1960

Leo Porter and Nora Porter v. Hyrum Price : Brief of Appellant

Utah Supreme Court

George B. Handy; Attorney for Appellant;

9151

In The Supreme Court of the State of Utah

LEO PORTER and NORA PORTER,
Plaintiffs and Appellants,

—VS.—

HYRUM PRICE,
Defendant and Respondent.

APPELLANT'S BRIEF

GEORGE B. HANDY
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CASES CITED

TEXTS CITED

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PRELIMINARY STATEMENT

Leo Porter and Nora Porter, Plaintiffs, appeal from a verdict rendered by a jury in the District Court of Weber County, State of Utah.

The record on appeal is in two volumes, one of which consists of the pleadings, minute entries and similar papers, all references to this volume are designated by the letter "R." The other volume which is separately numbered is a transcript of the testimony and proceedings at the trial. References to this volume are designated by the letter "T."

STATEMENT OF FACTS

On January 29, 1958, Plaintiff Nora Porter was seated in the automobile of Plaintiff Leo Porter, while said automobile was parked parallel to the west curb of Ogden Avenue, in Ogden, Utah, between 35th and 36th Streets. Ogden Avenue runs in a north and south direction. The said automobile was facing south, was stationary and was approximately six (6) or eight (8) inches from the west curb of Ogden Avenue. (Tr. 15, 20). The time of day was 4:40 p.m. (Tr. 7). While in this position the automobile of Plaintiff Leo Porter was struck head-on by an automobile driven by the Defendant, Hyrum Price (Tr. 7), causing injuries to Plaintiff Nora Porter, who was seated in said automobile, and causing damage to the automobile of Leo Porter.

The defendant, Hyrum Price, was afflicted with diabetes and had been so for seventeen (17) years (Tr. 84). He is employed at Hill Air Force Base, and resided at 988-36th Street, which is south and east from the place of the accident. On the date of the accident, Mr. Price was transported from his place of employment to a point in West Ogden where he picked up his own automobile and then drove east across the 24th Street viaduct, which is approximately sixteen (16) blocks north of the place of the accident. Defendant Price turned south on Lincoln Avenue from 24th Street and claims to have no recollection of operating his automobile from that point to the point of collision, although he drove fifteen (15) or six-

teen (16) blocks through early evening, heavy traffic, along streets regulated by eight (8) Semaphore signals that he negotiated successfully. (Tr. .....). Mr. Price admits to having been afflicted with diabetes for seventeen (17) years (Tr. 84). He has been under the constant care of physicians who have attempted to educate him in regard to the disease and its control. Mr. Price admitted to having several insulin reactions during the term of the disease and was instructed by his physician to carry candy (Tr. 85) with him at all times to curb insulin reactions. He has no recollection as to whether or not he carried candy with him on the day of the accident (Tr. 95).

Mr. Price's sole defense to the suit of the plaintiffs is that he had an insulin reaction that caused him to lose consciousness and thus cause the accident. Mr. Price on his deposition taken in April, 1959, claimed to have taken sixty-five (65) or seventy (70) units of insulin on the morning of the accident, and at the time of the trial he claimed that he did not remember the exact dosage (Tr. 86).

Dr. Drew Petersen, specialist in internal medicine, with considerable experience in diagnosing and treating diabetic conditions, was defendant's physician and testified that Mr. Price, the defendant, had had a severe insulin reaction that had caused him to lose control of his automobile and cause the accident. Dr. Petersen testified that one of the causes of an insulin reaction was the tak-

ing of an excessive dose of insulin (Tr. 145), and that if the defendant took sixty-five (65) or seventy (70) units of insulin on the day of the accident that this was an excessive dosage and would cause an insulin reaction (Tr. 143). Mr. Price after the accident was regulated on fifty (50) units of insulin and the recommended dosage before the accident was fifty-five (55) units (Tr. 162).

Dr. Petersen stated that most insulin reactions are preceded by warning or premonitory symptoms (Tr. 146), and that this reaction occurred at the time when it could have been expected (Tr. 155).

Dr. O. M. Lewis, specialist in internal medicine, with considerable experience in diagnosing and treating diabetics, stated that he diagnosed the insulin reaction suffered by Mr. Price as being caused by the Defendant Price taking more insulin than was needed on the day in question. (Tr. 120). Dr. Lewis was also of the opinion that it was unlikely that the Defendant Price would not feel some warning or other premonitory symptoms of the coming on of the insulin reaction (Tr. 121), and that this insulin reaction suffered by Mr. Price occurred at the time when it could be expected (Tr. 122).

STATEMENT OF POINTS TO BE ARGUED

POINT I.

THAT THE VERDICT OF THE JURY IS CONTRARY TO THE PREPONDERANCE OF THE EVIDENCE.

POINT II.

THAT THE COURT ERRED IN INSTRUCTING THE JURY ON UNAVOIDABLE ACCIDENTS.

POINT III.

THAT THE COURT ERRED IN FAILING TO GIVE PLAINTIFFS' REQUESTED INSTRUCTION NO. 5.

POINT IV.

THAT THE COURT ERRED IN FAILING TO GIVE PLAINTIFFS' REQUESTED INSTRUCTION NO. 9.

POINT V.

THAT THE COURT ERRED IN FAILING TO GIVE PLAINTIFFS' REQUESTED INSTRUCTION NO. 10.

ARGUMENT

POINT I.

THAT THE VERDICT OF THE JURY IS CONTRARY TO THE PREPONDERANCE OF THE EVIDENCE.

The evidence preponderantly shows that Mr. Price had been a diabetic for seventeen (17) years (Tr. 84) and in that time had suffered several insulin reactions which if not checked would have caused him to lose consciousness. He knew that he could have such a reaction at any time, and that if it happened while driving a motor vehicle he would lose control of the vehicle and that probably great injury and destruction would result to others. He knew that an overdose of insulin would cause such a re-

action. He admitted to taking such an overdose in a deposition taken in April, 1959, although at the time of the trial in the month of August, 1959, he thought it more discreet to not remember exactly how many units of insulin he had taken on the day of the accident. He knew that if he was to have a reaction it would be at about this time of the day. Both Dr. Petersen and Dr. Lewis testified to this. (Tr. 122, 155). He claimed to have no recollection of anything that occurred after he turned on to Lincoln Avenue from 24th Street, but successfully negotiated sixteen (16) blocks of heavy evening traffic and negotiated eight (8) Semaphore signals and was in the vicinity of his home when first observed by a friend, Mr. Robert Call. (Tr. 7, 13). If the facts are as contended by defendant, why didn't he lose control of the car at or near the point of losing consciousness, rather than 16 blocks later.

This is not a case where unconsciousness is caused by a physical disability that the driver has no knowledge that he has and hence has no reason to suspect that he would become incapacitated while driving and perhaps cause injury to others. It is apparent also that it is unlikely that unconsciousness came upon Mr. Price without some warning or other premonitory symptoms.

Defendant raises the defense that this accident was unavoidable. However, the evidence is clear that because of the defendant's diabetic condition that he could lose consciousness at any time; that an insulin reaction which

would bring on unconsciousness most likely would occur preceding the evening meal and at the time of day that this accident occurred. That an overdose of insulin which he admitted taking would cause a reaction and that if he did have an insulin reaction while driving a motor vehicle that great injury and destruction could occur to others and their property, and thus we can only conclude that it was negligent of defendant to drive under these circumstances, and that if he insisted on driving a motor vehicle in his condition that he would have to suffer the consequences and bear the responsibility for any injury or damage that he caused to others.

The conclusion seems justified that if the operaor of a motor vehicle knew that he was subject to attacks, in the course of which he was likely to lose consciousness, such a loss of consciousness does not constitute a defense in an action brought by a person injured as the result of the operator's conduct while unconscious.

In *Eleason v. Western Casualty & Surety Co.* (1948) 35 N.W. 2d, 301, it appeared that the driver of a truck suffered an epileptic seizure, became unconscious, and lost control of the truck, with the result that the vehicle struck a workman at the side of the street. It further appeared that the driver knew that he was subject to spells or seizures rendering him unconscious, although he did not know that he had epilepsy. The court held that the driver was negligent as a matter of law, since under these circumstances the epileptic seizure was not an

act of God and the collision was not an unavoidable accident and in so holding stated:

> "The problem then becomes a question of whether it is negligence for a man to drive a car when he knows that he is subject to such spells. It is considered that, as a matter of law, this is negligence. The fact that the driver did not know the technical name of his malady is not controlling. What is important is that he knew that he might be unable to control the car which he was driving. He also must have known that if he lost control of the car there was danger of someone being injured. Driving a car where people are to be met with on highways today is dangerous enough if one has complete control of his powers. When a driver knows that he may become unconscious and lose control at any moment, he must be held negligent in attempting to drive."

See also 28 A.L.R. 2d, page 40, Section 18 and 19. American Jurisprudence, Vol. 5, Page 605, Sec. 179.

> "One who knows he is physically unfit to operate an automobile on the highway, as for example, that he is subject to attacks of such a character as will prevent his operating an automobile as a reasonably prudent man would do, and nevertheless undertakes to drive on the highway, should be held liable for an injury resulting when he sustains an attack while driving, by reason of which he loses control of the car and causes an injury to another."

Criminal liability has been founded upon a person allowing himself to fall asleep while operating a motor vehicle. Where negligence in the operation of a motor vehicle is the operative factor in determining criminal responsibility a number of cases have held or recognized that an automobile operator unconscious from illness at the time of an accident may nevertheless be found guilty of a criminal offense under some circumstances. The rationale of these cases is that a driver may be guilty of criminal negligence in undertaking to drive when he knows that he may black out or lose consciousness.

The Court held in *People v. Decina* (1956) 2 NY2d 133, 63 A.L.R. 2d, 970, that where the defendant, knowing himself to be subject to epileptic attacks which could cause unconsciousness for a considerable time, consciously undertook to drive on a public highway, suffered an attack, and ran at high speed onto the sidewalk, resulting in the death of four persons that culpable negligence within the intendment of the statute under which he was charged was shown by defendant's electing to drive, knowing that he suffered from epilepsy, which would cause him to become unconscious.

In holding sufficient an indictment charging that the defendant lost control of his automobile during an epileptic seizure whereby another person was killed, and that the defendant had prior knowledge that he was subject to epileptic seizures which struck without warning from time to time and rendered him unconscious and unfit to

operate an automobile, the court in *People v. Eckert,* 2 NY2d 126, 63 A.L.R. 2d 985, held that the terms "reckless" and "culpably negligent" as used in the statute mean something more than the slight negligence necessary to support a civil action for damages, and connotes conduct where the actor has knowledge of the highly dangerous nature of his actions or knowledge of such facts as under the circumstances would disclose to a reasonable man the dangerous probability of serious bodily harm or death under the particular circumstances of the case. The conduct of the defendant in driving with the knowledge that he was subject to incapacitating seizures was held to go beyond the bounds of lack of skill and foresight and to demonstrate disregard of and indifference to the rights of others.

See also, *People v. Freeman,* (1943) 142 P.2d 435 (California.)

The Utah case of *State v. Olsen,* (1945) 160 P2d 427 has a direct bearing on the issue under discussion. In this case, the driver, a woman, while driving a truck, felt drowsy but continued to drive and fell asleep, losing control of the truck and the truck ran onto a sidewalk and killed a child. The driver was charged with involuntary manslaughter and convicted.

In affirming the conviction, the Supreme Court stated:

"*** for while one cannot be liable for what he does during the unconsciousness of sleep, he is responsible for allowing himself to go to sleep—to get into a condition where the accident could happen without his being aware of it, or able to avoid it."

See also, *William v. Frohock,* 114 So2 221 (Fla.)

POINT II.

THAT THE COURT ERRED IN INSTRUCTING THE JURY ON UNAVOIDABLE ACCIDENTS.

"The law recognizes unavoidable accidents. An unavoidable accident is one which occurs in such a manner that it cannot justly be said to have been proximately caused by negligence as those terms are herein defined. In the event a party is damaged by an unavoidable accident he has no right to recover since the law requires that a person be injured by the fault or negligence of another as a prerequisite to any right to recover damages."

The Court will recognize that this instruction has been taken verbatim from the Volume entitled "Jury Insrtuctions for Utah," which would seem to give this instruction some respectability. The annotation to this instruction in "Jury Instructions for Utah" gives as supporting authorities *Nelson v. Lott,* 17 P2 272, a Utah case of 1932 which even at the time did not seem to be substantial authority for this type of instruction; and the California case of *Parker v. Womack,* 230 P2 823, which was overruled as far as it would apply to Utah

law by the case of *Butigan v. Yellow Cab Company,* a California Supreme Court decision, found in 320 P2 500 at 505, which case was decided in 1958 and in so holding the California Court stated:

> "We are of the view that the rule applied in Parker v. Womack 37 Cal. 2 116, 230 P2 823 should be reconsidered. In reality the so-called defense of unavoidable accidents has no legitimate place in our pleading.
>
> "* * * * * Parker v. Womack is overruled insofar as it is inconsistent with the views expressed herein."

Plaintiffs contend that the giving of any instruction on unavoidable accident was erroneous under the circumstances of this case. Such an instruction would be confusing and misleading and would lead the jury to believe that if at the time of the impact the defendant was unconscious and could not control his automobile that the accident was unavoidable, and the jury would not give proper consideration to the question of whether or not it is negligent for the defendant to operate a motor vehicle in his physical condition.

In *Butigan v. Yellow Cab Company,* 320 P2 500 cited above held that the giving of an instruction on unavoidable accidents was prejudicial and erroneous.

> "In the modern negligence action the plaintiff must prove that the injury complained of was

proximately caused by the defendant's negligence, and the defendant under a general denial may show any circumstances which militates against his negligence or its causal effect. The so-called defense of inevitable accident is nothing more than a denial by the defendant of negligence or a contention that his negligence if any, was not the proximate cause of injury. (Cases cited).

"The statement in the quoted instruction 'unavoidable' or 'inevitable accident' that these terms 'simply denote an accident that occurred without having been proximately caused by negligence' informs the jury that the question of unavoidability or inevitability of an accident arises only where the plaintiff fails to sustain his burden of proving that the defendant's negligence caused the accident. Since the ordinary instructions on negligence and proximate cause sufficiently show that the plaintiff must sustain his burden of proof on these issues in order to recover, the instruction on avoidable accident serves no useful purpose. * * * * *.

"The instruction is not only unnecessary but it is also confusing. When the jurors are told that 'in law we recognize what is termed an unavoidable or inevitable accident,' they may get the impression that unavoidability is an issue to be decided, and that if proved, it constitutes a separate ground of non-liability of the defendant. Thus they may be mislead as to the proper manner of determining liability; that is solely on the basis of negligence and proximate causation. The rules concerning negligence and proximate causation which must be explained to the jury are in themselves complicated and difficult to understand.

"A further complication resulting from the unnecessary concept of unavoidability or inevitability and its problematic relation to negligence and proximate cause can lead only to misunderstanding * * * * *.

"The giving of a confusing or misleading instruction is of course error, and we are of the view that in the absence of a special situation of the type discussed above (California statute cited) the use of an unavoidable accident instruction should be disapproved." (Italic ours.)

In *Carlburg v. Wesley Hospital and Nurse Training School* (Kansas) 323 P2 638, the Kansas Supreme Court upheld the District Court in refusing to give a requested instruction on unavoidable accident, stating as follows:

"Generally speaking when an accident is caused by negligence, there is no room for application of the doctrine of 'unavoidable accident' even though the accident may have been 'inevitable' or 'unavoidable' at the time of its occurrence and one is not entitled to the protection of the doctrine if his negligence has created, brought about or failed to remedy a dangerous condition resulting in a situation where the accident is thus 'inevitable' or 'unavoidable' at the time of its occurrence. In other words, a person is liable for the combined consequences of an 'inevitable' or 'unavoidable' accident and his own negligence.

"The facts of the accident in the case at bar do not bring it within the doctrine of 'unavoidable accident.' The term 'unavoidable accident'

excludes and repels the idea of negligence. It is an occurrence which is not contributed to by the negligent act or omission by either party. The term is synonomous with 'mere accident" or 'pure accident.' These terms imply that the accident was caused by some unforeseen and unavoidable event over which neither party had control. (Italics ours.)

In the case *Paskil v. Leigh Rich Corp.* 340 P2 741 (California) which was a personal injury action arising when plaintiff fell while bowling, the Court stated:

> "Turning now to the specific question whether it was error under the facts of this case to give the 'unavoidable accident' instruction, the following language from Halleck v. Brown, 164 Cal. Appeal 2 586, 330 P2 852, 854 appears to be controlling. *'It is well settled that the giving of the unavoidable accident instruction is prejudicial where the evidence discloses no condition and no action or conduct apart from the conduct of the parties that could reasonably have been found sufficient to aquit them of negligence."* (Italics ours.)

See also *Tomchik v. Julian* (California) 340 P2 72.

Plaintiffs contend that the giving of the instruction objected to gave to the defendant an unfair advantage and one that he was not entitled to, and that it served only to confuse and mislead the jury and was prejudicial to the rights of the plaintiffs.

POINT III.

THAT THE COURT ERRED IN FAILING TO GIVE PLAINTIFFS' REQUESTED INSTRUCTION NO. 5.

Plaintiffs' requested Instruction No. 5 reads as follows:

> "If the defendant, Hyrum Price, knew that because of his diabetic condition he was subject to attacks in the course of which he was likely to lose consciousness but nevertheless operated a motor vehicle on a public highway and while in a state of unconsciousness caused by his diabetic condition, drove his automobile onto the wrong side of the road and into the automobile in which Plaintiff Nora Porter was seated, causing damage to the motor vehicle owned by Leo Porter and injury to Nora Porter, you will find the Defendant, Hyrum Price, was negligent in causing the said collision and will award judgment to the plaintiffs for such damages and injuries as you find were caused by and are the proximate result of defendant's negligence."

The evidence showed that the Defendant, Mr. Price, had been under the care of various physicians for seventeen (17) years for the treatment of diabetes, and that during that time he had had several insulin reactions; and that he was well aware that he could have an insulin reaction at any time which would cause him to lose consciousness unless he was able to arrest the reaction. Both the physicians testified that these insulin reactions could occur without warning although this was improbable. Under these circumstances, the driver who

loses consciousness and thereby loses control of his automobile is negligent as a matter of law and the above instruction should have been submitted to the jury.

American Jurisprudence, Volume 5, page 605, section 179;

28 A.L.R. 2d, page 40, section 18,

Eleason v. Western Casualty & Surety Co., 35 NW2 page 301;

See also State v. Olson (Utah) 160 P2 427.

POINT IV.

THAT THE COURT ERRED IN FAILING TO GIVE PLAINTIFFS' REQUESTED INSTRUCTION NO. 9.

The requested instruction reads as follows:

> "You are instructed that it is the duty of a person who operates a motor vehicle upon the public highways to maintain himself in such a physical condition that he can operate the said motor vehicle in such a manner as an ordinary prudent man could do, and he is responsible for any damage or injury he causes to the property or persons of others if he allows himself to get into a condition where an accident could happen without his being aware of it or able to avoid it, and if you find that defendant suffered from diabetes, and in any manner did not properly care for himself so as to allow himself to get into a physical condition where he could lose control of his automobile while operating

said automobile upon public highway, you will find the defendant negligent if you find that defendant did in fact lost control of his automobile because he failed to maintain himself in proper physical condition."

Testimony of defendant in his deposition taken in April 1959 was that on the day in question he had injected himself with either sixty-five (65) or seventy (70) units of insulin. He did not remember which. The testimony of his physician was that he had prescribed that Mr. Price, the defendant, take only fifty-five (55) units at that time, and that either sixty-five (65) or seventy (70) units would be an overdose and would cause such a reaction as defendant claims to have had and would cause unconsciousness. In taking the overdose of insulin, defendant failed to properly maintain himself in a proper physical condition, knowing that if the sugar content in his blood was out of balance that he would lose consciousness, and if this occurred while driving his car that he would lose control of the car with the possibility that he would injure someone who was in his line of travel.

This would appear to be a stronger case against the defendant than was found in the case of *State v. Olsen* (Utah) 160 P2 427 where the driver of a truck was found guilty of criminal negligence and convicted of involuntary manslaughter when she fell asleep while driving, ran up on a sidewalk and killed a child.

POINT V.

THAT THE COURT ERRED IN FAILING TO GIVE PLAINTIFFS' REQUESTED INSTRUCTION NO. 10.

The requested instruction reads as follows:

> "You are instructed that in determining whether or not defendant was guilty of negligence and colliding with the automobile of Leo Porter on the day and at the time in question, you may take into consideration that he was afflicted with a disease known as diabetes, as a result of which he was subject to attacks which could occur with or without warning to defendant, and that such attacks were of such a character as would prevent his operating an automobile as an ordinary, prudent man would do."

The evidence has clearly shown that the defendant was suffering with a disease known as diabetes and had been so afflicted for the past seventeen (17) years. That during that time he had suffered several insulin reactions, and the evidence also shows that the cause of his losing consciousness on the day in question, if he did so, was an insulin reaction. It is the contention of the defendant that such a reaction came on without warning.

In the case of *Williams v. Frohock* (Florida) 114 So2, 221, the defendant while driving in downtown Miami (Florida) in the day time suffered a sudden illness in which he "blacked out." His car went out of control,

leaped the curb, and injured the plaintiff who was a pedestrian on the sidewalk. The defendant had suffered loss of consciousness several times before but never while driving. His physician had not diagnosed his condition as one furnishing a propensity for repetition and had never told him not to drive. On a jury verdict, the defendant was found to be negligent in causing the accident, and judgment was rendered for plaintiff for Ten Thousand ($10,000.00) and No/100 Dollars compensatory damages. Plaintiff, the prevailing party, appealed because the Court excused the defendant for gross negligence and withdrew from the jury the consideration of punitive damages.

Insofar as the decision of the District Court of Appeals of Florida relates to the issue of defendant's negligence, it affirmed the verdict and stated:

> "It is the law of this state as recognized by the Supreme Court in Bridges v. Speer, 79 So2 679, 681 'that where one has notice or knowledge of the existence of a physical impairment which *may* come on suddenly and destroy his power to control an automobile, it is negligence to an extreme degree for such persons to operate his vehicle.' (Italics Ours.)
>
> "Ordinarily the fact that a person has one or more sick fainting spells over a period of years could well be considered enough to put such a party on notice that it could and might happen again at any time such as while driving an automobile."

It is to be noted that in the case cited above although the Court found that defendant's medical history was not such as to necessarily give him a "premonition or warning of his condition," it affirmed the finding of negligence.

CONCLUSION

Plaintiffs contend that it is immaterial whether defendant experienced any premonitory symptoms prior to losing consciousness. If he had warning symptoms and did not heed them, he was negligent. He had knowledge that it was a reasonably foreseeable possibility that he could have an insulin reaction at any time and lose consciousness. Knowing that such was the case, it is only just that the responsibility for the accident should rest squarely upon the defendant, and that plaintiffs should not be completely helpless and without remedy. Add to this, the fact that defendant induced the severe insulin reaction by a greatly excessive injection of insulin, and it must be concluded that this accident was a result of defendants negligence and not unavoidable. If the defendant lost consciousness sixteen (16) blocks north of the point of the accident, a reasonable person may well ask, "If the facts are as stated by the defendant, why did he not lose control of his automobile at or near the point of losing consciousness rather than safely negotiating his automobile through sixteen (16) blocks of heavy evening traffic, negotiating successfully eight (8) semaphore signals and various stop

signs, and losing control of his automobile in the near vicinity of his home?"

The only fair conclusion to arrive at is that the defendant did have warning or knowledge that he was suffering or about to suffer an insulin reaction which, if left unchecked, would cause him to lose consciousness, but that he was attempting to get home in order to treat himself, and in thus taking a long-shot chance took other people's lives in his hands.

The verdict of the jury must be reversed and the cause remanded solely for the purpose of determining plaintiffs' damages.

Respectfully submitted,

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