

1986

# Joan F. Stephens v. Brent Henderson : Reply Brief

Utah Supreme Court

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**BRIEF**

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DOCKET NO. 860440 IN THE SUPREME COURT OF THE STATE OF UTAH  
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JOAN F. STEPHENS, :  
Plaintiff - Respondent, : Docket No. 86-0440  
vs. : Category No. 13b  
BRENT HENDERSON, d/b/a :  
CLASSIC SKATING CENTER, :  
Defendant - Appellant, :  
and :  
JOHN DOE, :  
Defendant. :  
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REPLY BRIEF OF APPELLANT  
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Appeal from the Judgment Upon Jury Verdict of the  
Fourth Judicial District Court of Utah County  
State of Utah

Honorable Cullen Y. Christensen, Judge  
-----

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### SUMMARY OF ARGUMENT

Defendant argues herein that the counterclaim which was originally asserted was abandoned by merger into the pre-trial order. The appeal is, consequently, properly before the Court.

The arguments advanced by plaintiff which claim the Liability Reform Act does not apply to this case have been considered and rejected by another court because they fail to fully address the vesting of substantive rights.

Legislative intent is not helpful under the circumstances of this appeal because plaintiff attempts to substitute intent for established rules of law.

Finally, the acts of John Doe were intentional as shown by the evidence or at least the jury should have received the opportunity to apply the standard of care for intentional torts by receiving the rejected instruction number 27.

### ARGUMENT

I.

THE APPEAL IS PROPERLY  
BEFORE THE COURT

Plaintiff argues in her brief that a counterclaim originally filed with the answer to the complaint, but not considered at trial, renders the judgment not ripe for appeal.

However, page 5 of the Respondent's Brief indicates that no objection is made to this appeal being heard by the Court and a review of the record shows that the counterclaim was abandoned prior to trial.

There is no specific reference in the record to a formal disposition of the counterclaim. However, an examination of the complete record will show that the counterclaim was not asserted at trial and was abandoned. While it would have been better form to have had a formal record of the dismissal of the counterclaim, the very nature of the claim, as pointed out by the plaintiff, is such that jury verdict implies that the counterclaim would not have been successful. The point raised is, therefore, moot.

Finally, the pre-trial order of the court, at R., p. 205, reduces the claims of the parties to their final form. As the pre-trial order shows, the counterclaim was not reserved at the time the pre-trial order was entered and was eliminated by merger of the pleadings into the order.

## II.

### THE LIABILITY REFORM ACT'S PROVISION ELIMINATING JOINT AND SEVERAL LIABILITY SHOULD HAVE BEEN APPLIED TO THIS CASE BECAUSE IT AFFECTS NO SUBSTANTIVE RIGHT WHICH HAS VESTED

In her brief, plaintiff argues that the provisions of the Liability Reform Act eliminating joint and several liability should not be applied to this case. (Brief of Respondent, Point II). In both defendant's principal brief and plaintiff's responsive brief, there is substantial discussion regarding retroactive versus prospective application and substantive versus procedural rights. A close examination of the recent Arizona Supreme Court case of Hall v. ANR Freight System, Inc., 717 P.2d 434 (Ariz. 1986) will serve to focus more clearly the argument made by defendant in his brief and to show the fallacy of the arguments presented in plaintiff's brief.

In Hall, the Arizona Supreme Court considered whether Arizona's Uniform Contribution Among Tort-Feasors Act was constitutional when, by its terms, it applied retroactively to accidents occurring before the effective date of the statute. While the Hall case deals specifically with contributory negligence rather than joint and several liability, the analysis used by the Arizona Supreme Court is entirely applicable to this case.



In the present case, plaintiff's argument is basically that (1) substantive legal rights may not be retroactively impaired, (2) joint and several liability is a substantive right, and, therefore, (3) joint and several liability may not be retroactively impaired. A similar argument concerning contributory negligence was involved in the Hall case. In that case, the Arizona Supreme Court stated as follows:

"The defendant's argument may appropriately be cast as a syllogism. Simply put, defendant argues that: (1) substantive legal rights may not be retroactively impaired, (2) contributory negligence is a substantive legal right, thus (3) contributory negligence may not be retroactively impaired. From this conclusion, the defendant explains, it is but a short step to the judgment that the Act, by encompassing past events, retroactively divests the defendant of common law contributory negligence as a bar to recovery and is therefore constitutionally infirmed. While we have no quarrel with the merits of deductive reasoning, we must eschew the tempting simplicity of defendant's analysis, which, though a correct statement of the law, belies an underlying morass of semantic confusion." Id. at p. 442.

The Court then agreed with defendant's premise that contributory negligence is a substantive legal right but continued as follows:

"However, the determination that contributory negligence is a substantive legal right merely begins, rather than concludes, our discussion. 'Substantive' is merely a label we apply to certain legal rights. The conclusion that a particular legal right is substantive, in contrast to procedural, does not mean that it can never be modified or abolished by the legislature. 'The rule is that any right conferred by statute may be taken away by statute before it has become vested.' The rule is the same for the common law." Id. at p. 442. (Citations omitted).

The Court, therefore, was ". . . squarely faced with deciding what is meant by 'retroactive' in the shibboleth 'substantive rights may not be retroactively impaired.'" Id. at p. 443. In addressing that question, the Court stated as follows:

"When the defendant asserts that substantive legal rights cannot be retroactively impaired, he cannot mean that substantive rights may never be altered. Such a contention would sweep far too broadly, since substantive rights, whether statutory or common law, may be abrogated before vesting. . . .

Nor can the defendant be heard to say that the prohibition against retroactive legislation means that statutes cannot affect past events. In Arizona it is conclusively settled that laws are not retroactive simply because they relate to past events. . . .

. . . Clearly, the mere fact that the Act applies to prior accidents does not make the Act retroactive in effect. Nor does the fact that the Act affects a substantive legal right render it retroactive. The critical inquiry in retroactivity analysis is not whether a statute affects a substantive right but whether a statute affects a vested right. Thus the implicit meaning of the statement 'substantive rights may not be retroactively impaired' is 'substantive rights may not be impaired once vested.'" Id. at pp. 443, 444 (Emphasis in original).

The focus of inquiry, therefore, is not so much on whether the right is substantive as on whether the right has vested. Accepting as correct plaintiff's argument that the right to joint and several liability is a substantive right does not end the inquiry. A determination must still be made as to when the right actually vests. In that regard, the Arizona Supreme Court in the Hall case stated as follows:

"Rights are vested, in contradistinction of being expectant or contingent. They are vested, when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent when they are only to come into existence on an event or condition which may not happen or be performed until such other

event may prevent their vesting." Id. at p. 444. (Quoting Steinfeld v. Neilsen, 139 P. 870, 896 (1913)).

See also, Silver King Coalition Mines Company v. Industrial Commission, 2 Utah 2d 1, 286 P.2d 689 (1954) where the court stated "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." Id. at p. 692.

Applying the foregoing principles to the doctrine of joint and several liability involved in this case leads to the inescapable conclusion that the right to joint and several liability does not vest until judgment is obtained. This principle can be demonstrated by examining the various points of time at which it might be argued that the right vests.

The first such point of time is that which plaintiff asks this court to accept, namely, the time the underlying cause of action accrues. This argument suggests that a plaintiff injured by multiple tort-feasors has somehow acquired a present interest above and beyond those rights acquired by a plaintiff injured by a single tort-feasor. What that present interest consists of under plaintiff's argument is impossible to define. A plaintiff injured by multiple tort-feasors acquires no additional cause of action by virtue of the doctrine of joint and

several liability. He or she may not employ any different procedure during the prosecution of such an action other than that which could be employed in an action against a single tort-feasor. The most that can be said is that the plaintiff may expect at some future point to enforce a judgment entirely against one of those multiple tort-feasors. But that expectation is dependent upon some future event, namely, entry of a judgment. That event may never happen. Such an expectation of a future happening is not a present interest which would cause plaintiff's right in joint and several liability to vest.

The next point of time at which it might be argued that the right to joint and several liability vests is at the time the action is commenced. However, the argument that the right to joint and several liability vests at that time suffers from the same infirmities as the argument just discussed.

The only reasonable conclusion as to when the right to joint and several liability vests is that it vests at the time judgment is entered. At that time, and only at that time, a plaintiff acquires a present interest or a right which that plaintiff did not previously have. It is only after judgment has been entered that plaintiff may take some affirmative action by virtue of the doctrine of joint and several liability. The doctrine allows the plaintiff to enforce or collect the judgment

entirely from any one of multiple judgment debtors. Before judgment is entered, plaintiff has nothing more than an expectation that once judgment is entered, plaintiff may collect 100% of the judgment from any of the multiple tort-feasors. The only reasonable and logical conclusion is that the right to joint and several liability vests at the time judgment is entered. Accordingly, if judgment had not been entered prior to the effective date of the Act, the plaintiff's right to joint and several liability was extinguished.

This conclusion has the added benefit of resolving what otherwise would be a conflict between the Liability Reform Act's provision eliminating joint and several liability and that abolishing contribution. Under plaintiff's argument, joint and several liability is abolished only in those cases where the underlying cause of action arose after the effective date of the Act. If a plaintiff's cause of action arose before the Act's effective date, that plaintiff would be entitled to collect 100% of his judgment from any of the joint tort-feasors even though the judgment is entered and collection is made after the Act's effective date. That situation creates a problem, however, because of the Act's provision eliminating the right to contribution. The Liability Reform Act abolishes the right to contribution of any joint tort-feasor who had not, before the effective

date of the Act, paid more than his pro rata share of liability.\* The result is that a joint tort-feasor might be obligated to pay 100% of the judgment and yet be left without the ability to collect contribution from the other joint tort-feasors. The only way to avoid that unjust result under plaintiff's argument is for this Court to ignore the law regarding when the right to contribution vests and to rule that contribution is still available in all cases where the underlying cause of action arose before the Act's effective date.

By contrast, the argument advanced by defendant avoids any conflict between the Act's provision eliminating joint and several liability and that abolishing contribution. Under defendant's argument, every judgment entered after the effective date of the Act could be enforced against any joint tort-feasor only to the extent of that joint tort-feasor's percentage of fault. Accordingly, as to any judgment entered after the effective date of the Act, the right to contribution would be unnecessary. The

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\*Since the right of action for contribution does not accrue until one of several joint tort-feasors has paid more than his pro rata share of liability, Unigard Insurance Company v. City of LaVerkin, 689 P.2d 1344 (Utah 1984), the provision of the Liability Reform Act abolishing contribution would eliminate the right to contribution of any joint tort-feasor who had not before the effective date of the Act paid more than his pro rata share of liability.

Act's abolition of the right to contribution would be entirely consistent with the elimination of joint and several liability in all cases where judgment was not entered before the Act's effective date.

In the present case, judgment was entered after the effective date of the Liability Reform Act which abolished the doctrine of joint and several liability. Accordingly, at the time the Act went into effect, plaintiff had no vested right in the doctrine of joint and several liability. Plaintiff was not, therefore, entitled to collect 100% of her judgment from defendant. This case must be reversed and remanded with instructions to the trial court to order plaintiff to refund to defendant 75% of the amount plaintiff recovered, plus interest.

### III.

IT IS NOT APPROPRIATE TO LOOK  
TO LEGISLATIVE INTENT TO  
RESOLVE THIS APPEAL

In part B under Point I of her brief, plaintiff argues that the Legislature intended the Liability Reform Act's provision relating to the abolition of joint and several liability to apply only to causes of action arising after the Act's effective date. Plaintiff quotes statements made by two State Senators and the Act's principal draftsman in support of that proposition.



These statements, however, cannot be considered as definitive statements of legislative intent. They are merely individual statements of opinion and do not reflect any general intent of the legislature. If the legislature had truly wanted to manifest its intent, it could have done so as it has done on numerous occasions, by expressly so providing in the legislation. See, e.g., U.C.A., § 78-16-1.

In any event, the intent expressed by those statements is contrary to the established rules of law for determining the effect of the Act as explained in Point II above. Consequently, this Court need not give any weight to the statements to which plaintiff refers since they are contrary to the law regarding the vesting of the right to collect pursuant to joint and several liability. Legislative intent should not be substituted for established rules of interpretation.

#### IV.

THE ACTIONS OF JOHN DOE  
CONSTITUTE AN INTENTIONAL  
TORT FOR WHICH INSTRUCTION  
SHOULD HAVE BEEN GIVEN

In her responsive brief, the plaintiff asserts that defendant was not entitled to a duty of care instruction on

intentional torts because the conduct did not amount to an intentional tort.

An examination of the record, at Trans., pp. 67-68 and 112, shows that the defendant raised the issue of the need for instructions on an intentional tort.

Plaintiff attempts to rely upon Matheson v. Pearson, 619 P.2d 321 (Utah 1980), to establish that the activity described here was not an intentional tort. The case is distinguished from this one on two principal bases. The first basis is that Matheson was concerned with whether facts existed to defeat summary judgment. This Court held only that the facts alleged could be found to constitute negligence rather than an intentional tort. There was no finding that the activity of the defendant in Matheson was merely negligent as a matter of law. Consequently, Matheson is of little use in resolving this appeal.

The second basis for distinguishing Matheson is that it reported the testimony of the tort-feasor as stating he did not intend to do any harm. The testimony in this case is that John Doe deliberately knocked down another patron seconds before knocking down the plaintiff and shouted something to the effect that: "I got another one". T., p. 5. This statement clearly implies an intentional act intended to result in some harm.

Defendant attempted to have the jury consider the standard of care for an intentional tort by offering Instruction 27 which was prefaced, "Should you determine that the plaintiff was deliberately knocked down. . . ." This introductory phrase to the instruction proposed to the jury that they could consider whether the action was intentional and gave them a standard of care to apply should they so find. The failure to give the jury clear guidelines to apply to the evidence left them without direction which was reversible error.

#### CONCLUSION


The appellant respectfully requests the Court to reverse the judgment entered by the District Court for failure to properly instruct the jury and/or to declare the Liability Reform Act applicable to this case.

DATED this 10th day of February, 1987.

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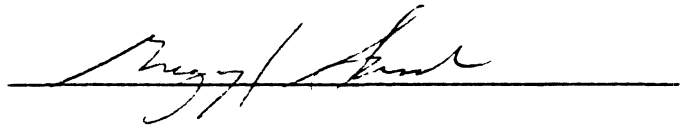
**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on the 10<sup>th</sup> day of February, 1987, four true and correct copies (two each) of the foregoing Reply Brief of Appellant were mailed to:

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