

1958

# Ruth Ethel Drury Marshall et al v. George T. Tayler : Brief of Respondents

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Romney & Nelson; Donn E. Cassity; Jack L. Crellin; Attorneys for Respondent;

---

## Recommended Citation

Brief of Respondent, *Marshall v. Tayler*, No. 8792 (Utah Supreme Court, 1958).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/3012](https://digitalcommons.law.byu.edu/uofu_sc1/3012)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

FILED  
MAY 21 1958

Clerk, Supreme Court, Utah

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

RUTH ETHEL DRURY MARSHALL,  
et al.,

*Plaintiffs and respondents,*

vs.

GEORGE T. TAYLER,

*Defendant and Appellant*

UNIVERSITY UTAH  
DEC 19 1958  
LAW LIBRARY  
Case No. 8792

**BRIEF OF RESPONDENTS**

ROMNEY & NELSON

DONN E. CASSITY

JACK L. CRELLIN

*Attorneys for Respondent*

## SUBJECT INDEX

	<i>Page</i>
STATEMENT OF THE CASE .....	1
STATEMENT OF FACTS .....	2
STATEMENT OF POINTS .....	3
ARGUMENT .....	4
POINT 1. PLAINTIFFS DID NOT ASSUME THE RISK OF INJURY TO THEMSELVES BY PLAC- ING THEMSELVES IN A KNOWN POSITION OF PERIL .....	4
POINT II. PLAINTIFFS DID NOT TRESPASS UPON DEFENDANT'S MOTOR VEHICLE. HOWEVER, EVEN IF PLAINTIFFS WERE TRESPASSERS, THE DEFENDANT WAS UNDER A DUTY TO EXERCISE REASON- ABLE CARE TO AVOID INJURING THEM AFTER THE DEFENDANT KNEW THEY WERE IN A POSITION OF PERIL .....	7
POINT III. THE COURT DID NOT ERR IN REFUSING DEFENDANT'S MOTION FOR DIRECTED VERDICT OF NO CAUSE OF ACTION .....	11
POINT IV. THE COURT DID NOT ERR IN GRANTING PLAINTIFFS' MOTION TO SUB- MIT THE ISSUE OF ORDINARY NEGLIGENCE TO THE JURY .....	16
POINT V. A WIFE DOES HAVE A CAUSE OF ACTION AGAINST HER HUSBAND FOR A NON-INTENTIONAL INJURY INFLICTED BY HER HUSBAND DURING COVERTURE, AND ESPECIALLY IS A HUSBAND UNDER A DUTY TO EXERCISE REASONABLE CARE TO AVOID INJURING HIS WIFE AFTER HE KNOWS SHE IS IN A POSITION OF PERIL.....	16
CONCLUSION .....	21

## SUBJECT INDEX—(Continued)

### INDEX OF AUTHORITIES

	<i>Page</i>
Bennett v. Bennett 224 Ala. 335, 140 So. 378 .....	19
Brown v. Brown 88 Conn. 42, 89 Atl. 889 .....	18, 19
Brown v. Gosser (Ky.) 262 SW2d 480 .....	19
Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432, 44 A.L.R. 785 .....	19
Byers v. Gunn 81 So. 2d 723 .....	9, 20
Carter v. Hayner 269 S.W. 216 .....	8
Clay v. Dunford 121 Ut. 177, 23 P.2d 1075 .....	7
Courtney v. Courtney 184 Okla. 395, 87 P2d 660 .....	19
Fitzmaurice v. Fitzmaurice 62 N.D. 191, 242 N.W. 526 .....	19
Fontaine v. Fontaine 205 Wis. 570, 238 N.W. 410 .....	19
Ice Delivery Co. v. Thomas 290 Ky. 230, 160 S.W.2d 37 .....	9
Katzenburg v. Katzenburg 183 Ark. 626, 37 S.W.2d 696 .....	19
Rains v. Rains 97 Colo. 19, 46 P.2d 740 .....	19
Roberts v. Roberts 185 N.C. 566, 118 S.E. 9, 29 A.L.R. 1479 .....	19
Taylor v. Patten 2 Ut. 2d 404, 275 P.2d 696 .....	16, 18, 20, 21
Voltz v. Orange Vol. F. Ass'n 118 Conn. 307, 172 A. 220 .....	9
Western Union Tel. Co. v. Hill 25 Ala. App. 540, 150 So. 709.....	12

### TEXTS

Blacks Law Dictionary .....	8
Prosser on Torts .....	12, 21
43 AL.R. 2d 634 .....	21

# IN THE SUPREME COURT of the STATE OF UTAH

---

RUTH ETHEL DRURY MARSHALL,  
et al.,

*Plaintiffs and respondents,*

vs.

GEORGE T. TAYLER,

*Defendant and Appellant*

Case No. 8792

---

BRIEF OF RESPONDENTS

---

## STATEMENT OF THE CASE

Ruth Ethel Drury Marshall brought action against

the defendant, George T. Tayler, for personal injuries arising out of an alleged tortious act of the defendant; Fern Drury Tayler through intervention, sought recovery for personal injuries to herself resulting from the same alleged tortious act of the defendant.

Fern Drury Tayler was the wife of the defendant during all the time with which we are concerned. However, the defendant had filed his action for divorce from Fern Drury Tayler prior to the accident complained of and said filing regularly resulted in a divorce decree being entered on or about October 16, 1956.

From a jury verdict in the Court below, the appellant appealed his cause to this Honorable Court.

### STATEMENT OF FACTS

The appellant's statement of facts contained in his brief on appeal is fairly representative of the facts in this case with the exceptions and omissions thereto being herewith set forth.

The defendant states that there is "some" testimony that he "weaved" his car when backing up from the motel the night of the accident which gave rise to plaintiff's action for damages, when in fact the husband of plaintiff Ruth Ethel Drury Marshall testified that the defendant "zig-zagged" back and forth both in going backward and in driving forward after completing his backward motion (Tr. 121-122). The plaintiff Fern Drury Tayler (Tr. 161-162), the plaintiff Ruth Ethel Drury Marshall (Tr. 262-266), and the plaintiffs' mother

Ethel G. Drury (Tr. 281-282) all testified to this fact. Defendant fails to point out in his brief that after backing up in the aforementioned zig-zagging manner the appellant instantly proceeded forward in the same manner and knocked the plaintiff Fern Drury Tayler from the automobile by driving so close to a soft-drink machine that she was slammed forcefully against it (Tr. 162-163, 263, 265-266). Defendant continued to zig-zag under the canopy of a service station and drove so close to a gas pump that the plaintiff Ruth Ethel Drury Marshall was dragged against it (Tr. 265-266).

Defendant also alleges in his brief that plaintiffs abandoned the theory of intentional injury and ill will by the statement of plaintiffs' counsel (Tr.156) that "I do not intend to show he had any ill will, your Honor." That this statement had reference only to the particular facts upon which the questions were then being directed is borne out by the failure of defendant's counsel to ask for a dismissal of the case at that time upon the grounds that the trial, at this point, was proceeding upon the pre-trial order limiting the issue to intentional injury. Further proof upon this point lies in the fact that the case was submitted to the jury upon the basis of intentional injury which was not objected to by defendant upon the ground complained of herein.

## STATEMENT OF POINTS

### POINT I

#### PLAINTIFFS DID NOT ASSUME THE RISK OF INJURY

TO THEMSELVES BY PLACING THEMSELVES IN A KNOWN POSITION OF PERIL.

#### POINT II

PLAINTIFFS DID NOT TRESPASS UPON DEFENDANT'S MOTOR VEHICLE. HOWEVER, EVEN IF PLAINTIFFS WERE TRESPASSERS, THE DEFENDANT WAS UNDER A DUTY TO EXERCISE REASONABLE CARE TO AVOID INJURING THEM AFTER THE DEFENDANT KNEW THEY WERE IN A POSITION OF PERIL.

#### POINT III

THE COURT DID NOT ERR IN REFUSING DEFENDANT'S MOTION FOR DIRECTED VERDICT OF NO CAUSE OF ACTION.

#### POINT IV

THE COURT DID NOT ERR IN GRANTING PLAINTIFFS' MOTION TO SUBMIT THE ISSUE OF ORDINARY NEGLIGENCE TO THE JURY.

#### POINT V

A WIFE DOES HAVE A CAUSE OF ACTION AGAINST HER HUSBAND FOR A NON-INTENTIONAL INJURY INFLICTED BY HER HUSBAND DURING COVERTURE, AND ESPECIALLY IS A HUSBAND UNDER A DUTY TO EXERCISE REASONABLE CARE TO AVOID INJURING HIS WIFE AFTER HE KNOWS SHE IS IN A POSITION OF PERIL.

### ARGUMENT

#### POINT I

PLAINTIFFS DID NOT ASSUME THE RISK OF INJURY TO THEMSELVES BY PLACING THEMSELVES IN A KNOWN POSITION OF PERIL.

Defendant contends that the act of plaintiffs in running to the separate sides of defendant's automobile, a 1955 Cadillac Coupe deVille, and holding on to the door handles thereof constituted an assumption of risk on their part for the damages sustained by them. The evidence is undisputed that the plaintiffs did hold on to

the handles of the car doors as they leaned over to attempt conversation with the defendant who was sitting in the driver's seat with the doors and windows locked (Tr. 161, 171, 260, 277, 294). Certainly the act of holding a door handle on an automobile while carrying on a conversation with one inside the automobile is a common, everyday experience for all of us. Such an act cannot be said to be inherently dangerous and known to be so by those of us who automatically act as the plaintiffs did in this instance by holding the automobile door handle for support while directing conversation to the occupant therein. And this is even more common in this day and age of low-built automobiles which an individual of ordinary height can see entirely over by standing erect. The plaintiff Fern Drury Tayler testified that the sudden jerk and simultaneous weaving of the automobile as the defendant put it in reverse motion swept her off her feet and she thereafter instinctively held on to the door handle to avoid being thrown under the weaving wheels of the auto. As the car weaved backwards she was unable to regain her balance, and the automobile's forward motion was so instantaneous with the end of its backward movement that she was never able to right herself and would have most assuredly been run over had she let go of the door handle. In fact she never let go of the door handle until she was knocked off the vehicle by being slammed against an object, namely a soft-drink vending machine (Tr. 161-

162). The same situation prevailed as to the plaintiff Ruth Ethel Drury Marshall according to her testimony (Tr. 262-263), except that she was eventually dragged against a gas pump (Tr. 263, 266). Even this painful experience did not cause her to let go of the door handle for fear of her life and it was not until the defendant's automobile headed for the open highway, at the same time picking up terrific speed, that she felt her better chance for survival required her to let go of the door handle (Tr. 266). Contrary to defendant's allegations, neither of the plaintiffs were in a known position of danger until the defendant's wrongful act swept them from their feet and from that time on they acted as any reasonable person under the circumstances would have acted. They were then faced with the choice of dropping off the automobile and risking their lives under the viciously weaving wheels or to continue to hold on to the door handles in the hope that ordinary, human compassion would lead the defendant to relieve them from their peril. That they chose the latter course is not surprising — in fact it is reasonable to assume that any ordinary individual under like circumstances would have acted in the same manner. And the jury, upon proper instruction by the court on the doctrine of assumption of risk, so found (R. 73, 84, 88). The authorities cited by defendant thus have no application to the facts of this case, and this court should not, as a matter of law, reverse the jury's findings upon the alleged defense of

assumption of risk. Defendant relies upon the tests laid down by this court in *Clay v. Dunford*, 121 Utah 177, 239 P. 2d 1075, as supporting his defense. The tests outlined therein for a valid defense of assumption of risk included (1) that the plaintiff must have looked, must have seen and must have known of the danger, and (2) that he volutarily subjected himself thereto. As stated by the court in that case, "knowledge of the risk is the watch-word of \* \* \* assumption of risk." It is respectfully submitted that these plaintiffs had no knowledge of any risk based upon a visual and considered appraisal of conditions confronting them until their very survival depended upon their ability to cling to the door handles of defendant's automobile. In this regard the jury was in unanimous agreement. See the case of *Byers v. Gunn* discussed under Point II wherein the plaintiff and three others had seated themselves upon the front fenders and hood of defendant's car after being refused admittance and plaintiff was thereafter thrown from the car and injured. In that case the court held that the plaintiff was not guilty of assumption of risk or contributory negligence as a matter of law and refused to interfere with the jury's conclusion in these matters after it was properly instructed by the trial court.

## POINT II

PLAINTIFFS DID NOT TRESPASS UPON DEFENDANT'S MOTOR VEHICLE. HOWEVER, EVEN IF PLAINTIFFS WERE TRESPASSERS, THE DEFENDANT WAS UNDER A DUTY TO EXERCISE REASONABLE CARE TO AVOID INJURING THEM

AFTER THE DEFENDANT KNEW THEY WERE IN A POSITION OF PERIL.

A trespasser is defined as "One who has committed trespass; one who unlawfully enters or intrudes upon another's land, or unlawfully and forcibly takes another's personal property." Black's Law Dictionary. A "trespass" is a transgression or wrongful act, and in its most extensive signification includes every description of wrong, and a "trespasser" is one who does an unlawful act, or a lawful act in an unlawful manner, to the injury of the person or property of another. *Carter v. Haynes*, (Court of Civil Appeals of Texas), 269 S.W. 216. It is difficult to see how the plaintiffs in this case (one the wife of the defendant — the other his sister-in-law) ~~would~~ <sup>could</sup> be held to be trespassers upon the defendant's automobile. They testified that they only wanted to talk to the defendant (Tr. 161, 260-261), and they had no intention of interfering with his possession of the automobile (Tr. 171, 277-278). Certainly this wife had the right to converse with her husband and to hope that he might respond. It would seem that the same privilege of communication should extend to his sister-in-law without constituting a trespass. Their holding of the automobile handles for the mere purpose of balance while attempting to converse with the defendant did not in any manner conflict with his possessory interest in the automobile nor did they cause any injury or exercise dominion over this automobile in any way damaging to the defendant. We respectfully submit that this

act of plaintiffs in holding onto the door handles of this automobile did at no time constitute a trespass upon the defendant's motor vehicle. It is certainly an ordinary occurrence for a wife to exercise dominion over her husband's automobile to a much greater degree than the mere holding of its door handles before being considered a "trespasser".

However, even if these plaintiffs were to be considered trespassers, the defendant would have no reason to complain of the negligence verdict in this case. It is a true statement of the law that the operator of an automobile owes to trespassers only the duty to refrain from wantonly or willfully causing injury to them after their presence becomes known to the driver. *BUT where the operator knows that the trespasser is in a position of peril, he is under a duty to exercise reasonable care to avoid injuring him.* *Voltz v. Orange Volunteer Fire Association*, 118 Conn. 307, 172 A. 220; *Ice Delivery Company v. Thomas*, 290 Ky. 230, 160 S.W.2d. 37. Defendant cites the case of *Byers v. Gunn*, Florida, 81, So.2d. 723, in support of their claim when in fact that case is directly in point in this case to support the plaintiffs' position. In the *Gunn* case the defendant's minor daughter, while driving her father's automobile, had stopped at a stop street. Four youngsters, including the plaintiff, approached the car and asked for a ride, which was refused. The daughter rolled up the windows and locked the doors, whereupon the four intruders sat down on the front fenders and hood of the car. The driver started

the car in motion and, after attaining speeds up to 40 miles per hour, stepped on the brake causing the plaintiff to be thrown off and severely injured. The Supreme Court of Florida, affirming the lower court, allowed the plaintiff to recover upon a verdict of negligence. In so holding the court stated:

The injured girl was a trespasser and the trial judge so informed the jury. The rule of law is clear that the standard of care owed to a trespasser is to refrain from committing a willful or wanton injury. *This rule, however, gives way to the further proposition that after discovery of the peril to a trespasser, the driver of the automobile is then duty-bound to exercise reasonable care and caution under the circumstances.* Absent contributory negligence on the part of the injured person there would appear to be no justifiable excuse for injuring a person in a position of manifest peril if such injury can be reasonably avoided, or as otherwise stated, if such injury can be avoided by the exercise of reasonable care and caution in the light of all the circumstances in the particular case.

*The court further held in this case that it could not be concluded as a matter of law that the plaintiff was guilty of contributory negligence or assumption of risk, and that the court was not justified in substituting its judgement for that of the jury.*

There can be no question but that the defendant in this case was aware of the peril of the plaintiffs after he put his automobile in motion. The weaving and zig-zagging previously referred to was aimed directly at

dislodging the plaintiffs from their precarious positions in being dragged while holding the door handles of the automobile. Furthermore it was testified on behalf of plaintiffs that there was no reason for defendant to drive under the canopy of the service station (Tr. 151, 163-164). The fact that one plaintiff was slammed against a cola vending machine and the other against a gas pump as a result of this choice of direction by defendant is too far outside the realm of chance to have been accidental. The defendant himself testified that the plaintiffs were hanging on to his car handles (Tr. 335, 336). He also testified that "I looked to the side of me, and it seemed to me, I saw Fern drop off." (Tr. 295). Also "I saw Ruth's head bouncing up and down" (Tr. 295), and "I pulled along and I kept on going, until Ruth finally saw I was going, and she let go, and when she did, I knew she had made a mistake." (Tr. 296). The jury found that the defendant did not use due care for the safety of the plaintiffs (R. 83, 86) and that plaintiffs did not assume the risk of injury to themselves (R. 84, 88) nor were they contributorily negligent (R. 84, 87). In view of the above the verdict of the jury must be sustained.

### POINT III

**THE COURT DID NOT ERR IN REFUSING DEFENDANT'S MOTION FOR DIRECTED VERDICT OF NO CAUSE OF ACTION.**

We shall first consider that portion of defendant's motion asking for a directed verdict based upon the ground that plaintiffs committed an assault upon him.

An assault is any act of such a nature as to excite an apprehension of a battery. It is well settled law that an assault must amount to an offer to use force and there must be an apparent present ability and opportunity to carry out the threat immediately. Prosser on Torts, §10, p. 50; *Western Union Tel. Co. v. Hill*, 25 Ala. App. 540, 150 So. 709. In this case there is no evidence whatsoever of an offer to use force upon the defendant by the plaintiffs, and certainly no threat nor threatening movement on the part of the plaintiffs. In fact the evidence is conclusive that the plaintiffs nor no members of their families had ever threatened the defendant — in fact they were very good friends, including plaintiff Marshall's husband (Tr. 114, 170, 178), and the plaintiff Marshall (Tr. 275). Plaintiff Tayler testified that she had never had an altercation with her husband, the defendant, nor did they ever have a violent argument in the sense that either lost his temper and struck the other (Tr. 155). In fact the record indicates only one argument in which any of the principals in this action were active and the record is conclusive upon the fact that the defendant precipitated the whole argument by referring to the plaintiff's grandmother as a "wicked, cruel old witch" upon being shown her picture (Tr. 177, 257, 290). The defendant even admits that Mr. Marshall took no part in this exchange of words (Tr. 290).

Indicative of the defendant's entire failure to make out an assault upon him at the time of the accident here

involved are the following portions of his testimony:

“\* \* \* and if she (Mrs. Marshall) could stall me until Monty (Mr. Marshall) got out of the truck — the danger was coming from Monty, not these two women.” (Tr. 343).

“When I looked back, Mr. Marshall was coming between the service station \* \* \* and I did not know whether he had anything in his hand or not. I could not see because of the darkness.”

Upon being asked if he saw something in his hand, he answered “No, I could not see.” (Tr. 366).

“I was more or less afraid of Mr. Marshall, and Mr. Marshall is a tire man. I did not know what he would do in a case where I am going to drive away \* \* \*.

Mr. Marshall is a very fine man. Mr. Marshall and myself never had any trouble \* \* \*.”

And in answer to the question whether defendant ever knew of Mrs. Marshall suggesting to her husband that he beat up the defendant, the defendant answered “No.” (Tr. 332).

“As I looked out the back of my car, I saw Mr. Marshall coming through between the pumps of the service station. Now whether he would do anything, I don’t know, but I knew he was coming, and I was not taking any chances \* \* \*.” (Tr. 296).

“I am not afraid of Mr. Marshall \* \* \*.” (Tr. 333).

The evidence clearly indicates that no time was defendant faced with a threat of battery or the use of force let alone the further requisite of present apparent ability on the part of plaintiffs to carry into effect any imagined violence on the person of the defendant. The courts have

been reluctant to protect extremely timid individuals from exaggerated fears of contact, and have required quite uniformly that the apprehension be one which would normally be aroused in the mind of a reasonable person. Prosser on Torts, *supra*. The defendant clearly intended to avoid any conversation with the plaintiffs and the plaintiffs' pleadings with defendant to let them talk to him cannot be said to constitute an assault upon him.

As to the defendant's second ground for a directed verdict based upon the theory of plaintiffs being trespassers and guilty of assumption of risk and contributory negligence as a matter of law, we refer the Court to our argument under Points I and II. For the reasons stated in Point II, the plaintiffs were not trespassers, and even if they were, the defendant owed them the duty to exercise reasonable care to avoid injuring them after their position of peril became apparent to him. For the reasons stated under Point I, plaintiffs were not guilty of assumption of risk. For the same reasons the plaintiffs were not contributorily negligent. The jury, being properly instructed upon these points without exception being taken thereto by defendant, found the plaintiffs to be free of contributory negligence and this court should not, as a matter of law, interfere with that finding. Defendant cites to the court many rulings of this court to the effect that contributory negligence becomes a question of law where the evidence is such that reasonable minds could not differ that the conduct in question failed to meet the standard of due care. These cases are absolutely correct, but we cannot agree with defendant that reasonable minds could not differ upon the standard

of care exercised by plaintiffs in this case. We submit that the act of holding onto an automobile door handle while conversing, or attempting to converse, with one inside the automobile cannot be said to violate the standard of due care. And plaintiffs' continued grasp on the door handles after being swept from their feet by defendant's wrongful action certainly cannot be said to fail the test of due care, as a matter of law, when the only alternative at that time was to drop off and risk their lives under the weaving wheels of the automobile. We further submit that defendant's argument to the effect that the plaintiffs should have released the door handles during that fleeting moment that the automobile necessarily stood still when changing from reverse to forward motion is not satisfactory in light of the facts as testified by plaintiffs, and apparently believed by the jury, that they were unable to perceive of any immobility of the automobile and were unable to regain their balance before the defendant's forward weaving motion continued them in their position of peril. To say that reasonable minds could not differ as to lack of due care shown by plaintiffs under these circumstances would do violence to all concepts of justice. In fact it would seem more conscionable to hold that reasonable minds must conclude that the conduct of plaintiffs met every standard of due care. The minds of eight reasonable jurymen so concluded.

## POINT IV

THE COURT DID NOT ERR IN GRANTING PLAINTIFFS' MOTION TO SUBMIT THE ISSUE OF ORDINARY NEGLIGENCE TO THE JURY.

As to defendant's further reiteration of his claim that plaintiffs were trespassers, we herewith incorporate the argument set forth in our Point II.

## POINT V

A WIFE DOES HAVE A CAUSE OF ACTION AGAINST HER HUSBAND FOR A NON-INTENTIONAL INJURY INFLICTED BY HER HUSBAND DURING COVERTURE, AND ESPECIALLY IS A HUSBAND UNDER A DUTY TO EXERCISE REASONABLE CARE TO AVOID INJURING HIS WIFE AFTER HE KNOWS SHE IS IN A POSITION OF PERIL.

The record in this case is conclusive that defendant had filed his suit for divorce from plaintiff Fern Drury Tayler sometime prior to the date of the accident complained of (Tr. 168-169, 285) and the divorce decree was granted defendant on or about October 16, 1956 (Tr. 290). And the record is further conclusive that the defendant and his wife, plaintiff Fern Drury Tayler, were not living together at the time of the injury which precipitated this action, nor were they living together under the same roof at any time during their entire 5½ years of marriage (Tr. 153-154, 167-168, 194-195, 198-201, 208, 285-286, 291, 302-303, 306, 323).

Defendant relies upon the limitation of this Court's opinion based upon the facts in the case of *Taylor v. Patten*, 2 Utah 2d. 404, 275 P.2d 696, to sustain his argument that a wife may not sue her husband for a non-intentional injury inflicted by the husband during cov-

erture. In that case, an action against plaintiff's former husband for assault on plaintiff while they were living apart during the interlocutory period of their divorce action, this Court ruled that, under statutes then existing and unchanged at the present time, "\* \* \* a wife may recover from her husband for intentionally inflicted injuries." This holding was necessarily restrictive because of the facts presented by the case. However, in arriving at this conclusion, the court was presented with the problem of whether our Husband and Wife statutes removed the disability of a wife to sue or be sued at common law without regard to the nature of the action or the intent involved. In arriving at his conclusion Justice Wade reasoned thus:

\* \* \* Under modern Husband and Wife statutes, such as ours, this fiction has been *completely eliminated* and the wife has been *completely emancipated* from this inability to own, control and manage her property, and *from her inability to sue or be sued for the protection of her property and personal rights*. The reason for her inability and lack of rights has been *completely eliminated* with the logical result that such courts hold her disabilities and loss of rights have *completely disappeared* with the common law fiction that the husband and wife are one. *Since the reason on which that disability was based has been eliminated, it is not necessary now to have an additional express statutory provision declaring that marriage does not disable a party thereto in enforcing tort liability against the other spouse.*

There is nothing in the above reasoning of the Court which would indicate that the removal of the wife's common law disabilities under our statutes should be construed to include only redress for <sup>intentionally</sup> ~~intentional~~ inflicted injuries. Quite to the contrary, the use of terms such as "completely eliminated", "completely emancipated", "completely disappeared", and "marriage does not disable a party thereto in enforcing tort liability against the other spouse" indicate the Court's feeling that the entire field of a wife's common law disabilities, including the right to sue her husband for injuries inflicted negligently as well as intentionally, was abrogated by the Utah statutes.

As a further indication of this Court's recognition of the right of a married woman to sue her husband for negligent tort we further quote from the *Taylor v. Patten* case:

\* \* \* From the foregoing it is clear that the legislature intended to establish the separate identity of the husband and wife *in all property and personal rights the same as if they were not married*. Giving these statutes a liberal construction to effect their objects and in the interest of justice requires us to hold that *a wife can sue and be sued the same as if she were unmarried*. \* \* \*

In the case of *Brown v. Brown*, 88 Conn. 42, 89 Atl. 889, an action by a wife against her husband to recover damages for assault and battery and false imprisonment, the court, in holding that the action would lie

under the Connecticut Married Woman's Act, said:

\* \* \* The right to contract with the husband, and to sue him for breach of contract, and to sue for torts, is not given to the wife by the statute. These are rights which belonged to her before marriage, and, because of the new marriage status created by the statute, are not lost by the fact of marriage, as they were under the common-law status. The status of the parties after marriage being fixed, there was no occasion for providing in express terms what the consequences would be. They followed logically. \* \* \*

In *Bushnell v. Bushnell*, 103 Conn. 583, 131 Atl. 432, 44 A.L.R. 785, the Connecticut court applied the decision in *Brown v. Brown* to a case of negligence. Likewise, the following cases have permitted a wife to sue her husband for negligent tort under similar married women's statutes: *Courtney v. Courtney*, 184 Okla. 395, 87 P.2d 660; *Bennett v. Bennett*, 224 Ala. 335, 140 So. 378; *Katzenberg v. Katzenberg*, 183 Ark. 626, 37 S.W.2d 696; *Rains v. Rains*, 97 Colo. 19, 46 P.2d 740; *Roberts v. Roberts*, 185 N.C. 566, 118 S.E. 9, 29 A.L.R. 1479; *Fitzmaurice v. Fitzmaurice*, 62 N.D. 191, 242 N.W. 526; *Fontaine v. Fontaine*, 205 Wis. 570, 238 N.W. 410; *Brown v. Gosser* (Ky.), 262 S.W. 2d. 480.

As was stated in the exhaustive study of this problem in the Courtney case, supra: "Nor can the difference in the nature of the torts committed be seriously considered from a legal standpoint \* \* \*. In the case of a negligent tort, the wife has suffered a wrong for which

the law should provide a remedy just as in the case of wilful tort.”

In light of the above authorities, and the reasoning employed by this Court in arriving at its conclusion in the *Taylor v. Patten* case, plaintiffs submit that the Utah statutes do, in fact, accomplish a complete emancipation for married women from their common-law disabilities including the right to sue their spouses for injuries resulting from negligent, as well as wilful, tort.

And, assuming for sake of argument, that the rule in *Taylor v. Patten* does in fact negate the recovery by a wife against her husband for negligent conduct, plaintiffs are of the opinion that the exception to the requirement of intentional injury in the case of trespassers would be applicable to this case, namely that the defendant was under a duty to exercise reasonable care to avoid injuring his wife after he discovered her in a position of peril. An operator of an automobile owes to trespassers only the duty to refrain from intentionally causing injury to them, but where the trespasser is in a position of peril known to the operator, he is then under the duty to exercise reasonable care to avoid injuring the trespasser. *Byers v. Gunn*, supra. We can see no difference in that case and the one posed by defendant assuming that plaintiff Tayler could recover only for intentional acts of the defendant. We incorporate our arguments set forth in Point II as equally applicable to the situation herein assumed.

The serious consequences which have often been suggested as the reason for eliminating the disability at common law of a married woman to sue her husband for his tortious acts simply have not materialized. This Court recognized this fact in the *Taylor v. Patten* case, *supra*, when it made note of the fact that the number of states which do allow such a recovery is constantly increasing. Likewise the legal writers have followed almost unanimously the growing minority. Prosser on Torts, §99, p. 904, has this to say on the subject:

An exhaustive analysis of the problem in a recent Oklahoma decision (*Courtney v. Courtney*, *supra*) seems to leave no justification for the majority rule except that of historical survival.

Defendant cites an exhaustive annotation, 43 ALR 2d 634, in which the majority rule is referred to as a “dwindling majority.” This undisputed fact that the jurisdictions embracing the doctrine of a wife’s right to sue her husband in tort are steadily increasing is most significant of the fitness of such a rule to assimilate itself with the public policy and needs of the present day. This court having taken the proper step forward by its decision in *Taylor v. Patten*, *supra*, should not now reverse itself and thereby adopt an outmoded and archaic fiction, born of the “dark ages”, which is now withering and destined to die upon the vine of progress.

## CONCLUSION

The evidence in this case clearly sustains the judgment of the lower court. Plaintiffs were not trespassers

upon the property of the defendant, nor were they guilty of assault, contributory negligence or assumption of risk for their resultant injuries. These injuries were the sole result of defendant's negligence in failing to exercise the ordinary degree of care required of him toward the plaintiffs, and the jury so found upon proper instruction.

This Court has, upon mature reflection and analysis, aligned itself with the decisions of a rapidly growing minority by heretofore holding that a married woman, under our statute, may sue her husband for injuries suffered as a result of his tortious acts upon her person including negligent as well as intentional violations thereof, and, therefore, the judgment of the lower court should be affirmed, and plaintiffs awarded their costs on this appeal.

Respectfully submitted

ROMNEY AND NELSON  
DONN E. CASSITY  
JACK L. CRELLIN

*Attorneys for Respondents*