1965

John F. Hawkins v. Helen H. Allen : Respondents Brief

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

JOHN F. HAWKINS,
Plaintiff-Respondent,

vs.

HELEN H. ALLEN,
Defendant-Appellant.

RESPONDENT'S BRIEF

Appeal from the Judgment of the
in and for Box Elder Co
Hon. VeNoy Christoffersen, Judge

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JOHN F. HAWKINS,
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vs.

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Defendant-Appellant,

Case No. 10265

RESPONDENT'S BRIEF

RELIEF SOUGHT ON APPEAL

John F. Hawkins, the respondent, seeks the affirmance of the judgment of the District Court and costs on appeal.

STATEMENT OF FACTS

The collision in this case occurred as the Hawkins vehicle, having made a left turn, was coming out of the turn and started into an easterly course at the intersection of First South and Tremonton Street in Tremonton, Utah (Tr. 2). Prior to making the turn, Hawkins (hereinafter called plaintiff) placed on his left turn signal for a distance of approximately 100 feet, approached the intersection from the inside lane of traffic, and turned into the lane of traffic next to the center line proceeding east (Tr. 3, 4). Before

entering the intersection, plaintiff noted the vehicle driven by Mrs. Allen, (hereinafter called defendant) an 86 year old woman, parked by a mail drop directly parallel to the curb and facing North. As the plaintiff's vehicle entered the intersection plaintiff and an occupant in plaintiff's vehicle, one Miss Gent, became aware of the car driven by Mrs. Allen which at that time, having proceeded directly parallel to the curb at a distance of no more than 2 feet, (Tr. 5, 6) pulled into the intersection from an untraveled portion of the roadway giving no indication of an intent to turn (Tr. 6). In order to avoid the collision Mr. Hawkins accelerated but his automobile was nonetheless struck in the right rear and damaged in the amount of $181.93. The damages were stipulated at trial. Hawkins speculated that his speed at the time of collision was, ". . . *about* 12 miles an hour" (Tr. 4). Further, under cross examination, Mr. Hawkins conjectured that defendant's speed was approximately the same (Tr. 9).

After the collision occurred, Mrs. Allen crossed the center line of the roadway, continued in motion down the wrong side of the road and did not stop until such time as Mr. Hawkins indicated that it was improper to leave the scene of an accident (Tr. 7). The testimony of Miss Gent indicated clearly that Mrs. Allen was never aware of the presence of the car driven by Hawkins (Tr. 8). Counsel for Mrs. Allen conceded the negligence of his client at the hearing on the motion for a new trial. The testimony of Miss Gent and Mrs. Allen has not been designated as a part of the record on this appeal.

POINT I.

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION.

Defendant relies for his contention that plaintiff was contributorily negligent as a matter of law in not yielding the right of way to the defendant upon Sec. 41-6-73 U. C. A. 1953 (as amended). The statute provides as follows:

> *Vehicle turning left at intersection*—the driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard, during the time when such driver is moving within the intersection.

In determining whether or not plaintiff was at fault under the statute, or in determining if the statute itself were applicable, the trial judge was, because sitting without a jury, empowered to decide several issues of fact. The trial judge needed to decide whether the Allen vehicle which was proceeding in the opposite direction from Mr. Hawkins, who was then turning left, was in the intersection or so close thereto as to constitute an immediate hazard.

Mr. Hawkins' testimony to the effect that he was first into the intersection was uncontested at the trial (Tr. 17-18). Being the only evidence before the court on that question, it would appear that there was clearly substantial evidence to justify the factual determination of the trial judge in favor of the plaintiff, Hawkins.

The testimony of Mr. Hawkins that Mrs. Allen was parked parallel to the mailbox on an untraveled portion of the roadway at the time Hawkins entered the intersection was sufficient basis upon which the judge could make a finding as to a matter peculiarly within his judicial discretion. That the judge did so decide is indicated by his statement,

> "*However, there is nothing shown by the defendant in this case that, at the time the plaintiff commenced the left turn, the defendant's car was approaching the intersection. In fact the evidence indicates the car was parked at the curb.* Also, the evidence shows that the defendant's car never did enter the intersection from the traveled portion of the roadway, but pulled into the intersection directly from the parking area at the curb, traveling a distance of some 15 to 18 feet before striking the rear of plaintiff's car, after the plaintiff had completed the left turn and was proceeding in an easterly direction from the intersection." (Emphasis added.)
>
> (Trial Judge's Decision on Motion for New Trial, R. 26.)

A presumption arises upon appeal that the court's decision on a discretionary matter has been made in proper exercise of such discretion when the contrary does not appear from the record. *Hanberry* v. *Fitzgerald,* 72 N. M. 383, 384 P. 2d 256, *Anderson* v. *Johnson,* 1 Ut. 2d 400, 268 P. 2d 427, *Book* v. *Book,* 99 Wyo. 433, 141 P. 2d 546. An appellant claiming abuse of discretion has the burden of proving that contention. *Knapp* v. *Life Insurance Corporation of America,* 8 Ut. 2d 220, 332 P. 2d 662. Matters

falling with the area of judicial discretion will not be lightly upset and discretionary determinations are better considered as reviewable only in case of "gross", "clear", "plain", "palpable", or "manifest" abuses of discretion. *Redwine* v. *Fitzhugh,* 78 Wyo. 407, 329 P. 2d 257, 72 A. L. R. 2d 644. See also; 5 Am. Jur. 2d "Appeal and Error" Section 744, page 217.

The effect of the ruling of the trial court was to acknowledge the defendant's failure to meet her burden of proof on the issue of contributory negligence. As to the mental processes of the judge on this point there can be little question in light of the following:

> "There is no evidence shown by the defendant as to the width of the street, or the distance the plaintiff must have traveled in order to get through the intersection. Since the defendant must affirmatively show this by competent evidence, and it has not been so shown, the motion is denied."
>
> (Judge's Decision on Motion for New Trial, R. 27.)

Appellant has attempted to establish at trial, upon motion for new trial, and now upon appeal, a mathematical basis for the contention that the plaintiff, Hawkins, was negligent as a matter of law. The computations begin upon the faulty premise that a given speed said to be from 10 to 12 miles per hour was established at trial for both vehicles. Mr. Hawkins, in fact, "imagined" (Tr. 12) the speed of his own vehicle and was, of course, only able to conjecture as to the speed of Mrs. Allen's. The Trial Judge, however, leaves little doubt as to his thinking on the matter and reasoned as follows:

> "The defendant further urges that because the plaintiff traveled twice as far as the defendant in the same length of time, the plaintiff must have known, or should reasonably have known, the defendant was approaching the intersection before the plaintiff commenced making his left turn. This is not so, since the distance traveled by the defendant was very short. Even counting the distance traveled in the parking area, the total distance the defendant traveled would be from 60 to 75 feet . . . Thus the plaintiff could very well have commenced his left turn 120 to 150 feet before impact."

Plaintiff has no argument with the authorities cited by the defendant or with the principles of law governing left turns therein enunciated. It should be noted, however, that in both *Cederloff* v. *Whited,* 110 Utah 45, 169 P. 2d 777 and *French* v. *Utah Oil Company,* 117 Utah 406, 260 P. 2d 1002, the party turning left turned in the face of an oncoming vehicle. Such precedents are scarcely appropriate where, as here, the evidence preponderates against the notion that when sighted by Hawkins the Allen vehicle was moving. The judge's conclusion that, " . . . the evidence indicates the car was parked at the curb," clearly establishes that this matter presents a different factual situation than the cases cited in defendant's brief.

Defendant contends that the lower court's findings of fact erroneously assumed that the collision did not occur within the intersection because the judge is supposed to have felt that the intersection was bounded by the edge of the roadway and not by the curb line. It is suggested that this assumption failed to take note of the statutory

definition of an intersection. A careful reading of the Trial Judge's Decision on the Motion for New Trial (R. 26) clearly indicates that no such faulty assumption was made. The judge merely points out that,

> ". . . the evidence shows that the defendant's car never did *enter the intersection* from the traveled portion of the roadway, but pulled *into the intersection* directly from the parking area at the curb, traveling a distance of some 15 to 18 feet before striking the rear of plaintiff's car, after the plaintiff had completed the left turn and was proceeding in an easterly direction from the intersection."

The trial judge reasoned that a vehicle parked upon an untraveled portion of the roadway was not a vehicle *"approaching"* from the opposite direction within the purview of the statute.

POINT II.

THE TRIAL COURT WAS NOT IN ERROR IN FAILING TO FIND THAT PLAINTIFF WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW FOR FAILURE TO KEEP A PROPER LOOKOUT.

Defendant had the burden of proving contributory negligence at trial. Plaintiff was required only to do what a reasonable and prudent person would have done under the circumstances. *Berger* v. *Salt Lake City*, 56 Ut. 403, 191 P. 233. In order for this court to concur with defendant's contention that respondent was contributorily negligent as a matter of law for failure to maintain a proper

lookout it must be found that as to that point reasonable men could not differ on the question of plaintiff's negligence.

The testimony at trial was to the effect that the plaintiff, Hawkins, upon approaching the intersection and upon entry into same was aware of only one vehicle in any direction, that vehicle being the car driven by Mrs. Allen which was then parked parallel to a mail drop on an untraveled portion of the roadway. Mr. Hawkins further indicated that in making the turn his attention was momentarily diverted in avoiding certain holes in the roadway (Tr. 4). It is clearly arguable that such conduct was under all the circumstances that of a reasonable man of ordinary prudence. The decision at trial in plaintiff's behalf was an indication that the judge below, operating as the decider of fact, chose so to believe. Unless this court can say that upon this issue reasonable men could not differ, his decision should be affirmed. Findings of the trial judge are ordinarily not disturbed on appeal if they are supported by the evidence or at least by substantial evidence, even though there may also have been other conflicting evidence pending against the trial judge's conclusions. 5 Am. Jur. 2d "Appeal and Error" section 839, page 282.

POINT III.

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE LOWER COURT WERE CORRECT AND IN ANY EVENT THE FORM OF SUCH FINDINGS DID NOT CON-

STITUTE PREJUDICIAL ERROR ENTITLING DEFENDANT TO THE RELIEF PRAYED FOR.

Defendant contends that the lower court was in error in failing to find that plaintiff's negligence proximately caused the collision. Counsel for Mrs. Allen conceded at the hearing upon the Motion for a New Trial, the negligence of defendant, concluding that the only issue for discussion at that time concerned the possible contributory negligence of Mr. Hawkins. In light of that admission the decision on the Motion for a New Trial of the trial judge was confined to precisely the issue of plaintiff's possible contributory negligence (R. 26).

It is difficult to understand in what manner defendant has been damaged by the Findings below. If, as defendant indicates, Findings of Fact and Conclusions of Law are to aid the appellate court, affording it a clear understanding as to the basis of the lower court's decision, it becomes apparent that the court can in this instance readily proceed with sufficient facts to understand the decision below.

The Findings explicitly indicate, "That as a result of the defendant's negligence, plaintiff's automobile was damaged in the amount of $181.93" (R. 22). The purport of the above statement is to indicate that plaintiff's damages resulted or were caused by defendant's negligence. The better view followed by most courts is that if the judgment or decree is not affected at all or is not affected in a way which is prejudicial to the party complaining, a defect or

error in the supporting verdict or findings may be disregarded by the reviewing court. *Boeing Airplane Co.* v. *Firemens Fund Indem. Co.*, 44 Wash. 2d 488, 268 P. 2d 654, 45 A. L. R. 2d 984. See also: 5 Am. Jur. 2d "Appeal and Error", section 819, page 260. Assuming, as the defendant contends, that the finding is inappropriate and the trial court is in error, it does not appear that any substantial right of the defendant was prejudicially affected by such defect or error entitling defendant to a reversal. This court has taken the position that in the case of erroneous findings of fact, the appellate court will not reverse the judgment if the findings that should have been made will support the judgment. *Tree* v. *White*, 110 Utah 233, 171 P. 2d 398.

The better view is that failure to specifically mention proximate cause in the findings of fact is a mere matter of form having little if any validity on appeal. Such failure provides no insuperable obstacle to this court's ability to interpret, understand and comprehend the rationale of the decision below. As a general rule no appeal lies upon the court's findings of facts. *Attorney General* v. *Pomeroy*, 93 Utah 426, 73 P. 2d 1277, 114 A. L. R. 726.

CONCLUSION

The trial judge's decision should be affirmed and respondent should be awarded costs.

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