1969

Bruce 0. Newton v. The State Of Utah And The Utah State Road Commission : Brief of Respondent

In The Supreme C
of the State of U

BRUCE O. NEWTON,

Plaintiff-Appe

vs.

THE STATE OF UTAH and THE
STATE ROAD COMMISSION

Defendant-

BRIEF OF R

Appeal from the Judgment
Court for
The Honorable

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In The Supreme Court of the State of Utah

BRUCE O. NEWTON,

Plaintiff-Appellant,

vs.

THE STATE OF UTAH and THE UTAH STATE ROAD COMMISSION,

Defendant-Respondent.

Case No. 11465

BRIEF OF RESPONDENT

NATURE OF THE CASE

Appellant's motor vehicle collided with a snow removal truck owned by the State of Utah, as the driver-employee of the State Highway Department was negotiating a left turn at the intersection of 9th South and State Street, Salt Lake City, Utah, on December 30, 1966 at 1:15 a.m.

DISPOSITION OF CASE

The Third Judicial District Court in and for Salt Lake County, the Honorable Aldon J. Anderson, presiding, entered judgment in favor of the defendant and against the plaintiff no cause of action.

RELIEF SOUGHT ON APPEAL

The Respondent requests the court to affirm the judgment of the District Court.

STATEMENT OF FACTS

On the 30th day of December, 1966, at approximately 1:15 a.m., at the intersection of 9th South Street and State Street, Salt Lake City, Salt Lake County, Utah, a driver of Respondent's vehicle was negotiating a left turn from the position between the left turn holding lane and the through lane of east bound traffic on 9th south into the center lane of north bound traffic on State Street to complete the "salt" spreading necessary to eliminate the snow hazard on the highway. Yellow warning lights were flashing and a roto beam amber light mounting on the cab of the 1965 International Truck owned by Respondent, was in operation. Respondent's driver was proceeding to turn left on the appropriate green light, having allowed immediate traffic to pass. Appellant was driving a 1959 Ford Ranchero proceeding westerly and collided with the Respondent's vehicle damaging the front end of appellant's vehicle and the right side of respondent's truck.

The collision occurred approximately fifteen to twenty feet east of the northeast corner of the intersection.

Appellant testified that he first saw the Respondent's truck when he was approximately 225 feet

east of the intersection (R-223) and the next time he saw the State Road Vehicle impact was inevitable, Appellant describing the truck as "50 feet high and 300 feet long" (R-216).

POINT I

THE SUPREME COURT IN REVIEWING THE JUDGMENT IN THIS CASE MUST VIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE RESPONDENT AND SHOULD AFFIRM THE JUDGMENT OF THE COURT BELOW.

Appellant has misapplied the holdings of this Court concerning appeals of non-suit judgments to the procedural determination announced by the Court below of "no cause of action."

While it is true that non-suit judgments may be based upon "no cause of action" the procedure whereby the defendant may move for a non-suit judgment following the presentation of the plaintiff's case is different from the facts of the instant case. After the presentation of both the plaintiff's and defendant's evidence and testimony, the Court reached a conclusion of negligence on the part of the appellant. There being no cross-claim against the appellant by the respondent, the Court held there be "no cause of action."

The appeal record does not contain a motion for "non-suit." "Non-suit" and "no cause of action" are not symnonymous terms. The appellant's argument must be disregarded and the better reasoning

of the Court in cases such as the instant appeal should be followed.

> "It is elementary that where there is dispute in the evidence, resolving the conflicts is for the jury under its prerogative as to the exclusive finder of facts. It is equally so that because of the jury's verdict in his favor, we accept the respondent's version of the facts and review the evidence and all inferences fairly to be drawn therefrom in the light most favorable to him. . . ." *Smith v. Gallegos*, 16 Utah 2nd 344, 400 P 2nd 570, 572 (1965).

It must be acknowledged that when a trial by jury is waived the trial judge is the exclusive finder of fact. The aforementioned holding of *Simth v. Gallegos* is applicable to the present appeal. This Court should, therefore, review the determination of the trial judge in a light most favorable to the respondent.

Affirming a decision of the trial judge sitting without a jury in an action arising out of an intersection collision, this court stated that:

> "Since reasonable minds could differ in resolving the questions of contributory negligence and proximate cause, we cannot disturb the trial judges determination of them." *Country Club Foods v. Barney*, 10 Utah 2nd 317, 319, 352 P 2nd 776 (1960).

Judgment in the lower Court was entered following a complete hearing of the arguments by opposing counsel. The determination of the trial

judge was properly determined based upon the opportunity to evaluate the evidence and testimony and is not a judgment of "non-suit."

Therefore, the Supreme Court should review the action in the light most favorable to the prevailing party and affirm the judgment of the lower Court against the plaintiff.

POINT II

THERE WAS NO ERROR OF THE LOWER COURT IN ENTERING JUDGMENT WHICH STATED TWO NEGLIGENT ACTS OF THE APPELLANT WHEN THE ORAL PRONOUNCEMENT STATED ONLY ONE ACT OF NEGLIGENCE.

Statutory procedure set forth in rule 52, Utah Rules of Civil Procedure, Utah Code Annotated 1953, specifies that:

> In all actions tried upon facts without a jury . . . . this Court shall find the facts specially and state separately its conclusions of law thereon and judgment shall be entered pursuant to Rule 58 A.

This Court has held that an appeal will not be entertained from the decision announced by the trial judge from the bench as only final judgment entered in accordance with law are appealable. *Watson v. O'Dell*, 176 P 619, 53 Ut. 96 (1918); *Ellinwood v. Bennion*, 73 Ut. 563, 276 P 159 (1929).

> An order for a judgment is itself not a judgment and an appeal does not lie from it as a final judgment.

Long standing precedence of this Court has established that a trial may enter judgment which differs from the decision announced at the close of the trial proceedings. *Drury v. Lunceford*, 18 Ut. 274, 415 P 2nd 662, 663 (1966).

> That the written judgment supercedes the oral statement of the court is not questioned. *McCollum v. Clothier*, 121 Ut. 3 11, 241 P 2nd 468 (1952); *Walker Bank v. Walker* Case No. 10374, 17 Ut. 2nd 390, 412 P 2nd 920, 1966; that the written judgment also supercedes the minute entry see *Hartford Accident & Indemnity Company v. Clegg*, 103 Utah 414, 135 P 2nd 919.

Announcing this criteria the Court in *McCollum v. Clotherier, supra,* at 472 held:

> The only judgment that can be given effect is the one entered in accordance with law. ". . . . no antecedent expression of the judge can in any way restrict his absolute power to declare his final conclusion in the only manner authorized by law, to wit: by filing his 'decision' (Findings of Fact and Conclusions of Law . . . .") *Phillip v. Hooper*, 43 Cal App 2nd 467, 111 P 2nd 22, 23. "Oral statements of opinion by the trial court inconsistent with the findings ultimately rendered do not effect the final judgment. (citation omitted)"

We therefore, submit there is no error in the record.

POINT III

THE COURT BELOW WAS CORRECT IN FINDING THE APPELLANT NEGLGENT IN FAILING TO KEEP AN APPROPRIATE LOOKOUT.

Appellant's testimony clearly shows that the Court, as a trier of fact, could reasonably conclude that the appellant failed to keep an appropriate lookout. Excerpts taken from the testimony of the appellant from the trial transcript, (R 219) indicates the following question?

> Q. (by Mr. Frank) How many times do you recall seeing the truck?"
>
> "A. I noticed the truck as it was coming down, the next thing I knew it was when it was in front of me and I hit it."

The amended left turn statute, § 41-6-73, Utah Code Annotated 1953, has placed a duty upon the driver when negotiating a left turn to determine if there are any vehicles approaching from the opposite direction which would constitute a hazard. The Court in *Smith v. Gallegos,* supra, at 572, also also placed the duty of care upon the driver proceeding thru the intersection.

> "Notwithstanding the onerous duty now imposed upon the left turner by the new statute he is entitled to assume that other drivers will also be conforming to the requirements of law by keeping within the speed limit, by keeping a proper lookout and by keeping proper control

> over their cars and by using reasonable care for the safety of themselves and others."

Additional caution is imposed upon the driver of a vehicle approaching an intersection displaying warning lamps by the motor vehicle code, § 41-6-133 (d) Utah Code Annotated, 1953.

> Any vehicle may be equipped with lamps which may be used for the purpose of *warning the operators of other vehicles of the presence of vehicular traffic hazard requiring the exercise of unusual care in approaching,* or overtaking or passing and when so equipped may display such warning in addition to any other warning signals required by this act.

There was sufficient testimony presented to the Court to show that the appellant's vehicle was displaying warning signals required by § 41-6-140.20 Utah Code Annotated 1953.

Snow removal equipment and other work vehicles—

> The State Road Commission shall adopt standards and specifications applicable to . . . . other lamps on snow removal machinery when operated on the highway, ... such standards and specifications must require the use of flashing lights visible from all directions and for identification distinct as to color. . . .

Standards for light on snow and ice control equipment effective on the morning of December 30, 1966, were approved March 16, 1960 by the State

Road Commission. The Commission adopted the policy of the American Association of State Highway Officials on "Standard Identification Lights for Snow and Ice Control Equipment". The pertinent specifications are:

> (c) The lights shall be flashing or be of the revolving type. . . .
>
> (d) Amber in color

Duty of care of a driver approaching an authorized snow removal vehicle displaying the approved warning light authorized by the Department of Highways, is set forth in § 41-6-140 Utah Code Annotated 1953 prior to the amendment of 1967, and is therefore the criteria for establishing the negligence of the appellant on December 30, 1966. The pertinent language is as follows:

> (c) flashing lights are prohibited except on . . . . an authorized . . . . snow removal or other authorized work vehicle or machinery, ... as a means of indicating . . . . *the presence of a vehicle traffic hazard requiring unusual care in approaching, overtaking or passing.*

The emphasized language of this section was identical with § 41-6-133 Utah Code Annotated 1953 and was eliminated in 1967 Laws of Utah 1967 Chapter 92. The amended section § 41-6-140 was utilized to specify the restrictions of lighting devices rather than setting forth the duty of care of the approaching driver as § 41-6-133 provisions apply to all vehicles authorized to display warning lamps.

Appellant testified that he observed the respondents truck when he was approximately 225 feet east of the intersection, trial transcript (R-223).

The Court also presented questions to the appellant in order to clarify the question of the application of brakes (R. 216).

> The Court: . . . . How far were you from the truck by your best estimate when you applied the brakes?
>
> Witness: Distance wise it is awful difficult to say. I was coming up to the intersection slow and the light turned green and I started to proceed on thru, the next thing I know the truck is right in front of me. It is fifty feet high and three hundred feet long and distance wise I couldn't tell. . . .

Appellant did not proceed with "unusual care," after first observing the Respondent's vehicle. Trial testimony of the appellant as to his own lookout was sufficient to present the court with the basis of the findings of "failure to maintain a proper lookout."

POINT IV

THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT THE APPELLANT WAS TRAVELING AT AN EXCESSIVE SPEED FOR EXISTING CONDITIONS.

Pertaining to the findings of excessive speed the trial judge was correct in weighing all evidence and testimony. Appellant has presented to this Court the fact that the only testimony as to the speed

of he appellant's vehicle was from the testimony of the appellant who stated this his speed was "15, 16, 17 miles per hour" (R 188 and 193).

This Court has stated in *Johnson v. Cornwall,* 15 Utah 2nd 172, 174, 389 P 2nd 710 (1954), that a statement as to the speed by the drivers of a truck involved in a left turn intersection accident were "more estimates and the jury was not bound to believe them".

In cases tried without a jury, the trial judge is given a responsibility of the finder of facts and may weigh all evidence and testimony. In *Kiepe v. LeChemi-nant,* 17 Utah 2nd 141, 4th 18 Pac. 2nd 894, 896 (1966) this Court stated:

> The duty to make findings rest primarily upon the trial court which is in a better position to determine the weight of the testimony than the Supreme Court, *Ecker v. Hatch,* 70 Ut. 1 257 Pac. 673.

Testimony as to the estimate of speed could be weighed by the trier of facts together with statements of the intent of the appellant as he approached the intersection. (R. 188)

> Question: As you approached the intersection of 9th South and State, what if anything, did you observe?
>
> Answer: Well, I was keeping my eyes pretty well open on what was going on in the road and I was looking north and south as far as I could see there to be sure that things were slowing

> down and coming to a halt so that I could proceed on thru without stopping the truck when the light turned green.

Determination by the trial judge of the excessive speed for existing conditions could properly be concluded from the evidence presented concerning weather conditions, point of impact, and failure to use "unusual care" in proceeding past the vehicle displaying an amber warning light.

The existing conditions in the intersection specifically stated in findings of fact as presented to this Court in the appeal record (R. 61-62) constituted an actual hazard demanding strict ad herence to the provisions of § 41-6-46, Utah Code Annotated, 1953.

> (1) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential haards then existing. In every event, speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance . . . .
>
> (3) The driver of every vehicle shall, consistent with the requirements of sub-division (1) of this section, drive at an appropriate reduced speed when approaching or crossing an intersection . . . . and when special hazards exist with respect . . . . other traffic or by reason of weather or highway conditions.

Testimony offered by appellant under direct examination by his own counsel (R. 88) indicates that

he was intending to avoid the necesstiy of stopping at the intersection and maintained a steady speed to the point where impact was inevitable.

Appellant's failure to control his speed "having regard to the actual and potential hazards then existing" i.e. snow upon the highway and presence of snow removal equipment in the intersection with roto-beam warning light in operation, resulting in a collision in violation of the above subsection (1) requiring that "speed shall be so controlled as may be necessary to avoid colliding with any . . . . vehicle" may be "regarded as prima facie evidence of negligence", *Thompson v. Ford Motor Co.*, 16 Utah 2d 30, 395 P.2d 62, *Klaffa v. Smith*, 17 Utah 2d 65 404 P.2d 659 (1965).

POINT V

THE COURT CORRECTLY CONCLUDED THAT THE DRIVER OF RESPONDENTS VEHICLE EXERCISED THE DEGREE OF CARE IN NEGOTIATING A LEFT TURN AS IS IMPOSED BY LAW.

U.C.A., 1953, 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.

The Court has recently interpreted the language of this provision in the case of *Smith v. Gallegos*, supra, at 572:

> If the left turner in performing his duty, and in making the required observation, sees no vehicle approaching, or that any coming is far enough away so that he can reasonably believe that he has time to make his turn, he may proceed.

Prior to the amendment of Section 41-6-73, this Court considered what constituted "immediate hazard" in regards to left turn situations.

Richards v. Anderson, Utah 2d 17, 337 P.2d 59 (1959):

> There is, of course, no precise set of measurements by which an immediate hazard can be gauged. It must be judged on the basis of common sense in the light of existing circumstances. In reference to a similar situation the Supreme Court of Delaware has said that an "immediate hazard" is created when a vehicle approaches an intersection on a favored street at a reasonable speed under such circumstances that, if the disfavored driver proceeds into the intersection it will force the favored driver to sharply and suddenly check his progress or stop in order to avoid collision. Conversely, if the disfavored driver has made his stop and deferred to all vehicles that would be required to go into a sharp or sudden braking to avoid collision, the cars far enough away have a clear margin to observe and make a smooth and safe stop are not an "immediate hazard" and are required to yield to the driver already at the intersection.

Appellants are mistaken in stating that "Mr. Kennedy was guilty of statutory negligence." Appellant's Brief, page 8.

This Court has upon several occasions ruled that violation of a traffic, safety standard does not constitute negligence per se. In *Klaffa v. Smith*, supra at 68, the Court reaffirmed its previous decisions.

> "(T)his court has in a number of cases, but with slight variations in the language, reaffirmed the view, which we think is the correct one, that violation of a standard of safety set by statute or ordinance is to be regarded as prima facie evidence of negligence, but is subject to justification or excuse if the evidence is such that it reasonably could be found that the conduct was nevertheless within the standard of reasonable care under the circumstances."
>
> ". . . We think the foregoing rule is the logical and reasonable one and in fact the only rule that can fairly be applied to the practical exigencies of human conduct and conform to our conception of law and justice."

Respondent's equipment operator was properly executing a left turn into the center lane of the East half of State Street to proceed with the salt spreading which was necessary in the snow removal assignment for the safety of the users of highways of the State of Utah.

Legislative enactment of requirements for the use of "flashing lights visible from all directions for identification, distinct as to color," to be used upon

"snow removal machinery when operated on the highways" specified that the use of such warning lamps was necessary to warn other drivers of the presence of such equipment.

> The operation of which may in hours of darkness necessitate parking in lanes of traffic, travelling against traffic sudden stops and otherwise interfering with normal traffic flow. 41-6-140.20, U.C.A., 1953.

This statutory provisions indicates the legislative intent to grant to operators of such maintenance vehicles certain exemptions from the ordinary "rules of the road" if necessary to perform the duties.

Mr. Kennedy, driver of Respondent's snow removal machinery, was diligent in his duties to adequately spread the salt necessary to keep the snow covered highways of the State of Utah in condition for geenral usage by other vehicles.

In the performance of his duties he was required to drive a motor vehicle equipped with a spreading device which was designed to be used, not in one single lane of traffic, but by straddling the lanes of traffic in order to spread a radius of approximately 20 feet of roadway.

Appellant contends that the driver of Respondent's vehicles was negligent in negotiating a left turn from a position other than completely within the left turn holding lane. The court below properly concluded that althcugh the Respondent's driver had straddled the left turn lane and the left through lanes of traffic on Ninth South in moving into a posi-

tion to enter State Street in a position approximately straddling the left through lane and center lane of traffic, that driver had exercised the duty of care imposed by law.

Legislative intent in the creation of the Highway Code is codified as 27-12-1, U.C.A., 1953 and specifies that:

> "The legislature intends to declare, in general terms, the powers and duties of the state road commission, leaving specific details to be determined by reasonable rules and regulations which may be promulgated by the commission."

Regulations imposed upon Mr. Kennedy in the performance of his "salting" procedure included the requirement that the warning amber lights, mounted on the high bumper of the truck be flashing; that the roto-beam amber light be functioning to warn drivers of other vehicles of the presence of a potential hazard; that he obey the signal lights and other traffic signs; that he yield to other traffic having the right of way.

Having taken all of the foregoing precautions, the driver is then granted an exception to the "rules of the road." When necessary in the performance of his duties, the driver may drive straddling the lanes of traffic, and if it is necessary to make a wide turn at an intersection to be in the position of straddling two lanes, this is within the authority of the State Highway Commission to direct the driver to operate the equipment in this manner.

Sufficient testimony was presented to the trial court, within the full scope of direct, redirect, and cross examination to justify the conclusion of law entered by the Lower Court No. 3. That the driver of defendant's vehicle exercised the degree of care in negotiating a left turn as is imposed by law."

Upon direct examination by Mr. Cotro-Manes, attorney for Plaintiff-Appellant, of Chauncey Eugene Kennedy, driver of Respondent's State Road Commission Sanding Vehicle, the following testimony was offered, (R 125):

> Q . . . Now, when the light turned green what did you then do Mr. Kennedy?
>
> A I started out into the intersection and slowly and when it appeared that the traffic going west had halted I noticed one car that had stopped there and I though that he was going to let me through so I continued. I went on with making my turn.
>
> Q What made you think he was going to let you through?
>
> A Because he was stopped.

The court also questioned Mr. Kennedy to clarify the observation of traffic made by him prior to negotiating the left turn: (R 166).

> I understood you to say this morning other cars had come through. Finally, this one you thought stopping for the light or stopping for you so you started to turn. Is that right or wrong?

THE WITNESS: Well, that would be right but I couldn't tell you how many cars.

Mr. Nicholas V. Grip was called as a witness on behalf of the Plaintiff and testified as follows:

Q . . . Could you describe for us what you saw?

A Well, I noticed the State vehicle going east from—let's see. East on Ninth South making a left turn on State Street.

Q And what else did you see?

A And I saw a small wagon—a kind of pickup truck plow right into him.

In answer to Mr. Cotro-Manes question as to the speed of Respondent's truck the same witness testified:

A Now, that is not easy to say except I know he was going very slow; going into a turn and spraying sand so he was going very slow.

Mr. Grip also testified that he did not see the Appellant's vehicle before the impact (R 107).

The trial court judge was correct in holding that the driver of Defendant's vehicle exercised the degree of care in negotiating a left turn as is imposed by law.

CONCLUSION

Appellant has failed to present arguments in its brief sufficient to show error upon which this court could grant reversal of the lower court's decision.

> ". . . The judgment and proceedings in the lower court are presmptively correct with the burden upon defendant (appellant) to show error." *Coombs v. Perry,* 2 Utah 2d 381, 275 P.2d 680, 681.

It is respectfully submitted that the judgment of the court below should be sustained.

Respectfully submitted,

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