1972

Luke Phillips And Ruby Phillips v. Tooele City Corporation : Appellant's Reply Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

LUKE PHILLIPS AND RUBY PHILLIPS Plaintiffs- appellants vs. TOOELE CITY CORPORATION Defendant-Respondent	Case No. 12740

- - - - - - - - - - - - - - - - - -

APPELLANT'S REPLY BRIEF

POINT I

The respondent in his brief has set forth a number of inaccurate allegations. It is for this reason that appellant deems it necessary to correct said misleading statements.

1. At page four of the respondent's brief under the statement of facts, the defendant states:

> After observing the truck in that position, Phyllis did not then again observe the dump truck nor was she aware of it again until it was in front of her(T.15) or at the side of her (t.16) just prior to colision.

This reading of the testimony of the Plaintiff's driver was inaccurate, as the witness stated. (T15-14)

I proceeding to go through and after I got past where he was, he came out and...

After more cross examination the Defendant's attorney twisted the words of the Plaintiff's witness (T 16-L 3):

Q The next time you observed it when it was in front of you, when it collided?

A. When it was at the side of me.

2. The second error in the statement of facts submitted in the Respondent's brief is relative to the point of impact of the two vehicles. Respondent characterizes the damage to the vehicles as follows:

> (Res. Brief p. 4)
> The damage began on the right front fender of appellant's vehicle, where is (sic) apparently came in contact with the left front bumper of the Defendant's truck.

Appellant's submit that the testimony of the investigation officer Howard E. Cooper, and the pictures submitted in evidence of the Appellant's automobile, clearly show that the Defendant's garbage truck, struck the "Maverick just behind the front wheel" (T 33-L 2) and that the damage to the Appellant's vehicle characterized

the Respondent as damage to the right front
nder, was caused by the force of the impact
hind the front wheels , "pushing the fender kind
forward on the Maverick" (T 33-L 21)

The transcript of the trial does not
dicate the part of the truck which hit the
verick behind the right front wheel, and the
legation by the Respondent that the damages
re done by the collision of the right front
nder of the Appellant's vehicle with the
ft front bumper of the truck is unfounded
sumptions of the Respondent, not supported
the record on appeal.

3. Respondent alleges that "The Defendant's driver told the investigating officer that as he approached the intersection he looked to the left and to the right and continued on into the intersection and as he looked to the left he saw the Appellant's vehicle and was unable to stop prior to collusion. (R.Brief page 4)

Appellant submits that the above statement
dicates the proper duty of care for a vehicle
tering an intersection following a stop, but
t this statement is not in compliance with
ficer Cooper's testimony which is set forth

page 31 of the trial transcript as follows:

And what did the driver of the garbage truck tell you in regard to this accident?

He says that as he approached the intersection he looked to his right but failed to look to the left until too close to the intersection to stop and to avoid hitting the oncoming car from his left.

Likewise, on page 38 of the Trial Transcript re-direct the officer testified as follows:

Officer, you mentioned that the driver of the garbage truck said he did not look to the left?

Until it was too late to avoid the collusion yes.

POINT II

Respondent did not address it's self to the question of the Appellant's position on appeal, and therefore Appellant assumes that there is no argument to the position that in reviewing the judgment is this case, the Supreme Court must view the evidence in a light most favorable to the Appellant.

POINT III

The Trial Court's Decision was based in full upon the provisions of Utah Code Anno. 41-2-10, (1953) , as to the impulation of the minor's

tributory negligence to the Plaintiffs, there
g no other statute referredto in the argument
council to the trial judge in the consideration
the Defendant's motion to Dismiss, the provisions
Utah Code Anno. 41-2-10, (1953) having been
d into the record at the request of the
al Judge. (T. 64)

POINT IV

spondent incorrectly states the rule on
uted contributory negligence in argument
the Appellant's cases cited in Point V of
Appellant's Brief.

Respondent submits that California law
set forth in Solloway v Watts, 136 P. 2d
lif. 1943) and Birnbaum v Blunt, 313 P 2d 87,
lif. 1957) should be followed by this court
order to impute contributory negligence to
Plaintiff's herein, as well as the statutory
utation of liability of an adult signing an
lication for a minors dirvers licence, in
er to bar the recovery of the parent-owner

an action to recover damages sustained by parent from a contributorily negligent rd party.

Both of the cases cited by Respondent were ided prior to the 1967 amendment to the ifornia Vehicle Code, which has over ruled decisions by legislation.

Section 17150 of the California Vehicle e provides as follows:

> Every owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or ommission in the operation of the motor vehicle in the business of the owner or otherwise by any person using or operating the same with the permission, express or implied ,of the owner.

Prior to this provision, the California tion above cited contained the following tence at the end of the paragraph:

> and the negligence of such person shall be imputed to the owner for all purposes of civil damages.

The Legislative Committee Comment of the ote is set forth in West's Annotated California es under the section above quoted, which states:

> The last clause of section 17150 has been deleted because it. . . prevented an

innocent vehicle owner from recovering any damages for a personal injury caused by the concurring negligence of his driver and a third person. Instead of barring an owners' cause of action in such a case, Sec. 17150 as amended permits him to recover his damages from the negligent third person.

Section 17708 of the California Vehicle , relates to the liability of a parent guardian and as amended 1967 reads as follows:

> Any civil liability of a minor whether licenced or not under this code, arising out of his driving a motor vehicle upon a highway with the express or implied permission of the parents. . . is hereby imposed upon the parents, ... so shall be jointly and severally liable with the minor for any damages proximately resulting from the negligent or wrongful act or ommission of the minor in driving a motor vehicle.

The Law revision Commission Comment-1967, forth in West Annotated California Codes lowing the above quoted statute states:

The same reasons which justify the deletion the provision for imputed contributory negligence m section 17150 justify the removal of the ilar provisions from section 17708.

Golloway v. Watts, supra, is now refered in the notes of decisions in West Anno. Calif es, following the above set forth statute as

he law prior to the amendment"

Utah law does not contain the language ich the California legislature found necessary delete from the law due to the Court holdings the cases cited by Respondent.

Utah legislatures and the Courts of this te have refused to impute negligence beyond e limits of the master-servant doctrine, and e provisions of Utah Code Anno. 41-2-10 and -2-22. Respondent urges this Court to now pand the imputed negligence set forth by tatute for the liability of a minor, to bar covery by the imputation of contributory gligence. This urging of the Respondent ing presented by the use of case law of lifornia, now of no force and effect due the corrective legislation, and surely This urt should not be mislead by the Respondent to the prevailing opinions on the issue of puted contributory negligence.

This Court has been of the firm position at the only negligence which can be imputed

a parent must be in complete compliance
h the statute. In Mugleston v Glaittli,
U 238, 258 P 2d 438 (1953) this Court
ted:

> The one real question raised by defendant on appeal is whether a parent who is absent and who has not directed the son to use the automobile, nor consented to its use, is guilty of negligence which will support a judgment against him. We believe he is not.

In Mugleston, the testimony revealed that
son had been given permission to drive the
ily vehicle within the yard of the family
perty by the owner of the car, the father,
that the parents had not given the child
nsent to drive the car upon the public streets.
Court had before it the consideration of
application of the identical statute now
effect, Utah Code Anno. 41-2-22, and refused
extend the liability of the child for the
ld's negligent use of the family vehicle
sing an accident, to the parents where it
ld not be shown that the father "knowingly"
mitted the minor to drive the vehicle upon
ighway.

Appellant submits that the use of the hicle in this instant matter by Utahna Perkins s not with the permission or knowledge of the aintiff Luke Phillips (T-44)

Q . Did you tell your daughter--your wife's daughter she could use the car?

A. No , I didn't.

Q. Had you ever told your wife's daughter she could use the car?

A. No.

Q. Were you home on the afternoon?

A. No, I was working. . . .

Respondent further assets that the holdings Secured Finance Co. v. Chicago, Rock Island, d Pacific Railway Co., 224 N.W. 88 (Iowa 1929) ould be followed by this Court to bar recovery the owner plaintiff, by imputation of a hor's contributory negligence.

Obviously, Respondent negligently failed ascertain whether the above case was the law Iowa today.

Secured Finance Co. v Chicago, RI, and Pac Co., supra, has been overruled by the Iowa preme Court in 1956 by the decision of

Stuart v Pilgrim, 74 N.W. 2d 212, wherein Court stated:

> Secured Finance Co. v Chicago R. I . & P.R. Co., 207 Iowa, 1105, 224 NW 88; Rogers v Jefferson, 224 Iowa 324, 275 NW 874, In re Estate of Green, 224 Iowa 1268, 278 N.W. 285, all supra, and any other Iowa case to the same effect are overruled in so far as they hold the contributory negligence of the consent driver of a motor vehicle is imputed to the owner as a matter of law. . .

A subsequent Iowa case, Houlahan v. Brockmeier N.W. 2d 545 , Iowa (1966) in an action brought a father owner to recover damages from a third ty, wherein the Court found the driver son be contributorily negligent, but that the al Court erred in imputing such negligence to Plaintiff, the Court stated:

> We once recognized what is commonly referred to as the both-ways test, imputing contributory negligence of the driver to the owner of a consent driven vehicle. But in 1956 this venerable concept was abandoned.

The Iowa Supreme Court, in considering s action to over rule the both-ways test Stuart v Pilgrim, supra, considered the following tions of the Minnesota Supreme Court, and New York Court of Appeals :

Christensen v Hennepin Transp Co., 215 Minn 394, 10 NW 2d 406, ( ) which Court stated:

> The very reason for holding the consenting owner liable for negligence of the operation of his automobile, that of furnishing financial responsibility to an injured party is completly absent in the owners action to recover for damages sustained by him as a result of the concurrent negligence of the operator and the third party.
>
> Therefore, it is non sequitur to say that, because the policy of the statute is to impose liability against the bailor it also is its policy to impute to him the contributory negligence of his bailee.

In 1962, the North Dakota Supreme Court compared the family purpose doctrine in effect in that state, with the statutory purposes of Iowa and Minnesota, upon which the previously cited cases of Stuart v Pilgrim, and Christensen v Hennepin Transp Co. were based.

In Michaelsohn v Smith, 113 N. W. 2d 571 (ND) (1962) the owner of a family automobile which was damaged in an intersection collision with another vehicle while the owner's minor son was driving the family automobile, instituted an action

inst the driver of the other automobile to
over the damages to his car. The trial
rt entered judgment awarding the Plaintiff
ages to his car, and the Supreme Court
irmed, holding that the son's contributory
ligences was not imputable to the Plaintiff,
Court stated:

> The family purpose doctrine and the financial responsibility statutes such as those of Iowa, and Minn. have their origin in an identical public policy, that of giving an injured party, who is free of negligence a cause of action against a financially responsible defendant.
>
> The doctrine was an extension of previously established rules of liability in order to "advance the dictates of natural justice." It's application, therefore, should only be coextensive with its purpose. To extend the doctrine to deny the right of a non-negligent car owner to recover from a negligent driver of another car would defeat the public policy the doctrine is intended to serve. It is our view, therefore, that the negligence of Austin Michaelsohn(the son) if any, may not be imputed to W. E. Michaelsohn (the plaintiff)

Mills v Gabriel, 259 App. Div. 60, 18 NYS 78, affirmed 31 N.E. 2d 512 (1940) is the dmark case of refusal to extend statutory bility to bar recovery of a non-negligent

ner against a negligent third party,

en the owners driver is contributorily

ligent. The Court therein stated:

> The purpose of the statute was to change the common-law rule by "making the owner liable for the negligence of a person legally operating the car with the permission, express or implied of the owner." (citations omitted). . .
>
> The statute does not change the common-law rule respecting the owner's right to recover from third persons under the circumstances disclosed by the record. Nor may it be involked for the purpose of imputing the operators' negligence to the owner, It is applicable for that purpose only in action brought by third persons against the owner . (emphasis added)

Mills v Gabrial, has been followed by

sebsequent appellant Court decisions in

York since 1940, and is controlling law

ay.

In Molino v County of Putnam, 272 NE 2d 323

NY 2d 44 (1971) the Court stated:

> The statute which imputes to an absentee owner the negligence of his driver for the purpose of imposing liability to an injured third party, does not impute contributory negligence to such an absentee owner in his action to recover his own damage.

also: Continental Auto Lease Corporation v

Dell, 19 N.Y. 2d 350, 280 NYS 2d 123, 227 N.E.

8; Brooks v Horning, 27 AP 2d 874, 278 N.Y.S.2d

espondent has also cited to this Court the istrict of Columbia case of National Trucking a Storage Company v Driscoll, 64 A. 2d 304 (.C. 1949) This case was decided by the D.C. ourt under the financial responsibility statute, .C. Code 1940 Sec. 40-401. It provided that driver operating motor vehicle with the nsent of the owner should, in case of accident e deemed to be the agent of the owner". nder the Utah holdings of master-servant gency cases, the contributory negligence of e agent has always been imputed to the master bar the recovery of the owner of a vehicle ing driven by the agent on the owners business, d appellants submit that the same doctrine of gency prescribed by statute under the D. C. Code not diverse from the common-law doctrine in e limited area acknowledged by this Court. wever, it is to be noted, that there is applicable statute in the State of Utah, to pply the holdings of National Trucking beyond e common-law master-servant doctrine.

Louisiana law, upon which Dileo v Montier, 195 So 74 (La.App. 1904); and Montenot v Pan American Fire & Casualty Co., 209 So 2d 105 (La) which are cited by respondent is as follows: L.S.A. CC Article 2318

> The father, or after his decease, the mother, are responsible for the damage occasioned by their minor or unemancipated children, residing with them, or placed by them under the care of other persons, reserving to them recourse against those persons.

Utah has no such statute, and the holdings based upon such law are inapplicable to the instant case. However, it may be noted in connection with the Louisiana cases, that the Supreme Court of that state has refused to impute the negligence of a minor son, who was driving his mother's car, to bar her recovery in Gaspard v Le Maire, 158 So 2d 149 (1963) because the father was not deceased. The Court stated:

> "The negligence of one person cannot be imputed to another person not guilty of personal negligence in the absence of a legal obligation on the part of the latter to respond for the fault of the former.

Respondent submitted to this Court that the Appellant had presented two isolated cases which respondent characterized as the "minority position", and that the respondent had presented the prevailing opinion on imputation of Contributory negligence.

Appellants set forth in their original brief the two cases which are directly in line with the instant matter before this Court Westergren et al Vs King, 99 A. 2d 356 (Del-1953) and York v. Day's Inc., 140 A 2d 730 (Me 1958) the language of the statutes in question are almost identical to the Utah laws, and Appellant urges this Court to review the policies and reasoning of those cases. It should be noted that Westergren, was decided before the Iowa Court overruled Secured Finance Co. v Chicago R.I. and P Railway Co., supra.

No longer is the position the appellant's urge this Court to adopt, in the minority. This Court has not had occassion previously to rule on the issue of imputed contributory negligence under the motor vehicle statutes

nvolved in the instant matter. Appellants ubmit that the preferable view to be adopted y this Court is that contributory negligence hould not be imputed to the owner under the orms of statutes discussed herein. The octrine of contributory negligence should ot be extended to apply vicariously to an nocent party.

In summary, Appellant's represent that espondent has cited for this Court cases which ave either been over-ruled, made inapplicable y amendment to legislation, or are based on statutes which are substantially dis-imilar to the provisions of Utah Code Anno., 1-2-10, or to the provisions which Respondent lleges the Trial Court based it's decision on, Utah Code Anno. (1953) 41-2-22.

CONCLUSION

his Court should reverse the Judgment of on-Suit, and remand the matter to the istrict Court for a determination by a ury, as to whether the Plaintiff's vehicle

damage was caused by the negligence of the Defendant's agent, which was the proximate cause of the Defendant's damages; and further set forth the rule to be applied by the lower court, that the contributory negligence, if any, of a minor driver cannot be imputed to the owner of a vehicle to bar recovery by such owner against negligent third parties.

Respectfully submitted,

Myrna Mae Nebeker
Attorney for Appellant
212 Phillips Petroleum Bldg..
Salt Lake City, Utah 84101