1965

Louise B. Taylor, et al. v. Virginia Clar'E Johnson : Brief of Respondent

In the Supreme Court of the State of Utah

LOUISE B. TAYLOR, et al,
Plaintiffs and Respondents,

vs.

VIRGINIA CLARE JOHNSON,
Defendant and Appellant.

BRIEF OF RESPO

Appeal From Fourth Di
Utah County, Utah
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CASE NO. 10316

RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action by the plaintiff, for herself and as guardian of her minor children, for damages for the wrongful death of her husband and father of the children, who was killed while in the process of removing a disabled motor vehicle and trailer from the highway when defendant drove a vehicle against the trailer.

DISPOSITION IN LOWER COURT

This matter was originally filed and tried in Juab County, and a jury returned a verdict of "no cause of action". On appeal to the Supreme Court, **Taylor** vs. **Johnson**, Case No. 9874, filed June 18, 1964, the Supreme Court

remanded the case to the District Court of Juab County for a new trial. The first appeal is reported at **15 Utah 2d 342, 393 P. 2d 382.**

Prior to the time the second trial was had, defendant filed a motion for change of venue which was granted by the District Court of Juab County, and the second trial was held in the District Court of Utah County. At that trial the jury returned a verdict in favor of the plaintiffs and against the defendant for $28,000.00. Judgment on the verdict was entered November 10, 1964.

Defendant filed a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. Those motions were denied January 6, 1965, by the Honorable Marcellus K. Snow of the District Court of Salt Lake County, who tried the case in the District Court of Utah County.

RELIEF SOUGHT ON APPEAL

The plaintiffs and respondents request that the jury verdict be upheld and that the trial court be affirmed in all particulars.

STATEMENT OF FACTS

Respondents will not re-state the facts as set out by appellant, but will merely add certain material facts which respondent feels the appellant inadvertently omitted or neglected to set forth. References to the page of the transcript of testimony in support of the additional facts herein contained will be referred to as "Tr."

The headlights of the wrecker, when it was in position picking up the Milner car and at the time when the defendant approached, were on low beam (Tr. 65). In addition

to the lights at the scene of the accident mentioned in appellant's brief, there was a flood light on the wrecker, the headlights were on on the Milner car, and the headlights were on on the Kester car. Also, there were at least four flashlights being used at the scene of the accident.

As she approached from the South and at a point one-half mile before she collided, the defendant saw the headlights and the oscillating lights on the wrecker, and recognized it to be a wrecker, and thought there might be an accident ahead. At that time, she could not tell whether the wrecker was moving or not, nor could she tell where it was on the road (Tr. 172, 173). Until she reached a point right in front of the wrecker, where she either had to hit the same head-on or attempt to go around it, she had never applied her brakes (Tr. 173, 178).

Mrs. Kester had had no difficulty whatever when other vehicles approached from the South while the wrecker was in place prior to the time that the defendant's car came on the scene (Tr. 54, 56). The reason Mrs. Kester could not get out in front of the wrecker to warn, as she had been able to do in other instances, was because the defendant was approaching at too great a speed (Tr. 50, 51, 54).

Officer Rex Hill was assisted in making the investigation by officers Sherwood and Ed Pitcher of the Utah State Highway Patrol (Tr. 85, 89, and 125).

During the course of the investigation the investigating officers made three road tests for the purpose of determining the coefficient of friction upon the roadway. Two of the tests were made early in the morning (Tr. 80), and

the third test was made in afternoon of that day (Tr. 85). At the time of the investigation the road was dry (Tr. 64), and was in the same condition as it was at the time the accident happened (Tr. 83).

At the time of the impact between the defendant's vehicle and the trailer and Kester vehicle, the emergency brake was set on the Kester vehicle (Tr. 19, 46).

The defendant's vehicle laid down 23 feet of skid marks on one side, and 16 feet of skid marks on the other side leading to the gouge marks (Tr. 74). The distance that defendant's vehicle traveled after impact was 56 feet rather than 46 feet (Tr. 94).

ARGUMENT

POINT I

INSTRUCTION NO. 9, AS GIVEN BY THE COURT, WAS IN ALL RESPECTS A PROPER INSTRUCTION ON THE FACTS OF THIS CASE.

The jury was instructed that it was the duty of the defendant to use reasonable care in driving her car to avoid danger to herself and others and to observe and be aware of the conditions of the highway, the traffic thereon, and other existing conditions (Instruction No. 6). Reasonable or ordinary care was defined in Instruction No. 5. They were further instructed in Instruction No. 7, that a person approaching a wrecker in darkness, which wrecker is displaying appropriate lights, and who knows it to be a wrecker, is charged with knowledge that the operation thereof may necessitate parking in lanes of traffic, traveling against traffic, and may otherwise interfere with the normal flow of traffic. 41-6-140.20, **Utah Code Annotated,**

1953. Further that it is the duty of such person to decrease his speed or stop if necessary, until it can be determined that it is reasonably safe to proceed, and that failure to do so may constitute negligence.

Instruction No. 11 advised the jury that no inference of negligence could be drawn from the fact that an accident had happened and that the mere fact, if it was a fact, that it was possible for a person to avoid an accident that he did not avoid, does not, of itself, justify a finding that he was negligent. Also, that if a person used ordinary care and did all that an ordinary prudent person would have done in the circumstance, he is not chargeable with negligence. Further, that the person whose conduct was set up as a standard is not the extraordinary cautious individual nor the exceptionally skilled one, but a person of reasonable and ordinary prudence.

The jury was instructed that before there could be any liability on the part of defendant it must appear from the evidence that she was guilty of negligence. Ordinary care was again defined and emphasized (Instruction No. 12). They were instructed by No. 13, that the law did not require defendant to anticipate or guard against anything that could not be reasonably expected and did not require her to regulate her conduct with reference to any conduct on the part of James W. Taylor not reasonably to be expected. Further, that she was not required to be extraordnarily alert or to foresee all that she could now see by looking back; nor was she required to use extraordinary caution for the avoidance of the accident that she could not have expected under the circumstances.

By Instruction No. 14, they were told that the defendant could not be expected to react differently than she did after the discovery that the wrecker was still standing on her side of the highway. Instruction No. 30 told the jury that they were to consider all of the instructions as a whole and not single out any individual point or instruction and ignore the others.

The instructions thus given by the court in this matter, taken as a whole, properly and fairly presented the issues as to the defendant's negligence to the jury. If the court leaned at all in its instructions it was in the defendant's favor by repeatedly emphasizing that only ordinary care was required of the defendant (Instructions Nos. 11, 12, 13, and 14).

The question of whether Taylor was guilty of contributory negligence precluding recovery was also fairly and properly submitted to the jury, basically in Instructions Nos. 15 and 9. The jury was instructed by Instruction No. 15, that the heirs of a negligent person could not recover against another negligent person, and that this was true even where one is more negligent than the other. Also, that if the jury found that James W. Taylor was negligent and that his negligence proximately contributed to cause the accident, plaintiffs could not recover.

In Instruction No. 9, the jury was told that a wrecker operator, in darkness, has the duty to reasonably warn approaching traffic of the obstruction on the highway by displaying lights, flares or other practical means and that if he failed to do so, they could find that he had been guilty of negligence. They were also instructed that if the defendant saw the wrecker and knew it to be a wrecker in

sufficient time to have reasonably avoided the collision, then any negligence of Taylor in failing to display lights, flares, or other practical warning devices, would not be a contributing proximate cause of his death, and the defense of contributory negligence would not defeat plaintiff's recovery.

Under Instruction No. 9, before the jury could eliminate the matter of failure to give adequate warning, if any, as contributory negligence precluding recovery, it would have to find, (a) that the defendant saw the wrecker, (b) that she knew it to be a wrecker, and (c) that she saw it in sufficient time to have reasonably avoided the collision. In context, and in effect, the court simply said in Instruction No. 9 that if Taylor failed to give a warning it does not necessarily preclude plaintiff's recovery from defendant if, in fact, defendant received a warning in some manner in sufficient time to have avoided the collision, however, and by whom, it may have been given.

Upon the facts of this case, and taking into consideration all of the instructions heretofore mentioned with reference to the necessity for finding negligence on the part of the defendant which was a proximate cause of Taylor's death, we believe that Instruction No. 9 was proper and a fair statement of the law. It is axiomatic that the only purpose of any warning device or requirement to warn is to give notice of a potentially dangerous condition, and if a person actually receives a warning and fails to act reasonably in accordance therewith, it is difficult to conceive that negligent conduct, causing injury, on the part of the person receiving the warning could be excused on the ground that the party injured failed to give a warning. **Velasquez**

vs. **Greyhound Lines, Inc.,** 12 Utah 2d 379, 366 P. 2d 989; **McMurdie** vs. **Underwood,** 9 Utah 2d 400, 346 P. 2d 711. The question of whether defendant acted reasonably was submitted to the jury in the several instructions heretofore mentioned.

Even if Instruction No. 9 is isolated from the others and construed as precluding a finding, by the jury, of contributory negligence in a manner other than failure to give warning, it would still be proper. This is so because, as a matter of law, there are no facts in the case except those pertaining to warning which could legally constitute contributory negligence precluding recovery. **Taylor vs. Johnson,** supra.

POINT II

THERE WAS NO ERROR ON THE PART OF THE TRIAL COURT IN REFUSING TO GIVE REQUESTED INSTRUCTIONS PURPORTING TO SUBMIT DEFENDANT'S "THEORY" OF THE CASE.

On brief, appellant raises the question, but fails to mention or identify the requests she complains were not given. We will have to assume that she is referring to defendant's requests No. 7, No. 8, and No. 9. No exception was taken to the refusal to give request No. 10.

Defendant's requests Nos. 7, 8, and 9 all contain provisions to the effect that the wrecker operator had a duty to warn approaching motorists by the use of lights, flares, guards or other warning signals. Each of these instructions also contains material relating to some other "theory" of the case. Request No. 7 refers to the duty of one who places himself in a dangerous position to use reasonable

care to watch for the approach of other vehicles on the highway. This is, in essence, the same instruction as No. 30 given in the first trial. It was not a proper instruction in this case because it presents a fact situation which is not supported by any evidence whatever. **Taylor** v. **Johnson,** supra. Request No. 8 is to the effect that if the wrecker operator had time to place flares or other warning signals upon the highway and failed to do so, the jury could find him negligent. The jury was instructed properly as to Taylor's duty to warn in Instruction No. 9.

Request No. 9 tells the jury that Taylor could be found negligent if he left the wrecker upon the highway for a period longer than the reasonable length of time necessary to remove the wrecked or damaged vehicle. This is about th same instruction as No. 29 given in the previous trial. Such instruction is improper here because it outlines a fact situation which has no support whatever by any evidence. Also, it fails to require that the jury find it to be a proximate cause of the accident. **Taylor** v. **Johnson,** supra.

Inasmuch as each of the instructions requested by defendant contained propositions or theoretical facts which were not supported by any evidence, they were properly refused by the court.

POINT III

INSTRUCTION NO. 10, RELATING TO THE PRESUMPTION OF DUE CARE, WAS PROPER.

The instruction contains the same language as is set forth in Jury Instruction Forms for Utah, Form No. 16.8 at page 54.

Such instruction would be improper only if evidence

was adduced which would make a prima facie case that the decedent was guilty of contributory negligence which proximately caused the accident. **Mecham** v. **Allen,** 1 Utah 2d 79, 262 P. 2d 285.

Here, again, we encounter defendant's contentions, (a) that the wrecker was left on the highway for an unreasonable length of time; (b) that decedent placed himself in a position of danger between the trailer and the automobile to which it was being fixed; and (c) that although Taylor had other warning devices in his wrecker, he failed to use them.

With reference to the first contention that he left the wrecker on the highway for an unreasonable length of time, the only evidence concerning this point is that of Mr. and Mrs. Kester, both of whom were at the scene throughout all of the difficulty. Their testimony was substantially as follows: The wrecker operator approached from the north and stopped his vehicle off the highway on the west side. He came over to the Milner car and trailer to look the situation over. Since the rear axle of the Milner car was broken, he could see that it would have to be hoisted and towed from its rear. To accomplish that, the trailer would have to be removed. Mr. Kester offered to pull the trailer in and it was removed from behind the Milner car and placed to the east side of the road where Mr. Kester could back his car to it. The trailer hitch had to be removed from Milner's car and affixed to that of Kester. While the decedent moved his wrecker into position, affixed his hoist to the rear of the Milner car and got that vehicle ready to be removed, Kester and Milner were in the process of attaching the trailer to the Kester

car. As Taylor finished lifting the automobile, he was asked by Milner if he had a socket wrench that would tighten the bolt on the trailer hitch. Taylor secured the wrench from the wrecker and was in the process of tightening that bolt on the trailer hitch when the accident occurred (Tr. 8 thru 22, and Tr. 38 thru 46). The time that elapsed between the completion of hoisting the damaged auto and the occurrence of the accident was not over two or three minutes at most (Tr. 58). There is no evidence whatever that the decedent left the wrecker on the highway for a longer period than was actually required to get the automobile and trailer in condition to be towed away. Moreover, this could not have been a proximate cause of the accident. **Taylor** vs. **Johnson,** supra.

With respect to whether decedent placed himself in a position of danger and failed to watch for other vehicles coming from the south, the only evidence is as follows: Decedent was crouched down between the trailer and the Kester car fastening the bolt on the trailer hitch. His view to the rear was blocked by the trailer (Tr. 21). The problem here is the same as it was with Instructions 28 and 30 given in the first trial. There is no evidence to support or justify appellant's contention in this respect. **Taylor vs. Johnson,** supra.

Mr. Taylor did have other warning devices in his truck which he did not use, but the fact remains that he did display warning lights indicating the presence of the wrecker on the roadway, and defendant admitted that she saw the warning lights at a time when she was one-half mile away and that she recognized it as a wrecker (Tr. 178). Additional flares could have served no other pur-

pose than to warn, which warning defendant already had. **Velasquez** vs. **Greyhound Lines, Inc.,** supra.

In any event, the question of whether defendant had adequate warning was submitted to the jury.

POINT IV

THE COURT DID NOT ERR IN ADMITTING EVIDENCE AS TO THE "DRAG FACTOR" AT THE SCENE OF THE ACCIDENT.

Highway Patrolman Hill was an experienced officer, having been employed by the Utah Highway Patrol for more than 9 years (Tr. 62). The officer had received special training in accident investigation, including training in determining speed from skid marks and from force of impact (Tr. 63).

Sgt. Sherwood of the Highway Patrol also participated in the investigation of the accident. Sgt. Sherwood has been on the Highway Patrol for almost 24 years (Tr. 125). He had had special training in accident investigation and reconstruction, including training from Northwestern University (Tr. 125). Both officers participated in the tests to determine the drag factor (Tr. 126). Both officers testified that they had investigated many accidents and had made tests as to braking and stopping distances.

The investigation of this accident lasted all night (Tr. 80). At the time of the accident the road was dry and in good condition (Tr. 64). The officers made three tests of the roadway to determine the co-efficient of friction. They made the first two right after they got thru at the hospital and the third at a later time Tr. 80). To make

the tests they drove the car down the road at thirty miles per hour, violently applied brakes, and measured the skid marks made by all four wheels and divided it by four (Tr. 81). The tests were made at the scene of the accident (Tr. 83, 85). The officers had a known speed and a known skidding distance, and by relating these two known factors to the nomograph the drag factor was ascertained (Tr. 85, 86).

As pointed out in the appellant's brief, the Supreme Court of Utah has approved the use of a pre-computed chart by an experienced officer. **Gittens** vs. **Lundberg,** 3 Utah 2d 392, 284 P. 2d 1115; **Peterson** vs. **Nielsen,** 9 Utah 2d 302, 343 P. 2d 731.

Counsel for defendant examined both officers quite extensively on cross-examination, and asked Officer Hill whether he had measured the co-efficient of friction on the gravel shoulder east of the hard surface of the highway (Tr. 123). Officer Sherwood was cross-examined regarding co-efficient of friction on the highway and on the shoulder of the road (Tr. 135). Had counsel desired, he could easily have drawn from either officer the wheel measurements of skid marks laid down by their car during the test and thereby have checked their arithmetic for possible error. Likewise, counsel could have inquired concerning any possible change in road condition between the time of the accident and that of the tests. These were experienced officers, giving no appearance or manifestation of any bias one way or the other, and had there been any difference in the road surface they would have made it known. In his objection at the trial, counsel gave the impression that he was more concerned about the use of the

calculator—"I have no objection to him telling what the four wheel marks were, the average length and what they were, but he said he used a calculator." * * * "But he testified all he did was test the length of the brake marks." * * * "He used some calculator." (Tr. 82). The calculator mentioned was the nomograph (Tr. 86). If the roadway had been damp or wet when the tests were made, it is obvious that the friction of the road would have been less than when dry, as it was when the accident occurred, and that the result of the lesser co-efficient of friction factor would have worked to defendant's benefit.

The evidence relating to the drag factor was properly received by the Court.

POINT V

THE OPINION EVIDENCE OF SGT. PITCHER OF THE UTAH STATE HIGHWAY PATROL AS TO THE SPEED OF THE JOHNSON VEHICLE WAS PROPERLY RECEIVED BY THE COURT.

Sgt. Pitcher was an expert and was so recognized by defendant. After plaintiffs had rested, Pitcher was called by defendant as her own witness, and was asked hypothetical questons which could be directed only to an expert on both her direct and redirect examination (Tr. 162, 167). Any complaint in this regard was thereby waived.

On the merits, however, it is submitted that the witness was an expert. Officer Pitcher had been with the Utah State Highway Patrol for 24 years. He was training officer for the patrol and director of the police academy at Camp Williams. This officer had attended the Traffic Institute at Northwest University, the Police Academy of the California Highway Patrol, had attended college, where

he had studied physics, although he had no degree, and had worked closely with prominent professors of physics at Utah universities. He was otherwise highly trained and skilled through study of books and publications and a great amount of personal experience in automobile accident investigation (Tr. 141, 142, 143). He had had experience reconstructing accidents from force of impact (Tr. 143). He had qualified as an expert in the courts of this state on possibly 50 occasions during the years (Tr. 144). Moreover, Sgt. Pitcher had personally assisted the other officers in the initial investigation of the accident in question (Tr. 89).

The question as to the qualification of a person who is tendered as an expert is to be determined preliminarily by the trial judge, and the court's decision will not ordinarily be reversed on appeal unless it is shown to have been based on an error of law or to have been an abuse of judicial discretion. 2 **Jones on Evidence,** paragraph 414, page 780. This Court has said that the ruling of the trial court as to whether a witness qualifies as an expert should not be disturbed lightly or at all unless it clearly appears that he was in error in his judgment on the matter. **Webb** vs. **Olin Mathieson Chemical Company,** 9 Utah 2d 275, 342 P. 2d 1094.

The difference between the hypothetical question asked Sgt. Pitcher by the defendant on direct examination (Tr. 162), and that asked by plaintiffs, is that defendant's question embraces a fact situation wherein defendant's vehicle is assumed to have come to rest within the distance stated, without taking into account any collision whatever with the trailer and the Kester car (Tr. 164), whereas in the

hypothetical question asked by plaintiffs, the fact of a collision with the Plymouth and the trailer was included (Tr. 145).

On cross-examination defendant asked Officer Pitcher if he used the stated distance of skid for the Johnson vehicle in his calculation and the officer stated that he did. Counsel neglected to ask him if that was the only factor he took into account in arriving at his formula conclusion as to total distance (Tr. 148). The officer explained that the so-called nomograph formula could not be applied because there had been a collision involved here (Tr. 149). Plaintiff's hypothetical question embraced the fact that there had been a collision (Tr. 145). On cross-examination defendant simply failed to ask the witness how he had weighted his formula to take the collision into account.

In any event, none of this runs to his qualification as an expert, but only to his credibility and the weight which should be given to his testimony by the jury.

CONCLUSION

Respondent respectfully contends and urges that there was no error whatever on the part of the trial court in the rulings or in the instructions complained of by appellant and that the verdict of the jury should be sustained.

Respectfully submitted,

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