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Cherie Burkhalter, and Guardian Ad Litem of Robin Burkhalter, A Minor v. John Gunther : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

CHERIE BURKHALTER, and
CHERIE BURKHALTER,
Guardian Ad Litem of
ROBIN BURKHALTER, a minor,
Plaintiffs and Appellants

vs.

GRANDEUR HOMES and
JOHN GUNTHER,
Defendants and Respondents

Case No.
10369

APPELLANTS' BRIEF

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TABLE OF CONTENTS

CASES CITED

AUTHORITIES CITED

STATUTES CITED

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PRELIMINARY STATEMENT

Leslie Terry Burkhalter was fatally injured in a collision with a pick-up truck owned by Grandeur Homes and being driven at that time by the Defendant John Gunther.

The collision occurred on State Street in Salt Lake County at the intersection of State Street and Gordon Lane. Terry Burkhalter was traveling north on State Street on a Triumph Motor Bike and the pick-up was proceeding south on State Street and then made a left turn into Gordon Lane.

The case was tried to a jury, which found the Defendant John Gunther negligent in failing to keep a proper lookout, on a special verdict, and found the decedent Terry Burkhalter negligent in that he failed to keep a proper lookout. The jury found Plaintiffs suffered general damages in the sum of $50,000.00.

STATEMENT OF FACTS

Leslie Terry Burkhalter was riding a motorbike north on State Street at approximately 8:45 a.m. on his way to work. He was involved in a collision at State Street and Gordon Lane (approximately 4100 South). John Gunther, driving a pick-up truck on company business for Grandeur Homes, made a left turn at the intersection of State Street and Gordon Lane and his vehicle and the motor bike driven by Terry Burkhalter collided. Terry Burkhalter expired almost instantly, after being thrown into the bed of the truck by the force of the impact.

The truck was carrying two by four lumber which extended beyond the rear of the truck some 6 feet 7 inches. (R.89)

The point of impact on State Street was 50 feet 4 inches from the island adjoining the left turn lane from which Mr. Gunther turned (Ex. D-17, R 87

There were three lanes for north bound traffic on State Street at the place where the collision occurred. (Ex. D 17, R. 90). The two lanes west of the lane in which the collision occurred were 12 feet 2 inches and 11 feet 6 inches across. The lane in which the collision occurred was 12 feet 1 inch across, and the actual point of impact on the highway was 6 feet 8 inches from the east curb line. (Ex. D17, R. 87).

After the impact, the pick-up truck traveled 44 feet 6 inches. (R. 88)

The evidence is clear by his own admissions that John Gunther at no time saw the Burkhalter motor bike until immediately before the collision occurred although he testified that he looked before making his left turn. (R. 210, 211, 222, 226, 227).

There was conflicting evidence as to the speed of the Burkhalter motorbike as it approached the intersection. Mr. Thomas E. Allen, an eye witness to the collision, testified that in his opinion it was not going more than 40 miles per hour (R. 119). He was parked on the east side of State Street and standing by his automobile and the motor bike went past him just before impact and he saw the driver of it as the brakes were applied (R. 118). Mrs. Veva H. Riding, who was following the Burkhalter motorbike, as they

proceeded north, testified that it was keeping pace with her and that she was doing a little less than 40 miles per hour (R. 131).

Two witnesses called by the defense testified to a higher rate of speed. One, a Mr. John Reich made his observation as the vehicle was a block and a half away from the collision point and stated that in his opinion it was going over 50 miles per hour (R. 241). A Mr. C. E. Sandquist, stated that he was parked at the stop sign controlling Gordon Lane prior to turning north on State Street, and observed the motorbike after he heard it approach. In his opinion the motorbike was traveling 60 miles per hour (R. 249). However, Mr. Sandquist also saw at least one or two other motorcycles at that same time approaching from the south (R. 250, 251), although no one else saw the extra motorcycles.

Mr. Allen testified further, that as he heard the brakes of the motorbike applied he also saw the driver of the motorbike duck his head (R. 118, 119). Mrs. Riding testified that the motorbike appeared to veer to the right and slow down prior to the impact (R. 131, 132).

Mrs. Riding stated that as soon as she saw the pick-up truck turn to the left she knew there would

be a collision because the motorbike was too near the intersection for a turn to be made. (R. 131, 132). The motorbike laid down 49 feet 6 inches of skid mark prior to the impact. (R. 92).

The evidence will be discussed further as it relates to the specific points relied upon by the Appellants.

STATEMENT OF POINTS

1. **There was no evidence from which the jury could find that Leslie Terry Burkhalter failed to keep a proper lookout, or that his failure to keep a lookout was a proximate cause of the collision.**

2. **It was error for the court to instruct the jury on "Failure to keep a proper lookout" in relation to Leslie Terry Burkhalter.**

3. **The court erred in giving its instruction No. 13 relating to vehicles making a left turn, and in failing to give plaintiff's requested instructions No. 4 and 6.**

4. **The court erred in giving instruction No. 19 in connection with the special verdict and in submitting the case to the jury on the special verdict in the form in which it was submitted.**

5. **The court improperly interfered with the jury and allowed the jury to complete its verdict in the jury box under the direction of the court.**

Point I

There was no evidence from which the jury could find that Leslie Terry Burkhalter failed to keep a proper lookout, or that his failure to keep a proper lookout was a proximate cause of the collision

Point II

It was error for the court to instruct the jury on "failure to keep a proper lookout" in relation to Leslie Terry Burkhalter

The argument on both Point I and II involves analysis of the same evidence, and arguments for convenience and brevity will be considered together

Appellants assert that the court erred with regard to its instruction in submitting the question of contributory negligence of the deceased on the theory of failure to keep a proper lookout to the jury (1) that there was no evidence to justify a submission of the case on this theory (2) that the jury erred in finding contributory negligence in "improper lookout" when there was no evidence of failure to keep a proper lookout, and (3) that in any event, failure of lookout on the part of Terry Burkhalter was not a proximate cause of the collision

Appellants have heretofore set forth the evidence of four persons who saw this collision or the events leading up to it.

Mr. Roach for the Defendants, must be ruled out as an eye witness since his last view of the motor bike was a block and one half away (R. 239). In any event his testimony related only to speed, and the jury did not find speed of Terry Burkhalter a factor in the collision.

Mr. Sandquist's testimony for the Defendant also related to speed. He estimated the motorcycle as going not miles per hour (R. 249) and he acknowledged on cross examination that when he saw the truck start to cross the street that he knew nothing was going to happen (R. 252); that he could tell there was going to be an accident (R. 253).

Mr. Thomas F. Allen, testified that he heard the gases on the motorbike (R. 118), that he saw it and that he would say that it was going about 40 (R. 119), "but after he applied his brakes, I seen him lower his head and then he collided into the truck" (R. 119). That at the time he first observed Terry Burkhalter, he did not have his head lowered, but "was just going down" (R. 119).

Mrs. Neva H. Riding, was following Terry's [illegible] halter about one-half block back of him [illegible] approached Gordon Lane. R. 130, 131. She saw the truck begin to make its turn and realized it was too close to the motorbike. R. 131. As stated in her own words, "Well, I saw the truck begin to make a left turn, and I realized that the motorcycle was too close, I knew immediately that was going to be some sort of impact, but the motorcycle tried to make a right hand turn to follow the truck as it was turning, but still didn't seem to make enough of a turn to keep from making from causing this accident." R. 131, 132. She stated that the motorcycle was too close to the intersection when the turn was made by the pick up. R. 132. Similarly, she was aware that the motorcycle was slowing down. R. 132.

On the basis of a conflict of evidence on the question of speed, appellants acknowledge that had the jury returned a verdict of contributory negligence based upon speed, there would be no room for argument as to sufficiency of evidence or proximate cause, and the court would be justified in sustaining the instruction of speed, the jury verdict on the question of speed, and that speed was a proximate cause of the collision.

However, take away the question of excessive speed, which is not the ground upon which the

... and Appellants witness, Mrs. Riding, and ... witness Mr Sandquist agree that the ... was bound to happen the moment Mr ... began his left turn.

... to this the testimony that Terry applied his ..., that he laid down 49 feet 6 inches of skid ..., and tried to turn to the right to avoid the ..., and it becomes clear that Terry Burkhalter ... observe the danger as soon as the danger de... , and he took all of the action he could to ... avoid the danger thrust upon him. Note also, ... the vehicle operated by Mr. Gunther had an ... al length of 25 feet 3 inches. That is, 18 feet ... of truck and 6 feet 7 inches of obstruction ... the rear of the rear of the truck. R. 88, Ex ... 17.

... this point the across road measurements have ... distance. The impact point was 6 feet 8 inches ... the curb, and the impact point on the truck was ... 2 inches from the front of the truck. R. 87, ... D 17. This leaves a protrusion to the west of ... impact point of 10 feet 9 feet 5 inches of truck ... Ex. D 17 and 6 feet 7 inches protrusion of ... R. 89, Ex. D 17. Add this to the point of ... 6 feet 8 inches from the east curb, and at the ... impact Mr. Gunther had effectively blockaded

22 feet 8 inches of the highway without ever [illegible] observed the decedent approaching

It may be that the jury, in a proper case might be entitled to infer improper lookout However, the face of affirmative evidence to the contrary, [illegible] is no room or such an inference, and in the [illegible] there is affirmative evidence of proper lookout, no evidence whatsoever of improper lookout

Under the circumstances, it was error to [illegible] court to instruct on failure to keep a proper look on the part of the decedent, and there was no evidence from which a jury could properly make finding which it did on the special verdict R

Finally, appellants assert that there was no [illegible] for the determination that improper lookout [illegible] part of Terry Burkhalter was the proximate cause the collision in view of the testimony of the [illegible] eye witnesses who watched both vehicles, to Riding and Mr Sandquist, each of whom [illegible] that as soon as the truck began to turn each saw collision was going to occur R 131, 132 and R 253

Point III

The court erred in giving its instruction No. 13 relating to vehicles making a left turn, and in failing to give plaintiffs requested instructions No. 4 and 6.

The court's instruction No. 13 quoted the applicable section of the Statutes. Section 41-6-75, as Traffic Laws of Utah 1961, as follows:

> "The driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard, during the time when such driver is moving within the intersection."

However, Appellants feel that the court erred in the balance of the instruction given which was as follows:

> "If you find from the evidence that when John Gunther commenced his left turn the deceased's motorcycle was not so close to the intersection as to constitute an immediate hazard, then you are instructed that it was the duty of deceased Leslie Terry Burkhalter to yield the right of way to defendant's truck, and failure to do so would be negligence."

It is doubtful that the instruction as given is a correct statement of the law as it existed prior to the

1961 amendment, but it is clear that it is not ... statement of the law following the 1961 amend...

The only burden visited upon Gunther under instruction as given was to conclude that Jerry B... halter was not so close as to constitute an imme... hazard at the time he, John Gunther, began ... turn, and then a duty sprung up on the part of ... Burkhalter to yield the right of way

Jury Instruction Forms For Utah (JIFU) ... a model instruction which indicates that under prior law the instruction given was not a ... instruction even as to the pre 1961 law of left ...

In the model instruction is contained the ... ing language (21 20)

> It means that *before* starting to ... *while making* the turn the driver of the ... must use such precaution as would satisfy ... reasonably prudent person, acting ... similar circumstances, that the turn can be made in safety (*Italics added*)

Nowhere in the court's instruction is there reference to continuing to observe and use ... on the part of Mr Gunther

The 1961 amendment eliminated any question of the right of the left turn driver to proceed with continued observation when it omitted the langu...

[illegible] the distavored left turn driver having a [illegible] proceed and all other traffic to yield, and [illegible] therefore a positive duty of the left turn [illegible] yield to any vehicle in or approaching the [illegible] so close as to constitute an immediate [illegible] such driver the left turn driver is [illegible] the intersection

[illegible] submitted that under the cases French [illegible] Refining Co., 117 Utah 406, 216 P. 2d [illegible] Yeates vs. Budge, 122 Utah 517, 252 P. 2d [illegible] Gardner vs. Cedarhurst, 1 Utah 2d 171, 263 P. 2d [illegible] Cedarloff vs. Whited, 110 Utah 45, 169 P [illegible] the court was in error in the instruction as [illegible] given prior to the 1961 amendment and that the [illegible] amendment has placed an increased duty upon [illegible] left turn driver

This court had occasion to pass on the amended [illegible] section 41-6-73, in the case of Smith vs. Gallegos, [illegible] Utah 2nd 344, 400 P. 2d 570, although not under [illegible] exact factual situation

In that case this court said:

> Under the new statute, the left turner is obliged to yield to vehicles so close as to constitute an immediate hazard "during the time when such driver is moving within the inter

> section." The addition of the language quoted clearly places a greater duty left turner in that he must yield to approaching vehicles close enough to tute a hazard prior to his beginning but also to vehicles which will cons hazard during the time he is moving the intersection," which includes the will be necessary for him to complet turn."

The court compounded its error at the tria at the outset of the case, the court mis of left turns in telling the jury what to lo the case (R. 83).

Appellants requested an instruction (Re No. 6) in substantially the language of IPI tion No. 21.20, requesting that the court instr the driver making a left turn "before starting to a vehicle and while making the turn," had a ing duty, and setting forth the statute as above.

The court indicated that this instructio "given in substance," but to the contrary, a pletely different and erroneous instruction o law of left turns was given.

Coupled with the court's failure to give Plain requested instruction No. 4, the result was to

...ce the plaintiffs theory of the case and ... the jury a distorted basis for its delibera...

...Points I and II heretofore, the Appellants ... the state of the evidence concerning ... its occupancy of the road and blockade ... which under the theory of the instruction as ... not improper. The instruction however, ... precluded the Plaintiffs from arguing to ... the continuing and increased duty on the ... Mr. Gunther.

... assume that there was evidence from which ... could make out failure to keep a proper ... on the part of the decedent, then it at once ... obvious that Plaintiffs case was jeopardized.

... instruction, No. 15, as given, in effect in... the jury that Gunther did not have to look ... starting his turn, and that from that point ... decedent was on the decedent and all risk of ... was on him.

... Trial Court was mistaken in its view of the ... left turns and by his statement to the jury in ..., his erroneous instruction to the jury and his ... to give the requested instructions of the

Plaintiffs, weighted the case heavily in favor Defendants and against the Plaintiffs

Coupled with the fact that the written inst submitted to the jury No 13 , was the instruction of the Defendants, and was never but submitted on the form prepared by the ants, and was corrected in the final line in "would be," rather than "was" negligence the whole effect of this instruction was to the jury that decedent did something wrong should preclude a recovery

As a practical matter, Appellants assert the facts developed in this case are such that the could rule as a matter of law, that the sole proxi cause of this collision was the inattention of Gunther.

Point IV

The court erred in giving instruction No. 19 in connection with the Special Verdict and in submitting the case to the jury on the special verdict in the form in which it was submitted

[illegible] feel that they have been made some [illegible] power in this case by the Special Verdict [illegible] submitted to the jury.

[illegible] court interrupted the cross-examination of [illegible] witness of the day to impart to the jury that [illegible] asked to submit a Special Verdict and that he [illegible] recently been reversed by the Supreme Court for [illegible] with the processes of the jury in such a [illegible] R. 103, 104. Apparently the court had reference to the case Correia vs. Albertsons, Utah [illegible] P. 2d 66.

It is submitted that such a statement as made [illegible] 103, 104, whether intentional or not, is calculated thoroughly confuse the jury which at that point [illegible] little information concerning the case and no information concerning the dispute which the trial [illegible] with the Supreme Court in another case.

The court could, I am sure, find a more direct and [illegible] way of submitting the Special Verdict than [illegible] in this case.

Had the court in its Special Verdict submitted Question No. 1 a and b as it did, and then in introduction to Question No. 2 used some language such as this:

If by your answer to 1 a you find that Mr. Gunther was not negligent, you need not answer 1 b or Question No. 2.

If by your answer to 1 a, you find that Mr. Gunther was negligent and by your answer to 1 b find that Mr. Burkhalter was negligent, you need not answer Question No. 2.

If, however, by your answer to 1 a, you find that Mr. Gunther was negligent and you find by your answer to 1 b that Mr. Burkhalter was not negligent, then you should answer Question No. 2.

Language of this nature would seem to have more accurately handle the situation, and to give the jury the benefit of an explanation of what it is to do rather than adding to their confusion.

As a result of the Special Verdict as given the court left ample room for the jury to be thoroughly confused.

... court earlier instruction No. 19 by saying ... Plaintiffs are entitled to recover ... should determine a sum of money which ... approximately represent the amount of ... sustained by reason of the death of ... Burkhalter.

... with the court's earlier statement of his ... problem with the Supreme Court, and the ... Special Verdict is drafted, the jury could ... conclude that there was no great reason to ... consider the question of negligence on the ... Leslie Terry Burkhalter, since a recovery was ... forthcoming in any event.

... also, that the jury was in fact confused ... Special Verdict (R. 204) and brought in only ... fully completed verdict which was completed ... the court's direction after the jury was back ... jury box.

Appellants are mindful of the rule which is oft ... that the instructions are to be read together ... determining their validity. However, in view of ... that the jury seized upon "improper lookout" ... basis for contributory negligence, the ground ... evidence to sustain it, when they completed ... Special Verdict in the jury box, appellants assert ... the jury was thoroughly confused by the special ... and the attention drawn to it by the trial ...