1972

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

In The Supreme C
of the State of

LETTIE DELL BROCK,

Plaintiff-

vs.

DEAN O. WARD and
FARM MUTUAL A
BILE INSURANCE C

Defendant

BRIEF OF

Appeal from the Ju
of Weber Co
The Honorable

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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 RESPONDENT

STATEMENT OF NATURE OF CASE

This is an action by respondent to recover damages she sustained in a motor vehicle accident in Weber County, Utah, involving a car driven by respondent and a truck driven by appellant Dean O. Ward, with appellant State Farm Mutual Automobile Insurance Company involved by virtue of its uninsured motorist coverage with respondent.

DISPOSITION IN LOWER COURT

Prior to the date of trial appellants filed a Motion for Summary Judgment which was denied by the Hon-

orable John F. Wahlquist on July 10, 1970. On September 20, 1971, a jury was impanelled to try the case with the Honorable Calvin Gould presiding. The jury returned a verdict awarding respondent $15,000.00 general damages and $5,145.84 as special damages. Judgment was entered by the Court awarding respondent $10,000.00 jointly and severally against both appellants and an additional $10,145.84 as against appellant Dean O. Ward only. During the trial of the case appellants moved the Court for a directed verdict, for an order of dismissal and for judgment notwithstanding the verdict, which were all denied by Judge Calvin Gould. Appellants thereafter appealed from the judgment of the Court entered on the verdict.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the jury verdict and the judgment entered thereon by the Court.

STATEMENT OF FACTS

Respondent is a mature married woman who was 45 years old at the time of the subject accident (R. 155). Her general health was very good as was her eyesight (R. 138). Her eyes were checked within three months of the subject accident and she passed the test without any need for glasses and without any restrictions on her driver's license (R. 139). On the morning of July 17, 1968, respondent left her home in South Willard, Utah, and was traveling in a southeasterly di-

rection on U.S. 91 toward Ogden City and the Defense Depot where she was employed (R. 138, 139). She had no reason to hurry because it only took her 10 to 15 minutes to drive to work. The accident occurred at 7:05 a.m. and she started work at 7:30 a.m. (R. 138, 156).

She was proceeding in the outside lane of a four lane highway at a speed of 55 miles per hour in a 65 mile per hour speed zone (R. 139). She testified that as she proceeded in a southeasterly direction nothing happened to distract her attention and that she was looking straight ahead prior to the accident in question (R. 139, 140). The road was dry, the weather was clear and the road was level (R. 140).

A short time earlier appellant Dean O. Ward had stopped a truck on the edge of the highway to talk to a friend and had left its left rearend 3½ feet out into the outside lane of traffic (R. 160). Mrs. Brock testified that she was approximately a quarter of a mile away from the parked truck when she first noticed it and that it appeared to be completely off the road (R. 150). In this connection, the following testimony is pertinent (R. 150):

"Q. In other words, when you first saw the truck you formed the opinion, or it appeared to you when you were a quarter of a mile away from it that it was off the road?

"A. Yes.

"Q. And you watched the truck as you drove toward it?

"A. Yes, I watched the whole road as I drove down the road."

Respondent testified that as she drove down the road the sun was somewhat glarey but she could see the truck and it appeared off the road. Then as she got within a short distance of the truck the sun came up completely from behind a peak causing her momentary blindness while her eyes adjusted to the sudden light. In this connection she testified as follows (R. 140, 141):

"Q. Okay. Now, as you proceeded down the highway going fifty-five miles an hour in the outside lane, just tell us what happened.

"A. Well, about a block, approximately, ahead of me I noticed a truck parked off the road. It appeared to be off the road. But the sun kind of glared. It was just coming up over behind a peak. And all the way along that truck appeared to be off the road entirely. When I got within a short distance, the sun came full boom over the mountain, and my eyes had to adjust to it. I couldn't—the truck appeared to be off the road. I assumed it it was. But my eyes had to adjust to the sun coming over, I guess, because that

truck appeared to be completely off the road."

Respondent further testified (R. 141):

"Q. Now, as you traveled this road each morning, are you familiar with the sun's conditions?

"A. Yes.

"Q. And just describe what happens as the sun makes its last move over the top of the mountain, as it comes over.

"A. Well, it is very sudden. There is just a sudden glare all at once. And your eyes are not adjusted to the bright light. It takes a few seconds to adjust to them.

"Q. Now then what happened as your eyes were adjusting? What happened then?

"A. I crashed into the back of the truck."

Trooper B. D. Wilcox testified that he was familiar with the stretch of road in question and that at that time of the morning traveling in that direction it is momentarily difficult to see when the sun pops over the mountain (R. 162).

Another witness, Vesta McIlvried, testified that she was familiar with the stretch of road in question and had traveled it for many years (R. 170). She further testified (R. 171):

"A. As the sun comes up over the mountain, you see the sun out in the area. And as it comes to your car and hits the hood of the car and the windshield, there is a very definite glare and a sudden burst of sunlight.

"Q. And what does that do to your eyes normally?

"A. Well, the glare, it is a second or two before your eyes are accustomed to that glare."

As a result of the accident in question, Mrs. Brock sustained lacerations to her face and a fracture of the acetabulum with subsequent destructive arthrosis involving the right hip. Dr. Wallace E. Hess performed a mold arthroplasty on the right hip and gave her a 40% permanent disability of the right lower extremity at the hip.

ARGUMENT

POINT I

RESPONDENT'S CONDUCT WAS NOT NEGLIGENT AS A MATTER OF LAW AND THE COURT PROPERLY SUBMITTED THE MATTER TO THE JURY AS A QUESTION OF FACT.

Appellant State Farm Mutual Automobile Insurance Company demanded a jury trial in its Notice

of Readiness for Trial. The verdict in favor of respondent was a unanimous one by all jurors who heard the case. Appellants are dissatisfied with the verdict and seek to overturn the same by arguing that respondent's conduct is a question of law for the court instead of a question of fact for the jury (R. 111).

The first trial judge to disagree with appellants' contention was The Honorable John F. Wahlquist, who denied appellants' Motion for Summary Judgment argued several weeks prior to the trial (R. 43). The second Judge to disagree with appellants' position was The Honorable Calvin Gould, who was the trial judge that heard the case. After extensive arguments by respective counsel, Judge Gould denied appellants' Motion For Directed Verdict, Motion to Dismiss, and Motion for Judgment Notwithstanding The Verdict (R. 125). Appellants make no contention that the jury was improperly instructed.

The rule that respondent is entitled to have the Court review the evidence and all reasonable inferences fairly to be drawn therefrom in the light most favorable to her is axiomatic. As to questions of fact or law this Court said in *Cooper v. Evans,* 1 Utah 2d 68, 262 P.2d 278 at page 280:

> "Contributory negligence would only be a question of law where the evidence showed, with such certainty that reasonable minds could not differ thereon, that the conduct in question either met or failed to meet the standard of due care. But where there is uncertainty as to

whether such standard has been met so that reasonable minds could differ upon it, the question of whether such negligence exists is not a matter of law, but is one for the jury to determine."

This Court in the recent case of *Weilenmann v. Morrell,* 491 P.2d 1208 (1971), indicated as follows:

> "This is a classic case for Solomon, but under our jury system, unless there is an obvious abuse of the mythical reasonable man's role in our jurisprudence, that, right or wrong, we invest the arbiter of the facts with Solomonic wisdom. So saying, we could have said that had the jury decided otherwise, so had we have done."

In the very recent case of *Gibbons v. Orem City Corporation,* 493 P.2d 1280 (1972), this Court said at page 1282:

> "In vacating the summary judgment and remanding the case for a trial, this court expressed its awareness and approval of the thought that a jury of lay persons is peculiarly advantaged to determine questions relating to negligence and contributory negligence which are tested by the standard of the ordinary, reasonable and prudent person under the circumstances. We stated:
>
> > 'Summary judgments are more frequently given in contract cases because of

> greater ease in determining the factual issues . . . . However, when it comes to determining negligence, contributory negligence, and causation, courts are not in such a good position . . . here enters a prerogative of the jury to make a determination . . .' "

In 22 ALR 2d 310, the following rule is found which reflects the modern thinking of the courts on this issue considering modern traffic conditions:

> "Finding the rule requiring a driver blinded by lights to stop or proceed at his peril impracticable under modern traffic conditions, a number of courts have repudiated or refused to adopt it, applying instead the more flexible standard of ordinary care under the circumstances, and holding that a motorist who continues on his course when his vision is interfered with by other lights cannot be held guilty of negligence as a matter of law."

In *Trimble v. Union Pacific Stages,* 105 Utah 457, 142 P.2d 674, where the automobile in which plaintiff's decedent was riding had been pulled onto the highway after sliding off the slippery pavement in a dense fog, at night, and while parked on the left shoulder of the highway and was struck by a bus, this court held that the bus driver was not negligent as a matter of law. This court recognized that there is a brief period of

blindness which commonly follows a sudden and unexpected exposure to bright light. This court then listed other cases where there was no negligence as a matter of law involving obscured vision by dust, sudden failure of headlights, blindness by the lights of approaching automobiles, visibility affected by a dark rainy day and the headlights of oncoming traffic, and inclement weather involving darkness, mist, rain, and fog.

In *Hitchcock v. Tosta,* 153 CA 2d 432, 314 P.2d 513, the California District Court of Appeal was confronted with a situation where plaintiff's truck driver had parked his truck and trailer with the left wheels about two feet off of the main traveled portion of the highway against the edge of the mountain. The main traveled portion of the highway was 16 to 17 feet wide. The defendant was driving 50 to 60 miles per hour on a curved, mountainous road which he had traveled many times and knew, or should have known that trucks customarily stopped and parked where the particular truck in question was stopped. The defendant was blinded by the rising sun and could not see clearly ahead and did not see the truck and trailer. The front of the defendant's automobile hit the left rear of the trailer with such force that the trailer axle of forged steel was bent forward to about a 35° angle. The California court held that the issues of negligence and contributory negligence were questions of fact and were properly submitted to the jury. In this connection see 42 ALR 2d 164, where it is stated:

> "In a number of cases involving a collision with a parked or standing vehicle where rain was at lesat one factor in visibility, it has been held that the question of the motorists's contributory negligence was for the trier of fact."

In the 1956 Utah case of *Fretz v. Anderson,* 5 Utah 2d 290, 300 P.2d 642, where an overturned automobile was on the east half of a paved road and where the driver of a truck parked his truck and was preparing to set out flares to warn other drivers and where plaintiff smashed into the overturned car because she could not see it as she was temporarily blinded by the lights of the truck on the opposite side, this court said at page 648 of the opinion:

> "The rule that a motorist is normally required to so operate his machine as to be able to see and avoid substantial discernible objects in the road ahead is generally recognized, as is its concommitant that the motorist must equip his machine with proper headlights and be able to stop within the distance of the lights' projection. However, this does not mean that a motorist striking an object in the highway is guilty of negligence as a matter of law under any and all conditions."

In the Fretz case, the Utah Supreme Court reiterated the rule that it was negligence as a matter of law for a person to drive an automobile upon a public highway and not be able to stop within the distance at which

the operator of said car is able to see objects upon the highway in front of him. This court then stated the modified version of this rule with the following language at page 648 of the opinion:

> "But this case has been modified by subsequent cases permitting the jury to determine, *in the light of existing conditions,* what a reasonable and prudent person would do under the circumstances."

In the recent case of *Durrant v. Pelton,* 16 Utah 2d 7, 394 P.2d 879, where defendant ran into the rear end of plaintiff's car which was stalled in the outside lane of two southbound lanes of a four lane highway after dark during a snowstorm. This court said at page 881:

> "However, the test as to what constitutes a proper lookout is usually . . . a latter-day classic question for jury determination . . . A jury should determine what a reasonable and prudent person would do under the conditions as they existed at the time of the accident."

In *Federated Milk Producer's Association, Inc. v. Statewide Plumbing and Heating Company,* 11 Utah 2d 295, 358 P.2d 348, where plaintiff's truck was driving on Redwood Road after dark at approximately 35 miles per hour and struck a windrow of dirt covering most of the east traffic lane and reaching a height of four to five feet, this court said at page 350 of the opinion:

"The unseeability of substantial objects on the highway in time to avoid an accident may depend on many things other than inattention, faulty headlights, or failure to give heed to what was there to be seen. A sudden heavy smoke, fog, snow or rain storm, lightning or approaching headlights or a combination of some or all of these elements coupled with the negligence of the other party, may make an accident unavoidable regardless of how alert and competent a driver is or how well equipped his car is with brakes, lights and other necessary appliances. The visibility of substantial objects may depend on their size, shape, color or whether they absorb or reflect light or blend with or stand out in contrast to the background. To be alert to all surrounding conditions, to have good eyesight, to have proper headlights and brakes and to keep the vehicle under relatively safe control are all very important, but under some circumstances all of these things are not sufficient to enable a reasonably prudent driver to avoid an accident."

And further at page 351 of the opinion the court said:

"Under these facts and circumstances defendant has failed to make a showing that a refusal to find that plaintiff's driver did not

> use due care to avoid this accident would be unreasonable. So a question of fact for the jury on this issue was presented and not one of law for the court."

Appellants rely on the guest case of *Hillyard v. Utah By-Products Co.*, 1 Utah 2d 143, 263 P.2d 287, where a truck driver for the defendant company parked the truck in front of his home with its rear end extending five feet out into the paved portion of the street. The driver of the car which crashed into the truck had been drinking beer, passed one car at 35 miles per hour in a 25 mile per hour zone, continued to accelerate to 50 miles per hour passing two other cars, and in passing a third car and seeing that he would be unable to do so because of oncoming traffic, he then swung to the right striking the parked truck. Action was then brought for the death of the guest passenger. This court said at page 289 of the opinion:

> "From the facts shown as to the manner in which deceased's host driver Aston operated his car, passing the cars at 50 miles per hour in a 25 mile per hour zone with a bottle of beer in one hand, there is no doubt that there was sufficient evidence to make a jury question both as to his negligence, and as to whether it was a proximate cause of the collision."

It would seem that if this is a jury question, the case at bar is obviously one. Mrs. Brock was in her

proper lane of traffic, traveling under the posted speed limit, looking straight ahead, and was not imbibing alcoholic beverages. Because of a slight sunglare appellants' truck appeared to her to be completely off the side of the road and as she approached closer the sun came completely over the mountain momentarily blinding her just prior to impact. We submit that the Hillyard case supports respondent's position that the subject case was properly submitted to the jury as a question of fact.

Appellants rely on *Anderson v. Parson Red-E-Mix Paving Company, Inc.*, 24 Utah 2d 128, 467 P.2d 45, where a 15-year-old guest passenger was riding with a 15-year-old boy who had taken an automobile without leave and while traveling down Main Street in Brigham City accelerated in order to avoid collision with a vehicle he had failed to see and over-accelerated causing the car to go into a sideways slide thereafter striking the extending steel chute of a cement truck which was parked on the side of the road. This court said at page 47 of the opinion that:

> ". . . there was nothing either to obstruct the vision or distract the attention of the host-driver Kim Mortenson. . . There is really no good reason why he should have lost control of his vehicle as is suggested."

The fact situation in this case is hardly comparable to the Brock case where Mrs. Brock was driving in a

normal fashion and is further distinguishable since there was no sun problem in the Anderson case.

Appellants rely on *Velasquez v. Greyhound Lines, Inc.*, 12 Utah 2d 379, 366 P.2d 989, where a passenger of a bus filed suit for injuries sustained when the bus collided with the rear of a semitrailer stopped on the highway. The truck stopped alongside of a car having tire trouble leaving the back end of the truck protruding into the street approximately seven feet. The driver started loading the flat tires into the tire rack of his truck, with the truck's clearance lights, stop lights and blinker lights turned on. The court observed ". . . even if the truck had been aflame, it could have given him no more information". The bus driver knew of the position of the truck and car and testified he intended to stop behind the truck to render assistance and to add the benefit of his lights to the scene. Then for some unexplained reason the bus driver momentarily lost consciousness by either falling asleep or blacking out and collided with the truck. This fact situation is hardly similar to the Brock case since there was no sun factor involved, Mrs. Brock did not know the exact location of the stopped vehicle, she was not planning to stop and render assistance, nor did she momentarily lose consciousness prior to the accident.

Appellants cite *Hirschbach v. Dubuque Packing Co.*, 7 Utah 2d 7, 316 P.2d 319, where respondents' truck and trailer was stopped in the road after dark with its tail lights on and appellants' driver observed the tail lights in time to have stopped and avoided the

collision. He knew the truck and trailer were in the road but continued on thinking they were moving in the same direction and ultimately struck the rear of the parked truck and trailer. This case is distinguishable from the Brock case in that there was no sun factor, the truck and trailer were completely in the road in the Hirschbach case, and the driver knew they were in the road which is not the situation in the Brock case.

Appellants rely on *Nagata v. Kahului Development Co., Ltd.*, 420 P.2d 103, where plaintiff driver was traveling in a direct easterly direction into the rising sun, was unable to see part of the road and ran into a parked truck that was parked at an angle so that 7 feet of it extended into the pavement. This case is distinguishable from the Brock case in that Mrs. Brock had complete view of the entire road even though there was a slight glare from the sun and her eyes told her that the truck was completely off the traveled portion of the pavement. The sun then came completely over the mountain momentarily blinding her a short distance prior to impact. In the Nagata case the plaintiff driver never did see the stopped vehicle and it was her passenger husband who told her to look out. It should further be noted that in the Brock case Mrs. Brock was on a through highway with a 65 mile per hour speed limit and in the Nagata case the driver was traveling in the City of Kahului, Maui, on her way to take her son to school in a residential area and traveling at a speed of only 20 to 25 miles per hour.

CONCLUSION

Mrs. Brock was a mature married woman traveling to work in her proper lane of traffic, well under the speed limit of 65 miles per hour on a through highway, had no reason to hurry, was looking straight ahead having excellent eyesight, and was aware of the parked truck in front of her which appeared to be completely off the road. There was a slight glare from the sun which had not completely come over the mountain. As she approached the stopped vehicle the sun suddenly came completely over the mountain momentarily causing her eyes to adjust to it and the collision then occurred. The trial judges said that her conduct was a question of fact for the jury and not one of law for the court. Eight jurors unanimously returned a verdict for her after hearing all of the witnesses on the issues of liability. Appellants had their day in court and it is respectfully submitted that the verdict and the court's judgment entered thereon be affirmed.

Respectfully submitted,

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