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Country Club Foods v. Gale V. Barney : Brief of Respondent

Utah Supreme Court

Bushnell, Crandall & Beesley; Attorneys for Plaintiff;

IN THE SUPREME COURT
of the
STATE OF UTAH

COUNTRY CLUB FOODS,
Plaintiff and Respondent,

vs.

GALE V. BARNEY,
Defendant and Appellant.

Case No. 9192

BRIEF OF RESPONDENT

BUSHNELL, CRANDALL & BEESLEY
Attorneys for Plaintiff

INDEX

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STATEMENT OF FACTS

Defendant's retrospective examination of the evidence in its statement of facts will require a review of the evidence pertinent to the issues raised on appeal. However, no extended discussion of th facts will be made at this time save in the following particulars:

Defendant, as he approached in an easterly direction the intersection of Third South and Sixth East Streets, was

watching to the South, and at no time saw Plaintiff's vehicle until a second or two before the collision. Mr. Gale, Plaintiff's agent, looked at Defendant's vehicle twice, once when he was one-quarter of a block from the intersection, and a moment before impact; but he also noticed Defendant's vehicle by his peripheral vision as he was coming down the street, and as he entered the intersection. When Mr. Gale became aware of the imminence of a collision, he accelerated his vehicle and swerved first to the left, and then to the right to avoid an impact. Officer Williams, who investigated the accident, testified that Mr. Gale left slide marks, commencing at the intersection, which indicated Mr. Gale had turned sharply to the left and then to the right before impact. The front end of Defendant's vehicle collided with the right rear of Plaintiff's truck at a point in the intersection where the front end of Plaintiff's vehicle was passing the southern edge of Third South Street.

STATEMENT OF POINTS

POINT I

THE TRIAL COURT PROPERLY FOUND THAT PLAINTIFF WAS NOT GUILTY OF ANY NEGLIGENCE WHICH PROXIMATELY CAUSED OR CONTRIBUTED TO THE COLLISION. (Reply to Defendant's Point 1 and 2).

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY FOUND THAT PLAINTIFF WAS NOT GUILTY OF ANY NEGLIGENCE

WHICH PROXIMATELY CAUSED OR CONTRIBUTED TO THE COLLISION. (Reply to Defendant's Point 1 and 2).

Defendant states he relies upon the testimony elicited from Plaintiff's agent, Lavoy B. Gale, to substantiate his argument to Point 1, contending that Respondent's agent was guilty of negligence as a matter of law. It is fundamental that an Appellate Court may determine a question as a matter of law ony when convinced that reasonabe persons coud not disagree upon the question when conscientiously applying fact to law. Covington vs. Carpenter, 4 Utah 2d, 378 294 Pac. 2d, 788.

Mr. Gale testified that he was driving Plaintiff's one and one-half ton Chevrolet Pickup in a southerly direction on Sixth East Street and was one-quarter of a block from the intersection of Third South when he first noticed the vehicle driven by Defendant. He estimated Defendant's vehicle to be one-half block from the intersection, proceeding in an easterly direction. Defendant's brief states Mr. Gale did not look to his right again and proceeded into the intersection. A close examination of his testimony does not warrant such a conclusion.

BY THE COURT: State whether or not you looked at all toward this car after you saw it the first time when as you say it was about a half a block away.

A. Yes, sir, as I went through the intersection I looked and observed the car and that's when I took my decision to swerve and accelerate my truck.

Q. Let me ask you then, from the first time that you noticed the vehicle until the time that you entered

the intersection, did you observe the defendant's car, either through your peripheral vision or by looking at it?

MR. KIPP: I will object as being repetitious. He testified that he did not.

THE COURT: Well, I will let him answer if he can.

A. I noticed the vehicle, like I say, prior to coming down the street. And as I entered the intersection and a moment before the point of impact, I did see the vehicle then. Accelerated my truck and swerved to miss it. (Tr. 21).

Defendant's brief further assumes that Defendant had the directional right-of-way merely by proceeding towards an intersection on the right of Plaintiff. It is clear that the law of directional right-of-way will be invoked only when two vehicles enter an intersection at the same time (U.C.A. 41-6-72 (b).

However, the Trial Court well determined Plaintiff to be the favored driver, and such finding was substantiated by the evidence. When Mr. Gale was questioned regarding this subject, he stated on direct examination:

Q. I see. Had you taken any precautions before this time?

A. I didn't deem them necessary. I figured I had the clearance and was far enough ahead to make the intersection.

Q. Were you able to determine which car had entered the intersection first?

A. I was. (Tr. Page 16).

And upon cross examination of Defendant, the following question was presented to him:

> Q. Which vehicle to your knowledge entered the intersection first?
>
> A. I don't know. (Tr. 26).

And the Court made final determination regarding which party was the favored driver as follows:

> MR. BEESLEY: By way of rebuttal, I would like to put him on the stand merely to reiterate which vehicle entered first. I am not sure that was before the Court or not.
>
> THE COURT: Well, that, I think, was made an issue in the beginning.
>
> MR. BEESLEY: I believe that it was.
>
> THE COURT: Or, in other words, your witness testified that he was a quarter of a block away when he saw the other one a half block away and the testimony is that they were driving at about the same speed. So I guess that covers it.
>
> MR. BEESLEY: I won't have anything further then, your Honor. (Tr. 27).

This Court has frequently enunciated the effect of the rules of right-of-way:

> "The right-of-way rules simply mean this: that if two persons are so proceding that if they continued their course, there would be danger of collision, the disfavored one must give way, and the favored one may proceed; and the favored one may assume that this will be done." Coombs v. Perry, 2 Utah 2d, 381, 275 Pac. 2d 684.

To be sure, the favored driver cannot totally ignore the other and blindly traverse the intersection, but until he is otherwise put on notice, he can presume that the disfavored driver will slow down and permit him to pass. Concurring in the case of Bullock v. Luke, 98 Utah 501, 98 Pac. 2d, 350, 354, Mr. Chief Justice Wolfe said:

> " * * * we must be careful not to stretch contributory negligence to the point where we make it encumbant upon one no tonly 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. * * *
>
> "Although plaintiff had the right-of-way under both rules above referred to, yet there devolved upon him the duty of due care in observing for other traffic. But in doing so, he had the right to assume, and to rely, and to act upon the assumption that others would do likewise; he was not obliged to anticipate either that other drivers would drive negligently, nor fail to accord him his right-o-way, until in the exercise of due care, he observed, or should have observed, something to warn him that the other driver was driving negligently, or would fail to accord him his right-of-way. If this principal is not clear in the earlier Utah cases, it is firmly established by the more recent expressions of this Court." Martin v. Stevens, 121 Utah, 484, 243 Pac. 2d., 747.

Defendant cites the cases of Bullock v. Luke, supra; Gren v. Norton, 213 Pac. 2d, 356; Conklin v. Walsh, 113 Utah, 276, 193 Pac. 2d, 437; Sine v. Salt Lake Transportation Co., 106 Utah, 289, 147 Pac. 2d, 875, to support the proposition that one is contributorily negligent as a matter of law for not seeing and avoiding the effects of another's negligence. Martin vs. Stevens, supra, stated in referring to these cases:

"Each of them was decided upon the proposition that the circumstances were such that the driver held to be negligent as a matter of law, either observed, or in the exercise of due care should have observed, the manner in which the other driver was approaching the intersection and clearly could, by ordinary reasonable care have avoided the collision. Or to state it in other words, the negligence, or manner of driving, of the other driver was such that the driver appraising the situtaion was alerted to it, or by using due care would have been so alerted in time so that by the exercise of ordinary precaution, he could have avoided the collision. And, in each of these cases, this seemed to the Court so clearly manifest that reasonable minds could not find to the contrary."

Plaintiff contends that its agent, Lavoy B. Gale, looked directly at defendant's vehicle on two occasions; first, approximately one-quarter of a block from the intersection, and secondly, a moment before the impact and that he also observed the vehicle through his peripheral vision while proceeding down the street. Assuming, for the purpose of argument, that plaintiff's agent saw defendant's vehicle only in the first two named instances, these facts are not sufficient or so clearly manifest that reasonable minds could not find to the contrary that plaintiff's agent was negligent as a matter of law. Mr. Gale took corrective action upon becoming aware of defendant's failure to observe the right-of-way, and the evidence does not justify that a conclusion that an earlier lookout would have put Mr. Gale aware of defendant's disregard to plaintiff's right-of-way in sufficient time to avoid a collision. Generally, the question of whether or not an action exercised by a driver is reasonable is a question of fact and should be determined by the trier of the fact, and even if the plaintiff were con-

tributorily negligent as a mater of law, the question of whether or not such negligence was a substantial causative factor in producing the collision is also one of fact to be determined by the trier of the fact. Hess v. Robinson, 109 Utah 60, 163 Pac. 2d 510; Williams vs. Zions Cooperative Mercantile Institution, 6 Utah 2d. 283, 312 Pac. 2d 564.

In the case of Bates vs. Burns, 3 Utah 2d 180, 218 Pac. 2d 209, plaintiff brought an action to recover damages when his vehicle was hit by defendant's coal truck. The jury returned a verdict for plaintiff but the trial court held plaintiff guilty of contributory negligence as a matter of law. Point No. II of plaintiff's appeal was that he was free from any contributory negligence which either proximately caused or contributed to produce the accident.

The collision occurred on Highway 91 north of the intersection of Third West in Pleasant Grove, Utah. The plaintiff was driving a pickup truck South of Pleasant Grove and stopped for a stop sign before entering the intersection. He looked both ways and the road was clear, and he then proceeded into the intersection at a speed of five to six miles per hour. When plaintiff got past the center of Highway 91 and was nearly through the intersection, he was hit by defendant's vehicle. The court held that a party who first enters an intersection as authorized becomes the favored driver and all other vehicles approaching the intersection are obliged to yield the right-of-way to him. In setting aside the trial court's ruling that plaintiff was guilty of contributory negligence as a matter of law, the Court held:

> "In order to justify the trial court in upsetting plaintiff's judgment, defendant must prove that the evidence

showed with such certainty that all reasonable minds must so conclude, that plaintiff was negligent; and that such negligence concurred in proximately causing his own injury. We cannot agree that such a conclusion can be reached."

CONCLUSION

Plaintiff's agent, Mr. Gale, observed the vehicle driven by defendant as he approached the intersection and correctly assumed that defendant would yield the right-of-way to him. Upon discovery of Defendant's disregard to Plaintiff's right-of-way corrective action was taken by Mr. Gale to avoid the collision. The evidence of record is not so clear that all reasonable minds with certainty must conclude that Plaintiff was guilty of negligence as a matter of law.

Respectfully submitted,

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