

STATUTE CITED

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PRELIMINARY STATEMENT

We shall refer to the parties as they appeared in the court below. All emphasis by the Appellant.

This action was initially commenced in the City Court of Salt Lake City, Utah, where the court sitting without a jury, rendered judgment for the plaintiff. The defendant

appealed to the District Court, where at pretrial, summary judgments were given to the defendant on plaintiff's complaint and to the plaintiff on defendant's counterclaim. Plaintiff's subsequent motion to amend findings of fact, vacate the judgment and for new trial, was denied. The plaintiff appeals from the denial of said motion and from the district court's summary judgment for the defendant on plaintiff's complaint.

STATEMENT OF FACTS

Since the court below rendered a summary judgment adverse to plaintiff, he is entitled to have the facts viewed in the light most favorable to him in this appeal. *(Abdulkadir* vs. *Western Pacific Railroad Co.,* 7 Ut., (2d) 53, 318 Pac. (2d) 339). Appellant's evidence would establish the facts to be as follows:

The two-car accident took place at the "T" intersection of 5th South and University Streets, Salt Lake City, Utah, on March 6, 1957 at approximately 8:00 a.m. Fifth South at this point is a through highway, designated as U. S. 40, and is 88 feet wide with three lanes of traffic in each direction, separated by a concrete island. (R. 5, 6, diagram). The inside west-bound lane was 10 feet wide, the center west-bound lane was 10 feet wide, and the outside west-bound lane was 23 feet wide. (Diagram). The posted speed limit on Fifth South at the point of collision was 40 miles per hour. (R. 7). University Street is 23 feet wide and has a stop sign facing north. (R. 5, diagram). The morning of the accident, the weather was overcast, and it had been raining, but at the time of the collision

there was no precipitation.

Plaintiff was proceeding west on Fifth South on the inside lane at 15 miles per hour approaching the intersection of University Street. (R. 15, plaintiff's affidavit). The center and outside west bound traffic lanes were well filled with other moving vehicles, which completely blocked plaintiff's view as to any traffic proceeding onto Fifth South from University Street. (Plaintiff's affidavit). The defendant stopped at the stop sign on University Street and proceeded south onto Fifth South in front of moving westbound traffic in the center and outside lanes of traffic, attaining a speed of five to ten miles per hour. (R. 5, 7). Defendant intended to make a left turn around the dividing island and proceed east on Fifth South. (The defendant entered the intersection prior to the entrance of the plaintiff into the intersection proper. (R. 7).

The plaintiff first noted the sudden appearance of the defendant's car just a few feet in front of him in plaintiff's lane of traffic and plaintiff immediately applied his brakes. At about the same instant the defendant saw plaintiff and attempted to stop. (R. 5, 7, plaintiff's affidavit). The two cars collided at a point five feet south of the line separating the inside and center west-bound traffic lanes and ten feet west of an extension of the east border of University Street where it intersects Fifth South. (R. 5, diagram). There were no visible skid marks on the road. (Diagram). The vehicles moved approximately two feet southwest after impact. (Plaintiff's affidavit). A Salt Lake Police Officer investigated the accident and prepared a

diagram of the scene of the accident. (Diagram). Immediately after the collision the defendant stated to the plaintiff, "I am sorry, it appears to have been my fault." (Plaintif's affidavit, R. 8).

It should be noted that there is no evidence before the court regarding the following relevant and material facts: The relative positions and speed of other traffic in the vicinity of the accident just prior to the accident; the condition of the brakes and windshields on the two vehicles involved; the exact time of and type of brake application by the parties; more exact physical circumstances bearing on the ability of either party to see one another prior to the time that each of them actually saw one another; familiarity of the parties with the intersection; how long defendant was stopped prior to moving onto Fifth South Street; exact position of the stop sign; position of the defendant when stopped at the stop sign; the time differential between the parties in entering the intersection; the speed and movement of the defendant in crossing Fifth South prior to the collision; the movement of west-bound traffic abreast of the plaintiff relative to the movement of the parties; the full testimony of both parties, one eye-witness and the investigating police officer. All of this could and should be supplied, and it is the contention of appellant that if all of the available evidence were presented, there would be questions of fact to be determined by a jury. On the record before the trial court, the rights of the parties cannot be determined as a matter of law.

STATEMENT OF POINT TO BE RELIED UPON

THERE WAS NOT SUFFICIENT EVIDENCE BEFOR THE LOWER COURT TO RULE THAT THE PLAINTIFF, AS A MATTER OF LAW, WAS GUILTY OF NEGLIGENCE, OR THAT ANY SUCH ALLEGED NEGLIGENCE WAS A PROXIMATE CAUSE OF PLAINTIFF'S DAMAGE.

ARGUMENT

Construing the evidence and inferences therefrom most favorably to the plaintiff, as this court is bound to do, the situation may be viewed as follows:

The plaintiff, proceeding west on Fifth South, was reducing his speed and going at the rate of 15 miles per hour in approaching the intersection at University Street. The defendant, without warning, going at the rate of 10 miles per hour, suddenly appeared in front of the plaintiff from in front of traffic to the right of the plaintiff which completely obstructed plaintiff's view. (Plaintiff's affidavit). The defendant had stopped at the stop sign on University Street and waited for a period of time that caused him to become impatient for the crowded westbound traffic to give him an opening to cut across the six lane through highway. Finding a slight break in the westbound traffic, the defendant seized the opportunity, and drove out onto Fifth South, although he could not see, or failed to see, the traffic approaching on the inside westbound lane on which plaintiff was slowly proceeding. It

may be also assumed, upon the the basis of plaintiff's proposed testimony, that the west-bound traffic to the right of the plaintiff was proceeding at such a speed, and in such relative positions that said traffic was able to have advance warning of the movement of the defendant, and therefore avoid collision with the defendant. (Plaintiff's affidavit). It is not disputed that the defendant was negligent. In summary, plaintiff alleges that in addition to the stipulated facts, a full presentation of the evidence would disclose other facts, presenting a total picture from which a jury could conclude that:

1. The defendant should have seen the plaintiff prior to the time the defendant actually did so and yielded the right of way to the plaintiff.

2. The plaintiff had no reason or opportunity to anticipate the presence of the defendant before the plaintiff actually did so.

3. Under all the circumstances the plaintiff was not negligent and the sole proximate cause of the accident was the defendant's negligence.

The sole question before this court is as to whether, as a matter of law, the plaintiff was negligent, and if any such alleged negligence was the proximate cause of plaintiff's damage.

The question involves Section 41-6-74, U.C.A. 1953, which provides:

"Vehicle entering a through highway. The driver of a vehicle shall stop as required by this

act at the entrance to a through highway and shall yield the right-of-way to other vehicles which have entered the intersection from said through highway *or which are approaching so closely on said through highway as to constitute an immediate hazard,* but said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on said through highway shall yield the right-of-way to the vehicle so proceeding into or across the through highway.

"(b) The driver of a vehicle shall likewise stop in obedience to a stop sign as required herein at an intersection where a stop sign is erected at one or more entrances thereto although not a part of a through highway and shall proceed cautiously, yielding to vehicles not so obliged to stop which are within the intersection *or approaching so closely as to constitute an immediate hazard, but may then proceed."*

The lower court apparently based its Summary Judgment primarily upon the case of *Smith vs. Lenzi,* 74 Ut. 362, 279 Pac. 893. The facts of that case are distinguishable. It did not involve obstructions to the vision of the two involved drivers, occurred on a dark night, involved a much different type of intersection, and different movements by the parties prior to the collision. In that case, the lower court entered judgment based on a *jury verdict* for the motorist proceeding on the *through street.* This court reversed the lower court on the grounds that the jury failed to receive proper instructions on the relative rights of the involved motorists. This court then proceeded not to rule on the liability as a matter of law, but rather to instruct the lower court on the proper applicable law at 279 Pac. 895, 896, as follows:

"If the respondent (approaching the through street) stopped immediately before entering Highland Drive, he complied with all the requirements of the ordinance. From that moment he was free to move without restriction, *so far as the ordinance is concerned.* As he approached Highland Drive after stopping, the statute gave him the right-of-way as against automobiles coming in the direction the respondent was traveling, and made it the duty of such persons approaching from the left to yield the right-of-way. But these rights and duties were only relative, and must be applied *in the light of the conditions existing at the time.* Aside from any statute or ordinance, it was the duty of both parties to use such caution as a reasonably prudent person would have done in entering the intersection. The speed that the cars were approaching, their distance from the point of intersection, the ability of the respective drivers to see were *all factors to be considered by the jury* in determining whether appellant or respondent was entitled to the right-of-way.

". . . When a person stops immediately before entering an arterial highway, he will necessarily enter the intersection more slowly. The rate that he is moving, the speed of the arterial traffic, and its frequence, together with any other surrounding circumstances, *must all be considered,* together with the statute giving to the person approaching from the right the right-of-way in determining whether at a given instance he should enter the stream of traffic."

The holding and dicta of *Smith vs. Lenzi,* as applied to the instant case require only that a court properly instruct a jury on the statutory law, in order that the *jury* may apply said law in the full light of the existing conditions. The plaintiff seeks nothing more than this. In the

instant case neither the facts before the lower court at the pretrial, nor the additional facts alleged by the plaintiff, will justify a finding that as a matter of law the plaintiff was negligent or that any such alleged negligence was the proximate cause of his damage. It may be noted that whatever support the defendant's position may receive from the Smith case is challenged in a vigorous dissent by two of the justices in that case, and in the more recent holdings of this court as reflected in intersection cases hereinafter cited.

In *Williams vs. Z.C.M.I.*, 312 Pac. (2d) 564, this court commented upon the statute involved in the instant case as follows:

> "The statute requires the driver entering a through highway to yield the right of way to other vehicles which have entered into the intersection from the through highway *or which are approaching so closely* on said through highway as to constitute an immediate hazard.
>
> "*A fact question* was presented as to whether defendant entered the intersection when plaintiff was approaching so closely on said through highway as to constitute an immediate hazard. *The further fact question was presented,* as to whether defendant had entered the intersection under such circumstances as to impose on plaintiff the duty of yielding the right-of-way."

Construing the stipulated and alleged facts most favorably to the plaintiff in the instant case, an obvious fact question is presented as to whether the plaintiff was approaching so closely to the intersection as to constitute an immediate hazard to the defendant.

Regarding the question of determining contributory negligence this court stated in *Martin vs. Stevens,* 243 Pac. (2d) 741, at pages 749-50:

> "The question of contributory negligence is *usually* for the jury and the court should be *reluctant* to take consideration of this question of fact from it. * * * The right to trial by jury should be safeguarded. Before the issue of contributory negligence may be taken from the jury, the defendant's burden of proving both (a) that plaintiff was guilty of contributory negligence, and (b) that such negligence proximately contributed to cause his own injury, must be met, and established with such certainty that reasonable minds could not find to the contrary; conversely, if there is any reasonable basis, either because of lack of evidence, or from the evidence and the fair inferences arising therefrom, taken in the light most favorable to plaintiff, upon which reasonable minds may conclude that they are not convinced by a preponderance of the evidence either (a) that plaintiff was guilty of contributory negligence or (b) that such negligence proximately contributed to cause the injury, the plaintiff is entitled to have the question submitted to a jury.
>
> "* * * An excellent text statement of the rights and duties of drivers at intersections is contained in 2 Blashfield Cyclopedia of Automobile Law and Practice, Perm. Ed. § 991 to 994 incl. pp. 206 et seq. The first of these rules is that the vehicle which enters the crossing first has the right-of-way over a second one coming from another direction, *unless* under the standard of due care, he should not proceed because to do so would hazard a collision. *In close cases*, this test is somewhat unsatisfactory because of the difficulties, after a collision has occurred, of determining who had the right-of

> way on that basis. The text just referred to correctly states: '* * * The mere fact of reaching the intersection first is no longer recognized as the sole test as to who has the right of way. In order for a driver to claim the right of way on the basis of entering the intersection first, it must appear that he did not speed up just for the purpose of claiming the right of way, *and also* that the margin or distance by which he claimed it was so clear as to be without doubt.' "

The court also quoted with approval the following language of Justice Wolfe from *Bullock vs. Luke,* 98 U. 501, 98 Pac. (2d) 350, 354:

> "* * * we must be careful not to stretch contributory negligence to the point where we make it incumbent upon one not only to drive carefully himself, but to drive so carefully as always to be prepared for some sudden burst of negligence of another and be able to avoid it. * * *"

The lower court in the instant case has evidenced not the slightest inclination to be "reluctant" to take contributory negligence from a jury or to avoid "stretching" said doctrine.

The citing of additional similar cases with varying fact situations would be of little help to this court.

A summary judgment is proper only if the pleadings and admissions show that there is no genuine issue of material fact, and that the moving party is entitled as a matter of law to such judgment. (U.R.C.P. 56 C; *Martin vs. Stevens,* supra; *Abdulkadir vs. Western Pacific Railroad Co.,* supra). The fact that the history of this case

shows that one judge hearing fully the case without a jury found for the plaintiff, and that a second judge, viewing only a part of the facts and allegations, summarily reached a contrary result, strongly indicates that this case is one upon which reasonable men may differ as to any negligence on the part of plaintiff and the proximate causes of the collision.

CONCLUSION

The recent decisions of this court clearly hold that in nearly all intersection cases the question of defendant's negligence and plaintiff's contributory negligence are for the jury. *Hess vs. Robinson,* 109 Ut. 60, 163 Pac. (2d) 510; *Lowder vs. Holley,* 120 Ut. 231, 233 Pac. (2d) 350; *Poulsen vs. Mannes,* 121 Ut. 269, 241, Pac. (2d) 152; *Martin vs. Stephens,* supra; *Kalaher vs. Brown,* 6 Ut. (2d) 346, 313 Pac. (2d) 804.

The summary judgment for the defendant should be reversed and a new trial ordered in plaintiff's cause of action.

Respectfully submitted,

MORETON, CRISTENSEN & CHRISTENSEN
& JAY E. JENSEN

Attorneys for Appellant