1963

Calvin H. Johnson v. Cornwall Warehouse Company and Ernest James : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT

of the

STATE OF UTAH

CALVIN H. JOHNSON,
Plaintiff-Appellant,

vs.

CORNWALL WAREHOUSE COMPANY, and ERNEST JAMES,
Defendants-Respondents.

Case No. 9921

APPELLANT'S BRIEF

Appeal from the Judgement of Third Judicial Court for Salt Lake County, Honorable Joseph G. Jeppson

GAYLE DEAN HUNT, and
DWIGHT L. KING,
Attorneys for Plaintiff and Appellant
2121 South State Street
Salt Lake City, Utah

R. M. BERRY
455 East Fourth South
Salt Lake City, Utah
Attorney for Defendant-Respondent

INDEX

AUTHORITIES CITED

STATUTES CITED

TEXTS CITED

IN THE SUPREME COURT

of the

STATE OF UTAH

CALVIN H. JOHNSON,
Plaintiff-Appellant,

vs.

CORNWALL WAREHOUSE COMPANY, and ERNEST JAMES,
Defendants, Respondents.

Case No. 9921

APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

This is an Appeal from a Judgment by the Honorable Joseph G. Jeppson, Judge of the Third Judicial District Court from an Order and Judgment of Non-suit and Judgment for Defendant Non Obstante Verdicto in favor of the defendants and against the Plaintiff. Plaintiff is seeking reinstatement of a Special Verdict in his favor and against the Defendants. The case arises out

of a collision between two automobiles at an intersection which resulted in personal injury to the plaintiff, and damage to his automobile, causing loss of earnings and medical expenses.

DISPOSITION IN LOWER COURT

The case now on appeal was presented to the Jury by the Trial Court on a Special Verdict. Special Verdict consisted of two propositions:

Proposition No. 1 read as follows:

PROPOSITION NO. 1

The Plaintiff was contributorily negligent in the operation of his automobile in the following particulars:

(a) In not keeping a proper lookout. .....

No preponderance of the evidence either way. X .....

(b) In failing to yield the right-of-way to the defendant False .....

No preponderance of the evidence either way .....

(c) In failing to have his automobile under control False .....

No preponderance of the evidence either way .....

(If you have answered "True" on a Subdivision of Proposition No. 1, do not consider Proposition No. 2)

PROPOSITION NO. 2 concerned damages only, and the Jury Verdict amounted to $3,131.09.

The Court entered Judgment upon the Verdict in favor of the plaintiff, and against the defendant for the $3,131.09; thereafter, on Motion for New Trial filed by the defendants, the Court made its Order and Judgment of Non-suit, and Judgment for defendant, N. O. V., the Court finding as a matter of law, that the plaintiff was contributarily negligent, failing to keep a proper lookout, and in failing to yield the right of way to the defendant's vehicle which entered the intersection first, and at a time when plaintiff's vehicle was not in the intersection, or so close as to constitute an immediate hazard. From this Order the Appeal was prosecuted.

RELIEF SOUGHT ON APPEAL

Plaintiff, by this Appeal, seeks to have this Court reinstate the Judgment on Verdict entered on the Special Verdict as found by the Trial Court Jury, on the ground that the Court's Order violates the rights of the plaintiff as guaranteed by Amendment No. VII of the Constitution of the United States in that said Amendment provides as follows:

"In suits at Common Law, where the value

in Controversy shall exceed $20.00, the right of Trial by Jury, shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the Common Law."

And Article "I" Section 10 of the Constitution of Utah.

STATEMENT OF FACTS

On May 31st, 1962, at approximately 4:45 P. M., at the intersection of 2nd South and 3rd West Streets in Salt Lake City, Utah, a truck driven by Defendant, James, on the business of Cornwall Warehouse Company, collided with a 1957 Chevrolet Station Wagon, being driven by plaintiff, the owner thereof.

Plaintiff filed his action. Defendant answered, and the Pretrial Order set the issue to be tried as those set forth in the Complaint and Answer. The Complaint charged defendants with negligence as follows:

a) Failure to keep a proper lookout;

b) Failure to keep said automobile under proper control;

c) Failure to yield the right of way;

d) Failure to stop at the stop sign on Third West Street at the intersection;

e) Entering said intersection when it was not safe to do so; and

f) Entering said intersection at a speed which was not reasonable under the circumstances.

The Answer denied negligence on the part of the defendants, and alleged as an affirmative defense that the accident was caused solely, or proximately contributed to by the negligence of the plaintiff.

At the intersection where the collision occurred, the eastbound traffic on Second South has the right of way over the southbound traffic on 3rd West, and northbound traffic on Third West. Traffic moving west on 2nd South is also required to stop by a stop sign at the intersection.

The only traffic having the right to proceed through the intersection without stopping being traffic eastbound on 2nd South.

Plaintiff was eastbound on 2nd South, Defendants were southbound on 3rd West, and making a left turn through the intersection to go east on 2nd South.

As Plaintiff approached the intersection, he observed the truck of defendant stopped at the stop sign facing south on 3rd West Street. (Record 139). He pro-

ceeded through the intersection at a speed of from 20 to 25 miles per hour, and was struck on the left rear side of his car as he approached the east side of the intersection. He saw the defendant's truck a moment before the impact occurred.

Plaintiff testified that he looked for traffic and was alert to the hazards in the intersection, (R. 141, 142), and saw the defendant's truck coming at him from the left side moments before the impact occurred. (R. 142). Plaintiff's estimate of defendant's speed was between 10 to 15 miles per hour. Defendant's estimate of his own speed was 8, 9, or 10 miles per hour (R. 256).

The trial Court, on the basis of the evidence outlined, found as a matter of law "The plaintiff was contributorily negligent in failing to keep a proper lookout and in failing to yield the right of way to defendant's vehicle which entered the intersection first and at a time when plaintiff's vehicle was not in the intersection, or so close as to constitute a hazard, and that plaintiff's claim is barred by plaintiff's contributory negligence. (R. 88)

ARGUMENT

POINT I

THE COURT ERRED IN RULING AS A MATTER OF LAW THAT PLAINTIFF WAS CONTRIBUTORILY NEGLIGENT.

The Trial Court, by its ruling setting aside the verdict in favor of the plaintiff and against defendants is ruling in effect that even though plaintiff is on a street protected by a Stop Sign, he must continuously watch the automobile which has stopped for the intersection, and avoid in every event any movement by such automobile.

The Intersection Laws of the State of Utah have been the subject of legislative enactment since the last case discussing this matter of which the plaintiff is aware. The intersection law now reads as follows:

> "*Section 41-6-73*: Vehicle turning left at Intersection. — The driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard, during the time when such driver is moving within the intersection."

This Section now makes it the duty of a driver approaching from a stop sign to yield the right of way to all vehicles that are so close as to constitute an immediate hazard, "during the time when such driver is moving within the intersection." There can be no question now, under this Section which was enacted by the Legislature in 1961, that a person on a disfavored highway must wait until traffic which might be a hazard to him

while he is moving in the intersection has cleared through the intersection.

The Section of the Law which was applicable to intersection right of way, prior to 1961, was Section 41-6-74, U. C. A. 1953 which provided that a person after stopping for a stop sign could proceed if no vehicle was approaching so closely as to constitute an immediate hazard.

Plaintiff submits that under the facts and circumstances of this case, there could not be presented a purely legal question as to plaintiff's contributory negligence. The question is one of the most difficult, complicated, and sensitive questions of fact, and as a consequence, must be left to the Jury for determination if plaintiff is to be granted his constitutional rights to a trial by Jury.

The general law seems to be clear. It is stated in Volume 5A American Jurisprudence, page 686, Section 712:

> "A driver who makes reasonable observation before entering an intersection is not contributorily negligent as a matter of law for failing to make additional observation. When it appears to be safe to cross an intersection, an automobile Driver's contributory negligence in the light of the defendant's unanticipated speed or other negligence is for the Jury.

> "Clearly, however, the fact that the plaintiff proceeded into or across an intersection with the traffic signal or sign in his favor ordinarily precludes finding him guilty of such negligence as a matter of law, and he is sometimes held free of contributory negligence as a matter of law in such circumstances."
>
> See also: Blashfield, Cyclopedia of Automobile Law and Practice, Volume 10, Part 2, Section 6619 P. 10-17, and 1956 Cumulative Pocket Part, No. 6619, P. 7-20.

This Court adopted the rule set forth as a general law in the United States in the case of *Williams vs. Zion's Cooperative Mercantile Institution,* 6 Utah 2d. 283, 312 Pac. 2d. 564.

This Court, in the Williams case stated the Law which we believe is beyond possibility of distinction on facts very similar to those now before this Court. In that case, the Court stated;

> "A fact question was presented as to whether defendant entered the intersection when plaintiff was therein, or if defendant entered the intersection when plaintiff was approaching so closely on said through highway as to constitute an immediate hazard. The further fact question was presented as to whether defendant had entered the intersection under such circumstances as to impose on plaintiff the duty of yielding the right of way. Those are proper jury questions and should have been submitted.

"After plaintiff observed defendant stopped at the stop sign, plaintiff traveled the 25 feet and the north half of the intersection with Third Avenue before the impact occurred. At 20 miles an hour, plaintiff would travel that distance in less than a second and a half. Had plaintiff without the loss of any time whatsover realized, when she saw defendant stopped, that defendant was going to pull into the intersection, regardless of plaintiff's position, still with most favorable road conditions and a vehicle mechanically perfect, plaintiff would have traveled 43 feet and into the course of defendant's truck before her car could have been stopped. We cannot say that plaintiff was negligent as a matter of law in driving into the intersection under the conditions present. Plaintiff's negligence, if she was negligent, in so doing is not so apparent that all reasonable minds would agree upon that fact.

"Nor are we able to say with certainty that her negligence, if any, in so doing was the proximate cause of the accident. That, too, was a fact question to be determined by the Jury — being one on which reasonable minds might well and probably would disagree."

In addition to the Williams case, this Court on several occasions has held that in intersection collisions a more difficult and closer question, as far as contributory negligence is concerned, can hardly be conceived. In the following cases, this Court has steadfastly held that in intersection collisions where time, distance, and other such important factors are a matter of opinion, and

usually driver opinion, the question of negligence, contributory negligence, are matters which should be left for the Jury to determine. See the following cases: *Beck* v. *Jeppesen,* 1 Utah 2d 127, 262 Pac. 2d 760, *Martin* v. *Stevens,* 121 Utah 484, 243 Pac. 2d. 747, *Poulsen* v. *Manness,* 121 Utah 269, 241 Pac. 2d. 152, *Lowder* v. *Hallen,* 120 Utah 231, 233 Pac. 2d 350; *Martin v. Sheffield,* 112 Utah 478, 189 Pac. 2d. 127. *Bates v. Burns,* 3 Utah 2d. 180, 281 Pac. 2d. 209, and *Larsen* v. *Evans,* 12 Utah 2d. 45, 364 Pac. 2d, 1088, are additional Utah cases which demonstrate the adherence of this Court to the basic and fundamental rules that questions of negligence, contributory negligence and proximate cause, in intersection collisions are questions of fact, and cases which require the Jury not only to find facts, but to apply standards of care, and the Jury, therefore, must be left to apply the standards and determine the basic facts.

There are several cases from jurisdiction other than Utah similar to the situation before the Court. One of the most interesting cases is *Pollind* v. *Polich,* 78 Cal. App. 2d 87, 177 P. 2d. 63. In this case the person on the disfavored roadway observed the favored driver approaching approximately two hundred feet away. The question was whether or not the favored driver was contributorily negligent as a matter of law in failing to observe the disfavored driver leave the stop sign and proceed into the intersection. The California Statute is similar to the Utah law quoted. The Court stated:

"Defendant had a right to assume not only that the car in which plaintiff was riding would make the required stop at 43rd Street, until he observed or, in the exercise of ordinary care, would have observed that the Driver was not making a stop, but also that the Ford car would not enter the intersection in front of cars approaching so closely as to constitute hazard. Defendant testified that he saw the Ford car approaching when it was about 30 feet west of the intersection, but as he was passing the Pulliam car his view of the Ford was obstructed as he approached the intersection, and that he assumed that Secrest, the Ford driver would stop long enough to allow his car and the Pulliam car to pass through the intersection first. He also testified that he next saw the Ford when it was about 12 or 15 feet in front of him, but that he, the defendant, could not swerve to the right to avoid a collision because of the Pulliam car. Secrest testified that he saw the Pulliam car approaching but did not see that of defendant. It was clearly a question of fact whether defendant was guilty of negligence in assuming that Secrest would not enter the intersection in front of his car and that of Pulliam, but would remain at the boulevard stop sign until the two cars had passed." (Page 65).

An additional authority directly in point concerning the duty of the person on a through highway is *De Priest* v. *City of Glendale,* 74 Cal. App. 2d 464, 169 P. 2d. 17. Here, the plaintiff admittedly failed to maintain a constant lookout as he approached the intersection and did not observe the car which came into collision with him. The California Court following the general rule again

held that under the facts and circumstances the negligence and contributory negligence were questions of fact for the Jury to determine.

One of the most important cases which seems to be directly in point is *Mead* v. *Cochran,* 184 F. 2d. 579. This case involved an accident on the open highway. The defendant left a stop sign after stopping and turned in front of the plaintiff's automobile. There was a collision. The basic question was whether or not plaintiff was contributorily negligent since his testimony indicated that he did not see the defendant's car at any time prior to the impact. The Federal Circuit Court following the general rule, held this was a question of fact to be submitted to the jury to apply the basic standards of care on the part of the driver of the automobile on the through highway. The following quote sets forth the facts and ruling:

> "Furthermore, plaintiff did testify that he looked to his left about 100 feet from the intersection and that before reaching that point there were trees and bushes on his left along old Route 40 which obstructed his view. Under the circumstances it might be that defendant's stationary car did not make a permanent mental impression upon the plaintiff. Defendant's automobile had been at a stand-still at some point within 15 to 23 feet distant from the pavement of new Route 40. Defendant suddenly started his automobile in motion, intending to cross the center line of new Route 40 and then swing to his left in order to

proceed along it in a northeasterly direction."

> "Under the facts of this case we believe that the question of contributory negligence was a question of fact for the jury." (Page 581).

In *Foresman* v. *Pepin,* 71 F. Supp. 772, affirmed 161 F. 2d. 872. Plaintiff approached on a through highway and observed that on her left the traffic on the highway was stopped, she then proceeded to cross through the intersection and did not look to the right to see the truck of defendant which was approaching and which ultimately came into collision with her. It was conceded that if plaintiff had looked to the right at the intersection, she may have been able to avoid the collision with the truck owned by the defendant. The Federal District Court submitted the case to the Jury. He overruled the motions for a new trial and was affirmed on appeal. Held that the contributory negligence of plaintiff was a question of fact for the jury.

The discussion in the Foresman case concerns the normal habits of drivers who are on through highways and who cross intersections where other traffic is waiting. Once a driver commits himself to a certain course of conduct, i. e., crossing the intersection, additional observation may or may not be possible. The significance of the driver's actions in either causation or in applying the standards of care is for the jury to determine. It would be a very unusual situation if the driver could

prevent collision should another vehicle enter the intersection after he had commenced the crossing.

CONCLUSION

Plaintiff respectfully submits that the lookout which a person approaching an intersection on a through highway must make is dependent upon the surrounding circumstances. Whether the lookout is one which is reasonable, which a prudent person would make, must be left to the Jury for its determination. Whether the making of additional observations would have prevented a collision is also a fact question. The trial Court erroneously granted the verdict Non Obstante Verdicto. This Court should reverse the trial Court ruling, order the reinstatement of the verdict in plaintiff's favor, and award to the plaintiff his costs as incurred.

Respectfully submitted,

GAYLE DEAN HUNT, and
DWIGHT L. KING
2121 South State Street
Salt Lake City, Utah

Mailed a copy of the foregoing Brief of Appellant to Counsel respondent this.....day of October, 1963.
