1969

Logan F. Carr, Individually and Logan F. Carr, As Guardian Ad Litem For Jeff L. Carr v. Bradshaw Chevrolet C0Mpany, A Utah Corporation, and Collins Rowley : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

LOGAN F. CARR, individually and LOGAN F. CARR, as Guardian Ad Litem for JEFF L. CARR, a minor,

Plaintiffs-Appellants,

v.

BRADSHAW CHEVROLET COMPANY, a Utah Corporation, and COLLINS ROWLEY,

Defendants-Respondents.

Case No. 11774

BRIEF OF APPELLANT

Appeal from the Judgement of the Fifth Judicial District Court for Iron County, Utah

HONORABLE C. NELSON DAY, JUDGE

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NATURE OF THE CASE

This is an action for personal injuries arising out of a collision involving a bicycle and an automobile; the minor plaintiff was riding the bicycle which collided with the automobile owned by defendant, Bradshaw Chevrolet Company, and driven by Collins Rowley. Collins Rowley was not served with process and is not before the court at this time. Logan F. Carr brings this action as Guardian Ad Litem for the minor, Jeff L. Carr, to recover damages for personal injuries.

DISPOSITION IN LOWER COURT

Defendant motioned for summary judgment contending that Jeff L. Carr was contributorily negligent as a matter of law. The Trial Court found in favor of defendant and dismissed the complaint of Plaintiffs with prejudice, upon the merits.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a reversal of the Trial Court's summary judgment in favor of defendant.

STATEMENT OF FACTS

At 10:00 A.M. on the 5th day of September, 1964, Jeff L. Carr left his home for the purpose of going downtown and purchasing supplies for a school project. He was riding his bicycle at this time and turned onto the sidewalk adjacent to the east side of the Cedar City main street, approximately three blocks south of the site of the accident concerned herein. He then proceeded north on said street in a normal ordinary manner. (Deposition of Jeff L. Carr, 7, and Affidavit of Jeff L. Carr).

Jeff L. Carr was eleven years old at this time and had been advised to ride his bicycle on the sidewalk when traveling on the main street in Cedar City, Utah, which advice was communicated to him, both by his parents and the then Chief of Police at Cedar City, Utah, in an address made by said Chief of Police to the students

where Jeff attended school. (Deposition of Jeff L. Carr, 6).

On the main street in Cedar City, Utah, at the time of the accident, existed a certain area known as Sullivan's Parking Lot, and as Jeff Carr approached the driveway of said parking lot, the defendant's automobile left said parking area, pulled across the sidewalk and stopped on said sidewalk, directly in front of the bicycle ridden by Jeff Carr. (Deposition of Jeff L. Carr, 9). At the time of the accident, Sullivan's Parking Lot was located on the east side of the Cedar City main street and the driveway here concerned ran from the main highway to the parking lot. On the south side of the parking lot existed a certain block wall approximately four feet in height and there was also a hedge immediately south of said parking lot driveway. (Deposition of Byron Keith Anderson, 13, and Deposition of Jeff L. Carr, 21).

On the 5th day of September, Jeff L. Carr was riding his bicycle on the east sidewalk adjacent to the Cedar City main street in a usual, normal manner; he was going moderately fast, but not too fast; he glanced down at intermittent intervals to examine the terrain over which he was traveling. (Affidavit of Jeff L. Carr). Defendant's automobile pulled out of Sullivan's Parking Lot and stopped directly across the sidewalk but Jeff could not stop his bicycle, although he saw the car and applied his brakes. (Deposition of Jeff L. Carr, 26).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DETERMINING, AS A MATTER OF LAW, THE CAPACITY AND CONTRIBUTORY NEGLIGENCE OF PLAINTIFF, AN ELEVEN YEAR OLD BOY, UNDER THE FACTS OF THIS CASE.

This case comes to the Supreme Court on a motion for summary judgment in favor of the defendant, and this Court has often stated law similar to that expressed in *Welchman v. Wood,* 9 Ut. 2d 25, 337 P.2d 410, (1959), concerning the advisibility of administering such a remedy.

> "Summary judgment is a drastic remedy and courts should be reluctant to deprive litigants of an opportunity to fully present their contentions upon a trial and therefore, summary judgment should be granted only when under the facts viewed in the light most favorable to the plaintiff he could not recover as a matter of law."

At the outset consideration should also be given to the fact that an eleven year old boy is involved in this matter and the requirement is that he exercise that degree of care which would ordinarily be observed by children of like age, intelligence and experience under similar circumstances. *Mann v. Fairbourn,* 12 Ut. 2d. 342, 366 P.2d 603 (1961), accord *Rivas v. Pacific Finance Co.,* 16 Ut.2d 183, 397 P.2d 990 (1964).

In addition to the foregoing propositions of law account must also be taken of the law which places the

burden of showing a child's capacity to be contributorily negligent upon the defendant, as set forth in *Nelson et ux. v. Arrowhead Freight Lines,* 99 U. 129, 104 P.2d 225 (1940), where this Court stated:

> "The question as to whether a child's capacity is such that it may be chargeable with contributory negligence is a question of fact for the jury, unless so young and immature as to require the court to judicially know that it could not contribute to its own injury or be responsible for its acts, or so old and mature that the court must know that, though an infant, yet it is responsible. Where the infant is under fourteen years of age, the burden rests upon the defendant to rebut the legal presumption of incapability of contributory negligence."

The foregoing principles of law are combined with the further proposition that contributory negligence is an affirmative defense and the burden rests upon the defendant to prove it by a preponderance of the evidence. *Stickle v. Union Pac. R. Co.,* 122 U. 477, 251 P.2d 867 (1952). All of the above must be overcome by the defendant if he is to prevail in this cause and the facts herein, combined with said principles of law, illustrate decidedly that this case should be submitted to the jury.

In viewing the facts most favorable to the plaintiff, evidence is available which supports a reasonable inference that Jeff L. Carr was not contributorily negligent and such facts should be submitted to the jury for its determination. *Green v. Higbee,* 66 U. 539, 244 P. 906 (1926) points up this contention. In that case a verdict

was directed for the defendant after a trial by jury. A small girl under six years old was hit by a car when she was attempting to cross a street. Plaintiff's evidence showed the small girl and her brother start across the street 40 feet in front of the approaching automobile. There was other evidence produced by plaintiff which indicated the swerving and skidding of the car. This evidence conflicted with that of defendant who contended that he was driving his car in a safe and reasonable manner; that he honked his horn, slackened his speed and approached within 20 feet of the small girl, when she ran out in front of the car. The trial court concluded that as a matter of law, defendant was not negligent. On appeal, the Supreme Court stated that there was sufficient evidence of circumstances from which legitimate inferences might be drawn with respect to the speed of the automobile and the control of it to entitle the plaintiff to have the question submitted to the jury under proper instructions of law. The Court concluded:

> "A verdict should not be directed for defendant, unless all reasonable men would draw the same conclusions from the evidence, and that conclusion would require a verdict for the defendant."

In the instant case the question to be determined is whether a reasonable boy of like age, intelligence and experience would have avoided the collision. The facts, when considered in the light most favorable to the plaintiff, are as follows.

1. Jeff L. Carr, an eleven year old boy, was riding

his bicycle on the main street sidewalk in Cedar City, Utah.

2. He had been advised, by his parents and the then chief of police of Cedar City, Utah, to travel the sidewalk when using the main street.

3. He was traveling moderately fast, not too fast, in a usual normal manner.

4. He was sitting on the bicycle seat, with his hands on the handlebars and feet on the footpedals.

5. Jeff was attentive to the route he was traveling and to the intermittent areas of rough terrain, which he had notice of because he had previously flattened a bicycle tire on similar terrain.

6. Defendant's automobile pulled quickly out of Sullivan's parking lot and stopped suddenly across the sidewalk directly in front of the approaching boy.

7. Neither of the persons in the car observed Jeff riding down the sidewalk.

8. Jeff glanced down and when he looked up, the automobile was directly in front of his path.

9. He did not have time to stop, although he saw the car and applied his brakes.

10. An alternative path around defendant's vehicle was not available.

11. A collision occured.

The defendant would disagree with fact number five and he would contend that defendant's automobile was eased across the sidewalk; however, the evidence of plaintiff produces a legitimate inference from which a jury could conclude that defendant's automobile pulled across the sidewalk at a rapid speed; that Jeff L. Carr, although acting in a reasonable and prudent manner, as determined by a child of like age, intelligence and experience, could not avoid the collision.

When dealing with the contributory negligence of one not an adult, the court will generally submit such a determination to the jury. The case of *Kawaguchi v. Bennett,* 112 U. 442, 189 P.2d 109 (1948), explains the earlier case of *Herald v. Smith,* 56 U. 304, 190 P. 932 (1920), concerning that question, in the following manner:

> "We do not understand that we there said [*Herald v. Smith, supra*] that as a matter of law any child of tender years cannot be guilty of contributory negligence, but rather that a court cannot say, *as a matter of law,* that such a child was guilty of contributory negligence, but must submit that question to a jury to determine whether the conduct of the child, measured by its capacity and experience, was negligent." (emphasis added)

The advisibility of submitting such a question to the jury is summed up nicely in 77 ALR 2d 917, Section 7:

> "Whether the question of a child's contributory negligence is regarded as one of capacity standard of care, or compliance with that standard, the courts are in substantial agreement that

> normally, *if not always,* a question of fact for the jury is presented, rather than one of law for the court. This conclusion seems to follow almost necessarily from the consideration that the answers to the relevant questions involve an investigation of the child's actual development, that is, of his age, intelligence and experience or education, the formulation of a fictional child having the same or similar capacities; and then the determination as to whether the plaintiff's actual conduct under the circumstances, often itself a matter of dispute, comes up to the standard which is expected of his fictional counterpart."

The burden is on defendant to demonstrate a child's capacity to be contributorily negligence and the only facts before the trial court were those contained in the pleadings, interrogatories and depositions. There were no witnesses before the court and therefore the demeanor of the infant, Jeff L. Carr, was not available to the trial judge, who states in his memorandum decision that a boy almost 12 years old, who participates in athletics and is a straight "A" student, can be contributorily negligent and is contributorily negligent under the facts of this case. Plaintiff contends that reasonable minds would differ concerning this question; that a boy 11 years old would not appreciate the existence of Sullivans' parking lot driveway in the same manner as an adult, nor would such a boy necessarily be cognizant of the danger involved, if any. The formulation of a fictional child of like age, intelligence and experience interjected into the position of Jeff L. Carr during the period of this incident, is necessarily a factual matter

to be determined by the jury. All available evidence, including the truth, veracity and demeanor of the witnesses is necessary to accomplish such a task.

Defendant contends that its automobile was eased onto the sidewalk from Sullivan's parking lot and stopped; however, it is plaintiff's contention that the automobile of defendant pulled directly across the sidewalk in a rapid manner and stopped abruptly, making it impossible for any reasonable boy of Jeff's capacity to avoid a collision. Such disputed facts, involving a child of eleven years, should be reversed for the jury to determine the truth and veracity of the witnesses, and should not be decided on summary judgment. *Morby v. Rogers,* 122 U. 540 252 P.2d 231 (1953).

POINT II

DISREGARDING THE INFANCY OF JEFF L. CARR, THE TRIAL COURT ERRED IN DETERMINING HIS CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW UNDER THE FACTS OF THIS CASE.

Even if Jeff L. Carr is held to an adult standard of care, contributory negligence under the facts of this case cannot be determined as a matter of law, for the reason that a jury could conclude that Jeff was justified in dividing his attention to include the rough terrain of the sidewalk along with the direction in whch his bicycle was proceeding. The case of *Hindmarsh v. O. P. Skaggs Foodliner,* 21 Ut. 2d 413, 446 P.2d 410 (1968), dealt with such a question. In that case the plaintiff

slipped and fell on a patch of ice in defendant's parking lot and the contention was that if plaintiff had watched her feet, she would not have stepped on the patch of ice. The Court held that contributory negligence in that case was grounded on the proposition that plaintiff could have seen the spot of ice and avoided it. The court seemed to indicate that this might be the correct rule of law, but went on to conclude:

> "However, this is subject to the qualification that if there is something which justifies plaintiff giving part of her attention elsewhere so that in the total circumstances it can reasonably be believed that she exercised due care, the conclusion that she was guilty of contributory negligence as a matter of law is not compelled."

A reasonable inference exists under the facts of the instant case from which a jury could determine that Jeff L. Carr acted reasonably in relation to a boy of like age, intelligence and experience, when he glanced down intermittantly to examine the terrain over which he traveled. The jury might also conclude that defendant's automobile could not have been eased onto the sidewalk in the short period of time taken to glance down and then look up to the direction of travel. This proposition is especially true when the facts are viewed in the light most favorable to the plaintiff.

CONCLUSION

In deciding this case, it must be remembered that the facts are to be looked at in the light most favorable

to the plaintiff; that the burden is on the defendant to establish the capacity of a child to be contributorily negligent; that the burden is on the defendant to prove by a preponderance of the evidence that the plaintiff was contributorily negligent; and that ordinarily the determination of a fictional child is in the province of the jury. We submit, that under the facts of the instant case, defendant has failed to carry his burden in one or more of the foregoing propositions.

The Trial Court erred in deciding, as a matter of law, that defendant has established his burden of proving the capacity of Jeff L. Carr to be contributorily negligent and that he was in fact contributorily negligent. The facts of this case, when viewed in the light most favorable to plaintiff, require their submission to the jury. Summary Judgment is not applicable here and the decision of the Trial Court should be reversed.

Respectfully Submitted,

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