1964

Phoebe H. Durrant v. Nancy Pelton : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

PHOEBE H. DURRANT,
Respondent ~~Appellant~~,

— vs. —

NANCY PELTON,
Appellant ~~Respondent~~.

Case No. 10082

APPELLANT'S BRIEF

Appeal From the Judgment of the
Third District Court for Salt Lake County
Hon. Marcellus K. Snow, *Judge*

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CASES CITED —

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NATURE OF CASE

This is an appeal from a judgment in favor of the respondent for damages occurring when a vehicle driven by the ~~defendant~~ appellant collided with the ~~appellant's~~ respondent's vehicle which was stalled on Wasatch Boulevard in or partly within a traveled traffic lane at about 6:00 p.m. on March 11, 1963.

DISPOSITION BY THE TRIAL COURT

The case was submitted to a jury which returned a verdict for respondent in the amount of $656.37, plus costs.

RELIEF SOUGHT ON APPEAL

Appellant seeks vacation of the judgment entered upon the aforesaid verdict and an order of this Court that the case be remanded for retrial upon proper instructions.

STATEMENT OF FACTS

On March 11, 1963, at about the hour of 6:00 p.m., the appellant was proceeding in a southerly direction along the public highway known as Wasatch Boulevard. She had progressed beyond the intersection of that Boulevard with the Parley's Canyon highway (the extension of 21st South Street) and was traversing the valley through which Wasatch Boulevard passes at this location. It was snowing heavily (R 126, 133, 140). The time was approximately 6:00 p.m., and it was already dark (R 133, 140). All the vehicles on the highway at the time (except for plaintiff's vehicle as to which there is conflict in the evidence) had their lights burning. Respondent's vehicle had stalled on Wasatch Boulevard at a point which is a short distance up the south slope of the valley. According to respondent's testimony, her vehicle was stalled at such a position that it merely projected into the west lane of traffic (R 98). The testimony of the appellant and two disinterested witnesses is, however, that respondent's vehicle was stalled directly in the middle of the west lane of traffic (R 143, 158). As the highway is constructed through the aforesaid valley, it curves distinctly to the right as one moves up the south slope. (Defendant's Exhibit 7.) Appellant was driving her vehicle in the right or westernmost lane of traffic at a

speed which was well within the posted speed limit (R 133, 140). There is no contradiction of her testimony that her vision was then restricted by the falling snow and the advent of darkness. At the moment she began her ascent of the south slope, the difficulties of seeing became more pronounced as her headlights were beamed into the direction of snowfall, and the headlights of oncoming cars came into her line of vision (R 133). It was at this point in her progress that, as her eyes became adjusted to the new circumstances and she had proceeded far enough around the curve so that respondent's car was directly in front of her, appellant became aware that respondent's vehicle was in her path and that some effort must be made to avoid collision (R 134). There is conflict in the evidence as to whether respondent had taken any action to warn oncoming drivers of the presence of her vehicle. Appellant's witnesses testified that the lights of the respondent's vehicle were not even turned on (R 141, 158). Appellant was unable to turn from the westernmost lane of traffic into the adjoining lane because of traffic on her left (R 128). Even though she was proceeding at a slower rate of speed than had respondent previously been proceeding (R 48) and slower than the speed of other cars on Wasatch Boulevard (R 140), she was unable to bring her car to a stop in time to avoid collision with plaintiff's vehicle.

ARGUMENT

POINT I

THE COURT ERRED IN INSTRUCTING THE JURY THAT THE APPELLANT HAD, IN

ESSENCE, AN OBLIGATION TO MAINTAIN SUCH CONTROL OVER HER VEHICLE THAT SHE COULD BRING IT TO A COMPLETE STOP, WHATEVER THE CIRCUMSTANCES OF VISIBILITY MIGHT BE, WITHIN THE RANGE OF HER VISION.

One of appellant's principal contentions, in denying liability under the facts of the instant case, was that she could not, in the exercise of reasonable care, have avoided the collision which is the basis of respondent's complaint. We believe this Court has been most explicit, in its decisions, as to the responsibilities of the drivers of vehicles under the circumstances of the instant case. While the driver who drives his car into the rear of a stalled vehicle must certainly justify his failure to stop or turn in order to avoid the collision, this Court has distinctly recognized that such failures can be satisfactorily explained so that the collision falls into the category of "unavoidable accidents". This Court has had occasion to consider a number of cases where the driver of the following vehicle undertook to explain his failure to stop on the basis of visual difficulties such as darkness, the fact that snow was falling, the fact that the lights of oncoming cars blinded him and the fact that the curvature of the highway prevented his becoming aware of the stalled vehicle in time to take effective action even though his speed was, under the circumstances of which he had knowledge, reasonable.

We believe that, where this Court has stated with great particularity what the responsibilities of individuals are under a given and commonly recurring situa-

tion, it is the obligation of the trial court, when requested, to give an instruction which is oriented to the situation rather than to give a general instruction in terms which have little meaning to the lay mind.

In the instant case, the Court refused to give the requested instruction on unavoidable accident which had relation to the specific facts of the case. The instructions in fact given by the Court as to the duty of the appellant were an adoption of the doctrine of *Dalley* v. *Midwestern Dairy*, 80 Utah 331, a 1932 case which has been frequently criticized by this and other courts. That case stated the controlling rule to be "That it is negligence as a matter of law for a person to drive an automobile upon a traveled public highway" * * * "at such a rate of speed that said automobile cannot be stopped within the distance at which the operator of said car is able to see objects upon the highway in front of him." The Court's Instruction No. 6 in the instant case is a paraphrase of the quoted language. For the Court's convenience, we reproduce it here:

> "You are instructed that there was a duty on the part of the defendant to keep her vehicle always under control so as to avoid an accident. She had no right to assume that the road was clear but under all circumstances and at all times she was required to be vigilant and to anticipate and expect the presence of other vehicles upon the highway. The test of control is the ability to stop, slow down or turn out quickly and easily. When this result is not accomplished, the inference can readily be made that the vehicle was running too fast or that proper effort to control it was not

made. If, therefore, you find from a preponderance of the evidence in this case that at and immediately prior to the time of the accident the defendant did not have her vehicle under proper control, then in that event the defendant was negligent."

Not only did the trial court instruct the jury in the doctrine of the *Dalley* case by Instruction No. 6, the Court emphasized and re-emphasized that doctrine in Instructions 7 and 8. No juror, having read Instructions 6, 7 and 8, could come to any conclusion about the law to be applied except that a driver is negligent if he runs into any obstruction on the highway which does not drop out of the sky immediately in front of him. For this jury, the only relief from the stark adjuration that a driver must always "keep her vehicle always under control so as to avoid an accident" was the J.I.F.U. instruction on unavoidable accidents which is, of course, stated in general terms and could not be related to the instant case by a conscientious juror in view of the fact that the Court had particularly instructed that a defendant must always be able to stop within the range of his vision.

Since the trial court was so clearly persuaded to the point of view of *Dalley* v. *Midwestern Dairy,* it is appropriate for us now to consider the extent to which that case expresses the present position of this Court. We believe the *Dalley* case has been so differentiated and its application so restricted in later Utah cases that it can no longer be cited as a statement of the basic law of this State.

The defendant's vehicle, in the *Dalley* case, was stalled on a straight stretch of highway, there was nothing to obstruct the plaintiff's vision, and weather conditions were good. The Court sustained a directed verdict against the plaintiff (the driver of the following car which collided with the stalled vehicle) and stated the controlling rule to be "that it is negligence as a matter of law for a person to drive an automobile upon a traveled public highway" . . . "at such a rate of speed that said automobile cannot be stopped within the distance at which the operator of said car is able to see objects upon the highway in front of him."

It should be noted that, in each of the *Dalley* case and the cases therein cited, there was comment about the plaintiff's "dilemma" — i. e. either his lights were inadequate or he failed to keep a reasonable lookout. Where the facts as to visibility are changed, however, the Utah Court has come to entirely different conclusions as to the patency of the following driver's negligence. In *Trimble v. Union Pacific Stages,* 142 Pac. 2d 764 (1943), the Court reviewed the *Dalley* case and its antecedents and, limiting those cases to their facts, said "We do not believe this (the *Dalley* doctrine) to be the correct rule of law" when applied to a situation where there is fog, smoke or some other obstruction of the following driver's vision. Some fifteen cases from almost as many jurisdictions were cited in support of the Court's conclusion that mere failure to stop within vision's range is not necessarily negligence where vision is obstructed by factors beyond the control of the following driver.

The statement of the *Trimble* case that negligence must be proved by more than the fact of collision was reaffirmed by the Court in *Hodges* v. *Waite,* 270 P. 2d 461, where the obstruction was a curve in the highway. There again, the question of whether the following driver (the plaintiff in that case) was negligent was a matter for the jury. The judicial statement which most effectively lays the ghost of the *Dalley* case, however, is found in *Federated Milk Producers Association* v. *Statewide Plumbing & Heating,* 358 Pac. 2d 348 (1961). "The *Dalley case* rule on which defendant relies," said Justice Wade, "requires a showing from which it must inevitably follow that plaintiff did not keep a lookout ahead . . . or did not heed what he saw or he could not see . . . *because his lights were not such as are prescribed by law.*" (Our emphasis)

There is no shred of evidence in the instant case that appellant failed to keep a lookout or that her lights were less than what the law requires. The credible evidence is that she was unable to stop within a few feet after she discerned through the snow that a snow-covered car with its lights off was stalled directly in her traffic lane in the darkness ahead.

In the instant case, the facts could hardly more clearly establish that we are dealing with a situation where *Dalley* v. *Midwestern Dairy* has no application. Everyone agrees that it was dark enough so that headlights were necessary for vision. Appellant's witnesses, who have no interest in the outcome of this case, testified that it was not merely dusk but dark. Exhibit P-6

establishes the time at which the sun descended below a flat horizon. The Court may, of course, take knowledge of the fact that the Oquirrh Range rises well above the flat horizon in the path of the sun's descent west of the accident site during early spring. That it was snowing heavily at the time of the accident is also a matter of general agreement. Mr. and Mrs. Anderson were very positive in their statements as to the effect of the snow to obscure vision. The fact that the highway curves so that a stalled vehicle at the accident site would not be in direct line of a following driver's vision for any great distance is made clear by an examination of defendant's Exhibit 7. The evidence is also without contradiction that there were northbound cars on the highway, that their headlights were burning and that the beams of their lights were occasionally directed into appellant's eyes as she began her ascent of the south slope of the dip. All that the Court need judicially notice to complete the picture of the appellant in a predicament dangerous for reasons beyond her control is the physical fact that falling snow tends to obscure vision more as one drives upward into it.

Under the facts of this case, Instructions 6, 7 and 8 were entirely improper, and it was improper for the Court to deliver them even if the Court had also given some instruction reasonably calculated to impart the respondent's legal position. In the absence of an instruction reasonably communicating to the jury the view of the *Trimble* case, the *Hodges* case and the *Federated Milk Producers* case, the trial court's delivery of Instructions 6, 7 and 8 was clear and prejudicial error.

POINT II

THE COURT ERRED IN FAILING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 11.

There is abundant evidence, most of which is not contradicted in the slightest by respondent, that a great many factors contributed to appellant's inability to see respondent's stalled car. There were the darkness, the falling snow, the change in light refraction as appellant's car began to ascend, the glare of oncoming headlights, the curvature of the road, and the natural camouflage of plaintiff's snow-covered car. Defendant did not even have the benefit of plaintiff's tail lights if we are to believe her testimony and that of the Andersons, the only disinterested witnesses.

Clearly, the evidence brings this case within the scope of the doctrine so carefully stated by this Court in *Federated Milk Producers Ass'n., Inc.* v. *Statewide Plumbing & Heating Co.* (supra). This Court there reviewed its several previous decisions on the point and approved the view of the Washington Court that, when visibility becomes difficult, a driver is not obliged to stop. If, indeed, the law were to impose a duty on motorists to stop or come to a near stop under such conditions, traffic would stop entirely with the most cautious driver. Obviously, a driver beginning to ascend a hill during a snow storm acts reasonably if he tries to maintain some momentum. He may otherwise become a highway obstruction himself.

The statement of doctrine in the *Federated Milk* case, to which we have referred, is this:

> "The unseeability of substantial objects on the highway in time to avoid an accident may depend on many things other than inattention, faulty headlights, or failure to give heed to what was there to be seen. A sudden heavy smoke, fog, snow or rain storm, lightning or approaching headlights or a combination of some or all of these elements, coupled with the negligence of the other party, may make an accident unavoidable regardless of how alert and competent a driver is or how well equipped his car is with brakes, lights and other necessary appliances. The visibility of substantial objects may depend on their size, shape, color or whether they absorb or reflect light or blend with or stand out in contrast to the background. To be alert to all surrounding conditions, to have good eyesight, to have proper headlights and brakes and to keep the vehicle under relatively safe control are all very important, but under some circumstances all of these things are not sufficient to enable a reasonably prudent driver to avoid an accident." (From page 298 of the Utah Report.)

This is precisely the instruction appellant requested the Court to deliver (Defendant's Requested Instruction No. 11; Record p. 49). The Court refused to do so, even though the authority for the requested instruction was cited and shown to the Court. Instead, the Court gave a general instruction on unavoidable accident and gave three specific instructions conveying the view that a driver must, at all times, be able to come to a full stop within the range of his vision and that one who stalls a car, however negligently, upon a highway

may assume that following drivers will be able to see and avoid the stalled car. In short, the trial court deliberately ignored the last pronouncement of this Court as to the obligations of motorists under conditions of difficult visibility.

Appellant contends the failure of the trial court to give Defendant's Requested Instruction No. 11 constitutes prejudicial error. No conscientious juror could have found this accident was "unavoidable" in the face of the instructions 6, 7 and 8 given by the trial court. Had defendant's instruction been given, no conscientious juror could have found otherwise than that the accident was unavoidable.

POINT III

THE COURT ERRED IN FAILING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 13.

Respondent filed her complaint in this matter in June of 1963 over her attorney's signature. In Paragraph 1 of that complaint, she alleges that her car was "stalled, out of gas" on the highway at the time of the accident. Respondent persisted in this statement of fact through the pretrial conference, and the pretrial order framed, as an issue, whether or not respondent's failure "to have her car properly fueled so the same would not run out of gas at a dangerous time and place" constituted negligence. Appellant briefed the point and relied upon respondent's admitted failure to keep gas in her car as a defense.

It was not until the trial of the case that the respondent made any effort to amend her pleadings to avoid the

effect of the admission in her pleadings that she had run out of gas. During the trial, respondent testified that her gas gage showed an adequate gas supply at the time of the accident and that she later drove the car before it was refueled. Appellant objected to such testimony and indicated to the Court that plaintiff should not be permitted to testify contrary to the allegations of her complaint particularly when defendant had no reason to anticipate such testimony. The officer who investigated the accident might have seen the gas gage. The people who towed the car away may have refueled it. Appellant made no effort to obtain such evidence because the need for it appeared to be lacking. Nevertheless, respondent was permitted by the Court to amend her complaint at the conclusion of her evidence to delete the reference to her having run out of gas.

Appellant, having objected to the amendment of the complaint and the introduction of evidence that the car stalled for any reason other than lack of fuel as alleged in the complaint, then asked the court to instruct the jury that it must find plaintiff had run out of fuel and to consider whether plaintiff was or was not negligent on that basis. The Court refused to do so.

The only basis upon which amendments to conform to the evidence are properly made is Rule 15(b), Utah Rules of Civil Procedure. That rule reads in its entirety as follows:

> "AMENDMENTS TO CONFORM TO THE EVIDENCE. When issues not raised by the pleadings are tried

> by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence."

The rule has application only to issues not raised by the pleadings and permits amendment which will cause the pleadings to raise the issues as they were posed by the evidence. It is not true that the pleadings in this case are silent on the issue of whether respondent permitted her vehicle to run out of gas. Respondent alleged that she did, and appellent admitted it. That issue was fully disposed of by the pleadings. We contend it was error for the trial court to permit the amendment over objection. In any event, appellant should have been given an opportunity to develop her evidence on the point. We believe the defense of contributory negligence based on fuel exhaustion is a meritorious defense. At least one court has ruled that it is negligence as a matter of law to obstruct a highway because of fuel exhaustion. In

Keller v. *Breneman*, 153 Wash. 208, 279 Pac. 588, 67 A. L. R. 92, the Court said:

> "His first act of negligence was in operating it over the highway in a condition to become stalled for want of a sufficient supply of gasoline."
>
> "A motor vehicle is a complicated piece of mechanism, and some part of it may give way and cause it to stall, no matter what degree of care the operator may have exercised to keep it in proper condition, and it is a want of such care to permit it to stall for want of a sufficient supply of gasoline."

Research has revealed no judicial statement of a contrary view.[1]

CONCLUSION

Most of the Utah cases which have posed the issue now before this Court have been cases when the following driver was *plaintiff*, not defendant. Even in *Dalley* v. *Midwestern Dairy*, the plaintiff was the following driver who ran into the back of a truck on a clear day, on a straight stretch of road when road conditions were excellent. It is usually the driver who obstructs the highway who is called upon to explain his conduct.

In the instant case, appellant was unable to avoid collision by reason of a combination of circumstances beyond her control. This Court has frequently commented upon and clearly defined the standard of care which must be satisfied by people driving under conditions of poor visi-

[1] See discussion in *Ford* v. *Herod*, 353 P. 2d 702 (Okla. 1960).

bility. Appellant is a working woman who was driving her two little children home from a day care center at dinner time in a snow storm. The trial court so instructed the jury that it was obliged to find that she was duty bound to expect that respondent (or someone of like habits) would stall a car in the middle of the traffic lane of Salt Lake County's major freeway. We believe the needs of society are badly served by any rule of law which would require her to park under such circumstances. We submit that she was not given a fair trial by a jury instructed as this one was.

Respectfully submitted,

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