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Welby Aagard v. Dayton & Miller Red-E-Mix Concrete Company and Thomas Charles Cook : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT
of the

STATE OF UTAH

FILED

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WELBY AAGARD,

Plaintiff and Appellant,

vs.

DAYTON & MILLER
RED-E-MIX CONCRETE
COMPANY and
THOMAS CHARLES COOK,

Defendants and Respondents.

Clerk, Supreme Court, Utah

Case No. 9373

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

PRELIMINARY STATEMENT

In this Brief we will refer to Plaintiff and Appellant as Plaintiff, and Defendants and Respondents as Defendants. The Record will be referred to by R., and the Transcript of Testimony will be referred to by the letters Tr.

STATEMENT OF FACTS

The Statement of Facts in the Appellant's Brief deals principally with portions of the testimony of the two drivers involved. In this Statement

we will endeavor to point out additional facts concerning the physical conditions of the highway where the accident occurred, the physical evidence as to the nature and point of contact between the two vehicles, and additional testimony given by the drivers and witnesses so there will be a more complete picture of the evidence that was before the Trial Court.

U. S. Highway 30 South runs generally east and west between Morgan and Devil's Slide, Utah. The accident occurred approximately two miles west of Devil's Slide at a point where the Highway forms an "S" type curve and passes, at an angle, under a railroad overpass. The traveled portion of the highway is somewhat restricted by the cement abutments of the overpass and is 22 feet in width without shoulders. (See Ex. 1 through 11 — Scale Diagram and correlated photographs).

The bed and rack of plaintiff's sheep truck was 7½ feet wide, 16 feet long, and was 9 feet 4 inches high from the ground. The rack was equipped with an upper and lower deck, and at the time of the accident was loaded with 56 lambs on the top deck and 44 lambs on the lower deck, each weighing approximately 75 pounds (R. 9, 10).

The points of contact on defendant's ready-mix cement truck were on the left end of a water supply tank located above and behind the truck's

cab and on the left rear corner of a fender platform over the rear dual tires. There was only slight damage to the defendants' truck (Tr. 39, 60, 61, 110 — Ex. 12, 13, 14).

The points of contact on plaintiff's truck were the angle iron uprights along the left side of the rack. Trooper Mason W. Hill of the Utah Highway Patrol, who investigated, described the damage on plaintiff's truck as starting very light toward the front and getting a little more severe as it went to the rear of the rack, and referred to the damage as indicating a very light impact (Tr. 59).

Clifford Bloomquist, driver of plaintiff's truck, testified that he passed through the underpass headed west and was about $2\frac{1}{2}$ truck lengths west of it when he first saw defendants' truck coming around the curve toward him, that it was on his side of the road about 200 feet away, that he knew there was going to be an accident, but he did not apply his brakes (Tr. 22, 23, 24). Bloomquist fixed the position of defendants' truck on the highway by reference to two painted yellow dividing lines (Tr. 22). Officer Hill testified that the road through the underpass was newly surfaced (Tr. 53, 54), and the absence of a center line is noted on his investigation work sheet (Ex. B.).

Trooper Hill first interviewed Bloomquist approximately an hour after the accident. At that

time plaintiff's truck was parked 2/10ths of a mile west of the underpass and was about 50 or 75 feet off the highway. The sheep that he had been carrying were on a side hill (Tr. 36).

Trooper Hill testified as to his conversation with Bloomquist as follows (Tr. 36, 37):

“Q. What did you do then, Mr. Hill?

A. I asked this gentleman if he was the driver, and he told me he was. I asked him what happened, and he informed me that the cement truck had sideswiped him in the underpass. I asked him where the driver was and he said that the cement truck had not stopped.

Q. Now, did you go up to the underpass at that time?

A. Yes.

Q. Were you able to see any signs on the road or around there, Mr. Hill, that indicated the point of impact or the place where this had occurred?

A. No, I didn't. I could not find any place showing the point of impact.”

And again on cross examination regarding his conversation with Bloomquist, Trooper Hill testified (Tr. 54):

“A. I asked Mr. Bloomquist what had happened and he told me that a cement truck had sideswiped him in the underpass.

Q. In the underpass?

A. Yes.”

Thomas Cook had been driving a cement truck

for the defendant, Dayton & Miller, for nine months prior to the accident (Tr. 102). He was familiar with the highway and the area in question and had made five trips by there the previous week (Tr. 103). As he approached the underpass traveling east, he was hugging the right shoulder of the road traveling 25 mph. (Tr. 106, 107). As he reached the west end of the underpass he observed plaintiff's truck rounding the curve approaching the underpass from the east at a pretty fast rate of speed. It appeared to be on its own side of the road as it rounded the curve, but as it passed defendants' truck it looked very close, and then Cook heard a noise like someone running a stick along a picket fence (Tr. 107, 108). He saw the rear of plaintiff's truck going under the underpass in his rear view mirror. He pulled off and parked his truck on the shoulder of the road at the first point that was wide enough, approximately 600 or 700 feet east of the underpass. Witnesses Jerome C. Rush and Ethel Rush were at their car preparing a picnic lunch at approximately where Cook stopped. Cook walked west back through the underpass. He could see dust arising from the ground, but plaintiff's truck was not in sight (Tr. 108, 120, 132, 133).

Both witnesses, Mr. and Mrs. Rush, had observed plaintiff's truck. As it passed them it was coming fast (Tr. 123, 132). They then heard a

crash (Tr. 123, 130). They could not see the underpass from where they were (Tr. 128).

This case was tried to the court sitting without a jury. At the conclusion of the trial, the case was taken under advisement and the court subsequently entered its judgment in favor of the defendants.

STATEMENT OF POINTS

POINT I.

THE EVIDENCE SUPPORTS THE FINDINGS OF THE TRIAL COURT.

POINT II.

THE TESTIMONY OF THOMAS CHARLES COOK IS CONSISTENT WITH THE PHYSICAL EVIDENCE AND FACTS AS CONTENDED BY DEFENDANTS.

ARGUMENT

POINT I.

THE EVIDENCE SUPPORTS THE FINDINGS OF THE TRIAL COURT.

The trial court, in rendering its judgment, made the following finding:

“That the evidence was evenly balanced as to which of the parties was negligent.”

The defendants, having prevailed at the trial court, are now entitled to have the evidence viewed in the light most favorable to them. *Weenig Bros. v. Manning*, 1 Ut. 2d 101, 262 P. 2d 491.

This court also in the *Weenig Case*, *supra*, in considering the burden of an appellant in seeking a review of a trial court's finding of fact, stated as follows:

“In order to upset the judgment and command one in its favor the first obstacle plaintiff must overcome is to demonstrate that the evidence shows with such certainty that reasonable minds could not differ thereon, that the defendant was guilty of negligence which proximately caused the collision. In the absence of such degree of proof we could not direct that such finding be made and reverse the decision of the lower court.”

Plaintiff claims defendants' truck was on the wrong side of the road. The evidence of physical damage to the vehicles indicated a minor sideswiping type of collision between the left side of plaintiff's truck rack and the left rear corner of defendants' truck. This contact could as logically have resulted from plaintiff's truck swinging over into defendants' path as plaintiff's driver started to enter the underpass or from the close proximity of both trucks to the center of the road because of the restrictive conditions of the underpass.

The fact that the end of the water supply tank on defendants' truck was scraped by plaintiff's rack without any contact being made with defendants' rear view mirror, which extended beyond the width of the mixer and tank, when viewed with the further fact that the amount of impact and damage on plaintiff's sheep rack on the left side increased in severity toward the rear, is strong evidence that plaintiff's truck was leaning and crossing

over into the path of defendants' truck as it passed. So also the physical effect of such a contact would be to swing the front of plaintiff's truck to its left rather than pushing it to its right and off the road as testified to by plaintiff's driver (Tr. 7).

It is now a well established rule in this jurisdiction, and the weight of authority generally, that a plaintiff, in order to prevail, must establish the negligence of the defendant and its proximate cause to plaintiff's damage by a preponderance of the evidence, and where the evidence is evenly balanced as to which of two or more probable causes resulted in the damage complained of, plaintiff has failed to sustain his burden. The rule was stated thus in the early case of *Tremelling v. Southern Pacific Co.*, 51 Utah 189, 170 Pac. 80 (p. 83):

"If the probabilities are equally balanced that the accident was produced by a cause for which the defendant is responsible or by one for which he is not, the plaintiff must fail."

This rule has been followed consistently in Utah, *Perrin v. U.P.R.R. Co.*, 59 Utah 1, 201 Pac. 405, *Sumsion v. Streator-Smith*, 103 Utah 44, 132 P. 2d 680, *Devine v. Cook*, 3 Utah 134, 279 P. 2d 1073, *In Re Richards*, 5 Utah 2d 106, 297 P. 2d 542.

The plaintiff on argument in his brief refers to the testimony of driver Bloomquist as clear, unequivocal and consistent. Mr. Bloomquist testified

on cross-examination that when he first saw defendants' truck it was 200 feet away, that it was completely on his side of the road and he knew there was going to be an accident, but he didn't touch his brakes or reduce his speed. (Tr. 23, 24, 28, 29). It is submitted that such is not consistent with the reactions of a normally prudent driver. Again when Trooper Hill first interviewed Bloomquist within an hour after the accident, Bloomquist stated that a cement truck had sideswiped him *in* the underpass (Tr. 36, 54), not some 200 feet west of the underpass where, as a matter of fact, the underpass would have had no connection with the accident.

POINT II.

THE TESTIMONY OF THOMAS CHARLES COOK IS CONSISTENT WITH THE PHYSICAL EVIDENCE AND FACTS AS CONTENDED BY DEFENDANTS.

The plaintiff cites the case of *Fowler v. Pleasant Valley Coal Company*, 16 Utah 348, 52 Pac. 594, for the rule of law that a party is bound by the testimony he gives. He contends that the testimony of Cook to the effect that he did not observe the plaintiff's truck on the wrong side of the road precludes the finding that he was ever on the wrong side of the road.

Defendant is in full accord with the rule as stated in the Fowler case. However, defendant's testimony that he didn't see the plaintiff's truck encroaching upon his side of the road is not incon-

sistent, as contended by the plaintiff, with the physical facts indicating that he was. Further, the rule of law contains an exception within the rule itself. Thus, a party's material statement of fact may negative his defense unless:

“More favorable testimony appears to contradict or modify . . . ” (169 ALR 798, 799, cited in Appellant's Brief, Page 17.)

There are two reasons why this rule is of no aid or comfort to the plaintiff. First, the fact that Cook may not have seen the plaintiff driving upon the wrong side of the road does not preclude the fact that he did violate the defendant's right of way as supported by the established facts.

Cook, in his testimony regarding the position of the plaintiff's truck, stated (Tr. 108):

“Q. Did he appear to be on his side of the road?

A. He was when he was coming around the corner, he was on his side.

Q. All right, go ahead.

A. As he passed me it looked like he was very close and it sounded like somebody running down the picket fence with a stick.

Q. Did you feel anything?

A. No.”

It is to be observed that there was no center dividing line on the road, and any statements regarding the truck's position upon the highway were

of necessity based upon estimates. The physical facts indicate that the trucks did not come into contact with each other until the cab portions of each had passed. The water tank of the defendants' truck then came into contact with the side of the sheep rack, and the degree of contact increased during the entire length of plaintiff's rack as the trucks passed, indicating that there was a gradual and increasing encroachment by the plaintiff's truck into defendants' truck, which was proceeding on its side of the road.

Defendant did not state that plaintiff never crossed into his lane of traffic. Such a statement, had it been made, may have fallen within the rule upon which the plaintiff relies so desperately and may have precluded his defense in the absence of other evidence which would tend to contradict or modify it.

Second, even if the rule as contended by the plaintiff were to apply in the instant case, the facts bring it within the exception stated within the rule because there was favorable and competent testimony in the nature of physical evidence, as discussed above, which was introduced at trial, tending to contradict and modify any statement or inference by defendant that plaintiff's truck did not cross the center point of the highway. Had the defendant testified that he observed the plaintiff's truck en-

croaching upon his side of the highway at the instant of impact, such testimony would have been strange indeed, and it is doubtful whether such a statement would have been worthy of belief. Under the circumstances the defendant's attention was directed to the road ahead of him, and he would have had to have looked behind him at the instant of impact to have observed the precise position of plaintiff's truck upon the highway.

To hold that defendant must testify to the observance of the act constituting negligence on the part of plaintiff in order to state an effective defense, would be to permit recovery by a negligent motorist merely because the defendant and victim of his negligence failed to observe plaintiff's precise violation. To so hold would be to ignore the whole field of physical and circumstantial evidence.

CONCLUSION

It is respectfully concluded that the evidence not only supports the findings of the trial court but in fact preponderates in favor of the defendants.

The judgment of the Second District Court from which this cause arises must be affirmed.

Respectfully submitted,

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