

1958

# Samuel R. Thurman v. Eldon Edward Partridge : Brief of Appellant

Utah Supreme Court

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Warren M. O'Gara; Counsel for Appellant;

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

**FILED**  
- 1958

SAMUEL R. THURMAN,

*Plaintiff and Appellant,*

vs.

ELDON EDWARD PARTRIDGE,

*Defendant and Respondent.*

Clerk Supreme Court, Utah

Case  
No. 8807

**BRIEF OF APPELLANT**

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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SAMUEL R. THURMAN,

*Plaintiff and Appellant,*

vs.

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*Defendant and Respondent.*

Case  
No. 8807

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## BRIEF OF APPELLANT

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### STATEMENT OF FACTS

This is an appeal from a decision by Joseph G. Jeppson, Judge, Third District Court in and for Salt Lake County, Utah granting judgment for the defendant and against the plaintiff of no cause of action on the complaint. This case was commenced in the City Court for Salt Lake City, Utah where it was tried and a judgment was entered in favor of the plaintiff. The defendant then appealed to the Third District Court where the case was tried to the court setting without jury.

The claims of plaintiff arise from a two automobile collision which occurred on February 18, 1956 at the intersection of Cleveland Avenue and Major Street in Salt Lake City, Salt Lake County, Utah. Immediately prior to the collision plaintiff was operating his automobile in a northerly direction on Major Street and the defendant was operating his vehicle in a westerly direction on Cleveland Avenue.

Major Street and Cleveland Avenue are each two lane, surfaced streets with dirt or gravel shoulders and there being no curbing bordering either street. Facing the traffic on Cleveland Avenue was posted and erected "Yield The Right of Way" signs such as are erected throughout Salt Lake City. Upon the common or southeast corner there was situated a house and trees between the house and the south edge of Cleveland Avenue and the east edge of Major Street.

The time of the collision was approximately 11:20 a.m. Upon the morning, prior to the collision, snow had fallen and was six inches deep on the ground and upon the two streets and in the intersection of Major Street and Cleveland Avenue. It had ceased snowing at the time of the collision.

Plaintiff testified that he was familiar with the intersection, the fact that there was a "Yield-Right-of-Way" sign against Cleveland Avenue traffic (TR30) and that he drove the street daily because he lived a short distance south of the intersection and he took this route to go to his work.

Plaintiff approached the intersection from the south at a rate of speed between 20 and 25 m.p.h. (TR. 25) when

he was 25 or 30 (TR. 27) feet from the intersection he first observed the defendant's auto approaching from the east (TR. 25). At this first observation defendant was traveling at 15 m.p.h. (TR. 47) and slowing down (TR. 26, TR. 29, 47). At this first observation of the defendant by plaintiff, defendant's automobile was 50 feet east of the intersection (TR. 27).

Plaintiff was first aware of danger when his auto was just entering the intersection and when defendant's vehicle was approximately even with the "Yield" sign (TR. 28, Exhibit, TR. 47); plaintiff tried to gain speed but his wheels were sliding (TR. 29) and defendant attempted to apply his brakes but he could not stop because of the snow (TR. 49).

The impact took place with the front end of defendant's auto (TR. 30) colliding with the middle of the right side of the plaintiffs (TR. 30). At the moment of impact the plaintiff's auto was in the center of Major Street with the front edge of his automobile at the north edge of the intersection (TR. 28).

Prior to the collision the defendant first noticed the plaintiff's automobile when he was at a point even with the "Yield" sign and when the front of his vehicle was 20 feet from the east edge of Major Street. Defendant observed the plaintiff at this time and plaintiff was 20 feet south of the south edge of the intersection (TR. 49). Defendant attempted to brake, but the brakes were ineffectual because of the slippery road and defendant attempted to turn, but this, too, proved ineffectual (TR. 49).

The defendant was aware of the generally snowy condition of the street all the way from State Street to Major

Street (TR. 49). Defendant had observed the "Yield" sign well before he got to the intersection and knew that it was a "Yield-Right-of-Way" sign.

The trial of the above case was commenced at 2:00 P.M. of November 20, 1957 and at the end of the afternoon of that day the parties rested their cases and argument by the respective counsel was set for hearing the next day at 10:00 A.M. of November 21, 1957.

That immediately prior to the hearing of Arguments by counsel the trial judge made the statement to counsel for both parties that he was "ready to decide the case" whether counsel for plaintiff was ready to argue his case or not at 10:30 A.M. of November 21, 1957.

While on the bench and as a preface to the Arguments of counsel which commenced at 10:30 A.M. of November 21, 1957, the trial Judge stated that on that morning on his way to the Courthouse he had driven his automobile to the intersection of Major Street and Cleveland Street in Salt Lake City where the collision occurred. That he had driven his automobile through the intersection and had stopped his automobile near the intersection and had estimated the distances at which he could observe vehicles approaching the intersection upon the intersecting street. That he had observed the trees and house which were situated on the southeast or common corner between the approaching vehicles of plaintiff and defendant. That he had observed the widths of the streets and had driven on Major Street noting the problems of traversing each intersection as he crossed it.

That on the morning of November 21, 1957, prior to the arguments of counsel and at the time of the view taken by the Court the general weather conditions were good and there was no snow on the ground. That the "yield-right-of-way" sign was not placed at the intersection and against Cleveland traffic but there was placed a "stop sign" against Major Street traffic.

## STATEMENT OF POINTS

### Point I.

THE COURT ERRED IN FINDING CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PLAINTIFF.

### Point II

THE FINDINGS OF THE TRIAL COURT ARE NOT SUPPORTED BY THE EVIDENCE.

### Point III

THAT THE PLAINTIFF WAS PREVENTED FROM HAVING A FAIR TRIAL BECAUSE OF IRREGULARITY IN THE PROCEEDINGS OF THE COURT AND AN ABUSE OF DISCRETION BY THE COURT.

## ARGUMENT

### Points I and II

THE COURT ERRED IN FINDING CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PLAINTIFF. THE FINDINGS OF THE TRIAL COURT ARE NOT SUPPORTED BY THE EVIDENCE.



This auto collision occurred at an intersection which was controlled by a "yield-right-of-way" sign imposing the duty of yielding upon the defendant Partridge. The rights and duties of the drivers approaching and entering such an intersection have not been expressly defined by Utah decisions, but plaintiff relies upon the decisions of this court with reference to intersection having stop signs or semaphore control.

The facts presented to the trial court for decision were that plaintiff was driving at 20 to 25 m.p.h. upon his approach to the intersection and at a position 25 or 30 feet south of the intersection he observed defendant's vehicle which was slowing down and was at a rate of speed of approximately 15 miles per hour; that defendant's vehicle was 50 feet east of the intersection. Plaintiff testified that he was aware of the "yield" sign against defendant; that he looked to the west for traffic eastbound on Cleveland Avenue; that he was first aware of danger when defendant was even with the "yield" sign and as plaintiff's vehicle was just entering the intersection.

When danger was first known to plaintiff he attempted to avoid the collision by gaining speed, but due to the snowy condition plaintiff was unable to avoid the collision.

It is important to note the position of the automobiles involved at the moment of impact and the point of impact in the intersection. The evidence clearly shows that the front end of the plaintiff's vehicle was even with the north edge of the intersection and that the front end of the defendant's auto collided with the middle of the right side of plaintiff's vehicle. This picture showing that plaintiff

was clear of more than half of the intersection while the front of defendant's vehicle had not traversed even half of the intersection.

Plaintiff contends that defendant has not shown that plaintiff is negligent in any respect. Plaintiff acknowledges that he had the duty of keeping a proper lookout and of driving at a safe speed for the existing conditions and of maintaining control over his motor vehicle. There is no proof that he has breached any of these duties. All the evidence shows that plaintiff conducted himself as an ordinary safe and prudent driver should under the circumstances. The evidence shows that he observed the defendant at the first opportunity and that what he saw would indicate to every reasonable person that the defendant was going to yield. The speed of plaintiff is not shown to be excessive under the circumstances.

The plaintiff takes the position that under the circumstances presented in this case that he had a right to rely on the "yield" sign and to rely upon defendant to yield to him and that he did everything in the operation of his vehicle that an ordinary, careful, prudent person would do for his own safety under the circumstances. In the present situation the "yield" sign together with the speed and approach of the defendant constituted an invitation to the plaintiff, who was approaching the intersection on the through highway so close to the intersection as to constitute an immediate hazard to any vehicle who was at or near the intersection on Cleveland Avenue, to proceed on through the highway.

Sherman v. Hall, . . . N.Y. 158 N.E. 16

Schleuder v. Soltow, Minn. 59 N.W. 2d 320.

The defendant, the disfavored driver, had the clear duty to yield to the favored driver, the plaintiff, and until the plaintiff was otherwise put on notice, he could presume that the defendant would yield to him and permit him to pass.

Bates v. Burns, Utah . . . 281 P 2d 209

Martin v. Stevens, Utah . . . 243 P 2d 747

Walker v. Peterson, Utah . . . 278 P 2d 291

41-6-72.10 . . . Utah Code annotated 1953.

### Point III

THAT THE PLAINTIFF WAS PREVENTED FROM HAVING A FAIR TRIAL BECAUSE OF IRREGULARITY IN THE PROCEEDINGS OF THE COURT AND AN ABUSE OF DISCRETION BY THE COURT.

Plaintiff refers to the statement of facts concerning the conduct of the trial court judge in viewing the intersection where the collision between plaintiff and defendant occurred. The trial judge went to the scene at a time when there was no snow on the ground which presents a different situation than that which existed upon the morning of the collision. There being heavy snow freshly fallen upon the morning and at the time of the collision. The traffic controls were different at the time of the judge's visit from those existing at the time of the collision in that a stop sign had been subsequently erected for Major Street traffic. Further, there is no showing that physical evidence which would demonstrate an obstruction upon the southeast corner of the intersection was similar or different from the time of the collision.

There clearly is a proper time for the trial judge sitting as the trier of fact to view the scene of an auto collision when such is the subject of a law suit. Plaintiff argues that the proper time and proper circumstances are met when evidence is being taken, when parties to the law suit have notice and opportunity to object and when parties may be represented at the viewing. In the matter here taken on appeal the trial judge saw fit to go to the scene of the collision and take evidence by estimating distances and observing whether or not there was an obstruction and observing the widths of the streets. The trial judge viewed the intersection without counsel for either side making a motion that such view be made and said viewing was made without notice to either counsel that there would be a view taken of the scene. Further, the trial judge viewed the intersection after both parties had rested this case and before counsel had argued their respective case.

Plaintiff most strongly urges this court that a trial judge in determining the facts concerning a matter on trial before him is required to observe the same limitations as the juror would. The trial judge must evaluate the evidence properly brought before him and he must not, as a juror must not, upon his own volition proceed to a scene of a collision and there take evidence upon which he decides a case.

Brown v. Transcontinental Gas Pipe Line Corp.,  
Ga., . . . 82 SE 2d 12

Nead v. DiLeva, N. Y. . . . 66 NE 2d 174

Greenberg v. City of Waterbury, Conn., . . . 167  
A 83

Conner v. Parker, Tex. . . . 181 SW 2d 873

Atlantic and Broglam Ry. Co. v. City of Cordele,  
Ga., . . . 54 SE 155

Wall v. U. S. Mining Co., Utah . . . 232 F 613

Noble v. Kertz and Sons Feed and Fuel Co., Cal.  
. . . 164 P 2d 257

The California Court in Noble v. Kertz case, above cited, stated clearly the contention of plaintiff when it made the following statement concerning a substantially identical problem. "To sanction such a rule would be to permit a trial judge to take evidence outside of court, without the parties or their counsel being present, and would effectively deprive a litigant of his constitutional right of an appeal. Such a rule would amount to a denial of due process, and certainly would deny to a litigant the fair and impartial trial to which he is entitled."

The Utah Supreme Court, in Provo River Water Users Assn. vs. Carlson, 103 Utah 93, 133 P 2d 777 in considering a case where a juror, during the trial, had a conversation with a witness, made the following statement: "The purpose of a trial of the issues is to have the facts determined impartially and fairly by a court or jury. Jurors as well as judges must base their verdicts or decisions on the evidence presented during the trial, not on the basis of some independent personal investigation or determination of the facts outside of court."

## CONCLUSION

The plaintiff is entitled to a fair trial and he is entitled to know that the evidence considered by the court

was evidence that was properly and fairly presented to the court. In the present case there is no ascertaining what observation and measurements were made by the trial judge beyond those acknowledged to counsel after the viewing and prior to argument. Plaintiff respectfully submits that he was deprived of a fair trial by the irregularity in the court proceedings and the abuse of discretion by the trial court.

Respectfully submitted,

WARREN M. O'GARA,  
*Counsel for Appellant*