1965

Thomas Eager v. Michael Willis and Charles Willis : Respondent's Brief

IN THE SUPREME COURT

OF THE

STATE OF UTAH

THOMAS EAGER,

Plaintiff-Respondent,

vs.

MICHAEL WILLIS, and
CHARLES WILLIS,

Defendants-Appellants.

Case No.
10335

RESPONDENT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE FIFTH DISTRICT COURT OF WASHINGTON COUNTY

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STATEMENT OF THE NATURE OF THE CASE

This is an action for personal injuries arising from a pedestrian auto collision at the intersection of 300 West and Highway 91 in St. George, Utah.

DISPOSITION IN LOWER COURT

On a jury verdict, the lower court entered judgment in favor of the plaintiff and against the defendants in the amount of $10,000.00.

RELIEF SOUGHT ON APPEAL

The defendants seek a reversal of the judgment in favor of the plaintiff and a new trial.

STATEMENT OF FACTS

The Plaintiff-Respondent accepts the facts stated in Defendants-Appellants brief as far as they go, but desires to add additional facts thereto.

Plaintiff-Respondent will be referred to herein as Plaintiff and Defendants-Appellants as Defendants.

Officer Hutchings testified that the sun while traveling east on Highway 91 created a problem (Tr.28). The defendant noticed the sun as he came east on Highway 91; he noticed the sun on the windshield, this happened every morning as he went to school and it did not irritate him. His car was equipped with visors, but he did not pull them down (Tr.67).

Defendant was well acquainted with the route as he traveled it to school many times that school year. HE KNEW THE SCHOOL CROSSING SIGN WAS THERE NEAR 300

WEST INTERSECTION AS HE HAD SEEN IT MANY TIMES (Tr.66).

Defendant did not see plaintiff or little Cannon girl in the intersection by the time he had entered the same (Tr.69). When defendant reached the west crosswalk of said intersection he saw a friend on the side and he nodded and waved his hand and when he looked back the plaintiff and little girl were right in front of him and he hit his brakes (Tr.62).

Defendant saw plaintiff grab the little girl and turn her (Tr.68). The bumper hit both plaintiff and little girl and they fell to the side (Tr.62). Defendant did not see plaintiff, Mr. Eager, until he was practically upon him and hit him (Tr.69).

As a result of said accident plaintiff was in a cast for eleven weeks and two days (Tr.38). He suffered an injury to his hand (Tr.38) which continued to

bother him even to the time of the trial of the case (Tr.41).

That at the time of the last examination of the plaintiff by Dr. Ruasch, before the trial of the case, to-wit, on November 25th, 1964, (Tr.10) he complained of pain in the left ankle and left knee, also pain above his left eyebrow where he had suffered a large cut in said accident and complained of headaches (Tr.11) and he was at the time suffering from post-traumatic arthritis (Tr.11-12). Plaintiff could not do what he had enjoyed before, like fishing, hunting and pine-nut gathering, on account of injuries sustained. (Tr.44-45).

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN STATING THE ISSUES IN INSTRUCTION NO.1.

Instruction No. 1 as complained of by counsel for defendant states the nature

of the case, the relief sought by the plaintiff and the position of the defendant in admitting the accident but denying plaintiff's injuries and stating defendant's position in alleging that the accident was soley caused or proximately contributed to by the plaintiff's own negligence.

It is submitted that the interpretation read into Instruction No. 1 by defendants counsel is strained and certainly not justified in view of further instructions, to-wit, Instruction No. 4 which reads as follows:

> "The party upon whom the burden of proof rests, must sustain it by a preponderance of the evidence. The law does not permit you to base a verdict on speculation or conjecture as to the cause of the incident in question. If the evidence does not preponderate in favor of the plaintiff, making the charge of negligence, then he has failed to fulfill his burden of proof and your finding must be against him on that issue. In otherwords, if after considering all the evidence, if should appear to you just as probable that the

defendant driver was not negligent, as that he was, or that his negligence, if any, was not a proximate cause of the incident as that it was such a proximate cause, then a case has not been established against the defendant driver by a preponderance of the evidence as the law requires and the defendant driver cannot be held liable." (Emphasis added).

The above instruction, particularly the part emphasized clearly states where the burden of proof is in the present matter and the duty of the jury with respect to considering all of the evidence to determine the preponderance of the same either for the plaintiff in his allegations or defendants in their denials.

It is submitted that if the Court had included all of the points suggested by defendant in Instruction No. 1 it would have been confusing and it is further submitted that it is the Court's duty to fully cover all of the matters before the Court in the instructions, which the Court did fairly and plainly. They are sum-

marized in Instruction No. 29 in the following words:

> "If in these instructions any rule, direction, or idea be stated in varying ways, no emphasis thereon is intended by me, and not should be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and are to regard each in the light of all the others.
>
> The order in which the instructions are given has no significance as to their relative importance." (Emphasis added.)

POINT NO. II

THE TRIAL COURT DID NOT COMMIT ERROR IN STATING THE DUTIES OWED TO PLAINTIFF.

Defendants argue that the giving of Instructions No. 15 and 17 in effect directed that the defendant was negligent although the Court did not rule that the defendant was negligent as a matter of law.

Defendant cites Charvoz vs. Cottrell (1961) 12 U. 2d 25, 361 P. 2d 516 in which case the plaintiff contended that the de-

ceased had the right of way in a crosswalk and therefore the defendant was negligent as a matter of law. The facts in that case show that the defendant was traveling in an automobile at approximately 30 miles per hour as he approached an intersection; that his headlights were on low beam, that he did not see the deceased until he was about 60 to 65 feet from the point of impact. He applied brakes but was unable to stop the car in time to avoid hitting the deceased. The plaintiff contended that defendant should have observed the deceased at least 100 feet from the crosswalk, therefore the defendant was negligent in failing to keep a proper lookout.

To this point the Court states as follows:

"This reasoning, however, overlooks certain other pertinent facts. It was

dark at the time of the accident; the street had a blacktop surface; the intersection was only dimly illuminated; the backdrop, as seen from defendant's automobile, was a dark vacant lot on the northeast corner of the intersection; there was a car stopped on the north side of the intersection with it's lights burning; and the decedent was wearing dark clothing. Therefore, although the evidence is undisputed that the defendant could have stopped his car in time to avoid the accident had he seen the deceased at a distance of 100 feet, the circumstances are such as to create a doubt in the minds of reasonable men as to defendant's ability to observe the decedent at that distance and hence the issue of failure to keep a proper lookout was for the jury."

The Court further holds in said case that:

"Before the duty of a driver to yield the right of way arises he must be in a situation whereby he is either aware of the presence of a pedestrian within the crosswalk or should have, in the exercise of reasonable care, become aware of the pedestrian's presence in time to yield the right of way."

We will agree with defendants contention beginning second line from bottom of Page 13 of his brief and continuing on Page 14 as follows:

"that the driver of the motor vehicle had the duty to yield the right of way to a pedestrian, but only when he is in a situation where he is aware of the presence of the pedestrian within the crosswalk, or should have been aware, in the exercise of ordinary care, of the pedestrians presence in time to yield the right of way."

And it is plaintiff's contention that by the exercise of ordinary care plaintiff's presence in the crosswalk could have been observed by defendant in ample time to have yielded the right of way. This position is based on the following reasons:

a. The defendant knew the location of the school crossing because he had traveled the route many, many times during the school year.

b. He knew and had observed the signs indicating the school crossing many times.

c. After making a turn heading east along the highway towards said school crossing he noticed the sun on the windshield, he had noticed it many times, but it did not irritate him. His car was equipped with visors but he did not use them.

d. When he approached the intersection he looked to the side to greet some friends and when he again looked toward the roadway the plaintiff and the little Cannon girl were right in his path and he could not stop.

Certainly with ordinary care he could have observed the officer in uniform with the little girl by his side, holding up his hands and trying to get his attention to stop, and even after he entered the intersection, if he had not been looking to the side and greeting friends, he could have observed plaintiff and little girl in time to have yielded the right of way.

We further agree with defendant's counsel in his statement in his brief on Page 19 as follows:

"If you assumed the defendant driver had no excuse for not seeing or not yielding to the pedestrian, Instruction No. 17 certainly would be proper."

It is submitted that the plaintiff was not negligent in jumping in the pathway of the automobile as admitted because in

his attempt to stop the defendant he had let go of the little Cannon girl's hand and he was using both of his hands to attract the attention of the defendant to yield the right of way and the little girl had stepped across the center of the highway and was in the immediate path of the automobile which was at that time only a few feet away. He did everthing that a human being could do to try and save the little girl and as a result both he and the little girl received severe injuries.

It is submitted that under the facts above shown in the evidence Instructions #15 and #17 are not a mis-statement of the law nor are they inconsistent with each other or with any of the other instructions given.

POINT NO. III

THE COURT DID NOT COMMIT PREJUDICIAL ERROR IN GIVING INSTRUCTION NO. 9.

It is submitted that defendants contention that the Court committed three prejudicial errors in giving Instruction No. 9 is not well taken because No. 9 should be considered with No. 10 which is as follows:

"Even though you find in favor of the plaintiff, and that the defendant was negligent, the plaintiff nevertheless may be barred from recovery by contributory negligence. Before contributory negligence would preclude plaintiff's recovery, you must find from a preponderance of the evidence, that each of the two following propositions are true:

Proposition No. 1

That the plaintiff was negligent in one or more of the following particulars:

a. That the plaintiff failed to observe the danger involved.

b. Plaintiff left a place of safety and moved into the path of a vehicle, when the vehicle was so close that it was impossible for the driver to yield the right of way.

Proposition No. 2

That said negligence of the plaintiff, if any, was a proximate and contribut-

ing cause of the accident. If you find these two propositions against the plaintiff, he cannot recover, even though you find in favor of the plaintiff and against the defendant on the issue of negligence of the defendant."

Both Instructions #9 and #10 should be considered with Instruction #29 which states specifically:

"you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and are to regard each in the light of all the others."

It is submitted that under Instruction No. 9 the jurors did find that the defendant was negligent in either or both of point 'a' in driving too fast for existing conditions or, point 'b' in failing to keep a proper lookout for pedestrians in the crosswalk.

Defendant argues that the defendant was blinded by the sun therefore could not see. If such was the case then he was certainly driving too fast for existing

conditions at 20 or 25 miles per hour in a 30 mile posted zone. If the sun was a factor in obscuring his vision and view, then he ignored the same, drove along at the same speed without regard to pedestrians in the school crossing.

If the sun was not a factor that he need consider then his early morning greeting to friends that took his attention away from the road ahead was certainly a failure to keep a proper lookout.

It is submitted that the jury is not obligated to designate the particular act of negligence upon which they base a decision, and defendants argument that when they did not in the present case then in all probablity they found negligence upon an improper ground is specious.

POINT NO. IV

THE COURT DID NOT COMMIT PREJUDICIAL ERROR IN INSTRUCTING ON DAMAGES.

First let us consider whether or not the judgment rendered in the present case is excessive.

The plaintiff, although 65 years of age was in good health prior to the accident complained of. He had lived somewhat of an outdoor, rugged life. He enjoyed fishing, hunting and pine-nut gathering, which pine-nut gathering was somewhat lucrative to him in the season thereof; and during the summer season he worked at much more lucrative employment than $100.00 per month that he was getting from the City as a Crossing Guard. All of which is now denied him on account of the injuries sustained.

He still suffered from the injury to his hand at the time of the trial. His headaches persisted at that time and his post-traumatic arthritis in the injured leg prevented the outdoor activities that he had enjoyed and profited from for so

many years prior to said injuries.

His headaches and suffering from injured hand and post-traumatic arthritis should not be minimized because he was not taking medication "pills" as defendant calls them. He would rather suffer the pains from the injuries than the sickness and nausea from the medication which he had taken for relief but had to abandon.

It is submitted that the award of $10,000.00 for the injuries sustained, for the suffering endured by the plaintiff for the eight months to the time of the trial, for the deprivation of activities which had helped to make his life worthwhile prior to the injury and assurance that the injuries were not just temporary but might continue for a long time and might even worsen.

POINT NO. 5

EXCESSIVE DAMAGES WERE NOT AWARDED UNDER THE INFLUENCE OF IMPROPER ARGUMENT OR FOR ANY OTHER CAUSE.

The suggestion that the award of $10,000.00 was motivated by some section of the statute which requires that much liability insurance is wishful thinking on the part of counsel for defendant because no such suggestion was ever made in the trial of the case or in the instructions to the jury and there was no indication that any of the jurors knew that there was such a statute; but it will be admitted that most people today know that a large percentage of the owners of automobiles carry liability insurance.

It is admitted that counsel for the plaintiff felt a responsibility to present to the jury the plaintiff's case as well as possible, and if counsel wants to call zeal in the presenting of the case

"enthusiasm" or considerable enthusiasm", then counsel for the plaintiff will have to plead guilty to this so called error.

Mr. Berry as counsel for the defendant characterized as error the remark by counsel for the defendant in his address to the jury "not to consider how the defendant would pay any damages found by the jury," as a statement obviously made to remind the jurors that insurance was present. It is submitted that it is not the province of the jury to consider the financial status of the defendant in a matter of this kind, but to observe the instructions of the Court, and they would certainly be violating their oaths as officers of the Court if they attempted to assess damages due the plaintiff from the standpoint of defendant's ability to pay.

Attention is directed to the unfinish-

ed statement by counsel for plaintiff in his argument to the jury and which is referred to by counsel for defendant, Mr. Berry (Appellant's Brief page 29). It will be noted that the statement is not finished and whatever intention counsel for plaintiff might have had in beginning the statement certainly the part complained of is not prejudicial and would not have been, had not Mr. Berry in his objection finished what he thought was the intended statement of counsel in the following words:

> "I object to this as improper type of argument, asking the jury to consider themselves in the situation of the plaintiff. This is asking for sympathy and passion and is not proper."

And the Court thereupon stated:

> "I have already instructed the jury what counsel says is not evidence. It is merely argument. As to it's propriety I am uncertain--" (Tr.78-79).

No further reference is made to the objected matter, and no reference whatsoever is made to the "Golden Rule" and

it is therefore submitted that no error was committed by counsel in his remarks.

But if it can be held that the unfinished statement was in error and any inference that could have been drawn from it by the jury was objectionable, then the question arises, did the same so inflame the juror's prejudice or passion to the extent that they awarded unreasonable damages for the injuries proved. In otherwords were the damages determined by the jury excessive, we submit not.

In Am. Jur-53, 64 Cum. Supp., Sec. 496 page 401 is a notation to add the following to Note 9:

> "There are many cases in which it was recognized that counsel's argument urging the jurors to place themselves in the position of a litigant, or to allow such recovery as they would wish if in the same position, was improper, but that the opposing party was not entitled to relief on the ground of prejudice, in view of the circumstances present."

Several cases are also referred to in 70 ALR 2d, 937-945. In 70 ALR 2d, page 945 Sec. 4 we find a California case referred to, DeYoung vs. Haywood reported in 292 P. 2d 917 in which the Court said:

"An action to recover for injuries sustained in an automobile accident, the Court, affirming a judgment for the plaintiff notwithstanding a statement in his attorney's argument that none of the jurors would be willing to go through such an accident for $9,000.00, said th t counsel for the plaintiff in their brief very properly did not try to justify the criticized statement, but merely contended that it was not made with any improper motive and was not prejudicial; and that certainly there was notsuch misconduct as would warrant a reversal of the judgment.

Quoting further from 70 ALR 2d, page 954, Note C--Verdict not excessive----

VERDICT NOT EXCESSIVE

"That the verdict of the jury was not excessive in amount has been a factor in a few cases in reaching a determination that although counsel's arguments urging the jurors to place themselves in the position of the litigant or to allow such recovery as they would

wish if in the same position may have been improper no prejudice resulted."

Then there are many cases listed to sustain that position. Under the same reference we find the following:

"A remark by counsel for the plaintiff to the jury, 'What would you have your wife treated for?' was improper, but was not of sufficient importance to justify a reversal of the judgment for the plaintiff where the amount of the verdict did not indicate that it seriously affected the result."

Crosswhite vs. Barnes, Va. 124 SE 242, 40 ALR 54.

It is submitted that if the unfinished argument of plaintiff's counsel referred to could be interpreted as being improper and prejudicial the circumstances of the case such as the statement of the Court that the jury had already been instructed that what counsel says is not evidence merely argument; that the amount of damages awarded by the jury were certainly justified in view of the injuries

sustained by the plaintiff as shown by plaintiff and Dr. Ruesch. The amount of damage and the fact that it was in even numbers, to-wit, $10,000.00, does not show that the jurors were acting under prejudice or passion or that they were motivated by anything other than a desire to compensate plaintiff in part for injuries sustained, the pain and suffering endured, and the assurance that part of said injuries at least would be permanent.

CONCLUSION

It is submitted that no errors occurred in the trial of the case complained of by Appellant and that a new trial should be denied and that said judgment should be sustained.

Respectfully submitted,

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St. George, Utah

I hereby certify that on this ____ day of May, 1965, I mailed two copies of this BRIEF by United States Mail, postage prepaid, to Raymond M. Berry, Attorney at Law, Attorney for Defendants-Appellants, 1473 South 11th East, Salt Lake City, Utah

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