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Walter Larson, Aleida P. Larson and Jon Larson v. Robert George Evans, M.D. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

WALTER LARSON, ALEIDA P.
LARSON and JON LARSON,

Plaintiffs and Appellants,

vs.

ROBERT GEORGE EVANS,
M.D.,

Defendant and Respondent.

FILED

FEB 24 1961

Clerk, Supreme Court, Utah

Case No. 9365

BRIEF OF RESPONDENT

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WALTER LARSON, ALEIDA P.
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vs.

ROBERT GEORGE EVANS,
M.D.,

Defendant and Respondent.

} Case No. 9365

BRIEF OF RESPONDENT

STATEMENT OF FACTS

The respondent does not accept or agree with the statement of facts in Appellants' brief. Plaintiff's statement of facts is incomplete and contains only one paragraph relating to the testimony of Jon Larson. The testimony of plaintiffs' witness was inconsistent and contradictory and appellants' have excluded most of the inconsistent and contradictory evidence which showed contributory negligence on the part of Jon Larson from plaintiffs' brief.

The following statement is submitted to supplement and clarify plaintiffs' statement of facts.

SPECIAL INTERROGATORY

Special interrogatories were submitted to the jury by the court (R. 440) and the jury answered interrogatory No. 1 "yes" (R. 440) saying that the negligence of Robert George Evans caused or contributed to the cause of the accident and the injuries of which plaintiffs complain (R. 440).

CONFLICTING EVIDENCE SHOWING CONTRIBUTORY NEGLIGENCE

On cross examination Jon Larson testified the accident occurred on a dry, clear night and at a time when there was no other traffic entering the intersection from the North or West (R. 405). The plaintiff driver testified the only lights in the area were on the Southwest corner of the intersection 60 to 70 feet away (R. 405, 406). Jon Larson testified he used the intersection regularly, at least three times a day, and that because a friend of his was injured in the intersection he knew his exact speed and had slowed down to 25 miles per hour at the time he entered the intersection (R. 409). The plaintiff driver testified he did not see the defendant's car until he was in the intersection (R. 409, 410)and that he was going 25 miles per hour at the time he first saw the defendant's car (R. 409).

Jon Larson testified the defendant's car was going at least twice as fast as he was going (R.

409). Plaintiff's Exhibit P-4 showed plaintiff's car travelled 52 feet after the impact and that defendant's car travelled only 50 feet after the impact. Exhibit P-4 also shows place of impact as in the Northeast quadrant of the intersection. Officer Gunn testified defendant's vehicle left no skid marks (R. 130). Officer Gunn, plaintiff's witness, testified Larson car left 40 feet of skid marks prior to impact (R. 199).

At time Jon Larson's deposition was taken he testified he never saw the defendant's auto until the front end of his car was at the middle of Evergreen (R. 410). Also Jon Larson admitted he had no recollection of using his brakes until he heard Officer Gunn testify (R. 199). When Jon Larson's deposition was taken he told us he did not apply his brakes (R. 199).

Inconsistently, Jon Larson testified as set forth in page 4 of Appellants' brief that he saw the headlights of defendant's car for two seconds (R. 173) and from that observation formed an opinion as to its speed (R. 173).

Then on cross examination Jon Larson testified he did not see the defendant's car until it was into the intersection (R. 409, R. 198).

Further, Jon Larson testified, inconsistently, saying as he entered the intersection he had no

thought of anyone approaching from the East (R. 171) and then turned around and said for two seconds (R. 173) he observed defendant's car to form an opinion as to it's speed (R. 173).

Jon Larson's testimony after the accident showed he was not confused and that immediately he ran over to the drug store and called an ambulance (R. 173, 174). Also, he claimed to have no difficulty in recollecting what Dr. Evans said at the scene of the accident (R. 174, 175).

Jon Larson's testimony about his income was interesting. At time of trial he testified he had a monthly salary of \$500.00 (R. 194). Another time he admitted under oath (R. 202, 203) that in his deposition he told me he was making \$1,000.00 per month. This latter statement was an exaggeration, said Jon Larson (R. 203, 204).

At the trial plaintiffs requested no instruction on the speed limit in the area on 23rd East (R. 21-37), and offered no evidence on the posted speed limit. Further, plaintiffs did not object to the court giving Instruction No. 4 (R. 69).

OFFICER GUNN

Plaintiffs called Officer Gunn as an expert witness on speed of plaintiff's vehicle (R. 419). Officer Gunn testified that based only on the 40 foot skid mark it was his opinion Jon Larson was going 30 miles per hour (R. 419). Officer Gunn also on

cross examination told us that in estimating the speed of Jon Larson's vehicle he did not take into consideration in making his estimate of speed on the plaintiff's car the amount of physical damage to each vehicle (R. 425), any braking prior to the skid marks (R. 425) and admitted that where the cars came to rest, the amount of damage and shadow marks of tires should have been considered in making an estimate of speed based on physical evidence (R. 425). Officer Gunn also said the damage to each car was considerable (R. 424) and said all of the skid marks he considered were left by the Larson vehicle prior to the time of impact.

Exhibit P-4 and the testimony of Office Gunn (R. 131) shows the path of each vehicle prior to and after the impact. Likewise, on voir dire examination Officer Gunn testified that there was no hedge (R. 121) and that his measurement began from the corner of the house (R. 121) and not from the hedge as plaintiffs' counsel says on page 4 of Appellants' brief.

Officer Gunn also testified (R. 126) that at the time defendant noticed the plaintiff's auto first it was approximately 50 feet away when the defendant entered the intersection (R. 125). Defendant also admitted that as he entered the intersection he was going at a speed of 30 miles per hour (R. 126).

Exhibit P-4 shows the Larson car travelled a distance about twice as far as the Evans car in the same amount of time and at a time when the defendant admitted he was going as much as 30 miles per hour (R. 126).

STATEMENT OF POINTS

POINT I

THE EVIDENCE WAS CONFLICTING AND THERE WAS SUBSTANTIAL EVIDENCE OF CONTRIBUTORY NEGLIGENCE ON THE PART OF JON LARSON AND THAT JON LARSON'S CONTRIBUTORY NEGLIGENCE PROXIMATELY CONTRIBUTED TO THE ACCIDENT AND PLAINTIFFS' INJURIES.

POINT II

THE CREDIBILITY OF WITNESSES IS FOR THE JURY TO DECIDE.

POINT III

THE LOWER COURT DID NOT ERR IN REFUSING TO DIRECT A VERDICT IN FAVOR OF THE PLAINTIFF AND IN DENYING PLAINTIFFS' MOTION FOR NEW TRIAL.

POINT IV

THE COURT DID NOT ERR PREJUDICIALLY IN GIVING INSTRUCTION NO. 3.

POINT V

THE COURT DID NOT ERR PREJUDICIALLY IN SUBMITTING INSTRUCTION NO. 8.

ARGUMENT

POINT I

THE EVIDENCE WAS CONFLICTING AND THERE WAS SUBSTANTIAL EVIDENCE OF CONTRIBUTORY NEGLIGENCE ON THE PART OF JON LARSON AND THAT JON LARSON'S CONTRIBUTORY NEGLIGENCE PROXIMATELY CONTRIBUTED TO THE ACCIDENT AND PLAINTIFFS' INJURIES.

Where judgment is rendered on conflicting evidence, the evidence will be reviewed on appeal in the light most favorable to the person for whom judgment was rendered in the court below. *Weenig Bros. Inc. vs. Manning*, 1 Utah 2nd 101, 262 P 2nd 491; *North vs. Cartwright*, 119 Utah 516, 229 P. 2nd 871; *Staton vs. Western Macaroni Manufacturing Company*, 52 Utah 426, 174 P. 821. Likewise in *Martin vs. Sheffield*, 112 U. 478, 189 P. 2nd 127, where there was conflicting testimony with regard to an intersection collision, this court said where reasonable minds might differ as to which version of events should be believed and as to whether plaintiffs conduct contributed to the accident the case should be submitted to the jury.

Where a witness modifies or varies his testimony in cross examination a particular part of his testimony on direct examination which was favorable may not be singled out to the exclusion of other parts of equal importance bearing on the subject. *Alvarado vs. Tucker*, 2 Utah 2nd 16, 268 P. 2nd 986.

There were many conflicts in the plaintiff's

testimony. On cross examination (R. 409, 198) Jon Larson testified he did not see the defendant's car until it was in the intersection. On direct examination when he wanted to talk about the speed of the defendant's car he said he observed the defendant's car for two seconds (R. 173). Jon Larson testified as he entered the intersection (R. 171) he had no thought of anyone approaching from the east. The point of impact was less than one car length from the east curblane of 23rd East (See Exhibit P-4). Yet, Jon Larson claimed to have observed the defendant's car for two seconds prior to the impact to judge its speed (R. 173).

When Jon Larson's deposition was taken he told me he did not apply his brakes (R. 199). After Jon Larson heard Officer Gunn testify he said he believed he used his brakes (R. 199). At the time Jon Larson's deposition was taken he testified he never saw the defendant's auto until the front of his car was at the middle of Evergreen (R. 410). But on direct examination he testified (R. 199) he was applying the brakes of his car as he entered the intersection.

On direct examination (R. 171) Jon Larson testified his speed was 20 miles per hour as he passed the market on the Southwest corner of the intersection. Later he testified as he entered the intersection his speed was 25 miles per hour (R. 171,

409). Thereafter plaintiffs called Officer Gunn as an expert witness (R. 419) and Officer Gunn testified that based on the 40 foot skid mark only it was his opinion Jon Larson was going 30 miles per hour. On cross examination Officer Gunn hastened to add that in estimating the speed of Jon Larson he did not consider in making his estimate the distance Jon Larson's car might have travelled before it left visible skid marks, the force of the impact and the considerable damage to each vehicle, and the distance each vehicle travelled after the impact (R. 425).

Plaintiffs own witness testified that the speed of plaintiff's car was greater than 30 miles per hour. Enough greater to do considerable damage to each vehicle and to carry it 52 feet beyond the point of impact. This was another conflict in plaintiffs' case and there was substantial evidence to show plaintiff's speed was considerably in excess of 30 miles per hour.

Plaintiff's examination of the defendant (R. 123) as well as the testimony of plaintiff's witness Clifford Coon (R. 134) shows this accident occurred in a residential area. Mr. Coon testified he lived in a house on the corner (R. 134).

Section 41-6-46 (2) (b) provides the speed limit in a residential area is 25 miles per hour and this is so whether it be day or night.

Jon Larson testified he was familiar with this intersection and knew it to be a dangerous intersection (R. 409). He claimed to be particularly alert as he entered the intersection (R. 409).

Under such circumstances it is established law that what is a reasonable and prudent speed under the conditions and having regard for actual and potential hazards then existing is a matter about which there is room for considerable disagreement and such being the case a jury question is presented. *Lodder vs. Western Pacific R. Company*, 123 U. 316, 250 P. 2nd 589, 593.

Jon Larson admitted he just slowed down to 25 as he entered the intersection (R. 409). Officer Gunn testified plaintiff's car skidded into the intersection (R. 128). That indicates a substantial speed in excess of 25 miles per hour.

Exhibit P-4 shows impact occurred on plaintiff's side of road and that although Jon Larson testified (R. 405) there was no traffic entering the intersection from the North or West he did not have control enough to swerve his car to the unused side of the road.

The defendant immediately turned to the North (R. 116) and it appears without doubt that if the plaintiff had been keeping any lookout and driving at a reasonable speed he could have swerved and avoided the collision.

Many times this court has said the question of proximate cause is for the jury. In *Sweet vs. Salt Lake City*, 43 Utah 306, 325, 134 P. 1167, this court said whether the speed at which the vehicle was going at the time of the accident was the proximate cause of the accident was a question of fact. In *Horsley vs. Robinson*, 112 U. 227, 186 P. 2nd 592, this court again said the question of excessive speed and proximate cause was for the jury.

On the question of lookout in *Devereaux vs. General Electric Company*, 5 Utah 2nd 433, 304 P. 2nd 375, this court said where plaintiff failed to see defendants approaching car on the highway as plaintiff was entering the highway, it was for the jury to decide if the plaintiffs negligent failure to see the defendant's car was the proximate cause of the collision.

The question of keeping a proper lookout is generally a jury question. *Coombs vs. Perry*, 2 Utah 2nd 381, 275 P. 2nd 680; *Stickle vs. Union Pacific Railroad Company*, 122 Utah 477, 251 P. 2nd 867; *Lowder vs. Holley*, 120 Utah 231, 233 P. 2nd 350. In *Martin vs. Sheffield*, 112 Utah 478, 189 P. 2nd 127, where accident arose out of intersection collision this court said the question as to the contributory negligence of the plaintiff in failing to keep a proper lookout was for the jury.

The rights of users of the highways are rela-

tive, and one is not relieved of the duty of using due care simply because he is the apparent possessor of the right of way and the question is whose negligence was the proximate cause of the accident and injury. *Sine vs. Salt Lake Transportation Company*, 106 Utah 289, 147 P. 2nd 875, 878, *Bullock vs. Lake*, 98 Utah 501, 98 P. 2nd 350.

Jon Larson's testimony was conflicting in all respects and it was properly submitted to the jury to evaluate.

This court in considering the plaintiffs' appeal must review the evidence, together with every inference fairly arising therefrom in the light most favorable to the defendant who prevailed in the court below. *Toomer's Estate vs. Union Pacific Railroad Company*, 121 Utah 37, 239 P. 2nd 163, *Coombs vs. Perry*, 2 Utah 2nd 28, 275 P. 2nd 680.

POINT II

THE CREDIBILITY OF WITNESSES IS FOR THE JURY TO DECIDE.

Jon Larson admitted he did not see the defendant's car until he was right upon it in the intersection (R. 409, 198). Later he claimed to have observed it for two seconds (R. 173) going at a terrific speed. Later he said he had no thought of anyone approaching the intersection from the East (R. 171). Yet, plaintiffs called Officer Gunn who testified (R. 419) plaintiffs car was skidding long before it reached the intersection.

Jon Larson claimed he could not see through the hedge and did not see defendant's car until it was entering the intersection. The skid marks and testimony of Officer Gunn as well as Jon Larson's statement that he observed the defendant's car for two seconds (R. 173) controvert his claim that the hedge was dense and if believed would show he was warned of defendant's approach by defendant auto headlights and could not stop because of his speed or because he did not heed the warning in time.

The credibility of a witness is for the jury. *Gittens vs. Lundberg*, 3 Utah 2nd 392, 284 P. 2nd 1115; *Martin vs. Stevens*, 121 Utah 484, 243 P. 2nd 747; *Gibbs vs. Blue Cab*, 122 Utah 312, Re. 123 Utah 281, 249 P. 2nd 213.

Likewise, when a witness, whose impeachment is attempted, is a party to the action, the witness' prior contradictory statement is an admission against interest and may be considered both as an admission and for the purpose of testimony the credibility of the witness. *Rose vs. Otis* (1892) — Colorado —, 31 Pac. 493; *State vs. Hougensen*, 91 Utah 351, 64 P. 2nd 229. If a witness willfully testifies falsely as to any material matter, the jury is at liberty to disbelieve the whole of the witness' testimony. *Gittens vs. Lundberg*, 3 Utah 2nd 392, 284 P. 2nd 1115. Also, the jury, in determining whether, and to what extent to believe a witness, may consider the witness' appearance, general de-

meanor, manner of expression and candor or want of it in answering questions on both direct and cross examination. *Gittens vs. Lundberg*, 3 Utah 2nd 392, 284 P. 2nd 1115.

The general rule is that a party will not be permitted to change his story to make out a case. In *Tebbs vs. Peterson*, 122 Utah 214, 247 P. 2nd 897, where at first trial the plaintiff said he didn't remember seeing any cars coming toward him and where at second trial plaintiff said he was blinded by oncoming lights, and where trial court directed a verdict for the defendant, this court said the plaintiff was bound by his prior testimony and will not be permitted to change his story to make out a case.

It follows that in this case Jon Larson was bound by his prior testimony (R. 410) on the question of keeping a proper lookout and should not have been permitted to change his story to show he observed defendant's car for two seconds (R. 173) just to rebut defendant's claim he was not keeping a proper lookout.

POINT III

THE LOWER COURT DID NOT ERR IN REFUSING TO DIRECT A VERDICT IN FAVOR OF THE PLAINTIFF AND IN DENYING PLAINTIFFS' MOTION FOR NEW TRIAL.

Defendant incorporates herein the argument set forth under Points I and II.

POINT IV

THE COURT DID NOT ERR PREJUDICIALLY IN GIVING INSTRUCTION NO. 3.

In *Toone vs. J. P. O'Neill Construction Company*, 40 Utah 265, 121 P. 10, the court gave the following instruction to which appellant objected. The request was as follows:

“If you find from the evidence that the plaintiff upon his own judgment uninfluenced by any assurance of safety on part of the defendant’s foreman, as to whether or not the place he was standing at the time he fired the shot was safe, or if you find that the plaintiff selected the place but he fired the blast without directions or suggestions of the defendant’s foreman, then the defendant is not liable, and you should return a verdict for the defendant.

On appeal when appellant objected this court said:

“... One way the court might have followed in charging the jury would have been to charge them in separate instructions, first, in accordance with respondent’s evidence; and second in accordance with appellants evidence which related to the proposition covered by the instruction in question, and in each instruction have directed the jury to return a verdict in accordance with their findings upon that question. The court was not bound to charge the jury in separate instructions, but could cover the question in one without offending against appellant’s rights.”

It is clear from the *Toone* case in Utah you can instruct on unrelated propositions in the same

instruction and that appellant has not accurately cited the holding of the Toone case in appellant's brief. *Toone vs. J. P. O'Neill Construction Company*, 40 Utah 265, 121 P. 10.

Nor does the case of *Riding vs. Roylance*, 63 Utah 221, 224 P. 885, assist appellant. In the *Riding* case, the trial court erred in instructing jury that defendant would not be liable if driver was not employee and this instruction was held misleading as the undisputed evidence was contrary and hence the instruction was prejudicial in character. 63 Utah 221, 224 P. 885.

Instruction No. 3 was short and concise. It was not an instruction upon contributory negligence but merely an explanation to the jury what the effect of contributory negligence on the part of Jon Larson would be on the other plaintiffs. It was explanatory only in character and was a correct statement of law.

It appears Judge Faux was following the admonition in J.I.F.U. given at page XV wherein it is said, "The fewer instructions given the better".

This instruction obviously had no prejudicial effect.

POINT V

THE COURT DID NOT ERR PREJUDICALLY IN SUBMITTING INSTRUCTION NO. 8.

The negligence of the defendant was found to

be a proximate cause of the accident. He admitted his fault and further the jury in answering Interrogatory No. 1 (R. 182) showed they were not confused about the defendant's negligence as they found it proximately caused the accident and the injuries of which the plaintiff complained.

Instruction No. 8 is found in J.I.F.U. 2.3 at page 12, and of course, is a recommended jury instruction form.

The instruction was necessary because defendant had to prove by a preponderance of the evidence that Jon Larson was contributorily negligent and that his negligence proximately contributed to the accident and the injuries of which plaintiffs complained.

Since the special interrogatories show the jury was not confused the cases cited in appellants' brief involving verdicts are not in point.

CONCLUSION

Because of the (1) inconsistent and contradictory statements of Jon Larson relating to lookout and speed, (2) the conflicting testimony of Jon Larson as contrasted to the physical facts with regard to speed and lookout, (3) the question of the credibility of the plaintiffs statements, and (4) the testimony of Officer Gunn, there was substantial evidence upon which the jury properly found Jon

Larson guilty of contributory negligence and that the same proximately contributed to the accident.

As Judge Faux said in his Memorandum Decision (R. 103) there was too much evidence of contributory negligence to let the jury say no contributory negligence and the verdict was justified.

Further, a review of the case shows the court below did not err prejudicially.

Respectfully submitted,

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