JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 27 of 1973

BEFORE: The Hon. Mr. Justice Luckhoo, J.A.(President ag.).
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Robinson, J.A.

B E T W E E N DAPHNE ZAIDIE - Plaintiff/Appellant

A N D LEONARD FORRESTER - Defendant/Respondent

H.O.A. Dayes for the plaintiff/appellant.

May 15 and June 13, 1975

ROBINSON, J.A.:

This is an appeal from that part of the judgment of a judge of the Supreme Court in a negligence action whereby it was on March 22, 1973 adjudged that the plaintiff-appellant's claim be dismissed with costs to be taxed or agreed.

On the 31st August 1970 about 9.30 a.m. the plaintiff-appellant (Mrs. Zaidie) was driving a Ford (Galaxie) L.T.D. American automatic car from the parking ground of Nubel Cleaners on the western side of upper Orange Street. The car was left hand drive. She had intended to go straight across Orange Street into Geffrard Place which is on the eastern side of Orange Street. There were four driving lanes in Orange Street i.e. two for traffic north-bound, two for traffic south-bound. There was a bus about 41 feet long which had stopped to let off passengers on the eastern side of Orange Street at a bus stop opposite the cleaners and on the same side as and north of Geffrard Place. Mrs. Zaidie said the bus driver "beckoned me to come across .... He beckoned twice. It was about 5 seconds between the two signals. There was nothing on the right. I moved off at the second signal to cross in front of the bus 6-8 feet from the bus ... I don't know why I didn't cross at his first signal." At that point Mrs. Zaidie could not properly see what traffic there was north on Orange Street. She conceded that "If I had been a little further out I would have been in the position to see better." She said that immediately before the accident, "I heard brakes drawing and I turned my head and saw a car coming beside the bus. I could not stop. The car appeared to be overtaking the bus in the middle of the road.

I saw the car only for a split second. I can't really say how fast the car was going but the impact was very severe .... The car hit me on the left side about the front door ..... I saw drag marks on the road, black tyre marks were seen circular line from the back of the bus coming towards the front of the bus ..... The car was practically on me when I first saw it. It was towards the front of the bus. My car had reached the middle of the road. I travelled about 20 feet. My car was about 4-6 feet towards Geffrard Place from the centre. We were both trying to avoid the collision and could not. When you come out of Nubel, there is a clear vision but you cannot see well until you come out. I didn't see the defendant's car until I heard the brakes ..... It (drag marks) curved towards Geffrard Place. I did not try to beat the car of the defendant across by accelerating."

Vincent McKen, a bus driver, gave evidence for the plaintiff-appellant to the effect that he was driving south along Orange Street, that he had stopped his bus to let off passengers above Geffrard Place behind another bus which was at the bus stop on the eastern side of Orange Street. He said "I saw a car at the cleaners with the front facing Orange Street in the water drain ..... I saw a lady driving her car ..... The car drove across the street and the Austin was coming down and they collided ..... I gave no signal at all to the lady who was driving the car. She just drove straight across the road."

The above is a brief outline of the case for the plaintiff-appellant.

The defendant-respondent, in his evidence, said that he was driving about 25-30 m.p.h. south along Orange Street. There was a bus in the lane next to the sidewalk. There was no traffic going north up Orange Street. He saw a Ford car at Nubel Cleaners with its front facing Orange Street in the water drain. The car was slowly moving. He was in line with the back of the bus. He blew his horn, slowed down and when he was about mid-way the length of the bus, "the car came over from Nubel, sped up across the road as if to go to Geffrard Place ..... I pressed my brakes, could not stop without hitting the car. I swerved a little towards Geffrard Place (i.e. to the left), the two cars collided in front of the bus but more to the right of it. My front side hit her

left side of the front fender. I left some drag marks - two parallel lines which turned slightly (eastwards)." He said that he was driving in his proper lane, did not cross over any lane, that after the collision he came out of his car and remonstrated with Mrs. Zaidie for smashing up his car and that she said "alright", which he understood to mean that she would fix his car.

It is upon the above evidential background that the decision of the learned judge was founded. That decision is recorded thus:-

> "Plaintiff has failed to discharge onus of proving her claim. Claim therefore dismissed with costs to be taxed or agreed.
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> Judgment for defendant on counterclaim $130 with costs to be taxed or agreed on counterclaim.
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> Defendant guilty of contributory negligence 50%."

We must observe that there were no findings of facts recorded by the learned trial judge and no reasons for judgment.

The defendant-respondent did not challenge the judge's findings and did not appear at the hearing of this appeal.

It was argued on behalf of the appellant that in the circumstances of this case the judge was entitled to hold that the defendant had not taken all the precautions that he should have taken as soon as he could, that there was evidence to support the apportionment of blame made on the defendant's counterclaim and that the decision of the learned judge to this effect should have gone on to reflect this apportionment as regards the plaintiff's claim. The complaint in effect was that the judge found the defendant 50% liable; yet

(a) gave the plaintiff no part of her claim; and
(b) found that she had not proven her case.

It is true to say that there is an inconsistency in the decision arrived at by the learned trial judge on the claim and counterclaim. The evidence disclosed that the respondent took evasive action at the earliest opportunity that is, as soon as the appellant had moved off (sped off) from the water drain and made to go across the road and into his path. The appellant had suddenly moved off from the position where the respondent had first seen her - in the water drain - going straight across the road. In the circumstances he could do no more than take

the action he said he did. As has been pointed out earlier, the appellant herself said at the trial, "I saw drag marks on the road - black tyre marks were seen circular line from the back of the bus coming towards the front of the bus ..... We were both trying to avoid the collision and could not." The respondent's evidence was that when he was in line with the back of the bus he saw the appellant's car in the western water drain. On the appellant's own evidence therefore the respondent must immediately have applied his brakes to have produced drag marks from the back of the bus. It is clear that the defendant did all that he could possibly do as early as he could.

In our view the evidence does not support the finding that both drivers were equally to blame; but rather shows that the appellant was wholly to blame for the accident. The respondent ought therefore to have been awarded the full amount of his damages on his counterclaim; which amount of damages had been admitted by the appellant at the commencement of the trial.

The appellant should therefore consider herself fortunate since there has been no appeal by the defendant-respondent and that consequently the quantum of damages in his favour cannot be disturbed. In the result the appeal is dismissed. That part of the judgment appealed from is affirmed. There will be no order as to the costs of the appeal.