

1973

Inga-Lill Elton v. Bankers Life & Casualty Company : Petition For Rehearing

Utah Supreme Court

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BRIEF IN SUPPORT OF
PETITION FOR REHEARING

STATEMENT OF THE CASE

At this point, we will not make a formal statement of the facts in this case, but will discuss those facts under our Point II. We will first seek to establish that this Court used an erroneous rule for appellate review in a case where there was a verdict and judgment in favor of plaintiff here. We will then seek to establish the rule that should have been followed by this Court and based upon that rule, and a discussion of the evidence most favorable to plaintiff, we will seek to show that the Court should either grant a rehearing or in the alternative to affirm the verdict and judgment of the trial court.

POINT I.

THE COURT USED AN ERRONEOUS RULE FOR APPELLATE REVIEW AND, IN FACT, IT SHOULD HAVE USED THE RULE THAT IT WOULD LOOK TO THE EVIDENCE MOST FAVORABLE TO PLAINTIFF TO SUPPORT THE VERDICT AND JUDGMENT.

This Court started its opinion on a false premise and worked from there to an erroneous conclusion. The Court states:

“Counsel reminds us that we must review the evidence in a light favorable to the verdict. We will do this by not reporting or considering the evidence adduced by defendant, but only that of the plaintiff, and holding the plaintiff responsible for any such evidence representing both the less favorable to its contentions as well as that which may be more favorable.”

The first sentence pays lip service to the rule contended for by plaintiff. Even then it does not properly state the rule because it should be “in a light *most* favorable to the verdict.”

The second sentence then states a rule which is entirely different from the rule contended for by us at the time of the submission of this case and as of now.

The Court cites the case of *Oberg v. Sanders*, 111 Utah 507, 184 P.2d 229 (1947). This case in no way supports the rule which this Court elected to follow in its consideration of this case on appeal. In the *Oberg* case, the trial court granted a Motion for a non-suit. The Court stated:

“The question for determination in this case is whether the trial court erred in granting the motion for nonsuit. To decide this question we must view the evidence in the light most favorable to plaintiff.”

This case did not hold that it would take into consideration the less favorable evidence against plaintiff's

position as this Court stated it was going to do in this case.

The *Oberg* case also made reference to the rule concerning weighing of testimony in connection with cross-examination which has no relevancy here. In connection with that rule the Court stated as follows:

“The rule is that the testimony of a witness is no stronger than where it is left on cross-examination.”

Apparently the Court takes the view in considering this case that the plaintiff, by calling a witness, vouches for all of his testimony and is bound by it. This just is not the rule as was pointed out by this Court in the case of *Schlatter v. McCarthy*, 113 Utah 543, 196 P.2d 968 (1948). In that case, the plaintiff called two witnesses. One by the name of Jones who testified in one aspect favorably to plaintiff and in another aspect unfavorably. Another witness was called by plaintiff who testified favorably on the subject Jones had testified unfavorably. Plaintiff's counsel made the argument that Jones should be disbelieved and that the testimony of the other witness should be followed in connection with his favorable testimony. In addressing itself to this question, this Court stated as follows:

“It is the general rule that a party who calls a witness vouches for his veracity, and cannot afterward impeach the witness, either by the testimony of impeaching witnesses or by argu-

ment to the jury. The rule is subject to some exceptions, notably where one party must call the adverse party as a witness. But a party is not bound by every statement that his witness makes, and he may, by testimony of other witnesses and in argument to the jury, show that the facts were different from those testified to by the witness. This is permitted, not for the purpose of impeaching the witness (although it may have that incidental effect), but for establishing the true facts. It would be a monstrous rule that would bind a party to every statement of every witness produced by him. It is common experience that several eye-witnesses to an occurrence will have different versions of the same transaction. A party who calls several eye-witnesses is entitled to argue before the jury that they should believe the facts to be as testified to by the witness most favorable to him. This is not an attack upon the veracity of the other witnesses called by him whose testimony may be different in some respects from that of others, but merely an attempt to convince the jury that the facts are really as contended by him. On the other hand, a party who has called a witness to help prove his case, and has vouched for his credibility, may not thereafter argue to the jury that such witness is unworthy of belief."

Within the meaning of this case, the argument by a party that the most favorable testimony should be taken by the jury to establish his case is not an attack on the

basis that the witness who testified differently than this is unworthy of belief.

The principle of the *Schlatter* case was reaffirmed by this Court as late as November, 1972 in the case of *Batt v. State*, 28 Utah2d 417, 503 P.2d 855 (1972). In that case, this Court stated:

“However, we note here that we are in accord with the idea that a party neither has to vouch for, nor be bound by, the testimony of a person whom he calls as a witness.”

The Court also cited Rule 20 of the *Rules of Evidence of Utah*. That rule provides:

“Rule 20. *Evidence Generally Affecting Credibility.*

Subject to Rules 21 and 22, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence concerning any statement or conduct by him and any other matter relevant upon the issue of credibility.”

The rule which should have been followed by this Court has been stated innumerable times. We will not attempt to make an exhaustive review of these cases but will only cite the more recent cases which have followed the rule.

In *Sine v. Salt Lake Transportation Company*, 106 U. 289, 147 P.2d 875 (1944) on a trial before the lower

court, without a Jury, the Court entered a judgment of no cause of action. The Court stated the following as the rule to be followed in the appellate review of this case:

“This is a case at law. It therefore follows that this appeal is upon question of law alone. That being true the function of this court is not to pass upon the weight of the evidence, nor to determine conflicts therein, but to examine it solely for the purpose of determining whether or not the judgment finds substantial support in the evidence. In so examining the evidence all reasonable presumptions are in favor of the trial court’s findings and judgment, and the evidence must be considered in the light most favorable to them. If the findings and judgment are substantially supported by the evidence, then the court may not disturb them.”

In *Toomer’s Estate v. Union Pacific Railroad Co.*, 121 U. 37, 239 P.2d 163 (1951) a verdict in a railroad crossing case was for plaintiff and in affirming plaintiff’s judgment, the Court stated the rule for appellate review as follows:

“The jury, having found the issues in favor of the plaintiff, he is entitled to have us consider all of the evidence, and every inference and intendment fairly arising therefrom in the light most favorable to him. See *Lewis v. Rio Grande Western Ry. Co.*, 40 Utah 483, 123 P. 97; *Cromeenes v. San Pedro, L. A. & L. R. Co.*, 37 Utah 475, 109 P. 10 and see

Nice v. Illinois Cent. R. Co., 303 Ill. App. 292, 25 N.E.2d 104.”

In *Mountain States Tel. & Tel. Co. v. Consolidated Freightways, et al.*, 121 Utah 379, 242 P.2d 563 (1952) the trial court awarded judgment to plaintiff and the Court stated that the one question of substance to be decided on appeal was whether the record supported the finding of the trial court that plaintiff's damage was caused by the negligence of the defendant. The Court stated the rule as follows:

“This assignment of error requires merely that we examine the record in the aspects most favorable to the plaintiff to determine whether there is evidence to support the judgment of the court below. *Beagley v. U. S. Gypsum Company*, Utah, 235 P.2d 783, and cases there cited.”

In *Gibbons and Reed v. Guthrie*, 123 U. 172, 256 P.2d 706, (1953), this Court, in supporting a trial court judgment, stated the rule as follows:

“It needs no citation of authority that this Court will not redetermine facts found by the fact finder in the lower court in law cases if in the light most favorable to the respondent the evidence is sufficient to sustain such findings.”

In *Niemann v. Grand Central Market, Inc.*, 9 U.2d 46, 337 P.2d 424 (1959) again in supporting the judgment of the trial court, this Court stated the rule as follows:

“It is well settled in the law that sufficiency of the evidence to support a jury verdict, in a law action, must be viewed in the light most favorable to the prevailing party. It is equally clear that the examination of an appellate court is limited to the question of whether there is substantial evidence upon which the jury could have based its verdict. In our judicial system the jury is the trier of fact, their determination of fact, based on face to face contact with each witness and on a first-hand appraisal of the evidence, must be given full consideration. The finding of a jury will be upset only when it is clearly not supported by substantial evidence.”

In *Dansak v. Deluke*, 12 U.2d 302, 366 P.2d 67 (1961), the Court applied the following rule in affirming a trial court judgment:

“This being a case at law it follows that this appeal is upon questions of law alone. This court cannot pass upon the weight of the evidence, nor determine conflicts therein, but can only determine whether or not the findings and judgment of the trial court find substantial support in the evidence. In so examining the evidence, **all reasonable** presumptions are in favor of such findings and judgment, and the evidence must be considered in the light most favorable to them.”

In some cases the Court has not used the words “most favorable” but never, so far as we can determine, has it

ever used the rule above quoted from the Elton case. These other cases have stated that if the evidence is sufficient to support the verdict or judgment the trial court must be affirmed.

In *Lym v. Thompson*, 112 U. 24, 184 P.2d 667 (1947) this Court stated the rule of appellate review as follows:

“We are called upon to decide whether or not there is evidence in the case that will directly or by inference support the decision of the trier of the facts. In deciding that question we decide merely—so far as circumstantial evidence is concerned—that if there are inferences to be drawn therefrom that will support the lower court’s conclusions upon the probabilities of that evidence, we are bound to uphold the decision, even though had we been trying the case we might have stressed the inferences adversely to such a conclusion. We have shown above how there are inferences that will support the lower court’s conclusion and therefore we must affirm it. It is so ordered.”

The Court, in the Elton case, flew right in the face of the rule as stated in the *Lym* case.

In *Horsley v. Robinson*, 112 U. 227, 186 P.2d 592 (1947) this Court held that it was a constitutional duty which this Court had in reviewing a law case and stated:

“Under a general verdict we cannot be assured what facts the jury found or that they found the facts necessary to sustain their

Finally, Mrs. Elton's summation of his working hours (R. 313) was stated as follows:

"A. Well, he did, but I mean the way I was able to observe my husband, it was because I know he had his regular duties in Court, he had—he was—he had this Ronnow, this Sunday Closing was sort of overlapping in preparing, and he spent every single minute studying. Like I said, even Sundays, Saturdays and Sundays. And this involved the whole family. It was just plain miserable. And I could see he was building up this pressure. And I told—there was nothing I could do about it. But this is what I feel was it just came to a climax."

From the foregoing evidence, certainly the jury was justified in finding that Judge Elton, in the last six weeks of his life, was under marked physical and emotional stress.

Turning now to the medical evidence most favorable to the plaintiff, we call the Court's attention, again, to plaintiff's Exhibit 6 which the Court entirely disregarded in its Opinion and in which the opinion of Dr. Null, and the other doctors, was to the effect that the marked physical and emotional stress indeed precipitated the decedent's death. This evidence alone is enough to justify the jury verdict and, in our opinion, is the evidence most favorable to the plaintiff's position in this case.

However, a review of the medical evidence produced

by plaintiff requires, under what we consider well established rules of Utah law, affirmance of the judgment below.

Dr. Robert M. Dalrymple was Judge Elton's treating physician. Judge Elton had suffered his first stroke on January 9, 1969 (R. 319) but, under the evidence, the jury in this case could well have found that by April 21, 1970, he had recovered. We will attempt to show this by a reference to Dr. Dalrymple's testimony.

Dr. Dalrymple saw the Judge on April 1, 1969 and at that time he had returned to work although he could not say he had returned to full time work (R. 323). Dr. Dalrymple saw the Judge in May, June, July, August, September and October, 1969 (R. 323). He stated that he continued to improve during that time and on October 3, 1969, he was doing a full day's work (R. 324). Dr. Dalrymple continued to see him through April 20, 1970. He stated that on February 23, 1970, he was doing well and that on March 23, 1970, "everything was satisfactory, no change" (R. 324 and 325). On April 20, 1970 his medicine was reduced "because he was doing quite satisfactorily" (R. 325).

It must be remembered it was during this latter period of time that, according to the foregoing testimony, the Judge was under a great deal of physical and emotional stress because of the work he was doing and the burden of the sensitive cases he was deciding. From this date on, it was all downhill where before this time his progress had been uphill.

The jury could well have found, and this Court should sustain it, that the stresses and the strains were what caused the ensuing physical deterioration of Judge Elton.

Judge Elton was brought into Dr. Dalrymple's office on April 21, 1970 by his wife in such a condition that he assumed the Judge had had another stroke (R. 325). On April 28, 1970, he had another episode which the doctor described as "not good" (R. 326). He then saw the Judge again on May 2, 1970 and, concerning his condition, he testified as follows:

"Q. Did you know anything about the work load that he was assuming during this period of time?

A. All I knew about it was that he had been working hard. I had suggested he cut down, but he was a very impulsive individual, and he would not listen very well.

Q. Did you know anything about these cases, the name of them, the Sunday Closing Law or have any knowledge of those?

A. I had heard rumors of them, sir, but they didn't mean much to me.

Q. During this period of time, did you form an opinion as to whether or not he was suffering under some stress?

A. Oh, I don't think there was any doubt about it, sir." (R. 327).

We, again, call the Court's attention to plaintiff's Exhibit 6 wherein it was the opinion of Dr. Null that this physical and emotional stress, from which Judge Elton was suffering, precipitated his death. How, in the face of this evidence, can this Court overrule the jury's finding that it was stress that was the proximate cause of the death of Judge Elton? That is what this testimony means and this is the finding this testimony supports.

The Judge died on May 13, 1970 and Dr. Dalrymple testified that the immediate cause of death was circulatory collapse. This, in turn, was due to damage of the brain, in other words, "all his reflexes went to pot and he collapsed" (R. 329). Dr. Dalrymple further testified:

"* * * I would just have to say in my own opinion that this man was well and doing well, and something drove him to pot, and I think he was under servere stress." (R. 331).

Here again we pause to have the Court reflect upon this evidence and answer the question, how in the world can this Court find, in view of this testimony, that the finding of the jury that the stress was the sole cause of the death of Judge Elton on May 13, 1970 was not justified by the evidence.

At this point, we call the Court's attention to the case of *White v. National Postal Transport Association*, 1 U.2d 5, 261 P.2d 924 (1953), in which, in a very similar situation, the Court held that it was proper to submit to the jury whether or not the decedent had died from an

accident defined as sudden, violent death from an external violent and accidental means resulting directly, independently and exclusively from any other causes. The Court stated:

“At the trial respondent proceeded on the theory that the accidental blow to White’s leg (1) reactivated or “lighted up” an inactive heart condition which led to his death, or (2) the blow started an unbroken chain of circumstances which led to his death independently of any contributing cause. Instructions embracing these two theories were presented to the jury and it is the giving of those instructions which is assigned as error by the appellant who contends that the respondent failed to adduce evidence to support a jury finding under either theory.”

In that case, the prior condition had reached a stationary period and the Court held it was proper to submit that case on both of the theories indicated in the foregoing quotation.

Dr. Dalrymple testified that Judge Elton was under undue stress and he did not think he was going to die that fast (R. 332).

This Court was totally wrong in saying that Judge Elton suffered from a lingering progressive heart disease. Dr. Dalrymple testified contrary to the Court’s statement when he testified “He (Judge Elton) had no heart trouble until he died” (R. 345).

On the question of the unexpectedness of Judge Elton's death, Dr. Dalrymple testified in his deposition as follows:

"* * * were you suprised by this development in a medical sense?

A. In a way, yes. He was doing so well, I really was quite shocked that he had this sudden* * *." (R. 358).

He further testified:

"A. As I said before, sir, the only thing is if one person has a stroke, they are always suspicious they will have another, but people live a long period of time and never have another stroke. I was just being extra cautious and trying to do some preventative medicine rather than treating him by the observation. I had no assurance that Mr. Elton was going to have another stroke." (R. 359).

The hospital records of May 13, 1970 (Exhibit 3-P) further support the jury's verdict by the following quotation:

"Patient has been followed by myself since that time and has had some weakness and headache for the past two weeks which have been associated with considerable emotional stress due to his work as a jurist.

Approximately 2 hours before admission patient had rather sudden onset of weakness and cyanosis and was immediately brought to the

hospital by ambulance. There is no history of recent chest pain, hemoptysis or dyspnea.”

The favorable testimony of Dr. Clyde Null also supports the jury verdict and this Court should look at this testimony favorably and we are sure, if it does, that it will conclude that the jury verdict was supported by sufficient evidence.

Dr. Null described the stroke in January, 1969, and which apparently was the same as the one of May 13, 1970, as a “cerebral cardiovascular accident” (R. 370).

Dr. Null testified as follows on cross-examination when counsel was seeking to get the doctor to testify that Judge Elton was going to die from the progression of his condition:

“Q. And when you—when the condition gets so bad—I mean eventually this person, as the condition progresses, is going to die from the progression of this condition?

A. That’s not really necessarily true, sir. It is a common clinical observation that we cannot always—we simply can’t answer all of these in that fashion. People will have a stroke, they will have symptoms of vascular insufficiency and this will go on for years, and others do not. And there are a whole host of factors which influence that.” (R. 383).

We respectfully submit that if the Court will follow the rule limiting its appellate review as indicated by the

cases heretofore cited, we are satisfied that no other conclusion can be reached than that the evidence supported the finding by the jury that there was a bodily injury defined by the doctors as a cerebral cariovascular accident and that the stress, which Judge Elton was under by virtue of his judicial duties, was the proximate precipitating cause of his death.

POINT III.

THE COURT ERRED IN HOLDING THAT A PRE-EXISTING DISEASE WOULD PRE- VENT RECOVERY UNDER THIS POLICY OF INSURANCE.

Respondent's position, in filing her Brief in this matter, was to meet the arguments and the theories set forth by appellant in claiming that error had been committed. In this regard, it is respectfully suggested that the respondent did meet the appellant's theory. But, more importantly and critical to the issue in this case, is the fact that the cases relied upon by the Court, in reversing the jury verdict, were not mentioned by the appellant in his Brief. The Court relied upon the following cases: *Smith v. Continental Casualty Company*, Dist. of Col. CT. App., 203 A.2d 168 (1964), *Bewley v. American Home Assurance*, 450 F.2d 1079 (1971), *Love v. American Casualty Company*, 202 F.Supp. 47 (1961), *Landress v. Phoenix Ins. Co.*, 291 U. S. 491, 54 S.Ct. 461, 78 L.Ed. 934 (1934), *Mutual Benefit v. Hudman*, 398 S.W.2d 110 (1965).

As was stated, these cases were not cited by appellant and, as such, a Petition for Rehearing should be granted in all fairness to allow respondent to reply to the effect of these cases. This is particularly important in this instance since the cases cited by the Court sustain a view that has been specifically rejected by numerous Utah cases.

In *Smith v. American Casualty Company*, supra, but, more importantly, in *Bewley v. American Home Assurance*, supra, the appellate courts took the position that the principle of proximate cause, applied ordinarily in negligence cases, does not apply in construing insurance liability cases. That is, these cases hold that if there is any concurrence of accidental injury or pre-existing bodily infirmity or disease, that it is "irrelevant whether the bodily infirmity or disease is a proximate cause of death or the remote cause, because recovery on the policy is precluded merely if the infirmity or disease is a contributing cause of death."

This Court cites *Mutual Benefit v. Hudman*, supra, where there was no evidence that the accident did precipitate the decedent's death. It appears, however, that the construction, put by this Court on this case, is erroneous because a later case from the same jurisdiction, *Mutual Benefit v. Ratliff*, 440 S.W.2d 119, stated with regard to the issue of causation:

"The Court clearly states in *Hudman* that they were not holding that every pre-existing frailty or enfeeblement of the human body which exists at the time of an accident will de-

feat recovery under policies similar to the one involved in *Hudman*. The Court cites with approval *Silverstein v. Metropolitan Life Insurance Company*, 254 N.Y. 81, 171 N.E. 914 (1930) in which Chief Justice Cardozo said:

“‘A policy of insurance is not accepted with the thought that its coverage is to be restricted to an Apollo or a Hercules.’

Competent evidence of qualified persons separated the real causes of Mr. Ratliff's death from mere conditions thereby raising issues of fact which the Court has found against Appellant. Appellant's no evidence points are overruled.”

As mentioned earlier, Utah does not follow this strict rule of sole cause but, rather, has, on numerous occasions, refuted such narrow construction. See *Whitlock v. Old American Insurance Company*, 21 U.2d 131, 442 P.2d 26 (1968). The Court stated as follows:

“It is appreciated that insurance companies in issuing these accident policies make perfectly legitimate efforts to so word them as to exclude death caused by disease and to cover only death caused by accident. Notwithstanding differences in wording in attempting to accomplish that objective, it is generally held that insofar as coverage for accident is concerned, the insurer takes the insured as he is; that even though he may have some diseased condition which would eventually result in his death, or that the injury would not have resulted in death to a more robust person, if an

accident occurs *which hastens his death*, recovery can be had under the policy. The critical question to be determined is whether the real and efficient cause, or as sometimes stated, the proximate cause of death was the disease, or the accident', and where the evidence would reasonably permit a finding either way, the issue is for the jury." (Emphasis added).

(Footnote 7 is as follows:

'Hassing v. Mutual Life Ins. Co., 108 Utah 198, 159 P.2d 117 (1945) and cases cited therein; *Fetter v. Fidelity & Casualty Co.*, 174 Mo. 256, 73 S.W. 592, 61 L.R.A. 459 (1903); *Kundiger v. Prudential Ins. Co. of America*, 219 Minn. 25, 17 N.W.2d 49 (1944). See also *DiEnes v. Safeco Life Ins. Co.*, 21 Utah2d 147, 442 P.2d 468 (1968).)

After making the foregoing statement; that is, that the central issue involves the question of proximate cause, the Court specifically adopted the holdings of two cases that involve fact situations almost identical with the facts in this case.

"A case supporting this view which is close to our own on its facts is *Brooks v. Metropolitan Life Insurance Co.*, 27 Cal.2d 305, 163 P.2d 689 (1943). Even though the deceased had had incurable cancer the Court stated that the presence of such a pre-existing disease would not relieve the insurer from liability if the accident was the prime or moving cause of the death. In *Gennari v. Prudential Ins. Co. of America*,

Mo. (1960), 335 S.W.2d 55, the defendant company claimed that the death was caused by a prior condition of hypertensive cardiovascular disease and arteriosclerosis. The Court stated that “ ‘It is well settled that although a person may have a weakened body * * * as the result of * * * disease nonetheless if death is directly caused by * * * accidental means * * * recovery may be had * * * if he dies by reason of it, even if he would not have died if his previous health had been different. In such event the condition of previous health is merely a predisposing and remote cause and not the *direct, proximate cause, as contemplated by the policy, notwithstanding such condition might have cooperated, concurred in and contributed to death*’.” (Emphasis added).

POINT IV.

THE COURT ERRED IN HOLDING THAT THE WORD “ACCIDENT” IN AN INSURANCE POLICY SHOULD BE CONSTRUED DIFFERENTLY FROM THE WORD “ACCIDENT” IN A WORKMEN’S COMPENSATION OR RETIREMENT STATUTE.

The word “accident” is in common every day use in the English language. Just why it should have a different meaning one place than another is really hard to understand. An accident is an accident.

This Court has held that stress and strain constitutes an accident under the very same facts as were presented

to the Court and jury in the case at bar. *Elton v. Utah Retirement Board*, 28 U.2d 368, 503 P.2d 137 (1972) in which the Court stated that it had heretofore held:

“* * * that an internal failure brought about by exertion in the course of employment may be an accident within the meaning of the Utah Workmen’s Compensation Act. *Powers v. Industrial Commission*, 19 Utah2d 140, 427 P.2d 740 (1967). The Utah Workmen’s Compensation Act employs language identical to that found in the Judges Retirement Act above quoted.”

Testimony in the previous Elton case is as follows:

“The persons who knew him best—his wife, his colleagues, his clerk, his baliff and the lawyers who practiced before him—all testified to the deterioration of his health, brought upon by the stresses of the highly sensitive cases handled by him during the last six weeks of his life. His physician testified that Judge Elton suffered from vascular disease, resulting in insufficient blood supply to the brain, and that this condition was aggravated by the stresses of Judge Elton’s employment and that these stresses were the principal factor *in cutting short his life.*” (Emphasis added).

It then ruled as follows:

“The record supports the trial court’s conclusion that Judge Elton died as a result of an

accident arising out of or in the course of his employment, and under the traditional rules of review the judgment of that court will not be disturbed. The judgment of the trial court is affirmed, no costs awarded."

It is impossible to understand how this Court could make the word "accident" have different meanings in different areas of the law. This is simply not justified on any logical basis, yet one of the interesting things about the holding of the Court is that it is based on the flat-out statement that there should be a distinction between Workmen's Compensation language and insurance policy language. The Court does this without the citation of a single authority. We think for the Court to take off on a new theory of law in the face of authority in this state directly against this holding is, to say the least, not in the highest tradition of the law.

We may talk all we want about the differences between statutes and insurance policies, but we always must return to the simple fact that we are only construing a common every day word "accident" and it should have the same meaning wherever used.

In *Richards v. Standard Accident Insurance Company*, 58 Utah 622, 200 P. 1017 (1921), it was expressly held that "accident" should mean the same in an insurance policy as it later was construed to mean in statutes.

In view of the fact that this Court has overruled the *Richards* case, it should not permit this ruling to be given retroactive operation. As this Court points out, the mat-

ter is contractual and the parties contracted at a time that the *Richards* case was in effect and certainly could rely upon that case as indicating what constituted an accident within the meaning of the policy issued to Judge Elton. The law is to the effect that in such a situation, the overruling authority should not be given retroactive enforcement. See *Williams v. Utah State Department of Finances*, 23 U.2d 438, 464 P.2d 596 (1970), and *Draper v. Travelers Insurance Company*, 429 F.2d 44 (1970) (10 CCA), 10 ALR3rd 1371.

These same authorities apply to the *Whitlock* case, supra, which has, we submit, been overruled by this Court in the Elton case. Whether or not this should have retroactive effect, should be considered at length by the Court on rehearing.

Because of the action of the Court, these issues were not presented to the Court at the time of the filing of the Briefs and arguing.

We certainly believe that this matter should be considered by the Court for the first time on a rehearing.

Also, along this line, the Court again makes what we believe to be a misstatement. It states "by and large the authorities cited by plaintiff are Workmen's Compensation cases." This just simply is not true. There are 12 insurance cases cited as against 5 Workmen's Compensation and Retirement cases.

Why, in all fairness, does the Court make this statement?

CONCLUSION

We wonder what happened to the analogy to this case made by a member of the Court presenting the question of a hemophiliac cutting his finger and dying which he would not have done except for the hemophilia.

In such a situation, the member of the Court indicated that certainly the cutting of the finger would be the sole cause of death.

Under the foregoing arguments and authorities, we submit that the Court should reverse itself and affirm the verdict and judgment of the trial court, or at a minimum, should grant a rehearing so the matters set forth herein could be presented to the Court, some of them for the first time.

Respectfully submitted,

BRIGHAM E. ROBERTS and
ROBERT D. MOORE, of
Rawlings, Roberts & Black

Attorneys for Plaintiff

400 Ten Broadway Building
Salt Lake City, Utah 84101