

1980

# Lisa Watters v. Clayton N. Querry, Jean C. Querry, Charles L. Querry, Elizabeth Hemingway, and David E. Hemingway : Respondents' Brief

Utah Supreme Court

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Case No. 16897

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Attorney for Plaintiff-Appellant

FILED

JUN 26 1980

IN THE SUPREME COURT  
OF THE STATE OF UTAH

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LISA WATTERS,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	
	)	
CLAYTON N. QUERRY, JEAN	)	Case No. 16897
C. QUERRY, CHARLES L.	)	
QUERRY, ELIZABETH HEMINGWAY,	)	
and DAVID E. HEMINGWAY,	)	
	)	
Defendants-Respondents.	)	

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RESPONDENTS' BRIEF

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Appeal From Verdict and Judgment of  
Third Judicial District Court for Salt Lake County,  
Honorable James S. Sawaya, Judge

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## TABLE OF CONTENTS

### Page

STATEMENT OF THE NATURE OF THE CASE . . . . .	1
DISPOSITION IN LOWER COURT . . . . .	1
RELIEF SOUGHT ON APPEAL . . . . .	1
STATEMENT OF THE FACTS . . . . .	2
ARGUMENT . . . . .	4
POINT I.	
THE ISSUE OF PROXIMATE CAUSE WAS PROPERLY SUBMITTED TO THE JURY . . . . .	4
POINT II.	
THE NEGLIGENT ACT OF THE LATER ACTOR, DEFENDANT QUERRY, WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT . . . . .	13
POINT III.	
APPELLANT'S THEORY OF THE CASE WAS SUBMITTED TO THE JURY . . . . .	20
POINT IV.	
THE COURT CORRECTLY INSTRUCTED THE JURY THAT A LATER ACT OF NEGLIGENCE WAS THE SOLE PROXIMATE CAUSE . . . . .	22
POINT V.	
COUNSEL FOR THE APPELLANT WAS ALLOWED TO SEE AND TAKE EXCEPTION TO THE COURT'S INSRUCTIONS . . . . .	24
CONCLUSION . . . . .	25
MAILING CERTIFICATE . . . . .	26

## CASES CITED

	<u>Page</u>
<u>Anderson v. Parson Red-E-Mix Paving Co.,</u> 24 Utah 2d 128, 467 P.2d 45 (1970) . . . . .	13
<u>Fisher v. Taylor,</u> 572 P.2d 393 (Utah 1977) . . . . .	11
<u>Hillyard v. Utah By-Products Co.,</u> 1 Utah 2d 143, 263 P.2d 287 (1953) . . . . .	7
<u>Jensen v. Dolen,</u> 12 Utah 2d 404, 367 P.2d 191 (1962) . . . . .	6
<u>Jensen v. Mountain States Tel. &amp; Tel. Co.,</u> <u>et al.,</u> Utah, 16417 (April 1980) . . . . .	8
<u>Jensen v. Taylor,</u> 2 Utah 2d 196, 271 P.2d 838 (1954) . . . . .	20
<u>King v. Ellis,</u> 350 S.W.2d 685 (Mo. 1962) . . . . .	17
<u>McMurdie v. Underwood,</u> 9 Utah 2d 400, 346 P.2d 711 (1959) . . . . .	14
<u>Nyman v. Cedar City,</u> 12 Utah 2d 45, 361 P.2d 1114 (1961) . . . . .	6
<u>Stevenson v. Kansas City,</u> 360 P.2d 1 (Kan. 1961) . . . . .	15
<u>Swartley v. Seattle School Dist. No. 1,</u> 421 P.2d 1009 (Wash. 1966) . . . . .	10
<u>Viator v. Gilbert,</u> 206 So.2d 106, (La.App. 1968) . . . . .	18
<u>Wash-A-Matic, Inc. v. Rupp,</u> 532 P.2d 682 (Utah 1975) . . . . .	10
<u>Watters v. Querry,</u> 588 P.2d 702 (Utah, 1978) . . . . .	9
<u>Webb v. Olin Mathieson Chemical Corp.,</u> 9 Utah 2d 275, 342 P.2d 1094 (1959) . . . . .	5

## OTHER AUTHORITIES CITED

57 Am.Jur.2d 487 . . . . .	4
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C. QUERRY, CHARLES L.	)	
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and DAVID E. HEMINGWAY,	)	
	)	
Defendants-Respondents.	)	

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BRIEF OF RESPONDENTS

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STATEMENT OF THE NATURE OF CASE

This was a personal injury action by plaintiff-appellant, Lisa Watters, against defendant-respondent Elizabeth Hemingway, resulting from an automobile accident.

DISPOSITION IN LOWER COURT

The case was tried in the District Court and the jury returned a verdict finding defendant Hemingway negligent. This negligence was not found to be a proximate cause of the accident, however. Defendant Clayton Querry was found to 100% at fault. The jury awarded \$115,000 general damages and \$38,000 special damages.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmation of the trial court's finding that defendant Hemingway's negligence was not a proximate cause of the accident. As an alternative, respondent asks for a

new trial on the issue of damages.

#### STATEMENT OF THE FACTS

This case arises out of an accident which occurred February 26, 1976. The accident occurred at approximately 10:00 p.m. at 2910 South 7th East, Salt Lake County, Utah. Visibility was clear and the road condition was level and dry.

All of the parties involved in this dispute, respondent Hemingway, defendant Querry, and appellant Watters, were driving north on 7th East prior to the accident. Respondent Hemingway made a left turn from 7th East and subsequently defendant Querry struck appellant's car from the rear.

In view of the respondent's favorable jury verdict, the facts will be considered in the light most favorable to her on this appeal. On the date of the accident, respondent, Elizabeth Hemingway, was 17 years old. Respondent and her brother had been engaged in dropping off two of her brother's friends in the vicinity of 7th East. Appellant, Lisa Watters, was 36 years old at the time of the accident. She was traveling on 7th East enroute to her place of work.

The respondent entered 7th East from Elgin Avenue. She turned onto to 7th East proceeding from Elgin Avenue to the lane next to the far left lane. She then moved into the left hand lane to make a left turn at the end of the island. She carefully signaled her lane changes. (TR. p. 201, L. 9-24) The movement of respondent's car, as supported by witnesses' testimony, was



gradual and not sudden and unexpected. (TR. p. 88, L. 27-29; TR. p. 266, L. 12-19)

The respondent's vehicle did not come to a complete stop. (TR. p. 201, L. 14-19; p. 266, L. 3-11) She merely slowed down, waited for a southbound car to pass, and completed her turn. The appellant noticed the respondent's car while she was still more than 160 yards away. (TR. p. 111, L. 4-5) The appellant had a clear view of traffic and observed that respondent was traveling more slowly and had applied her brakes. (TR. p. 112, L. 3-23) Appellant attempted to change lanes but could not complete the change because of traffic to the right of her. (TR. p. 113, L. 18-19) By this time, appellant had moved so close to respondent as to necessitate an abrupt, hard stop on the part of appellant. (TR. p. 113, L. 20-23) Still, she was able to avoid contact with the respondent's car.

At this time, the vehicle of defendant Query was proceeding north in the left lane of traffic. The undisputed facts disclose that the defendant Query, immediately prior to the collision with appellant's vehicle, was engaged in conversation with a passenger and, therefore, was not maintaining a proper lookout. He did not observe the sudden stop of appellant's car. (TR. p. 216, L. 8-14, First Trial)

As respondent completed her turn around the island, appellant began to pull away from the position where she had stopped. Defendant Query then collided with appellant's vehicle. At this instant, respondent's car had completed her



turn and was not a factor in the cause of the accident. The respondent pulled her car to the side of the road and asked if anyone was hurt. (TR. p. 204, L. 19-24) Someone replied that everyone was all right and the respondent proceeded home. (TR. p. 205, L. 9-15)

## ARGUMENT

### POINT I.

#### THE ISSUE OF PROXIMATE CAUSE WAS PROPERLY SUBMITTED TO THE JURY.

Respondent Hemingway was found negligent by the jury. Yet, after viewing all of the facts, the jury found that this negligence was not a proximate cause of the accident. It is a well-established law, that has been followed in Utah, that causation is a question for the jury and not a question of law. The court has the duty to define the law, but the jury is the proper body to apply the law to the facts of the case.

Even though proximate cause may at times be a difficult question, the question should still be submitted to the jury. It is only at those times when reasonable minds could not differ, that the question can be decided as a matter of law.

It has been said to be the general rule that what is the proximate cause for an injury is ordinarily a question for the jury, the court instructing them as to what the law requires to constitute it, and the jury applying the law to the facts. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. 57 Am.Jur.2d 487.

Negligence alone is not enough to make the negligence actionable. The negligence must also be shown to be the proximate cause of the injury. Utah law has realized that a party may be negligent and yet that negligence may not be a proximate cause of the accident. In Webb v. Olin Mathieson Chemical Corp., 9 Utah 2d 275, 342 P.2d 1094 (1959), the plaintiff's rifle exploded while he was hunting. He sued the defendant for negligence in manufacturing the gun. The jury found the issues in favor of the plaintiff and the defendant appealed from that judgment. The defendant claimed that there was no evidence of its negligence and that the only reasonable deduction to be drawn from the evidence was that the accident was a result of the plaintiff's own negligence. The plaintiff had altered the gun considerably and the defendant alleged that this was the proximate cause of the accident. The defendant's expert said that the changes made by the plaintiff were probably a factor in the accident. The court said:

If it is only 'probable' the jury would not be required to find such to be the fact; nor should it be so ruled as a matter of law, because there is no basis for saying the evidence preponderated that way. 342 P.2d at 1100.

The Supreme Court held that the evidence presented a question for the jury as to whether the manufacturer was negligent, whether that negligence proximately caused the plaintiff's injuries, and whether the plaintiff was contributorily negligent.

In the present case, there is only a possibility that

the respondent Hemingway's negligence could be found to be a proximate cause of the injury. The jury is not required to find that the negligence was a proximate cause and it should not be so ruled as a matter of law.

The majority of Utah cases insist that the issue of proximate cause be submitted to the jury. In Jensen v. Dolen, 12 Utah 2d 404, 367 P.2d 191 (1962), the plaintiff and defendant were involved in an automobile accident. Plaintiff Jensen was a passenger in a car which was struck in the rear by a car operated by the defendant. The car in which the plaintiff was a passenger had stopped at a stop sign. The defendant, sliding on a patch of ice, collided with the stopped vehicle. The defendant moved for a directed verdict at the end of the evidence on the grounds that there was no showing of negligence on the part of the defendant and the ice on the highway was the sole proximate cause of the accident. In holding that jury issues were presented as to whether the defendant was negligent and as to whether the accident would have happened in the absence of the negligence, the court said:

Ordinarily, the issue of proximate cause is a matter to be submitted to the jury for its determination. \*\*\* Thus, this issue, along with the question of negligence, should have been submitted to the jury. 367 P.2d at 193.

The Utah Supreme Court reiterated their position that proximate cause was an issue to be decided by the jury in Nyman v. Cedar City, 12 Utah 2d 45, 361 P.2d 1114 (1961). The plain-

tiff was injured when the automobile in which she riding ran into obstructions on a street in Cedar City. The City was performing some construction and they had failed to put up any barricades or warning signs or lights to warn traffic of the obstructions. The court held that the evidence in this case did justify the findings that the City was negligent and that the negligence was a proximate cause of the accident. In making that decision, the court said:

When the evidence is such that there is doubt about whether one of two causes is a proximate cause of an injury so that the question could reasonably be found either one way or the other, the question is one of fact for the court or jury.  
361 P.2d at 1117.

In Hillyard v. Utah By-Products Co., 1 Utah 2d 143, 263 P.2d 287 (1953), the Utah Supreme Court once again held that questions of whether the defendant was negligent and whether that negligence was the proximate cause of the accident were for the jury. The plaintiff's son was killed when the car in which he was riding crashed into the rear of defendant's truck which was parked with its rear end protruding out on to the highway. As the car in which the plaintiff's decedent was riding approached the negligently parked truck, it attempted to pass another vehicle and when unable to do so, swung back into the right-hand lane and collided with the parked truck. The court stated that the conduct of a later intervening actor in negligently failing to observe a dangerous condition until it is too late to be avoided raises a question of fact, to be determined by the jury,

whether the later intervening acts supersedes the negligence of the initial actor:

The second situation involves conduct of a later intervening actor who negligently failed to observe the dangerous condition until it is too late to avoid it. \*\*\* With respect to the second situation, where the second actor fails to see the danger in time to avoid it, it is held that a jury question exists, based on the rationale that it can reasonably be anticipated that circumstances may arise wherein others may not observe the dangerous condition until too late to escape it. 263 P.2d at 292.

Defendant Querry failed to see the danger in time to avoid the accident. Under Utah law, this is exactly the situation that should be submitted to the jury.

In Jensen v. Mountain States Tel. & Tel. Co., et al., Utah, 16417 (April, 1980), the Utah Supreme Court once again held that the evidence was not such that it could be said that reasonable minds could not differ and hence a jury issue was presented. Mountain Bell was performing service work on underground telephone lines and parked one of its vans in the intersection. There were signs placed before the van and the van had its four-way flashers on, its headlights on, and two strobe lights flashing. The plaintiff brought this suit after he was injured in an accident with an automobile driven by defendant Gonzales who was making a left hand turn at the intersection. The trial court awarded summary judgment for defendant Mountain Bell, ruling as a matter of law that their negligence was not the



proximate cause of injuries sustained by the plaintiff. In reversing that decision, the court stated:

We recognize at the outset that in appropriate circumstances summary judgment may be granted on the issue of proximate cause. However, in a situation involving independent intervening cause, the primary issue is one of the foreseeability of the subsequent negligent conduct of a third person, and in this case, that issue must be resolved by the finder of fact.

In the previous appeal of this case, Watters v. Querry, 588 P.2d 702 (Utah, 1978), the court also found that there was a legitimate question that should be determined by the jury:

It appears to us that there is a legitimate question as to whether a jury could reasonably find that defendant Hemingway, in making the alleged abrupt stop, should have foreseen that, in traffic such as there was on that highway, some momentarily inattentive driver following her would not be able to react and brake quick enough to avoid collision with her car or the car behind hers. 588 P.2d at 704.

The Supreme Court vacated the judgment and remanded the case for a new trial. The decision did not, as a matter of law, decide that defendant Hemingway's negligence was the proximate cause of the accident. If the situation presented an obvious question of law, the Supreme Court would have decided the matter on the prior appeal. Instead it decided that the issues presented did raise a question for the jury and remanded the case for a new trial.

Once the jury has looked at the facts, weighed them, and made their decision, the Supreme Court should not decide the

question as a matter of law. In Swartley v. Seattle School Dist. No. 1, 421 P.2d 1009 (Wash. 1966), a junior high student died of strangulation when some plywood fell on to him while he was in a room which he had no permission to enter. In holding that the evidence, as to whether the rule requiring permission was a safety rule, created a jury question, the court said:

In the light of all the facts and circumstances, whether this was a safe manner of storage of plywood and whether the deceased was guilty of contributory negligence, became questions of fact for the jury. Thus, the court could not rule on it as a matter of law. 421 P.2d at 1012.

The court also maintained that:

The negligence of appellant and the contributory negligence of the deceased was the primary questions for the jury; they were questions of fact. Their final resolution by the verdict of the jury placed them beyond the province of this court to determine otherwise. 421 P.2d at 1013-1014.

In the present case, the issues of fact have been properly resolved by the jury and should not be disturbed by this court.

In Wash-A-Matic, Inc. v. Rupp, 532 P.2d 682 (Utah, 1975), the plaintiff claimed that there had been a lease contract formed and the defendant subsequently would not accept the supplies. Plaintiff claimed that this was a breach of the contract and that the defendant was liable for damages. The trial judge found that there was no binding contract between the plaintiff and defendant and that the plaintiff was not entitled



to any damages. In holding that the evidence was insufficient to establish a contract between the plaintiff and defendant, the Supreme Court said:

The evidence was sufficient to sustain the judgment made, and we should sustain the trial court even if we might have come to a different decision had we been trying the matter. 582 P.2d at 683.

The Supreme Court of Utah again reiterated their stand on appellate review in Fisher v. Taylor, 572 P.2d 393 (Utah, 1977). The plaintiffs brought the action for breach of a written contract for purchase of a clothing business. The purchase agreement provided for a down payment and equal monthly installments. The defendants took possession but subsequently failed to make the equal monthly payments. The plaintiff was to pay all taxes prior to the transfer of the corporate stock but failed to make these payments. The trial court rendered a judgment for the unpaid balance of the purchase price and defendants filed this appeal. The Supreme Court held that the performance by defendants was not excused because plaintiff was disabled from performance by her own inaction of not paying the taxes. The court, in discussing their duty of review, stated:

This Court has consistently followed the well-recognized standard of appellate review which precludes the substitution of our judgment for that of the trial court on issues of fact, and where its findings and judgment are based on substantial, competent, admissible evidence we will not disturb them. 572 P.2d at 394.

The jury is the correct party to make the conclusions of fact after hearing the evidence. The Supreme Court should not disturb the findings unless clearly against the weight of evidence. In this case, two different juries have made the same finding, indicating that that finding is supported by the evidence.

Jury Instruction No. 24, given by the court, was the instruction approved by the Supreme Court in the prior appeal of this case. The court said that the difficulty with the previous instruction given was that it seemed to exculpate defendant Hemingway if it was found that defendant Query was negligent, whether or not the latter's conduct was foreseeable. Jury Instruction No. 24 (Annex 9) corrects this defect by stating that if the actions of Elizabeth Hemingway were found wrongful and the collision of defendant Query's car with that of appellant Watters was "within the natural and continuous sequence of events which might reasonably be expected to follow the actions of defendant Hemingway," then defendant Hemingway could be found a proximate cause of the injury. Appellant now claims that this instruction was too difficult to be submitted to a jury, yet the instruction is consistent with the law and had been approved for the jury in the previous appeal for this particular accident.

Proximate cause is a jury issue and should only be decided as a matter of law when reasonable people could not differ. As shown by Utah precedent, proximate cause is almost always a jury question. The Supreme Court should not disturb

this finding after it was properly decided by the jury.

POINT II.

THE NEGLIGENT ACT OF THE LATER ACTOR,  
DEFENDANT QUERRY, WAS THE SOLE PROXIMATE  
CAUSE OF THE ACCIDENT.

An actor may possibly be negligent and create a potentially dangerous situation, yet the actor is not liable for every result which occurs because of his negligence. The initial actor is not the proximate cause of an accident if they have created a situation which is harmless unless acted upon by a force for which they are not responsible. A later actor's conduct can be found to be a subsequent intervening act when their conduct makes a harmless situation injurious. In the present case, respondent Hemingway's conduct did not proximately contribute to the injury. Respondent Hemingway had completed her maneuver and appellant Watters had stopped. Without defendant Querry's subsequent intervening negligence, his inattentiveness and improper lookout, no injury would have resulted.

In Anderson v. Parson Red-E-Mix Paving Co., 24 Utah 2d 128, 467 P.2d 45 (1970), the defendant had negligently parked his truck on the highway. The plaintiff was injured when the car in which he was riding, due to negligence on the part of the driver, collided with the parked truck. While observing that the cement truck created a dangerous condition, the Utah Supreme Court pointed out that the accident occurred in broad daylight on a clear day where there was nothing to obstruct the vision or

distract the attention of the plaintiff's driver before colliding with the truck. The court then stated:

Where one has negligently created a dangerous condition. . . if the previously created dangerous condition is such that the later actor, in the exercise of reasonable care, should have observed and avoided it, in which instant the later act of negligence is an independent intervening and therefore sole proximate cause. 467 P.2d at 46.

The Supreme Court held that the negligence of the driver was the sole proximate cause of the collision and the plaintiff was precluded from recovering from the owner of the truck.

In McMurdie v. Underwood, 9 Utah 2d 400, 346 P.2d 711 (1959), three large trailer-trucks had stopped along the highway. Unit No. 1 had developed difficulties and had stopped to make repairs. Unit No. 2, driven by respondent, stopped in front of Unit No. 1 and the driver returned to give assistance. Unit No. 3, driven by another defendant, parked on the pavement with all of its lights on. The appellant approached the situation, and observing Unit No. 2 blocking the road, stopped and waited for the oncoming traffic to clear. While parked in this position, appellant noticed a speeding truck approaching in his rearview mirror. The truck collided with the appellant's car. The driver of the pickup truck was found negligent as a matter of law and settled prior to trial. The trial court returned a judgment in favor of the other defendants and the plaintiffs appealed. The plaintiff argued that there was error in the instructions given to the jury. The jury instruction was as follows:

You are instructed that the driver of the pickup truck was negligent as a matter of law, and if you find that she observed the hazards if any of the stopped vehicles upon the highway or under the circumstances should have observed said vehicles, but because of her negligence failed to do so in time to avoid said accident, then you are instructed that the negligence on her part was the sole proximate cause of the collision, and your verdict must be in favor of the defendants and against the plaintiffs, no cause of action. 346 P.2d at 712.

The court maintained that the issue had been rightfully submitted to the jury and that the pickup driver's negligence was the sole proximate cause of the collision.

In the present case, exercise of reasonable care on the part of defendant Query would have enabled him to avoid the accident. Due to Query's negligence and inattentiveness, he failed to observe the situation as he should have. Therefore, his later negligent act became the sole proximate cause of the collision.

It was not probable that defendant Query would be inattentive and hit appellant Watters' automobile. A person need not be responsible for all possible consequences of a negligent act as illustrated in Stevenson v. Kansas City, 360 P.2d 1 (Kan. 1961). The plaintiff was injured by a person who attacked and beat her while she was going to a restroom in defendant's building. The plaintiff claimed that the defendant's negligence, which was the proximate cause of her injury and damage, consisted of the failure to provide and furnish her with a safe place to



attend the performance, to provide and maintain proper and sufficient police and guards near the door where the assault occurred, and their failure to have ramps sufficiently lighted. The court looked at the questions of whether there was any negligence on the part of the defendant and whether that negligence was the proximate cause of the plaintiff's injuries. In holding that the negligence of the defendant, if any, was not a proximate cause of the injuries, the court said:

A person is not charged with all possible consequences of his negligent acts. He is not responsible for a consequence which is merely possible according to occasional experience, but only for those consequences which are probable according to ordinary and usual experience. 360 P.2d at 3-4.

The court also maintained that:

Negligence is not the proximate cause of an accident unless, under the circumstances, the accident was a probable as well as an actual consequence thereof. . . . 360 P.2d at 4.

In the present case, respondent Hemingway should not have to guard against every possible consequence of her negligence. She should only be responsible for those occurrences which are a probable result of her actions. It is not probable that a following driver will be so inattentive that he will fail to see a dangerous situation ahead of him.

The negligence of respondent Hemingway was not a proximate cause of the injury. Two juries have returned this same decision. There are other cases where this same conclusion has

also been reached. In King v. Ellis, 350 S.W.2d 685 (Mo. 1962), a suit was brought for personal injuries resulting from a collision of two automobiles, alleged to have been caused by the defendant's negligent operation of a third automobile. Defendant Ellis was driving the lead vehicle. The second vehicle was being driven by the plaintiff. All of the vehicles were being operated in the lane next to the center line. The defendant turned to his left in front of the plaintiff, made a "U" turn and headed back on the other side of the highway. The plaintiff saw the defendant, applied her brakes and slowed down or stopped so that she did not make contact with the defendant's truck. A car following the plaintiff saw the situation and tried to apply his brakes but the brake line failed. The subsequent driver settled with the plaintiff before trial. At trial, the plaintiff testified that the defendant's truck was traveling very slowly when she first saw it just a little while before her car was struck. She also claimed that she did not see the defendant give any signal. The trial court rendered a judgment in favor of the defendant and the plaintiff appealed. The defendant contended that the sole and independent cause of the collision and plaintiff's injuries was the failure of the brakes on the following automobile. He also contended that the negligence on the part of the defendant was not the legal and proximate cause of the collision between the automobiles. The court held that the erratic and negligent operation of the defendant's pickup



truck was not a proximate cause of injuries to a following plaintiff motorist who was able to stop and avoid contact with the truck but who was injured when the rear end of her automobile was struck by the second following automobile whose brake line failed when that driver attempted to stop. In making this decision, the court stated that if the subsequent driver's brakes had not failed, the plaintiff would not have been injured.

The court stated:

Without the sudden and unexpected failure of the brakes on the Rayburn car in the present case, the collision would not have occurred. On the record before us the brake failure was an efficient, intervening cause and the proximate cause of the plaintiff's injuries. 359 S.W.2d at 689.

The court, in citing another case with approval, also felt that:

The negligence of the driver of the third or last car was the proximate cause of the collision and plaintiff's injuries and that the alleged negligence of the driver of the first car was too remote to be causative in the legal sense. 359 S.W.2d at 688.

In Viator v. Gilbert, 206 So.2d 106, (La.App. 1968), the suit arose as a result of a four-car collision on a Louisiana highway. All the vehicles were proceeding in the same direction. The driver of the first car was intoxicated and attempted to make a "U" turn in the left lane of the highway at what he erroneously thought was a crossing in the neutral ground. His car stalled with the rear portion extending into the left lane of traffic. The driver of the second automobile brought his car to a gradual

stop behind the first car. About 30 or 40 seconds later, the second driver was hit in the rear by a car driven by Mr. Gilbert. The trial court found that the first driver was negligent but that his negligence was not the proximate cause of the accident. Mr. Gilbert was found negligent and his negligence was the proximate cause of the accident. Also, a subsequent driver involved in the collision was found to be a proximate cause. The trial court entered judgment for the plaintiff against certain of the defendants and those defendants appealed. On appeal, the court looked at the question of whether the negligence of the first driver was a proximate cause of the accident. In making their decision, the court stated:

While there can be no doubt of Mr. Wilkinson's negligence, it is undisputed that Mr. Provost was able to come to a gradual stop behind him and avoid a collision, and that all of the impacts occurred after this stopping. When the lead vehicle makes a sudden stop, or one in order to execute an illegal maneuver, but the operator of a second vehicle is able to bring his car to a stop without a collision, the first driver is not liable if a third vehicle collides with the second.\* \* \* We find, therefore, that the jury was correct in concluding that Mr. Wilkinson's negligence was not a proximate cause of the accident. 206 So.2d at 109.

In the present case, defendant Hemingway was negligent, as decided by the jury, but that negligence was not the proximate cause of the injury. The subsequent negligence of defendant Querry was an intervening cause and as such, the sole proximate cause of the collision. Without defendant Querry's

inattentiveness, the collision would not have occurred. Defendant Hemingway's negligence was too remote to be causative in a legal sense.

This case has been tried twice before a jury. The same conclusion, that defendant Hemingway was negligent but that the negligence was not the proximate cause of the accident, was reached in both trials. At the second trial, testimony that defendant Hemingway had stated that she "felt like she caused an accident" was allowed to be admitted into evidence. Yet, with the new jury and the admission of the additional evidence, the same result was reached. Defendant Hemingway's negligence was not a proximate cause of the accident.

### POINT III.

#### APPELLANT'S THEORY OF THE CASE WAS SUBMITTED TO THE JURY.

A new trial should be granted only when it is found that there was an error and that the error was prejudicial.

Appellant claims that her theory of the case was not submitted to the jury. These theories were set forth in Jury Instructions No. 17 and 17A of appellant's Requested Instructions. However, these instructions were effectively given by other instructions. The court cannot be said to have failed to properly instruct the jury when their Requested Instructions were fully covered in other instructions given. Jensen v. Taylor, 2 Utah 2d 196, 271 P.2d 838 (1954).

The appellant's proposed Instruction 17 (Annex 1) is

couched in terms of a general verdict. This case was not submitted on a general verdict theory. The court's instruction to the jury, No. 37 (Annex 2), states:

This case is not submitted to you for the rendition of a general verdict as is sometimes done, but it is your function herein to make findings of fact as to special interrogatories or questions which are herewith submitted to you.

It would have been improper to submit this instruction to the jury and, therefore, it was properly left out of the submitted instructions.

Appellant's proposed Instruction 17A (Annex 3), along with proposed Instruction No. 17, was given to the jury in other instructions. Instruction 17 claims three acts of negligence on the part of the plaintiff. Those acts were an illegal left turn which blocked traffic, an improper lookout and failure to drive as a reasonable driver would. Instruction 17A merely repeated the duty to maintain a proper lookout and to drive reasonably. The court's Instruction No. 18 (Annex 4) instructed the jury that if they found that the driver had conducted herself in violation of the applicable statute, that she would be negligent as a matter of law. The statute stated that it was unlawful to make a "U" turn except in designated areas. The jury was given instruction No. 19 (Annex 5), that provided that the law required that a person should not turn their vehicle upon a public highway unless such movement could be made with reasonable safety. The court's Instruction No. 25 (Annex 6) gives the instructions of

the duty to maintain a lookout and to drive reasonably as requested by the appellant. No. 25A tells the jury that a proper lookout must be kept. No. 25B explains that cars must be kept under reasonably safe and proper control. The jury could, from these instructions, easily decide that if a driver blocked a highway and this action was unreasonable, the driver would be negligent. There was no instruction given about the duty to maintain a constant lookout for following traffic because the duty to keep a proper lookout applies to all surrounding traffic, not merely to following vehicles.

The appellant's theory of the case was adequately given to the jury. Repetition of these instructions would only have erroneously emphasized these points of the case.

#### POINT IV.

THE COURT CORRECTLY INSTRUCTED THE JURY  
THAT A LATER ACT OF NEGLIGENCE WAS THE  
SOLE PROXIMATE CAUSE.

The instructions given to the jury were not incorrect statements of the law. Instruction 7D (Annex 7) states:

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.

The jury should be informed that a subsequent intervening act can break the chain of events and thereby relieve the initial negligent actor from any liability. The subsequent intervening act then becomes the sole proximate cause. Without this instruction,



the first negligent actor would be unduly held liable for all possible consequences resulting from his act. This instruction is not erroneous. It is a correct statement of the law.

Jury Instruction No. 17 (Annex 8) gives further clarification to Instruction No. 7D. It does give a definition of efficient cause as the "one that necessarily sets in operation the factors that accomplish the injury." It then further explains that there can be more than one proximate cause. This instruction is necessary and does not add any complications to the idea of proximate cause.

By appellant's own admission, defendant Query was the efficient intervening cause. "Mr. Query was exactly that--an efficient intervening cause." (Appellant's Brief, p. 27) Defendant Query was, by being the efficient intervening cause, the one who set in operation the factors that accomplished the injury.

There is no error and confusion created by giving both Instruction 17 and 7D. Instruction 7D uses the phrase "unbroken by any new cause" and Instruction 17 uses the phrase "unbroken by an efficient intervening cause." As explained by the instructions, these instructions are correct because an efficient cause sets in operation the factors that accomplish the injury and this would be a new cause. Instruction No. 24 (Annex 9) just continues to elaborate on these concepts along with the other correct instructions.

These instructions are the approved instructions for the

question of proximate cause. Instructions 17 and 7D are correct statements of the law and are approved in JIFU. Instruction No. 24 elaborates on these approved instructions. It gives definitions of proximate cause specifically applicable to this accident.

POINT V.

COUNSEL FOR THE APPELLANT WAS ALLOWED TO  
SEE AND TAKE EXCEPTION TO THE COURT'S  
INSTRUCTIONS.

Counsel for appellant claims that he was not afforded an opportunity to see the instructions prior to their submission to the jury. Yet, when he excepted to the failure of the court to give some of appellant's instructions, he said:

The Court has in Chambers stated its reasons as being that he would follow the instructions given by Judge Snow in the previous trial, contrary to my urgency that having a second opportunity to try the case, that we should make it as much better as possible.

Specifically, Instructions 7 and 17-A are plaintiff's proposed instructions dealing with their claims of negligence on the part of defendant Hemingway. 17 states the claims. 17-A defines the defendant's instruction, setting out the claim. (TR. p. 320, L. 19-29)

This indicates that there was a discussion in Chambers. At that time, it was decided that the instructions that were given by Judge Snow would be followed. Mr. King stated that he excepted to the failure to give certain instructions and the reasons were discussed in Chambers. Then Mr. King points out the



instructions he is talking about are those that purportedly convey the plaintiff's theory of liability. This indicates that the discussion in Chambers included a discussion about the issue of liability.

Mr. King brought up the discussion in chambers several more times during the course of the trial. He admits there was a discussion in chambers. (TR. p. 311, L. 25-30) He claims, in his affidavit, that the discussion was only about damages. Yet, he said that after working with the court on the instructions, he spent a half hour trying to work out a map. (TR. p. 317, L. 3-5) If the discussion had been merely about damages, there would have been no necessity to work out a map which would have been used to convey the liability issues to the jury.

From these statements, it appears that Mr. King was present at a discussion in Chambers and that the discussion focused around the instructions to be given to the jury, including those on liability, prior to the court instructing the jury.


#### CONCLUSION

Proximate cause is, in all but the exceptional cases, an issue for the jury. The question was properly submitted to the jury to allow them to apply the applicable law to the facts. Defendant Querry's negligence was an efficient intervening cause and, as such, the sole proximate cause of the collision. The appellant's theory of the case was submitted to the jury and the instructions were not conflicting. They had been approved and were accurate statements of the law. Counsel for appellant was

afforded an opportunity to discuss the proposed instructions before they were given to the jury. A new trial on the issue of liability should not be granted because appellant is disappointed in the result of his second attempt to convince a jury that defendant Hemingway's negligence was the proximate cause of the collision.

Dated this 26th day of June, 1980.

STRONG & HANNI

By   
PHILIP R. FESSLER  
Attorneys for Defendant-  
Respondent Hemingway

#### MAILING CERTIFICATE

I certify that I mailed two copies of the foregoing Respondents' Brief to Samuel King, Attorney for Plaintiff-Appellant, 301 Gump & Ayers Building, 2120 South 1300 East, Salt Lake City, Utah 84102, and to Gary A. Frank, Attorney for Respondents Hemingway, 5085 South State Street, Murray, Utah 84107, this 26th day of June, 1980.



APPELLANT'S PROPOSED  
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 Hemingway 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.

ANNEX 1

## INSTRUCTION NO. 37

This case is not submitted to you for the rendition of a general verdict as is sometimes done, but it is your function herein to make findings of fact as to special interrogatories or questions which are herewith submitted to you. In making your findings of fact you should bear in mind that the burden of proving any disputed fact rests upon the party claiming that fact to be true, and he must prove it by a preponderance of the evidence. Before you may answer "yes" to any question submitted to you you must find the same to be true by a preponderance of the evidence. It requires the agreement of six, (three-fourths), of the jurors to answer any question, and at least six of the jurors must agree that the answer to the question should be "yes" before such answer may be made.

APPELLANT'S PROPOSED  
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.

ANNEX 3

## INSTRUCTION NO. 18

If you find from a preponderance of the evidence that a driver conducted herself in violation of the following statute which is proposed for the safety of others, such conduct would constitute negligence as a matter of law, unless excused as explained in the last paragraph below.

The statute is, in pertinent parts, as follows:

Whenever a highway has been divided into two separate roadways by a dividing section, it shall be unlawful to drive any vehicle upon any such highway except to the right of such dividing section, or to drive any vehicle over, upon, or across any such dividing section or to make any left turn or semicircular or U-turn on any such divided highway, except through a plainly marked opening in such dividing section designed and designated for such left turn, semicircular or U-turn, unless a sign or signs authorized and displayed by the state road commission or other governmental agency shall otherwise indicate.

While the above rule is generally true, it is not absolute under all circumstances. It may be overcome by evidence showing that under all the surrounding circumstances the conduct in question was in conformity with the standard of care a reasonable and prudent person would have observed under like circumstances.



## INSTRUCTION NO. 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.

ANNEX 5

## INSTRUCTION NO. 25

It was the duty of the drivers to use reasonable care under the circumstances in driving their cars to avoid danger to themselves and others and to observe and be aware of the condition of the highway, the traffic thereon, and other existing conditions; in that regard, they were obliged to observe due care in respect to:

A. Use reasonable care to keep a lookout for other vehicles or other conditions reasonably to be anticipated.

B. Keep their cars under reasonably safe and proper control.

C. Not to follow another vehicle more closely than is reasonable and prudent, having due regard for their own speed, the speed of such other vehicle, other traffic upon the highway, and all other conditions there existing, and to keep at such a distance and maintain such control of their automobiles as is reasonable and prudent for the safety of themselves and others.

Failure of the drivers to operate their automobiles in accordance with the foregoing requirements of the law would constitute negligence on their part.

## INSTRUCTION NO. 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.

## INSTRUCTION NO. 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. To 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.

INSTRUCTION NO. 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 Hemmingway were wrongful and that the collision of Clayton Querry's car with that of Lisa Watter was within that natural and continuous sequence of events which might reasonably be expected to follow the actions of Elizabeth Hemmingway, and result in the injury to Lisa Watters, then you may find that the actions of Elizabeth Hemmingway were a concurring proximate cause of the injury even though the later negligent act of Clayton Querry cooperated to cause it.

But, if the actions of Clayton Querry 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 Hemmingway, then the acts of Clayton Querry are the independent intervening cause and, therefore, the sole proximate cause of the injury.