

1990

Jimmy Wray Lingle and Roadrunner Trucking Corp v. Fay Gaw : Brief in Opposition to Certiorari

Utah Supreme Court

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Edward T. Wells; attorney for respondent.

Robert R. Wallace, Scott F. Squire; Hanson, Epperson & Smith; attorneys for defendant.

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UTAH SUPREME COURT

BRIEF

900467

IN THE UTAH SUPREME COURT

JIMMY WRAY LINGLE and
ROADRUNNER TRUCKING CORP.,

Petitioners,

vs.

FAY GAW,

Respondent.

Case No. 900467

RESPONDENT'S BRIEF IN OPPOSITION TO DEFENDANTS
LINGLE AND ROADRUNNER TRUCKING CORPORATION'S
PETITION FOR WRIT OF CERTIORARI

EDWARD T. WELLS
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff/Respondent
4252 South 700 East
Salt Lake City, UT 84107
Telephone: (801) 262-8915

Robert Wallace
Scott F. Squire
HANSON, EPPERSON & SMITH
Attorneys for Defendant/Petitioner Lingle and
Roadrunner Trucking Corp.
4 Triad Center, #500
Salt Lake City, UT 84110

Jody K. Barrett
Joy Sanders
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for the State of Utah
10 Exchange Place, #1100
Salt Lake City, UT 84111

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Joy Sanders
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Attorneys for the State of Utah
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Salt Lake City, UT 84111

I.

PARTIES TO THIS PROCEEDING

The parties to this proceeding are as follows:

Jimmy Wray Lingle	Defendant/Petitioner
Roadrunner Trucking Corporation	Defendant/Petitioner
Fay Gaw	Plaintiff/Respondent

In addition, the State of Utah was a defendant in the trial court and a respondent before the Utah Court of Appeals. The State has not petitioned for certiorari.

II.

TABLE OF CONTENTS

	<u>Page</u>
I. <u>PARTIES TO THIS PROCEEDING</u>	ii
II. <u>TABLE OF CONTENTS</u>	iii
III. <u>TABLE OF AUTHORITIES</u>	v
IV. <u>OBJECTION TO JURISDICTION</u>	1
V. <u>STATEMENT OF THE ISSUES PRESENTED FOR REVIEW</u>	1
VI. <u>CONTROLLING CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS</u>	1
VII. <u>STATEMENT OF THE CASE</u>	2
VIII. <u>SUMMARY OF ARGUMENT</u>	3
<u>POINT I</u>	3
<u>POINT II</u>	3
<u>POINT III</u>	3
IX. <u>ARGUMENT</u>	4
<u>POINT I</u>	
<u>CERTIORARI SHOULD BE DENIED BECAUSE THE UTAH COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH JORGENSEN V. ISSA, 739 P.2d 80 (Utah App. 1987)</u>	4
<u>POINT II</u>	
<u>CERTIORARI SHOULD BE DENIED BECAUSE THE PETITION DOES NOT STATE THE STATUTORY GROUNDS FOR JURISDICTION AS REQUIRED BY RULE 49(a)(6)(D) OF THE UTAH RULES OF APPELLATE PROCEDURE</u>	6
A. <u>Factual Background</u>	6
B. <u>Legal Analysis</u>	6

POINT III

THE PETITION FOR CERTIORARI FAILS TO EXPLAIN WHY
THIS COURT SHOULD GRANT CERTIORARI TO REVIEW
QUESTION 3

7

X. CONCLUSION

8

III.

TABLE OF AUTHORITIES

Page

CASES

<u>Gaw v. State of Utah,</u> 143 Utah Adv. Rep. 3 (1990)	3, 5
<u>Gregory v. Forthwest Invs. Ltd.,</u> 735 P.2d 33 (Utah 1987)	6
<u>Hall v. Warren,</u> 632 P.2d 848 (Utah 1981)	3, 5
<u>Intermountain Farmers Ass'n v. Fitzgerald,</u> 574 P.2d 1162 (Utah 1978)	3, 4
<u>Jorgensen v. Issa,</u> 739 P.2d 80 (Utah App. 1987)	4
<u>Thompson v. Ford Motor Co.,</u> 16 Utah 2d 30, 395 P.2d 62 (1964)	3, 4

OTHER AUTHORITIES

<u>Utah Rules of Appellate Procedure, Rule 49(a)</u>	1, 3
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IV.

OBJECTION TO JURISDICTION

The Utah Supreme Court lacks jurisdiction to hear this petition because no petition was timely filed which complies with Rule 49(a)(6)(D) of the Utah Rules of Appellate Procedure.

V.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether certiorari should be granted when the reasoning of the Utah Court of Appeals' opinion is identical to other Utah Supreme Court and appeals court decisions?

2. Whether certiorari should be granted when the petitioner fails to timely cite any statutory provision conferring jurisdiction on the Utah Supreme Court to review the Utah Court of Appeals' decision by a writ of certiorari.

VI.

CONTROLLING CONSTITUTIONAL PROVISIONS, STATUTES,
ORDINANCES, RULES AND REGULATIONS

Rule 49(a) and (a)(6)(D) of the Utah Rules of Appellate Procedure:

(a) Contents. The petition for a writ of certiorari shall contain, in the order indicated:

(6) (D) The statutory provision believed to confer on the Supreme Court jurisdiction to review the decision in question by a writ of certiorari.

VII.

STATEMENT OF THE CASE

Plaintiff and appellant Fay Gaw (hereafter Gaw) was injured in a car/truck collision. She was paralyzed from the waist down. (R. 510.)

The truck was driven by defendant Jimmy Wray Lingle. (Hereafter Lingle.) (R. 510.) The truck was owned and operated by defendant Road Runner Trucking. (R. 509.) The incident occurred on a State highway. (R. 510.)

Carbon County and the City of Helper were dismissed and no claim is made against them in this appeal. (R. 218, 387.)

The trial court granted summary judgment in favor of the State of Utah. (R. 1376.) At the time of trial, only three parties remained: the injured party (Gaw), the truck driver (Lingle), and Lingle's employer (Roadrunner Trucking).

The jury returned a verdict allocating 75% negligence to plaintiff Gaw and 25% negligence to defendant Lingle. (R. 1671.) Gaw appeals.

In a 3-0 opinion, the Court of Appeals reversed the trial court's granting of summary judgment to the State of Utah. The

State of Utah has not filed for certiorari. The Court of Appeals also reversed the jury verdict because the trial court allowed erroneous instructions on per se negligence to be given to the jury. The Court of Appeals ordered a new trial as to all parties. Gaw v. State of Utah, 143 Utah Adv. Rep. 3 (1990).

VIII.

SUMMARY OF ARGUMENT

POINT I

The decisions of the Court of Appeals are not in conflict. The decision of the Court of Appeals in this case is in complete harmony with this court's decisions in Hall v. Warren, 632 P.2d 848 (Utah 1981); Intermountain Farmers Ass'n v. Fitzgerald, 574 P.2d 1162 (Utah 1978); and Thompson v. Ford Motor Co., 16 Utah 2d 30, 395 P.2d 62 (1964).

POINT II

Defendants/Petitioners failed to properly state the statutory grounds for invoking this court's power to issue a writ of certiorari and the petition should be dismissed.

POINT III

Petitioners have failed to explain why certiorari should be granted to review question "3" as required by Rule 49(a)(9) of the Utah Rules of Appellate Procedure.

IX.

ARGUMENT

POINT I

CERTIORARI SHOULD BE DENIED BECAUSE THE UTAH COURT
OF APPEALS' DECISION IS NOT IN CONFLICT WITH
JORGENSEN V. ISSA, 739 P.2d 80 (Utah App. 1987)

The one and only reason petitioners give for granting certiorari is the notion, without any factual explanation, that the decision of the Court of Appeals in this case somehow conflicts with the decision of Jorgensen v. Issa, 739 P.2d 80 (Utah App. 1987). The short answer is that there is no conflict.

The issue presented to the Court of Appeals in this case was a simple one previously decided by this Court. That is, when a person violates a statute which sets forth a standard of care, is the violation negligence unless the conduct is excused or justified?

In Thompson v. Ford Motor Co., 16 Utah 2d 30, 395 P.2d 62, 64 (1964), the Utah Supreme Court ruled that "prima facie negligence" is the correct standard and a trial court commits prejudicial error when it gives a jury instruction which provides that the violation of a statute is negligence without the possibility for justification or excuse.

Similarly, in Intermountain Farmers Ass'n v. Fitzgerald, 574 P.2d 1162, 1164-65 (Utah 1978), the Utah Supreme Court ruled:

[T]he violation of a statute does not necessarily constitute negligence per se and may be considered only as evidence of negligence, but is subject to justification or excuse. . . .

Thereafter in Hall v. Warren, 632 P.2d 848, 850 (Utah 1981) ruled:

As a general rule, violation of a standard of safety set by a statute or order is prima facie negligence . . . subject to justification or excuse.

The Court of Appeals in Jorgensen v. Issa, supra followed the rationale and ruling of Thompson, Intermountain Farmers Ass'n and Hall by reasoning that a "violation of a statute or ordinance is negligence per se which may be excused." Id. at 82. The court then explained how the negligence could be excused or justified.

Finally, in this case, the Court of Appeals held that a jury instruction which states that a violation of a statute is negligence, irrespective of whether the violation is excused or justified, is prejudicial error. Gaw v. State of Utah, 143 Utah Adv. Rep. 3 (1990). The ruling is not inconsistent with Jorgensen v. Issa, supra. More importantly, the ruling is identical with Thompson v. Ford Motor Co., supra, and consistent with the subsequent opinions of this Court.

POINT II

CERTIORARI SHOULD BE DENIED BECAUSE THE PETITION DOES NOT STATE THE STATUTORY GROUNDS FOR JURISDICTION AS REQUIRED BY RULE 49(a)(6)(D) OF THE UTAH RULES OF APPELLATE PROCEDURE

A. Factual Background.

The petitioners cite Rule 48(a) as the only grounds for jurisdiction. (Petition for Certiorari p. 2.)

B. Legal Analysis.

Numerous rules of the Utah Rules of Appellate Procedure require appellants or petitioners to set forth in their pleadings or petition, the statutory grounds for jurisdiction. For example, Rule 9(c) requires the docketing statement to contain: "The specific rule or statutory authority that confers jurisdiction. . . ." Rule 24(a)(4) requires an appellant's brief to contain: "A brief statement showing the jurisdiction of the appellate court." Similarly, Rule 49(a)(6)(D) of the Utah Rules of Appellate Procedure requires the petitioner to set forth in the petition:

(D) The statutory provision believed to confer on the Supreme Court jurisdiction to review the decision in question by a writ of certiorari.

The penalty for failing to cite the correct statutory provision is dismissal of the appeal. Gregory v. Forthwest Invs. Ltd., 735 P.2d 33 (Utah 1987). Further, citing to a rule of appellate procedure as a basis for jurisdiction does not meet the

requirements because the Utah Rules of Appellate Procedure do not confer jurisdiction. Id. In summary, petitioners failed to set forth in the petition, the statutory provision conferring jurisdiction as required by Rule 49(a)(6)(D). They cite only a rule of appellate procedure. The petition is defective for failing to comply with Rule 49(a)(6)(D) and should be dismissed.

POINT III

THE PETITION FOR CERTIORARI FAILS TO EXPLAIN WHY THIS COURT SHOULD GRANT CERTIORARI TO REVIEW QUESTION 3

The petition for review lists three questions presented for review. Question 3 is: "3. Whether the giving of a jury instruction was harmless error?" Rule 49(a)(9) requires the petitioner, for each question presented, to list any special and important reasons why certiorari should be granted, as listed in Rule 46. The petitioner wholly fails to do so. The omission is not surprising because none of the reasons for granting certiorari set forth in Rule 46 apply to question 3.

In short, question 3 doesn't warrant certiorari. It is only one of many arguments presented to and adversely ruled upon by the Court of Appeals. However, an adverse ruling does not justify certiorari.

X.

CONCLUSION

The Utah Court of Appeals based its decision on prior precedents of the Utah Supreme Court. The ruling is consistent with the prior decisions of this Court and the Utah Court of Appeals. The petition for certiorari is defective for failing to comply with Rule 49(a)(6)(D) and 49(a)(9). For these reasons, the petition for certiorari should be denied.

DATED this 26th day of November, 1990.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff/Respondent

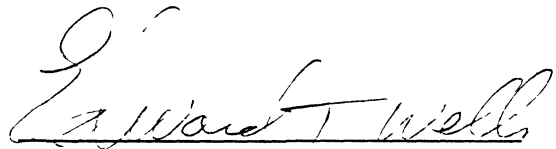
By: 

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION TO DEFENDANTS LINGLE AND ROADRUNNER TRUCKING CORPORATION'S PETITION FOR CERTIORARI (Gaw v. State of Utah, et al.) was mailed, postage prepaid, this 27th day of November, 1990, to the following:

Joy Sanders
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, #1100
Salt Lake City, UT 84111

Robert Wallace
HANSON, EPPERSON & SMITH
4 Triad Center, #500
Salt Lake City, UT 84110

A handwritten signature in cursive script, appearing to read "Robert Wallace", is written over a horizontal line.

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