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Lavar F. Reese and David Reese, By and Through His Guardian Adlitem, Lavar F. Reese v. George Proctor : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

LaVAR F. REESE and DAVID REESE, by and through his Guardian Ad Litem, LaVar F. Reese,

Plaintiffs and Respondents,

v.

GEORGE PROCTOR,

Defendant and Appellant.

Case No. 12572

BRIEF OF APPELLANT

Appeal from the judgment of the Third District Court for Salt Lake County
Honorable Aldon J. Anderson, Judge

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INDEX

CASES CITED

TEXTS CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

LaVAR F. REESE and DAVID REESE, by and through his Guardian Ad Litem, LaVar F. Reese,
Plaintiffs and Respondents,
v.
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Defendant and Appellant.

Case No. 12372

BRIEF OF APPELLANT

NATURE OF THE CASE

This is an action for personal injuries and property damage arising out of a collision between the plaintiff, David Reese, riding his bicycle and the defendant, George Proctor, driving his automobile.

DISPOSITION IN LOWER COURT

The case was tried to a jury. From a verdict and judgment for the plaintiffs the defendant appeals.

RELIEF SOUGHT ON APPEAL

The defendant seeks reversal of the judgment against him and a new trial.

STATEMENT OF FACTS

On September 5, 1969, at about 7:15 p.m. in the daylight, the plaintiff, David Reese, a 15 year old retarded boy, was riding his bicycle to a store in the Cottonwood Heights Shopping area to get some milk for his mother. David was familiar with the way. He rode his bicycle from his home on DeVille Drive through a stop sign and into the path of the defendant's vehicle — on David's right — traveling west on 7000 South Street (R. 191). In this area 7000 South Street is an arterial street running east and west; it is generally straight and level. The roadway is marked for one lane of traffic in each direction. DeVille Drive, out of which David Reese rode his bicycle, is a stop street that dead ends at 7000 South.

At the south edge of 7000 South there is drain gutter running east and west along the edge of 7000 South and abutting against the north end of DeVille Drive.

The posted speed on 7000 South Street was 40 miles per hour. Mr. Proctor, the defendant, was traveling west in the center of the westbound roadway at approximately 35 miles an hour (R. 200). This speed was confirmed by Officer Weldon Conger, the investigating officer (R. 184), and also Officer C. D. Throckmorton, plaintiff's expert witness (R. 354).

Mr. Proctor was coming from a grocery store a block away and was approximately 50 feet east of the crosswalk shown on Exhibit 1-P when he first observed David. David was then at the drain gutter at the south edge of

7000 Souh approximately 40 feet from the point where the impact eventually occurred. (R. 191-92). He was riding his bicycle at a constant speed at a slight angle off the perpendicular to 7000 South. The point of impact as deterimned by Officer Conger is marked by a circled X on Exhibit 1-P.

David's speed was estimated by Mr. Proctor at between 10 and 20 miles per hour (R. 194). His first assumption on seeing David was that David would turn left and use the traffic-free eastbound portion of 7000 South (R. 196). Upon seeing David he let up on the accelerator (R. 195). When Mr. Proctor first became aware David was intending to come on across the street he hit his brakes (R. 200). He described letting off the accelerator, glancing in the rear view mirror and hitting the brakes to be almost simultaneous (R. 217). Mr. Proctor further testified that even at the time he hit his brakes he still assumed David would turn left into the safe lane (R.196).

A neighbor and friend of the plaintiff's family, Mr. Gary Bywater, stated he saw David ride into the street and judged David's speed at 5 miles per hour (R. 224). Even though Mr. Bywater, was standing along the route taken by the defendant, he did not observe the defendant's vehicle before the collision or watch David to see if David would stop. Officer Conger fixed the point of impact as approximately 14 feet 2 inches south of the north curb of 7000 South and 19 feet 6 inches west of the prolongation of the east curb of DeVille Drive (R. 170). He found skid marks that were straight and level.

The defendant's car laid down approximately 31 feet of skid marks on the front wheels prior to the impact point (R. 173).

According to plaintiff's expert, Officer Throckmorton, at 35 miles an hour the defendant was traveling 51.2 feet per second (R. 362). Officer Throckmorton also calculated using reaction time of ¾ of a second that Mr. Proctor traveled 38 feet during the reaction time period (R. 364).

On Exhibit 1-P the plaintiff's counsel had Officer Throckmorton count back from the point of impact 1, 2, 3, 4 and 5 seconds and indicate the approximate point that David Reese would have been at each second before impact assuming David's speed to have been five miles per hour. The officer then indicated by red marks the approximate point that the defendant's automobile would have been at each second back assuming a speed of 35 m.p.h. before reaction or braking. Officer Throckmorton's calculations show that approximately 1 second before the impact David Reese was at the center line of 7000 South. The calculations then show at 2 seconds before impact David was toward the center of the eastbound roadway and that 3 seconds before impact he was well in the middle of the eastbound roadway. The calculations of Officer Throckmorton also show that Mr. Proctor had only 2.75 seconds at the most from the time he first saw David until the automobile reached the "point of escape."

Plaintiff's counsel requested and the court gave Instruction No. 32 which was the verbatim JIFU instruc-on last clear chance as regards inattentive plaintiffs.

In arguing the case to the jury, Plaintiff's counsel, using the testimony of Officer Throckmorton, the markings on Exhibit 1-P and the last clear chance instruction, argued that David Reese was in a position of danger when first observed some 5.75 seconds before the collision and that the defendant could have stopped twice in the distance involved. Counsel further argued to the jury, under the instruction given, that Mr. Proctor was 231 feet away 5 seconds before impact, 199 feet away 4 seconds before impact, 130 feet away 3 seconds before impact and that by the time David was out in the middle of the eastbound roadway Mr. Proctor had not even started to react to stop. He stated at 2 seconds before impact David was almost to the center line but that it would not have helped then because Mr. Proctor's automobile could not avoid the accident in 2 seconds or less (R.24).

Plaintiff's counsel argued that David was totally inattentive and the last clear chance doctrine applied because Mr. Proctor first saw David at the drain gutter and did not see David look in his direction until almost the moment of impact. As there were no obstructions David could have looked and seen Mr. Proctor before crossing the drain gutter. Because there was no traffic in the eastbound portion of the roadway Mr. Proctor assumed David would turn left using the eastbound portion of the roadway and not continue on across.

David had been trained to stop at stop signs (R 341-42). After the accident he admitted to his father he did not stop or look both ways before he rode into the street (R. 219).

ARGUMENT

THE GIVING OF INSTRUCTION NO. 32 ON LAST CLEAR CHANCE WAS PREJUDICIAL ERROR UNDER THE FACTS OF THIS CASE.

By virtue of a pretrial order plaintiffs were allowed to amend their original complaint to include the theory of last clear chance (R. 41).

The last clear chance doctrine was given at trial as Instruction No. 32 which is the same as JIFU instruction 17.20.

It is one of two JIFU instructions on last clear chance. It is for an inattentive plaintiff whereas JIFU instruction 17.21 is for a plaintiff in "helpless peril" — more commonly referred to as inextricable peril.

The facts clearly show that David Reese was not in a position of inextricable peril. Plaintiffs' case was founded in making David out to be an "inattentive plaintiff" — as the select on of JIFU 17.20 as opposed to 17.21 shows. The instruction states:

> Under certain circumstances a plaintiff is entitled to a verdict against a defendant even though the plaintiff be guilty of contributory

negligence. This rule of law that thus permits a negligent plaintiff to recover judgment is known as the doctrine of last clear chance. If you determine that David or LaVar Reese were in fact guilty of contributory negligence you should then consider whether or not the doctrine of last clear chance is applicable to this case. The doctrine is applicable only if you find from a preponderance of the evidence that each of the following six propositions is true:

1. That David Reese was in a position of danger.

2. That David Reese was, by reason of inattention or lack of proper alertness, totally unaware of the peril that threatened him.

3. That George Proctor actually saw David Reese and knew of his perilous position.

4. That George Proctor then realized or by the exercise of due care should have realized that David Reese was unaware of the danger to himself.

5. That at the time George Proctor saw David Reese and knew of the peril to him and realized or should have realized that David Reese was oblivious to the danger, he then had a clear opportunity to avoid the accident by the exercise of ordinary care and with his then existing ability. There must have been an actual opportunity existing at that moment for George Proctor to avoid the accident. Also, it must have been a fair, clear opportunity and not just a bare possibility of doing so.

6. That George Proctor then negligently failed to avail himself of that clear opportunity and as a proximate result the plaintiff, David Reese, was injured.

> If you find from a preponderance of the evidence that each of the above six propositions is true, the doctrine of last clear chance is applicable to this case, and David Reese and LaVar Reese are entitled to a verdict, even though you find both or either guilty of contributory negligence. If you find that any one of the above six propositions is not true, the doctrine of last clear chance has no application and cannot be invoked by David Reese.

One of this court's most recent discussions of the doctrine of last clear chance is *Donohue v. Rolando,* 16 Utah 2d 294, 400 P.2d 12 (1965). The *Donohue* case very clearly set forth basic principles for the application of the last clear chance doctrine. The doctrine is humanitarian; no person can justifiably injure another where he has a clear opportunity to avoid doing so.

> "The doctrine implies thought, appreciation, mental direction and lapse of sufficient time to effectually act upon the impulse to save another from injury." 400 P.2d at 15

The court in *Donohue* further explained the need to understand the defendant's knowledge and the state of plaintiff's condition.

It is first essential to determine whether plaintiff's negligence continues up to the moment of injury or whether such negligence has come to rest while leaving plaintiff in a perilous position from which he cannot extricate himself.

If plaintiff's negligence is continuous up to the moment of injury, the defendant, to be liable, must have

actual knowledge of the peril and a clear opportunity to avoid the harm.

If plaintiff's negligence has come to rest but left him in a position of extricable peril, defendant can be liable for injuries to plaintiff if defendant *should have* known of plaintiff's peril.

In applying these rules *Donohue* held that the last clear chance doctrine was not proper where the plaintiff could have, up to the moment of collision, turned his bicycle onto the safe portion of the road shoulder.

In the present matter it is undisputed that David Reese rode his bike through a stop sign onto a main arterial road and into the path of defendant's automobile. It is undisputed that David Reese could have easily seen defendant's car and avoided any injury by turning his bicycle into the traffic-free eastbound lane of traffic. Indeed, because he could have turned into the traffic-free eastbound lane on 7000 South, David was in no danger until he chose to continue into defendant's lane.

In *Laidlaw v. Barker,* 78 Idaho 67, 297 P.2d 287 (1956), an action was brought for the death of a 13 year old boy struck by an automobile in a 60 mile zone when he attempted to cross the highway without looking. The court held the doctrine of last clear chance to be inapplicable because visibility of the defendant's approaching automobile was unobstructed and the plaintiff had a clear chance to avoid the accident.

There is a presumption of law that one acts, or will act, out of the instinct for self-preservation, in a manner so as to avoid injury to himself. Mr. Proctor had every right to assume that David Reese would therefore keep his bicycle in the safe traffic lane and not pull in front of his car.

> "The defendant is entitled to assume that the plaintiff is paying or will pay reasonable attention to his surroundings . . ." *Van Wagoner v. Union Pacific,* 112 Utah 189, 186 P.2d 293, 302 (1947).

At trial plainiff called an expert accident reconstruction witness — Police Officer C. D. Throckmorton. Using David Reese's speed of 5 m.p.h. as testified to previously by Mr. Bywater (R. 224), Mr. Throckmorton marked Exhibit 1-P to show David's approximate posistion at each of five seconds prior to impact. See Exhibit 1-P.

It can be clearly seen from the exhibit that David was only one second from impact when he first entered into a dangerous situation — crossing into Mr. Reese's lane of traffic. Prior to the one second mark David was in no danger because he was in a traffic-free portion of the road. At the slow 5 m.p.h. speed emphasized by plaintiff's counsel David could have easily pulled into the safe portion of the road and out of Mr. Proctor's lane.

Three seconds prior to impact David had not even reached the midway portion of the safe eastbound lane. It is not uncommon for a driver to encounter automobiles,

pedestrians, or bicyclists pulling onto the highway and waiting for traffic to clear in the opposite lane before proceeding on across. See *Hickok v. Skinner,* 113 Utah 1, 190 P.2d 514 (1948).

A large portion of Officer Throckmorton's testimony was directed towards showing how many times defendant could have stopped from the moment David was first observed. This type of an argument is improper and misleading because the jury can be thus led to believe the defendant had a duty to stop prior to the moment the law declares his duty begins. It is crucial in a last clear chance case that defendant's duty continually be related to specific points in time and plaintiff's situation at each specific moment.

In *Berton v. Cochran,* 81 Cal. App. 2d 776, 185 P.2d 349 (1947), a boy on a bicycle emerged from a private driveway and was struck when he pulled into the path of a motorist. The court rejected plaintiff's argument for last clear chance based upon the number of times the defendant could have stopped from the moment he first saw the boy. It was emphasized that the legal inquiry must be to the moment when the emergency actually arose, and because the doctrine presupposes time for effective action it is not applicable where the emergency is so sudden that there is no time to avoid the collision.

Under any view of the facts Mr. Proctor only had mere seconds to react to David's situation. Clearly, when he first saw David there was no imminently dangerous situation. To allow Mr. Proctor a *clear last* chance to

avoid the accident consideration must be given to stopping distance, reaction time, and judgment time. It cannot be said that *the chance* Mr. Proctor may have had to avoid the accident was a clear chance or the last chance.

Many counts have held that the instruction on last clear chance should not be given in a case involving a collision of moving vehicles where the act creating the peril occurs practically simultaneously with the happening of the accident. See 2 *California Jury Instructions* 616 (1956) and cases cited thereat.

In this case there is no doubt but what David Reese could have avoided colliding with Mr. Proctor's car up to the very moment of impact. Because the bicycle was moving at a much slower rate of speed than defendant's automobile the bike could have been maneuvered more easily and quickly than the automobile. In such a situation the last clear chance doctrine should not be applied. Defendant respectfully suggests this court adopt the standard expressed in *Niday v. Tomasini,* 240 Ore. 589, 403 P.2d 704, 706 (1965):

> "Where, as in this case, each driver is in control of a vehicle which is moving and each driver has an opportunity to avoid colliding with the other, *it would be pure speculation as to who had the last clear chance to avoid the collision.*
>
> "One driver cannot say, 'We were both negligent in the control of our vehicles, but you alone are responsible because I drove to the point of collision before you did and you should have missed me.'
>
> "The rule of law is well settled in this state that concurrent negligence of a plaintiff contin-

uing up to the time of injury bars recovery under the doctrine of last clear chance." (Emphasis added.)

Defendant suggests that the only safe and equitable way to avoid giving the jury such a chance to speculate is to require the trial court to first determine there is *substantial* evidence of a last and clear chance to avoid injury; simply allowing the case before the jury on *some* evidence invites error.

The events leading to this accident occurred within a very few seconds. Three seconds prior to the moment of impact plaintiff was not even midway into the safe, traffic-free eastbound lane. He had plenty of time and space to avoid injury. At this same moment however Mr. Proctor was at the point of no escape — he could not have avoided striking David.

The most liberal view of the facts in favor of plaintiff would give Mr. Proctor only an additional 2.75 seconds prior to the point of escape. Each additional second however only put David in a much safer position less likely to cause any reasonable man to believe he would ignore a clear avenue of safety.

Even during these 2.75 seconds David was not in danger and therefore Mr. Proctor had no duty even under a last clear chance theory to immediately take evasive action.

Even assuming a duty, for the sake of argument, a period of time between zero and 2.75 seconds cannot

reasonably be said to constitute a *clear* chance for one to avoid the accident.

> ". . . evidence only permits one or two seconds for the train crew to have taken the necessary steps to have prevented the accident. This is not giving the defendant the last clear chance. The opportunity to avoid the accident must not be a possibility; it must be a clear opportunity." *Van Wagoner v. Union Pacific R. Co.*, 114 Utah 262, 186 P.2d 293, 302 (1948).

Giving any weight at all to the contrary evidence that David was going as fast as 10-20 m.p.h. reduces Mr. Proctor's 2.75 seconds to somewhere between a mere fraction of a second and 2.75. In any light this was too much hair splitting to allow the jury to speculate whether Mr. Proctor had the last and a clear chance to avoid the accident.

CONCLUSION

The judgment in favor of the plaintiffs should be reversed because the court committed prejudicial error in submitting the case to the jury under the last clear chance doctrine for the following reasons:

(a) David's negligence was continuing and concurring negligence.

(b) David was not in a position of danger until he crossed into the westbound portion of the roadway.

(c) Until David crossed into the westbound portion of the roadway he had the same or a greater opportunity and chance as the defendant to avoid a collision and after crossing into Mr. Proctor's lane neither had a chance to avoid the collision.

(d) The plaintiff failed to show that the defendant had a clear and fair opportunity of avoiding the collision after it became obvious David Reese was not going to stay in the eastbound portion of the roadway.

Respectfully submitted,

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MAILING NOTICE

I hereby certify I mailed two copies of the foregoing brief, postage prepaid, to Robert M. McDonald, 800 Walker Bank Building, Salt Lake City, Utah 84111, this ..... day of March, 1971.