

UPCHURCH v. ROTENBERRY

Supreme Court of Mississippi, 2000.
761 So.2d 199.

PITTMAN, PRESIDING JUSTICE, for the Court. . . .

On the night of October 5, 1992, the decedent, Timothy Adam Upchurch, was riding in the passenger seat of Teresa Rotenberry's car while Rotenberry was driving. Adam was the only passenger in the car. The car was traveling west on Highway 182 in Oktibbeha County, Mississippi when Rotenberry lost control of her vehicle. Upchurch claims Teresa left the road suddenly without warning, causing injuries and damages to the decedent that resulted in his death. [The plaintiff sued for wrongful death of her son. The jury found for the defendant. The plaintiff moved for judgment n.o.v. The trial court overruled the motion and this appeal followed.]

[There were no eyewitnesses except Rotenberry. One expert, Rosenhan, however, testified from evidence at the scene that Rotenberry's vehicle traveled in a straight line from the point it left the road to the point it hit the tree 160 feet away, that there were no scuff or skid marks, and that the vehicle's speed when it hit the tree was 60 mph.]

The speed the vehicle was traveling when it struck the tree, as well as, whether the vehicle left any marks either on the roadway or the area between leaving the road and striking the tree is . . . disputed in this case. Rotenberry's expert, Thomas Shaeffer, testified that there were tire marks which began on the road and proceeded off the road, through the grass, and down toward the tree. Shaeffer identified these marks as yaw marks. Shaeffer defines yaw marks as a mark a tire makes when it is still rotating but not traveling in the direction that it is oriented. . . .

On direct examination, Shaeffer testified that the car was traveling approximately 25 to 35 mph when it hit the tree. However, on cross examination, Shaeffer testified that the car was going 42 to 50 mph when it made impact with the tree.

Rotenberry introduced into evidence photographs to corroborate the conclusions of Shaeffer. . . .

Shaeffer also testified that he observed small pebbles wedged between the rim and tire on both the front left and rear left wheels of the vehicle. This is additional evidence that the vehicle made an extreme right hand turn. All of the evidence presented at trial by Shaeffer was consistent with the vehicle making an evasive maneuver to the right in order to avoid an object on the roadway. Shaeffer's final determination

was that the car struck the tree and flipped over on its top, which undoubtedly caused additional damage to the vehicle.

Rotenberry testified as an adverse witness. Throughout the discovery proceedings and at the trial itself, Rotenberry testified that she could not remember the events leading up to the accident including a two-day period just prior to the accident. However, on November 13, 1992 (about 5 weeks after the accident), Rotenberry did sign a written statement detailing the accident. In this statement, Rotenberry testified that a large animal, either a deer or a dog, ran across the road and into her lane ultimately causing her to leave the road. . . .

In her brief, Upchurch raises the issue that Kirk Rosenhan, plaintiff's expert, testified that he smelled alcohol on the defendant at the accident scene. However, on direct [cross?] examination of Rosenhan the following exchange occurred.

Q. Did you get close to Teresa Rotenberry?

A. Not really.

Q. Did you get close enough to smell her?

A. No, I didn't.

Q. Did you smell any odor of intoxicant on her?

A. Uh, not on her. . . .

On redirect examination after an overnight recess, Rosenhan changed his testimony to say that he had not been specific as to the driver of the vehicle the day before and that he did smell alcohol on the driver the night of the accident. The above exchange, however, makes it clear that Rosenhan was perfectly specific on direct examination in denying that he smelled alcohol on Rotenberry at the scene of the accident. It is noteworthy that Rosenhan did testify on direct examination that he smelled alcohol in the area. Also, the presence of beer in the car is not disputed in the facts of this case.

Larry Guyton, a trooper with the Mississippi Highway Patrol, also testified for the plaintiff. Officer Guyton testified that he arrived on the scene after Rotenberry had been taken away by ambulance. Officer Guyton spoke to Rotenberry by telephone in her hospital room two days after the accident, October 7th, and again on October 8th. Rotenberry was able to remember the accident at this point. She appeared alert during the conversation. Officer Guyton testified that Rotenberry told him that she was traveling westbound on Highway 182 near Starkville when she saw an animal coming into her lane from the opposite side of the road. She swerved to the right to avoid hitting the animal. In Officer Guyton's opinion, Rotenberry appeared to be telling him the truth.

Further, Officer Guyton testified on direct examination that Rotenberry told him that she had two beers earlier in the evening at a place called "The Landing" on Highway 182 near Starkville. On cross examination, however, Officer Guyton testified that Rotenberry did not tell him about drinking beer or about being at The Landing. He just asked

her how the accident occurred, and she told him. Further, he stated that he did not put anything in his accident report concerning drinking or about being at The Landing. He continued by testifying that Rotenberry had not told him anything different than what was in his report. . . .

. . . [T]his Court concludes that reasonable and fairminded jury members could reach different conclusions. Consequently, the jury verdict stands, and the motion for JNOV is denied.

This Court will not intrude into the realm of the jury by determining the credibility of a witness and making findings of fact. The jury is the judge of the weight of the evidence and the credibility of the witnesses. Through her statement and the testimony of other witnesses, Rotenberry offered evidence explaining the events of that tragic night. The jury considered this evidence, weighed it, and found in favor of Rotenberry. . . .

This Court has been even more specific regarding the realm of the jury concerning the credibility of witnesses in stating:

The demeanor or bearing, the tone of voice, the attitude and appearance of the witnesses, all are primarily for inspection and review by the jury. The jury not only has the right and duty to determine the truth or falsity of the witnesses, but also has the right to evaluate and determine what portions of the testimony of any witness it will accept or reject; therefore, unless it is clear to this Court that the verdict is contrary to the overwhelming weight of the credible testimony, this court will not set aside the verdict of a jury.

. . . According to its duty, the jury concluded that Rotenberry acted reasonably in swerving to the right to avoid an animal and that she did not have time to avoid a tree which lay only 160 feet (or slightly over 53 yards) from where Rotenberry left the road. The jury makes such fact determinations, not this Court. . . .

The resolution of disputed facts such as this is a duty that devolves upon the jury sitting as finders of fact. They are charged with listening to the witnesses, observing their demeanor, and coming to their own conclusions of which evidence they find more credible. Our system of jurisprudence has determined that citizen jurors, employing their native intelligence and collective life experiences, are best qualified to make those judgments. Absent some clear indication that the jurors in a particular case somehow ignored that duty, neither the trial court, nor this Court reviewing the record on appeal, are permitted to interfere in the conclusions reached by these jurors.

Notes

The Process of Determining Fault

1. Lawyers often find it difficult to obtain facts necessary for an assessment of fault. One reason is that injuries are often caused by tiny

miscalculations, hard for the actor to appreciate and almost impossible for a jury to understand at a later date. For instance, a car traveling at 50 m.p.h. travels about 75 feet per second. The time for drivers to react to an emergency, such as a child darting into the road, varies considerably. About half of all drivers take nearly a second to respond, but some take two seconds. See LEON ROBERTSON, *INJURIES, CAUSES, CONTROL STRATEGIES AND PUBLIC POLICY* 42 (1983). If a driver hits a child 100 feet from the point of observation, a reaction time for hitting the brakes of one second might have been sufficient to avoid the impact, but a reaction time of two seconds would not. Or again, what about the fact that a driver may lose part of her field of vision as she gets older—and with no way to be aware of this? Studies seem to indicate that loss of visual field is commonly associated with auto injuries, yet the topic does not come up in the cases. See *id.* at 62.

2. A second problem in obtaining facts for making a judgment about fault lies with the accuracy of testimony. A very considerable body of information indicates that witnesses are generally inaccurate in a number of particulars. Part of this lies in perception of events, which is especially difficult if they occur quickly, only once, and with violence or stress. See ELIZABETH LOFTUS, *EYEWITNESS TESTIMONY* (1979).

3. A social scientist studying the process of settling tort claims in automobile accident cases has said that, in practice, evaluation of claims consists chiefly in discovering traffic violations and that though “formal tort law” concerns issues of duty, foreseeability, reasonable care and a “fine weighing” of negligence, in most auto cases a traffic violation is the central issue. H. ROSS, *SETTLED OUT OF COURT* 20 (1980). If this is so, is it merely a result of the negligence per se rule? Does it make it any more or any less important to find out exactly what the conduct was?

4. As some of these paragraphs show, the process of determining fault in tort cases is difficult at best. This leads to the idea that if you try to deal with vehicle safety after injury has occurred, you must look for fault, but that if you try to prevent accidents before they occur, you might try to change the environment. For example, roads may be better designed or signals more visible. Another approach to automobile safety left the tort system altogether. This sought to require auto makers to provide safer automobiles. This approach required regulations to be issued by the National Highway Traffic Safety Administration. Current opinion indicates that, so far, this approach has not been very successful. See JERRY MASHAW & DAVID HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990). Does that leave us to rely upon uncertain estimates of fault?

The Credibility Rule

5. Credibility of witnesses is almost always a question for the jury, and almost never a question for the judge. Standard instructions tell the juries to determine credibility of witnesses for themselves, considering factors such as the witnesses' demeanor and other factors mentioned in *Upchurch*. See, e.g., ILL. PATTERN JURY INSTRUCTIONS-CIVIL § 2.01 (3d Ed. 1992).

6. *Lawyers' roles.* What is the role of the lawyers in this? Would you expect simply to gather favorable witnesses together, put their testimony on and quit? What else *could* you do?

7. *Credibility and directed verdicts.* Given the credibility rule, should the plaintiff be entitled to a directed verdict in her favor if the defendant puts on no evidence at all, or if his evidence does not contradict the plaintiff's? In *Dorn v. Leibowitz*, 387 Pa. 335, 127 A.2d 734 (1956), a pedestrian testified she crossed with the light, and was struck by a truck after she had taken five steps into the crosswalk. The defendant offered no testimony except that of a police officer, who did not contradict the plaintiff in any substantial way. The court held that the plaintiff was not entitled to a directed verdict or "binding instructions" in her favor, since her credibility was for the jury even though she was not contradicted. Some courts take the view that if the plaintiff offers testimony that is not only uncontradicted, but is clear and self-consistent, a directed verdict for the party having the burden of proof—usually the plaintiff—is permissible. See FLEMING JAMES & GEOFFREY HAZARD, *CIVIL PROCEDURE* 348 (3d ed. 1985). But, as one may readily imagine, there are few cases that meet such requirements.