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Vernon J. Smith v. Wilmer Lee Barnett : Appellant's Petition For Re-Hearing and Brief In Support Thereof

In the Supreme Court of the State of Utah

VERNON J. SMITH,
Plaintiff and Appellant,

vs.

WILMER LEE BARNETT,
Defendant and Respondent.

CASE NO. 10959

Appellant's Petition for Re-Hearing and Brief in Support Thereof

Appeal from Judgment of the Third Judicial District Court
Salt Lake County, State of Utah
The Honorable Merrill C. Faux, Judge

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In the Supreme Court of the State of Utah

VERNON J. SMITH,
Plaintiff and Appellant,

vs.

WILMER LEE BARNETT,
Defendant and Respondent.

CASE NO. 10320

Appellant's Petition for Re-Hearing and Brief in Support Thereof

Appellant, Vernon J. Smith, petitions the Court for re-hearing in the above case upon the grounds hereinafter set forth. In support of said petition, appellant relies upon the following points:

POINT I

THE SUPREME COURT FAILED TO RULE UPON POINTS RAISED BY THE APPELLANT IN HIS BRIEF.

POINT II

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON UNAVOIDABLE ACCIDENT.

POINT III

THE INSTRUCTIONS TO THE JURY AS A WHOLE WERE PREJUDICIAL TO THE PLAINTIFF.

WHEREFORE, Appellant prays that the petition for re-hearng be granted and that upon such re-hearing and after consideration of the record and the law, the decision of the Court be recalled and a decision entered in favor of the Appellant and the case remanded to the lower court for a new trial with direction to the lower court concerning proper jury instructions.

S. Rex Lewis, for
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Brief in Support of Petition for Rehearing

POINT I

THE SUPREME COURT FAILED TO RULE UPON POINTS RAISED BY THE APPELLANT IN HIS BRIEF.

It is respectfully urged to this Court that the points presented by Appellant, points II through point VI, were not ruled upon by this Court as provided in the Utah Constitution, Article VIII, Section 25, which states as follows:

"When a judgment or decree is reversed, modified or affirmed by the Supreme Court, the reasons therefor shall be stated concisely in writing, signed by the judges concurring, filed in the office of the Clerk of

the Supreme Court, and preserved with a record of the case. Any judge dissenting therefrom, may give the reasons of his dissent in writing over his signature."

Rule 76(a) of the Utah Rules of Civil Procedure also states the law as follows:

"Every decision of the Court, together with the reasons therefor concisely stated shall be in writing and filed with the Clerk. Any justice dissenting may likewise give his reasons therefor in writing and file the same in the case."

This Court in its initial opinion disposed of Appellant's Point II through Point VI as follows:

"Plaintiff claims prejudicial error on account of the Court's failure to give certain requested instructions (3) and its giving a number of other instructions. We have carefully analyzed these claims and find no merit in them."

This Court cited as (3) the case of Wellman vs. Noble, 12 Utah 2d, 350, 366 P2d 701, in which this Court held that it **was not error to refuse to give an instruction** on unavoidable accident. Appellant agrees with the Court that it is not error to fail to give an instruction on unavoidable accident. Failure to give such instruction was not involved in the present case. The present case involves the giving of an instruction on unavoidable accident when the facts do not merit such an instruction and the giving of which instruction Appellant claims is prejudicial error as to his claim. Appellant respectfully urges this Court to make a specific ruling upon the lower court's giving an

instruction on unavoidable accident in a pedestrian-automobile case such as this case is and encompassing the facts as presented in this case.

POINT II

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON UNAVOIDABLE ACCIDENT.

Apparently Appellant failed in his brief or in oral argument to adequately explain to the court the facts involved in this case and that the giving of an instruction on unavoidable accident was prejudicial error as to the Plaintiff herein.

The Court, in its initial opinion filed herein, states the facts as the Plaintiff contends they were. More particularly the Court has stated that "the Plaintiff, while walking south in line with the sidewalk on the east side of State Street had covered about 2/3 of the distance of the entrance when he was struck by Defendant's car, which had come from the north on State Street and was making a turn to east into Rainbow Drive. It was a dark, dry night with some street lights."

There are no cases encompassing the facts as they existed in this case as this Court has found them to be where the courts have failed to say that giving of an instruction encompassing unavoidable accident was not prejudicial and reversible error.

The Defendant, in his brief, found one recent New Mexico case wherein the court approved an instruction on unavoidable accident, which is the case of Faulkner vs. Martin, 75 N.Mex, 159, 391 P2d 660 (1964). It is respect-

fully pointed out to this Court that the New Mexico case, though not exactly in point, is a poorly reasoned case and that the dissent in th New Mexico case is well reasoned and complies with the majority rule. The dissenting justice in the New Mexico case agrees with the Plaintiff herein and cites 65 ALR 2d 12, 85. The dissent also states that people do not "loom" in front of cars, absent fog or smog or similar vision obstruction.

The overwhelming weight of authority in the majority of cases is to the effect that such an instruction encompassing unavoidable accident involving the striking of pedestrians at or near a street intersection is prejudicial and reversible error. The California Supreme Court holds it is error in any case. Butigan vs. Yellow Cab Co., 49 Cal 2d. 652, 320 P2d. 500. This Court in the case of Wellman vs. Noble, Supra, wherein this Court affirmed the lower court in its failure to instruct on unavoidable accident stated, p. 352: **"Here the issue of unavoidable accident is not involved any more than in practically any other accident case."** (Emphasis added)

This Court is again referred to the Annotation in 65 ALR 2d p. 85, wherein it states that in the majority of the cases involving the striking of pedestrians at or near street intersections, instructions on unavoidable accident and inevitable accident instructions have been considered inappropriate and reversible error. Plaintiff refers the Court to the annotation and quotes some of the cases as follows:

"McBride vs. Woods (1950) 124 Colo 384, 238 P2d 183—Where the mishap resulted when the Defendant, whose car was parked diagonally, in a place marked near

a street intersection, backed the car out in daylight, slowly, but striking Plaintiff, an elderly person who was passing on the crosswalk and moving somewhat in the direction the vehicle was backed. The Defendant did not see the Plaintiff, nor was he immediately aware that he had struck her, and he testified that, 'It was not possible to back out of that parking space and miss the car ahead and get into my own lane without backing into the crosswalk.' He conceded that the bumper of his car was backed into the crosswalk a distance of about 3 feet. The court following a verdict for the Defendant **held it was error** to submit to the jury the question of unavoidable accident, 'where there is absolutely no evidence in the case which warrants a submission' of such question, 'all evidence clearly showing that **the accident could have been avoided.'** " (Emphasis added)

P. 86. In Quillin vs. Colquhoun, (1925) 42 Idaho 522, 247, P. 740—wherein a pedestrian suffered injuries at or near a street intersection, the court, in reversing the judgment for Defendant, disapproved of the inclusion of the words "an accident" in the instruction that if the jury found from a preponderance of evidence that the misadventure "was an accident and not attributable to the negligence of anyone" the verdict should be for the Defendant.

P. 86. In the Missouri case of Jones vs. Goldberg, 78 SW2d 509—a pedestrian was injured at a street intersection. It was held that the evidence merely presented issues of negligence and contributory negligence, that there was no basis for the giving of a so-called accident instruction to the effect that if Plaintiff's injuries were caused by an accident, mischance or misfortune, and not by any negligence on the part of the defendant contributing thereto,

plaintiff was not entitled to recover. Consequently it was held **that the giving of the instruction was error and warranted the trial court in granting a new trial after a verdict for the defendant.** (Emphasis added)

P. 89. In the case of Orr vs. Hart, (1934) 219 Iowa 408, 258 NW 84—a street pedestrian case, **it was held error** to give an unavoidable accident instruction inasmuch as "the record shows conclusively that this accident happened through the fault and negligence of one or both of the parties thereto.' " (Emphasis added)

P. 89. In the case of Smith vs. Johnson (1954) 2 Ill. App. 2d 315, 120 NE 2d 58—a case of injury to a street pedestrian, it was held error to give an accident instruction inasmuch as there was no evidence that the pedestrian's injuries were sustained by accident alone not coupled with negligence.

P. 89. In Levans vs. Vigne, (1936) 339 Mo. 550, 98 SW2d 737—a street pedestrian case, it was held not error to refuse to give an accident instruction since the case presented an issue of negligence of defendant and not of casualty from an unknown cause.

It is stated in 1 Blashfield Encyclopedia of Automobile Law & Practice, Section 635, Chapter 15, p. 485:

> "A mere accident being one in which neither party is at fault, the mere fact that neither driver of two automobiles colliding with each other saw the other until too late to avoid the collision is not enough to show that the accident was unavoidable, since in such a case the negligence, if any, producing the situation, determines the liability, so that if either party can avoid an accident by the exercise of proper care it cannot be said to be unavoidable. For example, if a blow-

out occurs but the driver of the car is reckless, the blowout is no defense."

"In other words, the issue of unavoidable accident arises only under evidence showing the accident happened from an unknown or unforeseen cause or in an unexplainable manner, which circumstances rebut defendant's allegd negligence.* * *"

In this case, the Plaintiff was walking back to his place of business on the sidewalk on the east side of State Street. The Plaintiff looked to his left, or east on Rainbow Drive, for traffic that may have been going west on Rainbow Drive. Plaintiff looked for traffic coming north on State Street and Plaintiff looked to his right to see if any vehicles were in the left-turn lane for southbound traffic. There was no traffic in the left-turn lane for southbound traffic when the Plaintiff proceeded to cross Rainbow Avenue going south to his place of business. Plaintiff had walked 2/3 of the way across Rainbow Drive, or 24 feet 8 inches, which would have taken him approximtely 6 seconds, when he saw the Defendant's car lights on him just prior to impact. Plaintiff cried out to stop and attempted to get out of the way, but could not. Plaintiff was run down by the Defendant in the cross walk, a sitting duck for the Defendant's well-aimed automobile. It is obvious that the Defendant did not look to the sidewalk or crosswalk area when he came into his left-turn lane. There was oncoming traffic, and the Defendant turned in front of the oncoming traffic.

State Street is a lighted street and persons are visible upon the sidewalks and crossings along the street. It is obvious that when a person turns his vehicle he does not

have his head locked in a straight forward position, but that he does or should turn his head and eyes as he turns his vehicle. It is also obvious, and should be a matter of judicial notice, that headlights do not shoot a straight beam like a piece of steel, but that headlights diffuse to the left and to the right. Headlights light up an area at right angles from the direction the beam is pointed. If the Defendant were unable to see to his left while makng his left turn, had he looked, he should have exercised extreme caution and even stopped, if necessary, so that he could see into the crosswalk area. It is further obvious that once the Defendant had left turned and crossed the traveled lanes of traffic, he had an additional 12 or 15 feet which was parking area that he crossed prior to reaching the sidewalk area during which time and distance his vehicle was facing directly into Rainbow Drive. It seems obviously apparent that a vehicle will not stop within one or two feet as testified to by the Defendant when he struck the Plaintiff. It also appears obvious that the Defendant was struck and knocked a distance of 20 feet, which impact dented the metal hood of the Defendant's car and caused grave injuries to the Plantiff resulting in a subdural hydroma requiring an operation, and a ruptured disc in his neck that required a fusion.

It should be readily apparent there was a miscarriage of justice, and that the Plaintiff is entitled to damages for his injuries sustained. It further should be apparent that the instruction on unavoidable accident may have been fatal to the Plaintiff's claim, and that the giving of the instruction was confusing and misleading to the jury, and that the giving of the instruction overemphasized the De-

fendant's case. The jury may also have considered that unavoidability was an issue or ground of defense separate and apart from the question of negligence and proximate causation.

Plaintiff adopts the position of this Court as stated in the Wellman vs. Noble case (Supra) that "Here the issue of unavoidable accident is not involved any more than in practically any other accident case."

If an unavoidable accident instruction is proper in this case, it may fairly be stated that it should be proper in practically any accident case. Plaintiff firmly believes this is not the law in this jurisdiction, that such instructions are not proper, are reversible error, and that this Court should so hold.

POINT III

THE INSTRUCTIONS TO THE JURY AS A WHOLE WERE PREJUDICIAL TO THE PLAINTIFF.

This Court is referred to its decision in the case of Taylor vs Johnson, 15 U2d. 342, 393 P2d 382, wherein the instructions to the jury were disected by this Court, and this Court concluded that, p. 350, "the instructions were misleading to the jury as to what would constitute negligence; that they were repetitious, and many of them were premised on factual situations which were not supported by the evidence. In view of the whole situation, the court committed prejudicial error in emphasizing its instructions as it did in favor of the Defendant and against the Plaintiff, and that therefore the Plaintiff is entitled to a new trial."

It has been previously pointed out to this Court that the lower court's instructions overemphasized the Defendant's defense, including the order of the instructions and by wrongfully including an instruction on unavoidable accident premised on a factual situation which was not supported by the evidence.

CONCLUSION

The Plaintiff respectfully submits to this Court that its prior ruling on this appeal failed to consider the matter of prejudicial and reversible error by the court's giving the unavoidable accident instruction. Plaintiff strongly urges upon this Court that such error committed by the trial court was reversible, and that this case should be remanded to the lower court for a new trial, with directions to the lower court concerning proper jury instructions.

Respectfully submitted,

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