

1966

Karl L. Badger v. Paul Taylor Clayson : Brief of Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

KARL L. BADGER,

Plaintiff and Appellant,

— vs. —

PAUL TAYLOR CLAYSON,

Defendant and Respondent

} Case
No. 10517

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

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

DISPOSITION IN LOWER COURT

At the trial the jury found plaintiff negligent in failing to maintain a proper lookout and returned a verdict in favor of defendant and against plaintiff of "No cause of action." Judgment in accordance with the jury verdict was entered by the Court. Thereafter, plaintiff moved the trial court for a new trial, which motion was denied.

RELIEF SOUGHT

Respondent seeks to have the action of the lower court affirmed in entering judgment of no cause of action upon the jury verdict and in denying plaintiff's Motion for a New Trial.

STATEMENT OF FACTS

On the 30th day of December, 1963, at approximately 8:00 o'clock A.M., plaintiff, Karl L. Badger, was driving an automobile east on 4500 South Street and defendant, Paul Taylor Clayson, was driving an automobile south on 1300 East Street in Salt Lake County.

Forty-five hundred South Street runs east and west and 1300 East Street runs north and south. The intersection of the two streets is controlled by a traffic semaphore. (R77, T8.) Thirteenth East has a paved surface width of 35 feet while 4500 South has a paved surface width of 32 feet. Both streets have shoulders 10 feet wide. (R76, (T8, R93, T25.)

West of the intersection 4500 South is level while north of the intersection 1300 East drops off quite rapidly (R77, T9). On the northwest or common corner of the intersection there were two power poles and a house and some low, defoliated bushes (R98, T30).

At the trial defendant testified that he was going south on 1300 East at about 30 m.p.h. (R242, T174).

Just as he entered the intersection the traffic semaphore changed from green to yellow for him (R243,

T175). He also stated that he was "right on" plaintiff's car when he first saw it (R240, T172).

Plaintiff testified that he was traveling east on 4500 South Street and that as he approached the intersection he cannot recall seeing any cars at the intersection, even though there was nothing to obstruct his view other than what the photographs show (R214, 225, T146, 147). He further stated that he did not see defendant's vehicle until almost the point of impact (R218, T150), but he could have seen it as he entered the intersection had he been looking (R214, 225, T146, 147). Plaintiff has no explanation as to why he did not see defendant's car until he did (R219, T151).

Both parties testified that they did not apply their brakes prior to the collision, and their testimony was borne out by the investigating officer who stated that there were no skid marks from either vehicle prior to the point of impact. The accident took place in the southwest quadrant of the intersection, the point of impact being 23 feet 4 inches from the north edge of the intersection and 11 feet 3 inches from the west edge of the intersection and involved the right rear side of defendant's car and the front of plaintiff's car (R89, T21).

Upon the conclusion of the evidence the Court submitted the question of defendant's negligence and plaintiffs contributory negligence to the jury upon a special verdict (R52). The jury was asked to find on "Question No. 1: What negligent acts proximately caused the collision?" In response to this question the jury was

asked to indicate what, if any, negligent acts were committed by either party. The jury made answer as follows:

“(A) Answer as to Mr. Clayton’s negligence, if any: We feel that the preponderance of evidence shows that Mr. Clayson was in the intersection when the light was red.

(B) Answer as to Mr. Badger’s negligence, if any: We feel Mr. Badger was negligent in failing to observe proper lookout on an accepted hazardous corner.” (R52).

Judgment of “No Cause of Action” upon the jury verdict was entered by the Court on November 12, 1965 (R53). Thereafter, plaintiff made a motion for a new trial on the grounds that (1) The verdict of the jury is contrary to the evidence and contrary to law, and (2) Error in law in the Court’s instructions to the jury (R54). The motion was argued on November 24, 1965 and on December 1, 1965, the trial court entered its order denying plaintiff’s motion (R56). This appeal was then initiated by plaintiff.

In page 7 of its Brief, plaintiff asserts categorically that the jury unanimously found defendant had “run the red light.” Defendant respectfully calls this Court’s attention to the fact that that was not the jury’s finding in respect to the negligence of Mr. Clayson. What the jury did find was only that defendant “was in the intersection when the light was red” which is a far different thing than running a red light. Implicit in this finding is the fact that plaintiff “jumped the gun” and entered the intersection before the light turned green for him. The jury also found more than that plaintiff was guilty of

failing to maintain a proper lookout, but found him negligent in failing to maintain a proper lookout at an accepted and known hazardous and dangerous intersection.

ARGUMENT

POINT I

THE JUDGMENT AND PROCEEDINGS IN THE LOWER COURT ARE PRESUMED BY THE REVIEWING COURT ON APPEAL TO BE CORRECT.

The cases are legion supporting the general proposition of law stated in Point I, and especially as it applies to the instant case. No cases have been found by respondent stating a contrary position.

Not only is there a presumption of validity on appeal of the judgment and proceedings in the lower court, but the burden is on the appellant affirmatively to demonstrate error, and in the absence of such the judgment must be affirmed by the reviewing court. *Leithead v. Adair*, 10 U. 2d 282, 351 P. 2d 956; *Coombs v. Perry*, 2 U. 2d 381, 275 P. 2d 680. Again, on appeal the judgment of the trial court is presumptively correct and every reasonable intendment must be indulged in by the appellate court in favor of it. *Burton v. Zions Co-operative Mercantile Institution*, 122 U. 360, 249 P. 2d 514; *Nagle v. Club Fontainebleu*, 17 U. 2d 125, 405 P. 2d 346; *Petty v. Gindy Manufacturing Corporation*, 17 U. 2d 32, 404 P. 2d 30.

This proposition of law is correct and is binding upon the appellate court whether the proceedings in the

lower court are before a judge only or a judge and jury. And the rule seems to have even more weight in the latter instance. When the trial court has given its approval to the determination by the jury by refusing to grant a new trial to the losing party, the appellate court will look upon the judgment of the trial court with some degree of verity with a presumption in favor of its validity, and again the burden is upon the appellant to show some persuasive reason for upsetting it. *Gordon v. Provo City*, 15 U. 2d 287, 391 P. 2d 430. In the same vein, it has been held that where a jury trial has been had and a motion for a new trial denied to the losing party, the presumptions are in favor of the judgment entered and the Supreme Court will not disturb that judgment unless the appellant meets the burden of showing error and prejudice which deprived it of a fair trial. *Lemmon v. Denver & Rio Grande Western Railroad Company*, 9 U. 2d 195, 341 P. 2d 215.

Other cases supporting this proposition are *Charlton v. Hackett*, 11 U. 2d 389, 360 P. 2d 176; *Universal Investment Company v. Carpets, Inc.*, 16 U. 2d 336, 400 P. 2d 564; *Taylor v. Johnson*, 15 U. 2d 342, 398 P. 2d 382; *Wendelboe v. Jacobson*, 10 U. 2d 344, 353 P. 2d 178; *Hadley v. Wood*, 9 U. 2d 366, 345 P. 2d 197; *Daisy Distributors, Inc., v. Local Union 976, Joint Council 67, Western Conference of Teamsters*, 8 U. 2d 124, 329 P. 2d 414.

POINT II

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN GIVING INSTRUCTION NO. 17.

In preparing the jury for its deliberations in this case the trial court gave 20 instructions which advised the jurors of their duties and responsibilities and the law (R33-51). Plaintiff's argument claiming prejudicial error in the giving of Instruction 17 is, in the opinion of defendant, much ado about nothing.

Instruction No. 5 (R36) advised the jury that "Where there is a conflict in the evidence, you should reconcile such conflict as far as you reasonably can; but where the conflict cannot be reconciled, you are the final judges, and must determine what the facts are . . ." Defendant asserts that any conflict in the evidence and testimony as to the color of the light at the time of the collision, the ability of either driver to see the other as he entered the intersection, whether either driver was watching for traffic as he entered the intersection, whether he should have been watching, and if he was, whether his lookout was reasonable and proper, were questions to be resolved by the jury. These questions were solved and on the resolution thereof plaintiff was found wanting in the reasonableness of his lookout for other vehicles that were on or might have been on the roadway.

In Instruction No. 9 (R38) the jury was told:

If in these instructions any rule, direction, or idea be stated in varying ways, no emphasis thereon is intended by me, and none should be inferred

by you. *For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and are to regard each in the light of all others.* (Emphasis added.)

The order in which the instructions are given has no significance as to their relative importance.

Instruction No. 11 (R-39-40) notes, among others, the following definitions for the jury:

The order in which the instructions are given has no significance as to their relative importance.

The term “negligently” means as a result of negligence, and the term “negligence” means the failure to do what a reasonably prudent person would have done under the circumstances of the situation or the doing of what such a reasonably prudent person under such existing circumstances would have done. The essence of the fault may be in acting or in omitting to act. The duty is dictated and measured by the exigencies of the occasion (R39).

“Reasonable care,” “due care,” and “ordinary care” mean that degree of care which the reasonable, prudent person would use and exercise in regard to his own safety under like or similar circumstances. (R40)

The pertinent provisions of Instruction No. 12 are as follows:

It is the duty of the driver of an automobile to use reasonable care under the circumstances in driving his car to avoid danger to himself and others and to observe and be aware of the condi-

tion of the highway, the traffic thereon, and other existing conditions; in that regard, he was obliged to observe due care in respect to:

To use reasonable care to keep a lookout for other vehicles, or other conditions reasonably to be anticipated . . .

Instruction No. 17 as given by the Court is as follows:

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.

Appellant's brief on this point does not fairly consider this instruction either as to its full and true meaning or in context with the other instructions. When the instruction is read and considered in the light of the other instructions given by the Court there is not even the remotest indication thereon that an absolute duty to be aware of other vehicles on the roadway is imposed. The instruction did impose upon both parties the duty to be as alert and aware of other vehicles on the roadway as a reasonable, prudent person would have been under the same or similar circumstances. This seems to be a reasonable requirement in view of plaintiff's own testimony to the effect that he did not see defendant's vehicle until almost the point of impact (R218, T150) but that he could have seen it as he entered the intersection had he been looking (R214, 225, T146, 147) and that he could not explain why he did not see defendant's car until he did (R219, T151). Defendant submits that there was nothing prejudicial or erroneous about Instruction 17 under these circumstances.

The general rule of law is overwhelmingly that in actions arising out of intersection accidents or collisions between vehicles, the question of the contributory negligence, especially as it relates to lookout, of either or both of the drivers involved in the accident is a jury question. See *Blashfield, Cyclopedia of Automobile Law and Practice, Permanent Edition*, Vol. 10 B, Sec. 6619, and the multitude of cases cited therein.

This rule applies whether the other vehicle is approaching from the right or from the left or whether the

vehicles are approaching each other from opposite directions or at right angles. In *Gold v. Portland Lumber Corporation*, 137 Me. 143, 16 A2d 111, a jury question of contributory negligence was presented where the driver of plaintiff's truck, upon reaching an obstructed highway intersection observed no approaching traffic and proceeded into the intersection when he observed defendant's truck which was approaching from the right at about 30 miles per hour.

Covington v. Carpenter, 4 U. 2d 378, 294 P. 2d 788, was a motorcyclist's action for personal injuries suffered in a collision with an automobile. The trial court directed a verdict in favor of defendant. Plaintiff appealed. In disposing of the case the Utah Supreme Court stated:

"Modern traffic complexities make it impossible to lay down by judicial rule what will always be, or fail to be, reasonable care in the operation of motor vehicles. . . .

As to what constitutes a proper lookout is usually, therefore, a latter-day classic question for jury determination, and each trial and appellate court must determine the question as a matter of law only when convinced that reasonable persons could not disagree upon the question when conscientiously applying fact to law."

In support of this rule are *Poulsen v. Manness*, Utah, 241 P. 2d 152; *Hess v. Robinson*, 109 U. 60, 163 P. 2d 510.

Before the issue of contributory negligence as it relates to lookout may be taken from the jury the party seeking to have this done must show that reasonable minds could not differ on the question. *Martin v. Stevens*,

Utah, 243 P. 2d 747, 749. See also *Rowe v. Dickerson*, 226 Ark. 780, 295 S.W. 2d 305; *Hickenbottom v. Jeppesen*, 144 Cal. App. 2d 115; *Matthews v. Nelson*, 57 N.J. Super 515, 155 A. 2d 111; *Topelski v. Universal South Side Autos, Inc.*, 407 Pa. 339, 180 A. 2d 414; *Rigot v. Conda*, 134 Colo. 375, 304 P. 2d 629.

Jablenske v. Eckstrom, 247 Minn. 140, 76 N.W. 2d 654, was an action arising out of an intersectional collision between plaintiff's southbound truck and defendant's westbound bus, wherein there was evidence that plaintiff reduced his speed and maintained a lookout to the east but was prevented from seeing the bus by the bright sun shining from the east; plaintiff's contributory negligence was for the jury.

Also supporting this position are *Schmittzche v. City of Cape Girardeau*, Mo., 327 S.W. 2d 918; *Stathopoulos v. Shook*, 251 N.C. 33, 110 S.E. 2d 452; *Moffat v. Helmer*, 345 Mich. 153, 75 N.W. 2d 887.

The duty of all drivers to maintain a reasonable and proper lookout for other vehicular traffic, pedestrian traffic and other hazards known or reasonably to be anticipated is so well established that defendant does not feel it necessary to cite any authority in support of that rule. In fact, the duty to keep a proper lookout applies as well to the favored driver on an arterial highway as to a disfavored on an intersecting street, and neither driver can excuse his own failure to observe because the other failed in his duty. *Conklin v. Walsh*, 113 U. 276, 193 P. 2d 437; *Johnson v. Syme, Adx.*, 6 U. 2d 319, 313 P. 2d 468.

In concluding the discussion under this point it should be noted that Instruction 17 as given by the Court (1) was to be considered by the jury in light of all the other instructions, (2) was given to the jury to apply to the conduct of both of the parties and not just plaintiff as he seems to indicate in his brief, (3) did not impose an absolute duty of lookout upon the plaintiff or the defendant, (4) imposed a duty to maintain a reasonable and proper lookout on both plaintiff and defendant, (5) taken in consideration with all the instructions, made the question of the defendant's negligence and plaintiff's contributory negligence questions for the jury's determination.

Defendant respectfully asserts that the trial court's conduct in this regard was proper and was not in any way erroneous or prejudicial, and in fact, a failure to so instruct would have been error.

POINT III

THE JURY FINDING ON PROXIMATE CAUSE IS NOT CONTRARY TO THE EVIDENCE AND NOT CONTRARY TO THE LAW UNDER THE CIRCUMSTANCES OF THIS CASE, AND THE COURT DID NOT ERR IN FAILING TO GRANT PLAINTIFF'S MOTION FOR A NEW TRIAL.

For the sake of brevity, defendant incorporates by reference into this Point the applicable facts, law, and argument from Point II of this brief.

As has been indicated, the jury found Mr. Badger guilty of negligence in failing to keep and maintain a

proper lookout while approaching and entering a known hazardous intersection. This finding was not precipitously made by the jury, but only after two days of trial wherein it heard testimony from the parties, the investigating police officer, all known witnesses to the accident, saw photographs of the intersection, heard instructions from the Court on the applicable law and six hours of deliberation.

Eight photographs of the intersection and the approaches to it were offered and admitted into evidence. Of these the plaintiff offered seven, Plaintiff's Exhibit P3 - P8, P10, and defendant one, Defendant's Exhibit D9. Plaintiff's Exhibit No. 6 is taken on 4500 South looking east, approaching the intersection, and shows what plaintiff could have seen as he approached it in his automobile. Plaintiff's Exhibit No. 5 is taken on 13th East looking south and shows the corner of the intersection common to both drivers. Plaintiff's Exhibit No. 10 is a panoramic view of the intersection.

Plaintiff contends that the jury could not have found that plaintiff was not maintaining a proper lookout or that if he were that it was a proximate cause of the accident. Defendant disagrees and asserts that after a consideration of all the evidence reasonable minds most certainly could differ on a finding of plaintiff's negligence. Defendant's contention in this regard is amply demonstrated by the answers of the jurors upon being polled by the Court. Each juror was asked individually whether or not he concurred in the finding that Mr. Badger was negligent in failing to maintain a proper lookout. The

jurors, presumably reasonable men with reasonable minds, disagreed, for six of them indicated that as their finding, while two of them declared it was not theirs.

The fact that reasonable minds could differ on this question and, in fact, did differ supports defendant's and the trial judge's position that the question of plaintiff's negligence and whether or not it was a proximate cause of the accident was a jury question.

Plaintiff also attempts to take advantage of the proposition of law which states that one exercising due care for his own safety and the safety of others need not anticipate negligent conduct on the part of others. However, since plaintiff was not in the exercise of due care at the time of the accident, since he was not maintaining a proper lookout, he cannot take advantage of that rule.

There is no evidence that had plaintiff been watching he still could not have avoided the accident, or that had he applied his brakes at the first instance when he could have seen defendant he could not have avoided the accident. In fact, had plaintiff decreased his speed only enough to allow defendant to travel six feet further defendant would have cleared plaintiff's path and there would not have been a collision.

Defendant feels that implicit in the requirement of a proper lookout is the requirement of altering one's conduct in relation to speed, control, right of way, etc., to conform to the demands of reasonable conduct as that is gauged by the situation revealed by the proper lookout.

Hence under all the facts and circumstances of this case taken as a composite, the jury found plaintiff guilty of negligence which proximately contributed to the accident and its resulting injury and damage. It cannot be seriously questioned that the submission of the question of Mr. Badger's negligence to the jury and its answer to that question were both correct.

In this case it is obvious that plaintiff either looked and failed to see the obvious or failed to look at all, and in either case he would be negligent, or at least reasonable minds could so find. For cases discussing the question of lookout and the facts surrounding accidents as they relate to the lookout see *Johnson v. Syme, Adx*, 6 U. 2d 319, 313 P. 2d 468, *Sant v. Miller*, 115 U. 559, 206 P. 2d 719; *Cederloff v. Whited*, 110 U. 45, 169 P. 2d 777; *Mingus v. Olsson*, 114 U. 505, 201 P. 2d 495; *Cox v. Thompson*, Utah, 254 P. 2d 1047; *Wilkinson v. Oregon Short L. R. Co.*, 35 U. 110, 99 P. 466; *Covington v. Carpenter*, 4 U. 2d 378, 294 P. 2d 788.

It is thus submitted that upon the bases of all the facts in this matter that the jury finding in relation to plaintiff's negligence and of its being a proximate cause of the accident was not contrary to law and, further, that the trial court did not err in refusing to grant plaintiff's motion for a new trial.

POINT IV

THE VERDICT IS NOT FATALLY INCONSISTENT AND CONTRADICTORY.

For the sake of brevity, defendant incorporates by reference the applicable law and facts from Point II and Point III into this Point.

Not by any stretch of the facts, the law or the imagination can the jury's verdict be called inconsistent or contradictory — let alone fatally so. By means of the interrogatories of the Special Verdict (R52) the jury was asked to state what, if any, negligent acts of either or both parties *proximately* (emphasis added) caused the collision; it was not asked to list all negligent acts of either party whether proximate or not. The finding of the jury certainly does not intimate that the duty of lookout was not the same for both drivers, it merely means that having the same duty, one driver failed in his duty and that failure proximately contributed to the collision. The other driver may or may not have failed in his duty; however, if he did fail, the jury apparently did not think it was a proximate cause of the accident, and the finding made by the jury of negligence on the part of defendant was sufficient and made any additional findings of negligence unnecessary and superfluous.

Having heard the testimony of all witnesses, seen the exhibits introduced in evidence, heard the trial court's instructions and argument of counsel, the jurors were well aware of the facts of the accident and the theory of negligence and non-negligence of the parties.

They were certainly aware of the fact that a finding of one act of negligence by either party would be a sufficient basis for awarding a verdict against defendant or denying one to plaintiff. And it may well be that the jury was concerned about ascertaining a primary negligent proximate cause of the accident, if any, of either or both of the parties rather than making a schedule of negligent acts that proximately contributed to the collision. Having determined the primary proximate causes of the accident, viz., being in the intersection when the light was red on the part of defendant and failing to maintain a proper lookout by plaintiff, the jury listed those causes as the primary proximate causes of the accident and dispensed with further findings of negligence by either party as being superfluous.

CONCLUSION

It is abundantly clear that the question of the negligence of both parties was for the jury's determination, since reasonable minds could differ as to whether neither driver was negligent and, if so, whether that negligence proximately caused or contributed to the collision. Having properly submitted these questions to the jury, the trial court refused to grant plaintiff's motion for a new trial after the jury found plaintiff guilty of a negligent act that proximately caused the collision. The evidence from the record justifies the action taken by the Court and the jury.

Based on the foregoing facts, authorities and argument, defendant urges this Court to affirm the judgment of the trial court upon the jury verdict and its order denying plaintiff a new trial.

Respectfully submitted,

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