

1958

Julia T. Alvarez v. Paul Paulus and Stover Bedding and Manufacturing Co. : Brief of Respondents

Utah Supreme Court

Follow this and additional works at: 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.

Emmett L. Brown; Attorney for Respondents;

Recommended Citation

Brief of Respondent, *Alvarez v. Paulus*, No. 8895 (Utah Supreme Court, 1958).
https://digitalcommons.law.byu.edu/uofu_sc1/3151

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.

DEC 13 1930

LAW LIBRARY

IN THE SUPREME COURT OF THE STATE OF UTAH

JULIA T. ALVAREZ,
Plaintiff and Appellant,

— vs. —

PAUL PAULUS and
STOVER BEDDING AND
MANUFACTURING CO.,
a Corporation,
Defendants and Respondents

Case
No. 8895

RESPONDENTS' BRIEF

EMMETT L. BROWN
Attorney for Respondents

I N D E X

	Page
NATURE OF THE CASE.....	1
STATEMENT OF FACTS.....	3
STATEMENT OF POINTS.....	4
ARGUMENT	5
POINTS:	
1. THE COURT DID NOT ERR IN REFUSING TO SUBMIT THE THEORY OF APPELLANT OF FAIL- URE TO YIELD RIGHT OF WAY AS NEGLIGENCE, SINCE SAME NEVER WAS DEVELOPED AS AN ISSUE IN THIS CASE, AND INSTRUCTION NO. 7 WAS THEREFORE IN ORDER.....	5
2. THE COURT DID NOT ERR IN SUBMITTING THE QUESTION OF ACCIDENT AS A DEFENSE TO THE JURY, AND APPELLANT IS ESTOPPED BY HER OWN REQUESTED INSTRUCTION NO. 4 FROM CLAIMING ERROR.....	6
3. THE COURT DID NOT ERR IN SUBMITTING THE QUESTION OF CONTRIBUTORY NEGLIGENCE TO THE JURY AND APPELLANT IS ESTOPPED FROM CLAIMING ERROR BY HER OWN REQUESTED INSTRUCTION NO. 11.....	9
CONCLUSION	10

T a b l e o f C a s e s

Beckstrom v. Williams, 3 Ut. 2d 210, 282 Pac. (2d) 309.....	5
Hartley v. Salt Lake City, 41 Utah 121, 124 Pac. 522.....	5
Kirchgestner v. Denver & R. G., 218 P. 2d 685.....	8
Patton v. Evans, 92 Utah 524, 69 P. 2d 969.....	8
Parker v. Womack, 37 Cal. 2d 116, 230 P. 2d 823.....	8
Pettingell v. Perkins, 2 Ut. 2d 266, 272 P. 2d 185.....	2 and 7
Thomas v. Frost, 83 Utah 207, 27 P. 2d 459.....	8

T e x t s

JIFU, Sec. 16.1.....	8
----------------------	---

IN THE SUPREME COURT OF THE STATE OF UTAH

JULIA T. ALVAREZ,
Plaintiff and Appellant,

— vs. —

PAUL PAULUS and
STOVER BEDDING AND
MANUFACTURING CO.,
a Corporation,
Defendants and Respondents

Case
No. 8895

RESPONDENTS' BRIEF

NATURE OF THE CASE

A jury with all of the evidence before them, and it might be pointed out that all of the evidence came from witnesses called on behalf of the appellant, decided the issues of fact in the present case in defendants' favor. The disputed issues of fact as outlined in the pre-trial order (R. 10) as applicable to this appeal are as follows:

1. Was Paul Paulus negligent as claimed by the plaintiff?

2. Was the plaintiff negligent as claimed by the defendants?
3. Was such negligence, if any, a proximate cause of the injuries received by Maria Elena Ontiveros?

Since the jury returned a verdict of No Cause of Action (R. 196) we must conclude that they arrived at such a verdict by concluding one of the following:

(1) The defendant Paul Paulus was not negligent as claimed by the plaintiff, nor was the plaintiff negligent, or

(2) The plaintiff and defendants both were negligent and their respective negligences were proximate causes of the injuries, or

(3) The defendant, Paul Paulos, was not negligent but that the plaintiff was negligent and her negligence was the proximate cause of the injuries sustained.

As no special interrogatories were requested we shall never know which of the above propositions was the conclusion of this jury.

This situation was expressed in *Pettingill v. Perkins*, 2 Ut. 2d 266, 272 P. 2d 185 at page 187:

“The verdict, no cause of action, is not necessarily predicated upon the ground of the negligence of the mother. The jury might well have found that there was no negligence on the part of the defendant. It would take a pull and a long stretch to say the evidence required the conclusion that defendant was guilty of negligence which proximately caused the death of the child.”

STATEMENT OF FACTS

The appellant in her brief has made a statement of the physical facts of where the child was and where the truck was driven, but has conveniently failed to indicate what the persons involved were doing.

For purposes of clarification, the respondents will give a brief description of the activities of the plaintiff and of the defendant, Paul Paulus, which activities are undisputed by the evidence.

When Mr. Paulus reached the point between 226 and 228 Emeril Avenue (Ex. 14) he stopped (P-1 Ex. 19) (R. 49) and left his truck, told the children to move back and then slowly backed out of Emeril Avenue (R. 49) and in so doing he stopped the truck again (R. 73) and honked his horn (R. 74).

Upon reaching (P-4 Ex. 19) (R. 55) Mr. Paulus again left the truck and went around it (R. 58) and cautioned the children to stand back, then in backing slowly he honked (R. 70) and looked in his mirrors (R. 62) and observed the three children constantly (R. 63).

It is to be noted that appellant's witnesses substantiated these facts. Mrs. Romero said the defendant Paulus got out of his truck, talked to the children, honked his horn, and drove slowly (R. 111). Mrs. Wittke stated she heard Mr. Paulus holler at the kids two different times and stop twice (R. 107). Witness Willy Valdez, called by appellant, also testified that Mr. Paulus honked his horn, told the children to get out of the way and got out of the

truck to tell the children to move back (R. 91). It is to be noted that Maria Elena was not one of the children referred to here and the only two people to observe her prior to the accident were Mrs. Romero and Willy Valdez.

During the period of time from the first time the truck was driven forward into Emeril Avenue to the point between 226 and 228 Emeril, until the accident itself, the plaintiff testified that she was doing the family wash (R. 118) and allowed the three pre-school children, including Maria Elena, age 22 months, to play on the front porch, even though she observed the large truck on Emeril Avenue (R. 119) going in and coming out; that she then went back to check on the wash (R. 120) and the accident occurred before her return (R. 121).

STATEMENT OF POINTS

POINT ONE

THE COURT DID NOT ERR IN REFUSING TO SUBMIT THE THEORY OF APPELLANT OF FAILURE TO YIELD RIGHT OF WAY AS NEGLIGENCE, SINCE SAME NEVER WAS DEVELOPED AS AN ISSUE IN THIS CASE AND INSTRUCTION NO. 7 WAS THEREFORE IN ORDER.

POINT TWO

THE COURT DID NOT ERR IN SUBMITTING THE QUESTION OF ACCIDENT AS A DEFENSE TO THE JURY, AND APPELLANT IS ESTOPPED BY HER OWN REQUESTED INSTRUCTION NO. 4 FROM CLAIMING ERROR.

POINT THREE

THE COURT DID NOT ERR IN SUBMITTING THE QUESTION OF CONTRIBUTORY NEGLIGENCE TO THE JURY AND APPELLANT IS ESTOPPED FROM CLAIMING ERROR BY HER OWN REQUESTED INSTRUCTION NO. 11.

ARGUMENT

POINT ONE

THE COURT DID NOT ERR IN REFUSING TO SUBMIT THE THEORY OF APPELLANT OF FAILURE TO YIELD RIGHT OF WAY AS NEGLIGENCE, SINCE SAME NEVER WAS DEVELOPED AS AN ISSUE IN THIS CASE AND INSTRUCTION NO. 7 WAS THEREFORE IN ORDER.

Each party to a suit is entitled to have his theory, when there is evidence to sustain it, submitted to the jury and the judgment of the jury on the facts tending to support such theory, assuming always that there is testimony offered to support the same. *Hartley v. Salt Lake City*, 41 Utah 121, 124 Pac. 522.

Again in *Beckstrom v. Williams*, 3 Utah 2d 210, 282 Pac. (2d) 309, this court has said a party has a right to have his theory of the case go to the jury "if the evidence would justify reasonable men in following his theory."

It is submitted that Appellant offered absolutely no evidence that the child had a right of way superior to the Respondent at the time of this accident. Appellant presents on page 15 of her brief a rather interesting theory

that since Respondent Paulus at Point 4 (Ex. 19) was east of the right of way called Emeril Avenue and his ultimate destination was past the west end of Emeril Avenue that Paulus was therefore a trespasser on the right of way at the time of the accident. Such is not the law and it is noted Appellant quotes no statute nor cases to substantiate this theory.

The pre-trial order did not, as Appellant claims, set out a Failure to Yield Right of Way as an issue in this case. Rather, the pre-trial order stated that it was the contention of the plaintiff (R. 9) that defendant Paulus was negligent in that he failed to yield to Maria Elene Ontiveros the right of way to which she was entitled (R. 10).

It is submitted that Appellant failed to produce any evidence at the trial to substantiate this contention and therefore it could not become an issue of fact for the jury to determine.

POINT TWO

THE COURT DID NOT ERR IN SUBMITTING THE QUESTION OF ACCIDENT AS A DEFENSE TO THE JURY, AND APPELLANT IS ESTOPPED BY HER OWN REQUESTED INSTRUCTION NO. 4 FROM CLAIMING ERROR.

Appellant proposed Instruction No. 4 (R. 151) as follows:

“You are instructed that the mere fact that an accident occurred is no evidence of negligence

and the fact that this accident occurred is no indication that the plaintiff or defendants were negligent.”

In the light of this proposed instruction it is difficult to see how Appellant can now complaint of Instruction No. 6 being submitted to the jury. Instruction No. 6 (R. 182) is as follows:

“The mere fact that the Deceased was struck and killed by a truck being backed by the Defendant Paul Paulus does not in and of itself support an inference that he was guilty of negligence that was a proximate cause of the injury and death of the Deceased, nor does it support an inference that the Plaintiff is guilty of negligence in her care and supervision of the child. The law recognizes that there are occasions when the operators of motor vehicles strike and inflict serious bodily injury or death upon pedestrians under circumstances where the driver of such vehicle or the pedestrian or person responsible for the safety of the pedestrian use due care. In such cases, there is no liability in law upon the persons involved.”

Pettingell v. Perkins, 2 Ut. 2d 266, 272 P. 2d 185—at page 196 of the Pacific Reporter the Court says:

“Furthermore, it is well established that a party cannot assign as error the giving of his own requests. He cannot lead the court into error and then be heard to complain thereof. To permit such action would needlessly prolong litigation, so there might never be an end thereto. Having by his own pleadings, evidence and instructions tried and rested the case upon the theory that the mother’s negligence would bar the father, he is bound

thereby, as the law of the case. He cannot now on appeal shift his theory and position.”

The Court quotes the following cases on this same rule: *Patton v. Evans*, 92 Utah 524, 69 P. 2d, 969, and *Kirchgestner v. Denver & R. G.*, 218 P. 2d 685.

In *Thomas v. Frost*, 83 Utah 207, 27 P. 2d 459, the court presented the rule that a defendant could not, on appeal, complain of statements in plaintiff’s instruction to same effect as statement in defendant’s requested instruction.

The annotation to Sec. 16.1—*Jury Instruction Forms—Utah*, on Unavoidable Accidents, refers favorably to *Parker v. Womack*, 37 Cal. 2d 116, 230 P. 2d 823, wherein the Court held that unless the defendant is guilty of negligence as a matter of law it is proper for the court to give an instruction on unavoidable accident.

Appellant claims error in that the court did not include in Instruction No. 6 a charge that Respondent Paulus had a greater degree of care by reason of the presence of children. It is well known that all the instructions are to be “considered and construed as a whole,” Instruction No. 18 (R. 195). In Instruction No. 5 (R. 181) the Court recited the degree of care that both Appellant and Respondent had under the existing circumstances and Appellant has claimed no error as to that instruction.

Further, Respondents contend that the giving of the instruction was not prejudicial to the Appellant.

POINT THREE

THE COURT DID NOT ERR IN SUBMITTING THE QUESTION OF CONTRIBUTORY NEGLIGENCE TO THE JURY AND APPELLANT IS ESTOPPED FROM CLAIMING ERROR BY HER OWN REQUESTED INSTRUCTION NO. 11.

It would appear that the Appellant is estopped from claiming the submission of the question of contributory negligence to the Jury by reason of her proposed Jury Instruction No. 11 (R. 158):

“You are instructed that the defense of negligence of the plaintiff may be involved in an action by the parent to recover damages for the death of the child.

“In determining whether or not the plaintiff in this case was negligent, you must decide whether or not plaintiff exercised that degree of care and supervision of the minor child as any reasonable and prudent person would have done under the same circumstances.

“If you find that Julia T. Alvarez did not exercise that degree of care and supervision of the minor child as any reasonable and prudent person would have done under the same circumstances, and that her failure to do so, was a proximate cause or the sole proximate cause of the accident, then you should return a verdict in favor of the defendants even though you might also find that the defendant Paul Palus was negligent in some respect.”

It is therefore submitted as elementary that to permit an Appellant to lead the trial court into error by requesting an instruction which he feels is error would be (1)

Unfair to the lower Court and the opposite party; (2) An approval of planned delay and expense to litigants and (3) An affirmance by this Court of a rule that the termination of litigation shall not be foreseeable.

The Appellant by her action has waived her right to complain and is estopped now from doing so. The Court is again referred to the cases quoted under Respondents' Point Two.

It is acknowledged that the burden of proof as to contributory negligence rests with the respondent and whether that proof is secured by the testimony of Appellant's witnesses is immaterial. Certainly the testimony of the Appellant as contained in the record from R. 118 to R. 121 is sufficient to take the question of contributory negligence to the jury as indicated and approved by Appellant's Instruction No. 11.

CONCLUSION

In conclusion it appears that the jury after a fair and impartial trial in which all of the evidence presented to them was given by Appellant's own witnesses, and after having been properly instructed on the issues of the case as formulated at the Pre-Trial, decided the issues of this case in favor of the Respondents. Not only is there sufficient evidence from which the jury might have reasonably so determined the issues of this case but it must be kept in mind that their verdict could have been based on any one of three findings, namely:

- (1) Respondent was not negligent.
- (2) Appellant was contributorily negligent.
- (3) Appellant only was negligent.

It is therefore most respectfully urged by the Respondent that the judgment on verdict of the District Court be affirmed.

Respectfully submitted,

EMMETT L. BROWN

Attorney for Respondents