

1974

Iris H. Stringham v. James Broderick : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Howard, Lewis & Peterson; Attorneys for Respondent.

Mangan & Draney; Attorneys for Appellant.

Recommended Citation

Brief of Appellant, *Stringham v. Broderick*, No. 13696.00 (Utah Supreme Court, 1974).
https://digitalcommons.law.byu.edu/byu_sc1/62

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

RECEIVED
LAW LIBRARY

IN THE SUPREME COURT OF THE STATE OF UTAH 1975

IRIS H. STRINGHAM,)	BRIGHAM YOUNG UNIVERSITY
Plaintiff and Respondent)	J. Reuben Clark Law School
)	
vs.)	Civil No. 13696
)	
JAMES BRODERICK,)	
Defendant and Appellant)	

Appellant's Brief

Appeal from the Judgment of the Seventh
Judicial District Court for Emery County
Honorable Edward Sheya, Judge

Mangan & Draney
P. O. Box 788
Roosevelt, Utah 84066
Attorneys for Appellant

Howard, Lewis & Peterson
120 East 300 North
Provo, Utah 84601
Attorneys for Respondent

FILED
JUL 23 1974

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	Page
STATEMENT OF KIND OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS	1
ARGUMENTS	3

POINT I

THE LOWER COURT, BY FAILING TO GIVE THE DEFENDANT'S REQUESTED JURY INSTRUCTIONS, FAILED TO PRESENT TO THE JURY, IN A CLEAR AND UNDERSTANDING MANNER, THE PRINCIPLES OF LAW APPLICABLE TO THIS CASE 3

POINT II

THE DEFENDANT IS ENTITLED TO THE SAME BENEFIT OF PROPER JURY INSTRUCTION AS WAS AFFORDED TO THE PLAINTIFF. FAILURE TO GIVE SAID INSTRUCTION IS REVERSIBLE ERROR 9

SUMMARY 10

ALPHABETICAL INDEX OF CASES

	Page
<u>Enell & Son, Inc. v. Salt Lake City Corp.</u>	
27 Utah 2d 188, 493, P. 2d 1282	10
<u>Flippen v. Milward</u>	
120 Utah 373, 234 P. 2d 1053	10
<u>Porter v. Price</u>	
11 Utah 2d 80, 355 P. 2d 66	5
<u>Simpson v. General Motor Corp.</u>	
24 Utah 2d 301, 470 P. 2d 399	10
<u>Wellman v. Noble</u>	
12 Utah 2d 350, 366 P. 2d 701	5

STATEMENT OF THE KIND OF CASE

This is an action by the plaintiff for injuries sustained arising out of an automobile accident on or about March 17, 1971, northwest of Green River, Utah on U. S. Highways 50 & 6. Defendant denied liability on the basis of unavoidable accident or plaintiff's contributory negligence.

DISPOSITION IN LOWER COURT

The Case was tried to a jury. From a verdict and judgment in favor of the plaintiff and against the defendant, the defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks for reversal of the judgment granted in the lower court by reason of the lower court's inadvertence, or mistake, or failure to give the defendant's requested instructions relative to defendant's theory of the case, namely the trial court failed to give the requested instructions relative to an unavoidable accident and J.I.F.U. Instruction 2.5., which defined what acts of the plaintiff constituted contributory negligence, while giving as Instruction No. 5, what acts of the defendant constituted negligence. Defendant asserts that this failure gave the Jury an undue emphasis on Plaintiff's theory of the case and no real assistance in applying defendant's theory.

STATEMENT OF FACTS

That on or about March 27, 1971, the plaintiff and defendant were traveling in separate cars from West to East on U. S. Highways 50 and 6. The weather was clear but windy. The roads were dry. At a point approximately 5 miles northwest of Green River, Utah, both

parties encountered wind storms carrying dust and debris. These wind storms were blowing in the same general direction the plaintiff and defendant were traveling, although somewhat across the road. The plaintiff proceeded through a small dust storm, then into a large dust storm at which time she immediately slowed her vehicle speed to five miles per hour. The defendant was a sufficient distance behind the plaintiff's vehicle as to be unaware of its presence on the road and had not seen plaintiff's vehicle prior to plaintiff's entry into a second dust storm. The posted highway speed was 70 miles per hour, and the defendant had been traveling between 65 and 70 miles per hour. Defendant entered the first dust storm and as quickly as he cleared the same, he became aware that another storm was in front of him. The distance between the two storms was only a matter of a few hundred feet. The defendant began to decelerate, turned on special lights and entered the storm. Immediately, he saw the brake lights of the plaintiff's vehicle and applied his own brakes. The distance was not sufficient for him to come to a stop and avoid the accident. At approximately 11:45 a.m. defendant's vehicle collided with the plaintiff's vehicle, propelling the plaintiff's vehicle forward into a third vehicle. The plaintiff's vehicle caught on fire. The plaintiff's husband, a passenger, was killed in the accident. The plaintiff was apparently unconscious and the defendant dragged the plaintiff from her burning vehicle. The plaintiff claims to be free of any contributory negligence. The defendant claims that he had no opportunity to prevent the accident having had insufficient notice of the plaintiff's presence in order to bring his vehicle to a stop prior to the accident, or that the plaintiff failed to give the defendant sufficient notice of the presence of the plaintiff's vehicle so as to avoid the accident.

ARGUMENT

POINT I

THE LOWER COURT, BY FAILING TO GIVE THE DEFENDANT'S REQUESTED JURY INSTRUCTIONS, FAILED TO PRESENT TO THE JURY, IN A CLEAR AND UNDERSTANDING MANNER, THE PRINCIPLES OF LAW APPLICABLE TO THIS CASE.

The Jury, as the trier of the fact, was instructed by the court as to what the law was. As laymen, the jury relies heavily upon the court's instructions in order to know how to proceed. While there were relatively few material differences in the testimony as to how the accident occurred, there is a great difference of opinion as to how the facts should be interpreted. For this court to understand defendant's theory of the case and defendant's grievance by reason of the lower court's failure to give the requested instructions, it is necessary to detail the factual situation involved.

There were three drivers of vehicles, a passenger and a highway patrolman who testified as to the accident during the trial.

The first driver was Mr. Bates of the Utah Fish and Game Department. He was traveling from Woodside to Green River for lunch. The other two drivers were the plaintiff and defendant. All three drivers agreed that prior to the dust storm, it had been dry and clear (Transcript, p. 39, line 23; p. 90, lines 9 - 11; p. 303, lines 4 - 8). Mr. Bates testified that he had passed the plaintiff's vehicle immediately prior to entering the dust storm (Ibid., p. 38, lines 28 - 30; p. 48, lines 5 - 16). This was the first dust storm that Bates had seen on the day in question. Bates testified that even up to one-half mile prior to the second storm he was traveling approximately 65 miles per hour (Ibid., p. 48, lines 9 - 16). Upon entering the dust storm, the passenger in the Bates vehicle,

Stevens, testified that Bates almost collided with the rear end of another vehicle (Ibid., p. 53, lines 21 - 28) because of the intensity of the storm. Bates testified that he could barely see the tail lights in front of him (Ibid., p. 40, line 6; p. 46, lines 24 - 28) and that he "could crawl along on the highway" (Ibid., p. 46, line 17). Bates and his passenger were both also aware of the fact that another vehicle was behind them since they had just passed it, so Bates continued to watch for it in his rear view mirror (Ibid., p. 39, line 28; p. 53, lines 14 - 15).

The second driver was the plaintiff. Prior to the accident the plaintiff had been traveling approximately 55-60 miles an hour (Ibid., p. 278, lines 14 - 15) when she was passed by the Fish and Game vehicle. She testified that she had gone through one dust storm which passed quickly and could then see a second dust storm (Ibid., p. 92, lines 12 - 17). The plaintiff reluctantly admitted that when she entered the second dust storm, she felt that it would also pass quickly (Ibid., p. 279, lines 14 - 29). Nevertheless, because of the density of the storm, she slowed her speed to approximately five miles per hour. Because the Fish and Game vehicle had passed her, she knew of the presence of that vehicle and obviously was on guard for the same. The plaintiff, Mrs. Stringham, testified that she "could not see ahead of me, only just the hood of my car." (Ibid., p. 279, line 18). She was in the storm approximately five minutes, moving 5 miles per hour, when the accident occurred (Ibid., p. 93, lines 6 and 21; p. 280, lines 21 - 22). The defendant stated that she slowed her speed to five miles an hour "because I didn't know how far ahead of me this other car was" (Ibid., p. 93, lines 6 and 7).

The defendant was the third driver. While we do not know how far the defendant was behind the other two vehicles, we know that he was traveling between 65 and 70 miles per hour, and it was approximately 5 minutes after the plaintiff entered the second storm,

that the accident occurred. Thus it would seem that the defendant was approximately 4 to 5 miles west of the plaintiff when she entered the second dust storm. The defendant had passed through a small dust storm (Ibid., p. 304, lines 8 - 13), when he observed the second storm, which was about 100 yards east of the first storm. The defendant decelerated at that point and entered the second storm. At the count of 1, 2, 3, the defendant observed the brake lights of the plaintiff (Ibid., p. 304, lines 20 - 22). The defendant immediately applied his brakes (Ibid., p. 304, lines 26 - 27) but was unable to avoid the accident. The defendant had neither prior warning nor knowledge of the presence of either the vehicle driven by Bates or the plaintiff's vehicle prior to entering the second storm. The highway patrolman investigating the accident testified that the storm extended into Green River (which was at least five miles east of the accident, and perhaps beyond, but was unable to identify how far east or west the storm extended (Ibid., p. 19, lines 28 - 30; p. 20, lines 5 - 7.) However, all of the drivers testified that the storm did not extend very far west of the scene of the accident.

This court has recognized that there are cases where the facts warrant giving an instruction on unavoidable accidents. (See Porter v. Price, 11 Utah 2d 80, 355 P. 2d 66, 68; and Wellman v. Noble, 12 Utah 2d 350, 366 P. 2d 701.) In the Wellman case the court noted that in most cases such an instruction is superfluous. However, due to the fact situation involved in this appeal, the defendant urges this court to concur with a statement made by the trial judge before he inadvertently omitted giving defendant's requested instruction relative to unavoidable accidents and J.I.F.U. Instruction 2.5. At that time, the trial judge said, "I think that I shall give an instruction on contributory negligence and also on unavoidable accident and let them mull both of those over" (Op. Cit., p. 332, lines 29 & 30; p. 333, line 1). However, due to some confusion at the time the court gave its instruc-

tions, both of those instructions were overlooked, which oversight was acknowledged by the trial court to counsel, and request was made by the trial court to give that instruction to the jury after the oversight was ascertained. However, plaintiff's counsel strongly resisted that suggestion, so the error was not corrected. The confusion referred to is as follows: The trial court originally reserved two days for the trial of the matter. In compliance with that understanding, the defendant subpoenaed a witness by the name of Helen Hurst to be and appear at 2:00 p.m. on Thursday, February 14, 1974, which was the second day of the trial, to testify for and in behalf of the defendant. However, the testimony of the medical experts took longer than was anticipated and expected so the trial was not completed on the second day, and the defendant was unable to call Mrs. Hurst at the time she was subpoenaed. Mrs. Hurst was scheduled to be at a wedding at Manti on the morning of Friday, February 15, 1974, and by leave of the court, she was allowed to go to Manti for the wedding ceremony. It was anticipated by defendant's counsel that the witness would be available for testimony at 2:00 p.m. on Friday, February 15, 1974. However, the witness did not appear at the appointed time, and after short delay the defendant was required to rest his case. The trial judge then proceeded to give the jury instructions (*Ibid.*, pgs. 335 & 336). Prior to the conclusion of the instructions, the defendant's witness, Mrs. Hurst, appeared to testify. The defendant requested, and, over the objection of the plaintiff, leave was granted by the court for the defendant to reopen his case and allow Mrs. Hurst to testify (*Ibid.*, pgs. 336 - 338). Although it does not appear in the transcript of the trial, thereafter, the court noted its own error in failing to give the instructions requested by the defendant relative to his theory, namely J.I.F.U. Instruction 2.5., and the instruction relative to unavoidable accident, namely, J.I.F.U. Instruction 16.1. Defendant's counsel requested the court to give the instructions

to the Jury at that time (which was prior to the argument of counsel). The plaintiff's counsel insisted that for the trial court to do so would be to give too much emphasis to defendant's theory of the case and would be reversible error. Based upon the arguments of the plaintiff, the trial judge did not give the defendant's requested instructions and directed both counsel to argue their theories to the jury based only on the instructions that had previously been given the Jury as to the law in the matter.

Defendant asserts and would urge this Court to find that this particular fact situation is one in which the trial court should have given the requested instruction relative to unavoidable accident. The facts show defendant had no warning of the presence of the plaintiff's vehicle until he was on it. The plaintiff's brake lights were on, indicating she was stopping on the roadway. Even the plaintiff could not see past her hood. The dust was rolling in. While the plaintiff was aware of and knew of vehicles in front of her the defendant had no such knowledge. As regrettable as the accident was, there was nothing a reasonable and prudent man could have done to avoid the accident. The non-party driver, Bates, did not slow his vehicle below 65 miles per hour until he was nearly in the storm, which indicates that he was not apprehensive until he was in the storm. The defendant started decelerating as he approached the storm, but found himself on to the plaintiff's vehicle too soon to stop. The defendant's conduct was not a great deal different from that of Bates, except he found plaintiff's vehicle nearly stopped in front of him, with brake lights glowing. If the plaintiff was in the storm for five minutes, traveling five miles per hour, she traveled approximately 440 feet from the west edge of the second storm, into the storm. The defendant, during that same period, traveled at least four and probably closer to five miles through the small storm and then into the second storm. The plaintiff and defendant both felt that the

second storm would pass quickly. Neither party expected the storm to be as dense as it was. The plaintiff practically came to a stop, and the defendant, not knowing of the presence of the plaintiff's vehicle, accidentally collided with that vehicle. If ever a fact situation would justify a jury instruction regarding an unavoidable accident, it would seem that this case would be the perfect one.

Notwithstanding appellant's urging this Court to find that the trial court should have given the instruction relative to a unavoidable accident, if this court should find against your appellant regarding the same, appellant would urge that a new trial should be ordered for failure to give requested J.I.F.U. Instruction 2.5.

Defendant asserts that the trial court, by giving the plaintiff's requested Instruction No. 5, relative to the duty of the defendant to the plaintiff and thus what constituted negligence, and by failing to give the defendant's requested J.I.F.U. Instruction 2.5., relative to the duty of the plaintiff to the defendant and thus defining what actually constitutes contributory negligence, was and is reversible error. Your appellant asserts, that without the requested instruction the jury was unable to accurately and correctly ascertain and apply the law in question. Subsequent to the jury verdict, as the parties were leaving the court house, the defendant's counsel was approached by six members of the jury who informed him that the only reason they had reached a verdict in favor the plaintiff and against the defendant was that when Instruction No. 5 was read in the jury room, which instruction clearly defined the defendant's duty to the plaintiff, and when the jury could find no instruction which defined the plaintiff's duties to the defendant, the jury felt it had no alternative but to find in favor of the plaintiff and against the defendant, even though the six jurors felt the accident could not be avoided. By reason of those representations, defendant's

counsel subsequently prepared identical affidavits to that effect for the jurors, which were duly executed by five of the jurors and submitted to the trial court, together with a motion for a new trial, which motion was subsequently denied. Those affidavits were requested to be transmitted to this Court as a part of the record. Appellant draws this court's attention to said affidavits for the purpose of demonstrating that the instructions given the jury were not correctly presented in that the instructions were neither clear nor understandable to the jury and thus caused the jury to misapply the same. Appellant thus asserts that the trial court's failure to give the requested instructions at the time requested was and is reversible error which caused the jury to be unable to correctly apply the law in a clear and understandable manner.

POINT II

THE DEFENDANT IS ENTITLED TO THE SAME BENEFIT OF PROPER JURY INSTRUCTION AS WAS AFFORDED TO THE PLAINTIFF. FAILURE TO GIVE SAID INSTRUCTION IS REVERSIBLE ERROR.

It is the settled rule of this court that each party is entitled to have its theory of the case presented to the jury so long as the facts are sufficient to substantiate the same. The defendant acknowledges that the trial court gave general instructions relative to negligence and contributory negligence. However, the trial court explicitly defined what acts of the defendant would constitute negligence on the part of the defendant in Instruction No. 5, but neglected to give at the request of the defendant J.I.F.U. Instruction 2.5., which would have set forth with particularity the duties of the plaintiff to the defendant and thus the acts of the plaintiff which would have constituted contributory negligence.

A case which appears to be close in its facts to the instant case is that of Flippen v. Milward (120 Utah 373, 234 P. 2d 1053 (1953)) where the defendant's automobile rear-ended the plaintiff's automobile in a dense fog. The Court in affirming a verdict for the defendant stated that the instructions regarding plaintiff's duty to use a stop light signal were proper. By the same reasoning it would seem that the trial court's failure to give defendants requested instruction regarding the plaintiff's duty to the defendant would be improper, and therefore reversible.

Defendant accepts the well established rule of law that the jury instructions must be considered in their entirety along with all other instructions (See Simpson v. General Motors Corp., 470 P. 2d 399, 24 Utah 2d 301 (1970)). Also Enell and Son, Inc. v. Salt Lake City Corp., 493, P. 2d 1283, 27 Utah 2d 188, (1972)). However, in considering all of the instructions together, the defendant asserts that undue emphasis was given to the plaintiff's theory of the case and that equal emphasis was not given to the defendant's theory of the case, which fact caused the jury to be confused and to inappropriately apply the law in question as is witnessed by their sworn affidavits.

SUMMARY

Defendant contends that a new trial should be ordered by this court directing that the trial court shall give jury instructions consistent with the defendant's theory of the case and that are harmonious with the facts. Undue emphasis should not be given to either the plaintiff's or defendant's theories, but the instructions should be fair, clear and understandable, so that the jury can correctly apply the law to the facts as they shall find them.

**RECEIVED
LAW LIBRARY**

DEC 9 1975

**BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School**