

1963

# Vivian Meier v. Merrill Soren Christensen : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

VIVIAN MEIER,

*Plaintiff and Appellant,*

vs.

MERRILL SOREN  
CHRISTENSEN,*Defendant and Respondent.*FILED  
SEP 27 1963

Clerk, Supreme Court, Utah

Case No. 9855

BRIEF OF RESPONDENT

Appeal From The Sixth Judicial District Court  
In And For Sevier County  
Honorable Ferdinand Erickson, Judge

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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VIVIAN MEIER,  
*Plaintiff and Appellant,*

vs.

MERRILL SOREN  
CHRISTENSEN,  
*Defendant and Respondent.*

} Case No. 9855

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BRIEF OF RESPONDENT

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STATEMENT OF THE KIND OF CASE

This is an action for personal injury arising out of an intersection collision between the plaintiff and the defendant.

DISPOSITION IN THE LOWER COURT

The defendant seeks to have the judgment of the trial court affirmed.

STATEMENT OF FACTS

The principal facts out of which this action arose have been recited in the Brief of the Appellant. Further reference to the record will be made in connection with respondent's argument.

## STATEMENT OF POINTS

### POINT I.

PLAINTIFF'S FAILURE TO OBJECT TO ALLEGED PREJUDICIAL COMMENTS OF THE COURT CONCERNING CERTAIN OF PLAINTIFF'S EVIDENCE, AND COUNSEL'S INVITATION TO THE COURT TO EXAMINE ONE OF PLAINTIFF'S WITNESSES, PRECLUDES ASSIGNING SUCH CONDUCT AS ERROR ON APPEAL, WHICH, IN ANY EVENT, DID NOT CONSTITUTE REVERSIBLE ERROR.

### POINT II.

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY CONCERNING PLAINTIFF'S ALLEGED CONTRIBUTORY NEGLIGENCE AND PROXIMATE CAUSE.

## ARGUMENT

### POINT I.

PLAINTIFF'S FAILURE TO OBJECT TO ALLEGED PREJUDICIAL COMMENTS OF THE COURT CONCERNING CERTAIN OF PLAINTIFF'S EVIDENCE, AND COUNSEL'S INVITATION TO THE COURT TO EXAMINE ONE OF PLAINTIFF'S WITNESSES, PRECLUDES ASSIGNING SUCH CONDUCT AS ERROR ON APPEAL, WHICH, IN ANY EVENT, DID NOT CONSTITUTE REVERSIBLE ERROR.

The plaintiff cites extensively from the record, certain testimony of Leslie Jensen, the former Chief of Police of Richfield. Claim is now made that questions asked of the witness by the judge, and comments made during the course thereof, constituted prejudicial error. During the course of the testimony, the officer attempted to illustrate his theory in arriving at the point of impact of the two

automobiles. Portions of this testimony was objected to by counsel for defendant. (R. 137). Thereafter discussion ensued between Court and counsel as to the basis of the testimony. Counsel for the plaintiff then invited the court to interrogate the witness in this language:

“MR. OLSEN: I would be glad to have you ask that question of the officer if you would like to . . . I think it might be well for the jury to understand that.” (R. 138).

Following this overture the court undertook to question the witness as cited on pages 6 through 12 of Appellant’s Brief. After the witness had made further explanation concerning his procedure in identifying the point of impact, Mr. Olsen then asked:

“Now did that answer your Honor’s question as to the checks the officers had?” (R. 139).

A further discussion followed between the Court, the witness and counsel, following which counsel for the plaintiff again queried:

“MR. OLSEN: Do you have any further questions, Your Honor?” (R. 140).

The appellant claims the trial court’s conduct was prejudicial because attention was focused on the importance of the problem. However, no objection was made; rather, several relevant questions were invited by plaintiff’s counsel who expressed his desire to have the jury hear the testimony so developed. (R. 138, 140).

The plaintiff points to a colloquy between Court

and counsel which he claims was designed to “undermine” the testimony of the officer. Appellant’s Brief p. 9). These remarks followed a discussion between counsel concerning the admission into evidence of a proposed exhibit by the plaintiff. Certain comments of plaintiff’s counsel were objected to as being argumentative. In ruling upon the offer the Court stated:

“THE COURT: Let me say that I think that it is probably confusing. After all the only way to determine, it seems to me, the point of impact, is take that area, for example which is legally described as the intersection, from the sidewalk on the north bordered by the sidewalk on the west, by the sidewalk on the south, by the sidewalk on the east. Now that area comprises your intersection.

“MR. OLSEN: That’s correct, Your Honor.” (R. 152).

The plaintiff cannot properly assign as error a statement by the Court with which agreement was expressed. Additionally, the court’s remark, was made during the course of ruling on a matter before him. In any event, no objection to any question, remark or comment of the court, was ever registered by plaintiff.

It is not improper for the trial judge to express to the jury his reasons for admitting or excluding particular evidence, if while so doing he does not indicate an erroneous view of the law which may mislead the jury. 88 C.J.S. Trials, Sec. 50.

In *Fox vs. Taylor*, 10 U.2d 174, 350 P.2d 154, this Court stated.

“We recognize the duty of the court under our law to avoid comments on the evidence; or which may tend to indicate an opinion as to what the facts are on disputed issues. Yet it must be realized that it is quite impossible to frame instructions applicable to a given case without making some reference to facts and sometimes to evidence.”

It was there observed that a statement by the Court that a “mere glance in the direction of the approaching automobile” is not sufficient to constitute due care. Further, the court pointed out that elsewhere in the instructions the jury was told of its sole prerogative to determine the facts on the basis of the evidence.

In *Douglas vs. Duvall*, 5 U.2d 429, 431, 304 P.2d 373, conduct of the trial court was claimed as prejudicial error when a discourse was given outlining the duties of directors which was phrased “somewhat in the vernacular.” The charge was found to be without merit. See also *Federated Milk Producers Assn. vs. Statewide Plumbing*, 11 U.2d 295, 358 P.2d 348. If any evidence is stated by the trial judge, the jury must be advised that they are the exclusive judges of all questions of fact. Such was done in the present case. (See Instructions No. 2, 3, 4 and 6, R. 12, 13, 14 and 16).

In the case of *State vs. Zimmerman*, 78 U. 126, 1 P.2d 962, on motion for a new trial, the defendant



assigned as error a statement by the trial court to the jury after it appeared that the jury was having difficulty in reaching a verdict, to the effect that the evidence was clear and simple. The jury retired and then returned shortly with a guilty verdict. The following language is taken from the opinion:

“No claim is made by appellant that any objection or exception was taken to the statement made by the trial court to the jury at the time such statement was made or at all until the filing of the motion for a new trial. Appellant contends that the statement complained of was in the nature of an instruction to the jury and should have been in writing. It is well established in this jurisdiction that an exception to an instruction must be made before verdict, otherwise it may not be reviewed on appeal. *The statement complained of, however, cannot well be said to be an instruction, but whether it be regarded as an instruction or as a remark, the rule is the same. An objectionable remark directed to the jury must be excepted to or it may not be reviewed on appeal.* 17 C.J. 79. A remark of a judge to a jury may not be said to be an order, decision, or ruling and therefore it is not deemed excepted to under the provisions of section 6806, Compiled Laws of Utah 1917. *We are thus precluded from reviewing the instruction or remark which appellant seeks to have reviewed, because, so far as appears, no exception was taken thereto until after verdict.*” (Emphasis added).

See also *Tulsa Hospital Assn. vs. Juby*, 73 Okla. 243, 175 P. 519.

The basis of this rule is sound. For as stated in *Employers Mutual Liability Insurance Company vs. Alan Oil Company*, 123 U. 253, 258 P.2d 445, 450, one of the purposes in requiring counsel to make objections to instructions in the trial court is to bring to the attention of the court all claimed errors in the instructions, and to give him an opportunity to correct them if he deems proper. Just as a motion to strike evidence, which turns out to be unfavorable to the party against whom it is offered, is not a substitute for an objection, neither should a party be permitted to object to invited questions of the court when answers to them may not be as favorable as counsel had hoped. He has thus taken his chances of advantage and should not have, when he finds the testimony prejudicial, or at least not helpful, the legal right to exclude it or avoid the consequence by later objecting. *Peterson v. Hansen-Niederhauser*, 13 U.2d 355, 374 P.2d 513.

It is submitted that the questions put to plaintiff's witness by the court were invited by counsel, that any reference to evidence by the court was made within the proper discretion and province of the court. Further, no objection was made to any of such questions or comments and the plaintiff cannot properly be heard to complain of these matters on appeal.

## POINT II.

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY CONCERNING PLAINTIFF'S ALLEGED CONTRIBUTORY NEGLIGENCE AND PROXIMATE CAUSE.

Appellant's contention that she entered the intersection in which the collision occurred first, assumes a factual conclusion which was a disputed issue properly submitted to the jury, and determined against her. There was evidence, based upon the point of impact as fixed by the plaintiff's own witness, from which the jury could properly conclude that she was not first in the intersection and did not have the right of way, since the defendant had traveled nearly through the intersection before the collision occurred in plaintiff's east lane of north-bound traffic. (Plaintiff was proceeding north and Defendant was proceeding east. Plaintiff's Exhibit 1, R. 102). Further there was testimony that plaintiff's windows were covered with frost. (R. 176, 349). This, without more, is a sufficient basis for finding that the plaintiff failed to keep a proper lookout or to exercise due care upon entering the intersection and that she was contributorily negligent in failing to yield the right of way. The Court's Instruction Number 7 properly left to the jury the question of which driver had the favored position in the intersection, and accurately stated the law in respect thereto.

### INSTRUCTION NO. 7

"When two vehicles are approaching an intersection at the same time and at substan-

tially the same distance therefrom, the driver approaching on the right has the right-of-way, and it is the duty of the driver approaching on the left to yield the right-of-way to the former. This is the basic rule of right-of-way at intersections and failure to abide by it constitutes negligence.

“There is a secondary rule of right-of-way at intersections, which is that the driver first entering the intersection has the right-of-way and it is the duty of the driver later entering the intersection to yield to the former. However, this latter rule must not be so applied that the drivers are permitted to speed up or continue headlong into the intersection merely because they enter a foot, or a yard, or an instant of time ahead of the other. In order for a driver approaching from the left to take advantage of this rule he must not have speeded up for the express purpose of getting into the intersection first, and it must appear that he had a clear and substantial priority in time in entering the intersection ahead of the driver approaching from the right before the driver approaching from the left may claim the right-of-way.” (R. 17).

This instruction clearly and properly states the law with respect to right of way at intersections as provided in Section 41-6-72, Utah Code Annotated, 1953. The court also gave the following related instructions:

#### INSTRUCTION No. 9A

“You are instructed that the evidence of reasonable care requires a driver to see and observe what is there to be seen and fail-

ure to see approaching vehicles within the range of reasonable observation is negligence.”

#### INSTRUCTION NO. 10

“When the law says that one person has the right-of-way over another, it simply means that one person has the immediate privilege of occupying the space in question and the other persons must yield to such person.”

#### INSTRUCTION NO. 11

“The fact that one has the right-of-way, if such be the fact, does not excuse him from the exercise of ordinary care to avoid causing an accident.

The instructions taken together clearly define the rule of law which should have been applied in this case. The plaintiff complains that the failure of the court to give his Instruction No. 4. (Appellant's Brief, p. 15, R. 47), was error because the jury was not advised that if she were at the time of, and immediately prior to the accident, driving her automobile into and across the intersection in a lawful and proper manner, that “she had the right to assume and rely and act on the assumption that others would do likewise; since she was not obliged to anticipate either that other drivers would drive negligently nor fail to accord her right-of-way until in the exercise of due care she observed, or should have observed, something to warn her that the other driver was driving negligently or would fail to accord her the right-of-way.”

The court properly refused to give this instruction because the circumstances of this case precluded the applicability of the instruction to the facts as established largely through her own testimony. (R. 202). She did not know her speed before entering the intersection. She said that she looked to her left as she approached the intersection. (R. 202). She did not see the defendant's truck although it was approaching from the left traveling 15-20 mph. (R. 348). Plaintiff suggests that her view of the intersection was obstructed by a house, a parked truck, and a high fence covered with vines and trees. (R. 205). This would indicate that if she did look to her left, it was some distance from the intersection. Near the intersection her view of First South Street, on which defendant was traveling, was unobstructed. At her deposition she testified she didn't know for sure if she had looked in both directions before entering the intersection. (R. 241). She first saw the defendant's truck almost simultaneously with the happening of the collision. (R. 245, 202, 203). The only time that she looked to the left, if at all, her vision was obscured, either from physical obstructions or from a frosted or steamed windshield. She did not make an attempt to observe approaching traffic to her left immediately before entering the intersection. Thus, the court's Instruction No. 9A was proper.

Even a "glance" in the direction of approaching traffic does not satisfy the requirement of due

care. *Fox vs. Taylor*, 10 U.2d 174, 350 P.2d 154. She is charged to see what reasonably could be observed.

Instruction No. 7, as given, is based upon *Martin vs. Stevens*, 121 Utah 484, 243 P. 2d 747, and was properly adapted to the facts of this case, as indicated by the more recent cases.

In *Johnson vs. Syme*, 6 U.2d 319, 313 P.2d 468, the favored driver was held negligent as a matter of law in failing to see a disfavored driver crossing at an intersection until 20 to 30 feet away. The Court concluded:

“. . . that plaintiff either looked and failed to see the obvious, or failed to look at all, and, as a matter of law negligently contributed to her own injuries. . . .”

The following language is taken from *Morris vs. Christensen*, 11 U.2d 140, 356 P.2d 34, concerning the duties of drivers at intersections:

“It is the duty of a driver to observe and see what there is to see so as to be able to exercise ordinary precaution and prevent collisions such as this. This duty extends to the favored driver with the right of way as well as the disfavored driver. But he who has the right of way need not anticipate sudden outbursts of negligence on the part of another driver. Indeed it may be said that failure to observe is negligence proximately contributing to the harm only where by observing the driver could have avoided or lessened the resulting harm.”

The circumstances presented in the present case

indicate no "sudden outbursts of negligence", if any, on the part of Christensen. He proceeded into the intersection at approximately 15-20 mph. Neither observed the other until just before impact. Had plaintiff seen defendant at a time when reasonable observation would have revealed his presence, the collision could have been, by reasonable action, avoided or the harm lessened.

In *Hess vs. Robinson*, 109 U. 60, 163 P.2d 510, the plaintiff was driving southward along a through street and failed to see defendant's ambulance coming into the intersection from the west. A collision occurred in the intersection. It was held that even though plaintiff was negligent in not seeing the ambulance, the question as to whether his negligence proximately contributed to his injury was properly submitted to the jury. Similar facts exist in this case. Plaintiff's contributory negligence in not looking to her left, or observing what she should have observed, was properly submitted to the jury. The facts were resolved against her and in reviewing the matter on appeal the facts are to be viewed in the light most favorable to the prevailing party below. *Ortega vs. Thomas*, .... U.2d ...., 383 P.2d 406.

In *Lowder vs. Holley*, 120 U. 231, 233 P.2d 350, cited by appellant, the court found that the plaintiff's failure to see the defendant's approaching truck could in no way have contributed to the accident because there was evidence which indicated that even had he looked the defendant's truck would



have been 250 feet away, and he could have assumed and acted on the assumption that the driver of the truck would exercise ordinary and reasonable care in his driving and that it would be safe to cross the intersection. There is no such evidence in this case. Observation would have revealed Defendant's truck either within the intersection, or approaching so closely as to make it unsafe to enter.

In the present case the plaintiff was negligent in at least one of the following particulars:

(1) In failing to look before entering the intersection, or

(2) In failing to observe what reasonable observation would have revealed; or

(3) In entering the intersection when it was not safe to do so.

Thus, the plaintiff's requested instruction No. 4 to the effect that she was entitled to proceed into the intersection until in the exercise of due care, she observed, or should have observed, something to warn her that the other driver was driving negligently or would fail to accord her right-of-way, had no basis under the facts and testimony of this case.

The plaintiff also complains that a specific instruction concerning proximate cause was not given for the plaintiff's benefit. Proximate cause was correctly defined in Instruction No. 12. The effect of negligence on the part of either party was stated in Instruction No. 15A. It also dealt with

and properly defined proximate cause. The plaintiff assigns as error the failure of the Court to give his Instruction No. 5 which deals with proximate cause and contributory negligence of the plaintiff. Both were adequately dealt with in Instruction 15A.

Although appellant complains of the Court's Instruction No. 18, no objection was made concerning it. (R. 355-357).

The instructions are to be considered as a whole since the Court obviously cannot give all of the law pertaining to the case in one instruction. When this is done, it is apparent that the law of the case was adequately covered in the instructions given and no prejudicial error was committed.

## CONCLUSION

The trial court did not commit prejudicial error in questioning the police officer who was called as plaintiff's witness. Such questioning was invited by plaintiff's counsel and statements of evidence made by the court were either agreed to, or were made within permissible limits. No objections were made to any of such proceedings and cannot be properly raised for the first time on appeal. The court, under the facts of this case, properly instructed the jury on the issues of contributory negligence and proximate cause.

It is respectfully submitted that the judgment rendered on the jury verdict should be affirmed.

Respectfully submitted,

HANSON & BALDWIN and  
MERLIN R. LYBBERT

By.....  
*Attorneys for Respondent*

### CERTIFICATE OF MAILING

I certify that three (3) copies of the foregoing Brief were served upon Olsen & Chamberlain, attorneys for Appellant, 76 South Main Street, Richfield, Utah, by mailing the same, postage prepaid, to said attorneys at the address stated this ..... day of September, 1963.

.....