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Lynn W. Martin v. Paul H. Stevens : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

LYNN W. MARTIN,

Plaintiff and Appellant,

— vs. —

PAUL H. STEVENS,

Defendant and Respondent.

} Case No. 7731

BRIEF OF APPELLANT

FILED

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IN THE SUPREME COURT of the STATE OF UTAH

LYNN W. MARTIN,

Plaintiff and Appellant,

— vs. —

PAUL H. STEVENS,

Defendant and Respondent.

Case No. 7731

BRIEF OF APPELLANT

STATEMENT OF FACTS

On the morning of September 25, 1950, at about 7:00 A.M. plaintiff was driving south on 18th East in his automobile. It was a clear morning; the streets were dry. As he travelled south on 18th East he approached the intersection of 18th East and Stratford Avenue. Upon approaching this intersection he slowed down. Looking to the east is a "blind intersection;" to the west it is open. Plaintiff looked to the west first; as he got closer to the corner he looked to the east and saw that it was clear and then proceeded into the intersection. As he

proceeded into the intersection, he turned his head back to the right to check again. At that time he heard the brakes or the tires squealing on the defendant's automobile. Plaintiff looked back to the left and saw that defendant's car was setting up a skid that was carrying defendant's car right into the side of plaintiff's car. Plaintiff jammed on his brakes and stopped, hoping defendant would not hit him squarely in the door by which he was sitting. R. 19, 20, 34, 38.

Plaintiff's automobile came to a stop a little beyond the center of the intersection, i.e., to the south. The left front fender and wheel of defendant's automobile struck plaintiff's car at the front post of the left front door. R. 21.

The impact of defendant's automobile colliding against plaintiff's rendered plaintiff unconscious. Plaintiff's automobile, by reason of the impact, was knocked west on Stratford Avenue up over two front yards and a hedge. Plaintiff's automobile came to rest on the parking a distance of 156 feet from the point of impact. R. 21, 83. Defendant's automobile came to a rest at a point about 18 feet in a southerly direction from the point of impact.

Plaintiff first observed defendant's automobile when it was about 60 feet up the street. R. 22. There were no traffic signs or controls at the intersection.

The northeast corner of 18th East and Stratford Avenue is built up quite a bit higher than the road. There is a fence with vines growing over it extending from the house almost to the sidewalk on Stratford Ave-

nue. The fence then runs east some 42 feet, then north encompassing the lot.

There are trees growing along the east parking of 18th East as you approach the intersection. The north parking of Stratford Avenue is also planted with trees. Between the fence and sidewalk shrubs were growing. There is a large weeping willow tree which covers most of the west lawn. The trees which are growing in the parking areas have branches close to the grounds and were thick with foliage. The trunks of these trees were about six inches in diameter. R. 23, 41, 44.

Plaintiff testified that as he approached the intersection he knew it was blind to the east. He looked first to the west and than as he got fairly close to the intersection, he looked to the east. At that time he could see approximately 150 to 200 feet eastward up Stratford Avenue. There were no cars visible at that time.

There were four solid lines of skid marks made by the tires of defendant's automobile extending east from the point of impact a distance of 57 to 65 feet. R. 34, 83.

Plaintiff, in stopping his automobile, left skid marks of approximately two feet in length. R. 34. 18th East Street and Stratford Avenue are asphalt covered streets. R. 46. There is a survey monument located in the center of the intersection. From this monument to the northernmost tire mark of defendant's automobile it was a distance of 22 inches. R. 36.

As one approaches Stratford Avenue when driving south on 18th East, the view to the east on Stratford

Avenue is obstructed by a high fence, vines, bushes, trees, etc., so that the front portion of the automobile would be halfway through the intersection before a clear view of Stratford Avenue could be gained. R. 44, 45.

It was stipulated that the asphalt surface of 18th East Street was 25.75 feet wide; that the asphalt surface of Stratford Avenue was 28 feet wide. See Exhibit C., R. 46.

Plaintiff's car, after the collision, had a salvage value of \$155.55. R. 53.

Stratford Avenue, running east from the intersection, rises in an average grade of $3\frac{1}{2}\%$. R. 71. The top of the fence running around the corner lot is about 7 feet above the asphalt surface of 18th East Street. The eye level on the average automobile is about $5\frac{1}{2}$ feet, so that it is not possible to see over the fence while driving along in an automobile. R. 72.

Exhibit D, which was admitted in evidence, shows the various distances of visibility eastward up Stratford Avenue as a motorist approaches Stratford Avenue travelling south on 18th East Street. For example, when 30 feet from the corner, there is a possibility of seeing some 105 feet east; 20 feet from the corner 205 feet; 15 feet from the corner 465 feet. However, as was testified to by Witness Rogers, there is quite a bit of shrubbery and trees that temporarily block out the line of vision or obstruct it entirely and a good field of vision is not available. R. 73. These distances would also vary depending on whether the car coming down Stratford

Avenue was nearer the north side of the road or the south side. R. 76. Conversely, a motorist driving west on Stratford Avenue would have the same difficulties in ascertaining the traffic coming into the intersection from the north.

Officer Peterson testified that defendant stated that he was going west on Stratford Avenue, saw plaintiff's car approaching the intersection, put on his brakes, but was unable to stop prior to hitting plaintiff. R. 84.

Officer Farnsworth testified that if defendant's automobile had come to a complete stop, leaving 57 feet of brake marks on the dry asphalt surface, defendant would have been travelling 32 miles per hour or more. This is assuming that the brakes of defendant's car were in good condition. R. 88. Officer Farnsworth also testified that if defendant's automobile did not come to a complete stop within that 57 feet, which it obviously did not, the speed of defendant's automobile would naturally be higher. R. 89.

According to Salt Lake City Ordinance number 6138, the maximum speed limit on Stratford Avenue is 25 miles per hour.

At the close of plaintiff's case, a discussion concerning a question of law was had in the judge's chambers and upon returning to the courtroom, the defendant made the following motion. (R. 90, 91) :

"Comes now the defendant and moves that the jury be directed to return a verdict in favor of the defendant and against the plaintiff on the plaintiff's complaint,

no cause of action, for the following grounds and reasons:

“1. There is no evidence in the record of any negligence upon the part of the defendant.

“2. There is no evidence that any negligence on the part of the defendant was the cause of the accident and the injuries, if any, sustained by the plaintiff.

“3. The plaintiff’s own testimony and the testimony of the other witnesses offered by the plaintiff shows conclusively that the plaintiff was himself guilty of negligence which was the sole proximate cause of the accident.

“4. The plaintiff’s testimony and the other evidence adduced on behalf of the plaintiff show the plaintiff to have been guilty of contributory negligence which was a substantial proximate cause of the accident.”

Defendant’s motion was granted by the court. R. 91.

STATEMENT OF POINTS

I. THE COURT ERRED IN GRANTING DEFENDANT’S MOTION THAT THE JURY BE DIRECTED TO RETURN A VERDICT IN FAVOR OF DEFENDANT AND AGAINST PLAINTIFF OF NO CAUSE OF ACTION.

(a) WHETHER OR NOT PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE WAS A QUESTION FOR THE JURY TO DECIDE AND CANNOT BE DECIDED BY THE COURT AS A MATTER OF LAW.

(b) ASSUMING PLAINTIFF WAS IN SOME MANNER CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW, SUCH NEGLIGENCE WAS NOT A SUBSTANTIAL LEGAL CAUSE OF THE ACCIDENT.

Defendant’s motion, which was granted by the court,

sets forth four grounds. However, it is obvious that the fourth ground was the one upon which the court based its decision in this matter, that is, whether plaintiff was guilty of contributory negligence as a matter of law and which negligence was a substantial legal cause of the accident. There can be no question but that defendant himself was guilty of negligence which was the substantial legal cause of the plaintiff's injuries.

ARGUMENT

(a) WHETHER OR NOT PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE WAS A QUESTION FOR THE JURY TO DECIDE AND CANNOT BE DECIDED BY THE COURT AS A MATTER OF LAW.

Even though this case was not tried in the District Court by the present attorneys on appeal, it is apparent that the trial judge in ruling upon the defendant's motion was persuaded that the doctrine in the cases of *Hickok v. Skinner*, 113 Utah 1, 190 P. 2d 514, March 5, 1948, and *Conklin v. Walsh*, 113 Utah 276, 193 P. 2d 437, May 11, 1948, should be applied to this case. It is the writer's contention that the facts of this case do not come within the doctrine as expressed in these cases and that under no circumstances should that doctrine be extended to include a case of this type. Plaintiff's argument is, that whether he was guilty of contributory negligence, which was a substantial and legal cause of the collision in question, should have been submitted to the jury for their sole determination.

Plaintiff, upon approaching Stratford Avenue on the morning of the collision, looked first to the right and then, as he drew closer to the intersection, looked to the left and could see approximately 150 to 200 feet east up Stratford Avenue. Seeing that no cars were in view, plaintiff then proceeded into the intersection, at the same time turning his head back to the right to ascertain if any cars were coming from that direction. At this point, plaintiff heard the screeching of brakes and looking back to the left, he saw defendant's automobile setting up a skid some 60 feet to the east. Plaintiff jammed on his brakes and stopped. Defendant, unable to stop his automobile, skidded for some sixty feet into the side of plaintiff's automobile. The exact point of the collision was a little beyond the center of the intersection. From the survey monument located in the center of the intersection to the northernmost tire mark of defendant's auto, was a distance of 22 inches, which would place defendant's automobile substantially over the center line of Stratford Avenue. On the basis of these facts, it is impossible to understand how the trial court could hold as a matter of law that plaintiff was guilty of contributory negligence, and that such negligence was a substantial legal cause of the accident.

Generally speaking, a motorist proceeding to a point near an intersection from which he can see a sufficient distance to ascertain that anyone coming from beyond, at any lawful speed, will not interfere with his safe crossing, may rightfully proceed. There cannot be thrust

upon the plaintiff the duty to foresee and avoid the negligence of the defendant, who obviously proceeded down Stratford Avenue at an unlawful rate of speed, oblivious to the fact that he could not see cars approaching from the north into the intersection of 18th East and Stratford Avenue, and unlawfully demanding that automobiles approaching from his right yield the right of way to him regardless of their position in the intersection. Having once made a reasonable observation as to the traffic on Stratford Avenue, plaintiff is not negligent because he does not again look for approaching vehicles before making the crossing.

Plaintiff testified that when he looked to the east he could see approximately 150 to 200 feet up Stratford Avenue. For example, according to Exhibits C and D, if plaintiff were 20 feet back from the corner he could see approximately 205 feet eastward up Stratford Avenue. Accordingly, plaintiff would then be some 46 feet from the exact center of the intersection. Plaintiff testified that he was traveling 10 or 15 miles per hour as he approached the intersection. At this speed plaintiff would traverse that distance in some 2 or 3 seconds. Assuming defendant were just beyond the 205 ft mark on Stratford Avenue, defendant would then be about 214 feet from the exact center of the intersection. Accordingly defendant would be traveling between 45 to 55 miles per hour in order to meet plaintiff at the exact center of the intersection. Certainly it is not unreasonable to conclude that defendant was traveling at such a rate of speed and

the jury could find such to be true. Where, under such a state of facts, can it be said that plaintiff neglected his duty in any way or failed to act as a reasonably prudent man would act under similar circumstances?

Certainly there cannot be thrust upon plaintiff the necessity of guarding against the unlawful speed which defendant must have been travelling down Stratford Avenue. It should be noted that the officer testified that from the 57 feet of black skid marks burned into the asphalt surface, he estimated the defendant would have been travelling 32 miles an hour, or more, if defendant had stopped at the end of the 57 feet. However, since the defendant smashed into the side of plaintiff's automobile, knocking it through two front yards and a hedge, a distance of approximately 156 feet, it is apparent that defendant was travelling considerably faster than 32 miles per hour. It certainly is not necessary that plaintiff be able to see as far as his eye can reach before proceeding into the intersection. His duty is performed if he can see sufficiently far to discover whether there is traffic approaching from that direction within a distance traversible by a vehicle driven at a lawful speed. This is not a case of plaintiff looking and not seeing what was obviously there, and it is only reasonable under the facts and evidence to assume that when plaintiff did look and saw no vehicles approaching, and could see approximately 150 to 200 feet, that defendant was then further east on Stratford Avenue travelling at an unlawful rate of speed. Whether the failure to observe was negligence must be determined by a jury considering all the factors

involved, as to the situation at the crossing and of the respective drivers at and immediately prior to the collision.

It cannot be said in this case that the facts are such that reasonable men could not, but conclude, that plaintiff was contributorily negligent. Plaintiff, in approaching the intersection of Stratford Avenue and 18th East, exercised the reasonable care that an ordinary prudent man would exercise to avoid injuring or being injured by other vehicles, in doing such, performed his duty required under the law. For a discussion involving these various principles, see *Blashfield Encyclopedia of Automobile Law & Practice*, Permanent Edition, Volume II, Sections 1037, 1038 at pages 223 to 234.

It would be a waste of time to cite cases from other jurisdictions as this court has already promulgated decisions which deal with this specific point.

At the risk of boring this court with numerous citations from its own decisions, plaintiff desires to make a review of the various cases dealing with this point.

In the case of *BULLOCK v. LUKE*, 98 Utah 501, 506, 507, 510, 511, 98 P. 2d 350, 352, 354, this court held that a motorist approaching an intersection at a speed of 25 miles per hour, who failed to observe a truck on his left until he was within 20 feet of the intersection although his view was unobstructed for a distance from 200 to 800 feet, varying inversely with his proximity to the intersection, was contributorily negligent as a matter of law for failing to observe the truck sooner and for in-

sisting on his right of way after it was apparent that the truck driver was not going to yield the right of way.

At page 352 of Pacific Reports the court states:

“Thus, under ordinary circumstances, where Bullock and Luke approached and entered the intersection, if Bullock had the right of way, it presupposes that he saw Luke approaching. If Bullock did not see Luke under circumstances where he should have seen him, he was careless, and, if as a result of such carelessness, either alone or in conjunction with carelessness on the part of Luke, a collision between them occurred, then it does not lie in the mouth of Bullock to assert that he assumed Luke would give him that right. His own carelessness is inconsistent with such an assumption. This principle, we believe, is decisive of the facts of this case under Bullock’s testimony that he did not see Luke until he, Bullock, was some 20 feet south of the point of impact, 5 feet short of the distance within which he could have stopped at the rate of speed he was travelling.”

At page 352 Pacific Reports this court quotes from Blashfield Encyclopedia of Automobile Law and Practice, Volume II, permanent edition, page 203, par. 1038:

“There is no arbitrary rule as to the time and place of looking for vehicles on an intersecting road, and no particular distance from the intersection is prescribed for that purpose. The general standards are that observation should be made at the first opportunity and at a point where the observation will be reasonably efficient for, and conduce to, protection.”

Justice Wolfe, in a concurring opinion, states at page

354 of Pacific Reports:

“* * * While one must exercise that degree of care which the situation dictates, even though the situation has a negligent factor in it created by another, we must be careful not to stretch contributory negligence to the point where we make it incumbent upon one not only to drive carefully, but to drive so carefully as always to be prepared for some sudden burst of negligence of another and be able to avoid it. * * * *The duty of A to avoid the negligence of B should only begin where that negligence was or should have been timely apparent to A, and apparent that it would in all probability continue, and A then failed to use such care as a prudent man would have used in like circumstances to avoid it.* * * *”

Is it possible for the trial court to say that the instant case falls within the category of *Bullock v. Luke*? How could plaintiff have failed to maintain a proper lookout under facts as presented in the record? Certainly the *Bullock* case would not so hold. Plaintiff Martin was not alerted to the negligence of defendant nor would any reasonable person have been alerted to such danger.

In the case of *HICKOK V. SKINNER*, 113 Utah 1, 7, 11, 190 P. 2d 514, 517, 518, 519 where plaintiff, having seen defendant's automobile approaching the intersection on a through highway 400 to 500 feet away, started his automobile forward from a point 20 feet back from the intersection and drove almost across the highway without again looking in the direction from which defendant's auto was approaching, plaintiff was held con-

tributorily negligent, precluding a recovery, notwithstanding that defendant should have yielded the right of way.

The court states in this case at page 517 of Pacific Reports:

“While the facts in the case of Bullock v. Luke * * * are dissimilar, one of the rules laid down by that case is applicable here, and that is, regardless of which driver is technically entitled to the right of way, both operators must use due care and caution in proceeding into and across intersections. While the burden to drive so carefully as always to be prepared for, and to be able to avoid, the negligence of another, should not be placed upon either driver, there should be placed upon both the burden to keep a proper lookout and to use reasonable care to avoid a collision.
* * *”

Justice Wolfe, in his dissent, states at pages 518 and 519 of Pacific Reports:

“Where an intersection is controlled by a semaphore, the rights of various streams of traffic to proceed and the duties of other streams of traffic to halt are clearly indicated by the various colored lights of the signal, little or nothing is left to human judgment. But where an intersection is controlled only by stop signs, or is uncontrolled, the rights of drivers to proceed and their duties to halt are, to a large extent, determined by human judgment. * * * And since the relative rights and duties of drivers approaching an intersection such as this depend to a large extent upon the exercise of human judgment, I am inclined to the opinion that the question of whether or not the judgment exercised by the

drivers was reasonable is a question of fact for the jury.”

In the Hickok case, plaintiff was aware of the approach of defendant toward the intersection, but disregarded this factor and drove across the highway without giving heed to the warning. Plaintiff Martin could not foresee that defendant would burst into view traveling at an unlawful rate of speed. Plaintiff had the right to assume, until given warning to the contrary, that defendant would approach at a lawful speed.

In the case of CONKLIN V. WALSH, 113 Utah 276, 280, 193 P. 2d 437, 439, a truck driver who, while driving a truck on an arterial highway at a speed of 30 to 45 miles per hour, observed an auto approaching from the left into an intersecting street at 10 or 15 miles per hour while the truck was a quarter of a block from the intersection. The truck driver looked to the right and failed until too late to avoid the collision to observe that the motorist, after stopping, was attempting to drive across the arterial highway. The truck driver was held guilty of negligence as a matter of law.

The court states at page 439 Pacific Reports:

“* * * By his own admission the truck driver travelled at least one quarter of a block without making any further observance of a car which, at the time he first saw it, was much nearer the intersection than was his * * *”

Here again in the Conklin case, plaintiff was aware of defendant's approach into the intersection and yet disregarded it. Such fact is not present in the instant case.

In the case of HUNTER V. MICHAELS, Utah, 198 P. 2d 245, Justice Wolfe in a concurring opinion states at page 253 of Pacific Reports:

“I agree, however, with the Chief Justice that under the California law it is not negligence in law for a person to cross the street at any place other than at a crosswalk. *I am also in accord with the view that it is a jury question as to whether the plaintiff exercised due care in keeping a lookout while she was crossing the street, and whether she gave sufficient reappraisals of the traffic approaching from the west as she was proceeding across. That is what I contended for in Hickok v. Skinner * * **”

Can this court say as a matter of law that plaintiff failed to appraise the situation as he approached the intersection of Stratford Avenue and 18th East Street? This is a question for the jury to decide, not the court.

In MINGUS V. OLSSON, et al, Utah, 205 P. 2d 495, 498, the evidence established that as a matter of law the pedestrian was contributorily negligent in attempting to cross a street on a crosswalk, either because he failed to look, or having looked, he failed to see what he should have seen.

Justice Wolfe states in the majority opinion, page 498, Pacific Reports:

“There can be no doubt that a pedestrian who undertakes to cross a busy street of a large city, without first observing for vehicular traffic, is guilty of contributory negligence. And this is true even though he may be crossing in a crosswalk and have the right of way. In the recent case of Hickok

v. Skinner * * * this court held that a motorist who had the right of way across an intersection, nevertheless had the duty to observe for traffic as he proceeded across the intersection. The rights of pedestrians to the use of the public streets are the same as those of motorists — neither greater nor less. Hence the same general duties devolve upon them. A pedestrian crossing a public street in a crosswalk or pedestrian lane, although he may have the right of way over vehicular traffic, nonetheless has the duty to observe for such traffic. Clearly decedent neglected that duty in this case. It follows that he was contributorily negligent as a matter of law. Of course, we do not mean to imply that a mere glance in that direction of the approaching automobile would suffice. The duty to look has inherent in it the duty to see what is there to be seen and to pay heed to it.”

There is no question but that plaintiff had the right of way in the instant case. He appraised the situation before traveling through the intersection, and whether or not defendant was there to be seen, in view of all the facts, was a question for the jury to decide and not the court.

In the case of NIELSON V. MAUCHLEY, Utah, 202 P. 2d 547, 549, the evidence was that plaintiff, while driving his automobile on an icy road at 25 miles per hour, saw defendant backing a school bus out of his yard. Plaintiff was then 300 feet away. He reduced his speed to 20 miles per hour at 243 feet and continued at that speed until 115 feet from the driveway, when he applied his brakes to avoid colliding with the school bus

which defendant had backed clear across the road. Plaintiff was not held guilty of contributory negligence as a matter of law. Justice Wade in that opinion, page 549 of Pacific Reports, states:

“In holding that the court erred in finding as a matter of law that plaintiff was guilty of contributory negligence, we do not wish it understood that the jury could not have so found. Whether or not plaintiff acted as a reasonably prudent man under the circumstances is a question of fact for the jury to determine. The mere fact that plaintiff had the right of way would not give him the right to proceed without regard to existing conditions. He must exercise due care and act as a reasonably prudent man would act under the existing circumstances. See *Bullock v. Luke* . . *Hickok v. Skinner* . . *Conklin v. Walsh* . . and *McDougall v. Morrison*, 55 Cal. App. 2d 92, 130 Fd 149, on page 151 wherein it is stated:

*“ ‘Each case must turn upon its own facts. Contributory negligence, as a matter of law, can only be found where reasonably prudent minds cannot but conclude that a reasonable careful and prudent person, situated as was plaintiff, would not have acted as he did. The situations where a court will so declare are rare. * * *’ ”*

Without intending to raise additional issues in the case, it appears to the writer that the court, through Justice Wade, may be abrogating the earlier rule laid down in *Hickok v. Skinner*, etc., but regardless of this, whether Plaintiff Martin acted with due care in approaching the intersection was a question for the jury.

In the case of *GREN V. NORTON*, Utah, 213 P. 2d 356, this court, speaking through Justice Latimer,

held that where a motorist had an unobstructed view to the north of the intersection for about one mile, he was charged with an awareness of defendant's large trailer-truck approaching from the north, and plaintiff was held contributorily negligent as a matter of law for failing to maintain a proper lookout.

Here again is the doctrine that plaintiff must see what is there to be seen where there are no obstructions, or restrictions in the field of vision. Plaintiff is charged with the duty of acting as a reasonably prudent man to avoid foreseeable negligence. Plaintiff Martin cannot be charged with knowing that defendant would suddenly burst into view at an unlawful rate of speed.

In the case of SPACKMAN V. CARSON, Utah, 216 P. 2d 640, 643, an action by a motorcyclist for damages from collision with a truck which, when the motorcyclist first observed it, was about 200 feet away, parked off the paved portion of the highway in front of a dwelling, and when he next observed it was about 30 feet away on the pavement. Whether or not the motorcyclist was negligent in the matter of lookout was for the jury to determine. The court stated at page 643, Pacific Reports:

“But according to plaintiff's testimony, when he first observed the truck it was standing motionless in front of a dwelling and there was no indication whatever that it was about to be moved on to the pavement. *The plaintiff was not alerted to any immediate danger. Under these circumstances we are convinced that the issue of whether the plaintiff was negligent in failing to keep a*

more diligent lookout ahead was properly submitted to the jury."

In the case of MARTIN V. SHEFFIELD, 112 Utah 478, 484, 485, 189 P. 2d 127, 130 the plaintiff was driving west on Wilson Avenue approaching 10th East Street. The defendant was driving north on 10th East toward Wilson Avenue. Plaintiff was proceeding at a speed of about 20-25 miles per hour at the time of the collision. When the plaintiff was 50 feet east of the intersection, she could see south of the intersection about 75 feet. Looking to the south she saw no car and she did not look again to the south until she saw defendant's car so close that the impact was about to occur. In this case there were skid marks from 36-51 feet made by defendant's car. Defendant stated he started to apply his brakes approximately 60 feet south of the intersection. This court stated at page 130, Pacific Reports:

"Is the evidence of plaintiff's conduct in the operation of her husband's car such that reasonable minds must conclude that she was guilty of contributory negligence, so that she was precluded as a matter of law from recovering any judgment for personal injuries? There was some evidence in this case that plaintiff failed to keep a proper lookout and that she failed to look to the left as she entered the intersection, and that she was travelling at an excessive rate of speed, from which evidence the jury might have found negligence on her part which contributed to the accident. The only evidence as to her failure to keep a proper lookout which is undisputed, is her testimony that she looked to the left when she was 50 feet from the intersection and that she saw no

car and that she looked to her right and did not look to her left again until she was in the intersection and saw defendant's car to her left as it was about to crash into the left side of her car. *There was a conflict in the evidence as to her speed, as to the defendant's speed, and as to whether the defendant stopped before the collision or stopped after the impact with plaintiff's car. These factors would all have some bearing on whether the failure of plaintiff to look to her left the instant she entered the intersection contributed to the accident or prevented her from stopping her car short of the point of impact, or prevented her from turning to the right to avoid the collision.*" (Italics supplied).

"Inasmuch as the conclusion whether or not she was negligent must depend upon those disputed factors, which constitute the premises for such conclusions, if those premises are jury questions, then they must first be determined before a proper conclusion can be drawn from them. If reasonable minds might differ as to which version of events shall be believed, then reasonable minds might likewise differ as to whether plaintiff's own conduct contributed to the accident. Since those conflicts in evidence, which constitute the very premises for the conclusions as to whether plaintiff was contributorily negligent, or free from negligence, must be resolved by the jury, the court could not properly withdraw from the jury the determination of such issue."

In the case of COMPTON V. OGDEN UNION RAILWAY & DEPOT CO., No. 7541, issued September 11, 1951 Utah, P. 2d, the court states:

"It seems inescapable that the deceased was guilty of contributory negligence. It was her duty

to look and listen for trains before going on the tracks. She had a clear view of the tracks to the north, well before she got far enough west to be in the path of a train. Under the evidence, the engine was there to be seen. If decedent had looked at anytime, either as she started, or as she pursued a course parallel to, but dangerously near the tracks, she must necessarily have seen the train approaching. She was, therefore, either negligent in failing to look or in failing to heed the train if she saw it * * * (citations) * * * *We find no circumstances of obstructed view or hearing; nor where other trains would confuse the deceased as existed in the cases of Malizia v. Oregon Shortline Ry Co.* * * * *The trial court was, therefore, correct in its ruling that she was guilty of negligence as a matter of law."*

The question in the instant case is whether defendant's car was there to be seen when plaintiff looked. In view of the factors of speed, distance, visibility, etc., which must be determined before plaintiff can be charged with failure to maintain a proper lookout, it is obvious that only the jury can make such a determination.

(b) ASSUMING PLAINTIFF WAS IN SOME MANNER CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW, SUCH NEGLIGENCE WAS NOT A SUBSTANTIAL LEGAL CAUSE OF THE ACCIDENT.

It is the contention of plaintiff that even assuming plaintiff was in some manner negligent, such negligence could not have been a substantial legal cause of plaintiff's injuries. It is plaintiff's contention that this case more properly fits in with the doctrine as expressed in *HESS V. ROBINSON*, 109 Utah 60, 163 P. 2d 510. In this case

the driver of the car traveling a through street, even though he should have seen an ambulance, which according to the evidence was traveling between 25 and 50 miles per hour, he could not know it would not stop for the stop sign until the vehicles were so close together that it would have no chance to avoid the collision.

Also, in the recent case of *LOWDER V. HOLLEY*, Utah....., 233 P. 2d 350, 351, 352, 353, 355 this court through Justice Wade, stated as follows :

“Reading the record in the light most favorable to respondents, as we must do since the trier of the facts found in their favor, it appears that on May 30, 1947, Decoration Day, at about 6:30 P.M. Amasa Lowder, one of the respondents herein, accompanied by Alene Lowder, his wife, and the other respondent herein, and two of their small children, was driving his 1937 Pontiac sedan westerly along a willow and tree lined graveled road running in an east-west direction situated in Mapleton, Utah. This road was rough, wet, and not very wide and he, therefore, did not drive more than twenty miles an hour until he approached a place where this road intersected with another road running north and south at which time he slowed down to approximately 5 to 10 miles per hour *and as he reached the intersection, Amasa Lowder looked north and south but did not observe any cars in either direction.* From the intersection when Amasa Lowder looked he could see up to a house located about 40 rods northwest of the intersection but his view of the road north beyond the house was obstructed by an orchard north of it. Having looked he entered the intersection and the rear end of his car had passed about three feet beyond the center line

of the traveled portion of the north-south road when it was hit on its rear right side by a light Terraplane pickup truck being driven south by Ruth Holley along the north-south road. The north-south road with which the east-west road intersected was also a graveled road and was 54 feet wide from fence line to fence line. Heavy black gouge marks left by the tires of the pickup truck in the gravel north of the point of impact indicated that Ruth Holley applied her brakes about 30 feet before the collision and then after the collision her truck had traveled about 75 feet across the intersection on the east side going south and Amasa Lowder's car was shoved about 25 feet across the road to the southwest corner of the intersection. The officer investigating the accident testified that from the physical facts disclosed by the marks and tracks on the highway, he was of the opinion that the driver of the pickup truck was traveling at the rate of about 40 to 50 miles per hour. Although Ruth Holley testified that she was only driving at the rate of 30 miles an hour she admitted that she didn't look east of the intersection until she was almost at the intersection and then her view was obstructed by a pile of dirt and she couldn't see anything. She further testified that as soon as she observed Amasa Lowder's car in the intersection she applied her brakes.

“From what we have outlined above, although there was no evidence that Ruth Holley drove in excess of 50 miles per hour, as the court as the trier of the facts found, the evidence was clearly sufficient for the trier of the facts to reasonably find that she was driving at about 50 miles per hour and could reasonably find, as it did, that she failed to keep a lookout and failed to yield the

right of way to Amasa Lowder's car which was already in the intersection and had almost reached the west side of it before her car entered the intersection and that this negligence of Ruth Holley was the proximate cause of the collision.

“Appellants strenuously argue that respondent Amasa Lowder's contributory negligence precludes both him and his wife from any recovery for damages and injuries. *They argue that he failed to look and see Ruth Holley's truck before he entered the intersection and had he looked he would have seen the truck and it would have been his duty to refrain from entering the intersection until he could do so safely.* Appellants are correct in stating that before entering an intersection the driver of a car must look and determine whether it is safe to enter. *However, under the facts as the court found them, had Amasa Lowder observed the truck just before he entered the intersection he would have been justified in considering it safe to enter because at that point, if the truck was being driven at the rate of 50 miles per hour, and Amasa Lowder was driving from 5 to 10 miles per hour, as the trier of the facts could reasonably have found, then the truck would have been at least 250 feet from the intersection since his car had traveled almost the entire distance across the intersection before the impact, and this being so he could have assumed and acted on the assumption that the driver of the truck would exercise ordinary and reasonable care in its driving and that it would be safe to cross the intersection. Had Ruth Holley exercised such reasonable and ordinary care the collision would not have occurred. Under such a state of facts Amasa Lowder's failure to see the truck could in no way have contributed to the accident.* The court, there-

fore, did not err in finding that Amasa Lowder was not contributorily negligent." (*Italics supplied.*)

Justice Wolfe, in a concurring opinion, states:

"As the plaintiff approached the intersection, he looked in both directions, shifted into second gear and proceeded across at 5 to 10 miles per hour. Plaintiff had gone about two-thirds of the way across the intersection so that the front of his car had reached the fence line on the west side of the north-south road, upon which defendant was approaching from the north, when plaintiff's car was struck in the right rear by defendant's truck. The investigating officer estimated that the defendant was traveling between 40 and 50 miles per hour, basing his opinion upon defendant's skid marks and the damage to both automobiles. Thus, the defendant was traveling approximately seven times faster than the plaintiff. Evidence concerning the presence of a dirt pile and an orchard which affected visibility was considered by the trial judge, sitting as the fact finder. Judgment was rendered for the plaintiff.

"I believe the judgment should be affirmed because the great disparity in speed between these two automobiles places this case in the *Hess v. Robinson*, 109 Utah 60, 163 P. 510 category rather than that of *Bullock v. Luke*, 98 Utah 501, 98 P. 2d 350. Although the road defendant was traveling is a better road permitting greater speed, there was no stop sign at this intersection. Both roads are gravel. *Whether the plaintiff upon entering the intersection should have observed the defendant's car, which could have been some 250 feet away, or if upon discovering it plaintiff reasonably could have assumed that he had the right of*

way and that the defendant would slow up to let him across are all questions of fact. Reasonable minds can and certainly do differ in such a situation as this. I cannot say there was error in the fact finder's conclusions."

Had Plaintiff Martin observed the defendant's car before he entered the intersection he would have been justified in considering it safe to enter. Assuming plaintiff was at that time traveling 10 miles per hour plaintiff covered some 46 or 50 feet before defendant ran into him. From the evidence, the point of impact was in the southwest quadrant of the intersection. Assuming defendant was traveling 32 miles per hour, defendant would have been at least 150 feet from the intersection. Of course, it is obvious that defendant was traveling considerably faster than 32 miles per hour and it is only reasonable to assume that defendant was traveling between 45 to 55 miles per hour. From the facts in evidence a jury could find defendant to have been traveling at such a speed. At this rate of speed defendant would have been around 250 feet from the intersection. Under such a state of facts Plaintiff Martin could have assumed and acted on the assumption that the defendant would exercise ordinary and reasonable care in his driving and that it would be safe to cross the intersection. Had defendant exercised such reasonable and ordinary care the collision would not have occurred. Under such a state of facts, plaintiff Martin's failure to see defendant could in no way have contributed to the accident, therefore, the trial court erred in finding Plaintiff Martin contributorily negligent as a matter of law.

CONCLUSION

In conclusion plaintiff apologizes for the numerous and sometimes lengthy quotations set forth in his brief. However, in view of the past history of cases of this type, plaintiff felt it necessary in order to impress upon the court the distinctions and differences which they have laid down. The trial court in this case caused the plaintiff considerable expense when this matter was not submitted to the jury as it should have been. It is the jury's sole prerogative to determine questions of fact where reasonable minds might differ as to the conclusions reached. Can this court, or the trial court say, under the facts as presented, that reasonable minds could not but conclude, that Plaintiff Martin was negligent for failing to maintain a proper lookout in view of the numerous factors which must be determined, such as; the speed defendant was traveling; obstructions and restrictions in the field of vision relative to the "blind intersection" to the east; distances traveled by the vehicles; whether plaintiff failed to see what a reasonable observation would have revealed; and whether or not plaintiff's failure to make a reasonable observation was a factor in causing the accident.

It is earnestly contended by plaintiff that the trial

court was wrong in its determination and plaintiff has been caused serious injury thereby. The judgment of the trial court should be reversed.

Respectfully submitted,

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..... copies of the within brief mailed to Moreton,
Christensen & Christensen, Attorneys for Respondent,
Judge Bldg., Salt Lake City, Utah, thisday of
October, 1951.
