Supreme Court of Appeals of Virginia

AT RICHMOND.

No. 1789.

F. W. TWYMAN, PLAINTIFF IN ERROR,

versus

DOUGLAS S. ADKINS, ADMINISTRATRIX OF LLOYD M. ADKINS, DEC'D, DEFENDANT IN ERROR.

FROM THE CIRCUIT COURT OF PITTSYLVANIA COUNTY.

BRIEF FOR DEFENDANT IN ERROR.

References are to pages of the printed record.

THE FACTS.

The judgment complained of by the petitioner was awarded in the Circuit Court of Pittsylvania County on March 31, 1936, for the sum of ten thousand ($10,000.00) dollars and costs. Upon the trial of the cause, the following state of facts could have been found by the jury:

The Plaintiff-in-error, Twyman, on the night of October 26, 1935, had spent several hours at a drinking and dancing place near Danville (115-119). This place, known as the Drift Inn Tea Room, was known to the defendant as a "big time place." (121.) He admitted that upon that occasion, he had taken several drinks (116-120). Other witnesses, including Chief Cole, of Schoolfield, who saw Twyman sometime after the accident, thought he was two-thirds drunk (67). State Traffic Police Officer J. H. Farmer, who saw him about the same time, said he acted, walked, and talked like a drunken man (70-71). Similar evidence was given by the witness, Ryland Shelton (47). It is significant that Twyman did not drive his car back to Danville from the Drift Inn Tea Room, but a friend that was with him, and unnamed by him, did the driving (121). It is perfectly clear that the jury was warranted in believing from this evidence that at the time hereinafter referred to, immediately before, and at the time of the accident, which resulted in the death of Lloyd M. Adkins, Twyman was under the influence of intoxicants or, as the witnesses have said, "drunk".

The Plaintiff-in-error, who was an officer at a C. C. C. Camp, started towards that camp, a distance of several miles from Danville and en route, picked up several of the inmates of the camp. After leaving that State Highway No. 58, he proceeded along the road towards Mount Cross, in Pittsylvania County, near which the camp was located, for about three miles. Before reaching the point of the accident, he had a great deal of difficulty in the operation of his automobile, due apparently to a defective gas line, and the occupants of the car pushed the same over several hills. Upon reaching the point of the accident, Twyman and the occupants apparently abandoned any effort to go further and left the car about in the center of the road (53); this, notwithstanding the fact that it could have been pushed off the hard surface and to a place of safety at a distance of about twelve

(12) feet from where it was parked (61). Another witness says it could have been pushed off the hard surface at a point fifty, sixty, seventy, or eighty feet away (74). The jury also had the right to infer that on a dark night, when the atmosphere was heavy, the car was left in this position with no lights upon it. It is true that Twyman and the car's occupants say that when they went to sleep the lights were burning, but the jury would not have to accept this evidence in the face of the testimony of the witness, Scarce, who passed the car a few minutes before the Adkins collision therewith, and testified that no lights were burning on same (52). To the same effect is the testimony of the witness Bowles (63).

The situation that confronts us is this: a drunken driver parks a gray automobile, similar in color to the color of the atmosphere that morning (73), in the middle of the highway without any lights burning thereon and drops off into a drunken stupor with his companions in the car also asleep (116), at a time when he says he was conscious of the fact that this presented a dangerous situation (123), and when, by the exercise of the slightest judgment and investigation, he and his companions could have easily pushed the car to a place of safety and avoided the menace that was presented to the traveling public.

The jury was further warranted in believing that the witness Scarce approached this parked car from a different direction from that approach made by Adkins and from a direction from which there was a far better and longer view of the spot without hills or obstruction in the road, and was barely able to escape a collision with the parked car and stopped his car when it was a yard and a half away.

ARGUMENT.

Assignment of Error No. 3.

We take it for granted that under this state of facts, there can be no question of the primary negligence of Twyman.

The Plaintiff-in-error, however, seems to chiefly rely upon the contention that the evidence shows that Adkins, the plaintiff's intestate, was guilty of contributory negligence. We submit that on the facts of this case, this was a question for the jury which has been resolved against the petitioner and that this court cannot interfere with the decision of the jury on that point. As we see it, the cases submitted by the petitioner fail to support his position.

Kinsey v. *Brugh,* 157 Va. 407, contains the following language: "The jury found, as they have a right to do from the testimony, that the defendant was guilty of negligence, and that such negligence was the sole proximate cause of the injury and that the failure of the plaintiff to carry a light was the remote cause which may have antecedently contributed to it." (413.)

In the present case, the jury has found that the defendant was guilty of negligence in failing to have lights on his car, in parking the same in the middle of the road, in failing to remove it to a place of safety, which could easily have been done, and the jury has found further that such negligence was the sole proximate cause of the death of the plaintiff's intestate, and the jury has further found that the failure of the plaintiff's intestate to stop his truck and avoid the collision was the remote cause which may have antecedently contributed to it.

Again in *Kinsey* v. *Brugh, supra,* the court said: "At any rate, whether or not there was any causal connection between the plaintiff's failure to display a light and

the injury was a question of fact which the jury have decided adversely to the defendant." (Page 414.) We submit that the court is very far from holding in that case that the failure to have a light on the buggy could not constitute negligence or that the defendant would have been liable under any and all circumstances for running into the buggy. But what the court did hold is precisely what we see it should hold in this case that under such circumstances the facts should be submitted to a jury and the jury's determination is controlling.

We can see nothing whatsoever in *Tignor* v. *Virginia Electric Power Company* (March 12, 1936), 184 S. E. 234, that is in point with the facts in this case. In the Tignor case there was a collision between the plaintiff and bus of the defendant on one of the streets of the City of Richmond. There is nothing in the evidence to indicate that it was dark at the time of the accident, the time being 6:30 o'clock P. M. in September. Even if dark, we assume that the street lights would have provided lights. Of course, under such circumstances, if the plaintiff had run into the defendant's bus while the same was parked, clearly he would have been guilty of contributory negligence, but these facts are not like the facts of this case. Here we have the plaintiff's intestate proceeding along the highway at a lawful rate of speed, operating a car in good mechanical condition and with no reason on earth to assume that a drunken driver would have deliberately left his car parked in the middle of the road without lights thereon and then settled down with his companions for a gentle snooze. Incidently, when the Scarce car passed him, Plaintiff-in-error was yelled at by the occupants of the Scarce car. If he had been normal, unquestionably he could have then seen the dangerous situation that confronted him, but with utter indifference to the safety of others, he continues in his stupor.

The Plaintiff-in-error argues that Adkins was guilty of contributory negligence as a matter of law because

of the physical facts attending the accident. We dismiss as worthless, or certainly as of a character that the jury could have disregarded, the experiments made by Officer Farmer because it clearly appears from his testimony that he went to the scene knowing full well when he approached it that Mr. Sanford's car was parked at the particular point and was on the lookout for it. He was not in the position that Adkins was in of having no reason to believe that the road was obstructed in the manner that it had been obstructed by Twyman, and Farmer frankly says that it was harder to see the Twyman car than it was a car with which he and Mr. Sanford experimented because of the difference in the color of the cars and the atmospheric condition on the morning of the wreck (73). The jury had a right to believe that on the night of the wreck, Adkins could not see the Twyman car until he was within thirty-seven steps of same. This, from the evidence of Scarce and Shelton (57, 84). In fact, at one point, Scarce says that it could not have been seen until he was within twenty-seven steps of the car (56). This result was secured when Shelton himself and Scarce knew what to expect and were on the lookout. Therefore, the jury had a right to believe that Adkins, in the exercise of ordinary care, could not have seen the Twyman car until he was within twenty-seven steps of same (81 ft.), or certainly until he was within thirty-seven steps of same (111 ft.). At thirty miles per hour, the Adkins car would have traveled forty-four feet per second. Russell Turner, a witness called by the defendant Twyman, with years of experience in driving automobiles, gave it, as his opinion, that a good driver, when confronted with an emergency, would take two or three seconds to apply his brake (114). Such being the case, we think it can be assumed that it was not negligence upon Adkins' part to hesitate for a period of time that would have allowed his truck to have gone a distance of eighty-eight feet at thirty miles per hour before

actually applying his brake, in which event he would have been within twenty-three feet of Twyman's car when the brake was applied.

We take it for granted that with the narrow space between the Twyman car and the guard rail to Adkins' left and Scarce's testimony showing that there was only eighteen inches clearance space, the difficulty of getting through under such circumstances was well-nigh impossible (53). In this connection we point out a misapprehension of counsel for the Plaintiff-in-error as to the situation of the road at the time of the experiments testified to by Scarce and Shelton. They seem to assume that the experiments, with reference to distance within which Shelton could stop his car at a rate of speed of thirty-eight miles per hour, were made with another car in the road at the point where Scarce said Twyman's car was parked. It is true that a casual reading of the evidence would leave such an impression, but Mr. Shelton, in his testimony, makes it clear, that after locating in the road the point at which his lights would pick up the parked car, he then moved the parked car and left a man standing where he picked it up with the lights (83). He then went back and approached the scene of the accident at thirty-eight miles per hour and applied his brakes at the identical spot where he had first picked the car up, and notwithstanding this, skidded beyond the point at which the car has been parked (84). In other words, there is no justification for the argument that upon the occasion of the experiment Shelton passed to the left of a car parked as Twyman's car had been parked, in safety. If we are correct in our analysis of the evidence, we submit that whatever may have been the defendant's testimony, the jury was warranted in finding from these facts that Adkins was free from any negligence that proximately contributed to his death.

ASSIGNMENT OF ERROR No. 2.

We do not understand that Plaintiff-in-error makes any contention that instruction number 8 is not correct as an abstract matter of law. He insists that there was no evidence upon which to base the instruction; that therefore, the giving of same was error and that such error was prejudicial.

Conceding for the sake of argument that plaintiff-in-error is correct in asserting that the instruction was not warranted by the evidence, it is difficult for us to see how it was harmful to him. All of the sympathetic considerations which plaintiff-in-error says were running towards plaintiff's intestate and his family and mentioned in pages 17 and 18 of the petition for writ of error were in the case long before the instruction was given. They were there without objection or exception. Certainly if there was no evidence that the plaintiff's intestate was suddenly confronted with an emergency we fail to see how the jury could have been influenced by the instruction.

However, we wish it understood that our concession that the instruction was without evidence to support it is for purposes of argument only. We emphatically insist that the instruction was entirely justified by the evidence. This is perfectly clear from the argument made in the petition for writ of error itself. At pages 21-24 the plaintiff-in-error points out what he says are discrepancies between the testimony of the witness Scarce and the witness Bowles as to the location of the Twyman car in the road. At page 25 in the petition for writ of error it is contended that had the plaintiff's intestate been exercising ordinary care "he could have stopped or turned in time to have avoided the collision". There were certainly sharp disputes in the evidence between these witnesses and the testimony of the plaintiff-in-error as to how much room there was to the left of the Twy-

man car. The plaintiff-in-error was supported in part by the evidence of two of the sleeping occupants of the car, Charlie Mays and Delton Nester. As we have pointed out, the jury has a right to find that in the exercise of ordinary care plaintiff's intestate could not have been expected to have seen the Twyman car until he was either 81 feet or 111 feet from it; that according to one of the witnesses examined for the plaintiff-in-error a careful and prudent driver would probably have gone a distance of 88 feet before his nerves and mind coordinated enough to have applied the brakes. There was evidence as to where the impact of the two cars occurred with reference to each. The left hand rear of the Twyman car was struck according to several witnesses (113), (67), (69). It is obvious that counsel for the plaintiff-in-error sought to develop a state of facts upon which they could argue to the jury that even though Twyman was negligent in either the parking of his car or failure to have lights thereon, yet there was ample room to pass the same on the left, and that the failure of plaintiff's intestate so to do constituted contributory negligence. Of course, if the testimony of Scarce and Bowles was true, and the jury evidently believed them, then plaintiff's intestate at a point not more than 111 feet of the scene of the accident was confronted with a situation where he had to determine with almost lightning like speed whether he should devote his energy to an attempt to stop his truck or in an attempt to pass the Twyman car on his left under circumstances that presented great difficulties to say the least. We insist that the jury had a perfect right to believe that through no fault of his own plaintiff's intestate was thus suddenly presented with a highly dangerous situation, a sudden emergency, that required almost instantaneous judgment upon his part, and even if it were possible for him to pass to the left, yet if he reasonably believed that his best chance of preventing an accident was to make no such effort in an attempt to stop, he was not guilty of any negligence.

This the jury was entitled to know and this is what the instruction complained of told them. It so happens that the undisputed evidence in this case shows that Mr. Scarce, confronted with a similar emergency a short time prior to this accident, chose to attempt to stop the car which he was operating rather than to pass to his right of the Twyman car. Approaching from a different direction from which the plaintiff's intestate was approaching and with a much longer view, he was able to avoid a collision by a yard and a half before striking the Twyman car. He then parked his car a distance of fifteen or twenty feet and was barely able to pass by slow and careful driving in low gear. Obviously what the plaintiff's intestate did was to reach a quick conclusion that he had no chance of passing to the left of the Twyman car and tried to stop, as a skid mark in the road indicated. The jury had a right to believe that no such decision confronted the plaintiff's intestate until he was certainly within 111 feet of danger and possibly within 81 feet. If this did not present a sudden emergency requiring quick decision, we cannot imagine the meaning of such a phrase.

Assignment of Error No. 1.

As to Assignment of Error No. 1, we fully realize that there is authority for the proposition that it is the duty of the driver of an automobile while driving at night to operate his car so that he can stop within the range of his lights. It is submitted, however, that in practically all of the cases so holding, they are from jurisdictions where there exists statutes similar to the Ohio statute "which requires that no person shall drive any motor vehicle in and upon any public road or highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead". There is no such statute in Virginia. Moreover, we submit that the most recent cases from practically all jurisdictions have re-

pudiated such a doctrine. For instance, the Supreme Court of the State of Washington in the case of *Ebling* v. *Nielsen,* 109 Washington 355, 186 Pac. 887, held to the view insisted upon by the petitioner in this case but, upon a rehearing of the same case, 113 Washington 698, 193 Pac. 569, it withdrew from that position and held that such failure to so operate a car as to be able to stop within the range of one's lights was not negligence *per se* but only circumstance that could be considered by the Jury.

Our sister state of West Virginia in the case of *Fleming* v. *Hartrick,* 131 S. E. 558, has distinctly held that the rule insisted upon by the petitioner "does not apply to a case where a dangerous situation which the driver of the automobile had no reason to expect suddenly appeared immediately in front of the car". (Page 561.) Recent cases which have repudiated the rule are cited as follows:

Millspaugh v. *Alert Transfer and Storage Company* (1927), 145 Wash. 111, 259 Pac. 22; *Burgesser* v. *Bullocks* (1923), 190 Calif. 673, 214 Pac. 649; *Tresise* v. *Ashdown* (1928), 118 Ohio St. 307, 160 N. E. 898, 58 A. L. R. 1476; *Morehouse* v. *Everett* (1926), 141 Wash. 399, 252 Pac. 157, 58 A. L. R. 1482; *Spiker* v. *Ottumwa* (1922), 193 Iowa 844, 186 N. Y. 465; *Owens* v. *Iowa County* (1918), 186 Iowa 408, 169 N. W. 388; *Kaufman* v. *Hegeman* (1923), 100 Conn. 114, 123 At. 16; *Rozycki* v. *Yantic* (1923), 99 Conn. 711, 122 Atl. 77, 37 A. L. R. 582; *Ham* v. *Los Angeles County,* 46 Calif. Appeals 148, 189 Pac. 462.

In this connection, we desire to quote from the case of *Tresise* v. *Ashdown* (1928), 118 Ohio St. 307, 160 N. E. 898, 58 A. L. R. 1476, as follows:

> In our opinion, however, the better reasoning supports the view that conduct of a driver of a motor vehicle which is not shown to have been in violation of law or ordinance should not be declared to be negligence *per se* but that each such case must be con-

sidered in the light of its facts and circumstances, and the usual tests applied to determine whether there was a failure to exercise ordinary care in the operation of such motor vehicle. The question presented is one of fact, and should be determined by the jury under proper instructions. The decisions supporting this rule seem to us the better reasoned cases and in harmony with the principles generally recognized and applied by this court. This view finds support in numerous decisions, including the following: *Murphy* v. *Hawthorne,* 117 Or. 319, 44 A. L. R. 1397, 244 Pac. 79; *Hallet* v. *Crowell,* 232 Mass. 344, 122 N. E. 264; *Corcoran* v. *New York,* 188 N. Y. 131, 80 N. E. 660; *Brigden* v. *Pirozzi,* 97 N. J. L. 535, 117 Atl. 602; *Spiker* v. *Ottumwa,* 193 Iowa, 844, 186 N. W. 465; *Kaufman* v. *Hegeman Transfer and Lighterage Terminal,* 100 Conn. 114, 123 Atl. 16; *Rozycki* v. *Yantic Grain & Products Co.,* 99 Conn. 711, 37 A. L. R. 582, 122 Atl. 717; *Ham* v. *Los Angeles County,* 46 Cal. App. 148, 189 Pac. 462; *Hatch* v. *Daniels,* 96 Vt. 89, 117 Atl. 105, 22 N. C. C. A. 205; *Tutsch* v. *Omaha Structural Steel Works,* 110 Neb. 585, 194 N. W. 731.

In the *Kaufman Case,* 100 Conn. 114, 123 Atl. 16, the supreme court of Connecticut had before it a case which called for a consideration of the principle now under discussion, the question being the correctness of an instruction similar to that given in the instant case. That court announced its conclusion as follows: "It is not necessarily contributory negligence, as matter of law, for the operator of an automobile to drive it in the night at such a rate of speed that he cannot stop it within the limit of his vision ahead; whether he is to be chargeable with negligence or not depends upon what is reasonable under all the circumstances, and unless they unmistakably point to but one conclusion, the decision of that question is essentially one of fact for the determination of the trier. To hold otherwise would force the traveler to assume that the highway was liable to be obstructed and, in view of this, to so travel that he would not collide with any obstruction in the highway, however negligently that might have been created and maintained."

> We therefore find that the instruction given to the jury—that the operation of a motor vehicle at such speed as not to be able to stop within the range of the rays of its headlights is negligence as a matter of law—is erroneous.

It is true that the Virginia Court has not directly passed upon this question. However, this Court has comparatively recently determined a proposition which is clearly analogous thereto. In the case of *Howe* v. *Jones,* 162 Va. 442, 174 S. E. 764, decided on June 14, 1934, Mr. Justice Holt, speaking for this Court, refused to hold that the failure of a driver whose vision was temporarily destroyed by glaring headlights of approaching automobiles to stop or to reduce his speed so as to be able to stop instantly was negligence *per se.* This case holds that the question involved is one of reasonable care and what is reasonable care is for the Jury. The Court recognized that there are courts of great ability which hold that "when vision is temporarily destroyed by glaring lights it is his duty to stop". We recognize that it is also true that courts of great ability have held that it is negligence *per se* to so drive as not to be able to stop within the range of one's lights, but we say that every objection that is pointed out by Mr. Justice Holt, in the case of *Howe* v. *Jones, supra,* to the rule declaring it to be negligence *per se* to drive when the vision is temporarily destroyed by glaring headlights applies with equal or greater force to the contention made by the petitioner in this case. We say that the considerations of public policy suggested by the plaintiff in error, in his petition, are far outweighed by considerations of public policy that would, in the event this Court took the views insisted upon by him practically halt and demoralize traffic on the highways of this state during the night time. We say that the conduct of a driver at night in this respect should be submitted to the Jury and the Jury should determine from all the facts and circumstances whether the

driver drove his car with ordinary care. The plaintiff in error, in this case, asked for no such instruction as this. If it had been asked for, it would no doubt have been given without objection.

For reasons urged we insist that the judgment of the lower court is plainly right and should be confirmed.

Respectfully submitted,

JOHN W. CARTER, JR.,
GEORGE E. BENDALL,
Of Counsel.

GEORGE E. BENDALL,
Danville, Va.
CARTER & WILLIAMS,
Danville, Va.
MARGARET L. CARTER,
TOM IRVIN GILL,
Danville, Va.
Counsel for Defendant in Error.