1972

Lettie Dell Brock v. Dean 0. Ward And State Farm Mutual Automobile Insurance Company : Brief of Defendants-Appellants

IN THE SUPREME COURT

OF THE

STATE OF UTAH

LETTIE DELL BROCK,
Plaintiff-Respondent,

vs.

DEAN O. WARD and
STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY,
Defendants-Appellants.

Case No.
12737

BRIEF OF DEFENDANTS-APPELLANTS

Appeal from the Verdict and Judgment of the
District Court of Weber County, State of Utah
The Honorable Calvin Gould, *Judge*

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CASES CITED

TEXTS

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NATURE OF THE CASE

This is an appeal from the judgment of the lower court on a jury verdict awarding plaintiff $15,000.00 general damages, and $5,145.84 special damages for injuries sustained in an automobile accident involving plaintiff, Lettie Dell Brock, and defendant, Dean O. Ward.

RELIEF SOUGHT ON APPEAL

The defendants-appellants seek a reversal of the lower court's judgment and an order directing that judgment be entered in favor of defendants, no cause of action.

STATEMENT OF FACTS

On the morning of July 17, 1968, at approxi-

mately 7:05 a.m., the plaintiff, Mrs. Lettie Brock, was driving south at a speed of about 55 miles per hour on U.S. 91, between Brigham City, Utah, and Ogden, Utah, (R. 138, 144). She was alone in her car and was driving to work in Ogden just as she had done at that same time each day, for a period of several months immediately prior to the accident (R. 145, 146). The highway at this point is a four lane highway, with a center dividing strip 9-½ feet wide, separating the two southbound and two northbound lanes. Each of the southbound lanes is approximately 11 feet wide (R. 164). The posted speed limit was 65 miles per hour (R. 145, 139). As Mrs. Brock traveled south, she occupied the right hand, or outside southbound lane of the highway (R. 139). The weather on this particular morning was clear, and the roads were dry (R. 144). Mrs. Brock testified that the only problem she had with the weather was a glare on her windshield caused by the sun which was just coming over the mountains to the east, but that she could still see the road ahead of her (R. 147, 149). The road at this point was straight and level for a distance of at least one mile north of the scene of the accident (R. 147).

The defendant, Mr. Ward, had been traveling south driving a dump truck, on the same highway but had pulled over and stopped on the right shoulder of the road, upon being waved down by a friend, Mr. Larsen, who had overtaken him (R. 175, 177). Mr. Ward pulled in behind Mr. Larsen as far over on the

right shoulder of the road as he could, but when he came to a stop, the left portion of his truck was protruding out into the traveled portion of the outside southbound lane of the road for a distance of about 3 to 3½ feet (R. 176, 177). Larsen stopped Ward so he could ask Ward to pick up a part for a tractor while he was in Salt Lake City (R. 175). Larsen was standing on the running board of the truck, its motor was still running and Ward had his foot on the brake and the right turn signal was flashing when the impact occurred (R. 177, 178). Between the time Ward stopped and the time of impact one southbound vehicle passed him (R. 178).

Mrs. Brock first became aware of the defendant's truck when she was one-quarter of a mile from it, at which time she formed the judgment that the truck was parked completely off the road, and therefore she made no attempt to apply the brakes or move into the left hand southbound lane (R. 147, 148, 141). There were no vehicles between Mrs. Brock and Ward's truck, in either of the southbound lanes. There was nothing to prevent Mrs. Brock from moving to the left to avoid the accident (R. 149, 140). She nevertheless continued in the southbound lane, and when she came to within 100-150 feet of the parked truck, the sun came completely up from behind the mountain, causing more of a glare (R. 141, 149, 150). Although the sun's glare increased in brightness when it came out completely over the mountain, Mrs. Brock, according to her testimony,

could still see the truck at all times, even though it took a while for her eyes to adjust to the sun's glare, and yet still she failed to apply her brakes or move to the left, but maintained her speed at 55 miles per hour for a distance of 100-150 feet at which time she crashed into the rear of the parked dump truck (R. 150, 151, 152, 141). From the time plaintiff first became aware of the truck which was at a point about one-fourth of a mile away, until impact, she thought it was completely off the paved portion of the roadway (R. 150, 151).

Plaintiff brought this action against defendant, Dean O. Ward, alleging negligent operation of a motor vehicle. Plaintiff named State Farm Mutual Automobile Insurance Company as a defendant on the basis of plaintiff's insurance contract with said company which provides "uninsured automobile coverage" (R. 1, 2). State Farm's liability to plaintiff in this action, therefore, hinges on the liability of defendant, Dean O. Ward. The court entered judgment against State Farm and Ward for $10,000.00, the limit of liability under the uninsured motorist coverage, and the balance of the judgment is against Ward only.

Motions were timely made by defendant, State Farm Mutual Automobile Insurance Company, for summary judgment, a directed verdict, and a judgment notwithstanding the verdict, which motions were all denied by the court (R. 43, 125).

ARGUMENT

POINT I.

PLAINTIFF'S NEGLIGENCE WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT, OR AT THE LEAST WAS A CONTRIBUTING PROXIMATE CAUSE WHICH WOULD BAR HER RECOVERY.

The plaintiff's negligent conduct in failing to take any evasive action whatsoever to avoid the dangerous condition, where the dangerous condition must have been observable in the exercise of ordinary care, was the sole proximate cause or at least a contributing proximate cause of the accident. Mrs. Brock testified that at all times, while traveling the last one-quarter of a mile before the accident, even though the sun was glaring in her eyes, she was able to clearly see both the road ahead of her and the parked truck that she crashed into (R 151, 153).

A case similar to the one at bar was decided by this court in *Hirschbach v. Dubuque Packing Co.*, 7 Utah 2d 7, 316 P.2d 319 (1957). In that case the defendant had parked his truck in the westbound lane of the road at night with the tail lights on. The road was a two lane highway, separated by a painted line, and was straight and level at the point where the accident occurred. The plaintiff, just prior to the accident was traveling west at about 40 miles per hour. The driver of plaintiff's vehicle observed the tail lights on defendant's truck in sufficient time to have stopped and avoided the collision, but he did not

do so because he was under the mistaken impression that the defendant's vehicle was moving in the same direction that he was. The lower court granted summary judgment in favor of the defendant, and the plaintiff appealed. On appeal the plaintiff argued that the lights on the defendant's truck had tended to confuse appellant's driver and to mislead him into believing that there was a moving vehicle ahead, and that under such circumstances the issue of the driver's negligence was a question of fact for the jury. This court rejected that argument stating in 316 P.2d at 320:

> "* * * we find no such doubt that the plaintiff in this case was negligent as a matter of law. The lights should have warned him there was an object in front which would have to be avoided and he should have driven in such a manner and at a rate of speed that he could have avoided a collision at any time."

The situation in *Hirschbach* is not the typical situation where the driver of a vehicle is "overdriving" his headlights at night and is not able to stop for objects in the road that suddenly come into view. Rather, the driver in *Hirschbach* saw the truck in sufficient time to stop, but did not because he formed the mistaken belief that the truck was moving. These facts are strikingly similar to the case at bar. Mrs. Brock also observed the parked truck at a point in time when she had ample time and opportunity to avoid the collision, but made no effort to do so (R 147, 140). As justification for her conduct, Mrs.

Brock testified that at least partially due to the sun's glare, she formed the mistaken belief that the truck was off the road, and further, she somehow continued in this belief right up until the moment of impact (R. 140, 150). The teaching of *Hirschbach* is that in such a situation the driver of a vehicle should drive "in such a manner and at a rate of speed that he could have avoided a collision at any time."

In addition, the cases are almost unanimous in holding that when a driver's vision is impaired (Mrs. Brock testified that it took several seconds for her eyes to adjust to the sun as it came completely out over the mountains) (R 141, 150), he must stop or reduce his rate of speed. In Annotations 22 A.L.R.2d 292, at 300, it states:

> "The situation where a motorist proceeding on the highway has his vision interfered with by glaring or dazzling lights has, in several jurisdictions, been regarded as calling merely for the application of the general rule requiring motorists to operate their vehicles so as to be able to stop within the assured clear distance ahead. Where this rule is applied, it is usually said that the motorist blinded by lights must either stop (if his vision is cut off completely) or proceed at such a rate of speed and with such control of his vehicle as to be able to stop in time to avoid any discernible object in the road ahead."

In *Nagata v. Kahului Development Co.*, 420 P.2d 103 (Hawaii 1966), the Hawaii Supreme Court held that a motorist who proceeded down a street for

over 200 feet while her vision was impaired by bright sunlight from the rising sun, which was low in the sky, and who collided with a large trailer which had stopped along a curb was contributorily negligent as a matter of law, in view of her failure to take any positive action in regard to her impaired visibility. The court, at page 108, stated:

> "A motorist who proceeds when his vision has been impaired, after having had time to adjust to the situation but failing to do so, is chargeable with contributory negligence as a matter of law."

And further at 108, 109, the court stated:

> "The standard of care has been generally held to be the same whether the impairment of vision is caused by sunlight or oncoming headlights. It would seem, however, that sunlight is inherently a pervasive condition as to which greater foreseeability and hence greater opportunity to take precautions is afforded. Annotations 22 A.L.R.2d 292, 408. Further the character of sunlight per se in a context of sunrise and sunset yields an inference of a more inclusive visual impairment, and expectably so, than that resulting from oncoming headlights. Consequently, impairment of vision caused by sunlight should require an even greater degree of care on the part of the driver as more opportunity to react and adjust to the adverse visual conditions is present than when one's vision is suddenly and momentarily impaired by oncoming headlights.
>
> "Drivers who failed to reduce their speed when sunlight impairs their vision have been

held contributorily negligent as a matter of law." (Cites omitted)

The facts in the instant case compel the conclusion that Mrs. Brock's conduct comes within the language and the holdings of the cases and authorities discussed above. When Mrs. Brock was within 100-150 feet of the parked truck, she was hit with an increased glare of the sun, and yet without reducing her speed or moving her car to the left (although admittedly she had ample room) she proceeded down the road for several seconds before impact while her eyes were adjusting to the sun's glare (R 149, 150, 140, 141). This was no sudden emergency situation, since she had been experiencing a glare for at least one-quarter of a mile previous to this time, and then had experienced a brighter glare, as has been indicated, for the last 100-150 feet before impact.

A series of Utah cases have held that in situations such as the instant case where a dangerous condition has been created, and a later actor comes along and observes the condition or couldn't help but observe the condition but fails to avoid it, then the negligence of the second actor is the sole proximate cause of the accident. In *Hillyard v. Utah By-Products Co.*, 1 Utah 2d 143, 263 P.2d 287, where this rule was first formulated, this court said at page 292:

> "Where a negligently created pre-existing condition combines with a later act of negligence causing an injury, the courts have drawn a clear cut distinction between two classes of cases. The first situation is where

one has negligently created a dangerous condition . . . and a later actor observed, or circumstances are such that he could not fail to observe, but negligently failed to avoid it. The second situation involves conduct of a later intervening actor who negligently failed to observe the dangerous condition until it is too late to avoid it. In regard to the first situation it is held as a matter of law that the later intervening act does interrupt the natural sequence of events and cut off the legal effect of the negligence of the initial actor. This is based upon the reasoning that it is not reasonably to be foreseen nor expected that one who actually becomes cognizant of a dangerous condition in ample time to avert injury will fail to do so. On the other hand, with respect to the second situation, where the second actor fails to see the danger in time to avoid it, it is held that a jury question exists, based on the rationale that it can reasonably be anticipated that circumstances may arise wherein others may not observe the dangerous condition until too late to escape it. The distinction is basically one between a situation in which the second actor has sufficient time, after being charged with knowledge of the hazard, to avoid it, and one in which the second actor negligently becomes confronted with an *emergency* situation."

In that case the defendant's truck driver had parked his truck in front of his home in such a way that the rear portion of the truck extended some 5 feet out into the paved portion of the eastbound lane of the road. Plaintiff's intestate was in a car that was traveling east at a speed greatly in excess of the

posted speed limit on that road. The driver of plaintiff's vehicle passed two cars and as he attempted to pass a third, it turned to its left to avoid the parked truck. At this point it was too late for plaintiff's vehicle to avoid a collision and it crashed into the left rear end of the parked truck. The court characterized this as an emergency type situation and held that the question of whether the second actor's negligence was the sole proximate cause of the accident was a question for the jury.

Velasquez v. Greyhound Lines, Inc. and Interstate Motor Lines, Inc., 12 Utah 2d 379, 366 P.2d 989, involved a situation where one James Buckley, traveling west, on Interstate 80, a new, divided highway, pulled his car off the highway and onto the gravel beyond the 10 foot emergency strip because of tire trouble. An Interstate truck stopped alongside the Buckley car, partially in the 10 foot emergency strip but with its back end protruding not more than 7 feet into the right traffic lane. This took place at 11:00 P.M. The truck's clearance lights, stop lights and blinkers were turned on and remained on. The Greyhound Bus driver came along later and observed the Interstate truck as he approached. He said he first observed it about three-fourths of a mile away and he realized that both the truck and the Buckley car were stopped while he was still a half a mile away. As the Greyhound Bus approached the scene, the evidence indicated the bus driver momentarily lost consciousness by either falling asleep or blacking out

from some other cause. He was aroused to consciousness just before the impact by the warning cry of a woman passenger. He swerved the bus to the left but not in time to avoid hitting the left rear corner of the truck. The plaintiff is one of several passengers injured in the collision.

The jury in this case returned a verdict against both Greyhound and Interstate Motor Lines. The trial court granted Interstate Motor Line's motion for judgment notwithstanding the verdict and held that Greyhound's negligence was the sole proximate cause of the collision. The Supreme Court in affirming the trial court's ruling, said at page 991:

> "* * * where there is a negligently created hazard (Interstate parking the truck) and a later actor (Greyhound) observed, or circum stances were such that he could not fail to observe, the condition, but he nevertheless negligently failed to avoid it, the later negligence would be an independent, intervening cause and therefore the sole proximate cause of the accident."

The Utah Supreme Court then goes on to say at page 992:

> "We think it is not reasonably to be foreseen that an oncoming driver (Greyhound) would see (or fail to see) this large, well lighted truck so parked upon the highway, and with at least one and one-half useable traffic lanes to his left, nevertheless run into it. The trial court was correct in so concluding and entering a judgment in favor of Interstate Motor

> Lines as a matter of law on the ground that the negligence of Greyhound was the sole proximate cause of the collision."

In the case now before this court it is undisputed that the two southbound lanes of traffic were each approximately 11 feet wide. These southbound lanes were separated from the northbound lanes by a safety lane or median strip that itself was about 9½ feet wide (R 164). There was about 28 feet between the left side of the Ward truck and the east side of the median strip that could have been used by Mrs. Brock (R. 164).

To use the language of the Supreme Court in the Greyhound case,

> We think it is not reasonably to be foreseen that an oncoming driver (Mrs. Brock) would see (or fail to see) this large truck so parked upon the highway in broad daylight and with at least one and one-half useable traffic lanes (actually 28 feet) to the left of the truck, nevertheless run into it.

It should be noted that in the *Greyhound* case the Greyhound driver claimed that he in some strange way lost consciousness just before getting to the Interstate Motor Lines truck. Nevertheless, the Utah Supreme Court held his failure to avoid hitting the truck that was there plainly to be seen was the sole proximate cause of the accident. In the case now before this court, by plaintiff's own admission, there were no vehicles between Mrs. Brock and the Ward truck either in the outside southbound lane or the in-

side southbound lane. The safety zone or median strip separating the north and southbound lanes, by plaintiff's own admission, was also without any vehicles in it. There was nothing that distracted Mrs. Brock's attention nor obstructed her view. For at least a quarter of a mile she observed the Ward truck and knew that it was stopped. She formed the opinion that it was off the traveled portion of the roadway when she first observed it and continued under this impression down to the moment of impact. When she was 100-150 feet away from the truck, the sun's glare was somewhat brighter than it had been during the quarter of a mile that she had traveled when she first noticed the truck, but during this 100-150 feet she nevertheless could see the Ward truck and still thought it was off the traveled portion of the highway just as she thought during the quarter of a mile that she had just traveled. She did not slacken her speed at all, nor did she move to the left but continued in the outside southbound lane and drove into the left rear duals of the Ward truck. All of this occurred on a clear, dry, sunshiny day and at a time when there was no traffic to interfere and nothing to distract Mrs. Brock's attention. It seems clear that the ruling of this court in the *Greyhound* case and in the other cases cited herein must apply to the facts of the instant case. If it does not apply, then a driver in broad daylight and with no obstructions can, with impunity, run into another vehicle that is there on the roadway and can plainly be seen.

In the recent case of *Anderson v. Parsons Red-E-Mix Paving Co.*, 24 Utah 2d 128, 467 P.2d 45 (1970), a situation similar to the instant case occurred. I nthat case the plaintiff, as guardian of her 15 year old son, David, sued for injuries he suffered when a car in which he was riding as a guest ran into the rear of defendant's concrete mixing truck, which was parked facing west on the north edge of 4th North Street in Brigham City, Utah. At the time of the accident the driver was washing out the mounted platform which extended from the rear of the truck, and which was used to unload concrete from the truck. The evidence showed that the driver of the car in which the plaintiff's son was a passenger, was heading north and had just completed a left hand turn to the west onto 4th North in an effort to avoid a collision with another automobile. The driver over-accelerated and the car began to slide on some loose material on the surface of the road. When the car came to within about 100 feet of the defendant's parked truck, the driver had sufficiently regained control so that he could have avoided the collision by proceeding around the left side of the truck. The driver, however, failed to observe the steel chute protruding from the truck and collided with the extended chute causing plaintiff's injuries. After presentation of plaintiff's evidence, the court granted defendant's motion to dismiss on the grounds, *inter alia*, that the sole proximate cause of the accident was the negligence of plaintiff's host driver. Relying on the rationale of *Hill-*

yard, supra, this court affirmed, holding that the sole proximate cause of the accident was the negligence of the host driver. The court distinguished the facts of the *Hillyard* case, however, by stating in 467 P.2 at 46:

> "There [Hillyard] the host-driver was following another car, which prevented him from seeing the truck, which had been parked with its rear end protruding onto the surfaced part of the highway, until the preceding car suddenly swerved around it. This created a true emergency in which the negligence of the host-driver . . . concurred with the negligence in parking the truck and causing the collision. However, care was taken to point out therein that 'where one has negligently created a dangerous condition . . . and a later actor observed, or circumstances are such that in the exercise of reasonable care he could not fail to observe, but negligently failed to avoid it' his later negligence is the intervening and sole proximate cause."

And further at p. 47, the court in support of its conclusion that this was not the emergency type situation, stated by way of describing the accident:

> "But accepting that further premise, plaintiff's own statement is that the driver had regained control about 50 feet west of the curb line (Main Street). He would then have had about 100 feet in which to brake and/or turn aside and avoid the collision with this large truck which stood there in plain sight. Under any view whatsoever that may be taken of those facts the trial court's conclusion that

the negligence of the host driver, Kim Mortenson, was the sole proximate cause of the collision is ineluctably correct."

In *Anderson* the driver saw the truck but did not see the chute. In the case before this court Mrs. Brock saw the truck for some time before impact but just did not see it was right in her lane of traffic. The truck and its position on the highway was there in plain sight. Even at the time the sun seemed brighter and more glary Mrs. Brock was still 100-150 feet from the truck. She could still see it clearly. She still thought it was off the roadway as she had thought from the time she first observed the truck a quarter of a mile away (R 150, 151). The sun becoming brighter or more glary when she was 100-150 feet from it changed nothing. Even if the sun became brighter, she still could see the truck and had 100-150 feet within which to pull ever so slightly to the left and the impact would never had occurred.

CONCLUSION

Mrs. Brock made no effort to take any evasive action of any kind, when confronted with the dangerous condition, which condition was observable to her, or in the exercise of ordinary care must have been observable to her, (R 141). She did not alter her course or speed when her vision became impaired (R 141). The cases on point compel the conclusion that Mrs. Brock's conduct was the sole proximate cause of the accident or at least was a contributing cause barring recovery.

The judgment in favor of plaintiff should be reversed and the trial court ordered, as a matter of law, to enter judgment in favor of defendants, no cause of action.

Respectfully submitted,

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