1964

Calvin H. Johnson v. Cornwall Warehouse Co. and Ernest James : Brief of Appellants

Utah Supreme Court

Raymond M. Berry; Attorney for Defendants-Appellants;
Gayle Dean Hunt; Dwight L. King; Attorneys for Plaintiff-Respondent;

IN THE SUPREME COURT
of the
STATE OF UTAH-

CALVIN H. JOHNSON,
Plaintiff-Respondent,

vs.

CORNWALL WAREHOUSE COMPANY and ERNEST JAMES,
Defendants-Appellants.

Case No. 10176

APPELLANTS' BRIEF

APPEAL FROM THE JUDGMENT OF THE THIRD DISTRICT COURT FOR SALT LAKE COUNTY

HON. MARCELLUS K. SNOW, JUDGE

RAYMOND M. BERRY,
Attorney for the Defendants-Appellants
203 Executive Building
455 East Fourth South
Salt Lake City, Utah

GAYLE DEAN HUNT
Continental Bank Building
Salt Lake City, Utah
and
DWIGHT L. KING
2121 South State Street
Salt Lake City, Utah
Attorneys for Plaintiff-Respondent

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STATEMENT OF THE NATURE OF THE CASE

This is an action for personal injuries and property damage arising from an intersection collision at Second South and Third West in Salt Lake City, Utah.

DISPOSITION IN LOWER COURT

The trial court made and entered judgment in favor of Calvin H. Johnson and against the Defendants-Appellants and denied the Motion for a New Trial of the Defendants-Appellants.

RELIEF SOUGHT ON APPEAL

The defendants want the following:

A. The judgment entered in favor of the Plaintiff-Respondent on April 28, 1964 vacated,

B. The Lower Court directed to grant the Defendants-Appellants' Motion for a New Trial.

STATEMENT OF MATERIAL FACTS

This case has been tried twice, and previously in Case No. 9921 this dispute was before this Court.

The accident happened at about 4:45 P.M. on May 31, 1962 (R. 428) at the intersection of Second South and Third West in Salt Lake City, Utah (Exhibit 2D1). The streets at this intersection are level (Exhibit 2D1). Visibility was not obstructed, and Mr. Johnson testified there was no obstruction to seeing Mr. James' truck or any other vehicle going south on Third West (R. 506). At the time of the accident, Mr. Johnson was driving his vehicle in an easterly direction on Second South (R. 504) at a speed of 20 to 25 m.p.m. (R. 505). He was using the inside eastbound lane (R. 505), and there was no traffic to his right in the outside eastbound lane (R. 505). There were no poles on the northwest corner of the intersection or no cars that blocked Mr. Johnson's vision or that would obstruct his ability to see Mr. James' truck (R. 506).

At the intersection of Second South and Third West, Second South Street is 92 feet wide, and Third West is 92 feet wide (Exhibit 2D1). Officer Nicholson found the point of impact to be 77' 10" east of the west curb of Second South (Exhibit 2D1) and 56' 2" south of the north curb of Second South (Exhibit 2D1).

Mr. Johnson testified (R. 511) that his car,

when he first observed the truck stopped at the stop sign, or wherever it was stopped, was some 150 to 200 feet west of the west curb of Third West. Officer Nicholson testified that Mr. Johnson told him he did not see the truck again until he was in the intersection and at a time when he, Mr. Johnson, was three quarters of the way across it. At that time (R. 415) the truck was only three feet from the side of Mr. Johnson's car, and he had no time to take any evasive action (R. 415).

Mr. James entered the intersection from the north. He was driving a Chevrolet truck and stopped before entering the intersection (R. 429). On Exhibit 2D1 (R. 480), Mr. James drew a symbol of the truck to show where he stopped, with the front of his truck north of the pedestrian lane. Mr. James waited at the intersection three or four minutes (R. 432) during heavy traffic. His truck was the only truck there (R. 432), and before entering the intersection, he allowed six or seven westbound cars to pass across the intersection and five or six eastbound cars (R. 432) Mr. James saw Mr. Johnson's car before entering, and at that time it was back of the fifth set of tracks shown on Exhibit 2D1. He marked his initials (EJ) to indicate the point on the diagram (Exhibit 2D1) to show the location of Mr. Johnson's car where he noticed it prior to entering the intersection. From the time Mr. James saw Mr. Johnson's car where the initials (EJ) are marked on Exhibit 2D1 until the time of

the impact, he did not see it again (R. 434). Mr. James accelerated from the time he left the spot where his truck was stopped to the time of the impact and stated his speed was about 10 m.p.h. at the time of the impact (R. 436).

Exhibit 2D1 also in red shows the position of the vehicles after the collision.

The trial court gave 50 instructions to the jury (R. 325 - R. 375), inclusive.

With respect to right-of-way the court in Instruction 27, (R. 353), instructed the jury as follows:

INSTRUCTION No. 27

"The Laws of the State of Utah provide that where a driver has driven past a stop sign into an intersection and a collision occurs, the collision shall be deemed prima facie evidence of the failure to yield the right of way on the part of the driver passing the stop sign but shall not be considered negligence per se in determining legal liability for such accident."

Additionally, the court gave Instruction No. 28, (R. 354) which reads as follows:

INSTRUCTION No. 28

"The terms, 'prima facie evidence of failure to yield the right of way,' and, 'negligence per se,' contained in the foregoing statute need clarification as they relate to this accident. The term, 'prima facie,' means, on the face of it; so far as can be judged from the first disclosure; or, presumably. The term,

'per se,' means, in itself; taking it alone; or, unconnected with other matters.

"*As applied to this case, you must find under the statute read to you that the fact of the collision is prima facie evidence of defendants' failure to yield the right of way and, hence, of negligence on their part.* This prima facie evidence is a form of evidence and, if there is none other tending to overcome it, or if this evidence of failure to yield the right of way preponderates over contrary evidence, it would require a finding of failure to yield the right of way on the part of defendants and, hence, a finding of negligence on their part and would require a verdict for the plaintiff, unless you also found that such negligence, though existing, was not the proximate cause of the accident or that plaintiff was contributorily negligent as I have defined those terms to you." (emphasis added)

The Defendants excepted and objected to Instructions 27 and 28. (R. 568-569).

In arguing the case to the jury in the closing argument, Mr. Hunt stated with respect to right of way (R. 557).

"In other words, if when the truck entered, Johnson was so close that he was a hazard, then, of course, we know that the truck driver was negligent. And I'm going to ask you, when you go in the jury room, to read "27" through "31" because there's language in there that hits the crucial part of this case. Twenty-seven says, 'The laws of Utah provide that where a driver has driven past the stop sign —' that's the stop sign that the

truck driver did — 'into an intersection and a collision occurs,' which he did, 'the collision shall be deemed prima facie evidence of failure to yield the right of way on the part of the driver passing the stop sign, but shall not be considered negligence per se in determining legal liability for such accident.

"In other words, the fact of the accident is evidence, as later instructions tell you, of the failure to yield on the part of the driver. And so until and unless they overcome that presumption, we are only left with the proposition of deciding what should be awarded Mr. Johnson."

Again in the closing argument (R. 560), Mr. Hunt again emphasized the importance of Instructions 27 and 28, and argued that in view of the instructions, Johnson had the right to assume the defendants' truck entering the intersection, whether stopped or moving, would yield to Johnson because Mr. James came from a stop sign.

ARGUMENT

POINT I.

THE LOWER COURT ERRED PREJUDICIALLY IN INSTRUCTING THE JURY ON THE LAW RELATING TO RIGHT OF WAY.

Instructions 27 and 28 which the Lower Court gave had the effect of directing right of way in favor of the plaintiff. The defendants objected to Instructions 27 and 28 upon the ground they contained erroneous statements of the law and were highly prejudicial (R. 568). Instructions 27 and 28 were plaintiff's requests (R. 287-288).

Section 41-6-74 Utah Code Annotated as amend-ed in 1961 reads as follows:

> 41-6-74. Vehicle entering a through highway. — (a) "The driver of a vehicle shall stop as required by this act at the entrance to a through highway and shall yield the right of way to other vehicles which have entered the intersection from said through highway or which are approaching so closely on said through highway as to constitute an immediate hazard *but said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on said through highway shall yield the right of way to the vehicle so proceeding into or across the through highway.* (Emphasis added)
>
> (b) The driver of a vehicle shall likewise stop in obedience to a stop sign as required herein at an intersection where a stop sign is erected at one or more entrances thereto although not a part of a through highway and shall proceed cautiously, yield right of way to vehicles not so obliged to stop which are within the intersection or approaching so closely as to constitute an immediate hazard, but may then proceed."

Paragraph (a) of Section 41-6-74.10 reads as follows:

> "(a) *In the event that a driver, after having driven past* a yield sign or a stop sign, *is involved in a collision with* a pedestrian having right of way in a crosswalk or *a vehicle having right of way in the intersection such collision shall be deemed prima facie evidence of his failure to yield the right of*

way as required by this section, but shall not be considered negligence per se *in determining legal liability for such accident.*" (Emphasis added)

INSTRUCTION No. 27 (R. 353)

"*The Laws of the State of Utah provide that where a driver has driven past a stop sign into an intersection and a collision occurs, the collision shall be deemed prima facie evidence of the failure to yield the right of way on the part of the driver passing the stop sign* but shall not be considered negligence per se in determining legal liability for such accident." (error emphasized)

INSTRUCTION No. 28 (R. 354)

"The terms, 'prima facie evidence of failure to yield the right of way,' and, 'negligence per se,' contained in the foregoing statute need clarification as they relate to this accident. The term, 'prima facie,' means, on the face of it; so far as can be judged from the first disclosure; or, presumably. The term, 'per se,' means, in itself; taking it alone; or, unconnected with other matters.

"*As applied to this case, you must find under the statute read to you that the fact of the collision is prima facie evidence of defendants' failure to yield the right of way and, hence, of negligence on their part.* This prima facie evidence is a form of evidence and, if there is none other tending to overcome it, or if this evidence of failure to yield the right of way preponderates over contrary evidence, it would require a finding of failure to yield the right of way on the part of defendants and, hence, a finding of negligence on their

part and would require a verdict for the plaintiff, unless you also found that such negligence, though existing, was not the proximate cause of the accident or that plaintiff was contributorily negligence as I have defined those terms to you." (Emphasis added)

On the last appeal in this same case, the defendants complained about the Lower Court giving Instruction 9-L (R. 51). Instruction 9-L was as follows:

"The entry of the defendants into a highway controlled by a stop sign and his being involved in a collision in the intersection, in this case, is prima facie evidence that plaintiff had the right-of-way.

"We mean by 'prima facie' that on the face of it, the plaintiff had the right-of-way.

"If you have in addition to the defendant entering the controlled highway, and being involved in a collision, additional evidence on the subject of negligence in failing to yield the right-of-way, you may find that plaintiff had a right-of-way, and in that event, your answer would be 'False' on No. 1 (b). But of you have additional evidence that overcomes the prima facie evidence, then you are instructed to find "True" on Proposition No. 1 (b).

The Green Sheet in Case No. 9921 (R. 273-274) gives this court's opinion on the first appeal. In respect to whether or not the plaintiff was guilty of contributory negligence, the court said:

"Defendants contend that even though this court should conclude that under the facts

of this case plaintiff's contributory negligence was a jury question, nevertheless the jury's verdict should not be reinstated because the court prejudicially erred in two of its instructions. We agree.

"The court instructed the jury that defendant truck driver after stopping at the stop sign proceeded into the intersection to make a left-hand turn without keeping a proper lookout for traffic in the position of plaintiff and at a time when it was not safe to enter and therefore the court found as a matter of law that defendant was negligent. Defendant driver had testified that he saw plaintiff's car crossing the railroad tracks as he started to enter the intersection to make his left turn at which time he estimated the car to be about 200, 150 or 100 feet from the west curb of Second South and Third West Streets and judged that he had plenty of time to safely enter and make his turn. In view of the discrepancies in the evidence as to how far west of the intersection plaintiff's car was at the time defendant driver entered the intersection, it was a fact which the jury should have determined whether defendant driver proceeded into the intersection without keeping a proper lookout and at a time it was not safe to enter.

"Under the provisions of Sec. 41-6-74.10, it is deemed prima facie evidence of failure to yield the right of way for a driver who has driven past a 'yield' or 'stop' sign and *collides with a car having a right of way in an intersection. The court instructed the jury that the entry of the defendant driver 'into a highway controlled by a stop sign and his being*

involved in a collision in the intersection, in this case, is prima facie evidence that plaintiff had the right of way . . .' This instruction is erroneous because it assumes that because plaintiff's entance into the intersection was from a street not regulated by a stop sign whereas the defendants' vehicle was from such a street, the plaintiff had the right of way. As we have shown above the evidence in this case is not such as to warrant a finding as a matter of law as to which driver had the right of way. Whether plaintiff was or was not in the intersection or so close thereto as to constitute an immediate hazard to defendant's entering or proceeding into the intersection was one for determination by the jury. If a jury should find that plaintiff was not in the intersection or so close thereto as to constitute an immediate hazard when defendants' vehicle entered the intersection, then plaintiff would not have the right of way and the collision therein could not be deemed prima facie evidence of defendants' failure to yield to such right of way." (emphasis added)

Just as Instruction 9-L at the first trial was an erroneous statement of the law, Instruction 27 was an erroneous statement of the law at the second trial, as Instruction 27 assumed under the facts the plaintiff had the right of way. Further. Instruction 28 in effect directed right of way in favor of the plaintiff, as that instruction told the jury the fact of a collision is prima facie evidence of defendant's failure to yield the right of way, and, hence, of negligence on their part.

In *Bates vs. Burns* (1955) 3 Utah 180, 281 P.2d 290, where the evidence showed the plaintiff stopped at a stop sign 125 feet south of the point of impact and then proceeded northerly into the intersection, and thereafter collided with a westbound vehicle on Highway 91 at the intersection of Highway 114 in Pleasant Grove, Utah, and where the evidence showed the plaintiff proceeded at a speed of 5 to 6 m.p.h. from the stop sign to the center of the highway, and where in fact the plaintiff not only entered the intersection first but had nearly passed over it before the defendant entered, the court said the plaintiff was the disfavored driver until he had entered the intersection at a time when no car on the through highway had entered or was so close as to constitute an immediate hazard, but having entered as authorized, he became the favored driver, and all other vehicles approaching the intersection on said through highway were obliged to yield the right-of-way to him.

At the second trial the evidence was substantially the same as at the first trial. It is undisputed that Mr. James, before entering the intersection, made a complete stop and that he waited at the stop sign north of the pedestrian lane with six or seven cars going one direction and five or six the other direction. Mr. James started from "0" and stated his speed could have been no more than 10 m.p.h. at the time of the impact. Exhibit 2D1 shows that it is a distance in excess of 80 feet from the place

where the front of Mr. James' truck stopped to the point of the impact. At an average speed of 5 m.p.h., his vehicle was going 7.35 feet per second, and it would have taken the truck slightly more than 10 seconds from the time it started ahead until it reached the point of impact, which was 77' 10" east of the west curb of Third West, and 56½ feet south of the north curb of Second South.

Mr. Johnson's speed going east on Second South was from 20 to 25 m.p.h. At 25 m.p.h. his vehicle was going 36.75 feet per second, or in ten seconds at that time, his vehicle would have travelled 367½ feet to reach the point of collision. Even if you assume the speed of Mr. Johnson's vehicle was only 20 m.p.h., his vehicle would have been going 29.4 feet per second and would have been 294 feet from the point of impact at the time the defendants' truck proceeded into the intersection.

Obviously, under these facts, the plaintiff did not have the right of way as a matter of law, and hence, the giving of Instructions 27 and 28 were prejudicial depriving the defendants of their right to prove the plaintiff was contributorily negligent in failing to yield the right of way. Further, Instructions 27 and 28 were prejudicial in that they relieved the plaintiff of any burden of proving he had the right of way in making a case.

POINT II.

CORRECT INSTRUCTIONS CANNOT CURE ERRONEOUS INSTRUCTIONS.

A correct instruction does not cure an erroneous one. This proposition would not be important except based on the proposition that instructions are considered as a whole, sometimes the giving of an incorrect instruction is defended upon the theory that some other instructions will correct the error.

Admittedly, in this case, correct instructions on right of way were given by the court, but these instructions did not have the effect of nullifying the erroneous prejudicial effect of Instructions 27 and 28. Where instructions are incorrect, the jury is at liberty to follow either the erroneous or the correct instruction.

In *Francis vs. City and County of San Francisco* (1955) 44 C.2d 335, 282 P.2d 496, the California Supreme Court said:

> "Giving of an erroneous instruction is not cured by giving of other correct instructions where the effect is simply to produce a clear conflict in instructions and it is not possible to know which instruction was followed by the jury in arriving at its verdict."

In *Neilson vs. Bowles* (1951) 124 Colo. 274, 236 P.2d 286, the Colorado Supreme Court said on appeal it will be considered that the jury assumed that all instructions were correct and that they felt at liberty to follow either a correct or an incorrect instruction.

Further, in *Pettingell vs. Moede* (1954) 129 Colo. 484, 271 P.2d 1038, the Colorado court said in respect to inconsistent instructions, one of which was correct and the other of which was erroneous:

> "* * * A jury is to regard all court instructions and consider them together, and it was so advised in the instant case; but even a correct instruction cannot cure an erroneous one. Where it is impossible to determine which line of reasoning a jury adopted, it likewise is improper to speculate that it selected the correct theory and disregarded a wrong one."

In *Lucas vs. Kirk* (1963) ....Ala..... 151 So. 2d 744, the Supreme Court of Alabama said a charge which is a misstatement of the law must of necessity be reversible error even when construed in light of other charges given at appellant's request on oral charge to the jury.

In *Ieronimo vs. Hagerman* (1963) 93 Ariz. 357, 380 P.2d 1013, the Arizona Court adopted the proposition that an unequivocal erroneous instruction was not cured by the mere giving of a correct instruction concerning the same subject matter elsewhere in the charge.

Instruction 28 given by the court was binding in its effect in that the jury was told you must find under the statute read you that the fact of the collision is prima facie evidence of the defendant's failure to yield the right of way and hence, and of negligence on their part. Generally speaking, binding instructions of a formula nature are more pre-

judicial if erroneous than non-binding, non-formula instructions.

In *LeVine vs. Headlee, Jr.* (1964) ....W. Va..... 134 S.E.2d 892, the court said a binding instruction must be complete in itself, and any omission from its language cannot be cured by reference to other instructions given.

In *Charvoz vs. Bonneville Irr. Dist.* (1951) 120 Utah 480, 235 P.2d 780, where an erroneous instruction was given to the effect the plaintiff could not recover from a loss arising from a break in an irrigation canal unless the break was solely caused by the defendant's negligence, and where it was well settled law that the defendant would be liable if his negligence concurred with an act of God or negligence of a stranger, and where it was claimed on appeal the error was cured by a proper instruction and proximate cause, this court said:

> "Assuming that this instruction may be unobjectionable in a proper case, we cannot agree that it cured the quite erroneous instruction preceding it. The instruction lays particular emphasis on persons and makes no reference to an act of God. Such instruction, even if construed as one treating concurrency of causes, is inconsistent so completely as to substitute confusion for clarity, lend doubt as to where responsibility could or should be reposed, and adds to the error already committed. We believe the trial court erred in failing to give a proper and understandable instruction on concurring causes."

In Instructions 27 and 28 the trial court told

the jury that Mr. Johnson had only to get involved in a collision to have the right of way, and this obviously confused the jury as to what the law on right of way was or should be, and left the jury at liberty to select the instruction on right of way which it might wish to follow. Further, in his closing argument, Mr. Hunt admonished the jury that the crucial point of the case could be decided from reading Instructions 27 to 31, and thus, emphasized the erroneous instructions.

POINT III.

THE PRIOR DECISION CONSTITUTES THE LAW OF THE CASE.

At the retrial, the case was retried on the same pleadings and the evidence was substantially the same. No new issues were introduced, and no new witnesses were called on the factual question, although the plaintiff called an additional medical witness.

The general rule is that where an appellate court in a prior opinion states the rule or principle of law which is directly raised on such appeal and is necessary for its decision, the rule as stated in the prior opinion must be adhered to and followed throughout all subsequent proceedings, by the trial court, appellate court, and the parties involved.

In the prior opinion in Case No. 9921, this court said it was a jury question as to right of way, and the fact a collision occurred did not mean the

plaintif had the right of way. In fact, the court said that Instruction 9-L on the prior appeal, which is substantially the same as Instruction 27, was an erroneous statement of the law, and that the question of right of way should be submitted to the jury. In effect, at the retrial, the trial court refused to follow the opinion of the Supreme Court and permit the jury to find whether or not Mr. Johnson's vehicle was so close as to constitute an immediate hazard at the time the defendants' truck entered the intersection.

In *Chipman vs. American Fork City* (1919) 54 Utah 93, 179 P. 742 in which the court on a second appeal found the pleadings and evidence substantially the same as that on a first trial and appeal, and that the trial judge at the second trial had correctly instructed the jury in conformance with the prior ruling on appeal, the court held the prior ruling on appeal constituted the law of the case, and said that it was immaterial what view the Supreme Court took on the question of liability on the second appeal, as the opinion on the first appeal was binding.

In *Helper State Bank vs. Crus.* (1938) 95 Utah 320, 81 P.2d 359, the court said a previous ruling of the reviewing court upon a point distinctly made is binding on the court on a second appeal and that where questions of fact and law are the same, the decision of the first appeal, whether right or wrong, becomes the law of the case, and on appeal is bind-

ing as well on the parties to the action, the trial court, and the appellate court. To the same effect is *Forbes vs. Butler* (1928) 73 Utah 522, 275 P. 772.

In *Petty vs. Clark* (1948) 113 Utah 205, 192 P.2d 589, where on a second trial the case was retried by a different trial judge, the court said on the second appeal:

> "Under the law of the case doctrine, it is usually held that where an appellate court in its opinion states a rule or principle of law which is directly raised on such appeal and is necessary for its decision, that rule or principle must be adhered to and followed throughout all subsequent proceedings in such case, both in trial court and in a subsequent appeal even though the court may believe that it would have been better to have decided the question differently."

At the second trial the evidence on liability was substantially the same, and the pleadings were the same. Further, Instructions 27 and 28 were substantially the same as Instruction 9-L, in that they contained an erroneous statement of the law. It follows that at the second trial the Lower Court prejudicially erred in giving Instructions 27 and 28, and did not follow the opinion of the Supreme Court, which constituted the law of the case.

CONCLUSION

The defendants should be granted a new trial.

1. The question of right of way depends upon whether or not the plaintiff's vehicle was so close

as to constitute an immediate hazard at the time the defendants' truck entered the intersection.

2. The plaintiff wrongfully assumed in requesting instructions, and the Lower Court wrongfully instructed the jury to the effect the plaintiff had the right of way because the plaintiff was on an arterial street.

The judgment of the Lower Court should be reversed because:

1. The Lower Court committed error prejudicial to the defendants in instructing the jury that the laws of the State of Utah provide where a driver has driven past a stop sign into an intersection and a collision occurs, the collision shall be deemed prima facie evidence of failure to yield the right of way on the part of the driver passing the stop sign.

2. The correct instructions on right of way did not cure the erroneous statements on right of way in Instructions 27 and 28, as the jury was at liberty to follow either instruction.

3. As the facts and pleadings were substantially the same, the Lower Court was bound at the second trial to submit the question of which driver had the right of way to the jury under a proper instruction, and bound not to direct the jury that the fact the defendant had driven past a stop sign into an intersection and had a collision was prima

facie evidence of the defendant's failure to yield the right of way.

Respectfully submitted,

RAYMOND M. BERRY,
Attorney for the
Defendants-Appellants
203 Executive Building
455 East Fourth South
Salt Lake City, Utah

I hereby certify that on this ..... day of August, 1964, I mailed two copies of this Brief by United States mail, postage prepaid, to Gayle Dean Hunt, and two copies to Dwight L. King at the addresses shown on this Brief.
