

1969

# Marilyn B. Calahan v. Kay Laurel Wood : Respondents' Brief

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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HEILYN B. CALAHAN,

*Plaintiff and Appellant,*

VS.

RAY LAUREL WOOD,

*Defendant and Respondent.*

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## RESPONDENT'S

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Appeal from the Judgment of the  
District Court of the County of Kane,  
Honorable John F. [illegible]

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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MARILYN B. CALAHAN,

*Plaintiff and Appellant,*

vs.

KAY LAUREL WOOD,

*Defendant and Respondent.*

Case No.

11552

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## RESPONDENT'S BRIEF

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### STATEMENT OF FACTS

Appellant has recited facts which she, or her Attorney, hoped the jury would believe. However, considering the facts which the jury had a right to find, and did, they are as follows:

In the early morning hours of December 6, 1966, a cold, "very foggy" morning, the Plaintiff, a cocktail waitress at Chris' Tavern up Ogden Canyon, left her work and was being given a ride by a customer to Ogden. The car wouldn't start, and was pushed down the canyon by a second car, about one mile, but without success.

Both cars stopped, squarely in the center of the west bound lane, with the left side of the cars 1 foot 7

inches from the dividing white line separating the east bound and west bound lanes. (T-34 - officer) There were no lights on the cars. (T-85; T-88) The officer, driving opposite bound by coincidence immediately after the accident saw no lights at all. (T-29) The men in the two vehicles had all alighted from the cars 5 to 10 minutes before the accident. (T-66) They had no flashlights. There was ample room to park on the north shoulder, (T-89) and in fact, the officer parked his car on the shoulder completely off the travel portion. (T-30)

The Plaintiff knew the car was blocking the road (T-66); that it was foggy; that the situation was dangerous, but elected to remain in the car because she was cold. (T-68)

The Defendant, driving west down the canyon at a speed of about 20 m.p.h. suddenly struck the unlighted vehicles, which he had not previously seen because of fog and darkness.

## ARGUMENT

### POINT ONE

THE DEFENSES OF ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE WERE PROPERLY SUBMITTED TO THE JURY.

We reply to Appellant's Points One and Three simultaneously.

In *Ferguson vs. Jongsma*, 10 Ut. 2d, 179, 350 P2d 404, this Court stated:

"To evaluate these instructions a clear understanding of the difference between assumption of

risk and contributory negligence is necessary. These terms are often used interchangeably; sometimes both are used when only one is applicable, and often the term assumption of risk is used when there is a total lack of evidence to support a finding that Plaintiff's recovery is barred by that doctrine and under some fact situations both assumption of risk and contributory negligence would bar recovery. If the instruction is based on a factual situation which would support a finding of contributory negligence but the instruction erroneously called it assumption of risk, this alone would not be prejudicial error.

Contributory negligence is based on carelessness, inadvertance and unintended events, but assumption of risk requires an intelligent and deliberate choice to assume a known risk. Assumption of risk requires knowledge by Plaintiff of a specific defect or dangerous condition caused by Defendant's negligence or lack of due care which Plaintiff could have, but voluntarily and deliberately failed to avoid and thereby assumed the risk of the injuries he sustained. On the other hand, contributory negligence requires evidence only that Plaintiff failed to use the care for his own safety which an ordinary, reasonable and prudent person would use under the existing circumstances.

Under both the doctrine of contributory negligence and assumption of risk, whether the Plaintiff failed to use due care for his own safety or he deliberately assumed the risk of injury in the face of known danger, was a jury question, unless the evidence was so conclusive on those questions that a finding otherwise would be unreasonable and so require a finding against Plaintiff as a matter of law."

It was contended by Defendant that Plaintiff

(1) Assumed the risk of injury to herself by knowingly accepting a dangerous condition, which she could have avoided by the simple act of leaving the stopped car, and

(2) That she was contributorily negligent for not exercising that degree of care *for her own safety* that a reasonable and prudent person under the same circumstances would have exercised.

In this respect, Plaintiff had ample time to object to the driver parking the car in the traffic lane—which she did not.

In *Balle vs. Smith*, 81 Utah 179, 17 P2d 224:

“A guest is required to exercise the same care for his own safety that a reasonable and prudent person would exercise under the same circumstances.”

In 60A C.J.S. Sec. 329 Motor Vehicles, Pg. 364, the text states:

“The common-law duty to exercise reasonable and prudent care is not nullified by statutory regulations with respect to parking which are regarded as cumulative requirements, and the failure to exercise such care may constitute negligence notwithstanding compliance with the regulations, since precautionary measures other than those specified may sometimes be necessary.

The test of negligence of a motorist parking or leaving his vehicle standing in the highway is whether he exercised such care as a reasonably prudent person would exercise in the same cir-

circumstances and it is not required that the driver shall have exercised extraordinary care. Ordinarily, the operator of the stopped vehicle has the right to assume that other vehicles using the highway will exercise reasonable care in keeping a lookout and in passing; but it has been held that he may not assume, so as to shield himself from liability that another motorist would discover his negligence and by discovering, be able to avoid it, and, where existing conditions are such as to affect vision it may not be assumed that an approaching vehicle will maintain its course on the left side of the highway."

If then the driver of Plaintiff's vehicle was negligent in the manner and place he parked his unlighted car, would not the Plaintiff be negligent for acquiescing in that negligence without protest? Would she be justified in assuming other motorists would discover the danger in time to avoid injury to her, when the driver would not be so justified?

Certainly Plaintiff's driver was negligent for violating the Provisions of 41-6-101, U.C.A. 1953 which states:

"Upon any highway outside of a business or residence district no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or main traveled part of the highway when it is practical to stop, park, or so leave such vehicle off such part of said highway, but in every event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle shall be available from a distance of 200 feet in each direction upon such highway."



Plaintiff may not plead ignorance of the law, even though she was in fact, not the driver.

However, aside from the statute, she knew the car was parked without lights, blocking the only west bound lane of a canyon road, in heavy fog. The car was so parked for 5 to 10 minutes—ample time to object, to leave the car, and there was ample shoulder for the car to park on off the travel portion of the road, as did the Highway Patrol officer.

61 C.J.S., Sec. 491, Pg. 116, Motor Vehicles:

“If an occupant of a motor vehicle knows, or in the exercise of ordinary care should know, that to remain in the vehicle is dangerous, and if under the same or similar circumstances a reasonably prudent person would leave or withdraw from the vehicle, he is guilty of contributory negligence, if, a reasonable opportunity therefore being afforded, he fails to do so, and such failure contributes proximately to cause his injury.

See also *Eserina vs. Overland Moving Co.* (1949) 15 Utah 519, 206 P2d 621.

## POINT TWO

THE JURY DID NOT FIND THE ACCIDENT “UNAVOIDABLE” AND THE APPELLANT’S OBJECTION TO AN INSTRUCTION THEREON IS MOOT.

The jury by Special Interrogatories found:

(1) Defendant was negligent for not keeping a proper lookout.

(2) The Plaintiff was contributory negligent for remaining in the vehicle under the circumstances.

Obviously, therefore, they did *not* find that the accident was unavoidable.

The instruction thereon could hardly be prejudicial, even if we assume Appellant correct in Point Two of her Brief.

In 5 Am. Jur. 2d, Sec. 805, Pg. 247, the text states :

“The admission of erroneous evidence and erroneous instructions based thereon, are rendered harmless or cured where the jury verdict is such that the evidence becomes immaterial. And error in the admission of evidence is cured where the verdict shows that the evidence was rejected by the jury.”

See also Sec. 792.

Here, the jury <sup>rejected</sup>~~requested~~ the defense of unavoidable accident.

If we assume the Trial Court erred in allowing that defense, the error was <sup>CURED</sup>~~caused~~ by the verdict.

It has long since been established in Utah that the erroneous admission of evidence on an issue found for the party complaining is harmless.

Smith vs. Gilbert, 49 Ut. 510, 164 P. 1026.

Garr vs. Cranney, 25 Utah 193, 70 P. 853.

See also 5A C.J.S., Appeal & Error, Sec. 1736.

Respectfully submitted,

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