

1953

Jacqueline Hardman v. Donald Matthew and C. J. Matthews : Brief of Respondents

Utah Supreme Court

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O. H. Matthews; Attorney for Respondents;

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

FILED

AUG 4 1953

JACQUELINE HARDMAN,

Plaintiff and Appellant,

VS.

DONALD MATTHEWS and C. J.
MATTHEWS,

Defendants and Respondents.

Clerk, Supreme Court, Utah

Case
No. 7980

RESPONDENTS' BRIEF

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OF THE
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JACQUELINE HARDMAN,

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vs.

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MATTHEWS,

Defendants and Respondents.

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ANSWER TO INTERMEDIATE APPEAL FROM
ORDER GRANTING THIRD-PARTY ACTION,
AND BRIEF OF RESPONDENT IN SUPPORT
THEREOF

RESPONDENTS' BRIEF

STATEMENT OF FACTS

Respondents agree with the statement of facts contained in appellant's brief in support of her appeal from order granting third-party action heretofore entered by the Honorable Clarence E. Baker on

the 13th day of January, 1953, granting the third-party action and denying appellant's motion to reconsider its order granting the third-party action to defendants and therefore refrains from further rehearsal of it, except to invite the Court's attention to the prayer of the Third-Party Complaint wherein respondents (Third-Party Plaintiffs) demand judgment against the Third-Party Defendants, in part, as follows:

(1) and for such sums as may be adjudged in this action against Defendants and Third-Party Plaintiffs in favor of the plaintiff.

STATEMENT OF POINTS

- I. THE LOWER COURT GRANTED RESPONDENTS' MOTION TO ALLOW WILLIAM A. JOHNSON AND MARILYN MILLER JOHNSON TO BE BROUGHT IN AS THIRD-PARTY DEFENDANTS IN THIS ACTION IN CONFORMITY WITH THE PROVISIONS OF UTAH RULE OF CIVIL PROCEDURE 14 (a).

ARGUMENT

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

TION IN CONFORMITY WITH THE PROVISIONS OF UTAH RULE OF CIVIL PROCEDURE 14(a).

Rule 1(a) Utah Rules of Civil Procedure, by its last sentence, explicitly provides that "they (the Utah Rules of Civil Procedure) shall be liberally construed to secure the just, needy, and inexpensive determination of every action."

The decisions are in harmony that the purpose of the rule is to avoid circuitry of action and to adjust in a single suit, several phases of the same controversy as it affects the parties. *Bossard et ux vs. McGwinn et al.*, D. C., 27 Fed. Supp. 42; *Kravos et al. vs. Great Atlantic & Pacific Tea Co.*, D. C., 28 Fed. Supp. 66; *Sklor et ux vs. Hayes*, D. C. 1 F. R. D. (Federal Rules Decisions) 415; *Sussan vs. Strasser et al.*, D. C., 36 Fed. Supp. 266; *Arsht vs. Hatton*, 72 Fed. Supp. 851.

Granting of motion to implead a third party is a matter of judicial discretion, (decided Jan. 16, 1953), *United States vs. DeHaven*, 13 Federal Rules Decisions 435. Appellant, on page 7 of her brief, charges that respondents are attempting to "force" plaintiff to litigate her claim against the third-party defendants . . . on the grounds that these parties were negligent and therefore liable for plaintiff's injuries; whereas, respondents' "force," if such it be, is not force directed toward appellant, but is force, if it be such, directed toward the third-party defendants and for judgment against them "for such sums as may be adjudged in this action against defendants and third-

party plaintiffs in favor of plaintiff. Appellant may not wish to litigate her claim against the third-party defendants, but respondents choose to litigate their claim with the third-party defendants and obtain judgment against them as prayed. Therefore, appellant is somewhat confused as against whom the so-called force is aimed and her conception of the situation is slightly in error. And, appellant's charge on the same page 7 of her brief that the so-called "force" is attempted to be used by showing that negligence of the third-party defendants caused them to be liable for plaintiff's injuries, but fail to charge against whom such liability is directed. There is no charge on the part of the appellant that such liability creates liability to plaintiff's benefit, unless she chooses to amend her complaint so as to state a cause of action against the third-party defendants. The liability which respondents have attempted to set forth is one which would inure to the benefit of respondents in the event plaintiff secured a judgment against them. Appellant's argument, in this respect, is not sound.

Page 8 of appellant's brief asserts that defendants (respondents) cannot comply with that portion of rule 14(a) "that the third-party defendants may be liable to him for all or part of the plaintiff's claim against him." And why cannot respondents comply with such provision of Rule 14(a)? Why, that is the very thing respondents have undertaken to do when they alleged in the third-party complaint a set of facts which were of such a nature as to permit respondents to recoup by contribution, indemnity, liability over, or otherwise, from the third-party de-

endants "such sums as may be adjudged in this action against Defendants and Third-Party Plaintiff in favor of the plaintiff." *Culmer vs. Wilson*, 13 Ut. 129, 44 Pac. 833; *Contribution Between Persons Jointly Charged For Negligence*. 12 *Harvard Law Review* 176.

And, "Based upon such reasoning," as expressed by appellant on page 10 of her brief, wherein it is stated "and, if the plaintiff rejects it, the allowing of the third parties to be made defendants is useless gesture," where appellant's "reasoning" is based upon assumption of facts not alleged in the third-party complaint, there is no useless gesture to be found. It will not stand as good "reasoning" when respondents demand judgment against the third-party defendants for such sums as may be adjudged against defendants and third-party plaintiffs in favor of the plaintiff.

Two requisites are found in the provisions of said Rule 14(e) which qualify a person to become a third-party defendant, to-wit: That he is not a party to the action and, that he is or may be liable to the defendant (third-party plaintiff) for all or part of the plaintiff's claim against him. It is quite clear that the third-party defendants were not parties to the action originally, and therefore, they qualify in that respect. Our principal argument, of necessity, then will be directed to the question whether these third-party defendants "or may be liable to defendants for all or part of plaintiff's claim against them."

Perhaps, appellant may argue that there is no specific allegation by respondents that the persons

named as Third-Party Defendants are "or may be liable to them for all or part of plaintiff's claim against them." If so, bear in mind that said Rule 14(a) requires such liability as a qualification to becoming a Third-Party defendant, and that respondents pursued the procedure outlined in Rule 14(a) to bring in Third-Party defendants who are "or may be liable to them for all or part of plaintiff's claim against them." That respondents, the appellant and the lower Court proceeded to act under Rule 14(a), that the prayer of the "Third-Party Complaint" demanded judgment, among other things, against the third-party defendants "for such sums as may be adjudged in this action against Defendants and Third-Party Plaintiffs, in favor of the plaintiff;" all of which factors combined left no doubt in the mind of anyone concerned that respondents required the third-party defendants be made parties to the action so as to avoid circuity of action and "to adjust in a single suit, the several phases of the same controversy as it effects the parties." Respondents' said prayer for judgment against the Third-Party Defendants "for such sums as may be adjudged . . . against third-party plaintiffs (respondents), in favor of the plaintiff" (appellant herein), disclosed the fact that respondents claimed the third-party defendants are "or may be liable to them for all or part of plaintiff's (Appellant's) claim against them." No other conception of such demand for judgment would be logical, sound or correct. The showing by said demand for judgment against the Third-Party Defendants "for such sums as may be adjudged against Defendants and Third-Party

Plaintiffs in favor of Plaintiff'' should be sufficient in and of itself to demonstrate that no other inference can be drawn therefrom than respondents' claim that the Third-Party Defendants are or may be liable for all or part of plaintiff's claim against them, and should settle such question beyond equivocation. If this Court were to hold that respondents' Third-Party Complaint is insufficient because of failure to set forth therein such claim of liability to respondents for all or part of appellant's claim against respondents, such omission could be cured by amendment of the Third-Party complaint, which amendment the respondents would undertake to have made. However, respondents contend that the intendment and inferences are sufficiently shown in the said Third-Party Complaint to comply with said Rule 14(a) that it does not take much imagination to determine that was respondents' purpose and such purpose was to comply with the requirements of said Rule 14(a) and to meet the very situation now confronting us.

It makes little difference whether appellant amends her complaint to state a cause of action against the Third-Party Defendants. If she does not so amend her complaint in that particular, it becomes quite obvious that she would be entitled to no judgment against the Third-Party Defendants. The liberal construction of the Third-Party Procedure was devised to determine in one action the several phases of the same controversy as it affects the parties, and should not permit appellant's failure so to amend her complaint to prevent determination of the same controversy as it affects the respondents and the Third-

Party Defendants. Further, appellant's option so to amend her complaint, or her refusal so to do, alone does not govern the determination of the application of Rule 14(a). Avoidance of circuity of action and the adjustment of the controversy as it affects the parties governs and controls such application and permits respondents to litigate with Third-Party Defendants, in this action, the alleged liability of the Third-Party Defendants to respondents which now exists or which may exist for all or part of appellant's claim against respondents.

Therefore, in the event respondents, by judgment, were held liable to appellant for some amount for which respondents contend, as respondents do contend in this action, that the negligence of the third-party defendants was the proximate cause of appellant's damage, then the third-party defendants are or may be liable to respondents for all or part of appellant's claim against respondents; and, respondents need not, by circuity of action, be compelled to maintain a separate action against the Third-Party Defendants to enforce their demand against the Third-Party Defendants whose negligence may have been the proximate cause of all the damage suffered by appellant and respondents. And, the liberal construction of said Rule 14(a), as provided for in Rule 1, *supra*, manifestly was written and adopted to meet just such objections to the Third-Party procedure as now are adduced by appellant.

The Federal Supreme Court, by amendment effective March 19, 1948, dropped the phrase authoriz-

ing the impleader of persons liable to the plaintiff and changed the rule in other particulars mainly for purposes of clarification. 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 plaintiff. Under the 1948 amendment only a person who is secondarily liable to the original defendant may be brought in. 1 Federal Practice and Procedure Rules Edition, section 421, pages 835-857.

In *Yap vs Ferguson*, 8 Federal Rules Decisions 166, it is stated:

“Third-Party Complaint further alleges that plaintiff’s damages were caused by reason of the failure of third-party defendant to comply with all the terms and conditions of its contract of sale and the warranty thereunder, and that if any recovery be had against defendant, the third-party defendants are liable to it therefor.

When the respective claims are the same and a recovery by the plaintiff against the defendant would necessarily be followed by a recovery for the defendant against the third-party defendant, then joinder is proper. *Bancroft Bldg. Corporation vs. Eisner*, 263 App. Div. 877, 32 N. Y. 2d 166; *Host vs. Minkowitz*, Sup. 53 N.Y.S. 2d 251.

... Where there is a substantive right to indemnification or contribution accruing to defendant against a third-party defendant, the procedure for its enforcement is to be found in Rule 14, Federal Rules of Civil Procedure.”

Respondents appreciate the fact that the Federal cases cited herein pertain to Rule 14 (a) before amendment, and that, no doubt, any allegation of liability of Third-Party Defendants to plaintiff in third-party complaint subsequent to the amendment would be considered surplusage. Appellant, no doubt, has in mind cases like *Statink vs. Holland Tp. et al.*, 28 Fed. Supp. 67, wherein defendants did not undertake to do more than tender to plaintiff other defendants who they said are liable solely to the plaintiff, and plaintiff indicated she will seek no recovery from the third-party defendants tendered by original defendants. But, that line of reasoning does not affect the instant case where respondents DO undertake to do more than make such tender, and do seek judgment, not against the plaintiff, but for judgment against the Third-Party Defendants "for such sums as may be adjudged against Defendants and Third-Party Plaintiffs in favor of plaintiff."

Considering the amendment to the Federal Rule and its application to allegation of "liability to plaintiff" as surplusage, as hereinbefore stated, it seems appropriate to quote from the Court's decision in *Susan vs. Strasser et al.*, *supra*, as follows:

"As stated by Alexander Holtzoff, Special Assistant to the Attorney General of the United States, in his admirable work, *New Federal Procedure and the courts*:

"Rule 14 of the new Federal Rules of Civil Procedure makes third-party practice an inherent part of the Federal Civil Procedure. Its purpose is to permit a defendant to bring in a third party

who is liable on the same claim or who is subject to liability arising out of the claim on which the suit is based. . . . The scope of the third-party practice under the new rules is exceedingly broad. It may be invoked against a party who is liable to the defendant for all or part of plaintiff's claim, as, for instance, in a case in which the third party is liable for contribution, or indemnification or as an insurer of the defendant's liability. . . ."

The case of *Arsht vs. Hatton*, 72 Fed. Supp. 851, while, because of the Federal amendment to its Rule 14(a), is not exactly in point, renders some light on the controversy which this Court now is called upon to determine; as is the case of *Kravas vs. Great Atlantic & Pacific Tea Co.*, 28 Fed. Supp. 66, and the case of *Crum vs. Appalachian Electric Power Co. et al.*, 29 Fed. Supp. 90, and the case of *Jeub vs. B/G Foods, Inc.*, 2 Federal Rules Decisions 238.

CONCLUSION

In conclusion, respondents contend that the lower Court granted respondents' motion for third-party action in conformity with the provisions of Utah Rule of Civil Procedure 14(a); and suggests that, in the event this Court determines otherwise that respondents be given opportunity to amend their third-party complaint to the effect that the third-party defendants are or may be liable to respondents for all or part of appellant's claim against respondents.

Respectfully submitted,

O. H. MATTHEWS,

Attorney for Respondents.