

1980

Lisa Watters v. Clayton N. Querry, Jean C. Querry,
Charles L. Querry, Elizabeth Hemingway, and
David E. Hemingway : Affidavit of Plaintiff's
Counsel, Samuel King

Utah Supreme Court

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SAMUEL KING; Attorney for Plaintiff

Recommended Citation

Legal Brief, *Watters v. Querry*, No. 16897 (Utah Supreme Court, 1980).
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SAMUEL KING
Attorney for Plaintiff
301 Gump & Ayers Bldg.
2120 South 1300 East
Salt Lake City, Utah 84106
486-3751

IN THE DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

| | | |
|----------------------------|---|--|
| LISA WATTERS, |) | |
| Plaintiff, |) | |
| vs. |) | AFFIDAVIT OF PLAINTIFF'S COUNSEL, SAMUEL KING |
| CLAYTON N. QUERRY, JEAN C. |) | |
| QUERRY, CHARLES L. QUERRY, |) | |
| ELIZABETH HEMINGWAY, and |) | Civil No. 234560 |
| DAVID E. HEMINGWAY, |) | |
| Defendants. |) | |

STATE OF UTAH

ss

COUNTY OF SALT LAKE

COMES NOW Samuel King and being first duly sworn, deposes and says:

1. During trial the court indicated to counsel that it would (1) not hear counsel concerning the instructions to be given the jury and (2) exceptions to the instructions would be taken after the jury was instructed and the judge had left the bench.

2. The court stated that it had sufficient contention in the courtroom and had no wish, in addition, to "be harangued by counsel for an hour in chambers about the instructions." The court acknowledged that counsel had the right to argue the instructions before they were given, but also stated that it

was strongly opposed to that procedure and didn't want it done. The court also indicated that it intended essentially to follow the instructs given by Judge Snow at the first trial, although it characterized them as "poor."

3. This affidavit is submitted as the matters occurred in chambers and were not reported.

4. Notwithstanding the court's remarks, plaintiff's counsel insisted on a pre-instruction session in chambers. During that brief session, aspects of the instructions concerning damages in the form of special verdict were discussed. The merits of liability had not been discussed when the court concluded the session. Plaintiff's counsel then paperclipped the key instructions from his requests which were in possession of the court and asked the court to consider and incorporate them.

5. When the court instructed the jury, it handed counsel its jury instructions. This was the first time counsel had seen, or been appraised of, the instructions the court was actually submitting to the jury. These instructions did incorporate some of the instructions requested by both parties.

6. After the jury was instructed, it was released for the afternoon to return the next morning for closing argument.

During the interim, plaintiff's counsel read the instructions given by the court and realized that her instructions, 17 and 17(a), on defendant Hemingway's liability had been omitted. Plaintiff's counsel, in the company of defendant's

counsel, Mr. Fishler, approached the court in chambers and stated to the court that apparently those instructions had been omitted by inadvertance, were vital and had to be included. Mr. Fishler responded that reading those instructions to the jury would give them a greater stress than the other instructions already given, and objected to them on that ground. Plaintiff's counsel, in an effort to compromise, proposed that the instructions simply be inserted in the sheaf of instructions which the jury would receive at the close of argument, thus avoiding overstressing them by separate reading, but still putting them in the instructions so he could argue Hemingway's negligence and proximate cause from them.

The court stated that it thought the matters were adequately covered, agreed with Mr. Fishler on not overstressing and refused plaintiff's request. Neither the court nor Mr. Fishler indicated any disagreement with the accuracy or appropriateness of the proposed instructions.

In refusing plaintiff's requested instruction 17 and 17(a), the court also commented that these had not been given by Judge Snow in the first trial. Plaintiff's counsel acknowledged that, but argued as the instructions were accurate and appropriate, whether they had been given before or not was immaterial and that they were needed to fully advise the jury. To this, the court replied negatively stating that it would

simply give the jury the instructions as they stood.

/s/ Samuel King

SAMUEL KING

SUBSCRIBED AND SWORN to before me January 23, 1980.

/s/ Hazel Sykes

Notary Public

Residing in Salt Lake County, Utah

My Commission Expires:

August 22, 1982

COURT'S INSTRUCTION 7

The terms "negligence," "contributory negligence," "ordinary care," and "proximate cause," as used in these instructions, are defined as follows:

A. "Negligence" means the failure to do what a reasonably prudent person would have done under the circumstances of the situation, or doing what such person under such existing circumstances would not have done. The essence of the fault may lie in acting or omitting to act. The duty is dictated and measured by the exigencies of the occasion;

B. "Contributory negligence" means that a person injured has proximately contributed to such injury by his want of ordinary care, so that except for such want of ordinary care on his part, the injury would not have resulted;

C. "Ordinary care" is that degree of care which a reasonably prudent person would use under the same or similar circumstances. "Ordinary care" implies the exercise of reasonable diligence and such watchfulness, caution and foresight as under all the circumstances of the particular case would be exercised by a reasonably careful, prudent person;

D. By "proximate cause" is meant that cause which in a natural, continuous sequence, unbroken by any new cause, produced the injury and without which the injury would not have occurred. [Emphasis added]

COURT'S INSTRUCTION 17

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause-- the one that necessarily sets in operation the factors that accomplish the injury.

The law does not necessarily recognize only one proximate cause of injury, consisting of only one factor, one act, or the conduct of only one person. The the contrary, the acts and omissions of two or more persons may work concurrently as the efficient cause of an injury, and in such a case, each of the participating acts or omissions is regarded in law as a proximate cause and both may be held responsible. [Emphasis added]

COURT'S INSTRUCTION 19

The law requires that no person shall turn a vehicle upon a public highway unless and until such movement can be made with reasonable safety. This does not mean, however, that the driver of a motor vehicle, before making a turn, must know that there is no possibility of accident. It means that before starting to turn a vehicle and while making the turn, the driver of the vehicle must use such precaution as would satisfy a reasonably prudent person, acting under similar circumstances, that the turn could be made safely.

COURT'S INSTRUCTION 24

You are instructed that a circumstance or act can reasonably be regarded as the effective factor in producing an injury and can be properly regarded as a proximate cause of it, even though later events which combine to cause the injury may also be classified as negligent, so long as the later act is something that might reasonably be expected to follow in the natural sequence of events. Thus, if you find that the actions of Elizabeth Hemingway were wrongful and that the collision of Clayton Query's car with that of Lisa Watters was within that natural and continuous sequence of events which might reasonably be expected to follow the actions of Elizabeth Hemingway, and result in the injury to Lisa Watters, then you may find that the actions of Elizabeth Hemingway were a concurring proximate cause of the injury even though the later negligent act of Clayton Query cooperated to cause it.

But, if the actions of Clayton Query in causing the collision were of such character as not reasonably to be expected to happen in the natural sequence of events started by the actions of Elizabeth Hemingway, then the acts of Clayton Query are the independent intervening cause and, therefore, the sole proximate cause of the injury. [Emphasis added]

PLAINTIFF'S REQUESTED
JURY INSTRUCTION NO. 17

Plaintiff claims that Elizabeth Hemingway was negligent because she obstructed a moving lane of traffic. Plaintiff claims that this negligence was of three types which are: (1) that she attempted an illegal left turn thereby blocking arterial traffic; (2) that she kept an improper lookout, so that she failed to clear the road as oncoming traffic approached; (3) that she failed to drive as a reasonable driver would have and should have under the existing circumstances.

If you find that Elizabeth Heminway was negligent in one or more of the above particulars, and if you further find that such negligence was a proximate cause of the accident, then you are to render verdict for plaintiff against Elizabeth Hemingway, and award plaintiff damages. If you do not so find, then you are to enter verdict in favor of Elizabeth Hemingway and against plaintiff.

PLAINTIFF'S REQUESTED
INSTRUCTION NO. 17a

Lookout. It is the duty of a driver to keep a reasonable lookout for other traffic. If a driver causes a collision, which the driver could reasonably have averted due to the driver's not keeping a reasonable lookout, such is negligence.

Reasonable driving. A driver has a duty to drive safely, to avoid creating hazards, and to be aware of other traffic. If a driver fails to so drive as a reasonable driver would under the existing circumstances, such is negligence.

PLAINTIFF'S REQUESTED
INSTRUCTION NO. 19

The terms "negligence," "contributory negligence," "ordinary care," and "proximate cause," as used in these instructions, are defined as follows:

A. "Negligence" means the failure to do what a reasonably prudent person would have done under the circumstances of the situation, or doing what such person under such existing circumstances would not have done. The essence of the fault may lie in acting or omitting to act. The duty is dictated and measured by the exigencies of the occasion.

B. "Contributory negligence" means that a person injured has proximately contributed to such injury by his want of ordinary care, so that except for such want of ordinary care on his part, the injury would not have resulted;

C. "Ordinary care" is that degree of care which a reasonably prudent person would use under the same or similar circumstances. "Ordinary care" implies the exercise of reasonable diligence and such watchfulness, caution and foresight as under all the circumstances of the particular case would be exercised by a reasonably careful, prudent person;

D. By "proximate cause" is meant that cause which in a natural, continuous sequence produced the injury and without which the injury would not have occurred. One or more parties may be joint participants in "proximate cause," either when

they are negligent at the same time, or when one is negligent, and as a direct consequence of that negligence, a dangerous condition exists which contributes to the happening of an accident by a later actor even though the later actor is also negligent. However, if the negligence of the later actor is so remote in terms of time and distance that such later actor could clearly have avoided the accident, after being legally charged with knowledge of the dangerous existing condition, then the actions of the later driver are the sole proximate cause of the accident.

The distinction as to whether a later actor's negligence is the sole proximate cause of an accident, or whether it is a contributing proximate cause with that of one or more other drivers, is a factual distinction, the question of fact being whether the first actor's negligence created a dangerous condition which in an unbroken chain of events produced an accident, or whether the negligent acts of the later driver or drivers occurred after there was sufficient time and space that, after they should have been aware of the dangerous existing condition, they had a clear opportunity to avoid it.

The fact that the later driver was negligent, as Clayton Querry was here, is not determinative of this factual issue, because if a first actor creates a dangerous condition blocking traffic, it may be reasonably anticipated under the then

existing circumstances, that a following driver might be momentarily inattentive or negligent and so happen into the accident before becoming alerted to the hazard. In that event, both drivers are guilty of contributing to proximate cause, and it will then be your duty, if you so find, to apportion the degree of fault between drivers.

What is required for the acts of the later driver to be the sole proximate cause, is that the dangerous condition exist so long that the later driver, even though temporarily inattentive clearly knew or should have known of the danger, and had an opportunity to avoid the collision, yet failed to do so. Under those circumstances, the later driver would be the sole proximate cause of the accident.