1969

Le Roy Sweat and Virginia M. Sweat, Administritrix of the Estate Of Blaine Orvel Sweat, Deceased, v. Rex T. Fuhriman, Craig Fuhriman, James H. Maddox and Dan Allison : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

LE ROY SWEAT AND VIRGINIA M. SWEAT, ADMINISTRITRIX OF THE ESTATE OF BLAINE ORVEL SWEAT, DECEASED,

Appellants

vs.

REX T. FUHRIMAN, CRAIG FUHRIMAN, JAMES H. MADDOX and DAN ALLISON,

Respondents

Case No. 11,596

APPELLANTS' BRIEF

Appeal from the Order for Summary Judgment of the District Court of Wasatch County, Hon. Maurice Harding, District Judge

J HAROLD CALL
Attorney for Appellants
23 Center Street
Heber City, Utah

JOHN L. CHIDESTER
51 West Center Street
Heber City, Utah

WORSLEY, SNOW & CHRISTENSEN
Raymond M. Berry
Continental Bank Building
Salt Lake City, Utah

GLENN C. HANNI
Boston Building
Salt Lake City, Utah

F. ROBERT BAYLE
Continental Bank Building
Salt Lake City, Utah
Attorneys for Respondents

PRINTERS INC. - SUGAR HOUSE

TABLE OF CONTENTS

CASES AND AUTHORITIES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

LE ROY SWEAT AND VIRGINIA M. SWEAT, ADMINISTRITRIX OF THE ESTATE OF BLAINE ORVEL SWEAT, DECEASED,

Appellants

vs.

REX T. FUHRIMAN, CRAIG FUHRIMAN, JAMES H. MADDOX and DAN ALLISON,

Respondents

Case No. 11,596

APPELLANTS' BRIEF

Appeal from the Order for Summary Judgment of the District Court of Wasatch County, Hon. Maurice Harding, District Judge

STATEMENT OF KIND OF CASE

This is an action for wrongful death brought by the parents of the deceased, Blaine Orvel Sweat.

DISPOSITION IN LOWER COURT

The respective parties all filed motions for summary judgment and the court denied plaintiffs' motion for summary judgment and granted summary judgment for the defendants.

RELIEF SOUGHT ON APPEAL

Appellants seek to have their motion for summary judgment granted or that the matter be sent back for trial.

STATEMENT OF FACT

Appellants contend that on Saturday night, May 18, 1968, defendant Craig Fuhriman, age 21, and the son of Defendant Rex T. Fuhriman who was also the owner of the car Craig was driving, was returning from a fishing trip to Flaming Gorge with David Lund as his companion. They ran out of gas on Highway US 40 about 22 miles East of Heber City, Utah, at approximately 11:00 p.m.

This is the spot where the accident later happened. The road is generally straight and level in each direction. Toward the East there was visability from the stalled car for about one and six-tenths (1.6) miles and toward the West there was visability for approximately one-half mile. The highway was divided into two lanes by paint marks down the center. At this time of night the traffic was light and the weather was clear and the road dry.

Defendant Craig Fuhriman and Lund hitched a ride to Heber City. No lights were left burning on the Fuhriman vehicle. They stopped at a Conoco station and asked the attendant for help in getting gas for their car.

Defendant James H. Maddox had taken the family car and gone to Price. He left a Jeep with his son, Steven

Maddox. Steven loaned the Jeep to Rickie Lee Allison, a sixteen year old boy and brother-in-law of James H. Maddox.

Rickie Lee Allison and Blaine Orvel Sweat, also sixteen years of age, had been to the local high school dance and stopped at a cafe adjacent to the service station. The station attendant asked Allison to assist Fuhriman. Allison agreed but indicated they would first have to take their dates home. This was done and Allison and Sweat returned to the Conoco station but there was no gas can at the station which could be used to transport gas.

The four boys then went in the Maddox Jeep, with Allison driving, to a service station at the Strawberry Junction, passing the Fuhriman vehicle on the way. There they awoke the attendant but he also did not have a gas can. The Allison boy said he had a second gas tank on the Jeep. Fuhriman then purchased $2.00 worth of gasoline which was put in the second gas tank. The four then returned, Allison driving, to the Fuhriman car. They went past it a short distance, made a U turn and returned and parked parallel with the Fuhriman car so the gas tanks were even. The Fuhriman vehicle was facing West toward Heber City and the Maddox Jeep was facing East toward Vernal. There is a dispute as to whether the Fuhriman car was completely off the black-top of the road or whether the left wheels were on the paved portion. The Jeep was in the West lane of traffic facing on-coming traffic. Four yellow blinker lights on the Jeep were turned on and its head lights were on bright. There were about two or three feet between the two parked vehicles. Craig Fuhriman got out

of the back end of the Jeep to watch for on-coming traffic. The Allison boy started to siphon gas out but got his mouth full of gas and started to cough and choke. Sweat then picked up the siphone hose, and while standing between the two vehicles started to siphon gas from one car to the other.

It was now early Sunday morning, May 19, 1968. The party of four had been there about five minutes when a car driven by Mr. Sargent ran into the two parked vehicles. Allison was killed outright and Sweat lived a few days in a hospital before dying. He never regained consciousness enough to talk. Fuhriman and Lund were also injured but have recovered.

POINT I

DEFEDANT DAN ALLISON IS LIABLE FOR NEGLIGENCE OF RICKIE LEE ALLISON.

Dan Allison signed the drivers license of his son, Rickie Lee Allison. Thus under the provisions of Section 41-2-10 Utah Code Annotated, 1953, he is liable for Rickie's conduct in the operation of the Jeep.

POINT II

RICKIE LEE ALLISON'S NEGLIGENCE WAS THE CAUSE OF THE INJURY AND DEATH OF BLAINE ORVEL SWEAT.

Rickie Lee Allison was the driver at all times of the Jeep and he is the one who agreed to help the stranded motorists. The depositions reveal that the Sweat boy never at any time agreed to any action or conduct of Fuhriman or Allison. He was an innocent bystander caught in a situation where common courtesy demands and requires that he does not interfere with the help requested by Fuhriman.

Allison parked the Jeep on a highway blocking a lane of traffic. Allison turned the Jeep to face on-coming traffic with four yellow blinker lights and the head lights on bright. (See the deposition of Trooper Giles, page (9), lines (15) through (17), and a statement of Harold J. Sargent.

Allison failed to give any warning to approaching traffic. The road was straight for 1.6 miles (Deposition of Trooper Giles, page (26) lines (1) through (5). This would give time to signal on-coming traffic or for a driver to see any signal of warning properly given.

POINT III

THE GUEST STATUTE IS NOT APPLICABLE IN THIS CASE.

The guest statute applies to persons riding in a motor vehicle. This is repeated time and again in the statute, Section 41-9-1, Utah Code Annotated, 1953.

Some cases have extended the statute to cover mounting and alighting from a motor vehicle but none have ex-

tended it so far as to include a fact situation like the present case. The journey for the time had ended, all occupants were out of the vehicle and had embarked on another venture. This activity was unrelated to riding in a car. No guest vehicle was moving.

POINT IV

CRAIG FUHRIMAN'S NEGLIGENCE WAS THE CAUSE OF THE INJURY AND DEATH OF BLAINE ORVEL SWEAT.

The negligence of Craig Fuhriman which contributed to the injury and death of Blaine Orvel Sweat can be summarized as follows:

1. Although he was an experienced driver he ran out of gas on a main arterial highway. (His deposition Page 13, lines 14 through 17.)

2. Left wheels of his car were parked on the black top portion of the highway when the car was abandoned. (Deposition of Trooper Giles, Page 9, lines 9 through 11, Page 15, lines 15 through 25, Page 16, lines 1 through 5.)

3. No lights were left on the car at any time. (His deposition, Page 44, lines 13 through 15.)

4. Knew how gasoline was to be siphoned from one motor vehicle to another and did not object. (His deposition Page 95, lines 14 through 22.)

5. Permitted a sixteen year old driver to park on the wrong side of the highway facing on-coming traffic. (His deposition Page 56, lines 20 and 21.)

6. Failed to put out any warning signals or devices of any kind. (His deposition Page 59, lines 1 through 18, Page 96 lines 20 through 25 and Page 97, lines 1 through 16.)

7. After the Jeep was stopped he stood to the rear of the Jeep to observe traffic. (His deposition Page 44, line 11.)

8. He failed to observe on-coming traffic as soon as he should have done under the circumstances. (His deposition Page 78, lines 22 through 25, and Page 79, lines one and two.)

9. Failed to inform approaching traffic of the dangerously parked vehicles. (His deposition Page 27, lines 2 through 6.)

10 He permitted the traffic approaching the parked vehicles to approach so close before giving warning that he was able to run only a couple of steps before he was struck by the Jeep which had been hit by the Sargent car. (His deposition, Page 38, lines 3 and 4.)

> "Failure to observe is negligence proximately contributing to harm where, by observing, driver could have avoided or lessened resulting harm."

Morris v. Christensen, 356 P2d, 34; 11 U2d 140.

"A motorist's duty of lookout is not fulfilled by merely taking a quick glance, or none."

Hughes v. Hooper, 431 P2d 983, 19 Utah 2d 389.

POINT V

CRAIG FUHRIMAN IS LIABLE FOR THE INJURY AND DEATH OF BLAINE ORVEL SWEAT UNDER THE DOCTRINE OF LAST CLEAR CHANCE.

All the elements of the Doctrine of Last Clear Chance are present in this case.

Sweat was in a position of peril. He could not see the on-coming car lights. See affidavit of Ranquist.

Defendant Craig Fuhriman was watching for on-coming traffic (his deposition, page 44, line 11) but he failed to give a warning in time. He himself was only able to run a couple of steps (his deposition, page 38, line 4) before he was hit by the Jeep which had been struck by the Sargent car.

Blaine Sweat was struck by the Sargent vehicle while standing between the vehicles trying to syphon gas into the Fuhriman car and died as a result of the injuries.

Mr. Fuhriman was twenty-one (21) years of age with five (5) years of driving experience, driving his father's automobile. He had contributed to the dangerous situation,

but he, alone, had the Last Clear Chance to avoid the accident by giving adequate warning of approach of the Sargent vehicle from the East, this he failed to do. The Allison boy, having a mouth full of gas, was clearing his mouth and nose of the gas and its fumes. Blaine Orvel Sweat was concentrating on syphoning gas, but Craig Fuhriman and his passenger were standing looking to the East toward the approaching car with a full knowledge of the peril of Blaine Sweat. Such conduct is a breach of the Doctrine of Last Clear Chance.

Section 480 of the Retatement of Torts states the provisions of the Last Clear Chance, such as are applicable in this case, as follows:

> "A plaintiff, who, by the exercise of reasonable vigilance could have observed the danger created by the defendant's negligence in time to have avoided harm therefrom, may recover if, but only if the defendant (a) knew of the plaintiff's situation, and (b) realized or had reason to realize that the plaintiff was inattentive and therefore unlikely to discover his peril in time to avoid the harm, and (c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff."

The terminology of his Section has been adopted by the Supreme Court of the State of Utah.

Graham v. Johnson, 166 P, 2d 230;

Compton v. Ogden Union Ry. & Depot Co., 120 Utah 453; 235 P. 2d 515.

A complete discussion of the Doctrine of Last Clear Chance and its application is found in 92 ALR 47, supplemented in 119 ALR 1041, and 171 ALR 365.

In the case of *Graham v. Johnson,* 169 P. 2d 230, at Page 238, the Supreme Court of the State of Utah stated:

> ". . . 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. . ."

It is claimed that Blaine Sweat was negligent in placing himself between the two automobiles to siphon gas or negligent in failing to see the approaching Sargent car, assuming but not admitting the negligence of Sweat, the subsequent negligence of Craig Fuhriman brings the humanitarian Doctrine of the Last Clear Chance into being.

> "Even though a plaintiff was negligent, if defendant had last clear chance to avoid accident, plaintiff was entitled to recover damages, notwithstanding his own negligence.
>
> "Plaintiff may recover, notwithstanding his own negligence if he is in a situation of inextricable peril and defendant either knows, or in the exercise of reasonable care should know of such peril, and thereafter has a clear opportunity to avoid the injury or fails to do so, since under such circumstances plaintiff's negligence has in a sense come to rest and is not a concurring approximate cause of in-

jury, but negligence of defendant is later, intervening sole proximate cause."

Marcellin v. Osgthorpe, 336 Ped 779, 9 Utah 2d 1.

In the case of *Jones v. Knudson,* 400 Ped 562, 16 Utah 2d 332, this court held that if a jury could find the necessary facts for the application of the Doctrine of Last Clear Chance that plaintiff's contributory negligence would be irrelevant.

The case of *Beckstrom v. Williams,* 282 P2d 309, 3 Utah 2d 210 also holds that a negligent plaintiff may recover under the theory of Last Clear Chance. See also *Lawrence v. Bamberger Railroad Company,* 282 P2d 335, 3 Utah 2d, 247.

CONCLUSION

For the reasons herein stated, plaintiffs submit that their motion for summary judgment should have been granted, particularly as to defendant Craig Fuhriman, and that the trial court's order granting defendant's motion for summary judgment should be reversed, or in the alternative the plaintiff should be granted a right to trial on the issues.

J HAROLD CALL
Attorney for Appellants
23 Center Street
Heber City, Utah