

1961

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

Utah Supreme Court

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Recommended Citation

Reply Brief, *Larson v. Evans*, No. 9365 (Utah Supreme Court, 1961).
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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

MAR 27 1961

WALTER LARSON, ALEIDA P.
LARSON and JON LARSON,
Plaintiffs and Appellants,

— vs. —

ROBERT GEORGE EVANS, M.D.,
Defendant and Respondent.

Clerk, Supreme Court, Utah

Case
No. 9365

REPLY BRIEF OF APPELLANTS

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REPLY BRIEF OF APPELLANTS

STATEMENT OF FACTS

The facts of this case, as well as the law applicable thereto, are fully discussed in plaintiffs' opening brief.

Plaintiffs do not feel that a reply brief is necessary insofar as the material issues are concerned. However, defendant's answering brief, in attempting to torture plaintiff Jon Larson's testimony into some semblance of

a defense, is repleat with mis-statements of both law and fact which, if not corrected, might prejudice plaintiffs' case.

For the convenience of the court we therefore indicate such mis-statements and respectfully urge the court to examine the record of these proceedings.

The defendant would have this court believe that the plaintiffs' brief excluded the testimony of Jon Larson. (Page 1 of defendant's brief). Quite to the contrary, the plaintiffs' brief contained every pertinent portion of his testimony that is contained in the defendant's brief, including his statements relative to the location of both vehicles when he first saw defendant's automobile, his speed, his failure to recall applying his brakes, and the length of time he observed defendant's headlights. (Pages 4-5 of plaintiffs' original brief).

The defendant contends that the testimony of the plaintiff driver is inconsistent in that he stated he saw defendant's headlights for two seconds and yet testified, to the best of his knowledge, that he did not recall seeing the defendant's automobile until he was entering the intersection. The former testimony is fully consistent with the undisputed physical evidence in the case which indicated skid marks and reaction distance totaling 73 feet from the point of impact thereby placing the Larson vehicle some distance south of the intersection at the time that observation of danger by the plaintiff driver resulted in his taking defensive measures to avoid col-

lision. (R. 419-420). Likewise, Jon Larson's testimony that he did not see the defendant's automobile until he was entering the intersection is absolutely consistent with the undisputed physical evidence relating to the existence of a dense five- or six-foot hedge which extended along the south side of Evergreen Avenue to its intersection with 23rd East. (R. 121, 127, 422, 136-137, 175, 366-367 and Exhibit P-1). Thus, in view of the defendant's own testimony that he did not see the plaintiff's automobile until both cars were in the intersection (R. 118, 121) because of the existence of said hedge and the testimony of the defendant's passenger to the same effect (R. 365-366), it is absolutely clear that Jon Larson's testimony is consistent with the only physical possibility under the circumstances. Jon Larson's testimony, when viewed in light of the undisputed physical evidence, indicates an unusual degree of consistency, frankness and honesty rather than being fraught with deceit as defendant alleges.

With respect to the income of Jon Larson, which is completely immaterial to this appeal, the defendant would have the court believe that the witness willfully misrepresented his income as being \$1,000 per month at the time his deposition was taken but then testified at the trial that his income was only \$500 per month and that his previous statement was an exaggeration. (Page 4 of defendant's brief). The facts are much different than they are represented by defendant. Mr. Larson testified on direct examination that he received a monthly salary of \$500 *plus override and commissions amounting to*

\$300 or more, which would have to be established more accurately by his bookkeeper. (R. 194). On cross-examination he declared that the figure given in his deposition was correct to the best of his ability to estimate at that time, and any variance between that figure and the actual amount of his income was an “unintentional exaggeration” on his part. (R. 202-204). Certainly, no willful misrepresentation can be conjured from such testimony.

Again on page 5 of defendant’s brief it is represented that Officer Gunn testified that there was no hedge, that his measurement began from the corner of the house and not the hedge as previously represented by plaintiffs. The defendant then cites page 121 of the Record on Appeal to sustain his statements. That page is entirely devoted to the testimony of the defendant and has no bearing on the matters raised. The pure fabrication of the statements made by the defendant in his brief can be shown by quoting the record itself. At pages 126-127 thereof, Officer Gunn testified as follows:

“Q. Yes. In that regard, Officer, perhaps I can call your attention to what has been marked as Exhibit 1-P and draw your attention specifically to the north-south street which is designated on the diagram as 23rd East and the street which is defined here as running from east to west and west to east described as Evergreen Avenue?

“A. Uh huh.

“Q. Are you familiar with such an intersection?

“A. Yes, I am.

"Q. Would this be the same intersection in question?

"A. Yes.

"Q. Officer Gunn, would you please state for the benefit of the jury, are you familiar with this particular intersection?

"A. Yes, I am.

"Q. Would you say that this diagram as it is drawn fairly represents the area in question?

"A. Yes, it does, it is exactly it.

"Q. Now going back to my previous question, Officer, would you please state for the benefit of the jury what did your physical investigation of the area determine?

"A. Well, on the southeast corner on the Evergreen side there was a hedge and shrubs.

"Q. Could you . . .

"A. About approximately . . .

"Q. Could you point these things out?

"A. About four to five feet tall about right in here.

"Q. Does that description on the diagram fairly well represent that . . .

"A. Yes, it does.

"Q. . . . row of shrubs?

"A. Yes."

In view of the fact that the hedge had been removed at the time of the trial, Officer Gunn testified as follows at pages 421-422 of the Record on Appeal:

"Q. Did you stand in that street on the night of the accident?

"A. Yes, I did.

“Q. On the night of the accident was that hedge there?

“A. Yes, it was.

“Q. Could you describe the hedge?

“A. The hedge was of a regular hedge variety, approximately four to five feet tall. I didn’t measure the exact height but it was pretty well up.

“Q. State whether or not you could see through it?

“A. No, you couldn’t.

“Q. Was it a very dense hedge?

“A. It was a regular thick hedge.”

With respect to the measurement of skid marks and reaction time by Officer Gunn, he testified as follows, at page 420 of the Record on Appeal:

“Q. Then would it be fair to say that he was first apprised of danger and acted to do something about it 73 feet back from the point of impact?

“A. That’s right. Now this 33 feet, we mean that is a thinking time it takes to get the foot off the throttle or wherever it was onto the brake.

“Q. And that was the average reasonable man?

“A. That’s right, 33 feet.

“Q. Were you able to determine on your diagram what point that would be in relation to this intersection?

“A. Yes.

“Q. Could you show it there on the diagram?

“A. *We measured back 40 feet from the point of impact which we determined by the land mark we set first and that would bring it down to 13*

feet 8 inches south of the south mark of the hedge, or the hedge mark and the pole here; 13 feet 8 inches south of this obstruction here."
(Emphasis added).

The misrepresentation of the actual facts by the defendant is clearly apparent from the above. The only statement by Officer Gunn as to the absence of said hedge had reference to the time of the trial after said hedge had been removed and not to the conditions prevailing at the time of the accident. (R. 420).

Again the defendant would have this court believe that the defendant observed the plaintiff's automobile to be 50 feet away as the defendant entered the intersection, and attempts to sustain this fact through the statement of Officer Gunn that the defendant so stated to him on the night of the accident. (R. 125-126). BUT defendant fails to advise the court of his own statements upon the subject to the effect that, because of the existence of the hedge, he did not see the Larson vehicle until it was toward the front of him. (R. 121). Likewise, his own passenger testified that both cars were in the intersection before she noticed danger. (R. 365). It is apparent that defendant's counsel has attempted to attribute statements to his client which the defendant, himself, has refuted.

STATEMENT OF POINTS

POINT I.

**THE VERDICT AND JUDGMENT OF THE
LOWER COURT ARE NOT SUSTAINED BY THE
EVIDENCE, AND THE LOWER COURT ERRED**

IN SUBMITTING THE QUESTION OF JON LARSON'S CONTRIBUTORY NEGLIGENCE TO THE JURY.

POINT II.

THE LOWER COURT ERRED IN REFUSING TO DIRECT A VERDICT IN FAVOR OF THE PLAINTIFFS AND AGAINST THE DEFENDANT IN ACCORDANCE WITH PLAINTIFFS' REQUESTED INSTRUCTIONS AS SET FORTH IN PAGES 27, 30 AND 31 OF THE RECORD ON APPEAL AND PLAINTIFFS' MOTION FOR A DIRECTED VERDICT SET FORTH ON PAGE 430 OF THE RECORD ON APPEAL.

POINT III.

THE LOWER COURT ERRED IN FAILING TO GRANT THE PLAINTIFFS' MOTION FOR A NEW TRIAL.

POINT IV.

THE LOWER COURT ERRED IN GIVING ITS INSTRUCTION NO. 3 FOR THE REASON THAT IT WRONGFULLY UNITED AN INSTRUCTION UPON THE CONTRIBUTORY NEGLIGENCE OF PLAINTIFF JON LARSON WITH AN INSTRUCTION THAT THE DEFENDANT WAS NEGLIGENT AS A MATTER OF LAW.

POINT V.

THE LOWER COURT ERRED IN SUBMITTING INSTRUCTION NO. 8 TO THE JURY.

ARGUMENT

POINT I.

THE VERDICT AND JUDGMENT OF THE LOWER COURT ARE NOT SUSTAINED BY THE EVIDENCE, AND THE LOWER COURT ERRED IN SUBMITTING THE QUESTION OF JON LARSON'S CONTRIBUTORY NEGLIGENCE TO THE JURY.

The defendant's argument under Point I consists of an attempt to prove excessive speed and failure to keep a proper lookout on the part of the plaintiff driver but does not cite any authority contrary to that set forth in plaintiffs' original brief. Defendant apparently takes the position that the plaintiffs were required to establish the speed limit upon 23rd East in order to prove the defendant's defense of contributory negligence. (See page 4 of defendant's brief). The defendant attempts to establish the speed limit at 25 miles per hour as being within a residential area. (See page 9 of defendant's brief). The plain truth of the matter is that said street is, and was, posted for a 35-mile-per-hour limit, and in the absence of proof of the speed limit thereon, the only applicable speed limit available for consideration is that of 50 miles per hour, unless this court will take judicial notice of the posted speed limit. In the absence of such an evidentiary guide to assist the jury it was clearly error for the lower court to allow the jury to speculate as to whether the Larson vehicle was being driven at an excessive or unreasonable speed. See *Olsen v. Warwood*, 123 U. 111, 255 P. 2d 725; *Alvarado v. Tucker*, 2 U. 2d 16,

268 P. 2d 986; and other cases cited in plaintiffs' original brief at pages 15-19 thereof.

With respect to speed and the maintenance of proper lookout, the defendant cites cases holding that whether speed or failure to keep a proper lookout is the proximate cause of an accident is a question of fact to be determined by the jury. But the defendant fails to take into consideration the requirement that there must be substantial evidence of speed or improper lookout such as would constitute negligence before the question of proximate cause is even called into issue. The record in this case does not disclose any such evidence. As pointed out hereinabove, and in plaintiffs' previous brief, the undisputed physical evidence in the record, i. e., skid marks, reaction time, and the existence of the hedge in relation to the intersection involved, completely rules out any inference of improper lookout on the part of the plaintiff driver. And even if his statements concerning the location of his automobile at the time he first saw defendant's automobile were considered as evidence of improper lookout, rather than evidence in support of the undisputed physical facts as above explained, such evidence would still be insufficient, as a matter of law, under the rule laid down in *Haarstrich v. Oregon Short Line R. Co.*, 70 U. 552, 262 P. 101, that testimony which is contrary to uncontroverted physical facts DOES NOT CONSTITUTE SUBSTANTIAL EVIDENCE.

The defendant also alleges, without any reference to any evidence whatsoever, that Jon Larson did not have

control enough to swerve his car to the opposite side of the road to avoid the accident. (Page 10 of defendant's brief). Jon Larson testified that he did cramp his wheels to the left to avoid the accident. (R. 171, 200, 202). And the defendant himself testified that attempts were made by both cars to avoid the accident. (R. 116). In addition the defendant admitted that the accident was due to his own fault. (R. 124, 404). Certainly, if the plaintiff driver had been traveling at an excessive speed with no control over his automobile in addition to maintaining an improper lookout, the defendant would have so indicated rather than assume full responsibility for the accident as he did. The above evidence, when viewed in connection with the undisputed physical evidence relating to skid marks, reaction time and visual impediments, absolutely negates any inference of lack of control on the part of the plaintiff driver. Certainly such evidence does not constitute substantial evidence or a preponderance of the evidence in favor of such a finding. The authorities heretofore cited with respect to permitting a jury to speculate upon evidence or to base findings of fact upon surmise, conjecture, guess or speculation, are fully applicable in this regard.

Thus, as pointed out in plaintiffs' original brief, the lower court erred in submitting the question of the plaintiff driver's contributory negligence to the jury for the following reasons: (1) There is no evidence in the record upon which to base such a finding; (2) there is no substantial evidence upon which to base such a finding as a matter of law; (3) there is no preponderance of evi-

dence upon which to base such a finding; (4) reasonable minds could not differ upon the evidence in this case as to the exercise of due care by the plaintiff driver; (5) it allowed the jury to speculate upon evidence which was not substantial in nature; (6) it allowed the jury to base a finding of fact on surmise, conjecture, guess, or speculation; (7) the only evidence upon which such a finding could have been made was as consistent, and even more so, with the absence of negligence than with its existence; and (8) it left to the jury the power to "hold that negligence might be inferred from any state of facts whatever." The defendant's brief has failed to provide any law contradictory to the above. It necessarily follows that each and every aspect of the claimed contributory negligence which was submitted to the jury was not supported by the evidence, as a matter of law, and, therefore, the court erred in submitting the special interrogatories contained in Instruction No. 17 to the jury. Likewise, the verdict and judgment were not sustained by the evidence as a matter of law.

POINT II.

THE LOWER COURT ERRED IN REFUSING TO DIRECT A VERDICT IN FAVOR OF THE PLAINTIFFS AND AGAINST THE DEFENDANT IN ACCORDANCE WITH PLAINTIFFS' REQUESTED INSTRUCTIONS AS SET FORTH IN PAGES 27, 30 AND 31 OF THE RECORD ON APPEAL AND PLAINTIFFS' MOTION FOR A DIRECTED VERDICT SET FORTH ON PAGE 430 OF THE RECORD ON APPEAL.

Plaintiffs incorporate herein the argument set forth under Point I and for the reasons therein set forth urge

this court to set aside the verdict and judgment of the lower court and order said court to grant the plaintiffs a new trial solely for the purpose of ascertaining the amount of damages suffered by each individual plaintiff and that the lower court enter judgment for plaintiffs in accordance with such findings.

POINT III.

THE LOWER COURT ERRED IN FAILING TO GRANT THE PLAINTIFFS' MOTION FOR A NEW TRIAL.

Plaintiffs incorporate herein the argument set forth under Points I, IV and V.

POINT IV.

THE LOWER COURT ERRED IN GIVING ITS INSTRUCTION NO. 3 FOR THE REASON THAT IT WRONGFULLY UNITED AN INSTRUCTION UPON THE CONTRIBUTORY NEGLIGENCE OF PLAINTIFF JON LARSON WITH AN INSTRUCTION THAT THE DEFENDANT WAS NEGLIGENT AS A MATTER OF LAW.

The defendant cites the holding in *Toone v. J. P. O'Neill Construction Company*, 40 U. 265, 121 P. 10, as authority for the proposition that a court may instruct on *unrelated* propositions in the same instruction. A cursory examination of the quoted portion of said case in defendant's brief will conclusively show the incorrectness of that contention. In the *Toone case*, this court held that an instruction in accordance with the appellant's evidence

and in accordance with the respondent's evidence *upon the same proposition is proper*. That case was properly cited in plaintiffs' original brief and the defendant has wrongfully charged the plaintiffs with citing the case inaccurately in his brief. The court can easily determine the source of the inaccuracy upon this point.

The defendant has completely failed to justify the giving of Instruction No. 3 by the lower court, which united an instruction upon the contributory negligence of the plaintiff driver with an instruction that the defendant was negligent as a matter of law. Such instruction clearly constitutes reversible error even in the absence of reversal under Points I, II, and III.

POINT V.

THE LOWER COURT ERRED IN SUBMITTING INSTRUCTION NO. 8 TO THE JURY.

Plaintiffs reincorporate the argument set forth in their previous brief under POINT V. The defendant argues that the inclusion of the questioned instruction in J. I. F. U. necessarily precludes any question as to its proper application under the facts of this case. Again plaintiffs reiterate that said instruction, as it related to this case, allowed the jury to reconsider the negligence of the defendant which had already been determined as a matter of law by the lower court, and, in the absence of limiting said instruction to the claimed contributory negligence of the plaintiff driver, the lower court committed reversible error for the reason that the effect of

such instruction upon the jury is not capable of ascertainment. The giving of instructions that permit the re-determination of the existence of negligence by a jury upon facts which have been determined negligent as a matter of law by the court constitutes reversible error. *Morrison v. Perry*, 104 U. 151, 140 P. 2d 772.

CONCLUSION

It is indeed a strange appellate procedure which leads the defendant to attack the veracity and truthfulness of plaintiff Jon Larson's testimony with such vehemence as that employed by the defendant in his brief and then rest his entire case upon the testimony of that plaintiff which defendant claims is contrary to the undisputed physical evidence of the case. An examination of the transcript clearly reveals that, contrary to defendant's assertions, said plaintiff's testimony sustains the uncontroverted physical facts of this case rather than being in conflict therewith. Such an analysis is to be favored in view of the rule of this court that testimony which is contrary to uncontroverted physical facts does not constitute substantial evidence. Under such rule, even if Jon Larson's testimony was found to be in conflict with the undisputed physical evidence, it would be insufficient to sustain the verdict of the jury. The absence of any substantial evidence relating to improper lookout, speed and control of the automobile driven by Jon Larson requires the reversal of the verdict and judgment of the

lower court. In addition thereto the giving of instructions No. 3 and No. 8 by the trial court constituted reversible error.

Respectfully submitted,

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