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Maartin W. Keller and Joan Keller v. Maxine P Atrakis : Appellants' Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

MAARTIN W. KELLER and JOAN KELLER,

Plaintiffs and Appellants,

vs.

MAXINE PATRAKIS,

Defendant and Respondent.

Case No. 11834

APPELLANTS' BRIEF

Appeal From the Judgment of the Third Judicial District Court, Salt Lake County
Honorable Marcellus K. Snow, District Judge

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NATURE OF THE CASE

This is an action by plaintiffs against the defendant for damages as a result of personal injuries and property damage sustained by the plaintiffs as a result of an automobile accident.

DISPOSITION IN THE LOWER COURT

The trial of the instant case was held on the 18th and 19th days of June, 1969, in the District Court of Salt Lake County before the Honorable Marcellus K. Snow, with a jury. On June 19, 1969, the jury returned a verdict in favor of defendant and against the plaintiffs for no

cause af action. Subsequently, the plaintiffs made a motion for a new trial, which motion was denied on August 18, 1969.

RELIEF SOUGHT ON APPEAL

The plaintiffs seek to have the order of the lower court denying plaintiffs' motion for a new trial reversed.

STATEMENT OF FACTS

This action arises out of an automobile accident which occurred on October 28, 1967, at approximately 1:00 p.m. near the intersection of 21st East and Sunnyside Avenue in Salt Lake City, Utah. (R. 105, 107) The accident occurred when the automobile owned and being driven by plaintiff Maartin W. Keller and in which his wife, plaintiff Joan Keller, was riding as a passenger was southbound on 2100 East and had stopped in the center lane of a three lane highway for a red light at the intersection with Sunnyside Avenue and was struck from the rear by an automobile being driven by the defendant Maxine Patrakis which was also southbound on 2100 East in the center lane of traffic. (R. 107)

On the day of the accident, it was raining moderately and the roadways were wet. (R. 106) The defendant Maxine Patrakis was eighteen years of age at the time of the accident and was driving her father's 1967 Chevrolet automobile which had been purchased new approximately three months prior to the collision. Prior to the accident, Miss Patrakis had driven the car for approxi-

mately two hours in the rain and had noticed that the brakes on the automobile would squeak and grab. (R. 115)

The approach to the intersection of 2100 East and Sunnyside Avenue is unobstructed for several hundred feet as is shown in photographs of the scene. (Ex. P-1) Also defendant concedes that she could probably see the intersection from further back than one hundred fifty feet. (R. 114)

Upon approaching the intersection of 2100 East and Sunnyside Avenue, the defendant testified she observed the semaphore light being red approximately one hundred fifty to two hundred feet prior to the intersection, and at this time, she was travelling at approximately twenty-five to thirty miles per hour. (R. 107) At a point somewhat closer to the intersection which she estimates to be seventy-five feet, she applied her brakes hard. (R. 112)

The defendant claims that the brakes failed to give her any reaction (R. 108); however, she concedes that she had slowed to approximately five miles per hour at the time of the impact. (R. 108) Also, she knew that the water might have some effect on the brakes and that they had squeaked and grabbed on the day of the accident because of moisture on them. (R. 115, 116)

Following the accident, the brakes were apparently in perfect condition, and the car was driven home by the defendant who exhibited no concern for their failure. (R. 118, 119) Also the defendant's father had the brakes

on the automobile checked by a mechanic shortly following the accident, and they were found to be functioning properly. (R. 130, 132)

ARGUMENT

THE TRIAL COURT ERRED IN GIVING THE "BRAKE FAILURE" INSTRUCTION AND IN FAILING TO GRANT PLAINTIFFS' MOTION FOR A NEW TRIAL.

The plaintiffs' basic contention in support of their motion for a new trial was that the court erred in giving Instruction No. 9 which was requested by the defendant and which is as follows:

> "An automobile driver who has no notice of *faulty brakes* and could not discover the *defect* through the exercise of reasonable care is not responsible for any damage caused by *brake failure.*
>
> If the driver knows or should know of such a *defect,* however, and takes no precautionary measures, he is liable for the consequence." (R. 36) (Emphasis added)

The plaintiffs made a timely exception to this instruction. (R. 123, 125)

It is clear that there was no evidence of any "brake failure" and to allow Instruction No. 9 relating to brake failure to be given to the jury gives the defendant an added advantage not warranted by the evidence and is extremely prejudicial to the plaintiffs. The facts of the accident indicate that the defendant simply failed to adequately allow for the increased stopping distance re-

quired on a wet road and in driving a car which had previously given some indication of having moisture on the brakes which had affected their reaction. The defendant concedes that she was aware that moisture on the brakes would affect their reaction, and her testimony is as follows:

> "Question: Now, had you had any difficulty prior to that time with the brakes on your vehicle, the day I'm talking about?
>
> Answer: Well, as I started out in the morning and as I progressed doing my errands, the brakes would squeak and they would somewhat grab when I applied them. (R. 109)
>
> * * * * *
>
> Question: Didn't you conclude from that that the water might be having some effect on the brakes?
>
> Answer: Yes.
>
> Question: And on this occasion when you applied them you said they squeaked again?
>
> Answer: Pardon me.
>
> Question: Oh, this accident happened as it was happening you said the brakes squealed when you put them on but didn't stop you?
>
> Answer: This is correct." (R. 116)

Following the accident, the defendant drove the automobile two or three miles to her home, and her father had the brakes on the automobile tested by a mechanic who found them to be functioning properly.

The plaintiffs do not dispute that the statement of the law set forth in Instruction No. 9 is correct and this is set forth in the case of *White v. Piney,* 99 Utah 484,

108 P.2d 249. However, there must be *some* evidence of a defective condition in the brakes in order for such an instruction to be given, and to give the same to a jury where no evidence supporting a defective condition is introduced is clearly prejudicial. For cases setting forth the rule that there must be some evidence to support a theory of the case before an instruction concerning the same is warranted, see *Webb v. Snow,* 102 Utah 435, 132 P.2d 114, and *Hall v. Blackham,* 18 Utah 2d 164, 417 P.2d 664.

The Supreme Court of the State of Washington, when presented with the issue involved in the instant case, ruled that it was improper to give a "brake failure" instruction where there was no evidence of a brake failure. In the case of *Woods v. Goodsen,* 55 Wash.2d 687, 349 P.2d, the defendant driver stated that she applied the brake pedal but the brakes failed to respond, and she struck a truck which, in turn, struck the plaintiff who was a pedestrian. The defendant claimed a brake failure defense, and the court gave two "brake failure" instructions which were substantially the same as Instruction Nos. 9 and 10 given by the court in the instant case. Expert witnesses were called who testified that the brakes were in proper operating condition when the accident occurred, and no evidence of a brake failure was introduced. The experts further testified that in their opinion, the alleged "brake failure" was due to the fact that the motor was not running when the defendant attempted to stop her automobile thus rendering it more difficult to stop the automobile which was equipped with

power brakes. In holding that it was prejudicial error to give the "brake failure" instructions, the Supreme Court of Washington stated in part as follows:

> "The respondent was charged with knowledge that, when the motor was not running the brakes would not function. * * * An automobile can be a dangerous instrumentality. The driver thereof is, therefore, charged with knowledge of its operational limitations.
>
> * * * * *
>
> * * The giving of instructions Nos. 18 and 19 was not merited by the evidence. The instructions were prejudicial because thereby the jury were permitted to exculpate the respondent from liability, if they found she did not know that which she is charged in law with knowing." (349 P.2d at p. 734)

Other cases supporting the rule set forth in the *Woods* case are *City of Miami v. Fletcher,* 167 S.2d 638 (Fla., 1964), where the court held that a "brake failure" instruction was properly not given where the driver knew of trouble with the brakes; *Hammonds v. Mansfield,* 296 S.W. 2d 652 (Tenn.); and *Savage v. Blancett,* 198 N.E. 2d 120 (Ill., 1964).

The law is clear the one who voluntarily operates a motor vehicle on the public highways undertakes an adult activity and the responsibilities which accompany the same and is bound to be aware of certain basic facts of physical science such as the fact that the stopping distance will increase on a wet roadway and when the brakes on the automobile are wet. The defendant was eighteen years of age at the time of the accident; however, the

standard of care is the same for any driver regardless of age, sex, experience or mental or physical ability. See *Biddle v. Mozzocco,* 204 Ore. 547, 248 P.2d 364. Also see *Jackson v. Wilhelm,* 102 P.2d 731, 106 Colo. 140, where the court held that the degree of care to be exercised by a driver increases when operating a motor vehicle on an icy roadway.

The defendant does not claim that the brakes on her automobile were defective, and, in fact, introduced evidence through her father which indicates that the car was checked by a garage shortly following the accident, and the brakes were found to be in perfect working order. (R. 130)

To allow the "brake failure" instruction to be given is tantamount to giving an "unavoidable accident" instruction which is not warranted by the facts of the case and under applicable Utah law. In *Woodhouse v. Johnson,* 20 Utah 2d 210, 436 P.2d 442, the Supreme Court of the State of Utah stated in relation to an "unavoidable accident" instruction that:

> "Such an instruction should be given with caution and only where the evidence would justify it." (20 Utah 2d at p. 13)

The following excerpt from the dissent by Justice Ellett in the *Woodhouse* case accurately sets forth the dilemma in which the plaintiff is placed by the giving of an instruction such as the "brake failure" instruction in the instant case where there was absolutely no evidence of any defect in the braking system:

> " * * * Such an instruction gives the defense counsel two arrows for his bow. He can discuss the evidence on all phases of the case regarding lack of evidence on the part of the defendant, then he can draw another arrow from his legal quiver and begin to talk about unavoidable accidents as if that were something apart from negligence. * * * It compels the plaintiff to assume the double burden of convincing the jury, first that defendant was negligent and second that there was no unavoidable accident. * * *
>
> If the jury finds no negligence on the part of the defendant, then there is no need for the instruction in the first place."

In the instant case, the issue was clearly whether or not the defendant was negligent in operating her automobile under the facts and circumstances present at the time of the collision and to allow a "brake failure" instruction to be given was prejudicial to the plaintiffs. The facts and circumstances existing at the time of the accident were that the road was wet and that the water had caused the brakes of the defendant's automobile to squeak and grab, and that the wet road coupled with the wet brakes of the automobile materially affected its stopping distance.

In order for an "unavoidable accident" instruction or a "brake failure" instruction to be given, there must be some evidence to support the same such as in the case of *Porter v. Price,* 11 Utah 2d 80, 355 P.2d 66. In that case, the defendant was seized with a severe insulin reaction which caused him to lose control of his automobile and strike the plaintiff. The court held that the un-

avoidable accident instruction was proper where the evidence indicated that the insulin reaction was sudden and could not have been foreseen and guarded against by the defendant. This is contrasted to the instant case where defendant had driven a car for over two hours prior to the collision and had observed that the brakes were becoming wet inasmuch as they had squeaked and grabbed.

A case similar to the instant case except for the "brake failure" instruction is *Holmes v. Nelson*, 7 Utah 2d 435, 326 P.2d 722, where a verdict of no cause of action was returned in favor of defendant who had struck a pedestrian. On appeal, the Court held that the granting of the motion for a new trial was proper based upon facts remarkably similar to those in the instant case as they relate to the distance from the point where the impact occurred to the point where the defendant was first aware of the need for a change in his course or speed of travel. In the *Holmes* case, the defendant testified that he observed the pedestrian about two hundred feet from the point of impact compared to one hundred fifty to two hundred feet in the instant case and at that time, removed his foot from the gas pedal as did the defendant in this case (R. 107, 108). In holding that the motion for a new trial was properly granted, the Court stated as follows:

> "We are of the opinion that this accident never should have happened; it was preventable. A careful review of the evidence leads us to the conclusion that the defendant either did not see this child when he said he did, or he was not going as slowly as he claims he was, or that he failed to

do everything reasonably possible to avoid striking the plaintiff by bringing his car to a stop as soon as possible or by turning to the right." (7 Utah 2d at p. 438)

CONCLUSION

In conclusion, it is respectfully submitted that the trial court erred in giving the "brake failure" instruction where there was no evidence that the brakes failed or that they were defective. The giving of such instruction was clearly prejudicial to the plaintiffs and was tantamount to giving an "unavoidable accident" instruction in a case where the facts did not warrant the same. The decision of the trial court denying plaintiffs' motion for a new trial should be reversed.

Respectfully submitted,

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