1970

John Wagner, aka Jack A. Wagner v. Earl C. Olsen : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN WAGNER, aka JACK A. WAGNER,
Plaintiff and Appellant,

vs.

EARL C. OLSEN,
Defendant and Respondent.

Case No. 12094

RESPONDENT'S BRIEF

Appeal From the Judgment of the Second District Court For Davis County
The Honorable Thornley K. Swan, Judge

WORSLEY, SNOW & CHRISTENSEN AND
HAROLD G. CHRISTENSEN
7th Floor, Continental Bank Bldg.
Salt Lake City, Utah 84101
Attorneys for Respondent

BEAN, BEAN & SMEDLEY
190 South Fort Lane
Layton, Utah 84041
Attorney for Appellant

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NATURE OF THE CASE

This is a suit for the alleged wrongful death of a 3 year old child.

DISPOSITION IN LOWER COURT

The case was tried to a jury in May of 1967. The jury returned a verdict in favor of Respondent Olsen.

RELIEF SOUGHT ON APPEAL

Olsen seeks affirmance of the lower court decision in his favor.

STATEMENT OF FACTS

Olsen does not agree with Appellant Wagner's statement of the facts. It does not state those facts most favorable to the verdict. We suggest, instead, the following:

On November 1, 1964, at approximately 7:00 p.m., Wagner driving his automobile, accompanied by his 3 year old son, saw an automobile behind him go out of control and turn over (T. 104). He continued some distance down the road, then made a U-turn and returned to the scene of the accident (T. 194).

He parked his car on the side of the road but extending two feet on the traveled portion of the highway (T. 113; T.S. 23). A highway patrolman and several other people were already on the scene. Nevertheless, Wagner left his 3 year old son alone in the car and went to the scene of the accident.

Even though there were no serious injuries (T. 118-19) and Wagner's assistance was not required (T. 113) he remained at the scene of the accident for over a quarter of an hour, leaving his son alone in the car (T. 134).

Later, Wagner, still at the scene of the accident, heard the sound of brakes. Having a premonition that his son might somehow be involved, he hurried back only to find that his son had been struck by a passing car (T. 119).

Olsen, whose car had struck the boy, had been proceeding the same direction as the parked car at well

below the 40 mile per hour speed limit (T. 20-21, 41). As Olsen was passing the parked car, the boy darted onto the highway from in front of the parked car. Olsen's car was then only 5 feet away (T. 22). The accident was unavoidable.

ARGUMENT

POINT I

THE INSTRUCTIONS ON CONTRIBUTORY NEGLIGENCE WERE PROPER.

The jury was instructed on contributory negligence in three instructions: 16, 22 and 27.

In Instruction No. 16 the jury was given a standard definition of contributory negligence.

In Instruction No. 22 the jury was told that vehicular traffic had the right of way over pedestrians at the place where the accident occurred and that they could consider this in judging the reasonableness of the conduct of the plaintiff in leaving his son alone in a car at that place.

In Instruction No. 27 the jury was told that the plaintiff had a duty to use reasonable care under the circumstances in the supervision of his son and that failure to do so would bar a recovery by him.

Plaintiff Wagner complains of Instruction No. 16 upon the ground that there was no negligence on the part of the plaintiff upon which to base the instruction. He

is saying, in other words, that the issue of contributory negligence should not have been submitted to the jury.

There was more than enough evidence to justify submission of the issue of contributory negligence. Wagner left his 3 year old child alone in an automobile parked partially on the traveled portion of a main highway (T. 113), in the dark of night (T. 113), to go to the scene of an accident where there were no serious injuries and a highway patrolman was already on the scene (T. 118, 119), without really knowing himself what his intent was in leaving his son alone (T.123).

He remained there for a quarter of an hour (T. 134) or longer knowing of the traffic conditions on this main traveled highway (T. 114), ignoring the reasonable expectation that the young boy would become frightened and leave the car in an attempt to find his father who he had seen cross the highway.

Wagner could have taken his son with him (T. 118), but instead, he parked his car where his son, if he left the car, would of necessity cross four lanes of traffic to find his father. This was done in spite of the fact that he could have pulled his car to a point where he could have observed and determined whether his assistance was needed without even leaving his car (T. 118). Safer and easily accessible parking spots were nearby (T. 112, 122). Wagner, himself, anticipated the danger because he admitted at trial having wondered at the time, before the accident, whether he should have left the boy alone in the car (T. 119).

The trial court did not err in submitting the issue of contributory negligence to the jury. It follows from this that the court did not err in giving its instruction No. 16 which was merely a definition of contributory negligence.

Plaintiff Wagner contends that the trial court erred in charging him with the duty of yielding the right of way to vehicular traffic when he was in no way involved in the accident. He misses the thrust of this instruction.

In Instruction No. 22, the jury was told:

> "A person in crossing the highway in the vicinity of this accident was required by law to yield the right of way to all vehicles on the roadway so near as to constitute an immediate hazard. *You may consider this only in connection with the conduct of the defendant and the plaintiff.*" (R. 23) (Emphasis added.)

This instruction bore upon the conduct of the defendant and of the conduct of the plaintiff in leaving his 3 year old son alone in a car parked at the side of a road in an area where vehicular traffic would be entitled to the right of way. This instruction did not bear upon the conduct of the plaintiff in crossing the road or in the conduct of plaintiff's son in crossing the road.

If there was any chance that the jury would apply this instruction to the minor child, the court anticipated that possibility and avoided it by the insertion of the last sentence. The jury could not more clearly have been made aware of the inapplicability of instruction No. 22 to the child.

It is basic to our jurisprudence and jury system that the jury is presumed to have followed the instructions given them.

In the recent case of *State v. Higgins,* 449 P.2d 393 (Wash. 1969) the Washington Supreme Court was called upon to rule whether the submission of a special interrogatory to the jury had the effect of inviting the jury to avoid the instructions and in effect allow double recovery. The Washington Supreme Court rejected appellant's contention, stating: "There is nothing in the language of the instruction given which implies such an invitation, and *we cannot presume that the jury misunderstands the plain language of an instruction.*" *Id.* at 397. (Emphasis added.)

In *Williams v. Ogden Union Railway and Depot Co.,* 119 Utah 529, 230 P.2d 315, 322 (1951) this court said:

> "The instructions may not in all regards be models of clarity, they may not present the legal principles in the best manner, and the sequence in which they are given may have a tendency to make them difficult to follow. However, the jurors were directed to consider them together and *we must assume they followed this direction.*" (Emphasis added.)

No complaint is made of Instruction No. 27 which defined plaintiff Wagner's duty for the care and supervision of his son in accordance with *Alvarez v. Paulus,* 8 Utah 2d 283, 333 P. 2d 633 (1959).

Indeed, no objection was made at the trial to Instruction No. 16 or Instruction No. 22. The only exceptions taken were with respect to Instructions Nos. 20, 25 and 30 (T. 145-46).

Plaintiff Wagner asserts error with respect to Instructions Nos. 16 and 22 in this appeal for the first time contrary to the provisions of Rule 51 which provides that a party may not assign as error the giving of an instruction unless he objects thereto, and the established law of this state as set forth in *McCall v. Kendrick,* 2 Utah 2d 364, 274 P.2d 962 (1954) and *Employers Mut. Liability Ins. Co. v. Allen Oil Co.* 123 Utah 253, 258 P.2d 445 (1953) and numerous other decisions.

POINT II

AN INSTRUCTION ON WILLFUL AND WANTON MISCONDUCT WOULD HAVE BEEN IMPROPER.

Plaintiff Wagner argues that the trial court should have instructed the jury that the defense of contributory negligence would not bar plaintiff's recovery if the jury found defendant's conduct to be "willful and wanton." The authorities cited by appellant which he alleges would support a finding of willful and wanton misconduct on the part of this defendant are clearly distinguishable from the facts of this case.

In the 1894 case cited by Wagner, *Esrey v. Southern Pacific Company,* 103 Cal. 541, 37 P.500, the plaintiff was injured when struck by an extra-wide railroad boxcar

while she was standing between the track and the railroad platform. The court stated "[T]here is no question but that the two brakemen, and possibly the engineer and fireman, saw her standing in this position."

In *Harrington v. Los Angeles Ry. Co.,* 140 Cal. 514, 74 P. 15 (1903), cited by appellant, the deceased plaintiff, a participant in a bicycle race, cut in front of an electric street car and was hit. Here again, however, the driver of the street car knew beforehand that the street car would cut across the path of the bicycle riders and he had been warned by "numerous bystanders" that the racers were coming. Some people had even stood in front of the street car in an attempt to get the motorman to slow down though he continued on and forced these people from the track. As the court stated at p.17 "[A]fter such discovery [of the bicycle riders] he could easily have stopped his car before it reached the path along which the bicyclists were proceeding, and thus have insured absolute safety to the riders . . . "

In *Donnelly v. Southern Pacific Company,* 18 Cal. 2d 863, 118 P.2d 465 (1941), the court refused to find willful and wanton misconduct where a railroad switchman had erroneously thrown a switch the wrong way thus causing the collision of two trains. The court pointed out that "a negligent person has no desire to cause the harm that results from his carelessness. And he must be distinguished from a person guilty from a person guilty from willful misconduct, such as assault and battery, who intends to cause harm." *Id.* at 468.

In *Falls v. Mortensen,* 207 Ore. 130, 295 P.2d 182 (1956) the defendant was operating his automobile within the city of Portland at speeds between 45 and 55 miles per hour. The defendant had testified he saw the plaintiff in the intersection, and the plaintiff was struck by defendant's car while it was "straddling the yellow line." *Id.* at 191.

In *Williams v. Carr,* 68 Cal. Rptr. 305, 440 P.2d 505 (1968), the defendant had gone to work at 5:30 in the morning, had worked all day and then went drinking with a group of friends until the early hours of the morning. At the time of the accident he had been awake for 22 hours. He continued to drive even though he was admittedly physically fatigued and had stopped the car shortly before to help awaken himself. He made no attempt to awaken any of the other passengers in the car and find someone less fatigued to drive.

In *Ferguson v. Jongsma,* 10 Utah 2d 179, 350 P.2d 404 (1960), the plaintiff was attempting to arrest the defendants when they intentionally drove their car towards him and drug him some 200 feet while he was dangling from the car door with his hands and arms hanging through the shattered glass. Additionally, the plaintiff had continually begged the defendant to stop the car and the defendant had told him "to go to . . ." and continued on until the car went out of control and struck a power pole.

None of the elements found in the above cases cited by plaintiff Wagner are found in our case.

Olsen did not see the Wagner boy previous to the boy darting into his path; Olsen had no way of knowing beforehand the boy would jump out; Olsen was not driving beyond the speed limit.

Olsen's conduct was not willful and wanton and plaintiff Wagner made no effort to so convince the court and jury. The boy leaped into the path of the car when, according to the most favorable evidence, there were but five feet between himself and the car. No choice was available to Olsen. His striking the boy was completely unavoidable.

Plaintiff Wagner's own authority of *Williams v. Carr,* 68 Cal. Rptr. 305, 440 P.2d 505 (1958) shows that the conduct of the defendant could not be classified as willful or wanton:

> "[W]illful misconduct implies the intentional doing of something either with knowledge, express or implied, that serious injury is a probable, as distinguished from a possible result, or the intentional doing of an act with a wanton or reckless regard of its consequences." *Id.* at 509.

In any event the Complaint was based upon ordinary negligence, not willful, wanton misconduct (R. 1). At pretrial no mention was made about proceeding on a theory of willful, wanton misconduct.

At trial nothing was said about willful, wanton misconduct. No objection was made to the trial court's failure to so instruct the jury. No request was made to so

instruct the jury. No mention of this was made in the Motion for New Trial (R. 39).

Matters neither raised in the pleadings nor put in issue at the trial can be considered for the first time on appeal. *Estate of Ekker,* 19 Utah 2d 414, 432 P.2d 45 (1967).

A party who by his own pleadings, evidence and requested instructions tries and rests his case upon a certain theory is bound by that theory which then becomes the law of the case and cannot upon appeal shift to another theory or position. *Pettingill v. Perkins,* 2 Utah 2d 266, 272 P.2d 185 (1954).

POINT III

THE COURT PROPERLY GAVE INSTRUCTION NO. 20 ON UNAVOIDABLE ACCIDENT.

Plaintiff alleges reversible error because the trial court gave an unavoidable accident instruction which "was not supported by any evidence including defendant's expert." (Appellant's Brief at 11.)

A survey of the cases where an unavoidable accident instruction was given reveals a criteria to determine whether such an instruction is proper:

Where the parties to the action are the only persons whose conduct is involved in the case, the matter can usually be resolved solely by reference to the conduct of

those parties. However, where the accident occurs due to the intervention of an irresponsible third party or force, the instruction is proper.

In this case the instruction was proper because the conduct of the child could reasonably have been found to have been the cause of the accident, even though not negligence due to his age. If so, it was unavoidable from the standpoint of the parties to the suit.

Wagner claims on this appeal there was no evidence that the accident was unavoidable.

However, at trial Olsen called three witnesses to establish such evidence: Captain Pitcher, as an accident reconstruction expert, and Mr. and Mrs. Garcia who were parked in their automobile near the plaintiff's automobile at the of the accident. The testimony of the Garcias was basically directed to the speed of the highway traffic prior to the accident and the length of time which they were parked behind plaintiff's automobile (about 15 minutes) before the accident occurred (T. 127-40).

Captain Pitcher, on the other hand, gave rather extensive testimony concerning the physical evidence at the accident scene. The sole point of his testimony was that the accident, from Olsen's position, was unavoidable. This, of course, was the thrust of Olsen's case (T.S. 41-58).

In *Woodhouse v. Johnson,* 20 Utah 2d 210, 436 P.2d 442 (1968), this court specifically rejected the contention

that the giving of an unavoidable accident instruction is reversible error. At most, an unavoidable accident instruction is repetitious of instructions which point out that defendant's negligence must be the proximate cause of the accident before he can be found liable.

In this case, however, the unavoidable instruction was not repetitious. It was the sole instruction given which stated affirmatively the defendant's case as presented through its expert witness.

To say that unavoidable accident instruction was repetitious of other "no causation" instructions, and thus confusing to the jury in this case, is unrealistic. In this case Wagner alleged negligence on the part of Olsen in at least four different ways. We do not believe that this case could have been fairly presented to the jury in light of plaintiff's specific affirmative allegations of negligence simply by instructions which speak abstractly of proximate cause.

The unavoidable accident instruction was supported by the evidence and the testimony of defendant's chief witness. It was the only instruction which affirmatively stated the defendant's theory of the case. Olsen was entitled to have his theory presented by the instructions. *Startin v. Madsen,* 120 Utah 631, 237 P.2d 834, 836 (1951).

POINT IV

THE TESTIMONY OF DEFENDANT'S ACCIDENT RECONSTRUCTION EXPERT WAS PROPER.

Plaintiff Wagner claims that Captain Pitcher was allowed to give opinion testimony on facts which he had assumed and which were otherwise not in evidence. The record clearly shows this claim to be without foundation.

The hypothetical question of which Wagner complains involved the following facts (T.S. 47):

1. A child of approximately age 4 (3 years, 9 months) ran a distance of 24 feet across a blacktop highway.

2. The path of the child was directly across the highway.

3. An automobile was proceeding in a generally north direction along the roadway in the inside lane of traffic.

4. The automobile left 40 feet of skid marks before striking the child.

5. The automobile was traveling at 39 miles per hour before the brakes were applied.

6. The driver in the automobile had a normal reaction time.

Specifically, appellant alleges that there was no evidence as to the path of the child (No. 2), the length of the skid marks before impact (No. 4), the reaction time

of a normal drive (No. 6), or the exact point of impact. (Appellant's brief at 13).

All of the facts listed above were in evidence, however. Plaintiff's own witness, Officer LaMar T. Chard, testified as to the correctness of fact No. 1 - the 24 feet (TS. 28). The defendant, on plaintiff's own cross-examination, testified as to fact No. 2—the direct path of the child (T. 39). Fact No. 3 was undisputed. The length of the skid marks before impact, fact No. 4, was again acknowledged by plaintiff's own witness, Officer Chard (TS. 33). The point of impact as being directly across from plaintiff's own automobile was testified to by the defendant (T. 28). Fact No. 5, the speed of defendant's automobile, was also testified to by Officer Chard (TS. 8).

Fact No. 6, the normal reaction time of the average individual, was offered into evidence by the expert witness himself in response to a question by defense counsel (TS. 49). It was not offered as the reaction time of Olsen. Plaintiff made no objection to defendant's witness offering in evidence the reaction time of the average person (TS. 49). It was proper for Capt. Pitcher to offer this evidence. "An expert or skilled witness can give an opinion upon facts previously testified to by him . . . " *Day v. Lorenzo Smith and Son, Inc.*, 17 Utah 2d 221, 408 P.2d 186, 189 (1965).

The hypothetical question asked Captain Pitcher was based upon facts in evidence and was relevant to the issue of causation.

POINT V

THE TRIAL COURT PROPERLY LIMITED CROSS-EXAMINATION OF DEFENDANT'S EXPERT WITNESS.

Plaintiff Wagner claims as his final point that the trial court committed reversible error when it limited his cross-examination of Captain Pitcher. As previously explained, the sole purpose of his testimony was to show that *any man* placed in the position of Olsen would have unavoidably struck the Wagner youth. The testimony dealt with the average man.

On cross-examination plaintiff attempted to question defendant's witness with respect to an intoxicated person rather than the average sober man. The trial court properly refused to permit this as cross-examination.

The general rule is that cross-examination of a witness may not go beyond the testimony given in direct examination. This rule is somewhat liberalized with respect to cross-examination of experts. As stated in 32 C.J.S. *Evidence* §560(1):

> "Rules governing the cross-examination of witnesses generally apply, with such modifications as the character of the testimony makes necessary, to the cross-examination of skilled witnesses and experts."

We do not challenge the principle that an expert may be cross-examined to test his good faith, knowledge and credibility. *State v. Christensen,* 13 Utah 2d 224, 371 P.2d 552 (1962). However, the nature of plaintiff's

cross-examination did not go to the good faith, knowledge or credibility of the witness but was a new line of inquiry as if the expert were plaintiff's own witness.

The extent to which cross-examination of an expert can be limited is one of the many areas to which the trial court must be allowed to exercise its discretion. Because of the trial judge's unique position he must be allowed wide discretion with respect to limiting cross-examination. As the Kansas Supreme Court said in *Bott v. Wendler*, 203 Kan. 212, 453 P.2d 100, 113 (1969), concerning the cross-examination of an expert witness:

> "No rule can be laid down that would determine the extent and limitation of cross-examination allowable in every case. Generally speaking the matters must rest in the sound discretion of the judge trying the case."

Even if the trial court should not have limited cross-examination, this was not reversible error. Any testimony which Wagner desire to elicit could have been elicited by calling the witness as his own. It was specifically pointed out to counsel for plaintiff that he was free to call Captain Pitcher as his own witness (T. 57). Pursuing this, counsel obtained a short recess while he left the courtroom to confer with Captain Pitcher (T. 58). But after having been given the opportunity to call Captain Pitcher and confer with him counsel did not do so. Any evidence the Appellant alleged he was denied by virtue of the trial court's limiting his cross-examination was denied him by virtue of his failure to call the witness as his own.

And even now, we do not know whether the ruling was prejudicial. No offer of proof was made. Wagner should not be permitted to claim reversible error where no showing was made as to what Captain Pitcher's testimony would have been. An offer of proof is necessary to save on appeal a point relating to the exclusion of evidence. *Smith v. Seibly,* 72 Wash. 2d 16, 431 P.2d 719 (1967).

CONCLUSION

The accident which lead to the death of Michael Wagner was unavoidable. Both parties had every opportunity to fully develop their case and present their evidence. The jury was fairly and correctly instructed and the matter placed in their hands. Their verdict for the defendant, no cause of action, was supported by substantial evidence. Appellant has presented this court with nothing indicating the jury acted otherwise than honestly, without bias and in accordance with the instructions given them.

The jury verdict should be affirmed.

Respectfully submitted,

WORSLEY, SNOW &
CHRISTENSEN AND
HAROLD G. CHRISTENSEN
Attorneys for Respondent
7th Floor, Continental
Bank Bldg.
Salt Lake City, Utah 84101