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Yetzen H. Demoor v. Paul Paulus and Fogg and Brady Furniture Co. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

YETZEN H. DEMOOR,

Plaintiff and Respondent

vs.

PAUL PAULUS and FOGG AND
BRADY FURNITURE COMPANY,
a Utah corporation,

Defendant and Appellant

FILED

NOV 15 1963

Clerk, Supreme Court, Utah

Case

No. 9941

BRIEF OF RESPONDENT

Appeal From the Judgment of the Second District Court
of Weber County
Honorable John F. Wahlquist, Judge

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BRIEF OF RESPONDENT

STATEMENT OF POINTS

POINT I

THE COURT PROPERLY REFUSED TO FIND
PLAINTIFF CONTRIBUTORILY NEGLIGENT AS
A MATTER OF LAW.

POINT II

THE TRIAL COURT CORRECTLY REFUSED
TO FIND THERE WAS ANY CAUSAL RELATION-
SHIP BETWEEN ANY CLAIMS OF CONTRIBU-

TORY NEGLIGENCE AS CLAIMED BY THE DEFENDANT AND THE COLLISION.

POINT III

THE FACTS AS FOUND BY THE TRIAL COURT SHOULD BE SUSTAINED.

POINT IV

IT IS THE DUTY OF THE SUPREME COURT TO REVIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE FINDINGS, AND THEY MUST BE ALLOWED TO STAND IF REASONABLE MINDS COULD AGREE WITH THEM.

STATEMENT OF THE CASE

This is an action to recover for property damage sustained as a result of the collision of two vehicles in Ogden City, Utah.

DISPOSITION IN LOWER COURTS

This action was originally commenced in the Ogden City Court. The case was first tried in the Ogden City Court on June 26, 1962. On September 17, 1962, Judgment was entered in favor of the plaintiff and against the defendant for the sum of \$230.91. Defendant appealed to the District Court of Weber County. On April 30, 1963, this action was tried de novo before the District Court of Weber County. Again judgment was entered in

favor of plaintiff and against the defendant. Judgment in the District Court of Weber County was for \$242.99, together with costs in the sum of \$26.80.

STATEMENT OF FACTS

Respondent is not entirely in agreement with appellant's statement of the facts, and therefore re-states facts pertinent to the issues before the Supreme Court of the State of Utah on appeal.

This case involves a motor vehicle collision which occurred on May 19, 1961, at approximately 2017 South Washington Boulevard in Ogden, Utah. Defendant Paul Paulus had delivered some furniture to a furniture store located at 2017 South Washington Boulevard for the defendant Fogg and Brady Furniture Company, his employer (T24-25). His truck had been parked parallel to the curb (T31 — Note: Witness refers to vehicle as having been parked "straight". Further elaboration of testimony required drawings on blackboard in view of apparent language barrier.).

Plaintiff made a right turn from 20th Street onto Washington Boulevard and proceeded south thereon (T12). Plaintiff saw defendant's truck at the curb and noticed that it was apparently pulling away from the curb, so the plaintiff moved his vehicle over to the left portion of the highway designated for southbound traffic to leave enough room for defendant to pull away from the curb and proceed on his way (T12). The defendant unexpectedly proceeded from the curb at a surprising, unusual and awkward angle and in a southeasterly direction (T31).

While the plaintiff, Mr. Demoor, had moved his vehicle from the right side of the roadway next to the west curblin towards the center of the road to give the truck room enough to pull out and proceed straight ahead, to his surprise, and for no apparent reason, the truck proceeded in a southeasterly direction twenty feet until impact (T29).

While defendant Paul Paulus was not too consistent in his testimony, he did state that he did not see plaintiff's automobile until about the time the impact occurred (T22).

The impact occurred at a point twenty feet east of the west curb line. It occurred between the left front of the defendant's truck and on the right side of the plaintiff's automobile. The damage on plaintiff's automobile commenced at the front door and continued back along the right side of the car through the right rear fender (T13). The right front fender was not involved (T19).

ARGUMENT

POINT I

THE COURT PROPERLY REFUSED TO FIND PLAINTIFF CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW.

The study of an automobile collision is probably best initiated by attempting to sift through all of the evidence to ascertain what really happened.

An individual about to be involved in a collision is not always the keenest of observers. The physical evidence

left at the scene of a collision offers a greater degree of reliability as to what really happened.

While the appellant contends that defendant was not moving at the time the impact occurred, the evidence shows this is not true.

The plaintiff, Yetzen H. Demoor, observed that defendant's vehicle was in motion at the time the impact occurred (T29). The physical evidence substantiates this.

The damage to plaintiff's vehicle commenced at the right front door and involved the right side of the car from the front door back to and including the right rear fender. *The right front fender was not damaged* (T13). Had defendant's vehicle been motionless at the time of impact, it is obvious that the right side of plaintiff's car could not have been damaged without some damage occurring to the right front fender. The only way in which the damage could have occurred as it did was for defendant's vehicle to have been in motion at the moment of impact as observed by the plaintiff.

While defendant repeatedly refers to his truck as being a "large van-type truck", no measurements were introduced into the evidence which would indicate its actual size. There is no evidence tending to indicate it was anything more than the normal type of small van used by many businesses for delivery purposes. The dimensions of many of the smaller vans are really not much different from the dimensions of a normal American automobile. The different type of construction gives them more interior room, but external dimensions are not necessarily much different.

The most striking point of interest is that defendant's

truck, after impact, was still facing in a southeasterly direction when its left front fender was twenty feet east of the west curb line.

This Court has often stated that the trial court sits at a decided advantage over the Supreme Court when it comes to ascertaining facts. This case is certainly illustrative of this principle. On page 30 of the transcript of testimony, the trial judge was very concerned over certain key factors. He asked the officer to step to the board and indicate the angle of the truck when the officer first saw it. The officer drew the angle of the truck on the blackboard. The trial court was able to observe the awkward and unusual angle at which the truck had proceeded from the curblineline. The Supreme Court now sits at a definite disadvantage because the blackboard, I am sure, has long since been erased and this picture is no longer available for evidence.

Counsel for plaintiff, for purposes of attempting to have some record on this item, asked the officer:

“Q Officer, it would appear from the board that you have the truck facing — .

A It would be facing southeast.

MR. SCHOENHALES: At a fairly acute angle.

A Yes sir.

MR. SCHOENHALES: No further questions.”
(T30).

You would certainly not expect a driver to move a vehicle from a curblineline at such an angle and so far out into the street. It is difficult to conceive of Where Mr.

Paul Paulus intended to go or where he would have gone had he not been involved in this collision.

Defendant concedes on page 8 of his brief that plaintiff has a right to assume other drivers on the highway will obey the law and act with due care.

41-6-68 Utah Code Annotated 1953 provides:

“Starting vehicles. No person shall start a vehicle which is stopped, standing or parked unless and until such movement can be made with reasonable safety.

41-6-69 Utah Code Annotated 1953 provides:

“Signals on turning, stopping or suddenly decreasing speed — When turning permissible. —

(a) No person shall turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required in Section 41-7-66, or turn a vehicle to enter a private road or driveway or otherwise turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety. No person shall turn any vehicle without giving an appropriate signal in the manner hereinafter provided in the event any other traffic may be affected by such movement.

(b) A signal of intention to turn right or left shall be given continuously during not less than the last 100 feet traveled by the vehicle before turning.

(c) No person shall stop suddenly decrease the speed of a vehicle without first giving an appropriate signal in the manner provided herein to the driver of any vehicle immediately to the rear when there is opportunity to give such a signal.”

Plaintiff Yetzen H. Demoor had a right to rely on the assumption that defendant would use due and reasonable care and act as required by the above-quoted statutes in the operation of his vehicle, and that he would operate it in a normal, lawful manner. He had a right to rely on this assumption until circumstances warned him, or in the exercise of due care should have warned him, to the contrary.

Plaintiff saw defendant's vehicle begin to pull away from the curb, so plaintiff changed his course of travel and moved towards the center of the highway so as to leave enough room for defendant to pull out and proceed in a normal manner down the highway. To plaintiff's great surprise, defendant continued to proceed out onto the highway in a southeasterly direction to such an extent that the plaintiff was unable to avoid a collision.

Where was Mr. Demoor's automobile when he first observed the defendant start to move? On page 17 of the transcript of testimony, Mr. Demoor stated that his car would be completely in a southbound position when he observed the defendant's vehicle start to move. He went to the blackboard and placed an "x" where he was when he first saw it. As further indicated on page 17 of the transcript of testimony, he then took a piece of chalk and traced his path on the blackboard.

Here once again the Supreme Court is a distinct disadvantage to the trial court in attempting to ascertain facts because we do not have the benefit of this blackboard which is so often referred to in the transcript of testimony and upon which the diagram of the collision,

position of vehicles and paths vehicles traveled were traced.

Defendant's evidence simply does not establish that the plaintiff was negligent in failing to anticipate or foresee the defendant would take a southeasterly course or travel out towards the middle of the street to point of impact twenty feet east of the west curblin, a distance equivalent to two normal lanes of traffic. The reasonable, prudent man certainly would have expected defendant would proceed in a southerly direction and in the proper lane of travel far short of the twenty feet he traveled to the point of impact.

In attempting to view the facts of this case as they would start to unfold to the plaintiff shortly prior to the collision, it is easy to see and understand why his conduct was reasonable and prudent. As he was proceeding south on Washington Boulevard, he observed a truck commence to move from the curb, so the plaintiff moved towards the center of the highway to allow the truck enough room to pull out and proceed normally down the street. With no apparent warning or signal, instead of proceeding normally down the street after pulling out, the truck proceeded in a southeasterly direction twenty feet out into the street. Certainly no one would expect such a strange, awkward maneuver. It is difficult to conceive of where the defendant was actually intending to proceed. It cannot be said as a matter of law that the plaintiff was contributorily negligent for having moved over towards the left of the highway in order to allow the truck enough room to pull out normally onto the highway instead of slamming on his brakes.

POINT II

THE TRIAL COURT CORRECTLY REFUSED TO FIND THERE WAS ANY CAUSAL RELATIONSHIP BETWEEN ANY CLAIMS OF CONTRIBUTORY NEGLIGENCE AS CLAIMED BY THE DEFENDANT AND THE COLLISION.

It is, of course, elementary that before the negligence of either party to a lawsuit will have any effect upon legal relationships, it must bear a proximate causal relationship. Equated in terms of this particular case, if a reasonable, prudent person would have been able to ascertain thatt defendant was not going to yield the right of way to plaintiff, that he was going to proceed out into the street at such an awkward southeasterly angle, regardless of the presence of plaintiff, could such reasonable, prudent person take such evasive action so as to avoid the collision?

Defendant presented no evidence on this point. It is difficult for the writer to see how the trial court could have reached a result other than to refuse to find defendant had met his burden of proof on this point.

In view of the extreme angle at which the defendant's truck porceeded out onto the highway, and in view of the fact it was still moving at impact, it is difficult to see how this collision could have been avoided unless a driver were possessed with such clairvoyant powers that he could have read the defendant's mind and ascertained that these surprising and unexpected movements would be made.

POINT III

THE FACTS AS FOUND BY THE TRIAL COURT SHOULD BE SUSTAINED.

The Supreme Court of the State of Utah has repeatedly held that the nice adjustment of rights and duties of drivers and the intricate questions pertaining thereto are primarily problems to be resolved by the trier of fact. Only when reasonable minds could not differ in reaching a contrary determination does it become necessary to upset such factual resolutions. *Country Club Foods vs. Barney*, 10 U. 2d 317, 352 P. 2d 776 clearly sets forth the law on this point.

When this case was first tried in the Ogden City Court before the Honorable Charles Sneddon, the issues were found in favor of the plaintiff — respondent herein — and against the defendant — appellant herein. When this case was tried a second time before the District Court of Weber County, the Honorable John F. Wahlquist again found the issues in favor of the plaintiff and against the defendant.

We have no accurate calibration as to how far it is from the corner of Washington Boulevard and 20th Street to 2017 Washington Boulevard. The officer guessed it would be between one hundred and one hundred fifty feet (T5). Since the “x” placed on the blackboard in the District Court of Weber County indicating where the plaintiff was when he first observed the defendant has long since been erased, the Supreme Court is at a decided disadvantage to the trial court in attempting to ascertain facts.

As noted from the Country Club Foods vs. Barney case, the policy of this Supreme Court has been that where reasonable minds could differ in resolving questions of contributory negligence and proximate cause, the Supreme Court cannot disturb the trial judge's determination of them.

The facts of this case compel affirmation of the judgment of both trial courts in which this case was previously tried.

POINT IV

IT IS THE DUTY OF THE SUPREME COURT TO REVIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE FINDINGS, AND THEY MUST BE ALLOWED TO STAND IF REASONABLE MINDS COULD AGREE WITH THEM.

The transcript of testimony in this case shows without a doubt that a great deal of the testimony centered around drawings made on a blackboard during the trial of the case. Near the close of the trial, the trial judge wished to ascertain pertinent facts which hold the key to the solution of the legal and factual problems to be resolved, so he had the investigating officer step to the board and emphasize through the diagram angles of vehicles and so forth (T30, 31).

The blackboard, of course, is not available now for the Supreme Court to observe, placing the Supreme Court at a decided disadvantage to the trial court.

In the case of *Sine vs. Salt Lake Transportation Company*, found at 106 U. 289, 147 P. 2d 875, the Supreme Court of Utah pronounced the law in this jurisdiction to be that in a law case, appeal is on question of law alone. That being true, the function of the Supreme Court is not to pass on the weight of the evidence nor to determine conflicts therein but to examine it solely for the purpose of determining whether or not the judgment finds substantial support in the evidence. In so examining the evidence, all reasonable presumptions are in favor of the trial court's findings and judgment, and the evidence must be considered in the light most favorable to them. If the findings and judgment are substantially supported by the evidence, then the supreme Court may not disturb them.

Again in *Lawrence vs. Bamberger Railroad Company*, found at 3 U. 2d 247, 282 P. 2d 335, the Supreme Court of the State of Utah stated:

“When the court has made findings and entered judgment thereon as was done here, it is then our duty to review the evidence in the light most favorable to the findings, and they must be allowed to stand if reasonable minds could agree with them. Likewise every reasonable intendment ought to be indulged in favor of the validity and correctness of the judgment under review, and it will not be disturbed unless the appellant meets his burden of affirmatively showing error.”

The points of law set forth in the foregoing Utah Supreme Court cases have been restated many, many, times in many, many other cases before the Utah Supreme

Court, and it is safe to say that the law is well settled in this jurisdiction that the trier of fact is at a decided advantage in such matters as observing the demeanor of the witnesses, assessing the credibility of the witnesses, in observing the inflections in their voices, which are oftentimes extremely meaningful, and in many other ways.

Appellant has simply failed to show that there is any reason for disturbing the findings of the trial court in this case.

CONCLUSION

The judgment of the trial court should be affirmed, and plaintiff awarded costs.

Respectfully submitted,

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