

1960

Jack A. Milligan v. Melvin Coy Harward, Kenneth B. McDuffy and C. E. Lindsey : Brief of Respondents

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Milligan v. Harward*, No. 9121 (Utah Supreme Court, 1960).
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IN THE SUPREME COURT
of the
STATE OF UTAH

JACK A. MILLIGAN,
Plaintiff and Appellant,

vs.

MELVIN COY HARWARD,
KENNETH B. McDUFFY,
and C. E. LINDSEY,
Defendants and Respondents

FILED

APR 8 - 1960

Clerk, Supreme Court, Utah

Case No. 9121

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

PRELIMINARY STATEMENT

To conform to the Preliminary Statement of the Appellant, throughout this brief plaintiff and appellant will be referred to as plaintiff, and defendants and respondents will be referred to as defendants. Further, all references are to the page numbers of the transcript of the trial and will be designated as "Tr." rather than to the renumbered pages of the record.

STATEMENT OF POINTS

POINT I.

THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT A VERDICT AGAINST THE DEFENDANTS, McDUFFY AND LINDSEY.

POINT II.

THE PLAINTIFF ASSUMED THE RISK OF RIDING WITH THE DRIVER HARWARD.

ARGUMENT

POINT I.

THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT A VERDICT AGAINST THE DEFENDANTS, McDUFFY AND LINDSEY.

Exhibit "A," a photograph of a drawing on a blackboard, contained in plaintiff's brief, was never introduced in evidence and is not part of the record in this case. This drawing on the blackboard was used only for illustrative purposes. The testimony of Officer Iba, upon which the drawing is based so far as it relates to any measurements, was stricken from the record. Upon motion duly made by counsel for the defendants, McDuffy and Lindsey, the Court struck all testimony of measurements from the record.

"MR. AADNESEN: First, your Honor has under advisement the motion that we made previously to strike the testimony of Officer Iba as it relates to the measurements which were made by

others, and we think that that motion should be considered now.

"As your Honor will recall, he testified he did not make them; all he did was write them down. And on that basis, they are hearsay, no opportunity for us to cross-examine the officer as to the manner in which he made them, and his acts.

"THE COURT: Well, the testimony as those measurements are strictly hearsay. The witness couldn't even say who it was that told him the distances, nor when or where. So that may be stricken." (Tr. 198)

Plaintiff's counsel does not challenge this ruling in his brief nor on this appeal.

Officer Iba also testified that the truck was properly parked.

"A. Well, I don't remember what the measurements was to the truck tires, but the truck was parked all right. I mean, as far as I can see, and I had the opinion of officers that the truck was possibly parked all right."

"Q. Well, you have measured that little— Could we do this fairly, and say that right along here (indicating)—

"A. Is the gutter.

"Q. (Continuing) —is the gutter. And would it be fair to assume, from your observations and what you saw, that the right wheels of that truck were on that portion, near the curb?

"A. Well, I wouldn't want to say. But I am satisfied in my own mind the truck was parked all right.

"Q. Well, if it had been parked farther out than that, you would have noticed it, wouldn't you?

"A. Yes." (Tr. 26)

* * * *

"A. No. As I recall, the truck was parked all right. I mean—

"Q. Otherwise, you said you'd have said something about it, wouldn't you?

"A. Possibly." (Tr. 27)

* * * *

"A. I don't know actually what it is, but I imagine there would be 10 feet wider than the other two. Because any time a car stops and parks against that curb, it becomes a parallel parking. And if there's no traffic there, why, they do use it as a traffic lane. Rather, I mean—

"Q. Well, as a matter of fact, it's wide enough, that with a vehicle parked there—

"A. With a car there, you could still use it as a traffic lane.

"Q. They can still use that lane, can't they? So in actuality, there were three traveled lanes, plus a parking lane, even though the parking lane itself, to the extreme right, is not marked.

"A. That's right. There's no markings on the road itself.

"Q. When you observed the position of this car, as a matter of fact, Officer, that evening, and from that truck, it's a fact, isn't it, that the car in which the plaintiff was riding could have gone past this (indicating) and still stayed in that lane?

"A. There was plenty a room, yes, sir." (Tr. 28-29)

Further, as the plaintiff points out in his brief, the right front of the automobile struck the left rear of the truck and the point of impact was barely a fraction of inches and had the driver of the automobile been a few inches further out in the street he would have missed the truck. The automobile was traveling north on State Street and the truck was parked on the east side of the street. Officer Iba pointed out that even the plaintiff's car, which was located to the left rear and west of the truck after impact, was not in the traveled portion of the road.

"Q. When you first saw the cars that were involved—and I understand there won't be any question but what there was the Harward automobile and the truck of Mr. Lindsey—what was the position of the Harward automobile; where, in relation to the traveled portion of the highway?

"A. The Harward car was cocked to one side. I mean, it wasn't directly straight into the back end of the truck; it was cocked to one side, like it had shifted after the impact.

"Q. Was it in the traveled portion of the highway, the Harward car?

"A. No, it was over, I imagine a little further to the east." (Tr. 10-11)

We submit that there is absolutely no evidence whatsoever in the record which could support any contention that the truck was parked in violation of the statute. The Court graphically summarized this as follows:

"THE COURT: I listened to the evidence that's been introduced here very carefully, and

critically, made rather copious notes on it, and I cannot find a thing in the record, not a word, that states or indicates in any way that this truck was not properly and lawfully parked. That eleven-foot measurement is not in the record, it's been stricken because there is no foundation on which to admit it, and all the other evidence as to the truck, and mention of it, nowhere is there any—not a word that I can find in the record, that the truck was not legally and lawfully parked. I am certain there isn't a word that it was more than 18 inches from the curb. There is some evidence that it's closer to the curb, and parallel to it, and that, in effect, is all the measurements there is with respect to its position, except that of Officer Iba, who said it was rightly and lawfully parked.

"Now if anyone can point out to me any evidence in the record that shows that truck was not properly parked, I'd be quite interested in getting it.

"Counsel have anything more?

"MR. MIDGLEY: I have a motion, your Honor, aside from the one that is made.

"Are you going to rule on this prior motion at this time, or should I continue?

"THE COURT: If you have something you want to say, you have been silent through the arguments of the rest of them.

"MR. MIDGLEY: On behalf of the Defendant Harward, we can't properly or logically resist the motion.

"MR. KING: Well, your Honor, I don't know that the record shows our objection, but we strenuously object to the Court's striking from the record the measurements by Mr. Iba, in which he

participated as a part of a team. And if the Court does take that evidence out, of course, it knocks out the basic evidence we feel supports the proposition that the bus, or the truck was not properly parked.

"MR. AADNESEN: Your Honor, I take it that my motion is granted at this time?

"THE COURT: Yes, the motion of Mr. McDuffy and Mr. Lindsey, for a dismissal of the action on the grounds and assertions they included in the motion, is granted, and the action is dismissed for want of sufficient evidence to go to the jury or to the court for any other judgment." (Tr. 198-200)

* * * *

"Now, all the evidence in regard to that truck is that it was parked on the side of the road near the curb, outside of the painted lanes on what is known as the drainage lane or the gutter lane, which, by the law, is a parking lane where cars and trucks may be parked.

"The evidence is that this truck was so parked, and within all the requirements of the statute; that it was while the car was so parked that the other car crashed into the back of it, which resulted in the damages done. But there is no evidence in the record from which a conclusion could be reached or found that there's anything in connection with the truck, or the owners thereof, which in any way contributed to this accident. So there being no such thing for the jury to hunt for, and work at, there is nothing and no reason for sending the jury out to deliberate on something on which there is no evidence or claim." (Tr. 202)

Contrary to the testimony of the defendant Harward, Officer Iba testified that the defendant's lights were burn-

ing on the truck at the time he arrived at the scene of the accident after it occurred. This becomes unimportant because all of the testimony in the case indicates that the vehicle could be seen beyond a distance of 500 feet on the highway and there is no evidence to the contrary.

Officer Iba testified as follows:

“Q. Now, when you arrived, what direction did you come from?

“A. I came from the south. I was heading north.

“Q. In the same direction that the plaintiff was going, is that right?

“A. Yes, sir.

“Q. Did you see some clearance lights on the truck?

“A. I don’t recall.

“Q. All right. Did you at any time?

“A. When I arrived there, I checked the truck to see—

“Q. All right. Let me ask you this: As you came up from the south, in this direction (indicating), did you have any trouble seeing the truck?

“A. No, sir, no trouble.

“Q. All right. You knew right where the accident was, didn’t you?

“A. Yes, sir.

“Q. And there are some railroad tracks back here (indicating) aren’t there?

“A. There’s railroad tracks at 2200, I believe, south on State. There’s about three, three tracks.

"Q. That go across the street.

"A. Yes, sir.

"Q. That would be somewhere down in this area (indicating) ?

"A. Yes, sir.

"Q. Roughly speaking. What is the lighting on that street?

"A. It's well lit. It has the lights that burn till daylight every morning.

"Q. Sodium vapor lights are they not?

"A. Yes, sir.

"Q. And tell me, there is a gas station across the street from there, isn't there?

"A. Yes, sir.

"Q. There's a restaurant just ahead of it aways.

"A. Yes, sir.

"Q. Isn't there also a motel right near where the accident happened?

"A. There's a motel between the accident and the New China, I believe.

"Q. Yes. In other words, somewhere in here (indicating).

"A. Yes. And there's another motel across the street to the west.

"Q. Over here (indicating).

"A. Yes.

"Q. And then there's a gas station here (indicating).

"A. Wasatch Avenue, in between the motel and the station.

"Q. Is that a rather fully lighted gas station?

"A. It's open all night.

"Q. Now, up this direction is 21st South, is that right?

"A. Yes, sir.

"Q. Is that a well lighted intersection?

"A. Fairly well. It's—

"Q. I take it, then, that the visibility is good in that area.

"A. Well, it's—it's good visibility. I mean—

"Q. It's well lighted.

"A. It was stormy that night. I mean, it had been raining but—

"Q. But the visibility was good?

"A. The visibility was all right.

"Q. And when you arrived at the scene of that accident, you made an observation, as you have previously said. The truck had clearance lights burning on rear and side.

"A. That's, that's what I have on here, so that must have been the way it was.

"Q. Well, as you recall it, there isn't any question, is there?

"A. No." (Tr. 32-34).

* * * *

"Q. Mr. Iba, just one or two more questions. When you arrived at the scene of the accident that night, you walked around in front of the truck first to see if anyone was hurt, is that right?

"A. Yes.

"Q. You saw nothing, is that correct?

"A. Nothing.

"Q. It was light enough for you to see in front of the truck, wasn't it?

"A. Yes, sir.

"Q. And, as a matter of fact, isn't it true that in the very near vicinity of this truck, where it was parked, was a sodium vapor light (indicating)?

"A. I believe it's up ahead.

"Q. Just up ahead of it?

"A. (Witness nods head in the affirmative.)

"Q. And also one to the rear, from where you measured to the light pole, isn't it?

"A. I can't remember.

"Q. But at any rate, there was a light hanging over and close to that truck, just ahead of it.

And, Mr. Iba, from the observations you made that night, from what you have seen, in consideration of the weather and everything else, would you say you could see at least 500 feet ahead while you were driving down the street?

"A. Well, I would say you'd have clear visibility of the street with the lighting.

"Q. Yes. And, as a matter of fact, an object as big as that truck, you could have seen it 500 feet away whether it was lighted or not, couldn't you?

"A. Possibly." (Tr. 40-41)

Finnegan, the passenger in the car riding in the back seat, also testified as to visibility and places the ability to see traffic on 21st South a distance of 1200 feet away.

"Q. When you were riding in the back of the truck, or in the back of the automobile, you said you had the six packs of beer on the right-hand of you, is that right?

"A. Right here on the right-hand side. (Indicating.)

"Q. And you were looking at the semaphore on 21st South?

"A. Looking at the traffic going by there. No semaphore. There was traffic lights going by there.

"Q. Down on 21st South?

"A. 21st South, traffic.

"Q. That's about three blocks, isn't it?

"A. No.

"Q. Well, measured in city blocks.

"A. I think it's about, maybe a block and a half from the scene of the accident. Two blocks you can figure I was looking at them before he hit the truck.

"Q. That's about it, huh, about two blocks?

"A. Yes.

"Q. Now, when you use 'blocks,' are you using the blocks down there, or what we normally call as a city block?

"A. Well, I go by the numbers. I think the Trucking Service is around 2200, or such a matter there.

"Q. 2200 would be—

"A. I imagine it would be something like 22, 2300, somewhere in there." (Tr. 79-80)

* * * *

"Q. So then you are talking about a figure of maybe a thousand, twelve hundred feet away.

"A. Well, I know that territory there.

"Q. You were looking at a point or distance down on 21st South, approximately 1200 feet away, down in this area (indicating)?

"A. Yah." (Tr. 80-81)

POINT II.

THE PLAINTIFF ASSUMED THE RISK OF
RIDING WITH THE DRIVER HARWARD.

The Court properly held that the plaintiff assumed the risk in this case. Without stressing the intoxication of the defendant Harward, we submit that the intoxication and actions of the plaintiff, the other passenger, and the activities that night were adequately established by the record. Officer Iba took 35 or 40 cans of beer from the car. (Tr. 19). They had been drinking all evening and the testimony of Finnegan is conclusive as well as providing some measure of humor. He testified on cross-examination while being confronted with his deposition previously given.

"A. That's right.

"MR. AADNESEN: On Page 5, line 6. (Reading) 'Question: You didn't actually keep a count of the number of beers you had?

'Answer: No, but it was a period of about three hours. I would say we consumed, maybe, oh, maybe about eight beers, or ten, in the period of three hours.'

"Is that about right?

"A. Six, eight, ten, I don't count them.

"Q. Now, you say Mr. Milligan's condition was just fine. You've testified to that. Nothing wrong with him.

"A. His condition?

"Q. Yes

"A. Yes.

"Q. And you drank drink for drink with him, except he had, what, about three more? Isn't that what you said?

"A. No, I didn't say he had three more. I say I believe I consumed just as many as he did, or Coy either.

"Q. And so if there was anything wrong with him, there would have been with you?

"A. That's right.

"Q. You can drink about the same amount he can, can't you?

"A. If I don't drink anything else.

"Q. Well, you two have been out drinking before. You know what capacity he has, don't you?

"A. Drank beer.

"Q. I say, you have been drinking before with Mr. Milligan; you are friends.

"A. Oh, yes, I've drank with Mr. Milligan before.

"Q. And there have been times when you have gotten a little under the weather. So you know how much it takes, don't you?

"A. Oh, yes. Yes. Yes. I'll say that, yes.

"Q. And would you say that the two of you drink about the same; it takes about the same amount before you have any problem, like intoxication?

"A. Well, as far as beer is concerned, I'll tell you the truth, I don't have any problem with beer at all.

"Q. Do you drink enough of it to know that?

"A. Yes, I do.

"Q. Would it be your testimony—

"A. I've consumed a lot more beer than that ever would, I'll promise you that.

"Q. Would it be your testimony you have never been drunk on beer?

"A. That I've been drunk on beer?

"Q. Yes.

"A. You can get stupid on beer, if you get overloaded, I'll say that, yes.

"Q. What's the difference between 'stupid' and 'drunk'?

"A. There's a lotta difference. When you're drinking 3.2 beer, then you're drinking something else that's real hard, why, there's a lot of difference between being stupid and drunk.

"Q. What's the 'stupid'?

"A. I guess it puts you in a daze, as far as I know.

"Q. Puts you in a kind of a daze, so you couldn't see plainly?

"A. If you were drunk, yes.

"Q. Now, you'd never drive a car in that condition, would you?

"A. No. Nobody else would.

"Q. You wouldn't get in the same car, would you?

"A. No.

"Q. And you wouldn't expect Mr. Milligan to?

"A. No.

"Q. Have you ever discussed that?

"A. Sure, we've often discussed it. I wouldn't get in with anybody, driving a car, that's drunk.

"Q. And especially if they had been drinking beer, and were stupid instead of just drunk?

"A. If they were drinking beer, and I thought they were anywhere's near intoxicated, I wouldn't get in the car; or stupid, either.

"Q. How many times have you had eight or ten beers in a period of—or eight or ten beers, plus two or three beers, in a period of three hours? Do that often?

"A. How many?

"Q. Yes. Do that often?

"A. Well, yes. When you entertain yourself, I think if you go in and you don't even play, you can sit at the bar there and you can consume a beer in ten or fifteen minutes. I don't say you can't. If you're a real lush, why, you probably would consume a dozen.

"Q. Well, now, what is your definition of a lush?

"A. Well, a lush is a heavy drinker.

"Q. I see. And if a person were a lush, you could consume about twelve beers, as I understand it, in a period of three hours?

"A. Oh, yes. Yes. I'd say yes.

"Q. You wouldn't do that unless you were a lush, is that right?

"A. No, I don't think you would.

"Q. Mr. Finnegan, let's go back over this. Your testimony today is, and your testimony that you testified before to was that you had a beer, which is about a glass and a half, at dinner time. Is that right?

"A. Well, can.

"Q. Yes. Then you had a few beers, two or three, while you were waiting for Mr. Harward, and that was at about ten o'clock at night, ten or ten-thirty is your testimony. Then when you played, started playing, you had eight or ten more. Do you consider yourself a lush?

"A. No, I don't consider myself a lush." (Tr. 89-92)

Mr. Finnegan also testified that he was thrown out through the back door of the car as a result of the impact and that while on the ground in back of the truck he could see that the car was in the traveled portion of the road. The record shows that the police removed Mr. Finnegan from the back seat of the car and much to Mr. Finnegan's amazement, there was no back door on the car as it was a 1954 Chevrolet two-door, not a four-door automobile.

"BY MR. AADNESEN:

"Q. What kind of a car did you say you were driving, Mr. Harward?

"A. It's a '54 Chev. Del Rey, two-door.

"Q. That's a two-door, isn't it?

"A. Yes.

"Q. Doesn't have any rear doors in it.

"A. No, sir.

"Q. You have to climb in through the front seat?

"A. That is right.

"Q. The testimony that you have heard given by Mr. Finnegan, that he was thrown out of the rear door, is impossible, isn't it?

"A. Well, he was still in the car when I was taken out, sir.

"Q. Yes. You never saw him on the ground anywhere, did you?

"A. No, I didn't.

"Q. And he was there, in behind the seat, all the time, wasn't he?

"A. He was at the time I was calling for help across the street.

"Q. And that was until the officers took you all out.

"A. That is right. I was first out of the car."
(Tr. 146)

Here again the Court adequately summarized the testimony.

"THE COURT: Both the Plaintiff Milligan and Mr. Finnegan, who were riding with Harward in his car at the time of the accident, knew Mr. Harward well. They had been with him considerable time in the early part of the night, playing pool with him, talking with him, and drinking beer with him. There are some differences in the statements of the three of them as to the amount of beer they drank that evening; but it isn't the amount of beer you drink, it's the effect of it, or the possible effect.

"Finnegan said, 'Of course, Harward was you drink, it's the effect of it, or the possible effect. drunk, was intoxicated.' The other guest said he didn't think Harward was intoxicated. But both of them knew Harward, they knew he had been drinking all evening with them, drink for drink. They go and get into his car with him knowing that he's drinking intoxicants, and knowing that that involves the risk expressly so provided by the statute. And the statute says that a person who does that assumes the risk of bad driving; and that if he were

driving in the car as a guest, he has the right and privilege, and should exercise it, to warn and caution the driver who has been drinking. Under those situations, the statute says the guest cannot assert a claim and recover a claim against the driver. And there is no dispute but what both Milligan and Finnegan were just guests in the car.

"So from that angle, that should dispose of the case." (Tr. 200-201)

* * * *

"Now, Milligan, the plaintiff, and Finnegan, the other guest in the car, had been with Harward a long time that evening, playing pool with him, drinking with him, over quite a period of time. They say they had all drank about the same rate and the same quantity. They were acquainted with Harward, they knew him, they knew his drinking habits; they knew he drank quite freely, especially with beer, and beer is an intoxicating liquor under the statute. They knew what he had been drinking that night, because they were with him, drinking with him. They knew as a matter of law that any man who drank that much beer in that much time is under the influence of intoxicating liquor; that it's unlawful for him to drive an automobile. So the statute says if you get yourself in that kind of a position, and get hurt by it, you have no relief against the owner of the car. You know the danger you are going into, and you shouldn't encourage it, you should frown away from it and protect yourself." (Tr. 203-204)

CONCLUSION

We respectfully submit that the Court properly ruled in favor of the defendants and against the plaintiff and not one shred of evidence exists in the record at any place to support the contentions of the plaintiff against the defendants, Kenneth B. McDuffy and C. E. Lindsey.

Respectfully submitted,

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