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Max E. Waddoups v. Richard F. Forbush and Ted Thuet : Brief of Appellant

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

MAX E. WADDOUPS,
Plaintiff and Appellant,

vs.

RICHARD F. FORBUSH and
TED THUET,
Defendants and Respondents.

FILED

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Clerk, Supreme Court, Utah

Case No.

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APPELLANT'S BRIEF

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IN THE
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MAX E. WADDOUPS,

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vs.

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TED THUET,

Defendants and Respondents.

Case No.
9058

APPELLANT'S BRIEF

STATEMENT OF FACTS

The trial court, Judge Aldon J. Anderson, granted Defendant Thuet's motion for summary judgment. This appeal is taken from that decision (R. 27).

Plaintiff's action was for damages resulting from an automobile collision that occurred on April 13, 1958. The casualty involved three vehicles. Plaintiff was driving his automobile in a southerly direction

on State Street, Salt Lake City, Utah, and was attempting to make a left hand turn at 46th South. Plaintiff was immediately followed by the vehicle of Richard F. Forbush proceeding in the same direction. Defendant was driving his vehicle in a northerly direction on State Street. Plaintiff, while proceeding to stop at said intersection, was struck by the Forbush vehicle, and then struck by the vehicle of Defendant. Plaintiff brought an action against the drivers of both vehicles, and subsequently the action against Forbush was dismissed.

The complaint enumerates three acts of negligence on the part of Defendant in support of its claim for relief:

1. Said Defendant failed to keep a proper lookout.
2. Said Defendant drove his automobile at a speed which was not reasonable under the circumstances then and there existing.
3. Said Defendant failed to yield the right-of-way to Plaintiff.

A general denial was entered thereto, and Defendants noticed September 23, 1958 for the taking of Plaintiff's deposition.

Plaintiff, in his deposition, testified that as he approached the intersection, he observed Defendant's vehicle on the inside lane for north bound traffic ap-

proximately one quarter of a block away, and decided to stop because:

“It was apparent I did have a tight squeeze.” (Dep. 10-18);

“I couldn’t quite make it.” (Dep. 10-28);

“Just the thought struck me there, I would play hell getting across the street. Because he appeared to step on it to come on through.” (Dep. 16-14);

“I might as well stop, that is it. He had the appearance to me he stepped on it and he was going to go right on through. That was just that quick.” (Dep. 19-10);

“I just came up to a quick stop in the process of the turn and couldn’t make it.” (Dep. 19-25).

No evidence was elicited from Plaintiff regarding the three allegations of negligence alleged in the complaint.

Defendant, by stipulation of counsel, moved the Court for summary judgment at the pre-trial on the basis that Plaintiff’s deposition failed to show any negligence on the part of Defendant which was, or could be a proximate cause of the injury to Plaintiff; and further that the deposition conclusively indicated that the accident was entirely unavoidable on the part of Defendant (Rec. 19). This motion was unsupported by affidavit. The motion was granted.

STATEMENT OF POINTS

POINT I

THE COURT ERRONEOUSLY GRANTED SUMMARY JUDGMENT WHILE ISSUES OF MATERIAL FACT WERE THEN AND THERE EXISTING.

POINT II

THE COURT FAILED TO REVIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO PLAINTIFF.

POINT III

THE COURT IMPROPERLY ABSOLVED DEFENDANT FROM ANY NEGLIGENCE WHICH WAS THE PROXIMATE CAUSE OF THE CASUALTY, AS A MATTER OF LAW.

ARGUMENT

POINT I

THE COURT ERRONEOUSLY GRANTED SUMMARY JUDGMENT WHILE ISSUES OF MATERIAL FACT WERE THEN AND THERE EXISTING.

The real function of summary judgment is to go beyond the pleadings and the present matter by affidavits, depositions, admissions, or other extraneous

materials for the purpose of showing that despite issues of fact raised by the pleadings, there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law.

Judge Gardner of the Eighth Circuit, in the case of *Parmelee v. Chicago Eye Shield Co.*, 157 F. 2d 582, 168 A. L. R. 1130, stated concerning summary judgment,

“The proceeding on motion for summary judgment is not to be regarded as a trial, but for the determination of whether or not there is a genuine issue to be tried.”

And the trial courts have been repeatedly cautioned in the use of summary judgments where the slightest issue of fact exists. In the case of *Doehler Metal Furniture Co. v. United States*, 149 F. 2d 130, 135; 8 F. R. Serv. 56 c, 41, Case 6, Judge Frank admonished the trial courts in this manner:

“We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgments. A litigant has a right to a trial where there is the slightest doubt as to the facts and the denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. Such a judgment, wisely used, is a praiseworthy, time saving device. But, although prompt dispatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay.”

And in the case of *Welchman v. Wood*, 337 P. 2d 410; 9 U. 2d 25, Justice McDonough, speaking for the Court, cautioned,

“Summary judgment is a drastic remedy and the courts should be reluctant to deprive litigants of an opportunity to fully present their contentions upon a trial. It should be granted only when under the facts viewed in the light most favorable to the Plaintiff, he could not recover as a matter of law.”

The pleadings properly framed the issues of fact to be determined prior to the deposition. It might be stated at this point that defendant did enter a counter-claim against Plaintiff, but this was not a factor at the summary judgment proceeding. How then, did the deposition affect the factual issues pleaded?

1. Plaintiff's deposition tended to show that he believed Defendant's vehicle was sufficiently close to the intersection to involve an immediate hazard.

2. Plaintiff concluded that he would therefore stop his vehicle before entering the intersection.

3. The Forbush vehicle struck Plaintiff from the rear, thereby moving him into Defendant's lane of traffic.

4. The sequence of impact from both vehicles colliding with Plaintiff was simultaneous.

"I came up and stopped and got hit from the rear, and almost just simultaneously stopped, bang, bang. That is the way that happened" (Dep. 18-2).

This testimony is enlightening in illustrating the sequence of events. It does not alter the issues of fact still to be determined; namely,

A. Was Defendant negligent in any of the following particulars:

1. Failed to keep a proper lookout.
2. Driving at a speed unreasonable under the circumstances.
3. Failing to yield the right-of-way.

B. Was such negligence a proximate cause of the casualty complained of.

With these material issues of fact undetermined, the Court erred in granting summary judgment.

"The question presented by a motion for summary judgment is, like that presented by a motion for judgment on the pleadings, one of law, and if a genuine issue of material facts exists, the motion must be denied." *Hartman v. American News Co.*, 1948, 171 F. 2d 581, 12 F. R. Serv. 56d. 21, Case 1.

As in the case of *Gray Tool Co. v. Humble Oil & Refining Co.*, 1951, 186 F. 2d 365, the rule stated by the Court is applicable in the instant case:

“* * * this is another of those all too numerous instances of the misuse of the summary judgment procedures to cut a trial short; that here, as often before, it has served only to prove that short cutting of trials is not an end in itself, but a means to an end, and that in the conduct of trials, as in other endeavors, it is quite often true that the longest way around is the shortest way through.”

POINT II

THE COURT FAILED TO REVIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO PLAINTIFF.

The deposition is of significant value to the court in making determinations regarding summary judgment. While it does bear the weakness that the demeanor of the deponent is not observable by the Court, it is often superior to that contained in an affidavit since the deponent was subject to cross-examination. To be sure, testimony obtained by deposition, and that is permissible in evidence, i. e. is competent, relevant, and material, may be used in support of, or in opposition to a motion for summary judgment. However, the Court should carefully construe the deposition liberally against the party moving for summary judgment.

“Unless the deposition in support of a motion for summary judgment, together with other supporting materials, if any, clearly establishes that there is no genuine issue of mater-

ial fact, the motion for summary judgment must, of course, be denied." *Griffith v. William Penn. Broadcasting Co.*, 1945 9 F. R. Serv. 56c. 41, Case 3. 6 Moore's Fed. Prac. 2078.

We have previously pointed out that Plaintiff's deposition did not establish proof that the Defendant was not negligent. The deposition was silent on this note. All that it demonstrates is that under the conditions then and there existing, plaintiff thought that a collision would occur if he entered the intersection. Plaintiff alleges that those conditions were in part created by the negligence of Defendant. May the trial court then review the deposition and grant a summary judgment for defendant when the deposition is silent upon the subject? Judge Maris for the Third Circuit in the case of *Toebelman v. Missouri-Kansas Pipe Line Co.*, 130 F. 2d 1016, 5 F. R. Serv. 56c. 41, Case 3, quite readily decided this question:

"Upon a motion for a summary judgment it is no part of the Court's function to decide issues of fact, but solely to determine whether there is an issue of fact to be tried * * * All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment."

And in the Case of *Richards v. Anderson*, 337 P. 2d 59, 9 U. 2d 17, the Utah Supreme Court held:

"Wherever a summary judgment is granted against a party, he is entitled to have the Trial Court. and this Court on review, consider all of

the evidence and every inference clearly to be derived therefrom in the light most favorable to him."

It must therefore follow that where depositions, affidavits, admissions, or other extraneous material or silent upon a material issue of fact, the Court must then review the evidence in the light most favorable to the party against whom such a motion is directed:

"In the case of a summary judgment, the party against whom the judgment has been granted is entitled to have all of the facts presented and all the inferences fairly arising therefrom considered in a light most favorable to him." *Young v. Texas Co.*, 331 P. 2d 1099. 8 U. 2d 206.

Had the Trial Court employed this basic principal of law, the issues as framed by plaintiff's pleadings required acceptance as fact and Defendant's motion, based upon such facts, required a denial.

POINT III

THE COURT IMPROPERLY ABSOLVED DEFENDANT FROM ANY NEGLIGENCE WHICH WAS THE PROXIMATE CAUSE OF THE CASUALTY, AS A MATTER OF LAW.

A broader, but not less conclusive question is whether the proximate cause of the Defendant's alleged negligence was in reality a question of law, rather

than a question of fact. And here we concede that it is the particular function of the trial court to pass upon questions of law by summary judgment procedure. Ordinarily, however, proximate cause is a factual matter to be submitted to the trier of the fact. The determinative test is whether the evidence, when considered in the light most favorable to the plaintiff justifies a judgment by "clear and convincing" proof (*in re Williams estate*, 348 P. 2d 683). Do the utterances in Plaintiff's deposition meet such a test?

It would appear that the deposition gives Defendant little aid by such a severe test. At most it only creates a possible concurrent negligence situation. (For case in point see *Berryman v. Peoples Motor Bus Co.*, 54 S. W. 2d 747.)

Illustration:

A negligently knocks B into the street, the impact causing B no substantial harm. Before B can arise, however, he is negligently run over by C who is acting in the scope of his employment as D's servant. B is severely hurt thereby. For this harm B is entitled to a judgment for the entire amount of harm from A, C, or D, or all of them. (Restatement of Torts, Sec. 879, Concurring or Consecutive Independent Acts.)

"Concurrent as distinguished from joint negligence arises where the injury is proximately caused by the concurrent wrongful acts or omissions of two or more persons acting independently. That the negligence of another person than the Defendant contributes, concurs,

or cooperates to produce the injury is of no consequence. Both are ordinarily liable." *Shearman and Redfield on Negligence* (6th Addition), Sec. 1222.

Justice Crockett stated the opinion of the Utah Supreme Court in *Hillyard v. Utah By-Products Co.*, 1 U. 2d 143, 263 P. 2d 287, 289:

"It has frequently been recognized that more than one separate act of negligence, even though they do not happen simultaneously, may be proximate causes of an injury."

In the final analysis, the question whether Defendant was negligent in any particular and whether this negligence was a proximate cause of the casualty is ultimately a question of fact, and where there is no evidence before the court touching upon this fact, the pleadings of Plaintiff must be accepted at face value. It was, therefore, improper for the Court to absolve Defendant from any negligence which was a proximate cause of the casualty as a matter of law.

CONCLUSION

It may be reasonably concluded that the deposition of Plaintiff has contributed little basis for the Court's decision to grant Defendant a summary judgment. It is clear that the Trial Court awarded summary judgment while material factual issues were unresolved, i. e. Defendant's negligence and its corresponding proximate cause. In the silence of the deposi-

tion on these issues, the court erroneously failed to review the evidence in the light most favorable to the Plaintiff, namely, the pleadings of the Plaintiff.

"While trial judges may feel that the Appellate Courts have unduly limited summary judgments and have often applied the rule unrealistically as some trial courts are still too prone to grant summary judgment, there is considerable evidence that the early and unsound trend in the trial courts has been checked and that the District Judges now recognize that summary judgments are to be cautiously granted." (6 Moore's Fed. Practice, pg. 2121.)

We respectfully submit that the decision of the District Court be reversed.

Respectfully submitted,

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