

1949

William E. French v. Utah Oil Refining Company : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Rich and Elton; Attorneys for Respondent;

Recommended Citation

Brief of Respondent, *French v. Utah Oil Refining Co.*, No. 7396 (Utah Supreme Court, 1949).
https://digitalcommons.law.byu.edu/uofu_sc1/1194

This Brief of Respondent 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 (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
OF THE STATE OF UTAH

FILED

NOV 21 1949

CLERK, SUPREME COURT, UTAH

WILLIAM E. FRENCH,

Appellant,

vs.

UTAH OIL REFINING COMPANY,
a corporation,

Respondent.

Case No.
7396

Brief of Respondent

RICH AND ELTON,

Attorneys for Respondent.

INDEX TO BRIEF

	Page
STATEMENT OF FACTS	1
ARGUMENT	
Contributory Negligence of Plaintiff	7
Last Clear Chance	13

INDEX TO AUTHORITIES CITED — CASES

Bullock v. Luke, 98 Utah 501, 28 Pac. 2d 350	9
Cederloff v. Whited, 110 Utah 45, 169 Pac. 2d 777	8
Conklin v. Walsh, Utah, 193 Pac. 2d 437	9
Graham v. Johnson, 109 Utah 346, 166 Pac. 2d 230	13
Hart v. Kerr, 110 Utah 479, 175 Pac. 2d 475	7
Hess v. Robinson, 109 Utah 60, 163 Pac. 2d 510	11, 12
Hickok v. Skinner, Utah, 190 Pac. 2d 514	9
Holmgren v. Union Pacific, 198 Pac. 2d 459	15
Horsley v. Robinson, Utah, 186 Pac. 2d 592	15
Mingus, v. Olsson, Utah, 201 Pac. 2d 495	9
Richards v. Palace Laundry Co., 55 Utah 409, 186 Pac. 439	16
Sine v. Salt Lake Transportation Co., 106 Utah 289, 147 Pac. 2d 875	9
State v. Newton, 105 Utah 561, 144 Pac. 2d 290	9

TEXTS

38 Am. Juris. 960, Sec. 271	14
-----------------------------------	----

STATUTES REFERRED TO

Sec. 57-7-137, U.C.A. 1943	7
Sec. 57-7-133, U.C.A. 1943	7

IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM E. FRENCH,

Appellant,

vs.

UTAH OIL REFINING COMPANY,
a corporation,

Respondent.

Case No.
7396

Brief of Respondent

STATEMENT OF FACTS

Appellant's statement of facts is, to say the least, meager and partisan. It is in about the same class as his pleading. Had plaintiff's complaint alleged the facts as shown by the evidence the case probably could have been decided upon a general demurrer instead of requiring a trial. A fair reading of the complaint would indicate that plaintiff entered the intersection from the east and was proceeding westerly through the intersection. Also it will be observed that there is a total absence in the complaint of any reference to the fact that the traffic was controlled by signal lights and a significant absence

of any allegation about a left hand turn in the intersection by plaintiff. The complaint bears evidence of a deceptive and misleading pleading. The statement of facts in plaintiff's brief is of the same caliber.

It is, of course, axiomatic that plaintiff's case is no stronger than his own evidence and as the cross-examination leaves it.

When plaintiff entered the intersection from the *south* the light was green for north and south bound traffic. He testified on cross-examination (R. 11-12) that he first saw defendant's truck to the north and on the opposite side of the intersection, "I was in the intersection, just over the walk." And he saw the Oil Company tanker 100 to 120 feet away. That was when he first saw it. The truck was running at normal speed, about twenty-five miles per hour (R. 12).

There was a car ahead of plaintiff's car, also making a left hand turn, and the next time plaintiff saw the tank truck of defendant it was about six feet away from him. It was practically upon him (R. 12). While he first testified that he attempted to keep both of these cars within his vision, he finally testified (R. 13) that he didn't know whether he observed the tank truck of defendant between the time that he observed it 100 to 120 feet away and the time he next saw it six feet away. "I don't know whether I observed it or not."

During this time plaintiff made a left hand turn (R. 14). There were a number of other cars in the intersection

at the time. It is a street carrying heavy traffic (R. 14). Plaintiff was following the car in front of him within three or four feet.

The front wheel of my car was right on the cross-walk when it was hit on the right rear wheel (R. 20).

Right after the accident plaintiff told Mr. Olson (the driver of defendant's truck) that he thought he had time to make the turn (R. 16); and told Mr. Porter (defendant's claim adjuster) that he was under the traffic light, in the intersection, when he first noticed the tank truck (R. 18). He also testified as follows, upon direct examination (R. 5-6):

“Q. What was it, if anything, that caused the collision, if there was a collision?”

“A. Well, there was a car ahead of me and I couldn't get out quite fast enough.

“Q. How fast were you traveling?”

“A. About eight miles an hour.”

He also testified that he examined the tracks after the accident and if the truck had gone straight there was plenty of room to miss his car but it swung to the west.

Mr. Reeves, who was with plaintiff in his car, testified that when they were making the left turn the signal light turned yellow, at which time defendant's truck was

125, maybe 150 feet, away. It hadn't entered the intersection; and that it was coming fairly fast, 25 miles per hour.

On cross-examination, however, he testified that when plaintiff entered the intersection from the south that he saw the tank truck and that, *at that time*, the truck was probably 50 feet north of the crosswalk (about 150 or 140 feet from plaintiff's car to the north), at which time the light was green (R. 36, 37 and 25). The width of the intersection was about 90 feet.

He also testified that plaintiff was 30 feet behind the car in front of him (R. 37). He also testified that the tank truck was in the west lane of traffic on the west side of Second West (R. 38).

“Q. What did you say the distance was between the French car and the Utah Oil truck: When you arrived at a position west and south of the semaphore?

“A. It was about half the width of the pavement.”
(About 45 feet).

He also testified,

“Q. When you started to turn do you know whether or not the Utah Oil truck had entered the intersection?

“A. When we started to turn it was crossing the side-walk. It hadn't crossed the sidewalk when we saw it (the light) turn.”

He also testified (R. 41) that the truck veered about forty feet to the west. On Cross-examination he testified (R. 43) that at the time of impact the Utah Oil truck was within ten to twelve feet of the west crosswalk.

Plaintiff then was called for further direct examination (R. 44) and testified that he was at a point marked "1" on the diagram on the board (not in evidence) when he saw the tanker 120 feet away. On cross-examination, however, this point was fixed at six feet from the point of impact (R. 45) and that he went six feet at eight miles per hour while the truck was going 120 feet at 20 or 25 miles per hour (an impossibility which no one was obligated to believe).

It makes no difference which of these various stories plaintiff adopts as the one which he will stick to, he is guilty of contributory negligence under the statutes and decisions of this court; and he is not relieved of his negligence by the last clear chance rule.

Under story No. 1 as told by himself he entered the intersection when the light was green, at which time the truck was 100 to 120 feet from him about 40 feet north of the north crosswalk. He was driving eight miles per hour and the truck was coming 20 to 25 miles per hour on the west lane of the west side of the highway, and he made a left hand turn following another car in front of the truck, and was hit because he thought he could make it and because his car didn't take up as fast as he thought it would.

2. On his story No. 2 as told by himself he didn't see the truck until six feet from the point of impact, at which time the truck was 120 feet away. He was traveling eight miles per hour and the truck was going 20 to 25 miles per hour. It is pure mathematics that if he went six feet at eight miles per hour, the truck at 25 miles per hour did not go to exceed 20 feet between the time he saw it and the time of the collision. To travel 100 to 120 feet in the distance that plaintiff was going six feet at eight miles per hour, the truck would have to go about 144 miles per hour, which was contrary to his own evidence and which no one had to believe and which the court was at liberty to disregard.

3. On story No. 3 as told by Reeves, the truck was 40 feet away when they drove in front of it. His story that the truck was in the west lane of travel and that it veered 30 to 40 feet west from its position on the highway and collided with plaintiff's car ten or twelve feet east of the west crosswalk is another miracle that no one had to believe. The fact remained that according to his story plaintiff drove in front of the truck when it was 40 feet away, according to one story; 100 to 120 feet away according to another story; and when plaintiff was six feet from the point of impact according to another story; and in all stories defendant's oncoming truck was traveling at 20 to 25 miles per hour.

ARGUMENT

Plaintiff was guilty of contributory negligence upon his own evidence and upon the evidence of Reeves.

1. He violated Section 57-7-137 U.C.A. 1943 in that he failed to yield the right of way to defendant's truck which had either entered the intersection or was so close as to constitute an immediate hazard.

2. He violated Section 57-7-133 U.C.A. 1943 in that he turned his vehicle from a direct course northward to westerly when such movement could not be made with reasonable safety.

3. He negligently and carelessly drove and operated his car into the pathway of defendant's oncoming vehicle in disregard of the hazard to himself and his car when it was so close as to constitute a hazard, regardless of any question of right of way.

Plaintiff's own evidence justified the court in directing a verdict for defendant. He certainly was not helped by the evidence of defendant's witnesses, nor it is necessary to consider that evidence in passing upon the question presented by this appeal. It is necessary only to cite recently decided cases to sustain the trial court.

Hart vs. Kerr, 110 Utah 479, 175 Pac. 2d 475.

In that case plaintiff made a left turn in front of an oncoming vehicle 300 feet away which was coming at 40 miles per hour. This court held he was guilty of contributory negligence. In this case under one story he made

the left hand turn when the oncoming vehicle was 100 to 120 feet away, and under another story it was 40 feet away. Under all of the stories the oncoming vehicle was coming at 20 to 25 miles per hour.

Cederloff vs. Whited, 110 Utah 45, 169 Pac. 2d 777.

In that case defendant drove his car in front of plaintiff's oncoming vehicle at a slow rate of speed. This court held he was guilty of negligence as a matter of law and that a verdict should have been directed for plaintiff who had a right to assume that he would stop before entering the other lane of traffic.

“Section 57-7-133, U.C.A. 1943, provides: ‘(a) No person shall turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety * * *.’ Defendant turned his car from a direct course in the highway into the lane of traffic intended for vehicles traveling in the opposite direction at a time when plaintiff's car was approaching in such close proximity that the collision occurred as soon as the front end of defendant's car had reached a few feet into plaintiff's lane of traffic. Had plaintiff's car run into the rear end of defendant's car after the front end thereof had entirely crossed plaintiff's course of travel, there might have been some question whether the turn could be made with reasonable safety, but under the facts in this case it is clear that as a matter of law the turn could not be made with reasonable safety, and the defendant was guilty of negligence. The defendant's testimony that he looked and did not see any car coming does not help his situation, because if he had paid attention to what was there to be seen he would have seen plaintiff's car com-

ing, as it was approaching in the immediate vicinity, and there is no claim that it did not have proper lights. It is equally clear that such negligence of the defendant was at least one of the proximate causes of the accident. The accident was the immediate and direct result of this negligence, and without such negligence it would not have occurred.”

Sine v. Salt Lake Transportation Co., 106 Utah 289, 147 Pac. 2d 875.

There this court held that regardless of right of way, it is negligence to drive in front of an oncoming vehicle.

See also :

Bullock vs. Luke, 98 Utah 501, 28 Pac. 2d 350.

Mingus vs. Olsson, Utah, 201 Pac. 2d 495.

Conklin vs. Walsh, Utah, 193 Pac. 2d 437.

Hickok vs. Skinner, Utah, 190 Pac. 2d 514.

This court also considered the same statute as applied to a criminal case in State vs. Newton, 105 Utah 561, 144 Pac. 2d 290, where the facts were not far different from this case and where this court used very strong language in describing those who make left turns at intersections into the path of oncoming vehicles.

In this last case the vehicle was 400 or 500 feet away when plaintiff last saw it. He was held to be negligent as a matter of law.

This case is stronger against plaintiff than most of those cases. Under his first story and under his second

story if you believe his evidence (which was positive that the truck was going 20 to 25 miles per hour) the truck was not over 40 feet away when he drove 6 feet in front of it. You can disregard the evidence of Olsson, defendant's driver, that he veered to the right in an effort to avoid the collision when he saw that plaintiff was not going to stop, but such is the only reasonable conclusion from plaintiff's own evidence. Plaintiff and his witness Reeves both said "it happened so fast". It could only happen that fast if they were in such close proximity as to constitute an immediate hazard and a violation of both statutes.

This case is also much stronger against plaintiff than some of those cases in that some of the parties involved in those cases claimed not to have seen the oncoming vehicles. In this case both plaintiff and his witness claimed to have seen it and neither of them testified that they thought it would stop or that plaintiff attempted to stop; although plaintiff in his revised version of his story said he didn't see the truck at all until six feet from the point of impact, at which time it was 100 to 120 feet away, coming at 20 to 25 miles per hour. In his original edition he said he saw it when he first entered the intersection and again saw it just before the impact. In either case he was negligent, because in his first edition he saw it coming and failed to stop, and in his revised edition he didn't see it at all until just before the impact. If that was the fact he was negligent in failing to look.

There are two stories in this case which are not entitled to credence because palpably impossible under the testimony.

1. That defendant's truck went 120 feet at 20 to 25 miles per hour while plaintiff's car traveled six feet at eight miles per hour. It just can't be done according to any mathematics and conflicts with the positive testimony of plaintiff to the contrary.

2. That defendant's truck was driving in the west lane of the west side of the street, veered 30 or 40 feet to the west and hit plaintiff's car 10 to 12 feet east of the west crosswalk. It just can't be done. The intersection was 90 feet each way, 45 feet on each side of the center; two lanes on each side of the center. If defendant's truck veered 30 or 40 feet to the west from its position in the west lane, it was clear out of the intersection and couldn't have hit plaintiff's car 10 or 12 feet east of the west crosswalk.

In passing upon the motion for directed verdict it was not necessary for the court to disregard this wholly unbelievable evidence, although under the decisions of this court it could have done so. But even if you believe the unbelievable you still arrive at the same result under our statutes and decisions.

Plaintiff seems to feel that the quotation from Blashfield and Hess vs. Robinson, 109 Utah 60, 163 Pac. 2d 510, are authority for having the case go to a jury, on the theory that defendant was proceeding through the intersection on an amber light.

We have not discussed in this appeal whether plaintiff was or was not negligent. That issue is beside the point. The only question here is whether plaintiff, under *his* evidence, was guilty of contributory negligence. In this connection, however, it will be noted that plaintiff did not plead a violation of the statute or an ordinance in that regard. Nowhere in the complaint does he allege that defendant went through an amber light, as an act of negligence.

We could well argue that he failed to prove any negligence of defendant as alleged but on this appeal that question is beside the issue because the case was decided by the trial court on the ground that the uncontradicted evidence established by plaintiff's own evidence showed contributory negligence on his part.

The case of *Hess vs. Robinson*, 109 Utah 60, 163 Pac. 2d 510, does not help plaintiff. In that case the defendant ran a stop sign and the plaintiff might have had reasonable grounds for believing that defendant would stop under one view of the evidence as to the speed that the ambulance was travelling. The court found that plaintiff was negligent but let the case go to the jury on the question as to whether his negligence proximately contributed to the accident. In this case the plaintiff saw the defendant's car coming at 20 to 25 miles per hour, made a left turn in front of it because he thought he could make it and he says the reason he didn't make it was because his car didn't get away as fast as he thought it would. Under any of his stories he made a left turn

in front of an oncoming car that he knew, according to his own testimony, was at most 100 to 120 feet away, and which was coming through the intersection at 20 to 25 miles per hour either on a green light or a light that had just turned amber when the truck was about to enter. There was no doubt as to the fact that plaintiff's negligence contributed to the accident because he testified that he was hit about six feet from the time he looked (whether first or last, according to which of his stories you accept) and saw the truck coming.

Certainly if it was negligence in the above recently decided cases, then plaintiff was negligent in this case under any of his stories.

It is most significant in this case that plaintiff failed to plead as an act of negligence of defendant that defendant proceeding through the intersection in violation of the traffic control signal. This fact alone distinguishes the case at bar from the Hess case.

LAST CLEAR CHANCE

Plaintiff says he was entitled to go to the jury on the doctrine of last clear chance under the doctrine of *Graham vs. Johnson*, 109 Utah 346, 166 Pac. 2d 230.

In the first place plaintiff did not plead any such ground of negligence. He rested his case on a denial of any negligence on his part. Last clear chance must be pleaded if it is relied upon as a ground of negligence or as a defense to allegations of contributory negligence.

If plaintiff had pleaded last clear chance, which he did not, he still would not bring himself within the doctrine. He was the one, and the only one, who had the last clear chance to avoid the accident. According to his evidence he was going only eight miles per hour when he made the left turn into the path of the oncoming truck. It is a fair assumption that he could have stopped before reaching the west lane of the west side of the street. He saw the truck coming and was able to approximate its speed at 20 to 25 miles per hour and according to his revised story it was 100 to 120 feet away. Why didn't he stop? He undoubtedly could have. He says he thought he could make it but his car didn't get away as fast as he thought it would. The doctrine of last clear chance puts the burden on him—not the other fellow, who has a right to assume that he will not violate the law by failing to yield the right of way. In the case of *Graham v. Johnson*, cited by plaintiff, the defendant knew the boys were playing in the street in violation of the ordinance. She had stopped 49 feet from them and then moved slowly in their direction, knowing that they were playing, failed to honk or warn them, and this court held it was a jury question as to whether she still could have stopped after a boy yelled to the Graham boy to look out. Plaintiff's position is akin to the Johnson girl, not the Graham boy. That is an entirely different proposition than plaintiff's case. And in that case Mr. Justice Wolfe said that the doctrine would apply only if the Johnson girl had ample time to stop or otherwise, by the sound of the

horn, avoid the accident. He gave an illustration of an intersection case where it would apply, as a stalled car where the defendant had ample time to stop or avoid the accident. He also warned that the doctrine should be guarded against misapplication and that the word "clear" was a very significant part of it, in the following language:

"But in the last clear chance doctrine the word 'clear' has significance. In a case such as this when both parties are more or less rapidly changing their positions the evidence must be clear and convincing that the party whom it is claimed could have avoided the accident had a 'clear' chance to do so."

Mr. Justice Wolfe also wrote the very recent opinion in the case of *Holmgren vs. Union Pacific*, 198 Pac. 2d 459, wherein the same doctrine was considered and discussed and applied to a railroad accident and similar language was used as between two moving vehicles.

Another excellent discussion of the doctrine is contained in *Horsley vs. Robinson*, Utah, 186 Pac. 2d 592, particularly in the concurring opinion of Mr. Justice Wolfe, wherein among other things the following is said:

"A driver is not ordinarily required to anticipate that another will have gotten out of his proper path of travel and that he, the driver must drive so as to create for some other a last clear chance opportunity. A driver of a car does not carry with him an anticipatory last clear chance obligation. Such obligation arises only after the operator of the vehicle is or should be

aware of the position of the other, who, being in a position of danger, is unaware of his peril, or, if aware, unable timely to extricate himself from it.”

A similar result was reached in *Richards v. Palace Laundry Co.*, 55 Utah 409, 186 Pac. 439, where the doctrine ^{was} ~~who~~ sought to be applied by a bicycle rider who rode from the east to the west side of the center of a street and fell in front of a motor bus which was 25 or 30 feet away, approaching at nine miles per hour.

Cases are legion holding that the doctrine does not apply to a case of this kind where the plaintiff drove in front of an oncoming vehicle by making a left turn in violation of two statutes when he actually saw the other car so close as to constitute an immediate hazard. Plaintiff's witness Reeves testified (R. 40-41) that the truck was about half the width of the pavement away when they were south and west of the semaphore (making the left turn) and plaintiff said in his revised story the truck was six feet away when he first saw it, and in his first story that it was six feet away when he saw it for the second time. What has this situation to do with the doctrine of last clear chance, even if it had been pleaded?

We respectfully submit that the trial court properly directed a verdict upon the evidence most favorable to plaintiff.

Respectfully submitted,

RICH AND ELTON,

Attorneys for Respondent.