1971

Gideon Pollesche and Maria Pollesche v. Transamerica Insurance Company, A California Corporation : Brief of Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

GIDEON POLLESCHE and
MARIA POLLESCHE,
Plaintiffs and Appellants,

vs.

TRANSAMERICA INSURANCE
COMPANY, a California corporation,
Defendant and Respondent.

Case No.
12555

BRIEF OF APPELLANTS

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

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NATURE OF CASE

The plaintiffs brought this action to recover damages from Transamerica Insurance Company under their policy's uninsured motorist clause, for personal injuries arising out of a rear end automobile accident on State Street in Murray, Utah, on Wednesday, December 6, 1967, at 1:04 p.m.

DISPOSITION IN LOWER COURT

Plaintiffs appeal to this Court from a jury verdict of no cause of action against both the plaintiff driver and plaintiff passenger. Thereafter the trial court denied plaintiffs' Motion for Judgment Notwithstanding the verdict and Motion for New Trial.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek a new trial.

STATEMENT OF FACTS

It is undisputed that Thora G. Patterson, an uninsured motorist, ran into the rear of plaintiffs' automobile on December 6, 1967, at about 1:04 p.m. while both cars were traveling north on State Street in Murray, Utah, resulting in personal injury to the plaintiff driver and owner Gideon Pollesche, and also to the plaintiff, non-owner passenger, Mrs. Maria Pollesche (Tr. 162, 166, 167, 180).

It is also undisputed that at the time of the said accident, a Transamerica Automobile insurance policy was in force entitling plaintiffs to recover damages for personal injury sustained as a result of the accident with the uninsured motorist, Thora G. Patterson, if she were found to be legally liable (Tr. 36, 167).

It is undisputed that the rear end collision of the two cars occurred in the north bound inside lane of State Street past the intersection on Vine Street which is controlled by a traffic semaphore (Tr. 177-178).

The plaintiff Gideon Pollesche states that he went through the intersection of State Street and Vine on a green light about 25 miles per hour and that there were two cars in front of him so he took his foot off the accelerator and slowed to a little bit less than 25 miles per hour when he was hit in the rear. Pollesche also denies that he put his foot on the brake (Tr.186).

David Weston, a Deputy Sheriff, investigated the accident and testified that it had snowed most of the morning and by the time the accident occurred, it was sunny, the roads were wet and visibility was good and

that he saw no skid marks (Tr. 177, 179). The officer also testified that in conversation with Mrs. Patterson at the scene she told him, "she had bent down to do something with her purse and when she looked up the collision occurred." (Tr. 182) The investigating officer also testified that he had made a note of Mrs. Patteron's statement about her picking up her purse in his accident report (Tr. 183). The plaintiff Gideon Pollesche testified that in response to the Deputy Sheriff's question of why did she hit plaintiff's car, Mrs. Patterson replied that, "her purse fell down from the front seat and she bent down to pick up the purse when she hit plaintiff's car." (Tr. 189).

Thora Patterson's version of the accident was that as she came north on State Street she did not know when or where the Pollesche car came in front of her (Tr. 165), but she first noticed it, she "imagines about Vine Street," but said she really didn't know where she first noticed the Pollesche car only that it was when he started putting on his brakes (Tr. 165). Mrs. Patterson also stated that Mr. Pollesche kept putting on his brakes (Tr. 165), and later (Tr. 172) says he put them on three times and that it irritated her and she repeated several times (Tr. 164, 165, 166, 168, 172), that she was concerned and wondering why he was putting on his brakes and that she knew he was putting on his brakes because she could see his brake lights going on and off (Tr. 167). Mrs. Patterson related that she "imagines" that Mr. Pollesche kept applying the brakes from Vine Street to the place of the accident (Tr. 172). After Mrs. Patteron says she was concerned and wondered what Mr. Pollesche was going to do because of his putting his brakes on and off, Mrs.

Patteron was then one car length, or about 20 feet, behind Mr. Pollesche at a speed of 25 miles per hour and she testifies (Tr. 166, 167, 171), that she then became aware and it was clear to her that the Pollesche car was going to stop and then the impact occurred. It is unclear from Mrs. Patterson's testimony whether she got her brakes on before impact inasmuch as she says at one point that she got her brakes on and then changed her testimony and said she did not know if she applied her brakes before she hit him or not (Tr. 166), and then still later in answer to another question says she, "imagines" her brakes took hold before impact.

On two different occasions in her testimony (Tr. 162, 166), Mrs. Patterson intimates that it was obvious to her that because she ran into the rear of the Pollesche car, she was at fault and finally at the end of her examination by plaintiffs' attorney, in response to the question, "Why were you concerned about the plaintiff Maria Pollesche?" (Tr. 166), Mrs. Patterson answered:

> ". . . and I got out of my car and immediately and went up and I asked her if I could help her and if I had hurt her. And she said, 'I can't talk to you.' She said, 'I am in pain, and I can't talk to you.' And I, I was concerned. I am a mother and I was concerned about her welfare more than I was concerned about wrecked cars or anything else. I was concerned about somebody being hurt, because *I was the cause of the accident.*" [Emphasis added.] (Tr. 167)

It was undisputed in the trial that both the plaintiff Gideon Pollesche and the plaintiff Maria Pollesche were injured as a result of the accident and although there was a dispute as to the extent and nature of the injuries,

all of the witnesses, the plaintiffs, Mrs. Patterson, the police officer and Dr. Neal C. Capel gave testimony relating to plaintiffs' injuries and there was no testimony or evidence that the plaintiffs were not injured in the accident. (Tr. 165, 178, 277, 234)

ARGUMENT

POINT I

THE VERDICT AND JUDGMENT OF THE LOWER COURT ARE NOT SUSTAINED BY THE EVIDENCE AND THE PLAINTIFF PASSENGER, MARIA POLLESCHE, SHOULD RECEIVE A DIRECTED VERDICT AGAINST THE DEFENDANT ON THE ISSUE OF LIABILITY, AND A NEW TRIAL ON DAMAGES BASED ON THE FACT THAT ALL OF THE EVIDENCE CLEARLY SHOWS THAT MRS. PATTERSON, THE UNINSURED DRIVER, WAS NEGLIGENT AND MARIA POLLESCHE WAS INJURED IN THE ACCIDENT.

The question of whether the defendant, Transamerica Insurance Company was liable to the plaintiff passenger, Maria Pollesche, in the Court below was based solely on the issue of whether Mrs. Patterson, the uninsured driver, was negligent and whether such negligence was a proximate cause of the rear end collision, since there was no evidence submitted to the Court or any question put to the jury concerning Maria Pollesche's contributory negligence and also because there was substantial evidence, with no evidence at all to the contrary, that the plaintiff, Mrs. Pollesche, was injured in the accident (Tr. 167, 171, 234, 277).

It is basic law that a judgment and verdict of the lower court will not be sustained when it is plainly wrong and manifestly against the weight of the evidence. *People v. Swasey*, 6 Ut. 93, 21 Pac. 400. Furthermore, a case should not be left to the jury but is a question of law for the court if the facts are such that only one reasonable inference or conclusion can be drawn therefrom on the question of negligence, 65 A C.J.S. Negligence, Sec. 253, p. 824.

An examination of the record in this case clearly shows that the only reasonable inference or conclusion that can be drawn from the evidence is that Thora Patterson, the uninsured rear ending driver, was negligent and such negligence was a proximate cause of the accident. It was Mrs. Patterson's duty to use reasonable care under the circumstances in driving her car to avoid danger to herself and others and to observe and be aware of the conditions of the highway, the traffic thereon, and other existing conditions. She was also obliged to use reasonable care to keep a lookout for other vehicles. She had the duty to drive at such speed as was safe and reasonable and prudent under the circumstances, having due regard to the width, surface, and conditions of the highway, the traffic thereof and any actual or potential hazzards then existing. Mrs. Patterson had the further duty not to follow plaintiffs' vehicle more closely than was reasonable and prudent having due regard for her own speed, the speed of other such traffic, other traffic upon the highway, and all other conditions there existing, *and to keep at such distance* and maintain such control of her automobile as was prudent for the safety of herself and others. *Weenig Bros. v. Manning*, 1 Utah 2d 101,

262 P.2d 491; 60 C.J.S. Motor Vehicles, Sec. 284, p. 141. See also, 41-6-62, Utah Code Anno., 1953; 60 C.J.S. Motor Vehicles, Sec. 326.

The record in this case discloses that all of the evidence on the subject of Mrs. Patterson's duty to observe the foregoing standard of care is such that reasonable minds could not differ that she was negligent. The only evidence with regard to the weather and conditions of the road were that the road was wet from melted snow and it was a sunny day with good visibility (Tr. 177). It was 1:04 in the afternoon and the accident occurred on State Street between the intersection of Vine Street in Murray, Utah, and the next street a half a block north, both of which were controlled at the time by a traffic semaphore (Tr. 177). Mrs. Patterson states that she was traveling 25 to 30 miles per hour (Tr. 166), and that she did not know how long she had been following the Pollesche car or where or when he came in front of her except that she first noticed him when she saw his brake lights come on, she "imagines" somewhere around Vine Street and the red light (Tr. 165, 172). Mrs. Patterson also states that she saw the brake lights go on and off on the Pollesche car and that he kept putting on his brakes and that she was concerned about it and wondering why and thought about going around him but also thought there might be a child or a dog or something in front of the Pollesche car and also she alleges she saw no car in front of the Pollesche car. She states that as many times as he applied his brakes, she thought there must have been some reason for it (Tr. 162, 164, 165, 168). Mrs. Patterson even says that she became irritated because Mr. Pollesche kept putting on his brakes. Besides having

the record replete with evidence that Mrs. Patterson, at least from her version of the accident, had more than adequate warning by the plaintiff driver that he was stopping or slowing, she also testifies that when it became clear to her and she was aware that he was going to, "come to a stop, a complete stop," her best judgment was that she was following the plaintiffs' automobile at a distance of one car length or about 20 feet and the only evidence of her speed at that time was still 25 to 30 miles an hour (Tr. 171, 166). The evidence from the police officer was that he could see no brake marks on the wet pavement and Mrs. Patterson testified first that she got her brakes on before impact and then changed her testimony and said she did not know if she got her brakes on before impact or not and still later says she "imagines" her brakes took hold (Tr. 166, 171).

In addition to the foregoing testimony which was brought out from both direct and cross-examination and which is the sum and substance of Mrs. Patterson's version of the facts of the accident, she states right at the beginning of her testimny that her car came in contact with the Pollesche car and that:

> ". . . after I hit him, I didn't get out of the car. I just sat in the car, because *anyone that does drive, I'm sure that we all know, that if you hit somebody from behind, that is, your're out.* And I was sure that I had insurance. There was no question about it. So I wasn't worried about it . . . and I found out later that my husband hadn't paid the policy . . . so I was not insured." [Emphasis added.] (Tr. 162-163)

Also, in response to a question about her physical condition after the impact, Mrs. Patterson said:

". . . I was kind of upset about it. But like I said, I thought, well, I have hit somebody from . . . in the rear and all you can do is just sit here and wait for the police to come and see what is going to happen. And I was very concerned about Mrs. Pollesche and she . . .

. . . I was concerned about somebody being hurt, because I was the cause of the accident." (Tr. 166, 167)

Mrs. Patterson then concludes her entire testimony at the trial with the following statement:

". . . it was my responsibility. I hit that car and I was concerned about the people and the people in that car." (Tr. 175)

It follows from the above, that the evidence in the record when viewed in the light most favorable to the defendant and respondent, fails to sustain the verdict of no cause of action against the nonnegligent plaintiff passenger, Maria Pollesche.

POINT II

IF THE PLAINTIFF PASSENGER, MARIA POLLESCHE, IS GRANTED A NEW TRIAL ON THE ISSUE OF LIABILITY, THEN THE PLAINTIFF, GIDEON POLLESCHE SHOULD ALSO RECEIVE A NEW TRIAL SINCE IT IS UNKNOWN FROM THE DECISION OF THE LOWER COURT WHETHER THE VERDICT WAS BASED ON A FINDING OF NO NEGLIGENCE ON THE PART OF MRS. PATTERSON, WHICH IS AGAINST THE EVIDENCE OR WHETHER IT WAS BASED ON PLAINTIFFS' CONTRIBUTORY NEGLIGENCE.

There were four verdicts presented to the jury below for their consideration (Tr. 116, 117, 118, 119). The first was for a finding in favor of the plaintiff Gideon Pollesche and against the defendant assessing damages, the second was for a finding for the plaintiff Maria Pollesche and against the defendant and assessing damages, the third was for a finding in favor of the defendant and against the plaintiff Gideon Pollesche no cause of action, and the fourth was for a finding in favor of the defendant and against the plaintiff Maria Pollesche no cause of action. The latter two verdicts were signed and the judgment and verdict given was no cause of action against both plaintiffs.

Because the verdict was no cause of action against the plaintiff Maria Pollesche, a nonowner passenger, who could not have possibly been contributorily negligent, the only logical basis upon which a no cause of action verdict against Maria Pollesche could rest, would be a finding of no negligence on the part of the uninsured driver Thora Patterson. If plaintiffs' contention as argued in Point I is assumed, that is that a finding of no negligence on the part of Mrs. Patterson is against the evidence and Maria Pollesche is entitled to a new trial, then justice and reason would demand a new trial also for Gideon Pollesche. If the only basis for a no cause of action verdict against Maria Pollesche was that the jury found no negligence on the part of the rear ending driver, then it necessarily follows that there is no way of determining whether the jury found no cause of action against the plaintiff driver, Gideon Pollesche, for the same reason, or whether in addition thereto found him to be

contributorily negligent. It is, therefore, logically necessary to grant a new trial to the plaintiff Gideon Pollesche if a new trial is granted to Maria Pollesche.

POINT III

THE LOWER COURT ERRED IN DENYING PLAINTIFFS' MOTION FOR A NEW TRIAL.

Plaintiffs incorporate herein the argument set forth under Points I and II in addition to the following:

In weighing the testimony of the uninsured driver, Mrs. Patterson, in the light most favorable to the dedendant and prevailing party in the Court below, the consideration of her testimony should not be restricted to isolated portions thereof, but all of her testimony, including that given on direct and on cross-examination, should be considered as a whole. *Alvarado v. Tucker*, 2 Utah 2d 16, 268 P.2d 986, citing *Putnam v. Industrial Commission*, 80 Utah 187, 14 P.2d 973, 981. Although there are portions of Mrs. Patterson's testimony which might be consistent with a finding of contributory negligence on the part of the plaintiff Gideon Pollesche, all portions of her testimony are consistent with a lack of due care and hence negligence on her part.

If the jury had followed the plaintiffs' instructions (Tr. 82), on the duty of the uninsured driver, Mrs. Patterson, to use reasonable care under the circumstances of the facts of this case, and the Court's instructions on negligence and proximate cause, it would have been impossible for them to have reached the verdict they reached in this case because even if they chose to believe

all of the rear ending driver's version of the facts as to her own actions, including her own acknowledgment of fault while testifying in Court under oath about a conclusion she was competent to testify about, and none of the plaintiffs' or the investigating officer' testimony, there is no way this kind of accident could have occurred without a failure of the uninsured motorist to exercise ordinary care.

CONCLUSION

Plaintiffs contend that the only reasonable inference or conclusion that can be drawn from the evidence is that Thora Patterson, the uninsured rear ending driver, was negligent and that such negligence was a proximate cause of the accident in question. Plaintiffs further contend that even if all of the evidence and testimony in favor of the plaintiffs as to liability is entirely disregarded, Mrs. Patterson's testimony considered as a whole would sustain plaintiffs' position, since there is no possibility of holding Maria Polesche contributorily negligent, and also because there is substantial evidence with none contrary that Maria Pollesche received injuries as a direct result of the accident in question.

It is clear that if plaintiffs' position on Point I is sustained, that it would be manifestly unfair not to give the plaintiff Gideon Pollesche a new trial on the issue of liability inasmuch as there is no way of telling from the verdict of the court below whether the no cause of action against Gideon Pollesche was because the jury found no negligence on the part of Thora Patterson, which is against the evidence, or whether it was based

on the plaintiff Gideon Polesche's contributory negligence. It is completely unknown whether the jury ever got to the point of determining whether Gideon Pollesche was contributorily negligent and, therefore, he should have an oportunity to have his case reheard if his wife's case is reheard.

In weighing the testimony of Thora Patterson as a whole including her admission and acknowledgment against interest that she was a fault, the only determination to be made is the damages suffered by the plaintiff Maria Pollesche and whether the plaintiff Gideon Pollesche was guilty of contributory negligence. This Court should, therefore, set aside the judgment and verdict of the lower court and remand the case to that court for a jury determination upon the question of damages only for the plaintiff Maria Pollesche and for a new trial as to the liability for the plaintiff Gideon Pollesche.

Respectfully submited,

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