1964

Calvin H. Johnson v. Cornwall Warehouse Co. and Ernest James : Brief of Plaintiff-Respondent

Utah Supreme Court

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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

BRIEF OF PLAINTIFF-RESPONDENT

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 NATURE OF THE CASE

Plaintiff on a thru street, Second South in Salt Lake City, Utah, heading east, was struck on left rear by defendant truck southbound on Third West and turning left after stopping at stop sign.

DISPOSITION IN LOWER COURT

(As stated in Defendants' Brief.) The jury, as in the first trial, found for Plaintiff, judgment was entered, and motion for new trial was denied.

RELIEF SOUGHT ON APPEAL

Affirmance.

STATEMENT OF FACTS

On May 31, 1962, at approximately 4:45 o'clock, P.M., at Second South and Third West, Salt Lake City, Utah,

Plaintiff drove an automobile 20 to 25 M.P.H. easterly on Second South Street, there a thru street, on the inside lane. Each street is 92 feet wide. Plaintiff's auto, when its left rear portion where struck was 77′ 10″ (R-505) straight east into the intersection measuring from the curb line, was struck by Defendant's truck which was 56′2″ (R-505) south of the curb line into the intersection, turning left "in a circular manner" (R-436) to go east on Second South (Exhibit 2D1). Defendant truck had stopped for a stop sign at Second South, according to Plaintiff at the curbline (R-444), according to Defendant's driver at pedestrian lane (R-431), waited for several cars to go by, then proceeded to turn left, Plaintiff estimated at 10 to 15 miles per hour (R-522), Defendant driver estimated accelerating from 7 to "about 10" miles per hour (R-436).

Plaintiff stated at the scene to the investigating officer (R-410, Line 23), on deposition (Deposition P. 12, Line 22), at the first trial, and at the second trial (R-512, Line 23) that he was "going over the tracks" when he saw the truck stopped. Although Plaintiff in deposition estimated his distance then at 150 to 200 feet, it turns out the tracks are approximately 125′ back from point of impact (Exhibit 2D1) thus fixing Plaintiff's position, moving of course, as he observed defendant truck.

Plaintiff agrees with defendant that "at the retrial ... the evidence was substantially the same" (Defendant's Brief P. 17); therefore, the previous decision, Utah Supreme Court No. 9921, in its statement of the facts and

conclusions can be adopted. It concludes the question of negligence and contributory negligence are jury questions. It reads, with respect to the facts, as follows:

> "In view of the jury's findings we view the evidence in a light most favorable to plaintiff. In such a light it would appear that plaintiff first observed the truck which collided with his car when it was stopped at a stop sign on the north side of Second South and Third West as he was traveling in an easterly direction while crossing some railroad tracks west of Third West on Second South when he was about 150 feet from the intersection and again when he was about 75 feet from the intersection of those streets. As he continued traveling he looked to the south and east and had entered the intersection when he looked to the north again which was immediately before he was struck by the truck. He was traveling between 20 and 25 miles per hour. He was the favored driver to enter the intersection first if a vehicle was not already in it or so close to coming in as to constitute a hazard since he was traveling in an easterly direction and for traffic traveling in an easterly direction Second South Street was a through street' at its intersection with Third West Street. At that intersection there are stop signs for north, south and westbound traffic but not for eastbound traffic. The accident occurred about 4:45 p.m. when traffic was heavy. Plaintiff was almost two-thirds across Third West Street when the left rear side of his car was hit by the truck. The intersection is about 95 feet wide on Third West and about 92 feet wide on Second South from curb to curb.
>
> "The driver of the truck estimated that plaintiff's car was about 100 feet away from the inter-

section when a traffic break occurred and he started to get into the intersection to make the turn into Second South. He estimated his speed as between 7 and 10 miles per hour, although he had no speedometer in his truck. Plaintiff in the short space of time he saw the truck had the impression it was barreling into him. From the physical evidence it appears that *plaintiff's car was approximately* 78 *feet east of the west curb of Third West* Street while the truck was about 56 feet south of the north curb of Second South Street when the impact occurred.

"Although from the testimony of the driver of the truck it could have been found that he first observed plaintiff's car when it was about 200 or 150 feet from the west curb of Third West and about 100 feet away from the intersection when he started to make his turn at a speed of about 5 to 10 miles per hour, these were mere estimates and the jury was not bound to believe them. The jury found that plaintiff had not failed to yield the right of way. Such a finding can only be consonant with a belief by the jury that the truck entered the intersection after plaintiff's car had already entered or at a time when plaintiff's car was close to the intersection and traveling at a rate of speed which would constitute an immediate hazard.

"The traffic was heavy. From plaintiff's testimony the jury could reasonably have found that the truck was still stopped at the stop sign when plaintiff was 75 feet away from the intersection when again observed by him before the collision. That plaintiff having observed the truck still stopped and being on a through street continued driving while observing traffic to the south and east. Thus there was a reasonable basis in the

evidence for a finding that plaintiff was not guilty of contributory negligence as a matter of law in failing to avoid allowing the truck to run into the left rear end of his car. The question of whether plaintiff under the circumstances disclosed by the evidence was guilty of contributory negligence which proximately caused the collision was one for determination by the jury. The court therefore erred in concluding that plaintiff was guilty of contributory negligence as a matter of law and granting a judgment of nonsuit against him."

Defendant complains (Defendants' Brief, P. 4) of 50 instructions, but Defendant requested 29, all of which were given or given in substance except a request for a directed verdict and one requesting a finding of no disability. Of the total instructions, there were 21 stocks, one on damages, 7 of Plaintiff's requests given (in addition to damage instruction), 2 framed by the court (No. 27 and No. 29) (R. 353 and R-355), and 19 of Defendants' requests given verbatim (Nos. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23). (R-331 to R-349).

ARGUMENT

POINT I. INSTRUCTIONS WERE NOT PREJUDICIAL.

Section 41-6-74.10, Utah Code Annotated, 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."

Instruction No. 27 read as follows (R-353):

> "The laws of 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.

Defendants apparently complain that in Instruction No. 27 there should have been inserted after the first clause the words "with a vehicle having right of way in the intersection."

We are then concerned, and this court must determine, whether the words in the statute just referred to, "vehicle having right of way in the intersection," refer to the vehicle on the thru street, as generally having "right of way" because of the nature of the intersection, or whether such words refer to the ultimate determination of who has the right of way in the particular situation.

It is submitted and urged that said words "vehicle having right of way in the intersection" in said statute refer to the vehicle on the thru street (or otherwise entitled by the nature of the intersecton or regulation signs, etc., to the position of favored driver).

The reason of the words "vehicle having right of way in the intersection" were unnecessary in this instruction, No. 27, is that the jury knew by ample evidence not disputed and indeed as a matter of law in this case (Ex. 2D1) who was on the thru street and who was entering, and didn't have to be and should not be told to redetermine this. In fact, to have told the jury to re-labor that question would have been confusing to them. They then would have wondered—regarding the omitted language "vehicle having right of way in the intersection" does that refer to vehicle on thru street—a matter not in dispute—or to the ultimate question of who is to blame.

The jury could not have been misled by the instruction as given even if it is found to contain super technical error. The broad edict enacted by the statute in question, 41-6-74.10, was that a driver entering a thru street, if he is involved in a collision, is at first blush the driver failing in his duty. It is only common sense enacted into statute.

That the words in the statute "vehicle having right of way in the intersection" refer to the vehicle, in such a case as this, which is on the thru street, is indicated by the title of the section, the title reading *Failure to yield right of way—Effect of collision—Rule on entering stop or yield intersection—Yield right of way.*

That section, 41-6-74.10 was enacted Laws of 1961, Chapter 86, Art. 2, House Bill No. 159. It is not a part of the Uniform Vehicle Code. It has been proposed as a part, and the writer is informed Utah is the only state yet

to adopt it. The latest edition of the Uniform Vehicle Code, 1962, Section 11-403, adopts a prima facie rule against drivers driving past a yield sign without stopping but has not included such a prima facie rule against a driver driving past a stop sign after stopping. Section 11-403 reads:

> ". . . Provided, however, that if such a driver is involved in a collision with a vehicle in the intersection after driving past a yield sign without stopping, such collision shall be deemed prima facie evidence of his failure to yield the right of way."

The legislatures have gradually affirmed the position generally taken by the motorist, that the vehicle entering the thru street or turning left must see that the way is clear. In *Porter vs. Mutual Insurance Co.,* 10 Wis. 2nd 314, 102 N.W. 2d 772, noted in *Fisher, Law of Right of Way and Traffic Law Enforcement,* 1964 pocket part, page 117, the court, in commenting on the Wisconsin Revised Code and attempting to get at the intent of the legislature in the revised code, quoted the annotator of the legislative council as follows:

> "The present law relating to the right of way of left-turning vehicles seems to prescribe a shifting of right of way. This is inconsistent with the popular notion that the driver of the left-turning vehicle must yield to through traffic . . . Note the Uniform Vehicle Code no longer has this objectionable provision for shifting of right of way from one driver to the other."

In *Law of Right of Way and Traffic Law Enforcement* by Judge Edward C. Fisher, Associate Counsel, Northwest University Traffic Institute, the author comments, 1964 pocket part, page 112:

> "The objectionable 'shift' of right of way from one driver to the other at some indefinable moment and in some undisclosed manner featured in all versions of the Uniform Traffic Code prior to the revision of 1962 is now eliminated."

And he further comments, 1964 pocket part, page 117:

> "By passage of H.B. 159 the Utah Legislature removed the shift from the left-turn rule."

It is obvious the language allegedly improperly omitted from Instruction No. 27 refers to the vehicle on the thru street and not to the vehicle ultimately found to have the right of way; therefore, the instruction properly excluded this language.

Bates vs. Burns (1955), 3 Utah 2d 180, 281 P.2d 290, quoted in Defendants' Brief (P. 12), was decided several years prior to the 1961 enactment above quoted, that is, Section 41-6-74.10a; therefore is no help.

The trend of the law was long ago noted in *Gratziano vs. Grady,* (1948), 83 Ohio App. 265, 78 N.E. 2d 766, Fisher, 1964 pocket part 108, where the court, in commenting on a left-turn case, said:

> "A careful consideration of provisions of the Code discloses a purpose to favor vehicles moving in a straight line over vehicles changing direction. Thus, traffic is kept moving and vehicles

changing direction are not permitted to join the flow of traffic except upon observance of the controlling rules of safety."

Defendants' Brief, Page 11, claims that the same error was committed in the second trial as the first. This is not so. In the first trial, the Court erroneously 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 . . ." In the second trial, the Court, after study with counsel in chambers of the decision of the Supreme Court covering the first trial, correctly instructed the jury (R-353) that the entry of the Defendant driver into an intersection "past a stop sign into an intersection and the collision occurs, the collision shall be deemed prima facie evidence of the *failure to yield the right of way* . . ."

There is a vast difference between "prima facie evidence of the *failure to yield* the right of way" and "prima facie evidence that Plaintiff *had* the right of way."

Defendants' Brief (P. 16) complains "In Instruction 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, . . ." Actually the court told the jury that if Mr. Johnson was on a thru street and had a collision with a driver having driven past a stop sign, that such "collision shall be deemed prima facie evidence of the failure to yield the right of way on the part of driver passing the stop sign but shall not be considered negligence per se

in determining legal liability for such accident"—and that is the law.

POINT II. INSTRUCTIONS WERE CORRECT

Defendants concede (Defendants' Brief, P. 14) "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."

It is submitted that Instructions 27 and 28 were correct and that other instructions referred to by Defendants as correct instructions had they been given without an instruction covering the statute quoted, that is, 41-6-74.10, would have been incorrect and would not have carried out the legislative intent.

Defendants claim (Brief P. 11) that "Instruction 28 in effect directed right of way in favor of the plaintiff, as that instruction told the jury the fact of collision is prima facie evidence of defendant's failure to yield the right of way, and, hence, of negligence on their part." Instruction 28 (R-354) defined prima facie negligence and negligence per se and aparently did so correctly and hardly can be said to "in effect directed right of way. . . ."

Therefore, there is little need to comment on the cases cited for authority that correct instructions cannot cure erroneous instructions.

It is elementary that error to be reversible must be prejudicial and inconsistencies not such as would alter the outcome of the case should avail Defendants little.

POINT III. INSTRUCTIONS HEREIN WERE IN ACCORD WITH PRIOR DECISION.

Again Instruction 9-L on the first trial is not the same as Instruction 27, second trial. In the first trial the court erroneously instructed the jury that "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 . . .' " In the second trial the language was straightened out to be consistent with the statute and referred to "prima facie evidence of the failure to yield the right of way . . ." (R-353)

The instructions could not have been misunderstood, were not misleading, were in accordance with the statute and consistent with the prior decision.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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I hereby certify that on this .....day of September, 1964, I mailed two copies of this Brief by U.S. Mail, postage prepaid, to Raymond M. Berry, Attorney at Law, 455 East 4th South, Salt Lake City, Utah.

GAYLE DEAN HUNT