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Robert Lee Jones v. Claudius D. Knutson and Salt Lake City Lines : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

ROBERT LEE JONES,
Plaintiff and Respondent,

—vs.—

CLAUDIUS D. KNUTSON and SALT LAKE CITY LINES, a Utah Corporation,
Defendants and Appellants.

Case No. 10163

RESPONDENT'S BRIEF

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

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STATEMENT OF THE KIND OF CASE

This is an action wherein plaintiff seeks damages for personal injuries suffered by him when the automobile which he was driving was struck in the rear by a bus owned by defendant Salt Lake City Lines and driven by defendant Claudius D. Knutson.

DISPOSITION IN THE LOWER COURT

The case was tried to a jury. From a verdict and judgment for plaintiff, defendants appeal.

RELIEF SOUGHT ON APPEAL

Respondent asks only that this Court affirm the judgment of the Trial Court.

STATEMENT OF FACTS

On November 2, 1961, the plaintiff, Robert Lee Jones, was injured when the automobile he was driving was struck in the rear by a bus owned by the defendant Salt Lake City Lines, and driven by defendant Claudius D. Knutson. The accident occurred between 11th and 12th East, on 9th South, in Salt Lake City. At this point on 9th South, the street is 61 feet 10 inches wide (R. 131), and is divided into 4 lanes, 2 eastbound and 2 westbound (R. 124). The eastbound lanes are divided from the westbound lanes by two yellow lines (R. 133), and the westbound lanes are divided by a white line (R. 145). The inside westbound lane is 11 feet wide, and the outside westbound lane is 19 feet 8 inches wide (R. 133). The road surface at the scene of the accident is black top asphalt (R. 131). Between 11th and 12th East, a distance of 690 feet (R. 132), 9th South has a very steep slope (R. 124). The hill starts at 12th East and ends at 11th East (R. 143). At the time of the accident the weather was clear and the street was dry (R. 124). The point of impact was in the outside westbound lane 287 feet 2 inches east of the east curb line of 11th East (R. 131).

Immediately prior to the accident, plaintiff, and a passenger, were driving along 13th East in Salt Lake City. At the intersection of 13th East and 9th South he turned west and proceeded down 9th South in the outside lane of traffic (R. 144). As he proceeded down 9th South he observed a car pull on to 9th South from the vicinity of East High School (R. 144). The car pulled into

the outside westbound lane, and plaintiff followed it down the hill. (R. 144). As the car pulled in front of plaintiff, he noticed some objects on top of the car. These objects later turned out to be a pair of shoes (R. 145). The shoes fell from the top of the car after it had passed 12th East going west on 9th South (R. 145). The car then pulled over to the curb, and the driver, a woman, went out in the street to pick up the shoes (R. 145). In order to avoid hitting the woman, plaintiff gave a hand signal and stopped (R. 145, 174). Prior to his stop he looked through his rear window for vehicles and there were none behind him (R. 174, 175). He stopped with his two left wheels one or two feet to the left of the line dividing the two westbound lanes (R. 145). While stopped he opened his door and picked up a shoe from the street (R. 145). He then rolled gradually forward (R. 174) at a speed of not more than 2 or 3 miles per hour to a point alongside the other car (R. 146). When alongside the other car he handed the shoe to his passenger, who was handing it to the other driver when plaintiff heard two or three beeps on a horn, turned his head, and was hit by the bus (R. 146). The impact knocked plaintiff's car 67 feet forward (R. 131). During the slow move forward he had his foot on the brake. He did not make any turns, did not change lanes, and made no further hand signals. Plaintiff did not see the bus at any time until a moment before impact (R. 149). Plaintiff's tail lights were working and could be seen by the bus driver from the time he first stopped, until the time of impact (R. 189, 191). One and one-half minutes elapsed

between the time that plaintiff stopped to pick up the shoe and the moment of impact (R. 138, 147). Plaintiff's car was motionless for approximately 30 seconds while stopped next to the other car (R. 147). At the time of the impact, plaintiff's car was in drive gear, the brakes were on, and the tail lights were working (R. 148). Pictures of the scene of the accident were admitted in evidence as exhibits 15 (R. 150, 151), 16 (R. 151, 152) 17 (R. 152) 18 (R. 152) and 19 (R. 152, 153).

On the day of the accident defendant Knutson was driving a 35 passenger bus, 35 feet in length (R. 180). The brakes were in good working order (R. 192). He was carrying 28 High School students (R. 181). He made a safety stop at 12th East and 9th South (R. 187). From that point a person could see all of 9th South from 12th East to 11th East (Exhibit 19, R. 152). Mr. Knutson testified that while he was stopped at 12th East he saw the Jones vehicle fully stopped, and the driver picking up something from the road (R. 187). He saw the Jones vehicle start to move forward at about the same time the bus started to move (R. 190, 191), and as the Jones vehicle moved down the hill its brake lights went on and off. (R. 189, 191). The bus brakes were applied all the way down the hill from 12th East (R. 188).

Mr. Knutson also testified in response to his own counsel's direct examination:

Q. Would you tell us what happened next?

A. He made a stop. *It wasn't a sudden stop, but it was an unexpected stop.* And I pressed on the brakes, and seeing I couldn't stop sounded

my horn and looked to my left, and there was a car coming along the left, so I couldn't pull on around, and I couldn't quite stop in time and bumped in the back of his car. (R. 188) (Italics added)

Q. All right. When you first became aware of the fact that Mr. Jones was going to stop at the point where the collision took place, what called your attention to the fact that he was making a stop?

A. Well mainly because he had stopped, because his lights were on and off coming down the hill.

Q. The lights were what?

A. The brake lights were on and off coming down the hill. (R. 189)

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANTS' MOTIONS FOR A DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT AND REFUSING DEFENDANTS' REQUESTED INSTRUCTION NO. 7.

Defendant requested the following instruction be given to the jury:

> You are instructed that Utah law provides that no person shall stop or suddenly decrease the speed of a motor vehicle without first giving an appropriate signal to the driver of any vehicle immediately to the rear when there is opportunity to give such signal. In this regard, the mere visible light showing the application of the brakes is not compliance with Utah law but the giving of an

> appropriate signal in this regard would require the giving of a hand signal.
>
> Therefore, if you find that the plaintiff in this action stopped or suddenly decreased the speed of his vehicle without first giving a hand signal to the driver of the vehicle immediately to its rear and that plaintiff further had an opportunity to give such a signal, then you will find that the plaintiff was contributorily negligent.

The court refused this instruction. After plaintiff's evidence, defendants made a motion for a directed verdict, which was denied. After the verdict for plaintiff defendants made a motion for a judgment notwithstanding the verdict, which was also denied.

The basic issue raised by these motions and the requested instruction is that of the contributory negligence of the plaintiff. In denying these motions and refusing the instruction the trial court was following the policy of the Supreme Court of Utah, set forth in *Webb* vs. *Olin Mathieson Chemical Corporation,* 9 Utah 2d 275, 342 P.2d 1094 (1959):

> "It is the declared policy of this court to zealously protect the right of trial by jury and not to take issues from them and rule as a matter of law except in clear cases."

As is the case with the question of negligence, contributory negligence is a question for the jury unless all reasonable men must draw the same conclusions from the facts as they are shown. *Rogalski* vs. *Phillips Petroleum Co.,* 3 Utah 2d 203, 282 P. 2d 304, (1955); *Moore* vs. *Miles,* 108 Utah 167, 158 P.2d 676 (1945). See also *Glenn*

vs. *Gibbons & Reed Co.*, 1 Utah 2d 308, 265 P.2d 1013 (1954). Contributory negligence becomes a question of law when from the facts reasonable men can draw but one inference, and that inference points unerringly to the negligence of the plaintiff as a contributing cause of his injury. *Cox* vs. *Thompson*, 123 Utah 81, 254 P.2d 1047 (1953). If the court is in doubt whether reasonable men might arrive at different conclusions, then this very doubt determines the question to be one of fact for the jury and not one of law for the court. *Webb* vs. *Olin Mathieson Chemical Corporation*, supra. See also *Yoshitaro Okuda* vs. *Rose*, 5 Utah 2d 39, 296 P.2d 287 (1956). In order to be guilty of contributory negligence as a matter of law the evidence must be undisputed, the facts must not be conflicting, and must clearly prove that one acted in a manner in which a reasonable prudent person would not have acted under the circumstances. *Allison* vs. *McCarthy*, 106 Utah 278, 147 P.2d 870 (1944). Only in a clear case, where all reasonable minds would agree, should the issue of contributory negligence be taken from the jury. *Compton* vs. *Ogden Union Ry. Depot Co.*, 120 Utah 453, 235 P.2d 515 (1951). In determining whether this plaintiff is contributorily negligent as a matter of law, the evidence and all reasonable inferences therefrom must be viewed in a light most favorable to him. *Cox* vs. *Thompson*, supra; *Roach* vs. *Kyremes*, 116 Utah 405, 211 P.2d 181 (1949).

At the pretrial (R. 15, 16) the defendants set forth their contention that the plaintiff was negligent in the following particulars:

1. In suddenly stopping his car in the path of the bus;

2. In failing to keep a proper lookout to the rear when he could have seen, or should have seen defendants' bus was immediately behind;

3. In failing to signal his intention to stop; and

4. In carelessly and negligently changing from one traffic lane to another without giving a signal of his intention to do so immediately into the path of the bus.

These same contentions were set forth in defendants' requested instruction No. 6 (R. 49), which was in fact given as the court's instruction No. 8 (R. 69). Therefore, if plaintiff had violated Sections 41-6-69 (c), 41-6-70, or 41-6-103, Utah Code Annotated (1953), and made a sudden unexpected stop without a proper signal as contended by defendants, the jury could have properly found him guilty of contributory negligence under that instruction. The evidence however, is quite to the contrary. Plaintiff stopped in order to avoid hittiing a woman in the road in front of him. At the time he stopped he gave a proper hand signal. At the time he stopped he looked through his rear window, and of course saw nothing that would be dangerous, since the bus had not yet arrived at 12th East for its safety stop. Also the stop was almost ¾ of the way down the hill, without any traffic whatsoever between plaintiff and the top of the hill. Plaintiff did not change traffic lanes. Defendants therefore failed to prove any of the elements of contributory negligence that they alleged. They received the

benefit of any doubt when the question was put to the jury. We have no quarrel with the theory that a hand signal is required for a sudden unexpected stop under the circumstances of *United States* vs. *First Sec. Bank of Utah*, 208 F.2d 424 (10th cir. 1953); however, there are circumstances where brake lights are a sufficient signal, and may be the only appropriate signal. See *Flippen* vs. *Millward*, 120 Utah 373, 234 P.2d 1053 (1951). However, there was no sudden unexpected stop involved here, and the aforementioned statutes do not apply. The issue of plaintiff's contributory negligence was therefore properly put before the jury, and the court did not err in refusing to give defendants' requested Instruction No. 7.

Plaintiff made the proper signal when he made his first stop. He also properly looked to his rear to observe any vehicles which would have presented an immediate hazard, and toward whom he owed a duty not to stop. The bus was not there, but came along later. He therefore did not violate any statute or ordinance, and as he moved slowly forward, he needed no further signal.

POINT II

THE TRIAL COURT DID NOT ERR IN GIVING THE JURY AN INSTRUCTION UPON THE THEORY OF LAST CLEAR CHANCE.

The trial court gave the following instruction, at the request of the plaintiff:

INSTRUCTION NO. 9

Under certain circumstances a plaintiff is entitled to a verdict against a defendant even though

the plaintiff be guilty of contributory negligence. This rule of law that thus permits a negligent plaintiff to recover judgment is known as the doctrine of last clear chance. If you determine that the plaintiff was in fact guilty of contributory negligence, you should then consider whether or not the doctrine of last clear chance is applicable to this case. The doctrine of last clear chance is applicable only if you find from a preponderance of the evidence that each of the following six propositions is true:

1. That the plaintiff was in a position of danger.

2. That he was by reason of inattention or lack of proper alertness totally unaware of the peril that threatened him.

3. That the defendant actually saw the plaintiff and knew of his perilous position.

4. That the defendant then realized or by the exercise of due care should have realized that the plaintiff was unaware of the danger to himself.

5. That at the time the defendant saw the plaintiff and knew of the peril to him and realized or should have realized that the plaintiff was oblivious to the danger, he then had a clear opportunity to avoid the accident by the exercise of ordinary care and with his then existing ability. There must have been an actual opportunity existing at that moment for the defendant to avoid the accident. Also, it must have been a fair, clear opportunity and not just a bare possibility of doing so.

6. That the defendant then negligently failed to avail himself of that clear opportunity and as a proximate result the plaintiff was injured.

> If you find that each of the above six propositions is true, the doctrine of last clear chance is applicable to this case, and the plaintiff is entitled to a verdict in his favor even though you find him guilty of contributory negligence. If you find that any one of the above six propositions is not true, the doctrine of last clear chance has no application and cannot be invoked by the plaintiff.

This instruction is quoted verbatim from JIFU, 17.20, and properly states the law of the state of Utah. See *Compton* vs. *Ogden Union Ry. & Depot Co.,* supra; *Andersen* vs. *Bingham & Garfield Ry. Co.,* 117 Utah 197, 214 P.2d 607 (1959); *Morby* vs. *Rogers,* 122 Utah 540, 252 P.2d 231 (1953). Whether or not the doctrine of last clear chance applies in a particular case depends entirely upon the existence or nonexistence of the elements necessary to bring it in to play. Such question is controlled by factual circumstances and must ordinarily be resolved by the fact finder. *Daniels* vs. *City & County of San Francisco,* 40 Cal. 2d 614, 255 P.2d 785 (1953). It is only when the facts are such that all reasonable men must draw the same conclusions, that the question presented by them is one of law for the court. *Sanchez* vs. *Gomez,* 56 N.M. 383, 259 P.2d 346 (1953). In determining whether the instant case should have been submitted on the plaintiff's theory of last clear chance, it is the duty of the court to consider the evidence in the light most favorable to the plaintiff. *Beckstrom* vs. *Williams,* 3 Utah 2d 210, 282 P.2d 309 (1955).

It is only when a plaintiff has been guilty of no negligence, or if contributory negligence is not alleged as an affirmative defense that the doctrine of last clear chance has no application. *Thomas* vs. *Sadler,* 108 Utah 552, 162 P.2d 112 (1945).

In the instant case the questions of contributory negligence and last clear chance were submitted to the jury. We can assume that they found that plaintiff was not guilty of contributory negligence or that he was so guilty, and that the defendant had the last clear chance to avoid the accident. Assuming therefore, for the purpose of argument, that plaintiff was guilty of contributory negligence, it must be determined if the doctrine of last clear chance applies.

The case of *Graham* vs. *Johnson,* 109 Utah 346, 166 P.2d 230 (1946), rehearing denied, 109 Utah 365, 172 P. 2d 665 (1946), is similar in nature to the instant case. In that case the plaintiff (called Gary by the court) and other young boys were in the street playing football, contrary to a city ordinance. The Defendant (called Darlene by the court) drove on to the street towards the boys, but did not sound her horn. The plaintiff started to run, not knowing the defendant was there, and was hit by defedant's car. The court assumed for the purposes of the opinions that the plaintiff was in violation of the ordinance prohibiting playing in the street and that the defendant was negligent in failing to sound her horn or to stop and allow the boys to become aware of her presence. The court said at 166 P.2d 233:

> "But such a violation does not permit a driver to use the street in the same manner as if no person were playing games thereon. A duty devolves on drivers to drive with care under the circumstances of the presence of boys in the street."

Applying that principle to the instant case, if the plaintiff violated a statute by stopping in the street and moving forward at a slow speed and again stopping without a hand signal, this violation did not permit the bus driver to use the street in the same manner as if no car were stopped there. Being aware of the car in his immediate path, the driver had a duty to drive with care under the circumstances, especially on a steep hill with a bus load of high school students, knowing that a car was in front of him with its tail lights flashing on and off. The court in *Graham* vs. *Johnson,* supra, indicated its reliance on sections 479 and 480, *Restatement of Torts,* as the rule in this state on last clear chance, and stated:

> 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 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.

The court reversed the case for failure to instruct on last clear chance.

On rehearing, the plaintiff contended that the court had misconceived the doctrine of last clear chance. The

court denied the petition for rehearing, but clarified its position on last clear chance. At 172 P.2d 667, it said:

> The last clear chance duty is to do what a prudent person would have done to avoid the accident had he had the opportunity, whatever that would be, after he did or should have appreciated the other's perils or approaching peril.
>
> To revert to the instant case; Darlene was cognizant of Gary's inattention and his unawareness that she was approaching. He was negligent in being where he was. She had ample opportunity to warn him and put him on attention. To do this timely the jury could find was a duty which she owed to the plaintiff even in spite of his negligence and due to his situation. The jury could find that she omitted to perform her duty. What must she anticipate as a natural consequence of her omission? She must anticipate that if she is seemingly placing Gary in increasing peril some one may be reasonably inspired automatically to warn him and that in response to the stimulus of that warning, he would or might naturally seek safety by running. What might be called the automatic chain stems from her omission timely to sound a warning. Nothing in this automatic chain is an independent superseding cause. The situation we are exposing is one where the chain of consequences due to failure to do that which the clear chance dictates, is automatic or semi-automatic a causation chain as in the well known "Squibb" case, stemming from the act of negligence of the defendant which was an omission to do what a prudent person would have done to avoid the accident when there was a clear opportunity to do so. That omission may have been defendant's only act of negligence but it is on

> one level and the pliantiff's on another level. The plaintiff's negligence was continuing but static. The defendant, who was controlling and operating the agency of approaching danger, had the clear chance to avoid the effect of the other's negligence and did not do so. That was her negligence and it came after the plaintiff's negligence had become known and fixed.

The situation in the instant case began to develop as the bus driver stopped at 12th East, and saw the Jones vehicle stopped in the outside lane of traffic. If it was negligent for the plaintiff to be so stopped, or moving slowly at that point, then his act of negligence had terminated or become static. Plaintiff was at that point in a position of peril. The defendant bus driver saw this situation from the top of the hill, over 350 feet away, yet he moved forward over 400 feet while the plaintiff moved only 50 feet, and admitted that plaintiff did not stop suddenly—only unexpectedly. At all times from the time of the safety stop until the moment before impact, the bus driver had a clear opportunity, had he been alert, to avoid the accident. He was controlling and operating the agency of approaching danger and had the last clear chance to avoid its effect.

In each of the cases defendants cite for the proposition that last clear chance should not apply in the instant case, the fact situation can be clearly distinguished. *Andersen* vs. *Bingham & Garfield Ry. Co.,* supra, involved an automobile-train collision, where the train had defective brakes. The engineer would have had time to stop had the brakes been in good working order. The

court held that the instruction on last clear chance was not applicable because the engineer did all he could presently do under the circumstances to avoid the accident. In the instant case there is no evidence of defective brakes, only evidence of the fact that the bus driver had a clear chance to avoid the accident, and had the means to do so if he had been alert to the developing situation. *Compton* vs. *Ogden Union Ry. & Depot Co.,* supra, involved a pedestrian who was struck and killed by a railroad engine. The court held that the doctrine of last clear chance did not apply for 2 reasons: (1) that the defendant train crew did not know, or have reason to know of the perilous situation of the decedent, and (2) the decedent, by the exercise of reasonable vigilance, could have extricated herself from danger at any time before the accident. In the instant case the defendant was in fact aware of the danger, and the plaintiff had no opportunity to extricate himself from the dangerous situation. *Cox* v. *Thompson,* supra, involved a pedestrian struck and killed by defendant's automobile at night on a poorly lighted highway. The court held that the doctrine of last clear chance did not apply because the defendant, due to the lighting conditions, and other circumstances, did not have a clear chance to avoid the accident. *Chavroz* vs. *Cottrell,* 12 Utah 2d 25, 361 P.2d 516 (1961), also involved a pedestrian, who was struck and killed by defendant's automobile. In that case the accident occurred after dark, in a dimly lighted pedestrian lane, and the decedent was wearing dark clothing. The court ruled that the defendent did not in fact have a last clear chance

to avoid the accident. In the instant case the accident occurred during a clear dry day, while nothing at all to obstruct or reduce the vision of the bus driver. He did in fact have the last clear chance to avoid the accident.

Let us then review the facts of the instant case as they apply to the six elements of last clear chance.

1. The plaintiff was in fact in a position of danger, being stopped in a lane of traffic.

2. The reason for his position was his own inattention or lack of proper allertness. He was totally unaware of the peril that threatened him and had no opportunity to extricate himself from the danger.

3. The defendant actually saw the plaintiff, and knew of his perilous position, over 400 feet prior to the impact.

4. The defendant should have realized that the plaintiff was unaware of the danger to himself since he had a clear view of the developing situation at all times.

5. At the time defendant first realized, or should have realized that plaintiff was oblivious to the danger, he had a clear opportunity to avoid the accident by the exercise of ordinary care with his then existing ability. He had this opportunity for over 350 feet.

6. Defendant negligently failed to avail himself of that clear opportunity, and as a proximate result, plaintiff was injured. This is clearly a fact situation which falls within the doctrine of last clear chance, and it would have been error not to submit the question to the jury.

CONCLUSION

The issues on the contributory negligence of the plaintiff, and the last clear chance of the defendants to avoid the accident, were properly submitted to the jury, and resolved in favor of the plaintiff. Respondent therefore respectfully submits that the judgment of the Trial Court should be affirmed and that he should have his costs on appeal.

Respectfully submitted,

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