

1990

Giron v. Noorbakhsh : Brief of Appellee

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Mark Dalton Dunn; Dunn & Dunn; Attorneys for Defendants-Respondents.

Graham Dodd; Vonn G. Keetch; Kirton, McConkie & Poleman; Attorneys for Plaintiffs-Appellants.

Recommended Citation

Brief of Appellee, *Giron v. Noorbakhsh*, No. 900560.00 (Utah Supreme Court, 1990).
https://digitalcommons.law.byu.edu/byu_sc1/3362

This Brief of Appellee 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 by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

DOCUMENT

KFU

45.9

89

DOCKET NO.

BRIEF

900560

IN THE SUPREME COURT OF THE STATE OF UTAH

MELANIE GIRON, an individual,
and LACEY GIRON, a minor child
by and through her guardian, ad
litem, MELANIE GIRON, her mother,

Plaintiffs/Appellants,

v.

PANTER NOORBAKHS, an
individual, and ROUHI
MAHOJERGHOMI, an individual;
JAY WELCH and MARCELLA
E. WELCH, his wife, and JOHN
DOES 1 through 5,

Defendants/Appellees.

Case No. 900560

Priority No. 16

BRIEF OF APPELLEES

**APPEAL FROM MINUTE ENTRY AND FINAL ORDER OF THIRD DISTRICT
COURT OF SALT LAKE COUNTY, JUDGE DAVID S. YOUNG**

GRAHAM DODD, #0896
VON G. KEETCH, #5097
KIRTON, McCONKIE & POELMAN
1800 Eagle Gate Plaza
60 East South Temple
Salt Lake City, Utah 84111

Attorneys for Plaintiffs/Appellants

MARK DALTON DUNN, #4562
DUNN & DUNN
460 Midtown Plaza
230 South 500 East
Salt Lake City, Utah 84102

Attorney for Defendants/Appellees

FILED

JUL 18 1991

CLERK SUPREME COURT,
UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

| | |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------|
| <p>MELANIE GIRON, an individual, and LACEY GIRON, a minor child by and through her guardian, ad litem, MELANIE GIRON, her mother,</p> <p>Plaintiffs/Appellants,</p> <p>v.</p> <p>PANTER NOORBAKHSH, an individual, and ROUHI MAHOJERGHOMI, an individual; JAY WELCH and MARCELLA E. WELCH, his wife, and JOHN DOES 1 through 5,</p> <p>Defendants/Appellees.</p> | <p>Case No. 900560</p> <p>Priority No. 16</p> |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------|

BRIEF OF APPELLEES

**APPEAL FROM MINUTE ENTRY AND FINAL ORDER OF THIRD DISTRICT
COURT OF SALT LAKE COUNTY, JUDGE DAVID S. YOUNG**

GRAHAM DODD, #0896
VON G. KEETCH, #5097
KIRTON, McCONKIE & POELMAN
1800 Eagle Gate Plaza
60 East South Temple
Salt Lake City, Utah 84111

Attorneys for Plaintiffs/Appellants

MARK DALTON DUNN, #4562
DUNN & DUNN
460 Midtown Plaza
230 South 500 East
Salt Lake City, Utah 84102

Attorney for Defendants/Appellees

TABLE OF CONTENTS

| | |
|-----------------------------------------------|----|
| TABLE OF AUTHORITIES | ii |
| STATEMENT OF JURISDICTION | 1 |
| STATE OF ISSUES AND STANDARDS OF REVIEW | 1 |
| STATEMENT OF THE FACTS | 1 |
| SUMMARY OF ARGUMENT | 2 |
| ARGUMENT | 3 |
| POINT I: | 3 |
| POINT II: | 5 |
| CONCLUSION | 9 |

TABLE OF AUTHORITIES

| <u>Cases</u> | <u>Page</u> |
|-------------------------------------------------------------------------------------------------------------------------|-----------------|
| <i>Devine v. Cook</i> 3 Utah 2d 134, 279 P.2d 1073 (1955) | 1,2,3,5,6,7,8,9 |
| <i>Management Comm. v. Graystone Pines, Inc.</i> 652 P.2d 896 (Utah 1982) | 4 |
| <u>Statutes and Rules</u> | |
| Utah Code Ann. §41-6-109.10 (1988 Replacement) | 7 |
| <u>Restatements</u> | |
| RESTATEMENT TORTS 2d. Section 328 B (1965) | 4 |
| <u>Treatises</u> | |
| W. Prosser & W. Keeton, PROSSER & KEETON on TORTS, §37 (W. Keeton, D. Dobbs, R. Keeton & D. Owen 5th ed. 1984) . . . | 4 |

STATEMENT OF JURISDICTION

The appellees (hereinafter referred to as "Welch") concur with the appellants' (hereinafter referred to as "Giron") statement of jurisdiction.

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

Issue: Did the district court err when it granted Welch's motion for summary judgment, holding "that there was no duty on the part of a signaling driver, such as Welch, to the signaled driver, such as Noorbakhsh, or the plaintiff in a fact situation very similar" to the Utah Supreme Court case of *Devine v. Cook*, 3 Utah 2d 134, 279 P.2d 1073 (1955)?

Standard: The facts in the appeal at hand must give rise to a greater legal duty on the part of Welch, the signalor driver, than that set forth in *Devine* ; or, those facts must show that Welch failed to conform to the standard of conduct required of the signalor driver as set forth in *Devine*, in order for this court to reverse the trial court's judgment.

STATEMENT OF FACTS

While it is true that the northbound traffic had backed up on Highland Drive from 3300 South to approximately the 3350 South intersection, there is nothing in the record to indicate that "rainy" conditions contributed to the traffic backup or impaired anyone's vision. It is disputed whether Panter Noorbakhsh (hereinafter referred to as "Noorbakhsh") was signaling to turn left at the intersection where 3350 South intersects Highland Drive. (R-73) It is also unknown, according to Noorbakhsh, how long she waited for a break in the traffic. (R-122) It is undisputed, however, that after Welch in some manner

signaled to Noorbakhsh, Noorbakhsh pulled out in front of Welch's vehicle, came to a complete stop and looked to see if any cars were coming. (R-125) She stated in her deposition, "I stopped in front of this car, the lady who gave me the right-of-way. I looked, and I couldn't see any cars coming, and then I came out a little bit more" (R-125) Without question, Noorbakhsh was in a position superior to Welch to observe traffic coming from behind and to the left of Welch.

Welch brought the motion for summary judgment, not asserting that they "had no duty to use reasonable care in signaling Giron", but rather that the *Devine* case does not create a duty under these circumstances. The trial court carefully applied the precedent set by this court and granted Welch's motion for summary judgment.

SUMMARY OF ARGUMENT

Just as Giron totally relies on this court's decision in *Devine v. Cook*, 3 Utah 2d 134, 279 P.2d 1073 (1955), in their summary of argument, Welch urges this court to apply the *Devine* case as the controlling precedent for the appeal at hand. The *Devine* court, in a fact situation where the signalor driver would have had a greater duty imposed upon him than Welch in the present appeal, held as a matter of law that the signalor driver did not commit "any act of negligence which caused or contributed to the cause of the accident." *Devine* at 1082.

The existence of a duty must be determined only by the court. It is a matter of law. The trial court did not find facts reserved for jury determination, but rather found that the circumstances at hand, based on

incontroverted facts, did not create a legal obligation upon Welch.¹ When the signalor driver is not in a position to determine whether the signalee driver can safely proceed or when the signalee driver has a better view of oncoming traffic, the trial court should determine that the signalor driver is not liable as a matter of law. Both of those situations are present in this appeal. Accordingly, the trial court's granting of Welch's motion for summary judgment should be upheld.

ARGUMENT

POINT I: BEFORE NEGLIGENCE QUESTIONS CAN BE SUBMITTED TO A JURY, THE TRIAL COURT MUST DETERMINE WHETHER THE LAW IMPOSES ANY LEGAL DUTY UPON THE DEFENDANT

Under the facts in *Devine*, the Utah Supreme Court determined, as a matter of law, that signaling another driver to proceed was not an act of negligence. In that case, the lawsuit had been tried to a jury. Apparently, at the conclusion of the evidence, the signalor driver moved for a directed verdict. That motion was not granted and on appeal, the Supreme Court concluded that the trial court committed error in refusing to do so.

The error committed by the trial court in *Devine* was that it failed in fulfilling its obligation to first determine whether, upon the facts and evidence, such a relation exists between the parties that a legal obligation would be imposed upon the defendant before allowing a jury to determine factual questions.

This is entirely a question of law, to be determined by reference to the body of statutes, rules, principles and

¹The findings of facts entered by the trial court are based on uncontested facts also cited by Giron in their brief.

precedents which make up the law; and it must be determined only by the court.

W. Prosser & W. Keeton, PROSSER & KEATON on TORTS, §37 (W. Keeton, D. Dobbs, R. Keeton & D. Owen 5th ed. 1984).

A trial court is also charged with the obligation to remove the issue from the jury when the actions of the defendant clearly have conformed with the standard of conduct set forth by the court and where no reasonable jury could reach a contrary conclusion. That determination typically takes the form of granting the defendant's motion for summary judgment or directed verdict. *Id.* See also, *Management Comm. v. Graystone Pines, Inc.*, 652 P.2d 896 (Utah 1982). The Restatement (Second) of Torts outlined the functions of the court in §328 B as follows:

In an action for negligence the court determines

(a) whether the evidence as to the facts makes an issue upon which the jury may reasonably find the existence or non-existence of such facts;

(b) whether such facts give rise to any legal duty on the part of the defendant;

(c) the standard of conduct required of the defendant by his legal duty;

(d) whether the defendant has conformed to that standard, in any case in which the jury may not reasonably come to a different conclusion;

(e) the applicability of any rules of law determining whether the defendant's conduct is of legal cause of harm to the plaintiff; and

(f) whether the harm claimed to be suffered by the plaintiff is legally compensable.

When the trial court was presented with Welch's motion for summary judgment, it was required to fulfill its obligations as set forth above and apply the only precedent in this jurisdiction to the facts at hand. It is clear from the court's conclusions of law and Judge Young's comments at the hearing on Welch's motion for summary judgment, that the trial court "closely examine[d] the circumstances surrounding the alleged negligent signal and expressly reject[ed] a blanket rule that signaling drivers could never be held liable for injuries resulting from their actions."

POINT II: THE FACTS IN THE APPEAL AT HAND IMPOSE LESS OF A LEGAL OBLIGATION UPON WELCH THAN THE FACTS IN DEVINE

All parties agree that the precedent to be followed in the present appeal is this court's decision in *Devine*. Giron has not urged this court to depart from its ruling in *Devine*, overturn that case and accept the reasoning of other jurisdictions. Accordingly, if this court is persuaded that the facts in the Giron appeal would give rise to a lesser or equal legal duty on the part of Welch than the duty set forth in *Devine* or show that Welch equally conformed to the standard of conduct required of a signalor driver as set forth in *Devine*, it must affirm the trial court's judgment.

On page 9 of Giron's brief, Giron correctly pointed out that *Devine* "stands for the principle" that trial courts should grant motions for summary judgment and directed verdict

... when both the signaling and signalee drivers have an adequate view of the surrounding dangers, or when the signalee driver has a better view. Under such

circumstances, as a matter of law it is unreasonable to assume that the signaling driver was doing anything more than yielding the right-of-way, because both drivers were undoubtedly aware that the signalee had as good a view, or better yet, a superior view of the surrounding dangers, and could thus judge the risks accordingly.

A close examination of the events surrounding and the locations of the Giron and *Devine* accidents clearly shows that the signalor driver in the Giron appeal would have less of a legal duty to "protect" the plaintiff than the signalor driver in the *Devine* case.

A. Intersections.

The accident in *Devine* occurred at the intersection of 1500 South in Bountiful, Utah, and US Highway 91. 1500 South, a two-lane street, runs east and west and crosses US Highway 91, a four-lane street running north and south. The speed limit in that immediate area for northbound traffic was 40 miles per hour. There were no visual obstructions other than vehicular traffic. *Devine* at 1074.

The intersection where the Noorbakhsh and Giron vehicles collided is off-set somewhat. Highland Drive is a four-lane street running north and south intersected by 3350 South Street to the east and 3330 South Street to the west. 3350 South Street is a two-lane street running east and west, slightly angled to the north. The speed limit in the immediate area for northbound traffic was 40 miles per hour. There were no visual obstructions other than vehicular traffic.

B. Signalor Drivers.

In *Devine*, the signalor driver was operating a tank truck and pulling a four-wheel trailer owned and operated by W. S. Hatch Company, Inc. The tank

truck was being closely followed by a tractor transporting a two-wheel semi-trailer also owned by the Hatch Company. The large trucks and trailers were proceeding northbound on US Highway 91 on the inside lane and desired to make a left-hand turn onto 1500 South. The trucks could not complete that left-hand turn because of the narrowness of 1500 South and the fact that the signalee driver was stopped at a stop sign in the right-hand lane of that intersection, eastbound on 1500 South. *Devine* at 1074.

Both trucks came to a complete stop at the intersection. The first truck indicated that he intended to make a left-hand turn and then, in some manner, signaled for the signalee driver to proceed into the intersection. The signalor driver knew that he was being followed by another large tractor and trailer. He knew that the signalee driver's view would be blocked by the two large vehicles owned by the Hatch Company. He knew of the plaintiff's vehicle because he had recently passed it. *Id.* His view of northbound traffic was limited to the use of his rearview mirrors. The purpose for signaling the signalee driver to proceed was to assist the Hatch trucks in making their left-hand turns. The signalor driver had the right-of-way to make a left-hand turn once any southbound traffic had cleared.

In the instant case, Welch was proceeding northbound in the outside lane of Highland Drive in heavy traffic. The traffic had backed up to approximately 3350 South from 3300 South. She was driving a Buick Skylark. Out of courtesy and in an effort to avoid blocking the intersection in violation of Utah Code Ann. §41-6-109.10 (1988 Replacement), she left space for Noorbakhsh, the signalee driver, to enter the intersection. (R-73) Noorbakhsh

was westbound on 3350 South and stopped at a stop sign. Welch had the right-of-way and was intending on proceeding straight ahead when traffic would permit. She gained no advantage in the traffic by yielding her right-of-way to Noorbakhsh. Welch's view of northbound traffic from behind her and to her left was limited to looking over her left shoulder or in her rearview mirrors. Finally, it was obvious to Welch that Noorbakhsh was looking for oncoming traffic when she pulled forward and came to a complete stop in front of Welch's vehicle.

C. Signalee Drivers.

The Hatch trucks were higher, longer and wider than Welch's Buick Skylark. There can be little doubt that the signalee driver's view of oncoming traffic in *Devine* was impaired to a greater extent than the view Noorbakhsh had either when stopped for the stop sign or, more particularly, after she had proceeded out into the inside lane of the northbound traffic. It is undisputed that Noorbakhsh pulled out into the intersection and in front of Welch to look for oncoming traffic and determine for herself whether it was safe to proceed.

D. Plaintiffs.

The plaintiffs in both cases were northbound in travel lanes adjacent to the signalor drivers. Again in the *Devine* case, the plaintiff's view of traffic stopped at the accident intersection would have been more greatly impaired by the two large trucks and trailers than the Buick Skylark. Additionally, Giron's caution should have been heightened by the fact that she was proceeding in heavy traffic and that it was obvious that traffic had built up from the stop light at 3300 South and Highland Drive.

CONCLUSION

Giron attempts to cloud the simple and straightforward issue presented for determination by this court. Without question, the trial court has the obligation of determining whether a legal duty exists under the specific factual setting in the case at hand. In this appeal, there is only one appellate decision which has precedential value. In comparing the Giron appeal and the *Devine* case, it is clear that Welch would have had less of a legal obligation than, or at least the same as, the signalor driver in *Devine*. Accordingly, the judgment of the trial court should be affirmed.

Respectfully submitted this 18th day of July, 1991.

DUNN & DUNN

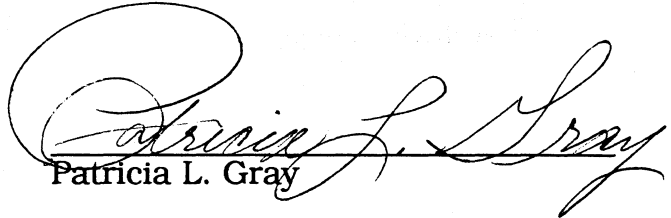


MARK DALTON DUNN
Attorney for Defendant/Appellee
230 South 500 East, Suite 460
Salt Lake City, Utah 84111

CERTIFICATE OF SERVICE

I hereby certify that on this 18 day of July, 1991, four (4) true and correct copies of the foregoing BRIEF OF APPELLEES, was hand-delivered to the following:

Graham Dodd
Von G. Keetch
Attorneys for Plaintiffs/Appellants
1800 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111


Patricia L. Gray