1966

Karl L. Badger v. Paul Taylor Clayson : Appellant's Brief

Supreme Court

KARL L. BA

— vs. —

PAUL TA

KIPP &
520 Boston
Salt Lake
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In the
Supreme Court of the State of Utah

KARL L. BADGER,
Plaintiff and Apellant,
— vs. —
PAUL TAYLOR CLAYSON,
Defendant and Respondent.

Case
No. 10517

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action to recover damages for personal injury and property damage resulting from an automobile accident which occurred at a blind intersection controlled by a semaphore signal.

DISPOSITION IN LOWER COURT

The trial jury on special interrogatories and acting on instructions of the court below found the defendant negligent in running a red semaphore but also found the plaintiff negligent in failing to maintain a proper lookout, whereupon the court entered judgment of "No Cause of Action." Plaintiff's motion for new trial was denied.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment and judgment in his favor as a matter of law on the liability issue and a new trial on the issue of damages or, that failing, a new trial on all issues of the case.

STATEMENT OF FACTS

The controversy which is the subject of this lawsuit arises out of a relatively simple fact situation. Plaintiff and defendant were operating automobiles which collided at the intersection of 4500 South and 1300 East Streets in Salt Lake County at approximately 8:00 a.m. on December 30, 1963. Immediately prior to the collision plaintiff was traveling east on 4500 South Street and defendant was traveling south on 1300 East Street. The accident occurred during daylight hours and the atmosphere was clear and the road surface was dry. Because of topographic and other conditions at the intersection, neither driver could see in the direction from which the other was approaching until his automobile was almost into the intersection. Traffic at the intersection is controlled by a semaphore signal.

Conditions at the intersection are illustrated by several photographs received in evidence (Exhibits P 3, 4, 5, 6, 7, 8, 10 and 12 and Exhibit D 9). The intersection is "blind" as to the corresponding views of vehicles approaching from the west and north because 1300 East Street drops off abruptly to the north of 4500 South Street leaving a dirt embankment between approaching

vehicles. There are also some trees, telephone poles and shrubbery located near the intersection. The defendant explained the visibility as follows: (R. 238)

> "Q. As you approach this intersection coming south, can you see 45th South to the west?
>
> A. When you are on 13th East traveling south, it's difficult to see 4500 South until you are practically right on it.
>
> Q. Does it start to come into your view as you come up that hill?
>
> A. Well, you have got to be almost immediately on it before you can see the 4500 South any distance west."

and (R. 243)

> "Q. You are very familiar with the intersection are you?
>
> A. Yes, I am.
>
> Q. And it is your judgment that you couldn't see a car any distance west on 45th South until you got almost into the intersection. Is that correct?
>
> A. That is correct.
>
> Q. And you didn't see this other car at all until just a moment before the impact?
>
> A. That is correct."

The plaintiff, Mr. Badger, who was also familiar with the intersection was in doubt as to whether or not a vehicle approaching from the west could see a south-bound automobile when the latter was right at the intersection next to the telephone poles located at the corner (R. 217). The evidence discloses that neither driver saw the other until just before the impact (R. 218, 243).

The principal liability issue involved determination of which driver had the green light in his favor. There was little conflict in the testimony with respect to the other issues.

Plaintiff testified that he was returning to his home at the time of the accident. He said that he slowed as he approached the intersection and that when he was about 120 to 125 feet west of the intersection the light turned green and he proceeded into the intersection at a speed of approximately 20 to 25 miles per hour (R. 141).

The defendant was on his way to work at the time of the accident. When he first saw the light it was green for southbound traffic. He recalls having seen the light about a block (600 feet) north of the intersection (R. 243-244). From this point he traveled at a constant speed of approximately 25 to 30 miles per hour to the point of impact (R. 244). He testified on direct examination that the light "turned from green to orange" just before he entered the intersection (R. 171). On cross-examination he could not say for sure whether or not he actually saw the light change (R. 246).

Other witnesses who testified on the liability issue included the investigating officer, a foreman for the Salt Lake County Street Lighting Department and two eye witnesses, Paules Peterson and Pieter Klein.

The investigating officer established the point of impact of the vehicles and testified that no brakes were applied by either vehicle. He also established from the

physical evidence at the accident scene that the Buick automobile driven by the defendant was involved in a collision with two other vehicles near the crosswalk on the south side of the intersection after the initial impact with plaintiff's automobile. He further testified that he observed the operation of the semaphore light after he arrived at the scene of the accident for about 20 to 25 minutes and that the light was working normally (R. 85). He testified that the light remained on amber for 5 to 6 seconds as timed by the sweep hand of his watch (R. 86).

The Salt Lake County Lighting Department Foreman, Armond Myers, testified with respect to time intervals of the various lights of the semaphore. He testified that the amber light for north-south traffic was displayed for a period of 5 seconds (R. 103). An exhibit kept by Mr. Myers in the ordinary course of his business and received in evidence discloses that the interval for the green light controlling north-south traffic was 14 seconds (Exhibit P-2).

Pieter Klein, testified that just prior to the accident he had been traveling north on 1300 East Street in a Dodge automobile. He intended to make a left turn at the intersection of 4500 South and as he approached the intersection he was traveling at a speed of approximately 20 miles per hour (R. 117-118). When he was about 100 feet back from the intersection the light turned yellow and he made a "slow stop" which he estimated consumed approximately 7 seconds (R. 117-118, 119). Klein

stopped his automobile next to the pedestrian lane at the intersection. When he was about 20 feet from the crosswalk he saw defendant's automobile straight ahead of him and approximately 200 feet north of the intersection (R. 119-120). Klein testified that the Buick automobile traveled at a constant speed from the time he first saw it until it entered the intersection at a speed of approximately 35 miles per hour and collided with the plaintiff's automobilee (R. 120).

The other eye witness, Paules Peterson, had been traveling north in a Chevrolet truck behind the Klein automobile. He was driving his truck at a speed of approximately 20 to 25 miles per hour when he saw the light change to yellow (R. 132). Peterson could see that Klein was going to make a left turn and since Peterson intended to proceed directly on through the intersection he turned to the right of the Dodge automobile and made a "slow stop" (R. 132). Peterson estimated that it took 10 to 15 seconds for him to stop his vehicle after he saw the light turn yellow (R. 132). Peterson saw the vehicles collide in the intersection but he did not know exactly where his vehicle was when the defendant's automobile entered the intersection.

The plaintiff was thrown out of his automobile by the impact and sustained severe personal injuries as a result of which he will be permanently disabled to a substantial extent and will probably require a shoulder fusion which will render his shoulder joint completely immobile (R. 185). The gravity of the injury is aggra-

vated by the fact that plaintiff does not have a normal right arm. Plaintiff also sustained substantial damages for lost wages plus medical expense of approximately $1,600 and property damage of approximately $1,500.

The court submitted the cause to the jurors on a special verdict which required them to determine specifically as to each driver "What negligent acts proximately caused the collision" (R. 52). In instructing on the law of the case the court fully advised the jury on the motorist's duty with respect to semaphore signals and also gave a specific instruction with respect to lookout for other vehicles. In the latter instance the court instructed the jury by his Instruction No. 17 that there is a duty imposed on a driver of an automobile "*to be aware* of the relative positions and speeds of vehicles approaching and he must recurrently reobserve and reappraise in the light of the consistent changing conditions of a fluid traffic situation" (R. 46).

The jury was out for deliberations (interrupted only by the mealtime recess) for approximately 6 hours (R. 254, 265). By their special verdict the jury unanimously determined that the defendant had run the red light and by a six to two verdict the jury determined that the plaintiff had failed to keep a "proper lookout" (R. 52. See also R. 265-266). Judgment of "No Cause of Action" was entered on the special verdict and the plaintiff's motion for new trial was denied (R. 53, 56). This appeal followed.

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GIVING INSTRUCTION NO. 17 WHICH IN SUBSTANCE INSTRUCTED THE JURY THAT PLAINTIFF HAD AN ABSOLUTE DUTY AS HE APPROACHED THE INTERSECTION TO OBSERVE OTHER VEHICLES APPROACHING, ENTERING AND CROSSING THE INTERSECTION AND TO CONTINUALLY REAPPRAISE THE SPEEDS, DISTANCES AND RELATIVE POSITIONS OF THE OTHER VEHICLES [EVEN THOUGH PLAINTIFF WAS PROCEEDING WITH THE GREEN LIGHT AND COULD NOT SEE APPROACHING VEHICLES BECAUSE OF THE PHYSICAL CHARACTERISTICS OF THE INTERSECTION].

The instruction of which plaintiff here complains reads in its entirety as follows:

"Instruction No. 17

> You are instructed that even though the operator of an automobile has the right-of-way, he still has the duty to keep and to maintain a reasonable, proper, and adequate lookout and to use reasonable and ordinary care to avoid a collision. One who has the right of way must use due care while crossing and must continue to keep a reasonable lookout and reappraise the situation as he approaches an intersection and use reasonable and ordinary care under the circumstances to avoid a collision as he proceeds.

> *There is imposed upon a driver the duty to be aware of the relative positions and speeds of vehicles approaching and he must recurrently reobserve and reappraise in the light of the consistent changing conditions of a fluid traffic situation.* Therefore, even if you should find from the evidence in this case that either driver had the technical right-of-way, you should also consider that such right-of-way is a relative right only, and if he was careless in failing to keep and continue to keep a reasonable and adequate lookout or failed to exercise reasonable and ordinary care under the circumstances to avoid a collision and that such negligence, if any, proximately contributed in any substantial degree to cause the collision, he would be negligent." (Emphasis added.)

The importance of the instruction is manifest since plaintiff was denied recovery on the basis of the jury's interpretation of what constituted a "proper lookout" under the law of the case (special verdict R. 52). By the instruction complained of the court specifically instructed the jury what reasonable care required, to wit: that "there is imposed upon a driver *the duty to be aware* of the relative positions and speeds of vehicles approaching and he must recurrently reobserve and reappraise in the light of the consistent changing conditions of a fluid traffic situation."

Plaintiff took due exception to the instruction contending in substance that the instruction nullified the "reasonable care" standard and would be tantamount to a directed verdict against plaintiff because it would be impossible for plaintiff to be aware of the changing

position of defendant's automobile as plaintiff approached the intersection (R. 255-256).

In order to discharge the duty imposed by Instruction No. 17 a motorist approaching a blind intersection is required as a matter of law to accomplish the impossible feat of seeing approaching vehicles which cannot be seen because of physical terrain or in the alternative to slow or stop his vehicle at the intersection where he can see other approaching vehicles and, if necessary, stop before entering the intersection even though he enters on a green light.

The instruction is erroneous because it imposes an *absolute duty* to be aware of other vehicles instead of a duty of *reasonable care* to observe and also because under the circumstances of this case the duty imposed was impossible to comply with unless possibly plaintiff had stopped at the intersection and looked up and down the cross street for approaching vehicles.

The duty to see another vehicle approaching an intersection is not absolute even where the terrain is such that one can be seen and there is no traffic control sign or signal at the intersection. This principal is established in *Martin* v. *Stevens,* 121 Utah 484, 243 P. 2d 747 (1952). The *Martin* case involved a collision at an open intersection. Plaintiff had the right of way. The trial court refused to permit plaintiff's case to go to the jury on the theory that plaintiff had a duty as a matter of law to see defendant's automobile approaching and that his failure to see the defendant's vehicle sooner than he did

was negligence as a matter of law. On appeal defendant's counsel contended that an open intersection collision will not occur unless both drivers are negligent and fail to see each other. The Supreme Court reversed, rejecting the contention that plaintiff had an absolute duty to see defendant's vehicle. In so holding the Court said:

> "No matter how far afield one may go in reviewing, analyzing and rationalizing the decisions in these intersection cases, he must always come back to the one basic concept which underlies and controls the Law of Torts: The conduct of the mythical but extremely useful 'ordinary reasonable prudent man under the circumstances,' all of which is encompassed in the shorter phrase 'due care.' "

> "That is the standard we apply to the plaintiff. Admittedly, the right of way is not absolute. One who has it, under one or both of the aforementioned rules may not, with foolhardy assurance, claim the right of way in the face of danger which one exercising due care would see and avoid. 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 act on 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 of 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 principle is not clear in the earlier Utah cases, it is firmly established by the more recent expressions of this court."

In *Hess* v. *Robinson,* 109 Utah 60, 163 P. 2d 510, plaintiff was traveling on an arterial highway. Defendant's ambulance approached from a cross street and ran a stop sign. There were no obstructions to vision of the intersection and the court instructed that both parties were negligent as a matter of law. The issue of proximate cause was submitted to the jury and a verdict for plaintiff was sustained on appeal. The Supreme Court was evenly divided as to whether or not plaintiff was guilty of negligence as a matter of law in not looking for traffic approaching the arterial highway. (The fifth judge concurred in the result.) Justice Wolfe's opinion analyzed the situation as follows:

> "In the first place, the trial court was distinctly in error in instructing the jury that the plaintiff was guilty of negligence as a matter of law . . . The [trial] court may have been misled by our case of Bullock v. Luke, 98 Utah 501, 98 P. 2d 350. But the facts of that case were far different from those in this case. In that case there was no stop sign — no designation of arterial highway . . .
>
> * * *
>
> "In this case the plaintiff was in law in no such position. Whether he could have ascertained from a view up 31st Street that the driver of the ambulance was not going to stop or at what point he could have so ascertained it, if he could have done so at all, until it was too late to stop, is strictly, under the facts of this case, for the jury. He was on an arterial. He could rely on the ambulance stopping before he reached the intersection until he was or should have been definitely aware that it was not going to do so. At that time he may have been well out in the intersection. Only

> at that point did his duty to stop or accelerate his speed — viz. attempt to avoid the accident, begin. Only then if he had not acted as a prudent man would have acted under the circumstances would he be guilty of contributory negligence. And even at that point if defendant thrust upon him the necessity of exercising a quick choice of action the jury should take that factor of emergency judgment into account in determining whether he was contributorily negligent.
>
> "Thus, the court was in error in instructing the jury that plaintiff was negligent as a matter of law."

Even where a motorist's view is such that he can see approaching vehicles the duty to be aware of such vehicles is not in many cases an absolute duty, as illustrated by the foregoing decisions. Certainly where there are obstructions to view or as in this case a total blocking of the view the duty of reasonable care caonnot be held to require as a matter of law that the motorist "be aware" of approaching vehicles.

Further, where the motorist has the right of way because he is proceeding with the green light, the right to assume non-negligence distinguishes the lookout duty from the ordinary open intersection case. See e.g. *Hess* v. *Robinson,* supra; *Youngblood* v. *Robison,* 239 La. 338, 118 So. 2d 1431, Annotation at 2 ALR 3rd 12.

Instruction No. 17 appears to be tailored from a portion of the language of the court's opinion in the case of *Hickok* v. *Skinner,* 113 Utah 1, 190 P. 2d 514. The "duty to be aware of the relative positions and speeds of ve-

hicles approaching'' and the duty to ''recurrently reobserve and reappraise'' must be considered in light of the facts involved in the *Hickok* case. Plaintiff in that case actually saw the defendant's automobile one-half block away but did not look again in the direction of defendant's automobile until the time of impact. The court in the *Hickok* case held that the plaintiff having testified that he saw defendant's automobile and was uninformed as to its speed and having failed to avail himself of an ample opportunity to look again in the direction of defendant's approaching automobile and reappraise its relative position was guilty of negligence. It is readily apparent that the duty to ''be aware of approaching automobiles'' and to ''reobserve and reappraise'' while appropriate under the facts of the *Hickok* case, have no application to the facts of the case at bar where the circumstances were such that the motorist could not see approaching vehicles until he was at the intersection. The instruction as applied to the facts of the case at bar is clearly an erroneous statement of the law.

The prejudicial effect of Instruction No. 17 is most obvious. It must be presumed that the jury followed the instruction in determining the issue of lookout. Under the circumstances of this case the instruction compelled the jury to find that the plaintiff did not keep a ''proper lookout'' because he was not aware of defendant's approaching automobile and did not see it until just a moment before the impact. Plaintiff was deprived of recovery solely on the basis of the jury's finding with respect to lookout. Notwithstanding the erroneous in-

struction two jurors dissented to the finding. In fairness and justice the judgment cannot be permitted to stand in the face of such patent error.

POINT II

THE JURY FINDING ON PROXIMATE CAUSE IS CONTRARY TO THE EVIDENCE AND CONTRARY TO THE LAW UNDER THE CIRCUMSTANCES OF THIS CASE AND THE COURT ERRED IN FAILING TO GRANT PLAINTIFF'S MOTION FOR A NEW TRIAL.

Plaintiff was denied recovery in this cause on the basis of the jury's finding that he was negligent in failing to observe a "proper lookout" and that such was a proximate cause of the collision. It is asserted under Point I of this Brief that the jury was erroneously instructed with respect to the plaintiff's duty to maintain a lookout. It is respectfully submitted, however, that in any event a failure to maintain a proper lookout on the part of plaintiff could not have been a proximate cause of the collision.

It is significant that the jury did not find plaintiff negligent in any particular except as to lookout. Since question number one of the special verdict required the jury to determine specifically "what negligent acts proximately caused the collision" the absence of a finding of negligence except on the issue of lookout necessarily determines that plaintiff was not negligent in driving at an excessive rate of speed, failing to slow down as he ap-

proached the intersection, failing to keep his car under proper control, entering against the semaphore, failure to yield the right of way, or in any other particular. On the other hand, the jury expressly found that the defendant was in the intersection when the light was red and that this constituted negligence which was a proximate cause of the accident. In other words, it must be assumed from the special findings of the jury that plaintiff entered on the green semaphore at a reasonable rate of speed and with his vehicle under proper control, but that he did not maintain the lookout which the court required under its instructions to the jury. A lack of diligence in maintaining a lookout could not possibly have been the cause of the accident for reasons presently to be demonstrated.

Failure to keep a proper lookout is not the proximate cause of an accident unless the driver by maintaining a proper lookout could have avoided the accident. A case illustrating this principle of law is *Morris* v. *Christensen*, 11 Utah 2d 140, 356 P. 2d 34. In the *Morris* case the plaintiff was proceedings through an intersection on a green light and failed to see the defendant's automobile approaching on the cross street until just before the impact. On appeal the Supreme Court held that the trial judge had reasonably and properly concluded that plaintiff's observation of approaching traffic would not have forewarned him of the impending hazard and that a failure to keep a proper lookout under such circumstances was not a proximate cause of the collision. In so holding the court enunciated the rule of proximate cause

which applies to the facts of the case at bar:

> "It is the duty of a driver to observe and to see what there is to see so as to be able to exercise ordinary precaution to prevent collisions such as this. This duty extends to the favored driver with the right of way as well as to the disfavored driver. But he who has the right of way need not anticipate sudden outbursts of negligence on the part of another driver. *Indeed, it may be said that the failure to observe is negligence proximately contributing to the harm only where by observing the driver could have avoided or lessened the resulting harm.*" (Emphasis added.)

In the case at bar plaintiff had no opportunity to avoid the collision after he could have first seen the defendant's automobile proceeding into the intersection. Each driver acknowledged that the other motorist's vehicle could not be seen until the drivers were almost into the intersection. The photographs received in evidence corroborate the testimony in this particular. The collision occurred when plaintiff's vehicle was only 11 feet and defendant's vehicle was only 29 feet into the intersection. (Pedestrian lanes were 10 feet back from the curb and point of impact was 21 feet 3 inches and 39 feet 4 inches from pedestrian lanes. See R. 77-80 and Exhibit 1. At 25 miles per hour plaintiff was traveling 36 feet per second, and the defendant at 30 miles per hour was traveling 44 feet per second. The ordinary stopping distance for an automobile traveling at the rate of 25 miles per hour with allowance for reaction time is 59 feet. When plaintiff was 59 feet from the point of impact (which was 48 feet from the west edge of the intersec-

tion), the defendant's automobile had to be at least 72 feet from the point of impact which was 43 feet from the north edge of the intersection. [This is computed by determining the time interval required for plaintiff to travel 59 feet at 36 feet per second and determining how far defendant would travel in that interval at 44 feet per second.]

Even if plaintiff's reaction had been perfect and had he been looking to the left (instead of to the right or at the semaphore or straight ahead of him, which are all places where a driver must be looking as he approaches an intersection) at the very instant defendant's car first became visible it would still have been totally impossible for the plaintiff to have stopped his automobile short of the point of impact. This does not take into account that plaintiff having the light in his favor had the right to assume that defendant would yield the right of way until in the exercise of due care plaintiff should have known to the contrary.

Thus plaintiff, after first seeing the defendant's automobile, would have to determine that defendant in view of his speed and approach was not going to yield the right of way, whereupon plaintiff would first become obligated to take evasive action. After first recognizing danger and before plaintiff could take any evasive action whatever the ordinary interval for reaction time (¾ second) would allow his car to move 27 feet. This is obviously why neither driver had a chance to apply his brakes or turn his vehicle before the collision and why each saw

the other only a split second before the collision. The mathematics are such that neither could have seen the other even a full second before the collision.

It is thus submitted that at the time of plaintiff's first opportunity to observe the other vehicle there was nothing plaintiff could do to avoid the accident and that a failure to keep a proper lookout could not have possibly been the proximate cause of the accident. *Morris* v. *Christensen,* supra.

POINT III.

THE VERDICT IS FATALLY INCONSISTENT AND CONTRADICTORY.

By its verdict the jury has found that plaintiff was guilty of negligence in failing to keep a proper lookout, but that defendant was not guilty of negligence in this particular. Since the rights and duties with respect to lookout are reciprocal (except to the extent that plaintiff as the favored driver had the right to assume that other traffic would yield to his vehicles) it cannot be said with reason that defendant maintained a proper lookout but that plaintiff did not.

The testimony of each driver was that he did not see the other automobile until just a moment before the impact, and each testified that traffic on the cross street could not be seen until the motorist was almost into the intersection. [Actually neither driver's neglect in maintaining a lookout could possibly have been a proximate

cause of the accident.] It may be argued with reason that the jury's tacit finding that defendant was not guilty of proximal negligence in failing to maintain a proper lookout is necessarily a finding that plaintiff could not have been guilty of negligence in this particular. The jury's finding that one driver was negligent with respect to lookout and that another was not under identical circumstances demonstrates a total lack of comprehension on the part of the jury with respect to the duty to maintain a lookout and nullifies the validity of the finding on the issue of lookout.

CONCLUSION

It is respectfully submitted for the reasons heretofore stated that the court incorrectly instructed the jury on the issue of lookout; that the court's instruction was so framed that it constituted, if followed by the jury, a directed verdict against plaintiff; that under the evidence plaintiff's failure to maintain a lookout could not have been a proximate cause of the collision, and that the jury's finding on the issue of lookout is nullified by a patent error in the application of reciprocal duties between the drivers involved. Plaintiff respectfully submits that the jury having found negligence on the part of defendant which was a proximate cause of the collision, and it having been demonstrated under the evidence and as a matter of law that the failure of the plaintiff to maintain a proper lookout could not have been a proximate cause of the accident, that plaintiff is entitled to

judgment on the issue of liability and the cause should be remanded for trial on the issues of damages only. In the event the court fails to reverse and remand for trial on the damages issue alone, then the cause should be remanded for new trial on all issues of the case.

Respectfully submitted,

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