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Parley Marsh v. Robert Bryce Irvine and James Blackwood Neil : Respondent's Brief

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

PARLEY MARSH,
Plaintiff-Respondent,

- vs. -

ROBERT BRYCE IRVINE,
Defendant-Appellant,

and

JAMES BLACKWOOD NEIL,
Defendant-Respondent.

Cause No.
11265

BRIEF OF PLAINTIFF-RESPONDENT

Appeal from the Judgment of the Third District
Court for Salt Lake County,
Hon. Merrill C. Faux, Judge

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Clerk, Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

PARLEY MARSH,	}	Case No. 11255
<i>Plaintiff-Respondent,</i>		
- vs. -		
ROBERT BRYCE IRVINE,		
<i>Defendant-Appellant,</i>		
and		
JAMES BLACKWOOD NEIL,		
<i>Defendant-Respondent,</i>		

BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT OF KIND OF CASE

Plaintiff, Marsh, a paid passenger, was awarded a verdict for personal injuries against his host, Defendant Irvine, who drove motor vehicle making right turn from stopped position at stop sign into intersection with arterial highway and angled across outside lane of travel to inside fast lane where he was rear-ended by East bound co-defendant arterial driver, Neil, whom the jury released both as to Plaintiff's personal injury claim and as to the turning driver, Irvine's cross claim for auto damages. After appeal Defendants settled between themselves the auto damage claim.

RELIEF SOUGHT ON APPEAL

Affirmance.

STATEMENT OF FACTS

On November 9, 1964 at approximately 4:20 p.m. Defendant Irvine in whose auto the Plaintiff was a paid passenger (R-345) drove said auto from stop sign at exit of Magna Mill Road and Highway No. 201 Northerly into said highway turning right to head East and after being in the right lane for some sixty feet (exhibit 3-P — map, red route marked by Defendant Irvine; also F-359), changed lanes to inside, fast lane of travel into path of East bound truck driven by co-defendant, Neil, resulting in a rear-end collision. The highway was straight (for several hundred feet), four-lane, fairly new (R-22) highway with asphalt surface (R-281) and was in the words of Highway Patrolman, Ed Fitcher who was called as an expert witness —

“a high type road with a good surface on it . . .” with raised separating island (R-286) with eight foot shoulder, thirteen foot outside and fourteen foot six inch inside lane for East bound traffic (R-222) and with several hundred feet of visibility (photos P-6, P-7 and P-9; also map 3-P).

Highway Patrolman, Robert Haywood: “Visibility is good for several hundred feet in both directions and it is open.” (R-277).

Any slope in the road was so slight that the officer noted it as “level” (R-277) and a slight curvature further to the West (from which Defendant Neil approached was so slight that it, in the words of Highway Patrolman, Haywood —

Q. Did it effect the visibility for several hundred feet?

A. No, Sir.

Notwithstanding Defendant Neil's approach from the West going East at such speeds that he was passing traffic moving at sixty miles per hour —

Q. . . . Had you also passed those at sixty miles per hour?

A. The traffic was moving at sixty miles per hour.

Q. Just answer my question. Did you pass those, also sixty miles per hour?

A. Yes.

Q. Was it because you had passed those safely at sixty miles per hour you thought you could also pass this one at sixty?

A. The stream of traffic which I was moving in was moving at sixty miles per hour. (R-477 and R-478);

the approach of other East bound traffic —

A. I saw traffic down the highway (Irvine, R-352, L-6);

one or two cars westward on the inside lane that Defendant Irvine could see —

Q. Where were those two cars at the time of the actual collision?

A. Somewhere between here and here (indicating). I guess. I was so startled when they went by me. (R-357);

cars in the inside lane —

- Q. So after observing — and, as I understand it, you thought the cars in the inside lane were a little closer than the cars in the outside lane?
- A. I would say they was, Yes. (Irvine, R-367, L-6);

heavy traffic in general —

“... because there was cars coming behind too down here or there is big traffic pattern because everybody gets off work and going home; so, I don't see the highway; I was loading passengers, I looked up, saw all traffic pass here.”

...

- Q. Now after you loaded your passengers did you look to see if the way was clear?
- A. That is when I did look, yes.
- Q. Is that when you saw the cars coming East?
- A. Yes, the traffic pattern. (R-355, L-6, Irvine).
- Q. Alright, I want to know if those cars passed through the intersectio before you got in it, or did you get in the intersection in front of them?
- A. These cars here were way back here, and I passed into the intersection in front of them because I knew I had time to enter the intersection;

and notwithstanding Defendant Irvine's observation of the on-coming East bound Neil truck as a distance of 500 feet —

- Q. The other car drive by Neil, where was it when you first saw it?

- A. It was probably down here (indicating.)
- Q. About how far back from the intersection?
- A. Well, my guess was 500 feet.
- Q. Was that your testimony back in 1965?
- A. Yes, right here.
- Q. And would that then be your answer now?
- A. As near as I can guess in feet without measuring, yes. (R-366)
- Q. One of the automobiles you saw in the traffic pattern was in the inside lane of traffic?
- A. Yes.
- Q. And two of the automobiles you saw in the traffic pattern were in the outside lane of traffic?
- A. That's my — I remember cars come like I said — There was cars all the way back, and I wouldn't specify as to a certain number of cars.
- Q. In other words, let's put in this way. When you looked down here you saw cars on the inside lane of traffic or in the lane next to the center island; you saw a car, or cars, in that lane of traffic?
- A. Yes, sir. I think so.
- Q. And you saw cars in the outside lane of traffic?
- A. I saw traffic pattern. Yes.
- Q. The car on the inside lane at that point was about — you would estimate — 500 feet from the intersection?

A. That is my estimation." (R-366)
Defendant Irvine, after making the foregoing observation drove into the intersection.

Q. So after making that observation, then you started your car and drove into the intersection?

A. That's right. (Irvine, R-367, 1-14)

After the foregoing observation, Defendant Irvine apparently never looked again to the left and West before the collision and his apparent confusion substantiates probable failure to look again to the left —

Q. Where were those two cars at the time of actual collision?

A. Somewhere between here and here (indicating) I guess. I was so startled when they went by me. (Irvine, R-357, 1-8)

Defendant Irvine remained in the outside lane of traffic some sixty feet, (Exhibit 3-P — red line), before crossing into the inside fast lane. Irvine's testimony indicates he was conscious of the lanes; and for reasons the Court would not allow Irvine to tell (R-363, 1-24) Irvine proceeded apparently without further observation from the outside to the inside lane of travel —

Q. . . . Is it possible that you left the stop sign, proceeded a distance down the outside lane of travel, then, swung over to the inside lane of travel?

A. No, because I thought everything was clear here; so, I went across to get in the lane.

The foregoing seem to belie such changing of lanes; however Irvine had already, in tracing his route on the map, (Exhibit 3-P) stated:

- Q. Now then, would you trace your course of travel from the stop sign over to the point of impact, please?
- A. Driving in Salt Lake in this area, that is at least twothirds of the cars that go from Magna come out of these East Mill entrances onto this highway and proceed East. It is our normal practice too.
- Q. Just tell us what you did on this occasion.
- A. I see everything is clear, so I proceed to go in here and across into this lane, and, in order to go into the left-hand lane, which was through lane into the city, this lane being the lane going to Magna. (Irvine, R-360)

Defendant Irvine started from Zero at the stop sign, was at 15 mph or 20 on entering the inside lane of traffic (R-364 and 458) and at 35 mph (R-361, L-2) in the inside lane of travel was struck from the rear by Defendant Neil's truck, not 230 feet East of the east exit of the Magna Mill Road as indicated in Defendant Irvine's brief, page 5, but 155 to 180 feet, Exhibit 3-P, and R-359, L-19. (The jagged lines at 230 feet were where Irvine indicated cars came to rest (R-359, L-22 to L-29).

Better evidence, that of the investigating officer from the physical evidence, indicates the point of impact at 140 feet East on the Mill exit road —

Q. Were you able to determine within what area the point of impact occurred?

A. Yes, sir.

Q. Within what area?

A. Inside lane of traffic.

Q. Now then, did you exclude the possibility of point of impact being either before or beyond certain points?

A. Yes, sir.

Q. . . . within theseven foot skid mark area?

A. Yes, sir.

Q. From your investigation, could it have been further West than that?

A. No, sir.

Q. . . . Have you indicated your best opinion?

A. My best opinion would be it would be in this seven foot distance there. (R-234, L-1).

When Neil first saw Defendant Irvine vehicle moving into the intersection he applied his brakes, his vehicle swayed —

A. . . . also my vehicle almost got out of control; I released the brake and let the engine take over the vehicle, again; and this is where this skid happened, when I jammed on the brakes, again to stop it.

Q. Now at the time you jammed on your brakes by then had you hit the Irvine car or —

A. No.

Q. Was it later you hit the Irvine car? Later?

A. After the skid. (R-59, L-1 to 10).
Neil slowed to what he thought was 30 mph when he rear-ended Defendant, Neil. (R-460, L-2).

Neil said he saw Irvine when he (Neil) was 150 feet back (R-462, L-1) as he was then going 60 mph, (R-462, L-4), that Defendant Irvine was stopped at the stop sign (R-463) —

Q. Did he stop right at the stop sign?

A. Yes, I would say he was stopped right at the stop sign. (R-463, L-28)

Neil knew it was shift change time at Kennecott (R-464, L-25); that at the time of Irvine's entry into the inside, fast lane, he, Irvine, was going 25 to 35 mph (R-466, L-6); and at that time Neil had apparently already braked the first time and lost control and thereafter braked to the point of collision as he said (R-466) —

A. How fast? I think I was traveling — I would say, I had already started to brake my vehicle; noticing an accident was imminent and, by that time, I was busy controlling the vehicle, trying to stop it.

Q. So how fast do you think you were going?

A. I would say maybe at this time I was still doing 55 miles an hour.

Q. Now was this the reason that you had braked, the fact that he was pointing towards — and coming towards your lane of travel?

A. I didn't start to brake until I saw him start to enter that lane; never expected the man to enter that lane of traffic.

Q. In other words you say now, until he started to enter your lane of travel, you hadn't started to brake?

A. No.

Q. Is that right?

A. That is correct.

Neil also said that when Irvine was at the stop sign he, Neil, was 150 feet away traveling 60 mph (R-454, L-26, 30).

Neil was 75 to 100 feet West of the stop sign (R-469, L-12) and going 60 mph (R-469, L-28) according to Neil, and Irvine was just making the turn (R-469, L-21) and when crossing into the fast lane of travel was going 20 mph (R-458, L-6). Neil slowed to what he estimated as 30 mph and struck Irvine (R-460, L-2). The second application of the brakes, according to Neil, likely made the skid marks —

Q. The skid marks then, they were probably made by the rear wheels weren't they?

A. In all probability it was the second fierce application of brakes (Neil, R-471, L-11)

Q. . . . And then when you got down to this point where the officer has indicated there are some two skid marks, you, again, applied them hard?

A. Yes. (Neil, R-471, L-23)

According to Neil the outside lane in front of Irvine was occupied with other vehicles:

Q. . . . Was there traffic immediately in front of his vehicle? . . .

A. Yes.

Q. About how close would you estimate to the front of his vehicle?

A. About two car lengths.

Q. Is that the answer you gave at that time?

Neil on cross gave the speed of Irvine on crossing to inside fast lane as 20 to 35 mph. (R-476, L-23). He also stated on cross that there were cars in front of him in his lane of travel (R-478, L-10).

Captain Ed Pitcher testified as an expert that the coefficient of friction at the scene of the accident was approximately .79 (R-544); that slowing distance from 60 mph to 30 mph was 114 feet (R-572); that if the accident happened 213 feet from the stop sign (R-502, L-9) Defendant Irvine consumed, in traveling from stopped position at stop sign to 35 mph at point of impact 8.4 seconds (R-510, L-4); that from the point Irvine may have entered the fast lane (Exhibit 3-P), (green line made by Neil,) (thereby along with his direction and speed altering approaching driver Defendant Neil of Irvine's intent to take the fast lane) to point of impact (as testified to by Neil as at green marks, Exhibit 3-P, i.e., 180 feet — 140 feet according to Officer Hayward (R-232, Exhibit 3-P), Irvine traveled 180 feet (213 feet minus 33 feet) and consumed 5.1 seconds (R-510, L-30); that approaching driver, Neil, in slowing from 60 to 35 mph consumed 1.7 seconds (R-517, L-4) leaving 3.4 sec-

onds to spare, or would have consumed to fully stop 4.2 seconds still leaving .15 seconds even if Irvine had been stopped on the road (R-517, L-15).

Inescapable conclusions follow that Neil either was much further back on making the crucial observations or that speeds were drastically different than indicated by the witnesses, also that Neil possibly consumed considerable time and distance while out of control.

POINT I.

DEFENDANT IRVINE'S REQUEST FOR DIRECTED VERDICT WAS CORRECTLY DENIED.

The Plaintiff's Complaint (R-1) reveals Plaintiff initially sued the turning driver, Defendant Irvine, regarding him at fault for failure to yield, improperly changing lanes, and failure to keep a proper lookout, and later added Defendant Neil, the arterial driver by Amended Complaint (R-6) after deposition of Irvine October 20, 1965 (R-350, L-13). We too regarded Neil as negligent but the jury failed to agree and our question is whether as to Plaintiff, Marsh, the paid passenger in Irvine's auto, there was negligence on the part of the turning driver, Irvine, to sustain the verdict.

It is difficult to see how the three cases cited in Defendant Irvine's brief under Point I — that Irvine should have had a directed verdict of no cause of action — aid him when the three cases cited ruled that the crucial questions of negligence and proximate cause of

the drivers in situations analogous to that of Irvine were jury questions.

Nelson vs. Molena, Washington, Jan. 1959, 334, Pac. 2d 170, is cited in Defendant Irvine's brief page 20 in support of Irvine's point that he should have had a direct verdict instead of a jury verdict against him, the brief noting:

"The appellant court held that the principles of law that applied in the instruction which should have been given were those applicable to following and preceding drivers and the statute relating to an overtaking driver was applicable. . . ."

In that case the right turning driver, Defendant Molena, made a right turn from a non-arterial highway onto arterial highway and was struck from the rear by Plaintiff, Nelson, who attempted to pass but was forced to turn back into his own lane by approaching auto, it being a *two lane* (Not a four-lane as here) highway. The verdict was for the Defendant, Molena, on cross claim. The Supreme Court held that the evidence raised questions for the jury as to whether Plaintiff Nelson was so far from the intersection when the Defendant Molena entered that a reasonably prudent man could believe it safe to enter and as to whether Plaintiff Nelson's excessive speed caused the accident. Judgment on verdict was affirmed.

The Court said, page 171:

"The principle question presented is whether the Court, under the facts in this case, should have applied, as a matter of law, the rules appli-

cable to intersection collisions (RCW 46.60.170) and thus should have held the disfavored driver to have been contributorily negligent. The trial court's answer, properly given, we think was no."

The court commented, page 172:

"Nelson (Plaintiff) urges that his Motion for a Directed Verdict and for Judgment n.o.v. should have been granted because it is undisputed that Molena (Defendant turning driver), the disfavored driver, if the intersection applied did not yield the right of way and his failure so to do caused the collision."

"If a disfavored driver enters an intersection at such a time and in such a way as to produce an emergency situation in which the favored driver is unable, in the exercise of reasonable skill and judgment to avoid a collision, the disfavored driver's failure to yield the right of way at the intersection would constitute negligence per se (*Miller vs. Asbury*, 1942 Wash. 13 Wash. 2d 533, 125 Pac. 2d, 652) even though the resultant collision occurs outside the bounds of the intersection. *Boss vs. Dufault*, 1953 Wash. 257 Pac. 2d 775; *Milne vs. City of Seattle*, 1944, Wash. 145 Pac. 2d 888; *Rutger vs. Walken*, 1943, Wash. 143 Pac. 2d 866; *Hook vs. Kirby*, 1933, Wash. 27 Pac. 2nd 567."

"Under such a state of facts, RCW 46.60.170 (quoted supra) would apply and the rights and liabilities of the parties would depend upon who had the right of way at the intersection.

"In the present case the testimony of a disinterested witness placed the favored driver (Plaintiff Nelson) so far away from the intersection when the disfavored driver (Defendant

Molena) entered the arterial that a reasonably prudent and cautious man could have believed that he and the favored driver were not simultaneously approaching a given point within the intersection and that he could with safety proceed to enter the arterial and travel upon it" . . .

"Of course we are called upon to decide whether, as the appellant Plaintiff Nelson contends Molena (turning driver) as a matter of law, entered the intersection in violation of RCW 46.60.170 and was responsible for the collision. We answer that in the negative. *It was at least a question for the jury under the testimony as we haveo utlined it.* (Underlining added.) Issues of negligence, contributory negligence and approximate cause are in such a situation questions of fact. *Gibson vs. Spokane United Railroad*, 1938, Wash. 84 Pac. 2d 349; *Pyle vs. Wilbert*, 1940, Wash. 98 Pac. 2d 664. The jury found and with abundant evidence to sustain the finding, that if Nelson had been proceeding carefully Molena had a reasonable margine of safety in proceeding on to th arterial highway and that the collision would not have occurred but for Nelson's excessive speed."

"The trial court properly denied the motion (of Plaintiff Nelso ,approaching driver) for a direct verdict and for a judgment n.o.v."

The court had submitted both theories to the jury, the statute on intersections and right of way on entry, that parties were "simultaneously approaching a given point within an intersection" within the purview of RCW 46.60.170, a yield right of way statute, and the statute 46.60.040, o "overtaking and passing" vehicles and the

court held no more and no less that a jury case was properly presented, instructed, and sustained by the evidence, the court saying page 173:

“It follows that there is no merit in the assignment of error directed against the court’s instruction, based upon RCW 46.60.040. Patently if Moleno was lawfully upon the arterial highway (as the jury could and did find) when the collision occurred, the rights and liabilities are those of following the preceding drivers and the statute relating to an overtaking driver was applicable.”

Had the jury here found that Irvine, like Moleno, was lawfully on the arterial highway (and over in the fast lane where Irvine was) the rights and liabilities of overtaking and passing vehicles might well apply but even then under the Washington case would remain a jury question, not a matter of a directed verdict as claimed by defendant Irvine in his brief.

Furthermore, Defendant Irvine submitted no requests on overtaking and passing vehicles in his 22 requests (R-37 to R-59) all of which were given except that for directed verdict (R-38) that for one version of last clear chance (R-54); and in fact Defendant Irvine submitted an instruction (R-47) with reference to right of way and same was given; and Irvine also requested an instruction as his request No. 11 (R-48) given by the court (R-116) Instruction No. 17 which read as follows:

“You are instructed that the driver of a vehicle approaching a stop sign at the entrance to a through highway shall yield the right of way to other vehicles which have entered the intersection

from said highway or which are approaching so closely on said through highway as to constitute an immediate hazard, that said driver having so yielded, may proceed and the drivers of all other vehicles approaching the intersection on said through highway shall yield the right of way to said vehicle so proceeding into or across the through highway.”,

Naturally Defendant Irvine did not object to said instruction No. 17 (R-665, 666, 667, Irvine's exceptions to the instructions).

Walker vs. Peterson, 3 Utah 2d 54, 278 Pac. 2d 291 is cited in Defendat Irvine's brief, Page 21, under his point I, that he is entitled to a directed verdict of no cause of action and is cited for the proposition that the arithmetic in the instant case warrants a negligence ruling as a matter of law against Neil, the arterial driver in favor of the turning driver, Defendant Irvine.

It is difficult to see how that case aids Defendant Irvine as against Plaintiff Marsh, his paid passenger.

In that case, at any rate, parties approached each other head-on when Defendant Peterson attempted a right turn in front of the on-coming Plaintiff, Walker vehicle. The left turning driver did not see the other auto nor look again until after he heard the screech of brakes and a horn and the court, Judge Lewis Jones, sitting without a jury, held both drivers negligent but entered a judgment for the turning driver believing that the excessive speed of approaching motorist was not a proximate cause of the collision.

The Utah Supreme Court held it must have been a proximate cause; and vacated the judgment, arriving at its conclusion based on the mathematics of the situation, reasoning that the Plaintiff approaching driver at 40 mph could have stopped in 126 feet or 77 feet short of impact whereas he left 148 feet of skid marks, knocked the Plaintiff's car 72 feet and traveled 42 feet from the point of impact besides, indicating a speed in excess of 55 mph.

That case holds that under its arithmetic the arterial driver's proven excessive speed was a contributing cause of the accident. It does not hold the turning driver free of causative negligence. The case could assist Defendant Irvine in his auto damage suit against approaching driver Neil were it not that the Supreme Court left undisturbed the proposition that the turning driver Defendant Peterson's situation (analogous to that of Defendant Irvine) was a factual question, and determinable by the jury.

In *Hefferman vs. Rosser*, 1965 Pa. 419 Pac. 550, 215 Atlantic 2d 655, cited by the defendant, the Plaintiff turned right into arterial highway and in 140 feet, according to Plaintiff, was rear-ended by the Defendant at 40-50 mph.

The jury found both parties negligent, hence no cause of action on Plaintiff's Complaint; the trial court erroneously granted a new trial, erroneously thinking that contributory negligence of Defendant should not have been a jury question. The Supreme Court held the

trial court to have been right the first time, i.e., that Plaintiff's contributory negligence was a jury question, the court noting page;

"Under Plaintiff's version (turning driver) not only was he not contributorily negligent but Defendant (arterial driver) was negligent in that he had full and adequate opportunity to avoid a collision with the Plaintiff vehicle. Under Defendant's version because of the manner in which the Plaintiff entered the East bound lane, Defendant was afforded no opportunity to avoid the collision and Plaintiff negligently effected an entry into the path of Defendant's East bound vehicle).

Irvine reasons the absence in the instant case of such pronounced discrepancy as to point of impact as there was in the Hefferman case entitles Irvine not just to a jury question on his negligence but to a directed verdict on his absence of negligence. Granted the discrepancy on point of impact was less in the instant case, 140 feet (Officer Hayward) to 180 feet, Exhibit 3-P — not 230 feet as noted in Irvine's brief, page 5, but the discrepancy was material; and other discrepancies complicate the instant case. As to speed — Neil testified variously at speeds of 60 to passing vehicles moving at 60 mph as to route of travel, Exhibit 3-P — Neil's version takes Irvine almost directly to the fast lane while Irvine's renders hi min a situation of changing lanes. As to speed at point of impact — if we believe the speeds given by witnesses as to both cars at the time of impact, 35 mph as to Irvine vehicle and 30 mph as to Neil vehicle,

the accident wouldn't have happened — Irvine would have gotten away. And the time and distance consumed by Neil while out of control is rather unanswered in the record.

Clear cut answers not being apparent to the trial court as to the negligence of the two defendants, the trial court left, and we believe properly, the determination to the jury; although we think a directed verdict, for Plaintiff Marsh as against Defendant Irvine, the turning and disfavored driver, may well have been proper.

POINT II.

DEFENDANT IRVINE'S MOTION FOR NEW TRIAL WAS CORRECTLY DENIED.

That Defendant Irvine, turning and disfavored driver, was not entitled to a directed verdict of no cause is covered under Point I and it follows that his motion for new trial was properly denied.

Many cases sustain a jury verdict against the driver entering arterial highway as Defendant Irvine did.

In *Hughes vs. Hooper*, 19 Utah 2d 389, 431 Pac. 2d 983, an accident occurred at open intersection 100 South and 600 West in Provo, Plaintiff proceeding North and Defendant East. Judgment was for the Defendant, Plaintiff appealed, the case was affirmed, the Supreme Court holding that the North bound driver, there the favored driver, being to the right unlike Defendant Irvine's position in the instant case entering an arterial highway, could have been contributorily negligent and whether he was for the jury, the court noting page 391:

"If there is doubt the issue is for the jury,"
 Citing *Country Club Foods vs. Barney*, 10 Utah
 2d 317, 352 Pac. 2d 776.

In the latter case Plaintiff South bound at open intersection in Price, Utah was struck by West bound Defendant, approaching from the left, Plaintiff recovered a judgment and Defendant unsuccessfully argued in the Supreme Court that the Plaintiff was guilty of contributory negligence as a matter of law. This court held that since reasonable minds could differ the question was one for the jury.

In these two cases the motorists in position analogous to that of Defendant Irvine enjoyed the favored position being to the right; still the question was ruled to be a jury question.

In *Mulback vs. Hertig*, 15 Utah 2d 121, 388 Pac. 2d 414, a case where there was no actual impact, this court upheld a jury verdict for arterial truck driver who ditched his cement truck to avoid hitting Defendant who stopped at stop sign then proceeded into the intersection into the truck's path. The court noting (page 123):

"Inasmuch as Plaintiff was on the arterial street and had the right-of-way, he was entitled to assume that the defendant would accord it to him until something warned him to the contrary. Under the evidence the jury could have found that Defendant did not honor Plaintiff's right-of-way but suddenly ran out into the intersection and into the Plaintiff's line of travel when the latter was so close that he could not have done anything other than he did to avoid a crash."

In *Peterson vs. Neilsen*, 9 Utah 302 343 Pac. 2d 731, a Defendant entering the arterial highway after stopping at stop sign and in an analogous position to that of Defendant Irvine in the instant case, was struck by Plaintiff arterial driver approaching from the left (in relative position of Defendant Neil driver in the instant case). With respect to the Defendant this court said, page 304:

"It is unquestioned that the evidence supports the finding that the defendant (auto entering the arterial) by proceeding on to the highway without looking to the North was negligent and that his negligence was a proximate cause of the collision. Our concern is whether this was the sole proximate cause or was the Plaintiff guilty of negligence which also contributed as a proximate cause of the collision thus barring her right to recover."

The case was remanded for retrial on the issue of whether the arterial driver was contributorily negligent as a matter of law as Judge Larson of the 7th District had ruled.

POINT III.

INSTRUCTIONS WERE FAIR TO DEFENDANT IRVINE.

Defendant Irvine objects that Instruction No. 6 mentions as example various experts, a doctor, engineer, appraiser or mechanic . . . but does not mention the category of expertise enjoyed by Captain Pitcher.

Surely the jury knew the items given doctor, engineer, appraiser or mechanic were examples and the jury surely knew after the careful qualification of Captain

Pitcher as an expert (R-492), that he was testifying as an expert. There were not in the case any engineers, appraisers or mechanics and although the court might have said:

“ . . . For instance, a doctor, engineer, appraiser or mechanic . . . ”

the fact that those professions are given as examples cannot but be properly understood by the reader, and the examples given under ordinary rules of interpretation do not limit the category but give examples of it.

In instruction No. 15 was a general instruction on speed applicable to all drivers. It is a simple statement of the rule of the road and no juror could have been misled by it in the facts of the instant case.

Furthermore, had Irvine entered the arterial highway in a slower, more cautious and deliberate manner observing to his left, the accident may well have been avoided. Furthermore, there is considerable discrepancy as to Defendant Irvine's speed at the time of entry of the inside fast lane of travel and the jury were entitled to find from the evidence that Irvine came out from the stop sign into the arterial highway at such a rate of speed as to contribute to the hazard.

With respect to Instruction No. 20, that no person should turn a vehicle upon a public highway unless and until such movement could be made with reasonable safety, Irvine's brief, page 28, claims “There is no evidence in this case that the Defendant Irvine after he

entered the inside lane of traffic made any turn whatsoever from the lane in which he was traveling."

As pointed out in the statement of facts, Irvine, according to his own testimony, Exhibit 3-P, has his route drawn in the outside lane for some sixty feet before his cross over into the inside, fast lane and he commenced at one point in his testimony, (R-363), to state his reasons for so doing but the court rejected that evidence (R-363).

Instruction No. 20 instructs in the words of the statute 41-6-61 Utah Code Annotated 1953:

"A vehicle shall be driven as nearly as practical entirely within a singel lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

Defendant Irvine objects to Instruction No. 21 in that the Court did not punctuate the words "safety" with "reasonable safety" in its instruction that the driver makig a right turn shall remain in the outside lane and shall not thereafter change to the left or inside lane until the driver has first ascertained that such movement can be made with safety. It seems this instruction did not impose a duty on Irvine to so control his auto as to guarantee accident avoidance but rather pronounced to the jury the rule which governs a driver in turning right on to a highway and in moving thereafter to a different lane of travel. Instruction No. 22 similarly pronounces a general rule with respect to changing lanes.

It is noteworthy that Irvine did not make that objection to Instructio No. 21 in his exceptions (R-666) nor

with respect to Instruction No. 22 (R-666); that this was a five day trial with instructions submitted at the beginning including Neil's requests, 11 and 12, which became the court's instructions Nos. 21 and 22, hence with adequate time to criticize any wording of any instruction; and that court was adjourned from 4:30 p.m. one day until 10:45 a.m. the next for consideration of jury instructions (R-655, 656). We assume the Court and counsel for Neil and certainly counsel for the Plaintiff would not have objected, had the criticism been brought to light, to punctuating the word "safety" in Instructions Nos. 21 and 22 with the word "reasonable," however we cannot conceive of the jury having been misled under the total instructions given.

Instructions Nos. 20, 21 and 22 read together, as they were, certainly acquainted the jury with the reasonably prudent man test. Instruction No. 20 was punctuated with the words "reasonable safety," "reasonably prudent person" and cautions the reader:

"This does not mean, however, that the driver of a motor vehicle before making a turn must know that there is no possibility of accident . . ."

Instruction No. 21 did not use the term "as close as possible to the right-hand curb" but used the words "as close as practical to the right-hand edge of the road or roadways" and Instruction No. 22 used the term "... driven as near as practical entirely within the single lane . . ."

The reasonable man test was clearly and unequivocally inserted into these three instructions.

Defendant Irvine's criticism of Instruction No. 23 on sudden emergency is directed mainly at the favored arterial driver, Neil, and as noted earlier the turning driver, Irvine's only hope of succeeding as to his paid passenger Plaintiff is to show that the sole proximate cause of the accident was assessible to the arterial driver, Neil and furthermore that reasonable minds could not differ as to such sole proximate cause; hence that the case should have been taken away from the jury in Irvine's favor. *Nikoleropolous vs. Ramsey*, 61 Utah 465, 214 Pac. 304, Irvine's brief, P-31, is cited for the proposition that the said emergency instruction should not have been given. In that case, however, the court found as a matter of law — (Page 471)

“That at the time of the injury and immediately before, the Defendant was not exercising reasonable and ordinary care in the operation of his car and that if an emergency whatever existed it was due entirely to his own negligence.”

In the instant case, however, it could be argued quite forcefully by Neil that, within the evidence there was room for the jury to find that the arterial driver, Neil, was not already negligent and that the emergency, if any, was not created by Neil's conduct but by Irvine's.

The turning driver, Neil, entering the arterial highway claims he should have enjoyed requested instruction no. 17, (R-54) on last clear chance and cites *Jones vs. Knutsen*, 16 Utah 2d 332, 400 Pac. 2d 562 as authority. But in that case as in most last clear chance cases, the injured was stopped, — seldom is last clear chance ap-

plied between two moving vehicles with rapid change of circumstances between them; *Hickock vs. Skinner*, 113 Utah 1, 190 Pac. 2d 514; *Utah Law Review*, Vol. 3, P. 211, and the reason is that any last chance is thus rendered unlikely to be clear.

In the *Jones vs. Knutsen* case the auto rear-ended had stopped on 9th South between 12th and 11th East to pick up a shoe; the driver reached it from his open car door, anded it to his passenger, rolled the car forward about fifty feet, and stopped to allow the passenger to give the shoe to another driver. The Supreme Court noted, page 333 —

(“About one and one-half minutes elapsed between the initial stop and the collision.) Immediately thereafter Defendant’s bus collided with the back end of Plaintiff’s vehicle. Testimony discloses that Plaintiff, by failing to look in his rear-view mirror, was unaware of the approaching bus; and also that Defendant bus driver had Plaintiff’s car in vision from the time he made his safety stop on 13th East about 400 feet from the collision cite. Plaintiff did not signal for his second stop; however his brake lights were lit from time of initial stop as he kept his foot on the brake. Defendant bus driver saw the brake lights but did not sound the horn or brake the bus for stop until seventy feet from Plaintiff’s car while going between 12 and 15 mph . . .”

The dissent would not have allowed last clear chance in the *Jones vs. Knutsen* case let alone the instant case, the dissenting justice questioning the clarity of the last chance.

Does not the admission of Defendant Irvine of a need for last clear chance instruction against the arterial driver, Neil, admit and assume negligence on the part of Irvine and does not that assumption of negligence sustain the award to Plaintiff, paid passenger in the Irvine car? It would seem so unless we adopt the last wrong doer theory as it relates to last clear chance which theory was long ago rejected in Utah, *Anderson vs. Bingham and Garfield Railway Company*, 117 Utah 197, 214 Pac. 2d 607.

Irvine could only be aided as to Plaintiff Marsh by the last clear chance doctrine if Irvine convinced this Court that a last clear chance on the part of the arterial driver, Neil, to avoid the accident switched the proximate cause of the accident entirely to Neil thereby absolving Irvine's responsibility to his paid passenger, Plaintiff Marsh, Irvine would thus be arguing "We are both negligent, thee and me but only thee (Neil) caused the mischief." In the *Anderson vs. Bingham and Garfield Railway Company* case Plaintiff, Anderson, in driving at a tangent toward the intersecting railroad track, collided with the train approaching at 7 to 10 mph without lights on the lead cars except lanterns though the engine further back had its head light on, Plaintiff contending the illusion that the engine was at the head of the train and thus the Plaintiff failed to observe the cars ahead of the engine. The engineer saw the auto and gave the "washout" signal to apply the brakes but they, being defective, only slowed the train. Plaintiff argued but failed to convince this court he was entitled to a last clear

chance instruction, the Court extensively exploring the last clear chance doctrine in light of the engineer's antecedent negligence in driving with bad brakes. The Court points out that proximate cause is not a satisfactory explanation of last clear chance, the court noting (Page 204) —

“Professor Flemming James, Jr. in an article entitled ‘Last Clear Chance — a Transitional Doctrine’ 47 *Yale Law Journal* 704, likewise rejects the proximate cause explanation of the last clear chance doctrine and observes that the Loach case (referring to the British case, *British Columbia Electric Railway Ltd. vs. Loach*, 1 A.C. 719, 1916) and the American cases which follow it seek to justify their position in the last wrong doer rule in one form or another.”

The Court notes that the restatement and the majority of American courts are in accord and the Court calls attention (Page 204) to *Colorado and S. Railway Company vs. Western Light and Power Company*, Colo. 214 Pac. 30 —

“Where Plaintiff who was injured when the streetcar he was riding in collided with a train, recovered a joint judgment against the streetcar and the railroad companies although it was later adjudged that, as between the two defendants, the railroad company had a last clear chance to avoid the collision.”

Similarly had the Plaintiff, Marsh, who was injured in the Irvine car recovered a joint judgment against the motorists Neil and Irvine, and had it been later adjudged that as between the two defendants the arterial driver,

Neil, had a last clear chance to avoid the collision, the judgment against Irvine, much less that against Neil, would not have been disturbed by the last clear chance application.

Hickock vs. Skinner, 113 Utah 1, 190 Pac. 2d 514 is a case in point with respect to last clear chance. Plaintiff traveled North on West Temple, stopped at 21st South in arterial highway, waited for West bound traffic to pass, looked East, saw an auto 400 or 500 feet East, observed South bound traffic, started across 21st South "without ever again looking to the East" and was struck by Defendant West bound auto. Defendant was negligently driving at 45 mph. This court said:

"Under these facts the trial court found the Plaintiff (auto entering arterial street) to have been guilty of contributory negligence as a matter of law and accordingly entered a judgment of nonsuit. The correctness of the trial court's ruling is the only question presented on this appeal."

The ruling of the trial court was affirmed.

With reference to last clear chance the court said:

"The last clear chance doctrine relied on by Plaintiff, is inapplicable in the present instance. As has been repeatedly announced by this court, this doctrine is of limited application in the case of two moving vehicles. . . . The faster Plaintiff was traveling the closer Defendant's car would be to the point of impact, and the less chance Defendant would have to take effective measures to avoid colliding with Plaintiff's car. Under the last clear chance doctrine, obligations are also relative. Each driver is charged with using due care

to avoid the collision, and one cannot say when his own negligence continues to the point of impact, 'We were both negligent, but you alone are chargeable because I got there first and you should have missed me.' "

POINT IV

EVIDENCE RULINGS WERE NOT PREJUDICIAL TO DEFENDANT IRVINE

Court rulings on expert evidence did not prejudice Defendant Irvine.

Plaintiff introduced evidence of the required stopping distance on the subject road from investigating officer, Highway Patrolman. Hayward; also from an expert, Captain Ed Pitcher, which evidence both Plaintiff and the turning driver, Defendant Irvine, were in a position to enjoy and to utilize to show that Defendant, Neil, the arterial driver, should have been able to stop or slow in time to avoid the accident.

The Court declined with respect to Hayward to allow the terminology "coefficient of friction" but allowed the officer to simply testify as to the stopping facility or drag factor of the road; and this was a more liberal ruling even than the Plaintiff asked for. Certainly Irvine could not complain, he thus having more latitude to explore with that officer his theory that the arterial driver, Neil, should have been able to stop. The Plaintiff's expert, Captain Pitcher, was then allowed by the Court to use the terminology "coefficient of friction" citing that at the scene of the accident and giving stopping and slowing distance at various speeds.

Defendant Irvine did not call back Pitcher as his own witness to elaborate or to straighten out any details as he might well have done nor did Irvine recall Hayward, the investigating officer, to go back into any matters of the road characteristics, nor did Defendant Irvine call other experts or witnesses to clarify road coefficient of friction or speed problems, if any, not understood by the jury.

Defendant Irvine claims the Court erred in allowing Captain Pitcher to testify as to stopping distance of a vehicle on a highway having a coefficient of friction of .45. This could not have but pointed up the vast advantage of Neil in attempting to slow or stop on a road with coefficient of .794 — Exhibit 17-P and the Court did allow, Exhibit 17-P. Captain Pitcher to show slowing distance at coefficient of friction of .794 to be only 114.5 feet. The Court may well have allowed Pitcher to testify to stopping distance at 60 mph on co-efficient road .79 but after all the evidence was of Neil's slowing from 60+ to 35 mph and not of stopping and Irvine could not have possibly been prejudiced by the ruling.

Captain Pitcher was at the trial three different days. Officer Hayward two with ample opportunity for Defendant Irvine to explore with these or other witnesses all facets of the speed — stopping distance problem.

CONCLUSIONS

On the evidence Defendant Irvine's only chance even at trial was not to escape liability but to cause arterial

driver, Defendant Neil, to contribute. The jury resolved what we believe were obvious jury questions. The settlement between defendants since appeal (in the absence of which settlement this Court would be considering possibilities of a new trial between Defendants leaving undisturbed Plaintiff's award) of automobile damage problems renders moot most of the alleged errors noted for appeal.

Respectfully Submitted,

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