1972

# Luke Phillips And Ruby Phillips v. Tooele City Corporation : Respondent's Brief

# IN THE SUPREME COURT OF THE STATE OF UTAH

LUKE PHILLIPS and
RUBY PHILLIPS,
*Plaintiffs-Appellants,*

vs.

TOOELE CITY CORPORATION,
*Defendant-Respondent.*

Case No. 12740

## RESPONDENT'S BRIEF

**Appeal from Judgment on Non-Suit from the Third Judicial District Court, Tooele County, Honorable Gordon R. Hall, Presiding.**


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### NATURE OF CASE

This is an action by the Appellants, Luke and Ruby Phillips, for damage to their automobile as a result of a collision with a truck owned and operated by the Respondent on December 18, 1970.

## DISPOSITION IN LOWER COURT

Upon Trial before a jury before the Honorable Gordon R. Hall, District Judge, and after Appellants had rested their case, the Court granted Respondent's Motion for non-suit and Findings of Fact and Conclusions of Law and Judgment were accordingly filed, and Appellants' Motion for New Trial was denied.

## RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmance of the judgment of non-suit and the supporting Findings of Fact and Conclusions of Law entered by the Trial Court.

## STATEMENT OF FACTS

Respondent will restate the facts inasmuch as Appellants' Statement of Facts contains considerable literary license.

On December 18, 1970, the Appellants were man and wife. The Appellant, Ruby Phillips, was, by a prior marriage, the mother of one Phyllis Utahna Perkins who on said date was sixteen (16) years of age and recently married. (T. 13, T. 20) The Appellants had purchased several months previously a 1970 Ford Maverick automobile which was registered in the names of both Ruby and Luke Phillips. (T. 47) The vehicle was being purchased with funds from the Appellants' family enter-

prise, the "Club 13" near Tooele. (T. 56) The "Club 13' business was characterized by the Appellants' Counsel as a "joint family business" (T. 61), Mrs. Phillips worked one shift and Mr. Phillips worked another in running the business. (T. 56) The Appellants had two vehicles, the Maverick being used by both Appellants. Mrs. Phillips on occasion allowed Phyllis Utahna Perkins to drive the automobile and stated that she felt she had the right to give Phyllis permission to drive the same. (T. 56) On the day in question, while Phyllis was visiting at the Appellants' home, her younger brothers who lived with the Appellants requested to go down town shopping and asked Phyllis to take them. Phyllis asked the Appellant, Ruby Phillips, if she could take the car for that purpose and Ruby gave her permission to drive the vehicle for that purpose. (T. 49) The Appellant, Ruby Phillips, also had signed the drivers license application for Phyllis Utahna Perkins prior to said date. (T. 13) Phyllis then with her younger brothers as passengers drove said automobile onto Utah Avenue. The roads were snow covered and slippery. (T. 36) As she was approximately a half block or approximately two hundred to two hundred fifty feet from the intersection of Utah Avenue with Fifth Street (T. 15, T. 16, T. 36) she observed the Respondent's dump truck apparently stopped on Fifth Street to her right in a position just behind the dip which runs parallel with the gutter of Utah Avenue and the truck was toward the middle of Fifth Street and not to the side. (T. 8) After observing the truck in that position, Phyllis did not then again ob-

serve the dump truck nor was she aware of it again until it was in front of her (T. 15) or at the side of her (T. 16) just prior to collision. There were no other vehicles in the area. (T. 16) Phyllis was driving at approximately fifteen miles per hour (T. 16) and the truck's speed at impact was approximately ten miles per hour. (T. 18) Phyllis testified she did not have time to put on her brakes prior to the impact. (T. 18) There also was no distraction or any reason why she looked away from the direction she was driving prior to impact. (T. 18, T. 19) The point of collision was somewhere near the center of the intersection in the northwest quarter of the intersection, Phyllis traveling approximately twenty feet south of the north side of Utah Avenue (T. 22), and the dump truck traveling approximately near the middle of Fifth Avenue. The damage began on the right front fender of the Appellants' vehicle (T. 1, T. 2, T. 4), where is apparently came in contact with the left front bumper of the Defendant's truck. The intersection of Utah Avenue and Fifth Street is an open intersection with no traffic control device. (T. 37) The investigating officer determined the point of impact approximately several feet north of the imaginary center line of Utah Avenue and just a little bit to the west of the imaginary center line of Fifth Street, near the center of the road. (T. 32) The Defendant's driver told the investigating officer that as he approached the intersection he looked to the left and to the right and continued on into the intersection and as he looked to the left he saw the Appellants' vehicle and was unable to stop prior to collision. (T. 31, T. 38)

## ARGUMENT

### POINT I.

### THE TRIAL COURT PROPERLY HELD AS A MATTER OF LAW THAT PHYLLIS UTAHNA PERKINS WAS NEGLIGENT AS A MATTER OF LAW.

Respondent answers Appellants' Points I, II, and III in Respondent's Point I herein.

Appellants' case left no doubt as to the negligence of the driver of the Appellants' vehicle. Phyllis Perkins testified that she was a half a block away from the intersection when she saw the dump truck and did not then again observe it nor was she aware of it until just prior to impact. In the Appellants' case-in-chief the investigating officer, Howard Cooper, testified that Phyllis Perkins at the scene of the accident pointed out to him her location when she first saw the dump truck, which he estimated at that time was two hundred to two hundred fifty feet from the intersection. Appellants offered no other evidence that would contradict or in any way refute that testimony. Using the minimum figure of two hundred feet and her testified speed of fifteen miles an hour, we can roughly compute that it took her approximately eight seconds to traverse the distance from when she first saw the dump truck to the point of collision. This computation being based on the testimony of the police officer that a vehicle travels at a ratio of one and one-half times in feet its given speed per second. (T. 37) Thus, by Phyllis' own testimony there was a time span

of approximately eight seconds and at least two hundred feet in which she paid absolutely no attention to a vehicle which she had observed to her right. The roads were slick and Phyllis made no attempt to slow down or prepare for any contingency prior to the impact. Under these circumstances there clearly is no issue for the jury as to her negligence as all reasonable minds would agree that such conduct constitutes negligence, which was a proximate cause of the collision.

This Court on prior occasions has made it clear that a person approaching an intersection cannot proceed into an intersection without keeping a lookout as to hazards contained therein or about, and that under certain circumstances such failure to keep a proper lookout is negligence as a matter of law. A case directly in point is *Hickok vs. Skinner*, 113 Utah 1, 190 P.2d 514 (1948). The Trial Court entered judgment of non-suit against the Plaintiff which was affirmed by the Supreme Court. The Plaintiff Hickok stopped at a stop sign at the intersection of 21st South and West Temple. Before he entered the intersection he looked to the east and saw an automobile about a half a block away, approximately five hundred feet. He also claimed that there was other traffic which required his attention. However, the Court on appeal noted that this traffic was such that he was not confronted with a rapidly moving traffic situation. The Plaintiff entered the intersection figuring he had time to make a safe crossing without ever looking back to the east at the car he had previously seen. He did not again see that vehicle until the same collided in the middle of

his vehicle. Plaintiff made no effort to avoid the collision. The evidence was that it would have taken the Defendant's vehicle approximately six seconds to reach the point of collision from where Plaintiff first observed him, and thus that during that period of time that the Plaintiff failed to re-observe what said vehicle was doing. The Court observed that even though Plaintiff had the right of way over Defendant, he could not ignore the Defendant's vehicle even though when he began to move into the intersection he reasonably believed he had time to get across. The Court observed that the time element was such that a reasonably prudent and careful person would have glanced to the east several times while traversing the distance from the stop sign to the point of collision, and that because of his slow speed Plaintiff could have easily come to a stop in time to avoid the collision. The Court then held that the Plaintiff was neglectful in regards to heeding and maintaining a proper lookout and that no jury could reasonably find that he was not negligent.

All of the factors set forth in the *Hickok* case are present in the case at bar. Phyllis Perkins had no other traffic to contend with, she had adequate time and opportunity to observe the actions of the truck, but by her own admission did not observe the vehicle again until just prior to impact. It is interesting to note that she testifies the truck was going ten miles an hour at impact and obviously had traveled at least twenty feet into the intersection prior to her observation just before impact. Phyllis also denies having applied her brakes prior to impact,

Thus one can only speculate as to where she was looking and to what her attention was directed, if any, as she obviously was not paying attention to the only vehicle in the vicinity.

Another identical case is that of *Conkling vs. Walsh*, 113 Utah 276, 193 P.2d 437 (Utah 1948). In this case the Court directed a verdict in favor of the Plaintiff, Mr. Conkling, finding that the drivers of both cars were negligent as a matter of law but that the negligence of the Plaintiff's driver was not imputed to the Plaintiff. The Plaintiff's driver stopped at the intersection for a stop sign. She looked both ways, saw no traffic coming and proceeded into the intersection without ever looking to her right or left again until the collision occurred. The Defendant testified as he approached the intersection he saw the Plaintiff's vehicle approaching the stop sign. The Defendant at that time was a quarter of a block west of the intersection. He looked to his right and did not look back to the north to observe the position of the Plaintiff's driver until he was in the middle of the intersection and the Plaintiff's driver was almost in front of him. The Defendant argued that he could reasonably rely that the Plaintiff's vehicle would stop and remain stopped at the stop sign. The Court, however, pointed out that the Defendant knew there was a car approaching but never looked again in that direction until it was too late to avoid a collision, and that even though he had the technical right of way, he had a duty to remain reasonably alert to the possibility of a disfavored driver starting across the intersection. The Court held that the driver of

the Plaintiff's vehicle and the Defendant's vehicle were negligent as a matter of law.

And likewise in the case of *Richards vs. Anderson*, 9 Utah 2d 17, 337 P.2d 59 (1959), the Trial Court granted a Summary Judgment against the Plaintiff finding him negligent as a matter of law. There the Defendant had stopped for a stop sign, waited for several cars and then entered into the intersection at five to ten miles per hour. The Plaintiff was approaching the intersection at fifteen to twenty miles per hour. The Plaintiff stated that he failed to see the Defendant until just before the collision and too late to avoid it. He attempted to excuse that neglect on the grounds that he had the right of way. The Court found that from the physical facts the Plaintiff had an adequate opportunity to observe the Defendant but failed to do so. The Court found him negligent as a matter of law, and in doing so held on page 61:

> "While it was necessary for Plaintiff to be watching his own lane ahead, his vision was not like looking through a pipe or a tunnel. His angle of vision would take in the moving objects in the adjacent lane, particularly a moving object such as Defendant's car, had he been looking.
>
> "It is a well settled rule that one may not be heard to say that he did not see what was plain to be seen. He either failed to look or saw and failed to heed, either of which makes him negligent. . . . The Plaintiff seems to have been guilty of the all too common fault of modern driving of assuming that because they are on a through highway they have the absolute right of way and than one desiring to enter or cross it must do so at his peril.

> The evidence amply justified the Trial Court in determining that he was precluded from recovery because of his own negligence."

In the present case it is not even established that Phyllis Perkins had the right of way nor that she was on a through highway but even assuming she had the right of way, under the facts and the law cited she is negligent and her negligence proximately contributed to the collision.

The cases cited by the Appellants in their Brief under Points II and III are cited out of context and are not in point inasmuch as they do not concern fact situations where one or both drivers knew of another vehicle's proximity to the intersection and failed to keep a lookout in regard to the same after having ample opportunity to make such an observation considering the speed, distance and traffic conditions. Appellants' assertion that Phyllis should not have reasonably seen the truck prior to impact is untenable under the present facts. She had ample opportunity to avoid the collision had she made any effort to observe what there was to be seen.

Equally untenable is the assertion by Appellants that Respondent's driver had waived his right of way and that somehow this gave Phyllis the right to go headlong into the intersection without exercising due care. The law as cited in the above cases makes it clear that Phyllis Perkins could not assume a right of way, whether by waiver or otherwise, and proceed without keeping a reasonable lookout. It should be noted that Appellants in their Brief argue that Phyllis was only one hundred fifty

feet away from the intersection when she first saw the truck, this being based upon the fact that she stated that there were only four houses on the block and that she saw the truck between the second and third house. Appellants' Counsel then makes the unwarranted assumption that there were only four building lots on the block and that somehow means Phyllis was one hundred fifty feet from the intersection. There was no evidence to support this assumption. The only evidence presented by the Appellants was "half a block," and "two hundred to two hundred fifty feet." They are now bound by that evidence.

Respondent respectfully submits, therefore, that the evidence established as a matter of law negligence on the part of Phyllis Utahna Perkins which negligence proximately contributed to the collision.

## POINT II.

## THE NEGLIGENCE OF PHYLLIS UTAHNA PERKINS IS IMPUTED TO BOTH APPELLANTS.

Respondent answers herein in its Point II Appellants' Points IV and V.

The case law presented in Point IV of Appellants' Brief is immaterial. Respondent agrees that a non-driving owner may generally recover from either joint tort feasors; however, that is not the issue in the present case. Here the Appellants are joint owners of the subject automobile and the driver is a minor under the age of

eighteen (18) years, whose negligence, if any, is imputed to the owners by law. Thus the citation by Appellants on page 23 of *Conkling vs. Walsh*, 113 Utah 276, 193 P.2d 437 (1948) which concerned a non-driving sole owner is not in point for that aspect. Likewise the citation of *Lavendar vs. Fox*, and other cases on page 24 are not in point since the agency sought to be created in *Lavender* is established by statute in the present case, to-wit: U.C.A. 41-2-10 and 41-2-22. In regard to those statutes the Appellants attempt to set up a straw man by referring only to Section 41-2-10 which creates liability for the signor of an application for a drivers license of a minor, under the age of eighteen (18), arguing that such imputation does not go to the Appellant, Luke Phillips. The Trial Court, however, based its decision herein primarily on Section 41-2-22 which states as follows:

> "41-2-22. Owner liable for negligence of minor.—Every owner of a motor vehicle causing or knowingly permitting a minor under the age of eighteen years to drive such vehicle upon a highway, and any person who gives or furnishes a motor vehicle to such minor, shall be jointly and severally liable with such minor for any damages caused by the negligence of such minor in driving such vehicle."

Appellants direct no argument or comment at all to this statute and its effect. The obvious effect of the statute is to create as a matter of law civil responsibility upon the owner of a vehicle allowing a minor's use thereof. Where such facts exist, it is not necessary to determine an agency since such is created by law on the owners.

The facts before the Trial Court were undisputed as to joint ownership. The car was registered in the names of both Appellants, it was being purchased from earnings from the "Club 13" a family business and enterprise being run jointly by the Appellants with said vehicle being used by both Appellants for the general benefit of their household. There was no contrary evidence as to the joint ownership of said vehicle. The facts were also undisputed that Ruby Phillips, acting as a joint owner and for purposes within the scope of said joint ownership, to-wit: use of a vehicle for the benefit of the residents of the Appellants' household, permitted Phyllis Utahna Perkins to drive said vehicle at the time and place at issue and, therefore, Appellants come within the imputation of responsibility of Section 41-2-22.

Appellants assert in their Point IV that Section 41-2-10 does not impute contributory negligence but is limited to the imputation of liability. The two cases cited by Appellants in support thereof are a minority position and do not present a logical and reasonable path for this Court to follow. It has generally been held that such imputation statutes impute contributory negligence as well as liability. This has been the rule in California stated in *Solloway vs. Watts*, 137 P.2d 477 (Calif. 1943) and *Birnbaum vs. Blunt*, 313 P.2d 87 (Calif. 1957). In the *Solloway* case, the Court held as follows on page 478:

> "The imputation of negligence to a parent is not limited to actions of third persons against the parent but it extends to actions in which the parent seeks redress and damages. The imputation

extends to all cases where the rights and obligations of parents are invoked in civil actions for damages. . . ."

A similar result was reached in the following cases: *Secured Finance Company vs. Chicago, Rock Island, and Pacific Railway Co.*, 224 NW 88 (Iowa 1929); *National Trucking and Storage Company vs. Driscoll*, 64 A.2d 304, (D.C. 1949); *Baber vs. Akers Motor Lines*, 215 F.2d 843, (App. D.C.); *DiLeo vs. DuMontier*, 195 So. 74, (La. App. 1904); *Fontenot vs. Pan American Fire and Casualty Co.*, 209 So.2d 105, (La.); and *Schiebe vs. Lincoln*, 471 NW 74 (Wis. 1937).

It would be a non-sequitur in the law for a person to be given a statutory responsibility for the negligence of a minor but on the other hand allowed to benefit against third parties notwithstanding the negligence of said minor for whom the owner is responsible. Such a result would be contrary to the obvious purpose and intent of the statute and the Legislature that formulated the same.

The Appellants likewise seek a strained reading of the imputation statute by suggesting that the word "minor" does not apply to Phyllis Utahna Perkins because she was married at the time of the accident. The Supreme Court of Utah, however, in *Rogers vs. Wagstaff*, 120 Utah 136, 232 P.2d 766, (1951) held that under U.C.A. 41-2-10 the words "minor under the age of eighteen" meant exactly that, a person who was under the age of eighteen years and marriage as far as the imputation statute was concerned had no effect on such a person's minority status.

Respondent submits that U.C.A. 41-2-22 applies in the present case to impute the negligence of Phyllis Utahna Perkins to the Appellants.

## CONCLUSION

Respondent respectfully submits that the Trial Court properly found as a matter of law negligence on the part of Phyllis Utahna Perkins and that under the laws of the State of Utah such negligence is imputed to the Appellants and bars their recovery for damages to their vehicle driven by said minor.

Respectfully submitted,

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ES CITED (Cont'd)

## STATUTES CITED



## OTHER AUTHORITIES CITED