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Paul Bramel And William B. Brook v. The State Of Utah : Brief of Appellant

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In The Supreme Court of the State of Utah

PAUL BRAMEL and WILLIAM B. BROOKS,

Plaintiffs-Respondents

-VS-

THE STATE OF UTAH,

Defendant

BRIEF OF APPEAL

Appeal from the judgment of the Third
Judicial District Court of Salt Lake County—Honorable Judge

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In The Supreme Court of the State of Utah

PAUL BRAMEL and WILLIAM B. BROOKS,

Plaintiffs-Respondents,

-vs-

THE STATE OF UTAH,

Defendant-Appellant.

} Case No.
11479

BRIEF OF APPELLANT

NATURE OF CASE

This is a review of an ordinary negligence action tried to the court below on a question of warning to motorists with reference to the freeway (I-15) ending at or near Ogden, Utah, and contributory negligence of the driver which resulted in Judgment for the Plaintiffs, Respondents, and against the Defendant, Appellant, State of Utah.

STATEMENT OF FACTS

On the 29th day of November, 1966, at approximately 8:00 p.m., a 1966 Kenworth Diesel Tractor with a 1963 Trail-mobile refrigerated trailer unit failed to negotiate the off-ramp at the ending of I-15 at or near Ogden, Utah, and the unit overturned resulting in considerable damage to the tractor

and trailer unit, and to the cargo of cucumbers, and some injury to the person of the driver of the tractor, William B. Brooks, one of the Respondants.

Some four to five hours earlier, Mr. Brooks had left Price, Utah after a rest stop (R-57) on a planned Houston, Texas to Spokane and Seattle, Washington haul (R-54). As he traveled I-15 there had been some patches of fog (R-58) but near and at the point of the accident, the fog had lifted (R-58), and visibility was at least 20 - 25 yards (R-76 and 80).

DISPOSITION BELOW

The lower court found that the signs placed by the State of Utah "gave virtually no warning to the motorist public . . . (so) that they would be able to negotiate with reasonable safety the exit at the freeway end" (R-31); that the driver Brooks was free of contributory negligence (R-32) and awarded judgment to the Plaintiffs for property damage and personal injury in the sum of \$27,878.25, including interest, together with costs.

RELIEF SOUGHT ON APPEAL

Appellants seek an Order of this Court reversing the judgment of the court below and dismissing the action of the Plaintiffs as a matter of law, or in the alternative remanding for a new trial.

ARGUMENT

POINT I

THE FINDING OF THE LOWER COURT THAT "AT MOST" ONLY CERTAIN LISTED SIGNS HAD BEEN IN

PLACE AT THE TIME OF THE ACCIDENT IS ERRONEOUS, AND CONTRARY TO THE EVIDENCE.

A complete reading of the transcript of the Trial fails to disclose the evidentiary testimony from which the court made the Findings of Fact, paragraph 5 (R-31). If the testimony of the Plaintiff, Brooks, is credited, there were only four or five Chevron signs "back up the road" (R-64) and one EXIT 25 MILES PER HOUR sign "just before you went off onto the off-ramp" (R-65). The court having apparently found that there were other signs up, appears not to have credited the testimony of the driver Brooks on this point. The clear testimony of the State's witnesses as to the signing of the area prior to the opening of the freeway section involved, on the other hand, appears to have been only partially credited by the court. It does not clearly appear what basis the court used in ascertaining the facts in this regard, accepting some of the testimony and rejecting other evidence on the matter of signs from the same witnesses. As stated in the Findings of Fact (R-31), the following signs "at most" were up:

Freeway Ends One Mile

All Traffic Must Exit

25 Miles per Hour speed signs (black on yellow) — two

Chevron channelizing signs (red and white) — several

Unlighted Barricades (black on white)

25 Miles per Hour Exit speed sign (black on yellow)

Yellow arrow at north edge of exit

It is respectfully submitted that other than the very general testimony of Brooks, (obviously not accepted by the court

below) that no signs were up at all except the Chevron signs and the one 25 MILES PER HOUR sign, there is no dispute in the record that the following signs were also in place at the time of the accident:

Single Lane Ahead (R-146 and 147)

Black on yellow arrow (additional) (R-150 and 169)

In addition, it should be noted that the evidence clearly shows that nearly all of these signs were reflectorized (R-145-147).

The existence of the SINGLE LANE AHEAD sign is deemed to be of particular importance. Through an extended period of cross-examination, the driver Brooks insist that the freeway went from three lanes to two lanes and then directly to the off-ramp never having narrowed to a single lane (R-76-78). This is contrary to the clear weight of the evidence, and to the exhibits P-1, P-2, and P-4. In finding, therefore, that "the State failed to give adequate, reasonable or sufficient notice . . . that traffic would be required to turn on to a one lane . . . exit road . . ." (R-31) the failure of the court to find that this sign was erected is not only erroneous, but reversible error. It is urged that when the actual number, type and condition of signing clearly in place at the time of the accident is recognized, the further finding of the court below and the judgment rendered thereon, is error as a matter of law.

POINT II

THE COURT ERRED IN FINDING ON THE EVIDENCE THAT THE SIGNS AS PLACED BY THE STATE FAILED TO GIVE ADEQUATE, REASONABLE OR SUFFICIENT NOTICE, AND IN FACT GAVE VIRTUALLY NO WARNING.

At first blush, the issued would appear to be a strictly factual consideration. However, the importance of this issue has been statutorily realized in 41-6-20 U.C.A. 1953, as amended, wherein it is required that "The State Road Commission shall adopt a manual and specifications for a uniform system of traffic control devices consistent with the provisions of this act for use upon highways within the state. Such a uniform system shall correlate with and so far as possible, conform to the system then current as approved by the American Association of State Highway Officials." To comply with this statutory mandate, the commission follows the *Manual on Uniform Traffic Control Devices for Streets and Highways* prepared by the American Association of State Highway Officials et al.⁽¹⁾ The record shows that there was conformity with the minimum requirements plus some additional signing according to testimony (R-130 and 131).

Turning from the statutory requirements incorporated in 41-6-20 U.C.A. 1953 to the case law briefly, the general rule is that a governmental highway authority is not negligent in failing to erect and maintain warning signs or barriers unless (a) the situation is inherently dangerous, or (b) such signs or barriers are specifically required by statute. *Ulve vs. City of Raymond*, 317 P 2d 908, 51 Wash. 2d 241 (1957). Concluding that the present situation is an inherently dangerous situation, the degree of required signing devices would certainly not exceed that which reasonably prudent men would, under the same or similar circumstances, consider to be sufficient. We submit that the basic standards followed in the

(1) Institute of Traffic Engineers, National Committee on Uniform Traffic Laws and Ordinances, National Association of County Officials, American Municipal Association; published by the U.S. Department of Commerce, Bureau of Public Roads, Washington D.C., June, 1961.

manual cited *supra*, should, as a matter of law, be sufficient to constitute an appropriate warning for a non-negligent driver.

We further submit that to determine the adequacy or inadequacy of the signing, the court must look only at the evidence directly relevant to that issue. The court should not speculate as to better methods of warning motorists nor should it consider subsequent additions to the signing or structuring of the roadway. It should limit its consideration to the issue of whether a careful user would be secure under the present circumstances. *ShIPLEY vs. City of Arroyo Grande*, 208 P 2d 51, 92 C.A. 2d 748, (1949). Additional evidence such as intoxication of the driver or driving record, etc., would lend evidence to the probabilities of an accident, but would add nothing to the issue regarding the adequacy of the signing *per se*. We would therefore suggest that there were ample signs to warn a reasonably careful driver and the instant case should lead to a result in harmony with such a conclusion. In *Nelson vs. City of Seattle*, 16 Wash. 2d, 592, 134 P 2d, 89, (1943), the court said that one sign, having the dimensions of three feet by five feet, with the wording "danger . . . when wet . . . speed 15" was sufficient, as a matter of law, for the court to conclude that the city was free from negligence in warning a motorist of the danger of the up-coming wooden block pavement.

Therefore, the number of signs and the spacing thereof, mentioned above, would be sufficient to warn the reasonable driver of pending danger and would certainly be contrary to the finding of the court that there was "virtually no warning to the motorist public".

POINT III

THE COURT ERRED IN FINDING THAT THE DRIVER, BROOKS, OPERATED THE UNIT IN A REASONABLE AND PRUDENT MANNER.

Except for the self-serving statements of Plaintiff Brooks (R-65) which is contradictory to his previous testimony, as the record clearly shows (R-64 and 65), all of the competent, believable evidence, and particularly the physical facts not in dispute, argue persuasively for a finding of negligence on the part of Brooks as a matter of law. Elsewhere in this Brief, it is pointed out that between one mile of the off-ramp and the off-ramp in question, the State of Utah was found by the court to have erected some ten or more warning and information signs regarding the ending of the freeway and the exit speed, etc., in connection with this highway. The Plaintiff Brooks insists that he didn't see any signs except the Chevron signs and the last 25 MILES PER HOUR exit sign (R-64 and 65). In view of the courts finding that there were at least twice that many signs in place, the driver, Brooks, stands convicted on his own testimony of having failed to see what was there to be seen, and thus of negligence as a matter of law. We urge that it is not within the realm of logic that a person driving in a "reasonable and prudent manner" (R-31-32) would have seen the signs which are found to have been in place and still failed to negotiate the off-ramp in question. The whole import of the signs which were found to be in place is that conditions ahead were changing and adverse, requiring a relatively slow speed of 25 miles per hour from the freeway speed of 70 miles per hour. What do three signs EXIT 25 MILES PER HOUR mean? And what do the other warning signs mean?

This court has heretofore held that "where the undisputed facts are of such a character that reasonable minds can arrive at but one conclusion, namely that the injured party was not exercising the degree of care imposed by law, it is the duty of the court to declare such conclusion as a matter of law". (*Edmunds vs. Germer*, 12 Utah 2d 215) (see also *Frank vs. McCarthy*, 188 P 2d 737, 112 Utah 422 (1948) on this point). We urge that the court below, having found the State to have erected some ten or more warning and informational signs within one mile of the off-ramps was bound by that finding to declare the failure of the driver to see and act upon the information thus disclosed to be negligent as a matter of law under the rule of the referenced case. In that same opinion, this court stated:

"The law not only places upon a driver of an automobile the responsibility of seeing things which are apparent, but charges him with the consequences of failing to see what, in the exercise of ordinary care, he should have seen".

In connection with the exit speed sign we submit, further, that on the record the Plaintiff Brooks again stands convicted of negligence primarily upon his own testimony. Brooks testified that visibility at the point of the accident was 20 - 25 yards, because "I was running with my lights on dim" (R-76 and 80). Yet in prior testimony on direct examination, Brooks admitted that he did not see the sign, indisputably there to be seen, until he was 20 to 25 feet from it (R-66)! These facts are totally inconsistent with the finding that Brooks was driving in a "reasonable and prudent manner", but are strongly indicative of the reverse.

Taking the facts as we find them, there is a clear showing in the testimony that Brooks was negligent in connection with this action on further grounds. The undisputed testimony of the State (R-146) and the physical facts as they are disclosed by exhibits P-1 and P-4 is that the last EXIT 25 MILES PER HOUR sign was placed approximately 50 feet from the exit. Throughout his testimony, Brooks insists that he was not exceeding 35 miles per hour as he approached the exit (R-58 and 76) and on cross-examination, he reduced this maximum speed to 32 miles per hour because "I was taching about 1800" (R-90). It is respectfully submitted that with approximately 75 feet to go before the exit, no driver driving reasonably and prudently at a speed not in excess of 35 miles per hour, would have any difficulty whatsoever in reducing his speed by 7 to 10 miles per hour.

Exhibits P-1 and P-4, taken after the accident, show convincingly that Brooks didn't even try to make the turn off, but rather ran off the ramp almost immediately. It flies in the face of reason to suppose that a person driving a motor vehicle in a reasonable and prudent manner, keeping a look-out for warning and directional signs, can be traveling at a rate of not to exceed 35 miles per hour, observe a sign requiring an exit speed of 25 miles per hour some 75 feet before the need, and still fail not only to negotiate the roadway safely, but in fact to run off it immediately! Add to this the testimony of the driver Brooks that he did not skid any wheel before the overturn (R-67) and an incontrovertible case of negligence is made out against the plaintiffs. The only logical conclusion from the evidence is that Brooks either failed to see what was there to be seen, or failed to consider and act non-negligently on what he saw. In this connection, it is submitted that there is some differential for safety over and above the posted min-

imum, allowing safe vehicular negotiation of our highways with speeds somewhat higher than posted, particularly when, as here, the driver is a professional, with a modern, well equipped motor vehicle. Accepting the testimony of the driver, Brooks, at face value, he should have been able with no difficulty at all to negotiate the turn-off from I-15 with perfect safety, and his failure to do so was conclusive evidence of his negligent and careless operation of his motor unit which was the proximate, if not the sole cause of the Plaintiffs damages.

POINT IV

THE NEGLIGENCE OF THE DRIVER, BROOKS, BARS ANY RECOVERY BY THE DRIVER OR HIS EMPLOYER, OWNER OF THE DAMAGED UNIT, FROM THE STATE OF UTAH.

It is well settled that an employer, owner of a motor vehicle who releases the motor vehicle to his employee and sends him out on the business of the employer is barred from recovery for any loss or damages to his property, vehicle, and cargo, where the negligence of the employee, is in any degree a contributing factor in the damages or loss. (*Frank vs. McCarthy*, 188 P 2d 737, 112 Utah 422 (1948); *Portre vs. Saunders*, 143 P 2d 554, 19 Wash. 2d 561 (1943); *Bailey vs. Jeffries - aves, Inc.*, 414 P 2d 503, 76 N. M. 278 (1966).

Indeed, this court has stated in a dictum, that an employer may be held answerable in damages for the *intentional* tort of his employee committed in the furtherence of his employer's interest or (where) the employment is such that the use of force could be contemplated in its accomplishments. *Barney vs. Jewel Tea Company*, 104 Utah 292. Had the State of Utah filed a counterclaim for damages to the property of the state

destroyed by the negligence of Brooks, it would have been entitled to recover any judgment rendered thereon against both Brooks and his employer, Bramel, in the instant case. The rule of respondeat superior is clearly and properly invoked in this connection, so that if the driver Brooks is guilty of negligence, neither he nor his employer may recover for damages to which such negligence has been in any degree a cause.

CONCLUSION

Viewing the evidence in the light most favorable to the Respondents, it is clear that the State of Utah, Department of Highways was not negligent in any particular as it relates to this action. The court found some ten or more reflectorized signs placed by the state within one mile of the exit from the freeway (R-31). The nature of the signs together with the numbers, completely negates any reasonable finding of negligence on the part of the Appellant, State of Utah. The uncontroverted evidence is that the section of highway was signed in compliance with the *Manual on Traffic Control Devices* as approved by the American Association of State Highway Officials and as required by 41-6-20 U.C.A. 1953 as amended. Indeed, the evidence justifies a finding that the signing of this area exceeded the standards so established, which must be deemed prima facie evidence of no negligence. There being absolutely nothing in the record to rebut this presumption, it is submitted that the State of Utah was not and could not be liable for negligence.

In any event, the State of Utah can not reasonably be required to respond in damages to the Respondents because the record is conclusive that on the testimony of the Plaintiff

driver, Brooks, he was negligent as a matter of law. Also, as a matter of law, his negligence as an employee of the other Respondent, owner of the motor unit, acting clearly within the scope of his employment, serve to bar recovery from the Appellant, State of Utah.

It is submitted, therefore, that justice demands this case be reversed and that judgment of dismissal be entered in favor of the Appellant, State of Utah, as a matter of law, or in the alternative, remanded for new trial.

Respectfully submitted,

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