1965

John F. Hawkins v. Helen H. Allen : Appellant's Brief

IN THE SUPREME COURT
of the
STATE OF UTAH

JOHN F. HAWKINS,
Plaintiff-Respondent,

vs.

HELEN H. ALLEN,
Defendant-Appellant.

Case No.
10265

APPELLANTS' BRIEF

APPEAL FROM THE JUDGMENT OF THE
FIRST DISTRICT COURT FOR
BOX ELDER COUNTY

Hon. VeNoy Christoffersen, Judge, Pro Tempore

RAYMOND M. BERRY,
Attorney for
Defendant-Appellant
1473 South 11th East
Salt Lake City, Utah

JOEL M. ALLRED,
Attorney for
Plaintiff-Respondent
15 East 4th South
Salt Lake City, Utah

TABLE OF CONTENTS

CASES CITED

OTHER AUTHORITIES CITED

IN THE SUPREME COURT
of the
STATE OF UTAH

JOHN F. HAWKINS,
Plaintiff-Respondent,

vs.

HELEN H. ALLEN,
Defendant-Appellant.

Case No. 10265

APPELLANTS' BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action for property damage arising from an intersection collision at the intersection of Tremont Street and First South in Tremonton, Utah.

DISPOSITION IN LOWER COURT

Honorable Lewis Jones on the morning of the trial disqualified himself and this case was heard, pursuant to stipulation by the Honorable VeNoy Christoffersen, Judge of The City Court of Brigham City, Utah. Sitting without a jury, Judge Christoffersen made Findings of Fact and Conclusions of law in favor of the driver making a left turn in front of the oncoming driver and judgment was made and entered in favor of the plaintiff in the sum of $181.93.

RELIEF SOUGHT ON APPEAL

Helen H. Allen, the appellant, wants the judgment in the lower court reversed and judgment of "No Cause of Action" entered in her favor.

STATEMENT OF MATERIAL FACTS

This accident happened on May 4, 1963 in broad daylight (TR 13) at the intersection of Tremont Street and First South in Tremonton, Utah (TR 9). The accident occurred at an open intersection and there were no traffic signs present at the time of the accident (TR 10). Mr. Hawkins said he did not observe the danger of a collision (TR 10) until the Allen car was three or four feet from colliding with his car. (TR 10) At the precise moment of the impact, Mr. Hawkins was driving out of the left turn made in front of the oncoming Allen car (TR 2). Mr. Hawkins testified that the speed of the Allen vehicle at the time of the collision was 10 to 12 miles an hour (TR 6), and that he also at the time of the accident was going 10 or 12 miles an hour (TR 9).

Before entering the intersection, Mr. Hawkins testified he saw Mrs. Allen's car parked in front of the post office some 25 or 26 steps south of the corner where the turn was made (TR 2). Mr. Hawkins judged his car was approximately 125 feet from the Allen car when he first observed it.

Mr. Hawkins testified that he had no vision head-on in his right eye at the time of the accident (TR 11).

There is a curb on the east side of Tremont Street (TR 5) and Mr. Hawkins testified as Mrs. Allen drove north she was driving along the curb line (TR 5). First South has a paved roadway wide enough for two cars and there is 15 to 18 feet from the south edge of the roadway to the south side of First South street (TR 6).

STATEMENT OF POINTS

POINT I

THE PLAINTIFF WAS CONTRIBUTORY NEGLIGENT AS A MATTER OF LAW IN THE FOLLOWING PARTICULARS:

A. FAILING TO YIELD THE RIGHT OF WAY TO THE DEFENDANT.

B. IN NOT KEEPING A PROPER LOOKOUT.

POINT II

THE FINDINGS OF FACT FAIL TO SUPPORT A JUDGMENT FOR THE PLAINTIFF AS THE LOWER COURT FAILED TO FIND THE DEFENDANTS NEGLIGENCE AS A PROXIMATE CAUSE OF THE COLLISION.

ARGUMENT

POINT I

A

AS A MATTER OF LAW, THE PLAINTIFF WAS CONTRIBUTORY NEGLIGENT IN NOT YIELDING THE RIGHT OF WAY TO THE DEFENDANT.

The collision occurred in an intersection. Section 41-6-8 defines intersection as follows:

> "Intersection (1) *The area embraced within the prolongation or connection of the*

lateral curblines, or if none, then the lateral boundary lines of the roadways of two highways which join one another at, or approximately at, right angles, or the area within which vehicles traveling upon different highways joining at any other angle come in conflict." (Emphasis added)

Section 41-6-73, Utah Code Annotated 1953 reads 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."

Affirmatively, the evidence shows that at the time of the collision, each vehicle was going 10 to 12 miles an hour. As the collision occurred west of the east curbline of Tremont Street, the evidence undisputedly shows this collision occurred in an intersection, and it is admitted by Mr. Hawkins, the plaintiff, he made a left turn in front of the oncoming Allen vehicle.

Mr. Hawkins claimed he had the right of way because he saw Mrs. Allen's car parked next to the curb some 50 to 60 feet south of the southeast corner of the intersection.

The driver making the left turn has control of the situation. The driver making the left turn

knows when he is going to turn, and the opposing driver does not, and in fact, the opposing driver must discover when and if the turn is going to be made. In *Cederloff vs. Whited* (1946) 110 U. 45, 169 P. 2d, 777, where the testimony showed the plaintiff was driving north on State Street in Salt Lake City in the center northbound lane and that the defendant was driving south at a point 200 feet north of Ninth South, and where then the defendant turned his car left directly in the path of the plaintiff's vehicle and the two collided a few feet east of the centerline at a time when the oncoming vehicle was going only 25 to 30 miles an hour, this court granted a new trial, saying the defendant in making a left turn solely and proximately caused the collision.

In *French vs. Utah Oil Company* (1950) 117 U. 406, 260 P. 2d, 1002, where a directed verdict against the driver making a left turn was affirmed, and where prior to the time of the collision, the left-turning plaintiff admitted he saw the defendant's truck 120 feet away, this court said:

> "Plaintiff elected to turn the risk of clearing the intersection ahead of the oncoming truck which was so close that even though it was moving at a reasonable rate a speed, a collision could not be avoided. In doing so, he met his own mishap and his negligence contributed to his injury and prohibits his recovery."

In *Walker vs. Peterson* (1954) 3 U. 2d 54, 278 P. 2d, 291, this court affirmed a finding that the

driver making the left turn was negligent in failing to yield the right of way.

The evidence most favorable to the respondent, Mr. Hawkins, shows that from where the respondent claimed he saw the appellant's vehicle stopped at the curb, the appellant's vehicle traveled some 60 to 75 feet to reach the point of impact, and the respondent admits at the time of the impact, Mrs. Allen's vehicle was going only 10 to 12 miles per hour. At 10 miles an hour, you're traveling 14.7 feet per second, and at 12 miles an hour, 18 feet per second. If Mrs. Allen came from a stop as Mr. Hawkins testimony states, then her average speed based on his testimony from the place where she stopped, would have been 5 or 6 miles an hour, and at 6 miles an hour, you are merely going 9 feet per second.

As Mr. Hawkins was not slowing, his average speed had to be something in excess of the 10 or 12 miles per hour he was going at the time of the impact. In the decision on the Motion for New Trial (R 26), the lower court said the plaintiff had completed the left turn and was proceeding in an easterly direction from the intersection at the time of the collision. The decision on the Motion for a New Trial recognizes that there is a curbline along the east side of Tremont Street. As a matter of law the defendant's vehicle was approaching the intersection at the time the plaintiff commenced the left turn as it would appear to Mrs. Allen over twice

as long to reach the point of impact from the place where she allegedly stopped as it would have Mr. Hawkins.

It is submitted that the lower court made Findings of Fact and reached the conclusions it did because it did not consider the statutory definition of an intersection. It is believed that erroneously the lower court assumed the collision did not occur within an intersection as it assumed the intersection was bounded by the edge of the roadway and not by the curbline. If we accept the theory that the east edge of the roadway of Tremont Street constituted the east edge of the intersection, then it's possible to undertand how the lower court found Mrs. Allen was not approaching the intersection, and that at the time the collision occurred, the Hawkin's car was proceeding east from the intersection. If, however, we accept the statutory definition as set forth in Section 41-6-8, Utah Code Annotated 1953, that the intersection embraces the area within the prolongations of the lateral curblines, then you must find Mr. Hawkins who had made a left turn to go east in front of an oncoming northbound car, as a matter of law, did not yield the right of way to a vehicle approaching from the opposite direction which was within the intersection or so close thereto as to constitute an immediate hazard to the safe movement of Mr. Allen's car in making a left turn.

It is further submitted that there is evidence

as to the distance plaintiff traveled to reach the point of impact as he testified as to his speed at the time of the impact. Further, regardless of the width of the street involved, the driver making the left turn has no right to make a left turn when a vehicle is approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard and that the mere fact the plaintiff commenced his turn 120 or 150 feet before the impact would not have afforded the plaintiff the right of way for being in the intersection first.

Unless the statutory definition of intersection is of no force and effect in Box Elder County, the plaintiff and respondent Mr. Hawkins, failed to yield the right of way to the vehicle which was so close as to constitute an immediate hazard at the time he entered and during the time during which he was making his left turn.

POINT I

B

AS A MATTER OF LAW, THE PLAINTIFF'S CONTRIBUTORY NEGLIGENCE WAS IN FAILING TO KEEP A PROPER LOOKOUT.

This accident occurred just after noon in broad daylight. There were no other cars on the street and the view of neither driver was obstructed by objects. However, the record shows the plaintiff and respondent, Mr. Hawkins was blind in the right eye and

had no head-on vision in that eye. The evidence shows that although at the time of the impact it was observed the speed of Mrs. Allen's vehicle was only 10 to 12 miles an hour, that nevertheless, the hazard or danger of an impact was not noticed by Mr. Hawkins until the front of the Allen car was three or four feet from the side of the Hawkin's vehicle, and then it was noticed only after the passenger in Mr. Hawkin's car called his attention to the fact that a collision was abount to occur.

In *Conklin vs. Walsh* (1948) 113 U. 276, 193 P. 2d, 437, the court held it was the duty of the driver on the arterial to keep a proper lookout just as well as to require the same of the driver entering the intersection, and that neither driver could excuse his own failure to see the other. In *Johnson vs. Syme* (1957) 6 U. 2d 319, 313 P. 2d 468, where the plaintiff failed to see a vehicle entering the intersection until it was directly in front of her at a distance of 20 to 30 feet away, at a time when the car entering the intersection was going 10 to 20 miles per hour, a summary judgment in favor of the defendant was affirmed, and the court said that in failing to see the decedant's vehicle until she was 20 or 30 feet from it, she was contributory negligent as a matter of law, and that she either looked and failed to see the obvious, or failed to look at all, and under the circumstances, either way, she was negligent as a matter of law.

In this particular case, Mr. Hawkins did not

observe the danger of a collision until the side of his car was three or four feet from the point of impact, and then only after his attention was called to the danger by a passenger. It can be argued that Mrs. Johnson in *Johnson vs. Syme*, supra, was five times as prudent as Mr. Hawkins, even though she was held to be contributory negligent as a matter of law in failing to keep a proper lookout.

POINT II

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW FAIL TO SHOW THE LOWER COURT FOUND THE ACCIDENT IN QUESTION WAS PROXIMATELY CAUSED BY THE DEFENDANT'S NEGLIGENCE.

Said the lawyer, "I'm unhappy because
The decision is full of flaws.
The sound of the judge's voice,
Made it impossible for the defendant to rejoice.
The decision fails to state Proximate Cause.

The lower court made no findings of fact on the proposition of whose negligence proximately caused the collision in question (R 22).

The purpose of Finding of Fact and Conclusions of Law is to aid the appellant court and to afford the appellant court with a clear understanding as to the basis of the lower court's decision (*Merrill vs. Merrill* (1961) 362 P. 2d 887, 83 Idaho 306).

In *Rogge vs. Weaver* (1962) .... Alaska .... 368, P. 2d 810, the court stated the purpose of the

requirement that Findings of Fact and Conclusions of Law be made by the trial court is to enable an appellant cout to determine grounds upon which the trial court reached it's decision, and to enable the defeated party to determine whether the case presents a question worthy of consideration by the appellant court and to spare the appellant court the necessity of searching the record in order to supply findings of Fact.

In *Harmon vs. Rasmussen* (1962) 13 U.2d 422, 375 P. 2d 762, where pleadings made an issue on whether a prescriptive easement for an irrigation ditch had been required and there was undisputed evidence that the ditch had been used for 20 years, a direct finding on that issue was held to be required and in the absence of the finding, this court reversed the lower court.

In the *State of New Mexico ex. rel. S. E. Reynolds vs. Board of City Commissioners of County of Guadalupe* (1962) 376 P. 2d, 976, 71 N.M. 194, the court held Rule 52(b) required in non-jury cases for the trial court to make Findings of Fact on material issues.

Rule 52(b), Utah Rules of Civil Procedure reads as follows:

> "52(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend the judgment accordingly. The motion may be made with a motion for a new trial pur-

> suant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial."

Further, Rule 52(c) provides that except in divorce cases, findings of fact and conclusion of law may be waived by the parties to an issue of fact by default, by consent in writing, filed in the cause, or by oral consent in open court entered in the minutes.

The Findings of Fact (R 22) don't show whether or not the defendant was negligent in failing to keep a proper lookout or failing to yield the right of way or in some other particular, nor do they show a finding as to where in the intersection, the collision occurred, or if in fact, the court made a determination on this point.

In effect, the Findings of Fact and Conclusions of Law show the lower court reached a conclusion, but that it did not make any findings of fact in support thereof. The Findings of Fact and Conclusions of Law (R 22) fail to show a single ground upon which negligence is based, and it is submitted not having found any ground that it is impossible to assume what the proximate cause of the action was

found to be by the lower court. Because the Finding of Fact fail to show specific grounds upon which negligence is determined by the lower court and also fail to show upon what ground the lower court determined the defendant's negligence, if any, proximately caused the accident, it is difficult to determine how the case was lost in the lower court. In fact, if you read the decision on the Motion for a New Trial (R 26), you can conclude that the lower court found the collision occurred after the plaintiff's vehicle had left the intersection which is directly opposed to the Finding of Fact contained in the record at R. 22.

CONCLUSION

Mrs. Allen is entitled to a Pyrrhic Victory. The lower court should be reversed.

Respectfully submitted,
RAYMOND M. BERRY,

Attorney for
Defendant-Appellant
1473 South 11th East
Salt Lake City, Utah

I hereby certify that on this ..... day of January, 1965, I mailed two copies of this Brief, by United States mail, postage prepaid, to Joel M. Allred, Attorney for the Plaintiff, 15 East 4th South, Salt Lake City, Utah.
