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 Respondents

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,

vs.

BRADSHAW CHEVROLET COMPANY, A Utah Corporation, and COLLINS ROWLEY,
Defendants-Respondents,

Case No. 11774

BRIEF OF RESPONDENTS

Appeal from the Judgment of the Fifth Judicial District Court for Iron County, Utah
Honorable C. Nelson Day, Judge

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STATEMENT OF CASE

This is an action for personal injuries arising out of the collision between a bicycle and an automobile; the minor plaintiff was riding the bicycle which collided with an 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 THE 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

Defendant seeks an affirmance of the trial court's summary judgment in favor of the defendant.

STATEMENT OF FACTS

Respondent can only agree in part with the statement of facts set forth in the brief of appellant since a number of the facts recited either go beyond the record or are not supported thereby. For this reason we deem it proper to formulate a statement of facts which we believe to be supported by the record. In developing the facts respondent is mindful of the rule that for purposes of this appeal we must view the facts in a light most favorable to the plaintiff, though we may deny the validity of those facts.

On September 5, 1964, at approximately 10:00 A.M., Jeff L. Carr, an eleven year eight-month old boy, left his home to ride his bicycle to downtown Cedar City for the purpose of purchasing school supplies. It was a clear day. There was no snow, rain, or ice on the sidewalk. (Deposition of Jeff L. Carr, P. 7.) The bicycle he had been riding had been a gift from his parents some six months before (Deposition of Jeff L. Carr, P. 3) and was considered a "racing bike" which possessed a gear mechanism, narrow tires, and brakes controlled from the handle bars. (Deposition of Jeff L. Carr, P. 4).

Due to an order given by the Cedar City Chief of Police during an address at Jeff's school advising bicycle riders to not ride on Cedar City's Main Street, Jeff turned onto Cedar City's Main Street sidewalk, three

blocks south of the scene of the accident. (Deposition of Jeff L. Carr, P. 6 and 7). He then proceeded at a "fairly" or "moderately" fast rate of speed. (Deposition of Jeff L. Carr, P. 12.)

At the time of this accident there existed on Cedar City's Main Street a parking lot known as Sullivan's parking lot, which lot Jeff Carr was aware of (Deposition of Jeff L. Carr, P. 8) as he proceeded along the sidewalk.

As Jeff rode down the sidewalk, Collins N. Rowley and Byron Keith Anderson were preparing to leave Sullivan's parking lot. Collins Rowley was the driver and after backing the car from its parking place pulled forward to the parking lot entrance in order to enter the Main Street traffic. (Affidavit of Collins N. Rowley.) In order for an automobile to enter Main Street, it was necessary that the automobile first cross the sidewalk and then enter the traffic. (Affidavit of Collins N. Rowley.) There was a house south of the lot with a four foot high wall which, combined with a hedge at the south of the parking lot, obstructed Mr. Rowley's view to the left. (Affidavit of Collins N. Rowley, Deposition of Byron K. Anderson, P. 13.) Because of the obstruction to his view, Mr. Rowley eased the car out so that he could see past the bushes and the wall and observed no one on a bicycle but did see two automobiles coming north on Main Street. (Affidavit of Collins N. Rowley.) He then pulled across the sidewalk, blocking it, and stopped in order to wait for the traffic to clear. (Depo-

sition of Byron K. Anderson, P. 9 and 15.) Neither Mr. Rowley nor Mr. Anderson saw anyone coming from either direction on a bicycle. (Deposition of Byron K. Anderson, P. 16, 17, Affidavit of Collins N. Rowley.) The car was stopped across the sidewalk "a good ten seconds" to allow the traffic to clear, (Deposition of Byron K. Anderson, P. 17) and at that point Jeff L. Carr collided with the automobile.

Prior to the impact, Jeff had been glancing down periodically at the sidewalk to avoid rough spots; (Affidavit of Jeff L. Carr) and yet he did not see the car back out of its parking place, start from the parking lot toward the sidewalk, begin to cross the sidewalk and in fact did not see the car until it was stopped in the center of and across the sidewalk and had been stopped for some time. (Deposition of Jeff L. Carr, P. 9, 10, 11 and 26.) It appears that Jeff L. Carr did not see the car until moments before he collided with it. (Deposition of Jeff L. Carr, P. 9.) His testimony indicated that he had "glanced down or something" and when he glanced up and saw the car he was unable to stop even after applying his brakes and thus collided with the parked car. (Deposition of Jeff L. Carr, P. 10 and 11.)

At the time of the accident, Jeff Carr was a good student, (Deposition of Jeff L. Carr, P. 24) athletic and independent. (Deposition of Jeff L. Carr, P. 22, 22A.)

It is clear that the District Court was fully cognizant of the facts of the case and analyzed those facts in depth in reaching its decision.

In the Memorandum Decision it was noted at page 2, paragraph 7 that:

> "While the said Jeff L. Carr was not an adult at the time of this incident and therefore could not be expected to have the maturity or judgment of an adult, yet, the court believes and finds that where a straight "A" student almost twelve years old who had been active in a variety of athletic activities drove his bicycle down the sidewalk and directly into a four-door sedan automobile which was parked across the sidewalk so as to block the same, such bicycle rider is negligent in failing to keep a proper lookout, in going too fast for existing conditions where he knew the parking place and driveway existed, and in failing to keep his vehicle under control."

The court further held at page 2, paragraph 6 of the Memorandum Decision that:

> "From the record in this case including the pleadings, depositions, affidavits and admissions on file, the court finds that there is no genuine issue as to any material fact and that the said Jeff L. Carr was negligent at the time and place of this incident, which negligence proximately contributed to his injuries and is thereby precluded recovery under the complaint filed herein."

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DETERMINING AS A MATTER OF LAW THE CAPACITY AND CONTRIBUTORY NEGLIGENCE OF PLAINTIFF, AN ELEVEN YEAR EIGHT-MONTH OLD

BOY, UNDER THE FACTS OF THIS CASE, AND DEFENDANT WAS ENTITLED TO A SUMMARY JUDGMENT.

In *Welchman* v. *Wood,* 9 Utah 2d 25, 337 P. 2d 410 (1959), the Utah Supreme Court noted that summary judgment is a drastic remedy and respondent is in agreement with that conclusion. It should only be used when under the facts viewed in a light most favorable to plaintiff he could not recover as a matter of law.

That decision did not state, however, that such remedy should be unjustly withheld and that simply because a plaintiff claims *injury* he should be allowed recovery. If defendant can illustrate that under the facts of this case plaintiff was negligent, thereby proximately causing his own injuries and that in regard to those facts reasonable men could not differ as to their conclusion based on those facts, then defendant is entitled to a judgment as a matter of law.

The Fifth Judicial District Court was so convinced and thus withheld the determination from jury consideration.

With regard to the facts of this case, plaintiff relies heavily on *Nelson et ux* v. *Arrowhead Freight Lines,* 99 Utah 129, 104 P. 2d 225 (1940), for the proposition that where a child is under fourteen years of age, there is a presumption that such child is incapable of contributory negligence.

In commenting on that conclusion in *Mann* v. *Fair-*

bourn, 12 Utah 2d 342, 366 P. 2d 603 (1961), this Court pointed out that such an arbitrary statement was mere dicta in the *Arrowhead* case "inasmuch as the plaintiffs in that case were sixteen and twenty years of age." 12 Utah 2d at 346. The Court further stated in *Mann* v. *Fairbourn* that "such a rule of law has not been observed by this Court in other cases." Citing *Harold* v. *Smith,* 56 Utah 304, 190 P. 932, 933; *Kawaguchi* v. *Bennett,* 112 Utah 442, 189 P. 2d 109; *Morbey* v. *Rogers,* 122 Utah 540, 252 P. 2d 231, and noted that the dicta of *Arrowhead* was corrected by the Court later in that same case when it said:

> "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."

This Court further amplified and supported respondents argument that plaintiff's capacity and negligence should have been decided as a matter of law when it noted:

> "The capacity or incapacity of a child is a factual inquiry and the test to be applied is that applicable to *any other question of fact.*" (Emphasis supplied) *Id.* at 346.

By relating the question of a child's negligence to a level parallel to any other factual determination, the court clearly defined the right of a judge to deliver a

summary judgment based upon facts about which reasonable men could not differ.

In light of the *Mann* case, *supra,* appellants' argument that any question involving a child's contributory negligence must be submitted to the jury is not supported by current Utah law, and the *Carr* v. *Bradshaw* appeal presents facts which justify the District Court's ruling of summary judgment.

Jeff Carr was riding a bicycle down a public sidewalk. He was glancing periodically at the sidewalk; he did not see the car leave its stall, start to the street, begin to cross the sidewalk, or come to a stop, even though he was aware of the location of the lot and knew what its purpose was. When he finally did look up, he saw the respondent's automobile stopped in the center of the sidewalk waiting for traffic to clear. He tried to apply his brakes, but he was too late and collided with the car.

It appeared to the District Court that a boy nearly twelve years old, a good student, independent and athletic, at the very minimum should watch where he is going while riding a bicycle, particularly one which he had ridden for only six months and which possessed narrow tires and handlebar-operated brakes. There was simply no other conclusion for reasonable men to reach than that the plaintiff was negligent in not keeping a proper lookout, in riding his bicycle too fast for existing conditions, and riding straight into a parked car. Had there been a brick wall extending into the sidewalk

instead of the respondent's automobile, reasonable men could not have assumed the wall would be at fault in being in the sidewalk but that a boy nearly twelve years old has at least some duty to not run into such a wall by keeping a proper lookout. With regard to the duty of a bicyclist to maintain both a proper lookout and reasonable speed, the cases of *Lapenteur* v. *Eldridge Motors,* 55 P. 2d 1064 (Washington, 1936), and *Gallenz et al* v. *Griffiths,* 38 Atlantic 2d 721 (Pennsylvania, 1944), seem particularly applicable. In *Lapenteur,* the court held that a bicyclist, who had been following approximately twenty feet behind an automobile while the driver was testing his brakes and who in the process of that test stopped the automobile suddenly and without warning to the bicyclist, was contributorily negligent as a matter of law when he collided with the back of the stopped car. In reaching that decision the court commented that a motorist following another must govern his speed and keep back a reasonably safe distance so as to allow himself reasonable time for an emergency stop and that that particular rule should also apply to a bicyclist and that he should be required to keep such distance from the automobile ahead of him and maintain such observation of the automobile that an emergency stop may be safely made, citing *Ritter* v. *Johnson,* 163 Washington 153, 300 Pac. 518. The court concluded its decision of that case by commenting that the consequences of the case itself demonstrates "that the appellant was either not maintaining a proper lookout or else that his speed was too great to provide a fair margin of safety under the cir-

cumstances." 300 Pac. at 1067. See also *McGowan* v. *Tayman,* 132 S.E. 316 (Virginia, 1926). In *Gallenz* a boy of fifteen suffered personal injuries when he was unable to stop the bicycle he was riding in time to avoid colliding with defendant's parked automobile. In affirming a judgment for the defendant on the grounds that defendant's negligence, if any, was not a proximate cause of the accident and that the plaintiff was contributorily negligent as a matter of law, the court noted:

> "A bicycle rider has the same duty as any other vehicle operator—to keep it under such control that he can stop or turn it to avoid collisions. *Mehler* v. *Doyle,* 271 Pennsylvania 492, 115 Atlantic 797. He cannot willfully run into a standing vehicle and recover damages from his resulting injury. *Simrell* v. *Eschenback,* 303 Pennsylvania 156, 154 Atlantic 369. And a boy of fifteen years of age is deemed to be sufficiently capable of appreciating the dangers incident to bicycle riding to convict him in a proper case of contributory negligence as a matter of law. *Geiger* v. *Garrett,* 270 Pennsylvania 192, 113 Atlantic 195; *Miller* v. *City of Erie,* 340 Pennsylvania 177, 16 Atlantic 2d 37."

See also *LeFleur* v. *Hernandez,* 191 Pac. 2d 95, 84 Cal. App. 2d 569, in which the court imposed a duty upon a ten-year-old bicyclist to exercise ordinary care at all times to avoid placing himself or others in danger and to avoid a collision; and *Johnson* v. *Northern Pacific Railway Company,* 66 Washington 2d 614, 404 Pac. 2d 444 (1965), where it was held that a minor on a bicycle is subject to the same rules of the road as a driver of a motor vehicle.

In accord with the above reasoning is *Rivas* v. *Pacific Finance Company,* 16 Utah 2d 183, 397 P. 2d 990 (1964). The court there held that even a boy just under six years of age who sued for injuries suffered when defendant's car ran into him on his sleigh could be guilty of contributory negligence. In reaching that conclusion, the court stated:

> "We are in accord with the idea that a child is not expected to have the maturity of judgment nor the capacity to cope with danger that an adult would have and consequently is not held to the adult standard of care. Nevertheless, a child even of this age has some duty to care for his own safety, and if he fails to observe it can be guilty of contributory negligence. The requirement is that he exercise that degree of care which ordinarily would be observed by children of the same age, intelligence and experience under similar circumstances."

Corollary to the foregoing is the fact that when a child is known to be in a situation of possible danger, he has a duty to observe extra caution for his own safety. This is a more particularized application of the usual standard requirement of due care under the circumstances, the modifying circumstance being the fact that a child is involved.

In *Donohue* v. *Rolando,* 16 Utah 2d 294, 400 P. 2d 12 (1965), the court referred to both *Mann* v. *Fairbourn, supra, Rivas* v. *Pacific Finance Company, supra,* and to *Nelson* v. *Arrowhead, supra,* in re-emphasizing the rule that a child must exercise that degree of care

which ordinarily would be observed by children of the same age, intelligence and experience under similar circumstances.

In treating the application of the above standard an annotation at 77 ALR 2d 921 seems particularly applicable. That annotation noted that under a procedure involving the above test the question would be regarded as one of fact: whether the infant plaintiff's conduct met the standard to be expected of children of like age, development and experience. It is further noted in that annotation:

> "As in other cases involving fact issues, the court would rule as a matter of law if it determined that reasonable men could not disagree upon the question. . . . " Page 921.

In applying the question of the capacity of a child for contributory negligence, numerous cases have recognized that there may be a presumption conclusive or rebuttable that a child of a particular age is capable of having exercised some care for its own safety. In *Gayhart* v. *Schwabe,* 180 Idaho 354, 330 P. 2d 327 (1958), the court held that a normal boy of thirteen has reached an age where a degree of responsibility for his contributory negligence is recognized. In *Plauche* v. *Consolidated Cos.,* 235 Louisiana 692, 105 Southern 2d 269 (1958), the court held that a child's caution in a given case must be judged by his maturity and capacity to evaluate the circumstances in each particular case, and he must exercise only the care expected of his age, intelligence and experience. Thus, the court held a child of twelve

can clearly be guilty of contributory negligence even though in that particular case the boy was held free of such negligence. It was also noted in *Gratto* v. *Palangi,* 154 Maryland 308, 147 Atlantic 2d 455 (1958) that a child of twelve knows he must share the use of the street with automobiles and as a swimmer must share the use of a great pond with boats. (For further cases treating this point see 77 ALR 2d 928 to 940. See also an annotation at 174 ALR 1134 regarding the capacity of nine to thirteen year olds and an annotation at 174 ALR 1136 for numerous cases where capacity and contributory negligence of minors has been found as a matter of law.)

An analysis of the facts of this case should clearly reveal the correctness of the District Court's decision in light of the standard of care applied to twelve year old boys. The plaintiff did not see the car until he was too close to avoid collision because he had been riding with his head down "or something." (Deposition of Jeff L. Carr, P. 10.) The car had been stopped in the sidewalk in order to allow safe entry into Main Street traffic flow a "good ten seconds." (Deposition of Byron K. Anderson, P. 17.) Had the car and the bicycle rider arrived at the point of impact at the same time, a different question would be raised, but such was not the case. The car was across the sidewalk, the driver had observed no bicycle riders coming from either direction, and the car had been stopped a substantial period of time when the plaintiff drove his bicycle into the car as negligent as if he had driven into a stone wall.

This type of accident is not unique to this jurisdiction. In *Jordan* v. *Crowell,* 171 Southern Reporter 477 (Louisiana Second Circuit 1937), a case nearly identical with the Carr case factually, the court held the bicycle rider guilty of contributory negligence. In that case the defendant, a nineteen year old boy, was entering a street from his private driveway, which had a four foot high wall and some shrubbery much higher which totally obscured his vision, both to the left and the right. He had to cross a sidewalk before reaching the street, which he knew was not only used by pedestrians but also by children in the neighborhood in riding their bicycles. He failed to honk his horn or give any warning whatsoever and pulled across the sidewalk and stopped. At that same time, an eleven year old girl was riding her bicycle on the sidewalk at a fairly rapid rate of speed. She was mature for her age and far above average in intelligence, and her testimony clearly demonstrated those facts. She was in the 8th grade, had passed this driveway many times and knew that cars came out of the driveway every day. She was fully aware that a car driver coming out of this driveway could not see her until he was in the act of crossing the sidewalk. With this knowledge, the young girl attempted to cross the driveway on the sidewalk without looking and at a very rapid rate of speed for a bicycle to travel. At the time of the accident she was "pumping" in order to gain speed and a witness observed that she had her head down, which resulted in a lower level of vision. Had she been riding at a normal speed with her head up, she could have seen the car in

time to avoid the accident. But the court held that she was negligent in riding on the sidewalk, in going at an excessive speed at the point of danger, and in not looking ahead; and her negligence contributed to and was a proximate cause of the accident and barred her recovery.

In *Lareau* v. *Trader,* 403 S.W. 2d 265 (Kentucky, 1966), an action was brought for the death of a thirteen year old bicyclist struck by defendant's car. In reversing a verdict given at trial for the defendants, the court noted that where there is serious doubt of a minor's capability of being contributorily negligent, the issue should be submitted to the jury, but where an infant of age thirteen years eight months had been intelligent, had had average judgment generally for one of his age, had been healthy, athletic and self-sufficient, and had been riding a bicycle since he was six years old and had been thoroughly familiar with the highway over which he was traveling, the infant as a matter of law had sufficient judgment to be held for any negligence he may have shown although the court found no contributory negligence in that particular case. Therefore in light of the above cases and based upon the facts as they are given in the *Carr* v. *Bradshaw* appeal, even when viewed in a light most favorable to the plaintiff, the conclusion is clear and undisputed; Jeff L. Carr, a boy having the intelligence, experience, and judgment of children his own age, was negligent, as a matter of law in failing to keep a proper lookout, in traveling too fast for existing conditions, and in colliding with a parked automobile stopped in order to allow traffic to clear prior to entry

into the traffic flow. On those facts, the District Court was justified in light of case law from this and other jurisdictions as well as general common sense in granting a summary judgment.

POINT II

THE TRIAL COURT DID NOT ERR IN DETERMINING AS A MATTER OF LAW THE NEGLIGENCE OF THE PLAINTIFF IN THAT THE PLAINTIFF'S OWN NEGLIGENCE WAS A PROXIMATE CAUSE OF HIS INJURIES AND WAS AT LEAST A CONTRIBUTING CAUSE OF THE ACCIDENT.

In his second point appellant asserts that even if an adult standard is applied to the plaintiff, this summary judgment still is unjustified due to what is asserted to be a justifiable act on the part of the plaintiff in diverting his attention from his lookout.

Respondent asserts that the standard to be applied in this case has been thoroughly discussed under Point I and that as to the diversion of attention by the plaintiff, the facts clearly illustrate that the plaintiff was riding his bicycle with his head down and that he had it down diverted from his attention to what was ahead long enough under the facts to

1) fail to see the car leave its parking stall,
2) fail to see the car start toward the Main Street,
3) cross the sidewalk, preparatory to entering traffic,

4) stop,

5) sit motionless for ten seconds prior to impact.

Respondent doesn't wish to contend that when a boy nearly twelve years old is riding a bicycle over an unsmooth sidewalk that he may not divert his attention to the terrain momentarily, but conversely the court can see from the facts that the failure in this case to keep a proper lookout was not momentary. It was long enough to allow all of the above events to occur and to ultimately cause plaintiff's injuries.

Plaintiff's own case of *Hindmarsh* v. *O. P. Skaggs Foodliner,* 121 Utah 2d 413, 446 P. 2d 410 (1968), makes it clear that

> " . . . Where there is a danger plainly to be seen, and the plaintiff fails to avoid it, it is ordinarily ruled that she was negligent either in failing to look or in failing to heed. . . . " 446 P. 2d at 412.

Thus, on the morning of the accident a bicycle rider wasn't looking where he was going, he was traveling "fast," was riding a complicated piece of machinery, he did not keep an adequate or proper lookout, and he ran into a car which had been sitting across the sidewalk at rest for a considerable period of time.

Respondent, therefore, submits that the court did not commit error in granting defendant's motion for summary judgment in this case in that the conduct of the child in failing to see and driving his bicycle into the side of a parked automobile was the sole proximate cause of his injuries; and the parking of the automobile

on the sidewalk, even though we consider this to be illegal and therefore negligent, was only a condition which had to exist for the accident to happen in the same manner as the wall to which we previously referred to in an example had to be there in order for the child to run into it. Further, that although children are not generally held to the same standards as adults in regards to negligent activities and the question of their capacity may generally be a jury question, the same test is applicable in light of case law of this jurisdiction and other persuasive jurisdictions to the question before this court as is applicable to *other questions of fact.*

It would appear to us that a jury of fair minded men could not reasonably find otherwise than that an eleven year old boy who drives his bicycle down a sidewalk and directly into a visible object in front of him is guilty of contributory negligence.

CONCLUSION

In deciding this case and in arguing the points for consideration, the facts must be looked at in a light most favorable to the plaintiff. In looking at those facts, as they exist from the depositions and testimony of those involved in the accident, only one conclusion arises.

Jeff L. Carr on a clear day ran into a car through the negligence of no one but himself and the injuries he received were a proximate result of that negligence and were at least a contributing factor to his injuries.

Therefore, the trial court was correct in its finding

that with regard to the facts of this case, even when viewed in a light most favorable to the plaintiff, reasonable men could not differ as to their conclusions and defendant was entitled to a summary judgment, as a matter of law.

Respondent respectfully requests that the determination of the Fifth Judicial District Court be affirmed.

Respectfully submitted,

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