

1963

Vivian Meier v. Merrill Soren Christensen : Brief of Appellant

Utah Supreme Court

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APR 16 1964

IN THE SUPREME COURT
OF THE STATE OF UTAH

FILED

APR 29 1963

VIVIAN MEIER,

Plaintiff-Appellant

Clerk

Court, Utah

— vs. —

Case
No. 9855MERRILL SOREN CHRISTENSEN,
Defendant-Respondent

APPELLANTS BRIEF

Appeal from the Judgment of the
6th District Court for Sevier County
Honorable Ferdinand Erickson, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

VIVIAN MEIER,

Plaintiff-Appellant

— vs. —

MERRILL SOREN CHRISTENSEN,

Defendant-Respondent

Case
No. 9855

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is an action for personal injury arising out of an intersection collision between the Plaintiff driving an automobile owned by her father and the Defendant driving a truck owned by the Sevier School District.

DISPOSITION IN LOWER COURT

The case was tried to a jury. From a verdict and judgment for the Defendant, Plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment of the Lower Court and a new trial.

STATEMENT OF FACTS

This case arose out of an intersection collision which occurred on the 19th day of November, 1960 at a point where First South Street and Second East Street intersect in Richfield, Sevier County, Utah. Vivian Meier, Plaintiff, was driving an automobile north on Second East Street and had proceeded into the intersection when the automobile she was driving was struck by a vehicle being driven by Merrill Soren Christensen. Vivian Meier suffered serious injuries as a result of the collision, and an action was brought to recover for the injuries she had suffered and resulting expenses which have been incurred by reason of the accident.

The matter was tried before the Honorable Ferdinand Erickson, District Judge sitting with a jury on the 23rd and 24th days of January, 1963. The jury returned a verdict of no cause of action, and from this verdict and the judgment thereon the Plaintiff now appeals.

POINTS URGED FOR REVERSAL

1. The District Judge erred in commenting on Plaintiff's evidence and extensively examining a witness called by Plaintiff, which acts of the Court were highly prejudicial.

2. The Court erred in failing to accurately instruct the jury as to the question of contributory negligence, if any, on the part of the Plaintiff, and further failed to accurately instruct as to the question of the Plaintiff's contributory negligence, if any, being a proximate cause of her injuries.

ARGUMENT

Point 1. The District Judge erred in commenting on Plaintiff's evidence and extensively examining a witness called by Plaintiff, which acts of the Court were highly prejudicial.

It is realized a trial judge in a jury case has a difficult task before him. He must have latitude in the conduct of a trial in order to meet the various circumstances and situations which arise during the course of the trial. However, a District Judge must conduct a trial in such a manner that it will not prejudice the rights of the parties, especially should he refrain from any remark which would in any way influence the jury.¹

A trial judge has power within proper limits to examine witnesses for the purpose of eliciting material facts. The limits of this examination, however, do not permit an extensive examination which would unduly impress the jurors with the judge's opinion of the testimony or of the witness testifying.² Such conduct on the part of a judge invades the province of a trial jury which is empaneled and sworn to try and determine by their verdict questions of fact.³ Appellate Courts have unanimously held any action by a District Judge which reflects on the testimony of a witness and which gives testimony an undue prominence by

¹ 53 Am Jur Trials Sec. 76

² Aero Enterprises vs. Walker 228 P2D 811, 123 Colo. 113

³ 78-46-4, UCA 1953

either minimizing or exaggerating its value constitutes reversible error.¹

It has been uniformly held that conduct of a judge trying a case must be such that it will be fair to both sides. A departure from this fundamental requirement has been held to be reversible error.² Prejudicial error has been held to be committed if a judge's comments and remarks to a witness indicate that the Court had prejudged the case, or that he thinks the witness is not telling the truth, or that his statements are inaccurate.³ It has further been uniformly held that comments on the evidence which go to the weight and sufficiency thereof are prejudicial error and invade the province of the jury.⁴

Keeping in mind the foregoing holding, we quote from the transcript of evidence to demonstrate the error committed by the District Judge and the highly prejudicial effect it had on the Plaintiff's case. As we briefly stated, this action arose out of an intersection collision between an automobile being driven by the Plaintiff and an automobile being driven by the Defendant. The most crucial issue of fact for the jury to find was the exact point of impact. To establish the point of impact the Plaintiff called a police officer who investigated the accident. The officer's testimony was offered to assist the jury in locating the exact point of impact and further, to demonstrate the Plaintiff's favored position in the intersection. Her position was that of being on the right at the time of entering the intersection, (R 131) and also that of entering the intersection first. (Plaintiff's exhibit 1; R 75, L 18-24; R 92, L 16-29).

¹ See Annotation 127 ALR 1389

² Am Jur Appeal & Error 1052

³ Am Jur 1052 - Appeal & Error 1053 & 1054

⁴ Am Jur Appeal & Error - 1055

Leslie Jensen, Richfield City Chief of Police, testified at some length concerning the investigation he made at the scene of the accident. (R 119 through 181).

The officer testified that he was able to identify the point of impact by locating the debris in the intersection. The debris consisted of glass, dirt, mud, and other material which had fallen from the cars. He stated he was able to cross check the point of impact and to establish it definitely by identifying scuff marks left by each of the four wheels of each of the automobiles. (R 135; R 136; R 138, L 19 through 30; R 139, L 1 through 18; R 142, L 12 through 19; R 178; R 179; and R 180). The officer stated that as the cars came together each of the cars was forced to slide sideways, and though there were no brake marks left by either car, he was able to establish a marking from each of the four wheels of each automobile by the scuff marks left at the time of impact. He said that he took a piece of chalk and chalked each of the four wheels on each automobile and by cross checking the position of the wheels at the time of impact with the pile of debris, he was able to establish an exact point of impact. The point of impact the officer established showed the front of the Plaintiff's automobile was nearly through the intersection.

The District Judge took exception to the officer's statement that a point of impact could be established with certainty. (R 138, L 14 through 18; R 154, L 2 through 11). The Court proceeded to make such an examination of the witness as to indicate to the jurors the officer's statements were open to serious question and that they were inaccurate. The Court also made comments in which he stated positively that a point of impact could not be established with certainty.

The emphasis added by underscoring certain portions of the statements and questions of the Court have been added by us and were not a part of the Court Reporter's transcript.

Commencing at Page 137 of the record, line 21, the Court states as follows:

THE COURT: Now, of course, that contemplates a factor on two moving objects, for example, two moving objects and we must assume, of course, both were moving at the time.

MR. OLSEN: That's right.

THE COURT: And they collide or meet. We have every right to believe under natural law that the position of those vehicles is going to be altered somewhat from their direction or course. At the first moment, for example that these vehicles are moving they are not going to come to a direct stop. I think we have a right to assume that. Would that debris, which he finds, the glass or, I think he mentioned the —

WITNESS: The mud or dirt or whatever you call it.

THE COURT: The mud or dirt or whatever happens to fall, would that—this debris—with the vehicle still moving, would that debris be where the impact came or would it be scattered along some distance?

MR. OLSEN: I would be glad to have you ask that question of the officer if you would like to, the way they cross check on that problem. I think it might be well for the jury to understand that.

THE COURT: The only reason I ask that is **that in the Court's judgment it is rather difficult to say just where these two automobiles or two moving objects came together**, both moving. If one were stationary, for example, why—

The foregoing questions and comments focused the jury's attention on the importance of the problem and also suggested the Court's opinion on the question of fact pre-

sented. With this background, the examination and comments which followed were disastrous to the Plaintiff's case.

Continuing at page 139, line 21 of the record:

THE COURT: Well, of course, it somewhat answers the question that was in the Court's mind. The only thought the court had, of course, was whether or not these visible things on the highway, the things he mentioned, the dirt, the glass, the debris, was proper evidence of the position of the cars at the time of impact. If a vehicle is traveling north on Second East, at that intersection, another vehicle is traveling East on First South and the two meet, the car traveling north—it would seem the car traveling north, the Oldsmobile was hit somewhere near the front door, would that not have a tendency to push that car farther east?

WITNESS: It would.

THE COURT: Now when would those marks, the tire marks become visible—immediately or would they extend over a little period of time?

A. They scraped the dust that's on the road. You know there is a coat of dust that's on there and it scrapes down there to the oil. It takes the dust off and leaves a black mark—tire prints.

Q. Could those marks be left immediately at the time of impact?

A. Yes.

Q. At the time these forces apply?

A. It would.

MR. OLSEN: Do you have any further questions, Your Honor?

BY THE COURT: What kind of marks do you refer to? What kind of marks would be left on the highway? I mean by the tires.

WITNESS: By the tires, they are generally kind of wide and sometimes they are narrow and maybe they will go quite a little ways, length ways, like they will be the width of the tires that is on the oil.

THE COURT: Would it always follow that where

two vehicles meet as these two vehicles did, there would be some tire marks?

A. Most of the time.

Q. BY THE COURT: Could not one car, for example, move without any appreciable evidence of a tire mark?

A. Well, generally when there is an impact like that, both cars leave a mark.

THE COURT: Now, may I ask you, what mark would the car traveling east, like the pick-up truck in this case, would there be any evidence?

WITNESS: There would be a small piece from either side, whichever way it went to, there would be some marks.

THE COURT: Now you got on the car that is traveling east, you've got a wheel running in the course or direction it's traveling on?

WITNESS: Yes.

THE COURT: Would that wheel tend to show a greater mark on the surface of the highway, than a wheel that is being slipped along?

WITNESS: Well, no, the car that's sliding along will make the widest mark.

THE COURT: And what marks did you observe so far as the vehicle traveling east on First South, that would be the pick-up truck?

A. Well, it had marks so you could tell where it slid on the oil.

THE COURT: Did you identify those marks and measure them?

A. Well, I just measured from there to the pile of debris that was laying in the middle of the road at the intersection.

THE COURT: That's all I have.

Q. The tire marks you are talking about are they brake marks or scuff marks from a car knocked sideways?

A. Well, if they've got their brakes on or if they let it go, it will make marks anyway, with the brakes on or off.

In order to demonstrate to the jury the officer's measurements and their significance, a plat was prepared for the Plaintiff by a registered land surveyor. The plat was admitted into evidence upon stipulation of counsel as Plaintiff's Exhibit 1. It showed the intersection drafted to scale and also showed each of the permanent markers used by the officer to fix the point of impact. The officer first located the point of impact by the method we have described, and then measured from the point of impact to permanent markers at or near the intersection. (R 142, L 23, R 143, L 15 through 24). The officer stated the point of impact could be re-established by measuring back from the monuments. It is clearly seen the point of impact could be re-established by measuring back from the permanent markers the same distance as was shown in the officer's report and then by making arcs after each measurement. The arcs would cross in the street at one point, which point would be the point of impact.

The District Judge continued to undermine the testimony of the officer and to indicate the methods he had used to gather his evidence and the manner in which he had made measurements weren't accurate and were subject to challenge. The examination continued (R 152, L 15):

THE COURT: Let me say that I think it is probably confusing. After all the only way to determine, it seems to me, the point of impact, is take that area for example, which is legally described as the intersection, from the sidewalk on the north bordered by the sidewalk on the west by the sidewalk on the south, by the sidewalk on the east. Now that area comprises your intersection.

MR. OLSEN: That's correct, Your Honor.

THE COURT: Now, there is a confined, limited area. Now if per chance an accident happens within that area, we know if, for example, a car is traveling east into that intersection, he has got to be for

example on the south side of that highway, hasn't he? And we know if a vehicle is traveling, for example, north on that or into that same intersection, it in turn must be on the east side of that highway. Now it appears to me that the only safe way to determine the point of impact, if it can be done, and if you can do that, is all these other factors, but assuming that you can go up there and see some debris and say, "Well, that must be it." That's about what we're doing. It seems to me that the measurements should be made within the intersection and not, for example, from a telephone pole out here to a certain point or from somewhere else. Now, I don't know why we've got a difference of distance between 35 and 32 feet. What's the significance of that thirty-five feet?

The examination continued further (R 155, L 5):

THE COURT: Of course, I'm aware of that, the only thing what we are trying to do here, Tex, with the aid of this jury and this court, is to fix, as near as we can fix, what someone said or where someone said the impact came, the officer who investigated.

MR. OLSEN: That's right.

THE COURT: Now he's got to have a square here, as I say bounded by sidewalks and corners. Now he has got to determine, for example, where that impact is before he can start measuring from the telephone pole out to some particular point.

MR. OLSEN: That's right.

THE COURT: And from some flume to some other point, so the essential thing is the point which this witness testified, **which may or may not be.** It's his judgment that this probably was where it happened, **so it appears to me that instead of running lines from given point, the essential thing, the thing he had to do is find out where those cars collided in his judgment.**

MR. OLSEN: That's just exactly what he's talking about.

THE COURT: Now if he could draw a square I think he could do that just as easily as anybody else—

MR. OLSEN: And he's—

THE COURT: And fix, for example, the center of that square in relation to the accident to the center of the square.

Continuing R 156, L 25:

THE COURT: Let me ask the witness one question: **What was the purpose of making this measurement?** That would be from looking north now, from the west end of the culvert, running in a northeasterly direction thirty-five feet?

WITNESS: Well, you try to take—you've got three or four points you measure from, so you will have something to go by.

THE COURT: From these points you measure from the known—you call it a monument—from this culvert here, you measure up how far? **You went thirty-five feet. Why thirty-five feet?**

WITNESS: Well, that's the center of the impact.

THE COURT: Well, that would be in this quadrant here, would it not? These two lines indicate the center—that would be the center, I assume, of the intersection?

WITNESS: Yes, right in this area here (indicating.)

THE COURT: Well, this line—that's why I want to know **why this thirty-five foot measure?**

WITNESS: Well, you got to have your measurements or you can just have one. But it is better to have two or three measurements, if one or the others are to be moved, like a telephone pole, they come and move it or they move a culvert out.

THE COURT: **Of course, you could take measurements, for example, and you could literally locate that accident in any quadrant, if you are just going to just take a measurement, that's my point.**

The Court not only commented on the method of locating the point of impact, but inaccurately informed the witness and the jury that by using the investigation methods

of the witness the accident could be located in any quadrant of the intersection. (R 157, L 20). This was not only a prejudicial comment, but was an inaccurate assumption of the Court.

The Court then continued: (R 157, L 27)

THE COURT: I want him to testify where in his judgment this accident happened. In what particular quadrant, **and I think that is something the jury should know on this thing.**

It is apparent the foregoing question indicated to the jury that the Court did not believe the testimony which had already been given by the witness and the Court was going to require the witness to give information to the jury which would have some value to them.

Continuing (R 158, L 14 through 19):

THE COURT: Well, it is in his judgment, that's where he believed it was, just a little north of the center line.

A. Just a little over the center line.

THE COURT: **I doubt that we can illuminate the matter much.** We have got rather confused, I know.

The last comment of the Court indicated to the jury the officer was very confused in his testimony and it was impossible to go farther with the witness to illuminate the matter or to identify the point of impact. This assumption was contrary to fact since it appears from an examination of the officer's testimony that he was very specific as to the point of impact. However, even if the comments of the Court were factual the judge would not have had the privilege of invading the province of the jury and commenting upon questions of fact and thereby emphasizing his opinions thereon.

The damaging remarks of the Court concerning the unreliability of the officer's testimony and the impossibility

of establishing a definite point of impact would be sufficient to prejudice a jury and cause the jury to discount or disregard the officer's testimony. This prejudice together with the instructions given by the Court, would leave the jury no alternative but to return a verdict against the Plaintiff, as was done.

Point 2. The Court erred in failing to accurately instruct the jury as to the question of contributory negligence, if any, on the part of the Plaintiff, and further failed to accurately instruct as to the question of the Plaintiff's contributory negligence, if any, being a proximate cause of her injuries.

The Plaintiff entered the intersection in which the collision occurred from the right, and the only logical conclusion which can be reached is the Plaintiff was also first in the intersection. (Plaintiff's exhibit 1; R 75, L 78-24; R 92, L 16-29).

Under these circumstances Plaintiff was entitled to instructions to the jury concerning her favored position in the intersection. By reason of Section 41-6-72, UCA, 1953, and also by reason of a local extension of the statute adopted by Richfield City under Richfield City Ordinances, 1953, Section 308, it is specifically provided a driver of a motor vehicle approaching an intersection shall yield the right of way to a vehicle approaching the intersection from the right. It is also provided a driver shall yield to the vehicle first entering the intersection.

The statute and ordinance provide definite rules for intersections in order to make movements of traffic both practical and safe. The rules established reiterate general traffic rules adopted throughout the United States and cited in 2 Blashfield Cyclopedia of American Law and Prac-

tice, permanent edition, Sections 991 to 994. The general rule commented upon is that the vehicle entering the crossing first has the right of way over the second vehicle coming from another direction, unless under the standard of due care, the driver should not proceed because to do so would hazard a collision. In the present case, even if there is doubt as to which automobile entered the intersection first, the rule concerning the driver approaching from the right applies and gives the Plaintiff the right of way. The Plaintiff was, therefore, entitled to an instruction which clearly showed the jury the Plaintiff had the right to rely on her favored position.

In the well reasoned case of *Martin vs. Stevens* (121 Utah, 848, 243 P2D, 747) the following language was used:

“Although Plaintiff had the right of way under both rules above referred to, yet there developed upon him the duty of due care in observing the other traffic. But in doing so, he had the right to assume, and to rely and act on the assumption that others would do likewise; he was not obligated to anticipate either the other drivers would drive negligently, nor fail to accord him his right of way, until in the exercise of due care, he observed, or should have observed, something to warn him that the other driver was driving negligently or would fail to accord him his right of way. If this principle is not clear in the earlier Utah cases, it is firmly established by the more recent expressions of this Court.”

The Court also discussed the Utah case of *Hess vs. Robinson*, 109 Utah 60, 163 PD2 510, where the Plaintiff failed to see the Defendant's ambulance coming into the intersection from the west. It was held that even though Plaintiff was negligent in not seeing the ambulance, the question as to whether his negligence proximately contributed to the cause of his injury was properly submitted to the jury. It was held the jury could find it to be within the

driver's duty of due care to assume the driver of the other vehicle would obey the stop sign, and that he was entitled to proceed through the intersection until it became apparent to him the ambulance would not stop.

In the case of Lowder vs. Holley 120 Utah 231, 233 P2d 350, the Plaintiff failed to observe the Defendant's vehicle approaching from the right. There was evidence from which it could be found that at the time the Plaintiff was about ready to enter the intersection the Defendant was 250 feet away. It was held the question of whether the Plaintiff's failure to see the defendant approach was negligence was a question of fact. It was also observed that had the Plaintiff seen the Defendant it could be found to be within his duty of due care to assume the Defendant would yield him the right of way.

In accordance with the Utah holdings cited above the Plaintiff submitted Plaintiff's proposed instruction No. 4 on the question of negligence which reads as follows:

You are instructed that if the Plaintiff, Vivian Meier, was at the time of and immediately prior to the time of the accident driving her automobile into and across the intersection of First South and Second East Streets in a lawful and proper manner, she had the right to assume and rely and act on the assumption that others would do likewise; she was not obliged to anticipate either that other drivers would drive negligently nor fail to accord her right of way until in the exercise of due care she observed or should have observed something to warn her that the other driver was driving negligently or would fail to accord her the right of way.

The District Court erred in refusing Plaintiff's instruction, and as a substitute therefor minimized the Plaintiff's position by giving instruction No. 10 (R 21) which states as follows:

When the law says that one person has the right of way over another, it simply means that such person has the immediate privilege of occupying the space in question and other persons must yield to such person.

The foregoing instruction appears to require that a party actually possess or be in a particular space before he has the privilege of claiming the right of way. The term "immediate privilege of occupying" appears to require that the party be in the particular space as though parked in that space in order to have any prior claim or right which would require the other party to yield. The instruction is not broad enough to allow the party having the prior right the privilege of continuing on and crossing the intersection.

Instruction No. 11 shown at page 22 of the Record reads as follows:

The fact that one has the right of way, if such be the fact, does not excuse him from the exercise of ordinary care to avoid causing an accident.

The two instructions cited above not only fail to explain the favored position of the Plaintiff, but, in fact, negate it.

Under the rulings in *Hess vs. Robinson supra*; *Lowder vs. Holley supra*; and *Poulson vs. Manis*, 241 P2D 152 121 Utah 269, the Plaintiff was also entitled to a specific instruction concerning proximate cause. Even if the jury concluded that the Plaintiff failed to keep a lookout to the east, Plaintiff was entitled to an instruction which could permit the jury to find that this failure, although negligence, may not have proximately caused the collision. (See Plaintiff's offered instruction No. 5 which was rejected.) The jury was entitled to be instructed that the Plaintiff, within the limits of reasonable care, could have assumed the Defendant would yield the right of way.

The general instruction on proximate cause and negligence given by the Lower Court, instruction No. 15-A (R 27), would mean nothing to the jury, and for this reason was objected to by the Plaintiff.

The error complained of was compounded by instruction No. 18 found at page 33 of the Record which is as follows:

If you find from the evidence that Vivian Meier knew or should have known, under the circumstances, that the car driven by Merrill Soren Christensen was not going to yield the right of way, then Vivian Meier had a duty to use reasonable care to avoid a collision; if you find she failed to do so, then she is negligent.

Bullock vs. Luke 198 P2D 350.

The addition of the case citation for the jury drew undue attention to the instruction and also set it apart and thereby gave it more weight than the other instructions. This instruction taken with instructions 10 and 11 seemed to place the absolute obligation on Vivian Meier of knowing the Defendant would fail to yield the right of way, and further placed the obligation upon Vivian Meier of avoiding the collision. The instruction was misleading in that it placed the burden of avoiding the accident upon the Plaintiff who held the right of way. It was also erroneous in that it failed to explain that even if Vivian Meier were found to be negligent in failing to see the Defendant, this negligence may not have proximately caused the accident, as we have already discussed. The instructions taken together appear to inform the jury that the Plaintiff was negligent by reason of the fact she was involved in an intersection collision.

CONCLUSION

In conclusion we respectfully submit the acts of the District Judge in commenting upon Plaintiff's evidence and also in extensively examining one of Plaintiff's witnesses were highly prejudicial.

In connection with Point 2 involving the instructions given by the District Court, we also respectfully submit the instructions did not accurately instruct the jury concerning the law of the State of Utah on intersection collisions. The instructions, in fact, gave the Plaintiff an insurmountable burden to overcome. In our opinion the instructions were such that it would have been impossible for the jury to find for the Plaintiff, since the instructions left the jury with only one conclusion to reach, and that was that the Plaintiff was negligent at the time of the collision, and for this reason, she could not recover.

For all of the reasons set forth, the Appellant requests that the verdict of the jury and the judgment of the Lower Court be reversed and the matter be remanded for a new trial.

Respectfully submitted.

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