

1960

J. Earl Morris v. C. Leo Christensen and Dale Christensen : Brief of Defendants and Appellants

Utah Supreme Court

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In the
Supreme Court of the State of Utah

J. EARL MORRIS,

Plaintiff,

vs.

C. LEO CHRISTENSEN and DALE
CHRISTENSEN,

Defendants.

Case No.
9217

FILED

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Clerk, Supreme Court, Utah

BRIEF OF DEFENDANTS AND APPELLANTS

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BRIEF OF DEFENDANTS AND APPELLANTS

STATEMENT OF FACTS

This case concerns an intersection collision involving plaintiff's automobile, going east on 9000 South, Salt Lake County, and an automobile driven by defendant C. Leo Christensen, and owned by his son, counterclaimant Dale Christensen. With Dale Christensen asleep in the car C. Leo Christensen had been driving north on State Street. At the intersection 9000 South had two lanes and was 41 paved feet wide, and State Street had four lanes and was 70 paved feet wide.

Plaintiff sued for damages against the defendant and counterclaimant, both of whom counterclaimed. At the pre-trial conference the negligence of defendant C. Leo Christensen was conceded. Plaintiff's complaint against the defendant Dale Christensen was dismissed, leaving him in the case as a counterclaimant (R. 83-85).

The case was tried before Merrill C. Faux, Judge of the Third Judicial District Court of Salt Lake County, without a jury. Judge Faux rendered judgment in favor of plaintiff and against the defendant, and dismissed the counterclaims. Defendant and counterclaimant appeal from that judgment.

Plaintiff testified that at about 6:30 a. m., December 26, 1958, he was driving east on 90th South Street, approaching State Street, in Salt Lake County, Utah (R. 13). He was alone in his car, a 1955 Mercury (R. 14. Ex. 1-P). The weather was clear. The road was dry. Daylight was breaking, but plaintiff's headlights were still necessary and were on (R. 14). The intersection had bright street lighting (R. 14). As he arrived at State Street, the traffic semaphore was red against him. He stopped his car and waited about 30 seconds for the light to change color (R. 24). When the semaphore turned green for him, he waited for a car on State Street to stop. This car was in the west, inside, lane of northbound traffic (R. 15). While plaintiff had been stopped his visibility in all directions was unobstructed, except for the signs of a corner gas station on his right, south. This minor obstruction did not prevent him from being able to see to the south "a considerable distance" (R. 28).

As plaintiff crossed the west side of State Street there was no hazard nor approaching traffic from the north, his left (R. 28, 29). His headlights illuminated 9000 South to the east) ahead of him, for several hundred feet and there were no hazard nor approaching traffic coming from that direction (R. 28, 29). There was no traffic behind him (R. 29). In regard to his looking south there is some variance in his testimony, although he admitted that as he crossed the center of State Street, south was the only direction from which traffic might come (R. 31). In substance plaintiff looked to the south once as he crossed the intersection (R. 29-31), and this was "as I was nearing the center of the intersection I looked to the south * * *" (R. 31). The stopped car in the west lane of northbound traffic did not substantially impair plaintiff's view of State Street to the south (R. 29). After crossing the center of State Street and clearing the stopped northbound car, plaintiff was not sure if he looked south again (R. 29).

Plaintiff failed to see the car driven by defendant. Plaintiff testified "Well, I proceeded across and I was nearly through the intersection and just the instant before impact why I saw this car hit me. It was too late for me to do anything about it" (R. 15). Plaintiff had no explanation for not seeing the car driven by defendant (R. 31). He affirmed his answer given on deposition that he first saw the car driven by defendant "just at the time the crash occurred" (R. 28).

Plaintiff knew that the speed limit on State Street was 40 miles per hour (R. 24).

Plaintiff had some variance in locating the place of impact. He testified that at impact his car was (1) 14 or 15 feet from the east edge of State Street (R. 16), (2) “nearly through the intersection” (R. 15), (3) “Well, I would say that it is about in the center of the east lane of the northbound traffic” (R. 25), and (4) affirmed his answer given on deposition “Well, it was—it was on the east side of State Street; the east traffic and it was nearly off the street. When he hit me he turned—he turned the way that I was going, east, somewhat to try and miss me, I suppose, and that is where the accident occurred, nearly off of State Street” (R. 25, 26).

Prior to impact plaintiff did not change course or speed and did nothing to avoid the collision (R. 25, 60). His speed at impact was 12 to 15 miles per hour (R. 51).

Impact of the collision was received on the right front of plaintiff’s car between the front wheel and front door (R. 26, 51).

Plaintiff’s witness, Joel Lund, was the driver of the car that had stopped for the semaphore in the west lane of northbound traffic (R. 32). Mr. Lund testified that plaintiff had the green light (R. 33, 35). He located the place of impact as “Well, it was a little bit off to the east of the outside lane” (R. 34, 36), that is that the impact occurred off of, and east of, the traffic lanes of State Street. He testified that, at impact, the car driven by defendant was headed north (R. 35), or northeast (R. 36). Mr. Lund did not see defendant’s car until the impact (R. 34).

Deputy Sheriff H. J. Houmand, the investigating officer, testified as follows for plaintiff. He diagrammed the intersection and stated that 9000 South had two traffic lanes, was paved for 41 feet and had 7 feet of shoulders, for a total width of 48 feet (R. 42, 43). State Street had four paved traffic lanes, with two of them for northbound traffic and two of them for southbound traffic (R. 40). The lanes were separated in the center by double, yellow, painted lines (R. 40). State Street was bounded by curbs and a retaining wall and had no substantial shoulders (R. 42, 43). It had a paved width of 70 feet (R. 42).

Officer Houmand placed the point of impact at 14 feet from the center of the intersection (R. 39). Plaintiff's car was damaged on the rear of the right front fender and doorpost (R. 51) and the car driven by defendant was damaged on the left front (R. 50). He did not determine the speed of the car driven by defendant from its skidmarks (R. 42), but stated that the debris from the collision was concentrated in a two or three foot area (R. 47). He affirmed that on his officer's report he had indicated the speed limit on State Street was 40 miles per hour (R. 43, 44). He stated that the car driven by defendant left 38 feet of skidmarks prior to the point of impact (R. 39, 46), that these skidmarks angled off to the east in a straight line (R. 46, 47), and that both cars came to rest east of the point of impact with the plaintiff's car 8 feet east of the car driven by defendant and that car being 14 feet from the point of impact (R. 39, 40, 45, 46). When asked why the two cars came to rest in this position he stated "I would assume that the Christensen—that the Christensen car was trying to

miss the Morris car." He was then asked "Q. You mean it was turned toward the east at the impact?" and he replied "A. That's right" (R. 46).

At the close of plaintiff's case a motion was made to dismiss plaintiff's complaint "on the ground that the plaintiff's evidence shows plaintiff to be guilty of contributory negligence which was the substantial, proximate cause of the accident" (R. 53). The motion was denied.

Defendant C. Leo Christensen testified that he was the father of the counterclaimant herein (R. 54, 55), and that he was driving and the counterclaimant sleeping in the car at the time the accident occurred (R. 55). Defendant had been driving automobiles for 33 years and had had no prior automobile accidents of any kind (R. 56, 57).

Defendant testified that he had been driving straight through from Payson, Utah, that he had not been drinking (R. 56), and that counterclaimant's car was in good mechanical condition (R. 57). Approaching the subject intersection he was driving at about 40 miles per hour, and had been in the outside, east, lane of traffic for 6 or 7 miles (R. 57).

He failed to see the semaphore until he was about 100 feet from the intersection. At that time the semaphore was yellow. He did not look at it again (R. 57). He first saw plaintiff's car at the same time that he first saw the semaphore. Plaintiff was then just coming to the west edge of the State Street pavement and was moving slowly—at 2, 3 or 4 miles per hour (R. 64). At that point defendant took his foot off the accellerator (R. 67, 68). He thought that

he had the right of way because he was so close to the intersection that he couldn't stop and the light was yellow (R. 57, 70). He was vague on when he first apprehended danger from plaintiff (R. 67-70).

Defendant next saw plaintiff when plaintiff was in the middle of the intersection. At this point defendant was, by defendant's testimony, 20 feet south of the intersection's south edge (R. 64), and about 35 feet from plaintiff (R. 65). He estimated that he had lost 5 miles per hour in speed since letting up on the accelerator (R. 68). He then, for the first time, applied his brakes (R. 65).

When defendant braked, he turned right, east, to avoid plaintiff (R. 59), but couldn't turn sharply because of a ditch bordering the east edge of State Street (R. 59). He was headed northeast at impact (R. 60). At impact he estimated that he and plaintiff were both going at about the same speed—12 to 15 miles per hour (R. 60).

Defendant claimed that the point of impact was 14 feet east of the paved portion of State Street (R. 60, 65). Impact occurred on the left front fender of the car he was driving (R. 60). He assisted Officer Houmand in making measurements of the scene after the accident (R. 61, 65), and stated that Officer Houmand was in error in his statement that the impact occurred 14 feet from the center of the intersection. He pointed out that this measurement would place the impact in the inside, west, lane of northbound traffic, and that he and Officer Houmand had actually taken the 14 foot measurement from the east edge of State Street, not from the center of State Street (R. 61, 65). It would appear

that Officer's Houmand's location of the point of impact is contrary to all of the rest of the testimony, and further that it would place the impact in the west lane of north-bound traffic, which would be very difficult as that lane was occupied by the Lund car (R. 32). This location of the place of impact is also inconsistent with the officer's own statement that defendant's "skidmarks angled to the east *going off of the road*" (R. 47).

STATEMENT OF POINTS

POINT I.

THE TRIAL JUDGE ERRED IN NOT FINDING THE PLAINTIFF GUILTY OF NEGLIGENCE, WHICH WAS A PROXIMATE, CONTRIBUTING, CAUSE OF THE ACCIDENT.

ARGUMENT

POINT I.

THE TRIAL JUDGE ERRED IN NOT FINDING THE PLAINTIFF GUILTY OF NEGLIGENCE, WHICH WAS A PROXIMATE, CONTRIBUTING, CAUSE OF THE ACCIDENT.

The issue is whether the plaintiff, as a matter of law, was guilty of negligence which was a proximate and contributing cause of the accident, even though plaintiff had the right of way, under the following facts: (1) Plaintiff had been on a minor road and had been stopped for 30 seconds waiting for the traffic semaphore to change so that he could cross an arterial highway (R. 24), (2) plaintiff

had accelerated from the stop and had gone across, or almost across, the 70 foot wide arterial highway before impact (R. 15, 16, 25, 26, 34-36, 60, 65, 78, 79, 80), (3) there had been no traffic approaching which might have diverted plaintiff's attention as plaintiff crossed the intersection (R. 28, 29), and, at the place of impact, defendant was approaching from the only direction from which plaintiff should have known, and did know, that cross traffic or hazards might approach (R. 31), (4) plaintiff had had virtually unobstructed visibility in all directions at all times since first stopping at the intersection (R. 28, 29), (5) defendant had been approaching plaintiff on the arterial highway within the speed limit and plaintiff knew the speed limit (R. 24, 43, 44, 66), (6) plaintiff failed to see defendant before impact (R. 15, 28, 31), and (7) defendant had approached at 40 miles per hour (R. 57), had not braked nor changed course until 38 feet from the place of impact (R. 39), and was clearly not yielding right of way to plaintiff at a time when plaintiff was still in position to easily avoid the collision (R. 58, 59, 63-65, 69, 70).

Negligence may be determined as matter of law under a given state of facts, even though all inferences are in favor of submitting the issue to the jury or of upholding a fact finding of no negligence.

Johnson v. Syme, 1957, 6 Utah 2d 319, 313 P. 2d 468,

Sine v. Salt Lake Transp. Co., 1944, 106 Utah 278, 282, 147 P. 2d 875, 878.

The facts given above in the statement of the issue fairly represent the evidence in the light most favorable

to plaintiff, and the law as applied to these facts indicates that plaintiff was guilty of contributory negligence.

The most recent Utah case with a very close factual similarity is *Johnson v. Syme*, supra. Its principles have been affirmed in *Fox v. Taylor*, 1960, Utah, 352 P. 2d 154. In *Syme* a dismissal of the plaintiff's complaint was affirmed by the Supreme Court of Utah, plaintiff being found negligent as a matter of law. The similarities of *Syme* and the instant case are: Both occurred on South State Street—*Syme* at 13800 South, and the instant case at 9000 South; in both cases the defendant ran traffic stop signals and clearly failed to yield right of way or take evasive action, and in each case this was, or should have been, apparent to the plaintiffs at a time when the plaintiffs could have avoided the collisions. Where the two cases differ the instant case is less favorable to plaintiff, in that in *Syme* the plaintiff saw the defendant before impact; in *Syme* the plaintiff's speed was 50 miles per hour and in the instant case plaintiff's speed rose from a stop to 12 to 15 miles per hour (R. 51), giving plaintiff herein more time in which to look for oncoming traffic and greater ability to stop quickly; and in *Syme*, plaintiff was on an arterial highway in the country and defendant entered from a side road, so that plaintiff therein was exposed to a lesser probability of cross traffic.

A driver with right of way may proceed until it is clear that if he does so there is danger of a collision. Accordingly cases such as *Bates v. Burns*, 1955, 3 Utah 2d 180, 281 P. 2d 209, allow a driver with right of way to proceed without fault into a position of peril, even though his lookout might

have been inadequate, if that driver could reasonably have assumed that the other driver would yield to him.

The instant case is distinguished from *Bates v. Burns*, and other Utah case with similar conclusions, because of factual differences, and is in accord with their legal principles. In *Bates* the plaintiff perceived danger when the other vehicle was 150 feet away. Plaintiff tried thereafter to avoid the danger, but couldn't do so because he was in an old truck with a low rate of acceleration. Prior to that time even if plaintiff had noticed defendant, plaintiff could have assumed that defendant would yield, as defendant had room in which to yield and had not manifested negligence nor failure to yield.

In the instant case plaintiff made no effort to avoid peril because he never saw defendant (R. 15, 28, 29).

In *Bates*, plaintiff had a Hobson's choice. He couldn't tell which direction defendant might choose when defendant tried to avoid him. In the instant case defendant could not swerve to his right, east, because of the curb and ditch (R. 43, 59), nor left, west, because of the Lund car which was stopped in the west, inside lane of northbound traffic (R. 15, 32). When defendant braked he chose the only course open to him—going ahead and to his right (R. 46, 47, 59, 60). This left plaintiff with a clear choice as to his remedial action.

It is recognized that the disfavored driver has a greater obligation than the favored driver to choose the right direction in which to swerve, *Bates v. Burns*, *supra*, but in the instant case defendant had no choice. It might be argued

that he could have continued straight ahead, but this requires an unnatural reaction from him in a split second, and presumes that plaintiff's course of travel, which could have been so readily altered, would not change. Plaintiff's speed was low, he could still have stopped, and defendant was not obliged to consider plaintiff negligent.

It should be noted that the impact occurred on the right front of plaintiff's car and the left front of defendant's car (R. 26, 50, 51). Considering this and the fact that defendant's swerve to the right delayed the impact, it is clear that a collision would have occurred if defendant had continued on in a straight line.

Reviewing the vital factors of time and distance, plaintiff entered the intersection when defendant was 100 feet away (R. 57, 58). At this time defendant was too close to stop. Because of this and his belief that the light was yellow, he assumed that he had the right of way, and that plaintiff would yield. He eased up on the gas, his habit when crossing an intersection, but did not brake (R. 64, 67, 69, 70).

Plaintiff had determined that there was no traffic approaching from any other direction (R. 28, 29) and that any hazard would come from the south (R. 31). His duty was to give greatest attention to the greatest source of hazard. *Covington v. Carpenter*, 4 Utah 2d 378, 294 P. 2d 788. Merely because he had the right of way given by the semaphore, plaintiff was not excused from the duty of every driver to keep a proper lookout and in that lookout to see what was to be seen. *Fox v. Taylor*, *supra*, *Johnson v. Syme*, *supra*, *Bates v. Burns*, *supra*, *Spackman v. Carson*, 117 Utah 390, 216 P. 2d 640, *Conklin v. Walsh*, 113 Utah 276, 193 P.

2d 437, *Sine v. Salt Lake Transportation Co.*, supra, in which the basic, lifesaving rule of the road is well stated as "The supreme rule of the road as to motorists at street intersections in cities is the rule of mutual forbearance." Plaintiff failed in this duty, either not looking or not seeing. If he had seen he would have been alerted to the imminent arrival in the intersection of the defendant.

Both cars continued in straight lines until defendant was 20 feet from the intersection and 35 feet from plaintiff who was then under the traffic light (R. 59, 60, 64, 65). During this interval plaintiff could have effectively stopped or slowed at any time while crossing the 35 foot wide west side of State Street, or the 17½ foot wide west lane of northbound traffic which was shielded by the Lund car (R. 15, 32).

Defendant then braked and swerved right, east, leaving 38 feet of skidmarks running northeast (R. 39, 46, 59, 60). Plaintiff continued blindly on.

If the trial judge's comment that defendant "chased" plaintiff 14 feet east of the intersection (R. 79), be interpreted as a finding of fact, then plaintiff had the whole width of State Street in which to see and avoid defendant. As pointed out above, defendant could not reasonably have been expected to not swerve. In addition defendant was angled away from plaintiff at impact (R. 46, 47, 59, 60). Accordingly, if plaintiff had followed the natural, and under the circumstances logical, reaction of braking and swerving away from danger, there would have been no collision. This conclusion follows with equal force regardless of which point of impact is chosen from the testimony.

Right of way terminates when it is clear that the other driver will not observe it, or poses an immediate hazard. *Richards v. Anderson*, 9 Utah 2d 17, 337 P. 2d 59, *Bates v. Burns*, supra. The duty of forbearance and avoidance then becomes paramount. *Sine v. Salt Lake Transportation Co.*, supra. The failure to yield can be manifested most directly by the disfavored driver being so close to the favored driver, and going so fast, that the disfavored driver *cannot* yield.

Under the above stated facts it appears that the plaintiff had a clear opportunity to see defendant and recognize the hazard, and negligently failed to do so, and that plaintiff had clear opportunities which he failed to take due to his negligence, and that plaintiff therefore proximately contributed, without excuse, to the accident.

The doctrine of "last clear chance" has not been raised as an issue, but deserves mention. It is not applicable against the defendant, even if it be assumed that the defendant apprehended danger 100 feet from the intersection and plaintiff was just entering, because at that point (1) defendant was too close to the intersection to stop (R. 70), and so had no clear chance, and (2) plaintiff was not then in a position of peril. *Fox v. Taylor*, supra, *McMurdie v. Underwood*, 1959, 9 Utah 2d 400, 346 P. 2d 711.

CONCLUSION

Appellants submit that the trial judge erred in not finding the plaintiff guilty of negligence which was a proximate cause of the subject accident, and request that relief be granted by remanding the case for a new trial with appropriate instructions.

Respectfully submitted,

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