

1971

# Milton L. Weilenmann v. Grant Blackhurst : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)



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.

Raymond M. Berry; Attorneys for Appellant John L. Black; Attorney for Respondent

---

## Recommended Citation

Brief of Appellant, *Weilenmann v. Morrell*, No. 12421 (Utah Supreme Court, 1971).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/3111](https://digitalcommons.law.byu.edu/uofu_sc2/3111)

This Brief of Appellant 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 (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

# IN THE SUPREME COURT OF THE STATE OF UTAH

---

MILTON L. WEILENMAN,  
*Plaintiff and Respondent,*

v.

GRANT BLACKHURST MORRIS,  
*Defendant and Appellant.*

---

## BRIEF OF APPEAL

---

Appeal from the Judgment of the District Court  
for Salt Lake County, Honorable Judge

---

RAYMOND

WOLFE

CLERK

Seventh

Month

Salt Lake

1911

JOHN L. BLACK

20 Judge Building

Salt Lake City, Utah 84111

*Attorney for Respondent*

## INDEX

	<i>Page</i>
NATURE OF THE CASE .....	1
DISPOSITION IN LOWER COURT .....	1
RELIEF SOUGHT ON APPEAL .....	1
PRELIMINARY STATEMENT .....	2
STATEMENT OF FACTS .....	2
ARGUMENT .....	3
POINT I	
PLAINTIFF WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW FOR FAILING TO KEEP A PROPER LOOKOUT .....	3
POINT II	
THE COURT COMMITTED PREJUDICIAL ERROR IN GIVING INSTRUCTION NO. 16 .....	7
POINT III	
THE COURT COMMITTED PREJUDICIAL ERROR IN GIVING INSTRUCTION NO. 19 .....	10
CONCLUSION .....	12

## CASES CITED

Benson v. D & RG Western RR, 4 Utah 2d 38, 286 P.2d 790 (1955) .....	6
Conklin v. Walsh, 113 Utah 276, 193 P.2d 437 (1948) .....	6
Covington v. Carpenter, 4 Utah 2d 378, 294 P.2d 788 (1956) ....	6
Cox v. Thompson, 123 Utah 81, 254 P.2d 1047 (1953) .....	6
DeMille v. Erickson, 23 Utah 2d 378, 462 P.2d 159 (1969) .....	8
Hickok v. Skinner, 113 Utah 1, 190 P.2d 514 (1948) .....	6

## INDEX (Continued)

	Page
Johnson v. Cornwall Warehouse Co., 15 Utah 2d 172, 389 P.2d 710 (1965) .....	9
Johnson v. Cornwall Warehouse Co., 16 Utah 2d 186, 398 P.2d 24 (1965) .....	8 & 11
Martin v. Ehlers, 13 Utah 2d 236, 371 P.2d 851 (1962) .....	6
Mingus v. Olsson, 114 Utah 505, 201 P.2d 495 (1949) .....	6

## STATUTE CITED

Utah Code Ann. §41-6-74 (1953) .....	8 & 9
--------------------------------------	-------

# IN THE SUPREME COURT OF THE STATE OF UTAH

---

MILTON L. WEILENMAN,  
*Plaintiff and Respondent,*

v.

GRANT BLACKHURST MORRELL,  
*Defendant and Appellant.*

} Case No.  
12421

---

## BRIEF OF APPELLANT

---

### NATURE OF THE CASE

This is an action for personal injuries and property damage arising out of a two car intersection accident.

### DISPOSITION IN LOWER COURT

The lower court entered a judgment on a jury verdict for plaintiff in the amount of \$12,782.50.

### RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the lower court judgment and an order directing the lower court to grant judgment in his favor as a matter of law, or, in the alternative, a new trial.

## PRELIMINARY STATEMENT

The parties will be referred to as they appeared in the lower court. All italics have been added unless indicated otherwise.

## STATEMENT OF FACTS

At approximately 7:00 a.m. on the morning of October 18, 1968, plaintiff was traveling south down I Street on his way to a political breakfast (R. 160). He had used this same route to go to work every day for over two years. At that hour it was still dark necessitating use of the automobile headlights (R. 161). As he approached the intersection of 11th Avenue with I Street he looked to the right, noticed that there was no traffic at the stop sign on his right and continued into the intersection (R. 163). He did not look further up 11th Avenue to ascertain if there was traffic approaching the intersection though the visibility is such that he could have seen for at least one block (R. 188). The defendant's automobile would have been somewhere on that block at the time plaintiff limited his lookout to the area of the stop sign.

Plaintiff related at trial that the next thing he remembered after was the noise of the collision with the defendant's car (R. 163). Mr. Morrell, the defendant, was knocked unconscious by the impact. His last recollection was driving east on 11th Avenue at 40 miles an hour with his lights on low beam recognizing that he was approaching a stop sign and knowing that he should stop at I Street (R. 201).

The investigating officer found that the light switches in both vehicles were pulled to the "on" position and that the brakes in both vehicles were operational (R. 152).

There was no witness who could testify whether Mr. Morrell had stopped at the stop sign.

The only evidence whether plaintiff in fact saw the defendant's car was plaintiff's recollection that there was a street light at the intersection (R. 163) when in fact the only illumination would have come from the automobiles' headlights (R. 158).

The impact of the accident threw defendant's car in the direction of plaintiff's travel where it finally came to rest some 57.6 feet from the southeast boundary of 11th Avenue. Plaintiff's car stopped approximately on the southeast corner of the intersection. See Exhibit 1-P.

## ARGUMENT

### POINT I

PLAINTIFF WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW FOR FAILING TO KEEP A PROPER LOOKOUT.

It is well-settled law that a driver who looks and fails to see the obvious, or fails to look, is negligent as a matter of law.

The case of *Johnson v. Syme*, 6 Utah 2d 319, 313 P.2d 468 (1957), is on all fours with the present matter. In *Johnson* the plaintiff was driving on a four-lane divid-

ed highway in the nighttime. The defendant's decedent entered onto the highway from the plaintiff's right without stopping or slowing down for the stop sign designed to protect highway traffic and was struck by the plaintiff's car. At trial the plaintiff admitted being very familiar with the intersection and stated that she saw nothing until the car in which Mr. Syme was killed appeared directly in front of her at a distance of 20 to 30 feet.

On the above facts this court stated:

"Under such conditions we cannot but conclude that plaintiff either looked and failed to see the obvious or failed to look at all and, as a matter of law negligently contributed to her own injuries and the death of another motorist." 313 P.2d at 469.

This case presents the same essential elements found in *Johnson*: the accident occurred during darkness (R. 161), plaintiff was on the favored road and defendant on the disfavored road, plaintiff was familiar with the intersection (R. 183) and the plaintiff struck the defendant's automobile as the latter entered the intersection from the plaintiff's right (R. 163).

In *Johnson* the plaintiff never saw the defendant until it was too late to avoid the accident. In this case the plaintiff admitted having never seen the defendant until actually involved in the collision (R. 163). At trial he stated:

"I looked to the right and to the left, then continued through the intersection. I then heard the



noise of the collision and that was the extent of my knowledge of what occurred." (R. 163)

Also at trial plaintiff asserted that his duty with respect to the defendant ended at his looking to see if any automobile was stopped at the stop sign as he approached the intersection. He stated:

"My responsibility was to look at that stop sign and see if there was a car at that stop sign." (R.186)

\* \* \*

"I saw no car at the stop sign. *I was not concerned whether or not there was a car behind the stop sign because the stop sign was there.* I had gone down the road day after day for better than two years, and had the right to assume that if there was a car beyond that stop sign—" (R. 185)

Plaintiff's legal duty did not end with a simple glance to see if any traffic was at the stop sign. Obviously the stop sign itself is incapable of preventing a car from passing through without stopping. Indeed it was possible for the plaintiff to see traffic conditions for a distance of at least one block up 11th Avenue (R. 188). It cannot be disputed but what the defendant was somewhere on that block, at the stop sign, or already in the intersection. Plaintiff therefore failed to see what was there before his eyes.

The reason why the law requires one to keep a proper lookout is to place upon every driver the duty to avoid accidents. As such, a lookout like that given by plaintiff which ends at the simple determination of which street

has the favored traffic flow does not fulfill the duty of keeping a proper lookout.

In *Conklin v. Walsh*, 113 Utah 276, 193 P.2d 437 (1948), this Court held, on facts similar to the present matter, that:

"The duty to keep a proper lookout applies as well to the favored as to the disfavored driver. Neither driver can excuse his own failure to observe because the other driver failed in his duty.

\* \* \*

"There is still a duty on the part of the driver traveling the arterial highway to remain reasonably alert to the possibility of the disfavored driver starting across the intersection in the belief that he can cross in safety." 193 P.2d at 439.

Because the plaintiff admitted he could have seen further up 11th Avenue than the area of the stop sign to which he limited his lookout and because plaintiff never saw the obvious in that he admitted he was actually involved in the collision when he *first* saw defendant's automobile, plaintiff was negligent as a matter of law. Defendant's Motion to this effect before the trial court was denied (R. 194). That denial constituted reversible error.

For other cases relevant to this issue see *Minquis v. Olsson*, 114 Utah 505, 201 P.2d 495 (1949); *Cox v. Thompson*, 123 Utah 81, 254 P.2d 1047 (1953); *Covington v. Carpenter*, 4 Utah 2d 378, 294 P.2d 788 (1956); *Hickok v. Skinner*, 113 Utah 1, 190 P.2d 514 (1948); *Martin v. Ehlers*, 13 Utah 2d 236, 371 P.2d 851 (1962).

and *Benson v. D & R G Western RR*, 4 Utah 2d 38, 286 p.2d 790 (1955).

## POINT II

### THE COURT COMMITTED PREJUDICIAL ERROR IN GIVING INSTRUCTION NO. 16.

Instruction No. 16 was submitted by plaintiff (R. 86). It reads:

You are instructed that when the law says that one person has the right-of-way over another, it simply means that such person has the immediate privilege of occupying the space in question and other persons must yield to such person.

If you find from a preponderance of the evidence that the defendant either entered the intersection without stopping at the stop sign or stopped first and then failed to yield the right-of-way, you are instructed that you must find said defendant was negligent. If you further find that such negligence proximately caused damages to the plaintiff, Milton L. Weilenmann, then you must find the issues in favor of plaintiff and against defendant and assess damages in accordance with these instructions, unless you further find from a preponderance of the evidence that plaintiff was himself guilty of negligence which proximately caused his own damages. (R. 61).

This instruction told the jury the defendant was negligent if he entered the intersection without stopping. It constituted prejudicial error because it presented to the jury an issue for which there was no evidence: There was no witness who could say whether the defendant had stopped at the stop sign. Mr. Morrell was knocked un-

conscious by the impact and had no recollection whether he had stopped before entering the intersection. He did recall that there was a stop sign ahead and that he intended to stop at this intersection (R. 201).

It is the law of this state that instructions should fit the facts of the case. *Johnson v. Cornwall Warehouse Co.*, 16 Utah 2d 186, 398 P.2d 24, 25 (1965). It is further the law that,

"A choice of probabilities creates only a basis for conjecture on which a verdict of a jury cannot stand.

\* \* \*

"One may only speculate as to the circumstances immediately prior to the collision." *DeMille v. Erickson*, 23 Utah 2d 378, 462 P.2d 159, 161-62 (1969)

In addition, Instruction No. 16 was prejudicial because it failed to tell the jury that if the defendant entered the intersection first, and at a time when Mr. Weilenmann was not so close as to constitute an immediate hazard to the defendant and not Mr. Weilenmann had the right of way.

This principle of law is found in the Utah Motor Vehicle Code:

**41-6-74. Vehicle entering a through highway.** — [(a)] The driver of a vehicle shall stop as required by this act at the entrance to a through highway and shall yield the right of way to other

vehicles which have entered the intersection from said highway or *which are approaching so closely on said through highway to constitute an immediate hazard*, but said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on said through highway shall yield the right of way to the vehicle so proceeding into or across the through highway.

(b) The driver of a vehicle shall likewise stop in obedience to a stop sign as required herein at an intersection where a stop sign is erected at one or more entrances thereto although not a part of a through highway and shall proceed cautiously, yield right of way to vehicles not so obliged to stop which are *within the intersection or approaching so closely as to constitute an immediate hazard, but may then proceed.*

Without stating the full requirements of the statute the instruction had the effect of stating the defendant's entrance into the intersection controlled by a stop sign and involvement in an accident amounted to prima facie evidence that plaintiff had the right of way. This court specifically held in *Johnson v. Cornwall Warehouse Co.*, 15 Utah 2d 172, 389 P.2d 710 (1964), that such an instruction was prejudicial.

Under *Johnson* the jury should not have been allowed to find the defendant negligent without first inquiring whether the plaintiff was in the intersection or so close thereto as to constitute an immediate hazard to defendant's entering or proceeding into the intersection.

Because nowhere in the charge were the jurors so instructed, Instruction No. 16 was duly objected to as was Instruction No. 20 for the same reason (R. 259-61).

The error in giving this instruction excluding an important principle of Utah law was likely aggravated when plaintiff's counsel in summation stated, as to the plaintiff:

"[H]ad he actually seen that automobile he still had the right to continue along that highway."  
(R.112)

The defendant submits that leaving the jury free to speculate on the facts and then apply them to an incomplete rule of law was prejudicial error.

### POINT III

#### THE COURT COMMITTED PREJUDICIAL ERROR IN GIVING INSTRUCTION NO. 19.

Instruction No. 19 was plaintiff's requested Instruction No. 6 (R. 87). It states:

You are instructed that a driver on a street protected by *stop signs* has the right-of-way over traffic approaching on the cross-street and has the right to assume that such traffic will not enter the intersection against the *stop signal*. He may continue to rely upon such an assumption until he sees, or in the exercise of reasonable care should have seen, that the other vehicle is going to proceed against the *signal*. (R. 64)

The impression given by Instructions 16 and 20 that any accident occurring between the parties' vehicles would

be due to the negligence of defendant because he was on the street with the stop sign was aggravated by Instruction No. 19.

This instruction was offered by plaintiff (R. 87). It appears to have been fabricated in part from JIFU 21.18. Indeed the last sentence is taken almost verbatim from that JIFU instruction.

It is significant to note that the JIFU instruction is for one based on an intersection controlled by traffic signals as opposed to stop signs. While the first part of Instruction No. 19 uses the terminology *stop sign*, *stop signal* or *signal* is the terminology of the remainder of the instruction.

It is significant that this instruction was taken from JIFU 21.18 in showing that it established a misleading standard. The last four words of the instruction "proceed *against* the signal" is proper only when applied to a traffic semaphore situation. In such situations it is improper to proceed into the intersection against a red light. However, on an intersection controlled only by a stop sign, one is not negligent for entering an intersection controlled by a stop sign. A stop sign is not the equivalent of a continuous red stop light.

Instruction No. 19 may correctly state the law with respect to traffic signals; it is misleading and incomplete as to intersections controlled by stop signs.

Technically one does not proceed *against* a stop sign unless there is other traffic in or so near the intersection as to constitute an immediate hazard. This instruction gives the impression that *any entrance* to the intersection by the defendant is negligence and "against the signal."

This instruction shows the danger of fabricating a jury instruction from another based upon different legal principles. Especially in the context of other legally incomplete instructions it cannot be said that such an instruction accomplished the object of enlightening the jury on their problems, *Johnson v. Cornwall Warehouse Co.*, 16 Utah 2d 186, 398 P.2d 24 (1965), but merely added to the confusion.

## CONCLUSION

This case presents an important question of public policy: Can the duty of every motorist to keep a proper lookout in order to avoid accidents be fully satisfied by a mere glance towards the intersection to assure he is on the favored street? Defendant submits that one's duty of proper lookout cannot be thus satisfied.

Though plaintiff could easily have seen all the traffic to his right for over one block's distance he made no effort to ascertain if there was any traffic behind the area immediately adjacent to the stop sign. It is beyond dispute that defendant's automobile was somewhere within that one block area when the plaintiff made his passing glance. It logically follows that the plaintiff failed



to observe what was plainly visible. This was negligence as a matter of law.

The jury could only have avoided finding the plaintiff negligent as a matter of law upon incomplete or misleading instructions. Failure of the trial court to properly instruct the jury according to the standards set forth by the Utah statutes laid the groundwork for the jury's improper verdict excusing the plaintiff from his duty to exercise a proper lookout.

Respectfully submitted,

Raymond M. Berry

WORSLEY, SNOW &  
CHRISTENSEN

7th Floor Continental Bank Bldg.  
Salt Lake City, Utah 84101

*Attorneys for Appellant*

### MAILING NOTICE

I hereby certify I mailed two copies of the foregoing brief, postage prepaid, to John L. Black, 530 Judge Building, Salt Lake City, Utah 84111, this      day of May, 1971.

---