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Cecil R. Martin v. Carl Ehlers : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT of the STATE OF UTAH

CECIL R. MARTIN,
Plaintiff and Respondent,

vs.

CARL EHLERS,
Defendant and Appellant.

No. 9565

BRIEF OF APPELLANTS

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Appeal from the verdict and judgment of the Third Judicial District Court for Salt Lake County, Honorable A. H. Ellett, Judge.

STATEMENT OF THE KIND OF CASE

This is an action to recover for personal injuries and property damage arising out of an intersection collision between the plaintiff driving his automobile and the defendant driving an emergency police vehicle.

DISPOSITION IN LOWER COURT

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

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the verdict and for judgment in his favor as a matter of law, or in the alternative, a new trial.

STATEMENT OF FACTS

The collision occurred in the intersection where 7th East Street intersects 27th South Street in Salt Lake County, Utah. 7th East Street is 37 feet, 11 inches wide. The west side of the street is 19 feet wide with one traffic lane; the east side of the street has two traffic lanes separated by a solid line. 27th South Street is 39 feet, 11 inches wide on the west side of the intersection and 41 feet, 1 inch wide on the east side. There are two lanes for eastbound traffic. (Tr. 5, 6 and 7, Exhibits P1, P2 and P3).

The point of impact was located 24 feet, 7 inches south of the north curb line of 27th South Street and 13 feet, 4 inches north of the south curb line of this street, and 17 feet, 10 inches east of the west curb line of 7th East Street. (Tr. 9 and Exhibit P1).

The intersection was paved with asphalt (Tr. 5) and was level (Tr. 10). The sun was shining and the roads were dry (Tr. 10, 76 and 98). The collision occurred about 5:30 p.m. in heavy traffic. (Tr. 12 and 13).

The appellant is a deputy sheriff for Salt Lake County. (Tr. 94). On June 10, 1959, at about 5:30 p.m. he was responding to an emergency call in a police automobile. (Tr. 96). It was equipped with a siren and two spotlights. The siren was located under the hood in the front of the automobile and the red spotlight was located at the bottom of the windshield on the right side of the car. The white spotlight was located in the same position on the left side of the car. (Tr. 97 and 98). Both lights were burning and the siren was constantly sounding from the time the officer began the emergency journey until the impact occurred. (Tr. 97, 98, 103 and 104). The posted speed limit on both streets was 30 miles per hour. (Tr. 31). As he approached within one block of the intersection where the accident occurred, he was driving south on 7th East Street between 35 and 40 miles per hour. (Tr. 98 and 99). There were automobiles stopped at the north, south and east entrances to the intersection. (Tr. 71, 99, 109 and 110). It was necessary to drive on the east side of 7th East Street because of the traffic stopped on the west side of the street at the intersection. (Tr. 77). As the police car neared the intersection, it was free of traffic. (Tr. 79). The officer slowed for the intersection and shifted into a lower gear. (Tr. 82, 90, 101 and 111). When the vehicle entered the intersection, it was struck broadside by respondent's car traveling in an easterly direction on 27th South Street, at about 30 miles per hour. (Tr. 48). The semaphore for east-west traffic had turned green as respondent was from 30 to 50 feet from the intersection. (Tr. 48). Respondent testified that he did not hear the siren nor observe the police car at any time prior to its entering the intersection. (Tr. 50). His automobile skidded 24 feet, 9 inches before the impact. (Tr. 9 and 10).

Two witnesses revealed themselves to the investigating officers. One of them, J. Thomas Fyans, was stopped north of the intersection. His car was the first in line at the intersection facing south. (Tr. 78). He heard the siren and saw the emergency vehicle when it was 500 to 600 feet north of the intersection. (Tr. 77). The siren sounded continuously until the impact. (Tr. 81). Fyans stayed in position while the police vehicle approached, even though the light turned green for Fyan's direction of travel. (Tr. 78, 79, 80 and 91).

The other witness, Daniel R. Gehrke, was directly behind the Fyans automobile and he also heard the siren and saw the red light burning on the vehicle. (Tr. 39, 40, 41, 42 and 43).

The impact knocked the emergency vehicle in a southeasterly direction where it spun around and struck a vehicle stopped in the northbound lane of traffic on 7th East. It then slid up against a utility pole on the southeast corner of the intersection. The respondent's automobile moved approximately 10 feet after the impact and came to rest facing in a southeasterly direction near the center of the northbound lane of traffic. (Tr. 17 and 18, Exhibit P1).

As respondent approached the intersection, he noticed cars stopped at the north, south and east entrances to the intersection and also that there was no moving traffic in the intersection. (Tr. 71). He was moving about 30 miles per hour at the time of impact and hadn't slowed down for the intersection. (Tr. 29, 68, 70 and 72). Both cars were damaged beyond repair and respondent received a minor chest injury. (Tr. 83, 101, 102 and Exhibits P4 and P5).

POINTS URGED FOR REVERSAL

I. THE EVIDENCE DOES NOT SUPPORT A FINDING THAT APPELLANT WAS NEGLIGENT.

II. RESPONDENT WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW.

III. THE TRIAL COURT ERRED IN ITS INSTRUCTIONS GIVEN TO THE JURY.

ARGUMENT

POINT I

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT APPELLANT WAS NEGLIGENT.

The appellant, hereinafter referred to as the officer, was responding to an emergency call and was therefore not subject to the usual rules and regulations governing the use of the highway by motorists. Title 41-6-14, Utah Code Annotated, 1953, as amended. He also had the right of way. Title 41-6-76, Utah Code Annotated, 1953.

An independent witness stated that the police car had its siren sounding and red light operating at least five to six hundred feet before the impact occurred. (Tr. 76 and 77). The siren and red light were continuously operating up to the point of impact. (Tr. 80 and 81). It should also be noted that the emergency vehicle was reducing speed as it approached the intersection. (Tr. 82). The evidence showed conclusively that with the exception of respondent's automobile, all other traffic

had stopped at the entrance to the intersection awaiting the emergency vehicle. (Tr. 78 and 79). Since the officer was conforming to the statutory requirements of notice to be given by an emergency vehicle, coupled with the fact that all automobiles within his view had stopped to yield the right of way to him, he had a right to proceed upon the assumption that the other automobiles on the highway would yield the right of way to him. See Lakoduk vs. Cruger, (Wash.) 296 Pac. 2d 690, more fully hereinafter discussed.

The evidence further shows that when the respondent's automobile came into view of the officer, there remained less than 25 feet in which to bring the emergency vehicle to a stop. (Tr. 9). Even at a speed of less than 20 miles per hour, the officer could not have stopped in time to have avoided the accident. His vehicle was struck broadside from the right. (Tr. 100 and Exhibit P4).

It is respectfully noted at this point that the jury found that the officer had his car under proper control. (R. 54). It is therefore respectfully submitted that by virtue of the facts as indicated above, there was no substantial evidence upon which a jury could base a finding of negligence in the way the officer was operating the emergency vehicle. The only finding by the jury that the officer was negligent, which negligence proximately caused the accident, was that he was driving too fast for the conditions then and there existing. (R. 54).

A well reasoned opinion from the Supreme Court of the State of Washington involving facts very similar to those in the instant case, with a statute substantially the same as our

Utah statute, is set forth in the aforementioned case of Lakoduk vs. Cruger, 296 Pac. 2d 690. In this case, a fire truck proceeded through an intersection against a red light while sounding its siren and displaying a red light in response to a fire alarm. The plaintiffs entered the intersection from a right angle to the fire truck and their pickup truck was struck broadside by the fire truck, killing three occupants of the pickup truck. With the exception of the fact that in the instant case the respondent collided with the emergency vehicle, the facts in the two cases appear to be the same. In reviewing the Washington Motor Vehicle Act, which is virtually the same as the Utah Motor Act involved herein, the Court, at page 701, quoted from the decision of Lucas vs. City of Los Angeles, 10 Cal. 2d 475, 75 Pac. 2d 602, as follows:

> "The expression 'with due regard for the safety of all persons using the highway' was explained in the Balthasar case where the Court said: 'It is evident that the right of way of fire apparatus over other vehicles is dependent upon due regard to the safety of the public only insofar as such due regard affects the persons required to yield the right of way. Notice to the person required to yield the right of way is essential, and a reasonable opportunity to stop or otherwise yield the right of way necessary in order to charge a person with the obligation fixed by law to give precedence to the fire apparatus. This is the only reasonable interpretation that the statute will bear. If the driver of an emergency vehicle is at all times required to drive with due regard for the safety of the public as all other drivers are required to do, then all the provisions of these statutes relating to emergency vehicles become meaningless and no privileges are granted to them. But if his 'due regard' for the safety of others

means that he should, by suitable warning, give others a reasonable opportunity to yield the right of way, the statutes become workable for the purposes intended.' "

See also the case of State of Washington vs. United States, 9th Circuit, 194 Fed. 2d 38.

The Washington Court then went on to say, in substance, that an arbitrary exercise of the privileges granted to an emergency vehicle cannot be predicated upon the elements of speed, and failure to observe other vehicles on the road, where a warning has been given. The Court stated at page 703:

> "In the case at bar, there is no conflict in the evidence relative to the use of the red lights and the continuous sounding of the siren with which the hose wagon was equipped. Fourteen disinterested witnesses heard the siren when at various points in the vicinity of the intersection, some of them at a greater distance from the approaching fire apparatus than was the farm truck. The conclusion seems irresistable that Mr. Lakoduk either did hear the siren but failed to heed the warning, or, in the exercise of reasonable care, should have heard it."

See also Holser vs. City of Midland, 330 Mich. 581, 48 N.W. 2d 208.

It should be noted in our instant case that all automobiles at the intersection either heard or observed the emergency vehicle approaching and yielded the right of way, as required by law, with the exception of the respondent. The facts show, without contradiction, that the officer had every right to expect that other users of the highway in front of him would yield the right of way, as every automobile in view had stopped. The

respondent failed to produce any evidence to show that had the officer been driving in any other manner he could have avoided the accident when respondent's automobile came into view. Under the conditions as they then existed, it would be highly unreasonable to expect the operator of an emergency vehicle to bring his automobile to a stop in a distance of less than 25 feet. Under such a state of facts, the conclusion is irresistible that the officer was not negligent, nor did he in any way proximately cause or contribute to the happening of the accident.

POINT II

THE RESPONDENT WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW.

The evidence shows without contradiction that two independent witnesses saw and heard the emergency vehicle approaching the intersection. It is also clear that the drivers of all the other vehicles in the vicinity of the intersection, whose names were never disclosed, were also aware of the approach of an emergency vehicle and yielded accordingly.

Witness Fyans stated that he heard and saw the emergency vehicle approaching the intersection when it was at least 500 to 600 feet to the North of the intersection. (Tr. 77 and 78). Witness Gehrke also heard and saw the officer approaching. The respondent maintains that he neither saw nor heard the emergency vehicle approaching as he neared the intersection, although all other cars at or near the intersection had stopped and yielded the right of way to the officer. This problem was also considered in the Lakoduk case, supra, at page 703, wherein the Court said:

"The deceased driver of the farm truck . . . was required upon hearing the siren, to yield the right of way by driving to the right curb, stopping, and remaining there until the emergency vehicle had passed when (1) the authorized emergency vehicle was approaching and (2) was giving audible signal by siren. This statute is unambiguous. Since appellants had red lights on their vehicle flashing and were giving the required audible signal, *the deceased driver will be deemed to have seen and heard that which was there to be seen and heard by a reasonably prudent driver, exercising due care for his own safety. Under the provisions of this statute it became the mandatory duty of the deceased driver to yield the right of way. He failed to obey the mandate of the statute. It must therefore be held, as a matter of law, that his failure to do so was negligence, which was a proximate cause of the accident.*" (Italics ours).

It is respectfully submitted that after the officer in our present case gave the required signals, the respondent was required to yield the right of way to him. The officer had a right to rely upon the signals given and the right of way granted him by statute until such time as he knew, or in the exercise of reasonable care should have known, that the respondent was not going to yield the right of way. This could only have occurred at the time the respondent's vehicle entered the intersection. The evidence reveals that less than 25 feet was traveled by the emergency vehicle before being struck broadside by respondent's automobile. With such short notice of impending danger, it was impossible for the officer to stop. As also was stated by the Washington Court in the Lakoduk case:

"Appellants did not see that the farm truck was not going to accord the hose wagon the right of way until

> the farm truck actually entered the intersection and was about 25 feet directly in front of the hose wagon. It affirmatively appears by undisputed evidence that at that moment there was not appreciable time for appellants to avert the certain disaster which inevitably followed." Lakoduk vs. Cruger, supra, at page 703.

Accordingly, in our instant factual situation, the officer could not have been the sole proximate cause of the accident. Respondent must have been at least contributorily negligent as a matter of law. Both drivers had an equal opportunity to see and avoid each other but were unable to do so. If the officer was negligent in failing to avoid the collision, because of the proximity of the respondent, then so must the respondent have been negligent. The officer had a statutory right of way and a right to assume that the respondent would heed his warnings in compliance with the requirements of the statute.

If, after colliding with an emergency vehicle the operator of the disfavored vehicle is permitted to escape his responsibility under the statute, requiring him to yield, by merely saying that he did not see or hear the emergency vehicle, even though all other operators in the immediate vicinity did see or hear the emergency vehicle, the statute then becomes meaningless. If respondent is to be judged in the light of a reasonable prudent person under the circumstances, he must then be charged with either having seen or heard the emergency vehicle approach as did all other drivers in the immediate vicinity. His failure to then yield would be negligence and at least a substantial and contributing factor in causing the accident. If the operators of emergency vehicles cannot place reasonable reliance upon the statute granting them the right of way, then the only safe

course of conduct for them is to obey all traffic rules and regulations while proceeding on an emergency call. This will effectively convert a speedy errand of mercy into a casual ride at the expense of person in imminent peril. Public policy requires speedy assistance be given to those whose lives are in peril and this of course is the reason for the statutes applicable thereto.

Emergency vehicle operators are required by the due performance of their duty to expose themselves to unusual risks of injury by answering emergency calls. If, in return, they are not granted a strong measure of protection in the performance of their duties, the obvious result will be an emergency journey without haste and at the expense of the public. This is not what the legislature contemplated in passing statutes for the benfit of such emergency vehicle drivers.

POINT III

THE TRIAL COURT ERRED IN ITS INSTRUCTIONS GIVEN TO THE JURY.

The trial court, by its Instruction No. 16, instructed the jurors that both respondent and appellant were to be judged by the same standard of care. (R. 48). This line of reasoning also was included in the Special Verdict. (R. 54). Appellant's counsel duly excepted to the same. (Tr. 120). Even in those jurisdictions where the courts submit issues of speed to the jury as a question of fact in determining whether the driver of an emergency vehicle is exercising due regard for the safety of others, the standard of care to be exercised by the operator of the emergency vehicle is not judged by the same standard as

an ordinary motor vehicle operator. See McKay vs. Hargis, Supreme Court of Michigan, 1958, 351 Mich. 409, 88 N.W. 2d 456, wherein that Court stated that the test is, did the officer exercise

> "the care which a reasonably prudent man would exercise in the discharge of official duties of like nature under like circumstances."

Appellant respectfully submits that the standard of care exercised by an operator of an emergency vehicle should be judged by the standard of care exercised by other operators of emergency vehicles and not by the usual standards required of other ordinary drivers on the highway. In accord with this position is the case of City of Baltimore vs. Fire Insurance Salvage Corporation of Baltimore, Supreme Court of Maryland, 1959, 219 Maryland 75, 148 Atl. 2d 444, wherein that Court stated at page 448:

> "In holding that operators of authorized emergency vehicles are liable for ordinary negligence under the statute mentioned, we do not, of course, mean to state that their conduct in the operation of such vehicles is measured by exactly the same yardstick as the actions of the operators of conventional vehicles . . . However, they are bound to exercise reasonable precautions against the extra-ordinary dangers of the situation that the proper performance of their duties compels them to create."

The trial court, by giving its Instruction No. 16, in effect held the appellant to the same degree of care as other motorists using the highway and did not take into consideration the fact that the officer's conduct in operating an emergency vehicle in the performance of his duties should be measured in this

light. Such an instruction was misleading to the jury in that no standard of care for emergency vehicle operators was presented to them so as to attain an intelligent determination of the issue.

CONCLUSION

In the case of Jensen vs. Taylor, 2 Utah 2d 196, 271 Pac. 2d 838, this Court considered the applicability of Utah statutes relating to emergency vehicles under the 1949 amendment to the Motor Vehicle Act in question wherein emergency vehicles were required to slow down as may be necessary for safe operation before proceeding through red lights. Since the Jensen opinion was rendered, the Utah legislature saw fit to amend the Motor Vehicle Code, insofar as it relates to emergency vehicles, *by removing the requirement of slowing down before proceeding through red lights or stop signs.* (Italics ours). Title 41-6-14, Utah Code Annotated, 1953, as amended. The jury specifically found that the appellant had the emergency vehicle under control. There was no evidence in our instant case to show that had the officer been driving at a slower rate of speed the accident could have been avoided. At a time when the officer knew or had reason to know of respondent's inattentiveness, there was not appreciable time for him to have averted the collision with less than 25 feet remaining in which to stop. The facts in the instant case are not in any way similar to those in Johnson vs. Maynard, 9 Utah 2d 268, 342 Pac. 2d 884, where this Court, in reviewing the evidence in that case, found evidence that would support a finding of negligence against the police officer. In the Johnson case, the evidence

indicated that the accident occurred on a rainy day during the noon rush hour and that the parties to the accident could have seen each other while 200 feet apart. Unlike the instant case there was, or should have been, knowledge on the part of the officer while 200 feet from the scene of the accident, of the inattentiveness of the other driver and with such knowledge, he proceeded into the intersection where the accident occurred.

Speed, right of way, and such other ordinary rules of the road have no application because the emergency driver is specifically exempted by statute from complying with those rules, and is only placed under a duty to drive with due regard for others under the circumstances.

The respondent was at least contributorily negligent in failing to yield the right of way to appellant. All traffic in the vicinity had stopped to yield the right of way to the emergency vehicle. The respondent claimed that he did not ever hear a siren although the window was down on the driver's side of the automobile (Tr. 69) and the siren was constantly sounding right up to the moment of impact. Respondent must have heard the siren and chose to ignore it. If, in fact, he did not hear the siren, at a time when all other drivers in the immediate vicinity were yielding the right of way, then he nevertheless must be charged with hearing that which in the exercise of ordinary care would have been heard, and his failure to do so was negligence.

The Court's instructions to the jury placed the same burden of care upon both operators. The appellant's actions were measured by those of an ordinary vehicle operator upon the highway and not by a standard of care that a reasonably prudent

man would exercise in driving an emergency vehicle under like circumstances.

Appellant respectfully submits that there was no substantial evidence to support the jury's finding that he was negligent and that his negligence was the sole proximate cause of the accident. The evidence further shows that the respondent was at least contributorily negligent as a matter of law and that the Court erroneously instructed the jury. There is absolutely no dispute in the evidence as to what occurred and under this set of facts and circumstances, justice dictates that the verdict and judgment should be reversed and set aside, and judgment entered in favor of the defendant and against the plaintiff, no cause of action.

Respectfully submitted,

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