

1990

# Harold Edwin (Hal) Rhodes v. John M. Fry and Judith L. Fry v. William C. Petersen : Petition for Writ of Certiorari

Utah Supreme Court

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## Recommended Citation

Legal Brief, *Rhodes v. Fry*, No. 900478.00 (Utah Supreme Court, 1990).

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UTAH  
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S9  
DOCKET NO.

UTAH SUPREME COURT

BRIEF

900478

IN THE SUPREME COURT OF THE STATE OF UTAH

HAROLD EDWIN (HAL) RHODES

Plaintiff/Respondent,

v.

JOHN M. FRY and JUDITH L. FRY,

Defendants/Third-party  
Plaintiffs/Appellants

v.

WILLIAM C. PETERSEN,

Third-party Defendant.

Case No. 900478

PETITION OF APPELLANTS JOHN M. FRY AND JUDITH L. FRY  
FOR WRIT OF CERTIORARI

APPEAL FROM A JUDGMENT BY THE UTAH COURT OF APPEALS  
AFFIRMING A JUDGMENT NOTWITHSTANDING THE VERDICT  
OF THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY  
STATE OF UTAH, HONORABLE BOYD L. PARK

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FILED

OCT 18 1990

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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HAROLD EDWIN (HAL) RHODES	:	
	:	
Plaintiff/Respondent,	:	
	:	
v.	:	
	:	
JOHN M. FRY and JUDITH L. FRY,	:	
	:	
Defendants/Third-party	:	
Plaintiffs/Appellants	:	
	:	
v.	:	Case No.
	:	
WILLIAM C. PETERSEN,	:	
	:	
Third-party Defendant.	:	

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### QUESTIONS PRESENTED FOR REVIEW

Did the Utah Court of Appeals err in affirming the district court's judgment notwithstanding the verdict, thereby finding that there was no competent evidence to support the verdict and that a violation of a statute is negligence per se?

### CONTROLLING PROVISIONS

The Utah Rules of Appellate Procedure, Rule 45 states:

**Rule 45. Review of judgments, orders, and decrees of Court of Appeals.**

Unless otherwise provided by law, the review of a judgment, an order, and a decree (herein referred to as "decisions") of the Court of Appeals shall be initiated by a petition for a writ of certiorari to the Supreme Court of Utah.

The Utah Rules of Appellate Procedure, Rule 46 states:

**Rule 46. Considerations governinig review of certiorari.**

Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for special and important reasons. The following, while neither controlling nor wholly measuring the Supreme Court's discretion, indicate the character of reasons that will be considered:

(a) When a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same issue of law;

(b) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of the Supreme Court;

(c) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision; or

(d) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by the Supreme Court.

The Utah Rules of Civil Procedure, Rule 50 states:

**Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.**

(a) **Motion for directed verdict; when made; effect.** A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific ground[s] therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) **Motion for judgment notwithstanding the verdict.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than ten days



after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

**(c) Same: Conditional rulings on grant of motion.**

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this Rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for a new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the respondent on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent

proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than ten days after entry of the judgment notwithstanding the verdict.

(d) **Same: Denial of motion.** If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as respondent, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this Rule precludes it from determining that the respondent is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Section 41-6-73 of the Utah Code states:

**Vehicle turning left -- Yield right-of-way.**

The operator of a vehicle intending to turn to the left shall yield the right-of-way to any vehicle approaching from the opposite direction which is so close to the turning vehicle as to constitute an immediate hazard.

#### **OPINION OF THE COURT OF APPEALS**

Rhodes v. Fry, Slip Opinion, Case No. 890473-CA (dated September 18, 1990). See Appendix A.

### **JURISDICTION**

This is a petition for a writ of certiorari to allow the Utah Supreme Court to review the Utah Court of Appeal's affirmance, entered September 18, 1990, of a judgment notwithstanding the verdict entered by the Honorable Boyd L. Parks of the Fourth Judicial District Court of Utah County, State of Utah. The Utah Supreme Court has jurisdiction pursuant to Section 78-2-2(3) of the Utah Code. See, Utah Code Ann. § 78-2-2(3) (1987).

### **STATEMENT OF THE FACTS**

A. Nature of the Case. This is a personal injury action based upon a two-vehicle accident at an intersection in Orem, Utah.

B. Course of Proceedings and Disposition Below. This matter was tried by jury in front of the Honorable Boyd L. Park. After a trial on disputed facts and disputed expert opinion, the jury found the Defendant/Appellant, John M. Fry (hereinafter "Fry"), not negligent. Thereafter the trial court entered a judgment notwithstanding the verdict in favor of the Plaintiff/Respondent, Harold Edwin Rhodes (hereinafter "Plaintiff"). Fry appealed seeking a reversal of the judgment notwithstanding the verdict entered by the trial court (in the face of disputed evidence), and reinstatement of the jury verdict

in his favor. The Utah Supreme Court transferred the case to the Utah Court of Appeals, who affirmed the judgment of the district court without opinion pursuant to Rule 31 of the Utah Rules of Appellate Procedure. See Utah R. App. P. 31. Fry now petitions this court for a writ of certiorari.

C. Statement of Facts. Note, subsequent to receiving the briefing schedule by the Court of Appeals, it was determined that the trial transcript for the second day of trial, November 29, 1988, had not been submitted by the reporter. The transcript was received, but the original was not numbered in accordance with Rule 11(b) of the Rules of the Utah Court of Appeals. As a result, references to that transcript are hereinafter ("TR, pg. \_").

1. This accident occurred at the intersection of 1300 South and Main Streets in Orem, Utah County, State of Utah on or about December 11, 1982. (R-559, pg. 47).

2. Third-party Defendant Petersen (hereinafter "Peterson") was the driver of a 1966 Volkswagen which was involved in the collision with a 1979 Chevrolet C10 pickup truck, driven by Fry. (TR, pg. 6).

3. Fry was westbound on 1300 South and intended to turn left or south. (TR, pg. 36).

4. Plaintiff was a passenger in the Volkswagen driven by Peterson. (TR, pg. 55).

5. Substantial evidence existed that Fry was not negligent in the subject incident:

a) Fry testified that as he approached the intersection, the light turned red. He stopped and waited through the cycle of the light. (TR, pg. 36).

b) During the time he was stopped at the red light, he was looking for on-coming traffic. He saw none with the exception of a brown station wagon. (TR, pg. 37)

c) The brown station wagon was approaching from the west and was turning left or northbound. Fry saw no other headlights or vehicles coming, so he started to make his turn. (TR, pp. 41, 44).

d) Petersen normally travelled in the left hand lane of traffic. (TR, pg. 19). However, the collision occurred in the eastbound traffic's far right lane in the intersection. (R-559, pg. 58).

e) Shelley Lambert, Fry's passenger, testified that she was looking for on-coming traffic and saw none. (TR, pg. 41; TR, pp. 109, 110).

f) Fry's expert testified that the Volkswagen in question was obscured from Fry's sight by other traffic. (R-497).

6. Prior to the impact, Petersen attempted to avoid the accident by braking. (R-559, pg. 51).

7. The experts called by Plaintiff disagreed with Fry's description of his actions (TR, pg. 36; TR, pg. 156), with the speed at which Fry proceeded into the intersection, (TR, pg. 39, TR, pg. 157), with the speed at which the Volkswagen was traveling prior to braking, (R-560, pg. 26; R-560, pg. 36; R-493; TR, pg. 167), and with the cause of the accident (R-559, pg. 57; TR, pg. 169; R-497).

8. Plaintiffs' experts testified that, based upon their calculations, Fry was negligent. (R-559, pg. 57; TR, pg. 169). Fry's expert testified that, based on his calculations, Fry was not negligent. (R-467).

9. The jury was instructed on the issues of negligence (R-357, 358). The court further instructed the jury that the mere fact that an accident happened does not support an inference that the defendants, or any party, was negligent. (R-363). The court refused to instruct the jury on unavoidable accident. (R-304, 385).

10. Petersen made a motion for a directed verdict which was granted. (R-387).

11. Plaintiff made a motion for directed verdict based upon: the stipulation that Plaintiff, as a passenger in the Petersen vehicle, was not negligent; the court's ruling as a matter of law that a case had not been proven against Petersen; and the court's refusal to instruct the jury on "unavoidable accident". (R-292).

12. The court took Plaintiff's motion for directed verdict under advisement and submitted the matter to the jury. The jury returned a verdict in favor of Fry when it answered "No" to the Special Verdict instruction #1 which stated:

1. At the time and place of the incident in question and under the circumstances as shown by the evidence, was defendant, John M. Fry, negligent?

Yes \_\_\_\_\_ No   X  

(R-385).

13. The court subsequently entered a judgment notwithstanding the verdict in favor of the plaintiff (R-442), from which Fry appealed. See Appendix B.

14. The Utah Court of Appeals, on a Rule 31 hearing, affirmed the judgment of the district court. Rhodes, Slip Opinion at 1.

## ARGUMENT

Fry petitions the Utah Supreme Court for a writ of certiorari to review various errors the Utah Court of Appeals made by affirming the judgment notwithstanding the verdict of the district court.

As set forth above, Rule 46 of the Utah Rules of Appellate Procedure identifies various reasons the Utah Supreme Court will consider in granting a writ of certiorari. In the present case, the Court of Appeals rendered a decision in conflict with decisions of the Utah Supreme Court and of other panels of the Court of Appeals on the same questions of law and has sanctioned a departure by the district court from the accepted and usual course of judicial proceedings so as to call for an exercise of the Supreme Court's power of supervision.

The Findings of Fact and Conclusions of Law (see Appendix C), made by Judge Park, are unclear as to his basis for finding Fry negligent as a matter of law. Two such basis can be inferred from his findings of fact and conclusions of law. Findings of Fact 6-15 suggest that Judge Park based his decision on the "fact" that, as a matter of law, Fry violated section 41-6-73 of the Utah Code and that such a violation was negligence per se. However, some of these same findings of fact, particularly findings 11, 12 and 14, and conclusion of law 3,



indicating that "reasonable minds could not differ" in finding Fry negligent suggest that, as a matter of law, no competent evidence existed to support the verdict in favor of Fry. Note that it is unclear whether Judge Park based his finding that "reasonable minds could not differ" (in finding Fry negligent) upon the assumption that a violation of the statute is negligence per se, or upon the "fact" that there was no competent evidence to support the verdict. Plaintiff contends that a finding that a violation of a statute is negligence per se is contrary to Utah law and that there was competent evidence to support the verdict.

#### POINT I.

##### **THERE IS COMPETENT EVIDENCE WHICH SUPPORTS THE VERDICT.**

We first address Judge Park's findings, suggested by his findings of facts and conclusions of law, that there was no competent evidence to support the verdict.

At the close of Fry's case in chief, the Plaintiff moved, pursuant to Rule 50 of the Utah Rules of Civil Procedure for a directed verdict. The trial court took Plaintiff's motion for a directed verdict under advisement and submitted the matter to the jury. The jury returned a verdict in favor of Fry. The court subsequently entered a judgment notwithstanding the verdict in favor of Plaintiff. Rule 50(b) states in part:

(b) Motion for judgment notwithstanding the verdict. Whenever a motion for directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. . . . If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. . . .

Utah R. Civ. P. 50(b).

The standard that the trial court must apply when considering a motion for a judgment notwithstanding the verdict is set out in Hansen v. Stewart, 761 P.2d 14 (Utah 1988). In that case, the court stated:

The standard to be applied by the trial court in determining whether to grant a motion for a j.n.o.v. is stricter than the standard for deciding to grant a new trial. A j.n.o.v. can be granted only when the losing party is entitled to a judgment as a matter of law.

Id. at 17. The trial court should grant a motion for judgment notwithstanding the verdict only if, after viewing the evidence in the light most favorable to the non-movant, it finds that no competent evidence supports the verdict. In reviewing the trial court's determination of such issues, the Court of Appeals must apply the same standard. King v. Fereday, 739 P.2d 618, 620 (Utah 1987). In addition to viewing the evidence in the light most favorable to the non-movant, the court must accord every

reasonable inference fairly drawn from the evidence the same degree of deference. Anderson v. Toone, 671 P.2d 170, 172 (Utah 1983).

In determining whether or not to grant such a motion, the court is not allowed to weigh the evidence or to determine which witnesses it feels are the most persuasive or truthful. The Court of Appeals of Ohio in Cox v. Oliver Machinery Co., 41 Ohio App. 3d 28, 534 N.E.2d 855 (1987) stated:

In ruling on a directed verdict -- or, in our case considering such a ruling on appeal -- a court must construe the evidence most strongly in favor of the non-moving party and determine whether reasonable minds can come but to one conclusion on the evidence submitted, that conclusion being adverse to non-moving party. If reasonable minds can reach different conclusions, the matter must be submitted to the jury. The court considers the motion without weighing the evidence or determining the creditability of witnesses. A motion for directed verdict raises a question of law because it examines the materiality of the evidence rather than the conclusions to be drawn from the evidence. Thus, the court does not determine whether one version of the facts presented is more persuasive than another; rather, it determines whether only one result can be reached under the theories of law presented in the complaint.

Id. at \_\_\_\_, 534 N.E.2d at 857-58 (citations omitted).

As stated in Bennion v. LeGrand Johnson Const. Co., 701 P.2d 1078 (Utah 1985), "[w]here evidence is in conflict in a jury trial, we assume that the jury believed those facts that support

its verdict, and we view the facts and the reasonable inferences that arise from those facts in a light most supportive of the jury's verdict." Id. at 1082 (citations omitted).

Fry's theory of the case was that his view of the oncoming traffic was obstructed by another vehicle and that his turning left was reasonable under the existing circumstances. In support of this theory, competent evidence was presented by Fry, supported by the direct testimony of his passenger Shelley Lambert and by the expert testimony of Dr. Rudolf Limpert.

The court's ruling (R-442), in paragraphs 4 and 5, illustrates the factual disputes that were presented during the course of the trial. Fry testified that while waiting for the light to turn green, he looked for oncoming traffic. After the light turned green, he proceeded into the intersection. He had observed an on-coming station wagon which was making a left turn. He looked for any other on-coming vehicles which would have posed an immediate hazard and there was none to be seen. He then proceeded to make his turn and was struck by the plaintiff's vehicle. (See Statement of Facts).

The passenger in Fry's vehicle, Shelley Lambert, testified that she also saw the station wagon start to make a left-hand turn. She did not observe any other vehicles which

would pose an immediate hazard. She was comfortable with Fry proceeding with his turn (TR, pg. 110).

The defendant's expert witness testified that the larger vehicle provided an obstruction which prevented Fry from seeing the Petersen vehicle. As a result, his opinion was that Fry's actions were not unreasonable. (R-497). In fact, the trial judge, in his findings of fact, referred to such competent evidence offered by Fry and Dr. Limpert. See, Findings of Fact 3, 5.

Thus, the record demonstrates that there was sufficient material evidence to support the jury's verdict. The jury found that the defendant's actions were reasonable and prudent under the conditions that the jury determined existed at the time of the accident. By affirming the trial court's judgment entering j.n.o.v. in favor of Plaintiff, the Court of Appeals rendered a decision that was clearly in conflict with decisions of the Utah Supreme Court and other decisions of the Court of Appeals, and sanctioned the departure by the trial court from the accepted and usual course of judicial proceedings so as to call for an exercise of the Supreme Court's power of supervision.

POINT II.

THE VIOLATION OF A STATUTE IS NOT NEGLIGENCE PER SE AND THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S FINDING THAT, AS A MATTER OF LAW, THE DEFENDANT WAS NEGLIGENT AND THE ACCIDENT WAS NOT AN UNAVOIDABLE ACCIDENT.

We now address Judge Park's ruling, suggested by his findings of fact and conclusions of law, that a violation of the statute is negligence per se.

In discussing this point, it is critical to avoid being distracted by the label, "unavoidable accident". The trial court became so involved with the term "unavoidable accident" that it failed to examine the role which such an instruction plays in a negligence claim. In Anderton v. Montgomery, 607 P.2d 828 (Utah 1980), the Utah Supreme Court held:

Unavoidable accident, rather than being a separate legal doctrine, is simply a recognition of the fact that an incident causing injury to the plaintiff does not necessarily give rise to liability in the defendant. Where the injury arises from a set of circumstances which do not reflect a lack of due care on anyone's part, no recovery may had under a theory of negligence, the accident being "unavoidable."  
. . . .

. . . .  
As explained above, a properly drafted unavoidable accident instruction punctuates the necessity of finding both negligence and causation prior to assigning liability. It is true that such an instruction amounts, in essence, to a reemphasis of principles already implicit in other instructions. . . .

Id. at 834.

The court, in finding this was not an "unavoidable accident" found as a matter of law, that Fry did not keep a proper lookout, and that such was a violation of his statutory duty pursuant to Section 41-6-73 of the Utah Code. See Utah Code Ann. § 41-6-73 (1981) (amended 1988). These findings, along with the other findings and conclusions by the court, in effect, hold a violation of this section is negligence per se.

Before addressing the question of whether a violation of the statute is negligence per se, it must first be pointed out that the trial court erred in finding, as a matter of law, that Fry did not keep a proper lookout.

As the Anderson v. Toone court held:

The law is well settled in our jurisdiction that most cases involving negligence are not susceptible to summary disposition, finding a defendant negligent as a matter of law. . . .

Plaintiff reasons that defendant's failure to keep a proper lookout was negligence as a matter of law and thus that issue should not have been submitted to the jury to be decided. but we have heretofore held that what constitutes a proper lookout is a question for the jury as the individual fact situation in each case does not lend itself to a rigid application of any rule, but demands instead a determination of the conditions as they existed at the time of the accident (Cite omitted.)

Anderson, 671 P.2d at 172.

The Utah Supreme Court previously overturned similar findings by a trial judge on a claimed failure to maintain a proper lookout. In Durrant v. Pelton, 16 Utah 2d 7, 394 P.2d 879 (1964), the court held:

However, the test "[a]s to what constitutes a proper lookout is usually \* \* \* a latter-day classic question for jury determination, and each trial and appellate court must determine the question as a matter of law only when convinced that reasonable persons could not disagree upon the question when conscientiously apply fact to law". . . . A jury should determine what a reasonable and prudent person would do under the conditions as they existed at the time of the accident.

Id. at \_\_\_\_\_, 394 P.2d at 881.

In Smith v. Gallegos, 16 Utah 2d 344, 400 P.2d 570 (Utah 1965), the court addressed the same issue presented in this appeal. It held:

Justice does not sanction any such favoring of one party at the expense of the other. It imposes upon all drivers, including not only the left turner, . . . but also upon the oncoming vehicle . . . the fundamental duty which pervades the entire law of torts and from which no one is at any time excused: to use that degree of care which a reasonable and prudent person would use under the circumstances for the safety of himself and others. . . . If the left turner in performing his duty, and in making the required observation, sees no vehicle approaching, or that any coming is far enough away so that he can reasonably believe that he has time to make his turn, he may proceed.



Id. at \_\_\_\_\_, 400 P.2d at 572.

In King v. Fereday, the plaintiff argued that a rear-end collision constituted a violation of section 41-6-62 Utah Code and amounted to negligence per se. The court held:

Plaintiff's argument therefore assumes that the fact of the collision alone establishes a violation of the state. In McCloud v. Baum, this Court held that a collision alone does not create an inference of negligence. Id. at 1127-28.

King, 739 P.2d at 620.

Finally, in Maltby v. Cox Construction Co., Inc., 598 P.2d 336 (Utah 1979), the court analyzed plaintiff's jury instruction which would have, in effect, directed a verdict in their favor. The court held:

This requested instruction is tantamount to an instruction that rear-end collisions are invariably the result of the negligence of the driver of the following vehicle. The instruction was properly refused. The Court properly instructed the jury as to the duties and responsibilities of each of these parties to keep a proper lookout, to keep their respective vehicles under proper control, and to sue such care as a reasonable prudent person would use under the circumstances. The jury was persuaded that Pritchard's actions were reasonable under these circumstances, and that plaintiff's were not.

Id. at 340.

In light of the long standing case law in Utah spelling out the jury's role to determine what constitutes issues

of negligence, the Court of Appeals erred in affirming the trial court's finding that Fry "did not keep a proper lookout for eastbound on-coming traffic."

It was also improper for the Court of Appeals to sanction the trial court's implicit holding that a violation of a statute is negligence per se. Such a holding is in direct conflict with Utah case. As stated in Intermountain Farmers Ass'n v. Fitzgerald, 574 P.2d 1162 (Utah 1978).

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

Id. at 1164-65 (quoting Thompson v. Ford Motor Co., 16 Utah 2d 30, 395 P.2d 62, 64 (1964)) (emphasis added).

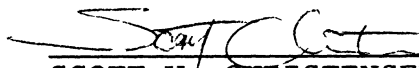
Thus, the Utah Court of Appeals committed error by affirming the district court's finding that as a matter of law Fry violated the statute and that such a violation was negligence per se.

#### CONCLUSION

Based on the authorities and discussion above, this court should grant a writ of certiorari for the purpose of reviewing the errors made by the Utah Code of Appeals (and the district court).

DATED this 18 day of October, 1990.

HANSON, EPPERSON & SMITH

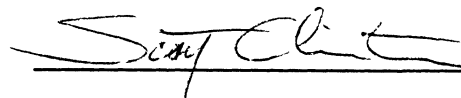
  
SCOTT W. CHRISTENSEN  
ERIC K. DAVENPORT  
Attorneys for Defendant/  
Third-party Plaintiff/  
Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, this 18<sup>th</sup> day of October, 1990, a true and correct copy of the foregoing to the following:

Fred D. Howard, Esq.  
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Attorneys for Plaintiff, Respondent  
120 East 300 North Street  
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Ray Phillips Ivie, Esq.  
IVIE & YOUNG  
Attorneys for Third-party Defendant, Respondent  
P.O. Box 672  
Provo, UT 84603



83-612.101

## APPENDIX A

SEP 20 1990

FILED

HANCOCK ET PERSON & SMITH

SEP 13 1990  
Clerk of the Court  
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

-----oo000-----

Harold Edwin (Hal) Rhodes,  
Plaintiff and Appellee,  
v.  
John M. Fry and Judith  
L. Fry,  
Defendants, Third-Party  
Plaintiffs and Appellants,  
v.  
William C. Petersen,  
Third-Party Defendant  
and Appellee.

ORDER OF AFFIRMANCE  
Case No. 890473-CA

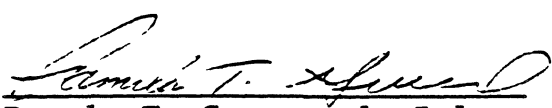
Before Judges Greenwood, Jackson and Bench (On Rule 31 Hearing).

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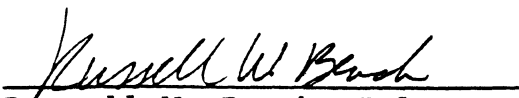
The judgment of the district court is affirmed.

DATED this 18th day of September, 1990.

ALL CONCUR:

  
Pamela T. Greenwood, Judge

  
Norman H. Jackson, Judge

  
Russell W. Bench, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 18th day of September, 1990, a true and correct copy of the foregoing ORDER OF AFFIRMANCE was deposited in the United States mail.

Scott W. Christensen  
Hanson, Epperson & Smith  
Attorneys at Law  
4 Triad Center, Suite 500  
P.O. Box 2970  
Salt Lake City, UT 84180

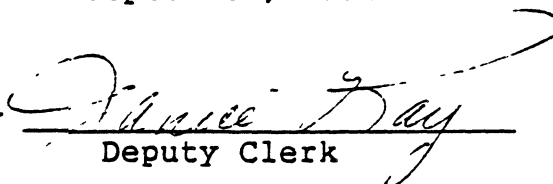
Fred D. Howard  
Leslie W. Slaugh  
Howard, Lewis & Petersen  
Attorneys at Law  
120 East 300 North St.  
Provo, UT 84603

Ray Phillips Ivie  
Ivie & Young  
Attorney for Petersen  
P.O. Box 672  
Provo, UT 84603

Honorable Boyd L. Park  
Fourth District Judge  
101 County Building  
Provo, UT 84601  
No. 64,555

DATED this 18th day of September, 1990.

By

  
Deputy Clerk

## APPENDIX B

1999 MAR - 21 11:15  
SP

FRED D. HOWARD (1547), for:  
HOWARD, LEWIS & PETERSEN  
ATTORNEYS AND COUNSELORS AT LAW

120 East 300 North Street  
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Provo, Utah 84603  
Telephone: (801) 373-6345  
Facsimile: (802) 377-4991

Q:Rhod-Jud.10  
Our File No. 14,608

Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY  
STATE OF UTAH

---

HAROLD EDWIN (HAL) RHODES,	:	
Plaintiff,	:	JUDGMENT
vs.	:	
JOHN M. FRY and JUDITH L. FRY,	:	
Defendants and	:	
Third-Party Plaintiffs,	:	
vs.	:	Civil No. 64,555
WILLIAM C. PETERSEN,	:	
Third-Party Defendant.	:	Judge Boyd L. Park

---

This matter having come on regularly for hearing before the Court sitting with a jury on November 28-30, 1988, and the Court having heard the Motion of plaintiff's counsel for a directed verdict and having granted the same by reason of the evidence presented, and the jury having heretofore resolved the question of damages regarding plaintiff's injuries herein, and after good faith presentation of the evidence by both plaintiff and defendant, being fully advised in the premises, and having heretofore



entered its Findings of Fact and Conclusions of Law; the Court does now make and enter the following Judgment against defendants John M. Fry and Judith L. Fry:

### JUDGMENT

The Court concludes that plaintiff is entitled to a judgment against defendants John M. Fry and Judith L. Fry in the amount of \$21,000.00 for special damages, together with accrued interest on said special damages from the date of the subject accident, December 11, 1982, until the date of judgment, at the rate of eight percent (8%), and for general damages in the amount of \$29,000.00, with interest to accrue on the total judgment at the rate of twelve percent per annum (12%), plus court costs thereafter.

DATED this 1<sup>st</sup> day of May, 1989.

BY THE COURT



BOYD L. PARK  
DISTRICT COURT JUDGE

### MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 4<sup>th</sup> day of April, 1989.

Scott W. Christensen, Esq.  
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R. Phil Ivie, Esq.  
Ivie & Young  
P. O. Box 672  
Provo, UT 84603

Shauntel Christensen  
SECRETARY

## APPENDIX C

1989 MAY -1 PM 1 40  
32

FRED D. HOWARD (1547), for:  
HOWARD, LEWIS & PETERSEN  
ATTORNEYS AND COUNSELORS AT LAW

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Q:Rhod-FOF.10  
Our File No. 14,608

Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY  
STATE OF UTAH

---

HAROLD EDWIN (HAL) RHODES,	:	
Plaintiff,	:	FINDINGS OF FACT AND
vs.	:	CONCLUSIONS OF LAW
JOHN M. FRY and JUDITH L. FRY,	:	
Defendants and	:	
Third-Party Plaintiffs,	:	
vs.	:	Civil No. 64,555
WILLIAM C. PETERSEN,	:	
Third-Party Defendant.	:	Judge Boyd L. Park

---

This matter having come on regularly for hearing before the Court sitting with a jury on November 28-30, 1988, and after a good faith presentation of the available evidence by both the plaintiff and the defendants; and the Court having heard the Motion of plaintiff's counsel for a directed verdict and having thereafter received memoranda of points and authorities by the respective attorneys in support of and in

opposition to said Motion, and the jury having heretofore resolved the question of damages regarding plaintiff's injuries herein, and the Court having taken said Motion under advisement, and thereafter having heard oral arguments regarding said Motion, and being fully advised in the premises, the Court concludes that all the evidence showed defendant William C. Peterson was not negligent and that John M. Fry was negligent; and does, therefore, grant Plaintiff's Motion for Directed Verdict; and it does now make and enter the following:

#### FINDINGS OF FACT

1. On or about December 11, 1982, the defendant John M. Fry was driving a 1979 Chevrolet C10 pickup truck which was involved in a collision with a 1966 two-door Volkswagen driven by third-party defendant William C. Petersen. The accident occurred at the intersection of State Road 265 and Main Street in Orem, Utah at approximately 6:22 p.m. The intersection was regulated by traffic lights.

2. The plaintiff Harold Edwin Rhodes was a passenger in the vehicle driven by third-party defendant William C. Petersen. Upon impact, the occupants of the Petersen vehicle were all rendered unconscious from the accident and have limited memory of the circumstances occurring at the time of the accident.

3. Prior to the collision, the Fry vehicle was traveling westbound on State Road 265, and the Petersen vehicle was travelling eastbound. Defendant Fry testified that he brought his vehicle to a stop at the intersection while he faced a red light. When the light turned green, he perceived a station wagon approaching that was going to make a left turn. Defendant Fry stated he did not see the Petersen vehicle and, therefore, proceeded to turn to the left across the eastbound lane of travel of the

Petersen vehicle. In an attempt to avoid defendant Fry's vehicle as it turned in front of Petersen's vehicle, Petersen applied the brakes and his vehicle laid down 35 feet 11 inches of tire skid marks before the point of impact between the two vehicles. (See Exhibits 2 and 10.)

4. The Court finds from the testimonies of the investigating officer, Fran Fillmore, and accident reconstructionists, Newell Knight and Greg DuVal, that defendant Fry was negligent.

5. John M. Fry's expert accident reconstructionist, Rudolph Limpert, stated on direct examination when asked: "Based on your experience in accident investigation and reconstruction, what caused this accident?":

A set of unfortunate circumstances, a vehicle driving behind a station wagon, a large domestic or American station wagon that's some distance behind. One could calculate how small that Volkswagen is in relationship to the perspective of that big car, the station wagon obstructing its view. And then the unfortunate accident occurred. So I don't see anything unreasonable in terms of the left turn by Mr. Fry when he made the left turn.

(Reporter's Transcript of Proceedings, Testimony of Rudolph Limpert, November 29, 1988, 2:10 p.m. transcribed p. 30.)

6. The Court notes that the jury by Special Verdict found defendant John M. Fry not negligent. The jury finding, together with the Court's instruction to the jury, that the plaintiff was not negligent as stipulated by the parties and further, that the Court had found as a matter of law defendant Petersen was not negligent, resulted in what would have to be termed an unavoidable accident. The Court had refused to

give an unavoidable accident instruction. The jury further found plaintiff Harold E. Rhodes incurred \$21,000.00 in special damages and \$29,000.00 in general damages.

7. Utah Code Ann., § 41-6-73, which was submitted as Jury Instruction No. 23, states:

The operator of a vehicle intending to turn to the left shall yield the right-of-way to any vehicle approaching from the opposite direction which is so close to the turning vehicle as to constitute an immediate hazard.

8. This Court finds that Utah Code Ann., § 41-6-73, is applicable to the case at bar and creates a statutory duty on all operators of motor vehicles who make left hand turns to ". . . yield the right-of-way to any vehicle approaching from the opposite direction which is so close to the turning vehicle as to constitute an immediate hazard."

9. This Court also follows the ruling in French v. Utah Oil Ref. Co., 117 Utah 406, 216 P.2d 1002, 1004 (1950) wherein the Utah Supreme Court held:

. . . a burden is placed on the driving making the turn as he has control of the situation, and if there is a reasonable probability that the movement cannot be made in safety then the disfavored driver should yield. The driver proceeding straight ahead has little opportunity to know a vehicle is to be turned across his path until the movement is commenced and in many instances, the warning is too late for the latter driver to take effective action.

10. The Court also adheres to the rationale of Yeates v. Budge, 122 Utah 518, 252 P.2d 220 (1953) wherein the Utah Supreme Court held that where a defendant attempted to turn across the path of the plaintiff, when he was only 40 feet away, the trial court could reasonably conclude that the plaintiff was so close as to constitute an

immediate hazard and that the defendant should have yielded the right-of-way to him.

11. This Court is reluctant to take from the jury its fact finding responsibility regarding negligence of the parties and whether the negligence was a proximate cause of plaintiff's injuries. The Court is mindful of those cases in which the Supreme Court has concluded that juries should be fact finders. (Mel Hardman Productions, Inc. v. Robinson, 604 P.2d 913, 917 (Utah 1979).)

12. The Court, however, given all the testimony of the witnesses, finds that the matter is one in which reasonable minds could not differ, and in fairness and equity, cannot find that this accident was an unavoidable accident. The Utah Supreme Court has defined an unavoidable accident as ". . . an unusual and unexpected occurrence 'which result[s] in injury and which happen[s] without anyone failing to exercise reasonable care . . .'" (Kusy v. K-Mart Apparel Fashion Corporation, 681 P.2d 1232, 1237 (Utah 1984); and Stringham v. Broderick, 529 P.2d 425, 426 (Utah 1974).

13. Even should this Court ignore the testimony of those witnesses who testified that defendant Fry was negligent and look only to the testimony of Fry's witness, Rudy Limpert, (according to his calculations this was an unfortunate accident), this Court is of the opinion that the accident was not an unavoidable accident as defined by the Supreme Court of this state.

14. The Court finds that given all the evidence reasonable men could not differ in finding that the defendant John M. Fry made a left hand turn across oncoming traffic heading eastbound along State Road 265 and did not keep a proper lookout for eastbound on-coming traffic which resulted in his colliding with third-party

defendant William C. Petersen's vehicle, thus violating his statutory duty pursuant to Utah Code Ann., § 41-6-73.

15. The Court also finds that the jury was confused in its application of the jury instructions to the facts of the case by essentially concluding the collision to be an unavoidable accident.

16. The Court further finds that plaintiff Harold Edwin Rhodes is entitled to his directed verdict against defendants holding that defendant John M. Fry negligently operated his vehicle which was the proximate cause of the plaintiff's injuries.

17. The Court finds that at the time of the accident, December 11, 1982, John M. Fry was the operator of a vehicle as a minor under 18 years of age; and this his mother, Judith L. Fry, signed John M. Fry's driver's license application.

From the foregoing Findings of Fact, the Court now makes and enters the following:

#### CONCLUSIONS OF LAW

1. The Court concludes that the plaintiff Harold Edwin (Hal) Rhodes was not negligent.

2. The Court concludes that the third-party defendant William C. Petersen was not negligent.

3. The Court concludes that reasonable minds could not differ regarding the liability of the defendant and third-party plaintiff John M. Fry and concludes the same to be negligent and that said negligence was the proximate cause of the accident in question and of plaintiff's injuries.



4. The Court concludes that by law, liability of John M. Fry is imputed to defendant and third-party plaintiff Judith L. Fry under Utah Code Ann. § 41-2-115(2).

5. The Court concludes that plaintiff is entitled to a judgment against defendants John M. Fry and Judith L. Fry in the amount of \$21,000.00 for special damages, together with accrued interest on said special damages from the date of the subject accident, December 11, 1982, until the date of judgment, at the rate of eight percent (8%), and for general damages in the amount of \$29,000.00, with interest to accrue on the total judgment at the rate of twelve percent per annum (12%), plus court costs thereafter.

DATED this 12<sup>th</sup> day of April, 1989.

BY THE COURT



BOYD L. PARK  
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 4<sup>th</sup> day of April, 1989.

Scott W. Christensen, Esq.  
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