1970

Stephen Simpson v. General Motors Corporation : Respondent's Brief

In the Supreme Court of the State of Utah

STEPHEN SIMPSON,
Plaintiff and Appellant,

vs.

GENERAL MOTORS CORPORATION,
a corporation,
Defendant and Respondent.

Case No. 11630

BRIEF OF DEFENDANT AND RESPONDENT

Appeal from a Judgment of the Thrid District Court
In and for Salt Lake County, Utah
The Honorable D. Frank Wilkins, Judge

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NATURE OF THE CASE

This is an action for personal injuries brought by an automobile painter against an automobile manufacturer based upon negligence in the design of an automobile.

DISPOSITION OF THE CASE IN THE LOWER COURT

This case was tried to a jury in the lower court, the Honorable D. Frank Wilkins, presiding. Trial resulted in a verdict and judgment in favor of the defendant. Plaintiff's Motion for New Trial was denied. This appeal followed.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the Judgment of Dismissal.

STATEMENT OF FACTS

Appellant claims that the facts do not support the verdict and then proceeds to recite that version of the facts least favorable to the verdict.

However, in this appeal the evidence is of primary importance only to Point III. Respondent will, therefore, rectify Appellant's version of the facts under that point.

ARGUMENT

POINT I. THE DOCTRINE OF STRICT LIABILITY IS NOT APPLICABLE TO THIS CASE.

The plaintiff based his case upon negligence, not upon strict liability. He alleged in his Complaint:

> "That the defendant was negligent, careless and heedless in the manufacture and design of the said 1966 Chevrolet Impala in the following particulars:

(a) that the design and arrangement of the torque tension rod and tension bar guide on the 1966 Impala station wagon was highly dangerous to the bodily safety and life of any person who might be called upon to remove the tail gate assembly for the purposes of repair or for other purposes.

(b) that the dangerous arrangement of the torque tension rod assembly constituted a hidden danger.

(c) that there was no warning provided anywhere on said station wagon or elsewhere to inform the plaintiff or make known to him the existence of such hidden danger and the precautions necessary to avoid serious bodily injury." (R. 1, 2).

Plaintiff alleged in his Complaint also that those specific negligent acts and omissions directly and proximately caused his injuries (R. 2).

The defendant in its Answer denied negligence and asserted affirmatively the defenses of contributory negligence and voluntary assumption of risk (R. 6).

The plaintiff submitted Interrogatories to which Objections and Answers were made. The defendant took depositions. A Pretrial conference was held before the Honorable Bryant H. Croft. A Pretrial order was entered setting forth the contentions and issues in this language:

"Plaintiff contends that the defendant was negligent in one or more of the following particulars:

1. That the design and arrangement of the torque tension rod and tension bar guide on the said station wagon was highly dangerous to bodily safety and life of any person who might be called upon to remove the tail gate assembly for the purposes of repair or for other purposes.

2. That the dangerous arrangement of the torque tension rod assembly constituted a hidden danger.

3. That there was no warning provided anywhere on the station wagon or elsewhere to inform the plaintiff or to make known to him the existence of such hidden danger and the precauions necessary to avoid serious bodily injury.

"In addition to the foregoing particulars of negligence, the plaintiff asked leave to add as an element of his cause of action the doctrine of res ipsa loquitur and said leave was granted.

"Plaintiff further contends that the negligence of the defendant in the particulars alleged and set forth above was the sole proximate cause of the injuries to plaintiff.

"Defendant denies that it was negligent in one or more the particulars alleged, or at all, denies that the doctrine of res ipsa loquitur applies and further alleges that the plaintiff was guilty of contributory negligence and that such contributory negligence on the part of plaintiff was either the sole proximate cause or a contributing proximate cause of his injuries and that he cannot in either event recover. Defendant alleges that the plaintiff was guilty of contributory negligence in one or more of the following particulars:

(a) That he failed to follow the instructions in the service manual or to consult it.

(b) That he lowered the tail gate beyond the limit of the torque tension rod and did so under tension without informing himself or inquiring of the probable consequences.

(c) He failed to keep a proper lookout for the location of the torque tension rod as he lowered the tail gate.

(d) That he failed to heed warning of a fellow employee; namely, Ray Ure, and in removing the tail gate at all for the purpose of painting it.

(e) Placed himself in a position of danger in lowering the tail gate.

"The issues to be tried in this case, therefore, are as follows:

I. Was the defendant negligent in one or more of the particulars alleged and set forth above as Items 1, 2 and 3.

II. If so, was such negligence on the part of defendant the sole proximate cause of the injury to plaintiff.

III. If so, what damages, if any, would the plaintiff be entitled to recover.

IV. Under the facts and circumstances of the case, does the doctrine of res ipsa loquitur apply.

V. Was the plaintiff guilty of contiributory negligence in one or more of the particulars alleged and set forth above as Items (a), (b), (c), (d) and (e).

VI. If so, was such contributory negligence on the part of the plaintiff either the sole proximate cause or a contributing proximate cause of the injury to the plaintiff." (R. 33-35)

Rule 16, U.R.C. P. provides relative to pretrial conferences:

> "The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action/ unless modified at the trial to prevent manifest injustice.
>
> * * *

The Appellant made no request for a modification of the Pretrial Order either at the trial or at any other time.

Plaintiff's Requested Instructions to the jury submitted the morning of trial were all directed toward negligence. Plaintiff's Requested Instruction No. 1 told the jury it was the duty of the defendant to inform users of any risks not readily observable and that the failure to do so would constitute negligence. (R. 43).

Plaintiff's Requested Instruction No. 2 told the jury it was the defendant's duty to eliminate dangers which involve inexpensive modifications of design and that the failure to do so would constitute negligence (R. 44). Both of these instructions were given in part by the Court.

By Requested Instruction No. 4 the plaintiff asked the Court to explain that he was not required to guard

against danger in places where it is not expected to be (R. 46). This instruction was given in part.

No instructions based upon the doctrine of strict liability were submitted to the court. Although counsel for the plaintiff did request the court to instruct the jury that the defendant had failed to sustain its burden of proof on the defense of contributory negligence, he did not request that contributory negligence be eliminated because of its not constituting a legal defense (R. 51).

In Instrucion No. 10 the court told the jury that the mere fact an accident happened did not prove that either the plaintiff or the defendant was negligent (R. 65). No exception was taken to this instruction.

In its Instruction No. 11 the court defined negligence, contributory negligence, ordinary care and proximate cause (R. 65). No exception was taken to this instruction.

In its Instruction No. 15, the court told the jury that a manufacturer was required to exercise ordinary care in the manufacture of automobiles (R. 69). No exception was taken to this instruction.

From the commencement of this action until *after* it was submitted to the jury two years later, both the plaintiff and the defendant relied upon law established

by *Hooper v. General Motors Corporation,* 123 Utah 515, 260 P.2d 549 (1953) as being the law of this case. *Hooper* holds that a manufacturer's liability rests upon negligence.

It is fundamental that a party may not attempt to persuade the trial court of one theory and, if unsuccessful, advance a different theory on appeal. If the law were otherwise, a trial would be a mere proving ground and appellate procedure a shambles.

The authorities are numerous but citation of two should be sufficient:

> Matters neither raised in the pleadings nor put in issue at the trial cannot be considered for the first time on appeal. *In re Estate of Ekker,* 19 Utah 2d 414, 432 P.2d. 45 (1967).

> A party who by his own pleadings, evidence and requested instructions tries and rests his case upon a certain theory is bound by that theory which then becomes the law of the case and cannot upon appeal shift to another theory or position. *Pettingill v. Perkins,* 2 Utah 2d 266, 272 P.2d 185 (1954).

POINT II. THE DOCTRINE OF STRICT LIABILITY IS NOT THE LAW OF UTAH.

The doctrine of strict liabiliy has never been adopted in Utah and is only a minority rule in American jurisdictions as a whole. The states of California, *Greenman v. Yuba Power Products, Inc.*, 29 Cal. 2d 47, 377 P.2d 897 (1960), Connecticut, *Garthwart v. Burgio* (Conn. 1965) 216 A.2d 189, Illinois, *Suvada v. White Motor Co.*, 32 Ill. 2d 6121, 210 N.E. 2d 182 (1965), Kentucky, *C. D. Herme, Inc. v. Tway Co.*, 294 S.W. 2d 534 (1956), New Jersey, *Henningson v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), New York, *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y. 2d 432, 191 N.E. 2d 181 (1963) and Oklahoma, *Marathon Battery Co. v. Kilpatrick*, CCH Products Liability Reporter Paragraph 5501 (1965) appear to be the only American jurisdictions embracing strict liability. Even its architect, Dean Prosser, claims only 14 jurisdictions.

Section 402A of the Restatement of the Law of Torts (Second), published in 1965 by the American Law Institute extended its statement of the law as applied to food and products for intimate bodily use to all products. The decisions did not and do not justify that extension.

The function of the American Law Institute is to state what the general common law of the United States is, not what it may become. This should be implicit in the term "Restatement" but Dean Prosser who is responsible for Section 402A himself acknowledges that

Section 402A states only a minority rule. In urging its adoption upon the membership of the American Law Institute, Dean Prosser said:

> "No one has to be any seer or sooth-sayer to foresee that this is becoming the law of the immediate future . . .
>
> "I would venture to predict that in another 50 years this has fair chances of becoming a majority rule in the United States, . . ." (41 ALI Proceedings, 1964 (1965), p. 350-51.)

In Utah manufacturers are liable only if negligent. The law of Utah is as set forth in *Hooper v. General Motors Corporation*, supra, where the court said:

> "Thus, to impose liability on an assembler of an automobile certain necessary elements must be made out. Plaintiff is required to show: (1) a defective wheel at the time of automobile assembly; (2) such defect being discoverable by reasonable inspection; (3) injury caused by the failure of the wheel due to its defective condition."

Furthermore,even if it be assumed for purposes of argument that the doctrine of strict liability should become the law of Utah, that doctrine would not preclude evidence of misuse or abnormal use. Contributory negligence in that sense is a defense to an action based upon breach of warranty, *Dallison v. Sears, Roebuck and Co.* (10 Cir. 1962) 313 F.2d. 343 or strict liability, *Swain v.*

Boeing Airplane Co., (2 Cir. 1964) 337 F.2d 940, (defense withdrawn by defendant).

POINT III. THERE WAS SUFFICIENT EVIDENCE OF CONTRIBUTORY NEGLIGENCE TO SUBMIT THAT ISSUE TO THE JURY.

Mr. Simpson began working around cars when he was 11 years old, helping his father who was also a car painter (R. 293). He took auto mechanics when a sophomore at Granite High School (R. 295). During this course he became familiar with the use of service manuals. (R. 319). When a junior, he worked for Litten's Body Shop doing both body work and painting (R. 294, 295, 317).

Between his junior and senior years, he worked at Capital Chevrolet as a painter (R. 295) and when he graduated from high school in June, 1961, he went to work full-time at Capital Chevrolet (R. 297).

Mr. Simpson had been painting cars full-time more than four years before this accident occurred. He was both trained and experienced. He could observe and appreciate mechanical relationships.

At the time of the accident, he was preparing to paint the tail gate of a 1966 Chevrolet station wagon. To avoid the necessity of masking the chrome tail gate supports, he removed the screws attaching the support to the tail

gate and, with the assistance of a fellow employee, Ray Dean Ure, lowered the tail gate below the horizontal sufficiently far to permit the torque rod to escape from its retainer and strike Mr. Simpson in the head.

Mr. Ure testified he was asked by Mr. Simpson for a hand (R. 210). Mr. Simpson had removed the supports and was holding the tail gate up. He told Ray Ure that he was going to let it down and asked him to help R. 212). As they lowered it, Ray on the passenger side and Simpson on the driver side, Ray noticed that the torque rod was at the point where if the tail gate was let down further it would come out of the retainer (R. 212). He said, "Hold it. I think that thing there is about to come out of the stay." Simpson replied, "Let's just let this down a little more." (R. 212). As they let the tail gate down further the rod came out from the retainer and struck Simpson in the forehead. Ure stated it was not customary to remove the supports to paint a tail gate (R. 213).

Mr. Ure exercised greater caution than Simpson even though Simpson was the one responsible for the work.

Simpson knew that the tail gate contained a mechanism for making it easier to raise the tail gate (R. 331). He knew this mechanism was a rod which worked up and down inside a guide (R. 333). He acknowledged that the

working of the rod and guide were "obvious", "apparent' and "noticeable" (R. 333). It was also apparent from the rod itself that is incorporated no feature which would prevent it from coming from the retainer (R. 334). To be guilty of contributory negligence, it is not necessary to anticipate the precise way harm can befall.

He admitted that he knew instinctively that if he had disconnected the retainer there would have been no tension on the rod (R. 330). He acknowledged that when warned by Mr. Ure, he turned immediately and looked directly at the rod (R. 336). This is at least circumstantial evidence of an awareness of the rod's propensities.

Simpson's expert witness, Professor Brown, agreed that the function and propensities of the torque rod were obvious. He testified

> "Q. Would you agree with generally the purpose of this torsion rod is to make the tail gate easier to raise?
>
> A. Yes.
>
> Q. And when you first examined the automobile shown in the photographs, was the location of the end of this torque rod obvious to you?
>
> * * *
>
> A. Yes.

Q. Was it obvious to you that the purpose of that was to act in a sense as a spring?

A. Yes.

Q. Was it obvious to you that if the tail gate were lowered beyond the limit of the rod, that it would come out of the retainer?

A. Yes.

Q. Was it obvious to you that if it did come out of that retainer, that it would come out under tension?

A. I strongly suspected this. It is a little bit difficult to know exactly the relationship of the spring force as the hinge moves out.

Q. You knew there had to be some load on it; otherwise it couldn't act as a counter-balance.

A. Yes. That is in its horizontal position. Being moved beyond the horizontal positon, you might conceivably expect something. I would expect it to be under tension, but it is not quite obvious.

Q. And you would expect the farther you moved, the greater the tension, just like when you pull a bow.

A. Yes, although the manner in which the hinge moves out, it simply — it isn't a simple — excuse me, it isn't a simple pivoted hinge.

* * *

Q. And in working on any counter-balancing or counter-balance system, it is ordinarily necessary to disarm the system before you take it apart, isn't it? In other words, take the load off of it before you take it apart.

* * *

A. That would appear to be prudent, yes." (R. 155-158)

Although Professor Brown could not visualize the exact effect of the offset hinge, the fact that the rod was under tension when the door was open was abundantly clear.

Frank Anderson, age 58, Body Shop Manager, employed by Capital Chevrolet Company was 8½ years and in the automobile service industry for 40 years, had general supervision over the painters and the body repairmen (R. 171, 172, 173).

He testified that the custom and practice would be to mask the tail gate supports and paint. It would not have been customary to remove them (R. 180). If it were necessary to remove the supports, a body man would have done it (R. 181).

Wilby Hall, employed at Capital Chevorlet for 39 years as paint foreman, testified that the practice and custom for painters would have been to mask the supports and paint the tail gate and then if it were necessary

to remove a support, that job would have been turned over to the body shop foreman who would have asked one of the body men to do it. He said as long as he had had the shop they had not removed such supports (P. 201).

Don Victor Welch, employed by Bennett Ford at the time of the trial but at Capital at the time of the accident, had worked for Capital since 1951 (R. 205). He testified that the customary way would have been to mask the chrome and paint. Overspray on chrome can be removed with lacquer thinner (R. 207).

Contributory negligence by definition is a deviation from the way prudent men customarily act. Indeed, the standard of care derives from custom and practice unless from statutory mandate.

Simpson himself acknowledges that the was not required to remove a door, a bumper, a grill or a tail gate; this was the responsibility of body men (R. 298, 349, 350). He admits he could have painted the tail gate from inside the car (R. 345).

Although he denied familiarity with the precise way the tail gate was counter-balanced, he acknowledged that he knew the tail gate was counter-balanced or had some mechanism to make it close (R. 349) and admitted he would not have opened a storm door, putting the closing

mechanism under tension and then removing the mechanism from the door (R. 349). He admits he could have painted the tail gate without removing the supports (R. 329) or by removing the support from one side at a time (R. 339). Unnecessarily departing from customary ways, with an appreciation of the potentiality of some harm, is contributory negligence.

In addition to departing from the customary practice, Simpson failed to follow the directions in the Fisher Body Service Manual for the removal of the tail gate supports or the removal of the tail gate.

That manual provided the following instructions:

"TAIL GATE SUPPORT ASSEMBLIES

Removal and Installations

1. Open tail gate and support it in that position.

2. Remove screws securing support to tail gate . . .

* * *

"TAIL GATE ASSEMBLY

Removal and Installation

1. Open tail gate . . .

> 2. Raise tail gate to an approximate vertical position to relieve torque rod tension. Remove torque rod retainer attaching screws and remove retainer . . ."
>
> * * *

Simpson knew service manuals were available at the office and knew that service manuals showed how to dismantle cars, yet he made no inquiry of anyone in the body shop and no reference to the manual (R. 320, 326, Ex. 1).

This evidence, and that of significant departure from customary practice, at the very least raised a jury question as to Simpson's contributory negligence.

POINT IV. THE COURT DID NOT ERR IN RECEIVING EXHIBITS 17 AND 18.

Contrary to appellant's assertion, Exhibit 17 was not offered or received. Exhibit 18, the Fisher Body Service Manual, was properly admitted in evidence.

One of the claims was that there was no warning provided anywhere on the station wagon or elsewhere to inform the plaintiff or make known to him the precautions necessary to avoid serious bodily injury (R. 34).

By way of foundation, it was established that there was a Fisher Body Service Manual pertaining to the

1966 model in the shop manager's office. Mr. Simpson knew of this and knew that the manual provided directions on dismantling cars (R. 320). This evidence was admissible to negate the allegation of no warning as well as to support the charge of contributory negligence based upon failure to make reasonable inquiry or to follow the directions set forth in the service manual.

When Exhibit 18 was offered, objection was made on the ground that it was not specifically called to the attention of the plaintiff or that he was instructed to refer to it in connection with the operation which he performed (R. 159). When re-offered, counsel for the plaintiff said he had no objection except that it had not specifically been called to the attention of the plaintiff. (R. 175).

The plaintiff was familiar with service manuals but even if he was not, it was proper for the jury to consider whether the service manual adequately apprised persons who might be removing parts from the car of the correct manner of doing so and whether the plaintiff should reasonably have referred to it.

POINT V. THE COURT DID NOT ERR IN GIVING INSTRUCTION NO. 16.

Instructions 13 and 4 set forth affirmatively the obligations of defendant manufacturer. Instruction No. 16 stated the reverse of those instruction in this language:

"An automobile manufacturer is not liable for injuries resulting when an automobile is used in a manner it was not intended to be used.

"Merely because a product can be used dangerously or because a user can be subjected to a danger does not make the product itself dangerous if it would not be so while being used as intended.

"A manufacturer is not required to foresee all possible ways in which a person may injure himself nor to protect against all such possibilities or against misuse by careless persons."

This instruction was based upon Section 165(1), Motor Vehicles, of 60 C.J.S. which, beginning at page 935, provides:

"A motor vehicle manufacturer is not an insurer, but is only required to exercise ordinary or reasonable care to see that the vehicle is made free from defects which might be reasonably expected to produce injury or damage. His duty is to design or construct his vehicle to be reasonably safe or fit for the purpose for which it was made, when used in he manner and for the purpose for which it was supplied. . . . He is not under a duty to make automobiles fool-proof or accident-proof. . . ."

"* * * His duty extends to the ordinary use of the vehicle, and he is not required to anticipate and guard against the risk of injury to

> those whose own acts or the acts of others might cause them injury, nor is he bound to anticipate and guard against the gross, careless misuse of the vehicle by reckless drivers."

It is the duty of the trial judge where trial is by jury to instruct the jury upon the law applicable to the theories of both parties insofar as such theories are supported by competent evidence. *Hall v. Blackham,* 18 Utah 2d 164, 417 P. 2d 664.

The substantial evidence of Simpson's departure from the customary practice in automobile paint shops, his failure to heed what his own intuition told him, his falure to refer to the service manual or to make inquiry of the body shop men amply justified the court in giving Instruction No. 16 focusing the manufacturer's liability upon the product's ordinary and intended use.

POINT VI. THE COURT DID NOT ERR IN GIVING INSTRUCTION NO. 18.

In Instruction No. 18, the court explained the effect of contributory negligence. That Instruction read as follows:

> "Even if you were to find the defendant negligent and that such negligence was a proximate cause of the accident, the plaintiff nevertheless may be barred from recovering damages by contributory negligence.

> "If you find from a preponderance of the evidence that the plaintiff was negligent and that such negligence was a proximate and contributing cause of the accident, then you verdict must be aainst the plaintiff and in favor of the defendant, no cause of action whether or not you also found the defendant negligent in proximately contributing to the accident."

The defendant's Requested Instruction on contributory negligence contained the specifications of negligence claimed by the defendant (R. 92). The court eliminated the specifications after discussions with counsel. Counsel for the Appellant now claims that the instruction was too broad. He did not, however, request a limiting instruction.

In *Galarowicz v. Ward,* 119 Utah 611, 230 P.2d 576 (1951) the court instructed the jury that liability could not be imposed upon defendant Ward merely because he owned the car unless the relationship of principal and agent or master and servant existed between him and his son.

Upon appeal, it was urged that the court erred in failing to define principal and agent and master and servant and that the instruction was too general. Utah Supreme Court observed that the plaintiff had not submitted any requested instructions further defining those terms and said that in the absence of his having done so, he cannot be heard to complain of the instruction given in general terms.

Counsel for Simpson does not urge that evidence was received which was outside the scope of the Pretrial Order, that any argument of counsel was made outside the scope of the issues framed by the Pretrial Order or that the jury could reasonably have found contributory negligence on a ground not encompassed by the Pretrial Order.

Why should we assume the jury found contributory negligence on a forbidden ground? All presumptions are in favor of the validity of the verdict *Joseph v. Groves, L.D.S. Hospital*, 10 Utah 2d 94, 348 P.2d 935 (1960).

CONCLUSION

The Appellant in this case pleaded his cause of action in negligence, stated his contentions at Pretrial in negligence, tried his case and submitted it to the jury relying upon negligence as the foundation of his right to relief.

It was not until Judgment against him had been entered that he concluded it may have been better to have sought to persuade the court to adopt the doctrine of strict liability as a few courts have done.

If litigants may not change horses in the middle of the stream, with even greater force, litigants may not change horses after they have approached the opposite bank.

It is manifest that the issue of contributory neligence was properly submitted to the jury under the evidence shown by the record.

The service manual was relevant to both the conduct of the defendant and the conduct of the plaintiff. The instructions were correct statements of the law.

In no sense can it be said that the points complained of rise to the level of irreversible error. The verdict of the jury should be upheld and the Judgment affirmed.

Respectfully submitted,

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