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Darrell J. Donohue v. Margaret Rolando : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

DARRELL J. DONOHUE,
Plaintiff-Appellant,

vs.

MARGARET ROLANDO,
Defendant-Respondent.

Case No. 10079

APPELLANT'S BRIEF

Appeal from the Seventh District Court for Carbon County
Honorable F. W. Keller, Judge

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STATEMENT OF KIND OF CASE

This is an action by plaintiff to recover for the wrongful death of his minor son resulting from a collision between an automobile being driven by defendant and a bicycle ridden by decedent.

DISPOSITION IN LOWER COURT

The case was tried to a jury, and from a verdict and a judgment for defendant the plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment and an order granting plaintiff a new trial.

STATEMENT OF FACTS

Plaintiff brought this action to recover damages for the death of his son resulting from the defendant running over the decedent, who at the time was riding his bicycle. From a judgment on a verdict in favor of defendant, No Cause of Action, plaintiff appeals.

At approximately 11:45 A.M. on June 6, 1962, defendant was driving south in the west lane of traffic on Carbon County road No. 6441, in the City of Spring Glen, Carbon County, Utah. (R. 151). The road at the point where the accident happened is a blacktop straight road, with two unmarked lanes for north and southbound traffic. The paved portion of the highway is 21 feet wide with a 4-foot shoulder on the east and a 19-foot shoulder on the west. The road has a slight grade to the south. The area is residential with homes located on the west side of the road. (R. 134, 135).

The defendant was alone in her car and was driving to Price, Utah, to report to work. She had traveled a distance of approximately ¾ of a mile when she saw three small children moving in a southerly direction along the west shoulder of the road. (R. 152, 153.) She estimated the children were approximately 2 feet off the paved portion of the road and noticed the first

child, a small girl, was walking and the other two children were riding bicycles. According to her testimony, upon seeing these children she reduced her speed from 20 miles per hour to 15 miles per hour. (R. 154-155.)

Defendant testified she passed the first two children without difficulty. After she had passed the second child, she noticed the third child was still riding his bicycle on the gravel shoulder adjacent to the road. (R. 158.) Defendant testified she then heard a "clang." She stepped on the brakes and turned to the left. After stopping the automobile she turned and saw the deceased and his bicycle lying in the road. (R. 159, 160.)

Defendant admitted she did not see the deceased in front of her car prior to the point of impact. (R. 159.) She further admitted she failed to honk her horn at any time prior to the collision. (R. 156.)

The minor son of plaintiff died within a few hours after the accident. (R. 175.) He was six and one-half years old. (R. 173.)

The investigating officer testified that when he arrived at the scene he found a bicycle lying in the west lane of traffic with its front wheel near the center of the road and pointing in an easterly direction. There were approximately 6 feet 7 inches of gouge marks on the road to the north of the bicycle, the bicycle was 3 feet south of the gouge marks, and 23 feet south of the bicycle and near the center of the road was a spot of blood. The officer estimated the point of impact

was 6 feet north of the gouge marks and the automobile stopped 16 feet beyond the blood spot, having traveled a total distance of 54 feet after the impact. (R. 136-138.) There were no skid marks. (R. 151.) (See Exhibit 1.)

The investigating officer examined the vehicle belonging to the defendant and found a dent on the right hood and fragments of hair on the right headlight. This damage was caused when the car struck the child. (R. 145.)

The jury returned a verdict of No Cause of Action in favor of defendant and against plaintiff. (R. 75a.) Plaintiff filed a motion for a new trial (R. 76) which was denied by the court. (R. 80). It is the judgment of No Cause of Action which is the subject of this appeal.

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GIVING INSTRUCTION NO. 7.

Instruction No. 7 (R. 54) charges the jury as follows:

> "The deceased, Phillip Donohue, had a duty to use that degree of care which a reasonably prudent child of his age, understanding and intelligence as you find it would use:

"1. To select a course of travel for his bicycle reasonably free of the hazard of getting into the course of a moving automobile on the highway;

"2. To observe and become aware of the presence and movement of the Defendant's car upon the highway and avoid colliding with the same.

"If you find by a fair preponderance of the evidence that the deceased violated his duty in one or more of the particulars above mentioned and that his doing so was the sole proximate cause of his being struck by the Defendant's automobile, or one of the contributing proximate causes of his being so struck, then you must find a verdict in favor of the Defendant and against the Plaintiff, no cause of action."

Plaintiff objects to the whole of said instruction and to various portions thereof, and respectfully submits the giving of the instruction was reversible error. We contend the instruction is error because the court determined as a matter of law the standard of care required by this deceased child. We submit that in cases involving the question of whether or not the conduct of a child constitutes contributory negligence, the standard of care with which the child should be charged is a matter to be submitted to the jury. In support of this contention we refer the court to the following authorities:

In *Morby v. Rogers,* 122 Utah 540, 252 P.2d 231, the defendant attempted to have a child of 13 years declared to be contributorily negligent as a matter of law for violating a provision of the Motor Vehicle

Code. In refusing to so hold, this Court stated at pages 233 and 235, 252 P.2d:

> "The problem thus presented to us is whether the generally accepted rule as to consideration of an infant's age and capacity in determining the question of his negligence is to prevail over the rule establishing negligence as a matter of law upon violation of a statutory duty promulgated for his safety. We believe that it should.
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> * * *
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> "The fact that the rule prevailing in this jurisdiction that a law violation is negligence as a matter of law, does not overcome the rule that the contributory negligence of a child is to be determined according to the proper standard of care with which he is charged, does not mean that the statutory violation rule is nullified where children are involved. If the violation of a statute by a child is found to evidence less care than that which ordinarily could be expected of a child of the same age, intelligence, knowledge, and experience, he could be held contributorily negligent barring his recovery. On an issue of contributory negligence, this measuring and judging the accountability of children of immature age is ordinarily to be left to a jury as a question of fact about which there might be reasonable difference of opinion. The trial court did not err in so ruling."

In *Mann v. Fairbourn,* 12 Utah 2d 342, 366 P.2d 603, plaintiff attempted to have the court rule that a child of 5½ years was incapable of being charged with contributory negligence. With respect to this question, the Court stated as follows at page 606:

"The capacity or incapacity of a child is a factual inquiry and the test to be applied is that applicable to any other question of fact. If the trial judge, after a consideration of age, experience and capacity of the child to understand and avoid the risks and dangers to which it was exposed in the actual circumstances and situation of the case, determines that fair-minded men might honestly differ as to whether the child failed to exercise that degree of care that is usually exercised by persons of similar age, experience and intelligence, the question of the child's contributory negligence should be submitted to the jury, but if the trial judge determines that fair-minded men could not conclude that the child had the capacity to be negligent, then he should decide the question of incapacity."

In *Herald v. Smith,* 56 Utah 304, 190 P. 932, the trial court directed a verdict against a 4-year-10-month-old child on the ground the child was contributorily negligent as a matter of law. In reversing this decision the Court stated as follows at pages 933 and 934:

"The plaintiff was a little girl four years and ten months old. She was lawfully on the street at the time of the accident. The defendant's duty to the plaintiff cannot be measured by what he might reasonably have expected to be the conduct of an adult person in such circumstances. It was his duty to avoid the accident if possible in the exercise of ordinary care, and it was for the jury to say whether he was justified in assuming that the plaintiff would do or might do the acts which the testimony shows she actually did. A child of that age cannot, as a matter of law,

be held to have appreciated the danger and is not presumed to conduct herself as an adult person would under similar circumstances. There is nothing in the record to indicate that the plaintiff had sufficient capacity to understand or appreciate the danger to which she was exposed by the approach of the defendant's automobile. In fact, the contrary appears.

> " 'The degree of care required of a child must be graduated to its age, capacity, and experience, and must be measured by what might ordinarily be expected from a child of like age, capacity, and experience under similar conditions. If it acted as might reasonably be expected of such a child, it cannot be charged with contributory negligence.' Gesas v. O.S.L.R.R., 33 Utah 156, 93 P. 279, 13 L.R.A. (N.S.) 1074."

The case of *Woodward v. Spring Canyon Coal Co.*, 90 Utah 578, 63 P.2d 267, involved the death of a child as the result of being struck by a car. From a judgment for plaintiff the defendant appealed. The case was reversed for an error concerning the court's instruction of the duty of the defendant driver, but the Court did comment on the instruction given concerning the duty of the deceased child. In this case the court instructed the jury as follows:

> "You are instructed that in determining whether the infant, Charles Franklin Woodward, was guilty of contributory negligence, you are to consider whether he was exercising that degree of care and caution which a reasonably prudent person of his age, general development, and

maturity should exercise under like circumstances. It is the duty of children to exercise that degree of care to avoid injuries, which children of the same age are accustomed to exercise under like circumstances and the maturity and capacity of the infant, his ability to understand and appreciate the danger, and his familiarity with the surroundings in the particular case, are all matters to be taken into consideration in determining this question.

The Court stated:

> "We find no error in giving of that instruction. One of the defenses interposed by the defendants was that the child, Charles Franklin Woodward, was negligent and that his negligence contributed to the injury which resulted in his death. It was proper that the jury should be instructed as to the nature and degree of care that the law imposed upon him." (Citing cases.)

In the case of *Kawaguchi v. Bennett,* 112 Utah 442, 189 P.2d 109, the court was considering the question of whether an 8-year-old child could be held contributorily negligent. The Court reviewed and approved the trial court's instruction. That instruction is as follows:

> "The degree of care required of a child must be graduated to its age, capacity and experience, and must be measured by what might ordinarily be expected of a child of like age and capacity under similar conditions, and, if it acted as might reasonably be expected of such a child, it cannot be charged with contributory negligence.
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> "This instruction is in accord with our view expressed in Herald v. Smith, supra."

See also 174 A.L.R. 1084 and 1170; 77 A.L.R. 2d 917.

Instruction No. 7 imposes on a six-year-old child a duty to exercise care first to select a course reasonably free of hazards; second to observe and become aware of defendant's car; and third to avoid colliding with defendant's car. The basic fault with the instruction is that whether a six-year-old child in the exercise of ordinary care, under the facts of this case, would have observed or become aware of the car and taken any measures to avoid same are fact questions. The instruction imposes these duties as a matter of law. To paraphrase the situation, in order to clarify the point, the trial court says the child must exercise the care of a child of his intelligence and age. But in the exercise of that care, he has a legal duty "to observe and become aware of . . . defendant's car." What is more, the child had the additional duty to "avoid colliding with same." If the child had the legal duty of observing and avoiding the car, plaintiff could not prevail because obviously the child did not avoid the car. This instruction erroneously comments on the evidence, places the legal duty on the child of avoiding the car, and this is tantamount to a directed verdict. The trial court might just as well have instructed the jury that the child was contributorily negligent and that plaintiff should not be allowed to recover. As the authorities cited clearly indicate, the only duty the child had was to comport himself in the manner of a reasonably prudent six-year-old—

not to have the eye of an eagle and the agility of an acrobat, as the instruction would seem to imply.

The trial court in this case attempted to impose upon the decedent a standard of care that was too onerous even for an adult. Decedent was only six years of age and in many states it would be conclusively presumed that he was incapable of being guilty of contributory negligence. (174 A.L.R. at 1125).

The error in Instruction No. 7 is prejudicial and reversible.

Language similar to that in the case at bar has been held by this Court to constitute reversible error.

In *Saltas v. Affleck,* 99 Utah 281, 105 P.2d 176, this court considered a similar instruction which provided as follows:

> "In this case it was the duty of the defendant Kenneth Butte to drive his automobile on said highway, using reasonable care and prudence *so that he could avoid injuring anyone or colliding with any person on the highway.*"

In ruling on the instruction this Court declared:

> "The instruction if followed practically instructed the jury that the defendant in addition to keeping a proper lookout and requiring the exercise of ordinary care and prudence having in consideration due vigilance commensurate with the circumstances and surroundings required him to use such care and prudence so that he could avoid colliding with anyone, regardless of whether such one were or were not guilty of negligence.

> "That part of the instruction failed to take into consideration the right of defendant to assume that all other persons upon the highway would use ordinary care and reasonable precaution for their own safety until the contrary appeared."

We also call attention to the fact that defendant's automobile overtook and struck the child from the rear. Instruction No. 7 imposes on the child the duty not only to observe defendant's automobile *but to observe it as it approached from the rear.* It is difficult to conceive how much more onerous to plaintiff's case this instruction could become.

This Court has on at least two occasions held that there is no legal duty of a traveler on the highway to keep himself apprised of traffic coming up on him from the rear—let alone imposing such a duty on a six-year-old child.

See *Covington, etc., v. Carpenter,* 4 Utah 2d 378, 294 P.2d 788; *Hayden v. Cederlund,* 1 Utah 2d 171, 263 P.2d 796.

Plaintiff respectfully submits that Instruction No. 7 requires a reversal of this case.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO IN-

STRUCT THE JURY ON THE THEORY OF LAST CLEAR CHANCE.

The trial court refused plaintiff's request to have the jury instructed on the theory of last clear chance. In reviewing this ruling, the Court must now construe the evidence in the light most favorable to the plaintiff.

It will be recalled that the defendant was the only witness who testified as to the happening of this accident. She testified that as she proceeded in a southerly direction along the highway she first saw the deceased and two other children riding their bicycles along the shoulder of the highway; that the deceased was ahead of the other children. Defendant did not testify as to the exact distance in feet she was from the children when she first saw them, but did describe the distance as being "from way up on that corner." (R. 154.) Defendant further testified she reduced her speed from 20 miles per hour to 15 miles per hour and guided her car closer to the center of the road. Defendant admitted the deceased was within her vision at all times, but she did not once honk the horn of her car and warn the deceased of her approach. She did not claim by her testimony that deceased was aware of her position on road prior to the collision. We contend the reasonable inference to be drawn from her entire testimony is that the deceased was evidently inattentive and unaware of her automobile and the impending danger.

Plaintiff respectfully submits that under these circumstances a jury question was presented as to

whether or not the defendant had the last clear chance to avoid this accident. In support of this contention we refer the court to the following citation:

In the case of *Morby v. Rogers,* supra, the defendant sounded his horn approximately 200 feet from the bicycle rider but waited until he was within 20 feet before sounding it again. In affirming submission of the doctrine to the jury, the trial court stated as follows, at **page 236:**

> "Thus the matter was properly submitted to the jury, if the evidence, taken in the light most favorable to the plaintiff, would reasonably support a finding (a) that the defendant knew of the plaintiff's situation of danger, and (b) realized or had reason to realize that the plaintiff was inattentive and unlikely to discover his peril in time to avoid harm, and (c) the defendant thereafter was negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff."
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> * * *
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> "Sounding his horn: the defendant's own testimony reveals that he was aware that the deceased seemed to be oblivious to his approach. He did sound his horn at 200 feet but waited until within about 20 feet of the boy before sounding it again. Should we exclude the other safety factors above mentioned it seems that the jury could reasonably have found that a further warning by the horn between those two distances may have enabled deceased to learn of defendant's approach and avoid the collision."

In *Graham v. Johnson*, 109 Utah 346, 166 P.2d 230, the trial court had directed a verdict in favor of defendant and against plaintiff minor child. In that case the defendant was driving her vehicle along a city street and saw the plaintiff minor child playing in the street. She did not sound her horn or stop her car prior to impact. A friend of plaintiff shouted and warned him of the approach of the vehicle. In reversing the ruling of the trial court, this Court ruled as follows:

> "What we have really been considering is a rather unique application of the so-called last clear chance doctrine. Our discussion has dealt with a negligent omission of Darlene in not timely sounding her horn—an omission actuated by a worthy motive but which the jury could nevertheless find to be negligence. It has also been conceded that the boys were negligent in that they were in violation of the ordinance against playing in the street which ordinance was designed for their protection as well as for the expedition of traffic. Why then in this case does not the negligence of plaintiff bar recovery even though Darlene was negligent? The reason lies in the fact that in this situation the so-called humanitarian doctrine of last clear chance applies."

This court then made reference to the Restatement of Torts on this subject and stated as follows:

> "Sec. 480 deals with the situation where the plaintiff was inattentive but had the ability, had he been alert, to avoid the oncoming danger to which the defendant was subjecting him. But in both cases the liability of the defendant arose because he failed to take the opportunity which

he alone had timely to avoid doing the plaintiff harm even though the plaintiff was negligent in getting himself in a position where he was helpless or because he was so inattentive that he was not alert to the approaching danger over which defendant had control. And in both cases to hold the defendant liable it must plainly appear to the jury that defendant knew or reasonably should have known of plaintiff's helpless peril or of his inattention and after such realization or after he reasonably, had he been conducting himself with the vigilance required of him, should have known it, 'is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff.' In the clear chance doctrine the plaintiff's negligence has become in a sense fixed and realizable and on to this state of things defendant approaches on to the negligent plaintiff with and in control of the danger."

In concluding the opinion, this Court stated:

"In situations where reasonable minds must all come to the conclusion that a defendant had ample opportunity to utilize an existing ability to avoid harm to the plaintiff the court should direct a verdict for the plaintiff; in situations where reasonable minds must all conclude that a defendant did not have such opportunity the verdict should be directed for the defendant. In those intermediate situations such as the supposition under the evidence that Darlene was coming down on the far west side of the street where the court is in doubt as to whether all reasonable minds could conclude one way or the other he should submit the case to the jury with instructions that it should be clearly convinced that the

> defendant had a clear chance, viz., ample opportunity or clearly an existing ability at the time she reasonably should have appreciated the plaintiff's danger, to avoid harming him; otherwise it should find for the defendant."

Defendant had ample opportunity to sound her horn and warn the deceased of her approach. The jury should have been permitted to determine whether or not she failed to exercise her last clear chance to avoid the accident.

CONCLUSION

Plaintiff respectfully submits the trial court committed reversible error by the giving of Instruction No. 7 and by refusing to instruct the jury on the theory of last clear chance. In view of said errors, this Honorable Court should reverse and remand the case for a new trial.

Respectfully submitted,

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