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Henry Early v. Karl L. Jackson : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

HENRY EARLEY,

Respondent,

— vs. —

KARL L. JACKSON,

Appellant.

FILED

NOV 29 1951

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Clerk, Supreme Court, Utah

RESPONDENT'S BRIEF

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Attorneys for Respondent

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IN THE SUPREME COURT
of the
STATE OF UTAH

HENRY EARLEY,

Respondent,

— vs. —

KARL L. JACKSON,

Appellant.

Case No.
7725

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

This is an action to recover damages sustained by the plaintiff in an automobile accident that occurred on Utah State Highway No. 3 near Laketown, Utah, on the evening of April 3, 1950. The defendant, Merne V. Muder, was never served with summons and the action was tried against the defendant, Karl L. Jackson, alone. Judgment was rendered against the defendant, Jackson, and in favor of the plaintiff. The defendant, Jackson, filed a motion for judgment notwithstanding the verdict

which was denied by the court. The appeal is from the judgment and from the denial of the motion for judgment notwithstanding the verdict.

The case was submitted to the jury by the trial court on the question of the negligence of the defendant, the contributory negligence of the plaintiff, and proximate cause. The defendant contended, in the lower court, as he does here, that the plaintiff was guilty of contributory negligence which precluded his recovery. The plaintiff contended that the negligence of the defendant was the sole proximate cause of the accident. The case was submitted to the jury under appropriate instructions, from which the defendant has not appealed, and the jury by its verdict found that the negligence of the defendant was the sole proximate cause of the accident.

The only question presented by this appeal is, therefore, whether there was sufficient evidence from which the jury could determine that the negligence of the defendant was the sole proximate cause of the accident.

THE FACTS

For the most part the facts as set forth by the appellant in his brief are correct, but do not present the situation in full from the respondent's standpoint. We will, therefore, make our own statement of the facts as we deem them material to our presentation of the case.

The accident occurred on April 3, 1950, at about 7:00-7:30 P.M., (R. 98), on Utah State Highway No. 3, (R. 99), approximately one-half a mile or more west of Laketown, Utah, (R. 125). The weather was clear. It

was dark. The visibility was good and there was no fog or mist, (R. 98, 109, 181, 199, 265). The highway proceeded in a general easterly and westerly direction, (R. 99), and was an oiled road approximately 20-21 feet in width, (R. 162). Near the point where the accident occurred a creek running north and south crosses under the highway in a culvert, (R. 99, 100). There was a gradual drop of about 6 or 7 feet from the highway down to the creek bed, (R. 104, 170). The road was straight and practically level for a distance of a half a mile west of the culvert at which point the highway curved to the north, (R. 100-101). It was also straight and level for a considerable distance east of the culvert, (R. 100). There was testimony that the shoulders on either side of the highway were approximately 3-4 feet in width, (R. 101), although this is not indicated by Exhibit 2 which was introduced in evidence by the defendant to show the highway at the scene. There was testimony that there were guard posts in place at the scene of the accident, and one of the witnesses testified that these guard posts were located at the edge of the hard surfaced portion of the road, (R. 163). There was other evidence that the guard posts were located at the edges of the shoulders, (R. 103). There was testimony that it had rained in the afternoon and that the highway was damp at the time of the accident, (R. 98). One witness testified that the highway was fairly dry, (R. 199), and one of the defendant's witnesses testified that there was a thin coating of ice on the road, (R. 239). The photograph, Exhibit 2, was introduced in evidence, looking east along the highway

and showing the guard posts referred to by the witnesses.

A Ford one-half ton pick-up truck, (R. 105), which the plaintiff Earley had been operating was parked on the highway over the culvert headed northwest with the front end thereof about a foot south of the center line, (R. 106, 178, 210). The rear wheels were on the south shoulder 2 or 3 feet off the oiled portion of the road with the rear of the bed of the truck sticking out over the edge of the culvert, (R. 106). It was stipulated between the parties that the truck which the plaintiff had been operating was 13½ feet from the front bumper to the furthest rear portion of the rear tire and that the overall length of the truck from the front bumper to extreme rear portion of the bed of the truck was 15½ feet, (R. 215). The headlights on the Earley truck were burning, (R. 111, 112, 268, 269).

At the time of the accident the plaintiff was running down the north edge of the highway in a westerly direction waving his arms to warn the defendant's driver who was proceeding east along the south side of the highway toward the plaintiff's truck, (R. 111). There was evidence that the plaintiff was 100-150 feet west of the culvert, (R. 112, 146), and as close to the north edge of the road as he could get, (R. 153-154). The plaintiff testified that he could not very well have got entirely off the the oiled portion of the road at that point, (R. 147). He further testified that there was at least 8 feet between him and the center line on the north side of the oiled portion of the road at the time of the accident, (R. 157). An examination of Exhibit 2 would confirm the

plaintiff's contention that he could not very well get entirely off the oiled portion of the road. Plaintiff testified that he heard the brakes screech on the defendant's vehicle and that was the last thing he remembered, (R. 112). He testified that by his presence he had not blocked the north half of the road, (R. 145); that he didn't know that the defendant's vehicle would have to turn to the left but expected that it would stop as it could have done, (R. 146). He further testified on re-direct examination that he knew the position of the truck on the highway created a hazard if someone came up the road at a high rate of speed and wasn't watching where he was going, but he did not feel that his presence on the north edge of the highway created a dangerous situation, (R. 157-158). Earley was knocked or carried into the creek and following the accident was brought out of the creek by the witness Willis, (R. 230, 278, 279).

Roland Reese, a State Highway Patrolman, testified that he investigated the accident a day or two following its occurrence; that neither vehicle was present on the scene at that time, (R. 161). He stated that he observed some skid marks on the highway in the vicinity of the culvert. These marks at the west end were about in the middle of the highway, (R. 165); that they proceeded for a distance of 114 feet 6 inches to the east at which point they left the oiled portion of the highway; that there were 30 more feet of skid marks on the north shoulder, (R. 164); that the marks on the shoulder indicated that the vehicle was skidding sideways, (R. 165-166), as it went over the culvert tearing up the gravel;

that there was no physical evidence from which he could determine the position the plaintiff occupied on the highway at the time of the accident, (R. 167).

Harold Johnson testified that he arrived on the scene of the accident at about 8:00 P.M. on the evening of the accident, (R. 175); that he saw the lights on the two vehicles involved in the accident when the car in which he was riding was about one-half a mile to the east, (R. 176); that he was present on the scene when they pulled the plaintiff out of the creek, (R. 177); that the truck operated by the plaintiff was on the south side of the highway leaning a little to the west of north with its lights burning with the front bumper of the pick-up almost to the center line, (R. 178). He observed the defendant's truck in a slough, (R. 179), about 40 feet east of the culvert and about 10-12 feet north of the highway. It was headed south, (R. 179, 180); that he heard Muder, the defendant's employee, say: "I was driving awful fast, and I hit him awful hard and I'm afraid he is dead." (R. 183). He also heard Muder say that he had not seen the Earley truck at all but just saw the man out waving his hands, (R. 184, 186); that the defendant's truck had not come in contact with the truck which had been operated by the plaintiff at all, (R. 187); that he observed some skid marks on the highway extending over to the point where the defendant's vehicle came to rest; that they started about 100 feet west of the culvert and kind of zig zagged; that as they got close to the culvert it looked as though the car turned sideways and started to skid sideways about 20 or 25 feet west of the culvert where the rear wheels went

off onto the north shoulder and made marks in the gravel over the culvert to the point where the defendant's vehicle rolled backwards into the slough, (R. 186).

Harold Johnson also testified that he observed the plaintiff's hat and glove on the north shoulder of the road, (R. 188), about 100 feet west of the culvert where the first tracks were visible, (R. 187).

Farrell Johnson, another witness, testified that he had been traveling east along the highway and arrived on the scene of the accident, (R. 195); that he observed the Earley truck; that its lights were burning, and he had seen the lights when he turned the bend a half a mile west of the truck, (R. 196); that the Earley truck was facing slightly northwest because he saw the lights when he made the bend, (R. 196, 197); that he drove over the culvert past the Earley truck without difficulty and without leaving the paved portion of the highway, (R. 197); that he observed the defendant's truck in the slough on the north side of the road facing the highway about 25 feet east of the culvert with its front end 8 feet north of the paved road, (R. 198); that later that evening he made observations at the scene and followed tracks from the point where the defendant's vehicle was in the slough to the west until he could see them no longer; that they started approximately 100 feet or maybe a little more west of the culvert, (R. 202), and went diagonally across the road until they reached a point approximately opposite where the Earley truck was sitting where the tracks indicated that the hind wheels had swung around onto the shoulder of the road; that the tracks continued east until

the truck lost its momentum and evidently skidded backwards into the slough, (R. 203); that he found Earley's glove lying on the north shoulder of the highway and his hat a few feet from it on the ground about 50-75 feet west of the culvert, (R. 204).

Lola Johnson, wife of Harold Johnson, also testified that the Earley truck was headed in a diagonal north-westerly direction, (R. 210); that after they stopped on the scene she ran down the orange line in the center of the road beyond the truck and that the truck was to her left as she was running west and she did not come in contact with it so that it was all south of the center line, (R. 210-211); that she saw black skidding marks on the oil and a furrough dug along the road in the gravel on the north shoulder; that she could not tell where the furrough in the gravel was with reference to the point where the creek crossed under the highway, (R. 212); that she heard the defendant's employee, Muder, say that he couldn't believe that Earley was alive because he had hit him so hard, (R. 214).

Sherman Lutz, who at that time was Deputy Sheriff of Rich County, testified that he was notified of the accident about 10:05 P.M., (R. 217), and the following morning made an investigation; that from where the defendant's car came to rest in the slough he observed skid marks extending to the west for a total distance of 144 feet 6 inches, (R. 218); that from the point where the marks first started at the west to the point where they left the oiled road on the north was 130 feet; that at the west end the marks started on the south side of the high-

way in the lane for eastbound traffic; that there were two sets of marks, one caused by each of the wheels, and that both sets at the west end were in the lane for eastbound traffic, (R. 219); that according to the marks the car traveled approximately 10 feet in the eastbound lane before turning to the north, (R. 220); that the defendant's truck stopped about 12 feet east of the culvert north of the highway facing south, (R. 222).

Elijah C. Willis testified that he lived about 1000 feet northwest of the culvert, (R. 228); that while at home he noticed a car parked on the highway with the lights toward his house; that he walked from his home towards the car; that when he was about 300 or 400 feet away from the culvert he observed the defendant's vehicle coming from the west, (R. 229); that it was about at the bend in the road approximately one-half a mile away, (R. 231); that he could hear the engine as it was making a lot of noise at that time, (R. 235); that he did not see the accident but pulled the plaintiff out of the creek and thought he was dead, (R. 230); that he observed a hat and one glove about on the edge of the oiled road at a guard post approximately 45 feet west of where Mr. Earley was in the creek, (R. 233). He admitted having given a signed statement to Mr. Burns, one of the defendant's attorneys, in which he said: "When I was about 200 feet from the highway and as the moving truck was about 50-100 feet from the parked truck I heard a man yell and I also heard the truck hit something, and I thought that the truck had hit one of the guard posts." (R. 239).

Merne V. Muder, the defendant's employee, testified

that he was operating the defendant's 1948 three-quarter ton Chevrolet pick-up truck at the time of the accident, (R. 251), with the headlights burning on high beam, (R. 253); that he was traveling in an easterly direction along the highway at a speed of 45-50 miles per hour, (R. 266, 267); that the road was straight for a half a mile west of the culvert, (R. 253); that he had driven over the highway many times before and was thoroughly familiar with it, (R. 252); that when he rounded the curve one-half a mile west of the culvert, he observed the lights at Laketown and also the lights on a vehicle which was parked by a pool hall in Laketown, (R. 254-255); that Laketown was located about a half a mile east of the culvert, (R. 252).

“Q. Now when you rounded the curve and enter that straight stretch you had no difficulty insofar as your visibility was concerned in seeing the lights of an automobile clear over by a pool hall in Laketown, about a mile away? That is correct, isn't it?

A. That's correct.

Q. And there wasn't any fog or any mist or anything that interfered with your visibility then?

A. Not in the position I was on the highway.”
(R. 265)

Exhibit 3 was introduced in evidence and identified as the defendant's truck which Muder was driving and the witness Muder testified that the damage shown thereon was that caused in the accident, (R. 262-263).

Muder further testified on cross examination as follows:

“Q. Now you stated that as you were coming down the highway at a speed of forty five, where you state it might be as high as fifty miles an hour, that you observed a light on the highway, a light or lights. Did you see just one or two lights? What did you see?

A. It gave me the impression it was a small, low burning, dim light.

* * *

Q. Which way did it give you the impression that that vehicle on which you observed this small, dim light was headed?

A. Well, after I had seen the light I could see that the pickup was across the lane behind me.” (R. 267)

“Q. Headed which way?

A. North.

Q. * * * Was it headed straight north or was it at an angle, one way or the other?

A. I couldn’t say positive.

* * *

Q. In any event, there was no lights on that vehicle that were facing directly towards you, or in your general area?

A. No sir.” (R. 268)

* * *

“Q. And you weren’t blinded by the lights of any westbound vehicles?

A. No sir.

Q. And then when you were two to three hundred feet away you distinctly saw a low light?

A. Yes sir.” (R. 268)

“Q. And where did that light appear to be? On what part of the highway?

A. Pretty close to center, I would say.

* * *

Q. At that time you didn't know what it was, did you?

A. I had my impression of it.

Q. You didn't know definitely?

A. No, I didn't know definitely.

Q. You knew there was something there, though?

A. Yes.

Q. And then you applied your brakes, you said, when you were two to three hundred feet away?

A. Yes.” (R. 269)

* * *

“Q. Well, weren't you concerned about bringing your vehicle under control so that whatever this light might be that was up there in the center of the road that you could stop if need be?

A. I wanted to bring it to a stop and keep it under control while I was doing so, yes.” (R. 269)

* * *

“Q. And you had pressure on the brake pedal from that time up until the time you saw Mr. Earley, didn't you?

A. Yes.” (R. 270)

* * *

“Q. * * * Now when did you first see the outline of a vehicle on the highway? How far away were you when you saw it, saw an outline of a vehicle?

A. I saw it I guess what you would call most

right, right approximately about the same time I saw the light; just a second later maybe.

Q. Well, how close were you to it? How far did you travel from the time you had first observed this low glowing light in the middle of the highway until you could tell what it was up there on the highway? How far did you travel?

A. Oh, I—probably fifty feet.” (R. 270)

* * *

“Q. So you were two to three hundred feet away when you first saw it and then you traveled about fifty feet when you could tell it was a vehicle up there, is that right?

A. Yes.

Q. Now at that time could you tell where the vehicle was on the highway?

A. Yes.

Q. Well, where was it?

A. Across my lane.

Q. All right. How far did the front of it project out on to the highway? Could you tell at that time?

A. Well, I saw, my impression was slightly over the yellow line.” (R. 271)

* * *

“Q. You knew there was a culvert there? You have gone over this road thirty six times before, did you know that was in the general area where the creek was?

A. Yes.

Q. You knew that at that time when you were two hundred to two hundred fifty feet away?

A. Yes.

Q. Did you put your brake on harder at that time?

A. Yes." (R. 271-272)

* * *

"Q. I mean when you were two hundred to two hundred fifty feet away you didn't even know then that you could even get past that truck, did you?

A. I didn't, no. No, not positive, no." (R. 272)

* * *

"Q. Then you continued with the increased pressure on the brake from that point down until you saw Mr. Earley?

A. Well, it may have been a little more.

* * *

Q. It kept getting more all of that time?

A. That's right.

Q. Where did you say Mr. Earley was; how far from the truck when he got hit?

THE COURT: You mean the parked truck?

Q. The parked truck, not yours.

A. Thirty or forty feet." (R. 274)

* * *

"Q. Well, it could have been as close as thirty feet to the parked truck and it might have been as far as fifty, is that correct?

A. That's right." (R. 274)

* * *

"Q. And when you first saw Mr. Earley where was he on the road?

A. The way it appeared to me it was close to the center of the south lane, north lane.

Q. Well, you mean he was about in the middle

of the westbound lane of traffic? Is that what you mean?

A. Yes sir." (R. 275)

* * *

"Q. Well, as you were going straight down the road with your lights on high beam they were illuminating all of that twenty foot strip of road? There isn't any doubt in your mind about that, is there?

A. No.

* * *

Q. And yet you didn't see Mr. Earley until you got within twenty to thirty feet of him?

A. No sir." (R. 276)

* * *

"Q. Well, when you were two hundred feet away you started moving over to the north half of the road, is that right?

A. That's right.

Q. And from that time on your lights, if anything, would be more concentrated on the north half of the road than any other part of the road, wouldn't they?

A. Yes.

Q. So for a distance of two hundred feet from the point of the accident, or the point where the truck was stopped your lights were illuminating very clearly all of the north half of the road and you were braking during all of that time?

A. That's right.

Q. How fast were you going when you first saw Mr. Earley?

A. My judgment on it would be around twenty five miles an hour." (R. 277)

* * *

“Q. Now when you saw him you said you applied your brakes very heavily, is that correct?

A. Yes.” (R. 278)

* * *

“Q. And you hit Mr. Earley with such force when you hit him that you smashed in the whole left front portion of that hood, didn’t you?

A. I did, yes.

Q. And you also damaged part of the grille?

A. Yes.” (R. 278)

“Q. And then after hitting him you either knocked or carried him from a point thirty to fifty feet west of the truck into the creek on the culvert of which the truck was stopped, didn’t you?

A. Yes.

Q. That would mean he was knocked or carried from the point of impact about thirty to fifty feet?

A. Yes.

Q. And then how far after that did your truck travel from where the Earley truck was stopped on the road?

A. Well, I would say—I couldn’t say positive on it.

Q. Well, approximately?

A. Probably ten or fifteen feet east and off north, off the road.

Q. And how far off the road?

A. To the bottom of the embankment where it starts up.” (R. 278-279)

* * *

“Q. Now part of this distance that you were traveling after you struck Mr. Earley you were in a sideward skid, weren’t you?

A. Yes.” (R. 279)

* * *

“Q. * * * So that after you hit Mr. Earley and knocked him approximately thirty to fifty feet your car still had enough momentum so it went into a sideward skid and skidded approximately thirty feet?

A. Yeah, off on an angle. It wasn't a straight slide.” (R. 280)

Muder testified that there was no contact at all between the car which he was driving and the parked truck, (R. 280).

Muder testified that there was no mist, fog, or anything to interfere with his visibility, (R. 265, 282), and that regardless of sidelights or flares he had no difficulty in seeing the outline of the truck at a distance of 200-250 feet, (R. 284).

POINTS

The defendant contends that the plaintiff was guilty of contributory negligence as a matter of law. First, it is claimed that the Earley vehicle was unlawfully parked upon the highway; Second, that there were no flares or lights to warn of the presence of the Earley vehicle; and, Third, that the plaintiff unlawfully ran down the north side of the highway when by law he should have proceeded down the left side thereof. All of these matters merely presented questions of fact for the jury to consider in determining the proximate cause of the accident. In answer to appellant's brief the respondent sets forth the following points:

I. Whether the position in which the Earley truck was parked on the highway at the time of the accident proximately contributed to the accident was a question of fact to be decided by the jury.

II. Whether the absence of flares or warning lights on the Earley truck proximately contributed to the accident was a question of fact for the jury.

III. Whether the action of the plaintiff in running down the north edge of the highway toward the defendant's vehicle proximately contributed to the accident was a question of fact to be decided by the jury.

IV. The position of the Earley truck on the highway combined with Earley's action in running down the north edge of the highway to warn the on coming vehicle did not as a matter of law proximately contribute to the accident.

ARGUMENT

I. WHETHER THE POSITION IN WHICH THE EARLEY TRUCK WAS PARKED ON THE HIGHWAY AT THE TIME OF THE ACCIDENT PROXIMATELY CONTRIBUTED TO THE ACCIDENT WAS A QUESTION OF FACT TO BE DECIDED BY THE JURY.

The Earley vehicle was parked on the south side of the highway over the culvert headed northwest with the front end thereof about a foot south of the center line of the highway. The defendant claims that this constituted negligence under Section 57-7-165 of the Utah Code. It was nonetheless for the jury to determine whether such negligence proximately contributed to the accident. See 4 Blashfield Cyclopedia of Automobile Law & Practice, Part 2, Sec. 2683:

“As to contributory negligence, the rule is that the fact that one is violating a statute or ordinance, at the time of receiving an injury of which he complains, is not conclusive so as to bar his recovery for the injury. In other words, while such violation may constitute negligence, in order that it may be available as a defense, it must further be shown that it proximately contributed to the accident.”

At page 19 of his brief defendant cites the California case of *Thomson v. Bayless* (1944) 150 Pac. (2) 413, which construed a provision of the California Motor Vehicle Code exactly similar to the Utah Statute. In that case the California Supreme Court in affirming the jury's verdict, sets forth the general rule governing such cases, as follows:

“It has recently been held that whether or not parking on the highway in violation of Section 582 of the Vehicle Code constitutes a proximate cause of the accident where the driver of the car in motion might also have been negligent, is a question of fact for the jury if reasonable men can differ thereon. *Inai v. Ede*, 59 Cal. App. 2d 549, 555, 139 P. 2d 76; see, also, opinion on prior appeal, 42 Cal. App. 2d 521, 526, 527, 109 P. 2d 400; cf. *Fennessey v. Pacific Gas & Elec. Co.*, 20 Cal. 2d 141, 124 P. 2d 51; *Mason v. Crawford*, supra.”

In the case at bar the jury by its verdict found that the position in which the Earley truck was parked on the highway did not proximately contribute to the accident. The jury's verdict should, therefore, stand.

II. WHETHER THE ABSENCE OF FLARES OR WARNING LIGHTS ON THE EARLEY TRUCK PROXIMATELY CONTRIBUTED TO THE ACCIDENT WAS A QUESTION OF FACT FOR THE JURY.

The defendant relies upon Section 57-7-191 of the Utah Code to show that there should be sufficient lights to reveal the presence of the vehicle at a distance of 500 feet and also relies upon Sections 57-7-212 and 57-7-213 requiring vehicles disabled upon the highway to exhibit flares, lanterns or reflectors at stated distances in front of and behind the vehicle.

It is undisputed in this case that there were no flares around the Earley truck. However, the evidence clearly shows that the headlights on the vehicle were burning and that the vehicle was headed northwest upon the highway. The evidence further discloses that the defendant's driver actually saw a light in the middle of the highway when he was 200-300 feet away and clearly saw the outline of the Earley truck on the highway when he was 200-250 feet away from it. Farrell Johnson, one of the plaintiff's witnesses, testified that he observed the lights on the Earley truck when he rounded the bend a half a mile west of the truck. The defendant's driver admitted that visibility was good and that as he rounded the curve a half a mile west of the scene of the accident he was able to see the lights burning in Laketown a mile away and at that point could clearly see the headlights on a vehicle in Laketown which was parked by a pool hall there. The defendant's witness, Elijah C. Willis, testified that he lived 1000 feet northwest of the culvert on which the

Earley truck was parked and that while at his home he observed the lights on the Earley truck as it was parked on the highway. Other witnesses who came from the east testified that they had observed the lights on the Earley truck and the defendant's truck when they were a half a mile to the east.

The purpose of a statute requiring lights or the placing of flares, reflectors or other devices is simply to give adequate warning of the presence of the vehicle. Where as in this case, there was actual and adequate notice of the presence of the vehicle the absence of flares, reflectors or other types of warning lights was wholly immaterial. The defendant's driver actually saw the light on the Earley truck when he was 250-300 feet away and actually saw the outline of the Earley truck on the highway when he was 200-250 feet away. He, therefore, knew in ample time of the presence of the defendant's vehicle on the highway and knew that it was parked crosswise in his lane headed north blocking the eastbound lane of travel. Furthermore, in view of the testimony of other witnesses and particularly that of Farrell Johnson and of Elijah Willis the jury could very readily have found that the defendant's driver saw or should have seen the light on the Earley truck when he rounded the curve approximately a half a mile to the west, or at least when he was within 1000 feet of the truck. It was for the jury under this evidence to determine whether any negligence in this particular proximately caused the accident. See 4 Blashfield Cyclopedia of Automobile Law & Practice, Part 2, Sec. 2632:

“The negligence of a driver in failing to have proper lights is not of itself actionable, nor will such negligence preclude recovery for injuries sustained in an automobile accident, if it is not the proximate cause of the accident; otherwise if such failure is the proximate cause of the accident.”

* * *

“The failure of a vehicle to carry lights as required by the law is immaterial if the unlighted vehicle was nevertheless plainly seen, or could have been plainly seen by the exercise of ordinary care, in time to avoid a collision, * * *.”

The case of *Duncan v. Madrid*, 101 Pac. (2) 382 (New Mex. 1940) cited at page 24 of the appellant's brief, was tried in the lower court without a jury. The appellate court merely held that there was sufficient evidence to support the findings and decisions of the lower court.

The case of *Paulsen, et al. v. Spencer*, 177 Pac. (2) 597 (Calif.) cited at page 24 of appellant's brief specifically held that it was for the jury to determine whether the absence of lights on the vehicle was a proximate cause of the accident. The California Court in that case said:

“The appellants first contend that it must be held, as a matter of law, that the respondent was guilty of negligence and that such negligence proximately resulted in the death of Paulsen. While there is some evidence indicating that the respondent parked his car as well off the pavement as was reasonably possible under the circumstances, there would seem to be no question that

he was negligent in not at least leaving a rear light lighted, as required by section 627(c) of the Motor Vehicle Code. *However, a question of fact was presented as to whether that negligence was a proximate cause of the death of Paulsen.* This is true because of the other circumstances which appear, with the reasonable inferences therefrom, which will be referred to in connection with the next point raised.” (Italics ours)

The other circumstances were that road on which the accident occurred was straight and afforded a clear view for at least three-eighths of a mile toward the parked car. The court stated that it must therefore be presumed that the deceased had lights of the strength required by the vehicle code to disclose the presence of the unlighted vehicle on the highway and that the question was, therefore, one for the jury.

The Montana Supreme Court adopted the same view in the case of *Ashley v. Safeway Stores, Inc.*, 47 Pac. (2d) 53, cited at pages 24 and 25 of appellant’s brief. There the truck was parked partially on the highway with no lights burning thereon either front or rear. In referring to the Montana statute which requires every motor vehicle to display two white lights in front and one light in the rear, the court said:

“A violation of this statute constitutes negligence. *Simpson v. Miller*, 97 Mont. 328, 34 P. (2d) 528. *Whether such negligence was the proximate cause of the accident or whether plaintiff was barred by reason of contributory negligence of Kitt was a question for the jury.* *McNair v. Berger*, 92

Mont. 441, 15 P. (2d) 834; *Fulton v. Chouteau County Farmers' Co.*, *supra*." (*Italics ours*)

It was for the jury in the case at bar to determine whether the absence of flares or other warning signs on or about the Earley truck proximately contributed to the accident. The jury found by its verdict that there was no contributory negligence on the plaintiff's part in this connection which proximately contributed to the accident. Under the facts of this case, there was ample evidence to support the jury in its finding. Its verdict, therefore, should not be disturbed.

III. WHETHER THE ACTION OF THE PLAINTIFF IN RUNNING DOWN THE NORTH EDGE OF THE HIGHWAY TOWARD THE DEFENDANT'S VEHICLE PROXIMATELY CONTRIBUTED TO THE ACCIDENT WAS A QUESTION OF FACT TO BE DECIDED BY THE JURY.

The appellant in his brief quotes from the Utah cases of *Reid v. Owen*, 93 Pac. (2) 680, 98 Utah 50, *Mingus v. Olsson*, 201 Pac. (2) 495, and *Sant v. Miller*, 206 Pac. (2) 719. All of these cases involve pedestrians who were crossing the highway and who were held to be contributorily negligent as a matter of law as they either did not look or failed to see the oncoming automobile before crossing its path. None of these cases are in point because the plaintiff in this case was not crossing the highway and was not crossing the path of the automobile. The plaintiff was proceeding down the north edge of the highway and the defendant's automobile until the brakes were applied an instant before the plaintiff was

struck was proceeding along the south side of the highway. It was not until the brakes were applied and the car apparently swerved to the left that the plaintiff was in any apparent danger, and it was then too late for him to avoid the accident as he testified that he was struck immediately after he heard the screech of brakes.

The appellant cites Section 57-7-46 of the Utah Code which requires a pedestrian when practicable to walk on the left side of the roadway facing the traffic which may approach from the opposite direction. The purpose of this statute is that a pedestrian shall so walk that he can see traffic which is approaching from the opposite direction, and will be in no danger of being struck from the rear. Here the plaintiff was not struck from the rear and was in fact facing the traffic which was proceeding in the opposite direction. As far as he was concerned it was immaterial that he was on the north edge of the road. Furthermore, it was likewise wholly immaterial from the defendant's standpoint. The defendant's driver testified that when he was 250-300 feet away from the Earley truck his headlights were illuminating the road for its entire width and that he had a clear and unobstructed vision ahead; that he was not blinded by the lights of any vehicles approaching from the opposite direction. The plaintiff's presence on the north edge of the highway should, therefore, have been discovered by the defendant's driver just as readily as though he had been proceeding on the south side of the highway. Furthermore, this Court has held that it is for the jury to determine whether the negligence of a pedestrian in

walking on the right hand side of the highway with his back to approaching traffic proximately contributes to the accident. See *Roach v. Kyremes*, Utah....., 211 Pac. (2) 181 (1949), where this court held:

“Appellant first contends the court erred in failing to direct a verdict in his favor because respondent was guilty of contributory negligence as a matter of law by walking in or along the right hand side of the highway because in so doing, she voluntarily placed herself in a perilous position. In determining whether a plaintiff is contributorily negligent as a matter of law, the evidence and all reasonable inferences therefrom must be viewed in a light most favorable to the plaintiff. Considered from this standpoint, there is evidence that respondent and Miss Sickler were not walking on the main travelled portion of the highway but out on the west shoulder; that they maintained a lookout for approaching traffic by glancing to the rear; that they moved farther over on the shoulder as automobiles approached; and, that they saw no light from defendant’s car nor did they hear it approach. Under circumstances such as these, it cannot be said that all reasonable men must conclude that respondent failed to exercise due care for her own safety.”

See also *Chatelain v. Thackeray*, 98 Utah 525, 100 Pac. (2d) 191. In that case the plaintiff was walking along the right hand side of the highway with his back to approaching traffic when he was struck by a vehicle proceeding in the same direction as he. The plaintiff testified that he was walking at a point about 3 feet east of the hard surfaced portion of the highway on the

gravelled shoulder, and the defendant's testimony was that the plaintiff was walking about 3 feet out on the hard surfaced road. It was contended by the defendant that the plaintiff in thus walking on the right hand side of the road with his back to approaching traffic was guilty of contributory negligence as a matter of law. The court held that the question of contributory negligence was properly submitted to the jury and the jury having found against the defendant, the appellate court was bound thereby.

See also *Hooker v. Schuler*, (Ida.) 260 Pac. 1027, in which the Idaho court held that a pedestrian walking on the right hand side of the highway contrary to a statute similar to the Utah statute was not guilty of contributory negligence as a matter of law, stating as follows:

“The trial court properly submitted the question of whether respondent's walking on the right-hand side of the road, or the negligent manner in which appellant handled his car, or the existence of defective brakes on his car, was the proximate cause of the injury, and it was certainly a question for the jury to determine what was the proximate cause of the injury complained of under proper instructions by the court.”

It is, therefore, respectfully submitted that it was for the jury to determine whether the defendant was negligent in running along the north edge of the highway toward the approaching car and whether such negligence, if any, was the proximate cause of the accident. The verdict of the jury clearly indicated that the sole

proximate cause of the accident was the negligence of the defendant and that there was no contributory negligence on the part of the plaintiff which proximately contributed to the accident. The jury's verdict on this point should stand.

IV. THE POSITION OF THE EARLEY TRUCK ON THE HIGHWAY COMBINED WITH EARLEY'S ACTION IN RUNNING DOWN THE NORTH EDGE OF THE HIGHWAY TO WARN THE ONCOMING VEHICLE DID NOT AS A MATTER OF LAW PROXIMATELY CONTRIBUTE TO THE ACCIDENT.

For the purpose of this appeal the court must adopt the evidence most favorable to the plaintiff. In this connection there was evidence that the Earley truck was parked on the highway over the culvert headed northwest with its front end about a foot south of the center line of the highway leaving the entire north half of the highway and one foot of the south portion of the highway open for traffic. The evidence was undisputed that the highway was straight and practically level for a distance of one half a mile to the west; that there was no fog, mist or anything in any way to interfere with visibility; that the headlights on the Earley truck were properly burning. There was also evidence to indicate that the plaintiff at the time of the accident was 150 feet west of his truck on the north edge of the paved road as close as he could get and that it was impractical at that point for the plaintiff to get entirely off the oiled portion of the road; that there was at least 8 feet between the plaintiff and the center line of the highway on the north

side of the oiled road at the time of the accident. There was the positive evidence of the defendant's driver that he saw a low dim light about in the center of the highway where he knew the culvert to be when he was 250-300 feet away, and that when he was within 200-250 feet he could clearly detect that the object on the highway in front of him from which the light was coming was a truck which was crosswise on the highway in his lane headed north with its front end partially over the north side of the highway; that defendant's driver at that time did not know whether he could safely pass to the north in front of the object and felt it advisable to bring his vehicle under control so that he could stop if need be. The defendant driver's positive testimony also indicated that the lights on the defendant's vehicle were burning on high beam and clearly illuminated the highway for its entire width, but that the defendant did not see the plaintiff until he was within 20-30 feet of him. There was evidence from other witnesses from which the jury could have determined that the defendant's driver in the exercise of due care should have ascertained the presence of the Earley truck on the highway when he was one-half a mile to the west thereof. There was testimony concerning brake marks from which the jury could determine at the time the brakes on the defendant's truck were first applied, that the defendant's vehicle at that time was on the south side of the road with all four wheels in the lane for eastbound traffic. There was further testimony which, if believed by the jury, would support a conclusion that the defendant's driver never saw the Earley

truck on the highway in front of him and that its presence accordingly had nothing whatsoever to do with the accident. Under this evidence the jury certainly could have found that the defendant's driver saw or should have seen the plaintiff's presence on the highway and the position of his truck in ample time to have stopped or brought his vehicle under control so as to have avoided the accident.

There was evidence from one of the witnesses that the brake marks caused by the defendant's truck zigzagged across the highway. Another witness testified the defendant's truck made a furrow in the gravel on the north shoulder. The jury would thus have been entitled to find under the evidence most favorable to the plaintiff that when the plaintiff was 150 feet west of his truck and on the north edge of the paved road, that the defendant's truck was then on the south half of the paved road; that when the brakes on the defendant's truck were applied, it swerved to the north and struck the plaintiff. The plaintiff at a point 150 feet west of the truck and on the north edge of the road should not have anticipated any danger from the defendant's vehicle which was approaching him on the south side of the road. In view of the distance between him and his truck and the position which he occupied on the extreme north edge of the paved road he would have no reason to anticipate that the defendant's driver would suddenly turn to the north and strike him or that he would apply his brakes and cause his vehicle to go out of control and cross to the north side of the road and strike him.

The appellant in his brief claims that the Earley truck blocked one-half of the highway and that Earley by his presence on the north edge of the paved road blocked the other half of the highway and the only lane in which the defendant's driver could have proceeded. We submit that this is not the case. There was 150 feet between the plaintiff and his truck and there was 6-8 feet of road on the north side of the center of the highway and all of the south half of the highway up to the truck on which the defendant's driver could have proceeded without even striking the plaintiff or the truck. If the defendant's driver had been keeping a proper lookout and had his vehicle under proper control, when he first observed the low light or earlier if the jury found that he should have seen the light on the highway earlier, there would have been ample room on the highway between the plaintiff and his truck on which the defendant's truck could have been driven in avoiding the plaintiff and in passing around the Earley vehicle if it could not have come to a complete stop.

It is further claimed by appellant in his brief that the plaintiff had an opportunity to avoid the accident at any time by stepping off the traveled portion of the highway. In this connection there was no reason for the plaintiff to step off the traveled portion of the highway until it was too late to avoid the accident. After all, he was on the extreme north edge of the paved road, and there was evidence that the defendant's truck was proceeding on the south half of the paved road. Earley testified that he heard the screech of brakes and the next

instant he was struck. The jury from this and other evidence could infer that the defendant's vehicle was being operated at a high and excessive rate of speed; that it was on the south half of the road until the brakes were applied when it swerved to the left and struck the plaintiff, who under such circumstances had no opportunity whatsoever to step off the highway and avoid the accident. Until the defendant's vehicle indicated that it was turning to the left or was going to proceed toward the side of the highway which the plaintiff was occupying there was no reason for him to move further off the paved portion of the road. There was evidence from which the jury could reasonably infer that the defendant's vehicle did not turn to the left until the brakes were applied, and that it was then too late for the plaintiff to avoid the accident. There is also testimony in the record that the plaintiff could not very well get entirely off the paved portion of the highway at that point and the photo of the highway, Exhibit No. 2, would support the plaintiff in this contention.

Based upon the skid marks caused by the defendant's vehicle, the damage done to the vehicle, the distance it knocked or carried the plaintiff, and the distance of its sideward skid and the point where it came to rest, the jury could well have determined that the sole proximate cause of the accident was the speed at which the defendant's vehicle was being operated and the failure of the defendant's employee to keep a proper lookout causing him to suddenly apply the brakes and throw his vehicle out of control and into the plaintiff.

The appellant at page 28 of his brief cites the case of *Keller v. Brenneman*, (Wash. 1929) 279 Pac. 588. In that case the plaintiff's truck became stalled on the highway and the plaintiff was walking near the center of the highway when he was struck by an automobile. The court held that the plaintiff was guilty of contributory negligence, but that case is distinguishable from the instant case on its facts. The plaintiff's vehicle became stalled near the top of a steep grade with a sharp turn to the right beyond the grade. The plaintiff was in front of his vehicle but still not at the top of the grade when the defendant's vehicle came around the curve and approached the top of the grade from the opposite direction. Because of the curve and the grade the defendant's lights did not light up the highway in front of him and he did not see the truck or the plaintiff until it was too late to avoid the accident. In the case at bar the highway was straight and level for a distance of a half a mile to the west and there was nothing to interfere with the vision or view of the defendant's driver, and, as a matter of fact, he saw the vehicle and should have seen the presence of the plaintiff upon the highway in ample time to have avoided the accident.

See *Hanson v. Aldrich*, 201 N.W. 778 (Iowa). There the plaintiff's vehicle became stalled on the road and the plaintiff hearing the defendant's car approaching from the rear walked a few feet directly behind his own car waving his arms to warn the defendant to stop, but the defendant struck the plaintiff causing him injury. The court held that the plaintiff was not guilty of contribu-

tory negligence as a matter of law; that he had a right to rely on the fact that the defendant would observe the law of the road and turn out. The court affirmed a judgment in plaintiff's favor, stating that the defendant had ample space to pass the plaintiff and his car on the highway and that the plaintiff was not called upon to anticipate negligence on the part of the driver of the other car, stating:

"The evidence shows that the defendant saw the plaintiff and his car at such a distance that the collision could in all probability have been averted. The lights on the Aldrich car were in good condition, and disclosed objects in its pathway at least 75 feet in advance of his car. Plaintiff could not know that defendant had no intention of stopping or turning to the left. Plaintiff had reason to think that he was within a zone of reasonable safety."

Considering the evidence as a whole, there was ample to support the jury in its conclusion that the negligence of the defendant was the sole proximate cause of the accident.

CONCLUSION

We submit that the issues of negligence, contributory negligence and proximate cause were properly referred to the jury by the trial court; that there was ample evidence on which the jury could determine and did determine, that the negligence of the defendant was the sole proximate cause of the accident. The plaintiff, therefore,

could not be held guilty of contributory negligence as a matter of law. The defendant's motion for a directed verdict and for judgment notwithstanding the verdict were properly denied. The judgment should be affirmed.

Respectfully submitted,

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