

1951

# General Insurance Company of America v. Mark Lewis : Brief of Respondent

Utah Supreme Court

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Paul J. Merrill; Attorney for Defendant and Respondent;

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## Recommended Citation

Brief of Respondent, *General Insurance Company of America v. Lewis*, No. 7671 (Utah Supreme Court, 1951).  
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**In the Supreme Court of the  
State of Utah**

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**GENERAL INSURANCE COMPANY  
OF AMERICA, a corporation,  
Plaintiff and Appellant,**

**vs.**

**MARK LEWIS,  
Defendant and Respondent.**

**No. 7671**

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**BRIEF OF RESPONDENT**

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**FILED**  
JUN 18 1951

**PAUL J. MERRILL  
Attorney for Defendant and  
Respondent**

**Clerk, Supreme Court, Utah**

NEW CENTURY PRINTING CO., PROVO, UTAH

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# **In the Supreme Court of the State of Utah**

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**GENERAL INSURANCE COMPANY  
OF AMERICA, a corporation,  
Plaintiff and Appellant,**

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Defendant and Respondent.**

**No. 7671**

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## **BRIEF OF RESPONDENT**

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### **STATEMENT OF FACTS**

The defendant and respondent cannot wholly agree with the statement of facts submitted by the Appellant in his brief. That as far as the description of the starting of the action and also the description of the insurance policies as well as the damages the respondent agrees with.

On the morning of December 22, 1947, Mr. Park left his home in the company with his son, Kenneth W. Park

and a Bill Howell (Tr. 13 and 29), for the purpose of proceeding to work at the plant of the Geneva Steel Company, located just west of Orem, Utah (Tr. 10). Mr. Samuel Park was driving his Studebaker sedan and his son and Mr. Howell were riding as passengers in the front seat (Tr. 13 and 20). They proceeded from Provo, Utah, toward the said steel plant along Highway 114, which is a two-lane roadway, one lane for northbound traffic and one lane for southbound traffic (Tr. 2, 3 and 10). This highway is an improved hard surfaced roadway and runs generally in a north-south direction near the steel plant (Tr. 3 and 11). A heavy snow was falling, and the highway was covered with hard packed snow, and was icy in spots (Tr. 3, 4, 9, 19, 24 and 25).

At about 8:40 A.M. on this morning, Mr. Park brought his automobile to a stop, facing north on said highway at a point approximately one quarter of a mile south of the Geneva plant (Tr. 3, 11 and 12). That Mr. Park's automobile was in runable condition at the time of his parking on the main portion of the highway (Tr. 14 and 17). He stopped his car in the main traveled portion of the road (Tr. 12). That Mr. Park made no effort to pull off on the shoulder of the road (Tr. 15).

Mr. Park and his two passengers remained seated in the car and after about four or five minutes, his automobile was struck from the rear by the defendant, Mark Lewis, driving his 1937 Plymouth Sedan Automobile (Tr. 2, 3, 4, 5, 6, 9, 11, 20 and 24). Immediately prior to this collision the defendant was on his way to work at the Geneva Steel Plant and had as passengers in his car, Guy Lewis and Frank Clayson (Tr. 6). He was driving between 15 and 20 miles per hour and his car was following the automo-

bile of one George Armour (Tr. 4 and 25). Armour pulled off the highway to the rear of the Park automobile and when the defendant applied his brakes on his car, the same skidded on the highway, collided with the left side of the Armour vehicle and skidded into the rear of the Park automobile (Tr. 4, 5, 8, 9, 24, 25, 26 and 27). The impact against the rear of the Park car caused it to collide with the rear of the automobile directly in front of it (Tr. 12, 13 and 21). The impact of the defendant's car with the rear of the Park vehicle was sufficiently severe to tear loose the front seat of the Park vehicle and throw Park and his two companions into the rear seat (Tr. 12, 13 and 20).

The Court entered judgment in favor of the defendant and against the plaintiff Insurance Company, no cause of action.

### STATEMENT OF POINTS

The respondent will take up the following points which are practically the same as appellant and are in the same order.

1. Did the Court err in making and entering Finding of Fact No. 7 to the effect "that after Samuel P. Park stopped his automobile, he did nothing to warn the defendant or other drivers of other automobiles approaching from the south upon said highway and that by failing to do so, he was guilty of negligence which contributed to the damages sustained to his automobile," for the reason that said Finding is not contrary to law.

2. Did the Court err in making and entering Finding of Fact No. 7 to the effect "that the said Samuel P. Park failed to move his car off the road onto the shoulder and

parked in the lane of traffic, and that by so doing he was guilty of negligence which contributed to the damages sustained to his automobile," the said finding is supported by the evidence and law.

Is there evidence to support the Conclusion of Law No. 1, and the judgment of no cause of action? Yes, the Court's decision is fully supported by the evidence and the law.

## ARGUMENT

### POINT I

The trial Court concluded that the plaintiff's insured omitted to do acts that resulted in his contributory negligence.

The evidence in this case shows that the plaintiff's insured stopped in the main lane of traffic upon a highway. There is no evidence in the whole record showing a necessary purpose for the insured to remain there. The car was in runnable condition all the time that he was parked on the main road and blocked traffic. That the defendant had a right to proceed along the highway as a reasonable prudent man would anticipating that no one would block the highway. The plaintiff's insured had a duty to warn approaching cars of the trouble on the highway. This he did not do thereby becoming negligent himself..

The appellant in his brief relies on the case of Reuben E. Caperton v. Ben Mast et al, 85 Cal. App. 2nd 157, 192 Pac. 2nd 467, the plaintiff had a trailer hitched to the rear of his car. The facts of this case are dissimilar and not in point to the one appealed here. The facts in this cited case were as follows: The defendant had seen the car and trailer for over 600 feet and that the car and ve-

hicle stalled because of a mechanical failure thus making it an emergency stop. This case is not in point.

The appellant also relies on the case of James E. Smith vs. Clinton Webb, 10 S. E. 2d 503, 131 A. L. R. 558, to be in point, However, a careful reading of the case will reveal that the school bus pulled off to the right to take on a passenger from the opposite side of the road. That the vision of the defendant in this case was not obstructed and not only could the defendant see the school bus but also the passenger come from the opposite side of the road. This case is not in point.

The appellant also relies on the case of Conrey vs. Abramson, 294 Mass. 431, 2 N. E. 2d 203, but again in this case the facts are dissimilar. The defendant made a hurried stop in this case and another vehicle coming in back of him stopped and a third in which the plaintiff was riding ran into the second, the second car rammed the defendant's. The court merely held in that case that defendant was not bound to anticipate that a passenger in the third car would be injured. The facts are entirely different in our case.

The appellant cites Estes vs. Slater, 3 N. Y. Supp. 2d 287, 18 N. E. 2d 690, but a careful reading of this memorandum decision would show that hitting a car in the rear was not the issue. The plaintiff's were proceeding down the road when they ran into the back of a parked car. They proceeded down the road and pulled off to the side then they went back to confer with the owner of the car they had hit. That while standing alongside the car the plaintiffs were injured. That this case is an accident between vehicles and pedestrians.

The appellant cites Winter vs. Davis, 217 Iowa 424,

251 N. W. 770, 42 C. J. Para. 13, page 613 as holding that the temporary stopping on the proper side of the highway for a necessary purpose is not negligence. This case is not in point with ours in that the plaintiff in the cited case had stopped his vehicle over off the street as far as he could get and had stopped to clean his windshield. The defendant was proceeding in the opposite direction when he went diagonally across the road and hit the plaintiff.

The only conclusion to draw from the appellant's cases cited is that they are not in point and that the rules of law expounded therein do not apply.

In general, the question of the plaintiff's contributory negligence presents a question of fact for the jury to decide upon the basis of all the facts and circumstances surrounding the accident. 5 American Jurisprudence, para. 407 at page 740.

We respectfully submit that the plaintiff's insured had the duty to warn the other motorists using the highway. That the whole question of contributory negligence is for the trier of the facts and that the evidence in this case would hold the plaintiff's insured contributorily negligent.

## POINT II

The contention of the defendant and respondent is that the plaintiff was contributorily negligent in not moving off the highway.

Contributory negligence is usually a fact to be determined by the trier of the facts. Reuben E. Caperton v. Ben Mast et al, 85 Cal. App. 2nd 157, 192 Pac. 2d 467.

The statute in Utah would seem to be controlling in this case. Quoting from the Utah Code Annotated, 1943, 57-7-165:

“(a) 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.

“This section shall not apply to the driver of any vehicle which is disabled while on the paved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle in such position.”

There can be no doubt in this case that the plaintiff by using due care could have pulled his car off the highway inasmuch as the Armour vehicle pulled off to the rear of the Park vehicle (Tr. 4). The evidence is indisputable that Park had four to five minutes to accomplish the act (Tr. 15). That the Park car was not disabled in any way but was in a runnable condition (Tr. 14).

Thus under the state law of Utah the plaintiff's insured was contributorily negligent for parking on a main traveled portion of the highway and there is evidence of this negligence and fully supports the court's finding of fact.

### POINT III

The trial court had the duty to listen to all the evidence and reconcile the conflicts to arrive at the true facts. That the record is complete to show that Park had the

duty to remove his car off the main thoroughfare that by not doing so he was negligent. That the record supports the trial court's Conclusion of Law No. 1.

### CONCLUSION

We respectfully submit that the judgment of the trial court was correct and should be affirmed with costs in favor of the Respondent.

Respectfully submitted,

**PAUL J. MERRILL**

**Attorney for Defendant and  
Respondent**