1964

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

PHOEBE H. DURRANT,
Plaintiff and Respondent,

— vs. —

NANCY PELTON,
Defendant and Appellant.

Case No. 10082

RESPONDENT'S BRIEF

Appeal From the Judgment of the
Third District Court, Salt Lake County
HON. MARCELLUS K. SNOW, *Judge*

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a judgment in favor of the plaintiff for damages occurring when a vehicle driven by the defendant collided with the plaintiff's vehicle which was stalled on Wasatch Boulevard in or partly within a traveled lane at about 5:20 or 5:30 p.m. on March 11, 1963.

DISPOSITION BY THE TRIAL COURT

The case was submitted to a jury which returned a verdict for plaintiff in the amount of $656.37.

RELIEF SOUGHT ON APPEAL

The defendant-appellant seeks to vacate the judgment entered in the plaintiff's favor and an order of this court that the case be remanded to the District Court for a new trial.

STATEMENT OF FACTS

The appellant's statement of facts does not comply with the rule of this court that they should be set forth not merely as the appellant contends them to be but as they must be viewed on appeal; that is, favorable to the verdict of the jury, so the respondent will set forth her own statement of facts.

On March 11, 1963, at about the hour of 5:20 or 5:30 p.m. (R 95) the plaintiff was proceeding in a southerly direction along Wasatch Boulevard where it cuts through the gully at Parley's Canyon in the inside lane of the two southbound lanes of traffic. She had progressed beyond the low part of the gully and was on the upgrade when her motor sputtered. When her motor started to sputter she pulled it to the right and got as far to the right as she could before the motor died (R 98). The point where the vehicle came to a stop was 3 to 4 blocks south of the junction of Wasatch Boulevard with Parley's Way. (R. 99) There was a light snow falling at the time. (R 96) The plaintiff's lights were burning on her vehicle. (R 97) From the point where Mrs. Durrant's car was stopped one could see all of the highway back to Parley's Way including the dip (R 113). (See also Exhibit 7) There was other traffic following plaintiff in the

same lane of traffic she was in and she observed a few cars traveling in the same direction as she turn out into the inside lane when they were 5 to 6 car lengths from the plaintiff's car after she had come to a stop. (R 99) Mrs. Durrant, the plaintiff, while sitting in her car, turned around in the seat and looked back and observed the defendant's car and a truck carrying the witnesses, Mr. and Mrs. Anderson, just coming down the hill past Parley's Way. (R 98-99) Mrs. Pelton's car was in front and they were three to four blocks from plaintiff's car. After she observed them she turned back around and sat there waiting for them to go out around her before she decided what to do. She stated that the truck and car were traveling fairly fast. (R 113) Shortly thereafter the impact occurred. When she observed the defendant's car and the following truck she stated that they did not have their lights on. When her car sputtered, it sounded like it might have been out of gas but she observed her gas gauge and it read ⅛ full. (R 100) When the impact occurred, plaintiff's glasses which she was wearing at the time were thrown into the back seat as well as her gloves which she had on her hands. (R 104) She sustained a whiplash injury (R 104), bruises to her chest, back, legs and abdomen. She incurred medical bills in the amount of $69.11. Her injuries had healed completely by the time of trial. (R 111)

In contrast to the foregoing facts the defendant testified that it had been snowing heavily for some time before the accident, but at the same intensity before the accident as of the time of the accident. (R 123-

126) She stated her vision was limited by the snow, but she could see 60 to 70 feet in front of her. (R 139) She had her lights on but the plaintiff and some other cars did not have their lights on. (R 136) She did not see the plaintiff's car until she was within 30 feet of it. (R 123) She was traveling at about 25 miles per hour (R 124) and she stated that under the conditions that existed at the time the accident occurred she could not stop her car within the distance she could see in front of her. (R 139) As soon as she saw the car in front of her she immediately applied her brakes but slid into the car. (R 126-127)

ARGUMENT

POINT I.

THE COURT DID NOT ERR IN INSTRUCTING THE JURY WITH RESPECT TO THE DEFENDANT'S OBLIGATION TO MAINTAIN CONTROL OVER HER VEHICLE, TO KEEP A PROPER LOOKOUT AND TO TRAVEL AT A REASONABLE SPEED.

Appellant contends that the giving of plaintiff's requested instructions No. 6, 7 and 8 was an adoption of the doctrine of *Dalley* v. *Midwestern Dairy*, 80 Utah 331, and that said rule announced in *Dalley* v. *Midwestern Dairy* is no longer the Utah law. The three instructions complained of by the defendant are instructions pertaining to lookout, control and the duty of a driver of a motor vehicle to drive at a reasonable speed under the existing conditions. In the *Dalley* v. *Midwestern Dairy* case the court did announce and adopt the rule of law that it is negligence as a matter of law for a person

to drive an automobile on a traveled public highway used by vehicles and pedestrians 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, citing the cases of *Nikoleropoulos* v. *Ramsey*, 61 Utah 465, 214 P. 304, and other cases.

The plaintiff in its requested instruction No. 2 (R. 31) did, in fact, request the court to instruct the jury with respect to the use of lights and that it was negligence as a matter of law for a person to drive a vehicle upon a highway at a rate of speed that the vehicle could not be stopped within the distance at which the operator of the vehicle was able to see objects on the highway in front of her and likewise, with respect to driving at a speed at which she was not able to stop when she saw plaintiff's vehicle, but the court refused the instruction.

On the facts as they existed in the case of *Dalley* v. *Midwestern Dairy*, our Supreme Court would apparently still come to the same conclusion. However, there are exceptions to the general rule in the *Dalley* v. *Midwestern Dairy* case. Some of the exceptions to the general rule are expressed in cases such as *Nielson* v. *Watanabe*, 90 Utah 401, 62 (P(2) 117, where the driver of a car was suddenly and unexpectedly blinded by the lights of an approaching vehicle and while so blinded the collision occurred. Under these circumstances the Utah Supreme Court held that it was not contributory negligence as a matter of law to run into an unlighted vehicle but was a question of fact for the jury. In *Trimble* v. *Union Pacific Stages*, 105

Utah 457, 142 P(2) 674, the Utah Supreme Court held that a bus driver was not negligent as a matter of law where the automobile in which the plaintiff decedent was riding was parked on the left shoulder of the highway without lights and was struck by the bus when it suddenly entered a fog area. In the case of *Hodges* v. *Waite*, 270 P(2) 461, 2 Utah(2) 152, our court held that it was a jury question as to whether or not the plaintiff was guilty of contributory negligence when he came around a curve which blocked his view and ran into the trailer of the defendant which was parked on the right shoulder of the road with part of the trailer being upon the hard surface. In the case of *Federated Milk Producers Association* v. *Statewide Plumbing and Heating Company*, 11 Utah (2) 294, 358 P(2) 348, the headlights of an approaching car and a large trenching machine on one side of the road obscured and distracted the attention of the plaintiff and the court again ruled that the plaintiff was not negligent as a matter of law in failing to see an unlighted row of dirt in time to have stopped before striking it, and that the question of plaintiff's contributory negligence was a proper question for the jury.

In the case before this court the trial judge did not make a ruling as a matter of law with respect to the negligence of the defendant but did properly submit it to the jury on proper instructions defining the defendant's duty with respect to lookout, speed and control.

There is a dispute in the evidence with respect to the existing conditions at the time of the accident. However, by the defendant's own testimony it appears that the

snowstorm, whatever the severity of it may have been, was of the same relative intensity some time before the accident as it was at the time of the accident. The defendant was, therefore, not surprised by the existence of the storm or the nature of it and if she was, as indicated in her testimony, driving at a speed where she could not stop within the range of her headlights the least that could be said would be that it would be a jury question as to whether or not she was driving at a speed that was reasonable and proper under the existing conditions. Likewise, her statement that she could see 60 to 70 feet in front of her but that she didn't see the defendant's vehicle until she was 30 feet from it would again raise the question as to whether or not she was keeping a proper lookout and this also would be a question for the jury. And again, if in fact the defendant was driving at a speed where she could not stop within the distance at which she could see objects in front of her, the issue of whether or not she had proper control of her vehicle would be a proper one to submit to the jury.

The witnesses, Mr. and Mrs. Anderson, were aware of the existence of the plaintiff's vehicle on the highway from the time they started down the hill until the time of impact between the defendant's and plaintiff's vehicles. If they were able to observe the plaintiff's vehicle under the same general circumstances that existed with respect to the defendant then it would be a question for the jury as to whether or not the defendant should also have seen the plaintiff's vehicle and been aware of it before the time she actually did observe it, according to her own testimony.

POINT II.

THE COURT DID NOT ERR IN FAILING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 11.

On pages 4 and 5 of appellant's brief appellant states that, "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." Appellant has cited as error failure of the court to give its requested instruction No. 11 but an examination of the instruction indicates that the instruction is not oriented to the particular situation that existed at the time this accident occurred. For instance, there is no evidence whatsoever in the case that there was any sudden heavy smoke or any fog, any lightning, or a rainstorm, or that in fact the headlights of the defendant were faulty. Including these items in an instruction pertaining to this case would be error.

The defendant complains about the court's giving the instruction it did on unavoidable accidents, but the defendant in its requested instruction No. 10 requested the court to give the instruction on unavoidable accidents as it was given by the court. Respondent, therefore, submits that the court properly refused to give the appellant's instruction No. 11 as requested.

POINT III.

THE COURT DID NOT ERR IN FAILING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 13.

Appellant in her brief at page 14 has claimed that respondent alleged she ran out of gas and that appellant admitted it. A review of the pleading will show that appellant in her answer (R 3) denied that plaintiff ran out of gas and alleged that plaintiff in fact parked her vehicle on the highway. The pre-trial order set up the issues to be tried. One of defendant's contentions which was set up as an issue to be tried was that plaintiff was negligent "in failing to have her car properly fueled so the same would not run out of gas at a dangerous time and place." (R 7) The burden of showing this was upon the defendant. Defendant also still contended that plaintiff parked her car and this was an issue. (R 7)

At the time of trial plaintiff testified without objection upon the part of the defendant (R 100, 101) that she did not know why her car sputtered and stopped; that in fact her gas gauge did not read empty but ⅛ full and that later she drove the car a short distance before putting any gas in it. (R 116) Appellant's counsel on page 13 of his brief claims that he objected to such testimony being given but the record is to the contrary. After all the evidence was in and both parties had rested, the plaintiff moved the court for an order allowing plaintiff to amend the complaint to conform to the evidence or proof that was offered. (R 74) This was the first time defendant's counsel objected. The court granted the motion (R 75). Defendant had already filed his request for instructions from 1 to 12 (R 38) which did not include any request pertaining to negligence with respect to running out of gas and it was only after plaintiff's motion to

amend had been granted that defendant then filed the requested instruction No. 13 asking the court to instruct the jury that they must find that plaintiff's automobile stalled upon the highway by reason of the exhaustion of its gas supply. The defendant never did request an instruction pertaining to whether or not one is negligent if her car stalls by reason of the exhaustion of her gas supply.

In appellant's brief, *Kellar* v. *Breneman*, 153 Wash. 208, 279 P. 588, has been cited supporting the doctrine that a driver is guilty of negligence in operating his car over a highway in a condition where it becomes stalled for want of a sufficient gas supply, it is further stated that research has revealed no judicial statement of a contrary view. The respondent desires to cite a few cases to the contrary.

In the case of *Fick* v. *Herman Oil Transport Company*, Nebraska 11 CCH (2) 366, a 1955 case, a truck tank combination hauling gasoline ran out of gas. The driver had failed to check it before leaving on a trip assuming that the driver who had last driven the truck had in accordance with usual practice had the gasoline tank filled. The road point where the tank ran out of gas had about a ten foot shoulder but it was soft and muddy at the time and the driver of the truck, therefore, pulled over to the right as far as he could without going out on the shoulder. The plaintiff vehicle ran into the rear of the tanker. The plaintiff charged the driver of the tanker with negligence in failing to check the fuel and for running out of gas on the highway. This issue

was submitted to the jury. On appeal, the appellant cited as error the failure of the trial court to withdraw this issue. On appeal, the trial court held the mere stalling of a vehicle temporarily on the highway caused by the exhaustion of the gas supply would not ipso facto constitute negligence as a matter of law and in this case there being no evidence to show that the driver was negligent the issue should have been withdrawn from the jury.

In the case of *Rath* v. *Bankston,* a 1929 California case, 281 P. 1081, the court held that the truck driver's failure to maintain sufficient fuel in the gasoline tank was excusable where the same procedure as to refilling the tank had been sufficient on previous trips.

In Volume 2, Section 824, *Blashfield,* Permanent Edition, at page 5, it is stated:

> "Generally speaking it is the duty of a driver on a highway to see that the car is maintained in such condition as to the fuel supply that it may not become a menace on the highway to other traffic by stopping on the road, and failure to exercise reasonable care to keep it in proper condition in this respect is negligence. But if a motorist has exercised reasonable care, an unforeseen failure of his gasoline supply does not constitute negligence."

The respondent, therefore, submits that the court was not in error in failing to allow plaintiff to amend her complaint. It was only amended to conform to the proof and the issues already set up and consequently the court likewise did not err in refusing to give appellant's requested instruction No. 13.

CONCLUSION

The court's instructions were fair and proper and a fair trial was had by both parties. The trial court's judgment on the jury verdict should be affirmed.

Respectfully submitted,

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