

1963

Yetzen H. Demoor v. Paul Paulus and Fogg and Brady Furniture Co. : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Recommended Citation

Brief of Appellant, *Demoor v. Paulus*, No. 9941 (Utah Supreme Court, 1963).
https://digitalcommons.law.byu.edu/uofu_sc1/4320

This Brief of Appellant 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 (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

YETZEN H. DEMOOR,
Plaintiff and Respondent,

— vs. —

PAUL PAULUS and FOGG AND
BRADY FURNITURE COM-
PANY, a Utah Corporation,
Defendant and Appellant.

FILED

27 1963

Clark, Supreme Court, Utah
Case
No. 9941

BRIEF OF APPELLANT

Appeal From Judgment of the Second District Court
for Weber County
HONORABLE JOHN F. WAHLQUIST, *Judge*

NIELSEN, CONDER AND HANSEN
W. EUGENE HANSEN
510 Newhouse Building
Salt Lake City, Utah
*Attorney for Defendant-
Appellant*

ROBERT E. SCHOENHALS
903 Kearns Building
Salt Lake City, Utah
Attorney for Plaintiff and Respondent.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
DISPOSITION IN LOWER COURT	1
NATURE OF RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS	2
ARGUMENT	6
Point I	
THE COURT ERRED IN FAILING TO FIND THAT THE PLAINTIFF WAS CONTRIBUTORILY NEG- LIGENT AS A MATTER OF LAW AND THAT SUCH CONTRIBUTORY NEGLIGENCE PROXIMATELY CAUSED OR CONTRIBUTED TO THE COLLISION	6
CONCLUSION	14

AUTHORITIES

Cases

Bates v. Burns, 3 Utah 2d 180, 281 P.2d 209	8, 9
Bullock v. Luke, 98 Utah 501, 98 P.2d 350	8, 11
Conklin v. Walsh, 113 Utah 276, 193 P.2d 437	8
Covington v. Carpenter, 4 Utah 2d 378, 294 P.2d 788	13
Farrell v. Cameron, 98 Utah 69, 24 P.2d 1068	11
Lawder v. Hallen, 120 Utah 231, 233 P.2d 350	8
Martin v. Stevens, 121 Utah 484, 243 P.2d 747	8, 9
Smith v. Bannett, 1 Utah 2d 224, 265 P.2d 407	13

Statutes

Utah Code Annotated 1953, Section 41-6-55	12
Utah Code Annotated 1953, Section 41-6-146	12

Rules of Civil Procedure Cited

Rule 8	4
Rule 12	4
Rule 16	4
Rule 20	4
Rule 18	5
Rule 19	5
Rule 6	6
Rule 13	6
Rule 20	6

Miscellaneous

38 Am. Jur "Negligence," Sec. 192, p. 871	8
---	---

IN THE SUPREME COURT
OF THE STATE OF UTAH

YETZEN H. DEMOOR,
Plaintiff and Respondent,

— vs. —

PAUL PAULUS and FOGG AND
BRADY FURNITURE COM-
PANY, a Utah Corporation,
Defendant and Appellant.

Case
No. 9941

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an action to recover for property damage sus-
tained in the collision of two vehicles in Ogden City, Utah.

DISPOSITION IN LOWER COURT

The lower court found for the plaintiff, awarding
damages for vehicle repairs and loss of use.

NATURE OF RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment entered
in the lower court.

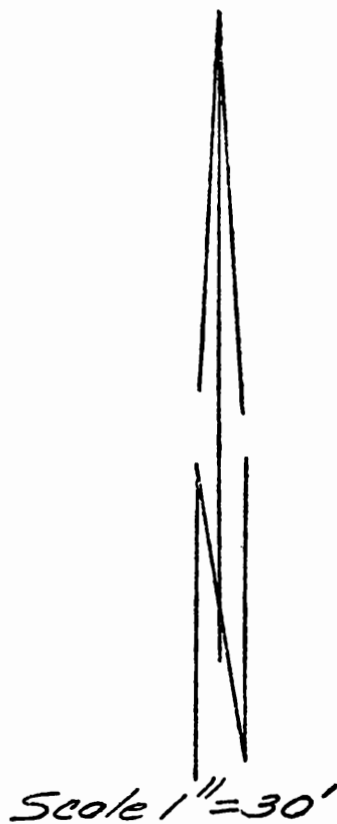
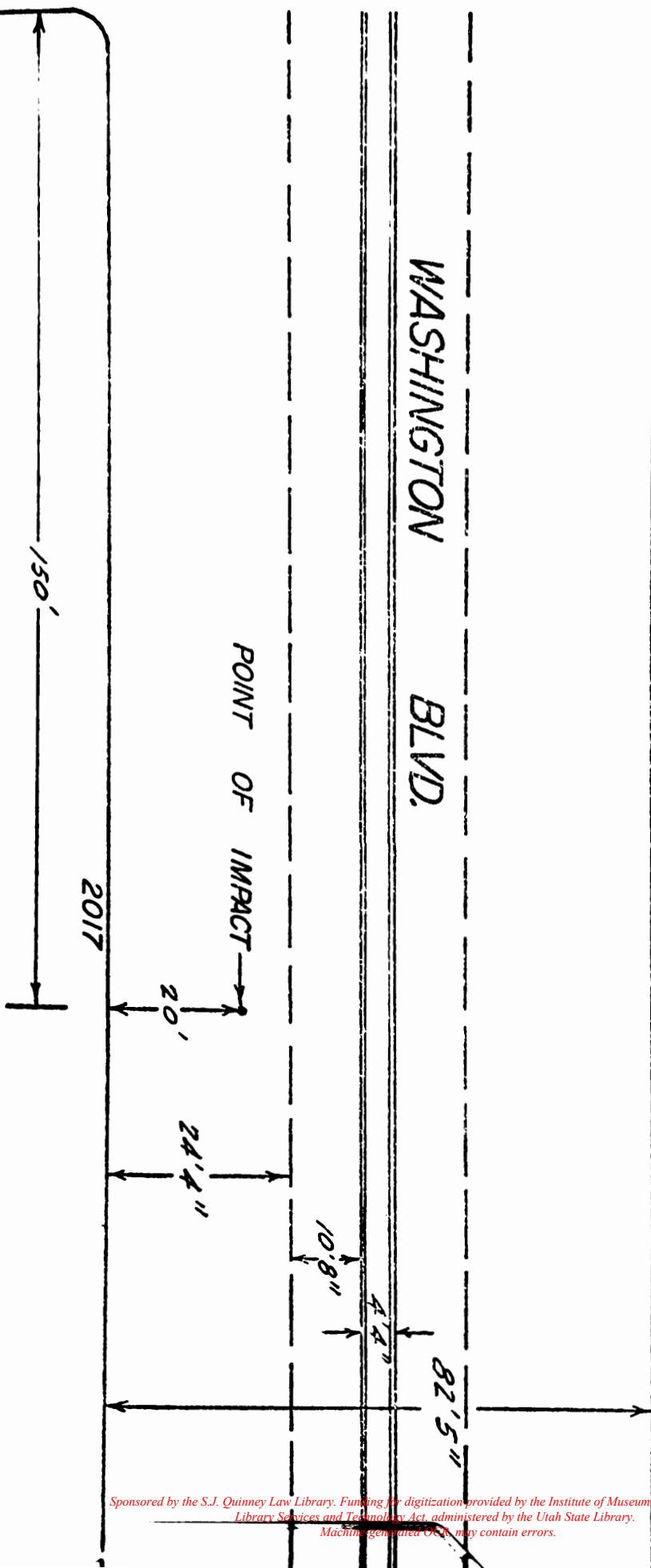
STATEMENT OF FACTS

This case involves a motor vehicle collision which occurred on May 19, 1961, at 2017 South Washington Boulevard in Ogden, Utah. Defendant Paul Paulus was in the process of moving a large van-type truck, owned by Defendant, Fogg and Brady Furniture Company, from a parked position on the west curb line of Washington Boulevard into a southerly course of travel on Washington Boulevard when a collision occurred involving the left front bumper of defendant's vehicle and the right side of plaintiff's vehicle. The weather was clear and the pavement dry. The time was approximately 7:10 p.m.

For illustrative purposes the following diagram is submitted:

TWENTIETH

STREET



The Defendant testified that he had waited for the southbound traffic on Washington Boulevard to clear and then had proceeded into Washington Boulevard at an angle which was necessitated by vehicles being parked to his front and to his rear. (R. 25) Defendant further testified he did not see Plaintiff until Plaintiff was approximately two car lengths away, at which time the Defendant immediately stopped his vehicle and the collision occurred. (R. 25)

The damage to the Plaintiff's vehicle was described by Plaintiff (R-20) as being a "gash" along the right side of his vehicle. The damage began at the front of the right front door and continued along the entire right side to the rear of Plaintiff's vehicle. The only damage to Defendant's vehicle was a slightly bent front bumper.

Plaintiff testified that he had been traveling east on 20th Street and had made a right turn where 20th Street intersects with Washington Boulevard. Plaintiff testified (R-16) that as he rounded the turn he observed Defendant's truck moving away from the curb at 2017 South Washington Boulevard. 2017 South Washington Boulevard is approximately 150 feet South (R-8) of the south curb line of 20th Street.

Plaintiff further testified (R-12) that as he observed the Defendant's truck moving away from the curb he moved his vehicle over next to the lane line which separates the inside and outside lane for southbound traffic. Plaintiff testified (R-16):

“As far as I was concerned that took care of the whole matter. I had given the truck enough room to proceed and go on his way and then as I kept on going I suddenly realized that this just wasn’t going to work, I realized at the last second, this truck, he kept on going at an angle towards the lane in which I was driving, however, for me it was too late to stop.”

Under cross-examination Plaintiff testified (R-18), “I had given the Defendant enough room and as far as I thought Mr. Paulus was going to go in making his angle out and go on his way south on Washington Boulevard.”

Plaintiff testified that Defendant gave no indication he was aware of Plaintiff’s presence. Plaintiff did not sound a warning of his approach. (R-18)

“Q. Did Mr. Paulus give you any indication that he had seen you.

A. He did not. There was no turn signals, no nothing.

Q. And did you sound your horn.

A. I had no reason to.”

Plaintiff did not move to the inside lane. (R-19)

“Q. And it would have been possible for you to have moved over into the inside lane and have avoided this collision.

A. Yes, sir, I could have gone clear over to the other side of the road too, but there was no reason for me to do that. I had taken every precaution to avoid the accident and I didn’t even expect an accident because I had given him all the room he had needed.”

Plaintiff then continued on and a collision occurred at a point approximately 20 feet East of the west curb line of Washington Boulevard. (R-6)

Defendant testified that his vehicle was stopped at the moment of the impact (R-23). Plaintiff testified that both vehicles were moving at the time of the collision and that the impact made both vehicles stop. (R-20) However, Plaintiff testified in answer to the next question that his vehicle traveled approximately a car length after the impact.

“Q. Mr. Paulus had actually come to a stop by the time you collided with him, had he not?

A. Well, he was going very slowly. I think the impact made both of us stop.

Q. How far did your car continue to travel after the first part of the impact?

A. A car length I guess, I bounced off his bumper.”

Plaintiff admitted (R-13) that he was traveling about twenty-five miles per hour.

A R G U M E N T

POINT I

THE COURT ERRED IN FAILING TO FIND THAT THE PLAINTIFF WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW AND THAT SUCH CONTRIBUTORY NEGLIGENCE PROXIMATELY CAUSED OR CONTRIBUTED TO THE COLLISION.

The Trial Court held that the Defendant failed to prove that Plaintiff was contributorily negligent. The Defendant submits that the evidence in the record, construed most favorably to the Plaintiff, discloses conduct by the Plaintiff that is clearly below the standard of care to which Plaintiff is required to conform for his own protection. The Defendant further submits that reasonable minds could not differ thereon, that Plaintiff did not act as a reasonable man of ordinary prudence under like circumstances should have acted.

This appeal presents two basic questions. Did the Plaintiff have a duty to avoid the collision? If Plaintiff did have a duty to avoid the collision, did Plaintiff act with due care to avoid the collision?

Plaintiff entered Washington Blvd., a four-lane highway that traverses Ogden's business district, from a street controlled by a traffic semaphore. Plaintiff testified that he saw Defendant's truck, a large van-type truck, moving into the outer traffic lane from its parking place at the curb, as he rounded the corner and began to proceed south on Washington Blvd. (T-12)

Plaintiff testified that he moved from his position in the curb to side portion of the outer lane toward the inner lane, because he had observed Defendant's truck leaving the curb zone and proceeding into the outer lane of traffic. (T-12) The direct or casual relationship between Plaintiff's observation of Defendant's truck and Plaintiff's immediate movement from the curb side (west) of the outer lane to the inner extremes of the

outer lane is testified to by the Plaintiff on both direct examination (T-12) and cross-examination (T-16). The outer south-bound lane of the four-lane highway was twenty-four feet four inches, and the inner south-bound lane was ten feet eight inches (T-10). Despite Plaintiff's original shift in position within the outer lane, which clearly seems to have been a reaction to the entrance of Defendant's truck into that lane, Plaintiff did not move into the inside lane, though he could have done so without endangering himself or others, since a red light had stopped the flow of traffic along Washington Blvd. at that time.

Defendant is willing to concede that, as a general proposition or rule of law, a driver has a right to assume that another driver will obey the law and act with due care. (See 38 *Am. Jur.* NEGLIGENCE, Sec. 192, p. 871). However, courts have placed a very significant limitation on this rule. This limitation denies a driver the right to assume due care by others when such driver has, or ought to have, knowledge of circumstances indicating that the other motorist is not exercising due care for his own and others' safety. (See 38 *Am. Jur.* NEGLIGENCE, Sec. 192, p. 871.) This rule of law, with its limitation, has been recognized by this court in numerous decisions (See: *Martin v. Stevens*, 121 Utah 484, 243 P. 2d 747; *Bullock v. Luke*, 98 Utah 501, 98 P. 2d 350; *Lawder v. Hallen*, 120 Utah 231, 233 P. 2d 350; and *Bates v. Burns*, 3 Utah 2d 180, 281 P. 2d 209.)

In *Conklin v. Walsh*, 113 Utah 276, 193 P. 2d 437, this Court held that a "favored" driver's right to as-

sume that other drivers will exercise due care does not substitute for the "favored" driver's duty to maintain a proper lookout.

In Utah, after *Conklin*, a driver's right to assume due care on the part of others terminates when an alert driver would have recognized the danger.

This court has indicated at various times that it will charge a driver with knowledge of a danger that he would have seen if he had exercised due care in observing the driving situation. (See: *Martin v. Stevens*, supra; and *Bates v. Burns*, supra.)

When a driver has actual or constructive knowledge of circumstances reasonably indicating that another driver is not acting with due care, then the assumption that others will exercise due care terminates and the alerted driver has the duty to act reasonably under the circumstances to avoid a collision.

It would seem reasonable to conclude that Plaintiff, based on his reaction to the appearance of Defendant's truck on the highway, was alerted to the danger posed by the truck. Plaintiff's own admissions would justify this conclusion (T-12) (T-16).

Once "alerted" to the conduct of the Defendant and of potential danger from such conduct, the Plaintiff cannot argue that he is entitled to the position of an unaware motorist. Rather, with a realization of the danger created by Defendant's angular entry, Plaintiff is compelled to act with due care to avoid a collision.

Plaintiff had many alternative courses of action available to him that would have avoided the collision. He could have stopped entirely. He could have reduced his speed until he determined where Defendant's vehicle was going to turn from its angular course to the south. He could have alone, or in combination with other acts, sounded his horn. Or he could have used the unoccupied inner lane and avoided the truck. It would be difficult to maintain the position, that the failure of Plaintiff to adopt one of these possible courses of action was not negligence.

In lieu of adopting one of the many reasonable courses of action available to him, Plaintiff chose to calculate what portion of the outer lane of the highway he thought the Defendant would need to turn his large van-type truck from its parked position onto Washington Blvd. Based on these mental calculations, Plaintiff gave a few feet of highway and continued on at a fairly rapid rate, astraddle the lane line, toward the existing hazard.

Plaintiff testified that he gave Defendant the room that was necessary and considered the matter closed (T-12); (T-18).

The absurdity of Plaintiff's conduct is most apparent when one realizes that, at best, Plaintiff would come within inches of a collision. Any visual error could make the difference.

Plaintiff's conduct is in utter disregard of a very basic demand of the law — that a Plaintiff, aware of an approaching danger, must select a course of conduct reasonably calculated to reduce the risk.

The unoccupied lane, open to Plaintiff on the left, coupled with the very slow speed of the Defendant's truck, suggest that Plaintiff's decision to remain in the immediately threatened lane of traffic is so below the standard of care, required by the law, and the solution is so devoid of possible benefits to be derived from this solution, that such conduct must be considered negligence as a matter of law.

In *Farrell v. Cameron*, 98 Utah 69, 94 P. 2d 1068, this Court held that a driver, who was alerted to the other motorist's peril in an approaching car, slightly over the center line, was negligent as a matter of law for failing to turn slightly and thereby avoid a collision. If it is negligence to refuse to avoid a vehicle that intrudes onto the wrong side of the highway, it would surely be negligence where, as here, a driver elects to remain on a collision course, when an adjacent, safe lane is available.

This Court has also held that parties cannot insist on right of way as an absolute (*Bullock v. Luke*, 98 Utah 501, 98 P. 2d 350) or on a position or course of travel as an absolute. (*Farrell v. Cameron*, supra).

To allow an alerted motorist the right to continue a course of travel that foreseeably may intersect the course traveled by a Defendant who is unaware of the Plaintiff's

presence, would be to allow gambling in lives, and encourage tests of skill in shaving danger.

Defendant further submits that Plaintiff violated the provision of Section 41-6-55, U.C.A. 1953 and is therefore guilty of negligence as a matter of law, in that observing a vehicle occupying the outside lane, even though at an angle, Plaintiff would be required to pass *on the left at a safe distance*.

Defendant further submits that Plaintiff should be held to be guilty of negligence as a matter of law in that he failed to sound his horn. Section 41-6-146, U.C.A. 1953 requires the sounding of a horn in those situations where it is “reasonably necessary to insure safe operation.” The case at hand would seem to be the very type of fact situation which the framers of the Statute had in mind. If the Plaintiff had sounded his horn when he was first alerted to the danger, there is a good possibility that the collision would have been avoided. The use of the horn in a situation such as presented here would seem to be even more imperative where a driver rather than going around the danger goes, instead, to its very edge.

In determining the issues presented by this Appeal, it should be noted that the Court in the past has clearly differentiated between two types of traffic situations. The first is where the Plaintiff faces a complex situation involving several vehicles which require the Plaintiff to divide his attention between these several vehicles. The Court has referred to this as “multiple

appraisement.” The second traffic situation is the non-complex or simple situation where the Plaintiff is confronted with a single vehicle and his attention can be focused almost exclusively on such vehicle. (See *Covington v. Carpenter*, 4 Utah 2d 378, 294 P. 2d 788; and *Smith v. Bannett*, 1 Utah 2d 224, 265 P. 2d 407.)

This classification has been used by the Court not merely as a device to characterize a particular circumstance, but also as a basis for deciding whether a driver’s conduct amounted to negligence as a matter of law. Undoubtedly this classification was not intended to apply a mechanical rule to all cases that fit the description of either category.

The Court’s theory appears to be based on the notion that given a complex choice it would usually be left to the trier of fact to determine whether the alternative chosen was reasonable and will seldom be considered a matter of law. On the other hand, given a driver confronted with only one vehicle, the conduct of such a driver very often, though not always, lends itself to judicial determination as a matter of law.

This appeal presents a case which is a very uncomplicated traffic situation. The hazard is readily apparent, a slow-moving truck with a driver apparently heedless to Plaintiff’s presence. The alternatives on the part of the oncoming driver are simple.

This case is strikingly similar in the basic traffic situation as that in the *Covington Case* where the distinc-