

1955

# Joseph V. Gittens v. Royce Lundberg : Petition for Rehearing

Utah Supreme Court

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Harvey A. Sjostrom; Attorney for Plaintiff and Appellant;

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IN THE SUPREME COURT OF THE STATE OF UTAH.

JOSEPH W. GITTENS,

Plaintiff and Appellant,

-vs-

ROYCE LUNDBERG,

Defendant and Respondent

:

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:

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Case No.

8295

FILED

JUL 12 1955

Clerk, Supreme Court, Utah

PETITION FOR RE-HEARING

Harvey A. Sjostrom,

Attorney for Plaintiff  
and Appellant.

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"You are instructed that, if the plaintiff was suddenly put in peril without having sufficient time to consider all the circumstances, he is excusable from omitting some precaution or making an unwise choice under the disturbing influence, although if his mind had been clear he ought to have done otherwise. This is especially true if the peril is caused by the defendant's fault. In such cases even if in bewilderment he runs directly into the very danger which he fears, he is not at fault or negligent."

## SUBJECT

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IN THE SUPREME COURT OF THE STATE OF  
UTAH

SECRET

**Plaintiff and Appellant.**

100

SECRET

Defendant and Respondent.

**CONCLUSIONS**

0295

## PETITION FOR RE-HEARING

To the Honorable Supreme Court of the  
State of Utah:

Extension of time for filing Petition  
for Re-hearing having been granted by this  
Court, comes now Joseph W. Wiggins, app-  
ellant in the above entitled cause, and  
respectfully files his petition for re-  
hearing and shows and represents that in  
its decision entered herein, the Court  
erred in the following particulars:

## STATEMENT OF POINT

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1. The Court erred in construing and interpreting requested instruction no. 17 ( point 2 of appellant's brief), but misconstrued the meaning of the same and which instruction reads as follows:

"You are instructed that, if the plaintiff was suddenly put in peril without having sufficient time to consider all the circumstances, he is excusable from omitting some precaution or making an unwise choice under the disturbing influence, although if his mind had been clear he ought to have done otherwise. This is especially true if the peril is caused by the defendant's fault. In such cases even if in bewilderment he runs directly into the very danger which he fears, he is not at fault or negligent."

and held in the opinion handed down that the said instruction did not state the law correctly in a "sudden peril" case.

## ARGUMENT

Point 1. We believe the Court erred in interpreting the true meaning of the

instruction. This instruction is approved in the case of Girard et ux vs. Irvine, 275 P. 840, which cites supporting authority. No fault was found with it there. Nor did Judge Jones place the construction or interpretation on said instruction now contended for by opposing counsel, namely that it failed to exclude the plaintiff in contributing in a negligent manner to his peril. (Tr. 24) The lower court placed its refusal on the ground that plaintiff knew of the approaching car and that this was sufficient for refusing said instruction.

It is elementary law that words, phrases, clauses, sentences and paragraphs must be taken in their ordinary meaning unless there is something in context or other relative matter which shows the ordinary meaning should not be adopted.

If an interrogatory had been put to the jury as to whether plaintiff was negligent in getting himself in a place of "sudden peril" regardless of how little his contribution might have been and the answer would have been in the affirmative then we agree the instruction should not have been given, or if it could be fairly said that the jury was bound to believe that he was negligent in some respect then the defendant's motion for a directed verdict should have been given, but which was denied by the lower court. (Tr.267)

It will be noticed by this Court that the very objection that opposing counsel made in his brief and at the hearing before your Honors was made in *Girard et ux v. Irvine* and this is what the Court said at page 843 of said volume 275 P.

"The jury was further told, that if the plaintiff Girard was suddenly placed

in peril by the negligence, if any, of the appellant and did not have sufficient time thereafter to consider all the circumstances, then he was excusable for omitting some precautions for his own safety which otherwise he would have taken, and likewise excusable for making, if the jury so found, an unwise choice under this disturbing influence.

It is claimed that the instruction ignored the question whether the plaintiff's position of peril was due to his own negligence. The instruction did not purport to say that a person placed in sudden peril by his own negligence is removed from the imputation of contributory negligence, but that an unwise choice under such circumstance is not of itself contributory negligence. Similar instructions were approved in *Randolph v. Hunt*, 183 P. 358, and *Hammond v. Pacific Electric Ry. Co.* 164 P. 50."

And continuing the California Court adds in the same paragraph:

"Moreover, the jury was repeatedly instructed that if Girard, in the operation of his automobile, was guilty of negligence which in the slightest degree proximately contributed to the accident, then neither he nor his wife could recover."

It will be noticed that the lower court in other instructions to the jury in this case told the jury that if Gittens was negligent at all which contributed to the

accident and his own injury then he could not recover. This is particularly pointed out in instruction No. / pp.37 of the transcript.

The opinion states among other things that "The jury could have believed that plaintiff created his own peril and thus was not entitled to the benefits of sudden emergency." We believe not and there is nothing in the verdict to show that the jury adopted the defendant's theory of where the accident took place - in the westernmost lane of traffic, or that plaintiff created, even in part, to his own peril. The jury may have found the verdict based upon plaintiff's evidence as to where the accident took place and that though plaintiff was entirely free of negligence in being in a sudden place of danger, yet the fact that he got confused

when in such a position of peril did not excuse him when he accelerated his pace in a easterly direction instead of stepping back due to that confusion. The instruction requested would have, in our opinion, correctly stated the law and the jury may have found under such instruction that because he made a mistake in going ahead instead of stepping back was excusable and not negligent conduct on his part and thus carried the verdict in his favor. We do not believe anyone can fairly say that the jury did not believe the plaintiff's testimony as to where he was when he saw the defendant coming south in the east lane of the west side of highway the third time he looked and that he was struck as one of his feet stepped on the center line of the road, but they may have held against him,

nevertheless, because he got confused and went east instead of stepping back. As said before, the instruction requested may have brought a different verdict if it had been given.

Judge Crockett says in discussing point no. 2, in paragraph 6 of the opinion that plaintiff by his own testimony related that he saw the car 3 times before entering the intersection. In this the Honorable Judge is in error. Plaintiff saw the car 2 times, the second time being when it was one half block away and the 3rd time when it was crossing the north part of the said intersection going south and plaintiff was in the inner lane of the south bound lanes on the west side of road. (Tr. 110 - 114).

If this Court cannot agree with the correctness of this requested instruction then we respectfully request that the in-

struction be set out in full in a opinion so that it will be a future guide post to the profession of this state, and, if it so please the Court, state why it differs with the three California cases cited.

Another matter which we wish to speak of, but which has nothing to do with the merits of this cause is this: If, perchance, there is lodged in the mind of any Justice of this Honorable Court that plaintiff's counsel attempted to get the matter of insurance before the jury for the purpose of prejudicing it, we respectfully call attention to the fact that plaintiff's counsel called attention of opposing counsel to what we had by way of statement on insurance by defendant out of the presence of the jury so the court could and did rule on it. (Tr. 131, 135). Then again counsel for plaintiff

asked to introduce exhibit 4 which was agreed to by counsel. This exhibit had stamped on it in large letters the word "insured" which we called to the attention of opposing counsel after he had agreed to let it in. (Tr. 219, 220). Then, again, looking at the exhibit, once more, opposing counsel seeing the word "insured" objected - which objection was taken care of by sticking a paper over it. The proof of what I say can be had by lifting the smallest of the "iron curtains" on this exhibit and referring to the transcript pages noted. If we had wanted to be unfair in these matters we certainly would not have taken such action as we did.

The petitioner respectfully submits that his petition for re-hearing should be granted for the reasons given in

discussion of Point no. 1 and a new trial  
granted.

**Respectfully submitted,**

**Harvey A. Sjoström**  
**Attorney for Appellant.**