

1956

# Margaret Reynolds v. W. W. Clyde & Co. and Fred Gray : Brief of Appellant

Utah Supreme Court

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Case No. 8405

**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

**FILED**  
FEB 20 1906  
Clerk, Supreme Court, Utah

**MARGARET REYNOLDS,**  
**Appellant,**

**vs.**

**W. W. CLYDE & CO., a corporation,**  
**and FRED GRAY,**  
**Respondents.**

**BRIEF OF APPELLANT**

**GEORGE K. FADEL**  
**and**  
**RAYMOND R. BRADY**  
*Attorneys for Appellant.*

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MARGARET REYNOLDS,

*Appellant,*

—vs.—

W. W. CLYDE & CO., a corporation,  
and FRED GRAY,

*Respondents,*

Case No. 8405

---

BRIEF OF APPELLANT

---

GEORGE K. FADEL and RAYMOND R. BRADY,

*Attorneys for Appellant.*

## STATEMENT OF FACTS

This is an appeal by the Plaintiff, Margaret Reynolds, from a verdict and judgment entered in the District Court of Salt Lake County, State of Utah, finding the issues in favor of the Defendants W. W. Clyde & Co., and Fred Gray, for no cause of action in a suit filed by the plaintiff against the defendants for injuries to the plaintiff caused by the alleged negligence of the defendants. Plaintiff will be hereinafter referred to as the appellant, and the defendant will be hereinafter referred to as the respondents.

The appellant filed an action in the District court of Salt Lake County, on October 7, 1953, alleging that on the 17th day of September, 1953, at 7:00 a.m., the appellant W. W. Clyde and Co., was engaged in constructing approaches to an overpass West of U. S. Highway 91 in the vicinity of Becks Hot Springs in Salt Lake County, State of Utah, and at the said time and place the respondent, Fred Gray was an employee of the Respondent W. W. Clyde & Co. and among the duties of the employment of Fred Gray was that of stopping traffic along U.S. highway 91 to allow the earth-moving vehicles and equipment of W. W. Clyde and Co., to cross the highway free from interference of the general traffic on said highway; that the appellant at the time was driving an automobile Northerly along the East side of U.S. Highway 91, and slowed down upon arriving at the crossing; that the respondent, Fred Gray began waving a red flag in such a manner that the appellant reasonably assumed that he intended for the appellant to continue forward rather than to stop; that the plaintiff continued forward and as her vehicle passed the respondent Fred Gray, the flag of the respondent negligently contacted the two side windows on the right side of the vehicle

driven by appellant violently shattering the glass and startling the plaintiff to the extent that the appellant became unnerved, frightened, upset and excited causing the appellant to temporarily lose control of the vehicle which veared to the West toward oncoming traffic before the plaintiff regained sufficient stability to right the course of the automobile, all of which caused the twisting, dislocation, and concussion of the plaintiff's back and nervous system.

The complaint and the amended complaints alleged in different counts that the acts of Fred Gray, were willful and wanton, but during the trial it was stipulated between the attorneys for the respective parties that the issue would be tried solely on the question of negligence.

The evidence was undisputed that the appellant was examined by Dr. Robert Lamb on September 25, 1953, who diagnosed an injury consisting of a protruded intervertebral disc, at the lumbar-sacral joint (R 37). The non surgical treatment failed to correct the injury and on May 21, 1954, appellant was admitted to the hospital for excision of this protruded disc (R 41). The undisputed evidence further shows that the appellant spent \$1477.30 for doctors, hospital, and drug charges in connection with the treatment of the injury to her back.

The appellant testified that on the morning of September 17, 1953, she was traveling Northerly on U.S. Highway 91, going from Salt Lake City to her place of employment in Bountiful; that U.S. Highway 91, at the vicinity of Becks Crossing is a four-lane highway; that if the lanes were numbered 1, 2, 3, and 4, starting from East to West, the appellant was traveling in lane 1 (R 18); that as appellant approached Becks Crossing she slowed down antici-

pating the presence of the flagman; that the flagman was standing on the East side of the highway on the shoulder, just off the pavement; that the flagman had a red flag on the end of a pole and was waving it in a direction parallel with the road and holding the flag down below his waist (R 20); that another vehicle was proceeding ahead of the appellant in the same direction and the appellant assumed that the flagman was waving appellant to proceed forward; that appellant proceeded forward in lane 1, and as she passed the flagman, she noticed from the corner of her eye that the flag pole of the flagman struck the wind wing of the car shattering the right front window of the car (R 20); that the noise of impact and shattering glass frightened and unnerved the appellant so that she lost control of her car to the extent that her car was in lane 3 before she could right it and turn back to the right hand side of the road (R 21); that appellant's left hip bumped against the arm rest on the door as she was turning the vehicle; that the South bound traffic in lanes 3 and 4 were approaching and moving at the same time that appellant was traveling North and there were no earth moving vehicles or trucks crossing the highway at that time; that appellant stopped on the East side of the road a short distance from the flagman and then proceeded another hundred and fifty feet or so, noticed her arm was bleeding, stopped, got out, and brushed glass from the seat (R 22); that she then proceeded to Bountiful, to her place of employment and there informed her co-workers of the incident and also notified the deputy marshal of Bountiful (R 23); that upon arrival at Bountiful she felt pain in her lower back region (R 23); that September 17, 1953, was Thursday; that she continued at work Thursday and Friday but was not able to report Saturday; that on Monday she was feeling

badly and consulted Dr. Diument, (R 27) who referred her to Dr. Lamb, who examined her on September 25, 1953, and subsequently operated to excise the protruded disc (R 37); that appellant had no previous injury to her back which prevented her from doing her work and that she was capable of doing all of her household chores and engage in dancing and other types of recreation such as bowling (R 61 & 62); that since September 17, 1953, appellant has been unable to do anything which requires bending, stooping, or lifting (R 62).

Leo Monks, deputy marshal of Bountiful, Utah, was called and testified that on September 17, 1953, he was deputy marshal and was acquainted with the appellant (R 85); that on said date there was a report made to him regarding the incident on U.S. Highway 91, and that the incident involved a flagman; that he inspected the automobile of Mrs. Reynolds at the time of the report and observed that the right front window on the right hand side was cracked (R 86); that at the time the report of the incident was made by appellant to the marshal, the appellant appeared very nervous, upset, and shaky, in contrast to her usual calm appearance; that the incident was reported to the marshal between 8:00 and 9:00 o'clock of September 17, 1953 (R 87).

Ronald Bradshaw, manager and owner of the Intermountain Glass Co., at Bountiful, testified that sometime during the middle of September, 1953, a vehicle was brought to him by Mrs. Reynolds for purposes of glass replacement (R 90); that the right ventilator glass on the vehicle was quite badly shattered and the door glass was cracked; that he replaced both the ventilator glass and the door glass (R 91).



One of the respondents, Fred Gray, was called as an adverse witness by the appellant (R 95). The respondent, Fred Gray, was the only eye witness to the incident which was the subject of the action. Gray testified that he was first employed by W. W. Clyde on August 3, 1953 (R 95); that he was assigned to the job of flagging traffic on the highway was given a stop sign and a red flag as equipment (R 97); that the stop sign was only used for a short period and then was discontinued and was not being used at the time of this the incident which was the subject of this action; that he continued to work flagging traffic until December 4, 1953 (R 103); that he remembered an incident when a lady driving an automobile passed his flag and then stopped a few feet down the road; that she was traveling in lane 1, when Gray stepped out to flag between lane #1 and 2, and that the lady ran through his flag (R 106); that Gray was flagging by waving his right arm up and down holding the flag; that Gray said he did not know whether the vehicle struck the flag (R 106); that after the lady passed, she ran up on the second lane and continued up the road about a hundred feet from where Gray stood and got out of her car on the right side (R 107); that this lady did not return to have any conversation with Gray (R 107); that the only other experience Gray ever had was when a lady ran through his flag and then came back to apologize for running through the flag (R 107). On direct examination, Mr. Gray was asked the following question:

Q. Mr. Gray, you said that you never did feel any impact between your stick and the automobile, is that right, at any time?

A. No, if anything like that happened it was an accident because she run through my flag and I was trying to stop her and if I hit the car, I hit it accidentally. (R 109)

then Gray further testified as follows: (R 109)

Q. Do you know whether or not you contacted the car?

A. No, I don't.

Q. You don't ever remember feeling it?

A. No.

Q. You said you watched this lady go off to the east side of the road and stop?

A. Yes.

Q. Why did you watch her?

A. Because I was watching them loads coming down the hill and I was watching where she was going. I was wondering where she was going.

Q. Why were you watching the loads, coming down the hill?

A. Because we had all the traffic stopped. He had his traffic stopped and I had mine stopped and she was the only one that went through my flag.

Q. Did she stop at any time?

A. No. Until she got up there and stopped about a hundred feet from where I was standing.

Q. She never stopped at any time?

A. No.

Q. She came right on through lane two and went on by you?

A. Yes.

Q. You said all the traffic was stopped?

A. They was. The outside lane. And I was in there standing there, standing at the middle between one and two and when she come through I was trying to flag her and she was the only car that went through.

Q. Did she dodge you to get through?

A. I stepped back.

Q. You stepped back; what for?

A. So she wouldn't run over me. I was standing right on that between the two lanes one and two.

Q. You were standing between the two lanes and where was she?

A. I was standing right on that line between one and two.

Q. You would say on the line that divides lane one and two?

A. Yes.

Q. Where was her automobile?

A. It came up the second lane and went up there and crossed over and stopped.

Q. Were there any cars stopped in lane one?

A. Yes sir, there were cars stopped, and there wasn't a car—this car up above is all.

Q. You were standing right on the line between lane one and two?

A. Yes.

Q. You had to step back from that line in order to keep from getting hit?

A. Yes, I wasn't going to stand there and let her run over me.

Gray further testified that he was the only watchman ever on duty at the south end of the road during the period (R 110).

The cause was submitted to the jury by instruction essentially ~~is~~ embracing negligence and contributory negligence. *The jury was polled, and the results thereof showed six in favor of the decision and two opposed.* (R 203).

The appellant then moved the court as follows:

1. To set aside the verdict of the jury, and any judgment entered thereon, and to enter judgment in favor of the plaintiff.

2. If the court does not see fit to grant the relief requested in paragraph 1, hereof, plaintiff moves the court for an order granting a new trial herein for the reason that the verdict is against the evidence and is not justified by the evidence adduced in this cause.

## STATEMENT OF POINTS

### Point I

THE TRIAL COURT ERRED IN DENYING THE MOTION OF THE APPELLANT TO SET ASIDE THE VERDICT OF THE JURY AND TO ENTER JUDGMENT IN FAVOR OF THE PLAINTIFF.

### Point II

THE TRIAL COURT ERRED IN DENYING THE MOTION OF THE APPELLANT FOR AN ORDER GRANTING A NEW TRIAL FOR THE REASON THAT THE VERDICT WAS AGAINST THE EVIDENCE.

## ARGUMENT

### Point I

THE TRIAL COURT ERRED IN DENYING THE MOTION OF THE APPELLANT TO SET ASIDE THE VERDICT OF THE JURY AND TO ENTER JUDGMENT IN FAVOR OF THE PLAINTIFF.

In this case the jury in order to find in favor of the respondent for no cause of action would have to find either

(A) That no such incident as claimed by the appellant transpired or

(B) That the appellant, herself was contributory negligent.

The statement of facts (supra) set forth the appellants version of how the defendant, Gray's flag contacted the windows of her vehicle, and her testimony as to the damage was confirmed by the testimony of the deputy marshal, Leo Monks, and the glass repairman, Ronald Bradshaw. The only other evidence of the incident was given by the respondent, Gray. The respondent, Gray, testified (R 105) that he recalled an incident when a lady driving an automobile passed his flag signal and then stopped a few feet down the road; that he couldn't remember the date or the day of the week; that he did not talk to the lady; that the lady ran through his flag, and that he doesn't remember if her car struck the flag as she passed; that she was in the second lane, and after she ran by, she cut across and went up about a hundred feet from where he stood and got out of her car on the right side; that the lady did not come back to talk to him; that the only other experience he ever remembers was when a lady ran through his flag and stopped on the side of the road and then came back and apologized, but he knew of no other instances.

The respondent, Gray, further testified as set forth in the statement of facts (supra-R 109). There can be little doubt that the respondent, Gray, was relating the same incident to which the appellant had reference. Apparently the incident was so significant that the respondent, Gray, remembered in considerable detail just what had transpired, even though he had been on duty since August 3, 1953, as a flagman on a heavily traveled U.S. Highway 91.



Therefore, if the jury concluded that the incident did not happen at all, their decision is not supported by the evidence in any respect and should have been set aside.

As to the problem of whether or not the jury could have found the appellant guilty of contributory negligence, the respondent, Gray, was a private citizen, not a police officer, directing traffic solely for the benefit of his employer. While the respondent may have had a contractual responsibility to regulate and protect the public by use of a flagman, this responsibility did not include police power, and the respondent was acting as a private citizen in the performance of the flagging operations. Assuming then that the respondent was flagging properly and not ambiguously, and that the appellant disregarded the signal, the appellant would not have been under any legal duty to heed the signal of the respondent, a private citizen. (Sadlowski vs. Meeron, et al., Mich 306, 215 N W 422). The appellant's testimony was that the respondent's flag was down at his side at the time she started to pass the respondent (R 20); whereas the respondent Gray, testified that he was standing between lanes one and two and that as appellant approached, respondent stepped back in order to keep from getting hit (R 110), and that if there were any impact between the stick and the automobile, it was an accident, because appellant ran through the flag and respondent was trying to stop her, and if respondent hit the appellant's car he hit it accidentally (R 109 lines 1 to 5).

The respondent, Gray's, testimony was such that it is difficult to determine what his impression of the incident really was. If in fact, the respondent, Gray, stepped back as the appellant's car approached, there would have been

no contact at all between the respondent's flag and the appellant's car; while the respondent was reluctant to admit any contact between the flag and the car, the incident of the lady passing through and stopping on the east side of the road was sufficiently clear in his mind in detail and he was willing to admit that if his flag did hit the car, it hit accidentally. To avoid the flag contacting the appellant's car, the respondent need only to have lowered the flag. Respondent, Gray, said he had traffic stop in lane 1, and that he was standing on the line between lane 1 and 2, and that as appellant came by, the appellant stepped back to keep from getting hit. If this were true, the appellant's car could not have come near enough to respondent to contact the flag, since the respondent testified that the appellant was always in lane two. The only conceivable way that the jury could have found the plaintiff guilty of contributory negligence would be a situation where the respondent, Gray, would be standing with his flag extended horizontally at about the level of the windows of the automobile, and that the appellant, having sufficient time and opportunity to stop or otherwise avoid the flag, nevertheless drove against the flag; but nowhere in the evidence can the existence of this situation be found.

In apparent disregard of the necessity to avoid ambiguity <sup>IV</sup> and signaling, the respondent, Gray, testified that the stop sign which was given to him by his employer to use in conjunction with the flag, which had clearly written on it the word stop, was not used by the respondent, Gray, after about a week (R 98) and that the respondent, Gray, discontinued the use of said sign upon his own initiative and without the instruction of his employer.

## Point II

THE TRIAL COURT ERRED IN DENYING THE MOTION OF THE APPELLANT FOR AN ORDER GRANTING A NEW TRIAL FOR THE VERDICT WAS AGAINST THE EVIDENCE.

The argument advanced in support of point #1 should apply with even greater force and affect to this argument under point #2. The duty of a trial judge in considering a motion for new trial is set forth in *King v Union R. R. Co.* —U—, 212 P2d 692, at page 696, where this court held as follows:

“The duty of a trial judge in considering a motion for a new trial was well stated in *Nelson v Angeles Hospital Ass’n of Los Angeles*, 23 Cal. App. 2d 71, 72 P. 2d 169, 171. There the court said:

“ ‘The law is well established that, on consideration of a motion for a new trial on the ground of insufficiency of the evidence to justify the verdict or decision, a trial court is not particularly concerned with the fact (if it so appear) that \*\*\* the evidence is ‘conflicting.’ To the contrary, notwithstanding any such conflict, or even though the apparent weight of the evidence should be in support of the ‘verdict or decision,’ since it is the personal duty of the trial judge to weigh and to consider the evidence and to reach a just conclusion thereon, *if he be satisfied that the verdict or decision in question is not in fact supported by the evidence, or that it is contrary to the weight of the evidence, he is not only authorized, but it is his bounden duty to grant a motion for a new trial.* 20 Cal. Jur. 117, 118, and authorities there cited. In such a situation, on appeal from the order, all



that is required to sustain it is the fact that the record discloses substantial evidence in support of the conclusion that has been reached by the trial court in that respect.' "

The trial judge in the instant case at the time of hearing on the motion for a new trial stated that while, as a trier of fact he may have reached a different conclusion, yet he did not feel that the trial judge should substitute his own opinion or judgment for that of the jury. If this were the position to be taken by all trial judges, there would be no instance in which the court would grant a new trial. It would seem then that the trial court should have exercised his duty to grant the motion for a new trial if the verdict were against the weight of the evidence, and failure to do so is an abuse of discretion.

## CONCLUSION

It is respectfully submitted that the cause should be remanded to the lower court for a new trial.

Respectfully submitted,

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