1967

G. Dayton Hughes v. Richard D. Hooper : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

G. DAYTON HUGHES,
Plaintiff and Appellant,

vs.

RICHARD D. HOOPER,
Defendant and Respondent.

Case No. 11[illegible]

BRIEF OF RESPON[illegible]

Appeal from the Judgment of the [illegible]
District Court for Utah [illegible]
Honorable Joseph E. Nelson, [illegible]

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CASES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

G. DAYTON HUGHES,
Plaintiff and Appellant,

vs.

RICHARD D. HOOPER,
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Case No. 10700

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an action by the owner-driver of an automobile for injuries and automobile damage arising out of an automobile accident which occurred on Sunday, the 7th day of June, 1963, at approximately 9:00 a.m. at an open intersection in Provo, Utah.

DISPOSITION IN LOWER COURT

The case was tried before the Honorable Joseph E. Nelson sitting with a jury. The jury brought in a verdict of no cause of action predicated upon its finding that the plaintiff was guilty of contributory negligence in not keeping a proper lookout.

RELIEF SOUGHT ON APPEAL

The plaintiff seeks reversal of the judgment of the lower court and judgment in plaintiff's favor as a matter of law.

STATEMENT OF FACTS

The verdict of the jury was in favor of the defendant and against the plaintiff and the defendant will, therefore, set forth the facts as they must be viewed on appeal favorable to the verdict of the jury.

The accident on which the plaintiff premises his cause of action occurred on Sunday the 7th day of June, 1963, at approximately 9:00 a.m. at the intersection of 100 South and 600 West Streets in Provo, Utah. There were no regulatory traffic signs or lights controlling traffic at the intersection for either driver.

The plaintiff was traveling in a northerly direction on 6th West Street, and the defendant proceeding easterly on 100 South Street. On the southwest corner of the intersection there stood a home (Defendant's Exhibits 12 and 13, and plaintiff's Exhibit 6), the north side of which was approximately 33 feet from the south curb on 100 South Street and the front of which approximately 56 feet west of the west curb on 6th West Street. (See plaintiff's Exhibit 6.) Plaintiff testified that there were several cars parked along the south side of 100 South Street beginning at a point approximately 30 feet west of the west curb line of 6th West Street (R. 138) which obstructed his view. Defendant did not recall seeing any

vehicle parked on the south side of 100 South Street (R. 166-167).

From a point approximately 120 feet west and 120 feet south of the point of impact each of the drivers could have seen the other within those distances. (Plaintiff's Exhibit 6) Plaintiff testified that he observed the parked vehicles as he approached the intersection (R. 73, 74) and that they did obstruct his vision (R. 73). Plaintiff approached the intersection at a speed of approximately 20 to 25 miles per hour according to his own testimony (R. 12, 137). Defendant testified that he approached the intersection, also, at a speed of about 25 miles per hour and in his proper lane of traffic (R. 164), and that plaintiff was traveling at about the same speed as defendant. As defendant approached the intersection, he looked first to the right and then to the left seeing no traffic on either occasion and then glanced back to his right again and saw the plaintiff's car at about the south cross-walk at a time when his vehicle was then at about the west cross-walk (R. 165). The defendant immediately applied his brakes (R. 165), skidded for about 10 feet (R. 7), and struck the vehicle of the plaintiff in the right side with the left headlight portion of the defendant's vehicle striking the plaintiff's vehicle over the left wheel well and the right headlight striking the left door of the plaintiff's vehicle (Plaintiff's Exhibit No. 1). The two vehicles then proceeded in a generally northeasterly direction side by side and came to rest on the northeast corner of the intersection.

The investigating officer located the point of impact 38 feet east of the west cross walk at the intersection

(28 feet from west curbline) and 28 feet north of the south cross-walk at the intersection (18 feet from south curbline) and measured an additional 5 feet from the forward point of impact on plaintiff's vehicle to the front of the plaintiff's vehicle indicating that the plaintiff's vehicle was 33 feet from the south cross-walk at time of impact. The nearest west cross-walk line was 10 feet from the curb and the south cross-walk line 10 feet from south curb. Each street was approximately 50 feet wide (Plaintiff's Exhibit No. 6). Defendant recognized that the cars parked along the south side of the intersection would constitute a hazard to his view (R. 140), and further testified that there was only a fraction of a second for him to determine whether or not any cars were approaching (R. 140, 141), and that there was just a fraction of a second from the time he saw the defendant's vehicle until the impact occurred (R. 142). Defendant testified that plaintiff was looking straight ahead and did not turn his head toward the defendant at any time after he saw him (R. 166). Plaintiff further testified that about one-third of his car was in the intersection at the time he saw the defendant's vehicle 15 feet from him (R. 144). He told the investigating officer he first saw the Hooper vehicle at time of impact (R. 42).

The two cars entered the intersection at about the same time (R. 165-166) and it was a close question as to who had the technical right-of-way.

ARGUMENT

POINT I.

THE VERDICT AND JUDGMENT OF THE TRIAL COURT ARE SUSTAINED BY THE EVIDENCE AND THE TRIAL COURT DID NOT ERR IN REFUSING TO DIRECT A VERDICT IN FAVOR OF THE PLAINTIFF.

The jury made an express finding that the plaintiff was guilty of negligence in the operation of his vehicle by not keeping a proper lookout and that he, therefore, could not recover on his complaint.

The basic question involved in the appeal is, therefore, whether or not there was sufficient evidence of plaintiff's failure to keep a proper lookout produced at the trial to support the court's presentation of this issue to the jury, and the jury's finding of contributory negligence upon the part of the plaintiff.

The question of contributory negligence is usually for the jury and the court should be reluctant to take consideration of this question of fact from it. *Nielson v. Mauchley,* Utah 115 Ut. 68, 202 P. 2d 547; *Toomers Estate v. Union Pacific Railroad Co.,* Utah, 121 Ut. 37, 239 P. 2d 163; *Martin v. Stevens,* Utah 121 Ut. 484, 243 P. 2d 747.

Plaintiff testified that he did not see the defendant vehicle until the defendant vehicle was already in the intersection and when the vehicle was not more than 15 feet from the plaintiff vehicle. In fact the jury could have found that plaintiff did not see the vehicle of the defendant at all until impact. The investigating officer

testified that in the conversation he had with plaintiff after the accident the plaintiff told him that he did not see defendant's vehicle until the time of impact (R. 42). There was also evidence that the plaintiff did not look at all because the defendant testified that he saw the plaintiff vehicle when plaintiff's vehicle was at about the south cross-walk as defendant was at about the west cross-walk and the plaintiff was looking straight ahead and did not turn his head toward the defendant at anytime after defendant saw the plaintiff (R. 166). By his own testimony plaintiff did not look at all until he was 15-20 feet from the intersection which would place his vehicle in the vicinity of the south cross-walk. The fact that he left no skid marks at all certainly supports the defendant's testimony and the plaintiff's that plaintiff either did not see the defendant vehicle at all or until a fraction of a second before impact. In fact, plaintiff testified that when he first looked, there was only a fraction of a second between that time and the time of impact.

(By Mr. Summerhays to Mr. Hughes)

Q. Now you say there was not much time from 15-20 feet back to determine whether or not there was a car there, is this correct?

A. It would only be a matter of a split second.

Q. Fraction of a second.

A. Yes. (R. 140-141)

The plaintiff was aware of the fact that the greatest danger to him would be from a car coming from his left in his line of traffic (R. 143), but he did not look until he was 15-20 feet from the intersection by his own testimony.

If there were cars parked along the south side of 100 South Street, there was still some distance between the north side of the house and the parked cars (33 feet or more) and knowing that his view would be blocked up close to the intersection placed a duty upon plaintiff to look for approaching cars from a point in between the house and the parked cars. He made no attempt to look, though he saw the parked cars in advance and knew they would constitute a hazard to his vision.

(Mr. Summerhays to Mr. Hughes)

Q. You knew then, that those cars constituted a hazard to your vision, did you not?

A. I didn't have much time to analyze it. It was only a matter of split second or two.

Q. Yes, but as you approached the intersection, you could see that the cars were parked along the intersection, could you not?

A. Yes.

Q. And you knew that they would constitute a hazard to your view, did you not?

A. I would say that I knew that.

(R. 139, 140)

If the parked cars created a dangerous situation, then plaintiff's duty was to use additional caution in accordance with the existing conditions creating the increased danger. *Klenk v. Oregon Short Line R. R. Co.,* 27 Ut. 428, 76 P. 214; *Mallard v. Sims,* 173 Wash. 649, 24 P. 2d 70. The amount of caution required by the law increases, as does the danger that reasonably should be apprehended.

If the plaintiff was going to rush headlong into the intersection, he should have used every opportunity available to determine whether there were any cars approaching. One can by carefully observing look through the windows of parked cars for possible movement of approaching cars. Plaintiff failed in his duty in regard to all of these possibilities.

The fact is that the defendant's vehicle was approaching close to the intersection at the same time as the plaintiff was approaching, and the car was there to be seen. The plaintiff's duty is not fulfilled by merely taking a quick glance, or none. He is charged with seeing what is there to be seen, and it is a jury question as to whether the vehicle of the defendant was there to be seen, whether plaintiff fufilled his duty in keeping a proper lookout and whether his failure, if any, was a proximate cause of the accident. *Martin v. Stevens,* supra; *Karl W. Badger v. Paul Taylor Clayson,* Utah, filed January 3, 1967, Case No. 10517.

Plaintiff has submitted an extensive argument to show that defendant was traveling at an excessive speed and that plaintiff entered the intersection first. In answer to said argument defendant points out some of the fallacies and weaknesses of the claimed facts and the conclusions drawn therefrom upon which plaintiff's argument is based.

Officer Baum testified that in his opinion the defendant was going 35-40 miles per hour (R. 21). He based this upon the 10 feet of skid marks which he ob-

served plus the impact and the distance the cars traveled after impact and the use of a skid chart (R. 21). Officer Baum had only been an officer for eight months at the time the accident occurred (R. 18). He had had two weeks training at the Utah Highway Academy at National Guard Camp covering all phases of a police officer's duties (R. 18). He did not know even approximately how many accidents he had investigated (R. 19).

In making his calculations he did not subtract the wheelbase of the car from the distance the car traveled after impact (R. 31). The 47 feet the defendant vehicle traveled after impact consisted of scuff marks, how many he was not sure (R. 36). During the last 19 feet the two cars traveled he admitted they were rolling together (R. 46). The officer also admitted that the speed of the plaintiff's vehicle would have carried the defendant's vehicle to the north and cause part of the scuff marks (R. 40), but he did not in fact take this into consideration in computing the speed. He admitted that he just felt like Mr. Hughes' speed was 20 miles per hour (R. 41), and that it could have been calculated, but he didn't know how to do it (R. 41). He actually went on Mr. Hughes' statement. He at first gave Mr. Hughes a ticket for failure to yield the right-of-way but later after talking to other officers decided not to press it (R. 23-24).

In connection with the witness Coon's testimony, he assumed a speed of 20 miles per hour for Mr. Hughes because this is the speed Mr. Hughes stated he was going, and this is the speed the officer told Mr. Coon Hughes was going (R. 54). His subsequent calculation

of speed was determined from the position of the vehicles after impact along with other factors, but the location of the vehicles after impact as far as measurements were concerned was never introduced into evidence (R. 70-71). His calculations were, therefore, not based on facts in evidence (R. 71).

Using the figures given him, however, he placed the vehicles as coming into the intersection at a time interval of .15 seconds apart or eight feet. The accuracy of this finding was quite questionable, and the jury would certainly have been justified in coming to some other conclusion. They could have found actually that the defendant entered the intersection slightly ahead of the plaintiff.

Whatever their finding may have been on right-of-way it is clear that they found him guilty of negligence for failure to keep a proper lookout.

CONCLUSION

The verdict of the jury is clearly sustained by the evidence, and the court properly submitted the case to the jury. The judgment of the court should, therefore, be affirmed.

Respectfully submitted,

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