1970

Maartin W. Keller and Joan Keller v. Maxine P Atrakis : Respondent's 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

RESPONDENT'S BRIEF

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

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STATEMENT OF THE 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 of action. Subsequently, the plaintiffs made a motion for a new trial, which motion was denied on August 18, 1969.

RELIEF SOUGHT ON APPEAL

The respondent seeks to have the order of the court below denying plaintiff's motion for a new trial affirmed.

STATEMENT OF FACTS

Respondent agrees with the appellants' statement of the facts, but there are additional facts which were not set out in appellants' brief and which are pertinent to the issues.

The car driven by the defendant was a new car, having been purchased in July of 1967 (R. 105), and was driven only around town for the three-month period up to the time of the accident (R. 129).

During the course of the morning's drive prior to the accident the brakes squeaked and grabbed somewhat, but they stopped the car (R. 109). The defendant thought that they must be getting moisture in them, but didn't give it a second thought because it was a new car (R. 115). The brakes had always functioned all right before, and although she thought the moisture might be having some effect on them, she did not know that the rain would affect the brakes so that they would fail in the manner that they did (R. 116).

Upon approaching the intersection when defendant saw plaintiffs' vehicle stopped at the semaphore, she let off on the accelerator and started to slow down. Miss Patrakis estimated that she had slowed down to 20 miles per hour when she was about 150

feet from the intersection (R. 108). She applied her brakes lightly at first, and when she felt she was close enough, at about 75 feet from the plaintiff's car, she applied them harder. She was surprised and stunned when the brakes did not work, and attempted to apply the foot emergency brake in order to avoid hitting the plaintiffs' car (R. 112).

In her conversation with the investigating officer the defendant told him about the brakes, how they squeaked and failed to work (R. 111), and Mr. Keller also testified he heard her tell the officer the brakes didn't work.

After the officer had completed his investigation he had the defendant pump the brakes on her vehicle, and then allowed her to drive home. The defendant testified that she did not think the officer would have let her drive if there had been any question about the safety of her doing so (R. 118).

On the Monday following the accident Mr. Patrakis took the car to a mechanic, where the brakes were checked and found to be all right (R. 130).

ARGUMENT

THE "BRAKE FAILURE" INSTRUCTIONS WERE A CORRECT STATEMENT OF THE LAW AND WERE WARRANTED BY THE EVIDENCE; THEREFORE, THE TRIAL COURT PROPERLY DENIED PLAINTIFFS' MOTION FOR A NEW TRIAL.

After the evidence was in, the trial judge gave the following jury instructions:

INSTRUCTION NO. 9

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 a driver knows or should know of such a defect; however, and takes no precautionary measures, he is liable for the consequences.

INSTRUCTION NO. 10

You are instructed that in this case defendant claims a defense of faulty brakes. The defendant has the burden of proving that the brakes were, in fact, faulty, that defendant had no notice of the fact that they were faulty or could not have reasonably anticipated that the brakes would or might not be effective in slowing or stopping her vehicle under all of the circumstances and conditions which then and there existed.

The statement of the law set forth in Instructions 9 and 10 is correct, and this is established in the case of *White vs. Pinney*, 99 Ut. 484, 108 P.2d 249 (1940).

Appellant has conceded that the instructions are a correct statement of the law, but is arguing that there was no evidence to support a theory of the case which would warrant the instructions. More specifically, appellant contends that there must be *some* evidence of a defective condition in the brakes in order for the "brake failure" instructions to be given, and

asserts that defendant introduced *no* evidence supporting a defective condition.

Respondent submits that the instructions were properly given, as there was sufficient evidence to support the defendant's theory of the case. The defense was based on a sudden brake failure caused by wet brake linings. The defendant was alone in the car; therefore, the defense offered the *only evidence available* to support its theory of the case, the sworn testimony of the defendant:

> Q. What happened when you applied your brakes?
>
> A. Well, as you know, the way people usually drive, I slowed down. I let off the accelerator. I went to step on the brakes, first slightly, in order just to slow me down and I got no reaction. I stepped on them harder, and there was still nothing there. And I believe I was just surprised, kind of stunned that they weren't taking. And from there I leaned forward and with my left foot I tried stepping on the emergency brake, and there just — there wasn't time. (R. 108).

It is evident that the jury believed the defendant's testimony regarding the sudden brake failure, and in view of Instruction No. 10, the jury determined that Miss Patrakis could not have reasonably anticipated that the brakes would fail under those circumstances. Although the defendant testified that the brakes had squeaked and somewhat grabbed while she was running her errands prior to the acci-

dent, this was no indication that her brakes would fail as they did. It was a question for the jury whether she was put on notice that her brakes would fail. The evidence was clear that the defendant applied her brakes soon enough to have stopped in time even in the rain. She testified that she applied the brakes lightly at about 150 feet and harder at 75 feet with her vehicle going about 20 miles per hour at the time.

Appellant points out the fact that the brakes were checked by a garage on the Monday following the accident and found to be in perfect working order, and infers that this is evidence that the brakes were not defective at the time of the accident. It is common knowledge that wet brake linings will dry out. The witnesses testified that they were at the scene of the accident for 45 minutes to an hour (R. 111) and during this period the brakes would have an opportunity to dry out. The investigating officer had Miss Patrakis pump the brakes and then allowed her to drive home; therefore, the officer was aware of the fact that wet brakes will dry out. In any event, the brakes would be dry by the Monday following the accident when they were inspected by the mechanic. The only available evidence to show whether the brakes were defective at the time of the accident was the testimony of the defendant. This evidence was offered by the defense, and it was believed by the jury. The only way one could probably get additional proof that wet brakes caused the accident would be if a service station or garage were immediately adjacent to the scene

of the accident and the car was taken in for an immediate inspection.

Appellant has cited the case of *Woods vs. Goodsen*, 55 Wash. 2d 687, 349 P. 2d 731 (1960) as authority for the proposition that "brake failure" instructions are improper in any case other than failure due to defective design or construction. The *Woods* case involved a brake "failure" due to the fact that the motor was not running when the defendant applied the power brakes. The court charged the defendant with knowledge that, when the motor was not running, the brakes would not function.

In holding that it was prejudicial error to give the "brake failure" instructions under that fact situation, the court ruled that a driver has a duty to be sufficiently informed as to the operation and mechanism of her automobile.

> 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 734.

The *Woods* case is clearly distinguishable on its facts. While the driver of an automobile may be charged with the knowledge that the power brakes on her car will not function when the motor is not running, this is a far different matter than the extent the braking efficiency of a new car might be affected by rainy weather.

Instruction No. 10 placed the burden of proof

upon the defendant to show that she "could not have reasonably anticipated that the brakes would or might not be effective in slowing or stopping her vehicle under all of the circumstances and conditions which then and there existed." This was a heavy burden of proof, yet after all the evidence was in, the jury was satisfied that Miss Patrakis could not have reasonably anticipated her brakes would fail as they did.

The question was properly submitted to the jury. As stated in 10 A Blashfield Automobiles 481, the general rule applicable to the case at hand is as follows:

> Under proper allegations, the question of defendant's negligence in regard to the condition and operating of brakes should generally be submitted to the jury.

In *Parker vs. Bridgeport Mach. Co.*, 91 S. W. 2d 807 (Tex. Civ. App., 1936), one of the questions was whether the defendant was negligent in driving his car while the brakes were frozen. The court considered the possible argument that it was inconsistent for the jury to find that the defendant was not negligent on any of the grounds alleged in the plaintiff's petition, and also to find that the accident was unavoidable. The jury had found that the brakes were frozen, yet still brought in a finding of unavoidable accident. The court did not feel that these findings were inconsistent.

> . . . notwithstanding the fact that in the

> stress of weather which overtook the driver of defendant's car as he traveled along the roadway and shortly before he reached the place of the collision the brakes on his car became frozen or partially frozen so as to prevent his stopping his car quickly, the jury was justified in finding that he was not negligent under all of the circumstances disclosed by the record in proceeding across the intersection with his brakes in this condition. 91 S. W. 2d at 809.

Further support is found in *Amelsburg vs. Lunning*, 14 N. W. 2d 680 (Iowa, 1944), which was based on a fact situation very similar to the case at hand.

The plaintiff sought damages for personal injuries resulting from a collision at a road intersection. The evidence showed that the defendant had driven his car through slush and muddy water the day before the collision which, by reason of freezing weather, caused the brakes to freeze. On the day of the accident the defendant had driven only a short distance before he reached the intersection where the accident occurred, and had had no cause to use the brakes.

The court held that whether the defendant was negligent in failing to discover the condition of the brakes was a question for the jury, not a question of law for the court.

The court referred to the general rule as stated in 5 Am. Jur. 643, §252:

> . . . where the brakes of an automobile have previously functioned properly, but sud-

> denly fail to respond, their failure does not render the owner guilty of negligence . . . unless he had knowledge of the defective condition.

Respondent submits that the question whether Miss Patrakis was negligent in regard to the condition and operation of her brakes was a question for the jury. Furthermore, Instructions 9 and 10 advised the jury of the law applicable to the case; and, if anything, were favorable to the plaintiff in that they imposed a heavy burden of proof on the defendant.

Appellant contends that to allow the "brake failure" instructions to be given was tantamount to giving an "unavoidable accident" instruction which was not warranted by the facts of the case. If appellant's logic were followed to a conclusion, in every case in which the court instructs the jury that unless they find negligence, the defendant is not liable, one could say that the court has given the jury an instruction that is tantamount to an "unavoidable accident" instruction. In every case in which the defendant is not guilty of negligence the jury, in effect, makes a finding that it was unavoidable as to the defendant.

In any event, the "unavoidable accident" instruction which the Utah Supreme Court says should be given with caution and only where the evidence would justify it, was *not given* in this case. Thus the problem of duplicity was not present. The reason the "unavoidable accident" instruction has come under fire is that:

> It compels the plaintiff to assume the double burden of convincing the jury, first, that the defendant was negligent and, second, that there was no unavoidable accident. *Woodhouse vs. Johnson*, 20 Ut. 2d 210, 436 P. 2d 442, 453 (1968) (dissenting opinion)

Instructions 9 and 10 placed no such burden upon the plaintiff in this case. If anything, the defendant under the unusually heavy burden of proving that she could not have reasonably anticipated that her brakes might fail as they did. It is apparent that the defendant sustained her burden of proof to the satisfaction of the jury.

Appellant has cited *Woodhouse vs. Johnson*, 20 Ut. 2d 210, 436 P. 2d 442 (1968), and there is some pertinent language from the majority decision in that case.

> Ferreting the wheat from the chaff in the plethora of requests from the contesting parties and fashioning instructions covering all aspects of such a case in a manner fair to both sides poses such a problem for the trial judge that losing counsel can usually point to some claimed error to use as a basis for argument that the jury must have been misguided because he did not win.
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> * * *
>
> This court has many times given expression to the importance of safeguarding the right of trial by jury and the solidarity that should be accorded a verdict after the parties have been given a fair trial. Even-handed justice requires that this apply to all alike: To de-

fendant, as well as to plaintiffs. 436 P. 2d at 446

CONCLUSION

Respondent submits that the instructions were as favorable for plaintiffs as could be expected in connection with setting out the law and the duties of a driver with respect to brakes; that there was sufficient evidence to support the contention that the defendant's brakes were defective at the time of the accident; that the question whether defendant was negligent was properly submitted to the jury; and, therefore, the decision of the trial court denying plaintiffs' motion for a new trial should be affirmed.

Respectfully submitted,

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Delivered (3) copies of the foregoing Brief to the office of Kipp and Christian this 19th day of May, 1970

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