

1959

La Rene Holmes v. P. C. Heidebrecht : Brief of Defendant and Respondent

Utah Supreme Court

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Hanson, Baldwin & Allen; Attorneys for Defendant and Respondent;

Young, Thatcher & Glasmann; Attorneys for Plaintiff and Appellant;

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IN THE SUPREME COURT OCT 14 1959

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STATE OF UTAH

FILED

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LA RENE HOLMES,
Plaintiff and Appellant,

vs.

P. C. HEIDEBRECHT,
Defendant and Respondent.

Clerk, Supreme Court, Utah

Case No. 8988

BRIEF OF DEFENDANT AND RESPONDENT

HANSON, BALDWIN & ALLEN
Salt Lake City, Utah
*Attorneys for Defendant
and Respondent*

YOUNG, THATCHER & GLASMANN
Ogden, Utah
*Attorneys for Plaintiff
and Appellant*

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BRIEF OF DEFENDANT AND RESPONDENT

STATEMENT OF FACTS

The statement of fact which appears in the appellant's brief is reasonably straightforward and in accordance with the evidence, with the exception of that material which appears beginning on Page 4 of the appellant's brief.

With this material, which begins in the third paragraph of Page 4 relating to the distance which the plaintiff had walked into Twelfth Street before the collision occurred, the respondent must disagree.

The statement that the plaintiff walked twenty-

three feet from the south curb of Twelfth Street to the point at which she was struck is, it appears, a pure supposition on the part of plaintiff's counsel.

The evidence indicates that the position of the plaintiff after the accident was thirteen feet eight inches north of the south curb line of Twelfth Street, and at a position thirty-two feet east of what the officers determined to be the point of impact. (Tr. 59).

Further, the officers testified that it was impossible to determine the exact point of impact and that what they determined to be that point might have been three or four feet away. (Tr. 61).

The investigating officers also testified that the accident occurred on the south part of Twelfth Street and that the plaintiff was struck by the right side of the defendant's car. (Tr. 66). The evidence shows that the street is forty-two feet wide and the distance from the south curb line to the center line, even though it was unmarked, is twenty-one feet. (Tr. 67).

On cross examination officer Vaughn Anderson testified that all of the defendant's car was in the eastbound lane of traffic, that is, south of the imaginary center line of Twelfth Street. He testified further that in his opinion the defendant's car was from six to seven feet wide. (Tr. 68). Thus it would appear that the plaintiff had walked not

twenty-three feet as counsel indicates in his brief, but had walked twenty-one feet minus the six or seven feet representing the width of the defendant's car, or closer to fourteen or fifteen feet.

The plaintiff herself testified that as she began to cross the street from south to north, she had her back slightly turned to traffic approaching from the west. (Tr. 90). She further testified that just as she stepped off the south curb, she looked west and saw nothing. (Tr. 91).

Lieutenant LeRoy G. Bennett was called as an expert witness by the plaintiff and appellant. Among other things he testified that based upon studies he had made, the average woman walked 4.11 feet per second. He offered in his testimony some calculations based on the assumption that Mrs. Holmes walked at about that speed.

Based upon his calculations as to the distance the automobile would travel at twenty-five miles per hour and the distance Mrs. Holmes walked before the collision occurred, he testified as to what in his opinion was the distance west of the point at which Mrs. Holmes was standing on the curb the defendant's car was located at the time she left the curb.

He offered these calculations based on certain facts submitted to him by counsel for the appellant.

Upon cross-examination Mr. Young testified that if she (the appellant) had walked fifteen feet, it would have taken her approximately 3.43 seconds from the time she left the curb to reach the point where the collision occurred, and further that the defendant's car at the time the appellant left the curb and proceeded across the street, was 125.74 feet west of the point of impact. (Tr. 102).

Based upon the physical evidence it would appear that approximately three seconds after the appellant left the curb and proceeded across the street, the collision occurred and that at the time she left the curb and said she looked to the west, she did not see the defendant's car, which was then only 125 feet from her.

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT DID NOT COMMIT ERROR IN GIVING INSTRUCTION NO. 8.

POINT II.

THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION FOR A NEW TRIAL.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT COMMIT ERROR IN GIVING INSTRUCTION NO. 8.

The first point argued by the appellant is ap-

parently that the court erred in giving Instruction No. 8. In argument under that point it appears that he objects to the giving of Instruction No. 8 in view of the court's Instruction No. 7 upon the theory apparently that these instructions contradict each other.

It is the position of the respondent that these instructions are not contradictory and that the evidence clearly shows that based upon either instruction or both, the appellant was guilty of contributory negligence as a matter of law.

The appellant takes the position that Instruction No. 8 was given erroneously and for that reason the case should be reversed. Assuming for purposes of argument, which the respondent does not admit, that the instruction was erroneous, it does not necessarily invite or require a reversal of this case based upon the record.

The court's attention is invited to Corpus Juris Secundum for a general statement found in Vol. 5-A, Paragraph 1763-1 under the title "Appeal and Error":

"As a general rule, the giving of an erroneous instruction will not constitute a ground for reversal where the complaining party has not been injured thereby. A judgment will not be reversed for error in the giving of instructions where the instructions

are erroneous only as to other parties or when the erroneous instruction is not only not prejudicial but is in fact favorable to the complaining party * * *.

“The principle that a judgment will not be reversed for error in the giving of instructions, where the complaining party was not prejudiced thereby, has also been applied in actions for death and personal injuries.”

It is the position of the respondent that the instructions given — that is, 7 and 8 — are not prejudicial and that even if, as the appellant contends, Instruction No. 8 were erroneous, it does not warrant a reversal.

The statute upon which Instruction No. 8 is based is 41-6-79, U. C. A. 1953, which reads as follows:

(a) “Every pedestrian crossing at a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.”

It is apparently the position of the appellant that an instruction based upon this statute is wholly unintelligible and imposes an unreasonable burden upon pedestrians and serves only to confuse jurors to whom such an instruction might be given.

This does not appear to be the view of this

court because the statute referred to is cited in a good many Utah decisions, and in none does this court say that the statute cannot be applied or that it is unintelligible or that it imposes unreasonable burden upon pedestrians.

The cases we refer to include *Cox v. Thompson*, 245 P.2d 1049, and *Smith v. Bennett*, 265 P.2d 401. The following quotation in this connection is referred to from Mr. Justice Wolfe's opinion in *Cox v. Thompson* which appears at Page 1051 of 254 P.2d:

"On the evidence set forth the trial court correctly found decedent contributorily negligent as a matter of law. From a fair appraisal of the evidence reasonable men can draw but one inference and that inference points unerringly to the negligence of the decedent. In response to a call from his wife, decedent, who was walking east across a poorly lit highway, turned and walked directly into the path of defendant's automobile. *Crossing a highway at a point where there was no marked crosswalk, decedent was duty bound to yield the right of way to a vehicle upon the roadway. See 41-6-79 Utah Code Annotated 1953.* (Emphasis ours.) This he failed to do. He, in addition, apparently failed to look, or having looked failed to see what he should have seen and paid heed to it. He said nothing and did nothing which indicated he was in any way aware of the danger presented. Decedent was properly found negligent as a matter of law."

At Page 10 of the appellant's brief, a refer-

ence is made to *Morrison v. Perry*, 140 P.2d 722. Attention is called to the language of the court appearing on Page 10 of the appellant's brief relating to a presumption of negligence when a violation of a statute has been proved and says that the presumption remains unless there is an explanation offered by the violator of the statute.

With respect to the argument that proof of a violation of a statute such as the one in question here raises only a presumption of negligence absent an explanation, the testimony is uncontradicted that the plaintiff could not offer any explanation because she flatly said that she never did see the defendant's car. (Tr. 91).

At Page 12 of the appellant's brief there appears a quotation from 88 C.J.S., Page 903, relating to error committed when instructions give improper and undue emphasis to specific issues, theories, or defenses. It is the contention of the respondent that the two instructions about which the appellant complains do not constitute an unnecessary or unusual emphasis upon one phase of the case or place unnecessary emphasis upon the respondent's theory of the case and that the respondent had a perfect right to have these instructions submitted to the jury.

This court's attention is invited to the case of *Bruner v. McCarthy*, 142 P.2d 649. This was an

action for personal injuries to the plaintiff, a hostler, while assisting in the coaling of an engine. Verdict and judgment were entered for the plaintiff, and the defendant appealed, claiming, among other things, that the defendant had been prejudiced by the giving of instructions claimed to be erroneous. One instruction complained of was relative to the safety appliance section of the Federal Employer's Liability Act, and it was admitted that no safety appliance violation was involved.

With respect to this contention, the court, in the opinion at Page 654, of 142 Pac. has the following to say:

“The next contention is that the lower court committed prejudicial error in giving instructions on abstract principles of law which were outside the issues and the evidence. Objection is made to that portion of instruction 7 in which the court read to the jury part of the Federal Employers' Liability Act including that part which related to the carrier's liability for injuries resulting from ‘any defect or insufficiency, due to its (the carrier's) negligence in its cars, engines, appliances, machinery, track, roadbed, work boats, wharves or other equipment. Admittedly there were no issues or evidence purporting to deal with defects of insufficiencies. It would have been better had this portion of the instruction been omitted. Yet we do not think that this was prejudicial error. A similar objection was made in *Kusturin v. Chicago & Alton R. Co.*, 209 Ill. App. 55, where the

court stated: 'The third instruction given at appellee's request stated the substance of the entire Federal Employers' Liability Act, including provisions therein not involved in this case. We think the portion objected to might well have been omitted, as said by us in a former case, but still we do not think the jury could have been misled to believe that appellee could recover here for any defect in appellant's track or roadbed.' "

The appellant in the Bruner case further complained that an instruction was given respecting failure to keep the roadbed in proper condition. As was the case with the safety appliance instruction, there was no evidence of improperly maintained roadbed or that such a condition might have had anything to do with the accident which injured the plaintiff.

With respect to this contention the court said:

"The defendants contend that the jury may have concluded from this instruction that defendants were charged with negligence in failing to keep their equipment and roadbed in proper condition. It could not so have concluded where there was no evidence remotely showing any such negligence. Moreover, since we have concluded that the evidence shows negligence on the part of the defendants as above demonstrated as a matter of law, we therefore must conclude that there could be no prejudicial error in this regard."

Other instructions relating to issues not in-

volved in the case were submitted by the court, objected to by the appellant, but the court rejected the appellant's contentions, holding that they were not prejudicial, and the court says the following with respect to these additional contentions by the appellant:

"Likewise there was no prejudicial error in instructing the jury on rules of the road even though those rules may have been inapplicable to the issues raised. Such an instruction could have only had the effect of influencing the jury to believe that the defendants were negligent in failing to enforce the rules. Since we have held that the defendants were negligent in other respects as a matter of law, they could not have been prejudiced by this instruction.

"The same holds true as to instruction 11 on the 'assumption of risk' doctrine. No such issue was raised by the pleadings or the evidence and no good purpose could have been served by the giving of such an instruction. Yet this could not be prejudicial to the defendants, for even if the jury inferred from the giving of such an instruction that the doctrine of 'assumption of risk' applied, the defendants could not have been prejudiced. If they had thought that the plaintiff had possibly assumed the risk, it would have been to the defendants' benefit, not to their disadvantage or prejudice."

The respondent submits that the Bruner case represents one of the best discussions by this court

with respect to contentions of the kind made by the appellant in this case that the appellant was prejudiced by the giving of the court's instructions referred to.

POINT II.

THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION FOR A NEW TRIAL.

It is the position of the respondent that the plaintiff was by no means prejudiced by the instructions complained of and that upon all the evidence the case was properly submitted by the court on the basis of these instructions, and the plaintiff's motion for a new trial should have been denied.

The principal part of the argument under this point has been presented in the argument under Point I because in essence they are part of the same proposition.

The respondent again submits to the court that based upon the record the activity of the plaintiff in crossing the street and either not looking in the direction from which the defendant's automobile proceeded or having looked, failing to see what there to be seen, she was guilty of contributory negligence as a matter of law under either Instruction No. 7 or Instruction No. 8.

Based upon the physical evidence presented and the testimony of the appellant's expert witness, the appellant was struck approximately three seconds

after she left the curb by an automobile which was no more than 125 feet from her at a time she claimed she looked and failed to see it there.

CONCLUSION

Based upon a fair appraisal of the testimony, physical evidence and the record presented by this appeal, the respondent respectfully submits to the court that the verdict and judgment thereon appealed from should be affirmed.

Respectfully submitted,

HANSON, BALDWIN & ALLEN
Salt Lake City, Utah

*Attorneys for Defendant
and Respondent*