1967

Gregory James Woodhouse, by and Through His Guardian Ad Litem, Glen W. Woodhouse, and Glen W. Woodhouse v. Norma Johnson : Respondent's Brief On Appeal

IN THE SUPREME COURT OF THE STATE OF UTAH

GREGORY JAMES WOODHOUSE,
By and Through His Guardian Ad Litem GLEN W. WOODHOUSE,
and GLEN W. WOODHOUSE,
Plaintiffs and Appellants,

— vs. —

NORMA JOHNSON,
Defendant and Respondent.

Case No. 10810

Respondent's Brief on Appeal

Appeal From a Judgment of the
Third District Court of Salt Lake County,
HONORABLE BRYANT H. CROFT, *Judge*

THOMAS, ARMSTRONG, RAWLINGS,
WEST & SCHAERRER
NEIL D. SCHAERRER
1300 Walker Bank Building
Salt Lake City, Utah
Attorneys for Defendant and Respondent

HATCH & McRAE
707 Boston Building
Salt Lake City, Utah
Attorneys for Plaintiffs and Appellants

TABLE OF CONTENTS

Authorities Cited

IN THE SUPREME COURT OF THE STATE OF UTAH

GREGORY JAMES WOODHOUSE,
By and Through His Guardian Ad
Litem GLEN W. WOODHOUSE,
and GLEN W. WOODHOUSE,
Plaintiffs and Appellants,

— vs. —

NORMA JOHNSON,
Defendant and Respondent.

Case
No. 10810

Respondent's Brief on Appeal

STATEMENT OF THE KIND OF CASE

As was stated by the appellants herein, this is an action to recover damages for personal injuries to a minor child.

DISPOSITION IN THE LOWER COURT

The case was tried to a jury who found no negligence on the part of defendant, and rendered a verdict of no cause of action.

RELIEF SOUGHT ON APPEAL

Defendant and respondent seeks that the jury verdict be sustained and the judgment on said verdict affirmed.

STATEMENT OF FACTS

Defendant desires to add the following to the appellants' statement of facts:

On June 11, 1967, defendant Mrs. Norma Johnson was registering her children for summer school. While at the school, she met a friend, Mrs. Una Jordan, and offered her a ride home (R-214). Mrs. Jordan accepted the ride, and when they arrived at the Jordan residence, Mrs. Johnson drove her car into the driveway (R-216). Mrs. Johnson was paying attention to her driving (R-215), and there were no children in the area at the time she drove into the Jordan driveway (R-216).

While the car was in the driveway, Mrs. Johnson and Mrs. Jordan sat chatting for approximately five minutes (R-217). During this time the motor was on, the windows were up, and the air conditioning was on (R-216). Then Mrs. Jordan got out of the car and proceeded toward the house (R-217).

After Mrs. Jordan left the car, Mrs. Johnson then looked to both sides and looked over her back shoulder and proceeded to slowly back her car out of the driveway (R-218, 220, 229). She had proceeded about four feet when she heard a faint cry (R-219). She then pulled her car forward approximately the same distance she

had backed, got out, and discovered that she had run over the 3-year-old Woodhouse child (R-230, 231).

Mrs. Jordan testified that when she got out of the car to go in the house, she looked toward the rear of the car and saw no children (R-274); further, that had the child been standing behind the car, she would have seen him (R-274). Anita Brown, a 15-year-old girl who was babysitting for a neighbor immediately next door to the Jordan residence, testified that she walked out of the front door just before the Johnson vehicle was starting to back up (R-341), and she saw the Woodhouse child under the car as evidenced by his feet with brown Keds sticking out from the back (R-342, 343).

It was apparent from the evidence that the Woodhouse child had been left unattended and had crawled unnoticed under the car while Mrs. Johnson and Mrs. Jordan were sitting in the car talking.

ARGUMENT

POINT I.

THE TRIAL COURT COMMITTED NO ERROR IN GIVING AN INSTRUCTION ON UNAVOIDABLE ACCIDENT.

Jury Instruction No. 18 relating to an unavoidable accident is taken verbatim from Jury Instruction Forms for UTAH (JIFU) 16.1 and 16.6. This form of instruction has had the general approval of the Utah State Bar, and has been in general use throughout the trial courts

of this state since the time of the publication of JIFU in 1957.

At 65 A.L.R.2d 12 appears an extensive annotation dealing with the subject of unavoidable accident instructions. The following statement from page 24 of the annotation summarizes the rule adopted by a majority of the courts:

> "In most jurisdictions in which the question has arisen, an "accident" instruction (that is, one stating the non-liability of the defendant in case the occurrence was an "accident," a "mere accident," an "unavoidable accident," or other like instruction employing the word "accident") may correctly be given in a motor vehicle case appropriate under the local decisions in its facts and circumstances as disclosed by the evidence."

The Utah court in the case of *Porter* v. *Price*, 11 Utah 2d 80, 355 P.2d 66, has clearly recognized the propriety of an unavoidable accident instruction. The *Porter* case distinguishes the California case of *Butigan* v. *Yellow Cab Company*, 320 P.2d 500, relied upon by appellants, and holds that where the evidence is susceptible of being so interpreted that an accident occurred without negligence on the part of the defendant, and where a party requests the unavoidable accident instruction, the trial court commits no error in giving such instruction. See also *Nelson* v. *Lott*, 81 Utah 265, 17 P.2d 272, holding that there is no prejudicial error in giving of an unavoidable accident instruction.

Plaintiffs under Point II of their brief make general statements to the effect that the evidence does not justify

an unavoidable accident instruction, yet nowhere do they show any substantial evidence of negligence. They claim that the facts of the case must support the instruction, yet they make no attempt to show what facts in this case would preclude the instruction. If there were ever a case where the evidence is susceptible of being interpreted to show no negligence on the part of a defendant and thus justify the giving of an instruction on unavoidable accident, it would seem that the instant case is that case. Unless plaintiffs contend that Mrs. Johnson had a duty before backing out of the driveway of getting out of her car, walking around it, and looking under it when there was nothing to put her on notice or bring to her attention any danger, it is difficult to see how her actions could in any way be considered unreasonable. While such extraordinary caution may be commendable, defendant is unaware of any authority whatsoever which would require it as a general standard of conduct. There is nothing in this record to show that Mrs. Johnson did anything that a reasonable prudent person would not have done, or failed to do anything that a reasonable prudent person would have done. Under such circumstances, the giving of an unavoidable accident instruction was proper.

POINT II

THE TRIAL COURT COMMITTED NO ERROR IN FAILING TO GIVE PLAINTIFFS' INSTRUCTIONS RELATING TO A SECOND INJURY.

In this case it was impossible to determine whether a wheel of defendant's vehicle passed over the Wood-

house child once, twice, or not at all, in that the tire merely scraped the child's head. In any event, where the jury found no negligence at all on the part of defendant, it would seem to be somewhat immaterial whether the child's injuries were sustained by reason of the backward or forward motion of the car.

The jury in this case was fully instructed on all of the necessary concepts and principles of negligence. There were both general negligence instructions and specific instructions covering the specific acts of negligence as claimed by the plaintiffs. When considered as a whole, the instructions as given fairly and adequately presented to the jury all of the issues for determination. This court has held time and time again that instructions must be considered altogether and viewed with tolerance and understanding to see whether the basic issues were fairly and intelligently presented for determination, and if that purpose is accomplished, that is all that is necessary, and no verdict should be nullified for minor errors or inconsistencies in the instructions. *Heywood* v. *D. & R. G. Railroad Company*, 6 Utah 2d 155, 307 P.2d 1045.

Plaintiffs have had a full opportunity to present their evidence and their contentions to the court and jury, and have had a fair trial upon all of the issues. The trial judge further considered all of plaintiff's claimed contentions of error on a motion for new trial and found no merit to the same. All presumptions now stand in favor of the validity of the verdict and judgment, and said judgment should be allowed to stand. *Wardell* v. *Jerman*, 18 Utah 2d 359, 423 P.2d 425.

CONCLUSION

Based upon all of the above and upon the complete record of proceedings in this case, defendant respectfully submits that the verdict of the jury and the judgment of the lower court be affirmed. Further, there is no need to make any advisory rulings with respect to a father's right to recover for the loss of future services of a minor, as requested under Point III of Appellants' brief, inasmuch as plaintiffs in no event are entitled to a new trial.

Respectfully submitted,

THOMAS, ARMSTRONG, RAWLINGS,
WEST & SCHAERRER
NEIL D. SCHAERRER
1300 Walker Bank Building
Salt Lake City, Utah

Attorneys for Defendant
and Respondent