

1976

## Mary J. Mackey v. Richard L. Harvey : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)



Part of the [Law Commons](#)

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

Henry E. Heath; Attorney for Defendant-Respondent;

---

### Recommended Citation

Brief of Respondent, *Mackey v. Harvey*, No. 14619 (Utah Supreme Court, 1976).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/392](https://digitalcommons.law.byu.edu/uofu_sc2/392)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

IN THE SUPREME COURT  
OF THE STATE OF UTAH

---

MARY J. MACKEY,  
Plaintiff-Appellant,  
vs.  
RICHARD L. HARVEY,  
Defendant-Respondent.

---

BRIEF OF APPEAL

---

Appeal from the Judgment of the  
Salt Lake County  
Honorable G. Hal

---

HENRY E. HEATH  
Attorney for Defendant-Respondent  
Strong & Hanni  
604 Boston Building  
Salt Lake City, Utah 84111

# TABLE OF CONTENTS

STATEMENT OF NATURE OF CASE . . . . .	Page 1
DISPOSITION IN THE LOWER COURT . . . . .	1
RELIEF SOUGHT ON APPEAL . . . . .	1
STATEMENT OF FACTS . . . . .	1
ARGUMENT . . . . .	2
POINT I . . . . .	2
INSTRUCTION NO. 15 WAS SUBMITTED AND RECEIVED IN VIOLATION OF THE RULES OF THE DISTRICT COURTS OF UTAH.	
POINT II . . . . .	3
THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GIVING INSTRUCTION 15 TO THE JURY.	
POINT III . . . . .	8
THE VERDICT IS CONTRARY TO THE EVIDENCE, AND IF THE APPELLANT FAILED TO KEEP A PROPER LOOKOUT, IT WAS NOT THE PROXIMATE CAUSE OF THE ACCIDENT, AND THE COURT ERRED IN FAILING TO GRANT APPEL- LANT'S MOTION FOR A NEW TRIAL.	
CONCLUSION . . . . .	13

## CASES CITED

<u>Badger v. Clayson</u> , 18 Utah 2d 329, 422 P.2d 665 . . .	6
<u>Benson v. D. &amp; R. G. W. R.</u> , 4 Utah 2d 28, 286 P.2d 790 . . . . .	11
<u>Hess v. Robinson</u> , 109 Utah 60, 163 P.2d 510 . . . . .	5, 6, 13
<u>Hickok v. Skinner</u> , 113 Utah 1, 190 P.2d 514 . . . . .	13
<u>Johnson v. Maynard</u> , 9 Utah 2d 268, 342 P.2d 884 . . .	7
<u>Larsen v. Evans</u> , 12 Utah 2d 245, 364 P.2d 1088 . . . .	7
<u>Martin v. Stevens</u> , 121 Utah 484, 243 P.2d 747 . . . .	4, 13
<u>Morris v. Christensen</u> , 11 Utah 2d 140, 356 P.2d 34 . .	10
<u>Walker v. Peterson</u> , 3 Utah 2d 54, 278 P.2d 291 . . . .	11
<u>Youngblood v. Robinson</u> , 339 P.2d 338, 118 So.2d 1431 . .	6

STATUTE CITED

78-3-21(3) (a) Utah Code Annotated, 1953 . . . . .	Page 3
--	-----------

RULE CITED

5.4 Rules of District Courts of Utah . . . . .	3
--	---

ANNOTATION CITED

2 ALR 3rd 12 . . . . .	6
------------------------	---

IN THE SUPREME COURT  
OF THE STATE OF UTAH

---

MARY J. MACKEY,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	Case No. 14619
	)	
RICHARD L. HARVEY,	)	
	)	
Defendant-Respondent.	)	
	)	

---

BRIEF OF APPELLANT

---

STATEMENT OF NATURE OF CASE

This is an action to recover damages for personal injury and to property resulting from an automobile accident.

DISPOSITION IN THE LOWER COURT

The case was tried before a jury who found the issues in favor of the respondent and against the appellant, no cause of action. Appellant moved for a new trial which the court denied.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the verdict and judgment in her favor as a matter of law on the issue of liability and a new trial on the issue of damages, or if that fails, a new trial on all issues of the case.

STATEMENT OF FACTS

Appellant and respondent were operating automobiles which collided at the intersection of 3300 South and 700 East Streets in Salt Lake County, at approximately 11:20 a.m. on

June 15, 1970. Traffic at the intersection was controlled by an electric semaphore signal with a green arrow turning signal for the 3300 South traffic. Appellant was traveling east on 3300 South, which has two through lanes going east and a left-turn storage lane for traffic turning north onto 700 East. Appellant observed the green turn arrow as she approached the left-turn storage lane and proceeded slowly into the intersection to make a left turn, where she was struck by the respondent. Respondent was traveling south on 700 East in the center lane which has three through lanes for the traffic going south with a left-turn storage lane for the traffic turning east onto 3300 South. As he approached the commencement of the left-turn storage lane, respondent observed the green light in his favor but did not look at it again and proceeded into the intersection where he struck the left-front of the appellant's vehicle. The intersection is extremely busy with a heavy flow of traffic. The traffic was stopped and backed up on 3300 South proceeding east and west. There also was traffic proceeding west on 3300 South and turning south onto 700 East or going the opposite direction than the appellant. There also was traffic stopped on 700 East facing north waiting to turn west onto 3300 South.

#### ARGUMENT

#### POINT I

INSTRUCTION NO. 15 WAS SUBMITTED AND RECEIVED IN VIOLATION OF THE RULES OF THE DISTRICT COURTS OF UTAH.

The trial of this matter commenced on the 31st day of March, 1976, and at the end of the second day, being April 1, 1976, all evidence was in and both the appellant and respondent rested. (T. 24) On the morning of April 2nd, which was the

time set for oral argument, the respondent submitted Instruction No. 15 to the court. Appellant took exception to it as to its contents and also that it was not timely filed with the court, but the court, contrary to Rules of Practice in the District Courts of the State of Utah, Adopted by order of the Judicial Council on September 15, 1975, and effective January 1, 1976, submitted the instruction to the jury.

Rule 5.4 Requests for Instructions provides:

Requests for instructions shall be presented to court at the commencement of the trial, provided, that additional or further instructions may be presented not later than the close of evidence. At the time of presenting requests, a copy of the same shall be furnished to opposing counsel.

Respondent's Requested Instructions are dated the 31st day of March, 1976, and contained instructions 1 through 19. No. 20, which was the court's No. 15, was submitted later as stated above. (T. 65-85)

This rule was established pursuant to the authority vested in the Judicial Council of the State of Utah by Section 78-3-21(3) (a) which provides:

Establish general policies for the operation of the courts including uniform rules and forms for practice and procedure, consistent with law and the provisions of this act.

POINT II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GIVING INSTRUCTION 15 TO THE JURY.

Instruction No. 15, which the appellant takes exception to, provides:

You are instructed that even though the operator

of an automobile has the right-of-way, he still has the duty to keep and to maintain a reasonable, proper, and adequate lookout and to use reasonable and ordinary care to avoid a collision. One who has the right-of-way must use due care while crossing and must continue to keep a reasonable lookout and reappraise the situation as he approaches an intersection and use reasonable and ordinary care under the circumstances to avoid a collision as he proceeds.

There is imposed upon a driver the duty to be aware of the relative positions and speeds of vehicles approaching and he must recurrently reobserve and reappraise in the light of the consistent changing conditions of a fluid traffic situation. Therefore, even if you should find from the evidence in this case that either driver had the technical right-of-way, you should also consider that such right-of-way is a relative right only, and if he was careless in failing to keep and continue to keep a reasonable and adequate lookout or fail to exercise reasonable and ordinary care under the circumstances to avoid a collision and that such negligence, if any, proximately contributed in any substantial degree to cause the collision, he would be negligent.

The importance of this instruction and the weight the jury put on it is apparent since they returned a verdict of no cause of action, which undoubtedly was based on an interpretation of what constituted reasonable care or a proper lookout.

Appellant contends that the instruction nullifies the reasonable care standard, for it imposes an absolute duty to be aware of other vehicles instead of a duty of reasonable care and is tantamount to a direct verdict against the appellant. The instruction takes the position that an intersection collision will not occur unless both drivers are negligent and fail to see each other.

This was the position taken by the defendant in the case of Martin v. Stevens, 121 Utah 484, 243 P.2d 747 (1952). The Martin case involved a collision at an open intersection where plaintiff had the right of way. The trial court refused to permit plaintiff's case to go to the jury on the theory that plaintiff had a duty as a matter of law to see defendant's automobile approaching and that his failure to see the defendant's vehicle



sooner than he did was negligence as a matter of law. On appeal the defendant contended that an open intersection collision will not occur unless both drivers are negligent and fail to see each other. The Supreme Court reversed, rejecting the contention that plaintiff had an absolute duty to see defendant's vehicle.

Although plaintiff had the right of way under both rules above referred to, yet there devolved upon him the duty of due care in observing for other traffic. But in doing so he had the right to assume, and to rely and act on the assumption that others would do likewise; he was not obliged to anticipate either that other drivers would drive negligently, nor fail to accord him his right of way, until in the exercise of due care, he observed, or should have observed, something to warn him that the other driver was driving negligently or would fail to accord him his right of way. If this principle is not clear in the earlier Utah cases, it is firmly established by the more recent expressions of this court.

Also in the case of Hess v. Robinson, 109 Utah 60, 163 P.2d 510, the plaintiff was traveling on an arterial highway and the defendant's ambulance approached from a cross street and ran a stop sign. The court instructed that both parties were negligent as a matter of law while the issue of proximate cause was submitted to the jury and a verdict for plaintiff was sustained on appeal. The court, in holding that plaintiff was not negligent as a matter of law in not looking for traffic approaching the arterial highway, stated:

In the first place, the trial court was distinctly in error in instructing the jury that the plaintiff was guilty of negligence as a matter of law . . . The [trial] court may have been misled by our case of Bullock v. Luke, 98 Utah 501, 98 P.2d 350. But the facts of that case were far different from those in this case. In that case there was no stop sign--no designation of arterial highway . . .

He was on an arterial. He could rely on the ambulance stopping before he reached the intersection until he was or should have been definitely aware that it was not going to do so. At that time he may have been well out in the intersection. Only at that point did his duty to stop or accelerate his speed--viz. attempt to avoid the accident, begin.

Where a motorist has the right of way because he is proceeding with a green light, as is the situation in the case before the court, the right to assume non-negligence distinguishes the lookout duty from the ordinary open intersection cases. (See Hess v. Robinson, supra; Youngblood v. Robison, 239 La. 338, 118 So.2d 1431, annotation at 2 ALR 3rd 12.)

Instruction 15 was taken from the case of Badger v. Clayson, 18 Utah 2d 329, 422 P.2d 665. This was a collision at the intersection of 1300 East 4500 South, both being residential streets, and it was admitted by both parties that they were familiar with the intersection and that it was a blind intersection. The defendant entered the intersection on a yellow light and was in the intersection on a red light when the plaintiff, traveling on the green light, collided with the defendant. The court, in taking the position that the hazardous intersection might well demand a higher duty of care, stated:

. . . there is plausibility to the idea that due to the special hazard in approaching a blind intersection, the standard of reasonable care might well demand special caution to be alert for oncoming traffic; . . . There seems to be no harm in such an instruction in the ordinary intersection case, and could be under the circumstances here where the plaintiff knew the intersection was very dangerous, did not slow down, conceded that he did not look, and entered the intersection after the defendant had entered it, but here the intersection was unusual where neither driver could see the other coming until he got to or in the intersection. Both of the drivers knew of the dangerous and hazardous nature of this particular "blind" intersection,--and both, knowing of this, with the split-minute change in mechanical semaphore signals, may have had a duty to slow down

below the posted speed limits. Neither did.

Appellant submits that there are three main distinctions between the Badger case and the principal case.

1. The accident took place on a residential street where there is less traffic and distraction for a driver to be aware of.

2. Both drivers knew of the hazardous, blind intersection and should have taken extra caution.

3. Defendant was in the intersection and plaintiff, failing to keep a proper lookout and observe whether the intersection was clear, struck the defendant.

The case before the court involves an intersection of two major arterial highways where traffic is thick and backed up waiting for lights to change and even other traffic in the intersection making left-hand turns opposite to the appellant. Appellant approached the intersection in a cautious manner, observing the light in her favor and other traffic in the intersection. She was in the intersection and traveling at a slow rate of speed while making her left-hand turn and was struck by the respondent.

I refer the court to the holding in the case of Johnson v. Maynard, 9 Utah 2d 268, 342 P.2d 884, that was upheld in Larson v. Evans, 12 Utah 2d 245, 364 P.2d 1088, where the court held:

A traveler approaching a signal-controlled intersection with the light in her favor has the right of way and can rely on it until something appears to indicate it is not safe to do so.

Instruction 15 places too great of a burden on a driver in an intersection of this type because it becomes

impossible for a reasonable driver to observe every happening in a busy arterial intersection.

### POINT III

THE VERDICT IS CONTRARY TO THE EVIDENCE, AND IF THE APPELLANT FAILED TO KEEP A PROPER LOOKOUT, IT WAS NOT THE PROXIMATE CAUSE OF THE ACCIDENT, AND THE COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR A NEW TRIAL.

Appellant's testimony was that as she approached the intersection, she saw the left-turn green arrow come on in her favor as she was about to enter the left-turn storage lane.

(R. 3, 9) She continued very slowly as it was her intent to make a left-hand turn. (R. 5, 11) She noticed other traffic in the intersection proceeding west to make a left turn south onto 700 East. Also, cars were backed up on 3300 South waiting for the light, to proceed east through the intersection. (R. 4)

In regard to the respondent's vehicle, on cross-examination, appellant stated that she did not remember seeing anything that was close enough to hit her. (R. 11) Her testimony on direct examination was: "It was somewhere on my immediate left, but I don't know how far it was away." (R. 5)

Respondent testified that he was traveling in the center lane and that he looked at the light as he approached the left-turn storage lane and it was green in his favor. He then stated: "I didn't think I had any trouble making it through, so I just kept on proceeding like I was." (R. 30)

Harold P. McEwan was an eye witness to the accident and he was on 700 East stopped in the left-turn lane. He stated that the lights were red for all northbound traffic on 700 East and he assumed that they would be the same for all southbound traffic on 700 East. (R. 14, 17) He observed a car proceeding

west on 3300 South, making a left-hand turn in front of him to go south on 700 East and a Chevrolet, driven by Miss Mackey, entered the intersection to make a left turn to go north on 700 East. He then observed the Harvey vehicle enter the intersection and immediately looked and the light was still red and the through traffic to go east and west had not started yet. Then the respondent ran into the appellant. (R. 15)

Deputy Ernest Clough investigated the accident and when he was asked whether he made a determination as to what happened, he indicated that the Mackey vehicle had pulled into the intersection to make a left turn onto 700 East and the Harvey vehicle southbound on 700 East went through a red light crashing into the side of the Mackey car. (R. 22)

Deputy Clough further testified that the 3300 South intersection is 49 feet wide and the left-front of respondent's vehicle was 17 feet 3 inches into the intersection and he skidded approximately 33 feet to point of impact and moved 4 feet 20 inches after impact. (R. 22-23)

It appears that appellant was denied recovery on the jury's finding that she was negligent in failing to keep a proper lookout and that such was the proximate cause of the accident. It is alleged under Point II that the jury was erroneously instructed with respect to the appellant's duty to maintain a lookout. However, in any event, a failure to maintain a proper lookout by the appellant could not have been a proximate cause of the collision.

It must be assumed that appellant entered the intersection on the green semaphore at a reasonable rate of speed

maintain the lookout which the court required under its instructions to the jury. It is submitted that a lack of diligence to maintain a lookout could not possibly have been the proximate cause of the accident.

The courts have held that failure to keep a proper lookout is not the proximate cause of an accident unless the driver, by maintaining a proper lookout, could have avoided the accident. See Morris v. Christensen, 11 Utah 2d 140, 356 P.2d 34.

In the Morris case the plaintiff was proceeding through an intersection on a green light and failed to see the defendant's automobile approaching on the cross street until just before the impact. On appeal the Supreme Court held that the trial judge had reasonably and properly concluded that plaintiff's observation of approaching traffic would not have forewarned him of the impending hazard and that a failure to keep a proper lookout under such circumstances was not a proximate cause of the collision. In so holding the court enunciated the rule of proximate cause which applies to the facts of the case at bar:

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

In the case at the bar appellant had no opportunity to avoid the collision, for she stated that she didn't remember seeing anything that was close enough to hit her until the respondent was upon her while she was in the intersection. The reason she did not see him was because the respondent was not within the immediate proximity to be seen and to cause the appellant to be aware of an existing danger.

The record does not say the speed of the vehicles. However, it does indicate that the appellant was going at a very slow rate of speed, and in fact, counsel attempted under cross-examination to show to the jury that at the very slow rate of speed which the appellant was going, she could have avoided the accident.

The only information we have as to the respondent's speed was that he skidded approximately 33 feet and moved 4 feet and 20 inches after impact. The movement after impact would indicate that he was traveling way in excess of 25 miles per hour for the stopping distance at that speed would be 32 feet.

The court can take judicial notice of how various rates of speed might have affected the accident and by simple mathematical calculations, it is readily ascertainable that if the appellant had failed to keep a proper lookout, it would not have been the proximate cause of the accident. (See Benson v. D. & R. G. W. R., 4 Utah 2d 38, 286 P2d 790; Walker v. Peterson, 3 Utah 2d 54, 278 P. 2d 291)

If the appellant's speed were 15 miles per hour, then she would have been traveling at the rate of 22 feet per second. If the respondent's speed were 35 miles per hour, then he would have been traveling at the rate of 51 feet per second. Three seconds before the accident the appellant would have been 66 feet from the point of impact while the respondent would have been 153 feet from the point of impact, a distance that would not have caused any alarm to a reasonable person.

Two seconds before the accident, the appellant would have been 44 feet from point of impact and the respondent



that would have still not alerted a reasonable person.

At one second before the accident, the appellant would have been 22 feet from the point of impact or approximately 5 feet from the commencement of the intersection, while the respondent would have been 51 feet from the point of impact or approximately 34 feet from the commencement of the intersection. (Deputy Clough testified that respondent was 17 feet 3 inches in the intersection. [R. 23]) Even at that distance, a reasonable person could assume that the respondent would bring his vehicle to a stop in view of the semaphore and busy intersection. Even if the appellant had seen the respondent at this point, she could not have avoided the accident because she would have traveled 17 feet, being the reaction time to apply her brake and an additional 12 feet before she could bring her vehicle to a stop, which would have placed her right in the path of the oncoming respondent.

This is looking at it in the light most favorable to the respondent, because no allowance is being made for the fact that he was braking his car, which would mean that he was actually back a farther distance in each situation than stated. Also, if respondent were going at a faster rate of speed, he would have been back still farther, making it more unreasonable for the appellant to have seen him.

The appellant, having the light in her favor and having the responsibility to observe the other traffic in the intersection, had the right to assume that respondent would yield the right of way until in the exercise of due care, appellant should have known to the contrary. Thus, appellant, upon seeing the respondent's automobile, would have to deter-



mine that respondent, in view of his speed and approach, was not going to yield the right of way, whereupon appellant would first become obligated to take evasive action. It is obvious that she did not have an opportunity to apply her brakes or turn her vehicle a split second before the collision.

I refer the court to the concurring opinion of Justice Woolf in the case of Martin v. Stevens, supra, where he is discussing the case of Hickok v. Skinner, 113 Utah 1, 190 P.2d 514, wherein he states:

Perhaps in the Hickok case, a reappraisal of the situation if it had been made at the right moment would have alerted the favored driver to the fact that the disfavored driver was not going to yield the right of way and perhaps given him time to avoid the collision. I say "at the right moment" because a moment sooner than that "right moment" the driver of the favored car might still have thought the other driver would slow down to let him pass whilst a moment later than that "right moment" it would have been too late to avoid the collision. This points up, I think, the duty we put upon the favored driver in those cases. The disfavored driver has the duty to slow down; and while the favored driver cannot totally ignore the other and blindly traverse the intersection, he can, until he is otherwise put on notice, presume that the disfavored driver will slow down and permit him to pass, . . .

It is submitted that at the time the appellant first had an opportunity to observe the respondent's vehicle, there was nothing appellant could do to avoid the accident and that the failure to keep a proper lookout was not the proximate cause of the accident.

#### CONCLUSION

The appellant respectfully submits that the rules of the district courts have been adopted pursuant to statute and have the force and effect of law, that they are fair for both

parties and should be upheld by the Supreme Court. If they are not upheld, then there is no reason to have the rules and they should be abolished or they will be abused and broken by all parties.

Instruction No. 15 was prejudicial in that it placed too great of a burden on the appellant in the fact situation of this case and was tantamount to a directed verdict on the lookout question. Even if the appellant had failed to keep a proper lookout, the evidence is overwhelming in her favor that her negligence was not the proximate cause of the accident.

Respectfully submitted

---

Homer F. Wilkinson  
Attorney for Plaintiff-  
Appellant

#### CERTIFICATE OF DELIVERY

I hereby certify that I personally delivered two copies of the foregoing to Henry E. Heath, Attorney for Defendant-Respondent at Strong & Hanni, 604 Boston Building, Salt Lake City, Utah, this 8th day of April, 1977.

---

Homer F. Wilkinson