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Marion G. Wright v. Theron W. Maynard : Brief of Appellant

Utah Supreme Court

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Case No. 7566

IN THE SUPREME COURT
of the
STATE OF UTAH

MARION O. WRIGHT,
Plaintiff and Respondent,

vs.

THERON W. MAYNARD,
Defendant and Appellant.

FILED
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Clerk, Supreme Court, Utah

APPELLANT'S BRIEF

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of the
STATE OF UTAH

MARION O. WRIGHT,

Plaintiff and Respondent,

vs.

THERON W. MAYNARD,

Defendant and Appellant.

Case No. 7566

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

This is an appeal by the defendant from an order of the Fourth District Court, directing a verdict in favor of the plaintiff and against the defendant, and from the order of the Court denying defendant's motion to set aside the verdict and judgment and enter judgment for the defendant or in the alternative to grant a new trial on the merits, and from the further order of the Court, granting to the plaintiff a new trial on the issue of damages only.

It should be observed here that two sets of numbering are employed in the record on appeal as prepared by the Clerk of the District Court. The pleadings and other papers not part of the transcript of testimony are numbered from 1 to 55 inclusive and in his brief we shall refer to this portion of the record by the designation "R". The transcript of testimony is separately numbered from pages 1 to 343 inclusive, and in referring to this portion of the record we shall designate it as "Tr.". We shall refer to the parties as they were designated in the Court below.

THE FACTS

The following facts out of which this case arises, are established without serious dispute:

The plaintiff, Marion O. Wright, resided near the northerly outskirts but within the corporate limits of the City of Orem. (Tr. 106). His home was on the east side of Highway 91, just north of a slight bend in Highway 91. Highway 91 was at that time a two-lane highway. (Tr. 7, 45, 80, 107). Immediately north of plaintiff's home was a garage owned and operated by the plaintiff and referred to in the record as Wright's Garage. (Tr. 4, 106). Two separate driveways lead from Highway 91 easterly. One of the driveways leads to Mr. Wright's home, the other driveway leads into the garage. (Tr. 107-108). The exact distance between driveways does not appear in the

record. The distance between Wright's Garage and the curve to the south was variously estimated by the witnesses at from 250 to 400 feet. (Tr. 47, 57, 83, 92, 148, 238).

At the time of the accident here involved, which was on January 14, 1949, the plaintiff had in his employ, as an assistant, one Walter J. Mitchell. (Tr. 4, 109). The regular hours of operation of Wright's Garage were from 9:00 A.M. to 6:00 P.M. (Tr. 4, 109). At the conclusion of the working day and shortly after 6:00 P.M., on January 14, 1949, the garage had been locked (Tr. 5, 109), and Mr. Mitchell was preparing to drive the plaintiff to a parts house in Orem, for the purpose of obtaining a part which was needed for the next day's work. (Tr. 34, 110). Mr. Mitchell owned his own automobile, which was a 1938 Ford and which was a light gray or tan in color. (Tr. 6, 44, 101, 111, 149, 205). The car was parked in the driveway leading to the Wright home. Mr. Mitchell backed his automobile out of the driveway, and onto Highway 91. (Tr. 10, 29). Just how far the automobile was backed onto Highway 91 is a matter concerning which there is a sharp dispute in the evidence, and which we will more particularly discuss hereafter in this brief. When Mitchell got the car on the road, the automobile flooded out or stalled. (Tr. 29, 37). At about the same time, the lights on the Mitchell automobile also went out. (Tr. 37). The plaintiff came from his house, out to the road where the Mitchell car was stalled and told Mitchell to get the

car off the road. (Tr. 11, 126, 136). Both Mitchell and the plaintiff realized that the car was in a dangerous situation where it was stalled. (Tr. 39, 40, 132).

The defendant, Theron W. Maynard, was driving his Dodge automobile in a northerly direction along Highway 91, through the City of Orem and toward Salt Lake City. He had with him as passengers, his wife, Mr. and Mrs. Raymond Klauck, and Mr. and Mrs. M. W. Wiscomb. (Tr. 146, 165, 232, 258, 274, 283, 293). After the Maynard car came around the bend or curve to the South of the Wright Garage, the Mitchell automobile suddenly "loomed up" before them. (Tr. 276). At the time the Mitchell automobile was first observed, the plaintiff, wearing white coveralls (Tr. 91, 142, 261, 287, 295), was discovered standing at the right or south side of the Mitchell automobile facing southerly in the direction from which the defendant's automobile was approaching and waving his arms. (Tr. 151, 176, 234, 260, 276, 284, 287, 291, 295). The defendant applied his brakes but when it appeared that he might not be able to stop in time to avoid a collision, he turned to the right, so as to pass in front of the Mitchell automobile. As the defendant's car neared the position where the plaintiff was standing, the plaintiff ran, or jumped directly in front of the defendant's automobile which collided with him. (Tr. 40, 152, 185, 261, 276, 295). As a result of the collision aforesaid, the plaintiff sustained per-

sonal injuries, the details of which need not be related here.

The defendant's automobile came to rest in a snowbank, a short distance past the point of impact. The plaintiff was discovered lying in the snow bank to the right of the defendant's vehicle with one foot just under the right running board. (Tr. 30, 41, 60, 153, 154, 186, 263, 271, 272, 295).

The Maynard automobile was not observed by either Mitchell or the plaintiff until it was only a short distance from the Mitchell automobile, notwithstanding the fact that there was an unobstructed view to the south for a distance of several hundred feet. Mitchell testified that he first saw the Maynard car when it was nearly on top of him. (Tr. 40). The plaintiff testified that the Maynard car was clear off the paved portion of the highway when it was first observed by him (Tr. 116), and about 50 to 60 feet away. (Tr. 133). In view of the testimony of the investigating officers that the distance travelled by the Maynard vehicle from the time it first left the paved portion of Highway 91, to the time it came to rest in the snowbank, north of the point of impact was only 52 feet (Tr. 209, 210, 225), it is apparent that the Maynard car could not have been more than 25 or 30 feet away from the plaintiff when it was first observed by him.

It is clear from the testimony of all of the eye witnesses to the accident, that the plaintiff ran directly

into the path of the Maynard automobile. The testimony of Mitchell was as follows (Tr. 40, 41):

“Q. And that was while Mr. Wright was signaling?

“A. Yes.

“Q. And he was clear off the highway at that time?

“A. Yes.

“Q. And then Mr. Wright ran to the front of your car, didn't he?

“A. Yes.

“Q. Right into the path of Mr. Maynard's automobile?

“A. Yes.

“Q. And if Mr. Wright had stayed where he was he wouldn't have been hit, would he?

“MR. McCULLOUGH: Object to it on the ground it is problematical, immaterial, irrelevant.

“MR. CHRISTENSEN: I will withdraw it.

“Q. Mr. Maynard's car didn't strike your car at all, did it?

“A. No. Not that I know of.”

The testimony of the plaintiff was as follows (Tr. 116):

“Q. You turned around. Which direction did you face?

“A. Turned around and faced the south.

“Q. Facing this on-coming automobile?

“A. Yes. And the first thing that entered my mind was that he was going to hit me against the side of this car. So I took off. That’s all I remember.

“Q. Which way did you go?

“A. Brother, I took off. I took off for the snowbank on the east side of the road, towards my house.

“Q. Did you observe where the Maynard car was traveling in relation to the concrete highway?

“A. *It was clear off of the highway the only time I saw it.*

“Q. And that’s off which direction?

“A. That’s off east of the highway.”

(Italics added.)

The testimony of the defendant was as follows (Tr. 152):

“A. I had to make a mental decision on what to do. There was traffic coming from the north. I couldn’t go to the left without crashing head-on. I had five passengers in my car to consider besides the man standing at the side of the car. I applied my brakes and my car slid directly at the stalled car. And I felt that if I continued in that course I would pin that man between the two cars, between the front end of my car and the side of the stalled automobile. So I pulled my car to the right, and played my brakes, to give me some trac-

tion to get to the right of the stalled automobile, and my car took hold, and I went to the right.

“Q. When you say your car took hold, what do you mean by that?

“A. The steering apparatus took hold, and I veered to the right and avoided hitting the car broadside.

“Q. Now did anything else happen at that time?

“A. At about—at the point I got to, almost to that automobile, I had pulled to the right, and was avoiding it, Mr. Wright broke from in front of it and jumped right in front of my automobile.

“Q. Did your automobile strike Mr. Wright?

“A. My automobile struck Mr. Wright.”

(Italics added.)

Mr. Maynard also testified on cross-examination as follows (Tr. 185):

“Q. Then you continued on past the point where you say that you struck Mr.—did you see Mr. Wright when you hit him?

“A. When he lunged in front of me, I definitely hollered as loud as I could, ‘No, no, no,’ just before the point of impact.

“Q. How far were you away then, when you hollered, ‘No, no, no’?

“A. I was practically to the car, and he dashed in front of me, as I hollered it out.

“Q. In other words, he ran over toward the side of the road?

“A. That’s right, from his position.

“Q. And you caught him approximately how far east of the Ford automobile, how far had he—

“A. Oh, perhaps two or three feet, of the front end of the Ford automobile.”

The testimony of Mrs. Amy Klauck was as follows (Tr. 261):

“A. Well, all I can say, we tried to turn, but the gentleman objected.

“Q. Well, the Court overruled him on that. You may answer it.

“A. Tried to turn. There was on-coming traffic from the north, and had we turned in the usual left hand to pass, trying to get around that, we would have hit the on-coming traffic, so he turned to the left. As we got to the car—

“Q. Just a moment—

“A. Or to the right, I beg your pardon. We turned to the right. And *as we got to the car, this man jumped in front of us.*” (Italics added.)

The testimony of Mrs. Maynard was as follows (Tr. 276):

“A. We didn’t go to the left. There was traffic coming, so we turned to the right. And just as we got in—*just before we went in front of the car, Mr. Wright jumped in front of us.*” (Italics added.)

The lights of the defendant's automobile were on low beam at the time the accident occurred. (Tr. 298, 309).

No specific testimony was adduced on behalf of the plaintiff with respect to the speed of the Maynard automobile. The passengers in the Maynard automobile estimated his speed from 20 to 35 miles per hour at the time the plaintiff was first observed, with most of them fixing the speed from 25 to 30 miles per hour. (Tr. 173, 249, 259, 275, 284, 298). They estimated the speed at the time the Maynard car came into contact with the snowbank at 8 to 10 miles per hour. (Tr. 248).

It is undisputed that the Maynard car came to rest in a snowbank in such fashion that the front and right side of the car were embedded in the snow. Witnesses on behalf of the plaintiff testified that the car was completely into the snowbank, except for the left wheel. (Tr. 41, 55, 79, 96). Witnesses on behalf of the defendant testified that the left side of the car and the rear wheels were entirely free of the snowbank. (Tr. 153, 155, 208, 222).

Byron Jensen testified that on June 8, 1949, he examined the lights of defendant's car for purposes of the state inspection law and found them to be in good order and in compliance with state requirements. (Tr. 254). A foundation for his testimony was laid by testimony of the defendant, that his

lights had not been adjusted, replaced or repaired between January 14, and June 8, 1949. (Tr. 163).

As to most of the other facts in the case, there is a very sharp dispute in the evidence. With respect to the width of the road, the plaintiff and certain witnesses called on his behalf testified that the main portion of the road was 27 feet wide with an additional four-foot paved shoulder on each side, making an overall width of 35 feet. (Tr. 107). The plaintiff and the witnesses who testified on his behalf also testified that the shoulder of the road had been cleared to a distance of 12 to 15 feet east of the easterly edge of the paved portion of the highway. (Tr. 80, 93, 118). There is no dispute that there was a large snowbank running along the east edge of the road approximately 3 to 3½ feet high and some distance east of the east edge of the paved portion of the road.

Officers Evans and Ingersoll, members of the State Highway Patrol, who had investigated the accident, were called and testified on the part of the defendant. They stated that by actual measurement the width of the paved portion of the road was 27 feet *including* the four-foot shoulders. (Tr. 207, 210, 214, 215, 219, 223). They estimated that the distance at the side of the road cleared of snow at 10 to 12 feet. (Tr. 210, 215, 216, 218, 224). Klauck estimated the cleared distance at 7 to 8 feet. (Tr. 305).

There is also a sharp dispute in the evidence as to the condition of the road at the time of the acci-

dent. The witnesses called on behalf of the plaintiff testified that the highway was either dry, or damp, or wet. They all testified that there was no ice on Highway 91 or that if there was it was merely splotchy and that generally the road was free of ice and hard packed snow. They also testified that the weather was warm and thawing and that there was slush at the sides of the road. (Tr. 33, 47, 60, 65, 67, 72, 98, 117, 135). To the contrary, all of the occupants of the Maynard vehicle as well as both of the patrolmen who investigated the accident, testified very clearly and positively that the roads were entirely covered with a sheet of glare ice and that they were extremely slick and slippery. (Tr. 147, 167, 209, 219, 222, 223, 224, 227, 229, 232, 237, 259, 260, 265, 275, 280, 283, 284, 285, 293, 300, 301).

There is likewise a sharp dispute in the evidence as to how far the Mitchell vehicle extended into Highway 91 from the driveway leading into the plaintiff's home. The witnesses for the plaintiff who testified to this fact, fixed the position of the Mitchell car at somewhere near the east edge of the paved portion of the road. Mitchell testified that the rear wheels were just over the east edge of the paved portion of the highway. (Tr. 10, 38). The plaintiff testified that the rear bumper of the Mitchell car was about even with the west edge of the four-foot paved shoulder of Highway 91. (Tr. 10, 38, 45, 90, 114, 115). Contrariwise, all the occupants of the Maynard automobile, testified that the Mitchell automobile was squarely

astride the right hand or northbound driving lane of Highway 91, completely blocking passage to northbound traffic. (Tr. 150, 233, 260, 283, 295).

It should be observed here that it was stipulated by counsel for the plaintiff that the length of the Mitchell vehicle was approximately 15 feet. (Tr. 131). There is no dispute that the Maynard automobile passed between the front end of the Mitchell automobile and the snowbank to the east of Highway 91. The left rear fender of the Maynard automobile scraped against the bumper of the Mitchell automobile in passing in front of it. Otherwise, there was no contact between the two vehicles. (Tr. 41, 131-132). Of necessity therefore, there must have been a space of at least 6 to 8 feet between the front end of the Mitchell automobile and the snowbank. Assuming a minimum distance of 6 feet between the front bumper of the Mitchell car and the snowbank, and assuming the length of the Mitchell automobile to be 15 feet, the rear end of the Mitchell automobile must have been at least 21 feet west of the snowbank, which would mean that it would have to protrude substantially into the paved portion of Highway 91.

It should also be observed that there is a conflict in the evidence as to whether there was oncoming traffic from the north at the time the collision occurred. Both the plaintiff and Mitchell testified that they looked to the north immediately prior to the accident and that there was no traffic approaching

from the north at that time. (Tr. 32, 115, 135). However, the defendant, and several passengers in his car, testified definitely that there was on-coming traffic from the north. (Tr. 149, 162, 261, 275, 276, 294, 298).

The defendant also testified that the plaintiff had stated to him that he, the plaintiff, did not hold him, the defendant, in any way responsible for the accident. Mr. Reese James Williams, who was a patient in the same room in the hospital as the plaintiff, testified to a similar statement made by the plaintiff. (Tr. 161, 201, 202). This testimony was of course denied by the plaintiff. (Tr. 328). The statement purportedly made by the plaintiff, as testified to by the defendant and by Williams, could have been believed by the jury as being an admission on the part of Wright that he realized that the defendant had done everything possible to avert the accident and/or that Wright himself was at fault in having jumped in front of the defendant's automobile at the last moment.

There is abundant evidence in the record from which a jury could find that the defendant was traveling at a speed of about 25 to 30 miles per hour; that he discovered the plaintiff standing in front of the Mitchell vehicle squarely astride his path of travel; that at the time the plaintiff was first discovered, he was waving his arms up and down; that the defendant fearing that it would be impossible to bring his car to a complete stop in order to avoid crushing the plaintiff against the Mitchell automobile and being

unable to turn to the left because of approaching traffic from the north, turned his car to the right; that the accident would have been completely averted had not the plaintiff at the last moment jumped directly into the pathway of the Maynard automobile. (Tr. 152, 153).

From this evidence the jury might have concluded that the defendant was in the exercise of reasonable care and did everything possible to avoid the accident; that the plaintiff negligently placed himself in a position which exposed himself unnecessarily to the perils of vehicular traffic on the highway; that the plaintiff failed to keep a proper, or any lookout for other vehicles on the highway; and that by reason thereof the plaintiff was guilty of contributory negligence which was the proximate cause of the accident; or that the accident in view of all the facts and circumstances was unavoidable.

At the conclusion of the trial, both parties made motions for directed verdicts. (Tr. 335, 336, 337). The motion of the defendant was summarily denied. After argument, the motion of the plaintiff was granted. The jury returned a verdict, pursuant to the direction of the Court, in favor of the plaintiff in the sum of \$1,004.44. (R. 44). It is very interesting to observe that the jury allowed the plaintiff only \$480.00 for general damages, and that all the items of special damages claimed by the plaintiff were cut squarely in half by the jury although there was no dispute in

the evidence as to most of the items of special damages claimed by the plaintiff. (R. 44). This to our mind is a very striking demonstration that the jury regarded the case as one of no liability and would have returned a verdict of no cause of action in favor of the defendant had the case been submitted to the jury on its merits. We believe that this factor is entitled to strong consideration by the Court, since the jury was present at the trial and had an opportunity to observe the demeanor of the witnesses upon the stand. It is quite apparent from the jury's verdict, that the jury did not believe that the plaintiff was entitled to recover on the evidence presented in Court.

POINTS TO BE ARGUED

I. THE DEFENDANT WAS NOT GUILTY OF NEGLIGENCE AS A MATTER OF LAW.

A. THE EVIDENCE DOES NOT CONCLUSIVELY ESTABLISH THAT THE DEFENDANT WAS TRAVELING AT SUCH A RATE OF SPEED THAT HE COULD NOT STOP HIS AUTOMOBILE WITHIN THE DISTANCE ILLUMINATED BY HIS HEADLIGHTS.

B. THE DOCTRINE OF DALLEY vs. MIDWESTERN DAIRY PRODUCTS CO., IS NO LONGER THE LAW OF THE STATE.

C. EVEN IF THE DOCTRINE OF THE DALLEY CASE IS STILL THE LAW OF THIS STATE, IT IS NOT APPLICABLE TO THE FACTS OF THIS CASE.

II. EVEN IF THE DEFENDANT WAS NEGLIGENT IN OVER-DRIVING HIS LIGHTS, SUCH NEGLIGENCE

WAS NOT THE PROXIMATE CAUSE OF THE PLAINTIFF'S INJURIES.

III. THE ACCIDENT WAS SOLELY AND PROXIMATELY CAUSED BY THE NEGLIGENCE OF THE PLAINTIFF OR IN THE ALTERNATIVE THERE WAS EVIDENCE FROM WHICH THE JURY COULD FIND THE PLAINTIFF GUILTY OF CONTRIBUTORY NEGLIGENCE.

IV. THE JURY COULD HAVE FOUND THAT THIS WAS AN UNAVOIDABLE ACCIDENT, NOT CHARGEABLE TO THE NEGLIGENCE OF EITHER PARTY TO THIS ACTION.

I. THE DEFENDANT WAS NOT GUILTY OF NEGLIGENCE AS A MATTER OF LAW.

A. THE EVIDENCE DOES NOT CONCLUSIVELY ESTABLISH THAT THE DEFENDANT WAS TRAVELING AT SUCH A RATE OF SPEED THAT HE COULD NOT STOP HIS AUTOMOBILE WITHIN THE DISTANCE ILLUMINATED BY HIS HEADLIGHTS.

It is apparent from the holding of the Court that the Court must have concluded that the only possible finding from the evidence was that the defendant was traveling at such a high rate of speed that he could not bring his car to a stop within the distance illuminated by his headlights, and was therefore guilty of negligence as a matter of law under the rule of *Dalley vs. Midwestern Dairy Products Co.* It is our position that the evidence is not conclusive on this question.

It is clear from the testimony of the defendant and the passengers in his car, that no all out effort

was made by the defendant to bring his car to a complete stop. He did apply his brakes but when it became apparent to him that it was doubtful whether he could stop his car before striking the plaintiff or the Mitchell automobile, he released the pressure on his brakes in order to get better traction, and turned his automobile to the right to avoid striking the Mitchell vehicle.

In other words, rather than run the risk of not being able to stop by reason of the icy condition of the road, defendant adopted what appeared to him to be the safer course of action, which was to turn out and around the Mitchell vehicle. In order to accomplish this it was necessary that he release the brakes in order to obtain the necessary traction. It is quite possible that if the defendant had persisted in his efforts to stop the automobile he might have been successful in so doing. Whether or not he would have been able to do so, is a fact that can never be definitely known, but must forever remain within the field of speculation.

It appears to us that it would be a monstrous proposition of law which would require an operator in the position of Mr. Maynard to apply his brakes full force when a better method of averting the accident appeared to be open. Mr. Maynard might have continued with full application of his brakes and might have successfully averted the accident completely. On the other hand, he might not have been able to avert

the accident and crashed into the Mitchell car. Which would have been the result, can never be known. The latter alternative would have involved the potentiality not only of more seriously injuring the plaintiff, but also any occupants in the Mitchell automobile as well as all the passengers in the defendant's automobile. Under these circumstances, the most that could possibly be said for the plaintiff's case would be that whether or not the defendant was overdriving his lights would be for the jury. The more logical view would be to say that there was no way to prove this fact, that it was too highly speculative to be submitted to the jury, and therefore the plaintiff had failed to carry his burden of proof on the question of negligence.

We think that the jury might well have found, and in all probability would have found that the defendant did all that due care required, and even more, to avert this accident. We are at a loss to understand how the Court could possibly hold, as a matter of law that the defendant was negligent.

B. THE DOCTRINE OF DALLEY vs. MIDWESTERN DAIRY PRODUCTS CO., IS NO LONGER THE LAW OF THE STATE.

We have heretofore pointed out that the evidence does not establish as a matter of law that the defendant was overdriving his lights. However, admitting for purposes of argument only, that the evidence was conclusive on this point, we are still of the opinion

that such was not negligence as a matter of law, but that it was a question for the jury whether, in view of all of the facts and circumstances, defendant was guilty of negligence.

It was strenuously argued to the Court in behalf of the defendant, that the harsh doctrine of *Dalley vs. Midwestern Dairy Products Company*, 80 Ut. 331, 15 Pac. (2d) 309, no longer prevails in this state, and that the question of negligence on the part of the defendant was for the jury.

The Dalley case was decided by a three-to-two decision of the Court. Mr. Justice Straup wrote a vigorous dissenting opinion in which he said:

“That the plaintiff unexpectedly and without notice or warning encountered a dangerous obstruction in the highway without lights or signals and created by the negligence and unlawful act of the defendant, admits of no controversy. He testified that with proper headlights, driving his automobile at about 25 miles an hour, and observing a careful lookout, he did not discover the truck until about 20 feet away. Such distance and rate of speed were given only as estimates.”

* * *

“However, let it be conceded that the duty imposed on automobile drivers is as stated in such cases and in some other cases cited in the prevailing opinion, still whether the plaintiff failed or omitted to comply with such requirements is, on the record and so generally on a given state of facts, a question for the jury; and because a driver in the nighttime drove against

or collided with a substantial object unlawfully left or placed on a public highway without lights or other signals to give warning of its existence, does not so conclusively speak the failure or omission of the performance of such duty, or the want of ordinary care on the part of the driver in the operation of the automobile, as to justify as matter of law the rejection of testimony as being false and unworthy of belief that the duty imposed was performed and due care exercised."

Since that decision, this Court has criticised the doctrine of the Dalley case on nearly every occasion that the same question has come before the Court. In some of the more recent decisions the doctrine has been substantially modified and its harsh operation greatly alleviated.

In *Hansen v. Clyde, et al.*, 89 Utah 31, 56 Pac. (2d) 1366, the decision was criticised by Mr. Justice Wolfe, in a dissenting opinion where he said:

"In the Dalley case a truck was left across the highway without lights. When the point decided in that case directly comes before this court in some future case, I hope to pay my respects to it. At this time, I shall only say that I hope some rule more nearly comporting with the realities of travel, although perhaps not so logical, may be worked out whereby one who endangers travel by deliberately and wrongfully placing a dangerous obstacle in the path of that travel may not go scot-free because the traveler is in law required to see it. I think the traveler should be given the benefit of some

presumption that others have not wrongfully obstructed the highway.”

In the same opinion, Mr. Justice Wolfe enumerated a number of hypothetical fact situations and stated what he considered should be the law applicable to each of the situations. The ninth situation discussed by Justice Wolfe, seems to fit the facts of this case. Mr. Justice Wolfe said:

“Ninth. Those cases where it is claimed there was a concurrence of two or more active negligences, but one or the other or all consisted, not of the basic act itself, but of the manner of doing the act or omitting to do some incidental act which is claimed should have attended the basic act, and, which, if done, would have avoided the effect of another’s negligence. This class is illustrated by those situations where someone traverses the right of way of another but it is claimed that the other was going too fast or failed to sound a warning and a guest passenger or other third party was injured. The basic act of traveling on one’s right of way was not negligence. It was the overspeed or failure to give warning which it was claimed was negligence. The reason such situations may be put in a separate class is because they constitute cases where there is really an attempt to thrust on one party the duty to avoid the effects of the negligence of another and yet which do not fall under any situation where the last clear chance doctrine is applicable. The act or omission claimed to be negligence is not such in the sense that it operated on another agency in the relationship

of cause and effect to cause an accident, but that, if it had not been present the effect of the other's negligence would have been avoided and the accident thus prevented. Where the act of the party putting himself in danger was deliberate or he had every chance himself to avoid it as distinguished from the situation where everything came quickly, it will generally be found that the cases have held that the other party's so-called negligence did not contribute to the accident. *Haarstrich v. Oregon Short L. R. Co.*, 70 Utah, 552, 262, P. 100. And the cases have divided on the question as to whether a motorist's overspeed in his own right of way can in law be held to have contributed to an accident caused by another assuming the right of way. One line of decisions holds that in such case the speeding had nothing to do with the accident, and that, while a person speeding over the course in which he had prior right of way may have been negligence, yet all that must be taken into consideration by one who wrongfully assumes the right of way and that the placing of himself across the course and not the speeding was the sole cause of the accident.' * * * I have attempted to point out at least in the case where the one committing the paramount negligence had ample opportunity to avoid it himself, such as where there was a clear lookout, but he deliberately rode into the line of danger, the negligence of the other, if any, is too remote."

In the case of *Nielsen v. Watanabe* (Utah), 62 Pac. (2d) 117, this Court made a definite departure

or engrafted a definite qualification on the Dalley case. The Court, speaking through Justice Elias Hanson said:

“If the truck could not, because of some obstruction, be seen as plaintiff and her husband approached it prior to the time they were blinded, and if plaintiff’s husband was driving at a lawful rate of speed an automobile properly equipped with lights and brakes without any reason to believe the headlights of another automobile would suddenly and unexpectedly blind him, that while so blinded the collision occurred without time for him to reduce his speed or stop his automobile, the rule announced in the cases relied upon by defendant and heretofore cited in this opinion would not apply. Under such circumstances it may not be said that plaintiff’s husband was, as a matter of law, guilty of contributory negligence. 3-4 Huddy Cyclopedia of Automobile Law (9th Ed.) p. 59, No. 30 and cases there cited.”

This court departed further from the doctrine in the case of *Moss v. Christensen-Gardner, Inc.* (Utah), 98 Pac. (2d) 363. The Court, speaking through Mr. Justice McDonough and referring to the Dalley case said:

“While this rule is recognized generally in other jurisdictions as well as in our own, it is certainly not a rule without limitation or restriction. Nor does it have universal application.”

The Court then went on to discuss other cases which had refused to follow the strict and harsh doctrine of the Dalley case:

“In the case of *Riner v. Collins*, 132 Kan. 613, 296 P. 713, 714, the Supreme Court of Kansas had before it the identical problem presented in the present case. The petition in the Kansas case alleged that on a dark night plaintiff while driving along the highway ran into defendant's truck which had been left standing on the highway without any lights or other signal to warn drivers of approaching vehicles. Defendant demurred on the ground that plaintiff was guilty of contributory negligence, and the collision was not caused by defendant's negligence. The argument advanced in support of the demurrer was that the law required the plaintiff to drive according to his ability to see and that plaintiff must have been negligent or he would have seen the truck in time to avoid striking it. The court held the complaint sufficient, stating that not only did the petition allege due care on plaintiff's part, it also described defendant's negligence as such that motorists in plaintiff's situation could not, in the exercise of due care, see the truck in time to avoid collision. Further, it was specifically alleged that the accident was caused by defendant's negligence.

“See also, as to the rule under discussion *Indianapolis Glove Co. v. Fenton*, 89 Ind. App. 173, 166 N.E. 12; *General Exchange Ins. Corporation v. M. Romano & Son* (La. App.), 190 So. 168; *Chapman v. Ind. Laundry Co.*, 38 Ga. App. 424, 144 S.E. 127; *McKeon v. Delbridge*, 55 S.D. 579, 226 N.E. 947, 67 A.L.R. 311; Vol. 9

Blashfield Cyclopedia of Automobile Law & Practice, Permanent Edition, page 193, No. 5966."

In a special concurring opinion in that case, Mr. Justice Wolfe pointed out very specifically that the decision was a departure from the logic of the Dalley case. He said:

"The instant decision commendably departs from the severe logic of the Dalley case in order to make the law comport not with logic but with realities—a very welcome symptom. The logic of the Dalley case would require that a driver blinded by lights stop until the blindness disappear. There is in logic no more reason why a man should proceed when unable to see objects because of being blinded by the lights of some other car than when unable to see them by the lights of his own car. But as stated in my dissenting opinion in *Farrell v. Cameron* supra, some concession must be made to actualities. In that case the implication was that a man on his own side of the road blinded by oncoming lights was under duty to discover an oncoming person on the wrong side of the road. Of course, such law should make driving at night on such used arterials practically an impossibility."

Mr. Justice Larson dissented. He also recognized that the case departed from the doctrine of the Dalley case. Justice Larson took the position that if the Court was going to pay lip service to the Dalley case, that it should follow its logic. Since the Court refused to specifically overrule the Dalley case, Judge Larson

took the position that it was necessary to dissent in order to consistently follow the law. Justice Larson said:

“The attempt to draw such fine distinctions as in the case of *Nielsen v. Watanabe*, 90 Utah 40, 62 P. 2d 117, and in the case at bar, seems to be a recognition that the rule in the *Dalley* case is not sound and therefore should be avoided, even though it requires super refinements in reasoning and hairsplitting in logic. *I think the Dalley case should be overruled, or the doctrine thereof modified so as to make possible a realistic approach to the problem.* * * * But when one is unlawfully upon the highway, is making an unlawful use of the highway, he should not be permitted to impose upon another making a lawful use thereof the duty of protecting him in his unlawful use. To a wrongdoer, the driver owes only the duty of not wilfully injuring him or his property. Since the wrongdoer is not lawfully upon the highway the driver is not charged with anticipating his presence there and is not impressed with the duty of protecting him to the same extent as he owes to one making lawful use of the highway. Such wrongdoer should therefore not be able to escape his liability by saying that the driver did not exercise toward him the same degree of care that is imposed for the protection of one lawfully upon the highway.” (Italics added.)

The decision in *Trimble, et ux v. Union Pacific Stages, et al.* (Utah), 142 Pac. (2d) 674, made a complete break from the doctrine of the *Dalley* case. The

facts of that case are generically similar to those in the case at bar. In that case, the defendant's driver suffered an impairment of vision by reason of a foggy condition existing on the highway. In the instant case, the defendant was subject to a severe visual limitation by reason of the white coveralls worn by the plaintiff and the tendency to blend in color with the snowy background and the light colored automobile. In that case the Court specifically refused to follow the doctrine of the Dalley case and set forth a number of exceptions to the doctrine of that case. Speaking through Mr. Justice Larson, the Court said:

“Appellant cites *Dalley v. Midwestern Dairy Products Co.*, 80 Utah 331, 15 P. (2d) 309 and *Hansen v. Clyde*, 89 Utah 31, 56 P. (2d) 1366, 104 A.L.R. 943 in support of the contention that the court should have instructed that as a matter of law defendant was guilty of negligence. These cases lay down the rule that it is the duty of a driver of a motor vehicle moving along the highway at night to so drive his vehicle that he can stop before colliding with any object within the range of his headlights. And further, if the lights with which the vehicle is equipped are not up to the standard set by law, the driver must reduce his speed proportionately. Failure to observe this standard of care is negligence as a matter of law. This is the rule of law that we are asked to apply in the case at bar. Appellant argues that since defendant's bus was moving at such a speed after entering the fog that it could not be stopped within the driver's range of vision, the driver, and his principals, the defendants were

guilty of negligence as a matter of law. Thus in effect appellants ask this court to say that one driving on a highway at night is bound to anticipate that there will be fog, smoke, or some other obstruction which will reduce the driver's vision, and that therefore all must drive at such speed that should they meet with such an obstruction they can stop their automobile within the range of their vision as it is limited by this obstruction. We do not believe this to be the correct rule of law, or the situation to which the rule laid down in the Dalley case, *supra*, was intended to apply. In *Nielsen v. Watanabe*, 90 Utah 401, 62 P. 2d 117, 119, there was a situation similar to the one in this case. There while the driver of the plaintiff's car was suddenly and unexpectedly blinded by the lights of approaching automobiles, or during the brief period of blindness which it is commonly known follows exposure to bright lights, the collision occurred, plaintiff running into a truck parked on the highway, without a taillight burning. This court there said: 'If the truck could not, because of some obstruction, be seen as plaintiff and her husband approached it prior to the time they were blinded, and if plaintiff's husband was driving at a lawful rate of speed an automobile properly equipped with lights and brakes without any reason to believe the headlights of another automobile would suddenly or unexpectedly blind him, that while so blinded the collision occurred without time for him to reduce his speed or stop his automobile, the rule announced in the cases relied upon by defendant and heretofore cited in this opinion (the Dalley case, and others laying down the same rule) would not apply. Under such circumstances it may not be said

that the plaintiff's husband was, as a matter of law, guilty of contributory negligence.' Citing 4 Huddy Cyc. of Auto. Law, 9th Ed., p. 50. And in *Moss v. Christensen-Gardner, Inc.*, 98 Utah 253, 98 P. 2d, 363, 365: 'Indeed the allegations that because of the glare of the headlights of the other car 'it was impossible, in the exercise of reasonable care, for plaintiff to see said unlighted and unmarked barricade * * * in time to safely avoid running upon the same' would seem to be equivalent to alleging that at the point where she could have, in the exercise of due care, seen the barricade, she was blinded by the glare of such headlights; and the blinding light having passed, there was not sufficient distance between her and the barricade to have brought her car to a stop.' The court then goes on to hold that since the complaint by the above allegation does not show that plaintiff was, 'as a matter of law, guilty of contributory negligence', the demurrer thereto should not have been sustained. Other courts have passed on this question and in the following circumstances, said that there was no negligence as a matter of law: Vision obscured by dust raised suddenly by passing automobile (*Johnson v. Prideaux*, 176 Wis. 375, 187 N.W. 207; *Murphy v. Hawthorne*, 117 Or. 319, 244 P. 79, 44 A.L.R. 1397; *Melton v. Manning*, Tex. Civ. App., 216 S.W. 488); sudden failure of headlights (*Mueller v. State Auto Ins. Ass'n*, 223 Iowa 888, 274 N.W. 106); blinded by the lights of approaching automobiles (*Kadlec v. Al Johnson Const. Co.*, 217 Iowa 299, 252 N.W. 103, *Salenme v. Mulloy*, 99 Conn. 474, 121 A. 870); when accident occurred on dark rainy day, and headlights of oncoming traffic blinded driver (*Kirby v. Sweif & Co.*, 199 Ark. 442, 134 S.W.

2d 865); forced off the road by approaching automobile, and when the "*weather was inclement, dark, misty and it was raining*" (Fleming v. Hartrick, 100 W. Va. 714, 131 S.E. 558); and when there was fog on the road, both when it was a heavy fog occurring all along the road and when there were spots or zones of fog (Lindquist v. Schmidt, 289 Ill. App. 614, 7 N.E. 2d 501; Nelson v. Inland Motor Freight Co., 60 Idaho 443, 92 P. 2d 790; Renaud v. New England Transp. Co., 286 Mass. 39, 189 N.E. 789; Ewing v. Chapman, 91 W. Va. 641, 114 S.E. 158; Desoto v. United Auto Transp. Co., 128 Wash. 604, 223 P. 1050); also where attention was diverted by warning signals placed on left side of the road, and right side was also blocked, but without warning signals. Miller v. Advance Transp. Co., 7 Cir., 126 F. 2d 442. In accordance with the foregoing authorities, it was not error for the lower court to refuse plaintiff's requested instruction that defendant was as a matter of law guilty of negligence. This matter was properly left for the jury." (*Italics added.*)

From the foregoing review of the Utah cases, it is quite apparent that the doctrine of the Dalley case has been eaten into to such an extent that it is no longer the law of this state. This Court has never let go unpassed, an opportunity to criticise the doctrine. It has definitely refused to follow it, in the more recent cases, which have come before the court. It is inconceivable that a doctrine which has received so much judicial criticism and which has been found to be so unrealistic and so wholly out of accord with modern day driving conditions, should be permitted to stand,

even nominally, as the law of this jurisdiction. It is time now, that this Court, specifically and unequivocally reject the doctrine of that case or at least so modify it as to make it comport to the realities of modern vehicular travel.

The doctrine has been specifically rejected by the Courts of many of our sister states. Those courts have pointed out many unsatisfactory factors of the doctrine, in addition to those which have been judicially criticised by the members of this Court. For example, see the case of *Morehouse v. City of Everett* (Wash.), 252 Pac. 157, where the court said at page 160:

“The rule contended for is, in our opinion, entirely too broad, and, if put in effect, would have very serious and unjust results. It loses sight of the fact that one driving at night, has, at least, some right to assume that the road ahead of him is safe for travel, unless dangers therein are indicated by the presence of red lights; it does not take into consideration the fact that visibility is different in different atmospheres, and that at one time an object may appear to be 100 feet away, while at another time it will seem to be but half that distance; it fails to consider the honest error of judgment common to all men, particularly in judging distances at night; it loses sight of the fact that the law imposes the duty on all autos traveling at night to carry a red rear light and the duty on all persons who place obstructions on the road to give warning by red lights or otherwise; it fails to take into consideration the glaring headlights of others

and the density of the traffic and other like things which may require the instant attention of the driver; it does not take into consideration that a driver at night is looking for a red light to warn him of danger, and not for a dark and unlighted auto or other obstruction in the road.

“(4) We believe that, generally speaking, where the statutes or the decisions of the courts require red lights as a warning of danger on any object in the highway and such lights are not present, it is a question for the jury to determine whether the driver at night should have seen the obstruction, notwithstanding the absence of red lights. In this day when the roads are crowded with automobiles, a red light is at once recognized as a signal for danger and therefore for cautious driving, but the absence of a red light, where the statutes or the decisions of the court require them, amounts to an implied invitation to travel the road in the usual manner. In many portions of this state, fogs are frequent—fogs so thick that the driver of an automobile cannot, by means of his headlights, clearly distinguish an object 5 feet in front of him. Must he stop on the road? If so, all others must do the same, and thus all traffic must cease. And in the process of stopping and blocking the road, many collisions must occur. A rule that will force this condition is a dangerous one and must do infinitely more harm than good.

“To hold that one is, as a matter of law, guilty of contributory negligence in not, under all circumstances, seeing whatever his lights may disclose, would be to practically nullify the statutes which require red lights to be carried

upon automobiles and to be placed upon obstructions in the streets or roads; or, at least, to encourage travelers on the roads, or those placing obstructions therein, not to comply with the law in those respects, for, under the rule contended for, a disobedience of the law with regard to red lights would not entail any evil consequences."

The Morehouse case was followed in the later Washington case of *Tierney v. Riggs*, 252 Pac. 163, where the Court said:

"The only question, therefore, is whether the respondent himself was guilty of contributory negligence. The testimony shows that he was driving it down Madison Street from the east at a reasonable rate of speed, that as he neared the appellant's car there was approaching a car from the west, and, in order to give that car proper passageway, he shifted from his position in the street towards the right, which resulted in the collision. The theory upon which appellant predicates his claim of contributory negligence is that the respondent should have been driving his car within the radius of his lights, and that failure to do so constituted negligence. But that doctrine has been recently and finally repudiated by this court in the case of *Morehouse v. Everett*, 252 P. 257, and in that opinion prior decisions of this court, upon which appellant relies, were referred to and explained.

"In the Morehouse case, we call attention to the fact that one driving a car at night is warranted in assuming that the road ahead of

him is safe for travel unless the dangers there are indicated by red lights, and that the absence of warning given by red lights amounts to an implied invitation to travel the road in the usual manner; that to restrict a driver's right by the 'drive within the radius of your lights' rule would be to encourage the placing of unlighted obstructions in the streets; and the court finally, as already said, repudiated that doctrine.

"The respondent's speed being reasonable and his handling of his car being such as a reasonably prudent man would indulge in, the fact that on a down grade his lights did not reveal the obstruction left in the street by the appellant did not make him guilty of contributory negligence in failing to see that object in time to avoid it."

The doctrine has also been rejected by the California Courts. See *Sawdey v. Rasmussen* (Cal. App.), 290 Pac. 684, where it is said (p. 686):

"It is a serious thing for courts to endeavor to establish arbitrary rules of safety, thereby assuming, to a large extent, the functions of the law making branch of government. The question of public safety is always relative to existing conditions. There are certain hazards that must remain as a part of the daily routine, and while the minimizing of these hazards is a goal to be earnestly sought, yet the elimination of hazard should be scientifically approached and with care lest in avoiding the hazard means of transportation be not rendered useless. To establish an arbitrary rule, such as here con-

tended for, might and would give obstacles to traffic and dangers far greater than might be reasonably anticipated. For instance, it would bring all traffic down to the speed of that car that would be obliged to travel at the slowest speed in order to obey the rule. It would be an incentive for all cars to equip with powerful lights to the end that the radius of illumination might be enlarged or lengthened so as to permit high speed, which excessive lighting would be worse than total darkness as far as safety of traffic would be involved. It would serve as a defense and as an excuse for all manner of traffic obstruction and would disturb and upset all prevailing traffic safeguards by making the stop test the determining factor in night driving.

“Our state is spending millions of dollars in highway construction and in road maintenance, coupled with an adequate and efficient highway patrol. Few accidents result from defective highways, and when a road or highway is rendered unsafe or hazardous it is the rule and custom that such dangers are sufficiently guarded or marked as to insure little likelihood of injury to the traveling public. Further, the law required that any obstacle left in the road at night or after dark have displayed warning lights sufficient to be seen at a distance far greater than the radius of any practicable headlight. With these safeguards already provided, it seems so unnecessary to further undertake to remove all hazards, at the risk of increasing them.

* * * *

“We decline to hold that, as a matter of law, it is negligence per se to fail to observe

an unlighted object of the character here involved, under the conditions shown to have existed in the instant case.

“Further, we cannot see the great importance of plaintiff’s ability or inability to stop within a certain distance. *For, as was said in Kendrick v. Kansas City (Mo. Sup.), 237 S.W. 1011, if plaintiff had seen the truck and trailer there would have been no need for him to stop, as he could have passed it on the highway.*” (Italics ours.)

See also the case of *Sponable v. Thomas (Kan.), 33 Pac. (2d), Page 721*, where the Court used this language in rejecting the doctrine:

“To determine the question as a matter of law, therefore, requires a consideration of the evidence favorable to plaintiff, and that evidence is that plaintiff, with car properly equipped as to lights and brakes and able to see forward some 30 feet or more, did not see defendant’s dark drab unpainted unlighted truck, the body of which stood high enough off the ground that it was above the range of plaintiff’s lights. In a case involving the same issue as here, this court said in *McCoy v. Pittsburg Boiler Machine Co., 124 Kan. 414, 417, 261 P. 30*:

“ ‘The purpose of a highway is for passage, travel, traffic, transportation, and communication. The automobile is a vehicle used for travel, traffic, transportation, and communication, and the statute is regulatory of such use. Highways are not maintained for the purpose of providing places for storage of automobiles * * * ’ Page 418 of 124 Kan., 261 P. 30, 31.

“The subject of regulation by the statute was movement of automobiles on highways, in the sense indicated. A red light at the rear end visible at night was deemed essential. The purpose was to provide a danger signal to overtaking traffic. The warning is more necessary when the automobile is at rest, than when it is in motion * * *” Page 419 of 124 Kan., 261 P. 30, 32.

“The plaintiffs in proceeding along the highway had a right to believe that it was safe and that there were no hidden undisclosed defects such as an unlighted truck standing in the path of travel. While the facts are not the same, in theory at least this case is controlled by the reasoning of *Barzen v. Kepler*, 125 Kan. 648, 266 P. 69, and *Deardorf v. Shell Petroleum Corp.*, 136 Kan. 95, 12 P. (2d) 1103. Had the truck in question been painted some contrasting color or had the body of it been low enough to be within the range of the headlights of plaintiff’s car, a different situation might be before us, but, as we view the matter, the question of whether there was contributory negligence, on the part of the plaintiff in not seeing the truck, under the evidence, was not a question of law, but was for the jury.”

To the same effect is the later case of *Long v. American Employers’ Ins. Co.* (Kan.), 83 P. 2d 674.

The Oregon Court has likewise rejected the doctrine in the case of *Murphy v. Hawthorne*, 244 Pac., page 79. The Supreme Court of Oregon said:

“Appellant’s principal contention, aside from the question as to the proper measure of damages, is that we should hold as a matter of law

that plaintiff was guilty of contributory negligence in failing to stop his automobile within the range of his vision. While some courts have announced a hard and fixed rule that it is negligence to drive an automobile at such rate of speed that it cannot be stopped within the range of the driver's vision [Citations omitted], we think it improper to do so. Each case must be considered in the light of its own peculiar state of facts and circumstances. After all, the test is, what would an ordinarily prudent person have done under the circumstances as they then appeared to exist? Can we say that all reasonable minds would reach the conclusion that plaintiff failed to exercise due care to avoid this collision? We think not. Plaintiff had a right to assume, in the absence of notice to the contrary, that defendant would not put this dusty, gray-colored truck on the highway after dark without displaying a red light on the rear thereof. If the truck had been lighted, the jury might well have drawn the reasonable inference that plaintiff would have been able to avoid striking it. As stated in *Haynes v. Doxie*, 198 P. 39, 52 Cal. App. 133:

“Notwithstanding the facts stated, it may also be true if the truck had been lighted as required by law, plaintiff would have been able to see it, and would have seen it, while at a distance great enough to enable him to stop his automobile and avoid the collision.”

“In *Hallett v. Crowell*, 122 N.E. 264, 232 Mass. 344, it was said:

“The jury doubtless could find that the plaintiff's motorcycle, lighted as required by law, could be stopped at the rate of speed he

was going within a distance of 15 feet and that he was about 25 yeet distant when he saw the rear wheel of the defendant's unlighted farm wagon. But the defendant was violating the statute, and the jury could find that the plaintiff did not know the wagon was ahead until he observed the glitter of his own headlight upon the rim of the right outside rear wheel of the wagon, when although driving at proper speed and immediately turning to the left as far as he could, he came into collision with the * * * wheel * * * and was injured severely. * * * It was therefore a pure question of fact whether under all the circumstances he exercised the care of the ordinarily prudent traveler.'

"In *Corcoran v. City of New York*, 80 N.E. 660, 188 N.Y. 131—a case involving a similar state of fact—we find this significant language:

" 'We are also of the opinion that the question of contributory negligence was one of fact for the consideration of the jury. The automobile was going at the rate of 8 to 10 miles an hour, and Noyes was shown to have been an experienced and careful operator. Although the testimony tends to show that this automobile, weighing 3,000 pounds, and going at the rate of from 8 to 10 miles an hour, could have stopped in from 18 to 20 feet, it is still a question of fact whether under the conditions which existed the guard rail and fence were visible from a sufficient distance to make such a stop possible. It is true that one of the occupants of the tonneau testified that the fence could be distinguished at a distance of 15 feet, but that is by no means conclusive, for the plaintiff was entitled to the benefit of the legal prin-

ciple that a traveler on a city street has a right to assume that all the parts thereof intended for travel are safe, and he is not open to the imputation of negligence if he fails to discern an unknown and concealed danger at the very instant necessary to prevent an impending disaster.'

"While there is authority to the contrary, we believe the better reasoned cases support the holding that whether plaintiff failed to exercise due care to avoid the collision was a question of fact for the jury."

The highly respected Supreme Judicial Court of Massachusetts has repeatedly held, in cases of this sort, that the question of negligence or contributory negligence (as the case may be), of the driver "over-driving" his lights is for the jury. In the case of *Langill v. First Nat'l Stores, Inc.* (Mass), 11 N.E. 2d 593, following *Jacobs v. Moniz*, 228 Mass. 102, 192 N.E. 515, that Court said:

"We think it cannot be ruled as a matter of law that where there is on the highway a motor vehicle, the light on which is not so displayed as to be visible from the rear, a careful driver of a motor vehicle is bound in all circumstances to see it in time to avoid it, and must therefore be guilty of negligence if he runs into it.

"In the instant case the speed at which it could be found the plaintiff was operating his automobile at the time of the accident was not negligent in itself. Whether it was negligent

in the light of all the other facts that the jury could have found presented a question of fact for their determination."

The same principle was adhered to in the following later cases:

Baker v. Hemingway Bros. Interstate Trucking Co. (Mass.), 12 N.E. 2d 95.

McGaffee v. P. B. Mutrie Motor Transp. Inc. (Mass.), 42 N.E. 2d 841.

Bresnahan v. Proman (Mass.), 43 N.E. 2d 336.

In the last cited case the court said:

"If the plaintiff's evidence was believed, and the circumstances of the accident were as he testified them to be, the issue whether he was contributorily negligent was one of fact. It could not be ruled, as matter of law, that the exercise of the care required him to see the 'dark only' sooner than he did. . . . He could rely to some extent upon travelers obeying the statute in regard to lights and according to common experience he could even reasonably expect that a tail light would be visible farther than the required 100 feet".

Other cases to the same effect are:

Rozycki v. Yantic Grain & Products Co., 99 Conn. 711, 122 A. 717.

Pennington Produce Co. v. Wonn (Tex. Civ. App.), 49 S.W. 2d 482.

Swift v. Michaelis (Tex. Civ. App.), 110 S.W. 2d 933.

Western Development Corp. v. Simmons (Tex. Civ. App.), 124 S.W. 2d 415.

Gulf Brewing Co. v. Goodwin (Tex. Civ. App.), 135 S.W. 2d 812.

Chaffie v. Duclos (Vt.), 166 A. 2.

Jackson v. W. A. Norris, Inc. (Wyo.), 93 P. 2d 498.

Olguin v. Thygeson (N.M.), 143 P. 2d 585.

The difficulties in cases of this sort were well summed up by the Supreme Court of North Carolina in the case of *Thomas v. Thurston Motor Lines, Inc.* (N.C.), 52 S.E. 2d 377. That court, like this court, has nominally adhered to the "assured clear distance" rule, and like this Court, has found that such a rule is unworkable and cannot be strictly applied in all cases without working substantial hardship and injustice. That Court, after stating the rule, said:

"Few tasks in trial law are more troublesome than that applying the rule suggested by the foregoing quotations to the facts in particular cases. The difficulty is much enhanced by a tendency of the bench and bar to regard it as a rule of thumb rather than as an effort to express in convenient formula for ready application to a recurring of actual situation the basic principle that a person must exercise ordinary care to avoid injury when he undertakes to drive a motor vehicle upon a public highway at night. The rule was phrased to

enforce the concept of the law that an injured person ought not to be permitted to shift from himself to another a loss resulting in part at least from his own refusal or failure to see that which is obvious. But it was not designed to require infallibility of the nocturnal autoist, or to preclude him from recovery of compensation for an injury occasioned by collision with an unlighted obstruction whose presence on the highway is not disclosed by his own headlights or by any other available lights. When all is said, each case must be decided according to its own peculiar state of facts. This is true because the true and ultimate test is this: What would a reasonably prudent person have done under circumstances as they presented themselves to the plaintiff?"

C. EVEN IF THE DOCTRINE OF THE DALLEY CASE IS STILL THE LAW OF THIS STATE, IT IS NOT APPLICABLE TO THE FACTS OF THIS CASE.

We invite the Court's attention to the fact that the doctrine of the Dalley case has generally been applied as against a plaintiff who has failed to see an obstruction on the highway and who has collided with the same and sustained personal injuries. In those jurisdictions, where the doctrine prevails, it is held that the plaintiff is guilty of contributory negligence in failing to discover the peril and to avert the same. There would of course be no occasion to apply the doctrine if the plaintiff were able to avert the obstruction, by turning out or otherwise avoiding the obstruction, other than by stopping. The important

thing would not be the inability to stop within the distance illuminated by the headlights, but rather the ability to avert the potential accident, either by stopping or changing course in the highway so as to avoid a collision. The record in this case is clear that the defendant maintained such control over his automobile as to be able to avert the peril presented by the obstruction on the highway, the Mitchell automobile. The defendant was able to and did slow his car down and drive around the obstructing vehicle and onto the shoulder of the road, which was cleared for vehicular traffic and where he had a right to drive. The defendant would have successfully averted the serious consequences of this accident had not the plaintiff at the last moment jumped directly into his path. It would indeed be a harsh and unfair application of the doctrine of the Dalley case to hold negligent as a matter of law this defendant, who duly appreciated all of the dangers, and who not only had to consider the perilous position of the plaintiff but also the safety of himself and the five passengers in his automobile, as well as any persons which might have been, for all the defendant knew, in or to the north of the Mitchell automobile.

Even if the defendant had been traveling at a very high rate of speed, of which there is no evidence in the record, we do not see how in justice or fairness he can be held responsible for the accident in view of the fact that he was able to avert the obstruction in his pathway.

It should be remembered too, that the plaintiff stood at the side of the Mitchell automobile, waving his arms to indicate his presence. This was undoubtedly understood by the defendant and would logically and reasonably be understood by any driver confronted with the same situation on the highway, to mean an indication on the part of the plaintiff that he was then in a position of peril and to signal the driver to go around. It is quite possible that the defendant would have attempted to go around the front of the Mitchell automobile even if he had been traveling so slowly as to be able, without question, to stop. As the plaintiff had indicated to him that he intended to remain in his present position, there would have been no real need or occasion for the defendant to have stopped, and wait until the Mitchell car was removed from his pathway or until the oncoming traffic from the north had cleared. There was an avenue of travel open to him over the cleared portion of the highway and he was entitled to use it.

As pointed out in the case of *Kendrick v. Kansas City*, 237 S.W. 1011, referred to in *Sawdey v. Rasmussen*, 290 Pac. 684, 688, there is no great importance to be attached to the plaintiff's ability to stop within a certain distance. So long as there is an open avenue of traffic around the obstructing object, there appears to be no reason why the plaintiff should be required to stop in the presence of the obstruction. All reasonable safety requirements are satisfied when the driver

chooses to proceed over an avenue of travel around the obstructing object.

POINT II. EVEN IF THE DEFENDANT WAS NEGLIGENT IN OVER-DRIVING HIS LIGHTS, SUCH NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF THE PLAINTIFF'S INJURIES.

Under Point I C, we have strongly urged upon the Court the proposition that there is no duty to stop when there is an opportunity to go around an obstruction on the highway. Much of the argument there stated is applicable with equal force to this point. We adopt it by reference without repeating it here.

We believe that it is clear from the record that excessive speed upon the part of this defendant, was not the cause of this accident. The record is far from clear that the defendant was traveling at such a rate of speed that he could not stop within the distance illuminated by his lights. He intentionally released his pressure on the brake pedal so as to get better traction for the purpose of steering over to the side of the road. However, let it be conceded, for purposes of this argument that defendant could not stop within the distance illuminated by his lights. As above pointed out, the defendant was traveling sufficiently slowly as to be able to avoid the obstruction presented by the Mitchell vehicle. He successfully avoided injurious contact with the automobile and would have averted the accident completely but for

the act of the plaintiff in jumping into his pathway at the last possible moment. No matter how fast or how slow the defendant might have been traveling, he could certainly not be expected to avert an accident where the injured party stepped directly into his pathway, at a moment when it was too late to stop or change the course of his direction.

We invite the attention of the Court to the case of *Grein v. Gordon* (Pa.), 124 Atl. 737. The opinion in that case is short and we set it forth here in full:

“In determining this appeal from the refusal to take off a nonsuit, we adopt the following excerpts from the opinion of the court below:

“ ‘While ascending a hill, and when near the top, the engine of a car in which deceased [mother of the minor plaintiffs] was riding stalled, because of failure of the ignition system to operate; the brakes were applied and the car brought to rest in the middle, or very near the middle of the highway. [“It was a much-traveled road.” “The car was not dropped back to a place of safety, though it could have been.”] There was room for traffic to pass on either side, and substantially the same amount of room on each side. The lights of the stalled car went off. It was a bright moonlight night. The deceased and another young woman got out and walked up in front of the car when it stopped, and had been standing there about 10 minutes. The driver a young man, remained in his seat and was

trying to adjust the ignition and the fourth member of the party, a young man, was standing on the left running board, giving the driver assistance. Defendant's car approached from the rear. His lights were burning. There is no testimony that his speed was excessive and none that would warrant a conclusion that he did not give warning by sounding his horn. He drove to the right of the stalled car. The two young women started to the right side of the road, the deceased leading, the other a step or two behind. As the deceased was stepping across the ditch at the side of the road ["the ditch is really part of the road"] she was struck by defendant's car and fatally injured. The surviving young woman says she did not see defendant's car or lights until her companion was struck; that, if they had looked, they could have seen the approaching car. [She testified they did not look for cars.]

“Where a vehicle has stopped, and is occupying the middle or substantially the middle of the highway, with sufficient space on either side for other vehicles to pass safely, a driver approaching from the rear may make use of the unoccupied portion of the roadway on either side of the standing vehicle, exercising such care as the circumstances require. If he passes to the right, he cannot be held negligent as a matter of law for so doing. If the driver of this car and its occupants desired that vehicles should not pass to their right, it was their duty to drop their car back to the right side of the road, leaving the remainder open for traffic. A standing vehicle does not exclude traffic from any unoccupied portion of the roadway that may be safely

used. The defendant had no more reason to expect that the young women would step from the front of the car across the road to their right than the driver of a car coming from the opposite direction and passing on the other side would have had to expect that they would step from behind the car across the road to their left. This is not a case of one vehicle overtaken by another traveling at greater speed. Without going into the question of contributory negligence on the part of deceased, in our judgment negligence on the part of defendant was not shown.'

"We need add only that this is a clear case of an unfortunate person suddenly stepping out in front of a moving car; no other inference is reasonable from the established facts, recited above. The facts stated in brackets are taken from the record.

"The judgment is affirmed."

In *Shelley v. Waguespack* (La.), 100 So. 417, the plaintiff had jumped in front of the defendant's automobile when he was only eight to ten feet away. In denying recovery, the court said:

"It is apparent from the foregoing statement of the testimony that there can be no liability attached to the defendant. The accident on the defendant's part was unavoidable."

* * *

"There was no occasion for the defendant to stop his car before he was confronted with the emergency. He saw the plaintiff standing motionless in a place of perfect safety

with no indication that she intended to go upon the street. He had every reason to believe that the plaintiff saw his car approaching, and he had the right to assume that she would retain her place of safety until his car had passed the crossing.

“There is no room for the application of the principle of last clear chance. We have seen that the defendant, after being suddenly confronted with the danger of running into the plaintiff, a danger which he did not and could not foresee, did all that was in his power to avert the collision, and all but succeeded.

“While a person driving an automobile is required to exercise the greatest caution and prudence when passing street crossings used by pedestrians, a like duty devolves upon a pedestrian; and where, in a case like the present one, the pedestrian attempts to effect a crossing without exercising his senses of sight and hearing, and is run into by an automobile, whose driver is without fault, and who had no reason to anticipate the presence of the pedestrian in the street, no liability can possibly attach to the driver of the automobile.”

In *Goodson v. Schwandt* (Mo.), 300 S.W. 795, the court said:

“It is clear that at the instant Goodson discovered he was in danger of being run over by the third automobile he was out of the path or course of the truck. He became confused, suddenly jumped back toward the South, and was instantly struck by the corner of the truck’s left fender. *His jumping back was the proxi-*

mate cause of the collision and of his injuries. We think the evidence for the plaintiff clearly shows that the injury to her husband was purely accidental and unavoidable by the defendant. As said in *Rollison v. Railed*, 252 Mo. 525, 541, 160 S.W. 994, 999:

‘To predicate negligence on two seconds of time is in and of itself a monumental refinement. We cannot adjudicate negligence in such pulse beats and hair splitting, such airy nothings of surmise.’ ” (Italics added.)

And on motion for rehearing the Court further stated:

“As heretofore stated, it was distinctly and definitely proved by plaintiff’s witness that *while Goodson was out of the path and to the left of defendant’s truck, he suddenly jumped back and was struck by the left front fender of the truck. This was the proximate and sole cause of his death.* There was no proof offered to sustain any assignment of negligence; in fact, plaintiff’s evidence disproved all of ~~them~~. But *if there had been proof to support other averments of negligence, the fact that Goodson suddenly jumped back and was struck by the fender and so sustained injuries from which he died defeated plaintiff’s chance for recovery.*” (Italics added.)

See also *Klink v. Bany* (Ia.), 224 N.W. 540; *Faatz v. Sullivan*, 199 Ia. 875, 200 N.W. 321.

POINT III. THE ACCIDENT WAS SOLELY AND PROXIMATELY CAUSED BY THE NEGLIGENCE OF THE PLAINTIFF OR IN THE ALTERNATIVE THERE WAS EVIDENCE FROM WHICH THE JURY COULD FIND THE PLAINTIFF GUILTY OF CONTRIBUTORY NEGLIGENCE.

It is the position of this defendant, that the plaintiff was guilty of contributory negligence as a matter of law. Based primarily on this point, we moved for a judgment of dismissal at the conclusion of the plaintiff's case, and for a directed verdict at the conclusion of the testimony in the case. We believe that it is conclusive from the plaintiff's own testimony in this case, that he failed to keep a proper or any lookout whatsoever for traffic approaching from the south, that he went upon the highway in light colored clothing, which blended well with the light colored automobile and the snowbank, which formed the background upon which approaching drivers from the south would have to discover him; that he failed to put out flares or any other warning devices to warn approaching traffic of his presence on the highway and also of the presence of the disabled vehicle; that he placed himself in a position of peril upon the highway, with his back toward approaching traffic, when he could have given instructions to Mitchell from a point of safety at the side of the highway or at least from the north side of the Mitchell vehicle, where he would have been able to face oncoming traffic; and that he jumped directly into the path of the Maynard vehicle.

We have set forth in our Statement of Facts, the testimony of the plaintiff to the effect that when he first discovered the approaching Maynard vehicle, that it was already off the highway. It must therefore have been very close to him at the time it was first discovered, since the evidence is undisputed that the total distance it traveled off the paved portion of the highway both before and after the point of impact was 52 feet. It is likewise undisputed that there was an unobstructed view to the south for a distance of several hundred feet. The minimum distance estimated from the Wright's garage to the north end of the curve immediately to the south being 250 feet. Other witnesses estimated it as high as 400 feet. The evidence is clear that the curve was not a sharp one and it is reasonably inferable that cars on the curve should be visible to a person standing at the point where the plaintiff stood, although the plaintiff would not be visible to such persons driving such cars by reason of the limited distance illuminated by their headlights and the further reason that they would not shine in the direction of the plaintiff until after they had completely rounded the curve. Assuming that the Maynard vehicle was traveling at 30 miles per hour (approximately 45 feet per second), it would have taken more than six seconds to reach the point of impact after clearing the curve. It would have been visible for several more seconds during the time it was on the curve. Notwithstanding this, the plaintiff failed to discover it until it was almost upon him. He then did the worst thing he

possibly could have done, that is, to run directly into its pathway, although the car was then off the paved portion of the highway and assumedly was not traveling in a direction directly toward the Mitchell automobile. He should have appreciated that by reason of the light colored clothing he was wearing and the light color of the Mitchell automobile and the snowy background, that it would be extremely difficult for drivers to detect his presence. Therefore, there would be incumbent upon the plaintiff a duty to exercise a very high degree of diligence to observe approaching traffic and either to avoid the same or to give fair warning of his presence. The record is clear that he did neither.

We believe that the plaintiff's own testimony is such as to justify a holding of contributory negligence as a matter of law. We have no doubt, that a jury would be entitled to find the plaintiff guilty of contributory negligence for any or all of the reasons above set forth. The Court committed prejudicial error of the grossest sort in holding as a matter of law that the plaintiff was free of contributory negligence.

We invite the attention of the Court to the case of *Singer v. Messina* (Pa.), 167 A. 583. In that case a truck driver parked his truck, without lights, on a highway, on a drizzly, foggy night. The highway was wide enough to carry four trucks abreast. The truck was parked in such a fashion that it extended

diagonally to the center of the highway, thus obstructing all of the traffic in one direction. While standing at the rear of the truck and hanging an unlighted lantern thereon, he was struck by the defendant's truck, and fatally injured. The defendant's truck was being operated at such a speed that it could not be stopped in a distance of less than 18 to 20 feet, although his visibility was only 6 to 8 feet in front of the truck. The court held that the accident was proximately caused, *not* by the negligence of the defendant in overdriving his lights, but by the contributory negligence of the deceased in placing himself in a position of peril without indicating his presence.

Said the Court:

“Appellant's contention, that the primary negligence was that of defendant's driver in proceeding at a speed which did not permit him to stop within the distance covered by the range of his lights, cannot prevail. *The proximate cause of the accident the causa sine qua non, was the gross failure of duty on the part of the deceased in parking his unlighted truck in the unlawful manner he did and in placing himself in a position of obvious danger at its rear without indicating his or its presence by a warning red signal light which might have given notice to the on-coming driver of the peril in front of him.*” (Italics added.)

See also *Sheely v. Sall* (Ill. App.), 3 N.E. 2d 943. That was an action for an injury to a helper on truck which was being backed into a curb preparatory to

unloading, on a busy thoroughfare in the nighttime. The helper stepped in front of an approaching automobile which attempted to pass in front of the truck. The court held that evidence failed to show due care on the part of the helper (plaintiff) and reversed a verdict in his favor.

The court said:

“The evidence is not contradicted that on the east side of the driveway, there were trees and telephone poles and that the plaintiff by taking 3 or 4 steps east could have put himself in a place of safety. . . . Instead of going east to a place of safety he ran west, the only way that a car could pass around the truck in safety. According to his own testimony, he ran directly in front of the automobile as it approached the south.”

* * * *

“This court is reluctant to set aside a verdict of the jury on the ground that the verdict is against the weight of the evidence. After reading this record, we have come to the conclusion that the plaintiff has failed to prove that just before and at the time of the accident in question, he was in the exercise of due care and caution for his own safety.”

See also *Shelley v. Waguespeck* (La.), 100 So. 417; *Pender v. Nat'l Convoy & Trucking Co.*, 206 N.C. 266, 173 S.E. 336; and *Smith v. Joe's Sanitary Market*, 132 Me. 234, 169 A. 900.

POINT IV. THE JURY COULD HAVE FOUND THAT THIS WAS AN UNAVOIDABLE ACCIDENT, NOT CHARGEABLE TO THE NEGLIGENCE OF EITHER PARTY TO THIS ACTION.

Without in any way waiving the arguments above set forth, or conceding an infirmity in said arguments, we suggest that a jury might also have been justified in finding that the accident here involved was in that class of cases known as unavoidable accidents. Clearly the defendant did all that could be done or reasonably could have been expected of him to avoid the accident, after discovering the plaintiff's position of peril. The jury might have found that the plaintiff, confronted with sudden emergency, did not act as an unreasonable man in darting to the east side of the road upon discovering the approach of the defendant's vehicle. In such event, neither party to the accident would be guilty of any negligence and the case would be one of unavoidable accident. In such case the law of course, leaves the loss where it falls and denies remedy to either party as against the other.

See *Klink v. Bany* (Ia.), 224 N.W. 540.

SUMMARY

We believe the proposition is too well established, too fundamental and too familiar to require any citation of authorities, that in ruling on a motion for a directed verdict all evidence and all inferences reasonably de-

ducible therefrom must be construed in the light most favorable to the party against whom such motion is directed. If there is any evidence in this record from which a jury could reasonably find that the defendant was not negligent; or that any negligence on the part of the defendant was not the proximate cause of the accident; or that the plaintiff was guilty of contributory negligence which was a causative factor in producing the accident; or if the jury could find from all the evidence that the accident was unavoidable, then the judgment of the district court must be reversed and the case submitted to the jury on its merits.

We are confident that the record adequately supports our contention that there is evidence on all of these points to support a jury finding in favor of the defendant. We take great comfort from the fact that the verdict of the jury, being very small in amount, is strongly indicative that the jury did not believe that the plaintiff was entitled to recover in this case. Though counsel for the plaintiff have argued to the trial court that the jury was unduly sympathetic to the defendant, we trust that this Court will not be misled by any such assertion, which sounds strange indeed, coming from the mouth of the plaintiff. It is a fact well known to all practitioners and judges, that the sympathies of the jury almost invariably run to the party injured. This is a most normal, human reaction. If the jury was in any wise sympathetic to the defendant and antagonistic to the plaintiff, such

a feeling must have derived from the apparent lack of candor on the part of the plaintiff and many of the witnesses who testified on his behalf. The testimony of the plaintiff and his witnesses, was so contrary to the testimony of the defendant and the passengers in his car and so contrary to the impartial testimony of the police officers who investigated the accident, as to justify the jury in concluding that the plaintiff and his witnesses committed perjury at the trial of this case. One of the witnesses for the plaintiff admitted to making an untrue statement, and the testimony of others was in many respects so inherently improbable as to defy credibility.

Particularly was this true with respect to the testimony as to the icy condition of the roads. It is a matter of common knowledge of which this Court may take judicial notice, that January, 1949, was the coldest month in the history of Utah weather recording. The six people in the defendant's automobile, as well as the two police officers who investigated the accident all testified positively and unequivocally as to the icy condition of the road. The jury would have been well justified in concluding that witnesses for the plaintiff perjured themselves when they testified that the road was not slippery.

CONCLUSION

It is respectfully submitted that the evidence fails to establish as a matter of law any negligence on the

part of the defendant or that any negligence on the part of the defendant caused the injuries suffered by the plaintiff. It is further submitted that the evidence conclusively establishes contributory negligence upon the part of the plaintiff or at the very least, that the evidence would support a finding of contributory negligence by the jury. It is also submitted that the jury might have found that the accident was unavoidable. The judgment of the trial court should be reversed with direction to enter a judgment in favor of the defendant, no cause of action, or in the alternative to grant a new trial on the merits.

Respectfully submitted,

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& CHRISTENSEN,

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