2000

# Ralph Brunyer v. Salt Lake County, Daniel Neil Ipson : Reply Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

---

RALPH BRUNYER,

Plaintiff,

vs.

SALT LAKE COUNTY, a Utah corporation, and DANIEL NEIL IPSON,

No. 14267

Defendants, Appellants and Third-Party Plaintiffs,

vs.

EMIL ZIGICH,

Third-Party Defendant and Respondent.

---

# REPLY BRIEF OF DEFENDANTS-APPELLANTS

---

MERLIN R. LYBBERT
KIM R. WILSON
HAROLD G. CHRISTENSEN (on the Brief)
CRAIG S. COOK (on the Brief)
of
WORSLEY, SNOW & CHRISTENSEN
700 Continental Bank Building
Salt Lake City, Utah 84010

Attorneys for Defendants-Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

---

RALPH BRUNYER,

Plaintiff,

vs.

SALT LAKE COUNTY, a Utah corporation, and DANIEL NEIL IPSON,

No. 14267

Defendants, Appellants and Third-Party Plaintiffs,

vs.

EMIL ZIGICH,

Third-Party Defendant and Respondent.

---

# REPLY BRIEF OF DEFENDANTS-APPELLANTS

---

MERLIN R. LYBBERT
KIM R. WILSON
HAROLD G. CHRISTENSEN (on the Brief)
CRAIG S. COOK (on the Brief)
of
WORSLEY, SNOW & CHRISTENSEN
700 Continental Bank Building
Salt Lake City, Utah 84010

Attorneys for Defendants-Appellants

TABLE OF CONTENTS

## CASES CITED



## STATUTES



## OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF UTAH

- - - - - - - - - - - - - - - - - - - - - -

RALPH BRUYNER,

Plaintiff,

vs.

SALT LAKE COUNTY, a Utah corporation, and DANIEL IPSON,

Defendants, Appellants and Third-Party Plaintiffs,

vs.

EMIL ZIGICH,

Third-Party Defendant and Respondent.

REPLY BRIEF OF DEFENDANTS-APPELLANTS

Civil No. 14267

- - - - - - - - - - - - - - - - - - - - - -

## POINT I

### THE FACTUAL CONTEXT OF THIS CASE DOES NOT REQUIRE THE RETROACTIVE APPLICATION OF THE UTAH CONTRIBUTION ACT BECAUSE THE "CAUSE OF ACTION" HAS NOT YET ACCRUED.

Appellants, in our original brief, have argued that the contribution statute enacted by the 1973 Legislature does not require retroactive application in order for a cause of action in the instant case to be maintained against respondent. The reason for this assertion is extremely simple: while the accident itself occurred prior to the enactment of the statute, the cause of action for contribution has not

accrued until a judgment has been obtained against the appellant and until appellant is forced to pay to the plaintiff in this case damages in excess of appellant's pro rata share of joint liability.

Respondent Zigich spends many pages in his brief citing authorities stating that statutes should generally be held as prospective and not retrospective and citing further authorities that Comparative Negligence should not be applied retroactively. Unfortunately, these arguments and authorities have no application to the present case.

First, even though there is an expressed statute in Utah relating to retroactive application of a statute (Section 68-3-3, U.C.A.) the exceptions, even to this type of statute, are those laws relating only to procedure and remedies. Thus, as discussed in Point II of this brief, the Contribution Statutes can be applied retroactively since they are remedial legislation.

Second, those cases cited by respondent concerning Comparative Negligence are not in point in the present controversy. As previously noted in Appellants' main brief, there is a great distinction between a Contribution Statute and a Comparative Negligence Statute. A contribution statute concerns the rights and liabilities between joint tort feasors who have incurred a common liability to the injured party. The victim of the tort has a "right" to choose any

or all of the tort feasors in an action to recover damages for the injury. The fact that the victim may pick and choose which tort feasor he wishes to sue does not in any way change the obligation existing at the time of the accident to the victim. Any recovery made by a fellow tort feasor in contribution is made as an indirect result of the original liability between all tort feasors and the victim.

On the other hand, Comparative Negligence affects the rights and obligations between the tort feasor and the victim which is substantially different from the doctrine of Contributory Negligence. In Comparative Negligence, a tort feasor may be held liable for damages even though the victim is also negligent in his actions. In Contributory Negligence, however, even the slightest degree of fault on the part of the victim precluded recovery. Therefore, assuming that a victim was 3 per cent negligent and that a tort feasor was 97 per cent negligent, in the case of Comparative Negligence the victim could recover 97 per cent of his damages while in the case of Contributory Negligence no recovery could be made. It is for this reason that the majority of courts, as noted by the respondent, have been unwilling to apply Comparative Negligence Statutes retroactively.

Respondent's argument that Sections 78-27-37 through 43 all constitute the "Comparative Negligence Act" is erroneous.

Although house bill No. 25 has been referenced as "Utah Comparative Negligence Act" such title is not part of the Act itself but is merely an abbreviation for clerical usage. Such references are not controlling in statutory construction. 73 Am.Jur.2d Section 95, Statutes, p. 320-321. The correct title of the "Act" in which the contribution sections appear is "An Act Relating To Actions For the Recovery of Damages in Actions Based on Negligence or Gross Negligence". Clearly, the sections relating to Comparative Negligence (78-27-37 and 38) are separable from those relating to contribution among joint tort feasors.

If this separation was not the case, respondent would have to argue that contribution is directly related to Comparative Negligence and that without a Comparative Negligence Statute there can be no contribution. Obviously, the doctrine of Contribution and the doctrine of Comparative Negligence are independent of one another to the extent that contribution may be obtained regardless of the negligence theory utilized in a jurisdiction between a tort feasor and an injured party. See Bielski v. Schulze, 16 Wis.2d 1, 114 M.W.2d 105.

Even authorities cited by the respondent are consistent with appellant's view of the contribution statute. For example, in the Oakland Construction Company case cited by respondent (Respondent's brief, p. 7) this court stated that

a statute is not to be applied retroactively if it "deprived a party of his rights or imposed greater liability upon him". Obviously, allowing one joint tort feasor to recover a pro rata share from another does not deprive him of any right since both tort feasors are liable from the time of the tort. There is no greater liability imposed upon the tort feasor than existed without contribution.

Likewise, the Joseph v. Lowery case cited by respondent (Respondent's brief, p. 11) again forbids retroactive application when a "duty to pay which did not exist at the time the damage was inflicted" is created. Here again, however, the joint tort feasor always had a duty to pay for the damages inflicted to the victim regardless of whether contribution was in effect.

In Point III of respondent's brief it is argued that "the right of contribution, if one exists, is created at the time of the accident" and merely vests upon the payment by one joint feasor of a disproportionate amount of recovery. Hence, the "inchoate" right at the time of the accident should control.

Such an argument is illogical. For example, there are thousands of instances every day where persons are given incidental or inchoate rights which may ripen into a cause of action subsequently. A person may be named as a beneficiary of a will but because of contingencies stated in the

may never inherit or have the right to contest the will. Or, as in the Silver King Coalition Mines Company case cited by appellant in its main brief, a person may have a right to recover for the wrongful death of a relative under the Occupational Disease Act but such right does not become actionable until all of the circumstances giving rise to the cause of action have occurred. As stated by this court in the Siver King Coalition Mines case "it is often said that a right is not 'vested' unless it is something more than such a mere expectation as may be based upon an anticipated continuation of the present laws". 268 P.2d at 692.

Thus, it is the time when a cause of action for contribution becomes complete and not the "incidental or inchoate right" arising from the accident itself which should govern the time sequence of a contribution lawsuit. It is the final act of payment of a disproportionate share of liability which creates a cause of action, just as it is the final acceptance of an offer which makes a contract binding.

Respondents reasoning, as to a contract situation, would require a court to look at the law at the time an original offer was made regardless of what the law was at the time the acceptance was given since, respondent would argue, the initial offer was an inchoate right which would eventually lead to a cause of action on the contract. Obviously, courts examine an event at the time the "cause

of action" arises regardless of what events preceded it: in this case, therefore, there has been no cause of action arising and appellant should not be barred from instigating this third-party action.

Finally, it should be noted that respondent has failed in his brief to cite a single case involving contribution per se. Rather, respondent has exclusively cited cases involving comparative negligence, which as stated previously, is not in point concerning the application of contribution statutes.

The respondent in his brief fails to distinguish the numerous cases cited by appellant from the states of California, Delaware, Hawaii, Iowa, Louisiana, Maryland, Mississippi, New Jersey, New York, Pennsylvania, Virginia, and Wisconsin which have all held that the time for computing a claim based upon contribution does not begin until after a pro rata share of a judgment has been paid by a joint tort feasor. For this reason, therefore, the trial court erred in holding that the contribution statute would be applied retroactively when, in fact, no retroactive application is necessary since no payments have yet been made by the appellants.

## POINT II

THE APPLICATION OF THE UTAH CONTRIBUTION STATUTE DOES NOT TAKE AWAY OR IMPAIR VESTED RIGHTS ACQUIRED UNDER EXISTING LAWS PRIOR TO ITS ENACTMENT, DOES NOT CREATE A NEW OBLIGATION, DOES NOT IMPOSE A NEW DUTY, AND DOES NOT ATTACH A NEW DISABILITY IN RESPECT TO TRANSACTIONS OR CONSIDERATIONS ALREADY PAST.

The question of whether the Contribution Act is substantive or procedural law is completely academic since the cause of action in a contribution suit does not arise until payment is made. However, assuming arguendo that retroactive application of the contribution statutes must be made, it is still evident that no substantive law has been affected by those statutes specifically relating to contribution.

Appellants and respondent are in agreement as to the definition of substantive law and also agree that Section 68-3-3, U.C.A. 1953 is controlling except as to those laws which do not affect substantive rights as distinguished from adjective law which pertains to practice and procedure. However, the disagreement between respondent and appellants seems to be centered upon which law is being analyzed and the effect it has upon substantive rights.

Once again, the respondent refers to the "Comparative Negligence Act" and cites the Oregon case of Joseph v. Lowery as controlling authority. Unfortunately, however, respondent again has relied upon an analysis of the comparative negligence

statutes relating to liability between a tort feasor and a victim and has avoided the issue of contribution among joint tort feasors.

In the Lowery case, for example, the statute referred to in respondent's brief concerned only the adoption of a comparative negligence standard. (Respondent's Brief, p. 18-19). That statute stated:

> Contributory negligence, including assumption of the risk, shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property if such negligence contributing to the injury was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of such negligence attributable to the persons recovering. Oregon Laws 1971, Ch. 68, Section 1, 495 P.2d 273 at 275.

If this action concerned Section 78-27-37 and 38 of the Utah Code, respondent's authorities would be germane and perhaps persuasive that the doctrine of comparative negligence should not be retroactively applied since the rights and obligations existing between a tort feasor and the injured party may be said to be altered. However, it has never been argued by either plaintiff or the appellants that comparative negligence should apply to this lawsuit. The sole question is whether Sections 78-27-39 through 43 are applicable as between respondent Zigich and appellants.

This crucial distinction has not been followed by respondent in his brief.

Respondent attempts to distinguish the case of Silver King Coalition Mines Company v. Industrial Commission, 268 P.2d 689 (Utah 1954) by arguing that the "cause of action" in that case did not exist until after the amended statute had been passed, while asserting that the cause of action in this case arose prior to the Comparative Negligence Act (Respondent's brief, p. 20-21). It is difficult to understand how respondent can distinguish the Silver King Coalition Mine Company case in this manner since even the authorities cited by respondent admit that the cause of action does not become complete until the disproportionate payment by one of the joint tort feasors. See respondent's brief, p. 25 and citation from 18 Am.Jur.2d Section 47.

A "cause of action" has been defined by this court as a "aggregate of operative facts which give rise to one or more relations of right-duty between two or more persons". Hartford Accident & Indemnity Company v. Clegg, 135 P.2d 919, 923 (Utah 1943). It is no more logical to say that "appellants' claim for contribution comes into effect . . . at the time of the accident which produces plaintiff's claim against him" (Respondent's brief, p. 21) than to say that the cause of action in Silver King Coalition Mines Company arose at the time the decedent became employed with

the mining corporation and began to contract silicosis. It is only when the operative facts become "complete" that the legal right called a "cause of action" can be enforced. In Silver King Coalition Mines Company the final fact was death; in the instant case the final fact is a disproportionate payment to the plaintiff. Until this payment is made, therefore, the cause of action is not complete for purposes of determining the application of statutes.

Finally, it must again be noted that respondent failed to cite a single case involving the question of substantive rights as applied to contribution statutes and fails to distinguish those cases cited by appellant in its main brief from California, Pennsylvania, Delaware, New Jersey, Michigan, and New York which have specifically held that contribution does not affect a substantive right but is only a change in remedy which creates no new obligations or burdens.

The overwhelming weight of authority supports appellants' alternate position that no substantive rights have been impaired with the enactment of the contribution statutes and, therefore, retroactive application can be made if deemed necessary.

## POINT III

THE TRIAL COURT ERRED IN DISMISSING THE THIRD-PARTY COMPLAINT ON THE GROUNDS THAT THE THIRD-PARTY COMPLAINT WAS PREMATURE SINCE NO PAYMENT HAD BEEN MADE IN EXCESS OF DEFENDANTS PRO RATA SHARE OF COMMON LIABILITY.

Respondent has failed to respond to Point III of appellant's main brief so that it must be assumed respondent agrees with appellant's analysis of Rule 14a of the Utah Rules of Civil Procedure and agrees with the authorities cited in support thereof that third-party complaints for contribution may be brought prematurely in the interest of judicial economy and consistent results. Further comment is unnecessary on this point.

## POINT IV

RESPONDENT IS IN ERROR WHEN HE ARGUES THAT APPELLANTS AND RESPONDENTS ARE NOT JOINT TORT FEASORS FOR THE PURPOSES OF CONTRIBUTION IN THAT THEIR LIABILITY IS NOT COMMON.

Respondent argues that he cannot be a joint tort feasor with appellants because of the protection of the Utah Guest statute (Respondent's brief, pp. 27-30). Respondents failed to point out, however, that appellants' third-party complaint alleges that respondent was intoxicated at the time of the accident and was guilty of wilful misconduct. Respondent also fails to state that affidavits filed subsequent to the complaint recited that the alcohol level in respondent's

blood on the morning of the accident was .07 per cent. (R. 95-96).

A portion of the Utah Guest statute, Section 49-9-1, Utah Code Ann., 1953 reads as follows:

> Nothing in this section shall be construed as relieving the owner or driver or person responsible for the operation of a vehicle from liability for injury to or death of such guest proximately resulting from the intoxication or wilful misconduct of such owner, driver or person responsible for the operation of such vehicle.

Section 41-6-44 Utah Code Ann., 1953, establishes presumptions of intoxication based on alcohol content of blood by weight, for use in civil suits. Section 41-6-44(b)(2) reads as follows:

> If there was at that time in excess of .05 per cent but less than .08 per cent by weight of alcohol in the person's blood, such facts shall not give rise to any presumption that the person was or was not under the influence of intoxicating liquor, but such fact may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor. (Emphasis added).

The question of respondent's intoxication is one for a trier of fact. It cannot be said, as a matter of law, that respondent would not be liable to the plaintiff under immunity of the Utah Guest statute. For this reason, it cannot be said as a matter of law that there is no "common liability" between appellant and respondent and therefore respondent's argument to the contrary must be discarded.

## POINT V

RESPONDENT IS IN ERROR IN CLAIMING THAT THE STATUTE OF LIMITATIONS HAS RUN AS TO THE RESPONDENT IN ANY ACTION EMINATING FROM THE WRONGFUL DEATH OF LOUISE BRUYNER.

Respondent states in his brief "as respondent can have no liability to the plaintiff for the wrongful death allegations of his complaint, because of the statute of limitations, the appellants cannot not circumvent the lack of liability between respondent and the plaintiff by third-party complaint for contribution due to the statute of limitations" (Respondent's brief, p. 31). This statement is completely erroneous.

It is well settled that a cause of action for contribution is separate and distinct from the underlying cause of action for tort in which the cause of action for contribution has its roots. Accordingly, the statute of limitations governing such underlying action for tort does not apply to the action for contribution, and the period within which an injured party must commence his action for tort, and the fact that such period has expired, are irrelevant when a joint tort feasor seeks contribution from another with whom he shares joint liability. See "What Statute of Limitations Applies to Actions for Contribution Against Joint Tort Feasor", 57 A.L.R.3d 927, 929. See also Prosser, Law of Torts (3rd Edition), p. 309 ("It is generally agreed that the fact that the statute of limitations has run against the

original plaintiff's action does not bar a suit for contribution, since that cause of action does not arise until payment").

Finally, it should be noted that the annotation cited by respondent at 26 A.L.R.3d 1283 is entitled "Automobiles: Right of Third-Person to Recover Contribution from Host Driver for Injuries or Death of Guest, Where Host is not Liable to Guest under Guest Statute". This annotation merely states, which has never been disputed by appellants, that if respondent Zigich is not liable under the guest statute to the plaintiff then no right of contribution exists between appellants and respondent. As previously noted, however, whether respondent is protected by the quest statute will depend upon a jury's determination as to the respondent's intoxication at the time of the accident.

Therefore, because the statute of limitations has not even begun to run against the appellants, respondent's "statute of limitations" argument is without merit.

## CONCLUSION

Respondent in his brief has failed to confront the issue now before this court i.e., whether appellant has a third-party claim against respondent based upon the contribution statutes. Respondent's characterization of "contribution" as "comparative negligence" is not supported by law or logic. Respondent has cited no authority specifically

relating to contribution that negates the large number of authorities cited by appellants in their main brief. It can only be assumed, therefore, that appellants' position is the one which is followed throughout other jurisdictions relating to this contribution question.

The determination by this court that the cause of action in a contribution suit does not arise until a joint tort feasor pays to a plaintiff a disproportionate share of his liability (as required in Section 78-27-39), would conform to numerous other jurisdictions which have made this same determination, would create no problem of confusion among the courts since an easily understandable standard of time would exist, and would equitably distribute the liability among joint tort feasors as was intended by the legislature in the passage of the contribution statutes.

For these reasons, the order of the trial court dismissing the third-party complaint of appellants must be reversed and the case remanded to the lower court for trial on the merits.

Respectfully submitted,

WORSLEY, SNOW & CHRISTENSEN

Merlin R. Lybbert
Kim R. Wilson
Harold G. Christensen
Craig S. Cook