1964

Carol Ewan v. Ray Butters : Plaintiff and Brief of Appellant

Utah Supreme Court

Bell & Bell; Attorneys for Plaintiff-Appellant;
Hanson & Garrett; Attorneys for Defendant-Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

CAROL EWAN,

Plaintiff-Appellant,

vs.

RAY BUTTARS,

Defendant-Respondent.

Case No. 10086

PLAINTIFF AND APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the
District Court for Salt Lake County
Honorable Ray Van Cott, *Judge*

BELL & BELL and C. BEN MARTIN
303 East 2100 South
Salt Lake City, Utah
Attorneys for Plaintiff-Appellant

HANSON & GARRETT,
520 Continental Bank Building
Salt Lake City, Utah
Attorneys for Defendant-Respondent

REPLY TO RESPONDENT'S BRIEF

CASES CITED

TEXTS CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

CAROL EWAN,

Plaintiff-Appellant,

vs.

RAY BUTTARS,

Defendant-Respondent.

Case No. 10086

PLAINTIFF AND APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the
District Court for Salt Lake County
Honorable Ray Van Cott, *Judge*

REPLY TO RESPONDENT'S BRIEF

The positions taken and arguments advanced in Respondent's Brief require reply and some extension of the citations of authority and correction of Respondent's misunderstanding of the position of Appellant.

The two primary problems are dealt with separately as follows:

I.

Presumption of due care arising from traumatic amnesia.

The rule that when an injured person is incapable, by reason of the accident, to remember the circumstances under which he was injured, he is entitled to the benefit of the presumption of due care, is well settled and by no means limited, as indicated in Respondent's argument, to the presumption familiar in death cases.

So well established is the rule that the new edition of American Jurisprudence will contain, when the Negligence Volume is completed, the following addition to the present Section 293, 38 Am. Jur 987 (Negligence) which is now found as a note in the 1964 Supplemental folder:

"Add following Note 10:

> "The rule is well established that where the loss of memory or other incapacity rendering the survivor of an accident incapable of testifying as to the accident is shown to be attributable to such accident, it will be presumed, in the absence of evidence to the contrary, that he exercised due care."

It is true that no case precisely in point in Utah has been yet decided. This case appears to be the first time the matter has been squarely presented to this court. It is therefore important here that the wisdom and widespread character of the decisions in our sister states should be noticed and the rule be here declared in conformity with what is fast becoming universal. No case has been noted in any jurisdiction where the validity of the rule

has been denied. Without attempting to list here the great number of decisions in point (many of which will be found compiled in ALR Blue Book of Supplemental Decisions, Issue No. 10, 1964, p. 447 adding citations to those compiled in the annotation in 141 ALR 873) the following list of cases will indicate somewhat jurisdictions in which the rule is now well established (aside from California where there is a great number of cases applying it):

Prewitt v. Rutherford, 238 Iowa 1321, 30 N.W. 2d 141

Breaker v. Rosena, 301 Michigan 685, 4 N. W. 2d 57, 141 ALR 867 (Annotated in ALR)

Little Rock Furniture Mfg. Co. v. Dunn, 218 SW 2d 527, Affirmed 222 SW 2d 985, 148 Texas 107

Johnson v. Hetrick, 150 At. 477, 300 Pennsylvanie 225

Gregona v. Rushton, 101 A. 2d 768, 174 Pa. Super. 417

Rutovitsky v. Magliocco, 147 At. 2d 153, 394 Pa. 387

Kreft v. Charles, 268 Wisconsin 44, 66 N. W. 2d 618

Teeter v. MS&J, 342 P. 2d 864 (New Mexico)

The clarity of the rule is indicated in the following quotation from *Gregona vs. Rushton,* cited immediately above, quoted and followed in *Rutovitsky vs. Magliocco,* above. In the *Gregona* case the plaintiff survived and testified that he couldn't remember the details. He woke up

in a hospital 14 days after the accident. In the *Rutovitsky* case the time involved was 6 hours:

> "Furthermore, since plaintiff testified that he remembered nothing from the time he stepped onto the Chester Road on August 21, 1950, until he regained consciousness in a hospital some 14 days later, he was entitled to the presumption that he did all the law required him to do and was not contributorily negligent. (Heaps vs. So. Pac. Trac. Co. 276 Pa. 551, 120 At. 548) Such presumption is overcome so as to render the question of contributory negligence a matter of law only where undisputed testimony and the inferences from it point only to one conclusion."

There is no occasion for the alarm expressed by Respondent about the application of the rule to this case. When it is remembered that what is involved here is the matter of denial of a jury trial, that the loss of memory is clearly shown to be due to the injury (R. 73, 74) and relates to crucial matters, every principle of justice and reason supports invocation of the rule. In other words, appellant is not asking this court to make any finding beyond the point that a presumption exists giving rise to questions on which the minds of reasonable men may differ, and to the right to trial by jury.

At pages 14 and 15 of Respondent's Brief propositions are urged having to do with parties who have "faulty recollections". Such cases are irrelevant to the present issues, which are limited to traumatic amnesia which may subside by the time of the trial (See the opinion of Dr. Morrow R. 74) or may not. Cases simply involving failure to recall are not involved.

II.

In italics at pages 10 and 11 of Respondent's Brief is urged that "Nowhere in her Brief, however, does Appellant point out those facts or evidence upon which a jury could conclude that she was in the exercise of due care."

In response to this charge, we respectfully point to certain decisions of this honorable Court, and the facts adverted to in the Appellant's Brief:

In *Covington vs. Carpenter,* 4 Utah 2d 378, 294 P(2) 788, this court said

> "Modern traffic complexities make it impossible to lay down by judicial rule what will always be, or fail to be, reasonable care in the operation of motor vehicles. The duty to keep a proper lookout is manifest, but the obedience to or violation of that duty must be determined according to particular circumstances and in accord with the constantly varying exigencies occasioning each accident. *As to what constitutes a proper lookout is usually, therefore, a latter-day classic question for jury determination, and each trial and appellate court must determine the question as a matter of law only when convinced that reasonable persons could not disagree upon the question when conscientiously applying fact to law.*"

(Emphasis ours).

In *Best vs. Huber,* 3 Utah 2d 177, 281 P(2) 208 this court repeated its pronouncement in *Linden vs. Anchor Min. Co.,* 20 Utah 134, 58 P. 355, 358:

> "Where there is uncertainty as to the existence of

> either negligence or contributory negligence the question is not one of law but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in testimony or because, the facts being undisputed, fair minded men will honestly draw different conclusions from them."

With these rules in mind it is not difficult to find precedent in Utah decisions establishing the fact that honest men may draw different conclusions from the facts in this case.

It is not disputed that Appellant looked along the street, saw cars, two of them, two blocks (660 feet long, each, or one-quarter of a mile) away, moving toward her at a speed of about 20 miles per hour (R. 32, lines 29-30). In the concurring opinion of Justice Wade of this court, in *Mingus vs. Olson* 114 Utah 505, it is said:

> In the same case, the Court said:
>
> > "If defendant was 133 feet away when they stepped from the curb into the street and traveling only 20 miles per hour, he would have ample time to sound his horn and stop in time to avoid the accident. Thus, under these circumstances, I think it would be a jury case."
>
> In the same case, the Court said:
>
> > "The duty to look has inherent in it the duty to see what is there to be seen, and to pay heed to it."

The case of *Coombs vs. Perry,* 2 Utah 2d 381, 275 P 2d 680 is an even more impressive precedent. We note these words:

> "It is to be borne in mind that although the motorist and pedestrian are both required to

> exercise the same standard of care, that of the ordinarily prudent person under the circumstances, that standard imposes upon the motorist a greater amount of caution than upon the pedestrian, because of the potential danger to others in the operation of an automobile."
>
> * * *
>
> "It is deducible that at the time plaintiff looked to the north the defendant *** at least was not necessarily so close to plaintiff to be a threat to her safety, and consequently that she did not step from a place of safety to a place of danger as defendant charges."

At pages 9 and 10 of Appellant's Brief there are detailed the facts which so clearly invoke the issues of last clear chance in this case. The facts above noted, and the rules expressed by this court make it eminently clear that Respondent should have avoided hitting Appellant if he had been obeying the lookout rule. She was within a couple of steps of the edge of the road. He had a wide, clear road in which to pass; Appellant was in sudden, dire, inextricable peril of which Respondent had reason to know in the exercise of due caution. Note the expression of this Court in *Beckstrom vs. Williams* 282 P 2d 309, 3 Utah 2d 210:

> "We are therefore concerned only with that portion of the rule which would permit a plaintiff in extricable peril to recover from one who had reasons to know of the peril and to avoid injuring him. Section 479 states the rule thus:
>
> "A plaintiff who has negligently subjected himself to a risk of harm from the defendant's subsequent

> negligence may recover for harm caused thereby if immediately preceding the harm (a) the plaintiff is unable to avoid it by the exercise of reasonable vigilance and care and (b) the defendant *** would have discovered the plaintiff's situation and thus had reason to realize the plaintiff's helpless peril had he exercised the vigilance which it was his duty to plaintiff to exercise and (c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff."

Commenting on this rule in *Marcellin vs. Osgulthorpe*, 9 Utah 2d 1, 236 P 2d 779, this court said:

> "Under such circumstances the plaintiff's negligence has come to rest and is not a concurring proximate cause of the injury, but the negligence of the defendant is the later, intervening, sole proximate cause."

and ordered a new trial.

It is not amiss to comment that in the Beckstrom case this court noted the rule that on appeal it is the duty of the court to consider the evidence in the light most favorable to the plaintiff in determining whether or not the case should have been submitted to the jury on the doctrine of last clear chance.

The case of *Marcellin vs. Osgulthorpe* is illuminating on this matter of avoiding something in the road. In that case there was a car projecting into the highway on the right hand side, and another car parked on the left, and applying the rule of evidence above stated, this court said:

> "There is no reason to assume that the defendant had to apprehend that the plaintiff would not see the Cadillac which was in plain sight on the highway in front of him with the tail lights on, nor that he would continue at a negligent rate of speed, nor that he would fail to guide his car safely between the other two. There was actually room to clear by several feet on either side."

In the present case there was ample room.

With the foregoing explanatory and answering comments, it is respectfully submitted that there exists in this case ample room for difference of opinion between reasonable men, and that the trial court erred prejudicially in denying the right to jury trial.

Respectfully submitted,

BELL & BELL and C. BEN MARTIN
303 East 2100 South
Salt Lake City, Utah

Attorneys for Plaintiff-Appellant