

1961

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

Utah Supreme Court

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IN THE SUPREME COURT
of the

STATE OF UTAH

FILED

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Clerk, Supreme Court, Utah

WELBY AAGARD,

Plaintiff and Appellant,

—vs.—

DAYTON & MILLER RED-E-MIX

CONCRETE COMPANY, and

THOMAS CHARLES COOK,

Defendants and Respondents.

BRIEF OF APPELLANT

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IN THE SUPREME COURT
of the
STATE OF UTAH

WELBY AAGARD, <i>Plaintiff and Appellant,</i> —vs.— DAYTON & MILLER RED-E-MIX CONCRETE COMPANY, and THOMAS CHARLES COOK, <i>Defendants and Respondents.</i>	}	Case No. 9373
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BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Throughout this Brief, Plaintiff and Appellant will be referred to as plaintiff. Defendants will be referred to as defendants, or by their individual names, as the case may be. All italics are ours.

STATEMENT OF FACTS

This is an appeal from a Judgment entered on the 24th of October, 1960, of No Cause of Action.

This action arises out of a collision between two trucks which occurred on the 3rd day of November, 1958, at approximately 1:30 P.M. on U.S. Highway 30, six miles east of Morgan, Utah.

Plaintiff's truck at the time of the collision was driven by his employee, J. Clifford Bloomquist, Dayton & Miller Red-E-Mix Concrete Company truck was being driven by the other defendant, Thomas Charles Cook.

The collision occurred near the underpass where U.S. Highway 30 crosses under the Union Pacific Railroad. The point of impact on the truck of plaintiff was along the left side. The point of impact on the truck of defendant, Dayton & Miller Red-E-Mix Concrete Company, was on the left side of the concrete truck. Plaintiff's truck was extensively damaged and a number of sheep which it was carrying destroyed.

The case was tried before the Honorable John F. Wahlquist on the 28th of September, 1960, and after trial the Court made the following Finding of Fact:

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

From this Finding of Fact, the Court concluded that the plaintiff was not entitled to recover.

The facts, plaintiff maintains, could only have been found as he contends. There is no credible evidence to the contrary of his contention. His position is that the Court arbitrarily and capriciously has refused to give effect to the undisputed, uncontroverted evidence.

Three witnesses testified concerning the scene of the collision and the circumstances surrounding the way that plaintiff's truck and the truck belonging to Dayton & Miller Red-E-Mix Concrete Company came together.

The driver of the plaintiff's truck was a man 66 years old. He had been hauling lambs up and down the road on which the collision occurred for several days prior to the collision. (R. 3). His truck was in good shape, the brakes and body free of mechanical difficulties of any kind. (R. 4) He came down the road going west as he entered the underpass and was travelling between 15 and 20 miles per hour. (R. 5). The truck was loaded with 100 head of lambs. As he came out from under the underpass he saw the truck being driven by Cook. His description on direct examination was as follows: (R. 6)

“Q. Now, as you approached the underpass, tell us what happened.

A. Well, when I approached the underpass why I just got through the underpass about two

lengths, not hardly two lengths of the truck I seen — this here cement truck coming and he was coming at a good rate of speed, and he was right over there on that curve over there.

Q. What do you mean when you say 'over there'?

A. About where you can see. I could see he was on the wrong side of the road when he came there he pulled back. He was coming back all right. He was getting back over there all right when he sideswiped me."

Plaintiff's truck was knocked over into the barrow pit and came into contact with the side of the road after the collision. (R. 7 and 8).

On cross-examination Mr. Bloomquist stated concerning what he observed, as follows: (R. 28)

"Q. Now, you testified I think on direct examination that you were traveling on your own side of the road?

A. Yes, *sir*.....

Q. And as I recall you said this cement truck came around the curve and he was on your side of the road coming right toward you?

A. Yes, *sir*.

Q. And how far was he on your side of the road?

A. Well, I can't tell you just exactly how far he was.

Q. I realize sir, you didn't measure it.

A. No, sir.

Q. And we don't expect to hold you to that type of an estimate, can you give us in your best estimate how far you claim this truck was over on your side of the road.

A. Well, when I first seen him I figured that his right front wheel was coming up, was right on the yellow line.

Q. His right front wheels?

A. Yes, sir.

Q. Then what you're saying, sir, is that all of his truck was on your side of the road.

A. All, his truck, the way I got it figured out, and the way it looked to me that his right front wheel was right on the yellow line between the two yellow lines.

Q. He was coming toward you?

A. Yes, sir; on a curve. You see that curve there you can see the way he came.

Q. Now you are referring to, your point of reference I take it then is the painted line on the road that you told us was there at the time?

A. Yes, sir. I am positive it was, I wouldn't swear to it, but I think it was. I know it is there now. It is dim.

Q. Mr. Bloomquist, do you remember at the time I took your deposition we discussed how far this truck was over the line or what you first saw as to where this truck was and do you remember telling me that you thought he was over about 3 or 4 feet and you determined that by the yellow line?

A. Yes, well that would put him over 3 or 4 feet if he was on the yellow line.

Q. Do you remember making this statement to me in answer to my question, was there any line or mark on the pavement?

A. Yes, Sir.

Q. Could you see it?

A. Well, I could see it when I got around the bend, I didn't see it when he hit me, of course I could see just, just see him coming and I could see that he wasn't going to miss me, I could see that."

The driver of the truck of defendants was Thomas Charles Cook. He was a boy of 18 years at the time the impact occurred, licensed to drive, but without a chauffeur's license. He had limited experience in the handling of the concrete truck. Concerning what Cook observed, he testified on direct examination as follows: (R. 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.”

On cross examination Cook stated as follows, concerning the position of plaintiff. (R. 116)

“Q. You never did then, Mr. Cook, see Mr. Bloomquist’s truck other than on its own side of the road?

A. I don’t think so. No, I never.”

Officer Mason Hill testified concerning the condition of the road. He discovered that there was no evidence on the surface of the highway to show the point of impact but he did discover that about 60 steps to the west of the underpass there was evidence of the plaintiff’s truck leaving the black top. At approximately 70 steps from the underpass there was evidence of the plaintiff’s truck having come into impact with the embankment on the north side of the highway. (R. 55).

A dispute developed between Bloomquist and Cook concerning the exact place in relationship to the underpass that the impact occurred. The evidence quoted seems clearly to show that there was no evidence that Bloomquist ever permitted his truck to be on the half of the road reserved for eastbound traffic.

Plaintiff's truck was brought to a stop about 70 feet beyond the west side of the underpass. After Bloomquist discovered that the sheep on the truck were dying and smothering, he moved the truck 2/10ths of a mile further down the road where he stopped and permitted the sheep to leave the truck. He thus attempted to prevent any more of them from dying than had already been killed.

Cook testified that after he came into impact with the plaintiff's truck, he drove up the highway a short distance, walked back to the underpass and then rode on a pickup truck back up to his own truck and proceeded on up the canyon. He testified that when he came back down the canyon after unloading his cement he saw the truck of plaintiff at the side of the road but did not stop. He never made any report of the collision between the two vehicles.

Plaintiff's driver, Bloomquist, reported the collision to the State Highway Patrolman and an investigation revealed that the truck driven by Cook was the one which came into impact with plaintiff's truck.

It is plaintiff's position that the evidence shows conclusively, without dispute, that the impact occurred on the half of the highway reserved for westbound traffic and that the impact could not have occurred without the negligence of the defendant, Thomas Cook, being the causative factor.

SUMMARY OF ARGUMENT

POINT I

THE TRIAL COURT ARBITRARILY DISREGARDED THE UNCONTRADICTED, CREDIBLE AND CONVINCING EVIDENCE.

POINT II

DEFENDANT, THOMAS CHARLES COOK, ADMITTED THAT THE TRUCK OF PLAINTIFF WAS NEVER ON HIS SIDE OF THE HIGHWAY.

ARGUMENT

POINT I

THE TRIAL COURT ARBITRARILY DISREGARDED THE UNCONTRADICTED, CREDIBLE AND CONVINCING EVIDENCE.

The witness, Bloomquist, testified clearly, unequivocally and consistently concerning one basic fact which it is submitted is conclusive. This was the fact that the

Dayton & Miller Red-E-Mix truck was over the center line of the highway. That the driver of the Dayton truck was getting back across the line of the highway at the moment the impact between the sides of the two trucks occurred. There is no other logical, reasonable, or sensible explanation of how the two vehicles came into impact.

Defendant Cook had no explanation of the impact. He testified clearly and consistently that at no time had he ever seen the truck of plaintiff on his side of the highway. He further testified that he did not believe that there ever was going to be any impact between his truck and the truck of plaintiff. He likewise testified that he remained on his own side of the highway. It is obvious that the testimony of defendant, Cook, could not be accurate since if the truck of plaintiff remained on his side of the highway, and the truck of the defendants remained on their side of the highway, there would have been no collision. When asked on cross examination to explain this inconsistency, the defendant Cook was unable to offer any explanation.

There was a basic dispute developed between Cook and the testimony of Bloomquist as corroborated by Hill, the Highway Patrolman, concerning the point of impact. Cook testified that the impact occurred on the east side of the underpass. Bloomquist testified that it occurred on the West of the underpass. Hill discovered

the tracks of plaintiff's truck on the west side of the underpass leaving the highway and also the evidence of impact between the right side of plaintiff's truck and the hill side which was west of the underpass.

This inconsistency and disagreement between the testimony of Bloomquist and Cook is not material to any issue on the question of negligence. As far as plaintiff is able to discover, it would make no difference whether the impact occurred on the east side of the underpass or the west side of the underpass. The crucial question is whether or not the truck of plaintiff was on its own side of the highway or infringed upon the portion reserved for eastbound travel.

It is respectfully submitted that there is no disagreement between the witnesses concerning where the vehicle of plaintiff was at all times. It was on its own side of the highway. The dispute arises as to where the defendant's vehicle was. As to this fact the evidence is contradictory.

Having established without dispute the position of the plaintiff's vehicle, it is respectfully submitted that the only way that collision could occur was if the defendant's vehicle invaded the half of the highway reserved for westbound traffic.

It appears to plaintiff that there could be no question that under the circumstances shown by the photo-

graphs and the plat of the highway where there are two large heavy trucks approaching an underpass, where visibility through the underpass is obstructed and the clearance is impaired, that anyone who drove, or permitted his vehicle to invade the half of its highway reserved for traffic moving in the opposite direction would be negligent in the absence of some emergency or other satisfactory explanation, as matter of law.

Bloomquist had no interest in the outcome of the trial and was not in any way monetarily concerned in who should prevail. True, he was an employee, at the time of the collision, for the purpose of driving truck of the plaintiff, but as far as the record indicates was not so employed at the time of the trial, and as a consequence, it is submitted, that his interest was not such as would classify him as a partisan or interested witness.

A very impressive case, concerning the testimony of an employe in litigation concerning his employer, is *Esso Standard Oil Company v. Stewart*, 190 Va. 949, 59 SE 2d 67, 18 ALR 2d. 1319. In this case, employees of defendant testified concerning the adjustments and repairs made on an oil furnace. The critical question concerned the condition of the oil furnace at the time of their inspection and repair. There was no contradictory evidence to the testimony of the employees. The Jury rendered judgment in favor of the plaintiff for damage resulting to his house when the oil furnace created smoke

which invaded the premises. The Virginia Court held as follows:

“Neither the Jury nor we are entitled to disregard the uncontradicted and not inherently incredible testimony.

“In *Epperson v. De Jarnette*, 164 Va. 482, 180 S.E. 412, we find:

“‘While the Jury is the Judge of the weight of testimony, and the credibility of witnesses, it cannot arbitrarily disregard the uncontradicted evidence of unimpeached witnesses which is not inherently incredible and not inconsistent with other facts and circumstances appearing in the record, even though such witnesses are interested in the result of the litigation.’”

This Court, in an original proceedings, arising out of an Industrial Commission case has cited the rule in different language but substantially the same as the Virginia Court. In *Jones, et al. v. California Packing Corporation et al.*, 121 Utah 612, 244 P.2d 640. This Court, after review of evidence, stated the general rule as follows:

(P. 619). “No issue is taken with the thought that the Commission is not obliged to believe evidence if there is anything inherently incredible about it, or any circumstance to warrant failure to accept it. However, where facts are proved by uncontradicted testimony of competent disinterested witnesses and there is nothing inherently

unreasonable, nor any circumstance which would tend to raise doubt of its truth, it should be taken as established. Refusal to do so is an arbitrary disregard by the trier of the facts, 20 Am. Jr. 1030, Evidence, Sec. 1180; 32 C.J.S., Evidence, Section 1038, page 1089, Evidence, Sec. 1038. For a somewhat comprehensive survey of the problem of when the trier of the fact may disregard uncontradicted testimony, see annotation 8 A.L.R. 796; see also *Jensen v. Logan City*, 96 Utah 522, 88 P.2d 459, and *Gagos v. Industrial Comm.*, 87 Utah 101, 48 P.2d 449."

At a later point in the opinion, the Court made the following additional statement concerning the disregard of substantial uncontradicted evidence:

"There is substantial, competent evidence which points so unerringly to the conclusion that the injury did result from the employment that we are persuaded that the Commission acted unreasonably and arbitrarily in refusing to believe it. There is no evidence of any substance to the contrary."

It is respectfully submitted that a finding which disregards uncontradicted, credible and reasonable testimony is arbitrary. That a finder of facts is as capricious when he makes no finding in disregard of such evidence as where he finds facts to the contrary.

It is respectfully submitted that the Trial Court in failing to find that the defendants were negligent, arbi-

trarily and capriciously disregarded competent uncontradicted, credible evidence. This Court should reverse the Trial Court and grant plaintiff a new trial, or order Judgment entered in his favor.

POINT II

DEFENDANT, THOMAS CHARLES COOK, ADMITTED THAT THE TRUCK OF PLAINTIFF WAS NEVER ON HIS SIDE OF THE HIGHWAY.

A slightly different rule applies to the testimony of a party to an action from the rule applicable where testimony is given by a disinterested or uninvolved witness.

This Court has on several occasions announced the rule that a party is bound by the testimony which he gives. This is so even though it is of such a nature as to completely destroy the possibility of his recovery. The first announcement of this rule by the Utah Supreme Court was in the case of *Fowler v. Pleasant Valley Coal Company*, 16 Utah 348, 52 Pac. 594. There, the plaintiff sued for damages resulting from personal injury and testified in his own behalf concerning certain facts relating to a dangerous overhanging coal slab in the mine in which he was working. This Court stated the rule as follows: (Pac. pg. 596)

“If there is a contradiction, it arises from plaintiff’s own testimony. In such case, where

non-suit is asked, the trial court may consider such testimony true as bears most strongly against the interest of the plaintiff."

This Court applied the general rule again in the case of *Benson v. Denver & Rio Grande Western Railroad Company*, 4 U. 2d 38, 286 P. 2d 790. This case involved the testimony of a driver concerning the distance he could see ahead and the speed at which he was driving. The Court upholding the granting of a nonsuit, cited the early case of *Fowler v. Pleasant Valley Coal Company*, supra, and quoted with approval the case of *Wheeler v. Fidelity & Deposit Company of Maryland*, 63 F. 2d 562, as follows: (p. 564):

"Where, as in this case, the party testifies in his own behalf, he is not entitled to go to the Jury on an issue unless that portion of his own testimony which is least favorable to his contention is of such a character as will sustain a verdict in his favor."

The Court in the *Benson* case also cited with approval *Alvarado v. Tucker*, 2 U. 2d 16, 268 P. 2d 986. This case involved the testimony of a police officer who was produced and testified on behalf of the plaintiff. This Court held that where the officer has testified that the brake marks indicated the automobile to be going between 25 and 30 miles per hour, a finding would be justified that the speed was 25 miles per hour. The evidence least favorable to the party producing it would be accepted.

This interpretation revealed that the defendant was not speeding since the speed limit was 25 miles per hour.

There are a number of annotations concerning this rule. One of the early annotations is at 80 *ALR* 625. There, the general rule is recited as follows: (P. 625)

“A majority of the cases support the rule that a party is precluded by his own testimony which is favorable to the adverse party.”

The annotation cites cases from a number of jurisdictions supporting the general rule. Among those are the following: United States, Alabama, California, Connecticut, Georgia, Idaho, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New York, North Carolina, Pennsylvania, Texas, Utah, Vermont, Virginia and Wisconsin.

The Utah case cited is *Fowler v. Pleasant Valley Coal Company*, supra. A more recent Annotation of the Rule is at 169 *ALR* 798. There, the Annotators recite the rule in the following language: (P. 799)

“If a party, in his testimony, makes a material statement of fact, negating his right of action or defense, and no more favorable testimony appears to contradict or modify, he is bound by it regardless of its credibility. Ordinarily, a Judge or Jury may disbelieve what a party says on the witness stand, even though uncontradicted, but under this general rule his opponent is entitled

to hold him to it, and even to demand a finding accordingly as matter of law.”

Again numerous jurisdictions are cited as being in favor of the general rule.

It is respectfully submitted that the testimony of Cook, who is a party to the action, to the effect that at no time was the truck of plaintiff observed on the wrong side of the road, should preclude any speculation or finding, that it was on the wrong side of the road.

The evidence of the plaintiff consistently also shows that his truck did remain on its own side of the road. The only possible way in which the truck of plaintiff and the truck of defendant, could collide is if the truck of defendants invaded the side of the highway reserved for use by westbound traffic.

It is respectfully submitted that the Court acted arbitrarily, capriciously and contrary to law in ruling that the evidence was evenly balanced, and plaintiff was not entitled to recover.

CONCLUSION

It is respectfully submitted that this Court should reverse the Judgment of the Trial Court and order that the Court determine that the defendants were negligent;

that plaintiff was entitled to judgment and order a new trial on the issue of damages only, or in the alternative grant plaintiff a new trial.

DATED thisday of, 1961.

Respectfully submitted,

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