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H. C. Tebbs v. Lynn Peterson : Brief of Plaintiff and Appellant

Utah Supreme Court

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**In the Supreme Court
of the State of Utah**

FILED

JUL 28 1951

H. C. TEBBS,

Plaintiff and Appellant

vs.

LYNN PETERSON,

Defendant and Respondent

Clerk, Supreme Court, Utah

Case No. 7707

BRIEF OF PLAINTIFF AND APPELLANT

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In the Supreme Court of the State of Utah

H. C. TEBBS,

Plaintiff and Appellant

vs.

LYNN PETERSON,

Defendant and Respondent

Case No. 7707

BRIEF OF PLAINTIFF AND APPELLANT

STATEMENT OF CASE

Plaintiff prosecutes this appeal from a judgment dismissing his cause of action. The judgment of dismissal was ordered entered at the conclusion of plaintiff's evidence, which was taken before the court, sitting without a jury. In making its Order of Dismissal, the Court said: "The court in this matter, after reviewing the authorities submitted by both sides, has concluded that the plaintiff is bound by the testimony given in the former hearing. The Court has also concluded that considering the plaintiff's testimony and

the other evidence in this case that he has failed to establish that he didn't come within the provisions or the rule set forth in *Dalley vs. Midwestern Products Company*, for this reason, that in the present case the evidence for the plaintiff shows that the collision occurred on a straight stretch of highway. The plaintiff couldn't have been suddenly blinded by the lights of an oncoming automobile because had an automobile been proceeding in the opposite direction he would have seen those lights immediately after he rounded the curve. If he was blinded at that time he should have slowed down. He had a distance of between two and three hundred feet, as I recall from the testimony, in which he could have slowed down before this collision occurred. The motion for a dismissal will be granted." (Tr. 106)

Thereafter counsel for the parties stipulated that Findings of Fact be waived and the Court make a formal Judgment of Dismissal. (R. 131). It is from the Judgment of Dismissal that plaintiff prosecutes this appeal.

In light of the grounds upon which the case was dismissed it is necessary to review the evidence offered and received at the trial:

Keishi Hirose testified: That he resides at Los Angeles. That he was in an automobile with Mr. Tebbs on January 5, 1947. That they were on their way from Hannah to Duchesne. That when they turned beyond the Strawberry River two cars came with bright lights that blinded him. (Tr. 4) That

right on the corner there was a great big rock. That when they came to that rock and turned there was a big light that made us blind. That when they made the turn there was a truck without lights in the middle of the road. That he thought it was about 40 feet from the truck when he first saw the light. That he tried to stop Mr. Tebbs who he thought stepped on the brakes. That he did not know what happened after the collision because he hit his head and was unconscious for eight or ten days. (Tr. 5)

On cross-examination, he testified: That he went with Mr. Tebbs to see some cattle, which if they were nice cattle he was going to feed them. (Tr. 8) That he did not think the truck was 200 feet away when he first saw it. That he didn't remember making that statement. That he recalled bringing a suit against Mr. Peterson. That he recalled being in the office of Rex Hansen. (Tr. 9) That he recalled being asked the question "How far was this truck ahead of your car when you first saw it?" and he answered "I guess will be two hundred feet." (Tr. 11) That when he first saw the truck, he yelled to Mr. Tebbs. That Mr. Tebbs had good lights; that the truck had no lights behind; that he was not quite sure that he saw the truck two hundred feet away. (Tr. 13)

Harry C. Tebbs, the plaintiff, testified that: He is the plaintiff; that he resides in Salt Lake City; that he is in the insurance business and owns a farm at Ioka. That he was in Duchesne County, Utah on January 5, 1947. (Tr. 14) That on that day he had

been up to Hannah to look at some cattle he had up there; that Hirose, the Jap, accompanied him; that the Jap wanted to see the cattle and if they suited him he and his associates were going to feed the cattle; that in coming from Hannah you first go South and then go onto the main highway. That the night of the 5th of January, 1947 at about 7:00 o'clock he was driving a 1941 Chrysler; that it was dark and cloudy. (Tr. 15) That he was traveling about 35 to 40 miles per hour. That as you approach and go beyond the Strawberry River, your view is obstructed by a large rock that comes out onto the road as you turn and there is a mountain that goes back from the rock a long way so you can't see around the rock. That just after he went around the turn he ran into Mr. Peterson's truck; that the truck was probably 300 feet or maybe a little more beyond the turn on the main road going into Duchesne. That just before he ran into the Peterson truck he was blinded by a very strong light. (Tr. 16) That he could not say definitely how far he was from the truck when he first saw it, but probably fifty-seventy feet. "I can't say." That immediately when he saw the truck, he threw his foot on the brake and swung to the left to avoid hitting it. That he hit the left corner of the truck and part of his car went under the truck; that he was looking straight ahead when he ran into the truck; that he had his car inspected at least once a month and frequently twice a month by the Freed Motor Company. (Tr. 17) That he was driving on the right hand side of

the road and the truck was on the right hand side of the road when the collision occurred. That there were no tail lights or reflectors on the rear of the truck. That Hirose was rendered unconscious in the collision and was seriously injured. That the plaintiff, who was driving the automobile, was pinned under the steering wheel and his ribs were broken. (Tr. 18) That Mr. Peterson and the two Ivy boys helped plaintiff out of the car. (Tr. 18) That just after the collision occurred, plaintiff asked defendant what he was doing with his car parked on the highway, and the defendant replied, "I am looking for a parking." That plaintiff asked to be taken out of the car. (Tr. 19) That plaintiff was taken out of the car to Duchesne and then to the Roosevelt Hospital where X-rays were taken for which he paid \$25.00 (Tr. 20). That the next day he was taken to Salt Lake to the L.D.S. Hospital where he remained for five weeks, nearly six weeks; that at the hospital his lungs were treated by Dr. Viko. That X-rays were taken of his leg and a twenty pound weight was placed on his leg to pull his hip down; that his hip was dislocated and broken. That a Dr. Okelberry operated upon him. He was operated on twice. (Tr. 21) That he entered the hospital at Salt Lake on the morning of the 6th and was operated upon 5 or 6 days later; that the first operation was through the knee and the second operation through the hip into the socket. (Tr. 22) That Dr. Viko treated the lungs and ribs of plaintiff. That plaintiff's wife nursed him most of the time; she was

there most of the time; that he was in the hospital until about the 12th or 15th of February. That he was on crutches after he was released from the hospital for about six months, until about October 1947; that he used a cane to walk with for nearly two years. (Tr. 23) That he continuously suffered pain and his nerves were so upset he couldn't digest his food; his stomach was paining him and he suffered with gas. That at the time of his injury he was in charge of the office of the Occidental Life Insurance Company where he made between six and seven hundred dollars per month from his labor. That he had at least thirty agents working under him. (Tr. 24) That the costs of plaintiff's medical and hospital treatment was: Roosevelt Hospital \$25.00, Dr. Boren \$25.00, L.D.S. Hospital \$59.65 and later \$279.85, Dr. Okelberry \$250.00, Dr. Viko \$50.00, Mr. Dillman for ambulance in taking plaintiff from Roosevelt to Salt Lake \$35.00, for a nurse \$50.00, making a total of \$840.50 (Tr. 25) which amount was later corrected to be \$824.50. That the automobile he was driving was of a value of \$1800.00 immediately before the accident and it was sold as a wreck after the accident for \$400.00 (Tr. 26) That the automobile belonged to the plaintiff, but it was registered in his wife's name, but she did not claim to own it though she frequently used it. (Tr. 27) That since the accident the earning power of the plaintiff is about \$200.00 per month; that his health will not permit the witness to work continuously; that at the time of the accident the plaintiff was 63 years of age. (Tr. 28)

On cross-examination, the plaintiff testified that since the accident he gets down to his office a couple of hours some days, and some days does not go to the office at all. (Tr. 29) That witness gets part of the profits that come to the office. (Tr. 31) That the automobile driven by the plaintiff was in good shape at the time of the accident. It had good brakes and good lights and on low beam you could see approximately 200 feet in head of you. (Tr. 32) That is an estimate but he had not checked it; that he did not know how far the truck was in front of him when he first saw it, but he would estimate the distance as 50 feet; that it couldn't have been 12 feet that he might have said it was 12 feet, but if he did that was wrong; that he may have said twenty feet. (Tr. 33)

Counsel for defendant read from what he claimed was testimony offered at the first trial the following:

“Q: About how far was it from you when you first observed it?”

“A: Well that would be hard to say. I don't think it could have been over twenty feet.”

“A: Yes sir. Because I immediately slapped my right foot down and whirled my car with all the power I could to the left.”

That at one time he said it was not over twelve feet, but later he amended his answer and stated that he thought it was fifty feet; that the place of the accident was one hundred or two hundred feet from the curve. (Tr. 34) That he was confused by the diagram that was used. (Tr. 35) That he placed the HCT

on the diagram but later found he was in error and changed the same. (Tr. 36)

Plaintiff further testified on cross-examination that his memory is clearer now than it was when he first testified; that he was very nervous and upset when he first testified and hadn't put the study and thought on it (what occurred at the time of the accident), that he has now. "My best recollection now is that I was blinded." That he was conscious following the accident; that at the other trial "I mentioned that they (lights) must have blinded me, that is my recollection and there was something prevented me from seeing that car, it must have been blinding me."

That he testified as follows at the former trial:

"Q. Well didn't you tell us, Mr. Tebbs that the truck that you saw on the highway, or the object, was about twelve feet in front of you when you first saw it?

A. That's right, when I saw it.

Q. Then you were watching ahead of you, weren't you?

A. Well, the only thing that has got me there, if I may answer, there could have been a car coming that might have blinded me somewhat.

Q. Well, was there a car coming? Did you see any car coming?

A. I don't know.

Q. Well, in other words the fact there could have been a car coming is just a possibility, you don't remember anything like that, do you, at this time?

A. I don't."

Did you so testify?

“A. I did. The witness further testified. But may I state I was thinking of lights, not car, if you are blinded you can’t see a car, I couldn’t. (Tr. 40)

Q. As a matter of fact, didn’t you tell us before that when you testified the reason you didn’t see the truck was as you came east around the curve your lights shot off the highway, and when you suddenly straightened out to go south-east on the straight-of-way the truck was right in front of you; didn’t you so testify that?

A. I think so, yes sir, that’s right.

Q. The last time we were over here on this case we were here about three and a half days, were we not?

A. I was, yes sir.

Q. And other than what you said there was a possibility there was a car could have blinded you, there wasn’t anything said about lights any time during that trial, was there?

A. This was the only instance I remember of.

Q. And in your testimony at that time that was a mere possibility; isn’t that right?

A. That was right as to lights, but as to car I don’t contend I ever saw a car, I was blinded. That is the confusion of that testimony.” (Tr. 41)

Plaintiff further testified that he was blinded a second after he came around the turn and got straightened up which was approximately 100 feet around the turn; that he was traveling 35 or 40 miles per hour; that the glare of the lights were such that

he couldn't say whether there was one or two lights; that ever since the accident he has had in mind something that prevented him from seeing the car; that he was looking down the highway and driving carefully; that he did not have time to turn to his left and go around the truck because he was doing his best. (Tr. 43) That the truck was in the right driving lane and the other lane was clear; that at the time of the collision his car had been turned about three feet to the left to avoid hitting the truck; that according to his judgment the truck was stopped at the time of the collision. (Tr. 44) That after the collision, plaintiff's car and the truck were six or eight feet apart. (Tr. 46)

Rulon Ashby, a witness called by the plaintiff, testified that he is in the insurance business; that on January 5, 1947 he was on his way, in an automobile driven by Mr. Bodily, from Salt Lake City to Vernal; that on the evening of that day as it was getting dark he saw Mr. Lynn Peterson about half way to the top of Daniels Canyon. (Tr. 58) That the lights had been turned on the Bodily car; that the Peterson truck was loaded with feed and stopped in the right hand lane of traffic; that there were no lights on the rear of the truck. (Tr. 59) That Mr. Peterson was having trouble with the fan that runs the generator and asked Mr. Ashby to call his, (Peterson's) Mother and to send some one to come out and help him. (Tr. 60)

The testimony of Elise Ashby is to the same effect as that of her husband. Mrs. Ashby further testified

that the front lights on Mr. Peterson's truck were on when he was stopped on the road in Daniels Canyon; that there were no rear lights on the truck. (Tr. 64-5)

Mr. Owen Bodily, called as a witness by the plaintiff, testified that he resides in Vernal; that on January 5, 1947 he, in company with Mr. and Mrs. Ashby and Mrs. Bodily, was driving his automobile from Salt Lake to Vernal; that prior to seeing a truck up in Daniels Canyon, he turned on his lights; that he saw Mr. Peterson and his truck about half way up the hill from Heber; that there were no rear lights on the truck; that at the time he saw Mr. Peterson and his truck, it was getting dark. (Tr. 66-7)

The testimony of Mrs. Myril Bodily, the wife of Owen Bodily, is to the same effect. (Tr. 69)

Robert Marchant, a witness called by the plaintiff, testified that he resides at Ioka; that he is acquainted with Mr. Tebbs, (Tr. 69) and with Lynn Peterson (Tr. 70); that he was at the scene of a collision between an automobile driven by Mr. Tebbs and a truck driven by Mr. Peterson about four years ago. That he and Mr. Wilkerson were on their way to Salt Lake in an old Packard with a semi-trailer body built onto the back of it. (Tr. 70) That shortly after they crossed the bridge west of Duchesne an automobile passed them; that was about a mile or a mile and a half East of the place of the accident; that the automobile that passed them was going in the same direction as they were, which was towards Salt Lake. (Tr.

71) That when they pulled onto the top of the hill they could see the headlights of two or three cars down the hill; that as they approached the scene of the accident, they met a car just leaving and the truck was moving when they first passed it. (Tr. 72) That the Tebbs car was not moving when he first saw it; that when he first went over to the cars they were probably eight feet apart, maybe a trifle more; that the truck was right near the center of the road when he first saw it; that after it was moved two of the left two wheels were off the hard surfaced portion of the highway. (Tr. 73) That he saw Mr. Peterson who asked for and got a pair of pliers from Mr. Wilkerson with whom Mr. Marchant was riding; that when he arrived the Jap was still in Mr. Tebbs car in a semi-conscious condition; that he remained at the scene of the the accident from one-half to an hour, perhaps more than that. That there were no tail-lights on the truck; there was a light on the right-hand side some eight or ten inches from the corner upon the south side as the truck faced east; (Tr. 74) that there were no other lights or reflectors on the back end of the truck; that when he first saw the Tebbs car it was across the highway; that the collision occurred near the hotel sign. (Tr. 75-6) That the car that took Mr. Tebbs away pulled out just as they got to the scene of the accident. (Tr. 77)

David Marlin Wilkerson, a witness called by the plaintiff, testified that he resides at Roosevelt, Utah and is a welder and mechanic, (Tr. 83) and has been

such since 1942; that from his experience he can tell whether a break in a piece of metal is a new or old break; that he was in company with Mr. Marchant in a Packard with a trailer on his way to Salt Lake when they came to the place where a collision had occurred between the automobile of Mr. Tebbs and the truck of Lynn Peterson; that the collision occurred about four or five miles west of Duchesne. That a number of cars passed them between the scene of the accident and Duchesne; that one car passed probably about a mile east of the point of collision; that the witness was traveling about 20 to 25 miles per hour; that the car that he recalls passing him was traveling about 30 or 35 miles per hr. (Tr. 85) That when he arrived at the top of the hill east of where the accident occurred, he noticed the lights and then a spotlight was wavering across the road in front of them; that he probably remained at the scene of the accident about an hour; that the witness helped Mr. Peterson put out flares; that there were no lights on the rear of the truck and the witness did not notice any reflectors; that he looked under the truck to see if there were any tail lights (Tr. 86); that there had been a tail light on the side of the truck on the frame, but the wires weren't connected; that the wires had been broken for quite sometime; that one set of the wires was rusty and the other was full of dirt and corroded; that there was a clearance light along the left-hand side that had been broken and one on the right hand side that was all right, but the wires had been broken

off; (Tr. 87) that the clearance light was along the side of the truck probably eight inches back of the corner along the side of the frame toward the front. (Tr. 88) That when he arrived at the scene of the accident, the truck was on the oil and the car was kind of kitty-corner over the yellow line. They were about eight feet apart; that the left-hand dual of the truck was right near the yellow line; the truck had ten tires; some of the tires were flat; that the truck was loaded with sacks which were brown and appeared to contain feed of two hundred pounds each. (Tr. 90)

On cross-examination, he testified that the channel frame on the back of the truck had been bent up; that the auto had evidently hit the truck on the left side. (Tr. 94)

Mrs. Dot F. Tebbs, the wife of the plaintiff testified about the nature of the plaintiff's injuries and that she did not own the automobile that her husband was driving at the time of the collision, but as such matters do not bear directly on the question presented for review, we shall not abstract her testimony. (Tr. 100 et seq.)

After the plaintiff had offered the evidence which we have heretofore summarized in some detail, the trial court took the case from the jury and orally made the order which we have heretofore quoted in this Brief. Later on May 12, 1951 the Judge signed the written Order of Dismissal which was filed in the court below on May 15, 1951 (R. 131) It is from the Judgment of Dismissal that plaintiff prosecutes this appeal.

ASSIGNMENTS OF ERROR

The plaintiff assigns as error the trial court's Judgment of Dismissal. The error committed by the trial court in dismissing the action may be discussed under two points, they being:

POINT ONE

The trial court was in error when in its oral decision it in effect held that the plaintiff was bound by the testimony given by him at the former trial and being so bound he could not be heard to now claim that he was blinded by the lights of a motor vehicle coming from the opposite direction which prevented him from seeing the truck in time to avoid the collision which resulted in his injury. (R. 131)

POINT TWO

The trial court was in error in dismissing the cause on the ground that as a matter of law the plaintiff was guilty of contributory negligence which proximately contributed to the plaintiff's injury and the damage to his automobile. (R. 131)

ARGUMENT

POINT ONE

PLAINTIFF IS NOT BOUND BY THE TESTIMONY WHICH HE GAVE AT THE FIRST TRIAL AND EVEN IF HE IS SO BOUND, SUCH TESTIMONY DOES NOT AS A MATTER OF LAW PRECLUDE HIM FROM RECOVERY IN THIS ACTION.

It will be noted that Mr. Tebbs, the plaintiff, at a former trial testified that he did not see the truck until he was within about twelve feet from the truck (this testimony was later changed to fifty feet). Mr. Tebbs was asked these questions and gave these answers:

“Q. Well didn’t you tell us, Mr. Tebbs, that the truck that you saw on the highway, or the object, was about twelve feet in front of you when you first saw it?

A. That’s right, when I saw it.

Q. Then you were watching ahead of you, weren’t you?

A. Well, the only thing that has got me there, if I may answer, there could have been a car coming that might have blinded me somewhat.

Q. Well, was there a car coming? Did you see any car coming?

A. I don’t know.

Q. Well, in other words, the fact there could have been a car coming is just a possibility. You don’t remember anything like that do you at this time?

A. I don’t.”

Plaintiff gave this version of his reason for so testifying on the former occasion.

“Q. Did you so testify?

A. I did, but may I state I was thinking of lights, not cars. If you are blinded, you can't see a car. I couldn't.

Q. As a matter of fact didn't you tell us before that when you testified the reason you **didn't see the truck** was as you came east around the curve your lights shot off the highway, and when you suddenly straightened out to go south-east on the straight-of-way the truck was right in front of you; didn't you so testify that?

A. I think so, yes sir, that's right.”

Further on in his testimony, he answers that he was confused, in that he was being questioned about a car and he had in mind lights; that he did not contend that he saw a car; that he was blinded so that he could not see the car; that it might have been a motorcycle but he believed it was a car. (Tr. 41)

The testimony of the plaintiff as to there being bright lights on a motor vehicle approaching from the east just before the collision is corroborated by Mr. Hirose, the Jap, who was riding in the front seat with the plaintiff. Mr. Hirose testified that he was blinded and did not see the truck until within fifty feet of it. Certainly if the Jap was blinded as he testified he was, it is a reasonable conclusion that the jury might reach that the plaintiff was blinded. The testimony of Messrs. Marchant and Wilkerson tends to corroborate the testimony of plaintiff and the Jap in that an automobile passed them at a time when it might well have been

in such a position on the road that it could have prevented the plaintiff in the exercise of due care from seeing the truck until it was too late to avoid hitting it.

Moreover, the authorities and adjudicated cases do not support the doctrine announced by the trial court in his oral decision that the plaintiff is bound by the testimony he gave at the first trial. The authorities are to the contrary. It is a matter of every day occurrence that a witness on further reflection concludes that he has been in error in his testimony and later seeks to correct the error. Indeed if a witness concludes he has erred in giving testimony, it frequently becomes his duty to correct the same. Any other rule would frequently perpetuate an injustice.

The following are among the text writers and adjudicated cases which are at variance with the holding of the trial court as to the effect of prior testimony given by a witness:

The law touching the effect of former testimony given by a party to an action is thus stated in 31 C.J.S., Section 402, page 1211;

“Testimony by a party on a former trial of the case or of another case will not estop him from giving testimony contradictory thereto if he can show his former testimony was given inconsiderately, by mistake, or without full knowledge of the facts. His former testimony is not conclusive against him even though it is unexplained.”

A number of cases are cited in a foot note to the text and we have added a number of other cases to

the same effect. Among the cases so holding are: *Jones v. Major*, 55 S.E. (2nd) 846; 80 Ga. app. 223; *Smith v. Producers Cold Storage Co.* (Mo) 128 S. W. (2d) 299; *Pogue v. Great Northern R. Co.*, 148 N. W. 889; 127 Minn 79; *Schroeder v. Wells*, 298 S. W. 806; *Little v. Straw* (Pa) 192 Atl 894; *Rowe v. Goldberg Film Delivery Lines* 50 Ariz. 285, 72 Pac (2d) 432; *Goodwin et al v. Robinson et al.*, 22 Cal App (2) 283; 66 Pac (2d) 1257; *Kyne v. Kyne*, 38 Cal App (2) 122; 100 Pac (2d) 806; *Hall v. Bakersfield Community Hotel Corporation*, 52 Cal App (2) 158; 125 Pac (2d) 889; *Roge v. Valentine*, 280 N.Y. 268; 20 N.E. (2d) 751; *McClary v. Mitchern*, 29 S. E. (2d) 329. The case of *Morton v. Hood* tends to support the general rule, 105 Utah 484; 143 Pac (2d) 434.

The foregoing cases go much farther in support of the view that prior statements made by a party or other witness at a former trial are not binding at a subsequent trial than is necessary to go here. Indeed, the testimony of the plaintiff at the prior trial is not necessarily at variance with the testimony he gave at the trial which is here on appeal. It will be noted at the former hearing, counsel for the defendant on his cross-examination studiously refrained from inquiry about any lights and confined his questions as to whether or not the witness saw a car. If the witness had said he saw a car as he rounded the curve just before the collision occurred, counsel would doubtless have argued that the witness could not see the car if he was blinded. The plaintiff apparently did not want to fall for such entrapment.

POINT TWO

THE FACTS IN THIS CASE DO NOT SHOW THAT THE PLAINTIFF AS A MATTER OF LAW WAS GUILTY OF CONTRIBUTORY NEGLIGENCE THAT PROXIMATELY CONTRIBUTED TO HIS INJURIES AND THE DAMAGE TO HIS AUTOMOBILE.

In its Oral Decision the court took the view that this case falls within the doctrine announced in the case of *Dalley v. Mid-Western Dairy Products Co.* 80 Utah 331, 15 Pac (2d) 309. The facts in the Dalley case and the cases upon which it is based are so unlike the facts disclosed by the evidence in this case that the Dalley case may not be said to be a precedent for the ruling here complained of.

In the Dalley case, a truck was parked on the oiled portion of the highway without any lights in the rear. The road over which Mr. Dalley was driving was a level oiled highway and was straight for a mile or more before Dalley reached the place where the truck was parked; there was nothing to obstruct Mr. Dalley's view; Dalley met no one and no one passed him in the vicinity of where the truck was standing; there was no wind, the moon was not shining, it was not cloudy, it was an ordinary summer night; Dalley was traveling about 25 miles per hour. He could have brought his car to a dead stop in 50 feet at that speed, if he had seen the truck forty feet away he thought he could have stopped or turned and thus avoided the collision that resulted in his injury.

It is quite apparent that the controlling facts in this case are so unlike the facts in the Dalley case that the former case is of little value in reaching a proper conclusion in the present case. The cases are alike in that a truck, contrary to law, was parked on the oiled portion of the highway without any lights on the rear of the truck. In such particular the cases are alike and conclusively show that the defendant in each case was guilty of negligence at the time of the collision.

In this case the evidence shows that a large rock obstructed the view of the plaintiff at a point where the road turned from an easterly to a southeasterly direction and a ridge or mountain extended from the large rock so that one approaching from the west could not see around the rock. Unlike the facts in the Dalley case, the evidence in this case shows that at a point about 100 feet beyond the curve (as plaintiff rounded the curve) a bright light blinded plaintiff and his companion so that he, for an instant, was unable to see the truck which was loaded with brown sacks and without any lights on the rear of the truck.

The testimony in this case shows that the defendant's truck was parked at a distance estimated from 200 to 300 feet Southeasterly from the curve in the road where the big rock obstructs the view of one approaching from the West towards the East (Tr. 34 and Tr. 16). The evidence also shows that as plaintiff had rounded the curve and had straightened his automobile so that the lights threw down the highway and

at a point about 100 feet from the curve, he was blinded by the lights of the oncoming car (Tr. 43). He saw the truck when a distance of between 50 and 70 feet from it (Tr. 17), and during the time it took him to cover that distance he was making every effort to avoid the truck. He, therefore, was blinded a distance of from 50 to 150 feet during which he did not see the defendant's truck on the highway. The reaction time of men of his age is at least a second and traveling at a speed of thirty-five or forty miles an hour he had to have from fifty to sixty feet before he could react. It is thus apparent that the short interval of time did not give him an opportunity to slow down or stop.

If the truck had been equipped with red lights on the rear it is reasonable to assume and the jury would certainly have been justified in finding that plaintiff would have seen the red lights in time to avoid the collision. The very purpose of requiring red lights on the rear of motor vehicles is to warn the traveling public that there is danger ahead.

It will be noted that the Dalley case was decided by a two to three decision. The decision has been subject to some adverse criticism but has not been reversed. However, this Court has refused to extend the doctrine of that case. In the cases of *Nielsen v. Watanabe*, 90 Utah 401, 62 Pac (2d) 117; *Trimble v. Union Pacific Stages*, 105 Utah 457, 142 Pac (2d) 674 and *Moss v. Christensen-Gardner Inc.*, 98 Utah 253, 98 Pac (2d) 363, this Court has held that the doctrine announced in the majority opinion in the Dalley case is subject to limitations and exceptions.

In the cases of *Nielsen v. Watanabe* and *Moss v. Christensen-Gardner Inc.*, supra, this Court held that when one is blinded by the lights of an oncoming automobile and while so blinded and without sufficient time to slow down collides with an automobile or other obstruction unlawfully placed on a highway without warning signals or lights, he may not be said to be guilty of contributory negligence. In the Trimble case the Court followed the same rule but applied the exception to a driver of a vehicle whose vision was temporarily restricted by fog.

To the same effect is the doctrine announced in 3-4 Huddy Cyclopedia of Automobile Law, 9th Edition, Page 59, Section 30 and the cases there cited.

The testimony in this case brings it clearly within the law announced in the foregoing cases.

We find it difficult to follow the Court's logic in reaching the conclusion he did and still greater difficulty in believing that it was within the province of the Court to lay down a rule of law to the effect that it was the duty of the plaintiff to slow down or stop when he saw an automobile approaching from the opposite direction. If the operator of a motor vehicle is required to slow down or stop when he sees an automobile approaching from the opposite direction, we wonder what will happen to traffic, especially where there may be two or more automobiles proceeding in the same direction in close proximity to each other and especially out in the country where traffic moves at

a greater speed. If the automobile in the lead should suddenly slow down or stop, the automobile immediately behind might well collide with the automobile in the lead thereby resulting in injury and liability to the operator of the automobile so suddenly slowing down or stopping.

Moreover, the plaintiff did not testify that he was blinded immediately after he made the turn. Section 57-7 198 (2), Utah Code Annotated, requires that the headlights on automobiles shall be of sufficient intensity to reveal persons and vehicles at a distance of at least 200 feet. Section 57-7 191 of the Code provides that a parked or stopped vehicle must be equipped with a red light in the rear visible at least a distance of 500 feet. The evidence shows that the plaintiff had his lights inspected at least once a month and that the same were in good condition. That being so, his lights should reveal the parked truck at a distance of 200 feet from the rear. If the plaintiff was traveling at a rate of 35 or 40 miles per hour he was covering between 50 and 60 feet per second. He was blinded a distance of from 50 to 150 feet. He had only between one and three seconds to slow down or stop. If the law is so exacting as the trial Court indicates in his oral opinion, namely that a driver of an automobile even though temporarily blinded, has no cause to complain of injuries sustained by him because another, at night parks his truck without rear lights on a public highway, then no useful purpose is served the public by requiring vehicles to be equipped with lights.

CONCLUSION

We submit that the Court should have submitted the case to the jury and that this Court should remand the case to the Court below with directions to grant a new trial and that plaintiff should be awarded his costs herein.

Respectfully submitted,

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