1969

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

Utah Supreme Court

IN THE SUPRE
OF THE STA

PARLEY MARSH,
Plaintiff and

— vs. —

ROBERT BRYCE
Defendant

JAMES BLACKWOO
Defendant

APPEL

Appeal From
District Court,
THE HON

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TABLE OF CONTENTS

Cases Cited

Texts

IN THE SUPREME COURT OF THE STATE OF UTAH

PARLEY MARSH,
Plaintiff and Respondent,

— vs. —

ROBERT BRYCE IRVINE,
Defendant and Appellant,

JAMES BLACKWOOD NEIL,
Defendant and Respondent.

Case No. 11255

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action by the plaintiff Marsh to recover damages for injuries arising out of the automobile accident, against two defendants, one of whom, Irvine, was the driver of the vehicle in which Marsh was riding and the other, Neil, the driver of the vehicle which struck the rear of the Irvine vehicle in which plaintiff was riding. Irvine also filed a cross-claim against the other defendant, Neil, for damage to the Irvine vehicle. (After this brief was prepared Neil settled with Irvine for Irvine's damages and the cross-claim has been dismissed.)

DISPOSITION IN LOWER COURT

The case was tried before a jury which returned a verdict for the plaintiff against the defendant Irvine for $10,000.00 and a no cause verdict in favor of the defendant Neil on both the complaint and the cross-claim. The trial court subsequently denied defendant Irvine's motion for a new trial.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the judgment of the lower court; that the Supreme Court enter a judgment for the defendant Irvine as a matter of law on the plaintiff's complaint and in the alternative for a new trial.

STATEMENT OF FACTS

The collision out of which the plaintiff's cause of action arose occurred on the 9th day of November, 1964, at about 4:20 p.m. on State Road 201 which is the main highway going past the Magna Mill and Arthur Smelter. (See Exhibit 3-P).

The plaintiff Marsh and defendant Irvine both worked at the Arthur Concentrate Plant. Marsh, together with Russell Beck and Bud Turpin rode back and forth to work from Salt Lake City with Irvine in his 1962 Ford station wagon on about a daily basis paying Mr. Irvine $.75 per day for the ride (R. 345).

State Highway 201 in the area where the accident occurred is a four-lane hard surface highway running

generally east and west with the inside eastbound lane being 14 feet 6 inches wide and the outside lane 13 feet wide. There is also an 8-foot hard surface shoulder used for emergency stopping on the south side of the highway (R. 222). The east and westbound lanes of traffic are separated by a raised island (R. 223) which has a break in it at the junction with the Magna Mill Road. (See Exhibits 2-P and 3-P). The Magna Mill Road joins from the south. A stop sign faces traffic going from the Magna Mill Road onto Highway 201 (Exhibits 3-P, 6, 7, 8 and 9-P). The stop sign is 12 feet south of the south edge of Highway 201 and 6 feet east of the east edge of the Magna Road. Officer Hayward, the investigating officer from the Utah Highway Patrol, described the highway as a fairly new asphalt base with oil and rock chip surface (R. 281) and probably travel worn (R. 222) or traffic worn (R. 281). The highway was fairly level in the area where the accident occurred (R. 277, Exhibits 6, 7, 8 and 9-P).

Officer Hayward testified that using an average drag factor for that highway, reaction time, plus stopping distance at 60 miles per hour on that highway was 250 feet, and other speeds as follows:

50 miles per hour — 178 feet
45 miles per hour — 154 feet.
40 miles per hour — 126 feet
35 miles per hour — 102 feet.
30 miles per hour — 79 feet.
(R. 282)

Visibility is good for several hundred feet both to the east and west from the Magna Road along Highway 201 (R. 277).

When he arrived, he noted the Neil and Irvine vehicles both in the inside lane of traffic where they came to rest after the accident (R. 224). The vehicles were several feet apart, and Mr. Irvine's vehicle was 77 feet east of the west end of two brake marks in the inside lane of traffic which were each 7 feet long and began 140 feet from the exit of the Magna Mill Road. These marks were left by the Neil vehicle and were the only marks left by the vehicle (R. 231, 232).

At the time of the accident the road was dry, it was daylight and the road was clean (R. 234-235, 237).

The officer thought the point of impact to be in the inside lane of traffic in the area of the two brake marks but excluded the possibility of the impact being to the west of the marks (R. 232-233, 288).

On cross-examination the officer said he couldn't say whether the impact was beyond the skid marks or at the skid marks (R. 288-289). No other evidence was given by the officer as to where the impact took place (R. 289). The officer checked the area west of the seven-foot skid mark for a distance of 200 to 300 feet and found no other marks (R. 297). Damage to defendant Neil's vehicle on the front end was $75.00; damage to defendant Irvine's vehicle on the left rear was very slight (R. 297, 301, 370).

Mr. Irvine, with Mr. Marsh in the front seat of the car, stopped at the stop sign at the Mill Road entrance to the main highway and picked up Mr. Beck and Mr. Turpin. He stopped about five feet west of the east edge of the Magna Mill Road and at about the stop sign (R. 351) with the front end about five feet south of Highway 201 (R. 366). He then looked to the west for approaching traffic. He observed traffic about 500 feet to the west of the intersection (R. 354) in both lanes of traffic (R. 355) with traffic in the inside lane being a little further away (R. 367). Mr. Beck, in the back seat, said, "It is clear; let's go." Irvine entered into the intersection and drove across the outside lane and into the inside lane as indicated on Exhibit P in red (R. 359). He placed the point of impact at a distance approximately 230 feet east of the east edge of the Magna Road entrance in the inside lane of traffic (R. 359) as shown in red. He was traveling at between 30 to 35 miles per hour when his vehicle was struck from the rear by the Neil vehicle (R. 360-361). In entering the intersection he drove in a normal manner and did not accelerate rapidly. When he left the stop sign, he did not proceed down the right-hand lane and then swing over to the inside lane (R. 362-363) but made a normal curve pattern into the inside lane (R. 367). He estimated he was going 15 miles per hour as he entered the inside lane of traffic (R. 234). After observing the traffic west of the intersection and entering the intersection he did not again look to the west, and he did not see the Neil vehicle until after impact (R. 444, 445).

The defendant, Mr. Neil, was on his way from Tooele to Sandy. He had been to Tooele in connection with his plumbing business and was driving a 1964 Chevrolet Greenbrier van-type vehicle. He had been over this road many times and was aware that there was a change of shift taking place at the mills as he was driving along the highway (R. 477) and was also aware of the congested traffic condition. He was traveling at a speed of 60 miles per hour which was the posted limit. When he first saw the defendant Irvine's vehicle, it was stopped at the stop sign, and Mr. Neil testified he was then 150 feet away traveling at 60 miles per hour (R. 454, 464). He observed Irvine move out into the intersection. He disagreed with Mr. Irvine's drawing as to the path the Irvine vehicle took from the stop sign and claimed that it went directly north until it entered his lane of traffic (R. 456; also see the green line drawn on Exhibit 3-P by Mr. Neil representing the path of Irvine's vehicle). He also placed the point of impact where the two short green lines appear east of the intersection 180 feet (R. 457, 467).

The Irvine vehicle moved uninterruptedly into the intersection, and it wasn't fast (R. 458). Neil testified that Irvine was going about 20 miles per hour when he crossed into his lane of traffic and that he was going 30 to 35 miles per hour at impact (R. 458). The direction of travel of the Irvine vehicle caused Neil some alarm as he saw it coming toward his lane of traffic (R. 458).

When Neil first saw the Irvine vehicle moving out into the intersection, he applied his brakes but his vehicle swayed and almost went out of control. He then

released the brake and let the engine take over the vehicle again and then he jammed on the brakes again to stop it, but the impact was definitely not where the skid marks were but further east (R. 459). He thought he was going around 30 miles per hour at the time of impact with the Irvine vehicle (R. 459). Neil testified that Irvine should have gotten up as much speed as he possibly could when he got in his lane, but instead got in the fast lane and loafed along (R. 460, 488) or drove in a normal manner (R. 477).

When Irvine entered Neil's lane of traffic, Neil was 75 to 100 feet back from the stop sign and still going 60 miles per hour. He said it was doubtful that he could have stopped before he got to the point of impact if he had kept his brakes on when he first applied them (R. 481) but admitted he could have slowed the vehicle to less than 30 miles per hour (R. 481).

Captain Ed Pitcher of the Utah Highway Patrol was called as an expert witness. He testified that he has had 28 years of experience with the Utah Highway Patrol and has investigated thousands of accidents, has had many years of training and has also trained police officers in Utah in accident investigation for many years.

Captain Pitcher testified that on a good asphalt road, which was dry and free from debris, where the temperature was not unusual and the road was level, the probable stopping distance of an ordinary car with good tires including reaction time and based on an average drag factor of .65 would be as follows:

60 miles per hour — 251 feet
(R. 509) 66 feet reaction time.
55 miles per hour — 215 feet
50 miles per hour — 182 feet
45 miles per hour — 153 feet
40 miles per hour — 128 feet
35 miles per hour — 101 feet
30 miles per hour — 79 feet

and that the average reaction time is three-fourths of one second. Captain Pitcher measured the distance on the scaled drawing on the line of travel as given by Mr. Neil for the Irvine vehicle from the stop sign to the inside lane of eastbound traffic as 33 feet and the distance from the point where Mr. Neil placed the point of impact to where he entered the inside lane of traffic as 180 feet from the scaled drawing. Using these factors and on the basis of a hypothetical question from plaintiff's counsel which assumed that the Irvine vehicle traveled from a stopped position at the stop sign to a speed of 35 miles per hour at the point of impact as testified to by witnesses, there being a total distance of 213 feet from the stop sign to the point of impact, Captain Pitcher computed it would take a total of 8.4 seconds.

From the point where Irvine entered the inside lane of traffic to the point of impact would take 5.1 seconds. He also computed on the basis of his experience and the hypothetical question that Irvine would enter the inside lane at a speed of 13.7 miles per hour (R. 510). He also testified that a car could not accelerate to a speed of 35 miles per hour in a distance of 32 feet; that that is about three times the expected maximum acceleration of the ordinary car, (R. 565, 566) and that he could not

make the turn at that speed. On the basis of the same drag factor, Pitcher testified that Neil would slow from 60 miles per hour to 35 miles per hour in a distance of 122 feet (R. 511, 519) and that it would take 1.7 seconds to slow from 60 down to 35 leaving a balance in time of 3.4 seconds reserve time (R. 517, 520). The Neil car at that point if brakes were applied would be 423 feet west of the point of impact. At 60 miles per hour he could have brought his vehicle to a complete stop in 4.2 seconds after the brakes were applied (R. 517). With 5.1 seconds available to Neil after Irvine entered the inside lane and including three-fourths of a second reaction time Neil could have come to a complete stop before the point of impact with .15 seconds to spare. [Mr. Neil claimed that he had faster than average reaction time which he said was five seconds. His was three seconds (R. 478, 479).] To slow to 30 miles per hour from 60 with a drag factor of .65 would take 139 feet.

Captain Pitcher also testified that he supervised some tests in the area of the accident on June 27, 1965, about seven months after this accident (R. 539). The tests were taken in between the two flumes shown in Exhibit 8-P (R. 540). The drag factor or co-efficient of friction determined by those tests were .79 and .80 (R. 544). He also testified that he was acquainted with the road, that it was a high-type road with a good surface on it, that his tests were made when the road was dry and clear of foreign material and that the surface where he made his tests appeared to be similar to the road were the accident occurred. He checked it again the

night before testifying (R. 542-544). Mr. Irvine testified the road surface had not been changed since the accident (R. 653).

With a drag factor of .79 it would take 114 feet to slow from 60 miles per hour to 30 according to Captain Pitcher (R. 572).

During the beginning phase of the case while Officer Hayward was testifying the court in chambers advised all counsel that it would not allow testimony of Officer Hayward with respect to the co-efficient of friction of the highway (R. 269) but that after the witness qualified as an expert through experience and training that he could testify relative to the approximate stopping distances (R. 269). The officer was thereafter permitted to testify from his Utah Highway Patrol chart on stopping distances using what he considered was an average drag factor for the highway in question as previously described by him (R. 282-285).

Subsequently, when Captain Ed Pitcher testified as an expert witness, the stopping distances were again brought out on the basis of an average drag factor for the highway as described by Officer Hayward (R. 294-496).

On Voir Dire Examination by Mr. Hanson Captain Pitcher, who had been in court during Officer Hayward's testimony and was aware of the court's ruling with respect to using the term "co-efficient of friction," testified that he was using an average drag factor for good

roads, good tires and so on, but the court finally allowed Mr. Hanson to bring out he was using a factor of .65 (R. 495).

On cross-examination he was allowed to bring out from Captain Pitcher that the chart used by Officer Hayward showed a co-efficient of friction of .45 to .65 for a traffic polished road on speeds over 30 miles per hour and to elicit from him the various stopping distances at speeds of 60 to 30 miles per hour using those drag factors. (R. 520-524, 552-553) Captain Pitcher did not agree with the chart and didn't agree that the numbers on the chart were proper numbers (R. 526).

The testimony on this interrogation follows:

> THE COURT: I want to make my point again; this witness has not testified as to the quality of that particular road.
>
> MR. HUNT: Correct.
>
> THE COURT: He says, according to the chart he uses, a good asphalt road—travel-polished—varies between .45 as a drag-factor and a .65 as a drag-factor.
>
> MR. HUNT: Who testified to that?
>
> THE COURT: Captain Pitcher; he says he uses this chart.
>
> A. No; I just read the chart; he asked me what it read. I read it to him. I didn't agree those are the proper numbers.
>
> THE COURT: You don't agree with your own chart?

A. That is just a suggestive chart, and it is, actually a page from a textbook which is used, but may have value where there are no tests available.

THE COURT: That is something entirely different; I assumed it was your chart. You put it out. You have the officers use it?

A. It is suggestive; where there are no tests available, or any other information.

MR. HANSON: Your Honor—

A. Might continue—I might explain why I use .65 in dealing with these —

MR. HANSON: I think that is immaterial. We do have a point here, where there is no specific drag-factor available. Maybe, I will have to go into this chart, with the Jury, tomorrow.

MR. HUNT: Your Honor, it was the Court that suggested we got to avoid this type of thing, and, now, goes into matters of coefficient of friction or drag-factor, and I am sure we are into the confusion —

(Argument.)

THE COURT: My suggestion was, the use by plaintiff of his own witness of calling for an expression of coefficient of friction; I permitted the testimony of Hayward to come in just as you requested it, and it is in the record. It is before the Jury.

If Mr. Hanson wants to attempt to bewilder the Jury with scientific terms, without an explanation of what drag-factor and what coefficient of frction means, it would seem to me you shouldn't object to that.

(R. 526-527)

The court admitted Captain Pitcher's testimony with respect to the skid tests made by him but would only admit testimony of the slowing distance from 60 miles per hour to 30 miles per hour using the test skid drag factor, although counsel sought to introduce other speeds such as 35 miles per hour which had been testified to by witnesses (R. 571-573). He was allowed to compute over objection the distances for stopping using a co-efficient of friction of .45 and Neil's counsel wrote them down on a chart for the jury (R. 575).

The court refused to give defendant Irvine's requested Instruction No. 1 for a directed verdict but did give the following instructions which counsel for Irvine objected to (R. 665, 666):

> #6 — The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. *A doctor, engineer, appraiser or mechanic* who by education, study and experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. Give the opinion the weight to which you deem it entitled, whether it be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound. (R 105) (emphasis ours)
>
> #15 — You are instructed that it is the law of this state that no person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards

then existing. The driver of every vehicle shall, consistent with these requirements, drive at an appropriate reduced speed when special hazards exist with respect to the traffic or by reason of the width of the highway, weather, the fact that one may be approaching an intersection or any other actual or potential hazards then existing. If you find from the evidence that either of the defendants drove his vehicle at a greater speed than was reasonable and prudent, considering the actual and potential hazards then existing, then, in that event, said driver was guilty of negligence. (R. 114)

#20 — The law requires that no person shall turn a vehicle upon a public highway unless and until such movement can be made with reasonable safety. 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. It means that before starting to turn a vehicle and while making the turn, the driver of the vehicle must use such precaution as would satisfy a reasonably prudent person, acting under similar circumstances, that the turn could be made safely. (R. 119)

#21 — You are instructed that when the driver of a vehicle intends to make a right-hand turn at an intersection, both the approach for the right turn and the right turn itself shall be made as close as practical to the right-hand edge of the road or roadways, and that on a roadway where there are two or more lanes marked for traffic in each direction, the driver of the vehicle making the right hand 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. Should it appear from a preponderance of the

evidence that a driver in making a right hand turn failed to execute the turn in the manner aforesaid, that driver would be guilty of negligence. (R. 120)

#22 — You are instructed that the laws of the State of Utah provide that whenever any roadway has been divided into two or more clearly marked lanes for traffic a vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety. A finding from a preponderance of the evidence that a driver in driving his car failed to comply with the foreging requirement would make that driver guilty of negligence. (R. 121)

#23 — A person, who without negligence on his part, is suddenly and unexpectedly confronted with peril arising from either the actual presence or the appearance of imminent danger to himself or others is not expected nor required to use the same judgment and prudence that may be required of him in calmer and more deliberate moments.

In such a situation, his duty is to exercise only the degree of care which an ordinarily prudent person would exercise under the same or similar circumstances. If, at that moment, he exercises such care, he does all the law requires of him, even though in the light of after events, it might appear that a different choice and manner of action would have been better and safer. (R. 122)

The court also refused to give defendant's requested Instruction No. 17 as follows:

#17 — Even though one party involved in a collision may be negligent, nonetheless, if the opera-

tor of the other vehicle actually sees or discovers the negligence, or in the exercise of due care should have seen or discovered the negligence, in sufficient time to avoid the accident with opportunity so to do, then you are instructed that it his duty to do so, and if he fails to act to avoid the accident with such opportunity, he is negligent. If, therefore, you find from a preponderance of the evidence in this case that the defendant, Robert B. Irvine, was negligent in pulling out into the through highway from the stop sign, but you further found from a preponderance of the evidence in this case that the defendant, James B. Neil, saw, or in the exercise of due care should have seen, the automobile of the defendant Irvine entering the highway when Neil was a sufficient distance away to avoid the accident and he failed to do so, his failure would constitute negligence upon his part and if such negligence on the part of the defendant Neil was a proximate cause of the accident, then your verdict must be against the defendant, James B. Neil. (R. 54)

ARGUMENT

POINT I.

THE COURT ERRED IN REFUSING TO GRANT DEFENDANT IRVINE'S REQUEST FOR A DIRECTED VERDICT OF NO CAUSE OF ACTION AS AGAINST THE PLAINTIFF MARSH ON HIS COMPLAINT AND IN FAVOR OF IRVINE AND AGAINST THE CROSS-DEFENDANT NEIL ON IRVINE'S CROSS-CLAIM. (THE CROSS-CLAIM HAS BEEN PAID SINCE THE APPEAL WAS FILED.)

The defendant, Irvine, takes the position in this case that the court should have granted a directed verdict in

favor of the defendant, Irvine, because the evidence was clear that Irvine had entered the intersection into the inside lane and proceeded so far east thereon, to-wit: 180 feet, that his conduct in entering the intersection as he did did not constitute negligence and certainly was not a proximate cause of the accident, if there was any negligence on his part. The investigating officer testified that he found two seven-foot skid marks commencing at a distance 140 feet east of the east edge of the intersecting Magna Road in the inside lane of traffic. He also testified that in his opinion the impact occurred somewhere in the area of the skid marks but he was unable to tell where because there was nothing but the skid marks from which he could pick up a point of impact. Every one of the witnesses present at the time of the accident put the point of impact beyond the two skid marks including Mr. Neil whose vehicle apparently left the two skid marks of 7 feet. According to Mr. Neil the point of impact occurred at a distance of 180 feet east of the point where Mr. Irvine entered into the inside lane of traffic, and it was his testimony that Mr. Irvine came directly out from the point where he was stopped by the stop sign into the inside lane of traffic as is indicated by the green line shown on Exhibit 3-P which was made by Mr. Neil.

Mr. Irvine, on the other hand, while indicating that he did not cross into the inside lane as sharply as Mr. Neil has indicated, did testify that the point of impact was further to the east than that shown by Mr. Neil. This is indicated on the diagram by two red marks, one of which is in the inside lane of traffic and the other in the outside lane, but both of which Mr. Irvine testified should have been

placed in the inside lane of traffic. He placed the point of impact about 190 feet east of the point where he said he crossed over into the inside lane of traffic.

Captain Pitcher testified that it would take 5.1 seconds from the time the vehicle crossed into the inside lane of traffic to travel the 180 feet to the point of impact. At that point, Mr. Irvine, by the testimony of all witnesses, was traveling at a speed of 30 to 35 miles per hour and was gradually accelerating. Mr. Neil was traveling at a speed of 60 miles per hour which was the admitted speed limit. There was no evidence to the contrary concerning this. When he first saw the defendant Irvine's vehicle, it was stopped at the stop sign, and Mr. Neil said that he was then 150 feet away traveling at 60 miles per hour. All of the actual eye witnesses, including Mr. Neil, testified that Mr. Irvine proceeded out from the stop sign in a normal manner without any undue acceleration. Captain Pitcher computed that the Irvine vehicle on normal acceleration would be going 13.7 miles per hour as it entered the inside lane. Mr. Irvine testified that he thought he was going about 15 miles per hour as he entered the inside lane of eastbound traffic. There is little, if any, dispute, therefore about five important facts in this case: (1) that Mr. Neil was traveling at a speed of 60 miles per hour as he approached the intersection; (2) that he saw the Irvine vehicle at the stop sign and watched it continuously thereafter; (3) that Mr. Irvine was traveling at a speed of about 30 to 35 miles per hour, at time of impact; (4) that Mr. Irvine drove in a normal manner with respect to the speed at which he traveled from the stopped position at the stop sign to a

point approximately 180 feet east of where he entered the inside lane of traffic and (5) that the point of impact occurred approximately 180 feet east of where Mr. Irvine entered the inside lane of traffic.

It would have been impossible for the accident to have occurred in the manner it did if Mr. Neil was only 150 feet away from Mr. Irvine at the time he first observed the Irvine vehicle stopped at the stop sign. At 60 miles per hour Mr. Neil was covering 88 feet a second and in two seconds would have covered 176 feet which would have put him past the point where Mr. Irvine entered into the inside lane of traffic before Irvine got to it. By Captain Pitcher's calculations it would take Mr. Irvine 3.3 seconds to travel from a stopped position at the stop sign to the inside lane of traffic. During that 3.3 seconds Mr. Neil at 60 miles per hour would cover a distance of 290 feet. In addition thereto we must take into consideration that Mr. Irvine traveled approximately 5.1 seconds after getting into the inside lane of traffic, part of which time Mr. Neil was undoubtedly also still traveling at a speed of 60 miles per hour or 88 feet per second. This computation was to the rear of the Irvine vehicle which was involved in the impact. Mr. Neil, therefore, had to be some 600 or 700 feet west of the intersection at the time Mr. Irvine first started out from the stop sign.

Captain Pitcher computed that it would take 1.7 seconds on the highway in question to slow from 60 miles per hour down to 35 using a drag factor of .65 and that it would take him 122 feet to reduce his speed during that

period of time from 60 miles per hour to 35 miles per hour. He also testified that at the commencement of the 5.1 seconds the Neil vehicle would be back 423 feet from the point where the collision took place (R. 517). Mr. Neil, therefore, had three times the time he needed to slow from 60 miles per hour to 30 or 35 miles per hour to avoid running into the rear end of the Irvine vehicle.

There was no need for a sharp application of brakes nor for Mr. Neil to run up on the Irvine vehicle applying his brakes hard as he did at the last instant.

Using the correct co-efficient of friction of about .79 for the highway, the defendant, Neil, would have had even more time to slow down or to stop. It would only take 114 feet to slow from 60 miles per hour to 30 according to Captain Pitcher with the drag factor of .79.

Mr. Irvine was so far east of the intersection at the time the impact occurred that neither the intersection law nor the right turn law applied with the duties of the drivers to each other but the law of preceding and following vehicles was applicable.

In the case of *Nelson* v. *Molena* (Wash. Jan. 1959), 334 P.2d 170, the defendant made a right turn onto an arterial highway. The defendant then traveled a distance of between 60 feet and 100 feet before being struck by the plaintiff who was proceeding in the same direction on the arterial highway. The plaintiff testified that he was driving between 50 and 60 miles per hour. The speed limit was 50 miles per hour. The question pre-

sented to the appellate court was whether or not an instruction should have been given applicable to right-of-way at an intersection. The appellate court held that the principles of law that applied and the instructions which should have been given were those applicable to following and preceding drivers and the statute relating to an overtaking driver was applicable. This case is similar to the one now before this court but the defendant Irvine's case is even stronger in that he had traveled approximately 180 feet after entering into the lane of traffic in which the accident occurred and in which Mr. Neil was traveling. Therefore, the law on intersections did not apply nor did the law on making a right turn apply. Mr. Irvine had traveled so far into the lane that neither of these fact situations were applicable to the situation that existed at the time the impact occurred. In the case of *Hollis E. Walker* v. *Levi G. Peterson,* 3 Ut.(2) 54, 278 P.2d 291, the defendant Peterson was making a left turn at an intersection near Bear River City and observed the plaintiff Walker's vehicle a distance north coming the opposite direction which he estimated in excess of 375 feet from the intersection where he was making the turn. The left turning driver did not see the other car nor look again until after he heard the screech of brakes and a horn sound and then it was too late to avoid a collision. The trial court found that both parties were negligent but that the speed of the plaintiff's vehicle was not a proximate cause of the collision and entered judgment for the plaintiff.

The speed limit just north of the intersection was 60 miles per hour but a short distance before the inter-

section and through it was 40 miles per hour. The plaintiff's car left 148 feet of skid marks up to the point of impact. The court on appeal said under normal conditions the stopping distance on the surfaced highway after brakes have been applied is 128 feet at 50 miles per hour and 155 feet at 55 miles per hour. This was on the basis of data published by the Utah Highway Patrol. So if plaintiff had stopped in the 148 feet, it would appear that he was traveling 50 to 55 miles per hour when he applied his brakes, but he did not stop in that distance. There was evidence indicating a speed considerably in excess of 55 miles per hour. Based on the reaction time plus the skid distance, the court concluded that the plaintiff must have been 203 feet away when danger was recognized and that if he had been traveling at the lawful speed of 40 miles per hour, he would have stopped in 126 feet or 77 feet short of the point of impact; whereas, the speed at which he was traveling rendered it impossible for him to stop. Under such state of facts said the court, "We do not see how reasonable minds could conclude other than that plaintiff's excessive speed was a contributing cause of the accident."

In the case now before this court the evidence is clear that when Mr. Irvine entered the inside lane of traffic, the defendant Neil was 400 to 500 feet away. All the distance he needed to slow to 35 miles per hour with the co-efficient of friction of .65 was 122 feet and if he had slowed to a speed of 30 to 35 miles an hour, there would have been no accident. It is clear, therefore, that his failure to slow his vehicle was not only negligence but

was the sole proximate cause of the accident. Irvine drove approximately 200 feet in the lane of traffic where the accident occurred with the rear of the vehicle being 180 feet from the point where entry was made into the inside lane of traffic, the point of impact having occurred on the rear of his vehicle 180 feet from the point where the vehicle entered the inside lane.

In the case of *Hefferman* v. *Rosser* (Pa., 1965), 419 Pa. 550, 215 A.2d 655, the plaintiff contended that he entered the highway from the north directly opposite the exit of a motel, traveled across two westbound lanes of traffic and into the inside eastbound lane of traffic to proceed in an easterly direction and traveled some 140 to 150 feet before he was struck in the rear by the defendant's vehicle which was also proceeding east in the inside lane of traffic. The accident occurred at night, but the highway was well lighted.

According to the defendant's testimony, he was proceeding at a speed of approximately 40 to 45 miles per hour and saw the plaintiff's automobile when defendant's automobile was about a car length from it. He claimed that the plaintiff came across the highway from the center of three exits from the motel whereas the plaintiff claimed he came out of the highway from the westerly most exit from the motel.

A jury found both parties guilty of negligence but on plaintiff's motion a new trial was granted. The trial court assigned two reasons for granting the new trial (a) That in submitting the issue of contributory negli-

gence to the jury he was in error and (b) that the verdict was against the weight of the evidence.

The Supreme Court in reviewing the case stated that the record indicated that certain facts were established beyond question: (1) The impact or contact between the two motor vehicles took place at a point on the inside eastbound lane directly opposite the motel's middle driveway; (2) The defendant's motor vehicle struck the plaintiff's motor vehicle in the rear; (3) Immediately after the accident defendant, a construction worker whose shoes were muddy, told the investigating police officer that due to the muddy condition of his shoes, his foot had slipped off the brake; (4) Route 22 at the point of the accident was at the time of the accident and is generally a very heavily traveled highway, and such traffic generally travels at high speed; (5) The plaintiff was thoroughly familiar with the highway having entered the highway from the motel many times previously to the accident; (6) The defendant did not actually see plaintiff's motor vehicle enter the highway from the middle driveway.

The court said the crux of the appeal is whether upon the basis of the instant record there was sufficient evidence of contributory negligence on the part of the plaintiff to justify the trial court in instructing the jury on that subject and to sustain a jury verdict based upon the finding that plaintiff was contributorily negligent. The trial court concluded there was not such evidence.

The court then said, as to the manner of the happening of the accident:

> We have the oral testimony of both plaintiff and defendant plus certain incontrovertible facts established by the testimony. Plaintiff, fully aware of the danger inherent in the heavy and fast speeding traffic proceeding both westerly and easterly on the highway, upon leaving the motel endeavored to effect an entry upon the highway which required passage over the two westbound lanes and a left-turn into the inside eastbound lane. To safely effect such an entry required observation of both westbound and eastbound traffic and the entry necessarily had to be made in a hasty and expeditious manner. If believed, plaintiff's testimony would indicate that he made the necessary traffic observations, that he came out fast on the highway, that he had successfully negotiated the passage over the westbound lanes and into the inside eastbound lane and that not only was he in the latter lane when struck, but he had proceeded in that lane for 140 to 150 feet when the rear end collision took place. On the other hand, the defendant testified that the accident occurred not after plaintiff had effected an entry into the eastbound lane and after he had proceeded therein 140 to 150 feet, but at the time plaintiff was entering the eastbound lane.
>
> Under plaintiff's version not only was he not contributorily negligent but defendant was negligent in that he had full and adequate opportunity to avoid a collision with plaintiff's vehicle. Under defendant's version because of the manner in which plaintiff entered the eastbound lane defendant was afforded no opportunity to avoid the collision and plaintiff negligently effected an entry into the path of defendant's eastbound vehicle.

The court, therefore, held that inasmuch as there was a conflict in the evidence as to the point at which the plaintiff's vehicle entered the eastbound lane, that is whether at the point of impact or whether at the west exit from the motel this became a jury question and the trial court was not justified in granting a new trial.

The plaintiff's contention of the facts in this case is quite in line with the undisputed facts in the *Marsh-Irvine-Neil* case and on the basis of the undisputed facts in this case with respect to where the impact occurred and where Irvine entered the intersection, there would be no negligence on Irvine's part and the sole proximate cause of the accident would be the defendant Neil's negligence. The court, therefore, committed error in refusing to grant the defendant Irvine's request for a directed verdict.

It should be kept in mind that though the speed limit along the area where the accident occurred is 60 miles per hour under normal conditions, there was, in fact, at the time the accident occurred a congestion of traffic by virtue of the change of shift at the Mills in the area along which the highway ran, and the defendant, Neil, was well aware of this fact. It is obvious that he continued to drive at 60 miles per hour even after he saw the defendant Irvine enter the highway and proceed into the inside lane of traffic. Several cars had passed through the intersection while Irvine was waiting, and it was after a break appeared in the traffic that he proceeded out into the intersection. If he had to wait long enough that no cars were required to even slow down upon his or any

other cars' entrance into the highway, traffic would then be unduly delayed on those streets intersecting with arterial highways.

POINT II.

THE COURT ERRED IN DENYING THE DEFENDANT IRVINE'S MOTION FOR A NEW TRIAL.

(A) THE COURT COMMITTED ERROR IN INSTRUCTING THE JURY and

(B) THE COURT COMMITTED ERROR IN ITS RULINGS ON THE EVIDENCE IN REFUSING TO ALLOW THE INVESTIGATING OFFICER TO TESTIFY PERTAINNG TO THE CO-EFFICIENT OF FRICTION OF THE HIGHWAY WHERE THE ACCIDENT OCCURRED BUT LATER ALLOWING CROSS-EXAMINATION OF OFFICER ED PITCHER WITH RESPECT TO INAPPLICABLE CO-EFFICIENTS OF FRICTION.

POINT II (A).

The court committed many errors in instructing the jury which prevented the defendant Irvine from having a fair and impartial trial. In Instruction No. 6 on expert witnesses the court by its instruction limited the qualification of expert witnesses to a doctor, engineer, appraiser *or* mechanic (italic ours).

In Instruction No. 15 the court gave a general instruction on speed so that it applied to both drivers. Counsel for the parties in chambers had stipulated that the defendant Irvine was not guilty of driving at an ex-

cessive speed and, therefore, withdrew that ground of negligence from the court. When the court submitted it to the jurors with respect to both drivers, it could have no other tendency than to confuse them with respect to the defendant Irvine's conduct. This was prejudicial to the defendant Irvine.

Instruction No. 20 provided that no person should turn a vehicle upon a public highway unless and until such movement could be made with reasonable safety. 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. It is also clear that he drove directly from a position at the stop sign over into the inside lane of traffic. This instruction, therefore, was inapplicable under the facts. Also the instruction, if it were applicable, should read in the last line thereof that the turn could be made with reasonable safety.

Instruction 21 was also inapplicable because the right turn was made and completed some 180 feet prior to the point where the accident occurred. It was not the proximate cause of the accident. Inasmuch as the defendant Neil was far enough away that his vehicle was not a hazard to the defendant Irvine's vehicle when Irvine made his turn into the inside lane, the turn did not constitute negligence. If it be classified as negligence, then it certainly was not a proximate cause of the accident.

In the case of *Meahler* v. *Doyle*, (1922) 271 Pa. 492, 115 A. 797, it was held that although the act of the driver

of a motor truck in failing to keep to the right of the center of an intersection in making a left turn might under certain circumstances be negligence which would render the driver liable, this conduct did not render him liable for an injury to the rider of a bicycle who collided with the truck, where the act did not occur as a result of this act but happened after the truck had made the turn and had traveled on a curve for about 67 feet, all of the way in plain view of the rider of the bicycle, who had ample room to avoid the truck. The case of *Nelson* v. *Molena,* (Wash.) 334 P.2d 170, previously cited, is also authority for the fact that the right turn law instruction would not be applicable in this case. In the *Nelson* case the court held that where the impact occurred 60 to 100 feet out of the intersection, the instruction on right-of-way should not have been given. In our case with the impact occurring 180 feet approximately from where the defendant entered into the inside lane of traffic, the failure to make a right turn into the right-hand lane and then into the inside lane, if the law so requires, was no longer an important fact with respect to the accident that occurred. This instruction was certainly prejudicial to the defendant Irvine.

In the case of *McGregor* v. *Weinstein,* et al., (Mont.) 225 P. 615, a statute provided that a driver must keep to the right-hand curb while making his turn. The instruction in the case provided that the driver must keep close to the right-hand curb and failure to do so constitutes negligence. The court held that the provisions of the statute are elastic and do not attempt to lay down definite

and rigid rules without reference to changing conditions, in the street and highways, their freedom from other vehicles moving or stationary or fixed or permanent objects in the avenues of traffic or the position a person operating a vehicle shall occupy to be free of negligence. In Volume 2 of *Blashfield Permanent Edition* § 1084 it is stated:

> An ordinance requiring a vehicle to keep as close as possible to the right curb is not to be taken strictly, but is satisfied if the driver keeps as close to such curb as is reasonably possible. The somewhat similar requirement that the vehicle keep as close as practicable to the right-hand boundary of the highway is an elastic one which does not prescribe specific measurements or to lay down rigid rules as to the distance which the vehicle must keep from the curb. Instead it is a regulation which looks to the circumstances of the case to give it color and meaning and convenience and the condition of the street including its relative freedom from all other vehicles or its more or less crowded condition must all be taken into consideration in determining the position upon the street which the vehicle must occupy in order that the driver shall be free from negligence.

In other words, it is not negligence for a driver to go into another lane of traffic other than the immediate right one if there is no traffic close enough to constitute a hazard to him if he does go into another lane. As stated in the cases and the articles all of these circumstances should be taken into consideration by the jury including the question of oncoming traffic. The court's instructions do not allow the driver such elasticity.

In both instructions Nos. 21 and 22, the court instructed the jury that the defendant Irvine was under a duty not to change lanes until the driver had first ascertained that such movement could be made with safety instead of using the term "with reasonable safety." Instructions Nos. 20 and 22 were also duplicitous and unduly emphasized the duty, if any, on the part of Mr. Irvine with respect to turning from a lane of traffic or in making a turn.

The court also committed error in giving Instruction No. 23 on sudden emergency. The instruction on sudden emergency is predicated upon the fact that the person who is confronted with peril must not have been negligent himself in creating the peril. In Mr. Neil's case the peril or emergency, if any, was created by his own conduct which was very clear from the evidence. In the case of *Nikoleropoulos* v. *Ramsey,* 61 Ut. 465, 214 P. 304, the accident occurred at nighttime when it was raining and the visibility was poor. The defendant did not see the plaintiff until he was within six feet of him, when he immediately applied his brakes, but was unable to stop before striking the plaintiff. The court stated that they were of the opinion as a matter of law under the facts disclosed by the record that at the time of the injury and immediately before defendant was not exercising reasonable and ordinary care in the operation of his car and that if any emergency whatever existed, it was due entirely to his own negligence and, therefore, he was not entitled to an instruction on sudden emergency.

In the case of *Wright* v. *Sniffin, et al.*, (Cal. 1947), 181 P. 2d 675 in an action against a motorist for death of a cyclist who attempted to pass the cyclist on the wrong side of the highway within 100 feet of an intersection the court held that the motorist was not entitled to an instruction on sudden emergency even though the cyclist made a left turn in front of the motorist because the motorist was guilty of negligence as a matter of law in passing on the wrong side of the highway near the intersection.

While the defendant Irvine was covering 180 feet, he was using up over five seconds of time. At the time he entered the lane, Mr. Neil was between 400 and 500 feet away. All the distance he needed to slow to 35 miles per hour with a co-efficient of friction of .65 was 122 feet or 1.7 seconds of time. All he had to do was slow down to 30 or 35 miles per hour, and there is no evidence to the contrary.

The court erred, also, in failing to give defendant's requested Instruction No. 17 which stated that even though the defendant, Robert B. Irvine, may have been negligent in pulling out into the through highway from the stop sign, nevertheless, if the operator of the other vehicle actually sees or discovers the negligence in sufficient time to avoid the accident with opportunity so to do, then it is his duty to do so, and if he fails to act or avoid the accident with such opportunity, he is negligent.

In this case Mr. Neil saw Mr. Irvine's vehicle at the stop sign, saw him pull into the intersection and watched him all the while, and yet apparently did nothing to try

to avoid the accident until he was almost at the point of impact. It was very clear that Mr. Neil had a clear chance to avoid the accident, but failed to do so and, therefore, this instruction should have been given. See *Jones* v. *Knutsen,* 16 Ut. 2d 332, 400 P. 2d 562.

While the court's error in giving some of the instructions complained about and excepted to by appellant's counsel might be considered harmless, yet when considered over all there is so much error the trial was not a fair one as to the defendant Irvine and a new trial should be granted.

POINT II(B)

The court committed error in allowing Captain Pitcher to testify over the objection of counsel during cross-examination by Mr. Hanson (R. 520-527) of the stopping distance of a vehicle on a highway having a co-efficient of friction of .45. The chart used by Officer Hayward was not in evidence (R. 140) and there was no testimony or evidence that the highway had a low co-efficient of friction such as .45.

The court refused to allow Officer Hayward to testify as to the co-efficient of friction of the highway (R. 243, 269). Captain Pitcher was required to testify as to the stopping distances on .45 even though there was no evidence as to that co-efficient of friction and even though he disagreed with any such co-efficient of friction for that highway (R. 526). The court refused to allow Officer Hayward to use the co-efficient of friction because

it would confuse the jury, but then improperly allowed Mr. Hanson, counsel for Neil, to question Pitcher about it even though it would confuse the jury. The court, in fact, stated as follows (R. 527, line 20):

> If Mr. Hanson wants to attempt to bewilder the jury with scientific terms, without an explanation of what drag-factor and what co-efficient of friction means, it would seem to me you shouldn't object to that.

Later Captain Pitcher testified that he had supervised tests made within a few hundred feet of the accident scene a few months after the accident and determined an actual co-efficient of friction of .79 but the court refused to allow Pitcher to testify as to stopping or slowing distances using the co-efficient of friction, except for the slowing distance from 60 miles per hour to 30 miles per hour of 114 feet (R. 572, 573). This was prejudicial to defendant Irvine in that both officers' testimony with respect to stopping distances was discredited.

CONCLUSIONS

The trial court erred in failing to grant Irvine's request for a directed verdict and subsequently also committed error in failing to grant defendant Irvine's motion for a new trial. The appellant is entitled to a judgment as a matter of law in his favor. In the event the court does not reverse the judgment, then appellant should be granted a new trial with appropriate direction to the trial judge with respect to instructions.

Respectfully submitted,

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