

1953

# Jacqueline Hardman v. Donald Matthews and C. J. Matthews : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

JACQUELINE HARDMAN,

Plaintiff and  
Appellant,

v.

Case No. 79

DONALD MATTHEWS and C. J.  
MATTHEWS,

Defendants and  
Respondents,

BRIEF OF APPELLANT

**FILED**  
MAY 25 1953  
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**IN THE SUPREME COURT OF THE STATE OF UTAH**

**JACQUELINE HARDMAN,**

**Plaintiff and  
Appellant,**

**v.**

**Case No. 7980**

**DONALD MATTHEWS and C. J.  
MATTHEWS,**

**Defendants and  
Respondents,**

**STATEMENT OF FACTS**

The facts in this case are as follows:  
On the 29th day of October, 1952, plaintiff Jacqueline Hardman filed an action against Donald Matthews and C. J. Matthews, defendants, for injuries that she sustained as a result of an accident on or about August 6, 1952. At the time of said accident plaintiff was riding as a guest in a 1951 Mercury automobile and plaintiff has alleged in her complaint that as a result of the defendant's

against the automobile in which she was riding as a guest, that defendants are liable for the injuries which she suffered. On November 19, 1952, the defendants filed "Answer and Counterclaim or Cross--Complaint for Interpleader" and also a motion to have William A. Johnson and Marilyn Miller Johnson made parties to this action. On November 21, 1952, plaintiff filed a reply to the Counterclaim or Cross-Complaint for Interpleader of the defendants and, thereafter, on the 2nd of December, 1952, the defendants filed a Third-Party Complaint and an Amended Answer and another motion to have William A. Johnson and Marilyn Miller Johnson, his wife, made Third-Party Defendants to this action. On the 9th day of December, 1952, the defendants through their counsel moved the Honorable Clarence E. Baker of the Third Judicial District Court in and for Salt Lake County, State of Utah, to allow them to bring in Third-Party defendants William A.

bile in which plaintiff was riding as a guest. Said matter was argued before the Honorable Clarence E. Baker, who on the 9th day of December, 1952, denied defendants' motion to allow said Third-Party Defendants to be brought into this action. R. 17. That thereafter on the 12th day of December, 1952, the court upon its own motion and without notice to attorneys for plaintiff vacated its previous order, entered on the 9th day of December, 1952, and stated, "Upon the court's own motion and good cause appearing therefor, it is ordered that the prior order of the court made and entered under date of December 9, 1952, denying defendants' motion for leave to bring in Third-Party Defendants, be and the same is hereby vacated and set aside and upon the court's reconsideration of said motion, it is hereby ordered that said motion for leave to make William A. Johnson and Marilyn Miller Johnson, his wife, parties to this action, be and the same is hereby granted."

Counsel for plaintiff was mailed notice on the 13th day of December, 1952, of the judge's reconsideration of said matter and new order. On the 17th of December, 1952, plaintiff petitioned the court, on a motion for rehearing of the court's order allowing the Third-Party Defendants to be made parties in this action, and requested that the court reconsider its action and deny to defendants the right to make William A. Johnson and Marilyn Miller Johnson Third-Party Defendants in this action. That on the 30th day of January, 1953, the Third Judicial District Court in and for Salt Lake County, State of Utah, by the Honorable Clarence E. Baker, denied plaintiff's motion to reconsider its order granting the third-party action to defendants.

On the 26th day of February, 1953, plaintiff filed in the Supreme Court of the State of Utah, pursuant to the Utah Rules of Civil



from the order heretofore entered by the Honorable Clarence E. Baker. R. 23-28 inc. On the 16th day of March, 1953, this court granted plaintiff's petition for an interlocutory appeal from the order entered by the Honorable Clarence E. Baker on the 30th day of January, 1953.

The pertinent provisions of the Third-Party Complaint of the defendants are contained in Paragraphs 3, 4 and 5 of said Third-Party Complaint and read as follows: (R. 8, 9)

"3. That on or about the 6th day of August, 1952, on a public highway called Sugar Street in Midvale, Salt Lake County, State of Utah, Third-Party Defendant, Marilyn Miller Johnson, negligently drove and operated a 1951 Mercury Club Coupe automobile, same being owned by Third-Party Defendant, William A. Johnson and being then and there operated by said wife, Third-Party Defendant, Marilyn Miller Johnson, with his consent and permission, into, against and upon a 1947 Chevrolet 1½ Ton Truck owned by Third-Party Plaintiff, C. J. Matthews and being then and there operated by said Third-Party Plaintiff, Donald Matthews, thereby proximately causing the injuries, damages and losses of and to said plaintiff and also thereby proximately causing the losses of said Third-Party Plaintiff, C. J. Matthews,



"4. That said Third-Party Defendant, Marilyn Miller Johnson, drove and operated said automobile in a careless and negligent manner in that she drove and operated said automobile at an unlawful rate of speed, to-wit, in excess of 60 miles per hour.

"5. That said negligence and wilfull misconduct of said Third-Party Defendant, Marilyn Miller Johnson, proximately caused and occasioned the injuries, damages and losses of plaintiff, same being more particularly set forth in the Complaint of plaintiff on file herein. That such injuries, damages and losses of plaintiff were the direct and proximate result of said negligence and wilfull misconduct of said Third-Party Defendant, Marilyn Miller Johnson. That plaintiff was riding in said automobile of Third-Party Defendant, William A. Johnson, being then and there operated by his wife, Third-Party Defendant, Marilyn Miller Johnson, with his consent and permission, at said time and place. That said wilfull misconduct of said Third-Party Defendant, Marilyn Miller Johnson, consisted of driving and operating said automobile in which plaintiff was riding at an unlawful rate of speed and in a manner showing and displaying a wanton disregard for the safety of said plaintiff."

### STATEMENT OF POINTS

#### **I. THE LOWER COURT ERRED IN GRANTING**

**DEFENDANTS' MOTION TO ALLOW WILLIAM A. JOHNSON AND MARILYN MILLER JOHNSON TO BE BROUGHT IN AS**

**THIS ACTION.**

ARGUMENT

POINT I. THE LOWER COURT ERRED IN GRANTING DEFENDANTS' MOTION TO ALLOW WILLIAM A. JOHNSON AND MARILYN MILLER JOHNSON TO BE BROUGHT IN AS THIRD-PARTY DEFENDANTS IN THIS ACTION.

The defendants, by their Third-Party Complaint and more particularly Paragraphs 3, 4 and 5 of said Complaint, are attempting to force plaintiff to litigate her claim against Third-Party Defendants William A. Johnson and Marilyn Miller Johnson. This the defendants are attempting to do on the grounds that these parties were negligent and are therefore responsible and liable for any injuries which the plaintiff may have suffered as a result of the accident. Rule 14 (a) Utah Rules of Civil Procedure is very explicit as to who may be made third-party defendants and nowhere does it set forth a situation in which these parties, William A. Johnson and Marilyn Miller Johnson, may be made third-party defendants.

Said rule reads as follows:

"When defendant may bring in third parties. Before the service of his answer a defendant may move ex-parte or, after the service of his answer, on notice to the plaintiff, for leave as a third party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the PLAINTIFF'S claim against him. . ."

Certainly the defendants cannot comply with this provision and more particularly that portion which requires that the third party defendants may be liable to him for all or part of the plaintiff's claim against him. It is asserted that this is a negligence action and if the plaintiff prevails in her claim as against the defendants certainly it would be on the grounds of showing that the defendants were negligent.

It should be noted that the Utah Rule of Civil Procedure 14 (a) was copied from the Federal Rule 14 (a), as it was amended. Prior to the amendment of the Federal Rule it read as follows:

answer the defendant may move ex-parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him..."

The amendment to the Federal Rule and which amendment was copied in the Utah Rules of Civil Procedure expressly excludes that portion which sets forth that a third-party defendant may be brought in where he is liable or may be liable to the plaintiff.

In the text Federal Practice and Procedure, Barron & Holtzoff, Sec. 421, p. 837, Rule 14, it states:

"To summarize the foregoing change, it may be said that under rule 14 as originally framed the defendant might have brought in as a third-party defendant either a person who was secondarily liable to him or a person who was primarily liable to the plaintiff. Under the 1948 amendment only a person who is secondarily liable to the original defendant may be brought in."

Under the Federal Rule prior to the amendment it was held that the plaintiff need not amend his complaint to state a claim against

See *Satink v. Holland Township*, DNJ 1940, 31 Fed. Sup. 229. Noted 1940, 88 U. Pa.L. Rev. 751. *Connolly v. Bender*, Ed Mich 1941, 36 Fed. Sup. 368.

In the case of *DELANO V. IVES*, Ed Pa. 1941, 40 Fed. Sup. 672, the court said:

"... The weight of authority is to the effect that a defendant cannot compel the plaintiff, who has sued him, to sue also a third party whom he does not wish to sue by tendering in a third-party complaint, the third-party as an additional defendant directly liable to the plaintiff."

Based upon such reasoning, the impleading of the third-party defendants in this case will amount to nothing more than a mere offer of a party to the plaintiff and, if the plaintiff rejects it, the allowing of the third parties to be made defendants is useless gesture. Thus it is apparent that even under the Federal Rules, prior to the amendment, such a condition as the defendants seek could not have been secured.

The footnote to Rule 14 (a) of the Utah

"Note:--Rule 14 (a). The Federal Rule was amended and as amended it recognizes our section 104-3-17."

104-3-17 as originally set forth in the Code of Civil Procedure provides:

"Persons civilly liable on the same obligation or instrument including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action at the option of the plaintiff."

It is apparent that according to the Rules of Civil Procedure the lower court erred in allowing these parties to be made third-party defendants.

It is not a question here that the third-party defendants, William A. Johnson and Marilyn Miller Johnson, may be liable to the plaintiff had she chosen to sue them or assert her cause of action against them. The defendants cannot under Rule 14 (a) force the plaintiff to bring her action against parties whom she has not chosen to sue.



**CONCLUSION**

In conclusion, plaintiff contends that the decision of the Third Judicial District Court should be reversed for the reasons herein stated.

Respectfully submitted,

**McCULLOUGH, BOYCE & McCULLOUGH**  
**Attorneys for Appellant**